**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**
**MEETING AGENDA**

January 27, 2023 - 1:00 p.m. (in-person and via Zoom)
(lunch provided at 12:00 for Board members at the Minnesota Judicial Center)

**If you are not a member of the Board and wish to attend the virtual meeting, please email Board Chair, Jeanette Boerner, jeanette.boerner@hennepin.us**

1. Approval of Minutes of October 28, 2022, Lawyers Board Meeting (Attachment 1)

2. LPRB Reports

   a. Rules and Opinions Committee—Dan Cragg
      (i) Addressing ABA Opinion 502 (Attachment 8)

   b. Chair
      i) Complainant Appeals & Panel Hearing Stats 1-1-22 to 12-31-22 (Attachment 2)
      ii) New Board Appointments (Attachment 3)
      iii) Panel Assignments effective 2-1-23 (Attachment 4)

3. New Business

   a. Board Approval of Updated Executive Committee Policy and Procedures (Attachments 5 and 6)

   b. OLPR Update—(Attachment 7)

   c. Udeani Case—Justice Thissen's concurring opinion (Attachment 9)

4. Open Discussion

# Lawyers Professional Responsibility Board Meeting Minutes
# October 28, 2022

The October 28, 2022, meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. via Zoom. Adjourned at 2:26 p.m.

Board attendees:
Chair, Jeanette Boerner
Landon J. Ascheman
Benjamin J. Butler
Daniel J. Cragg
Michael Friedman
Cliff Greene
Jordan Hart
Katherine Brown Holmen
Virginia Klevorn
Tommy Krause
Mark Lanterman
Paul J. Lehman
Kristi J. Paulson
Susan C. Rhode
Geri C. Sjoquist
Mary L. Waldkirch Tilley
Antoinette M. Watkins
Bruce R. Williams
Allan Witz
Julian C. Zebot

Other meeting participants in attendance:
Susan Humiston, OLPR Director

Agenda Items:

1. **Approval of July 22, 2022 minutes -**approved unanimously.

2. **LPRB Reports**

a. Committees

i) Diversity and Inclusion-Michael Friedman

Posting from Supreme Court notice for 5 openings: 3 lawyers and 2 public members. DI Committee focused on recruitment. Deadline for applications for posting 11/14/22. Written to all of the minority bar associations. Thanks to Nicole Frank from OLPR for helping to find those contacts. Other than those letters, DI Committee sent letters/emails to 33 individuals. 20 to lawyers, 13 to public members reflecting a good balance. All of individuals were recommended by board members either this year or last year. Of the 33, 7 had prior interviews with our interview committee last year: 5 lawyers and 2 public members. Mr. Friedman noted that the deadline is still out there and there is time for committee to get message out. Mr. Friedman can share template as well with board members. Cliff Greene played a substantial role with direct and indirect contact with strong candidates. DI Committee is very enthusiastic about who has been invited but won't share any names at this time because applications not received. Court will let the Board know who was selected.

DI Committee had extensive meeting that we recorded to reference in the future. Many topics covered but hard for our committee to fully feel like we could move into other work with some uncertainties such as ABA recs and our own structure as a board to be figured out. DI has an idea of 3 different hours for training board members that touch on diversity such as Judge Harris from Sept training. Another idea is related to ability to focus on moral change but since reinstatements are part of ABA report we don't want to dive in too deep.

MF invited questions. Director Humiston inquired about whether she would like us to push out recruitment to DEC. Mr. Friedman noted that the Board's focus was on expanding diversity. He will share our template letter.

Mr. Ascheman would like the letter to share in order to help with recruiting. He noted the Board is discussing reorganizing the committee. Who will work on the moral change CLE: DI and TEO? Mr. Friedman will follow up after meeting.

Chair Boerner noted that we appreciate any further recruitment by OLPR to DEC.

ii) Rules and Opinions-Dan Cragg

a. Approve Amendments to Opinion 20

Amended opinion 20-presently published opinion needs to be updated to reflect rule changes. Rule 7 (misleading firm names). Current redline reflects best effort to change nothing about substance of opinion but update with the correct cross references to the rule and quotes from current rule.

**Unanimously approved.**

b. Further discussion about proposed rule changes

Feedback from OLPR, Bill Wernz discovered an anachronistic cross reference to the Code of Judicial Conduct. Referred to Canon 3 but need to 2.1 regarding panel members recusing themselves. Changed private probation staying with chair/executive committee. Most meaningful change is Rule 18 Reinstatement hearing provision. Default is shall but allows for Panel to default if good cause shown. We didn't know if we could create an exhaustive list like attorney moving back in good standing as an example. This accounts for any good cause scenario. Most changes already approved. Rules committee wants further approval based on feedback.

Motion to adopt all redline changes and move the court for changes. Seconded.

Discussion: Mr. Ascheman- isn't all redline up for approval. He notices there is blueline and redline perhaps by error notably with Rule 8(c) and then an extra subdivision added in. Mr. Cragg will fix the formatting issues that came upon conversion to PDF. Mr. Ascheman noted also several places where it said

the MN Rules of Civil Procedure rather than the Rules of Civil Procedure for the MN District Court. Also, Judicial code and another place where rules mentioned are not specified to be MN.

Mr. Ascheman also inquired about the Reinstatement hearing language regarding exceptional circumstances to prevent manifest injustice. How is this different than good cause? Language borrowed from a Rule 16 order. Chairs will make sure parties have time they need but if close in time, panel needs a really good reason to continue it out again.

Mr. Friedman also noted the same typo regarding 8c. Mr. Cragg will edit.

Chair Boerner noted that ABA report is out, and we will be offering comments. Many proposed changes might impact the rules. What does it mean for Board to move this forward now and working on comments to the ABA report. Are we better served to hold it and if there are additional changes with our comments to come back in January and add to this? What is efficient and what is best to be well-received by the court?

Mr. Cragg noted that implementing the ABA report is going to be a long process. Assumes the court can like all or a part of it. Even if the Court immediately wanted to implement all recommendations tomorrow, it would still take a year or more to work through. As such, we should move forward now – these amendments are conforming to what we are already doing. None of our rule changes are inconsistent with the ABA report. We can still make recommendations with ABA report but that will slow us down again.

Mr. Ascheman agrees with Mr. Cragg. The Court will take a long time. Believes his term will be up before they get anything implemented. These changes are needed.

Ms. Klevorn agrees with Landon and believes we should move forward.

Mr. Butler wanted an update as he came late due to a work conflict. Mr. Butler supports the amendments generally but has a concern on timing. He would hate to present something that become moot or outdated as soon as we present it requiring us to do it over again.

Ms. Klevorn noted there is no reason to anticipate they will be moot. The Court will decide what they will decide to do separately. We should move forward.

Motions carries by majority vote. 1 opposed

iii) Training, Education and Outreach-Landon Ascheman
We had fantastic training in Spring/Summer. No updates at this time. He likes the idea of an internal training with regard to moral change.

b. Chair

i) Complainant Appeals & Panel Hearing Stats 1-1-22 to 9-30--22
Complainant appeals coming in fast. Chair Boerner stressed how important it is to get them done within 30 days out of respect for both Respondent and Plaintiff. Our average is 21 days. Bulk of our appeals are DNW with no investigation. See some admonition appeals from complainant.
Panel matters-up and down and now trended up. Higher reinstatements in 2022 than 2021. Panels are very busy.

ii) Merging committees to streamline work- Rules and Opinion committee needs help. Some committees overlap in their work. Dan Cragg has been swamped. DI and TEO both doing training. Look for these changes soon.

ii) Open Board positions in January 2023- several board openings sadly for us because we are losing Mr. Zebot and Ms. Waldkirch-Tilley who are not seeking second terms. Mr. Zebot's position is an MSBA position. Also losing Mr. Ivy, Mr.

Witz, Ms. Klevorn and Chair Boerner. We will realign to make sure we can handle the changes and keep our cases moving.

3. New Business

a. Board Approval of FAQ for panel proceedings -thanks to Susan Rhode for drafting. Unanimously approved. Director wants to know if replacing the Panel Manual. Chair confirmed it will.

b. OLPR update- Director Humiston

Highlighted that October was a busy month: 4 oral arguments before the Court. 2 lawyers had not had prior experience arguing before the MN supreme court. Arguments are available on the Court's livestream.

Board as well as the OLPR and some individual board members are still defendants in a lawsuit. Lawsuit at district court dismissed, sanctioned 50k under rule 11 and has appealed the dismissal and sanction to 8th circuit.

National Organization of Bar Counsel puts together survey of licensing fees from around the county. The survey divides between mandatory bars and voluntary bars. NJ puts this together and distributes- it shows overall funding and where the information is available as well as what is dedicated to discipline and client security boards. The report examines like-size jurisdictions. MN is cheaper than other jurisdictions and does a lot with the funding.

September seminar was well received with great feedback from it. Many people enjoyed Judge Harris' presentation in Implicit Bias. Director has also been asked to recruit Judge Harris to speak to the next national organization of bar counsel.

Opinion 502- distributed through SharePoint site. Lawyers who are representing themselves. Helpful in terms of how MN approaches the topic. The OLPR takes the dissent's position and would not anticipate following the majority opinion.

ABA report- next steps- OLPR methodically looking through and looking at impact and cost. Staff are very engaged in the conversations. Ms. Klevorn asked that the OLPR consider the public perspective when going through the report with staff. Mr. Friedman noted he was creating a list and going through them and asked what the OLPR has done. Director offered to help coordinate and put together a chart. The OLPR is collecting some data such as which states have diversion programs.

Mr. Williams noted spike in files over 1 year old and inquired as to why. Director said more lawyers have multiple files against them. We have more in the queue- charges coming. More reinstatement hearings as well. Director is disappointed numbers look the way they look because it does not show how well she feels they are actually doing.

Ms. Klevorn inquired about really old cases- 3 over four years ago, etc. Director noted they are older because on hold for different reasons such as pending federal criminal charges and these are just now resolving or stipulating to disbarment. The OLPR generally waits for the criminal proceedings to go first so they are not ahead of the court before they rule on issues. One case charging out this month was on hold until the lawyer went through the entire criminal proceeding. It is hard to separate them out fairly. Ginny suggested that they be asterisked to note they are on shold. Director does want to note these without having to asterisk everything and agrees it is challenging. Director will continue to see how the OLPR data management case system can code cases and keep track of where they are in phases.

Chair Boerner noted that ABA Opinion 502 should be discussed by this board and bring back to the table at a later date for discussion.

c. ABA report- Board is working on it. with Ben and Bill taking lead on writing.

4. Open discussion

Mr. Lanterman noted he has questions about the Halunen case after reading media coverage as follows:

a. Is it true that you were ready to dismiss the original complaint and why?
b. Is it true that office never subpoenaed complainants and if so, why not?
c. Some complainants are trying to submit additional information and Halunen opposed and OLPR joined in that- why?
d. Why only a 6 month suspension? Filings indicate drugs and sexual assault. If the victim was a woman, it would have been more. Noted he was trying to understand as a public member.

Mr. Lanterman noted that it might be pending, and his questions can't be answered but the articles raised questions for him.

Director noted the case is still pending, and it is not appropriate for her to comment substantively. Some answers are in public filings. OLPR did not join response but submitted own response and is public. Director refers all to public findings and we should speak through them.

Mr. Lanterman noted he read the filings but in the OLPR response the OLPR opposed the complainants because they do not have standing. Director noted again that the reasons are stated in the motion. This is before the court and should be litigated there. Director reasons are well explained according to caselaw.

Mr. Lanterman asked why the complainants do not have standing. Director noted it is because of the way the rules are written, and it is in the OLPR motion. Many states do not even allow complainants the right to appeal but MN does. There are a variety of ways in which cases are approached. OLPR position is very well-grounded in the rules and policy.

Mr. Lanterman thanked the Director but with his Law Enforcement background it appears an assault occurred. Mr. Lanterman noted again that he understands that it is a pending matter.

Director added that the OLPR position on cases is one of the more challenging things they do. There are competing opinions about many different things. Some think the Director is too harsh and some too lenient.

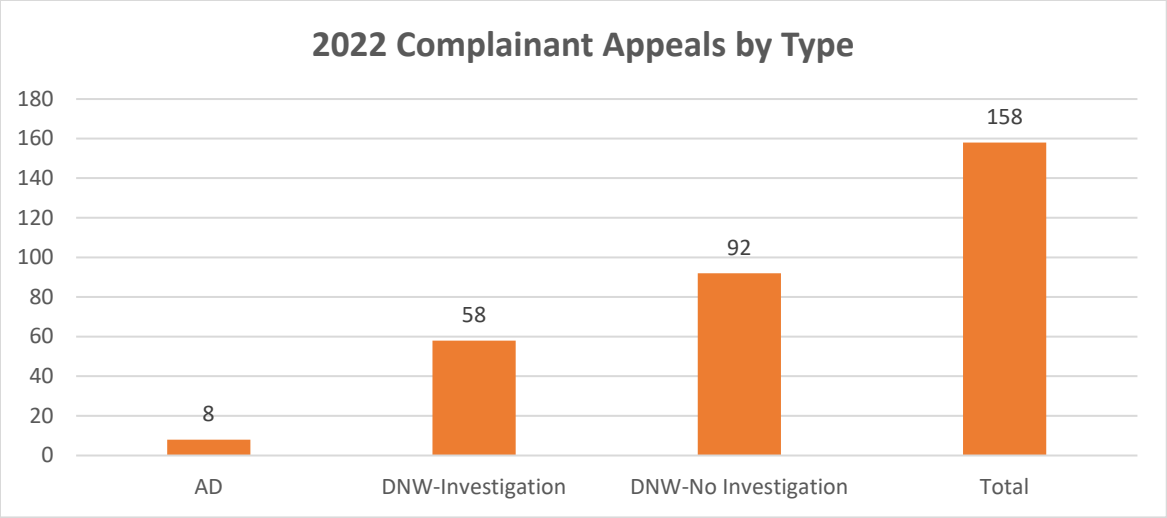
Mr. Williams noted board got inundated with questions. He inquired about what the Director would do differently. Director noted the OLPR would not do anything differently and stands by their position.

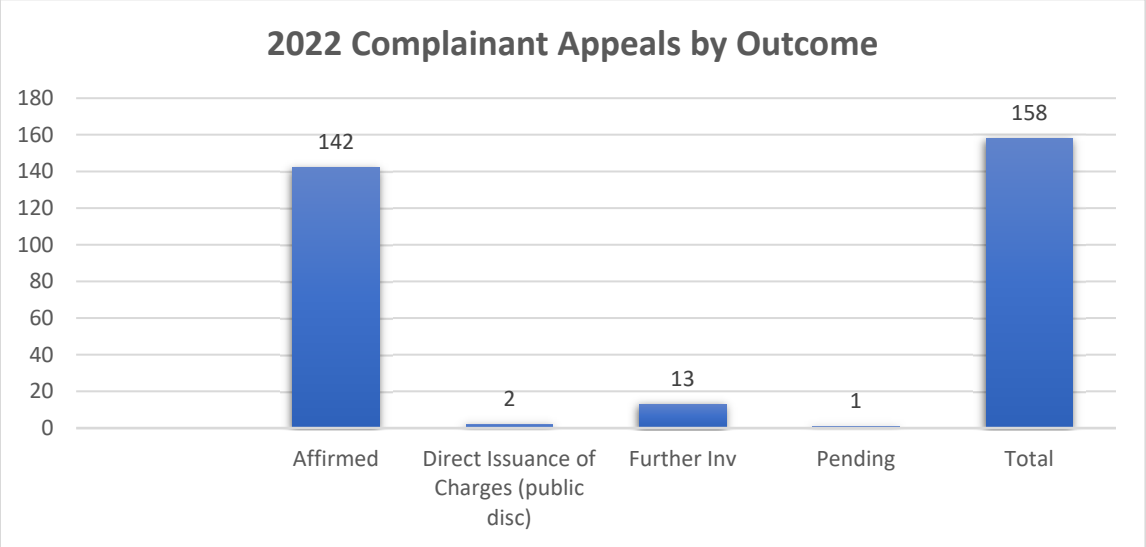
Ms. Klevorn noted that this is one of the spaces where it is really important that there is a statement from the office in non-legal ease for the public to read. The outcome should be drafted in a clear way for the public to understand what has happened.

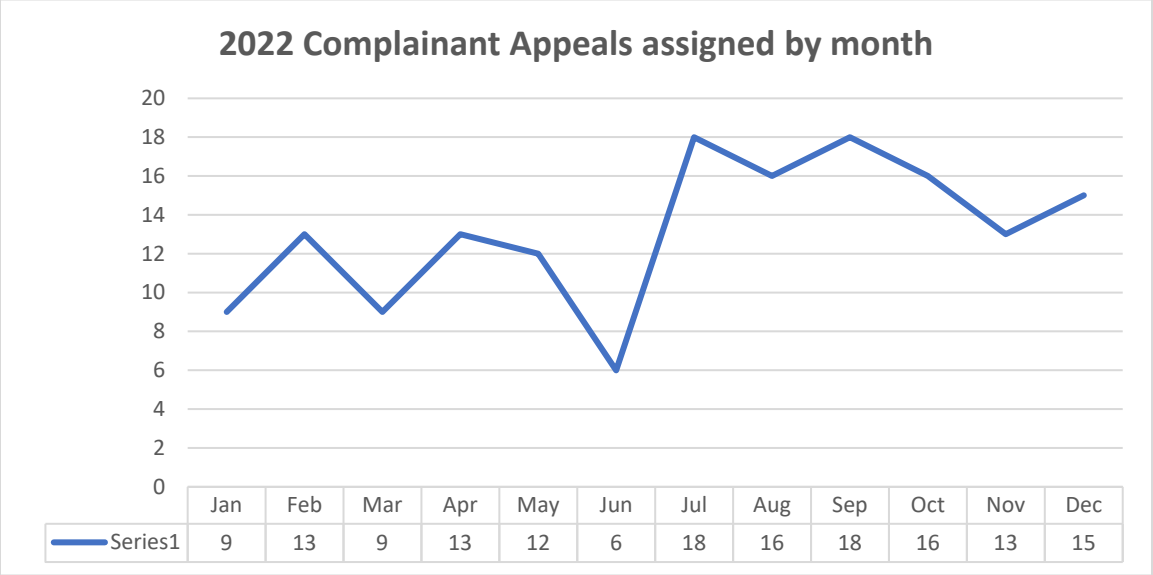
Mr. Friedman will not speak on the case which is the OLPR's discretion. He noted that the Star Tribune journalist for this story was unreliable. He assumed information was taken from Plaintiff's counsel from a civil lawsuit without having an interest to sort things out further. Mr. Friedman gave an example of the error in the reporter's confusing the Board and the OLPR. Given the content of the situation and the fact that the story was not fundamentally about the circumstances but had a sub-headline that tied things back to the office seemed to reflect a reporter who wanted to sensationalize a story. Mr. Friedman noted that the Board does not have a role in this.

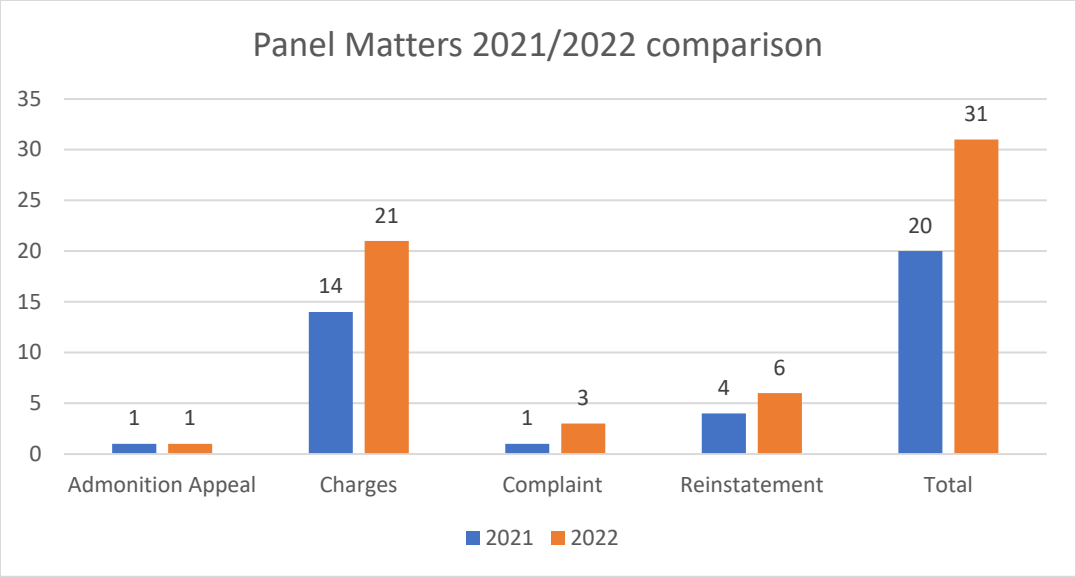
Chair Boerner noted that the article gave blowback to the board because it made it seem that the Board made decisions in the Halunen case which is incorrect. Having the public understand our role is adjudicatory that we are not second chair on these cases is important for this very reason.

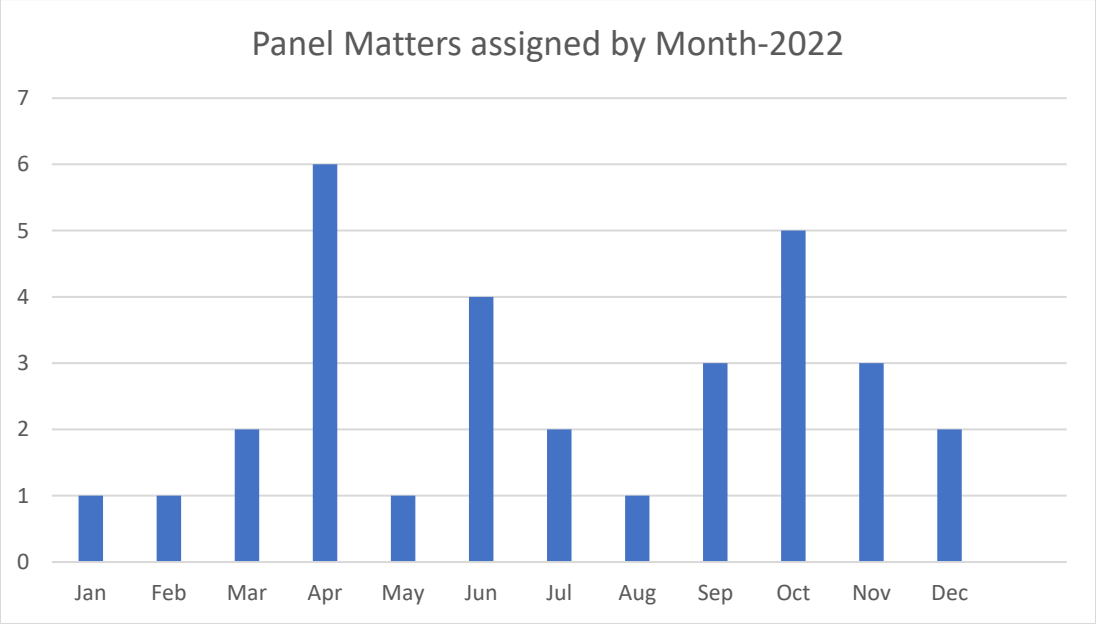
*Meeting adjourned.*


2022 Complainant Appeals by Type
180
160
140
120
100
80
60
40
20
0
8
58
92
158
AD
DNW-Investigation
DNW-No Investigation
Total


2022 Complainant Appeals by Outcome
180
160
140
120
100
80
60
40
20
0
142
2
13
1
158
Affirmed
Direct Issuance of Charges (public disc)
Further Inv
Pending
Total


2022 Complainant Appeals assigned by month
20
18
16
14
12
10
8
6
4
2
0
Jan Feb Mar Apr May Jun Jul Aug Sep Oct Nov Dec
Series1 9 13 9 13 12 6 18 16 18 16 13 15




| **Outcomes 2022** | |
|---|---|
| Pending | 7 |
| Case settled before panel action | 4 |
| Charges issued | 14 |
| Complaint dismissed | 3 |
| No Charges Issued | 1 |
| No Charges Issued-Admonition | 1 |
| Reinstatement denied | 1 |
| **Total cases 2022** | 31 |

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8042

FILED

January 19, 2023

OFFICE OF APPELLATE COURTS

**IN RE APPOINTMENTS TO THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

O R D E R

IT IS HEREBY ORDERED THAT:

1. Carol R. Washington, Antone Melton-Meaux, Matthew Ralston, and Sumbal Mahmud are appointed as attorney members of the Lawyers Professional Responsibility Board, each for a 3-year term effective as of February 1, 2023, and expiring on January 31, 2026.

2. Wendy L. Sturm, nominee of the Minnesota State Bar Association, is appointed as an attorney member of the Lawyers Professional Responsibility Board for a 3-year term effective as of February 1, 2023, and expiring on January 31, 2026.

3. Sharon H. Van Leer and Francis Leo are appointed as public members of the Lawyers Professional Responsibility Board, each for a 3-year term effective as of February 1, 2023, and expiring on January 31, 2026.

4. Daniel J. Cragg, nominee of the Minnesota State Bar Association, is re-appointed as an attorney member of the Lawyers Professional Responsibility Board for a 3-year term effective as of February 1, 2023, and expiring on January 31, 2026.

Dated: January 19, 2023

BY THE COURT:

Lorie S. Gildea
Chief Justice

LAWYERS BOARD PANELS
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Rule 4(e), Rules on Lawyers Professional Responsibility provides that the Chair shall divide the Board into Panels, each consisting of not less than three Board members and at least one of whom is a non-lawyer and shall designate a Chair and a Vice-Chair for each Panel.

Effective February 1, 2023, the following Panels are appointed:

Panel No. 1.
**Daniel J. Cragg, Chair**
Matt Ralston, Vice-Chair
Jordan Hart (p)
Frank Leo (p)

Panel No. 2.
**Bill Pentelovich**
Wendy Sturm, Vice-Chair
Paul J. Lehman (p)
Sharon Van Leer (p)

Panel No. 3.
**Landon J. Ascheman, Chair**
Katherine Brown Holmen, Vice-Chair
Andrew Rhoades (p)
Geri Sjoquist

Panel No. 4.
**Kristi J. Paulson, Chair**
Sumbal Mahmud, Vice-Chair
Michael Friedman (p)
Mark Lanterman (p)

Panel No. 5.
**Bruce Williams, Chair**
Carol Washington, Vice-Chair
Tommy Krause (p)

Dated: January 23, 2023

Jeanette Boerner, Chair
Lawyers Professional Responsibility Board

(p)- public member

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICIES AND PROCEDURES

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LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 1

# COMPLAINANT APPEALS

**Background**:

Board members must hear and decide appeals from complainants dissatisfied with the Director's disposition of a complaint under Rule 8(d)(1) determination that discipline is not warranted, (2) OLPR-issued private admonition, or (3) stipulated probation. When deciding such an appeal, the Board member may:

(1) Approve the Director's disposition;

(2) Direct that further investigation be undertaken;

(3) If a district ethics committee recommended discipline, but the Director determined that discipline is not warranted, the Board member may instruct the Director to issue an admonition; or

(4) In any case that has been investigated, if the Board member concludes that public discipline is warranted, the Board member may instruct the Director to issue charges of unprofessional conduct for submission to a Panel other than the Board member's own.

Minn. Rules Lawyers Prof. Resp. 8(e). The reviewing Board member must set forth an explanation for the Board member's action. *Id.*

**Assignment:**

The Director must promptly refer complainant appeals to the Board for assignment. The Board Chair or the Board Chair's designee will assign Complainant Appeals in a random and equitable manner. This process is designed to be blind to the Director's Office. The Chair or Chair's designee has discretion to modify assignments to accommodate personal and professional conflicts, Board member availability, expertise, and competence in a particular subject matter, and other relevant considerations.

**Timeliness:**

Board members are expected to render their decisions expeditiously and no more than 30 days from receipt of the appeal. If an appeal is pending more than 30 days, the Vice-Chair of the Board will contact the Board member to inquire as to the status of the matter. If the appeal is still pending after an additional 30 days, then the Board Chair may reassign the appeal to a new Board

member. The complainant and the respondent shall be informed in writing of any such reassignment.

**Scope of Review:**

The record on appeal consists of the facts, allegations, and other information submitted to or considered by the Director. If the Director explains that the OLPR has considered publicly available information from a court or other source, then the reviewing Board member may consider the same or similar information.

**Standard of Review:**

The standard of review depends upon the type of matter at issue. The Director's determination, following investigation, that discipline is not warranted should be reviewed for abuse-of-discretion. An abuse of discretion occurs only when the decision "is based on an erroneous view of the law or is inconsistent with the facts in the record." *Hudson v. Trillium Staffing*, 896 N.W.2d 536, 540 (Minn. 2017) (citation omitted). This "very deferential standard" recognizes that the Director is best suited to determine the scope of an investigation in any particular case and that the Director's conclusions following an investigation should be given considerable weight. *Teffeteller v. Univ. of Minnesota*, 645 N.W.2d 420, 427 (Minn. 2002). But while the Director's decisions should rarely be overturned, "rarely is not never." *State v. Soto*, 855 N.W.2d 303, 305 (Minn. 2014). If the Director makes findings that are unsupported by the evidence, misapplies the law, or delivers a decision that is "against logic and the facts on record," *Bender v. Bernhard*, 971 N.W.2d 257, 262 (Minn. 2022), then the reviewing Board member may take one of the other actions authorized by Rule 8(e).

If the Director determines that discipline is not warranted without investigating the complaint, then the Board member's review is *de novo*, meaning that the Board member need not defer to the Director's determination, but may recognize the Director's discretion not to investigate. This standard is appropriate because a determination without investigation that discipline is not warranted is akin to the granting of a motion to dismiss for failure to state a claim under Minn. R. Civ. P. 12. Such decisions are reviewed *de novo*. *Krueger v. Zemen Const. Co.*, 781 N.W.2d 858, 861 (Minn. 2010). In such a case, both the OLPR and the reviewing Board member must "accept the facts alleged in the complaint as true and give the [complainant] the benefit of all favorable inferences." *Id.* A complaint should be dismissed without investigation only if the complaint does not assert facts "which would support granting the relief demanded." *Halva v. Minn. St. Colleges and Univs.*, 953 N.W.2d 496, 501 (Minn. 2021).

**Directing Further Investigation Based Upon New Information:**

If new information relevant to a complaint is provided to the reviewing Board member, and the member determines that the new information merits further investigation of the complaint, then the Board member should direct further investigation pursuant to Rule 8(e)(2). The Board

member may not undertake such an investigation or seek out information that was not submitted to the Director and/or the Director did not consider. For example, if the Director did not state that the OLPR considered certain publicly available information, then the Board member may not seek that information out.

**Reporting**:

The Board Chair or designee shall maintain records of all Complainant Appeal assignments and report the data quarterly to the Board. The process and records regarding assignments shall be transferred to Board Chair successor and Board Chair's successor designee upon completion of Chair term.

Approved by the Board on _____, 23.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 2

# PANEL MATTERS

**Panel Composition:**

Panels must include at least one lawyer member and one public member at all times. The Panel Chair should be a lawyer member and should not be substituted. Rule 4(e), Rules on Lawyers Professional Responsibility (RLPR). If the Panel contains more than three members, then the Panel Chair must designate which of the other members will sit on a particular case. The Panel Chair must sit on every case submitted to the Panel. The Chair should rotate the other members so that for each case, the Panel includes (a) an odd number of members; and (b) at least one attorney member; and (c) at least one public member.

**Assignment:**

The Director shall promptly refer Panel matters to the Board for assignment. The Board Chair or the Board Chair's designee will assign Panel matters in a random and equitable manner. This process is designed to be blind to the Director's Office. The Chair or Chair's designee has discretion to modify assignments to accommodate personal and professional conflicts, Board member availability, Board member expertise and competence in a particular subject matter, and other relevant considerations. If the Panel Chair cannot consider a particular case, then the Board Chair or Board Chair designee shall assign the case to a new panel. Any objections to an assignment by participants in the process shall be directed to the Board Chair.

**Administrative duties:**

The Panel Chair should actively manage the cases assigned. This may include convening panel meetings to discuss cases or producing scheduling orders on reinstatement matters. Panels should strive to be available at the soonest practical date to handle hearings to avoid delay to the impacted parties.

**Reporting**:

The Chair or Chair's Board designee shall maintain records of all Panel Assignments and report the data quarterly to the Board. The process and records regarding assignments shall be transferred to Board Chair successor and Board Chair's successor designee upon completion of Chair term.

Approved by the Board on _____, 2023.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 3

## COMMUNICATION WITH BOARD MEMBERS

The Executive Committee reminds Board members, and advises the OLPR and its staff, as well as complainants, about the following Rule of Lawyers Professional Responsibility regarding *ex parte* communications.

RULE 29. EX PARTE COMMUNICATIONS

> Ex parte communications to any adjudicatory body including panels, referees and this Court are strongly disfavored. Such communications should not occur except after first attempting to contact the adversary and then only if the adversary is unavailable and an emergency exists. Such communications should be strictly limited to the matter relating to the emergency and the adversary notified at the earliest practicable time of the prior attempted contact and of the ex parte communication.

If a Board member receives an *ex parte* communication, then the Board member should alert the party that the communication is inappropriate and inform any other parties of the communication. All such communications shall be provided to the Director's Office to ensure the file is complete.

The Executive Committee does not interpret Rule 3.5(g), Minnesota Rules of Professional Conduct, to prohibit private communication between the OLPR, a respondent attorney, and/or a complainant. That rule governs private contact between a lawyer and "the judge or an official before whom a proceeding is pending." The OLPR and its staff are not "official[s] before whom a proceeding is pending" because the OLPR simply investigates and makes recommendations.

The Executive Committee likewise does not interpret Rule 3.5(g), Minnesota Rules of Professional Conduct, to prohibit communication between the OLPR and the Board to facilitate the exchange of information necessary for the Board to review complainant appeals.

Approved by the Board on _____, 2023.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 4

# DIRECTOR-INITIATED INVESTIGATIONS

## Background:

Rule 8(a), Rules on Lawyers Professional Responsibility (RLPR), provides:

> At any time, with or without a complaint or a District Committee's report, and upon a reasonable belief that professional misconduct may have occurred, the Director may make such investigation as he or she deems appropriate as to the conduct of any lawyer or lawyers; provided, however, that investigations to be commenced upon the sole initiative of the Director shall not be commenced without the prior approval of the Executive Committee.

## Procedure for Requesting Executive Committee Approval:

When the Director believes it appropriate to open an investigation file on his, her, or their sole initiative, the Director must submit to the Board Chair a request to do so. The Chair must forward the Director's request to each Executive Committee member, and must inquire of each member her, his, or their opinion on whether the Executive Committee should approve the request. If any Executive Committee member requests that the Committee meet to consider the request, then the Board Chair must convene a meeting of the Executive Committee, at which the Committee will discuss and vote on the Director's request. The Executive Committee must promptly issue a written decision on the Director's request and must provide that decision to the Director.

## Definitions and Interpretation:

A. The Executive Committee interprets the Director's authority to initiate an investigation on her, his, or their "sole initiative" to permit the Director to initiate investigations in the following instances without being required to seek Executive Committee prior approval; that is, these are matters in which it is considered that a complaint against a lawyer exists:

   1. When a complainant wishes to remain anonymous.

   2. An investigation against the same lawyer or against another lawyer that is ancillary to an ongoing investigation. For example,

investigation of a lawyer's trust account would be considered ancillary to an investigation of a complaint regarding delay in probate administration; or investigation of a matter not covered by a complaint when there is already a pending public disciplinary proceeding or charges of unprofessional conduct; or investigation of attorney non-cooperation during a disciplinary investigation. Similarly, investigation of similar client matters in addition to one raised by a complaint (i.e., reviewing court dockets to determine whether an attorney has been sanctioned in other cases than one about which a complaint has been filed. *See In re Nathanson*, 812 N.W.2d 70 (Minn. 2012)).

3. Matters referred by the Minnesota Department of Revenue or appropriate child support agencies (*see* Rule 30, RLPR) or other governmental agencies, even if submitted without a specific request for an investigation.

4. Matters in which a District Ethics Committee, having investigated a complaint against one lawyer, recommends that the Director initiate an investigation of different matter against the same lawyer or recommends an investigation of another lawyer.

B. Pursuant to Rule 8(a), RLPR, the Executive Committee gives prior approval to the Director's for initiating investigations where approval would otherwise be required, in the following types of matters:

1. Matters in which it has come to the Director's attention that a lawyer has entered a guilty plea to or been convicted of a crime of the type described in Rule 10(c), RLPR. If the attorney has been indicted or charged with such a crime but is not yet convicted, then the Director must seek Executive Committee approval to investigate.

2. Matters in which an attorney may be holding himself or herself out as an attorney or practicing law, during a period when Supreme Court records indicate that the attorney is on restricted status. This may overlap with Section A.2 (ancillary matter) above but is intended to authorize investigation of this issue even if the underlying complaint matter is dismissed without investigation.

3. Matters in which an attorney on probation fails to cooperate with the OLPR's requests for information necessary to ensure compliance with the terms of probation.

4. Matters in which following a Supreme Court order of suspension for which the attorney is required to notify clients, courts and opposing parties pursuant to Rule 26, RLPR, no affidavit of compliance has been timely filed and it appears from any source that the attorney is continuing to practice law.

5. Matters in which another jurisdiction forwards to the Director a public disciplinary determination, which the disciplined attorney has not forwarded to the Director as required by Rule 12(d), RLPR. If the Director learns of the other-jurisdiction discipline by other means, then the Director must seek Executive Committee approval to investigate.

6. Matters not otherwise covered above in which it appears that an attorney who is required to do so may not be properly maintaining an Interest on Lawyers Trust Account (IOLTA).

7. Matters in which a suspended attorney appears to have been employed by a licensed attorney and no written notice as required by Rule 5.8, Minnesota Rules of Professional Conduct, has been served upon the Director.

Approved by the Board on _____, 2023.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 5

# COMPLAINTS AGAINST LPRB AND CSB MEMBERS, DIRECTOR AND DIRECTOR'S STAFF, AND DEC MEMBERS

## Complaints against the Director or Staff Members:

Upon receipt of a complaint against the Director or OLPR staff members, the Director will forward the complaint to the Chair of the Lawyers Board unless the allegations are based solely upon their participation in the resolution of a complaint (see policy below). The Chair will assign the complaint to a Lawyers Board Panel in rotation, which will determine whether the matter can be summarily dismissed. If the complaint cannot be dismissed, the Panel will submit the complaint to the Supreme Court for assignment to special counsel for investigation. Special counsel shall have the authority to dispose of the matter under Rule 8(d)(1), (2) or (3), Rules on Lawyers Professional Responsibility (RLPR). If special counsel determines the matter should be presented to a panel (Rule 8(d)(4)), RLPR, it will be presented to a special panel as provided below.

## Complaints by Lawyers Professional Responsibility Board and Client Security Board Members:

Complaints made by a Lawyers Board or Client Security Board member should initially be handled within the normal channels of the discipline system. If in the Director's determination the credibility of the Board member may be at issue, or other circumstances exist indicating that the Director or any of his, her or their staff should not handle the matter, then special counsel may be requested.

## Complaints against Lawyers Professional Responsibility Board and Client Security Board Members:

Upon receipt of a complaint against a Board member that is not based solely upon their participation in the resolution of a complaint, the Director shall initially handle the complaint within the normal channels of the discipline system. If a determination is made to investigate the matter, the District Ethics Committee shall investigate. If the matter to be investigated is not the type of matter normally assigned to a District Ethics Committee, the matter shall be assigned to special counsel for investigation. , If the District Ethics Committee recommends a dismissal and the Director agrees, the Director will do so. If the District Ethics Committee recommends further investigation or that the lawyer be disciplined, the matter will be assigned to special counsel. If the District Ethics Committee recommends dismissal but the Director determines further investigation is necessary, the matter will be assigned to special counsel for investigation. In each circumstance, special counsel shall have the authority to dispose of the matter under Rule 8(d)(1), (2) or (3), RLPR, or if necessary, may present charges to a special panel (Rule 8(d)(4)), RLPR.

**Complaints Against LPRB and CSB Board Members, Director, Director's Staff or DEC Members Based Solely Upon Their Participation in the Resolution of a Complaint:**

Complaints against Board members, Director, the Director's staff, and DEC members that are based solely upon dissatisfaction with the disposition of a prior complaint and that allege no substantive misconduct other than the participation in the disposition of a complaint shall be forwarded to the Board Chair or designee. If the Chair or designee determines that the submission contains no factual assertions in support of the allegations of misconduct beyond the fact that the Board member, Director, Director's staff, or DEC member participated in the resolution of a prior complaint(s), then the Chair or designee shall dismiss the complaint. The decision of the Chair or designee shall be final.

**Appeals:**

If a complaint other than one based solely upon their participation in the resolution of a complaint against a Client Security Board member, Lawyers Board member, the Director or an attorney employed by OLPR results in a dismissal, admonition or stipulated private probation, and no hearing under Rule 9, RLPR, was held, and the complainant is not satisfied with the disposition, the complainant may appeal to a Lawyers Board member (other than a member of a Panel that may have issued the disposition) chosen in rotation, as provided by Rule 8(e), RLPR. If a hearing was held under Rule 9, RLPR, the complainant may petition for review or appeal to the Supreme Court as provided by Rule 9(l), RLPR.

Any appeal by a complaining Board member under Rule 8(e), Rules on Lawyers Professional Responsibility, must be heard by the Board Chair or the Chair's designee, provided that the designee must be a member of the Executive Committee.

**Special Counsel or Special Panels:**

Special counsel should be appointed by the Supreme Court, through its Commissioner, as referees are appointed in public matters. The Director shall file a written request for appointment of special counsel in a file specifically denoted by the Clerk of Appellate Court for that purpose, along with a list of at least 20 past and present District Ethics Committee members and all persons who in the last ten years completed service as Lawyers Board members, as well as any Director, or Assistant Directors, who have not been employed in the Director's Office within the past year. The Director shall use the Office case number to designate the matter in order to maintain the confidentiality of parties involved. Special panels may be appointed from the same pool of members. Compensation for special counsel shall be the same as provided to senior judges who serve as referees within the disciplinary system. Special Panels shall serve without compensation, but reasonable expenses will be reimbursed consistent with judicial policies.

Approved by the Board on _____, 2023.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 6

# APPROVAL AND TERMINATION OF APPROVED STATUS FOR FINANCIAL INSTITUTIONS

## Background:

Rule 1.15(k), Minnesota Rules of Professional Conduct, requires the Lawyers Professional Responsibility Board to "establish rules governing approval and termination of approved status for financial institutions [to be depositories for lawyer trust accounts." This policy serves as those rules.

## Approval:

1. A financial institution shall be approved as a depository for lawyer trust accounts if it files with the Office of Lawyers Professional Responsibility an executed trust account overdraft notification agreement, in a form provided by the Office.

2. The website of the Office of Lawyers Professional Responsibility and the Lawyers Professional Responsibility Board shall maintain a list of approved financial institutions.

## Termination of Approved Status:

1. The Director may terminate approved status of a financial institution upon a determination that the financial institution has (1) repeatedly failed to report overdrafts on trust accounts maintained in the institution or has failed to take corrective steps to report overdrafts after notification by the Director; (2) failed to execute a trust overdraft agreement; or (3) failed to follow terms of the agreement.

2. The Director shall provide notice of non-compliance prior to terminating approved status of a financial institution.

Approved by the Board on _____, 2023.

OFFICE MANUAL

# EXECUTIVE COMMITTEE
# POLICY AND PROCEDURE MEMORANDA

TABLE OF CONTENTS

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 1

RE: Executive Committee Approval of Director-Initiated Investigations.

This memorandum states the policies and procedures to be followed in implementing Rule 8(a), Rules on Lawyers Professional Responsibility (RLPR), which was amended effective July 1, 1986, to provide:

> At any time, with or without a complaint or a District Committee's report, and upon a reasonable belief that professional misconduct may have occurred, the Director may make such investigation as he or she deems appropriate as to the conduct of any lawyer or lawyers; provided, however, that investigations to be commenced upon the sole initiative of the Director shall not be commenced without the prior approval of the Executive Committee.

The Executive Committee has not delegated the "prior approval" function to any member.

**Procedure for Requesting Executive Committee Approval**

When the Director believes it appropriate to open an investigation file on his or her sole initiative, the Director shall mail or submit electronically to the Executive Committee a request to do so on the approved form (CO11), attached hereto. If any Committee member requests that the matter be considered by the Committee as a whole, it shall be so considered. If no such consideration is requested and a majority of those responding approve the file-opening, a file may be opened. If discussed at the next Committee meeting, then if a majority of those voting at that meeting approve the file-opening request, the Director may initiate the investigation.

If any Committee member does not respond within one week of the mailing of the request form, the Director's Office shall follow up with a telephone or electronic request. If no response is received within three days thereafter, the Director shall proceed in accordance with the responses then received. With the Chair's permission, these times may be accelerated in appropriate situations, with notice given to members of the accelerated schedule. If a member is unavailable during the scheduled time, the matter shall proceed before the other Committee members.

**Definitions and Interpretation**

A. Rule 8(a), RLPR, makes clear that "at any time, with . . . a complaint . . . , and upon a reasonable belief that professional misconduct may have occurred, the Director may make such investigation as the Director deems appropriate . . . ." Thus, any instance in which the Director receives a complaint in written or electronic form from any person or entity is not subject to this policy. *See also* Lawyers Board Summary Dismissal Guidelines.

B. The Executive Committee further defines and interprets the "sole initiative" of the Director to permit the Director to initiate investigations in the following instances without being required to seek Executive Committee prior approval; that is, these are matters in which it is considered that there is a complaint:

1. When a matter is referred or submitted to the Director by someone outside the Director's Office with a request that the matter be considered, but with a request that the person referring the matter (e.g., a judge) not be considered the complainant (thus the file is administratively identified with the Director as complainant).

   This statement also includes instances in which the Director receives a copy of a court decision or order or other document that is sufficiently self-explanatory submitted by a court or court administrator or other court personnel, even if without a specific request for an investigation.

2. An investigation against the same lawyer or against another lawyer that is ancillary to an investigation generated by a complaint or by a file authorized by the Committee--e.g., investigation of a lawyer's trust account would be considered ancillary to an investigation of a complaint regarding delay in probate administration; or investigation of a matter not covered by a complaint when there is already a pending public disciplinary proceeding or charges of unprofessional conduct; or investigation of attorney non-cooperation during a disciplinary investigation. Similarly, investigation of similar client matters in addition to one raised by a complaint (i.e., reviewing court dockets to determine whether an attorney has been sanctioned in other cases than one about

which a complaint has been filed. *See, In re Nathanson*, 812 N.W.2d 70 (Minn. 2012)).

In most such situations, the ancillary matter against the same attorney will be investigated as part of the investigation that is already open, although the matters may be separated into two investigation files at closing if it is deemed that a complainant's appeal rights will be affected (i.e., the lawyer will be disciplined for non-cooperation but the complainant's underlying matter is being dismissed).

3. Matters referred by the Minnesota Department of Revenue or appropriate child support agencies (*see* Rule 30, RLPR) or other governmental agencies, even if submitted without a specific request for an investigation.

4. Matters in which a District Ethics Committee, having investigated a complaint against one lawyer, recommends that the Director initiate a different matter against the same attorney, or recommends an investigation of another lawyer.

5. Matters brought to the Director's attention by anonymous complaints, if clearly meant to be a "complaint" and if the Director in his or her discretion believes that the Rule 8(a) standard is otherwise met.

C. The Executive Committee interprets Rule 8(a), RLPR, to grant it authority to give prior approval to the Director for initiating investigations in the following types of matters, which otherwise would require such approval, without requesting individual investigation approvals of the Executive Committee for each individual matter; the Director may, in his or her discretion, seek approval if there are no exigent circumstances, or as set out in the final paragraph of this policy:

1. Matters in which it has come to the Director's attention (not covered in section B. above) that a lawyer has entered a guilty plea to or been convicted of a crime of the type described in Rule 10(c), RLPR. If the attorney has been indicted or otherwise charged with such a crime but not

yet convicted, then the Director shall submit any request to initiate an investigation to the Committee.

2. Matters in which it appears that an attorney may be holding himself or herself out as an attorney or practicing law, during a period when Supreme Court records indicate that the attorney is on restricted status for continuing legal education delinquencies or is delinquent for a substantial period in lawyer registration fee payments. This may overlap with Section B.2 (ancillary matter) above, but is intended to authorize investigation of this issue even if the underlying complaint matter is dismissed without investigation. Also as explained in Section B.2, the underlying matter may be severed from the investigation to permit a complainant's appeal rights.

3. Matters in which an attorney on probation fails to cooperate with the Director's Office requests for information necessary to ensure compliance with the terms of probation.

4. Matters in which following a Supreme Court order of disbarment or suspension for which the attorney is required to notify clients, courts and opposing parties pursuant to Rule 26, RLPR, no affidavit of compliance has been timely filed and it appears from any source that the attorney is continuing to practice law.

5. Matters in which another jurisdiction forwards to the Director a public disciplinary determination, which the disciplined attorney has not forwarded to the Director as required by Rule 12(d), RLPR (reciprocal discipline). In other instances in which the Director learns of public discipline of a Minnesota attorney in another jurisdiction, but where the disciplinary authority has not sent a copy to the Director, Executive Committee approval shall be sought.

6. Matters not otherwise covered above in which it appears that an attorney who is required to do so may not be properly maintaining an Interest on Lawyers Trust Account (IOLTA), such as when the Director receives notification of a trust account overdraft, and after inquiry, the Director

concludes that misconduct, including non-cooperation with the inquiry, has occurred.

7. Matters in which a suspended attorney appears to have been employed by a licensed attorney and in which, upon internal inquiry, no written notice as required by Rule 5.8, Minnesota Rules of Professional Conduct, has been served upon the Director.

In all other matters not clearly covered by the foregoing, particularly when there is any potential for publicity or significant adverse comment regarding the file-opening, the Director shall err on the side of requesting file-opening authorization. The Board Chair may interpret the application of these guidelines when there is doubt.

**Approval:** The above policy was approved by the Lawyers Professional Responsibility Board at its June 26, 2015, meeting.

JUDITH M. RUSH
CHAIR, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

KENNETH S. ENGEL
VICE-CHAIR, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

CO11

**Print on OLPR Letterhead**

**NOTE: If this is mailed include self-addressed, stamped envelope for Board Chair**

**MEMORANDUM**

TO: LPRB Executive Committee Members

FROM: Martin A. Cole
Director

DATE: ð1

RE: Request for Authorization to Initiate Investigation File

Based upon the following information, the Director hereby requests authorization from the LPRB Executive Committee to initiate an investigation without having received a formal complaint.

1. Name of attorney-respondent: ð2

2. Brief outline of possible misconduct and reason for investigation:

   ð3

3. Manner in which above information was brought to the Director's attention:

   ð4

4. **Please notify the Director's Office of one of the following alternatives::**

   a. I approve this request.

   _____
   JUDITH M. RUSH

   _____
   KENNETH S. ENGEL

   b. I wish to discuss this request at the next Executive Committee meeting.

   _____
   JUDITH M. RUSH

   _____
   KENNETH S. ENGEL

| | |
|---|---|
| ROGER GILMORE | ROGER GILMORE |
| TERRIE S. WHEELER | TERRIE S. WHEELER |
| ROBIN M. WOLPERT | ROBIN M. WOLPERT |

Enclosure(s)
cc: File Clerk

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 2

RE: Panel Assignment Procedures.

## PANEL ASSIGNMENTS

Rule 4(f), RLPR, provides in part, "The Director shall assign matters to Panels in rotation." To enhance the appearance of fairness and avoid any perception that the Director's Office could manipulate Panel assignments, the task of assigning Panel matters to Lawyers Board Panels is implemented by use of a blind rotation system, which is the responsibility of the Board Chair or an Executive Committee member designated by the Board Chair.

The procedure followed is outlined as follows:

1. A rotation chart is prepared by the Board Chair or the Board Chair's designee. The chart designates Panel rotations from one through six, picked arbitrarily for at least 50 cases. The designee provides the Board Chair with a copy of the rotation schedule. *See* Exhibit A.

2. In the Director's Office, the following are immediately forwarded to the Panel clerk for Panel assignment: charges when signed, admonition appeals when the Director decides to present them to a Panel; expunction petitions and reinstatement petitions when received.

3. The Panel clerk promptly contacts the designee's staff member. The Panel clerk informs the staff member of the name of the respondent and type of proceeding. The staff member gives the Panel clerk the name of the Panel Chair and number of the next Panel on the rotation chart.

   If the Chair of the next Panel on the rotation chart has a conflict in a matter, the staff member instead gives the Panel clerk the name of the Panel Chair and number of the next Panel on the rotation chart. The staff member then assigns the skipped Panel to the next matter.

   If the Panel clerk is unable to reach the staff member within 24 hours, the clerk attempts to contact the Board Chair or Board Chair's designee. If the clerk is unable to contact either the staff member or the designee, the clerk contacts the Board Chair or Vice-Chair who shall choose a Panel randomly.

## SUBSTITUTIONS

Rule 4(e), RLPR, provides in part, "The Board's Chair or the Vice-Chair may designate substitute Panel members . . . ." It is impractical for such substitutions to be made personally by the Chair or Vice-Chair, or by the Board Chair's designee. Therefore, this function is delegated to the Panel clerk in the Director's Office. The procedures to be followed by the clerk are as follows.

If a Board member has a conflict in a matter or cannot serve on a Panel for some other reason, a substitute Panel member must be obtained. The Panel clerk finds a substitute Panel member using a rotation schedule. This rotation schedule is separate from the Panel rotation schedule. The Panel clerk must, however, take into consideration the following:

1. Panel Chairs are not called to substitute unless there is an emergency or no non-chairs are available.

2. Panels must include at least one lawyer and one public member.

The Panel clerk notes on the clerk's rotation chart the reason why each Board member could not serve as a substitute. The basis for a conflict need not be specified.

## BOARD MEMBER EXPERTISE AND WORKLOADS; DISTRICT COMMITTEE AND FORMER BOARD MEMBER PANEL SUBSTITUTIONS

Rule 4(e) and (f), RLPR, provides in part,

> (e) . . . The Board's Chair or the Vice-Chair may designate substitute Panel members from current or former Board members or current or former District Committee members for the particular matter, provided that any panel with other than current Board members must include at least one current lawyer Board member. . . .
>
> (f) . . . The Executive Committee may, however, redistribute case assignments to balance workloads among the Panels, appoint substitute panel members to utilize Board member or District Committee member expertise . . . .

A. Expertise.

A Panel Chair, a respondent or the Director may request that there be a substitution on a particular Panel to utilize the expertise of a Board member or a District Committee member. The request should be addressed to the Board Chair, in writing, with copies to appropriate parties, and to the Board Vice-Chair. The request shall be made at or before the time of the pre-hearing meeting and shall state the particular expertise needed. The Board Chair (or by delegation from the Chair, the Vice-Chair) decides whether expertise is needed, and if so, substitute an expert Board member or District Committee member. The Director's Office maintains a directory of Board members, showing expertise, and a list of District Committee chairpersons.

The substitution must harmonize with the requirements that each Panel include a current Board member and a public member. The substitution should not be for the Panel Chair. The Board Chair or Vice-Chair choose the person substituted for by the above criteria and, secondarily, by seniority.

B. Workload Balancing.

Either on the Executive Committee's own initiative or at the request of a Panel Chair, the Board Chair or Board Chair's designee may redistribute case assignments among Panels or among Board members in such a way as in the designee's discretion balances workloads in a reasonable fashion.

C. Substitution of District Committee Members.

Normally, reasonable efforts should be made to utilize current Board members on Panels. However, when an expert is desirable, or Board members generally have excessive workloads in view of their volunteer status or when some other particular exigency requires, the Board Chair or Board Chair's designee may on the Chair or designee's initiative or after receiving a written request from any interested party, substitute current or former District Committee members.

D. Assignment of Admonition Appeals.

The Executive Committee is mindful that, particularly for outstate Board members, the burden of hearing an admonition appeal may contribute to excessive workload. To

balance workloads in connection with admonition appeals, the Board Chair or Board Chair's designee for case assignments shall re-assign admonition appeals when appropriate so that as many admonition appeals as practical may be heard before a single Panel in a single day. It is hoped that through this procedure each Panel may have no more than one admonition appeal hearing day per year. To implement this policy, whenever it appears appropriate to re-assign an admonition appeal to a Panel that already has an admonition appeal pending, the Director shall request the Board Chair or Board Chair's designee in writing to make such re-assignment, pursuant to this policy.

## CHOOSING "THE PANEL CHAIR" UNDER RULE 10(d)

Rule 10(d), RLPR, provides,

> **Other Serious Matters.** In matters in which there are an attorney's admissions, civil findings, or apparently clear and convincing documentary evidence of an offense of a type for which the Court has suspended or disbarred lawyers in the past, such as misappropriation of funds, repeated non-filing of personal income tax returns, flagrant non-cooperation including failure to submit an answer or failure to attend a pre-hearing meeting as required by Rule 9, fraud and the like, the Director may either submit the matter to a Panel or upon a motion made with notice to the attorney and approved by the Panel Chair, file the petition under Rule 12.

When the Director makes a motion under Rule 10(d) to a Panel Chair, the Panel Chair shall be chosen, together with a Panel, in the same manner employed for Panel assignments generally, as stated above.

## CHOOSING "THE PANEL CHAIR" UNDER RULE 10(e)

Rule 10(e), RLPR, provides,

> **Additional Charges.** If a petition under Rule 12 is pending before this Court, the Director must present the matter to the Panel Chair, or if the matter was not heard by a Panel or the Panel Chair is unavailable, to the Board Chair, or Vice-Chair, for approval before amending the petition to

include additional charges based upon conduct committed before or after the petition was filed.

In order to eliminate any difficulties in identifying "the Panel Chair" for purposes of this rule, the following procedures are to be implemented. If charges were made against the respondent and assigned to a Panel, the Chair of that Panel shall approve (or decline to approve) supplemental petitions based on additional charges. If the matter against the respondent was never assigned to a Panel (e.g., the respondent waived the Panel before charges were filed), the supplementary petition is sent to the Board Chair for approval and signature.

**Approval:** The above policy was approved by the Lawyers Professional Responsibility Board at its June 26, 2015, meeting.

JUDITH M. RUSH
CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

KENNETH S. ENGEL
VICE-CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

EXHIBIT A

PANEL ROTATION CHART

| File # | OLPR Case # | Panel # | Panel Chair | Respondent | Type of Matter |
|---|---|---|---|---|---|
| 14-01 | | 4 | | | |
| 14-02 | | 1 | | | |
| 14-03 | | 6 | | | |
| 14-04 | | 2 | | | |
| 14-05 | | 5 | | | |
| 14-06 | | 4 | | | |
| 14-07 | | 2 | | | |
| 14-08 | | 6 | | | |
| 14-09 | | 4 | | | |
| 14-10 | | 1 | | | |
| 14-11 | | 2 | | | |
| 14-12 | | 3 | | | |
| 14-13 | | 6 | | | |
| 14-14 | | 3 | | | |
| 14-15 | | 2 | | | |
| 14-165 | | 2 | | | |

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 3

RE: Disqualification of Attorneys Previously Employed by the Office of Lawyers Professional Responsibility.

**Purposes.** This memorandum identifies certain circumstances and procedures regarding possible conflicts of interest in representation by former Director's Office attorneys in disciplinary proceedings, as well as the guidelines to be used in determining whether consent should be given to the representation and procedures for seeking disqualification of attorneys previously employed in the Director's Office from representing respondent attorneys. The subjects addressed include:

1. When Rule 1.9 or Rule 1.11, Minnesota Rules of Professional Conduct (MRPC), apply;

2. How and by whom decisions are to be made regarding such application; and

3. When and by whom consents or waivers should be given or declined for representation by former employees.

**Policy Considerations.** Determination of the above matters requires balancing of several policy considerations. Among the policies which should be considered are the following:

1. The appearance of impropriety is to be avoided, particularly in professional responsibility matters, and most particularly by the Lawyers Board, the Director's Office and former employees. Improper appearances can undermine confidence in the integrity of the professional responsibility system.

2. Although the maintenance of public confidence in the government is an important consideration, the rules should not unnecessarily prejudice the government lawyer, deprive private litigants of the right to counsel of their own choosing, impede recruiting efforts by the government, or impinge upon the government's own assessment of the extent to which its employees should be limited in future employment, for those are also important concerns.

3. As Comment [4] to Rule 1.11, MRPC, states in part:

> This rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefits of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government.

4. The conduct of lawyers during their employment in the Office of Lawyers Professional Responsibility should not be affected in any way by personal desires to ingratiate themselves with respondents or other parties by less than zealous representation of the Office. Any appearance that a lenient disposition, in which a Director or Assistant Director participated, may have been followed, for personal motives, by representing a respondent in a subsequent case, must be avoided entirely. Conversely, zealous representation by a Director or Assistant Director should not be retrospectively undermined by the same attorney's suggesting in subsequent proceedings that the disposition in which he or she participated is lacking in weight or relevance.

**Definitions.** "Matter" is defined in Rule 1.11(e). In the professional responsibility context, "matter" shall include any Supreme Court, referee or Panel proceeding, admonition, warning, probation, investigation, charge or allegation involving a specific respondent attorney.

"Personal and substantial responsibility" shall include any action regarding a particular file, including decision, approval, disapproval, recommendation, rendering of advice or

investigation. Signature by a Director or Assistant Director on any charging or dispositional document, or assignment of the file to any attorney for investigation, shall signify that there is "personal and substantial responsibility" of the signatory or assigned attorney in the file.

**Procedures for Determining Whether Rules 1.9 and/or 1.11 Apply.**

1. Notice. Whenever a respondent subject to investigation or charges of unprofessional conduct is represented by an attorney formerly employed by the Office of Lawyers Professional Responsibility; and the respondent has a prior file not expunged; and the prior file contains any documents signed by the former employee, or there are other indications of involvement by the employee, then the Director shall notify an Executive Committee member chosen in advance as its delegate of the former employee's representation and the prior file. A copy of the notice shall be sent to respondent's counsel.

2. Recommendation. The Director's Office shall also inform the delegate of whether the Director believes that Rule 1.9 or 1.11 applies or may come to apply to the current representation, and whether there are any other relevant circumstances. A copy of this communication shall not be furnished to respondent's counsel unless the delegate determines it would be appropriate to do so.

3. Consideration. If the matter appears routine, the delegate may decide whether Rule 1.9 or 1.11 applies and, if so, whether consent to the representation is given or declined. If the matter appears difficult or sensitive, the delegate may refer it to the Executive Committee for consideration. If such referral is made, or if the delegate is considering whether to decline consent to representation, respondent's counsel shall have the opportunity to submit his or her statements regarding the representation to the delegate or, on referral, to the Executive Committee.

4. Additional Consideration. If, after a matter has initially been reviewed regarding representation of respondent by a former employee, additional facts or circumstances arise, the Director or respondent's counsel may

inform the Executive Committee delegate, so that the matter can be reconsidered.

5. Notice to Respondent. In all cases in which respondent's counsel receives the notice described in procedure subparagraph 1 above, respondent's counsel shall be requested to provide to the Executive Committee delegate a copy of a letter from respondent's counsel to respondent informing respondent of the prior file in which the former employee participated, and a copy of respondent's consent to the representation. Copies of these documents need not be submitted to the Director.

The Director or respondent's counsel (the former employee) may also bring other relevant matters to the attention of the Executive Committee delegate.

**Disqualification Standards.**

The Executive Committee shall instruct the Director to seek disqualification of any former employee representing a respondent, when:

1. Respondent is the subject of a prior file resulting in Supreme Court discipline or stipulated probation, when the former employee personally and substantially participated in the prior file.

2. The former employee personally and substantially participated in issuing a determination that discipline is not warranted for a respondent within two years of the current file opening.

3. The former employee represents a respondent in any matter before the Office of Lawyers Professional Responsibility that was pending at the time the employee ceased employment at the Office. A matter is considered pending if a file has been opened and assigned to an attorney in the Office.

4. A former employee in representing a respondent before the Office, the Board or the Court, at any time attempts to use confidential information obtained in the course of his employment in the Office of Lawyers Professional Responsibility.

If the former employee has personally and substantially participated in the issuance of a prior warning or admonition to a respondent attorney, the following factors shall be taken into account by the Executive Committee or its delegate in determining whether Rule 1.9 and/or 1.11 applies:

1. If the prior warning or admonition was issued at least five years before the current file opening, there shall be a rebuttable presumption that Rules 1.9 and 1.11 do not apply.

2. When the interval is less than five years, the following factors apply:

   a. If there is similarity or identity of the subject(s) of the previous file and current allegations (for example, the same or similar Rules of Professional Conduct were allegedly violated), such a relationship will tend to indicate that the prior and current matters are the same or substantially related.

   b. If it appears that the prior warning or admonition will be a material factor in determining the nature of the discipline for the offense, this shall tend to indicate that the prior file is the same or substantially related.

**Employee and Former Employee Notice.** Copies of this policy shall be sent to attorneys employed within the Office of Lawyers Professional Responsibility who are still practicing law in the State of Minnesota. The Director shall provide a copy of this policy to attorneys hereafter employed by the Office.

**Approval:** The above policy was approved by the Lawyers Professional Responsibility Board at its June 26, 2015, meeting.

JUDITH M. RUSH
CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

KENNETH S. ENGEL
VICE-CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 4

RE: Communications with Reviewing Board Member During Complainant Appeal Process.

At its April 15, 1988, Board meeting, the Lawyers Professional Responsibility Board approved the following policy and procedures to be followed by Lawyers Board members reviewing complainant appeals. Rule 8(e), Rules on Lawyers Professional Responsibility (RLPR), provides:

> **(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 Director shall notify the lawyer of the appeal and assign the matter by rotation to a board member, other than an Executive Committee member, appointed by the Chair. The reviewing Board member may:
>
> (1) approve the Director's disposition; or
>
> (2) direct that further investigation be undertaken; or
>
> (3) if a district ethics committee recommended discipline, but the Director determined that discipline is not warranted, the Board member may instruct the Director to issue an admonition; or
>
> (4) in any case that has been investigated, if the Board member concludes that public discipline is warranted, the Board member may instruct the Director to issue charges of unprofessional conduct for submission to a Panel other than the Board member's own.
>
> The reviewing Board member shall set forth an explanation of the Board member's action. A summary dismissal by the Director under Rule 8(b) shall be final and may not be appealed to a Board member for review under this section.

The occasion for adopting this memorandum is a complaint filed by a complainant against a respondent after the respondent communicated with the reviewing Board

member, by letter, without furnishing a copy to the complainant, while the complainant's appeal was under consideration. The complaint alleged a violation of Rule 3.5(g), Minnesota Rules of Professional Conduct (MRPC), and Rule 29, RLPR, which respectively provide as follows:

> 3.5(g) In an adversary proceeding a lawyer shall not communicate or cause another to communicate as to the merits of the case with the judge or an official before whom a proceeding is pending except:
>
> (l) in the course of official proceedings;
>
> (2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if the party is not represented by a lawyer;
>
> (3) orally upon adequate notice to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer; or
>
> (4) as otherwise authorized by law.
>
> RULE 29. EX PARTE COMMUNICATIONS
>
> Ex parte communications to any adjudicatory body including panels, referees and this Court are strongly disfavored. Such communications should not occur except after first attempting to contact the adversary and then only if the adversary is unavailable and an emergency exists. Such communications should be strictly limited to the matter relating to the emergency and the adversary notified at the earliest practicable time of the prior attempted contact and of the ex parte communication.

The complaint was dismissed, and the dismissal confirmed by a reviewing Board member upon appeal. It now appears beneficial to clarify the decision of the Board regarding these matters.

**Respondent Communications.**

Generally speaking, the complainant appeal process is not like the process of a judicial appeal, during which it would be improper for one side to communicate *ex parte* with the appellate court. The respondent is during the investigation "authorized by law" [Rule 3.5(g)(4), MRPC] to communicate with the decision-makers (the district committees and the Director), without furnishing a copy to the complainant. Indeed, under Rule 20(a), RLPR, the respondent is entitled to have the file kept confidential, except insofar as it needs to be disclosed to serve investigative purposes. The complainant will usually not know in detail the content of the investigative file upon the Director's determination nor upon appeal, when the file is transmitted to the reviewing Board member. The respondent's communications with a district committee, the Director and the reviewing member on an *ex parte* basis are all "authorized by law" and therefore do not constitute unprofessional conduct.

**Director Communications.**

The attached APl, AP1A, AP2 and AP3, are the current form correspondence used for complainant appeals. APl is addressed to the complainant, AP1A is addressed to the respondent, and AP2 and AP3 are alternate forms addressed to the reviewing Board member. The Director's communications with the reviewing Board member are not copied to the respondent or the complainant, although the respondent may always obtain a copy of the file upon request, pursuant to Rule 20, RLPR. Very infrequently, the Director may also communicate additional information, orally or in writing, to the reviewing Board member. For example, it may be that on the documents submitted to the Board member the complaint would appear to have some merit. However, the Director's Office may have conducted a personal interview with the complainant in which it became apparent that the complainant was mentally unbalanced and unreliable. It does not appear necessary or helpful that such observations have to be communicated to the complainant. The Director's practice of communicating information to the reviewing Board member is appropriate.

***Ex Parte* Communication by the Complainant.**

Complainants sometimes communicate additional information to the reviewing Board member after the complaint is filed. Some complainants communicate often and voluminously. Insofar as this information concerns the original complaint and the matter under appeal, the reviewing Board member may give it whatever consideration seems appropriate. The information may or may not be shared with respondent and the Director, depending on whether their comment would seem to be helpful; however, the information shall be provided to the Director to ensure the Director's file is complete. Insofar as the complainant raises new complaints, not previously considered, the reviewing Board member may recommend to the Director whether any further investigation seems appropriate in accord with Policy & Procedure No. 13

**Approval:** The above policy was approved by the Lawyers Professional Responsibility Board at its June 26, 2015, meeting.

JUDITH M. RUSH
CHAIR, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

KENNETH S. ENGEL
VICE-CHAIR, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

AP1
Inserts 1-9

ð1

ð2 (Complainant)

Re: ð3, Attorney at Law

Dear ð4:

Your appeal of the Director's disposition in the above matter has been received and is being referred to designated Board member ð5. **OPT SENTENCES 1:** Your appeal letter states that you will be submitting additional information by ð6[date] To date, we have not received any additional information from you. If you wish to submit additional information, you should do so immediately. Please note that the Board member may make a decision based on the documents already contained in the file. **OPT SENTENCES 2:** Your appeal was received beyond the 14-day time limit for appealing the Director's determination. The reviewing Board member may determine that the appeal will not be allowed. The respondent attorney has been provided a copy of your appeal letter. The Board member will notify you directly, in writing, of the final decision concerning your appeal.

**OPTIONAL PARAGRAPH**

Your request for information regarding the file is governed by Rule 20(a), Rules on Lawyers Professional Responsibility, which states:

> **(a) General Rule.** The files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of a lawyer, shall be deemed confidential and shall not be disclosed . . . .

This Rule was promulgated by the Supreme Court, and forbids the disclosure you request.

Very truly yours,

Office of Lawyers Professional
Responsibility

By _____
ð7
Assistant Director

ð
cc: ð8 (Designated Board member)
ð9 (Respondent or respondent's counsel)

AP1A
Inserts 1-8

ð1

ð2 (Respondent or respondent's counsel)

Re: Complaint of ð3 against ð4, Attorney at Law

Dear ð5:

Enclosed please find a copy of the letter received from the above complainant appealing the Director's disposition in the above matter. Also enclosed is a copy of my letter informing complainant of the assignment of the appeal to designated Board member ð6.

You are not required to respond to this appeal. Any questions or correspondence should be directed to the undersigned.

The Board member will notify you of his/her decision in writing.

Very truly yours,

Office of Lawyers Professional Responsibility

By _____
ð7
Assistant Director

ð
Enclosures
cc: ð8 (Designated Board member)

AP2
Inserts 1-6

ð1

ð2 (Board Member)

Re: Appeal of Director's Disposition in Complaint of ð3 (name and address) against ð4 (name and address).

Dear ð5:

Enclosed please find copies of the following:

1. Complaint.
2. Respondent's answer.
3. District Ethics Committee report.
4. Director's determination that discipline is not warranted.
5. Complainant's letter seeking review.
6. My letters of this date informing complainant and respondent of the assignment of this matter to you.

Your options are to (a) affirm the Director's determination, (b) direct further investigation or (c) direct submission to a Panel to determine whether public discipline is warranted. **Pursuant to Rule 8(e), Rules on Lawyers Professional Responsibility, please set forth an explanation of your determination. OPT 1. SENTENCES:** The appeal was received after the 14-day time limit provided in the Rules on Lawyers Professional Responsibility for appeal of a Director's determination. You must first determine, in your discretion, whether to allow the appeal to go forward, and, secondly, the disposition on appeal. **OPT 2. SENTENCES (to become part of above paragraph):** Please note that because the District Ethics Committee recommended discipline, and the Director determined discipline is not warranted, you have an additional option on appeal. Pursuant to Rule 8(e), Rules on Lawyers Professional Responsibility (RLPR), you may direct the issuance of an admonition. **Please set forth an explanation of your determination pursuant to Rule 8(e), RLPR.**

Please inform the complainant and respondent, in writing, of your decision and send the Director a copy for our file. Thank you.

Very truly yours,

Office of Lawyers Professional
Responsibility

By _____
ð6
Assistant Director

ð
Enclosures

AP3

Inserts 1-6

ð1

ð2

Re: Appeal of Director's Disposition in Complaint of ð3 (full name and address) against ð4 (full name and address).

Dear ð5:

Enclosed please find copies of the following:

1. Complaint.
2. The Director's determination that discipline is not warranted.
3. Complainant's letter seeking review.
4. My letters of this date informing complainant and respondent of the assignment of this matter to you.

The foregoing constitutes our entire file in this matter, as the Director summarily dismissed the complaint without investigation. Your only options are to (a) affirm the Director's determination or (b) require further investigation. **Pursuant to Rule 8(e), Rules on Lawyers Professional Responsibility, please set forth an explanation of your determination. OPT. SENTENCES:** The appeal was received after the 14-day time limit provided in the Rules on Lawyers Professional Responsibility for appeal of a Director's determination. You must first determine, in your discretion, whether to allow the appeal to go forward, and, secondly, the disposition on appeal.

Please inform the complainant and respondent, in writing, of your decision and send the Director a copy for our file. Thank you.

Very truly yours,

Office of Lawyers Professional
Responsibility

By_____
ð6
Assistant Director

ð
Enclosures

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 5

RE: Approval of Procedures for Handling Complaints Against LPRB and CSB Board Members, Director, Director's Staff, and DEC Members.

**Section 1. Complaints against the Director or Staff Members.**

Upon receipt of a complaint against the Director or staff members, the Director will forward the complaint to the Chair of the Lawyers Board unless the allegations fall within the criteria established in Section 4 of this policy. The Chair will submit the complaint to a Lawyers Board Panel appointed in rotation, which will determine whether the matter can be summarily dismissed. If the complaint cannot be dismissed, the Panel will submit the complaint to the Supreme Court for assignment to special counsel for investigation. Special counsel shall have the authority to dispose of the matter under Rule 8(d)(1), (2) or (3), Rules on Lawyers Professional Responsibility (RLPR). If special counsel determines the matter should be presented to a panel (Rule 8(d)(4)), RLPR, it will be presented to a special panel as provided below.

**Section 2a. Complaints against Lawyers Professional Responsibility Board and Client Security Board Members.**

The initial handling of complaints against Board members will be handled within the normal channels of the discipline system unless the allegations fall within the criteria established in Section 4 of this policy. The Director will receive the complaint and determine whether it can be summarily dismissed. If it cannot, and it is of a routine nature and normally assigned to a District Ethics Committee for investigation, the Director will do so. If the District Ethics Committee recommends a dismissal and the Director agrees, the Director will do so. If the District Ethics Committee recommends further investigation or that the lawyer be disciplined, the matter will be assigned to special counsel. If the District Ethics Committee recommends dismissal but the Director determines further investigation is necessary, the matter will be assigned to special counsel for investigation. Special counsel shall have the authority to dispose of the matter under Rule 8(d)(1), (2) or (3), RLPR, or if necessary, may present charges to a special panel (Rule 8(d)(4)), RLPR.

**Section 2b. Complaints by Lawyers Professional Responsibility Board and Client Security Board Members.**

Complaints made by a current Lawyers Board or Client Security Board member may present special problems. As above, initial handling of such complaints can be handled within the normal channels of the discipline system. The Director will receive the complaint and determine whether it can be summarily dismissed. If it cannot, and it is of a routine nature and normally assigned to a District Ethics Committee for investigation, the Director will do so. If the District Ethics Committee recommends a dismissal and the Director agrees, the Director will do so. If the District Ethics Committee recommends discipline or further investigation, and if in the Director's determination the credibility of the Board member is at issue, or other circumstances exist that the Director believes indicate that the Director or any of his or her staff should not handle the matter, then special counsel may be requested.

If the complaining Board member is dissatisfied with the determination of the Director or special counsel, normally such an appeal would be reviewed by a Board member selected in rotation. Since the impartiality of the Board member may be subject to question in such situations, the Chair shall designate at least two former Board members to be available to act in rotation as a special reviewing Board member. If the reviewing Board member directs that the matter be further investigated or sent to a panel, then special counsel or a special panel shall be appointed.

**Section 3. Special Counsel or Special Panels.**

Special counsel should be appointed by the Supreme Court, through its Commissioner, as referees are appointed in public matters. The Director shall file a written request for appointment of special counsel in a file specifically denoted by the Clerk of Appellate Court for that purpose, along with a list of at least 20 past and present District Ethics Committee members and all persons who in the last ten years completed service as Lawyers Board members, as well as any Director, or Assistant Directors, who have not been employed in the Director's Office within the past year. The Director shall use the Office case number to designate the matter in order to maintain the confidentiality of parties involved. The Court may also want to consider the appointment of retired judges as special counsel. Special panels may be appointed from the same pool of

members. Compensation for special counsel shall be the same as provided to senior judges who serve as referees within the disciplinary system. Special Panels shall serve without compensation, but reasonable expenses will be reimbursed consistent with judicial policies.

If a complaint against a Client Security Board member, Lawyers Board member, the Director or an Assistant Director results in a dismissal, admonition or stipulated private probation, and no hearing under Rule 9, RLPR, was held, and the complainant is not satisfied with the disposition, the complainant may appeal to a Lawyers Board member (other than a member of a Panel that may have issued the disposition) chosen in rotation, as provided by Rule 8(e), RLPR. If a hearing was held under Rule 9, RLPR, the complainant may petition for review or appeal to the Supreme Court as provided by Rule 9(l), RLPR.

**Section 4. Complaints Against LPRB and CSB Board Members, Director, Director's Staff or DEC Members Based Solely Upon Their Participation in the Resolution of a Complaint.**

After complaint decisions have been issued and appeal rights have been exhausted, dissatisfied parties occasionally file ethics complaints against Board members, the Director, the Director's staff, or District Ethics Committee (DEC) members where the only misconduct alleged is the participation of the Board member, Director, Director's staff or DEC member in the decision. These complaints constitute an improper attempt to obtain further review not authorized by the RLPR and a waste of limited available lawyer discipline resources if formally processed as ethics complaints. It is the policy of the Board that such submissions not be formally processed as ethics complaints where the only alleged misconduct by the Board, Director, Director's staff or DEC member is the exercise of a function properly within the scope of his or her duties.

Complaints against Board members, Director, the Director's staff, and DEC members that are based solely upon dissatisfaction with the disposition of a prior complaint and that allege no substantive misconduct other than the Board, Director, Director's staff, or DEC member's participation in the disposition of a complaint shall be forwarded to the Executive Committee Delegate to determine whether they are appropriate for resolution pursuant to this policy. If the Executive Committee Delegate determines that

the submission contains no factual assertions in support of the allegations of misconduct beyond the fact that the Board member, Director, Director's staff, or DEC member participated in the resolution of a prior complaint(s), the Delegate shall return the submission to the Director with the direction that the complaining party be notified that no action will be taken regarding their submission. If the Delegate determines that the complaint includes allegations that fall outside the scope of Section 4 of this policy, the complaint shall be processed in accordance with Sections 1 or 2 of this policy. The decision of the Executive Committee Delegate shall be final and is not subject to further appeal or review.

Formal lawyer disciplinary action is not an option with respect to a non-lawyer. Therefore, with respect to complaints against non-lawyer Board members and DEC members that are based solely upon dissatisfaction with the disposition of a prior complaint and that allege no substantive misconduct other than the Board or DEC member's participation in the disposition of a complaint, the Director may make the determination that no substantive misconduct has occurred and notify the complaining party that no action will be taken with respect to their complaint. Copies of the Director's determination shall be provided to the Board member or DEC member involved and to the Board Chair or DEC Chair as appropriate.

**History of Amendments**

**January 20, 1989, Amendment.**

On October 28, 1988, the Supreme Court approved the portions of the policies that were before it for consideration. *Kennedy v. L.D., et al.*, 430 N.W.2d 833 (Minn. 1988). Before Kennedy petitioned the Supreme Court for review, it was decided on an *ad hoc* basis that complainant appeals against Board members and the Director's staff, like other complainant appeals, should proceed pursuant to Rule 8(d), RLPR. The Court's approval was incorporated in the January 20, 1989, Board amendment.

**June 15, 1989, Amendment.**

The Director of the Office of Lawyers Professional Responsibility has also been appointed Director for the Client Security Board. Amendment to this policy appears appropriate to cover attorney members of the Client Security Board in the same fashion as attorneys on the Lawyers Professional Responsibility Board.

**September 19, 2003, Amendment.**

Section 4 of the policy was added to address ethics complaints filed against participants in the lawyer discipline process merely to obtain further review not authorized by the RLPR.

**June 26, 2015, Amendment.**

Section 2b was added to address complaints by current Lawyers Professional Responsibility Board or Client Security Board members and to provide for former Board members to be designated to hear such appeals.

The last full paragraph of Section 4 was added to address the process for addressing complaints against non-lawyer members of the Lawyers Professional Responsibility Board or Client Security Board.

**January 26, 2018, Amendment**.

The policy was updated to eliminate gender pronouns for the Director. Pursuant to the request of the Supreme Court Commissioner, the policy was revised to reflect that requests for special counsel shall go to the Commissioner rather than the State Court Administrator by electronically filing a letter request in a specifically-designated file, and to set forth the provision for payment of special counsel consistent with payment provided to discipline referees. The policy was also updated to make clear that the rules referenced are to the Rules on Lawyers Professional Responsibility (RLPR).

**Approval:** The above policy was approved by the Lawyers Professional Responsibility Board at its January 26, 2018, meeting.

_____

ROBIN WOLPERT, CHAIR,
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 6

RE: Enforcement Policies Regarding Attorneys Who Fail to Meet Requirements of Continuing Legal Education, Lawyer Registration, or Interest on Lawyer Trust Accounts.

The Minnesota Supreme Court, as part of its responsibility in regulating the practice of law, has adopted several sets of regulations which, if violated, may also entail violations of certain Rules of Professional Conduct. If an attorney practices law while on restricted status for continuing legal education delinquencies, or while suspended for delinquencies in lawyer registration payments, Rule 5.5, Rules on Lawyers Professional Responsibility (RLPR) (unauthorized practice of law), may be violated. If an attorney maintains a non-interest bearing trust account, or does not properly pay over interest accruing on a trust account, Rule 1.15, RLPR (safekeeping property), may be violated. In several cases involving such violations, the Court has imposed discipline.[1]

There are many attorneys who are on restricted status, or are not current in fee payments, or do not maintain IOLTA accounts, who nonetheless are not in violation of any rules. These attorneys may be retired, not practicing in Minnesota, or not required to maintain a trust account. It appears that no completely comprehensive method of identifying all violators is feasible.

The Director's Office routinely checks CLE and lawyer registration status in connection with the receipt of complaints against attorneys. If the allegations of a complaint directly implicate the unauthorized practice of law (UPL), then that issue will be dealt with in the context of the complaint investigation and determination. If the issue of UPL is not a direct part of the complaint allegations, but there appears to be some indication that the attorney may be continuing to practice, then the reviewing duty attorney shall prepare a CO26 letter (attached) and request information from the attorney. This request will not prevent the complaint from being summarily dismissed or otherwise investigated as to the issues directly raised by the complainant.

If the information received indicates that misconduct may have occurred, including but not limited to UPL, then the Director shall initiate a separate investigation file and issue a determination. If the respondent attorney does not respond, a CO26A letter (attached) may be sent.

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[1] *In re Wertz*, 442 N.W.2d 781 (Minn. 1989).

Because the Executive Committee's supervisory duties with respect to the Director's Office are general in nature, the details of implementing the foregoing policies and procedures are matters well within the Director's discretion.

**Approval:** The above policy was approved by the Lawyers Professional Responsibility Board at its June 26, 2015, meeting.

JUDITH M. RUSH
CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

KENNETH S. ENGEL
VICE-CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

CO26
Inserts 1-14

ð1

ð2-Respondent

Re: Suspension for Nonpayment of Fees

Dear ð3:

It has come to our attention in the course of reviewing ð4-[source of information] that since ð5-[Date of suspension], you have been suspended for nonpayment of your lawyer registration fee. Practice while suspended for nonpayment of lawyer registration fees is unauthorized practice of law and a violation of Rule 5.5(a), Minnesota Rules of Professional Conduct (MRPC).

**Opt. ¶A** (CLE Restricted Status)
It has ð6-[also] come to our attention that on ð7-[Date of CLE court order], the Minnesota Supreme Court placed you on restricted status for failing to comply with CLE requirements. Practice while on restricted status, except for the representation of oneself as set forth in Rule 12, Rules of the Minnesota State Board of Continuing Legal Education of Members of the Bar, is unauthorized practice of law and a violation of Rule 5.5(a), MRPC.

Please submit to this Office within 14 days proof of your payment of the lawyer registration fee and penalty **ð8-**[Keep or delete sentence following this insert] and proof of your compliance with all CLE requirements for reinstatement. Also, please provide an affidavit concerning your practice of law since ð9-[Date of suspension or CLE court order (whichever is earlier)]. If you choose not to be reinstated at this time, provide an affidavit that you have not practiced law since ð10-[Date of suspension or CLE court order (whichever is earlier)] and do not intend to do so as long as your lawyer

registration fee remains unpaid ð**11**-[Keep or delete sentence following this insert] and as long as you remain on restricted status.

**Opt. ¶B** (DEC Investigation)
Your response to this letter should be sent directly to this Office. You need not include this information in your response to the district ethics committee investigator. Your response to the DEC should concern only the underlying complaint.

**Opt. ¶C** (In-House Investigation)
You may include this information in your response to the complaint of ð12. Please direct your response to the undersigned.

**Opt. ¶D** (Summary Dismissal)
Your response to this letter should be sent directly to the undersigned at this Office, and need not concern the complaint of ð13, which is not being investigated.

Thank you for your anticipated cooperation with the disciplinary system.

Very truly yours,

Office of Lawyers Professional
Responsibility

By _____
ð14
Senior Assistant Director

ð

CO26A
Inserts 1-7

ð1

ð2 (name & address)

Re: ð**3A** CLE Restricted Status ð**3B** Suspension for Nonpayment of Fees

Dear ð4:

By letter dated ð5, I requested certain information and an affidavit from you within 14 days. I have not received a response to my request.

Pursuant to Rule 25, Rules on Lawyers Professional Responsibility, please provide the documents and information requested in my ð6, letter within five days. If such documents and information are not timely received, this Office may open a disciplinary file and request a more complete response.

Very truly yours,

Office of Lawyers Professional Responsibility

By _____
ð7
Senior Assistant Director

ð

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

RE: Approval and Termination of Approved Status for Financial Institutions Under Rule 1.15(i), Minnesota Rules of Professional Conduct.

This memorandum states the policies and procedures to be followed by the Office of Lawyers Professional Responsibility in implementing Rule 1.15(i) - (n), Minnesota Rules of Professional Conduct (MRPC), as promulgated by the Minnesota Supreme Court on December 27, 1989.

Rule 1.15(k), MRPC, provides:

> A financial institution, to be approved as a depository for lawyer trust accounts, must file with the Office of Lawyers Professional Responsibility an agreement, in a form provided by the Office, to report to the Office in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether the instrument is honored. The Lawyers Professional Responsibility Board shall establish rules governing approval and termination of approved status for financial institutions, and shall annually publish a list of approved financial institutions. No trust account shall be maintained in any financial institution that does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon three days notice in writing to the Office.

Approval.

1. A financial institution shall be approved as a depository for lawyer trust accounts if it shall file with the Office of Lawyers Professional Responsibility an executed trust account overdraft notification agreement, in a form provided by the Office.

2. The Office of Lawyers Professional Responsibility shall maintain a current list on its website of approved financial institutions.

Termination of Approved Status.

1. The Director may terminate approved status of a financial institution upon a determination that the financial institution has (1) repeatedly failed to report overdrafts on trust accounts maintained in the institution or has failed to take corrective steps to report overdrafts after notification by the Director; (2) failed to execute a trust overdraft agreement; or (3) failed to follow terms of the agreement.

2. The Director shall provide notice of non-compliance prior to terminating approved status of a financial institution.

The details in implementing the foregoing policies and procedures are matters within the Director's discretion.

**Approval:** The above policy was approved by the Lawyers Professional Responsibility Board at its June 26, 2015, meeting.

JUDITH M. RUSH
CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

KENNETH S. ENGEL
VICE-CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 8

RE: Enforcement of Rule 8.4(h), Minnesota Rules of Professional Conduct, Prohibiting Discriminatory Conduct.

This memorandum states the policies and procedures to be followed by the Office of Lawyers Professional Responsibility in enforcing Rule 8.4(g), Minnesota Rules of Professional Conduct (MRPC), as promulgated by the Minnesota Supreme Court effective October 1, 2005, as amended April 1, 2015.

Rule 8.4(h), MRPC, provides:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (h) commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including:
>
> (1) the seriousness of the act,
>
> (2) whether the lawyer knew that the act was prohibited by statute or ordinance,
>
> (3) whether the act was part of a pattern of prohibited conduct, and
>
> (4) whether the act was committed in connection with the lawyer's professional activities.

Guidelines.

**1. Deference to Other Forums.** Among the elements of a Rule 8.4(h) violation would be that the act is "prohibited by federal, state or local statute or ordinance." The Board would expect routinely to defer to the relevant governmental agencies, and to courts, which have expertise in these matters. The Board reserves the

discretion in a particular case—for example, one involving an attorney who had already been found to have harassed or illegally discriminated against someone—to proceed in advance of another agency. However, it is expected that most such matters would first be heard elsewhere. It should be noted, however, that if the other forum does not have a standard of clear and convincing evidence, discipline proceedings could probably not be made summary through a collateral estoppel claim. Rule 10(d), Rules on Lawyers Professional Responsibility, would allow bypass of a Panel hearing in appropriate cases.

**2. Discretion.** The Board regards the four enumerated factors under Rule 8.4(h), MRPC, as providing a considerable basis for exercise of discretion by the Office of Lawyers Professional Responsibility in determining whether to pursue a particular matter. Thus, not every claim of discrimination or finding in another forum of discrimination would trigger a disciplinary investigation or proceeding.

**Approval:** The above policy was approved by the Lawyers Professional Responsibility Board at its June 26, 2015, meeting.

JUDITH M. RUSH
CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

KENNETH S. ENGEL
VICE-CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 9

RE: Approved Contingency Expenses.

In accordance with Judicial Branch Special Expense Procedures 205(n) (attached hereto), the Lawyers Professional Responsibility Board hereby authorizes payment for those unusual expenses which the head of an agency incurs in conducting public business.

The following expenditures are illustrative of permissible expenses and may be incurred with the prior approval of the Director of the Office of Lawyers Professional Responsibility.

1. A coffee and cake reception for a departing Director or retirement of an employee of the Office of Lawyers Professional Responsibility. ***See Judicial Special Expense Procedures VI 3.f.***

2. A gift for a departing Director of Lawyers Professional Responsibility from the Lawyers Professional Responsibility Board. ***See Judicial Special Expense Procedures VI 5.b.***

3. A gift for a retiring Chair of the Lawyers Professional Responsibility Board from the Board. ***See Judicial Special Expense Procedures VI 5.b.***

4. Coffee and pastries served when conducting business with the Board or Executive Committee. ***See Judicial Special Expense Procedures VI 3.f.***

5. Meals and related expenses incurred when conducting Lawyers Professional Responsibility Board business with members of the Court, Board or bar. ***See Judicial Special Expense Procedures VI 3.***

**Approval:** The above policy was approved by the Lawyers Professional Responsibility Board at its June 26, 2015, meeting.

JUDITH M. RUSH
CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

KENNETH S. ENGEL
VICE-CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

# Minnesota Judicial Branch Policy/Procedures

| | |
|---|---|
| **Policy Source:** | State Court Administrator |
| **Policy Number:** | 205(n) |
| **Category:** | Finance |
| **Title:** | Special Expense Procedures |
| **Origination Date:** | January 1, 2014 |
| **Effective Date:** | January 1, 2014 |
| **Revision Date:** | January 1, 2014 |
| **Contact:** | Director of Finance |

## Special Expense Procedures

### I. PURPOSE

These branch policies and procedures for special expenses are designed to:

- Establish a clear definition for costs to be regarded as special expenses
- Ensure consistent, agency-wide review and approval of all special expenses
- Promote accountability for special expenses

### II. APPLICABILITY

These procedures apply to all Minnesota Judicial Branch employees and Judges.

### III. GENERAL REQUIREMENTS

Special expenses are those costs incurred in connection with legitimate business functions of the branch or assigned duties of a branch employee or judge for which a higher level of scrutiny is deemed necessary, and which are not reimbursable through the normal expense reimbursement or procurement provisions. Special Expenses may not be used to pay for private club memberships, alcoholic beverages, special occasion flowers, entertainment, prizes, employee parties (including holiday and birthday parties), moving and relocation expenses.

**Business Risks:**

Noncompliance and/or inconsistent application of these policies and procedures may result in inconsistent oversight of certain expense items and increases the likelihood for improper reimbursement of expenses.

## IV. DELEGATION OF AUTHORITY

1. Each division director or district administrator is authorized to approve special expense requests up to $10,000 unless the request is for the division director or district administrator.

2. The State Court Administrator or Deputy will approve special expense requests for the division directors, for agency-wide recognition expenses, for international travel, and all requests over $10,000. District Court Chief Judges will approve Judicial District Administrators special expense requests.

3. It is the responsibility of any person approving a Special Expense Request Form to ensure compliance with this policy. The finance offices will review and approve all Special Expense Request Forms as an internal control measure to ensure policy compliance. If the finance office identifies requested items not permitted under this policy, the Special Expense Request Form will be rejected and returned to the requesting division along with the reason the expense was not approved. Any employee expense reports relating to a rejected request will not be processed unless extraordinary circumstances are documented and approved at the same level(s) as described in 1-2 above.

## V. PROCEDURE & REVIEW PROCESS

1. The requestor must complete the Special Expense Request Form to request approval for expenditures as defined in this policy as special expenses.

2. Except in emergency situations and where prior approval is not possible, **approval is required before special expenses are incurred**. Requests received after the fact or too late to ensure prior review and approval must include an explanation for why the Special Expense Request Form was not initiated in a timely manner.

3. The requestor forwards the Special Expense Request Form to the appropriate division director or district administrator and/or State Court Administrator or Deputy for review and approval. The form must also be submitted to the finance office for review and approval as an extra control measure to ensure adequate documentation and policy compliance.

4. After all required approvals are obtained; the finance office returns the Special Expense Request Form to the requestor or requesting division and retains a copy. The requesting division is responsible for ensuring that proper purchasing policies are followed and funds are encumbered prior to an obligation being incurred.

5. After approved expenses have been incurred, the requestor or requesting division reviews vendor invoices or the Employee Expense Form and attaches any required receipts, packing slips or other pertinent documentation, references the approved special expense request form, and forwards the documents to the appropriate finance division for payment review and approval prior to payment processing.

## VI. SPECIAL EXPENSES

The expense items identified below are defined as special expenses. The amounts of these expenses must be reasonable, and the expenses are subject to the approval requirements of this policy.

A Special Expense Request Form **must** be completed and approved by the SCAO Division Director or District Administrator, and submitted with the Employee Expense Report and/or related invoices for the following expenses:

1. Registration, tuition, fees, and related travel expenses for conferences, seminars, workshops, training or education courses that are in excess of $500 per person and not sponsored by HRD, other SCAO Divisions, or MACM.
2. Expense reimbursement for out-of-state travel when authorized by the SCAO Division Director or District Administrator, or international travel when authorized by the State Court Administrator or designee, shall be limited to airfare, tuition, lodging, meals, and other expenses as specified by the Court travel policy. The special expense form must be completed prior to travel.
    a. This does not include day travel (travel without an overnight stay) to neighboring states of North Dakota, South Dakota, Iowa, and Wisconsin.
3. All refreshments/meals provided for meetings and Court business events. A list of attendees must be submitted with the Special Expense Request Form. A biennial blanket special expense request form may be used for recurring meetings. The meeting's purpose must adhere to one of the following conditions:
    a. A meeting with participants from many geographic locations where the majority of the participants are in travel status
    b. A division/district-wide staff meeting for all managers or judges.
    c. A division/district planning or organizational meeting.
    d. A staff meeting of all division/district employees or judges.
    e. A structured training session, available to employees and judges, provided it has been approved by the agency training or staff development office.
    f. Refreshments for official Court employee recognition, retirement and departure events.
4. Full cost of an employee meal when it is a part of the structured agenda of an outside conference, workshop, seminar, or meeting which the appointing authority.
5. Expenses for individual employee awards and agency recognition events as follows:
    a. At the discretion of the SCAO Division Directors or District Administrators, awards for individual or group achievements which are limited to non-cash/non-negotiable items of nominal value (see HR Policy 316). Items of nominal value are those that have no market or retail value such as promotional or advertising items.

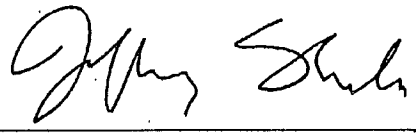
b. Refreshments for official Court employee recognition, retirement, and departure events.
   - No payment for alcoholic beverages.
   - No reimbursement for party decorations. (Table cloths, flatware, napkins, plates, glasses, etc. are allowable.)

c. Retirement, employee recognition, or employment separation gifts including but not limited to plaques, trophies, framed certificates with cash value of $150 or less.

6. Refreshments and/or meals during official meetings of statutory boards, councils, task forces, advisory committees and commissions and during official meetings of external non- statutory councils, task forces, advisory committees and commissions for which expenses are authorized by statute or as a condition of a federal grant or contract. Official meetings include meetings of sub-committees provided that such meetings are authorized by the full board, council, task force, advisory committee or commission. All meetings shall be scheduled to minimize inclusion of meals.

7. Refreshments or meals for specialty court achievement celebrations.

Approval:



Jeffrey Shorba, State Court Administrator

December 9, 2013
Date

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 10

RE: Timeliness re Board Member Decisionmaking in Complainant Appeals, Admonition Appeals, Probable Cause Determinations and Motions to Panel Chairs

In an effort to avoid unnecessary delay to the disciplinary process, the Executive Committee has formulated a policy regarding expected timelines in Board member decisionmaking.

1. Complainant Appeals. Board members assigned to the complainant appeals roster are expected to render their decisions as expeditiously as possible, but within no more than 30 days from receipt of the appeal. If an appeal is pending more than 30 days, the Director's Office notifies the Vice-Chair of the Board, who will send a reminder letter to the Board member. If the appeal is still pending after an additional 30 days (i.e. is pending for 60 days), the Director's Office shall write the Board member informing him or her that the appeal is withdrawn. The appeal shall then be reassigned in rotation to the next member on the complainant appeals' roster. The complainant and the respondent shall be informed in writing of the reassignment.

2. Admonition Appeals and Probable Cause Hearings. Matters taken under advisement after a Panel hearing are to be the exception, and that option should only be exercised in exceptional circumstances. Any matters taken under advisement should be decided within one week after the hearing. The Director's Office will advise the Board Chair of any Panel's failure to meet this timeline. The Board Chair will send a reminder letter to the Panel Chair, advising the Panel of the need to make its determination promptly.

3. Motions to Panel Chair(s). Panel Chair(s) should rule promptly on contested motions, within no more than one week unless exceptional circumstances exist. The Director's Office will advise the Board Chair if a Panel Chair fails to meet this timeline. The Board Chair will send a reminder letter to the Panel Chair requesting him or her to decide the matter promptly.

Approved by:

Dated: _____ _____
GREGORY BISTRAM
CHAIR

Dated: _____ _____
NANCY W. McLEAN
VICE-CHAIR

Dated: _____ _____
WILLIAM M. MAUPINS

Dated: _____ _____
KATHLEEN SHERAN

Dated: _____

_____
GENEVIEVE UBEL

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 11

RE: Office of Lawyers Professional Responsibility *Pro Bono* Policy and Procedures.

## I. CONSIDERATIONS

JUDICIAL BRANCH POLICY. Effective August 1, 2015, the Minnesota Judicial Branch adopted a policy entitled "Practice of Law Other Than Court Employment." A copy of the policy is attached as Exhibit 1 (hereinafter Judicial Branch Policy). All employees of the Office of Lawyers Professional Responsibility (hereinafter OLPR or Office) must comply with the Judicial Branch Policy. The Judicial Branch Policy required the amendment of this policy to make both policies compatible and address matters not governed by the Judicial Branch Policy. This policy supplements the Judicial Branch Policy.

OLPR POLICY. Recognizing the ethical obligation of every attorney to provide legal services to those of limited means and to undertake activities to improve the legal system, and the significant unmet need for civil legal services for low-income and disadvantaged persons in this state, it is the policy of this Office to encourage and support participation by Office attorneys in *pro bono* activities.

Every attorney has a responsibility to provide *pro bono* legal services. The Minnesota Supreme Court has adopted an aspirational standard for the provision of *pro bono* legal services of 50 hours per year. *See,* Rule 6.1 of the Minnesota Rules of Professional Conduct.

*Pro bono* work reflects favorably upon our commitment to public service. Attorneys have unique skills and abilities which can be used to provide services for the disadvantaged, and to promote the public interest, in ways no other profession can. Volunteering for *pro bono* work also provides to individual attorneys an opportunity to broaden their professional experience and skills, as well as the satisfaction of helping those in need.

## II. DEFINITIONS

A. *PRO BONO* SERVICES. As used in this policy, "*pro bono* services" means participation in professional activities by an Office attorney that does not involve the practice of law in a bar association or other organization whose purpose is to provide or support the provision of free or low cost legal services to persons of limited means, including the following:

1. Serving as an officer, board member, or committee member in any organization whose purpose is to provide or support the provision of free or low cost legal services to persons of limited means;

2. Providing research assistance or expert advice to providers of free or low cost legal services to persons of limited means;

3. Participating on the board of a legal services organization;

4. Providing training or preparing materials for seminars or other educational activities involving the law governing services provided to persons of limited means; or

5. Participating on bar committees and projects relating to the delivery of legal services and *pro bono* legal services.

B. ACTIVITIES FOR IMPROVING THE LAW, THE LEGAL SYSTEM, OR THE LEGAL PROFESSION. As used in this policy, "Activities for Improving the Law, the Legal System, or the Legal Profession" shall mean participation on bar committees, projects, and seminars which are within the scope of an Attorney's employment responsibilities.

## III. POLICY

A. *PRO BONO* SERVICES. An Attorney who wishes to engage in *pro bono* services must seek and receive the approval of the Director prior to engaging in the activity.

B. ACTIVITIES FOR IMPROVING THE LAW, THE LEGAL SYSTEM, OR THE LEGAL PROFESSION. Each Attorney is required to engage in activities that are within the scope of his or her employment responsibilities. These activities are not subject to the approval process or limitations set forth in the Judicial Branch Policy.

## IV. PROCEDURES FOR SEEKING APPROVAL OF *PRO BONO* SERVICES

A. ADVANCE PERMISSION. An Attorney who wishes to provide *pro bono* services must seek permission from the Director in advance.

B. CONSIDERATIONS. In determining whether or not to approve an Attorney's request, the Director shall consider, among other considerations:

1. Whether the request falls within the kinds of *pro bono* services permitted by this policy.

2. Whether the matter appears likely to interfere with the performance of the Attorney's official duties and responsibilities (e.g., the matter or activity appears likely to require protracted absences during office hours; or participation would clearly conflict with the interests of the agency or Office).

C. CHANGES IN SCOPE OF AN APPROVED *PRO BONO* SERVICE. If, after the Director has approved an Attorney's request to provide *pro bono* services, it appears that the matter will be more time-consuming or complex than originally contemplated, the Attorney must seek approval by the Director for permission to continue his or her participation in the *pro bono* services.

D. MALPRACTICE COVERAGE. Before agreeing to provide *pro bono* services, the Attorney should determine whether the proposed *pro bono* activity requires malpractice insurance and whether the referring program or organization has a malpractice insurance policy that covers its attorney volunteers. The Office does not provide malpractice coverage for *pro bono* services.

## V. IDENTIFICATION WITH THE OLPR

Attorneys who participate in *pro bono* services may not indicate or represent in any way that they are acting on behalf of the Office, or in their official capacity.

A. The Attorney is responsible for making it clear to individuals involved in a *pro bono* service that he or she is acting in his or her individual capacity as a volunteer, and is not acting as a representative of, or on behalf of, the Office.

B. The Attorney may not use office letterhead or otherwise identify his or herself as an attorney for the OLPR in any communication or correspondence connected with providing *pro bono* services. The Office address may be used, with the permission of the Director or supervisor, if the address does not include the agency name or indicate the nature of the Office.

## VI. USE OF OFFICE RESOURCES

A. HOURS OF WORK. When performance of *pro bono* services is required during regular work hours, the Attorney may request that the Director approve a flexible work schedule to accommodate the time needed for *pro bono* services, or may take leave without pay or vacation leave.

B. TELEPHONE CALLS. Local telephone calls may be made from the Attorney's personal line. Long distance phone calls may not be charged to the Office or agency. Arrangements for long distance calls should be made through the referring program or organization.

C. USE OF OFFICES. An Attorney may use his or her personal office space to do research, and to draft letters or other written materials. Such work should be done in a manner which does not interfere with the performance of the Office's or the Attorney's regular functions or duties and responsibilities.

D. CLERICAL SUPPORT. Typing, copying, collating, and similar administrative services may be performed on a limited basis by clerical staff who agree to volunteer their time, with the approval of the clerical staff's supervisor.

E. SUPPLIES AND USE OF EQUIPMENT.

1. Attorneys may use word processing and dictation equipment so long as such use does not interfere with the performance of the Office's or the Attorney's regular functions or duties and responsibilities.

2. A limited amount of office supplies, photocopying, and fax use is available to Attorneys performing *pro bono* services. Significant, identifiable expenses, e.g., use of a large amount of paper, stamps, and so on, should be promptly reimbursed to the office or agency.

This policy was approved by the Lawyers Professional Responsibility Board at its March 22, 1996, meeting.

Amended at the October 2, 2015, meeting.

**Approval:** The above policy was approved by the Lawyers Professional Responsibility Board at its June 26, 2015, meeting.

JUDITH M. RUSH
CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

KENNETH S. ENGEL
VICE-CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

# Minnesota Judicial Branch Policy

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|---|---|
| **Policy Source:** | Minnesota Judicial Council |
| **Policy Number:** | 307 |
| **Category:** | Human Resources |
| **Title:** | Practice of Law Other Than Court Employment |
| **Effective Date:** | July 1, 2003. August 1, 2015 |
| **Revision Date(s):** | February 19, 2009; June 28, 2007; April 21, 2006, March 18, 2010, June 25, 2015 |
| **Supercedes:** | |

## Practice of Law Other Than Court Employment

### I. POLICY STATEMENT

It is the policy of the Minnesota Judicial Branch that no Minnesota state court employee shall engage in the practice of law, outside of court employment, except as otherwise provided within this policy.

This policy does not prohibit an attorney employed by the Minnesota Branch from performing legal services for the Minnesota Judicial Branch as required within the scope of his or her job responsibilities; or an employee in a Self-Help Program from performing legal services for the public pursuant to Rule 110 of the Minnesota Rules of General Practice for the District Court. When performing legal services as part of a self-help program the matters must be with respect to court procedures.

For purposes of this policy, the practice of law denotes the following activities:

1. Rendering legal consultation or advice to a client;

2. Appearing on behalf of a client at any hearing, proceeding or related deposition or discovery matter or before any judicial officer, court, public agency, referee, magistrate, commissioner or hearing officer, except where rules of the tribunal involved permit representation by non lawyers;

3. Engaging in other activities that constitute the practice of law as provided by state or common law.

Under this policy:

A. An employee may act pro se.

B. Subject to the Code of Judicial Conduct, Rules of Professional, Employee Code of Ethics, and other applicable Human Resource Rules and Policies, an attorney employed by the Minnesota Judicial Branch may:

1. Perform legal services for themselves.

2. Give legal advice to and draft or review documents for members of his or her immediate family.[1] The attorney may be compensated for such representation only to the extent permitted by law, rule, or ethical canon.

3. Participate in activities for improving the law, the legal system or legal profession.

4. Serve as a mediator or arbitrator.

5. Perform legal services through a pro bono legal clinic, approved pursuant to Rule 2B of the Continuing Legal Education Board, involving uncontested matters or matters not pending before any court or government agency, e.g., preparation of wills through Wills for Heroes. An attorney employee providing pro bono legal services may not appear in court, give legal advice pertaining to, or draft or review documents for matters that may come before any court or government agency as a contested matter.

   With respect to paragraphs 3, 4 and 5, an attorney employee must obtain prior written approval from the appointing authority and the District or MJC Human Resources Manager before engaging in any of these activities. An attorney employee shall promptly provide a copy of the written approval from the appointing authority to the District or MJC Human Resources Manager.

When an attorney employee does perform legal services:

1. The attorney's job duties as a Minnesota Judicial Branch employee shall take priority over legal services provided to others. The legal services shall not be performed if they would interfere with the job duties of the attorney employee.
2. Any legal services that are performed shall not be within the scope of the attorney's employment.
3. No legal services or related activities authorized under this policy shall take place during the attorney's usual working hours, unless appropriate leave is authorized and charged.
4. No public resources may be used in connection with the legal services provided to others.
5. Any costs or attorney fees awarded as a result of the attorney employee's representation in a pro bono matter must be returned to the referring legal organization.

Reasonable precautions must be taken in all cases by the Court or court-related agency and authorized employees to avoid actual and perceived conflicts of interest, the actual or perceived lending of the prestige or power of the public offices or positions of the employees, or conveying the impression that such employees are in a special position to exert influence over the outcome of any proceeding.

## II. APPLICABILITY

All judicial branch employees, full and part-time.

## III. IMPLEMENTATION AUTHORITY

[1] For the purpose of this policy, "immediate family" will be defined as the employee's spouse, co-habitor, the parents or grandparents of the employee's spouse or co-habitor, parents, step-parents, grandparents, guardian, children, step-children, foster children, grandchildren, brothers, sisters, or wards of the employee.

Implementation of this policy shall be the responsibility of the chief judges of the ten judicial districts and the Court of Appeals, the Chief Justice of the Supreme Court, and the State Court Administrator.

## IV. EXECUTIVE LIMITATIONS

Not applicable.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 12

RE: Director Evaluation Process.

Rule 5(a), Rules on Lawyers Professional Responsibility (RLPR), provides in part that the Board shall review the performance of the Director every two years and make recommendations to the Court concerning the continuing service of the Director.

After reviewing various approaches to the evaluation process, the Lawyers Professional Responsibility Board, at its September 10, 1999, meeting, approved the following procedures for the Director evaluation process.

1. The Chair shall appoint an Executive Committee member to act as personnel liaison at all times. The personnel liaison's identity will be made known to all members of the Office to keep the lines of communication open between the members of the Office, the Executive Committee and the full Board. When possible, the personnel liaison will attend bi-monthly meetings held by the Director with each group in the Office (attorneys, paralegals, support staff).

2. In off years, that is when the Director is not up for reappointment, the Chair should informally contact members of the Board and the Office with regards to the Director's performance and report back to the Executive Committee. The Executive Committee should then vote on the available merit increase for the Director.

3. In years of reappointment, the Chair should (a) request a self-evaluation from the Director to be distributed to the Executive Committee and then to the full Board; (b) survey the Office through the personnel liaison (office members will be invited to confidentially communicate to the personnel liaison during a comment period regarding the Director's performance); (c) solicit input from outside the OLPR as appropriate to assess the perceptions of the public or the bar; (d) discuss the matter with the members of the Executive Committee, leading to a vote on a recommendation to the Board as to reappointment; (e) report to the

Board, and invite further discussion at that time prior to a Board vote on a recommendation to the Court regarding reappointment.

**Approval:** The above policy was approved by the Lawyers Professional Responsibility Board at its June 26, 2015, meeting.

JUDITH M. RUSH
CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

KENNETH S. ENGEL
VICE-CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 13

Date: September 24, 2010

Re: Approval of Procedures Defining the Scope of Review on Complainant Appeals

The purpose of this policy is to clarify the scope of review by a Board member and procedures for handling information received outside of the record.

**Background**. Executive Committee Policy and Procedure No. 4, made in response to a complaint that a reviewing Board member received information from a respondent, clarified that such a communication is not a prohibited *ex parte* communication that requires disclosure of the information received to the complainant. While Policy and Procedure No. 4 remains valid, the Executive Committee believes further clarification of the role of the Board member in conducting a review is necessary to provide guidance and consistency for the reviewing Board member and the Office of Lawyers Professional Responsibility.

**Authority for Board Member Review**. Rule 8(e), Rules on Lawyers Professional Responsibility provides:

> (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 Director shall notify the lawyer of the appeal and assign the matter by rotation to a board member, other than an Executive Committee member, appointed by the Chair. The reviewing Board member may:
>
> (1) approve the Director's disposition;
>
> (2) direct that further investigation be undertaken; or
>
> (3) if a district ethics committee recommended discipline, but the Director determined that discipline is not warranted, the Board member may instruct the Director to issue an admonition; or
>
> (4) in any case that has been investigated, if the Board member concludes that public discipline is warranted, the Board member may instruct the Director to issue charges of unprofessional

conduct for submission to a Panel other than the Board member's own.

The reviewing Board member shall set forth an explanation of the Board member's action. A summary dismissal by the Director under Rule 8(b) shall be final and may not be appealed to a Board member for review under this section.

**Scope of Review**. The record on appeal shall consist of the facts, allegations, and other information available to the Director in reaching its determination. The member's disposition other than pursuant to Rule 8(e)(2) must be based only on that record.

**Consideration of Material Outside of the Record**. Any submissions made by a complainant, respondent, or other person in connection with a complainant's appeal shall be forwarded to the reviewing member by the Director's Office without forwarding copies to the complainant or respondent If, upon review, the member determines that new material has been submitted that was not available to the Director at the time of decision, and that the new material may have affected the decision if it had been available as part of the original record, then the reviewing member should direct further investigation with an explanation of the reasons therefore. It will be the responsibility of the Director to forward copies, if appropriate, of additional materials along with a notice of investigation to the complainant and respondent as part of its further investigation. The reviewing member shall not communicate with the complainant, respondent, or others to elicit any additional information or undertake any independent investigation. Procedural questions may be directed to the Director's Office. Any substantive discussion of the merits or requests for guidance should be directed to another member of the reviewing Board member's panel.

**Approval**. The above policy was approved by the Lawyers Professional Responsibility Board at its September 24, 2010 meeting.

Judith M. Rush, Chair
Lawyers Professional Responsibility Board

Joseph V. Ferguson, III, Vice-Chair
Lawyers Professional Responsibility Board

## OLPR Dashboard for Court And Chair

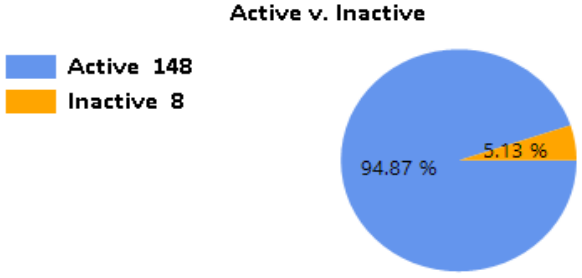
| | Month Ending December 2022 | Change from Previous Month | Month Ending November 2022 | Month Ending December 2021 |
|---|---|---|---|---|
| **Open Files** | 471 | -27 | 498 | 481 |
| **Total Number of Lawyers** | 327 | -4 | 331 | 354 |
| **New Files YTD** | 1020 | 88 | 932 | 945 |
| **Closed Files YTD** | 1030 | 115 | 915 | 906 |
| **Closed CO12s YTD** | 163 | 15 | 148 | 109 |
| **Summary Dismissals YTD** | 514 | 45 | 469 | 429 |
| **Files Opened During December 2022** | 88 | 24 | 64 | 73 |
| **Files Closed During December 2022** | 115 | 32 | 83 | 64 |
| **Public Matters Pending (excluding Resignations)** | 38 | -4 | 42 | 41 |
| **Panel Matters Pending** | 18 | 0 | 18 | 8 |
| **DEC Matters Pending** | 81 | -8 | 89 | 106 |
| **Files on Hold** | 10 | -1 | 11 | 12 |
| **Advisory Opinion Requests YTD** | 1688 | 116 | 1572 | 2004 |
| **CLE Presentations YTD** | 44 | 0 | 44 | 49 |
| | | | | |
| **Files Over 1 Year Old** | 156 | -9 | 165 | 123 |
| **Total Number of Lawyers** | 86 | -4 | 90 | 85 |
| **Files Pending Over 1 Year Old w/o Charges** | 72 | 2 | 70 | 57 |
| **Total Number of Lawyers** | 49 | 1 | 48 | 44 |

| | 2022 YTD | 2021 YTD |
|---|---|---|
| **Lawyers Disbarred** | 5 | 4 |
| **Lawyers Suspended** | 21 | 17 |
| **Lawyers Reprimand & Probation** | 6 | 4 |
| **Lawyers Reprimand** | 4 | 3 |
| **TOTAL PUBLIC** | **36** | **28** |
| **Private Probation Files** | 7 | 9 |
| **Admonition Files** | 81 | 88 |
| **TOTAL PRIVATE** | **88** | **97** |

# FILES OVER 1 YEAR OLD

| Year/Month | OLPR | PAN | HOLD | SUP | S12C | SCUA | REIN | TRUS | Total |
|---|---|---|---|---|---|---|---|---|---|
| 2018-06 | | | | | | 1 | | | **1** |
| 2018-07 | | | | 1 | | 1 | | | **2** |
| 2018-08 | | | | 1 | | | | | **1** |
| 2018-10 | 2 | | | | | | | | **2** |
| 2018-12 | 1 | | | | | | | | **1** |
| 2019-03 | | | | | | 2 | | | **2** |
| 2019-04 | 1 | 1 | | | | 1 | | | **3** |
| 2019-05 | | | | 2 | | 1 | | | **3** |
| 2019-06 | | | 1 | | | | | | **1** |
| 2019-07 | 1 | | | 1 | | 1 | | | **3** |
| 2019-08 | 1 | | | | | | | | **1** |
| 2019-09 | | | | 1 | | 2 | | | **3** |
| 2019-10 | | | | | | 2 | | | **2** |
| 2019-11 | | 1 | | | | | | | **1** |
| 2019-12 | | | | | | 1 | | | **1** |
| 2020-01 | 1 | 3 | | | | | | | **4** |
| 2020-02 | 1 | 2 | | | | 1 | | | **4** |
| 2020-03 | | | | | | 1 | | | **1** |
| 2020-04 | | | | | | 1 | | | **1** |
| 2020-05 | 1 | | | 1 | | 1 | | | **3** |
| 2020-06 | | | | 2 | | 1 | | | **3** |
| 2020-07 | | 1 | | | | | | | **1** |
| 2020-08 | 1 | | | | | 3 | | | **4** |
| 2020-09 | 2 | | | 2 | | 2 | | | **6** |
| 2020-10 | | | | 1 | 1 | 1 | | | **3** |
| 2020-12 | | 1 | | | | 3 | | | **4** |
| 2021-01 | 4 | | | 3 | | | | | **7** |
| 2021-02 | | | | 1 | | 1 | | | **2** |
| 2021-03 | 5 | | 1 | | | 2 | | | **8** |
| 2021-04 | 4 | | | 2 | | 3 | | | **9** |
| 2021-05 | 7 | | 1 | 1 | | | | | **9** |
| 2021-06 | 6 | | | | | | | | **6** |
| 2021-07 | 4 | 1 | | 1 | | 2 | | | **8** |
| 2021-08 | 7 | 1 | 1 | 3 | | 1 | | 1 | **14** |
| 2021-09 | 4 | 1 | | | | 1 | | | **6** |
| 2021-10 | 7 | 1 | | | 1 | 1 | | | **10** |
| 2021-11 | 8 | | | | | | | | **8** |
| 2021-12 | 4 | | | | 2 | 1 | 1 | | **8** |
| **Total** | **72** | **13** | **4** | **23** | **4** | **38** | **1** | **1** | **156** |

| | **Total** | **Sup. Ct.** |
|---|---|---|
| Total Cases Under Advisement | 38 | 38 |
| Sub-total of Cases Over One Year Old | 118 | 29 |
| **Total Cases Over One Year Old** | **156** | **67** |



# All Pending Files as of Month Ending December 2022

| Year/Month | SD | DEC | REV | OLPR | PAN | HOLD | SUP | S12C | SCUA | REIN | RESG | TRUS | **Total** |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2018-06 | | | | | | | | | 1 | | | | **1** |
| 2018-07 | | | | | | | 1 | | 1 | | | | **2** |
| 2018-08 | | | | | | | 1 | | | | | | **1** |
| 2018-10 | | | | 2 | | | | | | | | | **2** |
| 2018-12 | | | | 1 | | | | | | | | | **1** |
| 2019-03 | | | | | | | | | 2 | | | | **2** |
| 2019-04 | | | | 1 | 1 | | | | 1 | | | | **3** |
| 2019-05 | | | | | | | 2 | | 1 | | | | **3** |
| 2019-06 | | | | | | 1 | | | | | | | **1** |
| 2019-07 | | | | 1 | | | 1 | | 1 | | | | **3** |
| 2019-08 | | | | 1 | | | | | | | | | **1** |
| 2019-09 | | | | | | | 1 | | 2 | | | | **3** |
| 2019-10 | | | | | | | | | 2 | | | | **2** |
| 2019-11 | | | | | 1 | | | | | | | | **1** |
| 2019-12 | | | | | | | | | 1 | | | | **1** |
| 2020-01 | | | | 1 | 3 | | | | | | | | **4** |
| 2020-02 | | | | 1 | 2 | | | | 1 | | | | **4** |
| 2020-03 | | | | | | | | | 1 | | | | **1** |
| 2020-04 | | | | | | | | | 1 | | | | **1** |
| 2020-05 | | | | 1 | | | 1 | | 1 | | | | **3** |
| 2020-06 | | | | | | | 2 | | 1 | | | | **3** |
| 2020-07 | | | | | 1 | | | | | | | | **1** |
| 2020-08 | | | | 1 | | | | | 3 | | | | **4** |
| 2020-09 | | | | 2 | | | 2 | | 2 | | | | **6** |
| 2020-10 | | | | | | | 1 | 1 | 1 | | | | **3** |
| 2020-12 | | | | | 1 | | | | 3 | | | | **4** |
| 2021-01 | | | | 4 | | | 3 | | | | | | **7** |
| 2021-02 | | | | | | | 1 | | 1 | | | | **2** |
| 2021-03 | | | | 5 | | 1 | | | 2 | | | | **8** |
| 2021-04 | | | | 4 | | | 2 | | 3 | | | | **9** |
| 2021-05 | | | | 7 | | 1 | 1 | | | | | | **9** |
| 2021-06 | | | | 6 | | | | | | | | | **6** |
| 2021-07 | | | | 4 | 1 | | 1 | | 2 | | | | **8** |
| 2021-08 | | | | 7 | 1 | 1 | 3 | | 1 | | | 1 | **14** |
| 2021-09 | | | | 4 | 1 | | | | 1 | | | | **6** |
| 2021-10 | | | | 7 | 1 | | | 1 | 1 | | | | **10** |
| 2021-11 | | | | 8 | | | | | | | | | **8** |
| 2021-12 | | | | 4 | | | | 2 | 1 | 1 | | | **8** |
| 2022-01 | | | | 10 | | 1 | 1 | | | | | 1 | **13** |
| 2022-02 | | | | 7 | 4 | 1 | | | | | | | **12** |
| 2022-03 | | | | 14 | 1 | | | | 1 | 1 | | | **17** |
| 2022-04 | | 1 | | 26 | | | 1 | | 1 | 2 | | | **31** |
| 2022-05 | | | 1 | 20 | 2 | 1 | | | | | | | **24** |
| 2022-06 | | 3 | 1 | 22 | | 1 | | | | | 1 | 1 | **29** |
| 2022-07 | | 2 | 3 | 13 | | | 1 | | | | | | **19** |
| 2022-08 | | 7 | 4 | 23 | | | | | | 1 | | | **35** |
| 2022-09 | | 14 | | 16 | | 1 | | | | | | | **31** |
| 2022-10 | | 16 | 1 | 12 | | | | | | 1 | | | **30** |
| 2022-11 | | 15 | 1 | 10 | | 1 | | | | | | | **27** |
| 2022-12 | 8 | 23 | 1 | 10 | | | | | | 1 | 4 | | **47** |
| **Total** | **8** | **81** | **12** | **255** | **20** | **10** | **26** | **4** | **40** | **7** | **5** | **3** | **471** |

| 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 |

January 18, 2023

**OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY**

2022 Year in Review Numbers—Year over (Year)

| | | |
|---|---|---|
| New Complaints: | 1020 | (946) |
| Closings: | 1030 | (909) |
| Advisory Opinions: | 1688 | (2004) |
| Public Discipline: | 36 | (28) |
| Disbarred: | 5 | (4) |
| Suspended: | 21 | (17) |
| Reprimand/Prob: | 6 | (4) |
| Reprimand: | 4 | (3) |
| Private Discipline (files): | 88 | (97) |
| Probation: | 7 | (9) |
| Admonitions: | 81 | (88) |
| Open Files: | 471 | (481) |
| Lawyers: | 327 | (354) |
| Year Old: | 156 | (123) |
| With Office: | 72 | (57) |
| With Court: | 84 | (65) |
| Lawyers: | 86 | (85) |
| Oldest File: | 6/2018 | (3/2017) |

**United States Court of Appeals**
***For The Eighth Circuit***
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
**St. Louis, Missouri 63102**

**Michael E. Gans**
***Clerk of Court***

**VOICE (314) 244-2400**
**FAX (314) 244-2780**
**www.ca8.uscourts.gov**

December 23, 2022

Mr. Herbert A. Igbanugo
IGBANUGO PARTNERS
Suite 1075
250 Marquette Avenue
Minneapolis, MN 55401-0000

RE: 21-3826 Herbert Igbanugo v. Minnesota OLPR, et al

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

HAG

Enclosure(s)

cc: Mr. Mark R. Bradford
Mr. Aram Desteian
Ms. Kate M. Fogarty
Mr. Scott A. Jurchisin
Ms. Janine Wetzel Kimble
Ms. Kelly Ann Putney
Mr. Aaron David Sampsel
Mr. Colin S. Seaborg

District Court/Agency Case Number(s): 0:21-cv-00105-PJS

**United States Court of Appeals**
***For The Eighth Circuit***
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
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December 23, 2022

West Publishing
Opinions Clerk
610 Opperman Drive
Building D D4-40
Eagan, MN 55123-0000

RE: 21-3826 Herbert Igbanugo v. Minnesota OLPR, et al

Dear Sir or Madam:

An opinion was filed today in the above case.

Counsel who represented the appellant was Herbert A. Igbanugo of Minneapolis, MN.

Counsel who represented the appellees Jeannette Boerner, Jennifer Bovitz, Amy Halloran, Susan M. Humiston, Tommy Krause, Minnesota Lawyers Professional Responsibility Board and Minnesota Office of Lawyers Professional Responsibility was Janine Wetzel Kimble, AAG, of Saint Paul, MN.

Counsel who represented the appellees Brian Lincoln Aust and Aust Schmiechen, P.A. was Aaron David Sampsel, of Minneapolis, MN, and Scott A. Jurchisin of Minneapolis, MN.

Counsel who represented the appellees Cassondre Buteyn, Michael Gavigan, Eva Rodelius, David L. Wilson and Wilson Law Group was Kelly Ann Putney, of Minneapolis, MN, Mark R. Bradford, of Minneapolis, MN, and Aram Desteian, of Minneapolis, MN.

The judge who heard the case in the district court was Honorable Patrick J. Schiltz. The judgment of the district court was entered on November 10, 2021.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

HAG

Enclosure(s)

cc: Lois Law
MO Lawyers Weekly

District Court/Agency Case Number(s): 0:21-cv-00105-PJS

# United States Court of Appeals
## For the Eighth Circuit

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No. 21-3826

---

Herbert A. Igbanugo

*Plaintiff - Appellant*

v.

Minnesota Office of Lawyers Professional Responsibility, [OLPR]; Susan M. Humiston, in her official capacity as Director of OLPR; Amy Halloran, individually and in her offical capacity as Assistant Director at OLPR; Jennifer Bovitz, individually and in her official capacity as Managing Attorney at OLPR; Minnesota Lawyers Professional Responsibility Board, (LPRB); Jeannette Boerner, individually and in her professional capacity as Attorney Member at LPRB; Tommy Krause, individually and in his professional capacity as Designated Board Member at LPRB; Wilson Law Group; David L. Wilson, individually and in his official capacity as Founder and Managing Attorney at Wilson Law Group; Michael Gavigan, individually and in his official capacity as Senior Attorney at Wilson Law Group; Cassondre Buteyn, individually and in her official capacity as Co-Owner and Lead Attorney at Wilson Law Group; Eva Rodelius, individually and in her official capacity as Senior Attorney at Wilson Law Group; Aust Schmiechen, P.A.; Brian Lincoln Aust, individually and in his official capacity as Purported Expert Witness in the Onofre Case and as Founding Partner of Aust Schmiechen, P.A.

*Defendants - Appellees*

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Appeal from United States District Court
for the District of Minnesota

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Submitted: October 19, 2022
Filed: December 23, 2022

Before LOKEN, GRUENDER, and GRASZ, Circuit Judges.

GRUENDER, Circuit Judge.

Herbert Igbanugo sued the Minnesota Office of Lawyers Professional Responsibility ("OLPR"), the Minnesota Lawyers Professional Responsibility Board ("LPRB"), and associated government officials ("the state defendants"). He also sued David Wilson and his firm the Wilson Law Group, other Wilson Law Group lawyers, and Brian Aust and his firm Aust Schmiechen, P.A. ("the private defendants"). Igbanugo claims that the state defendants violated his constitutional rights and seeks declaratory and injunctive relief. Igbanugo sought Rule 11 and 28 U.S.C. § 1927 sanctions against the private defendants. The district court[1] granted all defendants' motions to dismiss and granted the private defendants' motion for Rule 11 sanctions against Igbanugo. We affirm.

## I.

Herbert Igbanugo is an attorney practicing immigration and international trade law in Minnesota. Igbanugo worked with defendant David Wilson in the early 2000s. Wilson left Igbanugo's firm sometime in late 2003 or early 2004 and established the Wilson Law Group. Since then, Wilson and Igbanugo have maintained a less than amicable professional relationship and have submitted ethics complaints against each other to the OLPR.

Attorneys from the Wilson Law Group represented three of Igbanugo's past clients in a malpractice case against Igbanugo (referred to by the parties and the district court as the "*Onofre* case") filed in Minnesota state court in 2016. Defendant

[1]The Honorable Patrick J. Schiltz, Chief Judge, United States District Court for the District of Minnesota.

Brian Aust served as an expert witness for the former Igbanugo clients. The *Onofre* plaintiffs won a jury verdict against Igbanugo on malpractice and related breach-of-contract and fraud claims in 2017. *See Cedillo v. Igbanugo*, No. 27-CV-16-7603, 2017 WL 7411331 (Minn. Dist. Ct. Dec. 19, 2017). The parties cross-appealed that judgment; the Minnesota Court of Appeals affirmed and the Minnesota Supreme Court denied review. *See Cedillo v. Igbanugo*, No. A18-0860, 2019 WL 2168766 (Minn. Ct. App. May 20, 2019), *rev. denied* (Minn. Aug. 20, 2019).

While the cross-appeals were pending, a Wilson Law Group attorney submitted an ethics complaint against Igbanugo to the OLPR, reporting the same misconduct allegations at issue in the *Onofre* case. The OLPR investigated the complaint and, pursuant to Minnesota attorney-disciplinary procedure, submitted the charges to the LPRB for a determination as to whether there was probable cause for disciplining Igbanugo. The LPRB found probable cause and the OLPR then filed a petition for disciplinary action with the Minnesota Supreme Court. *See In re Disciplinary Action Against Igbanugo*, No. A21-0338 (Minn. filed Mar. 15, 2021).[2]

Igbanugo sued the defendants in federal court in January 2021, raising claims related to the *Onofre* case and the OLPR's related disciplinary investigation. Against the state defendants, he alleges that the OLPR disciplinary proceedings violated his First, Fourth, Fifth, and Fourteenth Amendment rights and seeks declaratory and injunctive relief. He also raises state-law claims against the state defendants for abuse of process, malicious prosecution, and conspiracy. Against the private defendants, Igbanugo brought an abuse-of-process claim and asked the court to impose Rule 11 or 28 U.S.C. § 1927 sanctions. During proceedings before the district court, Igbanugo abandoned his abuse-of-process claim and instead requested

[2]This pending case is not Igbanugo's first brush with attorney discipline. Igbanugo has been disciplined on four separate occasions and was temporarily suspended from the practice of law in 2015. *See In re Disciplinary Action Against Igbanugo*, 863 N.W.2d 751, 755, 764 (Minn. 2015) (noting that Igbanugo had been disciplined on three prior occasions and temporarily suspending Igbanugo from the practice of law).

sanctions based on a declaration that the private defendants violated the Minnesota Rules of Professional Conduct.

All of the defendants then moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The private defendants also moved for Rule 11 sanctions. The district court granted all of the motions to dismiss. As to the claims against the state defendants, the district court abstained from exercising jurisdiction under *Younger v. Harris*, 401 U.S. 37 (1971). As to the claims against the private defendants, the district court found that Igbanugo lacked standing to sue for a declaratory judgment and lacked a valid cause of action to seek sanctions. Lastly, the district court granted the private defendants' motion for Rule 11 sanctions and ordered Igbanugo to pay $50,000 in sanctions. Igbanugo appeals.

**II.**

We first consider Igbanugo's claims against the state defendants. We generally review a district court's grant of a motion to dismiss *de novo*. *City of Ashdown v. Netflix, Inc.*, 52 F.4th 1025, 1026 (8th Cir. 2022). However, "[w]e review the district court's decision to abstain under *Younger* for abuse of discretion." *Minn. Living Assistance, Inc. v. Peterson*, 899 F.3d 548, 551 (8th Cir. 2018). We affirm because the district court did not abuse its discretion in abstaining from exercising jurisdiction over Igbanugo's constitutional and state-law claims.

"The *Younger* abstention doctrine, as it has evolved, provides that federal courts should abstain from exercising jurisdiction when (1) there is an ongoing state proceeding, (2) which implicates important state interests, and (3) there is an adequate opportunity to raise any relevant federal questions in the state proceeding." *Plouffe v. Ligon*, 606 F.3d 890, 892 (8th Cir. 2010) (applying *Younger* to abstain from exercising jurisdiction over claims related to ongoing state attorney-discipline proceedings). However, even if these conditions are met, a federal court should not abstain if there is a showing of "bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate." *Id.* at 892-93.

The district court found that all three *Younger* factors were satisfied and therefore abstained. Igbanugo argued that abstention was improper because the OLPR was biased against him. On appeal, Igbanugo argues that the district court erred by failing to accept the bias allegation in his pleading as true, as is required at the motion-to-dismiss stage. *See Schulte v. Conopco, Inc.*, 997 F.3d 823, 825 (8th Cir. 2021). We disagree because the facts in Igbanugo's pleading, taken as true, do not plausibly allow us to infer that the OLPR's post-*Onofre* investigation of Igbanugo was tainted by bias.

Igbanugo points to the following facts in support of his bias allegation: first, that the OLPR has investigated him multiple times in the past; second that the OLPR only investigated him, and not Wilson, in the wake of the *Onofre* case; third that Igbanugo lost his temper in a 2007 OLPR disciplinary proceeding; fourth, that the Minnesota Star Tribune published an article in 2013 quoting him as critical of the OLPR; and fifth, that the Minnesota Star Tribune has recently reported on a high rate of staff turnover at the OLPR. None of these facts support a plausible inference of bias. The OLPR's post-*Onofre* investigation was prompted by a jury verdict that Igbanugo committed malpractice. *See In re Disciplinary Action against Igbanugo*, No. A21-0338 (Minn. filed Mar. 15, 2021). The other investigations, Igbanugo's loss of temper, Igbanugo's comments to the media, and OLPR staff turnover do not show "more than a sheer possibility" that the OLPR was biased in investigating Igbanugo. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Therefore, the district court did not err in finding that Igbanugo failed to allege bias plausibly.

Igbanugo provides no other reason as to why the district court might have abused its discretion in abstaining from exercising jurisdiction over the claims against the state defendants. Therefore, we affirm the dismissal of Igbanugo's claims against the state defendants.

## III.

We next address Igbanugo's abuse-of-process claim and request for sanctions against the private defendants. We affirm because Igbanugo waived his abuse-of-process claim and lacks standing to seek sanctions based on the private defendants' alleged violations of the Minnesota Rules of Professional Conduct.

Igbanugo first argues that the district court erred in finding that he abandoned his abuse-of-process claim and asks us to consider it on appeal. However, Igbanugo clearly stated to the district court that he did not intend to pursue his abuse-of-process claim. Igbanugo therefore waived the claim, and we cannot review it. *See Robinson v. Norling*, 25 F.4th 1061, 1062 (8th Cir. 2022) ("When an argument has been waived, meaning it has been intentionally relinquished, it is entirely unreviewable on appeal." (brackets and internal quotations marks omitted)). Because Igbanugo waived his abuse-of-process claim, Igbanugo cannot use it as a basis for requesting sanctions against the private defendants. *See Cohen v. Lupo*, 927 F.2d 363, 365 (8th Cir. 1991) ("[T]here can be no independent cause of action instituted for Rule 11 sanctions.").

Igbanugo also argues that the district court could issue a declaration that the private defendants violated the Minnesota Rules of Professional Conduct and award him sanctions on that basis. However, Igbanugo lacks standing to seek this relief. *See McGowen, Hurst, Clark & Smith, P.C. v. Com. Bank*, 11 F.4th 702, 709 (8th Cir. 2021) (explaining that a plaintiff seeking a declaratory judgment must establish Article III standing). Igbanugo has not shown how any injuries to his own reputation would be redressed by a declaration that the private defendants violated the Minnesota ethical rules. *See Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 718 (8th Cir. 2021) ("To establish Article III standing, plaintiffs must show (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that a favorable decision will likely redress the injury."). On appeal, Igbanugo argues that a declaration would help improve his reputation among clients and in the legal community. Igbanugo, however, seeks a declaration that only mentions the

private defendants (and not himself). Any reputational benefits Igbanugo might receive from a declaration about the private defendants are far too remote to confer standing. *See McGowen*, 11 F.4th at 709 ("[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.") Therefore, Igbanugo cannot use his allegation that the private defendants violated the Minnesota Rules of Professional Conduct during the *Onofre* case as a basis to seek sanctions.[3]

In sum, Igbanugo waived his abuse-of-process claim and has no other grounds to seek sanctions against the private defendants. Therefore, we affirm the district court's dismissal of Igbanugo's claim and requests.

## IV.

Lastly, we consider Igbanugo's appeal of the district court's award of $50,000 in sanctions to the private defendants. We review a district court's award of Rule 11 sanctions for abuse of discretion. *Clark v. United Parcel Serv., Inc.*, 460 F.3d 1004, 1008 (8th Cir. 2006). The district court did not abuse its discretion, so we affirm the award.

Under Rule 11, an attorney must "certify to the best of [his] knowledge" that any "pleading, written motion, or other paper" submitted to the court is "not being presented for any improper purpose" and does not contain frivolous legal arguments. Fed. R. Civ. P. 11(b)(1)-(2). Therefore, Rule 11 "requires that an attorney conduct a reasonable inquiry of the factual and legal basis for a claim before filing." *Coonts v. Potts*, 316 F.3d 745, 753 (8th Cir. 2003). In evaluating a motion for Rule 11 sanctions, the district court "must determine whether a reasonable and competent

[3]Additionally, the conduct of the private defendants that Igbanugo argues warrants sanctions occurred solely in state court. Rule 11 and § 1927 do not apply to proceedings that wholly took place in state court. *See* Fed. R. Civ. P. 1 (stating that the Federal Rules of Civil Procedure apply to proceedings in United States courts); *In re Case*, 937 F.2d 1014, 1023 (5th Cir. 1991) (explaining that § 1927 does not apply to conduct occurring in state-court proceedings).

attorney would believe in the merit of an argument." *Id*. (internal quotation marks omitted). If sanctions are appropriate, we may order the sanctioned attorney to pay "part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Fed. R. Civ. P. 11(c)(4).

The district court found that Igbanugo's claims against the private defendants were motivated by retaliatory animus, making the deterrence rationale for Rule 11 sanctions particularly salient here. *See Vallejo v. Amgen, Inc*., 903 F.3d 733, 747 (8th Cir. 2018) ("The primary purpose of Rule 11 sanctions is to deter attorney and litigant misconduct . . . .") (brackets omitted)). The district court determined that Igbanugo's motivation in pursuing sanctions against the private defendants was to retaliate against them for their roles in the *Onofre* case. Additionally, the district court found that Igbanugo's claims lacked a reasonable basis and that a competent attorney would not believe in their merit. In determining the amount to award, the district court found the hourly rates of the attorneys of the private defendants to be within the norm and noted that the amount of time spent on the case appeared reasonable given Igbanugo's 109-page complaint and other voluminous filings and motions. Nevertheless, the district court reduced the requested sanction amount from $66,447.37 to $50,000 because, ultimately, "[t]he primary purpose of Rule 11 sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for all of its costs in defending." *Vallejo*, 903 F.3d at 747.

Igbanugo argues that the district court abused its discretion by erroneously describing his claims as frivolous and motivated by animus. We disagree. The district court's conclusions are supported by the record. "We will only reverse a sanction when the district court based its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *MHC Inv. Co. v. Racom Corp.*, 323 F.3d 620, 624 (8th Cir. 2003) (internal quotation marks omitted). Igbanugo does not identify any relevant factor that the district failed to consider or any factor that the district court did consider but improperly weighed. Likewise, the evidence supports the district court's view that the deterrence rationale for Rule 11 sanctions justifies a significant penalty. *See Welk v. GMAC Mortg., LLC*, 720 F.3d 736, 738-39 (8th Cir. 2013) (affirming a district court's award of $50,000 where an

attorney brought unreasonable and vexatious claims with no basis in law). Therefore, we find that the district court did not abuse its discretion in imposing $50,000 in sanctions.

## V.

For the foregoing reasons, we affirm.

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*Comment period open*

# ABA issues consultation report on Minnesota's discipline system

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

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

The Minnesota Supreme Court periodically undertakes a review of its lawyer discipline system. Earlier this year, the Court invited the American Bar Association's Standing Committee on Professional Regulation to conduct such a review. This is the second time the Court has invited the ABA to consult on Minnesota's discipline system; the first came in 1981 and made the state one of the first jurisdictions to undertake such a review as part of a service that was then new to the ABA.

Since 1980, the ABA's Standing Committee has conducted 67 consultations, and accordingly brings a wealth of knowledge and insight into various ways to ensure "optimal fairness, effectiveness, transparency, accountability, and efficiency" in a discipline system.[1] The report for Minnesota contains a great deal of information and includes 25 recommendations for the Court's consideration to further optimize Minnesota's discipline system. The Court has opened a public comment period through December 30, 2022 and will conduct a public hearing on March 14, 2023.

As a longtime believer in continuous improvement, I have been excited to dig into the recommendations. The report is 88 pages long, so there is no way this brief column can do it justice. But I thought I would take this opportunity to highlight a few aspects of the report in case you were interested in learning more or submitting a comment.

## Consultation team and process followed

The consultation team for Minnesota included Justice Daniel Crothers of the North Dakota Supreme Court; Sari Montgomery, private respondent's counsel from Chicago, Illinois; Maret Vessella, chief bar counsel for the State of Arizona (which has a similar-sized lawyer population to Minnesota's); and Ellyn Rosen, regulation and global initiatives counsel at the ABA and reporter for the Standing Committee. Although the report is the product of the Standing Committee as a whole, these individuals spent a great deal of time interviewing people, reviewing thousands of pages of information, and thoughtfully bringing their experience to bear to assist Minnesota.

The report describes (in almost 20 pages!) Minnesota's discipline system as well as the roles and responsibilities of numerous stakeholders in the process. It includes descriptions of the additional work of the OLPR beyond investigating and prosecuting discipline cases. The team dug into case files and reviewed dispositions and work product at all levels of the system. Further, the team sought input from a large contingent of stakeholders through interviews, both in person and virtually—complainants; respondents; respondent's counsel; the OLPR director, attorneys, and staff; Lawyers Professional Responsibility Board members (current and past); former OLPR directors; state bar leadership; district ethics committee chairs and investigators (lawyers and non-lawyers); Supreme Court discipline referees; probation supervisors; staff from Lawyers Concerned for Lawyers; and members of the bar generally. The length and detail of the report show the robust nature of the undertaking and the variety of perspectives and information sought and reviewed.

## Strengths and recommendations

The report identified several strengths of our system. Chief among them is the longstanding commitment of the Court to an effective, fair, and transparent system, demonstrated by means that include ensuring adequate funding and resources to support the system and supporting periodic reviews to optimize the process. The report commended Minnesota on the number of dedicated volunteers throughout the state who play an integral role in many parts of the system by devoting significant time and talent.

The report acknowledged the Lawyer's Board work on training and education for Board members and its commitment to diversity and inclusion, including its adoption of a Commitment Statement on Non-Discrimination and Inclusion. The report also highlighted the website and the annual report produced, both of which provide lots of information so that the public and others can gain insight into a complex system. Finally, the report noted the commitment and efforts of the Office to improve case-processing times, the Office's use of technology and movement toward a paperless office, and its flexible hybrid work environment. The report further noted the Office's commitment to accessibility, expressed by various means—such as the fact that the office is open and accessible to the public, the ease of locating information relating to ADA accommodations and processes, and the variety of ways that non-

English-language speakers may access interpreter services or documents in several languages. Although not meant to be all-inclusive, the strengths noted are core strengths of Minnesota's system and are part of our bedrock.

The 25 recommendations were categorized in several areas: structure, resources, metrics, public access and outreach, training, procedures, diversion, and sanctions. Although there is a lot in the recommendations, a clear theme of the report is the recommended value to Minnesota of streamlining and updating processes and, depending on priorities, allocating additional resources. The theme of the report really resonated with me. Minnesota has a complex system that is not easily summarized or understood by those who have not spent years handling attorney discipline cases. While process is very important, it is also important to continually ask whether the right balance is being struck, the right structure is in place, and changes in practice over time are being reflected in the Office's procedures and rules.

The report offers a lot of substantive advice and includes several significant rule change recommendations. For example, recommendation 19 advocates the adoption of a diversion rule.[2] This is something that the Board and Office included in its 2018 strategic plan as an area to explore—though we have not yet had an opportunity to do so. The idea is that instances of isolated and non-serious misconduct, which currently result in private discipline such as an admonition, are better handled by referral to programs that are helpful to the lawyer (and therefore their clients), such as law practice management courses, trust account schools or ethics programs, or lawyer assistance programs. Most of these referral programs do not exist in Minnesota (beyond the excellent Lawyers Concerned for Lawyers—specifically acknowledged in the report), but nonetheless, many jurisdictions have successfully adopted diversion programs in lieu of discipline after creating such programs. Many jurisdictions around the country have diversion programs and they are structured in a variety of ways.

Recommendation 21 concerns streamlining the admonition process. Minnesota has more private discipline, per the team's experience, than other similarly situated jurisdictions (80-110 admonitions plus several private probations annually). Some of this discipline would necessarily be impacted by the creation of a diversion program, if adopted, but the report also recommended changing how and who reviews admonitions to eliminate a complex and inefficient appeal process.

This recommendation touches on more than just process, however. It is about when a private sanction is appropriate. The report recommends that admonitions "should only be issued in cases of minor misconduct where diversion is not appropriate, there is little or no injury caused by the misconduct, and the admonition will result in little likelihood of repeated misconduct."[3] In related fashion, recommendation 23 suggests eliminating the sanction of private probation.[4] In my experience reviewing cases from other jurisdictions, Minnesota issues admonitions or private probation in a lot of circumstances where public discipline would more likely be pursued elsewhere. Also, I'm concerned that we have lawyers with more private discipline than they should have. Adopting these recommendations would materially change how Minnesota approaches the distinction between private and public discipline, and in the Standing Committee's view, bring Minnesota more in line with other jurisdictions while fulfilling the primary purpose of discipline—protecting the public.

## Conclusion

The report contains a lot of additional recommendations, as you can no doubt glean from the fact that I have only discussed three. I also do not want to leave you with the impression that, because there are 25 recommendations, our discipline system is a fixer-upper. Because it is not, and the nature of the recommendations make that clear. As I wrote in last month's column, lawyer regulation is an interesting and dynamic area of law, and there is a lot of change and innovation happening throughout the country. We have a solid system that can always be improved, including—potentially—in some fundamental ways if we think the changes are in the best interest of Minnesota. I'm very thankful to the Court for taking this opportunity to look beyond our borders and engage in this deliberative and transparent process. I hope you read the report. I hope you engage in the public comment process. And know that I would love to hear your opinion on the recommendations or other ideas you may have as we work together to optimize Minnesota's lawyer discipline system.

## Postscript/Author's note

As already noted at its online posting, my September 2022 column was an update of Martin Cole's July 2015 Bench & Bar column entitled "Dealing with Unrepresented Persons," available on our website at *lprb.mncourts.gov*, as are all prior articles written by this Office. My failure to highlight that fact and provide the appropriate attribution was an error, which I regret. Thank you to Mr. Cole for graciously accepting my apology for this mistake. Also, to clarify any potential confusion caused by the statement, "The rule does not require an attorney to advise an unrepresented person in all instances to secure counsel," Rule 4.3(d), MRPC, permits but does not require a lawyer to advise an unrepresented person to secure counsel. ▲

### NOTES

[1] American Bar Association Report on the Lawyer Discipline System for Minnesota (September 2022), on the Minnesota Judicial Branch website (*www mncourts.gov*), with a link found at *www.lprb mncourts.gov*.

[2] Report at 71-74

[3] Report at 78

[4] Report at 81-83.

**COMMENTS**
Comments are due by December 30, 2022, and must be filed electronically in Supreme Court File No. ADM10-8042.

# MORE ON THE ABA CONSULTATION REPORT

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

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

The November professional responsibility column ("ABA issues consultation report on Minnesota's discipline system") provided an introduction to the September 2022 ABA consultation report on Minnesota's lawyer discipline system. In addition to a general overview, the column focused briefly on three recommendations (Nos. 19, 21, and 23), and the potential impact that adopting these recommendations would have on the current private versus public discipline distinction. Because there are several additional recommendations, I thought it beneficial to continue to explore the consultation report. For this column, my focus is on recommendations that require additional resources or change responsibility for tasks currently performed within the discipline system to other organizations.

## Funding

As a refresher, Minnesota's attorney discipline system is funded by your annual registration fees. Of the $263 annual registration fee you pay as an active lawyer, $128 is allocated to attorney discipline. The Minnesota Supreme Court has worked hard over the years to keep the annual registration fee largely steady. As a result, Minnesota compares quite favorably to annual registration fees paid in other jurisdictions generally.

For example, Tennessee has a similar lawyer population and is a voluntary bar state like Minnesota (meaning that lawyers need not be members of the state bar association as part of licensure). In Tennessee, the annual registration fee is $570 and $140 is dedicated to attorney discipline. Colorado is also a voluntary bar jurisdiction, with an annual registration fee of $325; it is unknown what portion of that amount is dedicated to discipline because Colorado combines all regulatory responsibilities under one umbrella. Iowa's annual registration fee is $270, very comparable to Minnesota, but $200 of that fee is allocated to attorney discipline. Wisconsin is a mandatory bar state, so the trade association bar performs the lawyer regulation tasks. Wisconsin's annual lawyer registration fee is $504, of which $150 is allocated to attorney discipline. Of the 18 voluntary bar associations, Minnesota ranks 10th in terms of its annual required fee. Of 23 jurisdictions that report funds earmarked for discipline, Minnesota ranks 14th.

Our office also does a lot for that $128 per active lawyer. In addition to investigating and prosecuting ethics complaints (the majority of our workload), the Office has several additional responsibilities. For example, staff attorneys frequently speak at ethics CLEs. We staff an ethics hotline that answers approximately 2,000 calls annually. We administer a large probation department. We train, support, and review the work of the district ethics committees (which provide tremendous assistance to the Office in the investigation of cases). We administer the Professional Firms Act's annual and first reports, a required annual compliance task for every entity organized in Minnesota for the provision of legal services on a for-profit basis.

We provide administrative and investigative support to the Client Security Board. We obtain and collect on discipline judgments. We act as trustee, when appointed, over client files and trust accounts if a lawyer dies, abandons their practice, or through disability becomes unable to return client files and close their client trust account. We respond to written requests for disciplinary history and track legal employment of suspended and disbarred lawyers. We provide administrative support to the Lawyers Professional Responsibility Board. We administer the discipline expunction rules. We administer a trust account overdraft program and provide guidance to lawyers regarding use of and compliance for their trust account. Finally, we administratively handle attorney resignations, reinstatements by affidavit, and conduct reinstatement investigations and hearings. Given the breadth of work performed by this Office, the annual fee paid by lawyers in Minnesota as part of a self-regulating profession is a very good value.

## Recommendations

The ABA generally recommends against discipline offices providing ethics advice.* The primary reasons for that recommendation are the significant time commitment required and the risk of the OLPR attorney who provided the advice being a witness in a later discipline or other proceeding. Because Minnesota has a long-standing tradition of providing ethics advice, the ABA did not recommend elimination of this service but encouraged the Court to take this staffing commitment into consideration in setting goals for case processing, and also recommended the Court explore whether the bar association could take on this task (recommendation 2(B)).



Attachment 7e

This is one area in which you may wish to provide comment to the Court during the comment period. Is this a valuable service? Do you believe attorneys in the OLPR should provide this service? What is its value to you? Would you support an increase in attorney registration fees if needed to keep this service available, or do you wish to keep it but not at additional cost?

The ABA also recommended additional investments in resources. Specifically, the ABA recommended the Lawyers Professional Responsibility Board (and a new Administrative Oversight Committee) have a staff person, and that referees be provided with additional staff assistance (recommendation 4). Right now, the OLPR provides staff support for the Board, and the Court's commissioner's office provides some clerical assistance to referees. The ABA recommended the OLPR hire an additional investigator and noted that it may need an additional paralegal to support case-processing objectives (recommendation 5).

The ABA recommended that the Court invest in additional technology tools for use in the discipline system, including enhancements to our database management system, document production tools, and forensic auditor tools, to name a few (recommendation 6). The ABA recommended the creation of a lawyer discipline decision database that is searchable, which would require resources to create and maintain (recommendation 7). The ABA recommended that the OLPR and the Board maintain separate websites, which would require additional resources to create and keep up to date (recommendation 9). The ABA recommended that paid court-appointed referees instead of board volunteers conduct reinstatement hearings (recommendation 13), a recommendation that will increase expenses for referees.

These are great ideas, worth exploring to understand the cost and likely return on investment that the additional allocations would provide. What are your thoughts on these various recommended additional investments? Before you say "none," because you want to keep the annual registration fee low, please work with me for a minute. What would you like to see the Court prioritize if they were going to provide some additional resources or look to reallocate existing resources? Can we also agree that doing more with the same resources is not in the best interest of a sustainable and optimized system?

The ABA also recommended that the Court consider having the Office do less in another area, such as taking on fewer trusteeships (recommendation 17). As the report indicates, this function can be quite time-consuming. Is there another entity that could take on this role? Is it important that the Office perform this function if another entity is unable to do so?

One additional area that requires exploration is who will create practice management programs if they are to be used as part of a disciplinary diversion program (which, as I noted last month, is a central recommendation (recommendation 19)). The ABA report specifically provides that "[t]he organized bar's active role in this process via programming to which the lawyer can be referred is vital to the success of the diversion process." (Report at 74.) If others are unable to step forward to create the programming necessary to support the diverted lawyer, and the creation of a diversion program is a priority, does the OLPR have sufficient resources to undertake this task? Where in the list of resource priorities should this fall, in your estimation? Budgets are in part statements of values. How would you weigh in?

**Conclusion**

As I stated last month, we have a solid system that can always be improved, including—potentially—in some fundamental ways if we think the changes are in the best interest of Minnesota. At its center, a lot of the ABA consultation report focuses on re-examining the policy choices reflected in current resource allocations, including suggestions on where the Court may wish to invest further to optimize the system. The questions presented are important.

I hope those of you with an interest in the subject have had an opportunity to read the report or at least review the recommendations. If you have comments, I would love to hear them, as would the Court, through your participation in the public comment period. Comments are due by December 30, 2022, and must be filed electronically in Supreme Court File No. ADM10-8042. ▲

* ABA Model Rules for Lawyer Disciplinary Enforcement 4(C) provides "Advisory Opinions Prohibited. Disciplinary counsel shall not render advisory opinions, either orally or in writing."

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 503** **November 2, 2022**

**"Reply All" in Electronic Communications**

*In the absence of special circumstances, lawyers who copy their clients on an electronic communication sent to counsel representing another person in the matter impliedly consent to receiving counsel's "reply all" to the communication. Thus, unless that result is intended, lawyers should not copy their clients on electronic communications to such counsel; instead, lawyers should separately forward these communications to their clients. Alternatively, lawyers may communicate in advance to receiving counsel that they do not consent to receiving counsel replying all, which would override the presumption of implied consent.*

## I. Introduction

Lawyers now commonly use electronic communications like email and text messaging in their law practice.[1] Subject to handling, security, and maintenance considerations beyond this opinion's scope,[2] the Model Rules permit these forms of electronic communication. This permissible communication extends to communications with counsel representing another person in the matter.

Under Rule 4.2 of the ABA Model Rules of Professional Conduct, in representing a client, a lawyer may not "communicate" about the subject of the representation with a represented person absent the consent of that person's lawyer, unless the law or court order authorizes the communication.[3]

When a lawyer ("sending lawyer") copies the lawyer's client on an electronic communication to counsel representing another person in the matter ("receiving counsel"), the sending lawyer creates a group communication.[4] This group communication raises questions under the "no contact" rule because of the possibility that the receiving counsel will reply all, which of course will be delivered to the sending lawyer's client. This opinion addresses the question of whether sending lawyers, by copying their clients on electronic communications to receiving counsel, *impliedly* consent to the receiving counsel's "reply all" response.

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021) (discussing ethical considerations in virtual law practice); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) (discussing lawyers' obligations in response to data breaches); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (discussing reasonable security precautions when communicating through email).

[3] The authorized-by-law exception is not the focus of this opinion.

[4] Throughout this opinion, the lawyer who sends the electronic communication is referred to as the "sending lawyer." The lawyer who represents another person in the matter and who receives the communication on which the sending lawyer's client is copied is referred to as the "receiving counsel."

Several states have answered this question in the negative, concluding that sending lawyers have *not* impliedly consented to the reply all communication with their clients. Although these states conclude that consent may not be implied solely because the sending lawyer copied the client on the email to receiving counsel, they also generally concede that consent may be implied from a variety of circumstances beyond simply having copied the client on a particular email.[5] This variety of circumstances, however, muddies the interpretation of the Rule, making it difficult for receiving counsel to discern the proper course of action or leaving room for disputes.

## II. Copying a Client on Emails and Texts Is Implied Consent to a Reply All Response

We conclude that given the nature of the lawyer-initiated group electronic communication, a sending lawyer impliedly consents to receiving counsel's "reply all" response that includes the sending lawyer's client, subject to certain exceptions discussed below. Several reasons support this conclusion, and we think that this interpretation will provide a brighter and fairer line for lawyers who send and receive group emails or text messages.

First, Model Rule 4.2 permits lawyers to communicate about the subject of the representation with a represented person with the "consent" of that person's lawyer. Consent for purposes of Rule 4.2 may be implied; it need not be express.[6] Similar to adding the client to a videoconference or telephone call with another counsel or inviting the client to an in-person meeting with another counsel, a sending lawyer who includes the client on electronic communications to receiving counsel generally impliedly consents to receiving counsel "replying all" to that communication.[7] The sending lawyer has chosen to give receiving counsel the impression that replying to all copied on the email or text is permissible and perhaps even encouraged. Thus, this situation is not one in

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[5] *See, e.g.*, Wa. State Bar Ass'n Advisory Op. 202201 (2022); S.C. Bar Advisory Op. 18-04 (2018). For a list of the factors bearing on implied consent, *see* Cal. Standing Comm. on Prof'l Responsibility & Conduct Formal Op. 2011-181 ("Such facts and circumstances may include the following: whether the communication is within the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by whom; the formality of the communication; the extent to which the communication might interfere with the attorney-client relationship; whether there exists a common interest or joint defense privilege between the parties; whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and the instructions of the represented party's attorney.").

[6] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. j (2000) ("[A] lawyer . . . may communicate with a represented nonclient when that person's lawyer has consented to or acquiesced in the communication. An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the communication. Similarly, consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmatively protests.").

[7] *See, e.g.*, N.J. Advisory Comm. on Prof'l Ethics Op. 739 (2021) ("While under RPC 4.2 it would be improper for another lawyer to initiate communication directly with a client without consent, by email or otherwise, nevertheless when the client's own lawyer affirmatively includes the client in an email thread by inserting the client's email address in the 'to' or 'cc' field, we think the natural assumption by others is that the lawyer intends and consents to the client receiving subsequent communications in that thread."); *see also* Va. Legal Ethics Op. 1897 (2022) ("A lawyer who includes their client in the "to" or "cc" field of an email has given implied consent to a reply-all response by opposing counsel."); N.Y.C. Bar Formal Ethics Op. 2022-3 (similar).

which the receiving counsel is overreaching or attempting to pry into confidential lawyer-client communications, the prevention of which are the primary purposes behind Model Rule 4.2.[8]

This conclusion also flows from the inclusive nature and norms of the group electronic communications at issue. It has become quite common to reply all to emails. In fact, "reply all" is the default setting in certain email platforms. The sending lawyer should be aware of this context,[9] and if the sending lawyer nonetheless chooses to copy the client, the sending lawyer is essentially inviting a reply all response. To be sure, the sending lawyer's implied consent should not be stretched past the point of reason.[10] Unless otherwise explicitly agreed, the consent covers only the specific topics in the initial email; the receiving counsel cannot reasonably infer that such email opens the door to copy the sending lawyer's client on unrelated topics.[11]

Second, we think that placing the burden on the initiator – the sending lawyer – is the fairest and most efficient allocation of any burdens. The sending lawyer should be responsible for the decision to include the sending lawyer's client in the electronic communication, rather than placing the onus on the receiving counsel to determine whether the sending lawyer has consented to a communication with the sending lawyer's client. Moreover, in a group email or text with an extensive list of recipients, the receiving counsel may not realize that one of the recipients is the sending lawyer's client.[12] We see no reason to shift the burden to the receiving counsel, when the sending lawyer decided to include the client on the group communication in the first instance.

Furthermore, resolving the issue is simpler for the sending lawyer. If the sending lawyer would like to avoid implying consent when copying the client on the electronic communication, the sending lawyer should separately forward the email or text to the client. Indeed, we think this practice is generally the better one. By copying their clients on emails and texts to receiving counsel, sending lawyers risk an imprudent reply all from their clients. Email and text messaging replies are often generated quickly, and the client may reply hastily with sensitive or compromising information.[13] Thus, the better practice is not to copy the client on an email or text to receiving

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[8] Model Rules of Prof'l Conduct R. 4.2 cmt. [1].

[9] *See* Model Rules of Prof'l Conduct R. 1.1, cmt. [8] ("To maintain the requisite level of knowledge and skill, a lawyer should keep abreast of the changes in law and its practice, including the benefits and risks of relevant technology[.]").

[10] *Cf.* Model Rules of Prof'l Conduct, Scope [14] ("The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.").

[11] *See also* Va. Legal Ethics Op. 1897 (2022) ("The reply must not exceed the scope of the email to which the lawyer is responding . . . as the sending lawyer's choice to use 'cc' does not authorize the receiving lawyer to communicate beyond what is reasonably necessary to respond to the initial email."); N.Y.C. Bar Ethics Op. 2022-3 ("Where an attorney sends an email copying their client, such communication gives implied consent for other counsel to reply all on the same subject within a reasonable time thereafter.").

[12] *See* N.J. Advisory Comm. on Prof'l Ethics Op. 739 (2021) ("[M]any emails have numerous recipients and it is not always clear that a represented client is among the names in the 'to' and 'cc' lines. The client's email address may not reflect the client's name, making it difficult to ascertain the client's identity. Rather than burdening the replying lawyer with the task of parsing through the group email's recipients, the initiating lawyer who does not consent to a response to the client should bear the burden of omitting the client from the group email or blind copying the client.").

[13] *See, e.g.*, N.Y.C. Bar Ethics Op. 2022-3 (discussing the lawyer competence and client risk issues arising when lawyers copy their clients on emails to opposing counsel).

counsel; instead, the lawyer generally should separately forward any pertinent emails or texts to the client.[14]

## III. The Presumption of Implied Consent to Reply All Communications Is Not Absolute

The presumption of implied consent to reply all communications may be overcome. We highlight several common examples to guide lawyers.

First, an express oral or written remark informing receiving counsel that the sending lawyer does not consent to a reply all communication would override the presumption of implied consent. Thus, lawyers who do not wish for their client to receive a "reply all" communication should communicate that fact in advance to receiving counsel, preferably in writing.[15] This communication should be prominent; lawyers who simply insert this preference in a long list of boilerplate disclaimers in their email signature area run the risk of the receiving counsel missing it. Although such disclaimers are better than nothing, a more effective approach would be to inform the receiving counsel - at the beginning of the email or in an earlier, separate communication - that including the client in the communication does not signify consent (or as noted above, not copy the client at all).

Second, the presumption applies only to emails or similar group electronic communications, such as text messaging, which the lawyer initiates. It does not apply to other forms of communication, such as a traditional letter printed on paper and mailed. Implied consent relies on the circumstances, including the group nature and other norms of the electronic communications at issue. For paper communications, a different set of norms currently exists. There is no prevailing custom indicating that by copying a client on a traditional paper letter, the sending lawyer has impliedly consented to the receiving counsel sending a copy of the responsive letter to the sending lawyer's client. Accordingly, receiving counsel generally should not infer consent and reply to the letter with a copy to the sending lawyer's client simply because the sending lawyer copied that lawyer's client on a traditional paper letter. The sending lawyer, as a matter of prudence, should consider forwarding the letter separately, instead of copying the client, but failing to do so does not itself provide implied consent to the receiving counsel to copy the sending lawyer's client on a responsive letter. In sum, although Model Rule 4.2 applies equally to electronic and paper communications, only in group emails or text messages does copying the client convey implied consent for the receiving counsel to reply all to the communication.

Finally, although the act of "replying all" is generally permitted under Model Rule 4.2, other Model Rules restrict the content of that reply.[16]

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[14] A separate forward is safer than "bcc'ing" the client because in certain email systems, the client's reply all to that email would still reach the receiving counsel.

[15] As in many other areas of professional responsibility and the law generally, written communications are advisable because they create an accurate record and help to prevent misunderstandings. Moreover, to avoid implied consent, an oral statement of course would need to be made in advance of the email communication at issue.

[16] *See, e.g.*, Model Rules of Prof'l Conduct R. 4.4(a) cmt. [1] (prohibiting "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship"); Model Rules of Prof'l Conduct R. 4.4(b)

## IV. Conclusion

Absent special circumstances, lawyers who copy their clients on emails or other forms of electronic communication to counsel representing another person in the matter impliedly consent to a "reply all" response from the receiving counsel. Accordingly, the reply all communication would not violate Model Rule 4.2. Lawyers who would like to avoid consenting to such communication should forward the email or text to the client separately or inform the receiving counsel in advance that including the client on the electronic communication does not constitute consent to a reply all communication.

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cmt. [2] ("If a lawyer knows or reasonably should know that [an email] was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures."); Model Rules of Prof'l Conduct R. 8.4(c) (prohibiting counsel from making misrepresentations).

DRAFT

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Rules and Opinions Committee

Opinion 21

* * * *

**Introduction**

On September 28, 2022, the American Bar Association issued its non-unanimous Opinion 502. Opinion 502 changes no language of ABA Model Rule 4.2; instead, by decree, the majority in ABA Opinion 502 simply casts a new, significantly broader interpretation of ABA Model Rule 4.2.

Both the Minnesota Lawyers Professional Responsibility Board (LPRB) and the Minnesota Office of Lawyers Professional Responsibility (OLPR) have declined to follow the majority opinion in Opinion 502, instead opting to adopt the minority position in Opinion 502. The majority opinion is non-persuasive because ABA Model Rule 4.2 (ABA 4.2) and its analogy found in Minnesota Rule of Professional Conduct Rule 4.2 (MRPC 4.2) fail to give fair notice to practicing Minnesota attorneys that communication by a *pro se* lawyer, representing his or her own legal interests, is subject

to the communication restrictions as set forth by the plain language under both ABA 4.2 and MRPC 4.2.

**Discussion**

MRPC 4.2 is a long-established "no-contact" rule of ethics that strictly prohibits Minnesota lawyers from contacting represented clients on any extant legal issue in which those clients have retained legal representation.[1] More specifically, MRPC 4.2 provides that:

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

Minnesota statute explicitly recognizes that the communication between an attorney and his/her client constitute legally privileged communications. *See* Minn. Stat. § 595.02, Subd. 1 (b). Working in conjunction with this statute, MRPC 4.2 serves the important purpose of barring attorneys who – in representing their client - may attempt to interfere with that privileged relationship, be it eliciting uncounseled disclosure of protected information from those represented clients, or otherwise employing any manner of potential coercive tactics with those represented clients, including those clients who may not have the same level of sophistication or shrewdness of opposing counsel.

[1] ABA Opinion 502 may be found at: *https://www.americanbar.org/news/abanews/aba-news-archives/2022/09/aba-formal-opinion-502*

The majority in Opinion 502 significantly expands the scope of ABA 4.2 by simply opining that a *pro se* lawyer does represent a client: namely, the attorney himself or herself.

According to this majority opinion, even *pro se* lawyers representing their own legal interests are now suddenly subject to the ABA Model Rule 4.2 prohibitions, notwithstanding the fact that under the plain language of both ABA 4.2 and MRPC 4.2, the *pro se* attorneys are categorically not representing any third-party client.[2]

Importantly, the minority has no issue with the important legal imperative that attorneys – whether representing a client or just their own legal interests - should never meddle, inhibit, or interfere with another attorney's relationship with his or her client. Nevertheless, the minority dissent in Opinion 502 is more compelling because both ABA 4.2 and MRPC 4.2 remain anchored on the antecedent language of "*In representing a client…*"[3]

In fact, the *pro se* attorney is categorically not representing a client as the term "client" is typically understood. Under common understanding, a "client" is typically known as "a person who employs or retains an attorney, or counsellor, to appear for him [her] in courts, advise, assist, and defend him in legal proceedings, as to act for him

[2] Fundamental canons of construction as expressed by Minn. Stat. §§ 645 do not support the ABA majority opinion since "words and phrases are construed according to rules of grammar and according to their common and approved usage…".

[3] The minority opinion commenting that "[t]houghtful commentators have identified the problems with Model Rule 4.2's language and inconsistent interpretations, and [they] have recommended fixing the rule rather than straining to achieve its purposes when lawyers represent themselves," they said. "By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion."

in any legal proceedings, and to act for him in any legal business. It should include one who disclosed confidential matters to [an] attorney while seeking professional aid, whether the attorney was hired or not."[4]

Minnesota attorneys are reasonably expected to know, understand, and follow the MRPC. However, it is simply not reasonable to expect that Minnesota attorneys will, perhaps through some type of intellectual osmosis, recognize that MRPC 4.2 strictures are now also applicable to *pro se* attorneys who are not representing a client.[5]

Both the LPRB and the OLPR take the position that both important policy objectives of preserving the integrity of the attorney-client relationship and fair notice to attorneys must be vindicated. Vindicating both policy objectives is far from an impossible task. In 2005, the State of Oregon successfully integrated these two objectives that almost exactly dovetail with the concerns stated in the minority ABA opinion.

Oregon Rule of Professional Conduct 4.2

In representing a client **or the lawyer's own interests**, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law or by court order to do so; or

[4] *Black's Law Dictionary*, 5th Ed., p. 230 (West Publishing, 1979). The MRPC does not otherwise define "client."

[5] The term "reasonable attorney" is used frequently in the MRPC. Any "reasonable" Minnesota attorney is reasonably expected to know and closely adhere to the MRPC. It is not reasonable to expect that Minnesota Attorneys will frequently check on various ABA interpretations that may differ from Minnesota interpretations – particularly, perhaps, when the ABA Opinion itself is not unanimous.

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer (emphasis added).[6]

**Conclusion**

Both the LPRB and the OLPR concur that Minnesota *pro se* attorneys representing their own legal interests ought not face discipline under MRPC 4.2 unless and until the language of this rule is amended to specifically incorporate the prefatory language of "In representing a client or the lawyer's own interests…"

# # # #

[6] This rule retains the language of DR 7-104(A), except that the phrase "or on directly related subjects" has been deleted. The application of the rule to a lawyer acting in the lawyer's own interests has been moved to the beginning of the rule.

STATE OF MINNESOTA

IN SUPREME COURT

A21-0754

Original Jurisdiction

Per Curiam
Concurring, Thissen, J.

In re Petition for Disciplinary Action
against Ignatius Chukwuemeka Udeani,
a Minnesota Attorney,
Registration No. 0300615

Filed: January 25, 2023
Office of Appellate Courts

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Susan M. Humiston, Director, Jennifer D. Peterson, Senior Assistant Director, Office of Lawyers Professional Responsibility, Saint Paul, Minnesota, for petitioner.

Ignatius Chukwuemeka Udeani, Minneapolis, Minnesota, pro se.

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S Y L L A B U S

Disbarment is the appropriate discipline for an attorney with a significant disciplinary history who engaged in serious and prolonged misconduct across multiple matters that harmed vulnerable clients and who failed to cooperate with the Director's investigations.

Disbarred.

## O P I N I O N

PER CURIAM.

The Director of the Office of Lawyers Professional Responsibility filed a petition for disciplinary action against respondent Ignatius Chukwuemeka Udeani. The petition alleged that Udeani breached his ethical duties to five clients, three of whom were vulnerable immigrants, including by misappropriating client funds and providing incompetent representation, and then did not cooperate with the Director's investigations into those activities. After a hearing, the referee concluded that Udeani committed the alleged misconduct and that multiple aggravating factors were present, including Udeani's extensive experience as a lawyer, long discipline history, lack of remorse, and the vulnerable nature of his clients who were harmed. The referee found no mitigating factors. The referee recommended that Udeani be disbarred. We agree. Based on Udeani's misconduct, we disbar Udeani from the practice of law.

## FACTS

Udeani was admitted to practice law in Minnesota in 2000. He has an extensive disciplinary history: he was put on private probation in 2007; admonished in 2012 and 2013; suspended for 30 days in 2017 and, when reinstated, placed on supervised probation for a period of 2 years; indefinitely suspended for a minimum of 3 years in 2020; and admonished four more times in 2020. This prior discipline was for multiple instances of misconduct concerning Udeani's fee arrangements with clients, trust accounts, and failure to competently and diligently represent clients.

The Director filed this petition for disciplinary action against Udeani on June 15, 2021, alleging misconduct consisting of nine separate rule violations and involving five clients. The Director alleged, and the referee concluded, that Udeani committed misconduct in numerous ways. He failed to return unearned fees to two clients, and for one of those clients, the referee concluded that the failure was misappropriation. Udeani committed additional financial misconduct by failing to get receipts for cash payments countersigned by a third client. He created costly and time-consuming delays by not acting with diligence and promptness for one client. He failed to represent three clients competently in immigration-related matters. And for one of those three clients, he did not promptly reply to the client's reasonable requests for information. Finally, he failed to cooperate with the Director's investigation into seven complaints.

Following a hearing on the petition—for which Udeani failed to appear[1]—the referee concluded that Udeani's actions and failures to act violated Minn. R. Prof. Conduct

[1] Udeani's only appearance before the referee was for a telephonic scheduling conference held 6 months before trial. Following the referee's findings, Udeani did not file a brief with the court, nor did he appear for oral argument.

1.1,[2] 1.3,[3] 1.4(a)(3)[4] and (a)(4),[5] 1.15(c)(4),[6] 1.15(h),[7] 1.16(d),[8] 8.1(b),[9] and 8.4(c).[10] The referee hearing in this matter was held while Udeani was suspended for other misconduct.

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[2] Rule 1.1 states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

[3] Rule 1.3 states: "A lawyer shall act with reasonable diligence and promptness in representing a client."

[4] Rule 1.4(a)(3) states: "A lawyer shall . . . keep the client reasonably informed about the status of the matter."

[5] Rule 1.4(a)(4) states: "A lawyer shall . . . promptly comply with reasonable requests for information."

[6] Rule 1.15(c)(4) states: "A lawyer shall . . . promptly pay or deliver to the client or third person as requested the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive."

[7] Rule 1.15(h) states in relevant part: "Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis, books and records sufficient to demonstrate income derived from, and expenses related to, the lawyer's private practice of law, and to establish compliance with paragraphs (a) through (f)."

[8] Rule 1.16(d) states: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has not been earned or incurred."

[9] Rule 8.1(b) states in relevant part: "An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not . . . knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6."

[10] Rule 8.4(c) states: "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

*In re Udeani* (*Udeani I*), 945 N.W.2d 389, 399 (Minn. 2020) (imposing indefinite suspension with no right to petition for reinstatement for three years). In *Udeani I*, the referee and the Director recommended that we suspend Udeani for the misconduct at issue there. *Id*. at 396. In this matter, the referee recommended that we disbar Udeani, and the Director agrees with that recommendation.

**ANALYSIS**

The only issue before us is the appropriate discipline for Udeani. In considering this issue, the referee's findings of fact and conclusions of law are deemed conclusive because neither party ordered a transcript of the proceedings. Rule 14(e), Rules on Lawyers Professional Responsibility (RLPR); *In re Fru*, 829 N.W.2d 379, 387 (Minn. 2013). The purpose of attorney discipline is "not to punish the attorney but rather to protect the public, to protect the judicial system, and to deter future misconduct by the disciplined attorney as well as by other attorneys." *In re Rebeau*, 787 N.W.2d 169, 173 (Minn. 2010). In determining the appropriate discipline for an attorney, we consider four factors: "(1) the nature of the misconduct; (2) the cumulative weight of the disciplinary violations; (3) the harm to the public; and (4) the harm to the legal profession." *In re Nelson*, 733 N.W.2d 458, 463 (Minn. 2007). We also consider aggravating or mitigating circumstances in determining the discipline to impose. *Fru*, 829 N.W.2d at 388. We address each of these in turn.

First, the nature of Udeani's misconduct is serious; it includes failure to return unearned fees—which the referee concluded was misappropriation in one instance[11]—lack of diligence, lack of competence, failure to communicate, and failure to cooperate with the Director's investigations. "Misappropriation of client funds alone is particularly serious misconduct and usually warrants disbarment absent clear and convincing evidence of substantial mitigating factors." *In re Sayaovong*, 909 N.W.2d 575, 581–82 (Minn. 2018) (citation omitted) (internal quotation marks omitted). Failure to return unearned fees is another form of financial misconduct and also constitutes "serious misconduct" because, "from the clients' perspectives, they [are] deprived of the use of their funds without any explanation." *In re Taplin*, 837 N.W.2d 306, 312 (Minn. 2013). Udeani's misconduct also placed two clients at risk of deportation—one for several months and the other for a period of years. We have issued serious discipline—including disbarment—for actions that place immigration clients at risk of deportation. *See In re Kaszynski*, 620 N.W.2d 708, 711, 713-14 (Minn. 2001). In addition, Udeani failed to cooperate with the Director's investigation into seven disciplinary complaints filed against him. We have explained that "failure to cooperate with a disciplinary investigation, in and of itself, constitutes an act of misconduct that warrants indefinite suspension." *In re Brooks*, 696 N.W.2d 84, 88 (Minn. 2005). And finally, we view "other disciplinary rule violations" more severely when paired

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[11] Our case law supports the referee's determination that the failure to return unearned fees to the clients was misappropriation, *see, e.g., In re Lundeen*, 811 N.W.2d 602, 608 (Minn. 2012)—a determination that was not challenged here. But the failure to return client funds is not always misappropriation. For example, in *Udeani I*, the referee did not conclude that the failure to return the client funds at issue was misappropriation. *See Udeani I,* 945 N.W.2d at 397.

with "serious client neglect and incompetence," *Fru*, 829 N.W.2d at 389, and "have disbarred attorneys in cases involving serious client neglect," *In re Fahrenholtz*, 896 N.W.2d 845, 848 (Minn. 2017). Udeani acted incompetently and neglectfully with respect to three clients, and this—paired with his failure to cooperate, failure to return unearned fees, failure to get cash receipts countersigned, and failure to communicate—is serious misconduct. In short, the nature of Udeani's misconduct weighs toward serious discipline.

Next, we consider "the cumulative weight of all of the professional misconduct in determining the appropriate sanction." *In re Rhodes*, 740 N.W.2d 574, 580 (Minn. 2007). Even if "a single act standing alone would not have warranted such discipline," we recognize that "the cumulative weight and severity of multiple disciplinary rule violations may compel severe discipline." *In re Oberhauser*, 679 N.W.2d 153, 160 (Minn. 2004). Udeani's misconduct here, like the misconduct that previously gave rise to his indefinite suspension, was not a "brief lapse in judgment or a single, isolated incident." *Udeani I*, 945 N.W.2d at 397. Rather, there are "multiple instances of misconduct occurring over a substantial amount of time." *Id.* Indeed, his ethical violations in this case were committed over 9 years and against multiple clients. This factor also weighs toward serious discipline.

We also measure harm to the public based on the quantity (" 'the number of clients harmed' ") and quality (" 'the extent of the clients' injuries' ") of the harm. *In re Coleman*, 793 N.W.2d 296, 308 (Minn. 2011) (quoting *In re Randall*, 562 N.W.2d 679, 683 (Minn. 1997)). Udeani caused widespread harm here. His misconduct injured five clients and their families. Similarly, the extent of the clients' injuries is extensive. Two clients were

placed at risk of deportation—a "most perilous fate." *In re Muenchrath*, 588 N.W.2d 497, 501 (Minn. 1999). The amount of money that Udeani failed to return was a substantial amount to one of his clients. Indeed, four clients faced financial hardship because of Udeani's misconduct—one of those clients was forced to move back in with parents, and others struggled to support their families. This factor weighs toward serious discipline.

Finally, we consider the harm to the legal profession. In addition to the harm Udeani caused his clients directly, much of his misconduct also undermined the reputation of and public confidence in the legal profession. In the immigration context, neglect and misconduct that threatens a client's immigration status undermines the "public's trust in the competence, diligence, and integrity of lawyers." *Fru*, 829 N.W.2d at 390. That is precisely what occurred here. Udeani's misconduct threatened the legal status of two clients. The referee found that Udeani's conduct left one of those clients "skeptical of lawyers" and the other "skeptical and afraid to trust attorneys." A third client from whom Udeani misappropriated funds felt "scammed" and "los[t] trust in lawyers." This factor also points toward serious discipline.

In addition to the four factors discussed above, we also consider aggravating or mitigating circumstances in determining the discipline to impose. *Id.* at 388. The referee found that no mitigating factors and five aggravating factors apply to Udeani's misconduct. The aggravating factors are Udeani's: (1) failure to cooperate after the Director served the petition for discipline;[12] (2) failure to acknowledge the wrongfulness of his misconduct or

[12] Failing to cooperate can be either an independent ground for discipline or an aggravating factor, depending on when in the proceeding it occurred, but the same conduct

show remorse; (3) harm to vulnerable immigrant clients; (4) substantial experience in the practice of law having been licensed since 2000; and (5) history of prior, similar misconduct. Our case law recognizes all of these factors as aggravating factors.[13]

Although each of these aggravating factors is significant, we take particular note of Udeani's disciplinary history, which is extensive and involves misconduct similar to his current misconduct. *See In re MacDonald*, 962 N.W.2d 451, 467 (Minn. 2021) (giving "serious weight" to disciplinary history that "involved the same type of misconduct"). Udeani was placed on private probation in 2007, based in part on his failure "to competently and diligently represent a client in an immigration matter." His admonishments in 2012 and 2013 were based on misconduct that included missing a hearing and not depositing funds into a client's trust account. We suspended him for 30 days in 2017 based, in part, on failing to handle client matters diligently. Finally, the 2020 suspension was for wide ranging misconduct, addressed in 16 counts, including refusing to refund unearned fees, failing to act competently and with diligence, and failure

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cannot be both. *Taplin*, 837 N.W.2d at 313. Here, the referee properly accounted for Udeani's noncooperation. His noncooperation before the petition was filed was an act of misconduct, as alleged in count five of the petition. The aggravating factor does not include that noncooperation but is instead limited to Udeani's noncooperation after the petition was filed. Specifically, after attending a telephonic scheduling conference with the referee, Udeani has taken no further part in the proceedings.

[13] *See Taplin*, 837 N.W.2d at 313 (recognizing failure to cooperate as an aggravating factor); *In re Severson*, 860 N.W.2d 658, 670 (Minn. 2015) (recognizing lack of remorse as an aggravating factor); *Kaszynski*, 620 N.W.2d at 712–13 (recognizing both vulnerability of clients—particularly including immigration clients who were dependent on their attorney in legal proceedings—and substantial experience in the practice of law as aggravating factors); *Rhodes*, 740 N.W.2d at 580 (recognizing prior history of misconduct as an aggravating factor).

to cooperate with the Director's investigations.[14] *See Udeani I*, 945 N.W.2d at 401. Overall, Udeani's previous discipline was for similar misconduct and harm to vulnerable victims. These factors aggravate Udeani's misconduct in this case.

In sum, Udeani failed to return unearned client funds, failed to get countersigned cash receipts, failed to act competently and diligently on behalf of his clients, failed to properly communicate with them, and failed to cooperate with the Director's investigations. His actions caused extensive harm to several clients and their families and damaged the legal profession. When the weight of these violations is combined and considered in light of Udeani's prior professional discipline for similar misconduct, the other aggravating factors found by the referee, and the lack of mitigating factors, we hold that the appropriate discipline in this case is disbarment.

## CONCLUSION

For the foregoing reasons, respondent Ignatius Chukwuemeka Udeani is disbarred from the practice of law in the State of Minnesota, effective on the date of this opinion. Respondent shall comply with Rule 26, RLPR (requiring notice to clients, opposing counsel, and tribunals), and shall pay $900 in costs under Rule 24(a), RLPR.

[14] Much of Udeani's misconduct in this case happened at the same time as the misconduct for which we suspended and admonished him in 2020. It was largely because of Udeani's noncooperation that the Director had to proceed separately with the misconduct committed here from that at issue in *Udeani I*.

## C O N C U R R E N C E

THISSEN, Justice (concurring).

I agree that Ignatius Chukwuemeka Udeani should be disbarred. I write separately to note my continued concern with the practice of relying on noncooperation with the disciplinary proceedings (which is an independent rule violation) as an aggravating factor. *See In re Nelson*, 933 N.W.2d 73, 75–77 (Minn. 2019) (Thissen, J., concurring). I suggest that the Lawyers Professional Responsibility Board review the question of whether the recent practice of bringing in noncooperation with disciplinary proceedings through the back door of aggravating circumstances is appropriate and whether the rules should be clarified on that issue.

933 N.W.2d 73 (Mem)
Supreme Court of Minnesota.

IN RE Petition for DISCIPLINARY ACTION AGAINST Christopher J. NELSON, a Minnesota Attorney, Registration No. 0259779.

A18-1149
|
September 11, 2019

ORDER

David L. Lillehaug, Associate Justice

The Director of the Office of Lawyers Professional Responsibility filed a petition for disciplinary action and a supplementary petition alleging that respondent Christopher J. Nelson committed professional misconduct warranting public discipline, namely: failure to pay a law-related judgment, failure to respond to court orders, and failure to comply with court orders to show cause why he should not be held in contempt; failure to appear for a court hearing, failure to communicate with a client, and making improper solicitations to provide legal services; and failure to cooperate with the Director's investigation. *See* Minn. R. Prof. Conduct 1.4(a)(4), 3.4(c), 7.3(c), 8.1(b), and 8.4(d); and Rule 25, Rules on Lawyers Professional Responsibility (RLPR). We referred the matter to a referee.

Respondent failed to appear for proceedings before the referee. As a result, the referee struck respondent's answer and deemed the allegations of the petition and the supplementary petition admitted. Following a hearing on the harm caused by respondent's misconduct and the presence of any aggravating factors, the referee made findings, conclusions, and a recommendation. The referee concluded that respondent committed the misconduct alleged in the petition and supplementary petition, that the harm caused was substantial, and that five aggravating favors were present. The referee recommended that respondent be indefinitely suspended with no right to petition for reinstatement for 6 months.

Because no party ordered a transcript of the proceedings before the referee, the referee's findings and conclusions are conclusive. *See* Rule 14(e), RLPR. We issued a briefing schedule. In her brief, the Director recommends that the court impose the 6-month suspension recommended by the referee. Respondent did not file a brief with this court.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. Respondent Christopher J. Nelson is indefinitely suspended from the practice of law, effective 14 days from the date of the filing of this order, with no right to petition for reinstatement for 6 months.

2. Respondent may petition for reinstatement pursuant to Rule 18(a)–(d), RLPR. Reinstatement is conditioned on successful completion of the written examination required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility, *see* Rule 18(e)(2), RLPR, and satisfaction of continuing legal education requirements, *see* Rule 18(e)(4), RLPR.

3. Respondent shall comply with Rule 26, RLPR (requiring notice of suspension to clients, opposing counsel, and tribunals), and shall pay $900 in costs pursuant to Rule 24(a), RLPR.

CONCURRENCE

HUDSON, Justice (concurring).

***74** I concur in the court's disposition of this case. The court recites that among other things, respondent failed to pay a law-related judgment, failed to respond to court orders, and failed to comply with orders to show cause. Such misconduct is indeed serious, but the abbreviated description in the court's order does not do justice to the outrageousness of respondent's actions. According to the allegations of the petition, which were deemed admitted because of respondent's failure to appear, one of

  

respondent's former clients secured a money judgment against him based on respondent's failure to resolve the client's case. Respondent refused to respond to or comply with court orders intended to facilitate collection of the judgment; avoided service of an order to show cause why he should not be held in contempt for failing to comply with the previous orders; and failed to appear before the court when he eventually was successfully served, leading the court to issue a bench warrant for his arrest. By his repeated failure to comply with his obligations to the court, respondent was successful in avoiding satisfaction of the judgment for 10 years until the judgment expired.

In my view respondent's flouting of the legal system, conducted in service of an effort to avoid responsibility for respondent's own professional failing, and sustained for a decade, merits a lengthy suspension. The Director recommends that we impose a minimum 6-month indefinite suspension. In my view, that is the absolute floor of possible sanctions that could be considered appropriate for respondent's misconduct. It is only because respondent, if he seeks reinstatement, will be required to demonstrate by clear and convincing evidence that he has undergone the requisite moral change to render him fit to practice law, *see In re Griffith*, 883 N.W.2d 798, 799 (Minn. 2016), that I concur.

McKEIG, Justice (concurring).

I join in the concurrence of Justice Hudson.

CONCURRENCE

THISSEN, Justice (concurring).

I concur in the discipline imposed in this case. Christopher J. Nelson's conduct in failing to pay a law related judgment, failing to respond to court orders, failing to show cause why he should not be held in contempt, failing to appear for a court hearing, failing to communicate with his client, making improper solicitations to provide legal services, and failing to cooperate with the Director's investigation warrant a suspension with no right to seek reinstatement for 6 months. Minn. R. Prof. Conduct 1.4(a)(4), 3.4(c), 7.3(c), 8.1(b) and 8.4(d); Rule 25, Rules on Lawyers Professional Responsibility (RLPR).[1] Because the 6-month suspension imposed in this case is appropriate based on Nelson's violations ***75** of the rules and his prior disciplinary history without any need to resort to consideration of other aggravating factors, I write separately to express concern regarding several aggravating factors the referee found to be present in this case.

[1] For example, we imposed indefinite suspensions of at least 90 days in *In re Ruffenach*, 486 N.W.2d 387, 391 (Minn. 1992), and *In re Pokorny*, 453 N.W.2d 345, 349 (Minn. 1990), for similar conduct—failure to pay malpractice or law-related debts and failure to appear at court hearings. In each case, the disciplined lawyer, like Nelson, had prior disciplinary history. In *Pokorny*, the court also found aggravating factors ("no contrition, no remorse, and no willingness to make amends"), but also found those aggravating factors were somewhat counterbalanced with a mitigating factor ("no evidence of a selfish or dishonest motive"). 453 N.W.2d at 348. Nelson's conduct here was more egregious.

First, the referee cited Nelson's substantial legal experience as an aggravating factor. As I have discussed elsewhere, *see In re Sea*, 932 N.W.2d 28, 43 (Minn. 2019) (Thissen, J., concurring in part & dissenting in part), I find the invocation of legal experience as an aggravating factor to be problematic without an analysis of why an attorney's legal experience actually aggravates either the wrongfulness of the attorney's conduct or the harm it causes. In particular, I see nothing in this case that would explain why Nelson's legal experience makes the particular conduct at issue in this matter worse than similar conduct by other, less experienced, lawyers. Certainly neither the Director nor the referee provided such an explanation. In my view, a greater showing should be made before legal experience is treated as an aggravating factor.

Second, the referee points to Nelson's selfish motive in failing to pay the law-related judgment entered against him as an aggravating factor. Certainly, not paying money plainly owed to someone else is selfish, but that is true in most situations where a debt is unpaid. I see no reason to conclude that Nelson's conduct was particularly selfish compared to any other lawyer who failed to repay a debt in violation of the Rules of Professional Conduct, and again, neither the Director nor the referee provided an explanation. Accordingly, I cannot agree that selfish motive should be an aggravating factor in this case.

  

Finally, the referee determined that Nelson's failure to participate in the disciplinary proceedings before the referee is an aggravating circumstance that requires additional discipline. As noted earlier, the referee also and separately determined that Nelson violated Minn. R. Prof. Conduct 8.1(b) and Rule 25, Rules on Lawyers Professional Responsibility, for failing to cooperate with the Director's investigation.[2] In short, the findings in this case call ***76** for us to impose discipline on Nelson for failing to cooperate with disciplinary proceedings and then to also treat his non-cooperation with the disciplinary proceedings as an aggravating circumstance requiring an even greater sanction.

[2] A lawyer's failure to cooperate with an ethics investigation has been considered a professional ethics violation requiring discipline in Minnesota since the 1930s. We reasoned that the failure of a lawyer to respond to important letters and notices—like letters from the ethics committee—called into question the lawyer's competence and professionalism. *See In re Larson*, 210 Minn. 414, 298 N.W. 707, 708–09 (1941); *In re Chmelik*, 203 Minn. 156, 280 N.W. 283, 284–85 (1938); *In re Breding*, 188 Minn. 367, 247 N.W. 694, 694–95 (1933); *In re Gurley*, 184 Minn. 450, 239 N.W. 149, 149 (1931). In 1979, we reaffirmed that "it is incumbent upon an attorney to cooperate with disciplinary authorities in their investigation and resolution of complaints against him" and that failure to do so "constitute[s] a separate act of professional misconduct." *In re Cartwright*, 282 N.W.2d 548, 551–52 (Minn. 1979). We also encouraged the Lawyers Professional Responsibility Board to adopt a rule that delineates the scope of a lawyer's duty of cooperation. *Id.* at 552.
In 1981, Rule 25 of the Rules on Lawyers Professional Responsibility was adopted. Rule 25 currently provides that "[i]t shall be the duty of any lawyer who is the subject of an investigation or proceeding under these Rules to cooperate with the District Committee, the Director, or the Director's staff, the Board, or a Panel, by complying with reasonable requests" including requests to appear for conferences and hearings. The Rule further provides that violation of Rule 25 "is unprofessional conduct and shall constitute a ground for discipline." The Minnesota Rules of Professional Conduct adopted in 1985 included Rule 8.1(a)(3). That language, now found in Rule 8.1(b), currently provides that "a lawyer ... in connection with a disciplinary matter, shall not ... knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority." We have employed Minn. R. Prof. Conduct 8.1 and Rule 25, RLPR, interchangeably as a basis for disciplining lawyers for lack of cooperation with disciplinary proceedings. *In re Aitken*, 787 N.W.2d 152, 161 (Minn. 2010).

I acknowledge that our past decisions have condemned double counting of non-cooperation while simultaneously allowing that very double-counting where one act of non-cooperation (usually non-cooperation with an investigation) is used to support the imposition of discipline for violating Minn. R. Prof. Conduct 8.1 and Rule 25, RLPR, and a different act of non-cooperation (usually non-cooperation in the proceedings before a referee) is used as an aggravating factor to augment the sanction. *See In re Villanueva*, 931 N.W.2d 816, 824 (Minn. 2019); *In re Gorshteyn*, 931 N.W.2d 762, 771–72 (Minn. 2019); *In re Hulstrand*, 910 N.W.2d 436, 444 (Minn. 2018); *In re O'Brien*, 809 N.W.2d 463, 466–67 (Minn. 2012); *see also In re Albrecht*, 845 N.W.2d 184, 193 n.16 (Minn. 2014) (reversing a referee's reliance on acts of non-cooperation to support both a determination of a Rule 8.1(b) violation and an aggravating factor finding); *In re Jones*, 834 N.W.2d 671, 680 n.9 (Minn. 2013) (same). I believe this practice of allowing non-cooperation to count as both an independent rules violation and an aggravating factor is improper.

First, we have long held that failure to attend a panel hearing is a "serious violation" of Rule 8.1 that itself merits a suspension. *In re Thedens*, 557 N.W.2d 344, 350 (Minn. 1997). If a lawyer fails to participate in the panel hearing, the Director should assert a formal violation of the rules rather than side-stepping normal processes and urging instead a finding of aggravating circumstances. *Cf. In re Charges of Unprofessional Conduct in Panel File 42735*, 924 N.W.2d 266, 273 (Minn. 2019) (stating that "to comport with due process, lawyers facing discipline must be given notice of the charges against them" (quoting *In re Taplin*, 837 N.W.2d 306, 311 (Minn. 2013))). Indeed, before 2002, we never cited failure to cooperate with a disciplinary proceeding as an *aggravating circumstance.* We only disciplined an attorney for failure to cooperate when the Director charged and litigated the non-cooperation as a substantive rule violation.[3]

[3] Over the two decades following the adoption of Minn. R. Prof. Conduct 8.1 and Rule 25, RLPR, we held on numerous occasions that failure to cooperate in a disciplinary proceeding constituted an independent rule violation and ground for

discipline:

> Failure to cooperate with the disciplinary process constitutes separate misconduct warranting discipline independent from the conduct underlying the petition. We have stressed that failure to cooperate with a disciplinary investigation, in and of itself, constitutes an act of misconduct that warrants indefinite suspension.

*In re Brooks*, 696 N.W.2d 84, 88 (Minn. 2005) (citations omitted). At times, we used somewhat imprecise language when imposing discipline for an independent non-cooperation violation in combination with other conduct that violates the Rules of Professional Responsibility. For instance, in *In re Nelson*, we stated that "noncooperation with the disciplinary process, by itself, may warrant indefinite suspension and, when it exists in connection with other misconduct, noncooperation increases the severity of the disciplinary sanction." 733 N.W.2d 458, 464 (Minn. 2007) (citing *In re Samborski*, 644 N.W.2d 402, 407 (Minn. 2002)); *see also In re De Rycke*, 707 N.W.2d 370, 375 (Minn. 2006); *In re Davis*, 585 N.W.2d 373, 377–78 (Minn. 1998). Our point was not surprising: a violation of Rule 8.1 and Rule 25 for non-cooperation may warrant indefinite suspension by itself and, if other professional ethics violations are also established, non-cooperation can support an even heavier sanction. In a few later cases, the latter part of this conclusion referring to a heavier sanction has been read without close analysis as supporting the notion that "non-cooperation is an aggravating factor" rather than an independent rules violation that the Director must prove. *See, e.g., In re Aitken*, 787 N.W.2d 152, 162 (Minn. 2010) (stating that non-cooperation is an aggravating factor despite the fact that the court had a few paragraphs earlier affirmed the referee's conclusion that the lawyer's non-cooperation was a violation of Rule 8.1 and Rule 25). In my opinion, that reading of the prior cases is incorrect.

***77** Second, our jurisprudence that non-cooperation can be both an independent rules violation and/or an aggravating factor emerged without any meaningful analysis. In *In re Westby*, 639 N.W.2d 358, 370-71 (Minn. 2002), we affirmed the imposition of discipline for failure to cooperate under Rule 8.1 and then, at the end of a string of six "aggravating factors" and without citation, we noted that the lawyer's "lack of candor and cooperation throughout the disciplinary proceedings is also an aggravating factor." In *In re Pierce*, 706 N.W.2d 749, 757 (Minn. 2005), we cited *Westby* in holding that failure to cooperate in disciplinary proceeding may be an independent violation of Minn. R. Prof. Conduct 8.1 and Rule 25, RLPR, and an aggravating factor as well.[4] *See also In re Mayrand*, 723 N.W.2d 261, 269 (Minn. 2006) (citing *In re Brooks*, 696 N.W.2d 84, 88 (Minn. 2005), for the proposition that "failure to cooperate with the disciplinary process constitutes *separate misconduct* warranting discipline independent from the conduct underlying the petition" despite the fact that in *Brooks* the Director asserted failure to cooperate as an independent violation of Rule 8.1 and not as an aggravating factor) (emphasis added); *In re Rhodes,* 740 N.W.2d 574, 580 (Minn. 2007) (stating that repeated failure to cooperate with the disciplinary process is a significant aggravating factor, again without citation). Notably, we have expressly overruled *Westby*, *Pierce*, and *Mayrand*. *In re Jones*, 834 N.W.2d at 680 n.9.

[4] In *Pierce*, we also cited *In re Engel*, 538 N.W.2d 906, 907 (Minn. 1995). There was no finding of aggravating circumstances in *Engel.*

In my view, the proper response to this since-overruled evolution of our jurisprudence is not the course first charted in *O'Brien*—allowing double counting of non-cooperation where different acts of non-cooperation in the course of a single disciplinary proceeding can be put into different boxes to support a rule violation on the one hand and a finding of aggravating circumstances on the other. The better course would be to return to the state of the law before *Westby*, *Pierce*, and *Mayrand*. Non-cooperation should not be used as an aggravating factor.

There are practical reasons for my position. The *O'Brien* rule has caused confusion among referees requiring repeated warnings from us about the proper application of the rule. *See In re Albrecht*, 845 N.W.2d at 193 n.16; *In re Jones*, 834 N.W.2d at 680 n.9. Further, a referee and our court have many tools to hold accountable a lawyer who fails to cooperate or participate in a hearing. Most significantly, when a lawyer fails to show up for his hearing, the Director's allegations against him are deemed admitted. *In re Gorshteyn*, 931 N.W.2d at 762. Finally, a clear rule that non-cooperation is a violation of the professional conduct rules, that the violation must be alleged and proved, and that non-cooperation cannot also be treated an aggravating factor, makes our system of lawyer discipline seem less arbitrary, more understandable, and fairer. And that in the end serves the public interest.

  

933 N.W.2d 73 (Mem)

## All Citations

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