LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
MEETING AGENDA

Friday, January 31, 2020 – 1:00 p.m.
Town & Country Club
300 Mississippi River Boulevard North
St. Paul, Minnesota

1. Approval of Minutes of September 27, 2019, Lawyers Board Meeting (Attachment 1).

2. Farewell to retiring Board Members Joseph Beckman, James Cullen, Roger Gilmore, Mary Hilfiker and Bentley Jackson

3. LPRB 50th Anniversary!

4. Updated Panel and Committee Assignments (in process)
   Panel Matter Status Updates Discussion
   New Board Member and Expanded Panel Chair Training

5. Committee Updates:
   a. Opinions Committee
      (i.) Amended Opinion No. 21 (Attachment 2)
   b. Rules Committee
      (i.) Status, Advertising Rules Petition
      (ii.) Status, Rule 20, RLPR, changes
      (iii.) Informational Item, Access to Justice Pro Bono reporting proposal
   c. DEC Committee
      (i.) Chairs Symposium, May 8, 2020
      (ii.) LPRB Seminar, September 25, 2020
   d. Mandatory Malpractice Insurance Committee

6. Director's Report:
   a. Year End Statistics (Attachment 3)
   b. Office Updates (Attachment 4)

7. Director's Reappointment

8. New Business

9. Quarterly Board Discussion (closed session)

10. Next meeting, Friday, April 24, 2020

If you have a disability and anticipate needing an accommodation, please contact Susan Humiston at 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 for information on how to submit an ADA Grievance form.

Attachment 1

MINUTES OF THE 188TH MEETING OF LAWYERS PROFESSIONAL RESPONSIBILITY BOARD SEPTEMBER 27, 2019

The 188th meeting of the Lawyers Professional Responsibility Board convened at 3:00 p.m. on Friday, September 27, 2019, at the Earle Brown Heritage Center, Brooklyn Center, Minnesota. Present were: Board Chair Robin Wolpert, and Board Members Landon J. Ascheman, Jeanette M. Boerner, James P. Cullen, Thomas J. Evenson, Mary L. Hilfiker, Gary M. Hird, Katherine A. Brown Holmen, Peter Ivy, Bentley R. Jackson, Virginia Klevorn, Tommy A. Krause, Susan C. Rhode, Susan T. Stahl Slieter, Gail Stremel, and Allan Witz. Present from the Director's Office were: Director Susan M. Humiston, Deputy Director Timothy M. Burke, Managing Attorney Cassie Hanson, Senior Assistant Directors Jennifer S. Bovitz, Siama C. Brand, and Binh T. Tuong, and Assistant Directors Nicole S. Frank, Amy M. Halloran, Alicia J. Smith, and Bryce D. Wang. Also present were Minnesota Supreme Court Associate Justice David L. Lillehaug, Emily Eschweiler, Executive Director of the Board of Legal Certification, Frederick E. Finch representing the Minnesota State Bar Association, and Nicholas M. Ryan.

1. APPROVAL OF MINUTES.

The minutes of the June 21, 2019, Board meeting were unanimously approved.

2. PUBLIC MEMBER RECRUITMENT.

Robin Wolpert noted that the terms of several public Board members expire at the end of January 2020. As a result, the Board would be losing the talents of some amazing people, and Ms. Wolpert extended her thanks to all of them.

Ms. Wolpert stated that this presents an opportunity to reiterate the need to recruit equally talented public members to the Board. Ms. Wolpert encouraged Board members to be proactive in identifying and communicating with potential candidates. Ms. Wolpert in particular is interested in having increased representation from greater Minnesota, of people of color, and of next generation lawyers. Ms. Wolpert believes that diversity in Board membership is critical to making good decisions.

Ms. Wolpert recognized that the Board is hard-working and many people may not be aware of the Board. Therefore, recruitment and retention of talented people is important for protection of the public and for due process to affected lawyers.

Peter Ivy stated that he believes that retired Rotarians are a good population to which to reach out. He wondered if the Board and/or Office could draft a letter setting forth the duties and responsibilities of a Board member which Mr. Ivy could forward to Rotarians. Ms. Wolpert stated that she believed this was a good idea and noted that the

Board materials contain a description of the duties and responsibilities of Board members focused toward public members.

Virginia Klevorn requested clarification on the process for Board members whose terms may be expiring but are eligible for an additional term. Ms. Wolpert stated that the Board member would be called and asked about the desire to continue service on the Board. A letter would then be forwarded to the Supreme Court with that information. Justice David Lillehaug confirmed this process.

Ms. Wolpert concluded by noting the Board needs quality public members, and asked Board members to continue considering how talented people could be recruited for the Board.

3. COMMITTEE UPDATES.

a. Rules Committee.

(i) Status, Comments, Rule 5.5, Minnesota Rules of Professional Conduct (MRPC).

As to background, Ms. Wolpert reminded the Board that the Minnesota State Bar Association (MSBA) previously had filed a petition to amend Rules 1.6 and 5.5, MRPC. The Court denied the petition to amend Rule 1.6, MRPC, granted in part the petition to amend Rule 5.5, MRPC, and directed the Board and the MSBA to jointly provide suggested comments for Rule 5.5, MRPC. These comments were provided. Then, at the June 2019 Board meeting, the Board debated the appropriate definition of "family member" for the comment to Rule 5.5, MRPC. The Board adopted a definition which it requested the Court to adopt in the comments, and that information was provided to the Court.

Ms. Wolpert reported that recently Susan Humiston had received an email from the Supreme Court Commissioner setting forth the language to the comments to Rule 5.5 regarding the definition of "family member." Ms. Wolpert read this definition to the Board. Justice Lillehaug anticipated that the order to this effect would be issued shortly.

(ii) Advertising Rule Changes.

James Cullen reported that the Board was being asked to revisit one item regarding the advertising rule changes on which the Board had made a decision previously. Originally, the MSBA Rules of Professional Conduct Committee had voted to recommend the Supreme Court adopt amendments to Rules 7.1 – 7.5, MRPC, that tracked the recent

amendments to the Model Rules of Professional Conduct. Thereafter, in April 2019, the Board approved co-petitioning with the MSBA to amend Rules 7.1 – 7.5, MRPC, by adopting ABA Model Rules 7.1 – 7.3. Then the MSBA General Assembly met. Mr. Cullen reported that according to Frederick Finch, the vote was very close on amending the proposed rule on attorney specialization. Mr. Cullen noted that this issue is a hot button issue for many, including the Board of Legal Certification (BLC). The MSBA General Assembly recommended adoption of all the ABA Model Rules, except that a lawyer should not be allowed to call themselves a specialist if not a certified specialist.

Mr. Cullen reported that the Board could continue to recommend amendments consistent with the Model Rules of Professional Conduct, or consider the MSBA General Assembly position. Mr. Cullen noted that there were concerns of a potential First Amendment challenge with the MSBA General Assembly's position.

Mr. Cullen stated that the Rules Committee met on September 17, 2019, regarding the MSBA General Assembly action on these proposed amendments. At that meeting, the Rules Committee recommended the Board take no action to revisit or modify the decision taken on this issue at the April 2019 Board meeting. Mr. Cullen noted that the Board can no longer co-petition with the MSBA due to the difference regarding the language governing specialization. He requested that the Board could adopt a motion to file a petition consistent with the decision at the April 2019 Board meeting.

Ms. Wolpert referred Board members to Timothy Burke's September 20, 2019, memorandum to the Board (included in the materials attached to the agenda), which reveals the precise issue. Ms. Wolpert then invited Emily Eschweiler, Executive Director of BLC to speak. Ms. Wolpert noted that an email from Ms. Eschweiler and a letter from BLC was also included in the materials.

Ms. Eschweiler thanked Ms. Wolpert for the opportunity to present to the Board. Ms. Eschweiler provided the background of BLC's position. BLC has been following the issue since before the ABA first proposed amending the pertinent rule. Ms. Eschweiler believes that the most important thing to keep in mind is there is very little difference between the Model Rule as recently amended and its predecessor, but there is substantial difference between the Model Rule and the Minnesota rule. BLC believes that the current Minnesota rule works well, protects the

public, is consistent with the Supreme Court's 2006 task force report, and is consistent with a 2006 survey which showed that the public believed it would be misled were the rule otherwise. She believes that any constitutional challenge to the current rule would be unsuccessful because it allows lawyers to make truthful statements.

Ms. Eschweiler noted that certified specialists go the proverbial extra mile to meet stringent credential standards. She believes that there is a potential for confusion with the public between "certified specialists" and "specialists," if both terms are allowed to be used without further explanation.

Ms. Eschweiler concluded that BLC does not object to renumbering or moving the current rule regarding specialization within the Rules of Professional Conduct, but believes important public protection issues remain and that adopting the ABA Model Rule or the MSBA proposal would be a major change.

Ms. Wolpert then invited Mr. Finch to speak on the MSBA's position.

Mr. Finch stated that during his tenure as MSBA Rules of Professional Conduct Committee Chair, he has worked to reduce disagreement between the MSBA and the Board on proposed rule changes. The MSBA Rules of Professional Conduct Committee recommended the Supreme Court adopt Rules 7.1 through 7.3 of the ABA Model Rules in full. The MSBA General Assembly, however, took out the words "certified as" at the start of Model Rule 7.2(c). The General Assembly did not address the comments in its debate regarding this rule. Mr. Finch believes the issue around the comments needs to be addressed before a rule change petition can be filed, which cannot occur at the earliest until after the MSBA General Assembly in December 2019. Mr. Finch expressed his regret that the Board and MSBA could not do a joint petition on this issue. He encouraged the Board to thoroughly consider the issue and do the right thing. Ms. Wolpert asked if the General Assembly vote on this issue was close. Mr. Finch reported it was, that to his recollection there was approximately a two or three vote difference. Ms. Wolpert asked what the MSBA General Assembly would be asked to do when it meets in December 2019. Mr. Finch reported that he would inform the MSBA General Assembly of the Board's decision on this issue, and on the agenda will be inconsistencies between the rule as

proposed by the General Assembly and the comments in the analogous section of the Model Rules.

Ms. Wolpert stated that the question as Mr. Cullen set forth was should the Board maintain its position adopted in April, or modify its position as Ms. Eschweiler suggests and the MSBA General Assembly did. The Rules Committee recommended that the Board keep the position it adopted previously.

Landon Ascheman believes it is a problem for a lawyer to be prohibited from using the word "specialist" when there are so many synonyms which a lawyer is allowed to use, such as "expert." Mr. Ascheman did not see any magic behind the word "specialist" such that it needed to be treated in a unique way in representations to the public.

Ms. Wolpert stated that a prior BLC survey indicated that the public thinks "specialist" means "certified specialist," which is not the case. Ms. Eschweiler agreed and stated that consistently across the country that attorneys are allowed to use the word "specialist" only in the context of certification. Mr. Ascheman asked if the 2006 survey looked at other words such as "expert" and the potential for confusion. Ms. Eschweiler reported it did not.

Mary Hilfiker asked about the cost to obtain certification. Ms. Eschweiler stated that the cost varies, but is generally $500-$2,000 or so. Ms. Eschweiler stated that a bigger issue is that there are some areas of law that are not areas of specialization, so there is no opportunity for a lawyer in those areas to ever become certified or use the term "certified specialist." Ms. Wolpert stated that in addition to cost, a substantial amount of time and effort is required to become a certified specialist.

Mr. Cullen made a motion that the Board petition the Supreme Court to amend Rules 7.1-7.5, MRPC, to conform to ABA Model Rules 7.1-7.3. Mr. Cullen stated that the timing as to when the petition is filed might be open, but wanted to clarify the Board would file its own petition. Ms. Wolpert recognized that the reason for this motion was that in April 2019 the Board approved a joint petition, but that is no longer possible in light of the action of the MSBA General Assembly. Ms. Wolpert asked Mr. Cullen if the effect of his motion was to keep the substance, but have the Board file its own petition on this area of controversy. Mr. Cullen confirmed this was the substance.

The motion was seconded and passed unanimously.

(iii) RLPR Rule Changes.

Mr. Cullen stated that the Board previously recommended a series of rule changes, and that questions had arisen to one of those, proposed Rule 20(f)(13), Rules on Lawyers Professional Responsibility (RLPR). The prior vote on this issue was without controversy. William Wernz has raised concerns with this proposed rule as it relates to the confidentiality of client information and materials the Director's Office receives pursuant to Rule 26, RLPR. Mr. Cullen stated that at the September 17, 2019, Rules of Professional Conduct meeting, Mr. Wernz made a very compelling presentation as to why that information ought not be public and should be retained as confidential in the Director's files. The concern is that attorneys could mine that data to get client names, and write to them, even when clients had retained lawyers on particularly sensitive matters.

Mr. Cullen reported that at its September 17 meeting, all Rules Committee members present were persuaded to revise Rule 20(f), RLPR, to revisit this issue and make client identifying information in Rule 26 materials not public. Mr. Cullen concluded that he believed it was appropriate the Board delay formal action regarding filing a petition arising out of its prior action until the Board could revisit this issue. The Rules Committee did not have proposed language at this time due to the short timeframe involved, but the Rules Committee would want to work with the Director's Office on proposed language.

Ms. Wolpert summarized that in April 2019 the Board approved these proposed changes; thereafter, there were questions raised about the scope of the rule. One of the issues raised at the recent Rules Committee meeting was people who retained a lawyer on a confidential basis, such as sex abuse victims.

Ms. Wolpert requested input from the Board and Ms. Humiston about whether the Board would want to revisit this issue.

Ms. Humiston stated that this information is already public. Rule 20, RLPR, provides that all information in the Director's discipline file, other than work product, is public once probable cause is determined. Ms. Humiston noted that the Director's files have other sensitive confidential information, including about third parties who have nothing to do with the underlying discipline matter. For example, the file may contain information about third parties in connection with audits.

Ms. Humiston recognized that this is a hole in the current rule that is true with the amended rule, and the Director's Office does all it can to protect this information. Very few persons come in to review the Director's public files.

Ms. Humiston stated raising of this issue was not a random decision to make part of the file public. Rather, it is part of a broader issue. Ms. Humiston has no interest in having this information not be confidential, and that this proposed rule amendment relates solely to information and materials received pursuant to Rule 26, RLPR. The purpose of this amendment was simply to clarify a potential ambiguity in the rules. Ms. Humiston noted that Eric Cooperstein felt strongly that this information should remain public.

Ms. Wolpert asked if the purpose of this amendment was to clarify the existing rule, so that whether or not the Board proposed a revision to the court rule, the practice would remain the same. Ms. Humiston replied it would. Ms. Humiston stated that the rules can be restructured to make much client information confidential, but the information received in a Rule 26 letter tends to be one of the lesser concerns. Also, Ms. Humiston does not want to have her office be in a position where substantial efforts to redact files would be required by an amendment to the rules as that would be an extremely large administrative burden.

Ms. Klevorn stated that she believes that sensitive information exists in every court proceeding and file and wondered why the Director's Office would be so unique as to redact client information which, in any other lawsuit, would be public. Ms. Klevorn's principal confidentiality concern would be regarding information in the Director's files about juveniles. Ms. Humiston replied that the purpose of the proposed changes was to make more clear what is and is not confidential, such as social security numbers, health records, etc. The Director's Office may possess more third party information in a file than in a typical lawsuit, especially when trust account audits are involved. Mr. Finch concurred that it would be appropriate to review the confidentiality rules as a whole.

Ms. Wolpert inquired about the sense of the Board as to whether this issue should be referred back to the Rules Committee for its next meeting, or if the Board was satisfied with what it did in April 2019. By an informal show of hands, the sense of the Board was to refer the matter back to the Rules Committee.

Mr. Cullen stated that the Rules Committee's intent would be to work with the OLPR and the MSBA's Rules of Professional Conduct Committee for a proposal all could support.

Ms. Klevorn raised an idea for the Rules Committee's consideration. Because under Rule 20, RLPR, there is a lot of exposure to information about innocent people and there is a desire for a transparent legal process, so she wondered if instead of reworking Rule 20, a new rule could be adopted requiring a person who wanted access to the Director's file to state a reason.

b. Opinions Committee.

Gary Hird reported that it had been difficult to arrange a Committee meeting regarding proposed changes to Board Opinion No. 21 to robustly discuss these proposed changes. The Opinions Committee had hoped to be able to do so and develop a proposal for the Board for this meeting, but now looks to do so before the Board's January meeting. The Opinions Committee is also looking at how best to get input from representatives of the MSBA; one option is perhaps a joint meeting. Ms. Wolpert stated she believes this is an important issue and thanked the Director's Office for distributing information on it to various stakeholders across Minnesota.

c. DEC Committee.

(i) Feedback, seminar.

Mr. Ivy stated that he hoped seminar attendees would submit evaluations for today's seminar.

(ii) Chair symposium feedback.

Mr. Ivy reported that after consulting with the DEC Committee, on August 31, 2019, he sent a 14-question survey to all DEC Chairs. Replies were received from five. Mr. Ivy wondered whether this meant the Chairs did not really have any concerns about the way the symposium is currently conducted.

From the five responses, Mr. Ivy noted that the Chairs liked the Earle Brown Heritage Center as the meeting location, want to keep the DEC Chairs symposium and professional responsibility seminar separate, do not want a one and one-half day consolidation, vary about whether they believe Skype or Webinar would be helpful, and believe the current format is effective. In other words, Mr. Ivy had no sense there was a huge

demand for change. Mr. Ivy recognizes that not all Chairs may attend every year, but because of the turnover across the state in the population of Chairs it is important to do the seminar every year. He believes the content is successful.

Ms. Wolpert noted that at the last Board meeting there was discussion of the idea to combine the symposium with the seminar, with a separate breakout for DEC Chairs. She asked if Mr. Ivy had a recommendation on this. Mr. Ivy reported that of the survey responses he received, one was in favor, one was opposed, and two gave no opinion. Ms. Wolpert asked for a recommendation from the DEC Committee about combining the symposium with the PR seminar. Mr. Ivy stated that he believed that was too much to combine into one event. Ms. Wolpert then asked what the various options were and noted that Susan Rhode had previously suggested an idea to leverage technology to increase attendance. Ms. Wolpert also asked whether all of the Director's lawyers should attend, as part of a broader effort to review how to better leverage the Director's Office resources. Ms. Wolpert suggested if making decisions along these lines in January made sense. Mr. Ivy stated that it did. Ms. Humiston stated that the Earle Brown Heritage Center may need to be reserved before January for an event in May, and would let Ms. Wolpert know. Ms. Wolpert stated that, if so, a decision may have to be made before the January Board meeting.

Ms. Wolpert stated that this is an important issue, as the symposium provides an opportunity for DEC Chairs to exchange information, but a substantial amount of Office resources are dedicated to putting together and presenting the symposium. Ms. Wolpert noted that Mr. Ivy had called all DEC Chairs before the most recent symposium, and 14 of 21 either attended or sent a designee. Ms. Wolpert asked if this was worth the resources involved, or whether there was a better way to present the seminar. Mr. Ivy noted a comment in one survey response, that the attendee was a new DEC Chair and felt it was therefore very important to have the symposium.

Ms. Rhode noted that people are more likely to attend when they have something to do, so maybe each Chair could be given responsibility for a part of the symposium. Mr. Ivy and Ms. Wolpert both believed this was an excellent idea. Chairs could report on things such as trends, difficult matters, etc.

4. DIRECTOR'S REPORT.

a. Office Statistics.

Susan Humiston reported that there had been very good movement in case processing. For two months the total number of open files had remained under 500, which is terrific. The total at the end of September may exceed 500, but the Director's Office is on top of its cases. Additionally, the Office has made great progress in getting year old file cases moved and concluded. Among other things, there are many fewer cases on hold. Several of the oldest cases in the Office are on hold, but even though no charging decision has been made in the underlying criminal investigation, the Director's Office has decided to move forward.

Ms. Humiston noted that this substantial progress has been made even though the Office tried a lot of cases this summer. This says a lot about the hard work of the staff, that the Office has continued to maintain and improve on case processing while undertaking a substantial amount of litigation. Although some of the case numbers may increase slightly in September, the Office remains in control of its workload. Total discipline appears to be trending down a bit year over year.

b. Office Updates.

Ms. Humiston reported that the Court's comments at the budget meeting and approval of the proposed budget had been very appreciated in the Office, resulting in a morale boost, particularly among the support staff. Ms. Humiston reported that the Office has hired Jennifer Wichelman as a senior attorney who will begin on October 7. Ms. Wichelman has been a partner at Bowman and Brooke and is a products liability lawyer with significant litigation experience. Ms. Wichelman was looking for a change in her practice, which led her to the Director's Office . Ms. Humiston reported there were many wonderful candidates, and two exceptional candidates who were finalists for the position.

Ms. Humiston stated that filling the investigator position has been more challenging. The principal obstacle has been pay, as Mr. Ivy noted when the position was first listed. One finalist had withdrawn because the candidate makes more in a current position. Nevertheless, the Office is very fortunate to have hired Gina Brovege, who also will start on October 7. She had her own investigation practice in Colorado for 25 years, and moved to Minnesota to care for her aging parents. Much of her work had involved investigation in criminal defense and death penalty cases. Ms. Humiston stated that she believes

Ms. Brovege will be a great hire, but that the issue of the pay scale for the position should be revisited.

Ms. Humiston reported that while working to improve case processing, the Office is also focusing on training. Cassie Hanson and Binh Tuong had recently returned from a COLAP conference in Austin, Texas. Ms. Hanson had told Ms. Humiston that Minnesota was very well-represented, and an increasing number of disciplinary counsel from across the country attended the conference.

Ms. Humiston invited Ms. Hanson and Ms. Tuong to share any observations. Ms. Hanson stated that COLAP was valuable for the attorneys in the Director's Office. The COLAP conference covered what was occurring in terms of well-being at law schools. Ms. Hanson's biggest take-away was the concept of redemption, that various lawyers at the conference had talked about their serious issues and the negative effects those issues had on their lives, but they had been able to come back and have healthy lives and careers. Ms. Tuong was very impressed that Minnesota is ahead of many jurisdictions. Many of the issues addressed at the COLAP conference have been addressed in the Minnesota system already. Ms. Humiston stated that she wants all attorneys in the Office to have exposure to the COLAP conference.

Ms. Humiston reported that three attorneys will be attending the NITA/NOBC trial training in October 2019. Ms. Humiston stated that as the case numbers continue to improve, she will be looking to implement additional areas of the strategic plan. She believes that training and well-being already have substantial forward momentum.

Ms. Humiston reported that Mark Lanterman and Ms. Humiston have presented twice to the NOBC, at conferences in Las Vegas and San Francisco. These presentations were very well-received. Mr. Lanterman and Ms. Humiston have been asked to do a third presentation, a webinar, but it is uncertain whether they will do so. Ms. Humiston thanked Mr. Lanterman for his significant commitment of time.

Ms. Humiston reported that she had received substantial correspondence on her recent article regarding civility in the profession. Additionally, Hennepin County Judge Susan Burke was on a panel at the NOBC conference in San Francisco discussing this issue. Judge Burke and Keshini Ratnayake are looking to put together presentations on civility and ethics. Ms. Humiston also directed Board members to Ms. Wolpert's article on well-being in the meeting materials.

Ms. Humiston reported that the vendor has given the LDMS software to the Director's Office for final acceptance testing. The Director's Office did testing

across the Office which went very well. Ms. Humiston believes this is a very good product, and the Office has identified ways to make it even better. Ms. Humiston is very impressed with people's can-do attitude about the product. Ms. Humiston stated that the vendor does have a fair amount left to do and anticipates that will be done by year-end. Ms. Humiston personally is excited about the more robust reporting capabilities, on which the vendor is working.

Mr. Hird expressed concern that Panel members do not always hear about cases which have been assigned to them. He suggested regular updates would be appropriate. Ms. Humiston stated that was an excellent point which she thanked Mr. Hird for providing. Ms. Humiston noted that many of these matters are reinstatement matters, which can take a substantial period of time. Mr. Hird stated that this occurs on other matters, too.

Ms. Wolpert asked how often would Panels like to receive updates, such as every 60 days at minimum. She stated that she can take this issue to the Executive Committee as to balance workload and what information can be communicated to Panels. Mr. Hird stated that these could be brief updates. Ms. Humiston identified this as a business process issue. Such updates could be easily provided, and she would look into it. Ms. Wolpert noted that if the matter had been discontinued, it would be off the list of Panel matters pending.

5. OTHER BUSINESS.

a. *Ex parte* Communications/DEC Reports.

Ms. Wolpert believes that previously a conversation was held in a closed session of a Board meeting as to whether DEC reports have evidentiary value and therefore should be admitted at Panel hearings, and whether Panel Chairs should decide whether DEC reports should be part of the record. Ms. Wolpert wanted to remind Board members of this past discussion and decision, that reports do not have evidentiary value, and Panel Chairs can decide whether to make these reports part of the record. Ms. Wolpert asked Panel members that if they had questions on this issue they should ask them of the Panel Chair who can if necessary discuss the issue with Ms. Wolpert. Ms. Wolpert asked Board members not to contact the Director's Office about what is or is not part of the record, as it poses a conflict of interest for these conversations to occur. Mr. Cullen asked why this issue was being raised at this time. Ms. Wolpert stated that it was because she wanted to remind Board members of prior Board decisions and of the importance of not contacting the Director's Office about this issue. The Board then had further discussion to clarify its understanding of this

policy and procedure. Ms. Wolpert noted that the conversation could be continued in the closed session if desired.

b. Panel Assignment Check-In.

Ms. Wolpert stated that data had been obtained regarding the assignment of Panel matters in 2019. So far this year, Panel 1 has been assigned six matters, Panel 2 three matters, Panel 3 four matters, Panel 4 three matters, Panel 5 three matters, and Panel 6 three matters. Thus, distribution has generally been even except for the assignments to Panel 1. Ms. Wolpert stated that she wanted to alert the Board to the assignments so far this year because Mr. Cullen had raised this issue previously. Ms. Wolpert also reminded Board members that the number of files assigned does not necessarily correlate directly to Panel workload.

Ms. Humiston stated that Ms. Hilfiker had asked how long Board members whose terms will end in January 2020 will be assigned to Panel matters. Ms. Humiston answered that matters will continue to be assigned to those members, and that any open matters remaining when the Board member's term expires will be assigned to a new person on the same Panel or reassigned to a different Panel.

c. CLE Rule change petition.

Ms. Wolpert informed the Board that a petition to allow more CLE credits to be taken through online courses has been filed, and the Board may be asked to be involved. Mr. Ascheman stated that this is largely being driven by the new lawyer section of the MSBA.

d. Approval of 2020 meeting dates.

Ms. Wolpert stated that establishing the April 2020 meeting date had been a challenge due to the desire to avoid scheduling at the same time as the April 2020 MSBA General Assembly and the Minnesota Women Lawyers annual conference. Ms. Wolpert requested approval of the draft list of 2020 dates, subject to finding a date for April 2020 which did not conflict with those events. The Board gave this approval.

6. **NEW BUSINESS.**

Justice Lillehaug stated that the Supreme Court had a new project for the Board which the Court hopes the Board will enthusiastically undertake. Through various means, Justice G. Barry Anderson and Justice Lillehaug have developed an interest in whether malpractice insurance should be mandatory for

lawyers who represent private clients. Justice Lillehaug had Ms. Humiston and Ms. Eschweiler do some preliminary research on this issue. There are about 25,000 active lawyers in Minnesota, about 13,000 represent private clients, and about 2,200 represent private clients but do not carry malpractice insurance.

Justice Lillehaug reported that a couple of states require malpractice insurance for lawyers who represent private clients, and this issue is bubbling in other states.

Justice Lillehaug personally believes that a client must have some protection through a lawyer carrying malpractice insurance. He believes it is in the interest of the Board to have a malpractice carrier involved when there is a problem in a lawyer's representation of the client.

Justice Lillehaug would like the Board to establish a sub-committee to study this issue. Questions to be asked include: Who are these 2,200 attorneys? What would the cost of mandatory insurance be? What are the pros and cons of this issue as a policy matter?

Ms. Wolpert asked if the Supreme Court had a deadline for input from the Board. Justice Lillehaug replied there was not.

Ms. Wolpert asked any Board member interested in participating on this sub-committee to email her and Ms. Humiston.

Ms. Klevorn requested clarification of whether any of the uninsured lawyers Justice Lillehaug spoke of were corporate attorneys. Justice Lillehaug clarified that these were attorneys in private practice.

Ms. Humiston reported a statistic she found interesting. Of the 24 lawyers publicly disciplined to date, only eight have malpractice insurance at this time. Ms. Humiston noted that historical records regarding malpractice insurance do not exist, so it cannot be determined whether these lawyers had malpractice insurance at the time of their misconduct.

Mr. Hird stated that he believes the MSBA should be involved in this conversation, and Ms. Wolpert stated that the MSBA would be included in the discussion. Justice Lillehaug asked the Board to consult widely, including the MSBA and malpractice insurance carriers, especially Minnesota Lawyers Mutual, to determine whether coverage would be available and its cost.

Ms. Humiston reported that in considering this issue Idaho had a concern about lawyers who were uninsurable and therefore would not be able to practice,

but all Idaho lawyers were able to get malpractice insurance through the private market at a cost of approximately $1,500 to $3,300 per year.

Ms. Humiston reported that a number of states have previously gathered information on this topic.

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

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

AMENDED OPINION NO. 21

A Lawyer's Duty to Consult with a Current or Former Client About the Lawyer's Material Error

A lawyer who knows or reasonably should know that he or she has committed a material error involving a current client has one or more duties to act under the Minnesota Rules of Professional Conduct. See Rule 1.0(g) and (i), Minnesota Rules of Professional Conduct (MRPC), for the definition of "knows" and "reasonably." The requirements of Rules 1.4 and 1.7, MRPC, are implicated in such a circumstance and the lawyer must determine what actions may be required under the Rules. The lawyer must inform a current client of the material error. An error is considered material if a disinterested lawyer would find that it is (a) reasonably likely to harm or prejudice a client; or (b) would reasonably cause a client to consider terminating the lawyer even in the absence of apparent harm or prejudice.

Since a lawyer's disclosure of a material error to a client may be disruptive to the lawyer-client relationship, the provisions of Rule 1.7, MRPC, dealing with a "concurrent conflict of interest" must be considered to determine whether the personal interest of the lawyer poses a significant risk that the continued representation of the client will be materially limited.[1] Under Rule 1.7, MRPC, the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present.[2] Assuming continued representation is not otherwise prohibited, to continue the representation the lawyer must reasonably believe he or she may continue to provide competent and diligent representation.[3] If so, the lawyer must obtain the client's "informed consent," confirmed in writing, to the continued representation.[4] Whenever the rules require a client to provide "informed consent," the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent.[5] In this circumstance, "informed consent" requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the continued representation.[6]

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[1] Rule 1.7(a)(2), MRPC.
[2] Rule 1.7(a), MRPC.
[3] Rule 1.7(b)(1) and (2), MRPC.
[4] Rule 1.7(b)(4), MRPC.
[5] Rule 1.4(a)(1), MRPC.
[6] Rule 1.0(f), MRPC.

Regardless of whether a material error creates a conflict of interest under Rule 1.7, MRPC, the lawyer also has duties of communication with a current client under Rule 1.4, MRPC, that may apply. When the lawyer knows or should know that he or she has committed a material error involving a current client, the lawyer shall inform the client about that conduct to the extent necessary to achieve each of the following objectives:

1) keeping the client reasonably informed about the status of the representation,[7]
2) permitting the client to make informed decisions regarding the representation,[8]
3) assuring reasonable consultation with the client about the means by which the client's objectives are to be accomplished.[9]

All three of these objectives require that a lawyer promptly notify a current client of a material error under Rule 1.4(a), MRPC, even in the absence of apparent harm or prejudice. In disclosing a material error to a current client, the lawyer should bear in mind Comment 5 to Rule 1.4, which provides that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."

If a lawyer discovers that he or she has materially erred after the representation has concluded, the lawyer is not required to inform the former client of the error under the Rules of Professional Conduct.[10] Business relations, risk management or general best practice standards may make disclosure of the lawyer's material error to a former client the preferred course of conduct in order for the lawyer to avoid or mitigate potential harm or prejudice to the former client. However, this obligation is not one mandated by the Rules of Professional Conduct.

Comment

The issue of when and what to say to a client; when a lawyer determines a material error has been committed is difficult and may create inherent conflicts. The Board is amending Opinion No. 21 to apprise the Bar of the Board's position on the matter and to conform Opinion 21 with ABA Formal Opinion 481 (April 7, 2018)

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[7] Rule 1.4 (a)(3), MRPC.

[8] Rule 1.4 (b), MRPC.

[9] Rule 1.4 (a)(2), MRPC.

[10] *See* ABA Opinion 481 (April 7, 2018).

(lawyer must inform current client of a material error; which is defined as "(a) reasonably likely to harm or prejudice a client; or (b) of such nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice").

Adopted: October 2, 2009.
Amended: _____, 2020.

_____

Robin M. Wolpert, Chair
Lawyers Professional Responsibility Board

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

OPINION NO. 21

A Lawyer's Duty to Consult with a Client About the Lawyer's Own Malpractice

A lawyer who knows that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client's interests has one or more duties to act under the Minnesota Rules of Professional Conduct. The requirements of Rules 1.4 and 1.7 are implicated in such a circumstance and the lawyer must determine what actions may be required under the Rules, with particular attention to Rules 1.4 and 1.7.

Since the possibility of a malpractice claim that arises during representation may cause a lawyer to be concerned with the prospect of legal liability for the malpractice, the provisions of Rule 1.7 dealing with a "concurrent conflict of interest" must be considered to determine whether the personal interest of the lawyer poses a significant risk that the continued representation of the client will be materially limited.[1] Under Rule 1.7 the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present.[2] Assuming continued representation is not otherwise prohibited, to continue the representation the lawyer must reasonably believe he or she may continue to provide competent and diligent representation.[3] If so, the lawyer must obtain the client's "informed consent," confirmed in writing, to the continued representation.[4] Whenever the rules require a client to provide "informed consent," the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent.[5] In this circumstance, "informed consent" requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the continued representation.[6]

Regardless of whether the possibility of a malpractice claim creates a conflict of interest under Rule 1.7, the lawyer also has duties of communication with the client under Rule 1.4 that may apply. When the lawyer knows the lawyer's conduct may reasonably be the basis for a non-frivolous malpractice claim by a current client that

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[1] Rule 1.7(a)(2).
[2] Rule 1.7(a).
[3] Rule 1.7(b)(1) and (2).
[4] Rule 1.7(b)(4).
[5] Rule 1.4(a)(1).
[6] Rule 1.0(f).

materially affects the client's interests, the lawyer shall inform the client about that conduct to the extent necessary to achieve each of the following objectives:

1) keeping the client reasonably informed about the status of the representation,[7]
2) permitting the client to make informed decisions regarding the representation,[8]
3) assuring reasonable consultation with the client about the means by which the client's objectives are to be accomplished.[9]

Comment

The issue of when and what to say to a client when a lawyer knows that the lawyer's conduct described in Opinion 21 could reasonably be expected to be the basis for a malpractice claim is difficult and may create inherent conflicts. The Board is issuing Opinion No. 21 to apprise the Bar of the Board's position on the matter and to provide guidance to lawyers who may confront the issue.

In consulting with the current client about the possible malpractice claim, the lawyer should bear in mind Comment 5 to Rule 1.4, which provides that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."

Other jurisdictions have recognized a lawyer's ethical duty to disclose to the client conduct which may constitute malpractice. *See, e.g., Tallon v. Comm. on Prof'l Standards*, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him."); Colo. B. Ass'n Ethics Comm., Formal Op. 113 (2005) ("When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client."); Wis. St. B. Prof'l Ethics Comm., Formal Op. E-82-12 ("[A]n attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission."); N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 734 (2000), 2000 WL 33347720 (Generally, an attorney "has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice

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[7] Rule 1.4 (a)(3).

[8] Rule 1.4 (b).

[9] Rule 1.4 (a)(2).

claim."); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 684 ("The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney's own interest.").

In re SRC Holding Corp., 352 B.R. 103 (Bankr. D. Minn. 2006), aff'd in part and rev'd in part *In re SRC Holding Corp.*, 364 B.R. 1 (D. Minn. 2007), reversed *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir. 2009) discuss certain matters addressed in Opinion 21. In *Leonard*, the Eighth Circuit held that the bankruptcy court had relied too heavily on ethics rules in determining whether the law firm had violated a legal duty to consult with its client about the law firm's possible malpractice. The Eighth Circuit said "[d]emonstrating that an ethics rule has been violated, by itself, does not give rise to a cause of action against the lawyer and does not give rise to a presumption that a legal duty has been breached." 553 F.3d 628. In predicting how the Minnesota Supreme Court would rule on an attorney's legal duty to consult with a client about the law firm's possible malpractice, the Eighth Circuit did not opine on a law firm's ethical duties to consult about such a claim. Recognizing the distinction, this Opinion does not opine on a law firm's legal duties to consult about such a claim.

A lawyer's obligation to report a possible malpractice claim to the lawyer's client also is discussed in a local article written by Charles E. Lundberg, entitled *Self-Reporting Malpractice or Ethics Problems*, 60 Bench & B. of Minn. 8, Sept. 2003, and more recently and extensively in Benjamin P. Cooper's article, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 Baylor L. Rev. 174 (2009) and Brian Pollock's article, *Surviving a Screwup*, 34 ABA Litig. Mag. 2, Winter 2008.

Adopted: October 2, 2009.

Humiston, Susan

From: Rich Thomas <thomas@burkeandthomas.com>
Sent: Wednesday, July 17, 2019 9:04 AM
To: Humiston, Susan
Cc: Gretchen Ryan
Subject: [EXTERNAL] Support for Amendment to Opinion 21

Ms. Humiston,

I write in support of your recommendation to amend Opinion 21 to bring it into conformity with ABA Opinion 481. Much of my practice is devoted to the defense of attorney malpractice cases and has for more than 30 years. I think the salient reasons to disclose potential legal malpractice claims are clear enough and really don't require additional discussion except perhaps to note that, given the fiduciary duty a lawyer has to a client, and its concomitant duty to advise and inform, a failure to make this disclosure may result in a tolling of any statute of limitations period for such a claim based upon a theory of "fraudulent concealment" given the duty to advise. I would like to address the second change, that is the duty to disclose matters which may not support a malpractice claim in negligence but may nevertheless implicate a client's desire to continue the relationship. What is frequently misunderstood in the context of a legal malpractice actions, and a lawyer's potential exposure as a result, is the distinction between negligence claims and claims for a breach of fiduciary duty. They are not the same and concern potentially different damages. A fiduciary duty requires full disclosure to a client of that type of information contemplated by Opinion 481. While such conduct may not support a negligence action in tort, it may support a breach of fiduciary duty claim which, even in the absence of consequential damage, could potentially support a claim for a return of fees under Perl v. St. Paul Fire and Marine Ins. Co., 345 N.W.2d 209 (Minn. 1984). A failure to disclose this may also have statute of limitations tolling consequences. In the end, and more importantly, it represents better practice.

Richard J. Thomas
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Humiston, Susan

From: Todd Scott <tscott@mlmins.com>
Sent: Wednesday, August 14, 2019 12:35 PM
To: Hanson, Cassie; Humiston, Susan
Cc: Paul Ablan
Subject: [EXTERNAL] RE: Amendments to Opinion 21.

Cassie & Susan:

Thank you for the information on the proposed amendment to LPRB Opinion 21 and the opportunity to submit comments regarding proposed changes to the Opinion. After giving it some thought, MLM has decided not to submit any comments for consideration by the Board at this time.

Again, we thank you for alerting us to this opportunity regarding this important matter, and we value our relationship with the Office of Lawyers Professional Responsibility.

Regards,

Todd

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From: Hanson, Cassie <Cassie.Hanson@courts.state.mn.us>
Sent: Wednesday, July 10, 2019 1:00 PM
To: Todd Scott <tscott@mlmins.com>
Subject: Amendments to Opinion 21.

Hi Todd:

Susan Humiston wanted me to make you aware of a proposed amendment to LPRB Opinion 21. The Lawyers Board plans to vote on the amendment in September. The Lawyers Board is soliciting comments on or before August 16, 2019 to the proposed amendment. You may submit any comments directly to Susan Humiston by email.

The redline and clean line version of both may be accessed below.

http://lprb.mncourts.gov/Pages/Instructions%20on%20Comments%20to%20Op.%2021.pdf

Thank you.

Cassie Hanson
Managing Attorney

MSBA

January 9, 2020

Robin Wolpert, Esq.
Chair, Lawyers Professional Responsibility Board
Sapientia Law Group
120 South Sixth Street, Ste. 100
Minneapolis, MN 55402

Re: Proposed Amended Lawyers Board Opinion 21

Dear Ms. Wolpert:

I write as Chair of the Minnesota State Bar Association Standing Committee on the Rules of Professional Conduct. At its meeting on December 17, 2019, our Committee reviewed the November 19, 2019 draft of proposed amendments to Lawyers Professional Responsibility Board Opinion Number 21, which the Board had circulated for comment.

After a thorough discussion of the proposed amendments, the Committee adopted the following comments on the proposed amended Opinion 21:

1. The Committee recommends that the Board amend the proposed opinion to substitute "knows" or "believes" for "knows or should know," as a state of mind standard in Opinion No. 21. ABA Formal Opinion No. 481 uses "believes" as the lawyer's state of mind, so the proposed language in Op. 21 would not conform the opinion to ABA Op. 481. Moreover, adding a "should know" requirement is an unprecedented expansion of a lawyer's obligations to a client and risks material problems in enforcing Rules 1.4 and 1.7, MRPC, if the change is made.

2. The Committee recommends that the Board amend the proposed opinion to incorporate the following definition, "An error is considered material if a disinterested lawyer would find that it is reasonably likely to harm or prejudice a client." (This definition would delete from proposed Op. 21 the words, "or (b) would reasonably cause a client to consider terminating the lawyer even in the absence of apparent harm or prejudice.") The "cause the client to consider terminating the lawyer" language is a radical departure from ethics guidance given by other state disciplinary bodies and by all of the major treatises on professional ethics. And the Committee believes that if adopted, it will complicate and expand panel hearings in otherwise routine disciplinary cases beyond reason because, among other things, it will create a need for expert testimony on what would reasonably cause a client to terminate a lawyer.

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Cheryl Dalby

3. If the Board does not adopt the preceding recommendations, or as otherwise necessary, the Committee recommends that the Board correct the following drafting problems:

   a. The Board should not state that it intends to "conform" Opinion 21 to ABA Formal Op. 481 if Opinion 21 does not include the "believes" standard of Op. 481 or if Opinion 21 does not use the same definition of "material error" as Op. 481.

   b. If the Board does not adopt the "knows" or "believes" standard, Op. 21 should be amended to adopt the standard "knows or *reasonably* should know," rather than the proposed, "knows or should know," because "reasonably should know" is defined in Rule 1.0(k), MRPC, and "should know" is not a defined term.

   c. The word "determines" in the Comment to proposed amended Op. 21 ("when a lawyer *determines* a material error has been committed") is inconsistent with the "should know" and "reasonably should know" standards, because "determines" denotes actual knowledge. The Comment should be amended to be consistent with the knowledge standard the Board ultimately adopts.

Mr. William J. Wernz, a former Director of the Office of Lawyers Professional Responsibility and a well-respected authority on Minnesota professional responsibility law, prepared a memo for our Committee on the proposed amended Opinion 21. Because it provides a detailed explanation of the basis for our Committee's recommendations, I am enclosing a copy of the memo for the Board's information.

Our Committee appreciates the opportunity provided by the LPRB to address this significant issue.

Sincerely,

p.p. Nancy Mischke

Frederick E. Finch
Chair, Rules of Professional Conduct Committee

Enc.
cc: Tom Nelson, Esq.
James P. Cullen, Esq.
Susan Humiston, Esq.

MEMORANDUM

TO: MSBA MRPC Committee

FROM: William Wernz

DATE: December 9, 2019

RE: Final Amended LPRB Op. No. 21 (Disclosing Material Error)

Current Lawyers Board Op. 21 (2009) addresses a lawyer's duty to consult with a client when the lawyer knows he or she has committed malpractice. In 2018, the ABA issued Formal Opinion 481, addressing a lawyer's duties when the lawyer believes he or she has committed a "material error."

At its April 26, 2019 meeting, the Lawyers Board first considered whether to amend Board Op. No. 21, to "conform" to Op. 481. The April Board minutes report that the Board Chair inquired about the mental state of the lawyer that amended Op. 21 should identify. The minutes also reported that, "Ms. Humiston stated that she believes that language addressing this issue could be included from ABA Formal Opinion 481 into Lawyers Board Opinion No. 21 to give guidance." Including this language would be consistent with LPRB's intent to "conform" Op. 21 to Op. 481.

In July 2019, the Board posted a draft proposed amended LPRB Op. No. 21. However, the draft did not in fact include Op. 481's mental state requirement or have any mental state requirement. The Board sought comments from stakeholders. In September 2019, the MSBA MRPC Committee submitted and discussed comments with representatives of the Board and the Office of Lawyers Professional Responsibility. The comments mainly concerned the Board's deletion of the mental state requirements of ABA Op. 481 ("believes") and current Op. 21 ("knows").

On November 19, 2019, the LPRB Opinions Committee notified the MSBA MRPC Committee Chair that it recommended further changes to the proposed opinion. The main change was to adopt a mental state test of "knows or should know" the lawyer has committed a material error. The LPRB now seeks the MSBA Committee's comments on the Opinions Committee draft. The LPRB expects to vote on a proposed amended Opinion 21 at its January 31, 2020, meeting. The Chair asked me to draft comments on the proposal for the MSBA MRPC Committee to consider at its December 17 meeting.

I have not commented on the basic proposal to expand the universe of attorney conduct that triggers a duty to consult, from "malpractice" to "material error." The Board has decided on that expansion and several bar opinions support this amendment. Assuming the Board will amend Op. 21 to effect that expansion, this memo proposes comments on the following subjects.

1. Why the mental state test, "knows or should know" the lawyer has committed a material error is unprecedented, unwise, and unwieldy.

2. Why the definition of "material error" as, "would reasonably cause a client to consider terminating the lawyer even in the absence of apparent harm or prejudice" is unprecedented (except in ABA Op. 481), unwise, and unwieldy.

3. How, if the Board adopts the above test and definition, there will be problems enforcing Rules of Professional Conduct 1.4 and 1.7, as interpreted by amended Op. 21.

4. How, if the Board adopts the "knows or should know" test, Op. 21 will require several drafting corrections.

I. Lawyer's Mental State: "Knows," or "Believes," or "Knows or Should Know"

A. Background. Mental state requirements are often crucial for the MRPC. For example, the Court recently reversed an admonition because OLPR failed to prove the knowledge requirement for violation of Rule 3.4(c) ("*knowingly* disobey an obligation under the rules of a tribunal"). *In* re *Panel File No. 42735*, 924 N.W.2d 266 (Minn. 2019). Similarly, OLPR and respondents have frequently argued whether the Rule 8.4(c) prohibition on "misrepresentation" includes any scienter element.

Current Op. 21 finds certain duties when a lawyer "*knows* that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim." "Knows" means "actual knowledge." Rule 1.0(g). ABA Op. 481 opines that duties arise when a lawyer "*believes*" he or she committed "a material error." "Belief" means "actually supposed the fact in question to be true." Rule 1.0(a).

B. "Knows or Should Know:" A Novel Test for the "Plain Meaning" of the Rules. The current draft of proposed Op. 21 states that, "A lawyer who *knows or should know* that he or she has committed a material error involving a current client has one or more duties. . .." The current draft states that the Board intends that Op. 21 "conform" to ABA Op. 481. Proposed Op. 21 does not explain how changing the mental state requirement from "believes" to "knows or should know" serves the Board's intent to conform.

ABA Op. 481 cites several state bar opinions that have mental state requirements for reporting malpractice or material error. Calif. Eth. Op. 2009-178 applies, "Where the lawyer *believes* that he or she has committed legal malpractice." N.C. State Bar Formal Op. 4 (2015) relates to "the actions that the lawyer takes following the *realization* that she has committed an error. . .." N.J. Sup. Ct. Adv. Comm. on Prof'l Ethics Op. 684 requires disclosure, "when the attorney *ascertains* malpractice may have occurred, . . ." Texas Op. 593 finds that duties arise upon the lawyer "*recognizing*" an error. Two state bar opinions cited in Op. 481 do not have an express mental state requirement. Colo. Bar Ass'n Ethics Comm. Formal Op. 113; NYSBA Comm. On Prof'l Ethics Eth. Op. 734.

"Knows or should know" does not appear in Op. 481, nor in any of the state bar opinions cited in Op. 481, nor in current Op. 21.

The Minnesota Supreme Court has held, "Pursuant to Rule 4(c), RLPR, Board opinions that interpret preexisting rules without either effectively creating new rules of professional conduct or exceeding the scope or plain meaning of the rules are entitled to careful consideration." *In re Panel File 99-42*, 621 N.W.2d 240, 241 (Minn. 2001).

Can it be said that the "plain meaning" of the MRPC which proposed Op. 21 purports to interpret includes a "knows or should know" test, when every other ethics opinion that interprets the same rules uses some other test? I do not think so. Is the "knows or should know" test so clearly the best alternative that Minnesota should become the first state to adopt it? No explanation of the merits of this test has been offered.

C. Conflicts Analysis and Other Problems With the "Should Know" Test

Discussion of this issue can be prefaced by noting and correcting a minor drafting problem with the "should know" test. "Should know" is undefined. However, adding "reasonably" corrects the problem. "Reasonably should know" denotes that, "a lawyer of reasonable prudence and competence would ascertain the matter in question." Rule 1.0(k).

There are two problems with the "[reasonably] should know" test that are not minor and are not correctible.

The first problem is that "knows or should know" would appear to cover virtually all situations in which a material error has been made. When should a lawyer reasonably know of the lawyer's material error? Would a prudent, competent lawyer likely recognize substantially all material errors? If so, the "knows or [reasonably] should know" test would provide no real mental state test. All or substantially all "material error" occurrences would trigger client consultation duties, because all such errors reasonably should be known.

The second problem is that the "[reasonably] should know" test does not coordinate with the Rule 1.7(a)(2) (materially limited representation conflicts) application of proposed Op. 21. Current Op. 21, proposed Op. 21, and ABA 481 all discuss a conflict of interest that may arise under Rule 1.7(a)(2). The conflict is between the lawyer's duties of disclosure and consultation to a client and the lawyer's concern about consequences to the lawyer from the lawyer's material error. In a common paradigm, a lawyer who knows of an error may be tempted to keep the error undisclosed, and recommend a settlement that would otherwise be insufficient, because settlement will make the client's discovery of the error unlikely. This conflict arises, however, only where the lawyer is aware of the error. Under the "should know" standard of proposed Op. 21, the lawyer is not aware of the error.

Rule 1.7(a)(2) conflicts almost always arise from a pull toward the interests of the lawyer, or another client of the lawyer, and the push to act solely in the client's interests. The lawyer who is unaware of the pulling force does not have a conflict.

Analysis of the severity of Rule 1.7(a)(2) conflicts also requires awareness of the facts that produce the conflict. As proposed Op. 21 notes, Rule 1.7 provides, "the lawyer *must reasonably believe* he or she may continue to provide competent and diligent representation . . .." Such a required belief fits the mental states of current Op. 21 ("knows") and of ABA 481 ("believes"), but does not fit the "should know" criterion of proposed Op. 21. The lawyer who merely "should know" of an error will believe that "competent and diligent representation" is unimpeded, and will not analyze any conflict.

II. Another Novel Test: "Would Reasonably Cause a Client to Consider Terminating the Lawyer"

Most of the state bar opinions cited by ABA Op. 481, including current Minnesota Op. 21, as well as the Restatement, require a lawyer to consult with a client on the lawyer's recognition of "malpractice." Other opinions cited by Op. 481 require consultation, more broadly, when the lawyer has committed a "material error." These opinions define "error" or "material error" to include "prejudice" or "harm." The "material error" test of Op. 481 is novel insofar as it finds duties where there is no harm or prejudice.

ABA Op. 481 and proposed Op. 21 share a definition: "An error is considered material if a disinterested lawyer would find that it is (a) reasonably likely to harm or prejudice a client; or (b) would reasonably cause a client to consider terminating the lawyer even in the absence of apparent harm or prejudice." However, the "consider terminating the lawyer" test is not rooted in any of the opinions cited by Op. 481.

Op. 481 extensively cites Colo. Bar Op. 113 (2005) and North Carolina Op. 2015-4. The Colorado opinion identifies an error that gives rise to consultation duties as one where,

"a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim, ..." The North Carolina opinion expressly borrows from the Colorado opinion. Op. 481 borrows the "disinterested lawyer" perspective, but adds a fire-the-lawyer alternative to the test of likely prejudice to the client's right or claim.

Is there any pedigree for the test "reasonably cause a client to consider terminating the lawyer?" Op. 481 does not give one. Op. 481 explains its expansion beyond precedent by reference to Rule 1.4 (reasonable communication). Op. 481 takes the position that Rule 1.4 requires communication of anything that "may impair a client's representation," or "would cause a reasonable client to lose confidence in the lawyer's ability," regardless of harm or prejudice.

There are compendious sources for reviewing interpretations by various authorities of Rule 1.4, such as the *ABA Annotated Model Rules of Professional Conduct,* the *Lawyers Manual on Professional Conduct, The Law of Lawyering*, and the Restatement of the Law Governing Lawyers. I have not reviewed these sources, but Op. 481 does not cite any precedent for its interpretation of Rule 1.4.

Again, the question arises, "Can it be said that proposed Op. 21 expresses only the "plain meaning" of the rules when it would be the first state bar opinion to take a position?"

One other touchstone for interpreting Rule 1.4 is the general standard that, "The Rules of Professional Conduct are rules of reason." "Reasonable" is that which "denotes the conduct of a reasonably prudent and competent lawyer." Rule 1.0(i). Do prudent and competent lawyers consult with clients about their harmless errors if they think disclosure would cause the client to lose confidence? Colorado Op. 113 states, "[A]n overbroad interpretation of the ethical duty to disclose may needlessly undermine the trust and confidence essential to a healthy attorney-client relationship." *Id.* at 2. I would add that, in my experience, I have not witnessed good lawyers disclosing harmless errors to clients.

III. Enforcement Problems

As noted above, the Court has held that Board opinions are "entitled to careful consideration," but only insofar as they, "interpret preexisting rules without either effectively creating new rules of professional conduct or exceeding the scope or plain meaning of the rules . . .." *In re Panel File 99-42*, 621 N.W.2d 240, 241 (Minn. 2001). When the Board adopts standards like "knows or should know," the Board can interpret Rule 1.4 and 1.7, but it cannot by its own authority effectively create a new rule. Board opinions can be persuasive authority, as convincing restatements of the rules' plain meaning.

A hypothetical will illustrate enforcement problems for amended Op. 21. Suppose that OLPR issues an admonition to Respondent Roe. The admonition alleges, "In representing Cline, Roe committed a material error, by the following conduct _____. Roe did not communicate regarding the material error to Cline. Roe did not actually know or believe she had committed a material error. Roe's error did not cause harm or prejudice. However, Roe should have known that her conduct would have caused a reasonable client to consider terminating Roe's representation. Roe's conduct violated Rules 1.4 and 1.7(a)(2), as interpreted by amended Opinion 21." Suppose the admonition is appealed.

As to the alleged Rule 1.7(a)(2) violation, in what way was Roe's representation "materially limited?" How does an unknown error limit the representation?

As to the alleged Rule 1.4 violation, is there discipline precedent for not communicating what the lawyer did not know but should have known? The Lawyers Board Panel Manual cites "consistency" as a goal six times on its first page alone.

How will OLPR prove by clear and convincing evidence that a harmless, unknown error was one that a lawyer was nonetheless required to disclose? Opinion 21 itself cannot create *requirements.* If Opinion 21 is intended to persuade adjudicators of the clarity of its interpretation of Rules, what will a Board Panel or the Court make of the facts that (a) the fire-the-lawyer standard is not found in any of the relevant state bar opinions and (b) the should-have-known standard is not found either in other bar opinions or in the ABA opinion, to which Op. 21 claims, misleadingly, to conform?

OLPR will have to provide expert testimony that there was an error, that the error was material, and that knowledge of the error would have caused a reasonable client to consider firing the lawyer. Are the burdens and risks of litigating the admonition appeal commensurate with protecting the public from non-disclosure of harmless, unknown errors?

IV. Board Jurisprudence, State Bar Opinions, the Restatement, and "Plain Meaning"

In 2016, the Board adopted Op. No. 24, dealing with confidentiality and client critiques, especially on social media. OLPR published an article explaining Op. 24. Patrick R. Burns, *Client Confidentiality and Criticisms,* Bench & B. of Minn., Dec. 2016. The article cited the Court's "plain meaning" limit on Board opinions.

The Burns article cited and summarized at length six bar opinions and the pertinent section of the Restatement. An implied principle of the article was that the Board believes its opinions satisfy the "plain meaning" test when they join the consensus of other bar opinions and the Restatement.

In 2019, OLPR again published an article, offering explanation why the Board seeks to "conform" to Op. 481. Susan Humiston, *Disclosing Errors,* Bench & Bar of Minn., July 2019. The article did not mention any state bar opinion or the Restatement. Moreover, the article did not disclose that (1) Op. 21 rejects the "believes" test of Op. 481; or (2) no state bar opinion uses the could-would-consider-firing-the-lawyer test. The "knows or should know" test was not considered by the Board until after the article was published. In short, the article does not disclose, let alone explain, why Minnesota should be the first state to take the positions of proposed Op. 21. The article also does not explain how being the first state satisfies the Court's requirement that LPRB opinions state only the "plain meaning" of rules.

Comparing the 2016 and 2019 OLPR articles leads to a fundamental question. What is the Board's jurisprudence in determining "plain meaning" and in issuing opinions? In 2015-16, OLPR and the Board anchored Op. 24 in what it saw as a consensus among state and local bar opinions. In 2019, OLPR and the Board depart, without explanation or even recognition, from all state bar opinions.

V. Drafting Issues

A. "Conform Opinion 21 With ABA Formal Opinion 481"

The Comment to proposed Am'd Op. 21 states, "The Board is amending Opinion No. 21 to apprise the Bar of the Board's position on the matter and *to conform Opinion 21 with ABA Formal Opinion 481* (April 7, 2018)." (Emphasis added.)

The statement is misleading. By substituting "knows or should know" for "believes," proposed Op. 21 does not "conform" to F.O. 481. The MRPC provide different definitions for "believes" and "reasonably should know." Rule 1.0(a), (k).

As noted above, these different mental states ramify throughout the opinions. Under proposed Op. 21, a lawyer would have duties regarding disclosure of conflicts, determining suitability of waivers, etc., all without any awareness of the conflicts – merely because the lawyer "should know" of the conflict.

B. "Reasonably Should Know" and "Should Know"

If the Board does not conform Op. 21 to Op. 481 by substituting "believes" for "knows or should know," at least the Board should add "reasonably" to "should know." In opining regarding the MRPC, using defined terms is preferable to using terms that only approximate defined terms.

C. "Determines" and "Should Know"

The Comment to proposed Op. 21 begins, "The issue of when and what to say to a client when a lawyer *determines* a material error has been committed is difficult and may create inherent conflicts." To "determine" is to "decide." To "decide," one must first "know." Use of "determines" is consistent with the mental state requirements of current Op. 21 ("knows") and of F.O. 481 ("believes") but it is inconsistent with proposed Op. 21 ("knows or should know'). If a lawyer should know of an error, but does not in fact know, the lawyer cannot *determine* "a material error has been committed."

VI. Conclusion and Recommendations

It appears that the Lawyers Board has not been informed of the fact that it would be the first state or local bar in the United States to issue an opinion that requires lawyers, on a knows or should know basis, to disclose their own harmless errors, defined by a fire-the-lawyer standard, The Board does know actually know that the "knows or should know" standard contrasts with the "believes" standard in ABA Op. 481, but the Opinion Committee proposes to continue to state the purpose of amended Op. 21 is to "conform" to Op. 481. An article purporting to explain amended Op. 21 offers no explanation of these and other problems.

If the Board sees a need to expand the basis for disclosure beyond malpractice, that can be done by more modest and well-founded means. Colorado Op. 113 requires disclosure of errors that result in "prejudice to the client's right or claim." Op. 113 offers numerous examples, e.g. loss of right to a jury trial through a failure to make a timely request, even though the malpractice elements of causation and damages cannot readily be proved. North Carolina Op. 2015-4 expressly followed Op. 113. From an enforcement perspective, harm or prejudice is much more readily proved than whether a reasonable client would consider firing a lawyer.

I recommend that the MSBA MRPC Committee recommend to the Lawyers Board that it:

1. Consider adopting the position of ABA Op. 481 that a lawyer who "believes" she has committed a material error has certain duties.

2. Consider adopting the position of Colorado Op. 113 and other bar opinions, that lawyers are required to disclose errors that result in harm or prejudice to the client's right or claim.

3. If the Board adopts the most recently proposed amended Op. 21, I recommend that it:

    a. Correct the drafting problems identified above.

b. Explain why Minnesota is departing from other states' bar opinions and ABA Op. 481 in material respects, and delete the claim to "conform" to Op. 481.

c. Explain how Op. 21 and its novel positions express the "plain meaning" of the Rules, including how a lawyer who does not know she has committed a material error has a conflict under Rule 1.7(a)(2).

Disclosing errors

Everyone makes mistakes. Law is a challenging field, and the stakes are often high for our clients. It has long been the position of the Lawyers Professional Responsibility Board that lawyers have an ethical duty to their clients to disclose errors that may provide a reasonable basis for a non-frivolous malpractice claim.[1] The American Bar Association has provided additional guidance on this topic. ABA Formal Opinion 481, issued last year, provides:

> [Rule] 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the [rules] to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation.[2]

Basis of this obligation

This obligation arises from our fundamental duty to communicate with our clients. Rule 1.4, Minnesota Rules of Professional Conduct, mirrors the ABA Model Rule, and sets forth our communication obligations. As a refresher, lawyers must "promptly inform" clients of any "decision or circumstance" where the client's informed consent is required.[3] We must "reasonably consult with the client about the means by which the client's objectives are to be accomplished."[4] We must "keep the client reasonably informed about the status of" her matter, and must "promptly comply with reasonable requests for information."[5] We must also consult with the client about any limitation imposed by the ethics rules on our ability to assist the client, and, importantly, we must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[6] Given the breadth of our communication obligation with our clients—particularly the requirement that we must explain matters such that clients can make informed decisions about their case—it is unsurprising that we have an ethical obligation to report to our client a material error.[7]

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 is material?

When the Lawyers Board reviewed this subject in 2009, the board focused on "a non-frivolous malpractice claim" as the event triggering the disclosure obligation. In doing so, the board focused in part on Rule 1.7, concurrent conflicts of interest. Certainly it is true that the possibility of a malpractice claim presents a potential concurrent conflict of interest if the lawyer is concerned about avoiding liability such that it may materially limit the representation of that client.[8] The recent ABA opinion posits, however, that "it is unreasonable to conclude that a lawyer must inform a current client of an error only if that error may support a colorable legal malpractice claim, because a lawyer's error may impair a client's representation even if the client will never be able to prove all of the elements of malpractice."[9] I agree, and the Lawyers Board is proposing to amend Opinion No. 21 to bring it into line with ABA Opinion 481.

As the opinion notes, errors occur on a continuum. For purposes of your disclosure obligation, if the error is material, you have a duty to inform a current client. As noted above, an error is material if a disinterested lawyer would conclude that it is reasonably likely to harm or prejudice the client or of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. Errors on the ends of the continuum are generally easy to discern (missing the statute of limitations, for example—disclosure obligation; missing a non-substantive deadline that causes no issues—no disclosure obligation), but between the two ends, each matter will need to be reviewed on a case-by-case basis from an objective perspective. Remember, too, that your disclosure must be "prompt" under the circumstances, which again will be a fact-specific inquiry.

What about former clients?

Because this duty springs from Rule 1.4, which is limited to current clients, the ABA Opinion limits its application to current clients. Accordingly, if you discover a material error after the representation has concluded, you do not have an ethical obligation to communicate that material error to your former client. There may be reasons, for risk management purposes or otherwise, that might counsel toward disclosure to a former client (such as the ability to mitigate harm), but that would be a matter of choice, not ethics, for the lawyer. Practitioners may also wish to review ABA Opinion 481 for its discussion of when a current client becomes a former client for additional guidance.

Obligation to self-report to the Lawyers Board?

One of the most persistent myths I have encountered as Director is the wide-spread belief that we have an ethical duty to report our own misconduct to the Lawyers Board. There is no duty to self-report ethical violations, whether it is your commission of a material error while handing a matter or otherwise. You do have an ethical duty to report the misconduct of another lawyer if you know that a lawyer has

committed a rule violation that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer.[10] While there may be reasons you may wish to self-report an ethical violation, you do not have an ethical duty to do so.

Conclusion

The Lawyers Board has issued an amended draft of Opinion No. 21 on its website to bring it into conformity with ABA Opinion 481.[11] You may comment on the proposed amendment through August 16, 2019, by sending an email to me at *susan.humiston@courts.state.mn.us*, or writing to the board c/o Office of Lawyers Professional Responsibility, 1500 Landmark Tower, 345 St. Peter St., St. Paul, MN 55102. The board will vote on the proposed amended Opinion No. 21 at its quarterly meeting on September 27, 2019. If you have a question as to whether you have an ethical duty to disclose an error in a particular circumstance, you can call the ethics hotline at 651-296-3952 or 1-800-657-3601. ▲

Notes

[1] Lawyers Board Opinion No. 21 (2009).
[2] ABA Formal Opinion 481 (4/17/2018).
[3] Rule 1.4(a)(1), Minnesota Rules of Professional Conduct (MRPC).
[4] Rule 1.4(a)(2), MRPC.
[5] Rule 1.4(a)(3), MRPC; Rule 1.4(a)(4).
[6] Rule 1.4(a)(5), MRPC; Rule 1.4(b), MRPC.
[7] "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Rule 1.4, Comment [5].
[8] Rule 1.7(a)(2), MRPC, defining a "concurrent conflict" to include "a significant risk that the representation of one or more clients will be materially limited... by a personal interest of the lawyer."
[9] ABA Formal Opinion 481 at 4.
[10] Rule 8.3(a), MRPC.
[11] *www.lprb.mncourts.gov/rules/pages/pendingrules.*

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 481 **April 17, 2018**

A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error

Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the Model Rules to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation.

Introduction

Even the best lawyers may err in the course of clients' representations. If a lawyer errs and the error is material, the lawyer must inform a current client of the error.[1] Recognizing that errors

[1] A lawyer's duty to inform a current client of a material error has been variously explained or grounded. For malpractice and breach of fiduciary decisions, *see, e.g.*, Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 629 (8th Cir. 2009) (predicting Minnesota law and concluding that "the lawyer must know that there is a non-frivolous malpractice claim against him such that there is a substantial risk that [his] representation of the client would be materially and adversely affected by his own interest in avoiding malpractice liability" (internal quotation marks omitted)); Beal Bank, SSB v. Arter & Hadden, LLP, 167 P.3d 666, 673 (Cal. 2007) (stating that "attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice"); RFF Family P'ship, LP v. Burns & Levinson, LP, 991 N.E.2d 1066, 1076 (Mass. 2013) (discussing the fiduciary exception to the attorney-client privilege and stating that "a client is entitled to full and fair disclosure of facts that are relevant to the representation, including any bad news"); *In re* Tallon, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.").

For disciplinary decisions, *see, e.g.*, Fla. Bar v. Morse, 587 So. 2d 1120, 1120–21 (Fla. 1991) (suspending a lawyer who conspired with his partner to conceal the partner's malpractice from the client); *In re* Hoffman, 700 N.E.2d 1138, 1139 (Ind. 1998) (applying Rule 1.4(b)). *See also* Ill. State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., P.C., 980 N.E.2d 1120, 1129 (Ill. App. Ct. 2012) (finding that a voluntary payments provision in a professional liability insurance policy was "against public policy, since it may operate to limit an attorney's disclosure [of his potential malpractice] to his clients").

For ethics opinions, *see, e.g.*, Cal. State Bar Comm. on Prof'l Responsibility & Conduct Op. 2009-178, 2009 WL 3270875, at *4 (2009) [hereinafter Cal. Eth. Op. 2009-178] ("A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation. . . . Where the lawyer believes that he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'" (citation omitted)); Colo. Bar Ass'n, Ethics Comm., Formal Op. 113, at 3 (2005) [hereinafter Colo. Op. 113] ("Whether a particular error gives rise to an ethical duty to disclose [under Rule 1.4] depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error."); Minn. Lawyers Prof'l Responsibility Bd. Op. 21, 2009 WL 8396588, at *1 (2009) (imposing a duty to disclose under Rule 1.4 where "the lawyer knows the lawyer's conduct may reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client's

occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

If a material error relates to a former client's representation and the lawyer does not discover the error until after the representation has been terminated, the lawyer has no obligation under the Model Rules to inform the former client of the error. To illustrate, assume that a lawyer prepared a contract for a client in 2015. The matter is concluded, the representation has ended, and the person for whom the contract was prepared is not a client of the lawyer or law firm in any other matter. In 2018, while using that agreement as a template to prepare an agreement for a different client, the lawyer discovers a material error in the agreement. On those facts, the Model Rules do not require the lawyer to inform the former client of the error. Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules.

The Duty to Inform a Current Client of a Material Error

A lawyer's responsibility to communicate with a client is governed by Model Rule 1.4.[2] Several parts of Model Rule 1.4(a) potentially apply where a lawyer may have erred in the course of a current client's representation. For example, Model Rule 1.4(a)(1) requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent may be required. Model Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Model Rule 1.4(a)(3) obligates a lawyer to "keep a client reasonably informed about the status of a matter." Model Rule 1.4(a)(4), which obliges a lawyer to promptly comply with reasonable requests for information, may be implicated if the client asks about the lawyer's conduct or performance of the representation. In addition, Model Rule 1.4(b) requires a lawyer to "explain a

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interests"); 2015 N.C. State Bar Formal Op. 4, 2015 WL 5927498, at *2 (2015) [hereinafter 2015 N.C. Eth. Op. 4] (applying Rule 1.4 to "material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim"; N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 684, 1998 WL 35985928, at *1 (1998) [hereinafter N.J. Eth. Op. 684] (discussing Rules 1.4 and 1.7(b) and requiring disclosure "when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Eth. Op. 734, 2000 WL 33347720, at *3 (2000) [hereinafter N.Y. Eth. Op. 734] (discussing the prior Code of Professional Responsibility and concluding that the inquirer had a duty to tell the client that it made "a significant error or omission that may give rise to a possible malpractice claim"); Sup. Ct. of Prof'l Ethics Comm. Op. 593, 2010 WL 1026287, at *1 (2010) [Tex. Eth. Op. 593] (opining that the lawyer must also terminate the representation and applying Texas Rules 1.15(d), 2.01, and 8.04(a)(3)). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (requiring disclosure where the conduct "gives the client a substantial malpractice claim against the lawyer").

[2] MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018) ("Communication") [hereinafter MODEL RULES].

matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." More broadly, the "guiding principle" undergirding Model Rule 1.4 is that "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."[3] A lawyer may not withhold information from a client to serve the lawyer's own interests or convenience.[4]

Determining whether and when a lawyer must inform a client of an error can sometimes be difficult because errors exist along a continuum. An error may be sufficiently serious that it creates a conflict of interest between the lawyer and the client. Model Rule 1.7(a)(2) provides that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." Where a lawyer's error creates a Rule 1.7(a)(2) conflict, the client needs to know this fact to make informed decisions regarding the representation, including whether to discharge the lawyer or to consent to the conflict of interest. At the other extreme, an error may be minor or easily correctable with no risk of harm or prejudice to the client.

Several state bars have addressed lawyers' duty to disclose errors to clients.[5] For example, in discussing the spectrum of errors that may arise in clients' representations, the North Carolina State Bar observed that "material errors that prejudice the client's rights or claims are at one end. These include errors that effectively undermine the achievement of the client's primary objective for the representation, such as failing to file the complaint before the statute of limitations runs."[6] At the other end of the spectrum are "nonsubstantive typographical errors" or "missing a deadline that causes nothing more than delay."[7] "Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client's interests."[8] With respect to the middle ground:

> Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client's objectives for the representation, or material disadvantage to the client's legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing, or direction of the representation, the lawyer may not withhold information about the error.[9]

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[3] *Id.* cmt. 5.
[4] *Id.* cmt. 7.
[5] *See supra* note 1 (listing authorities).
[6] 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *2.
[7] *Id.*
[8] *Id.*
[9] *Id.*

Another example is contained in the Colorado Bar Association's Ethics Committee in Formal Opinion 113, which discusses the spectrum of errors that may implicate a lawyers' duty of disclosure. In doing so, it identified errors ranging from those plainly requiring disclosure (a missed statute of limitations or a failure to file a timely appeal) to those "that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice."[10] Errors by lawyers between these two extremes must be analyzed individually. For example, disclosure is not required where the law on an issue is unsettled and a lawyer makes a tactical decision among "equally viable alternatives."[11] On the other hand, "potential errors that may give rise to an ethical duty to disclose include the failure to request a jury in a pleading (or pay the jury fee), the failure to include an acceleration provision in a promissory note, and the failure to give timely notice under a contract or statute."[12] Ultimately, the Colorado Bar concluded that whether a particular error gives rise to an ethical obligation to disclose depends on whether the error is "material," which further "depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim."[13]

These opinions provide helpful guidance to lawyers, but they do not—just as we do not—purport to precisely define the scope of a lawyer's disclosure obligations. Still, the Committee believes that lawyers deserve more specific guidance in evaluating their duty to disclose errors to current clients than has previously been available.

In attempting to define the boundaries of this obligation under Model Rule 1.4, it is unreasonable to conclude that a lawyer must inform a current client of an error only if that error may support a colorable legal malpractice claim, because a lawyer's error may impair a client's representation even if the client will never be able to prove all of the elements of malpractice. At the same time, a lawyer should not necessarily be able to avoid disclosure of an error absent apparent harm to the client because the lawyer's error may be of such a nature that it would cause a reasonable client to lose confidence in the lawyer's ability to perform the representation competently, diligently, or loyally despite the absence of clear harm. Finally, client protection and the purposes of legal representation dictate that the standard for imposing an obligation to disclose must be objective.

With these considerations in mind, the Committee concludes that a lawyer must inform a current client of a material error committed by the lawyer in the representation. An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

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[10] Colo. Op. 113, *supra* note 1, at 3.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 1, 3.

A lawyer must notify a current client of a material error promptly under the circumstances.[14] Whether notification is prompt will be a case- and fact-specific inquiry. Greater urgency is required where the client could be harmed by any delay in notification. The lawyer may consult with his or her law firm's general counsel, another lawyer, or the lawyer's professional liability insurer before informing the client of the material error.[15] Such consultation should also be prompt. When it is reasonable to do so, the lawyer may attempt to correct the error before informing the client. Whether it is reasonable for the lawyer to attempt to correct the error before informing the client will depend on the facts and should take into account the time needed to correct the error and the lawyer's obligation to keep the client reasonably informed about the status of the matter.

When a Current Client Becomes a Former Client

As indicated earlier, whether a lawyer must reveal a material error depends on whether the affected person or entity is a current or former client. Substantive law, rather than rules of professional conduct, controls whether an attorney-client relationship exists, or once established, whether it is ongoing or has been concluded.[16] Generally speaking, a current client becomes a former client (a) at the time specified by the lawyer for the conclusion of the representation, and acknowledged by the client, such as where the lawyer's engagement letter states that the representation will conclude upon the lawyer sending a final invoice, or the lawyer sends a disengagement letter upon the completion of the matter (and thereafter acts consistently with the letter);[17] (b) when the lawyer withdraws from the representation pursuant to Model Rule of Professional Conduct 1.16; (c) when the client terminates the representation;[18] or (d) when overt acts inconsistent with the continuation of the attorney-client relationship indicate that the

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[14] *See* N.J. Eth. Op. 684, *supra* note 1, 1998 WL 35985928, at *1 ("Clearly, RPC 1.4 requires prompt disclosure in the interest of allowing the client to make informed decisions. Disclosure should therefore occur when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted."); 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *4 ("The error should be disclosed to the client as soon as possible after the lawyer determines that disclosure of the error to the client is required."); Tex. Eth. Op. 593, *supra* note 1, 2010 WL 1026287, at *1 (requiring disclosure "as promptly as reasonably possible").

[15] *See* MODEL RULES R. 1.6(b)(4) (2018) (permitting a lawyer to reveal information related to a client's representation "to secure legal advice about the lawyer's compliance with these Rules").

[16] United States v. Williams, 720 F.3d 674, 686 (8th Cir. 2013); Rozmus v. West, 13 Vet. App. 386, 387 (U.S. App. Vet. Cl. 2000); *see also* MODEL RULES Scope cmt. 17 (2018) (explaining that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists").

[17] *See* Artromick Int'l, Inc. v. Drustar Inc., 134 F.R.D. 226, 229 (S.D. Ohio 1991) (observing that "the simplest way for either the attorney or client to end the relationship is by expressly saying so"); *see also, e.g.*, Rusk v. Harstad, 393 P.3d 341, 344 (Utah Ct. App. 2017) (concluding that a would-be client could not have reasonably believed that the law firm represented him where the lawyer had clearly stated in multiple e-mails that the law firm would not represent him).

[18] A client may discharge a lawyer at any time for any reason, or for no reason. White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc., 647 F.3d 684, 689 (7th Cir. 2011); Nabi v. Sells, 892 N.Y.S.2d 41, 43 (App. Div. 2009); MODEL RULES R. 1.16 cmt. 4; *see also* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 77 (11th ed. 2018) ("Clients, it is said, may fire their lawyers for any reason or no reason.") (citations omitted).

relationship has ended.[19] If a lawyer represents a client in more than one matter, the client is a current client if any of those matters is active or open; in other words, the termination of representation in one or more matters does not transform a client into a former client if the lawyer still represents the client in other matters.

Absent express statements or overt acts by either party, an attorney-client relationship also may be terminated when it would be objectively unreasonable to continue to bind the parties to each other.[20] In such cases, the parties' reasonable expectations often hinge on the scope of the lawyer's representation.[21] In that regard, the court in *National Medical Care, Inc. v. Home Medical of America, Inc.*,[22] suggested that the scope of a lawyer's representation loosely falls into one of three categories: (1) the lawyer is retained as general counsel to handle all of the client's legal matters; (2) the lawyer is retained for all matters in a specific practice area; or (3) the lawyer is retained to represent the client in a discrete matter.[23]

For all three categories identified by the *National Medical Care* court, unless the client or lawyer terminates the representation, the attorney-client relationship continues as long as the lawyer is responsible for a pending matter.[24] With respect to categories one and two above, an attorney-client relationship continues even when the lawyer has no pending matter for the client because the parties reasonably expect that the lawyer will handle all matters for the client in the future as they arise.[25] In the third category, where a lawyer agrees to undertake a specific matter, the attorney-client relationship ends once the matter is concluded.[26]

Although not identified by the *National Medical Care* court, another type of client is what might be called an episodic client, meaning a client who engages the lawyer whenever the client requires legal representation, but whose legal needs are not constant or continuous. In many such

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[19] *See, e.g.*, Artromick Int'l, Inc., 134 F.R.D. at 230–31 (determining that a man was a former client because he refused to pay the lawyer's bill and then retained other lawyers to replace the first lawyer); Waterbury Garment Corp. v. Strata Prods., 554 F. Supp. 63, 66 (S.D.N.Y. 1982) (concluding that a person was a former client because the law firm represented him only in discrete transactions that had concluded and the person had subsequently retained different counsel).

[20] Artromick Int'l, Inc., 134 F.R.D. at 229.

[21] *Id.* at 229–30.

[22] No. 00-1225, 2002 WL 31068413 (Mass. Super. Ct. Sept. 12, 2002).

[23] *Id.* at *4.

[24] *Id.*; *see also* MODEL RULES R. 1.3 cmt. 4 (2018) (stating that unless the relationship is terminated under Model Rule 1.16, the lawyer "should carry through to conclusion all matters undertaken for a client").

[25] *See* Berry v. McFarland, 278 P.3d 407, 411 (Idaho 2012) (explaining that "[i]f the attorney agrees to handle any matters the client may have, the relationship continues until the attorney or client terminates the relationship"); *see also* MODEL RULES R. 1.3 cmt. 4 (2018) (advising that "[i]f a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal").

[26] Simpson v. James, 903 F.2d 372, 376 (5th Cir. 1990); Berry, 278 P.3d at 411; *see also* Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc., 687 F. Supp. 2d 381, 389–90 (S.D.N.Y. 2010) (noting that an attorney-client relationship is ordinarily terminated by the accomplishment of the purpose for which it was formed); Thayer v. Fuller & Henry Ltd., 503 F. Supp. 2d 887, 892 (N.D. Ohio 2007) (observing that an attorney-client relationship may terminate when the underlying action has concluded or when the attorney has exhausted all remedies and declined to provide additional legal services); MODEL RULES R. 1.16 cmt. 1 ("Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded.").

instances, the client reasonably expects that the professional relationship will span any intervals and that the lawyer will be available when the client next needs representation.[27] If so, the client should be considered a current client. In other instances, it is possible that the attorney-client relationship ended when the most recent matter concluded.[28] Whether an episodic client is a current or former client will thus depend on the facts of the case.

The Former Client Analysis Under the Model Rules

As explained above, a lawyer must inform a current client of a material error under Model Rule 1.4. Rule 1.4 imposes no similar duty to former clients.

Four of the five subparts in Model Rule 1.4(a) expressly refer to "the client" and the one that does not—Model Rule 1.4(a), governing lawyers' duty to respond to reasonable requests for information—is aimed at responding to requests from a current client. Model Rule 1.4(b) refers to "the client" when describing a lawyer's obligations. Nowhere does Model Rule 1.4 impose on lawyers a duty to communicate with former clients. The comments to Model Rule 1.4 are likewise focused on current clients and are silent with respect to communications with former clients. There is nothing in the legislative history of Model Rule 1.4 to suggest that the drafters meant the duties expressed there to apply to former clients.[29] Had the drafters of the Model Rules intended Rule 1.4 to apply to former clients, they presumably would have referred to former clients in the language of the rule or in the comments to the rule. They did neither despite knowing how to distinguish duties owed to current clients from duties owed to former clients when appropriate, as reflected in the Model Rules regulating conflicts of interest.[30]

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[27] *See, e.g.*, Parallel Iron, LLC v. Adobe Sys. Inc., C.A. No. 12-874-RGA, 2013 WL 789207, at *2–3 (D. Del. Mar. 4, 2013) (concluding that Adobe was a current client in July 2012 when the law firm was doing no work for it; the firm had served as patent counsel to Adobe intermittently between 2006 and February 2012, and had not made clear to Adobe that its representation was terminated); Jones v. Rabanco, Ltd., No. C03-3195P, 2006 WL 2237708, at *3 (W.D. Wash. Aug. 3, 2006) (reasoning that the law firm's inclusion as a contact under a contract, the law firm's work for the client after the contract was finalized, and the fact that the client matter was still open in the law firm's files all indicated an existing attorney-client relationship); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 78-79 (11th ed. 2018) ("Lawyers might believe that a client is no longer a client if they are doing no work for it at the moment and haven't for a while. . . . [A] firm may have done work for a client two or three times a year for the past five years, creating a reasonable client expectation that the professional relationship continues during the intervals and that the lawyer will be available the next time the client needs her.").

[28] *See, e.g.*, Calamar Enters., Inc. v. Blue Forest Land Grp., Inc., 222 F. Supp. 3d 257, 264–65 (W.D.N.Y. 2016) (rejecting the client's claim of an attorney-client relationship where the relationship between the law firm and the client had been dormant for three years; despite the fact that the attorney-client relationship had not been formally terminated, it ended when the purpose of the parties' retainer agreement had been completed).

[29] AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, 71–78 (Arthur H. Garwin ed., 2013).

[30] *Compare* MODEL RULES R. 1.7 (2018) (addressing current client conflicts of interest), *with* MODEL RULES R. 1.9 (2018) (governing former client conflicts of interest).

Because Model Rule 1.4 does not impose on lawyers a duty to communicate with former clients,[31] it is no basis for requiring lawyers to disclose material errors to former clients.

The California State Bar's Committee on Professional Responsibility and Conduct reached a similar conclusion with respect to California Rule of Professional Conduct 3-500, which states that "[a] member [of the State Bar of California] shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." In concluding that a lawyer had no duty to keep a former client informed of significant developments in the representation, and specifically the former client's possible malpractice claim against the lawyer, the Committee focused on the fact that the lawyer and the former client had "terminated their attorney-client relationship" and on Rule 3-500's reference to a "client," meaning a current client.[32]

Finally, in terms of possible sources of an obligation to disclose material errors to former clients, Model Rule 1.16(d) provides in pertinent part that, upon termination of a representation, "a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee[s] or expense[s] that has not been earned or incurred." This provision does not create a duty to inform former clients of material errors for at least two reasons. First, the wording of the rule demonstrates that the error would have to be discovered while the client was a current client, thereby pushing any duty to disclose back into the current client communication regime. Second, Model Rule 1.16(d) is by its terms limited to actions that may be taken upon termination of the representation or soon thereafter; it cannot reasonably be construed to apply to material errors discovered months or years after termination of the representation.

Conclusion

The Model Rules require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The lawyer

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[31] *See* Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline Adv. Op. 2010-2, 2010 WL 1541844, at *2 (2010) (explaining that Rule 1.4 "applies to ethical duties regarding communication *during a representation*" (emphasis added)); Va. State Bar Comm. on Legal Ethics Eth. Op. 1789, 2004 WL 436386, at *1 (2004) (stating that "*[d]uring the course of the representation*, an attorney's duty to provide information to his client is governed by Rule 1.4(a)") (emphasis added)).

[32] Cal. Eth. Op. 2009-178, *supra* note 1, 2009 WL 3270875, at *6.

must so inform the client promptly under the circumstances. Whether notification is prompt is a case- and fact-specific inquiry.

No similar duty of disclosure exists under the Model Rules where the lawyer discovers after the termination of the attorney-client relationship that the lawyer made a material error in the former client's representation.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328
CHAIR: Barbara S. Gillers, New York, NY ■ John M. Barkett, Miami, FL ■ Wendy Wen Yun Chang, Los Angeles, CA ■ Hon. Daniel J. Crothers, Bismarck, ND ■ Keith R. Fisher, Arlington, VA ■ Douglas R. Richmond, Chicago, IL ■ Michael H. Rubin, Baton Rouge, LA ■ Lynda Shely, Scottsdale, AZ ■ Elizabeth C. Tarbert, Tallahassee, FL. ■ Allison Wood, Chicago, IL

CENTER FOR PROFESSIONAL RESPONSIBILITY: Dennis A. Rendleman, Ethics Counsel; Mary McDermott, Associate Ethics Counsel

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Attachment 3

January 27, 2020

OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY

2019 Year in Review Numbers—Year over (Year)

New Complaints:	1003	(1107)
Closings:	1029	(1115)
Advisory Opinions:	1944	(2057)
Public Discipline:	35	(45)
Disbarred:	5	(8)
Suspended:	22	(23)
Reprimand/Prob:	4	(8)
Reprimand:	4	(6)
Private Discipline (files):		
Probation:	14	(14)
Admonitions:	107	(117)
Open Files:	482	(509)
Year Old:	119	(145)
With Office:	49	(46)
With Court:	70	(99)
Oldest File:	3/2015	(1/2015)
Additional Numbers:		
Referee Trials:	11	(4)
Panel Hearings:	10	(8)
New Inv.:	566	(572)

Discipline by Decades:	1990s	Disbarments: 74	Public Discipline: 365
	2000s	Disbarments: 52	Public Discipline: 327
	2010s	Disbarments: 62	Public Discipline: 403

OLPR Dashboard for Court and Chair

	Month Ending December 2019	Change From Previous Month	Month Ending December 2018	
Open Matters	482	-28/510	509	
Total # of Lawyers	362	-24/386	353	
New Files YTD	1003	+71/932	1107	
Closed Files YTD	1029	+99/930	1115	
Closed C012s YTD	267	+19/248	321	
Summary Dismissals YTD	437	+35/402	535	
Files Opened During December 2019	71	+11/60	88	
Files Closed During December 2019	99	+58/41	82	
Public Matters Pending (excluding Resignations)	35	-1/36	38	
Panel Matters Pending	11	-1/12	14	
DEC Matters Pending	97	+5/92	83	
Files On Hold	10	-1/11	23	
Advisory Opinion Requests YTD	1944	+144/1800	2057	
CLE Presentations YTD	58	+4/54	68	
Total Files Over 1 Year Old	119	-12/131	145	
Total # of Lawyers	75	-10/85	80	
Matters Pending Over 1 Year Old w/o Charges	49	-4/53	46	
Total # of Lawyers	37	-5/42	36	

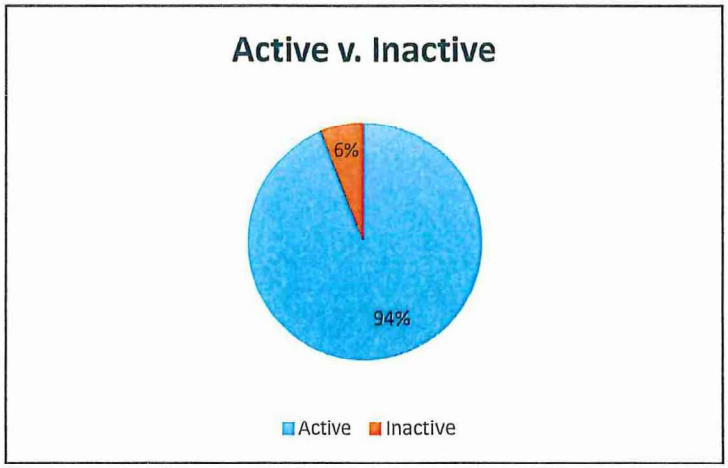
	2019 YTD	2018 YTD
Lawyers Disbarred	5	8
Lawyers Suspended	22	23
Lawyers Reprimand & Probation	4	8
Lawyers Reprimand	4	6
TOTAL PUBLIC	**35**	**45**
Private Probation Files	14	14
Admonition Files	107	117
TOTAL PRIVATE	**121**	**131**

Files Over 1 Year Old as of Month Ending December 2019

Year/Month	OLPR	AD	ADAP	PROB	PAN	HOLD	SUP	S12C	SCUA	REIN	TRUS	Total
2015-03							1					1
2015-11							2					2
2015-12							1					1
2016-02							1					1
2016-05							1					1
2016-06						1						1
2016-07	1											1
2016-08	3											3
2016-09									1			1
2016-10							2					2
2016-12	1											1
2017-01							1					1
2017-02							1		1			2
2017-03	1					2	1					4
2017-04							1					1
2017-06							1		1			2
2017-07							2					2
2017-08				1			2		1			4
2017-09	3						1		2			6
2017-10	1				1				1			3
2017-11	2											2
2017-12	2				1		1		1			5
2018-01	1								1			2
2018-02						1	3					4
2018-03	1						1	1		1		4
2018-04	4						5					9
2018-05							1					1
2018-06	3							1				4
2018-07	4											4
2018-08	5			1		2	3		1			12
2018-09		2					1		1			4
2018-10	5						2		2	1		10
2018-11	3		1				2			1		7
2018-12	9						1				1	11
Total	**49**	**2**	**1**	**2**	**2**	**6**	**38**	**2**	**13**	**3**	**1**	**119**

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	106	44
Total Cases Under Advisement	13	13
Total Cases Over One Year Old	**119**	**57**

Active	111
Inactive	8



All Pending Files as of Month Ending December 2019																
Year/Month	SD	DEC	REV	OLPR	AD	ADAP	PROB	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	Total
2015-03										1						1
2015-11										2						2
2015-12										1						1
2016-02										1						1
2016-05										1						1
2016-06									1							1
2016-07				1												1
2016-08				3												3
2016-09												1				1
2016-10										2						2
2016-12				1												1
2017-01										1						1
2017-02										1		1				2
2017-03				1					2	1						4
2017-04										1						1
2017-06										1		1				2
2017-07										2						2
2017-08							1			2		1				4
2017-09				3						1		2				6
2017-10				1				1				1				3
2017-11				2												2
2017-12				2				1		1		1				5
2018-01				1								1				2
2018-02									1	3						4
2018-03				1						1	1		1			4
2018-04				4						5						9
2018-05										1						1
2018-06				3							1					4
2018-07				4												4
2018-08				5			1		2	3		1				12
2018-09					2					1		1				4
2018-10				5						2		2	1			10
2018-11				3		1				2			1			7
2018-12				9						1					1	11
2019-01				18	1											19
2019-02		1		19			1			2						23
2019-03				16				2					2			20
2019-04		1	1	24	1					1						28
2019-05		1		14	1			2	1						1	20
2019-06		2	1	23				1	1							28
2019-07		7	1	24									2			34
2019-08		10	3	12					1							26
2019-09		19	5	15										1		40
2019-10		18		21					1				1			41
2019-11		19		18												37
2019-12	16	19		8										4		47
Total	16	97	11	261	5	1	3	7	10	41	2	13	8	5	2	482

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

Attachment 4

MINNESOTA JUDICIAL BRANCH

Lawyer Details

Lawyer ID	0327335
Last Name	ADAMS POWELL
First Name	KARLOWBA
Middle Name	R.
Address	835 GERANIUM AVE E SAINT PAUL, MN 55106
Date Admitted	09/18/03
Last Payment	01/03/20
Next Payment Due	01/01/21
Authorized to Practice Law?	AUTHORIZED

Additional information related to limited license statuses may be obtained through the **Lawyer Registration Website.**

Current Disciplinary Status	DISCIPLINARY PROBATION

Additional information on disciplinary history or statuses may be obtained at **Lawyer's Professional Responsibility Board Website.**

CLE Status	2
FEE Status	PRACTICING 3 YEARS OR MORE
Professional Liability Insurance	Lawyer does represent private clients Does not currently have insurance.
Good Standing:	Yes

<- Back to Lawyer List...

MINNESOTA JUDICIAL BRANCH

Lawyer Details

Lawyer ID	0282807
Last Name	ONYEMEH SEA
First Name	BOBBY
Middle Name	GORDON
Address	SEA LAW OFFICE BOBBY ONYEMEH SEA ESQ. 2147 UNIVERSITY AVE W, STE 218 ST. PAUL, MN 55114
Date Admitted	05/08/98
Last Payment	09/20/19
Next Payment Due	10/01/20
Authorized to Practice Law?	NOT AUTHORIZED

Additional information related to limited license statuses may be obtained through the **Lawyer Registration Website.**

Current Disciplinary Status	SUSPENDED
Additional information on disciplinary history or statuses may be obtained at **Lawyer's Professional Responsibility Board Website.**	
CLE Status	2
FEE Status	PRACTICING INCOME < $25,000
Professional Liability Insurance	Lawyer does represent private clients Does not currently have insurance.
Good Standing:	No

<- Back to Lawyer List...

Jennifer -

thank you for taking the time to answer my questions and help us make sure we are in compliance with the rules. We (MN Lawyers) are lucky to have such a great PR Board!

Nicole

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OCT 09 2019
OFFICE OF LAWYERS
PROF. RESP.

2019-2020
HABA Board

Mai Lee Yang
Shuly Her
Pa Nhia Vang
Pakou Moua
Fue Lo Thao
Cha Xiong
Shoua Xiong
Abigail Evenson
Nou Her

October 7, 2019

Susan Huminston
Director
Minnesota Office of Lawyers
Professional Responsibility
1500 Landmark Towers
345 St. Peter Street
St. Paul, MN 55102-1218

Dear Susan,

Thank you for speaking to the Hmong American Bar Association at our annual banquet on Friday, October 4th. We had so many attendees compliment us afterwards about how much they enjoyed and learned from your presentation. We even heard from the non-lawyer guests about how great the program was this year. Our preliminary estimates are that the banquet was successful at raising funds to continue our mission of developing attorneys of Hmong descent and educating on legal issues of importance to the Hmong community. We offer free CLEs to the public, a LSAT test preparation scholarship, and networking opportunities through the year.

The Hmong American Bar Association appreciates all the hard work you put into preparing the ethics presentation and your time on a busy Friday night. Our short note of thanks cannot match your efforts, but we wanted to let you know our appreciation. We hope to welcome you back at any one of our future banquet and programs.

Sincerely,

President - Mai Lee Yang
Vice President - Shuly Her
Secretary - Pa Nhia Vang
Treasurer - Pakou Moua
Advisory Board - Cha Xiong, Shoua Xiong,
Abigail Evanson, Nou Her, Fue Lo Thao

HMONG AMERICAN BAR ASSOCIATION
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haba.minn@gmail.com
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Practicing law without liability insurance

I recently fielded a question from a trial court judge asking if it was ethical to engage in private practice in Minnesota without malpractice insurance. The answer: yes. The questioner was a bit incredulous at the answer—as I admit I was before taking this job. I always assumed that everyone in private practice carried malpractice insurance. Sure, government lawyers probably did not, and I could see where in-house counsel did not need insurance, but of course everyone else was required to carry insurance, right? Nope.

This is true in all U.S. states save two: Oregon and Idaho. The U.S. stands in stark contrast to its international peers in this regard. Most developed countries require some form of professional liability insurance for lawyers in private practice. All Australian states, all Canadian provinces and territories, most of the European Union, and several Asian countries require varying levels of insurance.[1] The required insurance in those countries is usually not *de minimus*, either: Minimum coverage in Australia is $1.5 million AUS; British Columbia, $1 million CAN; England and Wales, 2 million; and Singapore, 1 million SGD. In contrast, the minimum coverage in Oregon is $300,000 per occurrence/$300,000 aggregate, and in Idaho, $100,000 per occurrence/$300,000 aggregate. This is fascinating to me given the old saw about how litigious America is compared to other developed countries.

Disclosure requirements

While Minnesota does not require malpractice insurance, we do require attorneys in private practice to disclose in their annual registration statement whether they carry professional liability insurance, and the name of the provider.[2] In 2004, the American Bar Association adopted a model rule on insurance disclosure. Thereafter, Minnesota and 23 other states enacted some form of disclosure requirement, and that information can be found by legal consumers in Minnesota, should they know to look, on Minnesota's lawyer registration website.[3] I am particularly intrigued, however, by the seven states that chose to adopt a requirement of direct disclosure to clients. Since 1999, for example, South Dakota's ethics rules have required attorneys who do not carry at least $100,000 per claim in liability insurance to disclose that fact to their clients in every written communication.[4]

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

SUSAN.HUMISTON@COURTS.STATE.MN.US

The numbers

Because Minnesota requires disclosure, we know generally how many lawyers represent private clients but do not carry insurance. Based upon data collected in Minnesota as of August 2019, of the 12,995 lawyers who disclosed on their annual registration that they represent private clients, 10,715 (82.45 percent) disclosed they carry liability insurance, leaving 17.55 percent uncovered. Due to data limitations, we do not know the types of practices those uninsured lawyers maintain. Are they solo or small firm practitioners? Do they mainly handle personal claims for individual legal consumers? Illinois estimates that as many as 40 percent of solo lawyers are uninsured. In a 2017 survey in Washington, 28 percent of solo practitioners reported being uninsured.[5]

I was curious to see if there was any correlation between uninsured lawyers and discipline, so we pulled some quick numbers. Just looking at 2019 public discipline: Of the 25 lawyers publicly disciplined this year, only 8 (32 percent) reported carrying insurance when they last updated their annual registration. Because Minnesota does not retain malpractice disclosure information year over year, we were unable to look at whether the attorney carried coverage at the time of the misconduct.

Another interesting but perhaps not surprising statistic is that solo and small firm practitioners represent a disproportionate share of malpractice claims, according to the ABA Profile of Legal Malpractice Claims (2012-2015).[6] For that period, insurers who participated in the survey reported that 34 percent of claims were against solo practitioners and 32 percent were against firms with two to five lawyers, for a total of over 65 percent of claims against firms with five or fewer lawyers! From a public protection perspective, this is not a comforting story: The segment of lawyers with the highest percentage of malpractice claims against them also report a higher lack of insurance.

The current landscape

Perhaps because of numbers like these, several states have taken up efforts to study the issue of mandatory malpractice insurance. As noted, only Oregon and Idaho require coverage for lawyers in private practice. Oregon has required insurance since 1977, and provides insurance through a shared risk pool. All Oregon lawyers who are not exempt pay $3,300 annually to the Fund, and receive coverage of $300,000 per occurrence/$300,000 in aggregate, with no deductible, and $50,000 in annual covered defense costs.[7] Idaho became the second U.S. jurisdiction to require insurance on January 1, 2018. Idaho lawyers who represent private clients must carry $100,000 per occurrence/$300,000 in aggregate, and must submit proof of insurance to renew their licenses.

Several other states have recently formed task forces to look at mandatory malpractice, and have seen their efforts stymied in large part by factions of the bar militantly opposed to required coverage. The Washington state bar (a unified bar) recently rejected a recommendation for mandatory insurance, despite a unanimous task force recommendation in favor of requiring coverage. This is particularly interesting (or hypocritical?) in view of the requirement that Washington's limited license legal technicians must carry insurance.

The Nevada state bar petitioned the Nevada Supreme Court in 2018 to require malpractice coverage, but portions of the bar objected, and the Nevada Supreme Court denied the petition on the grounds that inadequate detail or support for the rule change was provided. In 2017 California's legislature required the bar to form a working group to study the issue. That working group recently recommended against mandatory insurance absent further data, but recommended further study of broader disclosure requirements.

Illinois has gone in a different direction. Beginning in 2017, lawyers who do not carry malpractice insurance but represent private clients must complete a four-hour online risk-management course every two years. This course helps lawyers identify risk areas in their practice and offers suggestions for improvement.

The factors that augur for requiring insurance are largely obvious, and were articulated in a recent article in this magazine in July 2019.[8] Such a mandate ensures meaningful remedies in cases of malpractice—and lawyers do make mistakes. It strengthens the reputation of the profession and protects lawyer's assets. It also strengthens the profession—lawyers with insurance have better access to risk management assistance and continual learning, including remediation services when things do go wrong. It also promotes self-regulation, and to me, it is an obligation inherent in a self-regulated profession: We have a responsibility to ensure that consumers of legal services are financially protected when mistakes are made.

Those opposed to mandatory insurance have cited the fact that there is no proof that there is harm going un-remedied. They also argue that any requirement would encourage litigation against lawyers; that the cost of insurance can be prohibitive; that a lawyer may be uninsurable (though reportedly all Idaho lawyers who sought coverage obtained it); and that it could discourage pro bono or low bono work—a presumably cost-related argument. And the libertarians among us see most, if not all, regulation as harmful.

Conclusion

I have spoken with other judges who are just as surprised as the above caller that lawyers are not ethically required to carry insurance in private practice. The more I look at the issue, however, I am not surprised that lawyers have successfully lobbied against such a requirement to date. Minnesota does not require doctors to carry liability insurance, either. While many do because of hospital or health plan requirements, it is not a requirement of licensure.[9] But ultimately I agree with the (rejected) conclusion of the Washington State Task Force, after its extremely thorough and thoughtful review of the matter, that "[a] license to practice law is a privilege, and every lawyer engaged in the business of providing legal services should be financially responsible for the effects of his or her own mistakes."[10] Because the task force ultimately concluded that legal liability insurance is generally affordable, available, and the right thing to do, it should be required in a profession that is regulated in the public interest. ▲

Notes

[1] Washington State Bar Association Mandatory Malpractice Insurance Task Force, Report to the WSBA Board of Governors (February 2019) at 26-27, *https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-report.pdf?sfvrsn=558e03f1_0.*

[2] Rule 22, Minnesota Rules of the Supreme Court on Lawyer Registration.

[3] *https://www.lro.mn.gov/for-the-public/lawyer-registration-database-search-public/*

[4] Rule 1.4(c), South Dakota Rules of Professional Conduct ("If a lawyer does not have professional liability insurance with limits of at least $100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that: (1) "This lawyer is not covered by professional liability insurance;" or (2) "This firm is not covered by professional liability insurance.") *See also* Rule 1.4(d), SDRPC ("The required disclosure in 1.4(c) shall be included in every written communication with a client."

[5] WSBA Task Force Report at 11.

[6] ABA Standing Comm. on Law Prof. Liability, Profile of Legal Malpractice Claims 2012-2015, at 7 (September 2016).

[7] WSBA Task Force Report at 23.

[8] Seth Leventhal, *The Case for Mandatory Legal Malpractice Insurance*, Bench & Bar (July 2019).

[9] A quick web search discloses that seven states, including Wisconsin, have minimum liability insurance requirements for doctors, and some additional states require insurance to avail yourself of state tort reform caps for medical malpractice claims.

[10] WSBA Task Force Report at 45.

Withdrawing as counsel (ethically)

How to ethically withdraw as counsel is the third most frequently asked question on our advisory opinion/ethics hotline. Annually, hundreds of Minnesota attorneys seek advice on whether and how they may terminate a particular lawyer-client relationship. This Office has written several columns on the subject,[1] but the topic's importance makes it worth revisiting periodically given the care required when the lawyer-client relationship ends prior to its planned conclusion.

Circumstances allowing withdrawal

"A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."[2] What "completion" means will depend on the agreement of the parties and the type of matter involved. If court rules allow it, a lawyer may limit the scope of representation to specific, agreed-upon services—provided the limitation is reasonable and the client has provided informed consent.[3] Lawyers also must ethically communicate the scope of the representation before or within a reasonable time of commencing representation, preferably in writing.[4] Compliance with the ethics rules ensures that both lawyer and client are on the same page regarding the services to be provided, and what completion of the representation will involve.

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The ethics rules contemplate numerous situations where continued representation is impermissible and withdrawal is mandatory, as well as several circumstances where withdrawal is permissible prior to completing the representation. Let's start with when you *must* withdraw. There are three scenarios: (1) the representation will result in a violation of the Rules of Professional Conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged.[5] Each is generally self-explanatory. Indeed, while it should go without saying that you must withdraw when you have been discharged, more lawyers than you would think have been disciplined for failing to do so.

Beyond mandatory withdrawal, Rule 1.16(b) establishes a robust list of reasons why a lawyer may permissibly withdraw. A lawyer may withdraw without a specific reason if it can be accomplished without material adverse effect on the interests of the client.[6] Withdrawal is permissible if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.[7] (Note, however, that other rules may make withdrawal in this circumstance mandatory, because you cannot assist a client in conduct you know to be criminal or fraudulent.[8]) Similarly, you may withdraw if the client has used your services to perpetrate a crime or fraud, or if the client insists upon taking action that you consider repugnant or with which you have a fundamental disagreement.[9] You may withdraw if the client fails substantially to fulfill an obligation to you regarding your services and has been given reasonable warning that you will withdraw unless the obligation is fulfilled. You may withdraw if the representation will result in an unreasonable financial burden on you, or your representation has been rendered unreasonably difficult by the client.[10] Finally, an attorney may withdraw if "other good cause for withdrawal exists."[11] Given the breadth of these provisions, the question is generally not whether a permissible basis for withdrawal exists, but rather whether timing and the applicable procedural rules will support withdrawal in a particular case, irrespective of the ethical basis for withdrawal.

Where to start

If you are representing a client in a litigated matter, the first consideration is the procedural rules governing withdrawal of the tribunal in the matter. I cannot stress this enough. Even in my short time as director, I have spoken on the ethics line to scores of attorneys who are not familiar with the procedural requirements of the court before which the relevant matter is pending. As Rule 1.16(c), MRPC provides, "A lawyer must comply with the applicable law requiring notice to or permission of a tribunal when terminating a representation." This is true even if withdrawal is ethically mandatory. And don't forget that until you effectively withdraw, you are counsel and owe your client compliance with all other ethical rules pending authorized withdrawal. While a listing of the procedural rules governing withdrawal are beyond the scope of this article, it is typically true that each tribunal has a general rule of practice or local rule governing the procedure and circumstances under which withdrawal may be accomplished.[12] Please do not forget the procedural rules relating to withdrawal as you focus on the ethical rules.

What to say

If you are counsel of record in a matter requiring a motion and order to effectuate withdrawal, what you may say to support that motion is also guided by the ethics rules. Rule 1.6, MRPC, protects confidential information relating to the representation. As I say whenever I have the chance, our duty of confidentiality is broader than simply protecting attorney-client privileged communications; it covers "all information relating to the representation of a client" unless an exception for disclosure exists. Such a broad confidentiality obligation can make it difficult to provide sufficient information to a court to establish good cause, and there is no exception in Rule 1.6(b) that allows disclosure of information specifically to effectuate withdrawal.

Some exceptions can apply. For example, the client may give informed consent to any disclosures.[13] Information can also be disclosed if it is not protected by the attorney-client privilege, the cli-

ent has not requested the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client.[14] This, however, might still be a small universe of information.

Beyond the foregoing, our advice is generally that the lawyer must start with general—and, of course, true—statements supporting withdrawal, such as that there has been a breakdown in the attorney-client relationship, or (as reflected in the comments) professional considerations require termination of the relationship.[15] Another potential disclosure exception is that "the lawyer reasonably believes the disclosure is necessary to comply with other law or court order."[16] If you are ordered to do so, after communications with your client under Rule 1.4, you can disclose such information as reasonably necessary to comply with such an order. I know this is generally an unsatisfying answer, but the truth is that competing interests present a real dilemma if your client will not authorize disclosure of information. This is a line to walk carefully.

What else to do

In all circumstances, and whether or not the matter is in litigation, there are additional considerations set forth in Rule 1.16 that must be satisfied upon termination of representation. The main requirement is that upon termination, "a lawyer shall take steps to the extent reasonably practicable to protect the client's interest."[17] The steps to take may vary according to the facts of the representation, but a non-exhaustive list includes: (1) giving reasonable notice to the client; (2) allowing time for employment of other counsel; (3) returning the client's file; and (4) refunding any advance payment of fees or expenses that have not been earned or incurred.[18] Please keep in mind your ethical obligation to take steps to protect the client's interest as well when you are disclosing confidential information under an exception. Requesting to do so in camera, under seal, or *ex parte*—depending on the nature of the information that may be disclosed—is often important to protect the client's interest, and is a "reasonably practicable" step available to you.

Conclusion

Withdrawal as counsel is generally ethically available but requires thoughtful consideration of timing and procedural requirements. I know that this can be frustrating for lawyers, but the rules are designed to protect even the most undeserving of clients. Because of the care that must be taken, I'm glad so many lawyers take advantage of the ethics line to obtain advice when they are considering termination of an attorney-client relationship. Please give us a call at 651-296-3952 if you need assistance in complying with your ethical duties when ending a lawyer-client relationship. ▲

Notes

[1] *See, e.g.*, Martin A. Cole, "Withdrawing: Must I? May I?," Bench & Bar (November 2014); Kenneth L. Jorgensen, "Ethical and Procedural Withdrawal Requirements, Minnesota Lawyer (11/1/2002); Edward J. Cleary, "Withdrawing as Counsel, " Bench & Bar (November 1999), all available at *www.lprb.mncourts.gov/articles*.

[2] Rule 1.16, Minnesota Rules of Professional Conduct (MRPC), Comment [1].

[3] Rule 1.2(c), MRPC.

[4] Rule 1.5(b), MRPC.

[5] Rule 1.16(a)(1)-(3), MRPC.

[6] Rule 1.16(b)(1), MRPC.

[7] Rule 1.16(b)(2), MRPC.

[8] Rule 1.2(d), MRPC; Rule 1.16(a)(1), MRPC.

[9] Rule 1.16(b)(3), MRPC; Rule 1.16(b)(4), MRPC.

[10] Rule 1.16(b)(5), MRPC; Rule 1.16(b)(6), MRPC.

[11] Rule 1.16(b)(7), MRPC.

[12] *See, e.g.*, Minn. Gen. R. Prac. 105 (2019) ("After a lawyer has appeared for a party in any action, withdrawal will be effective only if written notice of withdrawal is served on all parties who have appeared, or their lawyers if represented by counsel, and is filed with the court administrator if any other document in the action has been filed. The notice of withdrawal shall include the address, email address, if known, and phone number where the party can be served or notified of matters relating to the action. Withdrawal of counsel does not create any right to continuance of any scheduled trial or hearing."); Minn. Gen. R. Prac. 703 (2019) ("Once a lawyer has filed a certificate of representation [in a criminal case], that lawyer cannot withdraw from the case until all proceedings have been completed, except upon written order of the court pursuant to written motion, or upon written substitution of counsel approved by the court *ex parte*."); D. Minn. LR 83.7 (2019) (allowing withdrawal with notice of substitution and only within proscribed timelines or upon motion for good cause shown).

[13] Rule 1.6(b)(1), MRPC.

[14] Rule 1.6(b)(2), MRPC.

[15] Rule 1.16, MRPC, Comment [3].

[16] Rule 1.6(b)(9), MRPC.

[17] Rule 1.16(d), MRPC.

[18] Id.

Your ethical duty of supervision

As 2019 comes to a close, I would like to focus on your ethical duties as a supervisor. Attorneys sometimes supervise other attorneys and frequently supervise non-attorney staff. While professional ethics certainly govern your personal behavior and choices, the rules also place upon you specific duties related to the ethical conduct of others. This is an important responsibility, and worth a review.

Who is covered?

Rule 5.1 sets the stage. The rule places specific responsibilities on principals in a legal organization, whether it's a law firm, legal services organization, law department, or government agency.[1] The rule covers not only a managing partner, but extends (depending on the form of the organization) to all members of a partnership or association and all shareholders. And don't be distracted by the rule's use of the term "law firm." By definition, the rule covers other forms of legal organizations beyond law firms.[2] Partners or managers are also not the only ones with obligations regarding the acts of others. The responsibilities also apply to anyone having direct supervisory authority over another lawyer.[3] Whether a lawyer has supervisory authority over another in a particular circumstances is often a question of fact.

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More broadly, Rule 5.3 extends the same responsibilities to nonlawyers who are employed, retained, or associated with the lawyer.[4] Nonlawyers are not bound by the ethics rules (nor subject to discipline by the Office of Lawyers Professional Responsibility), but partners, shareholders, managers, and direct supervisors are charged with the responsibility to ensure any nonlawyer with whom they associate acts in a manner compatible with the lawyer's ethics. This covers a broad range of people: Secretaries, paralegals, investigators, law clerks, document management providers, and other vendors that assist the lawyer in the rendition of legal services are all covered, whether they are employees, independent contractors, or third-party vendors.[5] If you have direct supervisory or managerial authority over another lawyer or nonlawyer personnel, you have an ethical obligation regarding those individuals, whether or not they are employed by your organization.

EXAMPLE:

An attorney failed to supervise or establish adequate measures to prevent his long-time office manager from stealing client and firm funds. The attorney received a lengthy suspension.

What is the responsibility?

The responsibility is tailored to the role. For those in a management or ownership role, the responsibility is to "make reasonable efforts to ensure that the [organization] has in effect measures giving reasonable assurance that all lawyers in the [organization] conform to the Rules of Professional Conduct."[6] Thus, the responsibility is to establish measures reasonably tailored to "assure" that the lawyers in the organization comply with the rules. With respect to nonlawyers, the responsibility of managers and owners is, similarly, to "make reasonable efforts to ensure that the [organization] has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligation of the lawyer."[7]

For direct supervisors, the responsibility is more direct: Make reasonable efforts to ensure that the lawyer's conduct complies with the ethics rules and the nonlawyer's conduct is compatible with the lawyer's ethics.[8] While one may rely generally on continuing legal education in professional ethics, particularly for lawyers, such education alone is insufficient to satisfy the managerial obligation to establish effective measures. Nor does it alleviate direct supervisory responsibilities.

How do you discharge this responsibility?

The text of the rule itself provides no guidance on how to discharge this responsibility but the comments to Rules 5.1 and 5.3 do, and they're worth a read. Because the measures will vary depending on size and the nature of practice, one size does not fit all. For most legal organizations, areas to address likely include:

- conflicts;
- deadlines and diligence;
- communication;
- accounting for client funds and property;
- protection of confidential information;
- marketing practices;
- contact with represented parties;
- security of technology;
- the unauthorized practice of law;
- lawyer impairment;
- reporting violations; and
- harassment and discrimination.

Policies and procedures should exist on these topics specific to lawyers and nonlawyers, as well as any other ethics topic relevant to your area of practice.[9] As with all effective compliance programs, effective measures do not stop with policies and procedures.

You need to include training for lawyers and nonlawyers, and an audit or review program to understand effectiveness. Only then, it seems to me, can you feel confident that you have "measures" in place to "assure" compliance, which is what the rule requires. I also recommend that you spend time thinking about the unique challenges in your environment or practice that affect supervision. For example, do many people work remotely or have flex schedules? Do your policies and procedures work if people are not physically present?

As the comments also note, you should think about the ethical atmosphere of the organization—the "tone at the top."[10] If you asked the lawyers and staff in your organization, would they say compliance with professional ethics is important and expected, and they know how to do their jobs in a compliant manner? Or are you relying on people to figure it out? Do you have competing polices or practices that are antithetical to compliance with the ethics rules? Do people know where to turn for answers when questions arise? Do you have confidential "up-the-ladder" reporting avenues where violations or close questions can be addressed? Are there meaningful consequences for noncompliance, depending on the seriousness of the issue, or is everyone just happy the Office of Lawyers Professional Responsibility didn't find out about it? If noncompliant conduct was found, did you look to see if there were others instances of noncompliance that point to a systemic issue, or did you just address the issue in isolation?

What will work best for your legal organization will depend on many factors, but asking yourself these questions will help you determine whether you have "measures" in place to "assure" compliance.

When is professional discipline imposed?

As the comment to Rule 5.1 makes clear, vicarious civil and criminal liability for the acts of others is beyond the scope of the ethics rules.[11] Nor are you strictly liable for the conduct of others. However, you can be professionally liable under these rules in basically three ways: (1) You are a covered attorney who did not have reasonable measures in place, or make reasonable efforts appropriate to your role, and misconduct occurred; (2) you order or, with knowledge of the conduct, ratify the misconduct; or (3) you are a covered attorney, you know of the misconduct at a time when consequences can be avoided or mitigated, and you fail to take remedial action.[12]

Lawyers have been disciplined recently under Rule 5.1 and Rule 5.3, both publicly and privately. For example, a solo attorney failed to put adequate measures in place to prohibit and detect the fact that her paralegal was forging her name on numerous pleadings and falsely notarizing affidavits of service in multiple cases.[13] The attorney received a public reprimand. In another case, an attorney failed to supervise or establish adequate measures to prevent his long-time office manager from stealing client and firm funds.[14] The attorney received a lengthy suspension. In both instances, trusted employees engaged in conduct wholly incompatible with the lawyer's professional responsibilities, and the lawyer was disciplined.

Finally, do not forget your obligation under Rule 8.3, MRPC. If you know that another lawyer has committed a violation of the rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer, you have an ethical obligation to report to this Office.

Conclusion

Because even the most trusted of personnel can engage in wrongdoing, the ethics rules focus on effective compliance measures—something you no doubt talk to your business clients about frequently. If you have good policies and procedures, train your lawyers and nonlawyers, and audit your organization's compliance with your policies and procedures, you will likely deter noncompliance in the first place or detect it before it poses a professional issue for you. As 2020 starts, resolve to review your organization's compliance with Rules 5.1 and 5.3, MRPC. Please call the ethics advisory line at 651-296-3952 if you have questions about your ethical responsibilities. ▲

Notes

[1] Rule 5.1(a), Minnesota Rules of Professional Conduct (MRPC).
[2] Rule 1.0(d), MRPC; Rule 5.1(a), Cmt. [1].
[3] Rule 5.1(b), MRPC.
[4] Rule 5.3(a) and 5.3(b), MRPC.
[5] Rule 5.3, MRPC, Cmt. [2] [3].
[6] Rule 5.1(a), MRPC.
[7] Rule 5.3(a), MRPC.
[8] Rule 5.1(b), MRPC; Rule 5.3(b), MRPC.
[9] For example, ABA Opinion 467 provides specific guidance to prosecutors on their Rule 5.1 and 5.3 obligations. See ABA Formal Opinion 467 (9/8/2014).
[10] Rule 5.1, MRPC, Cmt. [3].
[11] Rule 5.3, MRPC, Cmt. [6].
[12] Rule 5.1, MRPC, Cmt. [6]; Rule 5.1(c), MRPC; Rule 5.3(c), MRPC.
[13] *In re Naros*, 928 N.W.2d 915 (Minn. 2019).
[14] *In re Rosso*, 919 N.W.2d 477 (Minn. 2018).

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 488 **September 5, 2019**

Judges' Social or Close Personal Relationships with Lawyers or Parties as Grounds for Disqualification or Disclosure

Rule 2.11 of the Model Code of Judicial Conduct identifies situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned—including cases implicating some familial and personal relationships—but it is silent with respect to obligations imposed by other relationships. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in evaluating ethical obligations those relationships may create under Rule 2.11: (1) acquaintanceships; (2) friendships; and (3) close personal relationships. In short, judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances. Judges' disqualification in any of these situations may be waived in accordance and compliance with Rule 2.11(C) of the Model Code.[1]

I. Introduction

The Committee has been asked to address judges' obligation to disqualify[2] themselves in proceedings in which they have social or close personal relationships with the lawyers or parties other than a spousal, domestic partner, or other close family relationship. Rule 2.11 of the Model Code of Judicial Conduct ("Model Code") lists situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned—including cases implicating some specific family and personal relationships—but the rule provides no guidance with respect to the types of relationships addressed in this opinion.[3]

Public confidence in the administration of justice demands that judges perform their duties impartially, and free from bias and prejudice. Furthermore, while actual impartiality is necessary, the public must also perceive judges to be impartial. The Model Code therefore requires judges to

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[1] This opinion is based on the Model Code of Judicial Conduct as amended by the House of Delegates through February 2019. Individual jurisdictions' court rules, laws, opinions, and rules of professional conduct control. The Committee expresses no opinion on the applicable law or constitutional interpretation in a particular jurisdiction.

[2] The terms "recuse" and "disqualify" are often used interchangeably in judicial ethics. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 1 (2011) [hereinafter MODEL CODE] (noting the varying usage between jurisdictions). We have chosen to use "disqualify" because that is the term used in the Model Code of Judicial Conduct.

[3] *See* MODEL CODE R. 2.11(A) (listing relationships where a judge's impartiality might reasonable be questioned, including where (1) the judge has "a personal bias or prejudice" toward a lawyer or party; (2) the judge's spouse, domestic partner, or a person within the third degree of relationship to the judge or the judge's spouse or domestic partner is a party or a lawyer in the proceeding; or (3) such person has more than a de minimis interest in the matter or is likely to be a material witness).

avoid even the appearance of impropriety in performing their duties.[4] As part of this obligation, judges must consider the actual and perceived effects of their relationships with lawyers and parties who appear before them on the other participants in proceedings.[5] If a judge's relationship with a lawyer or party would cause the judge's impartiality to reasonably be questioned, the judge must disqualify himself or herself from the proceeding.[6] Whether a judge's relationship with a lawyer or party may cause the judge's impartiality to reasonably be questioned and thus require disqualification is (a) evaluated against an objective reasonable person standard;[7] and (b) depends on the facts of the case.[8] Judges are presumed to be impartial.[9] Hence, judicial disqualification is the exception rather than the rule.

Judges are ordinarily in the best position to assess whether their impartiality might reasonably be questioned when lawyers or parties with whom they have relationships outside of those identified in Rule 2.11(A) appear before them.[10] After all, relationships vary widely and are unique to the individuals involved. Furthermore, a variety of factors may affect judges' decisions whether to disqualify themselves in proceedings. For example, in smaller communities and relatively sparsely-populated judicial districts, judges may have social and personal contacts with lawyers and parties that are unavoidable. In that circumstance, too strict a disqualification standard would be impractical to enforce and would potentially disrupt the administration of justice. In other situations, the relationship between the judge and a party or lawyer may have changed over time or may have ended sufficiently far in the past that it is not a current concern when viewed objectively. Finally, judges must avoid disqualifying themselves too quickly or too often lest litigants be encouraged to use disqualification motions as a means of judge-shopping, or other judges in the same court or judicial circuit or district become overburdened.

Recognizing that relationships vary widely, potentially change over time, and are unique to the people involved, this opinion provides general guidance to judges who must determine whether their relationships with lawyers or parties require their disqualification from proceedings, whether the lesser remedy of disclosing the relationship to the other parties and lawyers involved in the proceedings is initially sufficient, or whether neither disqualification nor disclosure is required. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in determining what, if any, ethical obligations Rule 2.11 imposes: (1) acquaintanceships; (2) friendships;[11] and (3) close personal relationships. Judges need not

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[4] MODEL CODE R. 1.2.

[5] *See* MODEL CODE R. 2.4(B) (stating that a judge shall not permit family or social interests or relationships to influence the judge's judicial conduct or judgment).

[6] MODEL CODE R. 2.11(A).

[7] Mondy v. Magnolia Advanced Materials, Inc., 815 S.E.2d 70, 75 (Ga. 2018); State v. Payne, 488 S.W.3d 161, 166 (Mo. Ct. App. 2016); Thompson v. Millard Pub. Sch. Dist. No. 17, 921 N.W.2d 589, 594 (Neb. 2019).

[8] N.Y. Advisory Comm. on Judicial Ethics Op. 11-125, 2011 WL 8333125, at *1 (2011) [hereinafter N.Y. Jud. Adv. Op. 11-125].

[9] Isom v. State, 563 S.W.3d 533, 546 (Ark. 2018); L.G. v. S.L., 88 N.E.3d 1069, 1073 (Ind. 2018); State v. Nixon, 254 So.3d 1228, 1235 (La. Ct. App. 2018); *Thompson*, 921 N.W.2d at 594.

[10] N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *2.

[11] Social media, which is simply a form of communication, uses terminology that is distinct from that used in this opinion. Interaction on social media does not itself indicate the type of relationships participants have with one another either generally or for purposes of this opinion. For example, Facebook uses the term "friend," but that is simply a title employed in that context. A judge could have Facebook "friends" or other social media contacts who

disqualify themselves in proceedings in which they are acquainted with a lawyer or party. Whether judges must disqualify themselves when they are friends with a party or lawyer or share a close personal relationship with a lawyer or party or should instead disclose the friendship or close personal relationship to the other lawyers and parties, depends on the nature of the friendship or close personal relationship in question. The ultimate decision of whether to disqualify is committed to the judge's sound discretion.

II. Analysis

Rule 2.11(A) of the Model Code provides that judges must disqualify themselves in proceedings in which their impartiality might reasonably be questioned and identifies related situations. Perhaps most obviously, under Rule 2.11(A)(1), judges must disqualify themselves when they have a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. The parties may not waive a judge's disqualification based on personal bias or prejudice.[12]

Beyond matters in which the judge's alleged or perceived personal bias or prejudice is at issue, Rule 2.11(A) identifies situations in which a judge's personal relationships may call into question the judge's impartiality. Under Rule 2.11(A)(2), these include proceedings in which the judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person (a) is a party to the proceeding, or is a party's officer, director, general partner, or managing member; (b) is acting as a lawyer in the proceeding; (c) has more than a de minimis interest that could be affected by the proceeding; or (d) is likely to be a material witness in the proceeding. Under Rule 2.11(A)(4), a judge may further be required to disqualify himself or herself if a party, the party's lawyer, or that lawyer's law firm has made aggregate contributions to the judge's election or retention campaign within a specified number of years that exceed a specified amount or an amount that is reasonable and appropriate for an individual or entity. But, while Rule 2.11(A) mandates judges' disqualification in these situations, Rule 2.11(C) provides that a judge may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers whether they waive disqualification. If the parties and lawyers agree that the judge should not be disqualified, the judge may participate in the proceeding.[13]

Apart from the personal relationships identified in Rule 2.11(A), a judge may have relationships with other categories of people that, depending on the facts, might reasonably call into question the judge's impartiality. These include acquaintances, friends, and people with whom the judge shares a close personal relationship.

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are acquaintances, friends, or in some sort of close personal relationship with the judge. The proper characterization of a person's relationship with a judge depends on the definitions and examples used in this opinion.

[12] MODEL CODE R. 2.11(C).

[13] Disqualification may not be waived where the judge harbors a personal bias or prejudice toward a party or a party's lawyer. *See* MODEL CODE R. 2.11(A)(1) & (C).

A. Acquaintances

A judge and lawyer should be considered acquaintances when their interactions outside of court are coincidental or relatively superficial, such as being members of the same place of worship, professional or civic organization, or the like.[14] For example, the judge and the lawyer might both attend bar association or other professional meetings; they may have represented co-parties in litigation before the judge ascended to the bench; they may meet each other at school or other events involving their children or spouses; they may see each other when socializing with mutual friends; they may belong to the same country club or gym; they may patronize the same businesses and periodically encounter one another there; they may live in the same area or neighborhood and run into one another at neighborhood or area events, or at homeowners' meetings; or they might attend the same religious services. Generally, neither the judge nor the lawyer seeks contact with the other, but they greet each other amicably and are cordial when their lives intersect.[15]

A judge and party should be considered acquaintances in the same circumstances in which a judge and lawyer would be so characterized. Additionally, a judge and party may be characterized as acquaintances where the party owns or operates a business that the judge patronizes on the same terms as any other person.

Evaluated from the standpoint of a reasonable person fully informed of the facts,[16] a judge's acquaintance with a lawyer or party, standing alone, is not a reasonable basis for questioning the judge's impartiality.[17] A judge therefore has no obligation to disclose his or her acquaintance with a lawyer or party to other lawyers or parties in a proceeding. A judge may, of course, disclose the acquaintanceship if the judge so chooses.

B. Friendships

In contrast to simply being acquainted, a judge and a party or lawyer may be friends. "Friendship" implies a degree of affinity greater than being acquainted with a person; indeed, the term connotes some degree of mutual affection. Yet, not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others. For example, a judge and lawyer who once practiced law together may periodically meet for a meal when their busy schedules permit, or, if they live in different cities, try to meet when one is in the other's hometown. Or, a judge and lawyer who were law school classmates or were colleagues years before may stay in touch through occasional calls or correspondence, but not regularly see one another. On the other hand, a judge and lawyer may exchange gifts at holidays and special occasions; regularly socialize together; regularly communicate and coordinate activities because their children are close friends and routinely spend time at each other's homes; vacation together with their families; share a mentor-protégé relationship developed while colleagues before the

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[14] N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *2.

[15] *Id.*

[16] *See* State v. Mouelle, 922 N.W.2d 706, 713 (Minn. 2019) ("In deciding whether disqualification is required, the relevant question is 'whether a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality.'" (quoting *In re* Jacobs, 802 N.W.2d 748, 753 (Minn. 2011)).

[17] N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *2; Va. Judicial Ethics Advisory Comm. Op. 01-08, 2001 WL 36352802, at *1, *2 (2001).

judge was appointed or elected to the bench; share confidences and intimate details of their lives; or, for various reasons, be so close as to consider the other an extended family member.

Certainly, not all friendships require judges' disqualification,[18] as the Seventh Circuit explained over thirty years ago:

> In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. A judge need not cut himself off from the rest of the legal community. Social as well as official communications among judges and lawyers may improve the quality of legal decisions. Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discharging one's friends or risking disqualification in substantial numbers of cases. Many courts therefore have held that a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer.[19]

Judicial ethics authorities agree that judges need not disqualify themselves in many cases in which a party or lawyer is a friend.[20]

There may be situations, however, in which the judge's friendship with a lawyer or party is so tight that the judge's impartiality might reasonably be questioned. Whether a friendship between a judge and a lawyer or party reaches that point and consequently requires the judge's

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[18] *See, e.g.*, *In re* Complaint of Judicial Misconduct, 816 F.3d 1266, 1268 (9th Cir. 2016) (stating that "friendship between a judge and a lawyer, or other participant in a trial, without more, does not require recusal"); Schupper v. People, 157 P.3d 516, 520 (Colo. 2007) (reasoning that friendship between a judge and a lawyer is not a per se basis for disqualification; rather, a reviewing court should "look for those situations where the friendship is so close or unusual that a question of partiality might reasonably be raised"); *In re* Disqualification of Park, 28 N.E.3d 56, 58 (Ohio 2014) ("[T]he existence of a friendship between a judge and an attorney appearing before her, without more, does not automatically mandate the judge's disqualification . . . ."); *In re* Disqualification of Lynch, 985 N.E.2d 491, 493 (Ohio 2012) ("The reasonable person would conclude that the oaths and obligations of a judge are not so meaningless as to be overcome merely by friendship with a party's counsel."); State v. Cannon, 254 S.W.3d 287, 308 (Tenn. 2008) ("The mere existence of a friendship between a judge and an attorney is not sufficient, standing alone, to mandate recusal.").

[19] United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985).

[20] U.S. Judicial Conf., Comm. on Codes of Conduct Advisory Op. No. 11, 2009 WL 8484525, at *1 (2009); Ariz. Supreme Ct., Judicial Ethics Advisory Comm. Op. 90-8, 1990 WL 709830, at *1 (1990) [hereinafter Ariz. Jud. Adv. Op. No. 11]; N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *2. *But see* Fla. Supreme Ct., Judicial Ethics Advisory Comm. Op. No. 2012-37, 2012 WL 663576, at *1 (2012) (stating that a judge "must recuse from any cases in which the judge's [close personal] friend appears as a party, witness or representative" of the bank where the friend was employed).

disqualification in the proceeding is essentially a question of degree.[21] The answer depends on the facts of the case.[22]

A judge should disclose to the other lawyers and parties in the proceeding information about a friendship with a lawyer or party "that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."[23] If, after disclosure, a party objects to the judge's participation in the proceeding, the judge has the discretion to either continue to preside over the proceeding or to disqualify himself or herself. The judge should put the reasons for the judge's decision to remain on the case or to disqualify himself or herself on the record.

C. Close Personal Relationships

A judge may have a personal relationship with a lawyer or party that goes beyond or is different from common concepts of friendship, but which does not implicate Rule 2.11(A)(2). For example, the judge may be romantically involved with a lawyer or party, the judge may desire a romantic relationship with a lawyer or party or be actively pursuing one, the judge and a lawyer or party may be divorced but remain amicable, the judge and a lawyer or party may be divorced but communicate frequently and see one another regularly because they share custody of children, or a judge might be the godparent of a lawyer's or party's child or vice versa.

A judge must disqualify himself or herself when the judge has a romantic relationship with a lawyer or party in the proceeding, or desires or is pursuing such a relationship. As the New Mexico Supreme Court has observed, "the rationale for requiring recusal in cases involving family members also applies when a close or intimate relationship [between a judge and a lawyer appearing before the judge] exists because, under such circumstances, the judge's impartiality is questionable."[24] A judge should disclose other intimate or close personal relationships with a lawyer or party to the other lawyers and parties in the proceeding even if the judge believes that he or she can be impartial.[25] If, after disclosure, a party objects to the judge's participation in the proceeding, the judge has the discretion to either continue to preside over the proceeding or to disqualify himself or herself. The judge should put the reasons for the judge's decision to remain on the case or to disqualify himself or herself on the record.

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[21] *See Schupper*, 157 P.3d at 520 (explaining that friendship between a judge and a lawyer is not an automatic basis for disqualification; rather, a reviewing court should "look for those situations where the friendship is so close or unusual that a question of partiality might reasonably be raised"); Ariz. Jud. Adv. Op. No. 11, *supra* note 20, 1990 WL 709830, at *1 (suggesting that in weighing disqualification where a lawyer who is a friend appears in the judge's court, the judge should consider as one factor "the closeness of the friendship"); CHARLES G. GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 4.07[4], at 4-27 (5th ed. 2013) ("Whether disqualification is required when a friend appears as a party to a suit before a judge depends on how close the personal . . . relationship is between the judge and the party.").

[22] N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *1.

[23] *See* Model Code R. 2.11 cmt. 5 ("A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.").

[24] *In re* Schwartz, 255 P.3d 299, 304 (N.M. 2011).

[25] *See* Model Code R. 2.11 cmt. 5. A judge who prefers to keep such a relationship private may disqualify himself or herself from the proceeding.

D. Waiver

In accordance and compliance with Rule 2.11(C), a judge subject to disqualification based on a friendship or close personal relationship with a lawyer or party may disclose on the record the basis for the judge's disqualification and may ask the parties and their lawyers to consider whether to waive disqualification.[26] If the parties and lawyers agree that the judge should not be disqualified, the judge may participate in the proceeding. The agreement that the judge may participate in the proceeding must be put on the record of the proceeding.

III. Conclusion

Judges must decide whether to disqualify themselves in proceedings in which they have relationships with the lawyers or parties short of spousal, domestic partner, or other close familial relationships. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in determining what, if any, ethical obligations those relationships create under Rule 2.11: (1) acquaintanceships; (2) friendships; and (3) close personal relationships. In summary, judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances. Judges' disqualification in any of these situations may be waived in accordance and compliance with Rule 2.11(C) of the Model Code.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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CENTER FOR PROFESSIONAL RESPONSIBILITY: Dennis A. Rendleman, Ethics Counsel

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[26] Disqualification may not be waived if the judge has a personal bias or prejudice concerning a party or a party's lawyer. MODEL CODE R. 2.11(C).

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 489 **December 4, 2019**

Obligations Related to Notice When Lawyers Change Firms

Lawyers have the right to leave a firm and practice at another firm. Likewise, clients have the right to switch lawyers or law firms, subject to approval of a tribunal, when applicable (and conflicts of interest). The ethics rules do not allow non-competition clauses in partnership, member, shareholder, or employment agreements. Lawyers and law firm management have ethical obligations to assure the orderly transition of client matters when lawyers notify a firm they intend to move to a new firm. Firms may require some period of advance notice of an intended departure. The period of time should be the minimum necessary, under the circumstances, for clients to make decisions about who will represent them, assemble files, adjust staffing at the firm if the firm is to continue as counsel on matters previously handled by the departing attorney, and secure firm property in the departing lawyer's possession. Firm notification requirements, however, cannot be so rigid that they restrict or interfere with a client's choice of counsel or the client's choice of when to transition a matter. Firms also cannot restrict a lawyer's ability to represent a client competently during such notification periods by restricting the lawyer's access to firm resources necessary to represent the clients during the notification period. The departing lawyer may be required, pre- or post-departure, to assist the firm in assembling files, transitioning matters that remain with the firm, or in the billings of pre-departure matters.[1]

I. Introduction

As succinctly noted in ABA Op. 09-455, "Many lawyers change law firm associations during their careers." That opinion addressed the need to disclose to new firms information about clients of a departing lawyer in order to perform a conflict of interest analysis before the departing lawyer joins the new firm. This opinion discusses the ethical obligations of both a departing lawyer and their former firm in protecting client interests during the lawyer's transition. Such ethical obligations include providing the firm with sufficient notice of the intended departure for the firm and departing lawyer to notify clients, work together to ensure that the transition of files as directed by clients is orderly and timely, return firm property, update remaining firm staff/lawyers, and organize files that clients authorize to remain with the firm.[2] A departing lawyer's and law firm's agreement to cooperate in these matters post-departure is relevant in determining whether notice provided by such lawyer to the firm is consistent with these obligations and with Rule 5.6(a) as further discussed below. Ideally the firm will have written policies to provide guidance to lawyers about the procedures the firm anticipates following when a lawyer leaves the firm. This affords everyone some uniform expectations about working together to facilitate transitioning clients.

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2019. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-414 (1999) at n. 1 (clients should be given the option to stay with a firm, go with a departing attorney, or choose another firm altogether).

Firm partnership/shareholder/member/employment agreements cannot impose a notification period that would unreasonably delay the diligent representation of the client or unnecessarily interfere with a lawyer's departure beyond the time necessary to address transition issues, particularly where the departing lawyer has agreed to cooperate post-departure in such matters. Nor may a firm penalize a client who wants to go with a departing lawyer by withholding firm resources the lawyer needs to continue to represent the client prior to departure. Departing lawyers also have a duty, pre- or post-departure to cooperate with the firm they are leaving to assist in the organization and updating of client files for clients remaining with the firm, including docketing of deadlines, updating lawyers at the firm who will take over the file and the like, and similarly to cooperate reasonably in billing. A departing partner may be required to return or account for firm property, such as intellectual property, proprietary information, and hardware/phones/computers, and to allow firm data to be deleted from all devices retained by the departing attorney, unless the data is part of the client files transitioning with the departing lawyer.[3]

II. Analysis

A. The Lawyer's Obligation to Represent Clients Diligently

Lawyers must represent clients competently and diligently. Rule 1.3 provides:

> A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 3.2 similarly requires:

> A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

In addition to the duty to represent clients diligently, lawyers have an obligation to communicate relevant information to clients in a timely manner, according to Rule 1.4. This would include promptly notifying a client if a lawyer is changing law firm affiliations.[4] Law firms may not restrict a lawyer's prompt notification of clients, once the law firm has been notified or otherwise learns of the lawyer's intended departure. As noted in ABA Op. 99-414, "informing the client of the lawyer's departure in a timely manner is critical to allowing the client to decide who will represent him."[5] While the departing lawyer and the firm each may unilaterally inform clients of the lawyer's impending departure at or around the same time that the lawyer provides notice to the firm, the firm and departing lawyer should attempt to agree on a joint communication to firm clients with whom the departing lawyer has had significant contact, giving the clients the option of remaining with the firm, going with the departing attorney, or choosing another attorney.[6] In

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[3] *See* State Bar of Ariz., Formal Op. 10-02 (2010) ("When a lawyer's employment with a firm is terminated, both the firm and the departing lawyer have ethical obligations to notify affected clients, avoid prejudice to those clients, and share information as necessary to facilitate continued representation and avoid conflicts. These ethical obligations can best be satisfied through cooperation and planning for any departure.").

[4] *See* D.C. Bar Op. 273 (1997) (A lawyer has an obligation under Rule 1.4 to notify a client "sufficiently in advance of the departure to give the client adequate opportunity to consider whether it wants to continue representation by the departing lawyer and, if not, to make other representation arrangements.").

[5] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-414, *supra* note 2, at 2.

[6] *Id.* at n. 2 & 5; State Bar of Ariz., Formal Op. 99-14 (1999).

the event that a firm and departing lawyer cannot promptly agree on the terms of a joint letter, a law firm cannot prohibit the departing lawyer from soliciting firm clients.[7]

Some states, such as Florida and Virginia, have a specific Rule of Professional Conduct regarding such situations. For instance, Florida Rule of Professional Conduct 4-5.8(c)(1) provides:

> *Lawyers Leaving Law Firms.* Absent a specific agreement otherwise, a lawyer who is leaving a law firm may not unilaterally contact those clients of the law firm for purposes of notifying them about the anticipated departure or to solicit representation of the clients unless the lawyer has approached an authorized representative of the law firm and attempted to negotiate a joint communication to the clients concerning the lawyer leaving the law firm and bona fide negotiations have been unsuccessful.

Under the Model Rules, departing lawyers need not wait to inform clients of the fact of their impending departure, provided that the firm is informed contemporaneously. Law firm management and lawyers remaining at the firm may also contact clients to inform them of the lawyer's impending departure. The preferred next step is for the departing lawyer and the firm to agree upon a joint communication sent to the clients requesting that the clients elect who will continue representing them.

Departing lawyers should communicate with all clients with whom the departing lawyer has had significant client contact that the lawyer intends to change firms. "Significant client contact" would include a client identifying the departing lawyer, by name, as one of the attorneys representing the client.[8] A departing attorney would not have "significant client contact," for instance, if the lawyer prepared one research memo on a client matter for another attorney in the firm but never spoke with the client or discussed legal issues with the client. Similarly, remaining members of the firm may communicate with these clients, offering for the client to be represented by the firm, another firm, or the departing lawyer. Neither the departing lawyer nor the firm may engage in false or misleading statements to clients.[9]

B. Clients Determine Who Will Represent Them

Clients are not property. Law firms and lawyers may not divide up clients when a law firm dissolves or a lawyer transitions to another firm. Subject to conflicts of interest considerations, clients decide who will represent them going forward when a lawyer changes firm affiliation.[10] Where the departing lawyer has principal or material responsibility in a matter, firms should not assign new lawyers to a client's matter, pre-departure, displacing the departing lawyer, absent client direction or exigent circumstances arising from a lawyer's immediate departure from the

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[7] *See* Ill. State Bar Ass'n, Advisory Op. 91-12 (1991); Iowa Bd. of Prof'l Ethics Op. 89-48 (1990); State Bar of Mich., Inf. Op. RI-86 (1991); Tex. Comm. on Prof'l Ethics Op. 422 (1985); Va. State Bar, Legal Ethics Op. 1403 (1991); Wash. State Bar Ass'n, Advisory Op. 2118 (2006); RESTATEMENT OF THE LAW THIRD, THE LAW GOVERNING LAWYERS § 9(3)(a) (2000).

[8] *See* State Bar of Ariz., Formal Op. 99-14 (1999), *see also* RESTATEMENT, *supra* note 7, at § 9(3)(a)(i) (limiting solicitation by departing lawyer to "firm clients on whose matters the lawyer is actively and substantially working").

[9] *See, e.g.*, Va. Rules of Prof'l Conduct R. 5.8; MODEL RULES OF PROF'L CONDUCT R. 7.1.

[10] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-414, *supra* note 2; *see also* Heller Ehrman LLP v. Davis Wright Tremaine LLP, 411 P.3d 548, 555 (Cal. 2018) (noting "the client's right to terminate counsel at any time, with or without cause" and that "[t]he client always owns the matter") (citations omitted).

firm and imminent deadlines needing to be addressed for the client. Thus, clients must be notified promptly of a lawyer's decision to change firms so that the client may decide whether to go with the departing lawyer or stay with the existing firm and have new counsel at the firm assigned.

C. Firm and Departing Lawyer Obligations for Orderly Transitions

Law firm management also has obligations to establish reasonable procedures and policies to assure the ethical transition of client matters when lawyers elect to change firms.

Rule 5.1 provides:

> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

Firms may require that departing lawyers notify firm management contemporaneously with the departing lawyer communicating with clients, employees of the firm, or others about the anticipated departure so that the firm and departing lawyer may work together to assure a professional transition of the client matters. The orderly transition of a client matter may require the firm to assess if it has the capacity and expertise to offer to continue to represent the clients. If a departing lawyer is the only lawyer at the firm with the expertise to represent a client on a specific matter, the firm should not offer to continue to represent the client unless the firm has the ability to retain other lawyers with similar expertise.[11]

The firm and departing lawyer must coordinate to assure that all electronic and paper records for client matters are organized and up to date so that the files may be transferred to the new firm or to new counsel at the existing firm, depending upon the clients' choices. A departing lawyer who does not continue to represent a client nevertheless has the obligation to take "steps to the extent reasonably practicable to protect a client's interests."[12] This duty includes the departing lawyer updating files and lawyers at the firm who take over the representation, when possible. If exigent circumstances cause a lawyer's immediate departure from the firm, either voluntarily or involuntarily, relevant clients of that lawyer still must be notified of the departure and the firm should provide the lawyer with a list of their current and former clients for conflict-checking purposes. The departed lawyer and firm should endeavor to coordinate after the departure, if necessary, to protect client interests.

Firm management should establish policies and procedures to protect the confidentiality of client information from inadvertent disclosure or misuse.[13] The duty of confidentiality requires that departing attorneys return and/or delete all client confidential information in their possession, unless the client is transferring with the departing attorney. The exception to this requirement is for a departing lawyer to retain names and contact information for clients for whom the departing lawyer worked while at the firm, in order to determine conflicts of interests at the departing lawyer's new firm and comply with other applicable ethical or legal requirements. Rule 1.6(b)(7)

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[11] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1.
[12] *Id.* at R. 1.16(d).
[13] *Id.* at R. 1.6(c).

provides that a lawyer may disclose confidential information "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." Firms should have policies that require the deletion or return of all electronic and paper client data in a departing lawyer's possession, including on a departing lawyer's personal electronic devices, if the clients are remaining with the firm. Personal electronic devices may include, for instance, cell phones, laptop computers, tablets, home computers, jump drives, discs, cloud storage, and hard drives.

D. Reasonable Notice Periods Cannot Restrict Client's Choice of Counsel or the Right of Lawyers to Change Firms

Model Rule 5.6 prohibits restraints on a client's choice of counsel. The Rule provides:

> A lawyer shall not participate in offering or making:
>
> (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . .

Firms have an ethical obligation to assure that client matters transition smoothly and therefore, firm partnership/shareholder/member/employment agreements may request a reasonable notification period, necessary to assure that files are organized or updated, and staffing is adjusted to meet client needs. In practice, these notification periods cannot be fixed or rigidly applied without regard to client direction, or used to coerce or punish a lawyer for electing to leave the firm, nor may they serve to unreasonably delay the diligent representation of a client. If they would affect a client's choice of counsel or serve as a financial disincentive to a competitive departure, the notification period may violate Rule 5.6. A lawyer who wishes to depart may not be held to a pre-established notice period particularly where, for example, the files are updated, client elections have been received, and the departing lawyer has agreed to cooperate post-departure in final billing. In addition, a lawyer who does not seek to represent firm clients in the future should not be held to a pre-established notice period because client elections have not been received.

Case law interpreting Rule 5.6 supports the conclusion that lawyers cannot be held to a fixed notice period and required to work at a firm through the termination of that period. Financial disincentives to a competitive departure have routinely been struck down by the courts and criticized in ethics opinions. In *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411 (N.Y. 1989), the Court of Appeals of New York held that any provision that imposes a "significant monetary penalty" on an attorney who remains in private practice is the functional equivalent of a restriction on the practice of law, even though there is no express prohibition on competitive activities imposed on the withdrawing partner.[14] Courts routinely refuse to enforce provisions in partnership agreements or the like that restrict the right of a lawyer to practice law by means of financial disincentives to competitive departures. "[C]ourts will not enforce contract terms that violate

[14] *See* Pettingell v. Morrison, Mahoney & Miller, 687 N.E.2d 1237, 1238 (Mass. 1997) (reduction in payments based on the net worth of the firm); Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d 739, 741 (Tex. App. 1995) (same); Jacob v. Norris McLaughlin & Marcus, 607 A.2d 142, 146 (N.J. 1992) (reduced payments based on annual draws); Gray v. Martin, 663 P.2d 1285 (Or. Ct. App. 1983) (reduced share of future firm profits).

public policy . . . the foundation for Rule 5.6 rests on considerations of public policy, and it would be inimical to public policy to give effect" to provisions inconsistent with the rule.[15]

There is no meaningful distinction for the purposes of Rule 5.6 between an agreement provision that imposes a financial disincentive to a competitive departure irrespective of the pre-departure notice requirements and a provision that imposes a financial disincentive for the failure to comply with a fixed, pre-established notice period that extends beyond the time necessary, generally or in a particular case, to ensure an appropriate transition, as discussed above. "Although 'reasonable' notice provisions may be justified to ensure clients are protected when firm lawyers depart, what is 'reasonable' in any given circumstances can turn on whether it is truly the client's interest that is being protected or simply a thinly disguised restriction on the right to practice in violation of RPC 5.6(a)."[16] Moreover, to the extent that a firm routinely waives the full notice requirement, enforcement in a particular instance is problematic when used to penalize a lawyer who leaves to compete with the firm.[17]

E. Access to Firm Resources During Transition Period

After the firm knows that a lawyer intends to depart but such lawyer has not yet, in fact, left the firm, the lawyer must have access to adequate firm resources needed to competently represent the client during any interim period. For instance, the lawyer cannot be required to work from home or remotely, be deprived of appropriate and necessary assistance from support staff or other lawyers necessary to represent the clients competently, including access to research and drafting tools that the firm generally makes available to lawyers. A lawyer cannot be precluded from using associates or other lawyers, previously assigned to a client matter or otherwise normally available

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[15] Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358, 370 (Ill. 1998); *see also* Stevens v. Rooks Pitts and Poust, 682 N.E.2d 1125, 1130 (Ill. App. Ct. 1997) ("courts have overwhelmingly refused to enforce provisions in partnership agreements which restrict the practice of law through financial disincentives to the withdrawing attorney"); *Pettingell*, 687 N.E.2d at 1239 ("[t]he strong majority rule . . . is that a court will not give effect to an agreement that greatly penalizes a lawyer for competing with a former law firm"); Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston, 678 So.2d 765, 767 (Ala. 1996); *Gray*, 663 P.2d at 1290. *But see* Howard v. Babcock, 863 P.2d 150 (Cal. 1993). The Supreme Court of California reviewed a partnership agreement which provided that departing partners who competed in the Los Angeles area in the field of insurance defense during the year following their departure forfeited their entitlement to withdrawal benefits other than their capital accounts. The court upheld the forfeiture provision: "[a]n agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law." *Id.* at 156. The *Babcock* decision has been rejected by courts outside of California that have considered it. *Pettingell*, 687 N.E.2d at 1239 ("[c]ourts have not been attracted to the contrary view expressed in *Howard v. Babcock*"); *see also Stevens*, 682 N.E.2d at 1130–33; Zeldes, Needle & Cooper v. Shrader, 1997 WL 644908, at *6 n.6 (Conn. Super. Ct. 1997); *Whiteside*, 902 S.W.2d at 744 ("[w]e are unwilling to follow this distinctly minority position and abandon the concept of client choice that we believe remains the premise underlying DR 2-108"); RESTATEMENT, *supra* note 7, at § 13 RN to cmt. b. ("Only in California . . . are restrictive covenants in law-firm agreements enforced"); *but see* Capozzi v. Latasha & Capozzi, P.C., 797 A.2d 314, 320-322 (Pa. Sup. Ct. 2002) (holding that forfeiture for competition provisions were enforceable but striking down the clause at issue as unreasonable).

[16] Mark J. Fucile, *Moving On: Duties Beyond the RPCs When Changing Law Firms*, OR. ST. B. BULL. (June 2013); *see also* Borteck v. Riker, Danzig, Scherer, Hyland & Perretti LLP, 179 N.J.246, 260–261 (N.J. 2004) ("firms must guard against provisions that unreasonably delay an attorney's orderly transition from one firm to another").

[17] *See* Angela Morris, *Are Law Firms Invoking Obscure Contractual Clauses to Delay Lateral Moves? Or Does It Just Seem That Way?*, ABA J., Apr. 1, 2019.

to lawyers at the firm to represent firm clients competently and diligently during the pre-departure period.

Similarly, firms cannot prohibit or restrict access to email, voicemail, files, and electronic court filing systems where such systems are necessary for the departing attorney to represent clients competently and diligently during the notice period. Once the lawyer has left the firm, the firm should set automatic email responses and voicemail messages for the departed lawyer's email and telephones, to provide notice of the lawyer's departure, and offer an alternative contact at the firm for inquiries. A supervising lawyer at the firm should review the departed lawyer's firm emails, voicemails, and paper mail in accordance with client directions and promptly forward communications to the departed lawyer for all clients continuing to be represented by that lawyer.

F. New Matters Coming in During Transition Period

During the notification period the lawyer and firm should determine how any new matters or new clients coming into the departing attorney will be treated—as a new client (or matter) of the existing firm or the new firm. To avoid client confusion and disputes, the firm and departing lawyer should discuss and clarify how new client matters will be addressed at the time that the departing lawyer notifies the firm of the impending departure.

G. Conclusion

Lawyers have the right to leave a firm and practice at another firm. Likewise, clients have the right to switch lawyers or law firms, subject to the approval of a tribunal, when applicable (and conflicts of interest). The ethics rules do not allow non-competition clauses in partnership or employment agreements. Lawyers and law firm management have ethical obligations to assure the orderly transition of client matters when lawyers notify a firm they intend to move to a new firm. Firms may require some period of advance notice of an intended departure to provide sufficient time to notify clients to select who will represent them, assemble files, adjust staffing at the firm if the firm is to continue as counsel on matters previously handled by the departing attorney, and secure firm property in the departing lawyer's possession. Firm notification requirements, however, cannot be fixed or pre-determined in every instance, cannot restrict or interfere with a client's choice of counsel, and cannot hinder or unreasonably delay the diligent representation of a client. Firms also cannot restrict a lawyer's ability to represent a client competently during any pre-departure notification periods by restricting the lawyer's access to firm resources necessary to represent the clients during the notification period. Firms should not displace departing lawyers before departure by assigning new lawyers to a client's matter, absent client direction or exigent circumstances requiring protection of clients' interests. A firm's reliance on a fixed notice period set forth in an agreement either to attempt to require the lawyer to stay at the firm for that period or to impose a financial penalty for an early departure must be justified by particular circumstances related to the orderly transition of client matters and must account for the departing lawyer's offer to cooperate post-departure in these and other matters. Otherwise, a firm's imposition of a fixed notice period may be inconsistent with Rule 5.6(a).

Abstaining: Hon. Goodwin Liu.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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WHENCE LAWYER DISCIPLINE?

The origins and evolution of the Lawyers Professional Responsibility Board

Forty-eight years ago, the ABA Clark Report assayed lawyer discipline systems around the United States and proclaimed a crisis. This article traces the history of the Lawyers Professional Responsibility Board that Minnesota launched in response, and examines the changes it has undergone in the decades to follow.

By William J. Wernz

The Lawyers Professional Responsibility Board was born amid a national scandal and crisis. In 1970, the ABA Clark Report sounded the alarm, calling for reform of attorney discipline programs in the United States.

> This Committee must report the existence of a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.

Former U.S. Supreme Court Justice Tom Clark chaired the committee that studied discipline systems for three years. The Clark Report identified 36 problems and recommended corresponding changes. The report laid the foundation for new attorney discipline systems in most states. Most importantly, the Clark Report sent a clear message that new discipline systems were urgently needed.

When the Clark Report was issued, the MSBA and the Minnesota Supreme Court took immediate and comprehensive action. In 1970, acting on MSBA petitions, the Court signed orders: (1) adopting the new ABA Model Code of Professional Responsibility (the ethics rules); (2) creating the Lawyers Professional Responsibility Board; (3) appointing board members and the board's administrative director; (4) raising the attorney registration fee from $7 to $25 to finance the discipline system; and (5) adopting rules for discipline procedures. On February 1, 1971, the new system was up and running.

The Lawyers Board's creation became an ongoing process. The Minnesota Supreme Court adapted the Clark Committee process to Minnesota. Every 10 to 15 years, the Court appointed a committee to review the Lawyers Board and director's office. The committees issued reports, recommending changes in rules and practices. Additional, more frequent review processes were built into the professional responsibility system. We will take a closer look at these committees and at the board's first iteration, but first a look back at lawyer discipline in Minnesota before 1970 will set the stage.

The old days

The Roman poet Juvenal posed a famous, pointed question: "Who will guard the guardians?" As to Minnesota lawyers, answers to this question evolved over many decades.

In 1891, the Minnesota Legislature created the Board of Law Examiners (BLE). From the early 20th century until 1971, BLE was the petitioner in public lawyer discipline cases. There were not many. By mid-century, public discipline was imposed on attorneys about twice a year.[1]

Although the Minnesota Supreme Court always played the primary role in regulating the legal profession, the Legislature played a much greater role until the 1930s than it does today. A 1921 statute provided that complaints against lawyers were to be filed with the Supreme Court, and the Court was directed to appoint some person to investigate such complaints. In compliance with this statute, the Court adopted a rule providing that such complaints were to be investigated by BLE.[2]

The Legislature also enacted statutes of limitations for discipline cases. Initially, the Court regarded them as binding. In one discipline case the Court held, "This proceeding not having been instituted within one year of such discovery [or two years of occurrence], the charge is barred [by statute] and for that reason must be dismissed."[3]

Gradually, the Court came to assert that its inherent power includes regulation of the legal profession. Three cases—from 1908, 1936, and 1973—show the evolution of the Court's position. In the first case, the Court stated, in suspending a lawyer's license, "The courts are not agreed as to whether an attorney can be removed from office on other than statutory grounds." In the second case, the Court asserted regulation of attorneys as an inherent judicial power. In the third case, the Court held that legislative attempts to intrude on the court's authority to regulate lawyers were unconstitutional.[4] The legislative incursions in the third case involved both the financing of the lawyer discipline system and the setting of standards for professional conduct.

Beginning in the early 20th century, the MSBA played an important role in lawyer discipline. Although in many states lawyer membership in bar associations is compulsory, MSBA membership has always been voluntary and less than universal. By the 1920s, at least some MSBA District Ethics Committees (DECs) were formed and played important roles. The DECs undertook initial reviews and could dismiss complaints or issue private disciplines. The DECs referred serious matters to a statewide MSBA committee, which in turned referred some matters to BLE for prosecution.

Standards for attorney conduct evolved slowly. The earliest Minnesota discipline cases either did not cite authorities, or cited the common law and the attorney oath of admission.[5] As discipline cases slowly accumulated, precedents could be cited. In 1908, the ABA adopted the Canons of Professional Ethics. The canons were the first nationwide attempt at setting professional standards. Some canons were drafted as statements of principle, or even exhortation, rather than as specific rules whose violation would lead to discipline. Although the Minnesota Supreme Court gave the canons great weight, the Court did not adopt them until 1955. By 1961, the Court had also adopted rules for discipline procedures.

Setting the stage

How did the discipline process work in Minnesota in the 1960s? What problems existed? Answers to these questions will explain why the Lawyers Board was created.

On April 17, 1969, Kenneth M. Anderson wrote a letter to Chief Justice Oscar Knutson, sharing observations about the Minnesota system. Anderson was a Gray Plant lawyer who served as BLE chair, then as the first Lawyers Board chair. Anderson was "alarmed at what seems to me to be a failure of the self-policing system in Minnesota." The failure came from the inadequacy of volunteer efforts, the insufficiency of funding, the paucity of precedent for guidance, and a general unwillingness among lawyers to police themselves or to be critical of fellow lawyers. Anderson recommended increased financing, professional staff, provisions for probations, and review of district committee dismissals.

District committees had authority to investigate, dismiss, issue private disciplines, issue public reprimands, or refer matters to the MSBA statewide committee. There was wide variety in the procedures and effectiveness of these local committees.

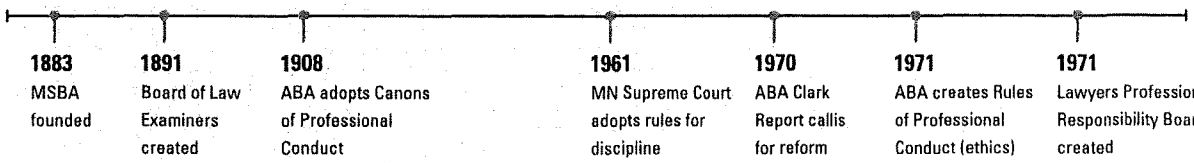
On October 23, 1969, the Court extensively amended the Rules for Discipline and Reinstatement of Attorneys. The amendments gave the MSBA statewide committee and the BLE more review authority.

In 1971, the first administrative director reported, "[W]e found that a number of the district committees were not functioning at all, and others were not functioning efficiently. We found that the committees were uncertain about procedures; they had no full-time central source to contact for advice or assistance. Too frequently, because of the awkward and underfinanced procedures, complaints did not receive the attention they should have received." The director also reported, "there were four district ethics committees which were not functioning at all" and "a great many of the committees were both confused and discouraged."[6] The primarily local character of attorney discipline procedures was reflected in what appears to be absence of a comprehensive, authoritative statewide list of licensed Minnesota attorneys until 1961.

In the early 1980s, as an assistant director at the Office of Lawyers Professional Responsibility (OLPR), I observed most district committees doing an excellent job. However, two cases showed me the inadequacy of primarily local systems. The first file was closed in the 1960s. A metro-area district committee had dismissed a complaint. The committee reasoned that because the lawyer had restored the client funds he had misappropriated, the problem had been resolved. By the 1980s, and today, there would be an audit of the entire trust account. There would be an investigation into whether the restitution followed or preceded detection of the shortage. Disbarment or suspension, rather than dismissal, would be the likely disposition.

The other case was charged in 1982, but the respondent's misappropriation of client funds stretched back years, even decades. The respondent practiced in a rural area. When I went there to investigate, I learned that everyone, including other lawyers, was afraid of the respondent. In the local probate court, lawyers had an honors system for checking out court files and the local probate judge for many years had been a farmer, not a lawyer. Court files relating to alleged misappropriations were missing. Respondent had apparently been stealing client money for decades, with impunity until the discipline proceeding. Everyone knew and no one did anything. A discipline trial resulted in findings of extensive misappropriation.

The Clark Committee recommended replacing local volunteer committees with a single, statewide committee that employed professional staff. Minnesota adopted a hybrid system.



The Minnesota discipline system prior to 1971 had structural and operational problems. Financing was an example of both types of problems. Before 1971, the system was financed by tax revenues, attorney registration fees, and contributions from the MSBA. The Court found this system "improper" for several reasons. The system covered all lawyers, but the MSBA contribution came solely from MSBA members. If the Court's claim to exclusive inherent authority was to be well-anchored, lawyers should provide financing, rather than the public. And the sum of financial support from lawyers was insufficient to support a central system and professional staff.

Delay was a perennial and most serious problem. Delay was built into a system that required transfers of cases from a local committee, to a state committee, to a state board, to a Supreme Court referee, to the Court itself. Delay was also built into a system that depended primarily upon voluntary lawyers, with busy schedules and little statewide oversight. The discipline procedure rules emphasized, then as now, "It is of primary importance to the members of the Bar and to the public that complaints involving alleged unprofessional conduct of attorneys be *promptly* investigated and disposed of..." (emphasis added).[7]

Development of uniform and appropriate standards was another challenge. Local volunteers sometimes showed favoritism toward misbehaving colleagues. Different districts treated the same misconduct differently. Even at the Supreme Court level, there were so few cases that, in Kenneth Anderson's words, "there is really no adequate body of common law to guide either the practicing lawyer or the various discipline agencies." For example, Anderson advocated for something we might assume always existed: "a rule adopted by the court stating that commingling of client funds with an attorney's own funds is improper..."

In Minnesota, the work of the Clark Committee was closely monitored. One Minnesota lawyer (John McNulty) was a committee member, and other Minnesota lawyers (especially Kenneth Anderson) closely watched the committee's work. In April 1969, 10 leaders of the Minnesota discipline system, including Justice Donald Peterson, attended an ABA conference in Chicago. They brought back to Minnesota an expectation, even prior to the report's release, that major changes were needed.

The system established in 1971 is in many ways structured like today's system, but there are important differences. The most important difference is that the 1971 system followed the model of state agencies, in which the board had primacy over both policy and cases. As the numbers of lawyers and cases greatly increased in the 1970s and 1980s, the involvement of the board in cases became unwieldy. In 1983, rules amendments shifted some responsibilities for cases from the board to the office now called "director" rather than "administrative director."

1971–1984

Minnesota's new system addressed many of the problems found by the Clark Report, but other problems required more time to address. In the board's early years, the procedural rules were frequently and extensively amended. Soon after adoption, for example, the rules were amended to provide for probation as a discipline disposition, to require district committees to notify the administrative director of the receipt of a complaint, and to add three public members to the board.[8] Minnesota became a leader by including public members on the Lawyers Board, District Ethics Committees, the Board on Judicial Standards, and the Client Security Board.

In 1977, amendments changed the district committees in several ways: (1) They no longer could dismiss complaints or issue private disciplines; (2) committee chairs would be appointed by the Court; (3) committees should have 20 percent non-lawyer members; and (4) committee reports were due 45 days after a complaint, rather than 90 days.[9]

1984–1986: Challenges and rebirth

In the mid-1980s, two developments created a turbulent chapter in the board's history.

The first development was rapid growth in the discipline system. In 1971, there were 400 complaints against lawyers and about a dozen public disciplines. In 1985, there were 1,244 complaints and 46 public discipline decisions. The system did not keep pace. The director's office became understaffed. Complaints were not handled promptly.

When I joined the office in 1981, there was a "file bank"—a large group of complaint files that were not assigned and were inactive. The problem was grave. "Prompt" disposition of complaints was, by rule, "of primary importance." The office was violating its own basic rule.

The explosive increase in complaints made some procedures and structures outmoded. Among these was the involvement of Lawyers Board hearing panels in numerous cases. For example, I presented a case in the early 1980s in which the director and a respondent attorney, represented by counsel, signed a stipulation in which misconduct was admitted and a specified discipline was recommended to the Court. Instead of filing the stipulation and disciplinary petition with the Court, however, by rule the director first had to present the matter to a board panel for approval. The panel conducted an evidentiary hearing before approving the stipulation. Rules to streamline procedures were badly needed.

The second development was that the director's office lost the confidence of many Minnesota lawyers. In 1984, an agenda item at the MSBA convention concerned whether to support the Lawyers Board's request that the Court increase the attorney registration fee to fund staff additions in the director's office. Staff was badly needed and the request should not have been controversial. However, scores of lawyers spoke against the proposal. The most common complaint was that the director's office did not proceed fairly in discipline cases.

A compromise was brokered. The fee increase would be approved. And the Court would appoint a committee to review the director's office and Lawyers Board, and to recommend changes. What began as an ad hoc solution to a serious but transitory problem became in-

Delay has been the most persistent problem. Since the 1980s, the Lawyers Professional Responsibility Board has had a policy that there should be no more than 100 files that are at least a year old. The most recently reported number of year-old files is 139.

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stitutionalized. The Court has appointed review committees every 10-15 years, not just to deal with a crisis, but to regularize the process of review and change.

The 1980s committee was, by far, the most important of the review committees. That committee worked long and hard with the Lawyers Board and the director to identify problems and recommend solutions. The work product, involving extensive amendments to the procedural rules, resulted in the essentials of a system that remains in effect today.

An important example of the streamlining of procedures in the 1980s involved rule amendments to reduce the number of hearings in certain cases. Going forward, petitions for discipline could be filed in the Court without board panel involvement where there were reasonable guarantees that a public accusation of serious wrongdoing had a substantial basis, such as criminal convictions, civil findings of fraud, admission of serious misconduct, or respondents' own waivers. The most serious cases received expedited treatment.

Then and now

By the mid-1980s, the essentials of the Minnesota lawyer professional responsibility system were in place. Perhaps surprisingly, the annual number of complaints has remained fairly stable. In 1985-87, the average was 1,189, while in 2014-6, the average was 1,239.

In recent decades, there have been many changes in the professional responsibility world. Technology has fostered great improvements, such as the board website. The law of lawyering has matured, with a wealth of research resources and case law precedents. Ethics expertise has become widespread in law schools, law firms, and among malpractice insurers. But the essentials of the system born nearly 50 years ago remain in place.

One of the essentials is review. The board's Executive Committee closely monitors the director's performance. From a greater distance, the Court's liaison justice monitors the system's performance. The board reviews the director's performance every two years and makes a recommendation to the Court regarding re-appointment. The director and board file annual reports. The board and the director have recently embarked on a five-year strategic planning process.

Delay has been the most persistent problem. Since the 1980s, the board has had a policy that there should be no more than 100 files that are at least a year old. In the early 1980s, there were regularly more than 200 such files, and many were consigned to the file bank. A staffing increase, streamlined rules, and other changes resulted in a long-term resolution of the problem. In 2008, however, a Supreme Court committee reported that there were about 150 year-old files and delay was the only serious problem in an otherwise well-functioning system. The report should have engendered reform, but instead the problem became much worse. By 2014 there were 231 year-old files. The alarm belatedly sounded and the Court, through its liaison justice, emphatically directed improvements. The most recently reported number of year-old files is 139.

The legal profession has come to occupy a very large place in American society. Effective professional regulation is a necessity. Nearly 50 years ago, bar and court leaders recognized the need and responded strongly and swiftly. And for over 30 years, review and improvement have been institutionalized, through periodic review committees and other procedures. With only a few exceptions, the review committees and processes have helped prevent repetition of the problems reported by the Clark Committee. ▲

Notes

[1] 3/15/1952 letter of Minnesota Supreme Court Clerk to U.S. Treasury Department.

[2] Section 5697 G. S. Minnesota (1921); Supreme Court Rule, adopted 5/20/1921.

[3] *In re Buck*, 214 N.W. 662, 662-3 (1927). The Court ceased recognizing the statute of limitations in discipline cases many years ago. *In re Heinze*, 233 Minn. 391, 395, 47 N.W.2d 123, 125 (1951).

[4] *State Bd. Of Law Exam'rs v. Hart*, 104 Minn. 88, 112, 116 N.W. 212, 214 (1908). *In re Tracy*, 197 Minn. 35, 266 N.W. 88 (1936). *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973).

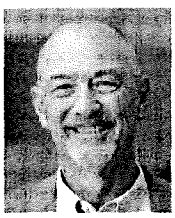
[5] *State Bd. of Examiners v. Dodge*, 93 Minn. 160, 100 N.W. 684, 689 (1904); *In re Lane*, 93 Minn. 425, 101 N.W. 613 (1904).

[6] R. B. Reavill, *District Ethics Committees*, Bench & Bar of Minn., Jan. 1972; R. B. Reavill, *Progress Report*, Bench & Bar of Minn., Feb. 1972.

[7] Rule 1, Rules of the Supreme Court for Discipline and Reinstatement of Attorneys, as amended 10/23/1969. The essence of this rule remains in effect today, but "fairness and justice" were added as primary values in or about 1987. Rule 2, Minn. R. on Lawyers Prof. Resp.

[8] R. B. Reavill, *Progress Report*, Bench & Bar of Minn., Feb. 1972.

[9] R. W. Bachman, Jr., *Report*, Bench & Bar of Minn., Jan. 1977.



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