

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD  
MEETING AGENDA**

Friday, January 29, 2021 – 1:00 p.m.

Zoom meeting (invitation to follow for members)

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

1. Approval of Minutes of September 25, 2020, Lawyers Board Meeting (Attachment 1)
2. Farewell to retiring Board Members Thomas Evenson, Gary Hird, Shawn Judge and Gail Stremel
3. Welcome New Member, William Pentelovitch
  - a. Reappointment of Returning Board Members
  - b. New Appointments (Public/MSBA); Open Position (Attachment 2)
4. New Panel and Committee Assignments (in process)
5. Committee Updates:
  - a. Rules Committee
    - (i) Status, Rule 7, Advertising Rule Petition
    - (ii) Status, Rule 20, RLPR, Petition
    - (iii) New item, Rule 1.8(e) (Attachment 3)
  - b. Opinion Committee
  - c. DEC Committee
    - (i) Chairs Symposium, May 2021
    - (ii) Seminar, September 17, 2021 (New date)
    - (iii) New Meeting Date, October 29, 2021 (Attachment 4)
    - (iv) New Member Training Manual
    - (v) Panel Manual
  - d. Malpractice Insurance Ad-Hoc Committee (on hold)
  - e. Equity, Equality and Inclusion Committee
6. Court-proposed Amendments to Rule 4 and 5, RLPR (Attachment 5)
7. Court-provided Panel Training

8. Director's Report:
  - a. Year End Statistics (Attachment 6)
  - b. Personnel Updates
  - c. Office Updates
  - d. Litigation Report
  
9. Old Business
  - a. Livestreaming of Board Meetings
  - b. Remote Panel Hearing Update
  
10. New Business
  - a. DEC, Board and OLPR consistency
  - b. DEC, Board and OLPR efficiency
  
11. Quarterly Closed Session
  
12. Next Meeting, April 23, 2021

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

# **Attachment 1**

**MINUTES OF THE 192<sup>nd</sup> MEETING OF THE  
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

**September 25, 2020**

The 192<sup>nd</sup> meeting of the Lawyers Professional Responsibility Board convened at 3:00 p.m. on Friday, September 25, 2020, electronically via Zoom. Present were: Board Chair Robin Wolpert, and Board Members Landon J. Ascheman, Daniel J. Cragg, Thomas J. Evenson, Michael Friedman, Katherine Brown Holmen, Peter Ivy, Shawn Judge, Tommy A. Krause, Mark Lanterman, Paul J. Lehman, Kristi J. Paulson, Susan C. Rhode, Gail Stremel, Bruce R. Williams, Allan Witz, and Julian C. Zebot. Present from the Director's Office were: Director Susan M. Humiston, Managing Attorneys Cassie Hanson, Jennifer S. Bovitz and Binh T. Tuong, and Senior Assistant Director Josh Brand. Also present was Minnesota Supreme Court Associate Justice Natalie Hudson.

Chair Robin Wolpert welcomed and thanked all who contributed to the District Ethics Committee (DEC) Seminar including Susan Humiston, Jennifer Bovitz, the DEC Committee Chair Allan Witz, and all the speakers and moderators. Ms. Wolpert commented that the programming was smooth and the content was timely.

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

The minutes of the June 19, 2020, Board meeting were unanimously approved.

**2. WELCOME JUSTICE NATALIE HUDSON, ASSOCIATE JUSTICE, MINNESOTA SUPREME COURT.**

Ms. Wolpert welcomed Justice Natalie Hudson, the LPRB's liaison justice. Ms. Wolpert commented that she is thrilled that Justice Hudson will be serving as the LPRB's liaison Justice and has known Justice Hudson since her service on the Court of Appeals from 2002-2015. Ms. Wolpert noted that Justice Hudson was appointed to the Minnesota Supreme Court in 2015 and elected in 2016. Ms. Wolpert advised that others will find Justice Hudson to be warm, friendly and a strong intellectual mind.

Justice Hudson addressed the group and thanked Ms. Wolpert explaining she was delighted when the Chief Justice asked her to take on this responsibility. Justice Hudson also advised that she knows Director Humiston as well, and this is a pleasure. Justice Hudson commented that this is a substantive assignment with a busy group and because of the substantive nature of this assignment, she has been allowed to drop Rules Committee assignment demonstrating the Court recognizes the importance of the work of the Board and the Office. Justice Hudson mentioned that she knows some of the members, including Susan Rhode and Landon Ascheman. Justice Hudson also

discussed that she had a good visit with Ms. Wolpert over the phone, and a wonderful visit with Ms. Humiston and some of the Office's managing staff. Justice Hudson explained that she appreciates the time people took with her and she is looking forward to building strong relationships. Justice Hudson described that she views herself as a conduit to the Court and that the line is always open.

**3. OPEN POSTING FOR ATTORNEY MEMBER (ATTACHMENT 2).**

Ms. Wolpert noted that the posting for the attorney Board position is located at Attachment 2. Kyle Loven has a new position that did not allow him to contribute as he wanted to. The position is also posted on the MJB and LPRB websites. Ms. Wolpert encouraged members to recruit people to apply. Ms. Wolpert noted that at the June meeting, the Equity, Equality and Inclusion Committee was formed and noted that we need to take a hard look at this issue on the Board. Ms. Wolpert encouraged members to find qualified diverse candidates that will add the missing lens that we do not have at the table.

Mr. Ascherman commented that he has reached out and posted and observed that the Affinity Bar listserv does not necessarily go out to all members. Mr. Ascherman further commented that recruitment needs a one on one connection. A reminder that qualifications include DEC service, but many DEC's do not have diversity.

Ms. Wolpert added she will work the phones if there is a good candidate.

Michael Friedman asked whether DEC experience is required? Ms. Wolpert responded that it is preferred, but not required and indicated that for MSBA candidates, there is not much chance if the candidate has no DEC experience.

Ms. Wolpert explained that the Executive Committee provides recommendations to the Minnesota Supreme Court and that the Office also does some background work. Ms. Wolpert commented that the application pool right now is strong and noted there is a gender imbalance currently on Board.

**4. COMMITTEE UPDATES:**

a. Rules Committee.

(i) Status, Advertising Rule Petition.

Peter Ivy, Rules Committee Chair, provided the Committee update. Mr. Ivy reported that the Rule 7 consolidation regarding legal services is currently before Ms. Wolpert and Ms. Humiston. Once the petition is ready, the MSBA would like to know because they would like to file

simultaneously. The difference between the MSBA and the LPRB's petitions is the position on the specialist language.

Ms. Humiston commented that the Office will be ready when the MSBA is ready.

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

Mr. Ivy reported that the proposed petition is approved and the Committee has solicited comments. Mr. Ivy noted that LCL is very appreciative, and that comments received were stylistic and typographical, and not substantive. Mr. Ivy stated it is the Committee's inclination to move forward and stated it is the Office's version of data practices.

Ms. Humiston commented that she is excited for the Rule 20, RLPR, revisions.

Mr. Ivy also discussed that a non-majority of the Rules Committee discussed Pennsylvania's Rule 8.4(g). Mr. Ivy reported that the Pennsylvania rule does not address much broader societal issues. Mr. Ivy advised that he sought Binh Tuong's OLPR perspective and learned that there have been two private and eight public dispositions involving Rule 8.4(g), MRPC. Mr. Ivy noted that Rule 8.4(g), MRPC, must be read with Rule 8.4(h), MRPC, and must also be considered with Rule 4.4, MRPC.

Overall, Mr. Ivy noted that we have had Rule 8.4(g) for years and it seems to be working well. Mr. Ivy thanked Ms. Tuong for her help.

Mr. Ivy also discussed the Pertler matter, a recent disbarment involving *Brady* violations. Mr. Ivy noted that the MSBA has quickly stepped in and a training is occurring on October 6, 2020.

Mr. Ivy also highlighted the *Peguse* case from Ramsey County (*State v. Peguse*, File No. A19-2026) pending before the Court of Appeals related to the intersection of *Brady* and data practices.

b. Opinions Committee.

Committee Chair Mark Lanterman advised there are no active issues currently. If there are any issues, let Mr. Lanterman know.

c. DEC and Training Committee.

(i) Seminar Feedback.

Ms. Wolpert stated she thought the DEC Seminar today was fantastic, and is seeking any feedback, including anything that could have been done better.

Mr. Witz, DEC Committee Chair, reported that a tremendous amount of work went into the Seminar which was seamless. Mr. Witz indicated a number of people were responsible and thanked Ms. Humiston, Ms. Bovitz, Ms. Wolpert, and the DEC Committee, and reported that it was great to work with them. Mr. Witz remarked the Seminar was excellent and a fantastic experience.

Shawn Judge added that she found the Seminar informative, and in particular, found the reinstatement programming very interesting and informative and the section on language excellent and timely.

Susan Rhode added that the programming did an excellent job tying the sessions together.

Justice Hudson commented that she was impressed and thought the portions of the Seminar she attended were excellent, and would like to view those she missed and was pleased to learn of the recordings. Justice Hudson also provided kudos to Ms. Wolpert.

Kristi Paulson remarked that the Seminar was logical and engaging. Ms. Paulson suggested considering the use of a Zoom meeting for more engagement, noting that, in some instances, it is hard to get questions typed in.

Ms. Wolpert added that at national meetings, when using other platforms, there is an allowance for table seating and interactions.

Ms. Humiston noted that over 200 attendees registered and while full attendance numbers have not been received, over 160 people attended in the morning session and over 140 people were still in attendance in the afternoon. Ms. Humiston added that we did use a vendor to assist with the platform and we were pleased with the vendor. The Office will be sending a survey seeking feedback.

(ii) Panel Manual Process Update.

Ms. Humiston reported that she has not completed the Panel Manual updates, but the updated version will be sent out to Panel Chairs, who will weigh in first, and then seek broader input. Ms. Humiston also reported that the COVID FAQs are on the website.

Ms. Wolpert reported that a vote on the Panel Manual is planned in January. Ms. Wolpert advised that Panel Chairs need to weigh in, and then it will be sent over to the MSBA Rules of Professional Regulation Committee.

(iii) Logo (Attachment 3).

Ms. Humiston provided an update on the logo that was produced with the help of MJC Communications. Ms. Humiston sends a thank you to MJC and Erin, who runs digital presence for the Court, and delivered an excellent product. Ms. Humiston noted that the logo is a good framework for consistent branding and for incorporating branding into website updates. If anyone has input, please send it to Ms. Humiston.

Mr. Witz also reported that his remaining item is the training manual which was slowed down, but will ramp up now.

d. Mandatory Malpractice Insurance Committee (on hold).

Ms. Wolpert provided the background that about one year ago, Justice Lillehaug reported that the Court wanted the Board to evaluate the issue of mandatory malpractice insurance. As a result, Ms. Wolpert started to put a Committee together and planned to work in concert with the MSBA. Ms. Wolpert reported being ready to begin the work of the Committee, but also acknowledged being overwhelmed by other more pressing work, including the pandemic and racial justice and equity issues. Ms. Wolpert recapped that Justice Lillehaug said he would defer to Justice Hudson regarding the priority of the work. Based on what has been happening this summer, this issue has been on hold. Ms. Wolpert explained she is up to speed on the leading literature on the issue and is ready to pull the trigger following a conversation with Justice Hudson.

Justice Hudson responded that she looks forward to discussing this issue and will also discuss it with the Court, including the priority of the matter, either in a special term or at the October meeting.

e. Equity, Equality and Inclusion Committee.

Ms. Wolpert reported on the work of this newly formed Committee reporting that the Committee first met on July 13, 2020, focusing on broad brainstorming with a key issue focused on data. On August 14, 2020, the key discussion item was what data is out there and how do we get it? Ms. Wolpert noted that Emily Eschweiler has been collecting data and if we could access that data, it would be helpful. Ms. Wolpert added that the Committee will meet one more time before the end of the year. Issues include criminal law process issues and which attorneys draw complaints. The Committee is focused on issues beyond diversity training. Ms. Wolpert is interested in determining whether there is a way to leverage neuroscience and cognitive behavior literature.

The discussion also included a lack of diversity on the Board and DECs. All should be aware the Committee is working and is in progress.

5. **DIRECTOR'S REPORT:**

a. Statistics (Attachment 4).

Ms. Humiston reported that new complaints are down for the year, but are starting to tick back up with a gap of 84. Advisory opinions continue trending up. Ms. Humiston reported that the Office has been able to control the docket and we have used time well but, unfortunately, that is not reflected in the numbers well. Specifically, what is not reflected, is significant work in public cases that will be coming forward. Public cases are tracking year over year. Private discipline is down. The Office has been fielding press calls around the Pertler and MacDonald cases.

Bruce Williams asked Ms. Humiston to address a class action complaint discussed with the Executive Committee. Ms. Humiston explained that the Office received a class action complaint consisting of approximately 100 complaints regarding four lawyers. The complaints were all the same complaint, but by numbers of people. If the Office counted each, it would substantially skew the numbers. The Office recognizes it is important for each complainant to have appeals rights. The goal is to have one named complainant and include others for notice purposes.

b. Office Updates.

Ms. Humiston reported that the Office is open to the public with around ten employees working in the Office, with the majority of employees still

working from home, given the Chief Justice's order. The COVID FAQs are now on the website. Ms. Humiston recognized Ms. Bovitz and Ms. Tuong, who are both doing outstanding work in their management roles. Both are up to the challenge; thank you for all the work they are doing. A special thank you to Mr. Ascheman who presented on an NOBC webinar on remote hearings. Overall, speaking engagements have picked up. Ms. Humiston noted that she loved the plain language session of the Seminar and likes looking at how to do things better. The lease signing is close and Ms. Humiston reported that the amenities of the new space will serve the Office and the Board well.

Ms. Humiston also provided information following the MacDonald Referee hearing, noting there were a lot of press and other calls seeking access to the public hearing. Ms. Humiston reported that the Office was able to livestream the hearing over YouTube and, at one point, over 30 people were viewing the hearing. Ms. Humiston described that the livestream will be marked as private after hearing, noting it will be treated like a regular court hearing and available the day of the hearing.

6. **NEW BUSINESS:**

a. **Live Streaming Board Meetings.**

Ms. Wolpert discussed that there is a question of access to Board meetings and whether they should be live-streamed. Ms. Wolpert explained that the Executive Committee discussed that non-pandemic meetings are held at Town & Country and the number of public attendees is sparse and generally public attendees do not show up. During the pandemic, access information has been posted on the website and a link is provided upon request. Ms. Wolpert noted public accessibility impacts transparency, accountability and may impact deliberations.

Mr. Ascheman commented that in the time of COVID, it is important to make recordings available, for the public to see. Personally, Mr. Ascheman noted that he is in favor of making recordings available in the absence of technology concerns.

Mr. Witz asked what is happening in other states on the same issue?

Ms. Humiston responded that it depends on volunteer states versus bar integrated states in many respects. Integrated states generally have archives accessible to members, and those that had meetings on their websites were

generally part of the bar association. Not all of those, however, were treating hearings the same, as some were livestreaming but not archiving hearings.

Mr. Williams asked how this was going to be accomplished here?

Ms. Humiston responded that streaming to YouTube is functional through Zoom.

Cassie Hanson added that she and Eric Cooperstein discussed this issue and Mr. Cooperstein felt if archives of hearings were kept online, lawyers would be hesitant to come forward with wellness issues.

Mr. Ascherman added that even if we (the Office/Board) stop public posting, others may still capture the proceedings.

Ms. Wolpert added that she would like members to think about these issues and would like to get the perspective of the MSBA Professional Regulation Committee. Ms. Humiston will also find out more from fellow directors in other jurisdictions as well as the related question regarding Panel hearings. A decision will be made in January.

7. **PROPOSED 2021 MEETING DATES (ATTACHMENT 5).**

Ms. Wolpert added that the proposed meeting dates have been vetted against other significant events noting June can be an issue with the MSBA Assembly, but 2021 looks okay. Executive Committee meetings are one week before Board meetings.

8. **QUARTERLY BOARD DISCUSSION (CLOSED SESSION).**

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

Thereafter, the meeting adjourned.

Respectfully submitted,

*Jennifer S. Bovitz* Bovitz, Jennifer  
Jan 14 2021 5:31 PM

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Jennifer S. Bovitz  
Managing Attorney

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

# **Attachment 2**



# MINNESOTA JUDICIAL BRANCH

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## State Courts Limit In-Person Activity in Court Facilities

The response to COVID-19 has impacted access to courthouses and may change the way cases are handled.

[Learn more »](#)

## Public Notice Detail

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### The Minnesota Supreme Court Announces a Public Member Vacancy on the Lawyers Professional Responsibility Board

*Posted: Tuesday, January 19, 2021*

A public member is being sought to fill a vacancy on the 23-member Lawyers Professional Responsibility Board.

The all-volunteer Board is made up of 14 attorneys and 9 public members. The Board is responsible for the oversight and administration of the Office of Lawyers Professional Responsibility. The Office is part of the Judicial Branch and is administered by a Director and a staff of 31.

The Board meets four times per year to consider issues involving the lawyer discipline system, including rule changes and policy implementation. Board members also preside over hearings concerning allegations of unprofessional conduct on the part of lawyers. Panels meet approximately three to four times per year. In addition, Board members consider appeals of dismissed complaints.

The current vacancy is for a three-year term ending on January 31, 2024. No

member may serve more than two three-year terms. The Minnesota Supreme Court will make the appointments.

Compensation is limited to reimbursement for costs. All applicants interested in appointment must submit a letter of interest and resume.

Please submit application materials to AnnMarie S. O'Neill, Clerk of Appellate Courts, via e-mail to [mjcappelleclerkofcourt@courts.state.mn.us](mailto:mjcappelleclerkofcourt@courts.state.mn.us) or by mail to 305 Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Boulevard, St. Paul, MN 55155. Applications must be received no later than 4:30 pm on Friday, February 19, 2021. **Email applications are preferred.**

## Lawyers Professional Responsibility Board (LPRB)

### Roles and Responsibilities—Public Members

The LPRB helps the Minnesota Supreme Court oversee the lawyer ethics and discipline system in Minnesota. The Board is composed of public members and lawyers. Public members play a critical role in bringing their perspectives and experiences to important issues such as the delivery of legal services and the quality of legal services. Because attorneys are self-regulated (by the Court, not an outside entity overseeing attorney regulation), it is important for public confidence in the system that the interests of the public are represented.

As a board member, you will:

- Receive training on attorney ethics and the related rules;
- Learn how the discipline system works to address lawyer misconduct;
- Review complainant appeals if someone is dissatisfied with how their complaint was handled;
- Sit on a panel that reviews charges of professional misconduct to determine if probable cause exists for public discipline against a lawyer (sort of like a grand jury system);
- As a panel member, make recommendations to the Court on whether attorneys who have been previously disciplined and are petitioning for reinstatement should be reinstated;
- As a panel member, review private discipline issued to attorneys;
- Provide your thoughts on potential changes to the ethics rules, bringing forward the perspective of the public.

The time commitment varies but is generally 3-5 hours per month, plus 4 meetings per year.

Lawyers must abide by strict ethics rules, and are disciplined if they do not. You can be a part of a system that works hard to protect the public and legal profession from attorneys who do not follow the rules.

# **Attachment 3**

**AMERICAN BAR ASSOCIATION  
ADOPTED BY THE HOUSE OF DELEGATES**

**AUGUST 3-4, 2020**

**RESOLUTION**

RESOLVED, That the American Bar Association amends Rule 1.8(e) and related commentary of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

**Model Rule 1.8: Current Clients: Specific Rules**

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

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

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

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

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective to clients.

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

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## **Comment**

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### **Financial Assistance**

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other

contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

[No other changes proposed in the commentary to this Rule except renumbering succeeding paragraphs.]

## REPORT

### I. Introduction

The Standing Committee on Ethics and Professional Responsibility (SCEPR) and the Standing Committee on Legal Aid and Indigent Defendants (SCLAID) propose adding a narrow exception to Model Rule 1.8(e) that will increase access to justice for our most vulnerable citizens. Rule 1.8(e) forbids financial assistance for living expenses to clients who are represented in pending or contemplated litigation or administrative proceedings. The proposed rule would *permit* financial assistance for living expenses *only* to indigent clients, *only* in the form of gifts not loans, *only* when the lawyer is working pro bono without fee to the client, and *only* where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions to the client for food, rent, transportation, medicine, and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. Similar exceptions, variously worded, appear in the rules of eleven U.S. jurisdictions.

The proposed rule addresses a gap in the current rule. Currently, lawyers

- may provide financial assistance to any transactional client;
- may invest in a transactional client, subject to Rule 1.8(a);
- may offer social hospitality to any litigation or transactional client as part of business development; and
- may advance the costs of litigation with repayment contingent on the outcome or no repayment if the client is indigent.

The only clients to whom a lawyer may not give money or things of value are those litigation clients who need help with the basic necessities of life. Discretion to give indigent clients such aid is often referred to as “a humanitarian exception” to Rule 1.8(e).<sup>1</sup>

Supporting a humanitarian exception to Rule 1.8(e), one pro bono lawyer wrote: “There are plenty of situations in which a small amount of money can make a huge difference for a client, whether for food, transportation, or clothes.”<sup>2</sup> Another wrote: “I

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<sup>1</sup> See, e.g., Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 GEO. J. LEGAL ETHICS 39, 40 (2015) (discussing the desirability of a humanitarian exception to Model Rule 1.8(e)); Model Rule 1.8(e) “is at odds with the legal profession’s goal of facilitating access to justice. [It] bars lawyers from assisting their low-income litigation clients with living expenses, such as food, shelter and medicine, though such clients may suffer or even die while waiting for a favorable litigation result.” The rule should be changed “[b]ecause of its indifference to the humanitarian or charitable impulses of lawyers and its harsh effect on indigent clients”); Cristina D. Lockwood, *Adhering to Professional Obligations: Amending ABA Model Rule of Professional Conduct 1.8(e) to Allow for Humanitarian Loans to Existing Clients*, 48 U.S.F. L. REV. 457 (2014). See also Florida Bar v. Taylor, 648 So. 2d 1190, 1192 (Fla. 1994) (giving an indigent client a used coat and \$200 is an “act of humanitarianism”).

<sup>2</sup> Statement of Legal Services Corporation (“LSC”) Program Executive Director in connection with a broad but anecdotal survey conducted by the National Legal Aid and Defender Association (NLADA) for the

hate that helping a client . . . is against the rules.”<sup>3</sup> And another: “Legal aid attorneys grapple with enough heartache and burdens that they should not also have to worry about whether a minor gift—an expression of care and support for a client in need—could violate the rule.”<sup>4</sup>

Model Rule 1.8 cmt. [10] gives two reasons for the prohibition against lawyers financially assisting litigation clients. First, it prevents lawyers from having “too great a financial stake in the litigation.” Second, allowing assistance would “encourage clients to pursue lawsuits that would not otherwise be brought.”

Regarding the first reason, because the assistance permitted by the proposed rule must be in the form of a gift, not a loan, there is no interest in recoupment that could affect the lawyer’s advice. Further, the amounts will often be small compared to the sums lawyers may now advance for litigation costs, which are repayable from a client’s recovery and therefore could affect the lawyer’s judgment.

Regarding the second reason—that financial assistance will “encourage... lawsuits that might not otherwise be brought”—in the limited circumstances the amendment describes, that outcome, if it occurs, furthers ABA Policy. By enabling the most financially vulnerable clients to vindicate their rights in court within the proposed rule’s restrictions, the amendment ensures equal justice under law, a core ABA mission.<sup>5</sup>

Additional support for this conclusion is found in legislation—for example, in civil rights and anti-discrimination statutes that empower courts to award counsel fees to the prevailing plaintiff. The policy behind this legislation is to facilitate access to courts, not discourage it.<sup>6</sup> Lawyers in turn advance the legislative purpose if they can financially help their indigent clients with living expenses while a case is pending.

Support is also found in two Supreme Court opinions recognizing the social value of court access. In another context, Justice Hugo Black wrote “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>7</sup> Nor can there be equal justice when the ability to bring and prosecute a case—to get a trial at all—is lost because of extreme poverty.

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ABA Standing Committee on Legal Aid and Indigent Defendants (“SCLAID”), on file with SCLAID (hereinafter, “SCLAID Survey”). See also Schrag, *supra* note 1 at 40.

<sup>3</sup> SCLAID Survey, *supra* note 2, at 3.

<sup>4</sup> *Id.* at 1.

<sup>5</sup> See ABA MISSION STATEMENT, <https://www.americanbar.org/about-the-aba/aba-mission-goals/> (last visited May 4, 2020). Many ABA policies support equal justice. See, e.g., ABA CONSTITUTION Art. 10, sec. 10.1 (creation of the Civil Rights and Social Justice Section and Criminal Justice Section); ABA CONSTITUTION Art. 15 (creation of the ABA Fund for Justice and Education); ABA BY-LAWS sec. 31.7 (creation of SCLAID).

<sup>6</sup> See *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (“The purpose of § 1988 is to ensure ‘effective access to the judicial process’ for persons with civil rights grievances.” H.R. REP. NO. 94-1558, p. 1 (1976)).

<sup>7</sup> *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

Nearly thirty years later, Justice Byron White rejected the argument that restrictions on lawyer advertising were justified by the goal of not “stirring up litigation.” Justice White wrote:

But we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: ‘we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action’. . . . That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride.<sup>8</sup>

The amendment SCEPR and SCLAID propose is client-centric, focused on the most vulnerable populations, and protects the ability of indigent persons to gain access to justice where they might otherwise be foreclosed as a practical matter because of their poverty.

## **II. Support for the Proposed Rule in the Nonprofit Community**

SCEPR and SCLAID have received support from the Society of American Law Teachers (SALT), the National Legal Aid and Defender Association (NLADA), approximately sixty lawyers in nonprofit organizations and legal services and legal aid offices, including the Legal Aid Society in NYC—an office of more than 1200 lawyers, and clinical faculty at law schools nationwide.<sup>9</sup> Further, in a letter to the ABA Board of Governors, the Association of Pro Bono Counsel (“APBCo”), a membership organization of nearly 250 partners, counsel, and practice group managers who run pro bono practices on primarily a full-time basis at more than 100 of the country’s largest law firms wrote:

APBCo supports the effort to modify the Model Rules and permit pro bono lawyers to help their indigent clients meet basic human necessities, such as food, rent, transportation and medicine during the course of the representation. In the context of pro bono representation, none of these kinds of charitable gifts present any concerns raised by the Model Rule, which is designed to prevent lawyers from providing financial assistance to clients in order to subsidize lawsuits or administrative proceedings in a way

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<sup>8</sup> *Zauderer v. Disciplinary Counsel*, 471 U.S. 626, 643 (1985) (*citing* *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 (1977)).

<sup>9</sup> See (i) SALT email of April 24, 2020, (ii) NLADA Memo of April 23, 2020, and (iii) emails dated April 10 and April 11, 2020 from Daniel L. Greenberg, Special Counsel for Pro Bono Initiatives at Schulte, Roth, & Zabel and former member of SCLAID, and Barbara S. Gillers, SCEPR Chair, to public interest lawyers and law school clinicians, and responses, on file with SCEPR. SALT is one of the largest associations of law professors in the United States.

that encourages clients to pursue lawsuits that might not otherwise be brought and gives lawyers a specific financial stake in the litigation. Neither pro bono lawyers nor their firms profit from public interest representation; the kinds of limited financial assistance contemplated by the proposed amendment will in no way violate the intended policy behind the Rule.<sup>10</sup>

### III. Background

Model Rule of Professional Conduct 1.8(e) was adopted in 1983.<sup>11</sup> Its prohibition against financial assistance in connection with litigation is derived from the common law prohibitions against champerty and maintenance.<sup>12</sup> As originally defined, maintenance is “improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.”<sup>13</sup> Champerty is “a specialized form of maintenance in which the person assisting another’s litigation becomes an interested investor because of a promise by the assisted person to repay the investor with a share of any recovery.”<sup>14</sup>

Payments or loans for litigation costs and expenses are allowed under the rule “because [they] are virtually indistinguishable from contingent fees and help ensure access to the courts.”<sup>15</sup> Comment [10], which was added in 2001 on the recommendation of the Ethics 2000 Commission,<sup>16</sup> makes clear that “court costs and litigation expenses [include] the expenses of medical examination and the costs of obtaining and presenting evidence”.<sup>17</sup> Litigation expenses also typically include payments for experts, translators, court reporters, medical examinations connected to the merits or remedies, mailing, and photocopying.<sup>18</sup> However, living expenses in connection with pending or contemplated litigation, e.g. for food, rent, and other basic necessities, were never permitted by the rule

<sup>10</sup> See Letter, April 14, 2020, APBCo to the ABA Board of Governors, on file with SCEPR.

<sup>11</sup> ART GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 at 193 (2013).

<sup>12</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [16] (2019) (paragraph (e) “has its basis in common law champerty and maintenance”); Cristina D. Lockwood, *supra* note 1 at 466 (“the restrictions in Rule 1.8(e) were adopted to protect the poor by incorporating rules against champerty and maintenance”); Utah State Bar, Advisory Op. 11-02 (2011) (Rule 1.8(e) is “derived from the common law prohibition of champerty and maintenance”) (cite omitted); Mich. State Bar Advisory Opinion RI-14 (1989) (Rule 1.8(e) “is the result of the common law rules against champerty and maintenance”). See also John Sahl, *Helping Clients With Living Expenses; “No Good Deed Goes Unpunished”*, 13 No. 2 PROF. LAW. 1 (Winter 2002) (common law doctrines of champerty and maintenance influenced the ABA Rules against financial assistance to clients).

<sup>13</sup> STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 30 (11th ed. 2018) (quoting *In re Trepca Mines, Ltd.*, [1963] 3 All E.R. 351 (C.A.)).

<sup>14</sup> CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.13 at 940 (1986) (cites omitted); GILLERS, *supra* note 13 at 630 (“[c]hamperty [is] the unlawful maintenance of a suit, where a person without an interest in it agrees to finance the suit, in whole or in part, in consideration for receiving a portion of the proceeds of the litigation . . . .”) (quoting *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997)); *In re Primus*, 436 U.S. 412, 424 n. 15 (1978) (champerty is “maintaining a suit in return for a financial interest in the outcome”; maintenance is “helping another prosecute a lawsuit”).

<sup>15</sup> MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [10] (2019).

<sup>16</sup> See GARWIN, *supra* note 11 at 207.

<sup>17</sup> MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [10] (2019).

<sup>18</sup> N.Y. City Bar, Formal Op. 2019-6 at 3 (2019).

because of concerns rooted in traditional common law prohibitions on champerty and maintenance.

Modern American applications of the doctrines of champerty and maintenance are varied and in some jurisdictions are quite limited.<sup>19</sup> Moreover, courts and commentators have recognized that these doctrines “can be used abusively—to deny unpopular litigants access to the courts to vindicate constitutional rights. They can also make it harder for persons with even mundane claims to go to court . . . .”<sup>20</sup> Some bar committees have rejected the essential justification for the doctrines.<sup>21</sup> The SCLAID Survey demonstrated that the prohibition on living expenses is especially harsh on indigent clients for whom even small financial burdens can pose significant barriers to initiating, participating in, and completing litigation.<sup>22</sup> For all of these reasons, and those explained below, the prohibition on financial assistance should no longer apply in the limited circumstances and the types of representations covered by the proposed rule.

#### IV. Analysis

##### A. The Current Rule

Model Rule of Professional Conduct 1.8(e)(1) and (2) strictly limit financial assistance to clients in pending or contemplated litigation. Only court costs and litigation expenses are permitted. The Rule reads: “A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.”<sup>23</sup>

Comment [10] explains why Rule 1.8(e) permits financial assistance for litigation expenses and court costs only: “Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, *because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.*”<sup>24</sup> The Comment continues: “[L]ending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence” is permitted “because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.

<sup>19</sup> REPORT TO THE PRESIDENT BY THE NEW YORK CITY BAR ASSOCIATION WORKING GROUP ON LITIGATION FUNDING 5-8 (Feb. 28, 2020) (“[t]he extent to which the United States has adopted and has continued to enforce prohibitions [based on champerty and maintenance] varies by jurisdiction”) (cites omitted).

<sup>20</sup> GILLERS, *supra* note 13 at 631 (cites omitted).

<sup>21</sup> See, e.g., Utah State Bar, Advisory Op. 11-02, *supra* note 12 at 4 (permitting “small charitable gifts” under Utah RPC 1.8(e), which is “more permissive” than M.R. 1.8(e); observing that “[t]he original goal of not stirring up litigation is no longer a justification for [the rule]”) (cites omitted).

<sup>22</sup> See Memo from SCLAID to the SCEPR dated June 14, 2016, on file with SCEPR [hereinafter, “SCLAID Memo”].

<sup>23</sup> MODEL RULES OF PROF’L CONDUCT R. 1.8(e) (2019).

<sup>24</sup> MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [10] (2019) (emphasis added).

Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.”<sup>25</sup>

## B. The Proposed Rule

The proposed rule adds a new exception, 1.8(e)(3). The new exception permits lawyers representing poor people pro bono or through certain organizations or programs to contribute to the living expenses of their indigent clients. As further explained below, the contributions must be gifts not loans for basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the litigation or administrative proceedings or from withstanding the delays that put substantial pressure on the client to settle. The assistance is permitted even if the representation is eligible for an award of attorney’s fees under a fee-shifting statute, for example, the Civil Rights Attorney’s Fees Award Act.<sup>26</sup> The lawyer may not promise the assistance in advance, seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client, or advertise its availability. The new provision reads:

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. The legal services must be delivered at no fee to the indigent client and the lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide financial assistance to clients.

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

<sup>25</sup> *Id.*

<sup>26</sup> 42 U.S.C.A. § 1988 (“[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 12361 of Title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs [with exceptions]”).

SCEPR and SCLAID propose new Comments [11], [12], and [13] to explain key elements of the new exception.

## Comment [11]

New Comment [11] offers guidance on covered expenses and permitted amounts. Below, this Report first sets out the text of new Comment [11] and then discusses its key elements. The text reads:

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may give the client modest gifts if financial hardship would otherwise prevent the client from instituting or maintaining pending or contemplated litigation or administrative proceedings or from withstanding delays that would put substantial pressure on the client to settle. Gifts permitted under paragraph (e)(3) include modest contributions as are reasonably necessary for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4

### Living Expenses

Comment [11] gives examples of permitted assistance: “Gifts permitted under paragraph (e)(3) include modest contributions as are reasonably necessary for food, rent, transportation, medicine and similar basic necessities of life.” This would include reasonable contributions for meals, clothing, transportation, housing and similar basic necessities. Examples from SCLAID include small amounts for moving to avoid eviction, bus fare, meals, clothes to go to court, and groceries, including cleaning supplies and toilet paper.<sup>27</sup>

### Amounts

The Rule and the Comments permit contributions of modest and reasonable amounts. This follows seven of the eleven jurisdictions that have already adopted a humanitarian exception.<sup>28</sup> The flexibility gives lawyers room to decide amounts based on

<sup>27</sup> See SCLAID Survey, *supra* note 2.

<sup>28</sup> See D.C. Rule of Prof'l Conduct 1.8(d) (a lawyer may “pay or otherwise provide . . . financial assistance which is *reasonably necessary* to permit the client to institute or maintain the litigation or administrative proceedings”) (emphasis added); Minn. Rule of Prof'l Conduct 1.8(e)(3) (a lawyer may guarantee a loan “*reasonably needed* to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship”; prohibits promises of assistance prior to retention and requires that client remain liable for repayment without regard to the

the cost of living in their jurisdictions and other factors. Rent assistance and food costs in New York City, for example, would differ from that in a rural area. Lawyers routinely make judgments about reasonableness. See, e.g., Model Rule 1.4(a)(2) (lawyers must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished”); Model Rule 1.4(a)(3) (lawyers must “keep the client reasonably informed about the status of the matter”); Model Rule 1.4(a)(4) (lawyers must “promptly comply with reasonable requests for information”); Model Rule 1.5 (lawyers must “not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses”); and Model Rule 1.6 (limiting the disclosure of confidential information “to the extent the lawyer reasonably believes necessary”); see *also*, Model Rule 1.0(h), (i) and (j) (defining “reasonable,” “reasonably,” “reasonable belief” and “reasonably should know”).

### No Definition of “Indigent”

The new Rule and Comments do not add a definition of “indigent.” None is needed. The word “indigent” has been in Rule 1.8(e) since 1983. It was also in the predecessor rule, DR 5-103(B). SCEPR is aware of no problems in applying this term. Further, the Model Rules already address obligations toward the indigent, the poor, and “persons of limited means.”<sup>29</sup> Additionally, SCEPR opinions address lawyers’ obligations toward the “indigent.”<sup>30</sup> Webster’s Dictionary defines (1) “indigent” as “suffering from indigence” and “impoverished” and (2) “indigence” as (3) “a level of poverty in which real hardship and deprivation are suffered and comforts of life are wholly lacking” and (4) “impoverished.”

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outcome of the litigation) (emphasis added); Miss. Rule of Prof’l Conduct 1.8(2)(2) (permits a lawyer to advance (i) “reasonable and necessary” (a) “medical expenses associated with treatment for the injury giving rise to the litigation” and (b) “living expenses incurred”; client must be in “dire and necessitous circumstances”; other limitations and conditions apply) (emphasis added). Mont. Rule 1.8(e)(3) (a lawyer may guarantee a loan from certain financial institutions “for the sole purpose of providing basic living expenses;” the loan must be “reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship;” client must remain liable for repayment without regard to the outcome; prohibits promises or advertisements before retention) (emphasis added); N.D. Rule of Prof’l Conduct 1.8(e)(3) (a lawyer may guarantee a loan “reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship;” client must remain liable for repayment without regard to the outcome; no promise of assistance before retention) (emphasis added); Tex. Rule of Prof’l Conduct 1.08(d)(1) (a lawyer may “advance or guarantee . . . reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter”) (emphasis added); Utah Rule of Prof’l Conduct 1.8(e)(2) (a lawyer representing an indigent client may “pay . . . minor expenses reasonably connected to the litigation”) (emphasis added). Only *one* of the eleven jurisdictions incorporates a dollar amount: Mississippi. See Miss. Rule of Prof’l Conduct 1.8(e)(2) (Permitted expenses “shall be limited to \$1,500 to any one party by any lawyer or group or succession of lawyers during the continuation of any litigation unless [the Standing Committee on Ethics of the Mississippi Bar approves a greater amount.]”).

<sup>29</sup> MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. [3] provides: “Persons eligible for legal service [that meet Rule 6.1] are those who qualify for participation in programs funded by the [LSC] and those whose incomes and financial resources are slightly above guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women’s centers and food pantries that serve those of limited means.”)

<sup>30</sup> See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-441 (2006) (discussing the ethical obligations of lawyers “who represent *indigent* persons”) (emphasis added).

Synonyms include “needy, necessitous, and impoverished.”<sup>31</sup> Finally, lawyers covered by the exception generally serve only the poor and the most economically disadvantaged.<sup>32</sup>

### Comment [12]

Comment [12] contains safeguards against conflicts and abuse by prohibiting lawyers from (i) using assistance to lure clients, (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client, and (iii) advertising the availability of assistance. It provides:

[12] The paragraph (e)(3) exception is narrow. A gift is allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide financial assistance to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

### New Comment [13]

New Comment [13] underscores that contributions may be made even if the representation is eligible for fees under a fee-shifting statute but not in connection with contingent-fee personal injury cases or other specified matters. It reads:

[13] Financial assistance may be provided pursuant to paragraph (e)(3) even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

<sup>31</sup> See ROGET’S INTERNATIONAL THESAURUS § 836.8 (3rd ed.). See also THE COMPACT OXFORD ENGLISH DICTIONARY, NEW EDITION, SECOND EDITION (1994) (“indigent” means “destitute,” “lacking in the necessities of life,” “in needy circumstances,” “characterized by poverty,” “poor,” “needy”).

<sup>32</sup> See, e.g., Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* n.4 (Sept. 2009), <https://mlac.org/wp-content/uploads/2015/08/Documenting-the-Justice-Gap.pdf> (“LSC establishes maximum income levels for persons eligible for civil legal assistance . . . the maximum level is equivalent to 125 percent of the federal poverty guidelines”). For poverty guidelines, see U.S. Department of Health & Human Services, *Poverty Guidelines 2020* (2020), <https://aspe.hhs.gov/poverty-guidelines>. See also ABA FINDLEGALHELP.ORG FREQUENTLY ASKED QUESTIONS, [https://www.americanbar.org/groups/legal\\_services/flh-home/flh-faq/](https://www.americanbar.org/groups/legal_services/flh-home/flh-faq/) (last visited May 4, 2020) (clients of public defenders are “indigent”).

### C. Proposed 1.8(e)(3) Does Not Present the Ethical Risks that 1.8(e)(1) and (2) Address

#### Policy Against “Encouraging Litigation”

As noted earlier, Model Rule 1.8(e) prohibits living expenses “because [permitting them] would encourage clients to pursue lawsuits that might not otherwise be brought. . . .”<sup>33</sup>

The proposed amendment could result in a poor client being able to bring and maintain a lawsuit that would not otherwise be brought or that would be settled quickly if brought because of the client’s adverse financial circumstances. SCEPR and SCLAID deem this a worthy objective. It reflects the view that legal ethics rules should not impede a poor client’s access to the courts, as the current rule does, where the conditions described in the proposed rule are present. Furthermore, as noted earlier, in public interest fee-shifting cases the proposed rule will reinforce the legislative goal of facilitating rather than impeding court access. It would frustrate that goal and achieve no benefit if the amendment allowed financial assistance to indigent clients only if a lawyer were willing to forego a court-ordered fee under a fee-shifting statute.

Comment [10] is *not* addressed to the problem of frivolous litigation, as some analysts seem to suggest.<sup>34</sup> Other rules do that. Model Rule 3.1 makes clear that a lawyer “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is basis in law and fact for doing so *that is not frivolous*. . . .”<sup>35</sup> Rule 11 of the Federal Rules of Civil Procedure requires lawyers to certify, *inter alia*, that court filings are not “presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation . . . [and that] claims, defenses, and other legal contentions are warranted by existing law or by a *nonfrivolous* argument for extending, modifying, or reversing existing law or for establishing new law.”<sup>36</sup> Many jurisdictions have similar court rules and other mechanisms to prevent frivolous litigation.<sup>37</sup>

Whatever the relationship between financial assistance and frivolous litigation in other contexts, however, it is not credible that a lawyer working *without fee* would assist

<sup>33</sup> MODEL RULES OF PROF’L CONDUCT R.1.8(e) cmt. [10] (2019).

<sup>34</sup> See Lockwood, *supra* note 1 at 472-474 (“the assertion [in Cmt. [10] is that] unlike the financing of litigation expenses, financing living expenses is somehow distinguishable from contingency fee financing and leads to frivolous litigation”); N.Y. CITY BAR REPORT BY THE PROF’L RESPONSIBILITY COMM. PROPOSED AMENDMENT TO RULE 1.8(E), NY RULES OF PROFESSIONAL CONDUCT 8 (Mar. 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/proposed-amendment-to-rule-18e-ny-rules-of-professional-conduct> [hereinafter “CITY BAR RPT.”] (NYRPC 1.8 cmt. [10], which is identical to Model Rule 1.8 cmt. [10], is aimed, in part, to curb frivolous litigation). Lawyers will “support” plaintiffs, it is suggested, in order to get retained to bring cases that turn out to be frivolous. As shown in the text by reference to Model Rule 1.8 cmt. [10] this is *not* the purpose of the prohibition in 1.8(e). It is not in the text. It is not in the Comment. Other Rules perform that function.

<sup>35</sup> MODEL RULES OF PROF’L CONDUCT R. 3.1 (2019) (emphasis added).

<sup>36</sup> FED. R. CIV. P. 11(b)(1) and (b)(2) (emphasis added).

<sup>37</sup> See, e.g., N.Y. Rules of the Chief Administrator of the Courts Part 130, *Awards of Costs and Imposition of Financial Sanctions For Frivolous Conduct In Civil Litigation*, 22 NYCRR 130-1.1.

a poor client with living expenses, which could not be recouped, so that the lawyer could file a frivolous lawsuit.

### **No Compromise of the Lawyer's Independent Judgment**

Rule 1.8(e) forbids financial assistance for living expenses also to avoid conflicts between the interests of the lawyer and the interests of the client and to protect the lawyer's independence. Living expenses are not allowed "*because such assistance gives lawyers too great a financial stake in the litigation.*"<sup>38</sup>

Rule 1.8(e)(1), however, allows the lawyer to advance the costs of litigation with repayment contingent on the outcome of the matter. There is no cap on the amount of these expenses, which can amount to tens of thousands of dollars. Lawyers also may invest thousands of hours on a contingency matter which will be compensated only if there is a recovery. The profession tolerates these outlays of time and money, trusting that lawyers will honor their obligations to exercise independent professional judgment in the advice they give clients and not be influenced by their own financial concerns.

The proposed rule presents no such risks simply because loans to assist indigent clients are prohibited. Unlike in the exception for advancing the costs of litigation, lawyers have no interest in repayment of the financial help.

### **No Competition for Clients**

Some opponents of expanding a lawyer's discretion to provide financial assistance under Rule 1.8(e) expressed concern that lawyers will use this discretion to improperly compete for clients.<sup>39</sup> The proposed rule avoids this problem because it prohibits advertising or publicizing the availability of financial assistance for living expenses. More importantly, however, pro bono lawyers don't compete for business. As stated by SCLAID: "Poverty lawyers and lawyers who provide *pro bono* service to clients in poverty are simply not competing for the business of their clients."<sup>40</sup>

### **Other Impediments to Financial Assistance**

There may be other laws or rules in American jurisdictions that will operate if financial assistance is allowed and provided. Some commenters seemed to suggest that the proposed rule might affect a client's tax status or the ability to qualify for public assistance or social services or, potentially, a financial disclosure requirement. SCEPR and SCLAID have seen no evidence that the type of modest assistance to indigent clients

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<sup>38</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. [10] (2019) (emphasis added).

<sup>39</sup> See, e.g., Sahl, *supra* note 12 at 5 ("[s]ome practitioners fear a competitive disadvantage in the marketplace for legal services if the profession permits lawyers to advance living expenses because only more established or affluent lawyers will offer such assistance") (cite omitted); Schrag, *supra* note 1 at 54 (a "thread that runs through the history of Rule 1.8(e) is the concern that lawyers might compete with each other for business through the generosity of the gifts or loan terms that they might offer their clients").

<sup>40</sup> SCLAID Memo, *supra* note 22.

for basic necessities of life permitted by the proposed rule will have such consequences.<sup>41</sup> However, Model Rule of Professional Conduct 1.4 requires lawyers to consult with clients about the representation and a reference is made to that obligation in the proposed new Comments.

Financial assistance to transactional clients, social hospitality toward all clients as part of business development, and payment of litigation expenses that may or may not be recovered may all have collateral consequences under tax or other law. But in allowing each, the only question is whether the activity creates the kind of dangers that should concern the Model Rules of Professional Conduct. The limited exception in the proposed amendment does not create those dangers.

## V. The Need for ABA Leadership

In all but eleven U.S. jurisdictions Rule 1.8(e) is identical or substantially similar to Model Rule 1.8(e).<sup>42</sup> Ethics Committees generally interpret the prohibition strictly.<sup>43</sup> Courts generally discipline lawyers for providing clients with non-litigation expenses.<sup>44</sup> Only a handful of courts and ethics committees have approved financial assistance in small amounts beyond litigation expenses, even where the text of the rule would forbid it.<sup>45</sup>

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<sup>41</sup> SCEPR asked Tom Callahan, Chair of the ABA Tax Section, about the tax consequences of the proposed rule. He told the Committee that the proposed rule appears to be a gift with true donative intent; that the gift should be neither income to the donee nor deductible by the donor for federal income tax purposes; and that there is an exclusion from gift taxes of up to \$15,000 per donee for 2020. Tom Callahan also indicated that the tax impact, if any, of state and local taxes has not been considered. Email exchange between Tom Callahan and SCEPR Chair Barbara S. Gillers, on file with SCEPR.

<sup>42</sup> See ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 173 (9th ed. 2019) (“[m]ost jurisdictions do not allow an exception for assisting indigent clients”).

<sup>43</sup> See N.Y. City Bar, Formal Op. 2019-6, *supra* note 18 at 2 (“routine medical care and living expenses do *not* qualify as expenses of litigation even if, in the absence of assistance, the client may be pressured to accept an unfavorable settlement”) (emphasis in original) (cites omitted); Conn. Bar Ass’n, Informal Op. 2011-10 (2011) (water bills; \$300 in advance rent to avoid eviction); Pa. Bar Ass’n, Informal Op. 94-12 (1994) (bond for preliminary injunction); Ariz. State Bar, Formal Op. 95-01 (1995) (transportation costs); Ill. State Bar Ass’n, Advisory Op. on Prof’l Conduct 95-6 (1995) (medical care); S.C. Bar Ethics Advisory Comm., Advisory Op. 89-12 (1989) (medical treatment). *But see* N.C. State Bar, Formal Op. 7 (occasional cab or bus fare or other transportation cost may be permitted as a litigation cost “when reasonable in light of the distance to be traveled”).

<sup>44</sup> See Schrag, *supra* note 1 at 59-61 (discussing “unforgiving” application of Rule 1.8(e)); Lawyer Disciplinary Bd. v. Nessel, 769 S.E.2d 484, 493 (W. Va. 2015) (prohibition on living expenses is absolute; no exception for “altruistic intent”); Matter of Cellino, 798 N.Y.S.2d 600 (4<sup>th</sup> Dept. 2005) (suspension for, among other violations, loaning a client money for the client’s son’s nursing and care and rehabilitation); State *ex rel.* Oklahoma Bar Ass’n v. Smolen, 17 P.3d 456 (2000) (suspending a lawyer for, among other violations, loaning a client \$1200 for living expenses); Maryland Attorney Grievance Comm’n v. Kandel, 563 A.2d 387 (Md. App. 1989) (discipline for advancing the cost of medical treatment and transportation to obtain the treatment).

<sup>45</sup> See, e.g., Florida Bar v. Taylor, 648 So.2d 1190, 1192 (Fla. 1994) (used clothing for child and \$200 for necessities approved as “act of humanitarianism”); Okla. Bar Ass’n, Op. 326 (2009) (“[n]ominal monetary gifts by a public defender to a death row inmate for prison system expenses”); Va. State Bar Legal Ethics Op. 1830 (2006) (“nominal amounts” to an incarcerated client to buy personal items or food at the jail

Of the jurisdictions that have adopted an exception to Rule 1.8(e)'s prohibition on providing assistance for living expenses, some go beyond the modest amendment SCEPR and SCLAID propose.<sup>46</sup> They permit, for example, advances and loans for basic needs and other living expenses. Reimbursement by the client is sometimes required. By contrast, the proposed rule permits gifts only. No loans. No advances. No reimbursements. New Jersey has a specific provision for pro bono legal services.<sup>47</sup>

The proposed rule draws on the rules of the eleven jurisdictions, expert commentary, and comments provided in response to earlier drafts. In addition, SCEPR and SCLAID notes that recently, the New York State Bar Association (NYSBA) House of Delegates unanimously approved a recommendation by the NYSBA Committee on Standards of Attorney Conduct (COSAC) and the City Bar Professional Responsibility Committee to adopt a humanitarian exception to NYRPC 1.8(e) that is similar in some respects to the one SCEPR and SCLAID propose for the Model Rules.<sup>48</sup>

The ABA has been a leader in access to justice for decades. It should lead here, too, by changing an out-of-date rule that interferes with access to justice by the most vulnerable population and encouraging all American jurisdictions to adopt the new rule.

## VI. Support Based on Bar Counsel Experience

SCEPR asked bar counsel for the eleven jurisdictions with some form of humanitarian exception about their experience implementing the provision. Two jurisdictions, D.C. and Louisiana, responded. Both jurisdictions permit loans for living expenses and apply in contingency matters. Chief Disciplinary Counsel in Louisiana wrote that Louisiana's version of Rule 1.8(e), which has been in effect since 1976,

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commissary); Md. State Bar Ass'n Comm. on Ethics, Op. 2000-42 (2000) (a "de minimus gift" does not violate 1.8(e)); Ariz. State Bar, Formal Op. 91-14 (1991) (loan for client's daughter's medical care prohibited but a gift for that purpose is permitted if the lawyer has a "charitable motivation").

<sup>46</sup> In addition to the rules cited in footnote 28, see Ala. Rule of Prof'l Conduct 1.8(e) (lawyer may advance or guarantee emergency assistance; prohibits (i) making repayment contingent on the outcome and (ii) promises or assurance of assistance before retention); Cal. Rule of Prof'l Conduct 1.8.5 (permits a lawyer to pay a client's personal or business expenses to third person, "from funds collected or to be collected for the client as a result of the representation" with the consent of the client: and "to pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interest of an indigent person in a matter in which the lawyer represents the client"); La. Rule of Prof'l Conduct 1.8(e) (permits financial assistance in addition to court costs and litigation expenses to clients in "necessitous circumstances"; conditions and limitations apply).

<sup>47</sup> N.J. Rule of Prof'l Conduct 1.8(e) provides: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that . . . (e)(3) a legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualifying pro bono service as defined in R. 1:21-11(a), may provide financial assistance to an indigent client whom the organization, program or attorney is representing without fee." N.J. Rules of Court, R. 1:21-11(a) defines "qualifying pro bono service" to include legal assistance through a legal services or public interest organization and legal assistance through a law school clinical or pro bono program.

<sup>48</sup> NYSBA COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT MEMORANDUM 3-6 (Jan. 15, 2020), <https://nysba.org/app/uploads/2020/03/12-14-cosac-AGENDA-ITEM-8.pdf>. CITY BAR RPT., *supra* note 34.

permits lawyers to advance monies to clients in necessitous circumstances. The Louisiana rule is not limited to non-profits and does not prohibit a lawyer from obtaining reimbursement, although it does not permit a lawyer to obtain reimbursement of interest for funds the lawyer advances directly . . . The Louisiana Office of Disciplinary Counsel has received very few complaints against lawyers concerning Rule 1.8(e) and (f). The complaints that have been lodged primarily involve how the lawyer calculated disbursement of funds from monetary recoveries resulting from a suit or settlement. Because you have informed me that the proposed ABA Rule prohibits any reimbursement of any necessitous circumstances advances, I do not anticipate that such a rule would lead to any complaints (such as the ones we have received) to a state's disciplinary counsel. Based upon my experience as the Chief Disciplinary Counsel in Louisiana, it is my belief that the rule discussed would not lead to an increase in disciplinary enforcement action nor increase the potential for harm to the public or to the legal profession.<sup>49</sup>

Disciplinary Counsel for D.C. wrote:

We have had few if any complaints about lawyers violating Rule 1.8(d) [the D.C. analogue to M.R. 1.8(e)]. I can't represent that no one has ever complained because I don't have a way of checking every one of the approximately 1000 complaints we receive each year. Certainly, we have never brought a case based on a violation of that rule, and it has been mentioned in only three reported opinions, two of which are reciprocal matters from other states whose parallel rule is not as liberal as our Rule 1.8(d).<sup>50</sup>

## VII. Support from the Pro Bono Community

Commenters have questioned whether the pro bono community supports adding a humanitarian exception to Rule 1.8(e). SCEPR's work in connection with the proposed rule shows that there is broad support for this in the pro bono and law school clinician

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<sup>49</sup> Letter from Chief Disciplinary Counsel in Louisiana, Charles B. Plattsmier to SCEPR Member Michael H. Rubin (Apr. 8, 2020) (on file with SCEPR).

<sup>50</sup> E-mail from Hamilton P. Fox, Disciplinary Counsel in D.C. to SCEPR Member Thomas H. Mason (Apr. 8, 2020) (on file with SCEPR) (citing the following reciprocal cases: *In re Schurtz*, 25 A.3d 905, 906-907 (D.C. 2011); *In re Edelstein*, 892 A.2d 1153, 1159 n.3 (D.C. 2006); *In re Wallace*, Board Docket No. 17-BD-001 at 10 n.6 (BPR HCR, Mar. 16, 2018)). See also Sahl, *supra* note 12 at 8 (DC's "permissive approach concerning lawyer advances for living expenses has existed for a 'long time and has not produced any official complaints.' Nor has the approach caused the bar any 'reason to be concerned.'") (citing the author's conversations with D.C. Bar Counsel); CITY BAR RPT., *supra* note 34 at 10 ("the committee informally consulted bar regulators and academic ethicists in the jurisdictions which currently have a version of a 'humanitarian exception,' in order to assess whether those rules have led to any notable abuses or problems. Without exception, no one reported problems with a humanitarian exception in pro bono cases.").

communities.<sup>51</sup> SCLAID is a cosponsor. ABA supporters include the Diversity and Inclusion Center and its constituent Goal III entities—the Coalition on Racial and Ethnic Justice; Commission on Disability Rights; Commission on Hispanic Legal Rights and Responsibilities; Commission on Racial and Ethnic Diversity in the Profession; Commission on Sexual Orientation and Gender Identity; Council for Diversity in the Educational Pipeline; and Commission on Women in the Profession; the Standing Committee on Pro Bono and Public Service, the Section of Civil Rights and Social Justice, the Commission on Homelessness and Poverty, the Law Students Division, the Commission on Domestic and Sexual Violence, the Standing Committee on Disaster Response & Preparedness, and the Standing Committee on Legal Assistance for Military Personnel. In addition, the Society of American Law Teachers (SALT), the National Legal Aid and Defender Association (NLADA), approximately sixty pro bono lawyers and law school clinicians nationwide, the Legal Aid Society of New York (an organization of more than 1200 lawyers), and APBCo support it.<sup>52</sup> Just recently— on Easter weekend and in response to SCEPR’s Survey—one lawyer wrote:

Ethics rule 1.8, and its correlating rule under New York rules, has substantially hindered our ability to support clients: rather than supporting those in the most desperate of circumstances, we can only help clients with no pending or contemplated litigation. We urge the rule be amended to allow our ability to respond to our client’s financial needs during this crisis.<sup>53</sup>

Some lawyers outside the pro bono community have suggested that giving pro bono lawyers discretion to help their needy clients would create stress that might impair the client-lawyer relationship. SCEPR has seen no evidence from the pro bono community that this is true, and there are several approaches short of denying the discretion to the many pro bono lawyers who seek it. Lawyers and legal services organizations can adopt a policy against providing assistance with living expenses to any client. Alternatively, decisions can be made not by individual attorneys but by a central decision maker according to rules and standards adopted by the organization.

### **VIII. Conclusion**

For the foregoing reasons, the ABA should adopt the proposed amendments to Rule 1.8(e).

Respectfully submitted,

Barbara S. Gillers  
Chair, Standing Committee on Ethics  
and Professional Responsibility  
August 2020

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<sup>51</sup> See Section II of this Report.

<sup>52</sup> *Id.*

<sup>53</sup> E-mail from Michael Pope, Executive Director of Youth Represent, to Daniel L. Greenberg and Barbara S. Gillers (Apr. 10, 2020) (on file with SCEPR).

**GENERAL INFORMATION FORM**

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Barbara S. Gillers, Chair, Standing Committee on Ethics and Professional Responsibility

1. Summary of the Resolution(s). The proposed rule amends Model Rule 1.8(e) by adding a narrow exception that will increase access to justice for the most vulnerable clients. Rule 1.8(e) forbids financial assistance for living expenses to clients who are represented in pending or contemplated litigation or administrative proceedings. The proposed rule would *permit* financial assistance for living expenses *only* to indigent clients, *only* in the form of gifts not loans, *only* when the lawyer is working pro bono and without fee or through a nonprofit legal services or public interest organization or a law school clinical or pro bono program, and *only* where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions to the client for food, rent, transportation, medicine, and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle.

The proposed rule closes a gap in the current rule. Currently, lawyers may provide financial assistance to transactional clients, may offer social hospitality to any litigation or transactional client and may advance or pay the costs of litigation with repayment contingent on the outcome or no repayment if the client is indigent. The only clients to whom lawyers may not give money or things of value are litigation clients who need help with basic necessities of life. By allowing lawyers to give such gifts, the proposed rule will increase access to justice and permit lawyers to follow their humanitarian instincts.

2. Approval by Submitting Entity. The Resolution was approved in May 2020 by both the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Legal Aid and Indigent Defendants.
3. Has this or a similar resolution been submitted to the House or Board previously? The ABA Model Rules of Professional Conduct were adopted by the House of Delegates in 1983. Model Rule 1.8(e) was a part of that submission. It has not been amended since its adoption in 1983.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The ABA Model Rules of Professional Conduct, as adopted by the House of Delegates, are ABA policy. This would amend that policy. The SCEPR knows of no other ABA policy that would be affected by this change. As noted in the report, "By enabling the most financially vulnerable clients to vindicate their rights in court within the proposed rule's restrictions, the amendment ensures equal justice under law, a core ABA mission." ABA Goal IV is to "Advance the Rule of Law." To meet this goal, one of the ABA's objectives is to "[a]ssure meaningful access

to justice for all persons.” SCEPR and SCLAID believe this resolution advances that objective.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. (If applicable) N/A
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. Information about the amendment will be provided to the Chief Justice of every state. Developments in the states will be tracked and published on the Center’s website.
8. Cost to the Association. (Both direct and indirect costs) None
9. Disclosure of Interest. (If applicable) N/A
10. Referrals.

Standing Committee on Legal Aid and Indigent Defendants  
 Center for Diversity and Inclusion  
 Business Law Section  
 Civil Rights & Social Justice Section  
 Criminal Justice Section  
 Health Law Section  
 Law Student Division  
 Litigation Section  
 Young Lawyers Division  
 Commission on Disability Rights  
 Commission on Immigration  
 Commission on Homelessness & Poverty  
 Center on Children & the Law  
 Commission on Domestic and Sexual Violence  
 Commission on Law & Aging  
 Standing Committee on Professionalism  
 Standing Committee on Pro Bono & Public Service  
 Standing Committee on Legal Assistance for Military Personnel  
 Standing Committee on Professional Regulation  
 Standing Committee on Lawyers’ Professional Liability  
 Standing Committee on Public Protection in the Provision of Legal Services  
 Commission on Lawyers’ Assistance Programs  
 Commission on Interest on Lawyers’ Trust Accounts  
 Standing Committee on Delivery of Legal Services  
 Standing Committee on Disaster Response & Preparedness  
 Standing Committee on Group & Prepaid Legal Services

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## Standing Committee on Lawyer Referral & Information Services

11. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Barbara S. Gillers, Chair of the Standing Committee on Ethics and Professional Responsibility, 917.679.5757, barbara.gillers@nyu.edu

12. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

Barbara S. Gillers, Chair of the Standing Committee on Ethics and Professional Responsibility, 917.679.5757, barbara.gillers@nyu.edu

## EXECUTIVE SUMMARY

### 1. Summary of the Resolution.

The resolution asks the House of Delegates to add a narrow exception to Model Rule 1.8(e) that will increase access to justice for our most vulnerable citizens. Rule 1.8(e) forbids financial assistance for living expenses to clients who are represented without fee to the client in a pending or contemplated litigation or administrative proceeding. The proposed rule will permit modest financial assistance to indigent clients by lawyers representing those clients in litigation or administrative proceedings pro bono or through a nonprofit legal services or public interest organization or a law school clinical or pro bono program.

The proposed rule would *permit* financial assistance for living expenses *only* to indigent clients, *only* in the form of gifts not loans, *only* when the lawyer is working pro bono without fee to the client, and *only* where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions for food, rent, transportation, medicine, and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. Similar exceptions, variously worded, appear in the rules of eleven U.S. jurisdictions.

A lawyer may not: (1) promise, assure or imply the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (2) seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; or (3) publicize or advertise a willingness to provide financial assistance to clients.

### 2. Summary of the issue that the resolution addresses.

ABA Model Rule of Professional Conduct 1.8(e) is at odds with the ABA's goal of increasing access to justice. It prohibits lawyers from helping indigent clients with basic and essential living expenses such as food, clothing, shelter and medicine while a litigation or administrative proceeding is pending even where financial hardship prevents the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle.

The history, development, and commentary on the prohibition against financial assistance to litigation clients establishes two reasons for the prohibition, which are succinctly stated in Comment [10] to Rule 1.8. First, the prohibition prevents lawyers from having "too great a financial stake in the litigation." Second, allowing assistance would "encourage clients to pursue lawsuits that would not otherwise be brought."

Because the assistance permitted by the proposed rule must be in the form of a gift, not a loan, there is no interest in recoupment that could affect the lawyer's advice. Further, by enabling the most financially vulnerable clients to vindicate their rights in court within

the proposed rule's restrictions, the amendment ensures equal justice under law, a core ABA mission. An exception for assistance permitted by the proposed rule is commonly referred to as a "humanitarian exception" to the prohibitions in Model Rule 1.8(e).

The proposed rule to add a humanitarian exception to Rule 1.8(e) has received support from a wide variety of pro bono, legal services and legal aid lawyers and from law school clinicians. This group includes approximately sixty lawyers in nonprofit organizations and legal services and legal aid offices, the Legal Aid Society in NYC—an office of more than 1200 lawyers, and clinical faculty at law schools nationwide. SCEPR and SCLAID have received support from the Society of American Law Teachers (SALT) and the National Legal Aid and Defender Association (NLADA). Further, in a letter to the ABA Board of Governors, the Association of Pro Bono Counsel ("APBCo"), a membership organization of nearly 250 partners, counsel, and practice group managers who run pro bono practices on primarily a full-time basis at more than 100 of the country's largest law firms wrote, "APBCo supports the effort to modify the Model Rules and permit pro bono lawyers to help their indigent clients meet basic human necessities, such as food, rent, transportation and medicine during the course of the representation. In the context of pro bono representation, none of these kinds of charitable gifts present any concerns raised by the Model Rule, which is designed to prevent lawyers from providing financial assistance to clients in order to subsidize lawsuits or administrative proceedings in a way that encourages clients to pursue lawsuits that might not otherwise be brought and gives lawyers a specific financial stake in the litigation. Neither pro bono lawyers nor their firms profit from public interest representation; the kinds of limited financial assistance contemplated by the proposed amendment will in no way violate the intended policy."

In addition, many ABA committees and entities involved in access to justice initiatives support the proposed rule. These include the cosponsor, the Standing Committee on Legal Aid and Indigent Defendants, the Diversity and Inclusion Center and its constituent Goal III entities, the Standing Committee on Pro Bono and Public Service, the Section of Civil Rights and Social Justice, the Commission on Homelessness and Poverty, the Commission on Domestic and Sexual Violence, the Law Students Division, the Standing Committee on Disaster Response & Preparedness, and the Standing Committee on Legal Assistance for Military Personnel.

While support for the proposed rule is deep and wide within the public interest community, the proposed rule *does not require* any lawyer to provide financial assistance for living expenses to indigent clients.

3. Please explain how the proposed policy position will address the issue.

The amendment to Model Rule 1.8(e) would eliminate the prohibition on providing indigent clients represented pro bono in litigation or administrative proceedings with modest financial assistance for basic necessities of life, e.g. food, clothing, shelter, and medicine, when financial hardship would otherwise prevent these clients from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on these clients to settle.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

During our pre-filing circulations of a draft resolution and report (on March 12 and 13, on April 20, and again in May 2020) the following committees noted their support for permitting modest financial assistance for basic living expenses to indigent clients represented pro bono in litigation and administrative proceeding but also offered general comments and specific amendments: the Steering Committee of the ABA's Death Penalty Representation Project, the Committee on Business and Corporate Litigation of the Business Law Section, and the Standing Committees on (i) Professionalism, (ii) Interest on Lawyers' Trust Accounts, (iii) Lawyers' Professional Liability, (iv) Professional Regulation, and (v) Public Protection in the Provision of Legal Services.

SCEPR and SCLAID made amendments to the report and resolution as a result. We believe these changes address most of the concerns raised.

As is customary for both SCLAID and SCEPR, we will continue to work with all entities presenting concerns to ensure that all are heard and that every reasonable attempt at consensus is made.

*No resolution presented herein reflects the policy of the Minnesota State Bar association until approved by the Assembly. Informational reports, comments, and supporting data are not approved by their acceptance for filing and do not become part of the policy of the Minnesota State Bar Association unless specifically approved by the Assembly.*

**MSBA Professional Regulation Committee  
November 17, 2020**

**REPORT AND RECOMMENDATION PROPOSING AMENDMENTS TO RULE 1.8(e), MINNESOTA  
RULES OF PROFESSIONAL CONDUCT**

**Recommendation:**

That the Minnesota State Bar Association (MSBA) petition the Minnesota Supreme Court requesting amendments to Rule 1.8(e) of the Minnesota Rules of Professional Conduct, and amendments to comments 11-13 of Rule 1.8 as indicated below.

**Report**

**Background on the ABA Model Rule:** In August 2020, the American Bar Association amended Rule 1.8(e), Model Rules of Professional Conduct (MRPC), to provide a “humanitarian exception” (see Attachment 1). Rule 1.8(e) generally forbids lawyers to provide financial assistance to litigation clients, but provides certain exceptions. The new humanitarian exception allows lawyers to provide modest gifts to indigent clients, to enable the clients to withstand delays in litigation.

Model Rule 1.8(e), as amended allows “modest gifts to the [pro bono] client for . . . living expenses if financial hardship would otherwise prevent the client [from withstanding delays in litigation]. . . .” Examples include gifts for food and rent. The amendment is called, “the humanitarian exception” (to the general prohibition in Rule 1.8(e) on lawyers providing financial assistance to litigation clients).

The main reason advanced within the ABA for amending Model Rule 1.8(e) was to enhance access to justice by financially needy persons. In line with this purpose, the amended Rule allows gifts to pro bono clients for living expenses. The ABA believed such gifts to be necessary sometimes for pro bono clients to withstand the delays of litigation.

The ABA Report identified numerous ABA committees, as well as a wide variety of pro bono organizations, which supported the amendment.

The ABA Report in support of the amendment cites numerous states that have already adopted a “humanitarian exception.” These states tend to allow amounts “reasonably necessary” to withstand delay in litigation. On June 11, 2020, New York adopted a “humanitarian exception” rule but did not limit the amount of gifts to those which are “modest.” See Attachment 2.

**Professional Regulation Committee (PRC) Deliberations and Reasoning:** In recent years the MSBA, the Office of Lawyers Professional Responsibility (OLPR), and the Lawyers Professional Responsibility Board (LPRB) have generally taken the position that ABA Model Rule amendments should have a presumption of adoption in Minnesota. The practice of law increasingly involves multi-state and multi-national representations, making uniformity in regulations increasingly desirable.

A sub-committee of PRC questioned the consistency of the amended rule’s permission for only “modest gifts” and the rule’s purpose to facilitate access to justice by allowing gifts for living expenses. Living expenses for the duration of litigation may well be substantial.

It appears that the main policy purpose of current Rule 1.8(e) is to prevent conflicts of interest that could arise if a lawyer had too great a financial stake in the resolution of litigation. A lawyer who worried about repayment of a loan might have an incentive to recommend a settlement by which the lawyer would receive a contingent fee, have out of pocket expenses repaid, and have a loan for living expenses repaid.

But the current rule only roughly fits the rule's policy purposes. A lawyer who guarantees a loan seems to have a financial incentive similar to a lender who makes a loan. In some cases, the financial incentives of a contingent fee and of recovery of costs and expenses may be far greater than a loan amount. A lawyer who has made a gift normally has no financial incentive regarding a case outcome, but gifts are a form of "financial assistance" and therefore are currently prohibited in Minnesota.

Proponents of the ABA amendment to Rule 1.8 contended that gifts to pro bono clients would not cause conflicts of interest.

**OLPR Practices.** In October, 2020, the PRC sub-committee met with the Pro Bono Council, a subcommittee of the MSBA's Access to Justice Committee that includes legal aid attorneys, pro bono attorneys and staff from organizations that work with them. Some of these attorneys indicated they have requested advisory opinions from OLPR regarding whether they may make modest gifts, such as a Target gift card, or holiday presents for a client's children. OLPR has opined that such gifts would violate Rule 1.8(e).

Two cases exemplify disciplines for lawyers' modest gifts to non-pro bono clients. Both clients were incarcerated during criminal appeals. Because it appears that neither representation was pro bono, the ABA amendment would not change the outcomes in such cases.

One lawyer representing an incarcerated defendant put \$1,000 of his own funds in the client's jail spending account, without expecting repayment. The gift was intended to facilitate long-distance calls to the client's family. The lawyer was admonished, because, "The attorney's actions appeared well-intentioned, but nevertheless violated the rule." Martin A. Cole, *Summary of Admonitions*, Bench & B. of Minn., Feb. 2012.

Another lawyer put money into the canteen account of an incarcerated prisoner-client to help the prisoner buy a TV. OLPR charged a Rule 1.8(e) violation, the lawyer admitted the charge, and pursuant to stipulation, the Court imposed discipline. The lawyer committed much more serious misconduct in other matters. *In re Novak*, File No. A-18-1329 (Minn. Oct. 11, 2018).

According to the ABA Report, OLPR's practices would be in line with the great majority of jurisdictions. Prior to the Model Rule amendment, only about a dozen states had adopted a "humanitarian exception" for living expenses, by case law or rule.

**Some Current Minnesota Pro Bono Lawyer-Client Gift Practices.** At the Pro Bono Council meeting and in interviews with some other pro bono attorneys, the following was reported. Some pro bono lawyers or organizations provide small, short-term financial support for clients. An example would be payment into court of back rent, which is required in certain eviction cases. One large law firm won reversal of a criminal conviction and received a very large award under a federal fee-shifting statute. The firm transferred the award to the now-former client, who had been freed from a long incarceration and had no other resources.

It appears generally that pro bono lawyers would favor adoption of the Model Rule. It is not clear, however, how much the rule would be used. There has not been any initiative from pro bono attorneys or organizations toward adoption of the Model Rule.

**Historical Background of the Minnesota Permission to Guarantee Loans.** In 1981, the Minnesota Supreme Court adopted an exception, allowing attorneys to guarantee but not to make, loans to litigation clients, to withstand litigation delay. The Court adopted this exception upon a Lawyers Board petition. An article recounts these developments. Note, *Guaranteeing Loans to Clients Under Minnesota's Code of Professional Responsibility*, 66 Minn. L. Rev. 1091 (1982).

The following is a section on the history of Rule 1.8(e) in Minnesota, copied from William J. Wernz, *Minnesota Legal Ethics*.

Rule 1.8(e) generally forbids lawyers to provide “financial assistance” to litigation clients, with certain exceptions. Most cases and controversies have centered on lawyers’ loans to clients, for living expenses. There always have been limits on attorney financial assistance to litigation clients, but the nature of the limits has changed from time to time. The rules limiting assistance are more the product of history and compromise than of a coherent overall design.

The rules on paying litigation costs and expenses have varied over time. An agreement by which a lawyer would “pay either the whole or a share” of costs and expenses once was once considered “champertous” and, without doubt, “would constitute professional misconduct . . .” *In re De La Motte*, 123 Minn. 54, 56, 142 N.W. 929 (Minn. 1913). Canon 42 of the ABA Canons of Professional Ethics stated, “A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.” Now, however, such payments may be made in certain circumstances, e.g., where the client is indigent or where repayment is contingent on outcome. Rule 1.8(e)(1), (2). Similarly, the rules on lawyers’ making loans for living expenses to litigation clients have changed. In general, until the adoption in Minnesota, in 1970, of DR 5-103, as part of the Code of Professional Responsibility, Minnesota lawyers were not forbidden to make loans for living expenses to litigation or other clients. Many years before 1970, the court answered the following questions in the negative, “But is it champerty or maintenance or against public policy for an attorney to solicit business, to pay money to a poor client for his living expenses during the litigation, or to advise him against a settlement of his case?” *Johnson v. Great N. Ry.*, 128 Minn. 365, 369, 151 N.W. 125, 127 (1915). Loans as inducements to retaining a particular attorney were, and remain, forbidden. *In re McDonald*, 204 Minn. 61, 63, 72, 383 N.W. 677, 679, 683 (1938); Rule 1.8(e)(3). The shift toward prohibiting loans for living expenses to litigation clients began with ABA Informal Opinion 288 (1954), which opined, against the weight of case authority, that loans to litigation clients were unethical. DR 5-103(B) of the Model Code of Professional Responsibility, adopted in 1969, provided that “a lawyer shall not advance or guarantee financial assistance to his [litigation] clients,” except for expenses. The Minnesota Code, adopted in 1970, followed the Model Code until 1981, when the former was amended to allow loan guarantees. Michael J. Hoover, *Avoidance of Proprietary Interests in Litigation*, Bench & B. of Minn., Dec. 1981, at 15.

**Champerty and Litigation Funding.** “Champerty” is an ancient common law doctrine that refers to a person obtaining a financial interest in litigation in return for a loan or other consideration paid to a litigant. In 2020, the Court abolished the ancient doctrine of champerty in Minnesota. *Maslowski v. Prospect Funding Partners, LLC*, 944 N.W.2d 235 (Minn. 2020). The Court reasoned that the common law should reflect current social values and, “Societal attitudes regarding litigation have also changed significantly.” The Court’s reasoning included that access to justice was an important goal and that society’s understandings of litigation had evolved. The Court noted that litigation financing was now an estimated \$50 - \$100 billion business in the United States.

Rule 1.8 comment 16 states, “Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its

basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation.”

**Comment Including Fee-Shifting Cases.** Model Rule 1.8 comment 13 states, “Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute.” There are many federal and state fee-shifting statutes. In some cases, very sizable fees may be awarded. The purpose of the fee-shifting statutes is to incentivize lawyers to undertake litigation that is deemed to be in the public interest. Some fee-shifting statutes are part of more general provisions that also allow for recovery of damages, while others provide only for injunctive relief. Some lawyers concentrate their practices in matters that allow for fee-shifting.

Following the recommendations of the PRC sub-committee, the PRC approved the ABA “humanitarian exception” in principle, but recommended several changes to make it more clear and concise. Most importantly, the Committee recommends an approach similar to that of New York, deleting the limitation “modest” as to permissible gifts.

### **Proposed Amendment to MRPC 1.8 and Comments.**

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

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client;
- (3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client; and
- (4) a lawyer representing an indigent client pro bono, even if the representation is eligible for fees under a fee-shifting statute, may provide gifts to the client for basic living expenses or modest gifts for other purposes. The lawyer may not:
  - (i) promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;
  - (ii) seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and
  - (iii) publicize or advertise a willingness to provide such gifts to prospective clients.

### **Comments.**

#### **Financial Assistance**

[10] Lawyers may not subsidize lawsuits brought on behalf of their clients, such as by making loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted. A lawyer may guarantee a loan to enable the client to withstand delay in litigation under the circumstances stated in Rule 1.8(e)(3).

[11] Paragraph (e)(4) provides another exception. A lawyer representing an indigent client without fee, even if the representation is eligible for fees under a fee-shifting statute, may give the client gifts. Gifts permitted under paragraph (e)(4) include contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(4) exception is narrow. Gifts are allowed in specific circumstances where they are unlikely to create conflicts of interest or invite abuse. Paragraph (e)(4) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including gifts pursuant to paragraph (e)(4), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(4) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

## ATTACHMENT 2

### JOINT ORDER OF THE DEPARTMENTS OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION

The Judicial Departments of the Appellate Division of the New York State Supreme Court, pursuant to the authority vested in them, do hereby amend Part 1200, Rule 1.8 (Rules of Professional Conduct) of Title 22 of the Official Compilation of the Codes, Rules, and Regulations of the State of New York, as follows, effective immediately (additions underlined).

#### **Rule 1.8: Current Clients: Specific Conflict of Interest Rules**

\* \* \*

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

- (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- (2) A lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client;
- (3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred; and
- (4) A lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, or a law school clinical or pro bono program, may provide financial assistance to indigent clients but may not promise or assure financial assistance prior to retention, or as an inducement to continue the lawyer-client relationship. Funds raised for any legal services or public interest organization for purposes of providing legal services will not be considered useable for providing financial assistance to indigent clients, and financial assistance referenced in this subsection may not include loans or any other form of support that causes the client to be financially beholden to the provider of the assistance.

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Hon. Rolando T. Acosta  
Presiding Justice  
First Judicial Department

---

Hon. Elizabeth Garry  
Presiding Justice  
Third Judicial Department

---

Hon. Alan D. Scheinkman  
Presiding Justice  
Second Judicial Department

---

Hon. Gerald J. Whalen  
Presiding Justice  
Fourth Judicial Department

Date: June , 2020

# **Attachment 4**

**OFFICE OF  
LAWYERS PROFESSIONAL RESPONSIBILITY**

445 MINNESOTA STREET, SUITE 2400  
ST. PAUL, MINNESOTA 55101-2139

TELEPHONE (651) 296-3952  
TOLL-FREE 1-800-657-3601

FAX (651) 297-5801

**UPDATED MEETINGS OF THE LAWYERS  
PROFESSIONAL RESPONSIBILITY BOARD  
2021**

Lawyers Professional Responsibility Board meetings are  
scheduled for the following dates and locations:

<u>Date</u>	<u>Location</u>
Friday, January 29, 2021*	TBD
Friday, April 23, 2021*	TBD
Friday, June 18, 2021*	TBD
Friday, October 29, 2021*	TBD

\*Lunch is served for Board members at 12:00 noon. The public meeting starts at approximately 1:00 p.m.

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

# **Attachment 5**

MEMORANDUM

TO: JUSTICE NATALIE E. HUDSON  
FROM: RITA COYLE DEMEULES  
DATE: October 28, 2020  
RE: *Rules 4–5, Rules on Lawyers Professional Responsibility*

Proposed amendments to Rules 4 and 5, Rules on Lawyers Professional Responsibility, are set out below. Following the track-changes version that shows the amendments, I have included a clean version, showing the rules with the amending language adopted.

**RULE 4. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

\* \* \*

(c) **Duties.** The Board shall have general ~~supervisory authority over~~ oversight responsibility for the administration of the Office of Lawyers Professional Responsibility and these Rules, \* \* \*

(d) **Executive Committee.** The Executive Committee, consisting of the Chair, and two lawyers and two nonlawyers designated annually by the Chair, shall be responsible for carrying out the duties set forth in these Rules and for the general ~~supervision-oversight~~ of the Office of Lawyers Professional Responsibility. The Executive Committee shall act on behalf of the Board between Board meetings. If requested by the Executive Committee, it shall have the assistance of the State Court Administrator’s office in carrying out its responsibilities. \* \* \*

\* \* \*

**RULE 5. DIRECTOR**

(a) **Appointment.** The Director shall be appointed by and serve at the pleasure of this Court, and shall be paid such salary as this Court shall fix. The State Court Administrator must consult with the Board shall review the performance of the Director every 2 years or at such times as this Court directs on the State Court Administrator’s ~~and the Board shall make~~ recommendations to this Court concerning the continuing service of the Director.

(b) **Duties.** The Director shall be responsible ~~and accountable directly~~ to the Board, and through the Board responsible and accountable to this Court, for the proper administration of the Office of Lawyers Professional Responsibility and these Rules.

The Director shall prepare and submit to the Board an annual report covering the operation of the Office of Lawyers Professional Responsibility and shall make such other reports to the Board as the Board or this Court through the Board may order.

**(c) Employees.** The Director ~~when authorized by the Board~~ may employ, on behalf of this Court, persons at such compensation as the ~~Board~~ Director shall recommend and as this Court may approve.

\* \* \*

#### **RULE 4. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

\* \* \*

**(c) Duties.** The Board shall have general oversight responsibility for the administration of the Office of Lawyers Professional Responsibility and these Rules, \*

\* \*

**(d) Executive Committee.** The Executive Committee, consisting of the Chair, and two lawyers and two nonlawyers designated annually by the Chair, shall be responsible for carrying out the duties set forth in these Rules and for the general oversight of the Office of Lawyers Professional Responsibility. The Executive Committee shall act on behalf of the Board between Board meetings. If requested by the Executive Committee, it shall have the assistance of the State Court Administrator's office in carrying out its responsibilities. \* \* \*

\* \* \*

#### **RULE 5. DIRECTOR**

**(a) Appointment.** The Director shall be appointed by and serve at the pleasure of this Court, and shall be paid such salary as this Court shall fix. The State Court Administrator must consult with the Board every 2 years or at such times as this Court directs on the State Court Administrator's recommendations to this Court concerning the continuing service of the Director.

**(b) Duties.** The Director shall be responsible to the Board, and responsible and accountable to this Court, for the proper administration of the Office of Lawyers Professional Responsibility and these Rules. The Director shall prepare and submit to the Board an annual report covering the operation of the Office of Lawyers Professional Responsibility and shall make such other reports to the Board as the Board or this Court through the Board may order.

**(c) Employees.** The Director may employ, on behalf of this Court, persons at such compensation as the Director shall recommend and as this Court may approve.

\* \* \*

# **Attachment 6**

### OLPR Dashboard for Court and Chair

	Month Ending December 2020	Change from Previous Month	Month Ending November 2020	Month Ending December 2019
<b>Open Files</b>	442	-13	455	482
<b>Total Number of Lawyers</b>	352	-5	357	362
<b>New Files YTD</b>	930	81	849	1003
<b>Closed Files YTD</b>	969	94	875	1029
<b>Closed CO12s YTD</b>	182	14	168	267
<b>Summary Dismissals YTD</b>	436	34	402	437
<b>Files Opened During December 2020</b>	81	-4	85	71
<b>Files Closed During December 2020</b>	94	19	75	99
<b>Public Matters Pending (excluding Resignations)</b>	34	2	33	35
<b>Panel Matters Pending</b>	23	9	15	11
<b>DEC Matters Pending</b>	75	1	74	97
<b>Files on Hold</b>	15	-1	16	10
<b>Advisory Opinion Requests YTD</b>	1700	153	1547	1944
<b>CLE Presentations YTD</b>	46	3	43	58
<b>Files Over 1 Year Old</b>				
<b>Total Number of Lawyers</b>	125	-14	139	119
<b>Total Number of Lawyers</b>	92	-15	107	75
<b>Files Pending Over 1 Year Old w/o Charges</b>	52	-18	75	49
<b>Total Number of Lawyers</b>	41	-14	57	37

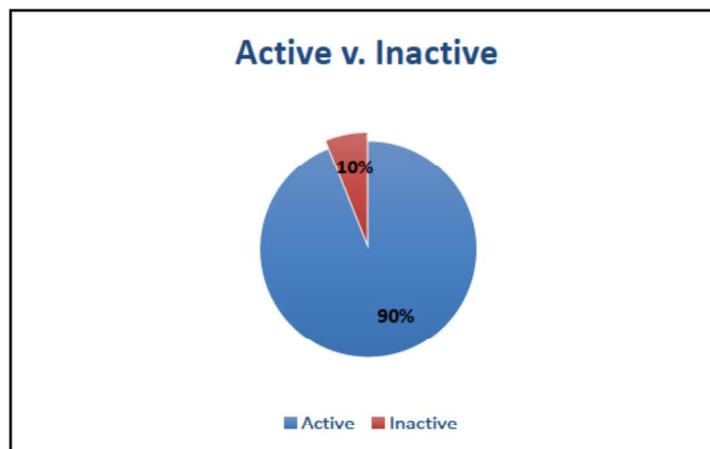
	2020 YTD	2019 YTD
<b>Lawyers Disbarred</b>	3	5
<b>Lawyers Suspended</b>	24	22
<b>Lawyers Reprimand &amp; Probation</b>	5	4
<b>Lawyers Reprimand</b>	1	4
<b>TOTAL PUBLIC</b>	<b>33</b>	<b>35</b>
<b>Private Probation Files</b>	20	14
<b>Admonition Files</b>	82	107
<b>TOTAL PRIVATE</b>	<b>102</b>	<b>121</b>

# FILES OVER 1 YEAR OLD

Year/Month	OLPR	AD	ADAP	PAN	HOLD	SUP	S12C	SCUA	REIN	Total
2016-06					1					1
2016-08						1				1
2017-02				1						1
2017-03				1	1					2
2017-04								1		1
2017-06								1		1
2017-09	1									1
2017-11						1				1
2017-12						1				1
2018-01	1									1
2018-02								1	1	2
2018-03	1					1				2
2018-04	1			1		1		1		4
2018-06				1		1				2
2018-07	1									1
2018-08	2			1		2		1		6
2018-10					2	1				3
2018-11						1		1		2
2018-12	1			1		1				3
2019-01	2				1			1		4
2019-02	1				1			1		3
2019-03	4			1						5
2019-04	4			1	4		1			10
2019-05	2			1	1	1				5
2019-06	1				1	1				3
2019-07	1			2		3	1	2	1	10
2019-08	3					2		1		6
2019-09	5					1		1		7
2019-10	5	1	1	1	1			1		10
2019-11	8	1	1	2	1	1				14
2019-12	8				1	3				12
<b>Total</b>	<b>52</b>	<b>2</b>	<b>2</b>	<b>14</b>	<b>15</b>	<b>23</b>	<b>2</b>	<b>13</b>	<b>2</b>	<b>125</b>

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	112	27
Total Cases Under Advisement	13	13
<b>Total Cases Over One Year Old</b>	<b>125</b>	<b>40</b>

Active	112
Inactive	13



## All Pending Files as of Month Ending December 2020

Year/Month	SD	DEC	REV	OLPR	AD	ADAP	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	Total
2016-06								1							1
2016-08									1						1
2017-02							1								1
2017-03							1	1							2
2017-04											1				1
2017-06											1				1
2017-09				1											1
2017-11									1						1
2017-12									1						1
2018-01				1											1
2018-02											1	1			2
2018-03				1					1						2
2018-04				1			1		1		1				4
2018-06							1		1						2
2018-07				1			1								2
2018-08				2			1		2		1				6
2018-10								2	1						3
2018-11									1		1				2
2018-12				1			1		1						3
2019-01				2				1			1				4
2019-02				1				1			1				3
2019-03				4			2								6
2019-04				4			1	4		1					10
2019-05				2			1	1	1						5
2019-06				1				1	1						3
2019-07				1			1		3	1	2	1			9
2019-08				3					2		1				6
2019-09				5					1		1				7
2019-10				5	1	1	1	1			1				10
2019-11				8	1	1	1	1	1						13
2019-12				8				1	3						12
2020-01				12					1			1		1	15
2020-02				22			1	1	1			2			27
2020-03				11			1				1				13
2020-04				15		1	1					1			18
2020-05				12			1					1			14
2020-06		1		18			1		2			1			23
2020-07		11		18			1								30
2020-08		5	1	23			1								30
2020-09		16	2	17			1		2		1				39
2020-10		7		17			1								25
2020-11		14	1	12											27
2020-12	13	21		16								1	5		56
<b>Total</b>	<b>13</b>	<b>75</b>	<b>4</b>	<b>245</b>	<b>2</b>	<b>3</b>	<b>23</b>	<b>16</b>	<b>29</b>	<b>2</b>	<b>15</b>	<b>9</b>	<b>5</b>	<b>1</b>	<b>442</b>

**ALL FILES PENDING & FILES OVER 1 YR. OLD**

SD	Summary Dismissal
DEC	District Ethics Committees
REV	Being reviewed by OLPR attorney after DEC report received
OLPR	Under Investigation at Director's Office
AD	Admonition issued
ADAP	Admonition Appealed by Respondent
PROB	Probation Stipulation Issued
PAN	Charges Issued
HOLD	On Hold
SUP	Petition has been filed.
S12C	Respondent cannot be found
SCUA	Under Advisement by the Supreme Court
REIN	Reinstatement
RESG	Resignation
TRUS	Trusteeship

# Prosecutorial ethics: Holding to account “ministers of justice”

I have been thinking a lot lately about ethics and the criminal justice system. Locally and across the nation we have been seeing what happens when people lose faith in the effectiveness and fairness of the criminal justice system. Many see a system that struggles to hold police accountable for misconduct and disproportionately impacts Blacks and other people of color. Systems are composed of individuals and I know many, many individuals of good faith are asking tough questions about the systemic challenges facing the criminal justice system.

One of the most influential roles in the criminal justice system is the prosecutor. Most of the practicing bar are not prosecutors, granted, but we are all voters and thus have the opportunity to hold elected prosecutors and those who appoint prosecutors to account. I thought it might be helpful to review the ethics rules applicable to prosecutors—both to establish a baseline and to inquire whether the current rules provide a sufficient foundation for today’s challenges.

## Minister of justice

Like all lawyers, prosecutors—federal and state—are accountable for all ethics rules, and in addition for a rule specific to prosecutors. While the focus is often on the specific requirements set forth in Rule 3.8, “Special Responsibilities of a Prosecutor,” it bears repeating that prosecutors are subject to the same rules as the rest of us—so issues such as competence,

diligence, conflicts, honesty, dealing with unrepresented parties, supervision, and reporting the misconduct of others apply to them as well. Where Rule 3.8 specifically is concerned, Minnesota follows, with some exceptions, the ABA model rule for prosecutors.

The comments to both the Minnesota rule and the model rule start with a well-known precept: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”<sup>1</sup> This ministerial role is important but undefined, and much has been written about it by scholars. Ministering justice can mean different things, but what I believe is indisputable is a rejection of the idea that the ends justify the means. The focus is not the conviction or the win or even the protection of the public, but rather to guarantee that justice—as we broadly think about it in this country—is done in each case. This is a heavy responsibility.



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.

SUSAN.HUMISTON@COURTS.STATE.MN.US

## The particulars

Rule 3.8, in both its Minnesota and ABA versions, sets out specific obligations for the ministers of justice. First, to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.<sup>2</sup> This requirement is obvious and foundational. Second, to make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given an opportunity to obtain counsel.<sup>3</sup> This is part of the prosecutor’s role in ensuring the integrity of the process. For example, while it might be the job of others to explain how to apply for court-appointed counsel, ultimately the prosecutor must make reasonable efforts to assure this actually happens in all cases. Third, to not seek to obtain from an unrepresented accused person a waiver of important pretrial rights, such as the right to a preliminary hearing.<sup>4</sup>

Fourth, and pivotally, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.<sup>5</sup> Both state and federal law establish a constitutional due process framework for disclosure obligations. This framework is widely known by shorthand reference to the main underlying case, *Brady*, which held that criminal defendants have a due process right to receive favorable information from the prosecution.<sup>6</sup> In 2009 the ABA made clear, and I find persuasive, the opinion that Rule 3.8(d) is not co-extensive with constitutional case law regarding disclosure, but rather is separate and broader.<sup>7</sup> The distinction lies in the issue of materiality.

A prosecutor’s constitutional obligation extends only to favorable information that is “material,” or in other words evidence that may affect the outcome. Rule 3.8, however, contains no such limiting language. As noted in ABA Opinion 09-454:

Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial’s outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.<sup>8</sup>

For all of the reasons cited in the ABA opinion, I’m persuaded that this is correct. But the Minnesota Supreme Court has not had an opportunity to address this question, and some states, like Louisiana, disagree.<sup>9</sup> Many jurisdictions in Minnesota have an open file rule (excepting work product), a practice that is consistent with both constitutional due process requirements and the ethics rules. Not every jurisdiction can say this, however, and I strongly encourage the jurisdictions that can’t to review the ethics requirements in addition to the constitutional requirements.<sup>10</sup>

Rule 3.8 also emphasizes the timely nature of disclosure. The ABA opinion states that “for the disclosure of information to be timely, it must be made early enough that the information can be used effectively.”<sup>11</sup> Effective use encompasses many things beyond just preparation for trial, and they include conducting a defense investigation, determining affirmative defenses or case strategy in general, and (perhaps most importantly) choosing whether to plead guilty.<sup>12</sup>

Minnesota’s Rule 3.8 includes two additional subparts, similar but not identical to the model rule, including Rule 3.8(e) on not subpoenaing defense counsel except under certain circumstances, and preventing extrajudicial statements by staff and others in keeping with the prosecutor’s obligations under Rule 3.6 regarding trial publicity. Interestingly, the ABA model rule includes two *additional* subparts not present in Minnesota’s rule. ABA Rule 3.8(g) and (h) both address a prosecutor’s ethical obligation to take action upon receipt of evidence that casts doubt on whether a defendant committed a crime of which he has been convicted.

### Beyond the rules

The prosecutor’s role is so central to the just functioning of the system that many standards exist to guide their conduct. In reviewing those standards, I was struck by two contained in the ABA Criminal Justice Standards for the Prosecution Function. First, a “prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, the prosecutor should stimulate and support efforts for remedial action.”<sup>13</sup> Second, and particularly relevant today, is “[a] prosecutor’s office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work.”<sup>14</sup>

Prosecutors carry a heavy burden as ministers of justice in our system, and there is so much more on the ethical requirements of the job than can be addressed in this column. Hopefully this information provides some guidance on ways the profession, through its votes, can hold these among us to account in performing this critical role. Are there other or different ethical rules that would further this goal? I am interested in your viewpoint. Thank you to all prosecutors who lead as ministers of justice. ▲

### Notes

- <sup>1</sup> Rule 3.8, MRPC, cmt. [1].
- <sup>2</sup> Rule 3.8(a), MRPC.
- <sup>3</sup> Rule 3.8(b), MRPC.
- <sup>4</sup> Rule 3.8(c), MRPC.
- <sup>5</sup> Rule 3.8(d), MRPC. Subpart (d) continues, “and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”
- <sup>6</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).
- <sup>7</sup> ABA Formal Opinion 09-454, *Prosecutor’s Duty to Disclose Evidence and Information Favorable to the Defense* (7/8/2009).
- <sup>8</sup> *Id.* at 4.
- <sup>9</sup> *In re Seastank*, 2017 BL 374915 (La 10/18/17) (holding ethics rule is no broader than *Brady/Bagley*); See *In re Kline*, 113 A.3rd 202 (D.C. 2015) (holding ethics rule requires prosecutor to disclose all potentially exculpatory information in his possession regardless of whether that information meets materiality requirements of *Brady*).
- <sup>10</sup> Court rules set forth important requirements as well. Rule 9.01, Minnesota Rules of Criminal Procedure, broadly requires disclosure of “all matters... that relate to the case” without a court order but upon the defendant’s request.
- <sup>11</sup> ABA Formal Opinion 09-454 at 6.
- <sup>12</sup> *Id.*
- <sup>13</sup> ABA Criminal Justice Standards for the Prosecution Function 3-1.2(f) (4th Ed. 2017).
- <sup>14</sup> *Id.* at 3-1.6(b).

## MOVING TO WEB-BASED TIME AND BILLING DOESN'T NEED TO BE HARD

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# Prosecutorial ethics: Part two

Last month this column focused on prosecutorial ethics. And shortly after it went to print, the Minnesota Supreme Court issued its decision in *In re Pertler*,<sup>1</sup> an important ruling on this topic. Thomas Pertler served as Carlton County Attorney from January 2005 to November 2018. From the chief of police, who understood his own ethical and constitutional obligations, Mr. Pertler learned that an investigation into an officer on the Cloquet Police Department substantiated that the officer had provided incomplete information in a search warrant application, conducted an incomplete investigation, and was subsequently disciplined (suspended) for the misconduct. Contemporaneous correspondence makes it clear Mr. Pertler understood that this information (relevant to the credibility of the officer) was both constitutionally and ethically required to be disclosed in cases where the officer's testimony was material.

Inexplicably, though, Mr. Pertler chose not to disclose this information to attorneys in his office handling cases involving the officer; he appears not to have taken any action at all on the information. Without explaining why,

Mr. Pertler did ask an assistant county attorney in his office to draft a *Brady/Giglio* disclosure policy around this time—but once it was drafted, he did not adopt the policy, train his staff about it, or tell anyone what he knew. Inevitably, attorneys in the Carlton County Attorney's Office later learned of the officer's misconduct, and that Mr. Pertler had known this information for some time.

I would like to pause to consider how those attorneys must have felt. Imagine the dread, helplessness, and anxiety in learning that your office had essentially abdicated its constitutional and ethical responsibilities with respect to cases where disclosure would have been required. I imagine, but do not know, that Mr. Pertler must have felt this way as well.

Mr. Pertler was defeated in the November 2018 election, a short time after all of this information started coming to light. Before the election, line prosecutors started dismissing cases involving the officer, many of them felonies—a few involving domestic assault or other crimes of violence. The newly elected county attorney, upon being sworn in, undertook a review of cases involving the officer. The 19 previously dismissed cases remained dismissed, and an additional eight convictions were dismissed, with records expunged, including one case in which the defendant was incarcerated and subsequently released after his conviction was vacated.

## Far-ranging impacts

Now let's reflect upon the many people affected by this conduct. Think of all the victims of the alleged crimes that had been charged. None of them received justice. Think of each of the defendants, who had been charged and in some cases convicted without the due process they were entitled to. Think of the defense counsel, including many public defenders, who were stymied in their efforts to effectively represent their clients. Think of the law enforcement personnel charged with protecting and serving the people of Carlton County whose work went for naught, tainted by the misconduct of one of their colleagues.

Ordinarily, the Office of Lawyers Professional Responsibility does not accept anonymous complaints. The allegation that prompted the investigation into Mr. Pertler's conduct was an exception. It can be difficult, despite reporting obligations under Rule 8.3, Minnesota Rules of Professional Conduct, for lawyers or staff to file a complaint against their supervisor. Even with potential protection under

state law for whistleblowers, this is a serious undertaking.

Ultimately, Mr. Pertler agreed to stipulate to disbarment, and the Court approved that disposition on September 16, 2020. This is the first Minnesota case I'm aware of where a lawyer was disbarred for conduct that occurred while acting as a prosecutor. In fact, very few prosecutors have been disbarred nationwide. Perhaps the most well-known case is the one involving Michael Nifong, the North Carolina district attorney who prosecuted the matter that became known as the "Duke LaCrosse Case." Mr. Nifong was disbarred in 2007 because he withheld discovery, including potentially exculpatory DNA evidence; directed a witness to withhold evidence; lied to the court and opposing counsel regarding the DNA evidence; and lied to disciplinary authorities investigating his misconduct.

In researching the appropriate disposition for Mr. Pertler's case, this Office repeatedly encountered research from academia questioning the lack of disciplinary enforcement for prosecutorial misconduct.<sup>2</sup> Indeed, the National Registry of Exoneration published a detailed study this fall entitled "Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement." The study—218 pages long and focused on cases where individuals were cleared based upon evidence of innocence—found that concealment of exculpatory evidence had occurred in 44 percent of exonerations; that prosecutors committed misconduct in 30 percent of exonerations; and that discipline (whether by an employer or regulatory bodies) was generally rare for prosecutors and, when imposed, was often "comparatively mild." The study also opined that one of the root causes of misconduct was ineffective leadership by those in command.

Although the September 2020 study came out after Mr. Pertler stipulated to disbarment, we (myself in particular) were heavily influenced by the lack of serious discipline for prosecutors who have engaged in serious misconduct, when considering the appropriate disposition for Mr. Pertler's case. Professional



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discipline is not punishment for the attorney, but rather is imposed to protect the public, protect the profession, and deter future misconduct by the lawyer and others. How can the purposes of discipline be served if serious misconduct is not met with serious discipline? Given the expansive scope of harm in this case, the fundamental dereliction of duty, and the precarious position in which his conduct placed other lawyers, we believed disbarment was the appropriate sanction, and the Court agreed.

### What it means

The lesson here is not that any misstep by a prosecutor will get you disbarred. Disbarment remains rare. The lesson is that all prosecutor's offices, state or federal, must put in place, train personnel about, and follow policies that are focused on ensuring that ethical and constitutional obligations are met in every case. As with so many things, the tone is set from the top. If your office rewards or permits bad behavior—or behavior “close to the line”—you may be placing your license at risk, as well as the licenses of those you supervise. If

you do not have good policies and are not crystal clear about the consequences of failing to follow those policies, there is a risk that you will not effectively set the standard of conduct expected by the ethics rules.

I hope also that one of the lessons is that if you mess up, you must acknowledge that mistake and work to correct it—no matter how difficult or embarrassing it may be. Mr. Pertler, for inexplicable reasons, did not assist his office in solving the problem created by the lack of prior, timely disclosure, but instead put a deputy in charge and left his post after he lost the election, not even serving out his term until his successor was sworn in—a fact that also weighed in the recommendation for disbarment. Mr. Pertler did not raise any mitigating factors during our investigation, and we often do not know what crosses another bears.

I hope others learn the many lessons embedded in this case. I also hope it is a call to action for all leaders in prosecutor's offices to refocus on ensuring you are leading in an ethical manner, and that you have in place the policies and procedures necessary to assist your staff

in meeting their obligations. In 2014, the American Bar Association issued Formal Opinion 467, “Managerial and Supervisor Obligations of Prosecutors under Rule 5.1 and Rule 5.3.” It offers good guidance on steps to take to set the tone from the top. The opinion discusses the importance of a culture of compliance, an effective up-the-ladder reporting structure, and the need for discipline and clear remedial measures when policies are violated.

I know this is far easier said than done. Thank you to all of the prosecutors that understand your duty and lead by example as “ministers of justice.” I know that cases like Mr. Pertler's are the exception, not the rule, but given the importance of the position, everyone must stay vigilant. As always, our ethics line is open to assist you in meeting your ethical obligations. ▲

### Notes

<sup>1</sup> *In re Pertler*, \_\_\_ N.W.2d \_\_\_, A20-0934, 2020 WL 5552562 (mem) (9/16/2020).

<sup>2</sup> See, e.g., Kevin C. McMunigal, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 *Hostra Law Review* 847 (2010).



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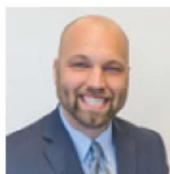
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# Safekeeping client property (including filing fees)

Safekeeping client or third-party property related to a representation is a fundamental ethics obligation. Lately several cases have crossed my desk involving failure to properly handle client money. For example, in July 2020, the Minnesota Supreme Court suspended Rochester attorney Michael Quinn for 18 months due in large part to how he handled a \$306 filing fee.<sup>1</sup> There are several lessons in this case worth your time if you handle other people's money.

Mr. Quinn accepted representation in a bankruptcy matter, quoting an \$1,800 flat fee for legal work, and \$306 for a filing fee. Mr. Quinn did not have his client sign a fee agreement. The client paid \$2,106 upon retention and Mr. Quinn promptly deposited the funds in his business account, not his trust account. Although he prepared a petition for bankruptcy, the client ultimately changed his mind and sought a refund. Mr. Quinn failed to refund the unused filing fee, failed to account to his client for the funds, and eventually stopped communicating with his client.

I'm sure you can see the many issues of concern with the above facts. What is also true is the business account where Mr. Quinn placed and kept the filing fee fell below \$306 on multiple occasions before the money was refunded. This fact significantly elevated the misconduct because this is misappropriation as the Minnesota Supreme Court, and courts throughout the country,

have defined it. Everyone understands that misappropriation of client funds is serious misconduct, but does everyone understand what constitutes misappropriation? Failing to properly safekeep client money is also serious misconduct in itself, and is the path that ultimately led to Mr. Quinn's lengthy suspension. Due to the significant potential consequences, let's review the rules.

## Rule 1.15, Minnesota Rules of Professional Conduct

Rule 1.15 is descriptively entitled "Safekeeping Property." It requires all funds (whether the client's or someone else's) held by a lawyer in connection with a representation to be placed in trust.<sup>2</sup> This fact was hopefully drummed into all of our brains in law school. When a client gives you an advance fee for legal services, it belongs in trust with limited exceptions that I will discuss.<sup>3</sup> If a client gives you funds to pay to a third party on their behalf, like filing fees, those funds also belong in trust.<sup>4</sup> There is no exception for this latter requirement, except a modest administrative one that I will also cover.

Mr. Quinn did not follow these basic rules. The advance legal fees that his client paid, which were unearned at the time of payment, were placed in his business account along with a specifically designated filing fee. As the Supreme Court made clear, this violation is, by itself, serious misconduct. The misconduct is failing to safekeep client funds—which, because they are not in trust, are potentially at risk. As those who are familiar with the Minnesota ethics rules know, there is a way that an attorney may ethically place an advance, unearned flat fee into a business account. To do this, you must follow the requirements in Rule 1.5(b)(1), MRPC. But you must follow the rules. Just because you have a verbal flat fee agreement with your client, and tell them the fees paid in advance will not be held in trust, does not mean that you can ethically put it into your business account.

Because you are not safekeeping the fees in trust until earned, the ethics rules require you to "in advance" have a written fee agreement signed by the client—not someone else—that contains the information in the five subparts of Rule 1.5(b)(1).<sup>5</sup> Mr. Quinn did not have a written fee agreement with his client, so the flat fee paid in advance by his client belonged in trust until he earned the fee by completing the work.

The filing fee paid by the client was specifically identified as such. Accordingly, that sum belonged in trust too, even if Mr. Quinn had in place a compliant agreement that allowed him to treat the \$1,800 flat fee as his property subject to refund. (Remember, also, that you may not ethically describe fees as nonrefundable or earned upon receipt.)<sup>6</sup> This requirement can present challenges if clients want to pay by a combined check or use a credit card.

An exception to the requirement that advance fees and expenses must go immediately into trust exists if the client is paying by credit card, and the service provider the lawyer uses cannot deposit monies into trust, while debiting transaction and other fees from a non-trust account. In that limited circumstance, credit card payments may be deposited into a non-trust account, but then must "immediately" be transferred to a trust account to the extent the funds are unearned (or a compliant fee agreement is not in place) or are advances for expenses.<sup>7</sup>

Mr. Quinn testified that he placed the filing fee in his business account because he needed to pay the filing fee with his personal credit card. The Court did not credit this argument, as Mr. Quinn could easily have placed the funds into trust and then transferred the filing fee from trust after he had separately paid the fee. Clearly, Mr. Quinn placed his own convenience in avoiding recordkeeping obligations over compliance with the rules. Had he taken that simple step in the first instance, he would not have engaged in the significantly more serious misconduct of misappropriating the filing fee.



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## Misappropriation

The Court has been crystal clear in numerous cases. A lawyer misappropriates funds when “funds are not kept in trust and are used for a purpose other than one specified by the client.”<sup>8</sup> Because Mr. Quinn’s business account frequently fell below \$306 before he made the refund (which he did only after an ethics complaint was filed), misappropriation was clear. The Court also rejected Mr. Quinn’s *quantum meruit* claims regarding the filing fee. Mr. Quinn claimed that he did additional work that entitled him to convert the filing fee to earned fees. The referee found the client had made no such agreement and the Court affirmed on a clear error standard of review.

Mr. Quinn made additional mistakes in this matter that contributed to his discipline, including failure to cooperate with the Director’s multiple requests for his bank records, but the gravamen of his misconduct was the filing fee misappropriation, which all happened because he failed to put the filing fee in the right

place in the first instance. Misappropriation of client or third-party funds is more than deliberate theft of unearned funds from trust, the classic definition. The minute we learned that Mr. Quinn had failed to safekeep and then spent that \$306, both I and the attorney handling this case knew the likely outcome, and it is fair to say we did not like it. The case law was clear, though. And just because we didn’t like it did not mean it was not the correct outcome. Mr. Quinn chose to disregard fundamental and pretty straightforward ethics rules that exist to safekeep property, rules that ensure the property is protected and available to use as specified by the client.

## Conclusion

Unfortunately, we are currently working on several additional cases where lawyers have placed filing fees in their business accounts, and then in the short run spent those sums other than as the client specified. Please understand that the Court’s case law considers this to be serious misconduct that will lead to

significant discipline, and will be prosecuted as such by this Office. Even small sums have significant consequences. Please learn from Mr. Quinn’s matter. There are a number of articles and resources on our website to assist you in properly maintaining your trust account, including articles on the most common mistakes.<sup>9</sup> Safekeeping client and third-party property is an important responsibility; please treat it as such, and let us know if we can assist you in meeting this obligation. ▲

## Notes

<sup>1</sup> *In re Quinn*, 946 N.W.2d 583 (Minn. 2020).

<sup>2</sup> Rule 1.15(a), MRPC.

<sup>3</sup> Rule 1.15(c)(5), MRPC.

<sup>4</sup> Rule 1.15(a), MRPC.

<sup>5</sup> Rule 1.5(b)(1)(i)-(v), MRPC; Rule 1.15(c)(5), MRPC.

<sup>6</sup> Rule 1.5(b)(3), MRPC.

<sup>7</sup> Appendix 1 to Rule 1.15(i), MRPC.

<sup>8</sup> *Quinn*, 946 N.W.2d at 587.

<sup>9</sup> See, e.g., Susan Humiston, “Is Your Trust Account in Order?” *Bench & Bar* (September 2016).



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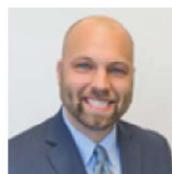
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# Lawyers in transition

As one year ends and another begins, some lawyers find themselves in transition between firms or employment opportunities. When this happens, it's natural to focus on employment law—and, if one is a partner, fiduciary obligations. But please don't forget there are also ethical obligations when a lawyer leaves a firm. And they're a frequent source of questions on our ethics hotline at this time of year. The American Bar Association issued a formal opinion on this topic that provides a good framework for lawyers and firms.<sup>1</sup> If you are considering leaving your firm, or are in the management ranks of a firm, it is important that you understand your ethical obligations.

## Restrictions on right to practice

Noncompetes are prevalent in business but prohibited in the legal profession. It is unethical to offer or make an agreement that restricts the right of a lawyer to practice after termination of the relationship.<sup>2</sup> An exception exists for benefits upon retirement, but otherwise the rule is straightforward. This is less about lawyer autonomy than about prioritizing the client's

right to a lawyer of their choosing (in keeping with the ethical imperative to place the client's interest first). Even though the point is well-settled, we receive questions every year about terms in employment agreements that clearly aim to restrict practice after termination. Lawyers are naturally competitive and money is money, but keep this clear ethical requirement in mind.

## Orderly transitions

One of our most important ethical obligations is to keep the client informed of the status of a matter and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation.<sup>3</sup> These communication obligations require notice to the client of material information—such as a planned law firm move or changed staffing on their case. The ethics rules do not dictate who must make this notice or what it must say.

Opinion 489 takes the position that the firm and departing lawyer should attempt to agree on a joint communication to firm clients with whom the departing lawyer has had significant contact—and we always advise as much on the ethics line. This is the best and most professional approach, since it appropriately puts the emphasis on supplying the client with information they need to make informed decisions about their matter. Alternatively, the opinion provides that separate notices may be provided. But in that case care should be taken to make sure clients know they have the option of remaining with the firm, going with the departing attorney, or choosing another attorney. Again, this approach appropriately places the choice in the hands of the client.

There are nuances here that must be taken into consideration. Notice need not be given to everyone who ever came in contact with the lawyer, no matter how casual the contact—the opinion focuses on significant contact on the matter. If the departing lawyer is very junior or not primary counsel, then notice may not make any sense. Remember, too, that notice and options are separate from the departing lawyer's prerogative to solicit former clients—a right that nothing in the ethics rules prevents, and as noted above, one that should not be restricted through agreement.

The opinion also focuses on making the departing lawyer's notices to the firm and to clients as nearly contemporaneous as they can be, but notes that firms can require advance notice to the firm sufficient to allow for an orderly transition. This includes working together to

provide a joint client notification, making sure files are in order for transfer, and coordinating coverage for key deadlines in a client's matter. The opinion cautions, however, that advance notice requirements should not be so broad as to pose, in effect, a proscription on practice. If the lawyer is terminated and not departing voluntarily, a whole new layer of complexity is added, but the main obligations from the client's perspective remain the same.

## Clients are not property

This is my favorite line in the opinion, and the one that so many lawyers and law firms struggle to embrace. Clients should not be divided up by the lawyer and firm; the focus, rather, should be on the client's right to decide. Again, there are nuances. Much will depend on the departing lawyer's role in the client representation. Reason should prevail but it can be difficult, particularly if the departure is sudden or acrimonious, to reach that goal. We hear from both sides of the coin on this point, but whether or not you expressly bring up the client's option to move, it certainly exists, and you just look petty (and may be violating the rules) if you deprive the client of information they need to make informed decisions about the representation. This includes providing relevant contact information for the departing lawyer. It goes without saying that a professional, neutral approach is always best. Few if any clients want to be involved in a law firm's internal battles.

The opinion also cautions against restricting the departing lawyer's pre-departure access to the file and resources to allow the lawyer to continue to competently and diligently represent the client as decisions are being made by the client regarding representation. Again, there are nuances. The guiding principle should be placing the client's interest first, and keeping that in mind tends to help things work out for the best. If a lawyer is terminated unexpectedly and immediately, and there are imminent case deadlines, this can be a challenge. Both the terminated lawyer and the firm must take steps to protect the client's interests.



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## 2021 H-1 Work Visa Quota Alert

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### Other obligations

While Opinion 489 does a good job framing some of the ethics issues implicated when lawyers change firms, the opinion is silent on the often complementary but sometimes conflicting legal obligations that also apply. Most partners and shareholders have fiduciary obligations to their employer or partners that, to the extent they are consistent with the ethics rules, also must be taken into consideration. No one size fits all here, and it is clear that the opinion is focused more on raising the noncompete and related issues than providing detailed guidance on the myriad ways that compliance with ethical obligations can assist in the orderly transition of matters. The opinion correctly notes, however, that firm management has an ethical obligation to have in place measures that offer reasonable assurance of compliance with the ethics rules.<sup>4</sup> Good checklists, procedures, and training on the variety of potential circumstances surrounding lawyer departures should be part of those measures, and will help guard against errors when the unexpected occurs.

### Conclusion

It is hard to mess up transitions if you step back and put the client's interests first. If your guidepost is what is best for the client, as well as how best to work together to serve the client, you will be in a good position to satisfy your ethical obligations. But don't forget there are legal duties, whether contractual or under common law, that should also be given consideration. At this time of year we frequently received calls on this topic and are happy to answer the ethics half of the questions. Best wishes for a significantly better 2021! ▲

### Notes

<sup>1</sup> ABA Opinion 489, *Obligations Related to Notice When Lawyers Change Firms* (12/4/2019).

<sup>2</sup> Rule 5.6(a), Minnesota Rules of Professional Conduct (MRPC). A lawyer may also not make or offer an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy. Rule 5.6(b), MRPC.

<sup>3</sup> Rule 1.4(a)(3), MRPC; Rule 1.4(b), MRPC.

<sup>4</sup> Rule 5.1(a), MRPC.



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# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 495**

**December 16, 2020**

## **Lawyers Working Remotely**

*Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.<sup>1</sup>*

### **Introduction**

Lawyers, like others, have more frequently been working remotely: practicing law mainly through electronic means. Technology has made it possible for a lawyer to practice virtually in a jurisdiction where the lawyer is licensed, providing legal services to residents of that jurisdiction, even though the lawyer may be physically located in a different jurisdiction where the lawyer is not licensed. A lawyer's residence may not be the same jurisdiction where a lawyer is licensed. Thus, some lawyers have either chosen or been forced to remotely carry on their practice of the law of the jurisdiction or jurisdictions in which they are licensed while being physically present in a jurisdiction in which they are not licensed to practice. Lawyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances enumerated in this opinion.

### **Analysis**

ABA Model Rule 5.5(a) prohibits lawyers from engaging in the unauthorized practice of law: “[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so” unless authorized by the rules or law to do so. It is not this Committee’s purview to determine matters of law; thus, this Committee will not opine whether working remotely by practicing the law of one’s licensing jurisdiction in a particular jurisdiction where one is not licensed constitutes the unauthorized practice of law under the law of that jurisdiction. If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so.

Absent such a determination, this Committee's opinion is that a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed (the "licensing jurisdiction") even from a physical location where the lawyer is not licensed (the "local jurisdiction") under specific parameters. Authorization in the licensing jurisdiction can be by licensure of the highest court of a state or a federal court. For purposes of this opinion, practice of the licensing jurisdiction law may include the law of the licensing jurisdiction and other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. In other words, the lawyer may practice from home (or other remote location) whatever law(s) the lawyer is authorized to practice by the lawyer's licensing jurisdiction, as they would from their office in the licensing jurisdiction. As recognized by Rule 5.5(d)(2), a federal agency may also authorize lawyers to appear before it in any U.S. jurisdiction. The rules are considered rules of reason and their purpose must be examined to determine their meaning. Comment [2] indicates the purpose of the rule: "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." A local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which that lawyer is licensed and therefore qualified to represent clients in that jurisdiction. A local jurisdiction, however, does have an interest in ensuring lawyers practicing in its jurisdiction are competent to do so.

Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis."<sup>2</sup> A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence.<sup>3</sup> Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Subparagraph (b)(2) prohibits a lawyer from "hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in [the] jurisdiction" in which the lawyer is not admitted to practice. A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is "holding out" as practicing law in the local jurisdiction. If the lawyer's website,

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<sup>2</sup> DICTIONARY.COM, <https://www.dictionary.com/browse/establish?s=t> (last visited Dec. 14, 2020).

<sup>3</sup> To avoid confusion of clients and others who might presume the lawyer is regularly present at a physical address in the licensing jurisdiction, the lawyer might include a notation in each publication of the address such as "by appointment only" or "for mail delivery."

letterhead, business cards, advertising, and the like clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not "held out" as prohibited by the rule.

A handful of state opinions that have addressed the issue agree. Maine Ethics Opinion 189 (2005) finds:

Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.

Similarly, Utah Ethics Opinion 19-03 (2019) states: "what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none."

In addition to the above, Model Rule 5.5(c)(4) provides that lawyers admitted to practice in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in the local jurisdiction that arise out of or reasonably relate to the lawyer's practice in a jurisdiction where the lawyer is admitted to practice. Comment [6] notes that there is no single definition for what is temporary and that it may include services that are provided on a recurring basis or for an extended period of time. For example, in a pandemic that results in safety measures—regardless of whether the safety measures are governmentally mandated—that include physical closure or limited use of law offices, lawyers may temporarily be working remotely. How long that temporary period lasts could vary significantly based on the need to address the pandemic. And Model Rule 5.5(d)(2) permits a lawyer admitted in another jurisdiction to provide legal services in the local jurisdiction that they are authorized to provide by federal or other law or rule to provide. A lawyer may be subject to discipline in the local jurisdiction, as well as the licensing jurisdiction, by providing services in the local jurisdiction under Model Rule 8.5(a).

## Conclusion

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction,

while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

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**AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND  
PROFESSIONAL RESPONSIBILITY**

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# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 496**

**January 13, 2021**

## **Responding to Online Criticism**

*Lawyers are regularly targets of online criticism and negative reviews. Model Rule of Professional Conduct 1.6(a) prohibits lawyers from disclosing information relating to any client's representation or information that could reasonably lead to the discovery of confidential information by another. A negative online review, alone, does not meet the requirements of permissible disclosure in self-defense under Model Rule 1.6(b)(5) and, even if it did, an online response that discloses information relating to a client's representation or that would lead to discovery of confidential information would exceed any disclosure permitted under the Rule. As a best practice, lawyers should consider not responding to a negative post or review, because doing so may draw more attention to it and invite further response from an already unhappy critic. Lawyers may request that the website or search engine host remove the information. Lawyers who choose to respond online must not disclose information that relates to a client matter, or that could reasonably lead to the discovery of confidential information by another, in the response. Lawyers may post an invitation to contact the lawyer privately to resolve the matter. Another permissible online response would be to indicate that professional considerations preclude a response.<sup>1</sup>*

### **I. Introduction**

Lawyers regularly are the target of online (and offline) criticism. Clients, opposing parties, and others are increasingly taking to the internet to express their opinions of lawyers they have encountered. Lawyers are left in the quandary of determining whether and how they ethically may respond when the opinions posted are unflattering, and the facts presented are inaccurate or even completely untrue. This opinion addresses a lawyer's ethical obligations in responding to negative online reviews.

### **II. Analysis**

The main ethical concern regarding any response a lawyer may make to an online review is maintaining confidentiality of client information. The scope of the attorney-client privilege, as opposed to confidentiality, is a legal question that this Committee will not address in this opinion. As this Committee itself concluded in ABA Formal Ethics Opinion 480 (2018), lawyers cannot blog about information relating to clients' representation without client consent, even if they only

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

use information in the public record, because that information is still confidential. ABA Model Rule of Professional Conduct 1.6 prohibits a lawyer's voluntary disclosure of *any* information that relates to a client's representation, whatever its source, without the client's informed consent, implied authorization to disclose,<sup>2</sup> or application of an exception to the general rule. Model Rule 1.6 states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

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<sup>2</sup> Comment [5] of Rule 1.6 states "Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation." A client or former client's negative online comments do not create "implied authorization" for the lawyer to disclose confidential information in response to the online criticism because that is not required to carry out the representation.

Only subparagraph (b)(5) is implicated here, and there are three exceptions bundled into that provision, the first two of which are clearly inapplicable to online criticism. First, online criticism is not a “proceeding,” in any sense of that word, to allow disclosure under the exception “to respond to allegations in any proceeding concerning the lawyer's representation of the client.”<sup>3</sup> Second, responding *online* is not necessary “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved.” A lawyer may respond directly to a person making such a claim, if necessary, to defend against a criminal charge or civil claim, but making public statements online to defend such a claim is not a permissible response. Thus, the remaining question is whether online criticism rises to the level of a controversy between a lawyer and client and, if so, whether responding online to the criticism is reasonably necessary to defend against it.

The Committee concludes that, alone, a negative online review, because of its informal nature, is not a “controversy between the lawyer and the client” within the meaning of Rule 1.6(b)(5), and therefore does not allow disclosure of confidential information relating to a client’s matter.<sup>4</sup> As stated in New York State Bar Association Ethics Opinion 1032 (2014), “[u]nflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice.”

The Committee further concludes that, even if an online posting rose to the level of a controversy between lawyer and client, a public response is not reasonably necessary or contemplated by Rule 1.6(b) in order for the lawyer to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. Comment [16] to Rule 1.6 supports this reading explaining, “Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes stated.”

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<sup>3</sup> Definition of “proceeding” from NOLO’S PLAIN-ENGLISH LAW DICTIONARY, <https://www.nolo.com/dictionary> (last visited Jan. 4, 2021):

1) The ordinary process of a lawsuit or criminal prosecution, from the first filing to the final decision. 2) A procedure through which one seeks redress from a court or agency. 3) A filing, hearing, or other step that is part of a larger action. 4) A particular matter that arises and is dealt with in a bankruptcy case.

<sup>4</sup> See also *Louima v. City of New York*, No. 98 CV 5083 (SJ), 2004 WL 2359943 (E.D.N.Y. Oct. 5, 2004), *aff’d sub nom. Roper-Simpson v. Scheck*, 163 F. App’x 70 (2d Cir. 2006) (“mere press reports regarding an attorney's conduct do not justify disclosure of a client’s confidences and secrets even if the reports are false and the accusations are unfounded”); *Lawyer Disciplinary Bd. v. Farber*, 488 S.E.2d 460, 462 (1997) (lawyer’s disclosure of confidential information in motion to withdraw inappropriate); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 476 (2016) (ABA Model Rule of Professional Conduct 1.6(b)(5) allows lawyer to disclose only such confidential information as is reasonably necessary for the court to make an informed decision on a motion to withdraw); Or. State Bar Formal Op. 2011-85 (2011) (lawyer may not disclose confidential information in motion to withdraw as “[n]either a disagreement between Lawyer and Client about how the client’s matter should be handled nor the client’s failure to pay fees when due” are considered a controversy triggering the self-defense exception).

There are a number of state ethics opinions that have analyzed this issue.<sup>5</sup> The majority reach the conclusion that, even if the online posting was made by a client, the posting of criticism does not rise to the level of a controversy that would allow a lawyer to disclose confidential information in responding. The Committee notes that Colorado Ethics Opinion 136 (2019) specifically finds that *if* the online criticism rises to the level of a controversy between lawyer and client, the lawyer may ethically disclose limited information, yet urges caution in responding. This Committee disagrees with the Colorado opinion, to the extent it concludes that lawyers may disclose a limited amount of confidential information in a public response; a public posting that discloses confidential information goes beyond a direct response to the accuser allowed by Rule 1.6 and its explanatory Comments. District of Columbia Ethics Opinion 370 (2016) permits disclosure of confidential information in responding to online criticism but is based on a rule that is significantly different than ABA Model Rule 1.6.<sup>6</sup> In addition to the ethics opinions addressing

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<sup>5</sup> See, e.g., Los Angeles County Bar Ass'n Prof'l Responsibility & Ethics Comm. Formal Op. 525 (2012) (lawyer may respond to online criticism only if the lawyer discloses no confidential information, the response does not harm the client, and the response is "proportionate and restrained"); Mo. Bar Informal Op. 2018-08 (2018) (negative online review by former client does not create sufficient controversy to permit lawyer to disclose confidential information in response and any response may not disclose confidential information but may acknowledge the lawyer's professional obligations); N.J. Advisory Comm. on Prof'l Ethics Op. 738 (2020) (in response to negative online review by client, a lawyer may state that the lawyer disagrees with the facts in the review but may not disclose information that relates to the representation except information that is "generally known" based on New Jersey's rule which permits disclosure of "generally known" information); Bar Ass'n of Nassau County Comm. on Prof'l Ethics Op. 2016-01 (2016) ("A lawyer may not disclose a former client's confidential information solely to respond to criticism of the lawyer posted on the Internet or a website by a relative of the former client or by the former client himself"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1032 (2014) (lawyer may not disclose confidential information just to respond to online criticism by the client on a rating site because the "self-defense" exception to confidentiality does not apply to informal criticism where there is no actual or threatened proceeding against the lawyer); Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm. Op. 2014-200 (2014) (lawyer may not give detailed response to online criticism of the lawyer by a client because the self-defense exception is not triggered by a negative online review and may choose to ignore the online criticism); State Bar of Tex. Prof'l Ethics Comm. Op. 662 (2016) (lawyer may not respond to client's negative internet review if the response discloses confidential information, but may "post a proportional and restrained response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct"); W. Va. Ethics Comm. Advisory Op. 2015-02 (2015) (lawyer may respond to positive or negative online reviews, but may not disclose confidential client information while doing so, even in response to a review); San Francisco Ethics Comm. Op. 2014-1 (2014) (lawyer may respond to online review by client if matter has concluded and the lawyer discloses no confidential information in the response; if the client's matter is ongoing, lawyer may not be able to respond at all).

<sup>6</sup> D.C. Bar Op. 370 (2016) concludes that a lawyer may disclose confidential information in responding to any specific allegations in a former client's negative online review, but is based on D.C. Rule 1.6, which states: "A lawyer may use or reveal client confidences or secrets: (3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or *to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client*" [emphasis added]. State Bar of Ariz. Formal Op. 93-02 (1993) does not address online criticism but concludes that a lawyer may agree to an interview and disclose confidential information to defend against accusations by a former client that the lawyer was incompetent and involved in a conspiracy against the client made to the author of a proposed book, even though there are no pending or imminent legal proceedings.

the issue, there are also disciplinary cases in which lawyers have been sanctioned for disclosing confidential information online.<sup>7</sup>

### III. Best Practices

The Committee therefore offers the following best practices to lawyers who are the subject of negative online reviews.

A lawyer may request that the host of the website or search engine remove the post. This may be particularly effective if the post was made by someone other than a client. If the post was made by someone pretending to be a client, but who is not, the lawyer may inform the host of the website or search engine of that fact. In making a request to remove the post, unless the client consents to disclosure, the lawyer may not disclose any information that relates to a client's representation or that could reasonably lead to the discovery of confidential information by another,<sup>8</sup> but may state that the post is not accurate or that the lawyer has not represented the poster if that is the case.

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<sup>7</sup> Illinois Disciplinary Board v. Peshek, No. M.R. 23794 (Ill. May 18, 2010) (assistant public defender suspended for 60 days for blogging about her clients' cases, on a website which was open to the public, including providing confidential information, some of which was detrimental to clients and some of which indicated that the lawyer may have knowingly failed to prevent a client from making misrepresentation to the court); Reciprocal discipline of 60-day suspension by Wisconsin in *In re Peshek*, 798 N.W.2d 879 (2011); *People v. Isaac*, No. 15PDJ099, 2016 WL 6124510 (Colo. O.P.D.J. Sept. 22, 2016) (lawyer suspended 6 months for responding to online reviews of former clients; lawyer revealed criminal charges made against clients, revealed that client wrote check that bounced, and revealed that client committed other unrelated felonies); *In re Quillinan*, 20 DB Rptr. 288 (2006) (Oregon disciplinary board approved a stipulation for discipline for 90-day suspension for lawyer who sent an e-mail disclosing to members of the Oregon State Bar's workers' compensation listserve personal and medical information about a client whom she named, indicating the client wanted a new lawyer); *In re Skinner*, 740 S.E.2d 171 (Ga. 2013) (Supreme Court of Georgia rejected a petition for voluntary discipline seeking a public reprimand for lawyer's violation of the confidentiality rule by disclosing confidential client information on the internet in response to client's negative reviews of lawyer, citing lack of information about the violation in the record and presumably feeling the public reprimand too lenient as it cited to the 60-day suspension in *Peshek* and 90-day suspension in *Quillinan* above); *In re David J. Steele*, No. 49S00-1509-DI-527 (Ind. 2015) (Among other violations, Indiana lawyer disbarred for, by his own description, "actively manipulate[ing his] Avvo reviews by monetarily incentivizing positive reviews, and punishing clients who wr[o]te negative reviews by publicly exposing confidential information about them" and including numerous false statements in the responses to the negative reviews); *In re Tsamis*, Commission No. 2013PR00095 (Ill. 2014) (public reprimand for lawyer who disclosed confidential information beyond that necessary to defend herself on Avvo in response to a client's negative reviews of the lawyer on Avvo: "I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about"); *People v. Underhill*, 15PDJ040 (Colo. 2015) (lawyer suspended eighteen months for responding to multiple clients' online criticism by posting confidential and sensitive information about the clients).

<sup>8</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [4] reads, in part, "Paragraph (a) ... also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person."

Lawyers should give serious consideration to not responding to negative online reviews in all situations.<sup>9</sup> Any response frequently will engender further responses from the original poster. Frequently, the more activity any individual post receives, the higher the post appears in search results online. As a practical matter, no response may cause the post to move down in search result rankings and eventually disappear into the ether. Further exchanges between the lawyer and the original poster could have the opposite effect.

Lawyers may respond with a request to take the conversation offline and to attempt to satisfy the person, if applicable. For example, a lawyer might post in response to a former client (or individual posting on behalf of a former client), “Please contact me by telephone so that we can discuss your concerns.” A lawyer whose unhappy former client accepts such a request may offer to refund or reduce the lawyer’s fees in the matter. As a practical matter, this approach is not effective unless the lawyer has the intent and ability to try to satisfy the person’s concerns. A lawyer who makes such a post but does nothing to attempt to assuage the person’s concerns risks additional negative posts.

If the poster is not a client or former client, the lawyer may respond simply by stating that the person posting is not a client or former client, as the lawyer owes no ethical duties to the person posting in that circumstance. However, a lawyer must use caution in responding to posts from nonclients. If the negative commentary is by a former opposing party or opposing counsel, or a former client’s friend or family member, and relates to an actual representation, the lawyer may not disclose any information relating to the client or former client’s representation without the client or former client’s informed consent. Even a general disclaimer that the events are not accurately portrayed may reveal that the lawyer was involved in the events mentioned, which could disclose confidential client information. The lawyer is free to seek informed consent of the client or former client to respond, particularly where responding might be in the client or former client’s best interests. In doing so, it would be prudent to discuss the proposed content of the response with the client or former client.

If the criticism is by a client or former client, the lawyer may, but is not required to, respond directly to the client or former client. The lawyer may wish to consult with counsel before responding. The lawyer may not respond online, however.

An additional permissible response, including to a negative post by a client or former client, would be to acknowledge that the lawyer’s professional obligations do not permit the lawyer to respond. A sample response is: “Professional obligations do not allow me to respond as I would wish.” The above examples do not attempt to provide every possible response that a lawyer would

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<sup>9</sup> *The Economist Explains What is the Streisand Effect?*, THE ECONOMIST (Apr. 16, 2013), <https://www.economist.com/the-economist-explains/2013/04/15/what-is-the-streisand-effect>. The social phenomenon known as the Barbara Streisand effect recognizes that efforts to suppress a piece of online information may actually call more attention to its existence.

be permitted to make, but instead provide a framework of analysis that may be of assistance to lawyers faced with this issue.

#### **IV. Conclusion**

Lawyers are frequent targets of online criticism and negative reviews. ABA Model Rule of Professional Conduct 1.6(a) prohibits lawyers from disclosing information relating to any client's representation or information that could reasonably lead to the discovery of confidential information by another. A negative online review, alone, does not meet the requirements for permissible disclosure under Model Rule 1.6(b)(5) and, even if it did, an online response would exceed any disclosure permitted under the Rule.

Lawyers who are the subject of online criticism may request that the website or search engine host remove the information but may not disclose information relating to any client's representation, or information that could reasonably lead to the discovery of confidential information by others. Lawyers should consider ignoring a negative post or review because responding may draw more attention to it and invite further response from an already unhappy critic. Lawyers who choose to respond online must not disclose information that relates to a client matter or that could reasonably lead to the discovery of confidential information by others. Lawyers may post an invitation to contact the lawyer privately to resolve the matter. Another permissible response would be to indicate that professional considerations preclude a response. A lawyer may respond directly to a client or former client who has posted criticism of the lawyer online but must not disclose information relating to that client's representation online.

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