

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD  
MEETING AGENDA**

**Thursday, January 31, 2019 – 1:00 p.m.**  
Town & Country Club  
300 Mississippi River Boulevard North  
St. Paul, Minnesota

1. Approval of Minutes of September 28, 2018, Lawyers Board Meeting (Attachment 1).
2. Farewell to retiring Board Members Norina Dove, Anne Honsa, Mike Leary, Cheryl Prince and Brent Routman.
3. Updated Panel and Committee Assignments (TBD).
4. Committee Updates:
  - a. Rules Committee.
    - (i) MSBA Petition & LPRB Response (Attachment 2);
    - (ii) Proposed LPRB changes;
    - (iii) Proposed ABA advertising rule changes.
  - b. Opinions Committee.
    - (i) Opinion No. 21 review.
  - c. DEC Committee.
    - (i) Chairs Symposium, May 17, 2019;
    - (ii) DEC Symposium, September 27, 2019.
5. Director's Report (Attachment 3).
6. Other Business.
7. Quarterly Board Discussion (closed session).

**REMINDER:** Please contact Chris in the Director's Office at 651-296-3952 if you were confirmed for the Board meeting and are now unable to attend. Thank you.

*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 185<sup>TH</sup> MEETING OF LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD SEPTEMBER 28, 2018**

The 185<sup>th</sup> meeting of the Lawyers Professional Responsibility Board convened at 3:00 p.m. on Friday, September 28, 2018, at the Earle Brown Heritage Center, Brooklyn Center, Minnesota. Present were: Board Chair Robin Wolpert, and Board Members Jeanette M. Boerner, James P. Cullen, Thomas J. Evenson, Roger Gilmore, Christopher A. Grgurich, Mary L. Hilfiker, Anne M. Honsa, Peter Ivy, Bentley R. Jackson, Virginia Klevorn, Michael J. Leary, Cheryl M. Prince, Susan C. Rhode and Bruce R. Williams. Present from the Director's Office were: Director Susan M. Humiston, Deputy Director Timothy M. Burke, Senior Assistant Directors Cassie Hanson, Jennifer S. Bovitz, Josh Brand, Siama Brand and Keshini M. Ratnayake, and Assistant Directors Binh T. Tuong, Amy A. Mahowald, Nicole S. Frank, Aaron D. Sampsel and Rebecca L. Huting. Also present were Minnesota Supreme Court Associate Justice David L. Lillehaug and Nicolas Ryan.

1. **APPROVAL OF MINUTES.**

The minutes of the June 8, 2018, Board meeting were unanimously approved.

2. **DEC SEMINAR DISCUSSION/FEEDBACK.**

The annual Lawyers Professional Responsibility Board seminar was held immediately before the Board meeting. Robin Wolpert solicited feedback from the Board members on the seminar. Ms. Hilfiker stated that she believed the seminar was the best that she had ever attended. Ms. Humiston noted that she thought the presentations at this year's seminar on neuro-science and technology were particularly good, as these are areas of the law which are changing quickly, and she asked Board members to let the Office know of topics members would like addressed at future seminars.

Peter Ivy appreciated the investigation checklist which was part of the materials regarding Rule 1.5, Minnesota Rules on Professional Conduct (MRPC). Mr. Ivy believes that practical items for District Ethics Committee (DEC) investigators are particularly valuable as investigators will keep and refer to these types of materials. Also, drafting these materials allow the Director's Office to help train the DEC investigators.

Ms. Wolpert thought there was a particularly good discussion regarding confidential documents which may arise during disciplinary investigations, and thought a checklist could be developed for this topic. Ms. Wolpert requested the Board

members email her, Ms. Humiston and Mr. Ivy with ideas for the DEC Chairs Symposium in May 2019 and the LPRB seminar in September 2019.

3. LAWYER WELL-BEING SUPREME COURT INITIATIVE.

Ms. Wolpert noted that Justice Lillehaug had discussed the topic of lawyer well-being during the seminar and turned the floor over to him. Justice Lillehaug stated that the Supreme Court call to action on lawyer well-being is scheduled for February 28, 2019, with public notice regarding the event and the date forthcoming. Justice Lillehaug noted with approval that at least one of the authors of the Hazelden/ABA study of lawyer substance use disorders and mental health would be present, and that Ms. Humiston and representatives of many stakeholder groups are represented on the program committee.

4. COMMITTEE UPDATES.

A. Rules Committee.

i. MSBA Petition Update. Mr. Grgurich reported that the MSBA has filed a petition to amend Rules 1.6 and 5.5, MRPC. The petition was included in the meeting materials. Ms. Humiston stated that the Office would draft the initial response on behalf of the Board and the Office. Ms. Wolpert informed the Board that the Supreme Court had issued an order establishing a public comment period, with written comments due November 20, 2018, and oral argument on January 15, 2019.

ii. LPRB Proposed Changes Update. Mr. Grgurich stated that a change had been proposed to Rule 1.1, MRPC, to address lawyer well-being, and a number of more administrative or process rule changes have been proposed to other rules. These proposals are being studied by an MSBA subcommittee chaired by William Wernz, which has taken a preliminary look at these proposals. Mr. Grgurich reported that he, Mr. Wernz and Timothy Burke had talked about the proposals. As to the administrative or process proposed changes, Mr. Grgurich did not expect much opposition. As to Rule 1.1, MRPC, Mr. Grgurich reported that he, Mr. Wernz and Mr. Burke believed it was best to table this item for the present because this is an issue the ABA is closely studying as well. Therefore, it appears appropriate to wait before proceeding to see how the ABA addresses this issue, including what language, if any, to include in Rule 1.1, or its comments.



iii. Joint Committee Proposal. Mr. Grgurich reported that the MSBA had proposed a joint committee with the LPRB to address proposed changes to Rules 7.1 through 7.5, MRPC, which address advertising and solicitation. The ABA has adopted changes to these Model Rules of Professional Conduct. The MSBA has established a subcommittee to determine the appropriate Minnesota approach. Members of this committee include Board members Mr. Grgurich and Cheryl Prince, as well as Mr. Burke from the Director's Office. The hope is for a joint proposal to emanate for the consideration of the Board and the MSBA. This subcommittee's first meeting will be on October 4. Ms. Wolpert and Mr. Grgurich issued an open call for volunteers, including Board members who are not on the Rules Committee, who may wish to join this committee.

B. Opinions Committee.

Anne Honsa reported that the Opinions Committee is studying LPRB Opinion No. 21 in light of ABA Formal Opinion 481. The Opinions Committee has had two meetings by conference call with Director's Office liaison Cassie Hanson. The Opinions Committee generally agrees there should be a change to Opinion No. 21. Ms. Honsa briefly summarized the differences between this Opinion and ABA Formal Opinion 481. Ms. Honsa reported that Ms. Hanson has offered to survey other states to determine what changes they have made in light of ABA Formal Opinion 481 and then the Opinions Committee will meet again, hoping to have a recommendation ready to present by the time of the January 2019 Executive Committee meeting.

Ms. Honsa reported that two additional topics may be ripe for consideration by the Opinions Committee. One is guidance on availability fees, and the other is the lack of propriety in representing both parties in a marital dissolution proceeding. As to the latter issue, Ms. Honsa stated that Ms. Humiston has stated that she would survey other state positions on this topic, and then report her findings to the Opinions Committee. Ms. Humiston noted that she had published an article on the topic of representing both parties in a marital dissolution proceeding, and that the feedback she received was that it resonated. The general sense she received was that lawyers either agreed, or at least grudgingly accepted, Ms. Humiston's conclusion in the article. In light of this feedback, Ms. Humiston wonders if an additional Board opinion on this topic is necessary.

C. DEC Committee.

Mr. Ivy reported that he and Joshua Brand will be starting to prepare for the May 17, 2019, DEC Chairs Symposium, which will be held at the Earle Brown Heritage Center. Board members are encouraged to mark their calendars.

5. DIRECTOR'S REPORT.

Ms. Humiston noted that the format of the monthly reports had changed a bit. The reporting format continues to be a work-in-process to give helpful information to the Board about the work of the Office. Thus, the Dashboard has been updated to include year-over-year comparisons. Also, at the recommendation of the Executive Committee, the report highlights the Hold and Rule 12(c) columns. These are categories of cases that are inactive for reasons beyond the control of the Office. Ms. Humiston believed that adding these columns gives greater perspective. Presently, there are 116 active cases more than one year old, and 32 additional cases on hold or otherwise not archived which are more than one year old.

Ms. Humiston noted that the number of older files in the Office is holding steady. The fact that the number of open and old files are not at the Board's targets frustrates the Office staff, which is doing a good job to handle the caseload. Ms. Humiston brought particular attention to the file statistics related to DEC's. The number of investigations conducted by DEC's is down, and the number of investigations conducted by the Office is up. Additionally, the DEC's are making more recommendations for discipline, including public discipline, than previously.

Ms. Humiston stated that she is very proud that the Office has worked through the older cases in the Office without falling behind. She expressed pride in the fact that the Office is handling all matters simultaneously, as the Office strives to achieve the Board's target of no more than 100 open files in the disciplinary system. Ms. Hilfiker asked if any matters were more than two years old. Ms. Humiston stated that the oldest file in the system was opened in January 2015, and the oldest file under investigation was opened in February 2016.

Ms. Humiston noted the five-year anniversary with the Office of legal secretary Nancy Humphrey, and the 25-year anniversary with the Office of Mr. Burke.

Ms. Humiston noted that the Office has received words of appreciation from persons outside the system for work done by staff in the Office. Jennifer S. Bovitz received a highly complimentary letter from a complainant in a recently completed public discipline matter which had also been handled by Mr. Slator before it was

transferred to Ms. Bovitz. Ms. Humiston received a letter from a Colorado lawyer who represented a lawyer in a reciprocal discipline proceeding stating the appreciation of that lawyer and his client for how Ms. Humiston approached the matter. Ms. Humiston has also received a thank you note from an attorney for the help Ms. Humiston gave to that attorney through the advisory opinion service.

Ms. Humiston provided some personnel updates. Siama C. Brand will be going on maternity leave, and during that time Patrick Burns will return to the Office part-time for a number of weeks. Also, Patricia Jorgensen is retiring from the Office after almost 34 years of service. Ms. Humiston noted that the Office will lose her substantial amount of institutional knowledge. The Office has begun the process of hiring a full-time replacement for this position, which had been part-time. Finally, Ms. Humiston reported that the new hires continue to do very well in getting up to speed.

Ms. Humiston reported that the Office is focusing on the parts of the strategic plan around lawyer well-being and organizational competencies. The Office is working toward implementation and developing plans around the strategic planning goals but is focusing on case processing right now.

Ms. Humiston directed the Board's attention to the Lawyer Well-Being Toolkit published by the ABA. This document has hands-on ideas for legal employers and is available on the Lawyers Concerned for Lawyers' website and will be available on the Office's website. Closer to home, Ms. Humiston stated that the Office is in the process of forming a well-being committee within the Office.

Ms. Humiston also reported that ABA Formal Opinion 482, issued September 19, 2018, addresses continuity of operations plans. The Minnesota Judicial Branch is engaged in a concerted effort regarding continuing of operations planning, an effort in which the Office is participating.

Ms. Humiston reported that the database project continues to progress. The Director has approved approximately \$30,000 for enhancements, from funds that had been budgeted. Development is being finalized toward a system that looks like it will be awesome and will allow about half of the matters to proceed in a paperless manner. Ms. Humiston acknowledged the work of Mr. Burke, Office Administrator Chris Wengronowitz, and other staff who have devoted substantial time to the project, with which Ms. Humiston is very pleased.

Ms. Humiston's October 2, 2018, *Bench and Bar* article will address the issue of trust accounts. Also on that topic, the Office will be offering a free seminar in

conjunction with the State Law Library on the basics of trust accounting. Ms. Hanson, Ms. Bovitz and paralegal supervisor Lynda Nelson of the Office will present at the free seminar. Ms. Humiston appreciated the effort of the State Law Librarian to reach out to facilitate this seminar which allows for 240 people to participate live through Webex, and the session will also be available on demand. Ms. Humiston noted that this presentation dovetails with the Office's strategic objective to develop outreach and education. Another approach in this regard may be reaching out to community law libraries that offer many seminars for solo and small firm attorneys.

6. **OTHER BUSINESS.**

A. *Michelle Lowney MacDonald vs. Lawyers Professional Responsibility Board.*

Ms. Humiston reported that the United States Supreme Court denied Ms. MacDonald's petition for a writ of certiorari, and the case is concluded.

B. Unclaimed Property.

Ms. Humiston summarized that the issue of wills taken by the Office through trusteeships and whether such wills are subject to destruction has been raised in the past by Jim Cullen and Gary Hird. The Office talked to the Department of Commerce about whether wills taken through trusteeships could be forwarded to the Department of Commerce pursuant to the unclaimed property act statute. The Department replied that by statute the only physical property that it could take was safety deposit boxes from financial institutions.

Mr. Cullen noted the recent passing of a lawyer and asked if that lawyer had the most wills which would be affected by the Supreme Court order allowing the Office to destroy such wills after a period of time. Ms. Humiston stated that she believed that the Office had a substantial number of wills from that trusteeship. Ms. Humiston specifically stated that she does not want anyone prejudiced because of the passing of a lawyer and understands the concern that Messrs. Cullen and Hird have raised regarding destruction of wills, but also noted that some of the wills date back to the 1960s and 1970s. Mr. Cullen stated that he would like a review of each will to determine whether the testator/testatrix remained alive. Ms. Humiston noted that there are approximately 600 such wills and that the Office is in no rush to destroy them as space is not an issue.

C. LPRB Well-Being Session.

Ms. Wolpert noted that the next quarterly Board conversation will be on November 30, 2018, and will address the topic of lawyer well-being. Ms. Wolpert recognized that people do not always read lengthy reports such as those that have been issued on this topic but thought it was important for people to be provided with the vocabulary necessary to be agents for change regarding lawyer well-being. During this session, Joan Bibelhausen of Lawyers Concerned for Lawyers will make a presentation, and likely Ms. Humiston will as well. Ms. Wolpert noted that other organizations, including the Supreme Court and the MSBA, are committed to the topic of lawyer well-being. The session will be at the Minnesota Judicial Center and consist of the presentations, an opportunity for conversation, and lunch.

D. Next Meeting.

Ms. Wolpert reminded members that the next meeting will be on January 31, 2019, and noted that this meeting will be on a Thursday. The meeting will be at the Town and Country Club.

7. QUARTERLY BOARD DISCUSSION.

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

Thereafter the meeting adjourned.

Respectfully Submitted,



Timothy M. Burke  
Deputy Director

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

# Attachment 2

Case No. \_\_\_\_\_

**STATE OF MINNESOTA  
IN SUPREME COURT**

**FILED**

September 12, 2018

**OFFICE OF  
APPELLATE COURTS**

---

In re the Minnesota Rules of Professional Conduct

---

**PETITION OF MINNESOTA STATE BAR ASSOCIATION TO AMEND  
RULES 1.6(b) AND 5.5 OF THE  
MINNESOTA RULES OF PROFESSIONAL CONDUCT**

---

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF MINNESOTA:

Petitioner Minnesota State Bar Association ("MSBA") respectfully submits this petition asking this Court to adopt the proposed amendments to Rules 1.6(b) and 5.5 4(c) of the Minnesota Rules of Professional Conduct attached hereto as Attachments 1 and 2, respectively. The proposed amendments would clarify and correct conflicting interpretations of the current Rule 1.6(b)(8) and conform the requirements for practice in Minnesota by lawyers licensed only in other jurisdictions to the needs of an increasingly nationwide practice of law.

In support of its petition, the MSBA would show the Court the following:

1. The petitioner MSBA is a not-for-profit association of lawyers admitted to practice before this Court and the lower courts of the State of Minnesota.
2. This Honorable Court has the exclusive and inherent power and duty to administer justice, to adopt rules of practice and procedure before the courts of this state,

to establish the standards for regulating the legal profession and to establish mandatory ethical standards for the conduct of lawyers and judges. This power has been expressly recognized by the Minnesota Legislature. *See* MINN. STAT. § 480.05 (2002).

3. This Court adopted the Minnesota Rules of Professional Conduct in 1985 in response to a petition of the MSBA. The Court adopted substantial revisions to the Rules in response to Petitions by the MSBA in 2005 and 2015. From time to time, the MSBA has petitioned the Court for amendments to individual rules because of changes to the ABA Model Rules of Professional Conduct, because of a perceived need to address new or changing issues in the practice of law, or to clarify or correct rules that were viewed as problematical. The Court has enacted numerous changes to the Rules since their initial adoption as a result of MSBA petitions.

4. The proposed amendments were recommended by the Rules of Professional Conduct Committee of the MSBA following a year-long study and after receiving input from MSBA sections, from the OLPR and from the LPRB. They were presented to the MSBA Assembly in December, 2017. The Assembly conducted an hour-long continuing legal education program on the proposed amendments to Rule 5.5 at its December 15, 2017 meeting. Attached to this Petition as Attachments 3 and 4 are the Reports and Recommendations of the MSBA Rules of Professional Conduct Committee on the proposed amendments. At its April 20, 2018 meeting the MSBA Assembly, the policy-making entity of the Association, adopted both Reports and Recommendations. A statement of the reasons for adopting the amendments is set forth in Attachments 3 and 4.



5. The interest of the MSBA in this matter is as follows. Key terms of Rule 1.6(b)(8), such as “establish a claim or defense” and “actual or potential controversy, are ambiguous. These ambiguities have been exacerbated by conflicting interpretations published by the Lawyers Professional Responsibility Board (“LPRB”) and the Office of Lawyers Professional Responsibility (“OLPR”) that make enforcement of the rule problematic. The MSBA respectfully urges amendments to Rule 1.6(b) to resolve the ambiguity and to provide clarity to Minnesota lawyers on responding to public criticism by clients and former clients. Second, the MSBA seeks to respond to the invitation of this Court, in *In re Panel File 39302*, 884 N.W.2d 661 (Minn. 2016) to amend and expand Rule 5.5 to better reflect the bar’s understanding of what practice areas are “reasonably related” to a lawyer’s field of practice and to amend the Rule to better reflect the realities of modern interstate practice of law. The MSBA thus asks this Court to publish the attached proposed Amendments to Rules 1.6(b) and 5.5 of the Minnesota Rules of Professional Conduct for notice comment and to adopt the Amendments after due consideration.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

September 12, 2018

By /s/Paul W. Godfrey  
Paul W. Godfrey (Attorney #0158689)  
Its President  
600 Nicollet Mall #380  
Minneapolis, MN 55402  
612-333-1183

*(Signatures continued on the following page).*

Minnesota State Bar Association  
Standing Committee on the  
Rules of Professional Conduct

By /s/Frederick E. Finch  
Frederick E. Finch (Attorney #29191)  
326 Brimhall Street  
St. Paul, MN 55105  
612-875-8001

## ATTACHMENTS

Attachment 1, Proposed amendments to Rule 1.6(b)(8), Minnesota Rules of Professional Conduct and comments thereto.....	6
Attachment 2, Proposed amendments to Rule 1.6(b)(8), Minnesota Rules of Professional Conduct and comments thereto.....	9
Attachment 3, Report and Recommendation regarding amendment of Rule 1.6, Minn. R. Prof. Conduct, adopted by the Assembly of the Minnesota State Bar Association.....	15
Attachment 4, Report and Recommendation regarding amendment of Rule 5.5, Minn. R. Prof. Conduct, adopted by the Assembly of the Minnesota State Bar Association.....	26

## ATTACHMENT 1

### Proposed amendments to Rule 1.6(b)(8), Minnesota Rules of Professional Conduct and comments thereto.

Rule 1.6(b) A lawyer may reveal information relating to the representation of a client if:

...

~~(8) the lawyer reasonably believes the disclosure is necessary to respond to a client's specific and public accusation, made outside a legal proceeding, of misconduct by the lawyer, where the accusation (a) raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects and (b) includes the client's disclosure of information or purported information related to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;~~

~~(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense in an actual or potential civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;~~

~~(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense by the lawyer in an actual or potential civil, criminal, or disciplinary proceeding based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;~~

~~(9)10) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order;~~

~~(40)11) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3; or~~

(4412) the lawyer reasonably believes the disclosure is necessary 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.

### **Comments to Rule 1.6.**

[8] ~~Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(8) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. Paragraph (b)(8) does not permit disclosure to respond to a client's petty or vague critique, or general opinion, of a lawyer, such as those that are common in online rating services. Specific allegations are those which can be factually verified or corrected. Public accusations are those made to third persons other than the lawyer and those associated with the lawyer in a firm. Paragraphs (b)(8) and (b)(9) recognize the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.~~

[9] ~~A lawyer entitled to a fee is permitted by paragraph (b)(8) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim or charge involving the conduct or representation of a former client. Such a claim or charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(9) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding~~

directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. A lawyer entitled to a fee is permitted by paragraph (b)(9) to prove the services rendered in an action to collect it.

## ATTACHMENT 2

### Proposed amendments to Rule 5.5, Minnesota Rules of Professional Conduct and comments thereto.

#### RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) 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, except that a lawyer admitted to practice in Minnesota does not violate this rule by conduct in another jurisdiction that is permitted in Minnesota under Rule 5.5(c), ~~and (d), and (e)~~ for lawyers not admitted to practice in Minnesota.

(b) A lawyer who is not admitted to practice in ~~this jurisdiction~~ Minnesota shall not:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of Minnesota law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice Minnesota law ~~in this jurisdiction~~.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction which:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraph (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Such reasonably-related services include services which are within the lawyer's regular field or fields of practice in a jurisdiction in which the lawyer is licensed to practice law.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction Minnesota that are services that the lawyer is authorized to provide by exclusively involve federal law or the other law of this another jurisdiction in which the lawyer is licensed to practice law, provided the lawyer advises the lawyer's client that the lawyer is not licensed to practice in Minnesota.

(e) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are performed on behalf of a person who has a family, close personal, or prior professional relationship with the lawyer.

### *Comment*

*[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional misconduct in that person's jurisdiction. The exception is intended to permit a Minnesota lawyer, without violating this rule, to engage in practice in another jurisdiction as Rule 5.5(c) and (d) permit a lawyer admitted to practice in another jurisdiction to engage in practice in Minnesota. A lawyer who does so in another jurisdiction in violation of its law or rules may be subject to discipline or other sanctions in that jurisdiction.*

*[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.*

*[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.*

*[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the general practice of the law of this jurisdiction. Presence may be systematic and continuous even*



if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] Prior versions of Rule 5.5 and prior interpretations of the Rule assumed that attorneys practice in fixed physical offices and only deal with legal issues related to the states in which their offices are located. The increased mobility of attorneys, and, in particular, the ability of attorneys to continue to communicate with and represent their clients from anywhere in the world, are circumstances that were never contemplated by the Rule. The adoption of Rules 5.5(b) and (c) in 2005 reflected the State's growing recognition that multi-jurisdictional practice is a modern reality that must be accommodated by the Rules.

The assumption that a lawyer must be licensed in Minnesota simply because he or she happens to be present in Minnesota no longer makes sense in all instances. Rather than focusing on where a lawyer is physically located, Minnesota's modifications of Rule 5.5(b)(1) and Rule 5.5(d) clarify that a lawyer who is licensed in another jurisdiction but does not practice Minnesota law need not obtain a Minnesota license to practice law solely because the lawyer is present in Minnesota.

Notwithstanding the Minnesota amendments to Rule 5.5(b)(1) and (2) and Rule 5.5(d)(2), Rule 8.5(a) still provides that a lawyer who is admitted in another jurisdiction, but not in Minnesota, "is also subject to the disciplinary authority of ... [Minnesota] if the lawyer provides or offers to provide any legal services in" Minnesota. In particular, such a lawyer will be subject to the provisions of Rules 7.1 through 7.5 regarding the disclosure of the jurisdictional limitations of the lawyer's practice. In addition, Rule 5.5(b)(2) continues to prohibit such a lawyer from holding out to the public or otherwise representing that the lawyer is admitted to practice Minnesota law.

[56] There are occasions in which a lawyer 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 this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraph (d), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[67] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

*[78] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia, and any state, territory, or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice because, for example, the lawyer is on inactive status.*

*[89] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.*

*[910] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.*

*[1011] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.*

*[1112] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.*

*[1213] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac*

vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

~~[13]~~[14] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraph (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients ~~in matters involving a particular body of federal, nationally uniform, foreign, or international law.~~

[16] Paragraph (e) recognizes that lawyers are often sought out by former clients, family members, personal friends, and other professional relationships for legal advice and assistance, even though the person is domiciled in a jurisdiction in which the lawyer is not licensed. The risk of harm to the public in such situations is very low and is outweighed by the value inherent in clients being able to choose lawyers they trust.

[15][7] Paragraph (d) identifies a circumstance in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. Except as provided in paragraph (d), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16][8] Paragraph (d) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation, or judicial precedent.

*[179] A lawyer who practices law in this jurisdiction pursuant to paragraph (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).*

*[1820] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraph (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, such notice may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b). An attorney who is not licensed in Minnesota but who limits his or her practice in Minnesota to federal law or the law of another jurisdiction in which the lawyer is licensed pursuant to Rule 5.5(d), must note the lawyer's jurisdictional limitations when identifying the lawyer on letterhead, on a website, or in other manners. See Rule 7.5(b).*

*[1921] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.*

### ATTACHMENT 3

#### **Report and Recommendation regarding amendment of Rule 1.6, Minn. R. Prof. Conduct, adopted by the Assembly of the Minnesota State Bar Association**

**April 20, 2018**

---

*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.*

#### **Report and Recommendation to the MSBA Regarding Proposed Amendments to MRPC 1.6, Confidentiality of Information**

**Rules of Professional Conduct Committee  
November 1, 2017**

#### **RECOMMENDATION**

RESOLVED, that the MSBA petition the Minnesota Supreme Court to adopt proposed amendments to Minnesota Rules of Professional Conduct 1.6(b)(8) and (9), and related comments, as set forth in this report.

Rule 1.6(b) A lawyer may reveal information relating to the representation of a client if:

(8) the lawyer reasonably believes the disclosure is necessary to respond to a client's specific and public accusation, made outside a legal proceeding, of misconduct by the lawyer, where the accusation (a) raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects and (b) includes the client's disclosure of information or purported information related to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense in an actual or potential civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense by the lawyer in an actual or potential civil, criminal, or disciplinary proceeding based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

(910) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order;

(1011) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3; or

(1112) the lawyer reasonably believes the disclosure is necessary 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.

#### **Comments to Rule 1.6.**

[8] ~~Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(8) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. Paragraph (b)(8) does not permit disclosure to respond to a client's petty or vague critique, or general opinion, of a lawyer, such as those that are common in online rating services. Specific allegations are those which can be factually verified or corrected. Public accusations are those made to third persons other than the lawyer and those associated with the lawyer in a firm. Paragraphs (b)(8) and (b)(9) recognize the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.~~

[9] ~~A lawyer entitled to a fee is permitted by paragraph (b)(8) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim or charge involving the conduct or representation of a former client. Such a claim or charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example,~~

a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(9) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. A lawyer entitled to a fee is permitted by paragraph (b)(9) to prove the services rendered in an action to collect it.

## REPORT

### *Committee History, Mission, Procedures.*

The Rule 1.6 subcommittee was appointed on April 25, 2017, by Mike McCarthy, then Chair of the MSBA Committee on the Rules of Professional Conduct (Committee). Initial members of the subcommittee were William J. Wernz, Fred Finch, David Schultz, Tim Baland, Jr., and Patrick R. Burns. On and after September 12, 2017, Timothy Burke replaced Patrick R. Burns.

Appointment of the subcommittee was requested by William J. Wernz in a memo dated April 17, 2017. The memo stated the purposes of the subcommittee would be (a) to study and make recommendations regarding a possible petition to amend Rule 1.6(b)(8), Minn. R. Prof. Conduct; and (b) to consider how the development of electronic social media and other electronic publication modes may affect the issues addressed by Rule 1.6(b)(8). The memo also stated, "The main occasion for this request is the issuance by the Lawyers Professional Responsibility Board (LPRB) of Opinion 24, on September 30, 2016." The memo also identified what Mr. Wernz regarded as serious problems with Opinion 24.

The subcommittee's recommendations were heard and considered at the Committee meeting held on September 26, 2017. At that meeting, the Committee voted to support the recommendations of the subcommittee absent any dissenting comments received from MSBA sections. Following that meeting, the proposed changes and background information were provided to all MSBA section chairs, with notice that comments were due October 27, 2017. The only comment received came from the New Lawyers Section, indicating they had reviewed and discussed the proposed changes to Rule 1.6 and voted to support them.

This information was brought back to the Committee when they met on October 31, 2017. It was noted by representatives of the Office of Lawyers Professional Responsibility (OLPR) that the LRPB would not be formally discussing the proposed amendments until their meeting in January, 2018. As a formality, the Committee again voted to support bringing the proposed changes to the MSBA Assembly at their December meeting. The Committee felt it important that these changes, along with the changes recommended to Rule 5.5, be combined in one petition to the Court.

### ***Sources.***

Sources reviewed by the subcommittee included Lawyers Board Opinion 24, the April 17, 2017, memo of Mr. Wernz, Patrick R. Burns, Client Confidentiality and Client Criticisms, Bench & B. of Minn., Dec. 2016 (“OLPR article”) and William J. Wernz, Board Forbids Lawyer-Self-Defense in Public Forum – a Further Look – Board Op. 24, Minn. Law., April 10, 2017 (“Wernz article”). The subcommittee also reviewed literature related to the advent and influence of electronic social media.

### ***Minnesota and ABA Model Rules 1.6.***

Since they were first adopted in 1985, the Minnesota Rules of Professional Conduct have followed the ABA Model Rules of Professional Conduct to a large degree. The 2005 amendments to the Minnesota Rules were generally designed to increase the overlap of the two sets of rules.

Nonetheless, Minnesota Rule 1.6 (“Confidentiality of Information”) has always had many variations from Model Rule 1.6. In 1985, the Court rejected ABA Model Rule 1.6 altogether, preferring to carry forward the confidentiality provisions of the Minnesota Code of Professional Responsibility into Minnesota Rule 1.6. From the 1980s to the early part of this century Minnesota adopted amendments to Rule 1.6 which generally enhanced the discretion of lawyers to disclose confidential information when necessary to rectify or respond to client misconduct. These amendments were usually not based on the Model Rules and in some cases the ABA rejected proposals similar to those adopted in Minnesota. Sometimes the Model Rules were later amended to permit disclosures similar to those permitted in Minnesota.

In 2005, Minnesota adopted several variations from Model Rule 1.6. The variations generally permitted more disclosures than the Model Rule. For example, Minnesota Rule 1.6(b) permits eleven types of disclosures, but Model Rule 1.6(b) permits only seven. Even where the Minnesota and Model Rules address the same types of permitted disclosures, the relevant provisions sometimes differ. For example, Minnesota added the words “actual or potential” to “controversy” in Model Rule 1.6(b)(8).

Based on this history, the Committee has not found it important to try to conform to ABA Model Rule 1.6(b).

### ***Lawyers Board Opinion No. 24 and the OLPR Article***

On September 30, 2016, the LPRB issued Opinion No. 24. The Board did not follow its customary procedures of seeking comment on a draft of the opinion and including a Board explanatory comment with the opinion. Opinion 24 did not address the meaning of Minnesota’s addition of “actual or potential” to “controversy.” Opinion 24 did not include any explanation of



its conclusion that Rule 1.6(b)(8) does not permit disclosure of information covered by rule 1.6(a), “when responding to comments posted on the internet or other public forum. . .”

It appears that Opinion 24 takes the position that there are no circumstances in which the “actual or potential controversy” provision of Rule 1.6(b)(8) permits disclosures. Mr. Wernz reported that he inquired of the OLPR and of the LPRB whether they believed there were any such circumstances, but did not receive a reply.

The OLPR article appears to take the position that the controversy provision would apply only in public debates, especially on the internet, “that have substantial ramifications for persons other than those engaged in [the debates].” The OLPR article regards such ramifications as “unlikely” in the case of internet ratings of a lawyer. The Committee considered, however, whether such ramifications would include decisions by prospective clients as to retaining lawyers who were the subject of such ratings. A majority of the Committee has concluded that there are circumstances, outside of legal proceedings, in which a lawyer should be permitted to disclose confidential information to respond to a client’s serious, specific allegations of the lawyer’s misconduct.

A majority of the Committee does not regard the status quo as satisfactory. The meaning of “actual or potential controversy” is debatable. It is not evident that Opinion 24 states the “plain meaning” of Rule 1.6(b)(8). The OLPR article is not consistent with Opinion 24 as to when disclosures are allowed in public controversies – OLPR would allow some disclosures, but Opinion 24 would allow none. A majority of the Committee regards its proposed rule amendments as not expanding disclosure permissions beyond those allowed under current rules.

### ***Electronic Social Media.***

Electronic social media (ESM) has developed after 2005. ESM has become a major fact of life. ESM provides important resources for information used in making everyday decisions, including selection of providers of various services. Developments include online rating services in which customers and clients rate the services of various providers, including lawyers. The Committee has reviewed online ratings of lawyers. The Committee has the following observations and conclusions.

Most online ratings of lawyers by clients express general opinions. Where ratings include allegations of fact, they are often fairly general and do not disclose confidential client information. Most factual allegations do not involve serious misconduct, but instead involve such matters as diligence, adequacy of communications, manners and the like. However, ESM postings can involve serious accusations of misconduct by lawyers.

### *Opinions, Rules and Cases in Other Jurisdictions.*

The Committee reviewed ethics opinions from other jurisdictions, including those that were cited in the OLPR article and were apparently relied on by the LPRB in issuing Opinion 24.

The opinions cited in the OLPR article do not address the situation where the client's accusation includes disclosure of confidential information. Three of the cited opinions expressly state that they assume the client has not disclosed confidential information and the other cited opinions expressly rely on these three opinions.<sup>1</sup> Opinion 24 in effect takes a position that is not taken by these opinions, viz. that Rule 1.6(b)(8) does not permit disclosure even when the client's accusation includes disclosures. Insofar as opinions in other jurisdictions take the position that lawyers may not disclose confidential information to respond to critiques outside of legal proceedings when the critiques do not themselves disclose confidential information, the Committee agrees with them.

D.C. Ethics Opinion 370, *Social Media I: Marketing and Personal Use* (Nov. 2016) was issued after LPRB Op. 24 was issued. Op. 370 includes a section, "Attorneys May, With Caution, Respond to Comments or Online Reviews From Clients." This section applies a Rule of Professional Conduct, unique to the District of Columbia, that allows disclosure or use of otherwise protected client information, "to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." D.C. Rule 1.6(e). Op. 370 states, "Attorneys may respond to negative online reviews or comments from clients. However, Rule 1.6 does not provide complete safe harbor for the disclosure of client confidences in response to a negative internet review or opinion." For further explication, Op. 370 cites Comment 25 to D.C. Rule 1.6.<sup>2</sup> The committee inquired of D.C. Bar Counsel's office regarding

---

<sup>1</sup> Los Angeles County Bar Ass'n Op. No. 525 addresses a situation "when the former client has not disclosed any confidential information." San Francisco Bar Ass'n Op. 2014-1 states, "This Opinion assumes the former client's posting does not disclose any confidential information and does not constitute a waiver of confidentiality or the attorney-client privilege." New York State Bar Ass'n Op. 1032 addresses response to a client statement that "did not refer to any particular communications with the law firm or any other confidential information." Texas State Bar Op. No. 662 and Pennsylvania Bar Ass'n Formal Op. 2014-200 both rely on the Los Angeles, San Francisco and New York opinions.

<sup>2</sup> Comment 25 to D.C. Rule 16 states, "If a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose that client's confidences and secrets in establishing a defense, without waiting for formal proceedings to be commenced. The requirement of subparagraph (e)(3) that there be "specific" charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an example of such a general criticism would be an assertion by the client that the lawyer "did a poor job" of representing the client. But in this situation, as well as in the defense of formally instituted third-party proceedings, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and

its experience with D.C. Rule 1.6(e). Bar Counsel indicated that it generally advises lawyers to avoid disclosures in responding to online reviews, but did not provide specific information on rule interpretation issues.

Several attorneys in other jurisdictions have been publicly disciplined for disclosing confidential information in response to online reviews.<sup>3</sup> Violations of confidentiality rules were clear in these cases. The conduct in these cases would violate both the current Minnesota Rule 1.6 and the rule as proposed for amendment.

The Committee believes it will be helpful to the bar and the public to address the situation in which the client has disclosed confidential information or purported information. Proposed Rule 1.6(b)(8) does address this situation.

#### ***Committee Comments on Drafting.***

The proposed amendments bifurcate current Rule 1.6(b)(8) into proposed Rules 1.6(b)(8) and (9), to make clear when a lawyer may disclose information in legal proceedings and when disclosure may be made outside legal proceedings. Current Rules 1.6(b)(9), (10), and (11) would be re-numbered 1.6b(10), (11), and (12).

#### **Proposed Rule 1.6(b)(8).**

The proposed amendment does not retain the term “controversy,” because it has proved ambiguous. The OLPR article takes the position that “public controversy” refers to issues outside legal proceedings, that is, “issues that are debated publicly and that have substantial ramifications for persons other than those engaged in it.” A “debate” does not require a “proceeding” and proceedings are not normally called “debates.” The OLPR article cites opinions from other jurisdictions as “consistent.” However, the opinions in other jurisdictions that construe the term “controversy,” conclude that “controversy” requires a legal “proceeding.”<sup>4</sup>

---

appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.”

<sup>3</sup> *People v. James C. Underhill Jr.*, 2015 WL 4944102 (Colo. 2015); *In the Matter of Tsamis*, Ill. Att’y Registration and Disciplinary Comm’n, Comm’n No. 2013PR00095 (Ill. 2014); *In the Matter of Margrett A. Skinner*, 295 Ga. 217, 758 S.E.2d 788 (Ga. 2014).

<sup>4</sup> Texas construes the “controversy” exception to confidentiality as applying, “only in connection with formal actions, proceedings or charges.” Texas Op. 662. Pennsylvania relies for its conclusion on a comment that has no Minnesota counterpart. “Comment [14] makes clear that a lawyer’s disclosure of confidential information to ‘establish a claim or defense’ only arises in the context of a . . . proceeding.” Pa. Op. 2014-200. The other opinions cited by the OLPR article do not construe the term “controversy.” Another cited opinion finds that the term “accusation,” as used the governing rule, “suggests that it does

The proposal uses the term “accusation,” rather than “actual or potential controversy.” The proposal also makes clear that an accusation “made outside a legal proceeding” is covered.<sup>5</sup> “Accuse” and similar terms were used for many decades before 2005. The term “accuse” was used in Rule 1.6(b)(5) from 1985 to 2005, in DR 4-101(C) of the Code of Professional Responsibility before 1985, and in Canon 37 of the ABA Canons that preceded the Code.<sup>6</sup>

The proposal uses the terms “specific and public” to modify “accusation.” The term “specific” is borrowed from D.C. Rule 1.6(e). The proposal includes the phrase “a substantial question as to the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” This phrase has been used for over thirty years in Minnesota and Model Rule 8.3, and has a reasonably well-understood meaning.

A client or former client who accuses a lawyer of serious misconduct in a representation will normally disclose confidential information or purported information in making the accusation. If a client made the accusation, “My lawyer stole my settlement proceeds,” the proposed rule would permit the lawyer to make disclosures necessary to show that the lawyer properly distributed the settlement proceeds. In contrast, disclosure would not be permitted if the client made the accusation, “Jane Doe is a terrible lawyer.”

#### Proposed Rule 1.6(b)(9).

The proposal associates the terms “actual or potential” with “proceeding,” rather than – as in current Rule 1.6(b)(8) – with “controversy.” This revision fits better with an important example of permission to disclose regarding a potential proceeding, viz. a lawyer’s report to a malpractice carrier of a client “claim,” which is not yet an actual lawsuit. Such claims are more accurately characterized as potential proceedings rather than potential controversies.

The proposal permits disclosure in relation to proceedings as necessary “to establish a claim or defense.” Current Rule 1.6(b)(8) associates establishment of a claim with a “controversy” only, and associates establishment of a defense with both a “controversy” and a “proceeding.” In

---

not apply to informal complaints, such as this website posting,” but instead applies only a formal “charge.” NYSBA Ethics Op. 1032.

<sup>5</sup> Definitions chosen from Black’s Law Dictionary tend to have narrow meanings associated with legal usages. Definitions from more general dictionaries tend to have more general meanings. To avoid the issue of which dictionary to prefer, proposed Rule 1.6(b)(8) includes its own definition – a covered “accusation” is one made “outside a legal proceeding.”

<sup>6</sup> Rule 1.6(b)(5) permitted disclosure “to defend the lawyer or employees or associates against an accusation of wrongful conduct.” DR 4-101 similarly permitted disclosure of confidential information by a lawyer **“to defend himself or his employees or associates against an accusation of wrongful conduct.”** Canon 37 provided, “If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation.”

*Kidwell v. Sybaritic*, 784 N.W.2d 220 (Minn. 2010), four justices associated regarded Kidwell's disclosures to establish a claim as permitted in a proceeding that Kidwell had commenced against his former employer.<sup>7</sup>

Proposed Comments 8 and 9.

The proposed comments make clear that the disclosure permission of proposed Rule 1.6(b)(8) does not apply to such disclosures as a client's mere expression of opinion, vague critique, and the like. "Specific accusation" is contrasted with "petty or vague critique," and "general opinion." "Public accusation" is defined in the proposed comment in a way that is consistent with the law of defamation.

*Fairness, Attorney-Client Privilege, Client Waiver by Disclosure.*

Current comment 9 to Rule 1.6 recognizes, as a basis for permission to disclose in connection with a fee dispute, "the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." Because this principle extends beyond a lawyer's contested claim to a fee, proposed comment [8] relates this principle to both Rule 1.6(b)(8) and (9), as amended.

The Committee took note of another application of a principle of fairness - the fact that a client's voluntary disclosure of privileged information operates as a waiver of the attorney-client privilege. "The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication." Restatement of the Law Governing Lawyers § 79. The policy reason for finding waiver in partial disclosure is that it would be "unfair for the client to invoke the privilege thereafter." McCormick on Evidence § 93 (7<sup>th</sup> ed. 2016), citing 8 Wigmore, Evidence (McNaughton rev.) § 2327 and Imwinkelried, The New Wigmore: Evidentiary Privileges § 6.12.4 (2ed. 2010). A waiver of the privilege would occur if a client disclosed privileged information in accusing a lawyer of misconduct.

Although the law of confidentiality under the Rules of Professional Conduct overlaps with the law of privilege, the two bodies of law are in many ways distinct. Nonetheless, the Committee believes that it would be unfair for a client to disclose, or purport to disclose, confidential information to support serious accusations against a lawyer and thereafter to invoke confidentiality rules to prevent the lawyer's self-defense either in or outside a proceeding. As noted above, some of the opinions of other jurisdictions on which the OLPR article and Opinion

---

<sup>7</sup> The remaining three justices based their opinion on employment law and did not find it necessary to reach ethics issues. *Kidwell* dealt with a whistle-blower claim.

<sup>7</sup> Restatement Sec. 59 cmt. d; Findings of Fact, Conclusions of Law, and Memorandum of Honorable John C. Lindstrom at 19, *In re Fuller*, 621 N.W.2d 460 (May 23, 2000).

24 rely expressly state that the opinions do not apply where the client's allegation involves a waiver of confidentiality or privilege.

***Balancing Moral and Professional Issues.***

Issues involving disclosure of confidential information in self-defense give rise to important moral and professional issues. A client's groundless, public accusation of serious professional misconduct, if apparently supported by disclosure of client information, may permanently damage a lawyer's reputation and income. A lawyer's unnecessary disclosure of client information may damage a client.

***Electronic Court Filing.***

An issue related to issues considered by the Committee arises with electronic court filings. Electronic filing has become standard in recent years in Minnesota court proceedings. Public access to court filings has been greatly enhanced. Under current Rule 1.6(b)(8) and (9), a lawyer may disclose confidential information as reasonably necessary to "establish a claim or defense." Lawyers may sue clients and other parties to establish a claim of defamation per se. If, as Opinion 24 concludes, Rule 1.6(b)(8) does not permit a lawyer to disclose information in self-defense outside a legal proceeding, the rule may create an incentive for a lawyer to defend his or her reputation against serious, false accusations by bringing a claim for defamation per se.

A lawyer may wish to call attention to filings in a defamation per se or other proceeding. The Committee has not attempted to resolve the issue of whether a lawyer Rule 1.6 permits the lawyer to make further public disclosures of information filed online in litigation. The Committee notes: (1) that such disclosure would apparently be permitted under the Restatement of the Law Governing Lawyers; (2) that a Supreme Court referee concluded that a lawyer's public disclosure of court records did not violate Rule 1.6 and OLPR did not appeal this conclusion; and (3) that OLPR does not currently take a position on when further disclosure by a lawyer of information available in court records does or does not violate Rule 1.6.<sup>8</sup>

The Committee believes that amending Rule 1.6(b)(8) to make clear a lawyer's permission to disclose to respond to serious accusations will reduce the lawyer's incentive to sue the client.

---

<sup>8</sup> Restatement Sec. 59 cmt. d; Findings of Fact, Conclusions of Law, and Memorandum of Honorable John C. Lindstrom at 19, *In re Fuller*, 621 N.W.2d 460 (May 23, 2000).

***Conclusion.***

The Committee believes that the proposed amendments will not broaden the circumstances in which a lawyer may disclose confidential information beyond those provided by current Rule 1.6(b)(8). The current permission to disclose “in an actual or potential controversy” can be interpreted in a very broad way. OLPR interprets “controversy” to include a certain type of “debate.” The Committee’s proposal requires, for disclosures outside a litigation “proceeding,” that the client make an accusation that is specific, serious, and public, and that also discloses confidential information. These requirements will result in very few permissions to disclose. The proposed amendments are also clear enough to reduce or eliminate the uncertainty and controversy resulting from the current rule and from Lawyers Board Opinion 24<sup>9</sup>

## **ATTACHMENT 4**

### **Report and Recommendation regarding amendment of Rule 5.5, Minn. R. Prof. Conduct, adopted by the Assembly of the Minnesota State Bar Association**

**April 20, 2018**

---

*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.*

### **Report and Recommendation to the MSBA Regarding Proposed Amendments to MRPC 5.5, Unauthorized Practice of Law Rules of Professional Conduct Committee November 1, 2017**

#### **RECOMMENDATION**

RESOLVED, that the MSBA petition the Minnesota Supreme Court to adopt proposed amendments to MRPC 5.5(b) and (d), 5.5(c)(4), 5.5(e), and related comments, as set forth in this report.

#### **REPORT**

Following the Court's decision in *In re Panel File 39302*, 884 N.W.2d 661 (Minn. 2016), the Rules of Professional Conduct Committee took up the question of whether Rule 5.5 of the Minnesota Rules of Professional Conduct should be amended in light of that decision and in light of changes in the practice of law since the rule was adopted in 2005. Rule 5.5 governs the unauthorized practice of law.

The Committee appointed a subcommittee in October of 2016 to review MRPC 5.5. The subcommittee's recommendations were considered by the Committee at multiple meetings. The proposed amendments were given preliminary approval in May, 2017, and forwarded to the Lawyers Professional Responsibility Board (LPRB) for their review and recommendations.



On September 9, 2017, the LPRB agreed with the proposed amendments to MPRC 5.5(b) and (d), with the addition of additional language to (d). The Board rejected the proposed amendment of Rule 5.5(c) and approved new Rule 5.5(e), but limited it to representation of persons with a family relationship with the lawyer.

On October 31, 2017, the Committee, after much discussion, voted to recommend to the Assembly the adoption of the portions of Rule 5.5 rejected by the LPRB. (The Committee accepted the additional language proposed by the LPRB in Rule 5.5(d).)

Here is an overview of the Committee proposal:

- The amendment to Rule 5.5(c)(4) is intended to respond directly to the Court's invitation in *In re Panel File 39302*, 884 N.W.2d 661 (Minn. 2016) to amend and expand that rule to better reflect the bar's understanding of the meaning of fields of practice that are "reasonably related" to a lawyer's practice in a jurisdiction in which the lawyer is licensed.
- Proposed new section 5.5(e) is intended to remove certain client relationships from the purview of Rule 5.5—including current and former clients, family members, close friends, and other professional relationships—to both reflect the common current practices of lawyers and allow client selection of lawyers and client trust to take priority over the geographic restrictions that may otherwise be imposed by Rule 5.5.
- The proposed amendments to Rule 5.5(b) and (d) are intended to allow lawyers to continue to practice the law of the jurisdictions in which they are licensed when they relocate to Minnesota. This proposal follows recent similar amendments in Arizona and New Hampshire.

Each of the suggested amendments is explained below, followed by a full text, redlined version of the Rule. The amendments are all offered in the context of trying to ensure that Rule 5.5 is not interpreted to proscribe conduct that would otherwise be thought of by the practicing bar as "what good lawyers do."

#### **I. Background.**

In August, the Minnesota Supreme Court decided a private admonition appeal, *In re Panel File 39302*, 884 N.W.2d 661 (Minn. 2016). The case concerned a Colorado lawyer, not admitted in Minnesota, who was contacted by his mother and father-in-law regarding efforts to collect a judgment from them. The in-laws were Minnesota residents and the opposing party, the underlying lawsuit, and the opposing party's counsel were all in Minnesota.

The Colorado lawyer agreed to help his in-laws negotiate a resolution. The Colorado lawyer, from his office in Colorado, exchanged about two dozen e-mails

with the opposing party's Minnesota lawyer over a three-month period. The Minnesota lawyer became frustrated with the process and filed an ethics complaint against him with the Minnesota Office of Lawyers Professional Responsibility (OLPR). OLPR issued the lawyer a private admonition for violating Rule 5.5 by practicing law in Minnesota. The Colorado lawyer appealed to a three-person panel of the Lawyers Professional Responsibility Board (LPRB). After a hearing, the Panel affirmed the admonition, focusing predominately on the location of the parties to the matter. Committee member Eric Cooperstein represented the Colorado lawyer in an appeal to the Minnesota Supreme Court.

Two primary issues were presented to the Court: 1) whether a lawyer practices "in" a jurisdiction by sending e-mails to a lawyer in that jurisdiction and 2) whether the Colorado lawyer's conduct was permitted under the "temporary practice" provision of Rule 5.5(c)(4), which allows a lawyer to practice temporarily in a jurisdiction if the legal services provided "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

The Court ruled, 4-3, that the Colorado lawyer had engaged in the unauthorized practice of law in Minnesota. The Court stated that a lawyer could practice in a jurisdiction solely by sending e-mail communications to someone in that jurisdiction. The Court relied heavily on dicta in a 1998 California decision, *In re Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998), a fee dispute in which both physical and virtual presence in California were at issue. Ironically, *Birbrower* inspired significant changes to Rule 5.5 of the Model Rules of Professional Conduct, which changes were mostly adopted in Minnesota in 2005.

The Court also ruled that the Colorado lawyer's conduct was not permitted by Rule 5.5(c)(4) because although the lawyer did some collections work, that work was not part of a "particular body of federal, nationally-uniform, foreign, or international law. See Rule 5.5, cmt. 14. Hence, the Court determined that the representation of his in-laws was not "reasonably related" to his practice in Colorado. The Court stated in a footnote, however, that "If there are concerns that these [Rule 5.5(c)] exceptions do not adequately meet client needs, the better way to address such concerns would be through filing a petition to amend Rule 5.5(c)."

## **II. Rationale for Seeking Amendments to Rule 5.5.**

Rule 5.5, which mostly follows the ABA Model Rule, presently enforces geographic restrictions on the practice of law. In the years since the present version of the rule was adopted in 2005, lawyers and clients have become increasingly mobile. Both lawyers' practices and their clients' legal matters

routinely cross state lines. *Panel File 39302* highlights some of the unintended consequences of the present rule and draws attention to how confusing it may be for lawyers to determine whether their conduct runs afoul of the rule.

For example, although the Minnesota Supreme Court has broadly defined when a lawyer may be practicing “in” a jurisdiction under Rule 5.5(a), the provisions of 5.5(c) are intended to allow a lawyer to practice “on a temporary basis” in a jurisdiction in which the lawyer is not licensed. The present rule leaves several questions unanswered:

- A Minnesota lawyer represents a Minnesota corporate client for many years. The client moves its main operations to another state where the lawyer is not licensed. Rule 5.5(c)(4) allows the lawyer to continue to represent the client, including meeting with the client in the other state, conducting transactions for and advising client, communicating with the client by phone and e-mail, etc. The legal work is essentially the same work that the lawyer performed while the client was in Minnesota. However, the exception in 5.5(c)(4) applies only on a temporary basis. May the lawyer continue representing the lawyer indefinitely? If not, how long will the “temporary exception” apply? What interest would be protected by forcing the lawyer to cease representing the client?
- A Minnesota lawyer with an office in Minnesota purchases a home outside Minnesota, such as in Hudson, Wisconsin or Fargo, North Dakota. The lawyer finds that he or she is more productive working from home on occasion. Working at home on a temporary basis would be permitted by Rule 5.5(c)(4). How many days a week may a lawyer work from home and still fall within rule 5.5(c)(4), rather than the prohibition in Rule 5.5(b) on establishing a “systematic and continuous presence” in a jurisdiction in which the lawyer is not licensed? A similar problem confronts lawyers who want to spend winters in other jurisdictions but continue working remotely during their time away.
- A Minnesota lawyer represents several long-time Minnesota clients in a variety of matters. The lawyer’s spouse obtains a “dream job” in another jurisdiction. The lawyer could easily continue all of the work for the Minnesota clients from outside the state, except for the prohibition in Rule 5.5(b) on establishing a “systematic and continuous presence” in a jurisdiction in which the lawyer is not licensed.

Note that for each of these examples, the issue could be presented in the opposite way, i.e. when a lawyer licensed in another state encounters one of these situations. The proposed amendments below would protect non-Minnesota lawyers from discipline by the OLPR; those lawyers could conceivably violate rules in their own states. Conversely, Rule 5.5(a) includes a safe harbor that states that a Minnesota lawyer does not violate the rule if his or her conduct in another jurisdiction conforms to what would be permissible for a lawyer licensed in another state who conducts business in Minnesota. Hence, these Rule amendments will protect Minnesota lawyers from Minnesota discipline, even if

another jurisdiction attempted to take disciplinary action against the Minnesota lawyer.

### **III. Proposed Amendments**

#### **A. Clarification of “reasonably related” in Rule 5.5(c)(4).**

As noted above, Rule 5.5(c)(4) provides an exception that allows lawyers to practice in another jurisdiction temporarily, if the legal services “arise out of or are reasonably related to the lawyer’s practice” in a jurisdiction in which the lawyer is licensed. In 39302, the Minnesota Supreme Court interpreted the scope of the term “reasonably related” by relying on a portion of a comment to Rule 5.5 that limits the reach of the exception to legal services that are part of a “particular body of federal, nationally-uniform, foreign, or international law. See Rule 5.5, cmt. 14. As noted above, the Court invited an amendment to Rule 5.5(c).

“Reasonably” is defined in the MRPC as describing “the conduct of a reasonably prudent and competent lawyer.” Rule 1.0(i), R. Prof. Conduct. The proposed amendment is intended to codify what the subcommittee believes that prudent and competent lawyers currently recognize as the scope of what is “reasonably related” to their practices: those areas that are within the lawyer’s regular field or fields of practice. A lawyer’s expertise in a particular area, whether it be shopping-center leases, nonprofit financing, transgender rights, restaurant franchises, etc., may attract clients regionally or nationally even where the practice area is not subject to a nationally uniform or federal body of law. Clients may seek out lawyers for this expertise and the public is well-served by allowing clients to hire lawyers with subject-matter expertise that suits the client’s matter. A lawyer’s expertise, gained through regular practice in a field of law provides reasonable assurance of client protection in a temporary practice context.

During the Committee’s discussions, several Committee members described their experiences with prudent and competent lawyers who have been offering services in their fields of practice across state borders on a regular basis. Such conduct was noted in the practices of large firms, corporate law departments, small boutique firms, and others.

The Committee believes that people in Minnesota will be better served and protected by being able to choose among lawyers who regularly practice in a field of law, even without a Minnesota license, rather than by a lawyer who is licensed in Minnesota but has very little experience in the field of practice relevant to the client’s matter. The growing complexity of law often makes field of law a better indicator of competence than local licensure. Current comment 14 to Rule 5.5 recognizes “nationally-uniform” law as “reasonably related.” Many areas of law could be termed “nationally-similar,” without being uniform. For example,

the ABA Model Rules of Conduct have been adopted in almost all states, but Minnesota, like many states, has variations that make the law marginally less than “uniform.” A Minnesota resident with issues relating to these Rules would be well-served by retaining, for example, Geoffrey Hazzard or Ronald Rotunda, both nationally-recognized ethics experts who do not have Minnesota licenses.

The proposed amendment finds support in the 39302 dissent. The 39302 dissent, discussing the appropriate scope of Rule 5.5(c)(4), stated, “One factor provided in Rule 5.5, comment 14, relates to whether the lawyer’s temporary services draw on the lawyer’s ‘expertise developed through the regular practice of law.’” To the extent that Rule 5.5 seeks to protect the public by ensuring competence, experience that arises from a lawyer’s regular practice is more likely to accomplish that goal than a lawyer who has little experience in a federal or “nationally-uniform” area of law. Trying to determining what characteristics of a body of law make it “nationally-uniform” but still distinct from federal law would perpetuate uncertainty about when lawyers fall within the protection of Rule 5.5(c)(4).

The proposed amendment uses the term “field or fields of practice.” This term has been used in Rule 7.4 for over thirty years, without any reported difficulty in definition or enforcement.

During the subcommittee meetings, Pat Burns expressed his personal reservations that the amendment was too broad in its expansion of the rule and his concerns regarding how the OLPR would determine what a lawyer’s “regular” fields of practice include. Director Susan Humiston wrote a letter to then-Committee chair Michael McCarthy, expressing disagreement with several aspects of the proposed amendments. Those arguments are discussed in Section IV, below

Along with the proposed amendment, the Committee recommends amending comment 14 by deleting a phrase from the final sentence, as follows: “In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients ~~in matters involving a particular body of federal, nationally-uniform, foreign, or international law.~~” Rule 5.5 cmt. 14 (cmt. 15 as renumbered below). This is intended to avoid confusion between the amended rule and the comment.

B. New section 5.5(e): representation of relatives and other personal referrals.

This new section is intended to directly address the *Panel* 39302 decision and other potential problems related to the continuous (as opposed to temporary)

representation of current or former clients that are located in other jurisdictions. The proposal would add a new provision allowing a lawyer to perform legal services in a jurisdiction if the services:

are performed on behalf of a person who has a family, close personal, or prior professional relationship with the lawyer.

This amendment accomplishes two purposes. First, it addresses the conundrum in 39302 that the present language of the rule provides no mechanism by which lawyers may provide legal services to family members and friends who happen to reside in other jurisdictions and where the subject matter of the legal issue is not within the lawyer's regular field of practice. The Committee believes that there are many situations in which family members and close friends would turn to a lawyer with whom they have a personal relationship to seek assistance in a legal matter rather than be forced to hire a stranger in their own jurisdiction. This could apply, for example, to a lawyer whose child had a dispute in another jurisdiction with a landlord or a lawyer whose aged parent had a dispute regarding the care provided by a nursing home. In these situations, there is little or no risk of harm to the public of the lawyer conducting the representation because the lawyer is well-known to the client, even if the lawyer has not previously represented that person and even if the lawyer does not have experience in that area of the law.

Second, this amendment would address the scenarios discussed above in which lawyers seek to continue work for clients who have relocated to other jurisdictions or who themselves seek to work from homes in bordering jurisdictions or take extended vacations in other jurisdictions. It is in the public interest to allow clients, including Minnesota clients, to continue working with their lawyers despite changes in the lawyers' geographic locations.

The amendment follows the Court's footnote suggestion that it might entertain a petition to expand the coverage of Rule 5.5(c). In reviewing the rules, the subcommittee determined that the clearest amendment would remove certain trusted relationships from the prohibitions of Rule 5.5(a) entirely. The language "family, close personal, or prior professional relationship" is taken from Rule 7.3, which allows direct solicitation of legal business from persons in those categories, also under the theory that there is little risk of abuse in those situations. The language of Rule 7.3 has been in place for several decades and has not presented enforcement problems for OLPR. A new comment 16 addresses the new language.

- C. Amendments to Rules 5.5(b) and (d) to allow a lawyer to continue to serve existing clients from another jurisdiction.

Although not raised directly by 39302, the issues surrounding when lawyers may practice in other jurisdictions provides an appropriate occasion for Minnesota to consider following the efforts of Arizona and New Hampshire to relax the prohibitions in Rule 5.5(b) against establishing offices in other jurisdictions where the lawyer would only practice the law of the jurisdiction in which the lawyer is licensed.

The amendments would allow a lawyer to move to another state but continue representing clients from the lawyer's licensed state. This is important, for example, when a lawyer moves to another jurisdiction because of a spouse's new job, to be closer to ailing parents, etc. The risk to the public in these situations is very small because the lawyer is simply continuing to do the exact same work that the lawyer did before, just from a different location. Much like the existing exemption in Rule 5.5(d) for lawyers who practice Federal law, such as immigration, this amendment would allow lawyers from other jurisdictions to practice only the law of that jurisdiction. Because the lawyer may not hold out as being licensed in the new jurisdiction, the lawyer therefore does not compete with the lawyers licensed in the new jurisdiction for clients with matters related to the law of that jurisdiction.

These amendments are found in Rule 5.5(b) and (d) and new comment 5 in the attached version of Rule 5.5. The amendments follow the structure of the rule in Arizona, with the exception that the amendments do not adopt Arizona's provision that the lawyer must advise "the lawyer's client that the lawyer is not admitted to practice in Arizona, and must obtain the client's informed consent to such representation." Minnesota did not adopt these provisions in the 2005 amendments, including Rule 5.5(c). It would be inconsistent to adopt these notice and consent provisions only for the amendments that are now proposed. New Hampshire adopted slightly different amendments in October 2016 that implement the same policy change.

#### **IV. Response to OLPR Director Humiston's Substantive Concerns**

In her April 24, 2017 letter to then-Committee Chair Michael McCarthy, Ms. Humiston raised several concerns that merited additional discussion by the Committee.

Regarding the proposed amendment to Rule 5.5(c)(4) (fields of practice), the Director noted that the majority opinion in *Panel File 39302* rejected the dissent's argument that a field of practice need not be nationally-uniform to qualify as "reasonably related." The Director suggested that the proposed amendment is a "nonstarter" for a majority of the Court. The Committee believes that the Court was interpreting the rule as written to the facts before the Court. The Court's

footnote invited amendments and the Committee believes the Court will be open-minded in considering the concerns of the practicing bar.

The Director's letter stated that the proposed amendments would benefit lawyers in other states, but expressed doubt that the amendments will benefit Minnesota lawyers while increasing risk to Minnesota consumers of legal services. The Director may have overlooked that the safe-harbor provision in Rule 5.5(a) protects Minnesota lawyers from discipline in Minnesota. The amendments, by clarifying the scope of Rule 5.5, protect Minnesota lawyers. Moreover, the amendments benefit Minnesota consumers of legal service, by increasing their range of choices of counsel without exposing them to the primary danger that unauthorized practice regulation seeks to prevent – incompetent representation. If there are harms to consumers arising from these proposed amendments the Director's letter does not identify them.

Ms. Humiston's letter state that the amendments would "enhance a conundrum that already exists in Minnesota for non-Minnesota lawyers, because Minn. Stat. § 481.02, subdiv. 1, would currently prohibit the conduct even if Rule 5.5 would allow it." The Committee does not believe there is a "conundrum." If this concern had substance, it would have weighed against the adoption of Rule 5.5(c), in 2005. The Committee is similarly unaware of any policy by the Director's Office to refuse to apply Rule 5.5(c) because of a conflict with § 481.02. The Minnesota Supreme Court has long held that it, rather than the Legislature, has the ultimate authority to define the unauthorized practice of law. *Cardinal v. Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864, 867 (Minn. 1988), *citing Cowern v. Nelson*, 207 Minn. 642, 647, 290 N.W. 795, 797 (1940). Although Minn. Stat. § 481.02 was mentioned by Justice Lillehaug in the oral argument in 39302, the Court did not address it in their opinion.

The Director's letter stated that other states are already less permissive in multi-jurisdictional practice rules than Minnesota, citing as an example a North Carolina rule. The Committee's intent is to enhance benefits to Minnesota clients, by increasing their choices of counsel, without increasing their risk. That some other states have stricter rules does not indicate that the restrictions were adopted to benefit the public, rather than to protect local lawyers' interests.

*[Text of proposed amendments to Rule 5.5 omitted. See Attachment 2].*





FILE NO. ADM10-8005

STATE OF MINNESOTA

IN SUPREME COURT

**FILED**

November 20, 2018

**OFFICE OF  
APPELLATE COURTS**

-----  
In Re Petition to Amend the  
Minnesota Rules of Professional Conduct.  
-----

COMMENTS REGARDING THE  
MINNESOTA STATE BAR  
ASSOCIATION PETITION TO  
AMEND RULE 1.6(b), MRPC

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE  
STATE OF MINNESOTA:

The Lawyers Professional Responsibility Board (LPRB) and the Director of the Office of Lawyers Professional Responsibility (Director) submit these comments regarding the Minnesota State Bar Association (MSBA) proposed amendments to Rule 1.6(b), Minnesota Rules of Professional Conduct (MRPC). The LPRB and the Director oppose the substantive proposed amendment to Rule 1.6(b), MRPC, but do not oppose the minor proposed amendment to Rule 1.6(b)(8), MRPC, which will make the meaning of the rule more clear.

## INTRODUCTION

1. The LPRB is a Board established by this Court to oversee the lawyer discipline system. Rule 3(c), Rules on Lawyers Professional Responsibility (RLPR). The Director is appointed by this Court to administer the lawyer discipline system. Rule 5(b), RLPR.

2. The LPRB embodies a wide diversity of viewpoints reflecting not only the bar, but the public as a whole. The LPRB is comprised of 23 members, nine of whom are non-lawyers. Rule 4(a)(2), RLPR. The non-lawyers include a former naval officer, an education specialist, a retired police sergeant, a public speaking instructor, a business management consultant specializing in alternative dispute resolution, a computer forensics expert, a retired corporate executive, and a retired county human

services director. *See*

<http://lprb.mncourts.gov/AboutUs/Pages/LawyersBoardDirectory.aspx>.

3. The lawyer members of the LPRB also reflect a diversity of practice. Six of the lawyer members are nominated by the MSBA. Rule 4(a)(2), RLPR. Some are sole practitioners, some are in small firms, some are in medium firms, and some are in large firms. Some are from the Twin Cities metropolitan area, others are from out-state Minnesota. These lawyers encompass the wide variety of areas of practice including complex civil litigation, criminal defense, family law, business transactions, professional review matters, insurance defense, law firm ethics counsel, criminal prosecution, intellectual property, estate planning and immigration law.

4. This Court has the exclusive and inherent power and duty to administer justice and adopt rules of practice and procedure before the courts of this state and to establish standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05.

5. This Court has adopted the MRPC to establish standards of conduct for lawyers licensed to practice law in the State of Minnesota. This Court has amended the MRPC from time-to-time for good cause shown.

## **BACKGROUND**

6. The LPRB considered the MSBA's proposed amendments at its April 27, 2018, meeting. The LPRB and the Director oppose the substantive proposed amendment but support the clarifying amendment to Rule 1.6(b)(8), MRPC, as set forth herein and requests the Court adopt this clarifying amendment.

7. Rule 1.6, MRPC, sets forth the fundamental principle that all information related to a representation is confidential. Rule 1.6(a), MRPC, provides, "Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client."

8. Rule 1.6(b), MRPC, already contains several specific exceptions that allow a lawyer to disclose information related to the representation of a client. For example,

Rule 1.6(b)(2), MRPC, allows a lawyer to disclose information which is not privileged, which the client has not asked the lawyer to hold confidential, and disclosure of which will not embarrass or harm the client. This exception often can encompass a fair amount of the information related to a representation.

**IT IS APPROPRIATE TO REFINE THE LANGUAGE OF RULE 1.6(b)(8), MRPC.**

9. One of the limited exceptions to the confidentiality of client information is contained in Rule 1.6(b)(8), MRPC. This subsection currently provides:

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

(8) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

10. The MSBA's proposed amendment to Rule 1.6(b)(8), MRPC, reads:

(8) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense ~~by on behalf of~~ the lawyer in an actual or potential ~~controversy between the lawyer and the client, to establish a defense in a~~ civil, criminal, or disciplinary proceeding ~~against the lawyer~~ based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

11. At the heart of reasoning underlying the existing proposals to modify existing Rule 1.6(b)(8), MRPC, is the word "controversy," which is not defined in the MRPC. This proposed amendment to Rule 1.6(b)(8), MRPC, will clarify that this exception to the general principle that client confidentiality in this provision is limited to two realms: Actual or potential civil or criminal litigation, and lawyer discipline proceedings. This amendment preserves the bedrock notion of client confidentiality, is

consistent with the LPRB and Director's long-standing interpretation of this rule, and is consistent with the law of other jurisdictions.

12. This proposed amendment to Rule 1.6(b)(8), MRPC, is the same as the MSBA's proposed new Rule 1.6(b)(9), MRPC. The LPRB and the Director join with the MSBA in recommending this language be adopted, but request it be included in the MRPC as Rule 1.6(b)(8), MRPC.

**IT IS NOT APPROPRIATE TO SUBSTANTIVELY MODIFY RULE 1.6(b), MRPC.**

13. In contrast, the LPRB and the Director believe that the MSBA petition to amend to add a new Rule 1.6(b)(9), MRPC, would unnecessarily create a broad exception inconsistent with the notion of client confidentiality, the LPRB's and the Director's interpretation of Rule 1.6, MRPC, and the law of other jurisdictions. As drafted, this proposal would add a new exception to Rule 1.6(b), MRPC, to allow a lawyer to disclose client confidential information in response to a client's negative assertions about the lawyer.

14. The MSBA's proposal arises out of a desire to allow a lawyer to respond to a client's negative commentary or review of the lawyer and/or lawyer's services in an online review website, blog post, or other social media. The LPRB and the Director recognize the important concern underlying the proposal is that in today's online world, prospective clients increasingly find lawyers by searching online, and baseless negative reviews can have an increasingly deleterious effect on the lawyer's ability to obtain business. Therefore, when a client uses confidential information to accuse the lawyer of a specific act of serious misconduct, a desire may exist to allow the lawyer to use confidential information if reasonably necessary to rebut the accusation.

15. However, confidentiality is a core tenet of the attorney-client relationship, and is integral to the fiduciary duties that attorneys owe to their clients. And it should also be remembered that confidentiality as defined under the MRPC is much broader than attorney-client privilege. Privilege applies to private communications between a

client and a lawyer in which legal advice is sought or obtained; confidentiality applies to all information related to a representation.

16. Rule 1.6(b), MRPC, already contains many exceptions to the general principle of confidentiality of client information. Each is tailored to a critical, overriding public interest. For example, a lawyer may disclose client confidential information “to prevent reasonably certain death or substantial bodily harm” (Rule 1.6(b)(6), MRPC); to prevent the commission of a crime or of a serious fraud in which the client has used or is using the lawyer’s services (Rule 1.6(b)(4), MRPC); or to prevent or rectify criminal or fraudulent conduct in an adjudicative proceeding (Rule 3.3(b) and (c), MRPC). No such overriding interest of critical importance exists here.

17. In Opinion No. 24, the LPRB articulated that a lawyer may not use confidential client information to respond to a client’s negative public comments about the lawyer. LPRB Opinion No. 24, adopted September 30, 2016, states in pertinent part, “When responding to comments, negative or otherwise, posted on the internet (or any other public forum) concerning the lawyer’s representation of a client, Rule 1.6(b)(8), MRPC, does not permit the lawyer to reveal information relating to the representation of a client.”

18. The LPRB and the Director believe their position to be consistent with interpretations nationally. All but one of the jurisdictions which have considered this issue have opined that lawyers ought not to be allowed to do so. For example, New York State Bar Assoc. Ethics Op. 1032 (Oct. 30, 2014), in reaching this result states in part:

This result properly respects the vital purpose of Rule 1.6(a) in preserving client confidentiality and fostering candor in the private communications between lawyers and clients, and it does not unduly restrict the self-defense exception. That exception reflects the fundamental unfairness of a current or former client—or others—being able to make consequential accusations of wrongful conduct against a lawyer, while the lawyer is disabled from revealing information to the extent reasonably necessary to defend against such accusations. Unflattering 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. We do not believe that [Rule 1.6] should be interpreted in a manner that could chill such discussion.

Other jurisdictions reaching the same result include Los Angeles Cnty. Bar Assoc. Op. 525 (December 6, 2012); Penn. Bar Assoc. Comm. on Legal Ethics and Prof. Resp. Formal Op. 2014-200 (2014); Bar Assoc. of San Francisco Op. 2014-1 (Jan. 2014); Prof. Ethics Comm. for the State Bar of Texas Op. 662 (Aug. 2016); and Bar Assoc. of Nassau Cnty. Comm. on Prof. Ethics Op. 2016-1 (May 9, 2016). The only exception, District of Columbia Bar Ethics Op. 370 (Nov. 2016), is based on a rule which is substantially different from Rule 1.6, MRPC.

19. The LPRB and Director's position is also consistent with the ABA Model Regulatory Objectives for the Provision of Legal Services. One of the objectives is "Protection of privileged and confidential information." Although there are exceptions, each is narrowly drawn to the minimum disclosure necessary in a given circumstance. Part of the basis for the duty of confidentiality is the duty of loyalty to clients. Clients view lawyers as obligated to preserve client confidences. We as lawyers are professionals, like doctors and psychotherapists. The LPRB and the Director are not aware of other professions allowing for disclosure of otherwise confidential information simply to respond to a negative online review.

20. The ABA has recently and consistently reiterated the importance of client confidentiality. ABA Formal Opinion 479 (issued December 15, 2017) addresses the "generally known" exception to former client-confidentiality under Rule 1.9(c). The ABA opined that, "Information is not generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information." Instead, information is only considered generally known if it is "(a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession or trade."



21. The ABA again recognized the importance of client confidentiality in Formal Opinion 480, issued March 6, 2018. That opinion states, “Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules [of Professional Conduct].”

22. Unfortunately, it is not difficult to envision potential problems created by the MSBA’s proposal. Take for example a criminal defense lawyer. The client may post a negative online comment about the criminal defense lawyer, accusing that lawyer of specific serious wrongdoing which the client believes is causing the client to be found guilty of an offense which the client states the client did not commit. Under the MSBA proposal, a lawyer would be allowed to reveal client confidential information, including information which could bear on the guilt or innocence of the accused. This could implicate the client’s right to receive a fair trial and undercut the client’s Fifth Amendment rights, and could ease the burden on the prosecution to prove the elements of the offense.

23. The principle purpose or rationale underlying the MSBA proposal appears to be based on the concept of waiver, which a client can do even unknowingly. The Rules of Professional Conduct, however, do not operate on the basis of waiver. Instead, disclosure based on client permission requires a client’s informed consent. Rule 1.6(b)(1), MRPC. Stated differently, the proposition that a client unfamiliar with the Rules of Professional Conduct effectively provides informed consent to disclosure of confidential information by counsel in retaliation for the client having posted information online is a stretch too far.

24. Already circumstances exist when a lawyer may well want to make disclosure but the Rules of Professional Conduct prohibit such disclosure, even when the circumstances in these matters would seem to have a greater public interest in favor of disclosure than the interest in responding to criticism. Indeed, in the anonymous world of online postings, it may well be that a lawyer cannot be certain that the person



who authored a post in the name of a client is, in fact, the client. The MSBA proposal does not address this important issue.

25. The proposed amendment brings additional concerns. It creates a broad exception to the general rule of confidentiality. Although the inspiration for the proposed amendment is concern about negative commentary in an online review website, blog post, or other social media, the proposed amendment allows disclosure in response to any "allegations by the client." As noted in proposed comment 8, "Public accusations are those made to third persons other than the lawyer and those associated with the lawyer in a firm." In other words, any criticism of a lawyer by a client to any person would allow a lawyer to bring out confidential client information to respond. This is overly broad. Moreover, the proposed amendment does not limit the lawyer's response to the website or other forum where the negative commentary occurred.

26. Additionally, the proposed language could cause lawyers acting in good faith to unwittingly violate the rule. The proposed amendment purports to limit responses to a situation in which the accusation "raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer . . . ." It is true that this standard is used elsewhere in the Rules of Professional Conduct in connection with a lawyer's duty to report. *See* Rule 8.3, MRPC. To the practicing bar, however, what constitutes an accusation involving the lawyer's "fitness as a lawyer" can be interpreted quite broadly. Many lawyers may interpret allegations that a lawyer failed to return calls or failed to act diligently as involving a lawyer's "fitness." The proposed amendment and comment thereto suggest there is a bright line between a "substantial question as to the lawyer's honesty, trustworthiness, or fitness" and a "petty or vague critique." In fact, the difference can be an area involving multiple shades of gray. A goal of the Rules of Professional Conduct should be to give clear direction to the practicing bar. In addition, the Director and the Board must be able to consistently enforce the Rules of Professional Conduct. This proposed amendment is inconsistent with these goals.

27. The LPRB and the Director recognize that the significant client protection concerns over duty of loyalty and confidentiality vis-à-vis the concern for protection of lawyer reputation and the profession at large, particularly in today's social media driven society, presents a close call of public policy. Accordingly, this is why the LPRB and the Director, in response to the MSBA proposal, considered voluminous materials over a period of many months during which time members also engaged in significant dialogue with each other and sought out the opinions of others in the legal community, including the MSBA.

28. Ultimately, a majority of the LPRB's lawyer and non-lawyer members voted to reject the MSBA's proposed additional exception, recognizing that while lawyer protection from spurious and inflammatory public allegations by a client is an important concern to be given serious consideration, the potential harm to the reputation of the legal profession coupled with the erosion of the duty of confidentiality and potential for abuse could not be overcome by the MSBA's proposal as drafted.

29. Further tipping the scales in the LPRB's and the Director's reasoning was the fact lawyers seeking recourse from negative posts or client commentary would remain free as they have always been to disclose confidential client information when the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential civil, criminal, or disciplinary proceeding based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client. In addition, a lawyer seeking recourse from negative posts or client commentary may respond by (1) stating that the lawyer has a duty of confidentiality to the client and will not respond online, and (2) inviting the client to constructively address the dispute in private. This kind of response upholds the core of the attorney-client relationship and does so in a manner that promotes a public trust and confidence in the profession.

## CONCLUSION

For the foregoing reasons, the Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility oppose the substantive amendment to Rule 1.6(b), MRPC, proposed by the Minnesota State Bar Association, and do not oppose the minor proposed amendment to make the existing meaning of the rule more clear.

Dated: November 20, 2018.

Respectfully submitted,

LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD

By Robin M. Wolpert / by  
ROBIN M. WOLPERT *cmst*

Its Chair

Attorney No. 0310219

1500 Landmark Towers

345 St. Peter Street

St. Paul, MN 55102-1218

(651) 296-3952

rwolpert@comcast.net

and

Susan M. Humiston

SUSAN M. HUMISTON

DIRECTOR OF THE OFFICE OF LAWYERS  
PROFESSIONAL RESPONSIBILITY

Attorney No. 0254289

1500 Landmark Towers

345 St. Peter Street

St. Paul, MN 55102-1218

(651) 296-3952

Susan.Humiston@courts.state.mn.us



**FILED**

November 20, 2018

**OFFICE OF  
APPELLATE COURTS**

**FILE NO. ADM10-8005**

**STATE OF MINNESOTA**

**IN SUPREME COURT**

-----  
In Re Petition to Amend the  
Minnesota Rules of Professional Conduct.  
-----

**COMMENTS REGARDING THE  
MINNESOTA STATE BAR  
ASSOCIATION PETITION TO AMEND  
RULE 5.5, MINNESOTA RULES OF  
PROFESSIONAL CONDUCT**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE  
STATE OF MINNESOTA:

The Lawyers Professional Responsibility Board (LPRB) and the Director of the Office of Lawyers Professional Responsibility (Director) submit these comments regarding the Minnesota State Bar Association (MSBA) proposed amendments to Rule 5.5, Minnesota Rules of Professional Conduct (MRPC). The LPRB and the Director support in part and oppose in part the proposed changes as more fully set forth herein.

#### **INTRODUCTION**

1. The LPRB is a Board established by this Court to oversee the lawyer discipline system. Rule 3(c), Rules on Lawyers Professional Responsibility (RLPR). The Director is appointed by this Court to administer the lawyer discipline system. Rule 5(b), RLPR.

2. The LPRB embodies a wide diversity of viewpoints reflecting not only the bar, but the public as a whole. The LPRB is comprised of 23 members, nine of whom are non-lawyers. Rule 4(a)(2), RLPR. The non-lawyers include a former naval officer, an education specialist, a retired police sergeant, a public speaking instructor, a business management consultant specializing in alternative dispute resolution, a computer forensics expert, a retired corporate executive, and a retired county human

services director. *See*

<http://lprb.mncourts.gov/AboutUs/Pages/LawyersBoardDirectory.aspx>.

3. The lawyer members of the LPRB also reflect a diversity of practice. Six of the lawyer members are nominated by the MSBA. Rule 4(a)(2), RLPR. Some are sole practitioners, some are in small firms, some are in medium firms, and some are in large firms. Some are from the Twin Cities metropolitan area, others are from out-state Minnesota. These lawyers encompass a variety of areas of practice including complex civil litigation, criminal defense, family law, business transactions, professional review matters, insurance defense, law firm ethics counsel, criminal prosecution, intellectual property, estate planning and immigration law.

4. This Court has the exclusive and inherent power and duty to administer justice and adopt rules of practice and procedure before the courts of this state and to establish standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05.

5. This Court has adopted the MRPC to establish standards of conduct for lawyers licensed to practice law in the State of Minnesota. This Court has amended the MRPC from time-to-time for good cause shown.

## **BACKGROUND**

6. The LPRB's position with respect to the proposed Rule 5.5, MRPC, amendments was approved by the LPRB at its September 8, 2017, meeting. The MSBA General Assembly approved its proposed amendments to Rule 5.5, MRPC, at its April 20, 2018, meeting. The LPRB and the Director join in recommending certain changes proposed by the MSBA, and believe others are not in the public interest.

7. Rule 5.5, MRPC, with certain exceptions, prohibits a lawyer not authorized to practice law in this state from doing so. The changes supported by the LPRB and the Director would expand certain exceptions.

8. Rule 5.5, MRPC, in its current form works well. It allows lawyers the flexibility necessary for their practices while respecting the authority of each state to regulate the profession within its borders. Only rarely is a non-Minnesota lawyer disciplined for engaging in the practice of law in violation of Rule 5.5, MRPC. The disciplines for violations of this rule tend to occur because a Minnesota lawyer is practicing (a) after being suspended or disbarred, (b) while suspended for failing to pay the lawyer registration fee, or (c) while on CLE-restricted status.

**PROPOSED AMENDMENTS TO RULE 5.5(b) AND (d), MRPC.**

9. The MSBA proposes to amend Rule 5.5(b) and (d), MRPC, as follows:

(b) A lawyer who is not admitted to practice in ~~this jurisdiction~~ Minnesota shall not:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of Minnesota law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice Minnesota law ~~in this jurisdiction~~.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in ~~this jurisdiction~~ Minnesota ~~that are services that the lawyer is authorized to provide by~~ exclusively involve federal law or the other law of this another jurisdiction in which the lawyer is licensed to practice law, provided the lawyer advises the lawyer's client that the lawyer is not licensed to practice in Minnesota.

10. The LPRB agrees with this proposal. The genesis of this proposal is to allow a lawyer who practices law in another state and moves to Minnesota to continue serving the lawyer's clients in the state in which the lawyer is licensed. Situations when this can occur include when a spouse has a job transfer, or a lawyer moves to be closer



to family. The goal of this proposed change is to allow the lawyer while physically in Minnesota to do what the lawyer was doing in the lawyer's home state.

11. The LPRB and the Director believe that the disclosure requirement serves an important function, namely, to ensure that a person hiring a lawyer understands the jurisdictional limitations on the lawyer's practice. Often, people assume that a lawyer physically present in a jurisdiction is licensed to practice in that jurisdiction. Ensuring clients understand that the lawyer nevertheless has limitations on the law the lawyer may practice is important.

12. The rule as initially proposed by the MSBA and presented to the LPRB did not contain this important element. Thus, when the LPRB considered this amendment, the LPRB's focus was to ensure the proposed rule contained a notice requirement, as the proposed rule now does.

13. The Director notes two potential issues with this proposed rule. First, it does not appear the "exclusively involve" change is necessary as it relates to federal law. Rule 5.5(d), MRPC, already provides, consistent with the model rule, that a lawyer may provide legal services "that the lawyer is authorized to provide by federal law . . . ." In addition to redundancy, the proposed rule also imposes a new requirement on lawyers practicing federal law which does not currently exist. Rule 5.5(d), MRPC, does not require non-Minnesota lawyers practicing law as authorized by federal law to notify clients of the fact that they are not licensed in Minnesota.

#### **PROPOSED NEW RULE 5.5(e), MRPC.**

14. The MSBA proposes to add a new subsection (e) to Rule 5.5, MRPC, which reads:

(e) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are performed on behalf of a person



who has a family, close personal, or prior professional relationship with the lawyer.

15. The proposed rule is designed to allow a lawyer to provide legal services to people who know the lawyer well but happen to reside in other jurisdictions.

16. The LPRB and the Director agree with the MSBA's recommendation that the rule should allow a lawyer not admitted in Minnesota to perform legal services in Minnesota if the services "are performed on behalf of a person who has a family relationship with the lawyer." Presently a non-Minnesota lawyer may represent a family member or any other person in Minnesota if the representation relates or arises out of the lawyer's practice in the lawyer's home jurisdiction. This narrow additional exception will allow a non-Minnesota lawyer to represent a family member even if the representation is unrelated to their practice. This will facilitate access to justice for family members.

17. The LPRB and the Director do not agree that this additional exception should be further expanded to include persons with whom the lawyer has a "close personal" or "prior professional" relationship. The terms "prior professional" and "close personal" are vague and ambiguous. Moreover, these terms are potentially quite expansive and therefore appear to be overbroad. In considering the MSBA's proposed Rule 5.5(e), MRPC, the LPRB considered more narrowly crafted alternatives. In the end, the LPRB could not settle on any acceptable alternative language. The vagueness of the proposed language creates enforceability challenges for the LPRB and Director.

18. The breadth of this new exception as set forth in the MSBA proposal raises consumer protection concerns. The concern is whether a person hiring a lawyer who is not licensed in Minnesota to handle a Minnesota matter truly understands any limitations on the competency of that lawyer which may exist.

19. The LPRB and the Director are also concerned that this (and the additional proposed amendments discussed below) create the possibility that a Minnesota lawyer may be misled to believe other jurisdictions have similar rules, when in fact most jurisdictions do not. This could cause a Minnesota lawyer to unwittingly undertake conduct which results in the lawyer receiving discipline in another jurisdiction.

20. Another concern is that the language of the rule as drafted does not limit this exception, as most other exceptions are limited, to temporary practice or to practice not involving appearance before a tribunal or in an alternative dispute resolution proceeding. Thus, as worded, this rule appears to allow a foreign lawyer to establish a permanent presence in Minnesota to represent friends and family. This proposed rule also appears to allow a foreign lawyer to appear before a Minnesota tribunal or in a Minnesota alternative dispute resolution proceeding on behalf of a friend or relative, without becoming admitted *pro hac vice* before the tribunal.

**PROPOSED AMENDMENT TO RULE 5.5(c)(4), MRPC, AND RELATED  
AMENDMENT TO THE COMMENT TO RULE 5.5, MRPC.**

21. The MSBA proposes to amend Rule 5.5(c)(4), as follows:

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction which:

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Such reasonably-related services include services which are within the lawyer's regular field or fields of practice in a jurisdiction in which the lawyer is licensed to practice law.

22. To confirm this significant expansion to the exception, the MSBA proposal would amend Comment 14 to Rule 5.5 as follows: "In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on

behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law."

23. The LPRB and the Director oppose the MSBA's proposed change to Rule 5.5(c)(4), MRPC, and the related proposed change to Comment 14 to Rule 5.5, MRPC. On the whole, this is the MSBA's most dramatic proposed change, and would create an exception that swallows the rule.

24. Importantly, this proposed amendment eliminates the Comment to the rule defining reasonably-related services as those "involving a particular body of federal, nationally-uniformed, foreign, or international law." (Rule 5.5, MRPC, Comment 14.)

25. The underlying purpose of rules against the unauthorized practice of law such as Rule 5.5, MRPC, and throughout the cases that analyze whether an attorney is engaging in the unauthorized practice of law, is the consideration that such provisions protect the Minnesota public. As the Annotated Model Rules of Professional Conduct note, "Although several concerns underlie the unauthorized-practice proscriptions, their primary purpose is to protect the public forum from the consequences of receiving legal service from unqualified persons." Ellen Bennett, Elizabeth Cohen, Martin Whittaker, *Annotated Model Rules of Professional Conduct*, Center for Professional Responsibility American Bar Association (7<sup>th</sup> Ed. 2009), p. 472. See also *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998) ("The prohibition against unauthorized law practice is within the state's police power and is designed to ensure that those performing legal services do so competently"); *Fought & Co., Inc. v. Steel Engineering and Erection, Inc.*, 951 P.2d 487, 497 (Haw. 1998) ("scope of [unauthorized practice of law] statutes must be expansive enough to afford the public needed protection from incompetent legal advice . . .").

26. When the current version of model Rule 5.5 (on which Rule 5.5, MRPC, is based) was adopted, the American Bar Association Commission on Multijurisdictional Practice Report to the House of Delegates, No. 201B (August 2002), specifically decided to take “a conservative approach, addressing those classes of conduct [set forth in the acceptance to the general rule against unauthorized practice] that do not pose unacceptable risks to the public interest.” (P.3.)

27. The rules governing the unauthorized practice of law are a patchwork across the 50 states. Many states have greater restrictions on unauthorized practice than those set forth in the Model Rules of Professional Conduct or the Minnesota Rules of Professional Conduct. Creating additional, unique exceptions can only serve to mean more deviance from uniform standards across jurisdictions and more confusion to the practicing bar as to the conduct that is, or is not, permissible.

28. The inclusion of Rule 5.5(c)(4) to the Model Rules of Professional Conduct (on which the Minnesota Rules of Professional Conduct are modeled) was to permit, on a temporary basis, transactional representative, counseling and other non-litigation work that arises out of or is reasonably related to the lawyer’s practice in the lawyer’s home state. *See* ABA Commission on Multijurisdictional Practice Report to the House of Delegates, No. 201B (Aug. 2002). The ABA Report explains that one of the reasons for including Rule 5.5(c)(4) was to cover services that are ancillary to a particular matter in the home state: “For example, in order to conduct negotiations on behalf of a home state client or in connection with a home state matter, the lawyer may need to meet with the client and/or other parties to the transaction outside the lawyer’s home state.” (*Id.* at 7.) The report further goes on to explain that, under the exception, the public and profession would remain protected:

In such circumstances it should be sufficient to rely on the lawyer's home state as the jurisdiction with the primary responsibility to ensure the lawyer has the requisite character and fitness to practice law; the home state has a substantial interest in ensuring that all aspects of the lawyer's provision of legal services, wherever they occur, are conducted competently and professionally.

(*Id.*)

29. Another reason for the inclusion of Rule 5.5(c)(4) was to respect pre-existing and ongoing client-lawyer relationships by allowing a client to retain a lawyer on multiple related matters, including matters that have no connection to the home state jurisdiction. (*Id.* at 7-8.)

30. Finally, Rule 5.5(c)(4) was intended to allow legal services on a temporary basis outside a lawyer's home state by a lawyer who has developed a recognized expertise such as nationally applicable bodies of law and the client has an interest in retaining a lawyer thoroughly familiar in those areas. (*Id.* at 8.)

31. The MSBA's proposal to amend Rule 5.5(c)(4), MRPC, ignores these important policy considerations. It is not limited to pre-existing attorney-client relationships or areas of nationally uniform law. Instead, it proclaims that if a lawyer practices in an area of law in one state, the lawyer may do so in any state, regardless of the substantial differences in law and procedure that can exist from state to state.

32. The LPRB and the Director believe that maintaining the language currently in the rule and comment protects the public. The LPRB and the Director are concerned that this amendment will allow lawyers to practice in an area of law in a jurisdiction in which the lawyer knows nothing about the law. For example, a lawyer may be well-versed in an area such as family law or landlord/tenant law in the lawyer's own jurisdiction. The law in these substantive areas, however, can vary widely between different jurisdictions. The fact that a lawyer knows the substantive law in one

jurisdiction provides no assurance that the lawyer will know the substantive law, or identify the issues relevant in that area of law, in another jurisdiction. Although a person may know a lawyer and believe that lawyer is competent, the person will have no ability to assess the lawyer's ability to competently represent that person in that area of law in a different jurisdiction.

33. Additionally, in *In Re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016), this Court declined the opportunity to adopt the position of the proposed rule change. Through that opinion, the Court could have defined "reasonably related" to encompass the breadth the proposed rule change envisions. This Court declined to do so. This proposed rule change appears to be an attempt to codify an interpretation of the rule that a majority of the Court refused to accept:

Instead, the dissent argues, without citing any legal support for its claim, that the subject on which an attorney has expertise does not need to be nationally uniform in order for legal services provided outside the attorney's home jurisdiction to reasonably relate to the attorney's practice in his or her home jurisdiction. We disagree. Rule 5.5(c) is an exception to the general prohibition on the unauthorized practice of law. By interpreting the exception to apply to expertise in any subject matter, the dissent allows the exception to swallow the general rule.

*Id.* at 699 n.4.

34. Finally, this proposed amendment does not appear to assist, in any way, Minnesota lawyers who may desire to practice on a temporary basis in another jurisdiction. Such practice would be governed by the rules of that jurisdiction. This proposed amendment primarily assists non-Minnesota lawyers coming into Minnesota, and the only assistance provided Minnesota lawyers is protection from reciprocal discipline once another state has already disciplined the lawyer for engaging in the

unauthorized practice of law. This lack of reciprocal benefit appears inequitable and therefore is troubling.

## CONCLUSION

For the foregoing reasons, the Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility support in part and oppose in part the proposed amendments to Rule 5.5, Minnesota Rules of Professional Conduct.

Dated: November 20, 2018.

Respectfully submitted,

LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD

By Robin M. Wolpert / *smh*  
ROBIN M. WOLPERT

Its Chair

Attorney No. 0310219

1500 Landmark Towers

345 St. Peter Street

St. Paul, MN 55102-1218

(651) 296-3952

rwolpert@comcast.net

Susan M. Humiston

SUSAN M. HUMISTON

DIRECTOR OF THE OFFICE OF LAWYERS  
PROFESSIONAL RESPONSIBILITY

Attorney No. 0254289

1500 Landmark Towers

345 St. Peter Street

St. Paul, MN 55102-1218

(651) 296-3952

Susan.Humiston@courts.state.mn.us

# Attachment 3



## OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY

### 2018 Year in Review Numbers—Year over (Year)

New Complaints:	1107	(1110)
Closings:	1115	(1069)
Advisory Opinions:	2057	(2051)
Public Discipline:	45	(40)
Disbarred:	8	(5)
Suspended:	23	(26)
Reprimand/Prob:	8	(5)
Reprimand:	6	(4)
Private Discipline (files):		
Probation:	14	(14)
Admonitions:	117	(90)
Open Files:	509	(517)
Year Old:	145	(149)
With Office:	46	(71)
With Court:	99	(78)
Oldest File:	1/2015	(1/2014)

## OLPR Dashboard for Court & Chair

	Month Ending December 2018	Change From Previous Month	Month Ending December 2017	
Open Matters	509	+6/503	517	
New Files YTD	1107	+88/1019	1110	
Closed Files YTD	1115	+82/1033	1069	
Closed C012s YTD	321	+16/305	393	
Summary Dismissals YTD	535	+26/509	531	
Files Opened During December 2018	88	+9/79	77	
Files Closed During December 2018	82	-25/107	91	
Public Matters Pending (excluding Resignations)	38	+3/35	30	
Panel Matters Pending	14	+1/13	6	
DEC Matters Pending	83	-1/84	82	
Files On Hold	23	+2/21	19	
Advisory Opinion Requests YTD	2057	+139/1918	2051	
CLE Presentations YTD	68	+4/64	61	
Total Files Over 1 Year Old	145	+5/ 140	149	
Matters Pending Over 1 Year Old w/o Charges	46	-6/ 52	67	

	2018 YTD	2017 YTD
Lawyers Disbarred	8	5
Lawyers Suspended	23	26
Lawyers Reprimand & Probation	8	5
Lawyers Reprimand	6	4
<b>TOTAL PUBLIC</b>	<b>45</b>	<b>40</b>
Private Probation Files	14	14
Admonition Files	117	90
<b>TOTAL PRIVATE</b>	<b>131</b>	<b>104</b>



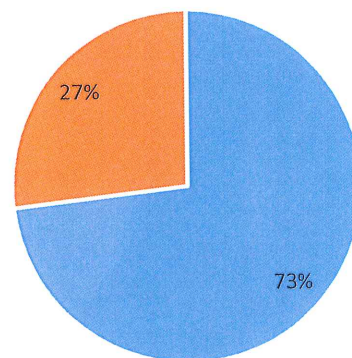
## Files Over 1 Year Old as of Month Ending December 2018

Year/Month	OLPR	AD	ADAP	PROB	PAN	HOLD	SUP	S12C	SCUA	TRUS	Total
2015-01							1				1
2015-03						1					1
2015-05							2				2
2015-11						2	1				3
2015-12						1		1			2
2016-02	1						2				3
2016-03							1	1	1		3
2016-05						1	1				2
2016-06				1		2			1		4
2016-07	1				1		1				3
2016-08	1					3		2			6
2016-09					2		1	2			5
2016-10					1	1		2			4
2016-11					2		2				4
2016-12	1				1		1	1			4
2017-01							2				2
2017-02	1						1	6			8
2017-03	2				1	1		1			5
2017-04	1						2	1			4
2017-05	1		1				1			1	4
2017-06	1				1		1	2	1		6
2017-07	2					1	2	1		1	7
2017-08	4	1					3	2			10
2017-09	7	2			1		4				14
2017-10	6	2				2	3				13
2017-11	8				1	2	1				12
2017-12	9	1					3				13
<b>Total</b>	<b>46</b>	<b>6</b>	<b>1</b>	<b>1</b>	<b>11</b>	<b>17</b>	<b>36</b>	<b>22</b>	<b>3</b>	<b>2</b>	<b>145</b>

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	142	60
Total Cases Under Advisement	3	3
Total Cases Over One Year Old	145	63

Active	106
Inactive	39

Active v. Inactive



■ Active ■ Inactive



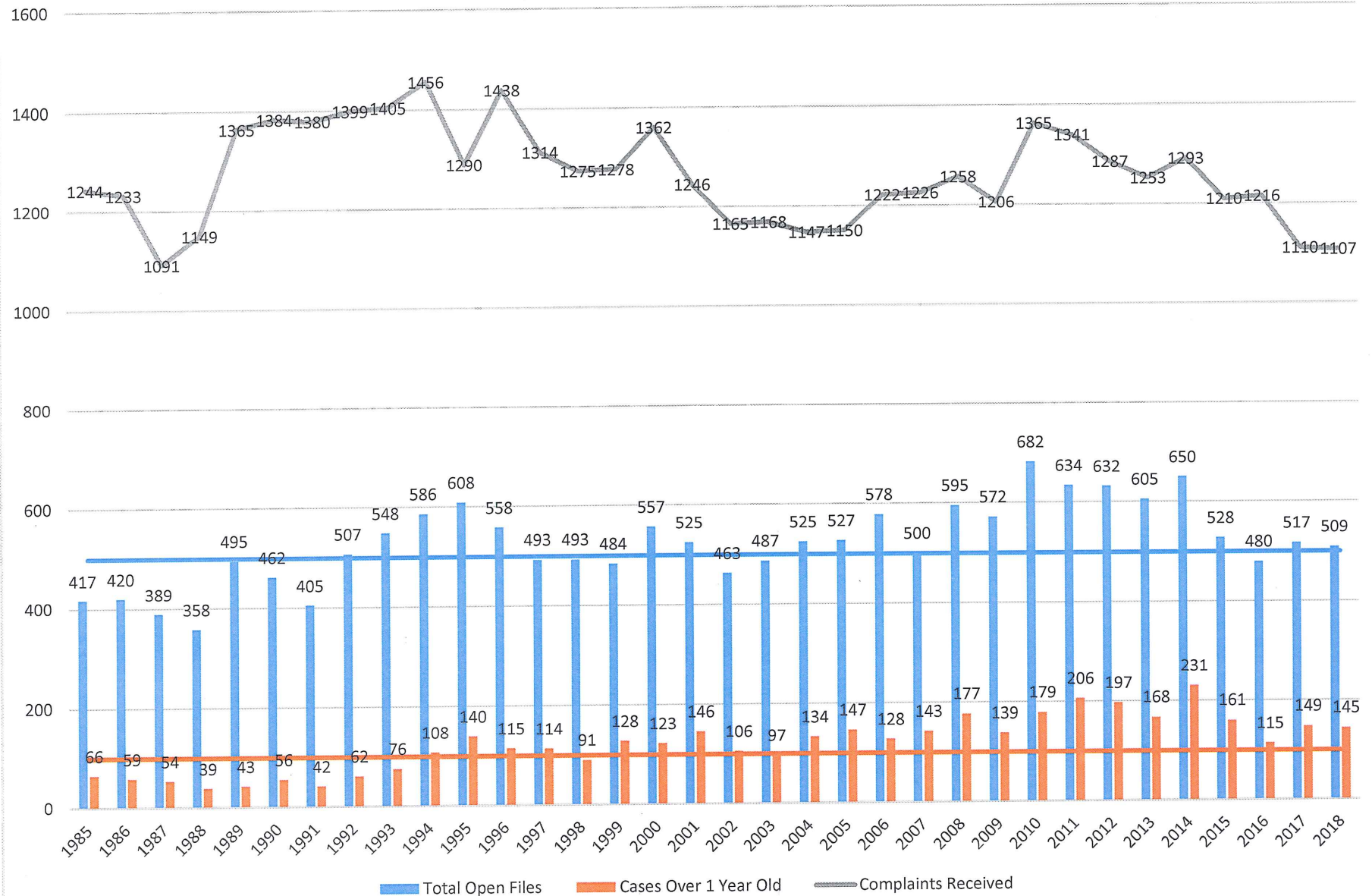
## All Files Pending as of Month Ending December 2018

Year/Month	SD	DEC	REV	OLPR	AD	ADAP	PROB	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	Total
2015-01										1						1
2015-03									1							1
2015-05										2						2
2015-11									2	1						3
2015-12									1		1					2
2016-02				1						2						3
2016-03										1	1	1				3
2016-05									1	1						2
2016-06							1		2			1				4
2016-07				1				1		1						3
2016-08				1					3		2					6
2016-09								2		1	2					5
2016-10								1	1		2					4
2016-11								2		2						4
2016-12				1				1		1	1					4
2017-01										2						2
2017-02				1						1	6					8
2017-03				2				1	1		1					5
2017-04				1						2	1					4
2017-05				1		1				1					1	4
2017-06				1				1		1	2	1				6
2017-07				2					1	2	1				1	7
2017-08				4	1					3	2					10
2017-09				7	2			1		4						14
2017-10				6	2				2	3						13
2017-11				8				1	2	1						12
2017-12				9	1					3						13
2018-01				15						4						19
2018-02				7	1				1	5						14
2018-03				12	1				1	2		1	1			18
2018-04				20	1			2		3						26
2018-05		2		18	1				1	2					1	25
2018-06		1	2	18	1				1	1		1				25
2018-07		3	1	20	1								1			26
2018-08		10	3	30					2	2			1			48
2018-09		13	3	10												26
2018-10		22	1	25						1			2			51
2018-11	1	15	1	12									1			30
2018-12	13	17		22									1	2	1	56
<b>Total</b>	<b>14</b>	<b>83</b>	<b>11</b>	<b>255</b>	<b>12</b>	<b>1</b>	<b>1</b>	<b>13</b>	<b>23</b>	<b>56</b>	<b>22</b>	<b>5</b>	<b>7</b>	<b>2</b>	<b>4</b>	<b>509</b>

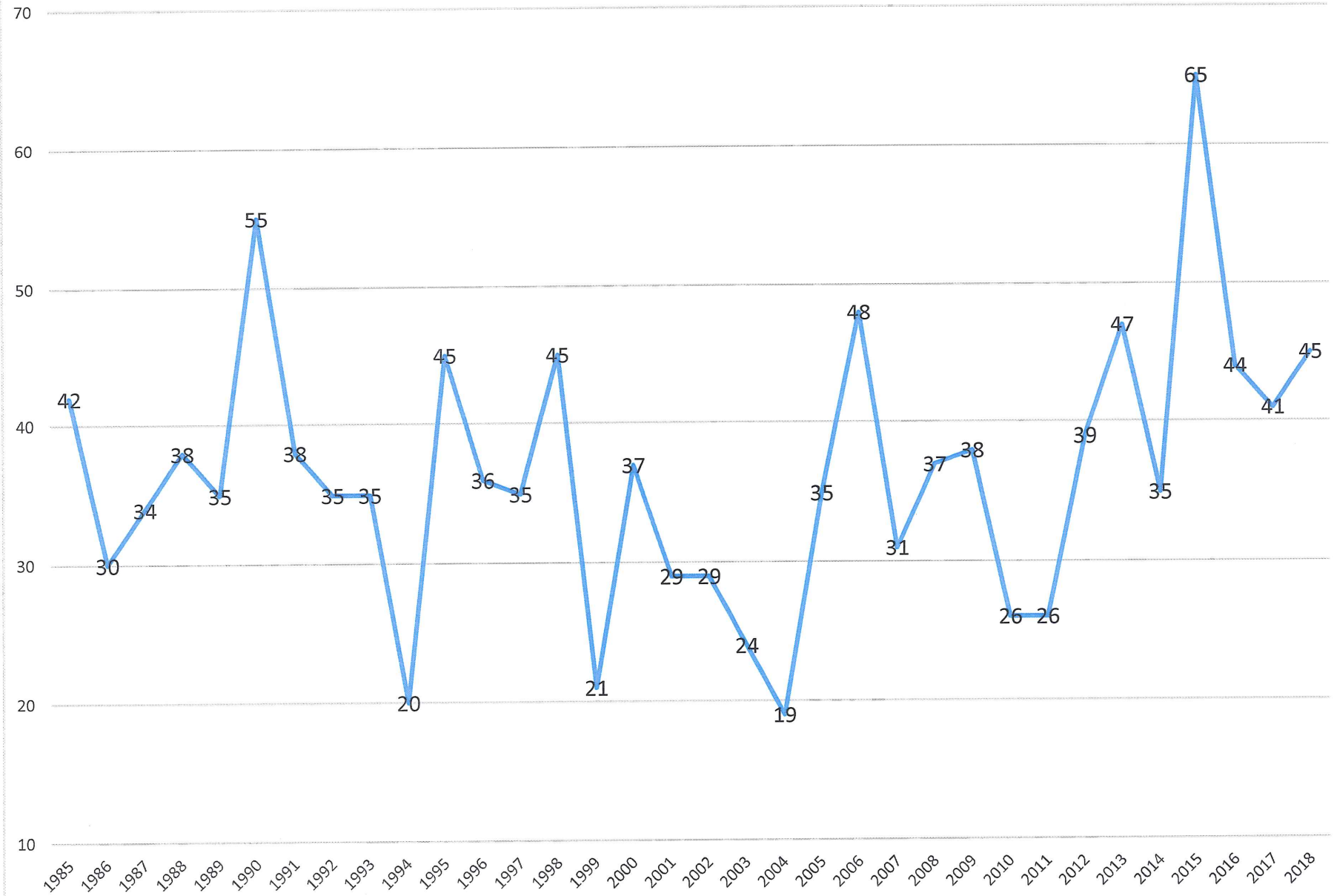
**ALL FILES PENDING & FILES OVER 1 YR. OLD**

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

## Total Open Files / Cases Over One Year Old / Complaints Received



# Public Discipline









# Matchmaking services for lawyers

Matching consumers with legal needs to lawyers who can meet those needs is certainly a worthy endeavor. Because there is no shortage of lawyers looking for work—and, according to numerous studies, a large number of people who cannot find qualified lawyers they can afford—entrepreneurs see this as a prime business opportunity.

## Text a Lawyer

I recently learned of a new service, Text a Lawyer, that launched in July in Oregon and Washington.<sup>1</sup> Like Uber, the service uses two mobile apps: one for consumers to submit legal questions, and another for lawyers who are waiting in a pool to answer those questions. For \$20, consumers are matched with a lawyer. The app allows consumers to pose their questions, input names to facilitate a conflicts search, and accept the attorney's (required) limited-scope retainer agreement. The app then refers the question to the highest-rated lawyer



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

who is currently online and practicing in the state and legal category specified, with only a limited time frame for acceptance. If accepted, the lawyer and consumer are then connected in a secure "chat box" where follow-up questions can be asked by the lawyer, and a final answer provided. At the end of the transaction, the consumer's credit card is charged, with \$15 going to the lawyer and \$5 to the service provider (\$4 for a connection fee, \$1 for a software

licensing fee). For a limited period of time, follow-up questions can be answered for \$9 each (\$8 to the lawyer and \$1 to the service). The lawyer receives a transcript of the exchange, and the consumer can request one as well. My favorite part of this service is that the lawyer swipes the "Final Answer" button on the app to complete the service—and who doesn't want to declare, "That is my final answer!"

But what about ethics? There are several ethical issues involved in participating in for-profit referral or matchmaking services. Avvo has run into this problem in several states with its fixed price legal services plan. Under that plan, Avvo allowed consumers to pay a set price for a particular service, such as an estate plan, and provided the consumer with several local attorneys with Avvo ratings to use for that service. A portion of the fee would go to the lawyer, a portion to Avvo. But Internet Brands, the company that purchased Avvo several months ago, announced that it planned to discontinue this service at the end of July 2018. No reason was offered for this decision beyond this generic pronouncement: "As a part of our acquisition of Avvo, we have evaluated the Avvo product offerings, and adjusted the Avvo product roadmap to align more comprehensively with our business and focus."<sup>2</sup> It was a good decision, as numerous states had correctly found that the Avvo fixed-fee service violated several ethics rules. What are the rules in Minnesota regarding the use of referral or matchmaking services?

## Minnesota's ethics rules

Let's start with the advertising ethics rules. Rule 7.2(b) states that "A lawyer shall not give anything of value to a person for recommending the lawyer's services" except under specific enumerated exceptions.<sup>3</sup> One such exception is for the "usual charges of a legal service plan or a not-for-profit lawyer referral service." Lawyers may ethically pay the "usual charges" of a lawyer referral service, but the exception is specific to not-for-profit organizations, thus expressly exclud-

ing for-profit referral or matchmaking services. Accordingly, in Minnesota, an attorney can pay the "usual charges" to participate in nonprofit referral services such as those run by a bar association or other nonprofit—but no others.

Interestingly, ABA Model Rule 7.2 contemplates a lawyer referral service that is run by someone other than a nonprofit by including the phrase "a not-for-profit or qualified legal referral service,"<sup>4</sup> adding that "[a] qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority." Minnesota did not adopt this version of the model rule, nor did lots of other states. The comments to Rule 7.2 also specifically discuss "lead generating services." The comments state that a lawyer may not pay a "lead generator" that "states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral."<sup>5</sup> So remember, you can only pay for referrals if the referral service that you are paying is run by a nonprofit, and you can only pay its "usual charges."

Additionally, the ethics rules governing law firms and associations also impact referral and matchmaking services. Specifically, Rule 5.4(a) prohibits a lawyer or law firm from sharing fees with a nonlawyer.<sup>6</sup> This latter rule is perhaps the larger hurdle for referral or matchmaking services because as you can see from the Text a Lawyer and Avvo business models, most such for-profit referral or matching services want a portion of the fee the consumer pays to the lawyer as compensation for making the connection. No matter how creatively businesses try to describe this charge, it looks and feels like prohibited fee-sharing with a nonlawyer. Because you generally cannot give anything of value for referrals (with limited exceptions), and cannot share fees with a nonlawyer, it is currently impossible to use for-profit referral services ethically in Minnesota, as well as in numerous other states.



The rationale behind these rules is twofold. Limiting permissible referral services to not-for-profit organizations, according to the comment, helps to ensure that the referral service is consumer-focused and provides unbiased referrals to lawyers of appropriate experience under circumstances in which other client protection measures—such as malpractice insurance requirements and complaint procedures—are also in place.<sup>7</sup> Prohibiting fee-sharing with nonlawyers works to ensure the professional independence of the attorney, as stated in the very title of Rule 5.4. If you are sharing fees with a nonlawyer, the argument goes, considerations other than the best interest of the client may materially affect the delivery of legal services. This line of reasoning, and the extent to which it is advanced by the rules, is certainly subject to debate.

In fact, that debate is currently being waged in a few jurisdictions. For example, the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois just published an extensive study on this topic, and is requesting comment on its proposal to allow for-profit referral services as long

as those services are registered with and regulated by the Illinois Supreme Court.<sup>8</sup> The impetus for this proposed rule change is primarily the belief that such a change may help to close the access to justice gap that has grown so prevalent, while still protecting legal consumers and the integrity of the legal profession—two guiding principles of lawyer regulation. The Association of Professional Responsibility Lawyers (APRL), a group of lawyers who, among other things, advise other lawyers and law firms on professional ethics issues, has also formed a task force with several subcommittees to study the issue of fee-sharing and related rules.

This topic is of interest to me, and I welcome your thoughts on whether Minnesota should review this issue, and if so, what you would like to see done. While I have your attention, I would like to cover one final point on a related but separate topic: finder's or referral fees between lawyers. The only way to ethically share legal fees with another lawyer not in the same firm is if you comply with the requirements of Rule 1.5(e), MRPC. Please make sure you review and comply with this rule if you are

fee-sharing. Also, the prohibition against providing something of value for referrals applies to other lawyers as well, with only one exception (found in Rule 7.2(b)(4), MRPC). If you have a referral arrangement in place with another lawyer, please revisit these rules, or call the ethics hotline at 651-296-3952 for advice. ▲

## Notes

<sup>1</sup> Robert Ambrogi, "Launching Soon: 'Text a Lawyer' Aims to be the Uber of Legal Help," LawSites (6/20/2018), [www.lawsitesblog.com](http://www.lawsitesblog.com).

<sup>2</sup> Jason Tashea, "Avvo's Fixed-Cost Service to be Discontinued by Internet Brands," ABA Journal (7/6/2018).

<sup>3</sup> Rule 7.2(b), Minnesota Rules of Professional Conduct (MRPC).

<sup>4</sup> ABA Model Rule 7.2(b)(2).

<sup>5</sup> Comment [5], Rule 7.2, MRPC.

<sup>6</sup> Rule 5.4(a), MRPC. There are a few exceptions to this broad prohibition but none for referral or matchmaking services.

<sup>7</sup> Comment [6], Rule 7.2, MRPC.

<sup>8</sup> *Client-Lawyer Matching Services: Study of the Attorney Regulation and Disciplinary Commission of the Supreme Court of Illinois*, Released for Comments on 5/30/2018, version 2 released on 6/25/2018, at [http://illinoiscourts.gov/Media/enews/2018/052518\\_ARDC](http://illinoiscourts.gov/Media/enews/2018/052518_ARDC).



MINNESOTA LAWYERS MUTUAL  
INSURANCE COMPANY

You can trust over 35 years  
of experience protecting lawyers.



There is a reason MLM is the *only* professional liability insurance carrier endorsed by the MSBA.

*Put your trust* in the carrier  
created by lawyers,  
run by lawyers,  
exclusively serving lawyers.

- Works exclusively with lawyers professional liability insurance
- Specializes in solo to mid-size firms
- Returned over **\$56 million** in profits to policyholders since 1988
- Offers an array of services to mitigate risks

Protecting Your Practice is Our Policy.®

Get a fast quote today!

**[www.mlmins.com](http://www.mlmins.com)**

or contact Chad Mitchell-Peterson

612-373-9681 or [chad@mlmins.com](mailto:chad@mlmins.com)



# What you don't know about trust accounts can hurt you

**T**he Minnesota Supreme Court has publicly disciplined several attorneys this year for trust account errors. I have previously written on this topic,<sup>1</sup> and because it's important and the consequences are so serious, I would appreciate your attention once again if you are in private practice. This time I'd like to tell you the tale of three firms.

## Firm A

Imagine you are in practice with a partner. You do not have a bookkeeper, but use Quickbooks, so entering client transactions and keeping track of client money is pretty straightforward. You each handle your own client transactions, but you've agreed your partner will handle the monthly reconciliation of the check register to the bank statements. You also periodically review the bank statements and client subsidiary ledgers to make sure everything looks okay. You have worked this way for several years, and do not believe there are any issues.

One day, the bank pays a fraudulent check drawn on your trust account, and you receive an overdraft notice. The OLPR receives notice of this overdraft as well, asks for an explanation and requests three months of trust account records, which you promptly provide. The first thing we notice is there are no monthly trial balance reports or three-way reconciliation reports, and there appears to be a shortage when we compare what it looks like the trust account should contain with what actu-

ally is in the trust account (even setting aside the fraudulent check transaction, which the bank immediately reversed).

The OLPR converts its inquiry into a disciplinary investigation, and asks for more monthly records. Neither you nor your partner actually know what a monthly trial balance report is, nor do you understand how a three-way reconciliation process differs from the check register/bank statement reconciliation process you use. Several months of very distracting and time-consuming back and forth take place, and you learn your trust account has pretty much always had a shortage, which sometimes reached several thousand dollars. This happened not because anyone was stealing client funds, but because you and your partner, over time, had mistakenly made disbursements from the trust account in excess of client funds in the account. These over-disbursements were not caught in the monthly reconciliation process. Because of this, you and your partner have been negligently misappropriating client funds (using one client's funds to pay another client's obligations), in addition to not maintaining the required books and records, for a long period of time. This continued even after you hired an accountant to help make sure everything was on track, because the accountant was allowing negative client balances in individual client matters to reduce the overall trial balance, and thereby under-calculating shortages in the account.

## Firm B

This tale is very similar to Firm A's situation, but this time you employ a bookkeeper to whom you and your partner have delegated responsibility for both your trust account and your business account. Your bookkeeper is excellent, has worked at a law firm previously, and you are so thankful that you do not have to worry about the accounts. You keep a close eye on disbursements (as only you and your partner can issue trust account and business account checks), you both generally monitor your client subsidiary ledgers, and you review the monthly reconciliation reports provided.

What you did not realize was that your bookkeeper did not know that trust accounting in Minnesota is different from standard accounting, and he too was failing to maintain monthly trial balance reports and to conduct a monthly three-way reconciliation process. Until the OLPR reviewed the matter, you also did not realize that sometimes credit card payments for advance fees were not being transferred to your trust account but rather were mistakenly left in your business account, even though the advances were noted on the subsidiary ledgers. Once the account was fully audited, it turned out that there were sometimes long and sometimes short periods of shortages that varied in amounts, as well as periods of co-mingling (periods where firm funds remained in the account because they were not withdrawn within a reasonable time of being earned), in addition to a failure to safekeep client funds that arose from leaving them in the business account.

## Firm C

The tale of Firm C is a bit different. You are the only partner but you employ several associates and a large team of support staff to manage your successful collection practice. You have a long-term office manager to whom you have delegated all accounting responsibilities, and whom you trust implicitly. You are so successful that you do not have to closely monitor the accounts, and you take comfort in the fact that, in addition to your own trustworthy staff, your sophisticated clientele closely monitors its own accounts. What you do not know is that your trusted office manager frequently moves money between accounts to meet firm expenses, often withdrawing money from trust to make sure that financial obligations of the firm are being met. You also did not know that client funds from third parties were being deposited into non-trust accounts and subsequently spent. Nor did you realize that the office manager was also taking funds to pay for her own and her family's personal expenses, which funds were sometimes stolen from trust accounts and sometimes from your business accounts.



**SUSAN HUMISTON** is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.



This behavior continued for a couple of years until there was a liquidity crisis—apparently your first clue that a potential issue existed. The OLPR audit showed that over a substantial period of time, more than \$2 million had been misappropriated. You close your firm and liquidate its assets to ensure that clients are made whole.


All of these scenarios have resulted or are in the process of resulting in varying degrees of public discipline. I cannot stress enough that handling other people's money is a serious responsibility, taken seriously by this Office and the Court, and you as the attorney are responsible for failures, even if you have delegated primary responsibility to others. Rule 1.15 and Appendix 1 to the Minnesota Rules of Professional Conduct describe in detail your responsibilities regarding trust accounts. The rule and appendix set forth an accounting system and monthly reconciliation process designed to catch errors (because mistakes happen) and timely correct them to ensure that you are safeguarding and appropriately accounting for client or third-party funds. It is not mysterious or difficult—but you must attend to it every month, whether you are doing it yourself or delegating the task to others. There are a lot of ways that errors in trust accounts can lead to serious discipline, and you do not want it to happen to you.

#### Help exists

In conjunction with the State Law Library, we will be presenting a free trust account CLE on October 31, 2018, from Noon to 1:30pm, at the Minnesota Judicial Center. More information can be found at the Law Library's website, [www.mn.gov/law-library](http://www.mn.gov/law-library), under the Services tab. This presentation offers a remote attendance option and will be videotaped and made available through the library's on-demand portal. The OLPR has numerous resources on our website, [www.lprb.mncourts.gov](http://www.lprb.mncourts.gov), under Lawyer Resources as well. While everyone is busy and few among us are trained in money management, attorneys who handle client or third party funds are almost guaranteed to regret not taking the time to ensure their trust accounts are being maintained properly. ▲

#### Notes

<sup>1</sup> "Spring Trust Account Cleanup," Bench & Bar (April 2018), and "Is Your Trust Account in Order?" Bench & Bar (September 2016), available at [www.lprb.mncourts.gov/articles](http://www.lprb.mncourts.gov/articles).



**The fine art  
of PI**

**for all types  
of accidents,  
even the  
artistic  
ones!**

**We take your referrals very seriously. Ourselves not so much.**

It is our goal to provide your clients with the best representation and to maximize your fees.

Our attorneys are experienced in MVA, wrongful death, aviation law, medical malpractice, product liability, foodborne illness and Legionnaires' disease.

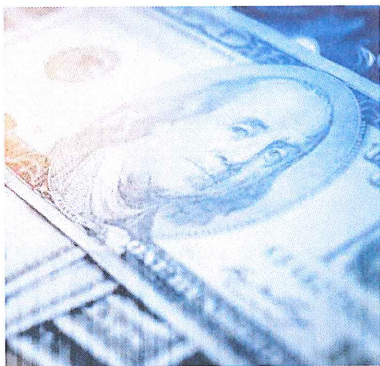
**SIEGEL  
BRILL PA**  
ATTORNEYS AT LAW

**PI TEAM  
MAXIMUM  
RESULTS**

(612) 337-6100 • [johndornik@siegelbrill.com](mailto:johndornik@siegelbrill.com) • [siegelbrill.com](http://siegelbrill.com)



# When someone else pays your bill



I love our ethics hotline.<sup>1</sup> Not only are we helping lawyers every day to navigate their ethical responsibilities, but oftentimes the questions present themes that make perfect subjects for this column. Lately I've answered several calls that involve issues arising because

someone else was paying the lawyer's bill. This can arise in lots of different practice areas: family, criminal, immigration, estate planning, employment, and insurance defense, to name a few. Much has been written on this subject in matters of insurance defense,<sup>2</sup> so I would like to set that specific practice area aside and focus more on when friends or relatives are footing the bill.<sup>3</sup> Let's begin, as always, with the rules.

## A lawyer's independence

One of the most important hallmarks of an attorney-client relationship is the lawyer's loyalty to the client. Preservation of this duty is furthered by compliance with the rules involving confidentiality, conflicts of interest, and professional independence. Two rules in particular are implicated when someone else pays the bill for legal services: Rule 1.8(f) and Rule 5.4(c), Minnesota Rules of Professional Conduct.



**SUSAN HUMISTON** is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

### Specifically, Rule 1.8(f) says:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent or the acceptance of compensation from another is impliedly authorized by the nature of the representation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to the representation of a client is protected as required by Rule 1.6.

### The related Rule 5.4(c) says:

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

## Informed consent

The first stop in a third-party payor relationship is informed consent of the client. Of course, there is sometimes a caveat: In a limited subset of cases this is not the first stop, such as for public defenders, other court-appointed counsel, or legal aid, where payment of the lawyer's fee by another is inherent in the nature of the representation. In all other cases, however, informed consent is your first stop. Why is this?

This is the first stop because the issue is fundamentally one of conflicts. You need to determine if there are or could be differing interests between your client and the third-party payor, and whether your responsibilities to your client may be materially limited by your responsibility to a third party, or your own interest in having your bill paid. Too often lawyers forget this important step because on initial consultation, everyone seems aligned, and you are just glad someone with money can pay you. You really do not know if the parties are aligned, however, unless you have a conversation on the topic. This is particularly true if the third-party payor is also a client.

## Things to consider include but may not be limited to these questions:

- What are the objectives of each relating to the representation?
- Are there limits to what and how much the third party is willing to pay?
- If so, how will that impact the representation?
- What happens if the third party stops paying the bill?
- What amount of information will be shared with the third-party payor?
- How will that impact the attorney-client privilege? (hint: likely waiver)
- Who is entitled to a refund if one is due?
- Does the third party understand they are not the client?

If you discuss these matters with the parties, you will be better able to ascertain if there is a risk from someone else paying the fee and how material the risk may be. Explaining the risks and alternatives to your client enables them to give informed consent as required by Rule 1.8(f)(1). This consent does not need to be confirmed in writing, unless the third-party payor is already a client (then you have a Rule 1.7 concurrent conflict you need to analyze as well), but your client must give informed consent. If you don't have a conversation on the topic at all, it is hard to say (or to prove, if a complaint is raised) that the client gave informed consent.

The best practice is to discuss these issues with your client and reflect the results of the conversation in your engagement letter. I also recommend you have a separate written agreement with the third-party payor. This helps to reiterate that the third-party is not the client, which can be confusing to some if the payor is signing the engagement letter too.



### No interference

Lack of interference by the third-party payor is so important that it is mentioned twice in the ethics rules, in Rule 1.8(f)(2), and Rule 5.4(c), MRPC. It is human nature for individuals who are paying the bill to want to have a say in how their money is spent. While those individuals can certainly share their opinion, that opinion cannot interfere with the independent exercise of your professional judgment. A good way to prevent this from occurring is to make sure the client and payor understand this important fact as part of the informed consent process, and to reiterate the requirement in the engagement letter and third-party payor agreement you use.

### Confidentiality

Only in limited circumstances may an attorney reveal client confidences to a third party. In fact, everything relating to the representation is confidential (remember, this is broader than the attorney-client privilege) and should not be shared except under specified circumstances.<sup>4</sup> You should discuss with your client the level of information it is permissible to share with the third party, and the risk of doing so. Most importantly, you should discuss with your client the impact of sharing information on the attorney-client privilege, particularly if waiver of the privilege may prejudice your client. Rule 1.8(f)(3) expects you to protect client confidences no matter who is paying, and the client must give informed consent to any disclosures.

A final caution: One recent hotline call I received concerned a lawyer who had fallen into the bad habit of

talking primarily to, and taking direction from, the concerned family member paying the bill because the family member was more attentive and accessible than the client. Please do not do fall into this habit. Even if the client has consented to the disclosure of information and the waiver of privilege has been addressed, your ethical duty is to abide by your client's decisions regarding the representation, and to consult with your client regarding the means to accomplish those objectives.<sup>5</sup> Do not abrogate that responsibility because of the ease of working with the person who is paying your bill.

Hiring a lawyer can be expensive. Some are fortunate to have a friend or relative who agrees to assist in that situation. For this to work, however, you need to have a good discussion with your client, preferably documented in writing, which will enable your client to give informed consent to the risks and advantages of this often conflict-ridden course of action. ▲

<sup>1</sup> Also known as our Advisory Opinion service; senior staff attorneys can be reached daily at 651-296-3952, or via email at [www.lprb.mncourts.gov](mailto:www.lprb.mncourts.gov).

<sup>2</sup> See William J. Wernz, Minnesota Legal Ethics, A Treatise, at 509-526 (8th Ed. 2018).

<sup>3</sup> See also Kenneth L. Jorgensen, "When a Friend or Relative Pays the Client's Legal Fee," Bench & Bar (February 2005).

<sup>4</sup> See Rule 1.6, MRPC. Rule 1.6(a) broadly defines the information that should be kept confidential as all "information relating to the representation." Rule 1.6(h) describes the specific circumstances in which a lawyer may reveal information relating to the representation. <https://media.gettyimages.com/photos/three-invoices-all-with-paid-stamp-picture-id900553128>



MINNESOTA LAWYERS MUTUAL  
INSURANCE COMPANY

You can trust over 35 years  
of experience protecting lawyers.



There is a reason MLM is the **only** professional liability insurance carrier endorsed by the MSBA.

*Put your trust* in the carrier  
created by lawyers,  
run by lawyers,  
exclusively serving lawyers.

- Works exclusively with lawyers professional liability insurance
- Specializes in solo to mid-size firms
- Returned over **\$56 million** in profits to policyholders since 1988
- Offers an array of services to mitigate risks

Protecting Your Practice is Our Policy.®

Get a fast quote today!

**[www.mlmins.com](http://www.mlmins.com)**

or contact Chad Mitchell-Peterson

612-373-9681 or [chad@mlmins.com](mailto:chad@mlmins.com)



# Attention general counsel: UPL and you

**E**arlier this year, the Ohio Supreme Court publicly disciplined the general counsel of a large corporation for the unauthorized practice of law.<sup>1</sup> This GC was licensed to practice law in Ohio, but joined the law department of a Florida-based corporation and moved to Florida in 2009. He did not, however, become licensed in Florida, where he maintained his office, and allowed his Ohio license to lapse in 2011, due to failure to remain current with CLE obligations.

In 2015, a former employee reported the GC to the Florida bar's unauthorized practice of law division and to the Ohio disciplinary office, both of which commenced investigations. The GC applied for and received a "House Counsel" authorization to practice in Florida, which then closed its investigation. But Ohio's disciplinary counsel charged the GC with the unauthorized practice of law in Florida from 2009 to 2015, and the Ohio Supreme Court ultimately suspended the GC for two years, with the suspension stayed provided the GC committed no further misconduct.<sup>2</sup>



**SUSAN HUMISTON** is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

## What about Minnesota?

Minnesota's unauthorized practice of law rule is similar to Ohio's. A lawyer who is not admitted in Minnesota cannot "establish an office or other systematic and continuous presence" in Minnesota for the practice of law, or "hold out to the public or otherwise represent that the lawyer is admitted to practice law" here.<sup>3</sup> Minnesota law makes it a misdemeanor for anyone other than a member of the Minnesota

bar to "give legal advice or counsel" or to perform legal services for someone else.<sup>4</sup> While many GCs or other in-house counsel perform non-legal functions, most also engage in the practice of law.

There is no exception in the ethics rule in Minnesota for in-house counsel.<sup>5</sup> Minnesota's Rules for Admission to the Bar provide that "[a] lawyer licensed in another jurisdiction shall not practice law in Minnesota as house counsel unless he or she is admitted to practice in Minnesota."<sup>6</sup> If you or members of your in-house legal team have an office or other systematic and continuous presence in Minnesota and engage in the practice of law here, you should be licensed in Minnesota. (The lone exception is discussed below.) Importantly, GCs and other in-house managing attorneys also have an ethical obligation to ensure that the lawyers they supervise comply with the rules of professional conduct.<sup>7</sup> You may be in good standing in Minnesota, but do you know about the members of your legal team?

## The exception

While there are a number of circumstances where a lawyer can "temporarily" practice in Minnesota,<sup>8</sup> there is also an exception in Rule 5.5(d), MRPC, for legal services an attorney is "authorized to provide by federal law." The comment to this provision provides that "Paragraph (d) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation, or judicial precedent."<sup>9</sup>

This rule, recognizing the concept of federal supremacy, arose from a 1963 U.S. Supreme Court decision involving non-lawyer patent agents.<sup>10</sup> While jurisdictions may vary in their implementation of this rule, the focus is often on the existence of authorizing federal regulation that allows an attorney or non-attorney to practice before federal agencies, such as the United States Patent and Trademark Office, the Internal Revenue Service, or the U.S. Citizenship and Immigration Service.<sup>11</sup> The most common example is that of an immigration lawyer not licensed in Minnesota

but licensed in another jurisdiction, who may have an immigration-only law practice in Minnesota because all matters are before a regulatory authority that accepts any state's license.

## What if you are not licensed in Minnesota?

There are several ways for in-house counsel admitted in another jurisdiction to apply in Minnesota. Generally, the Board of Law Examiners recommends that lawyers qualifying under Rule 7A (Admission without Examination based on Years of Practice) apply under that rule as it provides the lawyer with the most flexibility.<sup>12</sup> Lawyers who do not have the requisite practice under Rule 7A may apply under Rule 6 (Admission by Examination), Rule 9 (Admission by Temporary House Counsel License), or Rule 10 (Admission by House Counsel License), provided the lawyer meets the qualifications for those rules.<sup>13</sup> The process for admission under Rules 7A, 9, and 10 generally takes two to six months, depending on how thorough the lawyer is when submitting the initial application, whether there are any serious issues in the lawyer's background, and how quickly the lawyer responds to requests from the Board office for additional information.<sup>14</sup>

Importantly, if a lawyer admitted under Rule 10 (House Counsel) changes employment, the lawyer has an obligation to notify the Lawyer Registration Office and the Board of Law Examiners within 10 days of employment termination, and the lawyer may no longer practice law in Minnesota.<sup>15</sup>

Lawyers who have been employed in Minnesota for a period of time prior to applying for a license will be asked by the Board staff to describe the actions the lawyer has taken to avoid the unauthorized practice of law in Minnesota. Additionally, if the lawyer needs time to qualify for admission without examination, the lawyer will need to provide an explanation as to how the lawyer meets the requirement that the practice be "performed in a jurisdiction in which the applicant is admitted, or performed in a jurisdiction that permits the practice by a lawyer not admitted in that jurisdiction."<sup>16</sup>





MINNESOTA LAWYERS MUTUAL  
INSURANCE COMPANY

## You can trust over 35 years of experience protecting lawyers.



There is a reason MLM is the *only* professional liability insurance carrier endorsed by the MSBA.

*Put your trust* in the carrier  
created by lawyers,  
run by lawyers,  
exclusively serving lawyers.

- Works exclusively with lawyers professional liability insurance
- Specializes in solo to mid-size firms
- Returned over **\$56 million** in profits to policyholders since 1988
- Offers an array of services to mitigate risks

Protecting Your Practice is Our Policy.®

Get a fast quote today!

**[www.mlmins.com](http://www.mlmins.com)**

or contact Chad Mitchell-Peterson

612-373-9681 or [chad@mlmins.com](mailto:chad@mlmins.com)

### Conclusion

Please help us spread the word by sharing this article with any general counsel or in-house lawyers you know. If a general counsel or any member of an in-house team offices in Minnesota, chances are they need to be licensed here. If your team is located in multiple states, please take a moment to understand each state's particular licensing and unauthorized practice of law rules. No one wants to mistakenly engage in the unauthorized practice of law. Questions about Minnesota's rules may be directed to the Board of Law Examiners at 651-297-1857 or the OLPR at 651-296-3952. ▲

Co-author EMILY ESCHWEILER is the director of MN Board of Law Examiners, Board of CLE, Board of Legal Certification, and Office of Lawyer Registration.

### Notes

<sup>1</sup> *Disciplinary Counsel v. Maciak*, 153 Ohio St.3d 185, 2018-Ohio-544, 102 N.E.3d 485 (2018).

<sup>2</sup> This GC was more fortunate than another Ohio in-house "chief legal officer," who was suspended in 2014 for two years. See *Disciplinary Counsel v. Troller*, 138 Ohio St.3d, 2014-Ohio-60, 6 N.E.3d 1138 (2014).

<sup>3</sup> Rule 5.5(b) (1) and (b) (2), Minnesota Rules of Professional Conduct (MRPC). See also Rule 5.5(a), MRPC (prohibiting a lawyer from practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction).

<sup>4</sup> Minn. Stat. §481.02, subd. 1 (2018); Minn. Stat. §481.02, subd. 8 (2018).

<sup>5</sup> Note, there is such an in-house exception in the ABA Model Rules. See ABA Rule 5.5(d) (1). In the model rules, there is an exception for in-house counsel who work solely for one employer. This portion of the UPL model rule was

not adopted in Minnesota.

<sup>6</sup> Rule 10(A), Minnesota Rules for Admission to the Bar.

<sup>7</sup> Rule 5.1(b), MRPC ("A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer's conduct conforms to the Rules of Professional Conduct.")

<sup>8</sup> See Susan Humiston, "Multijurisdictional Practice and UPL Risk," *Bench & Bar* (October 2016), at [lprb.mncourts.gov/articles](http://lprb.mncourts.gov/articles) (discussing the exceptions for "temporary" practice found in Rule 5.5(c), MRPC).

<sup>9</sup> Rule 5.5(d), Comment [16], MRPC.

<sup>10</sup> *Sperry v. Florida State Bar*, 373 U.S. 379 (1963) (holding that a state may not sanction a non-lawyer patent agent for the unauthorized practice of law where the patent agent's work before the USPTO was authorized by federal regulation).

<sup>11</sup> See Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of*

*Lawyering* (4th ed.) §49-13 at 49-40 ("Most importantly, the mere existence of a body of federal law does not create a federal right to practice that law free of all state UPL restrictions.")

<sup>12</sup> Rule 7A, Minnesota Rules for Admission to the Bar.

<sup>13</sup> Lawyers licensed by a non-U.S. jurisdiction working for a corporation may also apply for a Foreign Legal Consultant License and provide representation to the corporation under Rule 11E(2).

<sup>14</sup> Additional information is available on the Board's website at [www.blm.gov](http://www.blm.gov).

<sup>15</sup> The "house counsel" license can be reissued at the director's discretion if the lawyer applies for re-issuance within 90 days and continues to meet the requirements under Rule 10. If the lawyer no longer works in a house counsel position, the lawyer must re-apply to the bar under another rule.

<sup>16</sup> Rule 7A(2), Minnesota Rules for Admission to the Bar.



## Suicide prevention: Every lawyer's opportunity

*In 1993, the managing partner of Leonard, Street and Deinard died by suicide at the age of 49. I clerked at Leonard, Street the following year and saw firsthand the deep impact that his life and sad passing had on the firm. In my position now, I am very cognizant of the deaths by suicide as well as the attempted suicides in our profession. This month I am giving over the column to an article by Joan Bibelhausen of Lawyers Concerned for Lawyers, which contains important information about suicide that every Minnesota lawyer should know. Remember, all services of LCL are confidential, and LCL will never share confidential information with the Office of Lawyers Professional Responsibility.*

— SUSAN HUMISTON

### Lawyer suicide is in the news

The American Lawyer recently published a heartrending essay, "Big Law Killed My Husband," by Joanna Litt, an attorney and the widow of LA attorney Gabriel MacConaill, who died by suicide in October.<sup>1</sup> Litt's tale in turn recalled a 2017 New York Times article, "A Suicide Therapist's Secret Past."<sup>2</sup> In it, therapist Stacey Freedenthal described her own attempt many years earlier. Even though she is well known in the field of suicide prevention, stigma had kept her from revealing this part of her history. As I read these stories,



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

I thought about our profession and the stigma that can keep us from reaching out in our most desperate hours.

Not only are lawyers at risk, but our clients are as well. Clients in many areas of law are facing crisis, loss, or other hardship that can lead to a sense of desperation or hopelessness. Very similar cases may involve clients who respond to their situations very differently. If a client gives cues that they may be suicidal, attorneys have the opportunity to act.

For lawyers, we all know this is a stressful profession. Press coverage of lawyer suicides has magnified the potential impact of that stress. As a profession, we experience depression and alcohol use problems at rates significantly higher than the general population. We also experience greater rates of anxiety, chronic stress, and divorce, and we have a higher rate of suicide and suicidal thoughts. If you've attended any of LCL's CLE programs in the past several years, you've heard us talk about this, but we need to keep talking.

The chronic stress we experience may trigger depression or other illnesses, and may lead to a sense of helplessness, increasing anxiety, and the inability to complete even mundane tasks. We're paid to solve the problems of others and feel we should be able to solve our own problems ourselves. We may feel shame because lawyers aren't supposed to feel helpless. That helplessness can become hopelessness, and the risk for suicide grows exponentially.

### What are the signs?

Symptoms of depression include:

- loss of interest in normally pleasurable activities;
- difficulty concentrating, remembering, or deciding;
- changes in sleep, appetite, and weight;
- fatigue;
- having thoughts of suicide.

At the same time there may be a rising sense of anxiety, as if every unfinished project is a ticking time bomb. Suicide enters one's thoughts

as a reasonable solution to a seemingly insurmountable problem. The suicidal person may express a wish to die or make statements that appear to be saying goodbye. He may give away prized possessions, quickly wrap up files, or put his affairs in order. She may make a plan and acquire the means to carry it out, and that plan may simply be enough alcohol to prove deadly. People who talk about suicide can die by suicide. We all need to talk about it.

Our profession is addressing these concerns through initiatives such as "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change."<sup>3</sup> This 2017 report demands that we begin a dialogue about suicide prevention. Lawyer assistance programs have worked to increase awareness for decades, and are grateful to have additional allies in this critical effort. The report's call to action recommends events to raise awareness, sharing stories of those affected by suicide, providing education about signs and suicidal thinking, learning signs of distress, and making resources available. These are all good things that can make a difference.

The signs are not always verbal. Some warning signs of suicide include:

- hopelessness;
- withdrawal;
- desperation;
- increased use of alcohol and other controlled substances;
- impulsiveness or high-risk behavior;
- loss of engagement or sense of humor;
- deterioration in functioning.



Lawyers sometimes think we need to be perfect or we are a failure. Any possible failure becomes an opportunity for intense self-scrutiny and every move we make can become defined by winning or losing. A compromise or settlement may be seen as a failure because we didn't get everything we asked for when we reached for the sky. In the case of Mr. MacConaill, his widow wrote, "[S]imply put, he would rather die than live with the consequences of people thinking he was a failure." It doesn't have to be that way, but colleagues have to be observant and provide meaningful encouragement as well as permission for self-care.

### What can you do?

Have the courage to ask and to act and be sure you have the time to listen if you personally choose to reach out. If you observe these disturbing behaviors, ask directly, but ask in a way that is true to you. "Have you thought of harming yourself? Are you in a lot of pain? Do you feel unsafe? Are you thinking of suicide?" Never ask in a way that suggests you need a "no" answer, such as "you're not thinking about suicide, are you?" Asking directly allows the person to speak freely. If he says "no" and you are still concerned, rephrase it and ask again. Give a reason why you asked; the person who said no may be ready to change her answer if you ask again and show you care. The person who is so depressed that he is paralyzed may not be able to affirmatively ask for help but may be able to answer a direct question honestly.

### What happens next?

The next step is just listening. Do so calmly, because this is not your crisis to fix. Give your full attention and be prepared for the time it takes to learn why the pain is so great that dying by suicide seems to be a reasonable option. If you believe suicide may be imminent, get them to professional help and be supportive as they get there. If they have a therapist, call that number. If not, consider taking them to an emergency room. Call 1-800-SUICIDE or 1-800-273-TALK, both of which are national suicide prevention hotlines. Counselors are also available 24/7 through LCL at 612-646-5590 or 1-866-525-6466.

Once the immediate crisis is past, support is critical to ongoing recovery. Therapy can help someone through the immediate mental illness and provide tools to develop resilience in the future. Medications are often appropriate, especially in the early stages. It's hard for a lawyer to admit he is struggling financially, but many are—and LCL can provide connections to resources to support the cost of ongoing treatment. Personal support and acceptance are critical. We need to know we're not alone.

If reading this makes you think of someone you're concerned about, or if you recognize some of these symptoms in yourself, please act. Dr. Freedenthal reported that as she began to feel the effects of her suicide attempt, her brain and body fought back and she lived. Knowing that one can come out on the other side of debilitating pain can provide incredible hope. Call for coaching if you need help on how to reach out to someone. Call for yourself if you find yourself realizing that you've thought about suicide. Hundreds of your Minnesota colleagues called for help last year on many different issues that cause stress or distress in their lives. You're not alone, and LCL is here to help. ▲

*JOAN BIBELHAUSEN is the executive director of Lawyers Concerned for Lawyers. LCL provides free and confidential peer and professional support to lawyers, judges, law students, and their immediate family members on any issue that causes stress or distress. Through LCL, up to four free counseling sessions are available statewide. Services are free, confidential and available 24 hours a day. You can help us reduce the stigma. To learn more, to get involved, or to request LCL's Suicide Prevention CLE program, go to [www.mnlcl.org](http://www.mnlcl.org), call 651-646-5590, or email (replied to during business hours) [help@mnlcl.org](mailto:help@mnlcl.org).*

### Notes

- <sup>1</sup> "Big Law Killed My Husband." An Open Letter From a Sidley Partner's Widow," Originally published in The American Lawyer (11/12/2018), republished and available at TaxProf Blog, [https://taxprof.typepad.com/taxprof\\_blog/2018/11/big-law-killed-my-husband-an-open-letter-from-a-sidley-partners-widow.html](https://taxprof.typepad.com/taxprof_blog/2018/11/big-law-killed-my-husband-an-open-letter-from-a-sidley-partners-widow.html).
- <sup>2</sup> [www.nytimes.com/2017/05/11/well/mind/a-suicide-therapists-secret-past.html](http://www.nytimes.com/2017/05/11/well/mind/a-suicide-therapists-secret-past.html)
- <sup>3</sup> <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf>

## TRADEMARK

### Copyright & Patent Searches

*"Experienced Washington office  
for attorneys worldwide"*

#### FEDERAL SERVICES & RESEARCH:

Attorney directed projects at all Federal agencies in Washington, DC, including: USDA, TTB, EPA, Customs, FDA, INS, FCC, ICC, SEC, USPTO, and many others. Face-to-face meetings with Gov't officials, Freedom of Information Act requests, copyright deposits, document legalization @ State Dept. & Embassies, complete trademark, copyright, patent and TTAB files.

**COMPREHENSIVE:** U.S. Federal, State, Common Law and Design searches, **INTERNATIONAL SEARCHING EXPERTS:** Our professionals average over 25 years experience each **FAST:** Normal 2-day turnaround with 24-hour and 4-hour service available

**GOVERNMENT LIAISON SERVICES, INC.**  
200 N. Glebe Rd., Suite 321  
Arlington, VA 22203

Ph: 703-524-8200, Fax: 703-525-8451

Minutes from USPTO & Washington, DC

**TOLL FREE: 1-800-642-6564**

**[www.GovernmentLiaison.com](http://www.GovernmentLiaison.com)**  
[info@GovernmentLiaison.com](mailto:info@GovernmentLiaison.com)



**Leland J. Frankman  
Harry A. Frankman  
Attorneys at Law**

*Over fifty years combined  
experience in providing  
consultation and expertise in  
eminent domain cases.*

900 IDS Center  
80 S Eighth St.  
Minneapolis, MN 55402  
(612) 375-1600