LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING AGENDA

July 28, 2023 – 1:00pm (in person and viz Zoom) – Minnesota Judicial Center

Lunch provided for Board members 12:00pm

Members of the public wishing to attend via Zoom are invited to contact Board Chair Benjamin Butler for information: Ben.Butler@pubdef.state.mn.us

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1. Approval of minutes of April 27, 2023, meeting (attachment 1).

2. Introduction of new member Kevin Magnuson.

3. LPRB reports:

   a. Rules Committee – Dan Cragg

      - Draft LPRB Opinion re: ABA Opinion 502 (attachment 2);
      - Update on referral from Justice Thiessen.

   b. Rule 3.8 Working Group – Michael Friedman

   c. Chair - Request from Hennepin Co. Adult Representation Services to consider recommending amendments to Rule 1.8 (attachment 3)

4. New business:

   a. Discussion item: *In re Mose*, A20-0198 (attachment 4 (Minnesota Supreme Court opinion); attachment 5 (LPRB panel recommendation)).

   b. Discussion item: whether to return to 6 panels in January 2024.

5. Director's report.

6. Open discussion.

7. Adjournment.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING

OPEN MEETING MINUTES

April 28, 2023. 1:00 p.m. (in-person and via Zoom) at the Minnesota Judicial Center

Lunch provided to Board and OLPR members 12:00 p.m.

Attendance

Board Members

- Ben Butler, Chair
- Susan Rhode, Vice-Chair
- Antoinette Watkins, Executive Committee member
- Landon Ascheman
- Dan Cragg
- Katherine Brown-Holmen
- Michael Friedman
- Jordan Hart
- Tommy Krause
- Paul Lehman
- Frank Leo
- Melissa Manderscheid
- Kristi Paulson
- William Pentelovitch
- Matthew Ralston
- Andrew Rhoades
- Wendy Sturm
- Sharon VanLeer
- Bruce Williams

Not Present:

- Mark Lanterman
- Carol Washington

Minnesota Supreme Court Liaison

- Natalie Hudson, Supreme Court Justice and liaison to the Office of Lawyers Professional Responsibility (OLPR) and Lawyers Professional Responsibility Board (LPRB)

Other Attendees:

- Susan Humiston, Director of the Office of Lawyers Professional Responsibility
- Members of OLPR staff and other members of the public.

Minutes:

Board members introduced themselves based on an influx of new members and holding these meetings in-person. Discussions of attorneys Geri Sjoquist and Sumbal Mahmud leaving the board and the need to replace them.

Approval of prior meeting minutes

The board approved the minutes from the January 27, 2023 open meeting.

Status of ABA Recommendations before the Minnesota Supreme Court

Justice Hudson mentioned she and the entire Supreme Court was impressed and pleased with the Board's and OLPR Director's responses to the ABA report. She expressed confidence in Chair Butler's quality of work, oral arguments, and preparation included in the board's report. Both the Board's and Director Humiston's replies to the ABA report were helpful to the Supreme Court that is still deliberating on that matter. The Supreme Court has met several times related to the ABA report, considers this initiative to be a high priority, and is making progress towards a final decision.

There are two important recommendations before the Court. The first is the recommendation to eliminate Rule 5A that deals with the board's role in recommending the OLPR Director's continuing service. The Supreme Court considers this unnecessary since the director is an at-will employee and serves at the pleasure of the Supreme Court. The second matter is to eliminate the Board's role under Rule 5B to authorize the director to make hiring decisions. The Court, ABA, Board, and the Director all agree that eliminating these requirements is a logical next step, it is thought to reduce conflict and improve the relationship between the Board and Director and aligns Minnesota with other states. Therefore, effective immediately, the director will no longer need the Board's approval to hire employees and the Board will not be asked to make recommendations on the Director's continuing service.

A Court decision will follow shortly. The Court feels strongly that a good working relationship between the Board and Director is necessary for a well-functioning lawyer disciplinary system.

Strategic plan

Chair Butler mentioned the Board will write an annual report to the Minnesota Supreme Court. He discussed the Board's findings of fact and conclusions of law writing seminar occurring on March 17, 2023 at the Minnesota Judicial Center with Appellate Court Judges Diane Bratvold and Theodora Gaitas. Both judges reported enjoying the session and the engagement with members.

Discussions occurred surrounding the organization of five versus six panels.

Member Bruce Williams mentioned a benefit of keeping five panels, typically with four members, is that panels can source changes to panelists conducting business internally versus soliciting members from another panel. He explained this is important to organize panels in this manner when an influx of new members join the LPRB and until such time panels gain more experience.

Member Andrew Rhoades agreed with Williams and suggested a downside of organizing with less panels is that the board accomplishes less work, meaning from a productivity standpoint, we accomplish less work and may contribute to backlogs.

Member Melissa Manderscheid asked if a technology committee should be included in the strategic plan.

Media policy

There was robust discussion, all agreeing that a media policy for the LPRB is necessary. The Director of the Minnesota Judicial Branch of Public Affairs assisted the board with formulating the existing media policy, currently on its sixth revision. Chair Butler presented the policy to the Board and invited comment.

Member Paul Lehman mentioned he agreed with the policy, but wanted clarification on the portion of the policy letter mentioning that Board members should "initially decline" comment to a reporter and further clauses that explained a Board member must immediately refer all inquiries in writing to the Board Chair or Vice Chair. Chair Butler clarified the intention of the policy letter is to guide members to state there is no comments on the record and that the member would circle back to the report after conferring with the Chair or Vice Chair. Discussions ensued whether Board members could or could not engage in discussions with the media. Member Lehman interpreted the policy letter to restrict members from speaking with the media.

Member Landon Ascheman suggested changing the order of bullet comments, specifically including the fourth bullet comment to appear first.

Executive Committee Member Antoinette Watkins was in favor of defining what constitutes immediately.

Member Bruce Williams explained these occurrences may not happen during the typical Monday-Friday, working hours' time period. He later explained to new members the past history of a Board member speaking to the press about internal matters that reduced trust and confidence from the Supreme Court in our ability to act as a Board. Both he and Justice Hudson explained the inappropriateness of sharing confidential information and internal matters publicly.

Member Melissa Manderscheid clarified that oftentimes reporters will divulge their deadlines to publish. She suggested members can reply that it was not appropriate for them to comment, but will have someone else get back to the reporter. Melissa also asked if a 1st Amendment review

was done on the media policy, which Justice Hudson stated the Supreme Court's legal department reviewed and supports the existing policy before the Board.

Member Andrew Rhoades suggested the Board consider signing non-disclosure agreements reinforcing the need to impress upon members the importance of keeping confidences.

Member Landon Ascheman wanted clarification whether lawyers presenting continuing legal education (CLE) credits and fielding general questions from the media would be considered violations to this policy. Vice Chair Susan Rohde responded by mentioning that members sometimes provide inaccurate information inferring the policy letter presented before the Board would be valuable.

Following substantive suggestions by members Kristi Paulsen, Wendy Sturm, and Sharon Van Leer surrounding the benefits of non-disclosure agreements that are used in education spaces, the importance of addressing 3rd party leaks to the press, and explaining the consequences of violating the media policy.

Justice Hudson mentioned the Supreme Court was considering whether to investigate the leak to the media, but concluded it was not a good use of resources. She appreciated Member Williams's and other members' comments capturing the importance of a board that respects privacies and keeps confidences.

Following a professional dialogue, the existing media relations policy letter passed unanimously.

Rules committee update

Member Dan Cragg implored other attorney members to assist and join him on the rules committee. He explained based on the work before him, he did not have enough help with attorney volunteers. Since Geri left the board and the low participation, Dan was concerned about the level of service and quality he alone could devote to this important committee.

Chair Butler mentioned Carrie Washington expressed a desire to serve on the rules committee with Dan.

Great Northern Innocence Project

Chair Butler explained the Great Northern Innocence Project wants to work with the LPRB to amend Rule 3.8 of the Minnesota Rules of Professional Conduct (MRPC) pertaining to special prosecutor responsibilities. Discussions between Chair Butler and OLPR Director Humiston concerning the value of considering this rule change and were perplexed why a previous initiative stalled. Director Humiston stated Colorado was considering or implemented a rule change and Minnesota might considering following suit. Chair Butler suggested that a workgroup not only consider the Innocence Project proposal, but also look at Rule 3.8 more holistically.

Following discussions, the following members agreed to serve on this workgroup:

- Michael Friedman (team leader)
- Landon Ascheman
- Frank Leo
- Melissa Manderscheid

Chair Butler asked that this group provide an update to the Board by the next meeting in July and a final deliverable by the October Board meeting.

ABA Model Rule version of MRPC Rule 1.8(e)

Another workgroup is forming that addresses Rule 1.8(e), gifts to lawyers from clients. Chair Butler presented information to the Board in writing and also displayed before the group outlining the replacement of Minnesota Professional Conduct Rule 1.8(e) with the ABA Model Rule version of Rule 1.8(e).

Vice Chair Susan Rohde or Member Melissa Manderscheid stated the Minnesota State Auditor took a position similar to this subject (i.e., gift cards) and that we may want to consult this position.

Member Matthew Ralston will lead this workgroup.

LPRB 2024 meeting dates

Following a brief discussion from various members related to amending the existing meeting cadence, the Board unanimously approved "option B," which sets meeting times in January, May, September, and December. This schedule avoids summer meeting dates. As presented to the Board, the only change included a May 17, 2024 date opposed to the May 24, 2024 time period presented in the Board's materials.

Director Susan Humiston's update

Director Humiston explained complaints are increasing, cases meriting investigations are increasing, and a category of complaints not included in the existing OLPR dashboard includes complaints closed when complainants do not respond to requests for clarification by the OLPR. These cases are reflected in the Board materials as CO12 closed YTD.

Director Susan Humiston mentioned Binh Tuong was promoted to OLPR Deputy Director. As such and aligned with the ABA's recommendations, Susan is delegating more responsibilities and authorities to Ms. Tuong. Binh will now approve (sign) dismissals and admonitions. Susan will retain dismissal authorities for summary dismissals. Susan lauded Krista Barre as a new managing attorney, coming to the OLPR from the Minnesota State Attorney General's office. Ms. Humiston stated Nicole Frank would assume managing responsibilities of trust accounts work.

Director Humiston mentioned an OLPR retired paralegal would return to provide the office paralegal training to existing staff. Susan stated that over 505 of her office participated in trauma-related training sponsored by Lawyers Concerned for Lawyers. Director Humiston recommends this training.

Director Humiston provided a budget update and forecast to the Board. She mentioned the OLPR is funded by attorney registration fees, not by legislative activity (i.e., taxes). She is concerned about competitive advantage and attracting talent compared with other offices such as Dakota County. She projects that by 2024, she will face a shortfall of $200,000 after including a $1.5 million transfer by the Client Security Board. Payouts expected to longstanding employees in the next year could impact her budget. Along this vein, she suggest it might be appropriate to charge a fee for a trust account school (training). Within this context, Ms. Humiston mentioned pausing work on the OLPR website until such time clarification could be reached concerning the separation of the OLPR and LPRB.

Director Humiston requested Board input to the annual seminar on September 22, 2023 at the Wilder Center. She mentioned ABA formal opinion 504 Choice of Law, ABA Model Rule 8.5 and impacts to lawyers having national practices, as well as Colorado and Rule 3.8D that addresses disclosure of information in a timely manner. Related to a comment made by Member Landon Ascheman, Director Humiston stated that the OLPR can open an investigation when a complaint is not filed. If a Court issues an opinion, the OLPR does not have to seek the Executive Committee's consent to open an investigation under these circumstances. The OLPR would seek Board approval only if the result is likely to lead to public discipline.

Member Bill Pentelovitch asked Director Humiston to clarify a circumstance he experience in a footnote to a Judge's decision implicating a Minnesota lawyer. The correct action, as implemented by Bill, was to surface this to Susan's attention. Another matter related to Susan exercising jurisdiction in matters related to federal criminal complaints against lawyers not from Minnesota. Susan consulted with the U.S. Justice Department and yes, the place in which the infraction occurred can trigger local authorities to investigate the infraction. In other words, where the lawyer practiced has jurisdiction. Bill mentioned this occurred under a pro hac vice circumstance, a legal term that includes an attorney to a case in a jurisdiction in which he or she is not licensed to practice in such a way that the attorney does not commit the unauthorized practice of law.

Member Bruce Williams asked Director Humiston about the federal RICO statute. Susan mentioned a recent tragic case when the U.S. Attorney charged an attorney for healthcare fraud to later took his life a day before trial. Bruce also explained Board members should check their junk or spam mail as complaints have sometimes been sent to members' spam files.

Chair Butler concluded the meeting with a review of Board timeliness of appeal cases on average, taking 20 days.

Chair Butler moved to adjourn the board meeting. Member Williams seconded, with the Board unanimously approving the motion.

DRAFT (July 25, 2023)

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

# # # #

Opinion on American Bar Association Formal Opinion 502

Communication with a Represented Person by a *Pro Se* Lawyer

On September 28, 2022, the American Bar Association issued its formal opinion 502.[1] This new ABA Opinion 502 significantly expands the scope of ABA Model Rule 4.2 by asserting that the *pro se* lawyer does represent "a client". This opinion is unusual in that it contains a dissent since this expansion of ABA Model Rule 4.2 was made with without regard to the important operative language of "In representing a client…" The instant Opinion adopts the position of the dissent in ABA Opinion 502 in order to eliminate any ambiguity in the meaning of Minnesota Rule of Professional Conduct 4.2 (MRPC 4.2)

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

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

DRAFT

More specifically, MRPC 4.2 provides that "*In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has consent of the other lawyer or is authorized to do so by law or court order*."

MRPC 4.2 has long served the overriding, critical interests of eliminating improper overreach with less sophisticated clients, interfering in other lawyers' relationships with their clients, and from eliciting uncounseled disclosure of protected information.

ABA Opinion 502 provides that *pro se* lawyers are now also subject to the Rule 4.2, notwithstanding the fact that the *pro se* attorney is not representing an actual third-party client as directly contemplated by Model Rule 4.2. In expanding the reach of 4.2 to *pro se* attorneys ABA Opinion 502 recites the same policy rationale underlying the original ABA Model Rule 4.2: eliminating overreach, interfering with another attorney's relationship with his or her client, and eliciting uncounseled disclosures.

The dissent in ABA Opinion in no way disputes these important, common-sense policy prerogatives that promulgate the proper functioning of Minnesota's legal system. Indeed, as a general matter, the Minnesota Rules of Professional Conduct have traditionally hewed closed to the carefully developed ABA Model Rules. However, in this instance, the LPRB believes the dissent in ABA Opinion 502 is persuasive.

The LPRB agrees with the dissent because both ABA Model Rule 4.2 and MRPC 4.2 are premised on the antecedent language of "*In representing a client,…*"As the dissent

succinctly asserts, the *pro se* attorney is simply not representing a client as the term "client" is typically understood.

As a practical matter and under common understanding, a "client" is typically known as "a person who employs or retains an attorney, or counsellor, to appear for him [her] in courts, advise, assist, and defend him in legal proceedings, as to act for him in any legal proceedings, and to act for him in any legal business. It should include one who disclosed confidential matters to attorney while seeking professional aid, whether the attorney was hired or not."[2]

There is no question ABA Opinion 502 addresses important policy reasons why ABA Model Rule 4.2, and by extension, MRPC 4.2 should be expanded to *pro se* attorneys. However, before that should happen, the prefatory language of 4.2 must be changed or amended as appropriate before an unsuspecting Minnesota attorney is unfairly snared under ABA Opinion 502. Minnesota attorneys deserve – and the Minnesota Supreme Court is required, to provide clear notice in the exact language of MRPC 4.2 itself.

It is the opinion of the LPRB that the *pro se* attorney should not face discipline under MRPC 4.2 unless and until the language of "In representing a client" is appropriately changed or modified under the supervision of the Minnesota Supreme Court following appropriate input from all stakeholders.

DRAFT

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

# # # #

DRAFT

To: Ben Butler, Chair, LPRB
From: Jeanette Boerner, Hennepin County Adult Representation Services
Re: Minn. R. Prof. Conduct 1.8(e)

As you know, I am the Director of Hennepin County Adult Representation Services. We are an independent county organization that provides advocacy to clients experiencing poverty in civil matters where they are entitled to an attorney. We connect our clients to resources to support them in achieving self-sufficiency and serve as advocates to protect their rights both in and outside of court.

My department received a federal grant (our project is called HELP- Health Equity Legal Project) to support pregnant parents with the goal of avoiding child protection engagement. We provide legal and social service support and have a parent mentor with lived experience assigned to each client. It's exciting and I am hopeful it will change the trajectory for BIPOC families who are grossly overrepresented in the child-protection and housing justice system.

I struggle with the ethical rules on gifts and want to make sure we are walking a clear line on this. We have restrictions with the grant but are permitted to provide a host of services to clients that involve paying for basic needs such as respite childcare, transportation, phone service, temporary housing, etc. We will not distribute this money directly to the clients either using a contracted vendor or paying the business directly. But to me, this could be interpreted as a gift even though it is our agency not the attorney giving the money. Providing temporary economic resources is key to the success of our program.

Minnesota Rule of Professional Conduct 1.8(e) provides that:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client.

I respectfully request that the Board consider recommending that the Minnesota Supreme Court replace our rule with the ABA Model Rule version of Rule 1.8(e). That rule provides:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
>
> (3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:
>
> (i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;
> (ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and
> (iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.
>
> Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

I submit that the ABA Model rule is much more compassionate and realistic than Minnesota's rule. Adopting it would allow our agency and similar agencies to dramatically improve the lives of indigent Minnesotans. Thank you for your consideration.

STATE OF MINNESOTA

IN SUPREME COURT

A20-0198

Original Jurisdiction | Per Curiam
Dissenting, Thissen, Chutich, JJ.

In re Petition for Reinstatement of
William G. Mose, a Minnesota Attorney,
Registration No. 125659.

Filed: July 12, 2023
Office of Appellate Courts

Edward F. Kautzer, Ruvelson & Kautzer, Ltd., Roseville, Minnesota; and

Daniel S. Kufus, Kufus Law, LLC, Roseville, Minnesota, for petitioner.

Susan M. Humiston, Director, Office of Lawyers Professional Responsibility, Saint Paul, Minnesota, for respondent.

S Y L L A B U S

A suspended attorney who proves that he has undergone the requisite moral change but fails to establish that he has the intellectual competence to practice law is not entitled to reinstatement, notwithstanding the attorney's agreement to resign his license upon reinstatement.

Petition denied.

Considered and decided by the court without oral argument.

O P I N I O N

PER CURIAM.

This petition presents a question of first impression: does our traditional test for attorney reinstatement apply when an attorney agrees that upon reinstatement, he will resign his law license and not apply for admission or re-admission to practice in any jurisdiction? We hold that under these circumstances, it does. Applying our traditional reinstatement test, we conclude that although petitioner William G. Mose has proven the requisite moral change for reinstatement, he has not demonstrated that he has the intellectual competence to practice law. We therefore deny the petition for reinstatement.

FACTS

Mose was admitted to the practice of law in Minnesota in 1980. But Mose did not begin practicing law until 1984, when he opened a solo law practice in the Twin Cities area. In 1986, he moved his law practice to the Pequot Lakes area, focusing primarily on family law. In 1989, Mose moved his practice back to the Twin Cities area.

Disciplinary History

Mose engaged in the active practice of law for only 5 years—1984 to 1985, and 1986 to 1990. In those 5 years, the Director of the Office of Lawyers Professional Responsibility received 19 complaints against Mose, all of which resulted in discipline.

In 1988, the Director received three complaints against Mose involving incompetence, client neglect, and failing to follow court orders. On July 19, 1989, based on a stipulation for discipline, we publicly reprimanded Mose and placed him on supervised probation for 2 years, subject to several conditions, including completion of a

trial advocacy course. *In re Mose (Mose I)*, 443 N.W.2d 191, 191–92 (Minn. 1989) (order). Our order provided for Mose's immediate suspension if he failed to comply with those conditions. *Id.* at 192.

In 1990, the Director petitioned to revoke Mose's probation for failing to comply with probation conditions and for additional client-related misconduct involving incompetence, failure to adequately communicate with clients, and false statements to clients. On July 16, 1990, we indefinitely suspended Mose from the practice of law for failing to comply with the terms of probation. *In re Mose (Mose II)*, 458 N.W.2d 100, 100 (Minn. 1990) (order).

While Mose was suspended, the Director filed a petition alleging that Mose committed additional misconduct in eight more client matters. The allegations involved incompetence, client neglect, lack of diligence, false statements to clients, failure to adequately communicate with clients, failure to account for or refund unearned retainer fees, failure to secure client consent before transferring client files to substitute counsel, failure to comply with the requirements of Rule 26, Rules on Lawyers Professional Responsibility (RLPR), and failure to cooperate with the Director's investigations.

On May 20, 1991, based on a stipulation for discipline, we suspended Mose for a minimum of 5 years, retroactive to the date of his original suspension. *In re Mose (Mose III)*, 470 N.W.2d 109, 109–10 (Minn. 1991) (order). Reinstatement was conditioned upon, among other things: successful completion of the entire bar exam; full compliance with the terms of probation set forth in our July 1989 order; and refunding certain unearned client retainers. *Id.* at 110.

In addition to the public reprimand and suspensions detailed above, Mose received four admonitions between June of 1989 and August of 1990 for client neglect and failure to adequately communicate with clients.

Reinstatement History

In 2007, Mose filed a petition for reinstatement to the practice of law; the Director opposed the petition. We concluded that Mose should not be reinstated to the practice of law because Mose failed to (1) satisfy several of the previous conditions of reinstatement, (2) prove that he had undergone the requisite moral change, and (3) prove that he is competent to practice law. *In re Mose (Mose IV)*, 754 N.W.2d 357, 359 (Minn. 2008).

In 2012, Mose again filed a petition for reinstatement; the Director again opposed the petition. We once more concluded that Mose should not be reinstated to the practice of law. *In re Mose (Mose V)*, 843 N.W.2d 570, 577 (Minn. 2014). First, we observed that Mose had failed to complete a trial advocacy course as required by a condition of his suspension. *Id.* at 574.

With respect to moral change, we concluded that Mose "has not established that he has changed either his conduct or his state of mind that resulted in his misconduct." *Id.* at 575. We noted the significant length of time that Mose had taken before trying to locate his former clients to make restitution. *Id.* We also noted that Mose had continued to demonstrate neglect and lack of diligence in his volunteer and student-teaching positions. *Id.* at 576. Additionally, we observed that Mose had no "deliberate plan to return to the practice of law [nor] systems in place to avoid future misconduct." *Id.*

Finally, we concluded that Mose had still not demonstrated his intellectual competence to re-enter the practice of law. Despite passing the bar exam an additional time (the third since his suspension), "[w]e conclude[d] that when an attorney is suspended for incompetence and lack of diligence, and has not practiced law for an extended period of time, the attorney must not only pass the bar examination, but also demonstrate legal reasoning and case management skills through paid- or volunteer-work experience." *Id.* at 577 & n.1. Although we noted that "[a] petitioner need not work at a law firm or as a paralegal to prove he or she is competent to practice law," *id.* at 576, Mose had not shown any work experience that required legal reasoning and case management:

> Mose has neither worked in a law-related field nor demonstrated through his part-time volunteer work that he has the intellectual competence to practice law. . . . Since his suspension 23 years ago, Mose has not had any full-time employment. Instead, he has worked on average 25 hours per week officiating sporting events, a job he retired from in 2013. Given the length of time since Mose has practiced law, his lack of legal employment since his suspension, and the type of work he performed as a volunteer, the panel's conclusion that Mose lacks the competence to practice law is supported by the record.

Id. at 577.[1]

Current Reinstatement Proceedings

Mose filed his current petition for reinstatement in February 2020. The matter was investigated by the Office of Lawyers Professional Responsibility, and the Director prepared her report on the petition.

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[1] In addition to the reinstatement petitions described above, Mose also petitioned for reinstatement on two other occasions: once in April 2005, and again in August 2018. Mose withdrew those petitions before consideration by our court.

In her report, the Director indicated that Mose has stated that he does not intend to practice law. Describing the case as "unique," the Director concluded that Mose "has not established his intellectual competency to practice law," and that his last passage of the bar examination was in 2010, and therefore not current.[2] However, the Director recognized that "those facts, while conditions for reinstatement, may be appropriate for a Court waiver since petitioner does not plan to practice law."

The Director also noted that Mose had "taken numerous and specific steps indicative of a specific plan to work in a law adjacent field," namely his desire to become an alternative dispute resolution (ADR) neutral. The Director explained that Mose plans to provide mediation services to parents who are having trouble with their children following a divorce.

Although the Director opined that she had "not yet seen the moral change required of a petitioner," she acknowledged that "[i]f petitioner is able to meet his burden" to demonstrate moral change, "the Director would not challenge that determination if petitioner's readmission was also conditioned on the immediate resignation of his license . . . and provided the Court is willing to waive the requirements of a current bar exam score and competence to practice law."

A panel of the Lawyers Professional Responsibility Board held a hearing on October 18, 2021. At the hearing, Mose informed the panel that he sought reinstatement

[2] For this assertion, the Director relied on Rule 6(J), Rules for Admission to the Bar, which provides that "[a] passing score on the Minnesota Bar Examination is valid for 36 months from the date of the examination. Applicants must be admitted within 36 months of the examination."

in order to resign from the practice of law and practice as an ADR neutral providing early neutral evaluation services. Mose explained that he wished to be reinstated and resign so that he could be placed on the Minnesota Judicial Branch's roster of qualified neutrals, which he is prohibited from joining with a suspended law license. *See* Minn. Gen. R. Prac. 114.12, subd. 2(a) (stating that a person whose "professional license has been suspended or revoked" may not be placed on the roster of qualified neutrals).

The panel received 37 exhibits and heard the testimony of Dr. Paul Reitman (a forensic psychologist), Janet Goehle (an ADR practitioner), and Mose himself. Dr. Reitman testified that he diagnosed Mose with generalized anxiety disorder and social phobia. Dr. Reitman attributed Mose's prior misconduct to his mental health, explaining, "[e]very time he was meeting with a client, it was not a pleasurable, positive experience for him. That's why he avoided them so much because he didn't know how to deal with people on that kind of basis." Dr. Reitman explained that Mose cooperated with a mental health treatment plan, and between 2020 and 2021, Mose had undergone a "transformation" where he recognized the wrongfulness of his conduct. Dr. Reitman testified that Mose's mental health symptoms were "in remission" due to his "transformation" and opined that Mose "can handle what he wants to do with the proper support."

Goehle testified that she had reviewed Mose's business plan for an ADR practice and felt that it was a satisfactory plan for Mose's proposed practice. Goehle explained that Mose has all of the training necessary to provide early neutral evaluation services and to apply for the qualified neutral roster. Goehle stated that she was aware of Mose's

disciplinary history but felt that working within the field of early neutral evaluation was a good way for Mose to start his ADR practice.

Finally, Mose testified that he had remorse, shame, and guilt for his misconduct. Mose stated, "I did a very bad job, and I have remorse for it. I feel bad from a lawyer's perspective, and morally I didn't treat people well. They expected a good lawyering job, and I did not do well." Mose stated that he thinks "a lot" about the harm that he caused to his clients.

Mose also testified about the steps he had taken to prepare for a career in ADR, noting that he took family law CLEs, familiarized himself with the ADR ethics rules, set up an office, and obtained liability insurance. Mose also stated that he had familiarized himself with the early neutral evaluation process through his job with Hennepin County Family Court Services. Mose explained that he will have a support system in Goehle and agreed to see a counselor at least once a month. Mose also expressed openness to taking medication for his mental health issues.

The panel recommended reinstatement, but with the condition that Mose immediately resign his law license upon reinstatement. The panel concluded that Mose demonstrated moral change by clear and convincing evidence, possessed the competence to practice law, and had satisfied all court-ordered conditions for reinstatement.

The Director filed the panel's findings, as well as a stipulation for reinstatement and resignation entered into between the Director and Mose. In the stipulation, the parties jointly recommend that the appropriate disposition is reinstatement, with Mose simultaneously moving to resign his license pursuant to Rule 11, RLPR, and agreeing not

to apply for admission or re-admission to practice law in Minnesota or any other jurisdiction.

ANALYSIS

"The responsibility for determining whether a petitioner will be reinstated rests with this court." *In re Kadrie*, 602 N.W.2d 868, 870 (Minn. 1999). While we consider a panel's recommendation, "we are not bound by it." *In re Tigue*, 960 N.W.2d 694, 699 (Minn. 2021).

While this petition presents unique circumstances, we begin with our traditional reinstatement test. In a petition for reinstatement, the petitioner bears the burden of proving: (1) moral change; (2) compliance with the conditions of suspension; and (3) compliance with the requirements of Rule 18, RLPR.[3] *In re Stockman*, 896 N.W.2d 851, 856 (Minn. 2017). "In addition to these requirements, we weigh five other factors: the attorney's recognition that the conduct was wrong, the length of time since the misconduct and suspension, the seriousness of the misconduct, any physical or mental pressures 'susceptible to correction,' and the attorney's 'intellectual competency to practice law.' " *Id.* (quoting *Kadrie*, 602 N.W.2d at 870).

I.

We have long held that demonstrating moral change "is the most important factor in the determination of whether to reinstate an attorney." *Stockman*, 896 N.W.2d at 857

[3] No party contests that Mose has complied with the requirements of Rule 18, RLPR (except the requirement to pass the bar exam, Rule 18(e)(1), RLPR, which we discuss below). We therefore do not address that element in our analysis.

(citing *In re Reutter*, 474 N.W.2d 343, 345 (Minn. 1991)). To establish moral change, a petitioner must show: (1) "remorse and acceptance of responsibility for the misconduct"; (2) "a change in the [petitioner's] conduct and state of mind that corrects the underlying misconduct that led to the suspension"; and (3) "a renewed commitment to the ethical practice of law." *Mose V*, 843 N.W.2d at 575. "These changes must be genuine, and not contrived or superficial." *Id.* We believe that Mose has satisfied all three elements of moral change.

A.

In 2014, we recognized no evidence demonstrating Mose's remorse and acceptance of responsibility for his misconduct. *Id.* at 575–76. In the present proceedings, however, Mose voiced unequivocal remorse for his misconduct and the impact that it had on his clients. As Mose bluntly put it, "I did a very bad job, and I have remorse for it." Mose also testified that he thinks "a lot" about the harm he caused his clients, which will lead him to "remember what [he] did wrong and try not to repeat the mistakes." Mose's "present candid admissions of his past misconduct weigh in favor of his reinstatement." *In re Dedefo*, 781 N.W.2d 1, 10 (Minn. 2010).

Mose also presented the testimony of Dr. Reitman, who similarly testified to Mose's remorse and noted that Mose did not try to minimize or rationalize his misconduct in his sessions with Dr. Reitman. Dr. Reitman's testimony bolsters Mose's expressions of remorse and acceptance of responsibility. *See In re Severson*, 923 N.W.2d 23, 31 (Minn. 2019) (considering the testimony of character witnesses in evaluating whether petitioner showed remorse and acceptance of responsibility). In sum, based on the record,

we agree with the panel's conclusion that Mose demonstrated remorse and acceptance of responsibility for his misconduct.

B.

We next consider whether Mose has demonstrated a change in his "conduct and state of mind that corrects the underlying misconduct that led to the suspension." *Mose V*, 843 N.W.2d at 575. In 2014, Mose pointed to his volunteer work and promise to implement a calendar "tickler" system to prevent future office mismanagement and missed deadlines. *Id.* at 575–76. We concluded that those facts did not support reinstatement because (1) Mose had demonstrated incompetence in his volunteer positions, and (2) Mose's promise to use a "tickler" system, by itself, was insufficient because Mose had failed to educate himself further on law office management. *Id.*

In the present proceedings, Mose and Dr. Reitman provided evidence of Mose's "transformation" in 2020 and 2021. Both testified that Mose had begun to deal with his mental health issues and had come to a deeper understanding of the gravity of his misconduct. Dr. Reitman explained that as a result, Mose "chose to learn from the consequences of his actions in order to make a presentation, in my opinion. It's a good solid psychological presentation and I think he has changed." Mose similarly testified that over 2020 and 2021, he began to understand how his mental health issues impacted his legal practice and developed coping techniques to manage his mental health.

Severson provides a useful analogy here. In *Severson*, both the petitioner and his therapist testified that the petitioner had made a "change" from being defensive and deflecting responsibility to being "sincere in his efforts to understand what he did wrong

and sincere in his desire to accept responsibility." 923 N.W.2d at 31 (internal quotation marks omitted). The petitioner also detailed lessons that he had learned from the disciplinary process and therapy. *Id.* at 31–32. We concluded that this evidence, coupled with the petitioner's remorse and acceptance of responsibility, demonstrated a change in conduct and state of mind that corrected the underlying misconduct. *Id.* at 32. Mose has similarly demonstrated a "change" in his state of mind that corrects, in Dr. Reitman's view, a key contributing factor to Mose's misconduct—Mose's mental health issues.

As for Mose's conduct, he has now done much more than merely promise to implement a particular office calendar system. He has acquired all the necessary training and certificates to offer early neutral evaluation services and to be listed on the judicial branch's roster of qualified neutrals. He developed a business plan for an ADR practice and discussed it with an ADR practitioner, who approved of the plan. He has set up an office and obtained liability insurance. And he has developed a professional support network and committed to continue treatment for his mental health issues.

In *Mose V*, we were concerned with Mose's "ongoing problem with following through on his commitments." 843 N.W.2d at 576. But Mose has demonstrated that since 2014, he has been able to set goals and stick to them. We therefore agree with the panel that Mose has proven a change in his conduct and state of mind that corrects the underlying misconduct that led to the suspension.

C.

We next evaluate whether Mose has proven "a renewed commitment to the ethical practice of law." *Mose V*, 843 N.W.2d at 575. In truth, Mose has no plan to return to the

practice of law. But Mose intends to practice in a law-related field—early neutral evaluation—and we therefore evaluate whether Mose has shown a commitment to ethically practicing in that field.

An attorney's "plan to return to the practice of law or implement systems to avoid future misconduct are factors that may be relevant" to whether a petitioner has demonstrated a renewed commitment to the ethical practice of law. *Severson*, 923 N.W.2d at 32. In 2014, Mose had not demonstrated a "deliberate plan to return to the practice of law"; he had not contacted any attorneys or law firms regarding potential employment. *Mose V*, 843 N.W.2d at 576. As described above, however, Mose has now taken concrete, deliberate steps to develop an ADR practice.

Additionally, Mose has implemented several "systems to avoid future misconduct." *Severson*, 923 N.W.2d at 32. Mose testified that he would have a support system of other ADR professionals to whom he could turn for advice or assistance. Mose further explained that he would work with Goehle to start out slowly and manage an appropriate caseload. Mose also committed to continuing treatment for his mental health issues, a contributing factor to his past misconduct. We are convinced that Mose's concrete steps to develop an ADR practice, coupled with his professional and mental health support networks, demonstrate a commitment to ethically practicing in the field of early neutral evaluation. *Cf. Stockman*, 896 N.W.2d at 861–62 (concluding attorney had demonstrated a renewed commitment to the ethical practice of law, in part, by having a job offer as an associate at a firm with mentorship support).

In sum, we believe that Mose has demonstrated moral change by clear and convincing evidence.

II.

We next evaluate whether Mose has complied with the conditions of his suspension. *See Stockman*, 896 N.W.2d at 856. The Director suggested in her report that Mose has not complied with our condition requiring successful completion of the bar exam. Observing that a "passing score on the Minnesota Bar Examination is valid for 36 months from the date of the examination," the Director took the position that Mose had not satisfied this condition because he last passed the bar exam in 2010. But before the panel, the Director took the position that the lack of a valid bar score was not a "technical barrier" to Mose's reinstatement.

The panel agreed with the Director's latter position, and so do we. All we required of Mose was "successful completion of the entire bar examination," not a valid bar exam score. *Mose III*, 470 N.W.2d at 110. Mose has passed the bar exam three times since his suspension. He has therefore satisfied this condition of his suspension.

The Director also noted in her report that Mose has not yet satisfied the condition from *Mose I* that he complete an appropriate trial advocacy course. We noted in 2014 that Mose had not fulfilled this condition, *see Mose V*, 843 N.W.2d at 574, and Mose offers no evidence in the present proceeding that he has taken an appropriate trial advocacy course since 2014. However, given that Mose has no intent to practice law, this condition no

longer serves any functional purpose. We are therefore inclined to waive this condition of suspension, subject to the agreement of Mose not to practice law in the future.[4]

III.

Finally, our precedent directs us to weigh five other factors: the attorney's recognition that the conduct was wrong, the length of time since the misconduct and suspension, the seriousness of the misconduct, any physical or mental pressures "susceptible to correction," and the attorney's "intellectual competency to practice law." *Kadrie*, 602 N.W.2d at 870.

It is true that we have referred to an attorney's "intellectual competency to practice law" as a factor to be weighed in reinstatement cases. *See Tigue*, 960 N.W.2d at 699; *Severson*, 923 N.W.2d at 28. But today we clarify that an attorney's "intellectual competency to practice law" is a requirement to be met for reinstatement, not merely a factor to be weighed. The attorney petitioning for reinstatement has the burden to prove, by clear and convincing evidence, their intellectual competence to practice law. *See Dedefo*, 781 N.W.2d at 7–8 (explaining that a petitioner must demonstrate "by clear and convincing evidence that [they are] entitled to be reinstated to the practice of law").

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[4] Our waiver of the trial advocacy course condition should not be read as approval of Mose's failure to comply with the condition. Indeed, if Mose had not presented other evidence of his moral change, we would be inclined to hold this failure against him, as we did in *Mose V*, 843 N.W.2d at 574, 576. But under the unique facts presented here, we believe that waiving this condition will not undermine the purposes of attorney discipline: "to protect the public, protect the judicial system, and deter future misconduct by the disciplined attorney and other attorneys." *In re Ulanowski*, 800 N.W.2d 785, 799 (Minn. 2011); *see also In re McDonald*, 962 N.W.2d 451, 466 (Minn. 2021) (noting that our disciplinary decisions are "tailored to the specific facts of each case").

We do not consider this proposition to be controversial. The first substantive rule of the Minnesota Rules of Professional Conduct is that "[a] lawyer shall provide competent representation to a client." Minn. R. Prof. Conduct 1.1. If we reinstated attorneys who lack the intellectual competence to practice law, we would seriously jeopardize our duty to "protect the public from harm and deter future misconduct." *In re Getty*, 452 N.W.2d 694, 698 (Minn. 1990); *see also In re Fru*, 829 N.W.2d 379, 388 (Minn. 2013) (explaining that a pattern of incompetence and client neglect is "serious misconduct" (citation omitted) (internal quotation marks omitted)).

Therefore, we must now determine whether Mose has demonstrated by clear and convincing evidence his intellectual competence to practice law.[5]

A.

In 2008, we addressed Mose's competence to practice law. *Mose IV*, 754 N.W.2d at 365. We noted that Mose had passed the bar exam twice since being suspended and was current in his CLE requirements but concluded that "more is needed to prove his competence to return to the practice of law," such as "work directly related to the law . . . or training specifically related to the practice areas in which he is interested in pursuing." *Id.* Citing Mose's pattern of incompetence during the years in which he practiced as an

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[5] In summary, we clarify that in a petition for reinstatement, the petitioner bears the burden of proving: (1) moral change; (2) the intellectual competence to practice law; (3) compliance with the conditions of suspension; and (4) compliance with the requirements of Rule 18, RLPR. In addition to these requirements, we will weigh four other factors: the attorney's recognition that the conduct was wrong, the length of time since the misconduct and suspension, the seriousness of the misconduct, and any physical or mental pressures susceptible to correction.

attorney and lengthy time away from the practice of law, we required that Mose must "provide more than his successful completion of the bar examination and CLE credits to prove he is now competent to practice law." *Id.*

We again considered Mose's competence to practice law in 2014. *Mose V*, 843 N.W.2d at 576–77. At that time, Mose largely relied on the same evidence of competence that he had relied on in *Mose IV*: successful completion of the bar exam and being current on CLE requirements. *Mose V*, 843 N.W.2d at 576. We again concluded that more was required, holding that "when an attorney is suspended for incompetence and lack of diligence, and has not practiced law for an extended period of time, the attorney must not only pass the bar examination, but also demonstrate legal reasoning and case management skills through paid- or volunteer-work experience." *Id.* at 577.

We acknowledged that Mose volunteered with HOME Line, a housing law nonprofit. *Id.* at 576. But we concluded that Mose's work with HOME Line "did not involve many of the skills necessary to practice law, such as long-term case management or legal research or writing." *Id.* at 577. Rather, the work involved "recording client intake information, reporting the information to a staff attorney, and responding to the client with possible courses of action." *Id.* We therefore concluded that Mose continued to lack the intellectual competence to practice law. *Id.*

In the present proceedings, Mose largely relies on the same evidence of competence that he relied on in *Mose IV* and *Mose V*. Before the panel, Mose pointed to his successful completion of the bar exam and compliance with CLE requirements, which we have twice said is inadequate to demonstrate Mose's competence to practice law. *Mose IV*,

754 N.W.2d at 365; *Mose V*, 843 N.W.2d at 576–77.

As for demonstrating "legal reasoning and case management skills through paid- or volunteer-work experience," *Mose V*, 843 N.W.2d at 577, Mose testified that he had worked for Hennepin County Family Court Services. But it appears that Mose was already doing that in 2014. *See id.* at 575. Mose further testified that he volunteered for the Volunteer Lawyers Network, but his position involved largely the same type of work he was doing at HOME Line in 2014: "recording client intake information, reporting the information to a staff attorney, and responding to the client with possible courses of action." *Id.* at 577. And while Mose mentioned working at a law office for a year, his description of his work was extremely vague: "I basically read witnesses' statements and gave them a summary at the end of the day."

Crucially, there was no testimony that Mose was successful in his law-related positions. This is important, because in 2008 and 2014, we noted that Mose had demonstrated a pattern of incompetence in his work and volunteer positions. *See Mose IV*, 754 N.W.2d at 366 (noting that "evidence showed that Mose was terminated from three different positions during his suspension for reasons such as missing work"); *Mose V*, 843 N.W.2d at 576 ("While a volunteer at [Family Court Services], Mose failed to complete paperwork correctly, work independently, and follow supervisors' instructions.").

Based on this record, we conclude that Mose has not demonstrated "legal reasoning and case management skills."[6] *Mose V*, 843 N.W.2d at 577. Mose has therefore failed to demonstrate his intellectual competence to practice law.

B.

Although we conclude that Mose continues to lack the intellectual competence to practice law, the Director suggests we could waive the competence requirement because Mose does not intend to practice law. Under the circumstances of this case, we believe it would be inappropriate to waive the competence requirement.

Although it is true that Mose is not technically planning on practicing law, he is planning on entering a field that is very much intertwined with the practice of law. The practice of ADR is governed by rules set by the judicial branch. *See* Minn. Gen. R. Prac. 114, 310. The members of the board governing the ethical practice of ADR are appointed by our court. Minn. Gen. R. Prac. 114.13(A). And ADR practitioners are intimately

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[6] Although the dissent suggests that we create a Catch-22 by requiring suspended attorneys to prove intellectual competence to practice law, we do not view our rule so harshly. First, in many cases, a suspended attorney's intellectual competence to practice law will not be in question. *See, e.g.*, *In re Ramirez*, 719 N.W.2d 920, 925 (Minn. 2006) (noting that it was "undisputed" that the attorney had the intellectual competence to practice law). Second, although our modified reinstatement analysis requires all suspended attorneys to demonstrate intellectual competence to practice law, only suspended attorneys who "ha[ve] not practiced law for an extended period of time" will have the burden of "demonstrat[ing] legal reasoning and case management skills through paid- or volunteer-work experience." *Mose V*, 843 N.W.2d at 577. Third, even for those attorneys who must make such a demonstration, the rule we articulate today is not as onerous as the dissent suggests. Mose's own activities since his suspension show that paid and volunteer work experience is available to suspended attorneys who need to develop and demonstrate intellectual competence. But critical to demonstrating legal reasoning and case management skills is demonstrating *success* in the paid and volunteer work that provide those opportunities. Mose failed to make such a showing here.

involved with litigation in the district courts. *See* Minn. Gen. R. Prac. 114.04 (describing the role of district courts and parties in selecting an ADR process). Indeed, given the entanglement between ADR and the law, some scholars suggest that the practice of ADR implicates the practice of law. *See* Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. Rev. 1871, 1881–82 (1997).

Moreover, Mose has indicated that he wishes to be reinstated and resign so that he can be placed on the judicial branch's roster of qualified neutrals, which he is prohibited from joining with a suspended law license.[7] *See* Minn. Gen. R. Prac. 114.12, subd. 2(a). Qualified neutrals who wish to provide many types of services—including services that Mose has suggested that he would attempt to provide—must be "qualified practitioners" in their field,[8] with qualification as a practitioner to be demonstrated in part by professional

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[7] We observe that Mose does not need to be on the judicial branch's roster of qualified neutrals to provide ADR services as a neutral. *See* Minn. Gen. R. Prac. 114.02(e)–(f) (distinguishing between a "Neutral," who is "an individual who provides an ADR process under [Rule 114]," and a "Qualified Neutral," who is "an individual . . . listed on the State Court Administrator's roster as provided in the Rules of the Minnesota Supreme Court for ADR Rosters and Training"); *see also* Minn. R. Gen. Prac. 114.04(b) ("Any individual providing ADR services under Rule 114 must either be a Qualified Neutral *or* be selected and agreed to by the parties." (emphasis added)).

[8] *See* Minn. Gen. R. Prac. 114.12, subd. 4(d)(1) (qualified neutrals providing parenting time expediting services must "be recognized as qualified practitioners"); *id.*, subd. 4(e)(1) (same for providing parenting consulting services); *id.*, subd. 4(f)(1) (same for providing Social Early Neutral Evaluations); *id.*, subd. 4(g)(1) (same for providing Financial Early Neutral Evaluations); *id.*, subd. 4(h)(1) (same for providing Moderated Settlement Conferences); *id.*, subd. 4(i)(1) (same for providing family law adjudicative services).

licensure.[9] Some of these qualified neutral positions additionally require at least 5 years of experience working in family law.[10] It would seem to violate the spirit—and perhaps the letter—of those rules to allow an attorney who practiced family law for only approximately 5 years, 30 years ago, before he was suspended, and who committed serious misconduct during those 5 years, to be reinstated and permitted to hold himself out as a "qualified practitioner" in family law without demonstrating that he is currently fit to practice law.[11]

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[9] *See* Minn. Gen. R. Prac. 114.12, subd. 4(d)(1) ("Recognition may be demonstrated by submitting proof of professional licensure, professional certification, faculty membership of approved continuing education courses related to high-conflict couples or acceptance by peers as experts in their field."); *id.*, subd. 4(e)(1) (same); *id.*, subd. 4(f)(1) (same); *id.*, subd. 4(g)(1) (same but substituting "family law related finances" for "high-conflict couples"); *id.*, subd. 4(h)(1) (same but substituting "family law" for "high-conflict couples"); *id.*, subd. 4(i)(1) (similar but substituting "family law" for "high-conflict couples" and adding "service as court-appointed adjudicative Neutral").

[10] *See* Minn. Gen. R. Prac. 114.12, subd. 4(d)(1) (requiring "at least 5 years of experience working with high-conflict couples in the area of family law"); *id.*, subd. 4(e)(1) (same); *id.*, subd. 4(f)(1) (requiring "at least 5 years of experience as family law attorneys" or "as other professionals working in the area of family law"); *id.*, subd. 4(g)(1) (same); subd. 4(i)(1) (requiring "at least 5 years of professional experience in the area of family law").

[11] The dissent suggests that the State Court Administrator's Office—the office that manages the roster of qualified neutrals—could prevent any harm to the public and the judicial system by keeping Mose off the roster. But just because another entity could prevent harm to the public and the judicial system does not absolve us of our "duty to regulate the legal profession." *See In re Riehm*, 883 N.W.2d 223, 232 (Minn. 2016). We—not the State Court Administrator's Office—are charged with protecting the public and judicial system from disciplined attorneys like Mose. *In re Eichhorn-Hicks*, 916 N.W.2d 32, 39 (Minn. 2018). While Mose may no longer be formally practicing law as an ADR practitioner, any harm he causes to the public and the judicial system as a qualified neutral would be directly attributable to our decision to reinstate him as an attorney and to permit him to resign his law license. Our "exclusive power to regulate

Put simply, parties expect—and the General Rules of Practice require—a neutral to have "experience in the subject matter of the dispute." Minn. Gen. R. Prac. 114.02(b)(1). The only substantive family law experiences Mose has had during his suspension are family law courses and his unsuccessful tenure at Family Court Services. We are unconvinced that these experiences have provided Mose with "experience in the subject matter" of family law. *See id.* Because we are not assured that reinstating Mose for the purpose of becoming a qualified neutral will protect the public and judicial system from harm, we decline to waive the competence requirement for reinstatement.[12]

In conclusion, we acknowledge Mose's admirable efforts to address his mental health issues and carefully develop an ADR practice, and we are heartened by his moral change. But because Mose has not demonstrated the intellectual competence to practice law, we must deny his petition for reinstatement.

Petition denied.

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attorney discipline proceedings" is therefore not as narrow as the dissent suggests. *Riehm*, 883 N.W.2d at 232.

[12] Our decision not to loosen our traditional test for attorney reinstatement is further supported by our rule that we do "not allow a lawyer to resign with charges pending." *In re Blomquist*, 958 N.W.2d 904, 911 (Minn. 2021). "We do not allow resignation when allegations of serious misconduct are pending because to do so 'would not serve the ends of justice nor deter others from legal misconduct.' " *Id.* (quoting *In re McCoy*, 447 N.W.2d 887, 891 (Minn. 1989)). To be sure, the charges against Mose are far from "pending." But allowing an attorney to be reinstated pursuant to a relaxed standard because the attorney agrees to resign from the practice of law would run afoul of some of the same concerns that the no-resignation-with-charges-pending rule is designed to avoid. Specifically, it would not serve the ends of justice nor deter others from misconduct if we were to allow an attorney to hold themselves out as resigned from the practice of law—which we allow only for an attorney in good standing—when, in fact, their standing was anything but good.

DISSENT

THISSEN, Justice (dissenting).

I would reinstate William G. Mose under the terms of the stipulation he entered with the Director, including his commitment to immediately resign his law license and agreement to never apply for admission or re-admission to practice law in Minnesota or any other jurisdiction.

The Minnesota Rules of Professional Conduct are rules governing the *practice of law*. "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Minn. R. Prof. Conduct, *Preamble: A Lawyer's Responsibility*, ¶ 14. A person can only harm the public as a lawyer—the thing we are concerned with in our role as regulator of the legal profession—if the person is going to practice law. Mose does not plan to, and has agreed that he never will, practice law. Under those circumstances, our refusal to reinstate Mose to allow him to permanently resign and move on with his life is troubling. It also demonstrates a lack of compassion for someone who, as the court acknowledges, has done significant work to address the mental health issues that resulted in his suspension and who wishes to contribute to society in a non-lawyer function.

The court's sole justification for refusing to reinstate Mose is that he has not demonstrated the "intellectual competence to practice law" due to a failure to do enough non-lawyer legal work since his suspension. *Supra* at 18–19. One may reasonably ask, why should we care about Mose's intellectual competence to practice law if he is not going to practice law?

The court answers that question by pointing out that Mose desires to work as a qualified neutral under Minn. Gen. R. Prac. 114. Importantly, Rule 114 does not require qualified neutrals to be lawyers. Certainly, by acting as a qualified neutral, a person is not "practicing law."[13] And Mose had already stipulated that he will not practice law, a circumstance that will not change if he is placed on the roster of qualified neutrals. By restoring Mose under the terms of this stipulation, we are not placing our imprimatur on his capacity to serve as a qualified neutral for the simple reason that Mose will not have a law license granted under our authority.

Further, Rule 114.12, subdivision 4, sets forth in great detail the qualifications, training and experience requirements that a person must meet to be placed on the qualified neutral roster. For some categories of qualified neutrals, those requirements include the elements noted in the court's opinion above—that qualified neutrals be "qualified practitioners" in their field, sometimes with professional licensure or years of experience working in the field. *Supra* at 20–21, n.8–10. Critically, in contrast with our direct oversight of lawyers under the Rules of Professional Responsibility, we have entrusted the State Court Administrator with overseeing qualified neutrals and with the authority to place individuals on, and remove individuals from, the roster of qualified neutrals. Minn. Gen. R. Prac. 114.12, subd. 2(a).

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[13] Of course, if non-lawyers hold themselves out as lawyers in the course of their practice as qualified neutrals, that would be a criminal act under Minn. Stat. § 481.02 (2022).

Nonetheless, the court reasons that:

> It would seem to violate the spirit—and perhaps the letter—of [Rule 114.12, subd. 4] to allow an attorney who practiced family law for only approximately 5 years, 30 years ago, before he was suspended, and who committed serious misconduct during those 5 years, to be reinstated and permitted to hold himself out as a "qualified practitioner" in family law without demonstrating that he is currently fit to practice law.

Supra at 21. But precisely because it would violate the Rules to place individuals who do not meet those experience requirements—and who additionally are not "recognized [beyond simply having the requisite experience] as qualified practitioners in their field," Rule 114.12, subd. 4—the State Court Administrator's Office cannot and will not put the person on the specific list of qualified neutrals that have those requirements. I trust the State Court Administrator's Office to do the job we have assigned to it.

Stated more succinctly, if having a legal license and experience is a requirement for getting on the roster of some categories of qualified neutral, then Mose will not qualify to be a qualified neutral because he is permanently giving up his law license. If legal licensure and experience is *not* a requirement for getting on the roster of a category of qualified neutral, the intellectual competence to practice law (the only thing standing between Mose and reinstatement) is irrelevant. There is no need for us to flex in our role as regulators of the legal profession to provide the same protections that we have charged the State Court Administrator's Office to provide.

Further, we have established an entire regulatory process to "provide standards of ethical conduct to guide Neutrals who provide [alternative dispute resolution (ADR)] services, to inform and protect consumers of ADR services, and to ensure the integrity of

the various ADR processes." Minn. Gen. R. Prac. 114.13(A) (Introduction). Every person who provides ADR services required by Minnesota court rules, *see* Minn. Gen. R. Prac. 114.01(a), is subject to the Code of Ethics for Court-Annexed ADR Neutrals and to the authority of the ADR Ethics Board. Minn. Gen. R. Prac. 114.01(b) and 114.04(a). Neutrals who do not perform competently or fail to provide a quality process, which includes ensuring diligence and procedural fairness, are subject to sanctions such as private or public reprimand, direction to take corrective action, or removal from the roster of qualified neutrals. Minn. Gen. R. Prac. 114.13(A); Minn. Gen. R. Prac. 114.13(B), subd. 3.

And in this case, according to the panel's Findings of Fact and the undisputed evidence in the record, Mose has accomplished all the training needed to apply for the roster—training conducted by well-respected trainers. Further, Janet Goehle, an ADR practitioner, testified that Mose's business plan for a proposed ADR practice was a good plan and that working within the field of early neutral evaluation was a good way for Mose to start his ADR practice.[14] Mose plans to work with Goehle to start out slow and manage an appropriate ADR caseload and has a support system of other ADR professionals to whom he could turn for advice or assistance. Nothing in the record suggests that Mose will not perform well as a qualified neutral if he otherwise meets the rostering requirements. And the court disputes none of these facts.

[14] In this regard, it is ironic that the reason the court finds that Mose has not demonstrated that he is intellectually competent to return to the practice of law following his suspension is because he has not shown enough experience in law-related work. It creates a bit of a Catch-22 and a somewhat manufactured and unfair hurdle, especially for suspended lawyers who must otherwise earn a living because they cannot practice law.

We should not stand in the way of Mose getting on with his life in a non-lawyer capacity. Accordingly, I dissent.

CHUTICH, Justice (dissenting).

I join in the dissent of Justice Thissen.

FILED
December 16, 2021
OFFICE OF
APPELLATE COURTS

FILE NO. A20-0198

STATE OF MINNESOTA

IN SUPREME COURT

In re the Petition for Reinstatement
To the Practice of Law of
WILLIAM G. MOSE,
No. 125659.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

The above-entitled matter came on for hearing before the undersigned Panel of the Lawyers Professional Responsibility Board on October 18, 2021, on the Petition for Reinstatement to the Practice of Law of William G. Mose (Petitioner or Mr. Mose.) Panel members consisted of Chair Peter Ivy, Geri Sjoquist and Paul Lehman. At the commencement of this proceeding the Petitioner advised the Director and the Panel that he sought reinstatement in order to resign from the practice of law and practice in the area of Alternative Dispute Resolution (ADR). Petitioner indicated that he has no plans to practice law.

At the conclusion of the proceeding the Panel received the Petitioner's Exhibits 101 through 109 and Director's Exhibits 1 through 28 without objection.

The Panel heard testimony of Petitioner's witnesses, Janet Goehle, Dr. Paul Reitman and Petitioner himself. Based upon all the files, records, and proceedings herein, the testimony of witnesses and arguments of counsel the Panel makes the following:

FINDINGS OF FACT

1. Petitioner William G. Mose was admitted to the practice of law in Minnesota in 1980. He had a significant disciplinary history which included 19 client complaints filed against him during the time period 1985-1990.

2. On May 20, 1991, based on a stipulation between Mr. Mose and the Director, the

Court suspended the Petitioner's law license for a minimum period of five years (Exhibit 9). Exhibit numbers refer to trial exhibits.

3. Petitioner petitioned for reinstatement to the practice of law in April of 2005 but later withdrew his petition (Exhibit 16). In February 2007 Petitioner filed a second Petition for Reinstatement. On August 7, 2008, the Court denied that petition (Exhibit 20).

4. On March 2, 2012, Petitioner filed a third Petition for Reinstatement. On March 12, 2014, the Court again denied the petition (Exhibit 24).

5. On August 9, 2018, Petitioner filed a fourth Petition for Reinstatement. Petitioner withdrew that petition in 2019 (Exhibit 25).

6. Petitioner filed this fifth petition in February 2020 (Exhibit 26).

7. During the five years that the Petitioner engaged in the practice of law, the Director received nineteen (19) complaints against Petitioner, all of which resulted in Petitioner's public and private disciplinary history. The Petitioner's misconduct included among other things neglect of client matters, false statements to a client to conceal neglect, failure to communicate with clients, incompetent representation, withdrawing from representation without notice to clients, failure to comply with the conditions of his probation, failure to cooperate with the Director in the investigation of several complaints, failure to advise clients of his suspension from the practice of law, failure to account for or refund unearned retainers, accepting a retainer after he was suspended, transferring client files to substitute counsel without obtaining the consent of the clients, providing clients false explanations for his inability to represent them, and failure to properly file a bankruptcy petition.

8. The Panel heard the testimony of Petitioner, Dr. Paul Reitman and Janet Goehle, Esq. (See generally Transcript pages 12-166.) Further references will be to the page and line

numbers in the Transcript of Proceedings, dated October 18, 2021.

9. Ms. Goehle testified to the following:

- Mr. Mose has all five of the certificates necessary to perform Early Neutral Evaluation. (Page 19, lines 24 through 25, Page 20, lines 1 through 3, Page 22, line 14.)
- There are not enough male providers for ADR, especially in outstate Minnesota where Mr. Mose intends to practice ADR. (Page 23, lines 7 and 8.)
- Ms. Goehle reviewed Exhibit 103, the business plan and discussed it with Mr. Mose. (Page 24, lines 13 through 21.)
- Mr. Mose has accomplished all the training needed to apply for the roster. (Page 25, lines 16 and 17.)
- Qualities of a good ADR practitioner are compassion, being open, listening and experience. (Page 27, lines 8 through 12.)
- Even though some ADR providers are attorneys, not all are. Some lawyers do not understand family law at all. It is not an ADR neutral's role to give legal advice. (Page 32, lines 1 through 19.)

Ms. Goehle was aware of the prior disciplinary issues of Mr. Mose while he was practicing as an attorney. She feels the team approach (partnering with another ADR practitioner) would be a good way for Mr. Mose to start an ADR practice based on what Ms. Goehle has observed. (Page 47, lines 10 through 12.)

10. Dr. Paul Reitman testified to the following:

- He is a forensic psychologist and interviewed Mr. Mose four times. (Page 51, line 2, Page 64, lines 23 and 24.)

- The MMPI that was administered to Mr. Mose by Dr. Reitman was valid. (Page 54, line 13.)
- Mr. Mose was not defensive in wanting to put on his best face. He did admit to flaws. (Page 55, lines 11 through 14.)
- Mr. Mose is putting himself on the line stating that he wanted to make something of his life… He is an honest man, basically. (Page 59, lines 21 through 25.)
- Mr. Mose is "really an intelligent man." (Page 61, lines 3 and 4.)
- Mr. Mose is different than he was thirty years ago because he has come to face his errors, he has accepted full responsibility, he is not minimizing or rationalizing and he has remorse. Mr. Mose stated to Dr. Reitman, "I can't ever forget what I did. I am so ashamed." (Page 66, lines 6 and 7.)
- Dr. Reitman characterized this as "ostrich style, put your head in the sand (and maybe it will go away)." (Page 66, lines 9 through 11.)
- Dr. Reitman, when asked about Mr. Mose's reaction to a discussion about the delay in his paying money back to his clients, he stated "I just can't believe I did that." He was so ashamed. (Page 71, lines 13 and 14.)
- Dr. Reitman testified with a reasonable degree of psychological certainty that his diagnosis would be generalized anxiety disorder and social phobia. (Page 73, lines 20 through 24.) That was his diagnosis on June 15, 2020, and that would be his diagnosis today and that these symptoms are in remission. (Page 74, lines 2 through 6.)
- Dr. Reitman, when asked about what caused these symptoms to go into remission, testified, "It was his transformation." "He chose to learn from the consequences

of his actions in order to make a presentation, in my opinion. It's a good, solid psychological presentation and I think he has changed." (Page 74, lines 7 through 14, Page 75, lines 4 through 7.)

- When asked by Director Humiston how the social phobia that was diagnosed affected Mr. Mose, Dr. Reitman testified, "Every time he was meeting with a client, it was not a pleasurable, positive experience for him. That's why he avoided them so much because he didn't know how to deal with people on that kind of basis." (Page 79, lines 24 through 25, Page 80, lines 1 through 7.)
- When asked by Director Humiston, what conclusions Dr. Reitman drew from the thirty-year past, Dr. Reitman stated, "I can count on my one hand how many people have engaged in a thirty-year career of wanting to get, in a sense, reinstated. That's very unusual…He's putting himself through scrutiny, further scrutiny, you know, which is your responsibility for the community, you know, for the community safety, but he's electing to do that. That speaks of his character." (Page 83, lines 18 through 25 , Page 84, lines 1 through 6.)
- When asked by Director Humiston to discuss his report (Exhibit 27) as it relates to distractibility and low concentration, Dr. Reitman testified that he gave Mr. Mose subtests from the Weschler Intelligence Scale. He indicated the test demonstrated no effect by the anxiety on his higher executive functions. (Page 86 generally.)
- In response to a question by panel member Lehman, Dr. Reitman indicated, "I'm still very impressed with the fact of how much time he has devoted to this and to get reinstated. Looking at the hurdles – that was put in front of him…The scores

of the MMPI are relatively stable throughout a patient's life unless something significant has happened in their life and they make a change. (Page 89 generally.)

- Dr. Reitman testified that, "What he wants to do is reachable and is something that he would be good at." He analogized Mr. Mose's prior attempt at practicing law, "It's kind of like swimming with weights on your ankles, and now that this has been lifted, I think he is going to really derive intrinsic rewards from doing this. I do think he's an ethical man and I think that he wants to help others." (Page 90, lines 13 through 25.)
- Upon examination by panel member Sjoquist, Dr. Reitman testified that, "Today he is an honest man. Today he is not a BSer. Today he is not going to screw a client. It would be abhorrent to him, and I think he would really be the kind of attorney that would say in so many words, "Look, do you want to put my kids through college or do you want to put your own kids through college? And he would be working to help the client get on with their lives and make a resolution…" (Page 94, lines 4 through 13.)
- When asked whether Mr. Mose would be a good fit for what he is proposing (ADR), Dr. Reitman opines that , "Yes, he would because he's been through hell that he brought on himself and he chose to come back over and over and over again. That said to Dr. Reitman that this speaks well for Mr. Mose's dedication and that dedication would "spill over into his practice because he genuinely cares about people." (Page 111, lines 20 through 25, Page 112, lines 6 and 7.)

- Chairman Ivy examined Dr. Reitman as to the supervision model and what it would be like for Mr. Mose. Dr. Reitman recommended that it would be for eighteen months. (Page 119, lines 17 through 22.)
- In summary, Dr. Reitman testified that, "I think Mr. Mose is a really genuinely good man and I think that I'd so badly like for him to have an opportunity to restore his tremendous shame and guilt and I think he could do that by this endeavor. I think he would do a service to our State. I really do." (Page 123, lines 5 through 12.)

11. Mr. Mose testified he lives in Hutchison, McLeod County, Minnesota. (Page 126, lines 24 and 25, Page 127, lines 4 and 5.)

- Mr. Mose testified he took 90-100 credits in family law CLEs in the last 30 years. He knows how to handle family law; he's been to the Family Law Institute and taken many CLE courses in family law. (Page 127, lines 15 through 21.)
- Mr. Mose indicated familiarity with the ethics rules for ADR and agreed to abide by those rules. (Page 128, lines 1 through 6.) (Exhibits 101, 102)
- When asked how he would handle someone who was confrontational, he indicated he would try to find out what the concern is of the person who is being confrontational, listen to the person and see if the issue can be resolved. (Page 128, lines 12 through 20.)
- As far as financial issues are concerned, Mr. Mose would have a fee agreement signed by both parties containing hourly rates and address other issues such as fee refunds. (Page 129, lines 9 through 12.)

- Mr. Mose testified that he has an office, liability insurance, will have an answering service and has a support system in Ms. Janet Goehle Mr. Dan Kufus and Ms. Karen Irvin. He would see a counselor at least once a month. (Page 132, lines 7 through 14.)
- Mr. Mose is familiar with ENEs having worked for Hennepin County Family Court Services and observed many ENES. (Page 133, lines 9 through 12.)
- He also was a volunteer law clerk when he worked for Volunteer Attorneys Network helping the lawyers get ready for trial. (Page 133, lines 13 through 25.)
- Mr. Mose's plan was, if he got his ADR certification, since he is trained in ENE and PTE, he would limit himself to that, he would take very few cases, and if people called him during the day, he would promptly call them back by the end of the day. (Page 134, lines 21 through 25, Page 135, lines 1 through 5.)
- Upon cross-examination by Director Humiston, she asked what insights he had as to why he engaged in his dishonest conduct. He testified he had remorse, shame and guilt. (Page 138, lines 4 through 7.) He also testified that he did not tell the truth and lied to his clients because he did not want to admit that he did not know how to do a contested divorce. It did not stem from greed or malice but instead lack of competence. (Page 138, lines 23-25.)
- When asked by Director Humiston that Dr. Reitman stated you believe your misconduct was irresponsible, that you are remorseful, Mr. Mose replied that, "I did a very bad job, and I have remorse for it. I feel bad from a lawyer's perspective and morally I didn't treat people well. They expected a good

lawyering job and I did not do well. So from an ethics and moral standpoint, I did not live up to my obligations." (Page 143, lines 15 through 21.)

- When asked by Director Humiston, "Why do you continue to open yourself up to this level of personal scrutiny?" Mr. Mose replied that he felt that in this particular subject area that he could be a good lawyer, he wanted to help people and use his reasoning to help them get out of situations or improve their situations. (Page 144, lines 14 through 24.)
- When asked about a support system, Mr. Mose indicated if he felt stressed or had personal problems, he would talk to a psychologist. (Page 146, lines 8 through 15.)
- When asked whether he was open to taking medication, Mr. Mose replied, certainly, if that was recommended by a psychiatrist or other treating professional. (Page 147, lines 22 through 25, Page 148, lines 1 through 3.)
- When asked what were his strengths in listening and compassion skills, Mr. Mose indicated he has a lot of compassion for other people and tries to follow Christian principles. (Page 149, lines 4 through 17.)
- When asked about the harm he caused to the clients during the five-year period that he practiced, Mr. Mose indicated that he thinks a lot about the harm. The people hired him and expected a good process to come out. He let them down and they had to get other lawyers. The administration of justice was "in a mess" because of his actions, so he caused them an emotional, legal and financial loss. "I think about that a lot." (Page 150, lines 6 through 16.)

- When asked by panel member Sjoquist if he has difficulty in saying I don't know, Mr. Mose indicated "Not at the present time but in the past people expected me to be a competent attorney and I was not competent in contested divorces, so it was very difficult for me to say I don't know because they gave me money and they expected me to be a competent lawyer…" (Page 156, lines 2 through 20.)
- Mr. Mose testified that his past conduct was morally wrong. He should have not lied. He should have not taken the cases he did. (Page 158, lines 2 through 11.)

12. Based on the foregoing Findings of Fact, the Panel makes the following:

CONCLUSIONS OF LAW

13. The Panel concludes that as to the issue of moral change, based on the testimony of the Petitioner and Dr. Paul Reitman, the Petitioner has shown by clear and convincing evidence having made the requisite moral change. The testimony was that Petitioner expressed true remorse and recognition of harm. Dr. Reitman conducted an MMPI, interviewed Petitioner on four occasions and interviewed Petitioner's wife and stepdaughter. In Dr. Reitman's professional opinion, based on a reasonable degree of psychological certainty, he diagnosed that Petitioner has a generalized anxiety disorder and social phobia in remission.

14. Important in Dr. Reitman's testimony was that:

- Petitioner "is not a person who wants to engage in the exploitation or manipulation of other people."
- Petitioner recognizes the harm caused by his misconduct and does have a great deal of remorse.
- Petitioner has been misunderstood because of his interpersonal style and his anxiety.

- Dr. Reitman recommends cognitive therapy for Petitioner with respect to social skills training, anxiety and depression management as well as developing good social and professional boundaries.

Petitioner testified that:

- He acknowledged the anxiety and social phobia.
- He acknowledged that during the time of his misconduct, he was disorganized, lacked discipline and was immature.

This Panel also finds that the Petitioner has proven by clear and convincing evidence that there has been:

- An observed record of moral change.
- A commitment to the highest standards in ethics.
- That he is worthy of the public confidence that comes with the readmission to the practice of law even though he will not be engaged in the practice of law.

15. The Panel has determined that Mr. Mose has met the pre-conditions for reinstatement, such as length of suspension, compliance with Rule 24, compliance with Rule 26, currency in his continuing legal education obligation (Exhibit 28), successful completion of bar exam, and payments of restitution to clients and/or the Client Security Board. On the issue of the bar exam, while Petitioner's last successful completion of the full bar exam was February 2010 (and his score has since expired) (Exhibit 21), it is the Panel's and Director's position that since the Court order did not require a current score, that the Petitioner has complied with this reinstatement pre-condition. It should also be noted that the Petitioner has passed the bar exam three times since his suspension in 1991.

16. That the Petitioner has shown through passing the bar four times, being current in

his legal education credits and his law-related experience that he would possess the competence to practice law even though he does not wish to practice law.

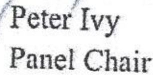
That based upon these Findings of Fact and Conclusions of Law, the Panel makes the following:

RECOMMENDATIONS

1. That Petitioner William G. Mose be reinstated to the practice of law in the State of Minnesota.

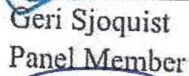
2. That Petitioner's reinstatement include a requirement that he simultaneously petition to resign from the practice of law immediately upon reinstatement.

Dated: 12/15/21



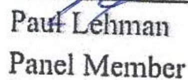
Peter Ivy
Panel Chair

Dated: 12/15/21



Geri Sjoquist
Panel Member

Dated: 12/15/21



Paul Lehman
Panel Member

OLPR Dashboard for Court And Chair

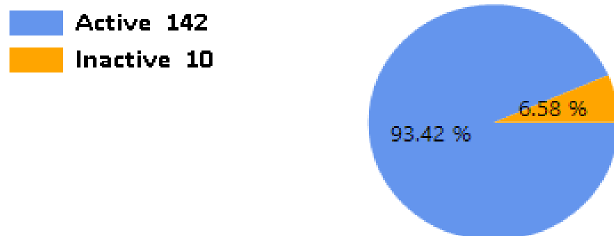
	Month Ending June 2023	Change from Previous Month	Month Ending May 2023	Month Ending June 2022
Open Files	524	-7	531	488
Total Number of Lawyers	392	3	389	336
New Files YTD	539	82	457	516
Closed Files YTD	487	89	398	509
Closed CO12s YTD	128	21	107	70
Summary Dismissals YTD	225	39	186	252
Files Opened During June 2023	82	-18	100	100
Files Closed During June 2023	89	-10	99	93
Public Matters Pending (excluding Resignations)	24	-3	27	45
Panel Matters Pending	11	0	11	14
DEC Matters Pending	104	-8	112	98
Files on Hold	9	1	8	15
Advisory Opinion Requests YTD	927	166	761	834
CLE Presentations YTD	20	1	19	24
Files Over 1 Year Old	152	-1	153	153
Total Number of Lawyers	96	4	92	94
Files Pending Over 1 Year Old w/o Charges	94	5	89	64
Total Number of Lawyers	71	7	64	45

	2023 YTD	2022 YTD
Lawyers Disbarred	3	2
Lawyers Suspended	17	9
Lawyers Reprimand & Probation	1	4
Lawyers Reprimand	0	1
TOTAL PUBLIC	**21**	**16**
Private Probation Files	6	2
Admonition Files	37	43
TOTAL PRIVATE	**43**	**45**

FILES OVER 1 YEAR OLD

Year/Month	OLPR	AD	PAN	HOLD	SUP	S12C	SCUA	REIN	TRUS	Total
2018-07							1			**1**
2018-08							1			**1**
2018-10	2									**2**
2018-12	1									**1**
2019-04	1									**1**
2019-05							1			**1**
2019-06				1						**1**
2019-07	1									**1**
2019-08	1									**1**
2019-09							1			**1**
2019-11					1					**1**
2020-01	1				3					**4**
2020-02	1				1		1			**3**
2020-05							1			**1**
2020-06					1					**1**
2020-08	1									**1**
2020-09	1						1			**2**
2020-10					1	1				**2**
2021-01	2				1		1			**4**
2021-02					1					**1**
2021-03	1		1	1	1		1			**5**
2021-04	2		2		1					**5**
2021-05	5		1	1	1					**8**
2021-06	7									**7**
2021-07	2				1					**3**
2021-08	5		2		1					**8**
2021-09	3				1					**4**
2021-10	3		1		1	1				**6**
2021-11	6									**6**
2021-12	2					2	1			**5**
2022-01	3			1					1	**5**
2022-02			2	1	1					**4**
2022-03	5		1		1					**7**
2022-04	12						1	1		**14**
2022-05	12		2	1	1					**16**
2022-06	14	1	1				1		1	**18**
Total	**94**	**1**	**13**	**6**	**19**	**4**	**12**	**1**	**2**	**152**

	Total	**Sup. Ct.**
Total Cases Under Advisement	12	12
Sub-total of Cases Over One Year Old	140	26
Total Cases Over One Year Old	**152**	**38**



All Pending Files as of Month Ending June 2023

Year/Month	SD	DEC	REV	OLPR	AD	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	**Total**
2018-07										1				**1**
2018-08										1				**1**
2018-10				2										**2**
2018-12				1										**1**
2019-04				1										**1**
2019-05										1				**1**
2019-06							1							**1**
2019-07				1										**1**
2019-08				1										**1**
2019-09										1				**1**
2019-11								1						**1**
2020-01				1				3						**4**
2020-02				1				1		1				**3**
2020-05										1				**1**
2020-06								1						**1**
2020-08				1										**1**
2020-09				1						1				**2**
2020-10								1	1					**2**
2021-01				2				1		1				**4**
2021-02								1						**1**
2021-03				1		1	1	1		1				**5**
2021-04				2		2		1						**5**
2021-05				5		1	1	1						**8**
2021-06				7										**7**
2021-07				2				1						**3**
2021-08				5		2		1						**8**
2021-09				3				1						**4**
2021-10				3		1		1	1					**6**
2021-11				6										**6**
2021-12				2					2	1				**5**
2022-01				3			1						1	**5**
2022-02						2	1	1						**4**
2022-03				5		1		1						**7**
2022-04				12						1	1			**14**
2022-05				12		2	1	1						**16**
2022-06				14	1	1				1			1	**18**
2022-07				14										**14**
2022-08				22			1							**23**
2022-09				22				1						**23**
2022-10		1	1	16										**18**
2022-11		1	1	17				1						**20**
2022-12		2	3	18										**23**
2023-01		5	4	15							1			**25**
2023-02		12	4	22			2				1			**41**
2023-03		13	1	28										**42**
2023-04		30	1	16										**47**
2023-05		25		17										**42**
2023-06	15	15		13							1	10		**54**
Total	**15**	**104**	**15**	**314**	**1**	**13**	**9**	**21**	**4**	**12**	**4**	**10**	**2**	**524**

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

MINNESOTA JUDICIAL BRANCH

FY2024-25 BUDGET NARRATIVE
MN Lawyers Prof. Responsibility Board (LPRB)
Office of Lawyers Prof. Responsibility (OLPR)

AT A GLANCE

- FY23 revenue is projected to be slightly above target.
- FY23 expenses are projected to be favorable to budget by approximately $100,000; transfer from Client Security Fund is not yet needed but reserves have been fully exhausted.
- Expense savings were due to IT projects which will be carried forward to FY24 and salary savings.
- The OLPR is currently budgeted for 13 attorneys (including the Director), 5 paralegals, one investigator, one auditor, one Office Administrator, nine staff and one law clerk.
- Primary stakeholders are the Supreme Court, the LPRB, licensed Minnesota attorneys and the public who hire lawyers.

Background:

The OLPR and LPRB serve approximately 30,000 licensed lawyers and the Minnesota public who consume legal services. In 2022, the OLPR received 1,020 complaints, an increase from the number of complaints received the prior year. In 2022, 36 lawyers were publicly disciplined, up from 28 the prior year. Private discipline in 2022 was 88, down from 97 in 2021. Complaints year to date in 2023 are up slightly from 2022, and are back to pre-pandemic levels. In addition to disciplinary functions, the OLPR performs several administrative functions, such as staffing an ethics hotline utilized an average of 2,000 times annually, running a large probation department supervising approximately 80 lawyers annually, administering an overdraft trust account program, as well as handling attorney resignations, judgment and collections for sanctioned attorneys, administration of the Professional Firms Act, acting as trustee for disabled or deceased attorneys when others are not available to transition practices, and serve as frequent speakers at CLEs throughout the State.

Revenue:

Revenue is driven by attorney registration fees. The LPRB/OLPR receives $135 for attorneys licensed to practice for more than three years, and smaller assessments for all other licensed attorneys. On October 1, 2023, the fee will increase to $142. Based on estimates from the Board of Law Examiners, only modest increases in registration revenue are projected over the biennium. Although the Court authorized the transfer of $1.5M from the Minnesota Client Security Fund to the Lawyers Professional Responsibility Board, those funds were not needed this biennium. Over the next biennium, the LPRB/OLPR will exhaust its reserve, including all transferred funds, and will have only a modest remaining reserve.

Expenditures:

Expenditures for FY23 are projected to be favorable to budget by approximately 100k due to IT projects which will be carried forward to FY24 (websites) and salary savings; this is true notwithstanding an unplanned technology expense of $42,000 for transfer of our data management system from SharePoint 2013 to

Office 365. Personnel costs have generally remained flat for several years despite increasing merit and health insurance costs due to timing of hires and staffing levels. Current projections anticipate being fully staffed over the biennium, and also include continuation of temporary law clerk (.5) and paralegal (.5) assistance currently in place. FY24-25 expenditures may need to be adjusted depending on the Court's decisions regarding the ABA's recommendations that have expense components.

Conclusion:

The Office has been in deficit spending for several years with essentially flat revenue numbers. The planned transfer from the Client Security Fund in FY24 and the currently scheduled increase to attorney registration will provide sufficient funds to ensure a modest operating reserve at the conclusion of the biennium, but further revenue increases will be necessary to ensure adequate funding beyond FY25.

FY2024/25 Budget Request
MN Lawyers Professional Responsibility Board

Appropriation: J650LPR

	Account	FY20 Actual	FY21 Actual	FY22 Actual	FY23 Budget	FY23 Projected	FY24 Projected	FY25 Projected
		a	b	c	d	e	f	g
Reserve Balance In		2,036,210	1,469,973	1,169,096	681,626	681,626	217,298	966,221
Revenue:								
Law Prof Resp Attorney Judgments	512416	29,548	26,918	17,271	29,813	42,000	43,260	44,558
Other Agency Deposits	514213	24,164	25,013	26,531	27,693	27,611	28,439	29,293
Law Prof Resp Misc.	553093	25,138	76,189	13,806	23,577	21,000	21,630	22,279
Attorney's Registration	634112	3,446,296	3,500,557	3,452,475	3,593,650	3,664,431	3,683,620	3,911,555
Attorney's Registration 3% Increase 10/1/2023	634112						144,191	
Law Prof Resp Bd Prof Corp	634113	67,350	65,775	62,375	69,940	62,000	63,860	63,860
Transfer from the Client Security Fund							1,500,000	
Subtotal Revenue		3,592,496	3,694,452	3,572,457	3,744,673	3,817,042	5,485,001	4,071,544
Expenditures:		4,158,733	3,995,329	4,059,927	4,386,789	4,281,370	4,736,078	4,821,775
Reserve Balance Out (Ending Cash Balance)		**1,469,973**	**1,169,096**	**681,626**	**39,510**	**217,298**	**966,221**	**215,989**

Notes:
* Revenue assumptions FY24/25 3% over FY23 projected amounts
FY23 Projected based on revenue received during the same time period in FY21/22
Atty. Reg. Assumptions: FY24 30,215 (23,867 @ $135; 3,510 @ $95; 487 @ $94; 1,428 @ $35; 922 @ $15)
FY25 30,451 (24,054 @ $142; 3,537 @ $101; 491 @ $99; 1,440 @ $38; 929 @ $15)

FY2024/25 Budget Update
MN Lawyers Professional Responsibility Board

Appropriation: J650LPR
Findept. ID: J653500B

	Account	FY20 Actual Expenditures	FY21 Actual Expenditures	FY22 Actual Expenditures	FY23 Budget Expenditures	FY23 Projected Expenditures	FY24 Projected Expenditures	FY25 Projected Expenditures
		a	b	c	d	e	f	g
Full Time	41000	3,241,787	3,146,944	3,060,270	3,535,587	3,361,867	3,651,542	3,854,185
PT, Seasonal, Labor Svc	41030	138,417	173,042	212,378	99,198	176,739	225,054	236,064
OT Pay	41050	283	816	4,033	3,000	2,046	3,000	3,000
Other Benefits	41070	11,384	37,394	99,521		30,433	45,524	31,271
PERSONNEL		**3,391,870**	**3,358,196**	**3,376,202**	**3,637,785**	**3,571,085**	**3,925,120**	**4,124,520**
Space Rental, Maint., Utility	41100	359,420	243,393	370,961	379,448	380,363	393,020	401,196
Printing, Advertising	41110	10,694	4,638	8,408	10,625	7,940	8,457	8,710
Prof/Tech Services Out Ven	41130	26,991	18,149	82,150	42,922	60,735	75,103	36,217
IT Prof/Tech Services	41145	149,599	68,609	49,417	34,500	55,298	40,279	40,414
Computer & System Svc	41150	51,782	51,832	49,102	53,434	86,764	59,979	63,605
Communications	41155	23,237	19,564	20,187	25,164	16,285	18,523	18,628
Travel, Subsistence In-St	41160	5,617	970	1,923	7,050	2,916	3,380	3,434
Travel, Subsistence Out-St	41170	16,414		1,602	20,600	12,443	20,000	20,000
Employee Dev't	41180	11,596	5,660	8,043	9,540	13,014	14,467	14,793
Agency Prov. Prof/Tech Svc	41190							
Claims Paid to Claimants	41200							
Supplies	41300	55,932	41,952	27,145	68,469	16,110	23,875	25,036
Equipment Rental	41400	3,036	3,125	2,166	2,275	2,166	2,008	2,008
Repairs, Alterations, Maint	41500	6,652	9,765	11,592	8,425	10,383	8,952	9,190
State Agency Reimb.	42030		61,839		56,552			
Other Operating Costs	43000	40,728		35,803		45,869	47,917	49,025
Equipment Capital	47060		106,736		30,000		30,000	
Equipment-Non Capital	47160	5,165	900	15,227		-	65,000	5,000
Reverse 1099 Expenditure	49890							
OPERATING		**766,862**	**637,133**	**683,725**	**749,004**	**710,285**	**810,959**	**697,256**
TOTAL		**4,158,733**	**3,995,329**	**4,059,927**	**4,386,789**	**4,281,370**	**4,736,078**	**4,821,775**

Notes:
FY24/25 assumptions: 5.84%/5.85% insurance increases and 9.0%/6.0% compensation increases
Personnel costs include additional (0.50) law clerk time and (0.50) paralegal temporary assistance currently in place in FY23, but otherwise is status quo without any additional expenditures as recommended in the ABA Report.

Communication, diligence, and client expectations

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

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

Email and cell phones are amazing tools—but if you practiced before they became prevalent, you know the tremendous impact, both positive and negative, they have had on the practice of law. A recently leaked presentation slide from an internal associate training at the law firm of Paul Hastings has again sparked conversation on this topic.

The slide describes some "non-negotiables" for junior associates at an AmLaw 20 firm: "You are online 24/7. No exceptions, no excuses." "Clients expect everything to be done perfectly and delivered yesterday." Reactions to the "non-negotiables" have been all over the map, with the firm saying the slide did not represent the views of the firm or its partners, some decrying the expectations as "horrible," and most others—including, I wager, a large percentage of lawyers—merely shrugging.

While it might not surprise anyone that expectations are high at a large firm where hourly rates (and annual salaries) are significant, less attention is given to how prevalent these same notions are for solo and small firm lawyers or government lawyers. My brother is a solo practitioner (plaintiff's personal injury) who works all the time and has clients who text at all hours and every day, week or weekend. I know many government lawyers who have demanding clients and large caseloads. Many in-house counsel have more work than they can handle and client representatives in multiple time zones. The "non-negotiables" are a reality for more lawyers than just associates in Big Law.

> DO THE ETHICS RULES REQUIRE YOU TO BE ACCESSIBLE TO YOUR CLIENTS 24/7? OF COURSE NOT. THE LEVEL OF CUSTOMER SERVICE EXPECTED BY YOUR EMPLOYER OR YOUR CLIENT IS ONE THING. YOUR ETHICAL DUTY OF COMMUNICATION, MEASURED IN TERMS OF PROMPTNESS AND REASONABLENESS, IS ANOTHER.

I have no solutions, unfortunately. But I thought it might be helpful to look at how the ethical requirements of communication and diligence fit into this conversation.

Communication

Do the ethics rules require you to be accessible to your clients 24/7? Of course not. The level of customer service expected by your employer or your client is one thing. Your ethical duty of communication, measured in terms of promptness and reasonableness, is another. Rule 1.4, Minnesota Rules of Professional Conduct (MRPC), sets out the ethical standards for communication. You must:

- promptly inform the client of any decision or circumstance where their informed consent is needed;
- reasonably consult with the client about the means to accomplish the client's objectives;
- keep the client reasonably informed of the matter's status;
- promptly comply with reasonable requests for information;
- consult with the client regarding any ethical limitations impacting the representation; and
- explain the matter to the extent reasonably necessary for the client to make informed decisions.

When used in the rules, "reasonable" means the "conduct of a reasonably prudent and competent lawyer." (Rule 1.0(i), MRPC.) *Prompt* is not defined in the rules, but dictionary definitions frequently use the synonym "quick." The comments to the rule provide some additional context, noting that if a prompt response is not feasible, someone should acknowledge the request and advise when a response will be provided. (Comment [4].) The comment also advises that regular communication with a client will help to minimize client requests.

Nowhere in the rule will you find the word *immediate,* even though it might feel that way with so many instantaneous forms of communication available. Good customer service and the ethics rules align when you approach client communications thoughtfully. Clients like regular updates—including the news that nothing is new—and no one likes surprises or last-minute fire drills, so anticipating the timing of known events, and planning accordingly, goes a long way toward ensuring good communications.

Clients also like to know what they can expect from you, so you may have more power to set and manage expectations than you think. Explain typical response times or communication timelines at the onset of the engagement, particularly if you represent individuals. Acknowledge communications even if you cannot respond, and provide an estimate of when you can respond. If you cannot get to it and you have staff, delegate the outreach. Bill regularly. Bills generally communicate a lot of information. You know all of this, but it is easier said than done with so much coming at you.

Time and again, we see lawyers who have the best of intentions but fail to meet these requirements because so much is on their plate. Remember, you are probably a lawyer because you are good at problem-solving. Embrace this challenge. When you keep the ethical requirements in mind, it helps to clarify when you are at risk of failing in your ethical duty of communication. While you may not always be able to provide the level of customer service you would like, make sure that you keep in mind the ethical requirements regarding communication.

Diligence

Clients often find legal timelines mysterious. And frustrating. It's not only big firm clients who expect results yesterday. So much of our culture revolves around immediacy. Your duty under Rule 1.3, MRPC, regarding timeliness is to "act with reasonable diligence and promptness in representing a client." Importantly, as the comment states, "A lawyer's workload must be controlled so that each matter can be handled competently."

This is perhaps one of the biggest challenges the profession faces. No one wants to turn away work; you don't always know when more work will come your way. Or sometimes you are unable to say no because you are not in private practice. Sometimes you have managed your workload well but the unpredictable nature of life and legal matters still throws a wrench in your plans. Probably nothing keeps more lawyers up at night than the number of things they have to do and the equally frustrating feeling that there is never enough time to complete what needs to be done.

Again, you know this—but even knowing that you have an ethical duty to act with diligence may not be sufficient to compel you to make changes or take action, particularly if you are one of many in the profession who suffer from depression or substance use disorders that interfere with the ability to get work done. (Remember our friends at Minnesota Lawyers Concerned for Lawyers—*www.mnlcl.org*—are there to talk and to help you find additional help if you need it.) It is sometimes hard to speak out and ask for help, or maybe you do not know who to turn to for help. The diligence rule is there, and enforced, to ensure that we do not let these other circumstances, although understandable, trump the interests of our clients.

A cautionary tale

In March 2023, the Minnesota Supreme Court suspended former city attorney Elizabeth Bloomquist from the practice of law for 30 days. As city attorney, Bloomquist failed to act diligently to make several misdemeanor charging decisions, allowing the statute of limitations to run on alleged criminal conduct in many cases, and failed to comply with victim notification statutes relating to those lapsed claims.

Bloomquist was arguably in an untenable position due to no-longer-sufficient levels of support personnel to allow her to get her work done on a timely basis. Although Bloomquist raised the issue of lack of support with the city, she also agreed that she likely could have done more. Ultimately, while recognizing the challenges faced by attorneys employed by government entities, the Court was unpersuaded that her lack of control over her own caseload warranted substantial mitigation under the facts presented. In representing a client, whether private or public, the duty to act with reasonable diligence and promptness should be foremost on your mind. When you cannot do so, keep raising the issue or take the steps necessary to withdraw ethically.

Conclusion

For as long as discipline has been imposed on lawyers, communication and diligence have been chief among the most violated rules. Objectively, they are easy enough to comply with. On the other hand, they can be challenging to satisfy for so many reasons. Because the obligations are so closely tied to the trust and confidence with which our clients and the public regard us, prioritizing your ethical duties of communication and diligence—notwithstanding the challenges that come your way, but also without succumbing to the pressure to act immediately—will serve you and the profession well. ▲

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HOT TOPICS *in legal ethics*

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

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

What is happening around the country in the world of legal ethics? "A lot" is the short answer. For this month's column, I thought you might enjoy a brief discussion of some current hot topics.

Confidentiality

Have you followed the dispute between the Securities and Exchange Commission and Covington & Burling? The SEC is seeking through an administrative subpoena the names of 298 publicly traded clients of the law firm to determine whether a 2020 cyberattack against the firm resulted in a leak of non-public information that was subsequently used in illegal trading. Eighty-three law firms filed an amicus brief opposing this disclosure under both attorney-client and confidentiality grounds. As of this writing, the parties were at an impasse, with enforcement up to a federal judge in the District of Columbia.[1] Remember, your duty of confidentiality under the ethics rules is broader than the attorney-client privilege doctrine; confidentiality covers all "information relating to the representation of a client" under Rule 1.6(a), Minnesota Rules of Professional Conduct (MRPC). A client's name and the fact of the representation falls within the scope of this rule, unless disclosure falls within an enumerated exception in Rule 1.6(b), MRPC (of which there are several).

Artificial intelligence

How various forms of artificial intelligence will impact the practice of law is obviously a hot topic. Attorneys in New York are learning the hard way that you cannot use ChatGPT to write your brief or find cases for you because the product will make up cases that do not exist but apparently look great on paper. Using ChatGPT, lawyers in the case of *Mata v. Avianca* cited six cases that were, apparently unbeknownst to them, wholly fictitious in a submission to the court. As this is written, an order to show cause why the lawyers should not be sanctioned is in process.[2] While this case is getting a lot of press, I know that this same thing happened in March in Minnesota. This should surprise me, but it does not.

Your duty of competence under Rule 1.1, MRPC, requires you to understand the benefits and risks of using technology in your practice.[3] It should also go without saying that you need to read the cases you cite to the court, and that you are responsible for having measures in place to ensure that those who assist you in creating work product also understand and comply with the ethics rules.[4]

Nonlawyers permissibly practicing law

As many of you know, Minnesota is currently conducting a pilot program that allows approved paralegals to provide broader, specifically enumerated legal services (under the supervision of a lawyer) in certain types of cases. Many states have implemented or are implementing similar programs. This effort began many years ago in Washington state—which recently sunset its program due to costs while allowing those already licensed to continue—and has grown to include Utah, Arizona, Oregon, and New Hampshire, in addition to Minnesota. Several other states have programs in process (Colorado, Connecticut, New Mexico, New York, North Carolina, and South Carolina), while some states have stopped efforts that were afoot (California and Florida). The structure of permissible programs differs depending on the jurisdiction, but they are alike in allowing trained nonlawyers to provide legal services under specific circumstances that would ordinarily be prohibited as the unauthorized practice of law.

As part of these efforts, jurisdictions are again asking how to define the practice of law, and what can and should be allowed by nonlawyers—including by non-humans, given the growing sophistication of artificial intelligence. Most people cannot afford lawyers, and many legal problems are not complex but do require specialized knowledge. Where these lines should continue to be drawn to protect the public is a particularly hot topic.

Due diligence on clients

The American Bar Association Standing Committee on Ethics and Professional Responsibility will be proposing a rule change at the ABA Annual Meeting in August to amend Model Rule 1.16 to incorporate an express ethical duty to "inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation" consistent with the ethics rules.[5] This proposed rule change is the result of a years-long effort to address concerns by the Treasury Department and others that lawyers may be unwittingly facilitating money-launder-

ing or other illegal conduct through the provision of legal services. While you have never been able to ignore red flags that your legal services were being used to facilitate unlawful conduct, the purpose of this rule change is to make the duty of inquiry part of the black-letter law.

Expanding multijurisdictional practice

The ABA is also currently studying proposed changes to Model Rule 5.5 relating to multijurisdictional practice in an effort to expand the ability of lawyers to practice across state lines. Since I have been in my position (and I am sure before then), there have been efforts to push licensure that is essentially nationwide in scope (once licensed in one jurisdiction, you are free to practice in any jurisdiction, except if special requirements exist to appear in court). While certainly more convenient for counsel, no one has yet figured out how to address the issues such a proposal would cause in the absence of a national regulatory scheme—which does not exist and cannot exist in a system where each state's Supreme Court (and in some instances, legislatures) regulates the profession in their jurisdiction. It will be interesting to see where this effort leads.

Frivolous claims and advocacy

Lawyers involved in challenging the November 2020 election have been the subject of public discipline proceedings in numerous jurisdictions, including but not limited to Rudy Giuliani (New York and D.C.), Jenna Ellis (Colorado), John Eastman (California), L. Lin Wood (Georgia), and Sidney Powell (Texas). More cases are likely to follow. These cases are not particularly novel in that it has long been ethically prohibited under Rule 3.1, MRPC, to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." What is more challenging, however, is the context in which these cases arise—extreme partisan politics. One commentator at a CLE I attended suggested regulators need to take care not to politicize discipline or penalize "aggressive advice." There is no doubt that the courts and discipline authorities will continue to debate where the line should be drawn between zealous advocacy and disciplinable conduct: a hot topic indeed!

Trust account schools and other proactive programs

Many jurisdictions, whether through their discipline offices or client security funds, are expanding efforts to assist lawyers in ethically meeting their trust accounting obligations by creating and expanding trust account schools. At a regulators' roundtable I attended in early June, several jurisdictions reported increasing their trust account training, such as Mississippi, California, and Ohio, and others have similar efforts in process. I hope that Minnesota will join this growing list in the next year. Other states are expanding efforts to provide, and in some cases make mandatory, practice-essential training or ethics schools, particularly for solo practitioners. Although resource-intensive, such programs are in my opinion a good value proposition for both lawyers and the clients we serve. It is exciting to see these proactive efforts continue to gain traction in jurisdictions.

Conclusion

This is a small sampling of topics that have the attention of legal ethics professionals. Another hot topic of interest to me that I will cover in a future column is the role of the First Amendment in attorney regulation, particularly as applied to attorney social media use. For some, such topics are beyond boring—but please know that a lot of ethics nerds are thinking deeply about these and other topics so that you do not have to! ▲

NOTES

[1] *Security Exchange Commission v. Covington & Burling, LLP*, Court File No. 1:23-mc-00002-APM (D.D.C. filed 1/10/2023).

[2] *Mata v. Avianca, Inc.*, Court File No. 1:22-cv-01461-PKC.

[3] Rule 1.1, MRPC, Cmt. [8] ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.")

[4] Rules 5.1, 5.3, MRPC (requiring those with managerial and direct supervisory authority to take "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that" lawyers and non-lawyer's conduct conforms to the rules and is compatible with the professional obligation of the lawyer).

[5] ABA Resolution 100.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 505 **May 3, 2023**

Fees Paid in Advance for Contemplated Services

Under the Model Rules of Professional Conduct, a fee paid to a lawyer in advance for services to be rendered in the future must be placed in a client trust account and may be withdrawn only as earned by the performance of the contemplated services. This protects client funds and promotes client access to legal services in the event the representation terminates before all contemplated services have been rendered. All fees must be reasonable, and unearned fees must be returned to the client. Therefore, it is not accurate to label a fee "nonrefundable" before it actually has been earned, and labels do not dictate whether a fee has been earned.

This opinion examines a lawyer's obligations under the ABA Model Rules of Professional Conduct with respect to fees paid in advance for legal work to be performed by the lawyer in the future.[1] In particular, this opinion seeks to clarify the proper handling and disposition of fees paid in advance for legal work to be performed in the future, including where the lawyer must deposit and maintain the funds and when the lawyer may treat them as earned. The opinion also explains when a lawyer must refund all or a portion of fees paid in advance and discusses whether such a payment may be, or can even be labeled, "nonrefundable." The answers are derived from the application of several Model Rules, including: 1.5(a), 1.5(b), 1.15(a), 1.15(c), 1.15(d), and 1.16(d).

Fees for services may be paid after completion of the services, of course. However, for certain matters, many lawyers request or require that funds in a certain amount be paid to the lawyer at the outset of the representation to secure payment for the lawyer's later work. Under the Model Rules such fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned. This is to protect the client from the risk that the lawyer may not be able to refund the prepaid fee in the event the representation terminates before the contemplated work is completed. The Model Rules protect the lawyer from the risk of nonpayment by allowing advance fees to be received and protect the client by requiring that the funds are kept safe and separate from the funds of the lawyer or firm.

I. Terminology

As a preliminary matter, it is useful to define terms commonly used to label certain client-lawyer fee arrangements: advances, retainers, flat or fixed fees, and "nonrefundable" or "earned-on-receipt" fees.

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[1] This opinion is based on the American Bar Association Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling. This is especially noteworthy for this opinion as jurisdictions have adopted substantially different rules relating to the management of client property including fees paid in advance for legal work to be performed in the future.

A. Advances v. Retainers

Fees paid by a client to a lawyer in advance for legal work to be performed by the lawyer in the future are sometimes referred to as an "advance fee," an "advanced fee," an "advance fee payment," an "advance fee deposit," a "fee advance," or simply an "advance." Advances are also sometimes called "special retainers," "security retainers," or simply "prepaid fees." To be consistent and clear, this opinion will use the term "advance" when discussing fees paid to the lawyer for legal work to be performed in the future.

When a client pays an advance to a lawyer, the lawyer takes possession – but not ownership – of the funds to secure payment for the services the lawyer will render to the client in the future.

This opinion will also refer to the term "retainer" fee. Neither the term "retainer" nor "retainer fee" is found in the Model Rules of Professional Conduct. Regrettably, many lawyers use the term loosely to mean any sum of money paid to the lawyer at or near the commencement of representation.[2] Whereas an advance is a deposit of money with the lawyer to pay for services to be rendered in the future, there is another type of payment that is not for services. Rather, "[t]he purpose of [a retainer] is to assure the client that the lawyer will be contractually on call to handle the client's legal matters."[3] This type of agreement and payment is variously referred to as a "general retainer," "classic retainer," "true retainer," "availability retainer," or an "engagement retainer."[4] Because all of these terms mean the same thing, this opinion will use the term "general retainer" to refer to this arrangement.[5] A general retainer is paid – and deemed earned – upon the promise of availability to represent a client, whether or not services are actually needed or requested by the client.[6] Thus, a general retainer has been conceptualized as a form of an option

[2] There is widespread agreement that the word "retainer" has been used so inconsistently that is has practically lost all definable meaning. BLACK'S LAW DICTIONARY (11th ed. 2019) ("Over the years, lawyers have used the term 'retainer' in so many conflicting senses that it should be banished from the legal vocabulary.") (quoting Mortimer D. Schwartz & Richard C. Wydick, PROBLEMS IN LEGAL ETHICS 100, 101 (2d ed. 1988)).

[3] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 506 (West 1986).

[4] Some jurisdictions have commendably sought to define terms and draw distinctions in their court rules. *See* Ariz. Rules of Prof'l Conduct R. 1.5 cmt. [7] ("The 'true' or 'classic' retainer is a fee paid . . . merely to insure the lawyer's availability to represent the client and to preclude the lawyer from taking adverse representation. What is often called a retainer but is in fact merely an advance fee deposit involves a security deposit to insure the payment of fees when they are subsequently earned, either on a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. . . ."). *See also* Fla. State Bar R. 4-1.5(e)(2) (defining "retainer," "flat fee," and "advance fee") and Iowa R. Civ. P. 45.8-10 (defining "general retainer," "special retainer, and "flat fee").

[5] It is sometimes said that retainers come in two varieties: "general retainers" and "special retainers." A special retainer is simply an advance going by another, unfortunately misleading, name. *See* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 5-6 (1993) ("A special retainer is an agreement between lawyer and client in which the client agrees to pay the lawyer a specified fee in exchange for specified services to be rendered. The fee may be calculated on an hourly, percentage or other basis and may be payable either in advance or as billed.") (footnotes omitted). The Committee is of the opinion that a special retainer is the same thing as an "advance." To be consistent and clear, this opinion will use the term "advance" when referring to such arrangements, although some of the cited sources and authorities may use the term "special retainer."

[6] "Because the general retainer is not a payment for the performance of services, but rather is compensation for the lawyer's promise of availability, the fee is earned by the lawyer at the time the retainer is paid and thus should not be deposited into a client trust account. The general retainer is not an advance deposit against future legal services, which instead would be separately calculated and charged should the lawyer actually be called upon by the client to

contract.[7] In other words, hourly time is not billed against a general retainer and a general retainer is not a flat fee for a specific amount of the lawyer's time – it is solely to reserve the lawyer's availability. An important result of these related features is that the money paid by the client in connection with a general retainer should not be placed in a trust account since it is considered earned upon the commencement of the contract.[8]

Some authorities treat the term "general retainer" or "true retainer," etc., as synonymous with "nonrefundable." This is not correct. A general retainer may, by custom, be considered earned when paid, but this does not mean that it is forever exempt from scrutiny under the Rules. It may be determined to be an unreasonable fee, or even unearned if the lawyer does not make himself or herself available. For example, if a company retains a lawyer to handle a hostile takeover bid should one arise and the lawyer does not, in fact, accept the engagement, then the fee, which may have been paid many months earlier and treated as the lawyer's own property, may be determined to be unreasonable and/or unearned and therefore the subject of an order requiring it to be returned, refunded, or repaid to the client. Other circumstances requiring refund might include the death, disability, suspension, or disbarment of the lawyer. Like all fees, a general retainer must be reasonable under the circumstances.[9]

General retainers "are quite rare,"[10] and have "largely disappeared from the modern practice of law."[11] However, attempts to cast what is actually an advance payment of fees for services to be performed later as a general retainer are very much present today. Given the rarity and unusual nature of a general retainer, and the fact that very few clients would actually need or benefit from one, the nature of the fee and lawyer's obligations and client's benefits under such an agreement must be explained clearly and in detail, including the fact that fees for legal services performed will be charged in addition to the general retainer,[12] and use of the term should be restricted to its traditional definition.

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perform the legal services in the future." Gregory C. Sisk, *Duties to Effectively Represent the Client*, § 4-4.4(b) (A Retainer for Lawyer Availability), *in* LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (West 2016).

[7] Lester Brickman, *The Advance Payment Dilemma: Should Payments be Deposited to the Client Trust Account or to the General Office Account*, 10 CARDOZO L REV. 647, 649 n.13 (1989). *See also In re* O'Farrell, 942 N.E.2d 799, 803 (Ind. 2011).

[8] This opinion does not attempt to exhaustively discuss general retainers. Though they can and do have legitimate uses, for years they have been criticized, disfavored, and narrowly construed based on contract law, public policy, and contemporary ethics principles. *See, e.g.*, Charles J. McClain, Jr., *The Strange Concept of the Legal Retaining Fee*, 8 J. LEGAL PROF. 123 (1983) (common law of retainers "rests on rather shaky conceptual foundations" full of "inconsistencies and contradictions" and "contributing yet another irritant to the already strained relations between the legal profession and the public at large"); Pamela S. Kunen, *No Leg to Stand on: The General Retainer Exception to the Ban on Nonrefundable Retainers Must Fall*, 17 CARDOZO L. REV. 719 (1996) (discussing "historical and descriptive misconceptions" and arguing that, in many instances, such retainers generate the fiduciary obligations attending other lawyer-client fee agreements); and Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67 FORDHAM L. REV. 443, 449-453 (1998).

[9] MODEL RULES OF PROF'L CONDUCT R. 1.5(a); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 (2001) [hereinafter RESTATEMENT].

[10] Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. LEGAL PROF. 113, 116 (2009). *See also In re* O'Farrell, 942 N.E.2d at 804 n.5.

[11] Provanzano v. Nat'l Auto Credit, Inc., 10 F. Supp. 2d 44, 51 (D. Mass. 1998).

[12] MODEL RULES OF PROF'L CONDUCT R. 1.5(b); RESTATEMENT, *supra* note 9, § 38.

This opinion focuses on advance fees paid by individual clients, usually for a single legal matter (or related matters) that will not recur on a regular basis. Examples include a divorce, defense of criminal charges, and discharge from employment or other civil matters not handled on a contingent fee basis. However, some clients may need legal services of a certain type on a repeat basis and may contract for such services. For example, the client and lawyer may enter into a renewable one-year agreement providing for a monthly payment to handle any or all collections arising out of one or more of the client's businesses. Some lawyers and clients may use the term "retainer" or "general retainer" to refer to such an arrangement. Such arrangements may be perfectly appropriate although they may not meet the definition of a general retainer even if "availability" is said to be a part of the arrangement. Perhaps the arrangement may best be understood as a fixed fee agreement, except that instead of handling one matter for a set fee no matter what services end up being required, the lawyer is handling several matters (subject to whatever limitations the parties place on the number, type, geography, etc., of the matters).[13]

B. Flat or Fixed Fees

Some lawyers prefer to charge their clients a flat or fixed fee for discrete legal services they provide. Examples include closing the purchase of a single-family home, incorporating a small business, drafting a will, or providing a defined, limited-scope service, such as drafting a motion. A flat fee is one that "embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted."[14]

If a flat or fixed fee is paid by the client in advance of the lawyer performing the legal work, the fees are an advance. Use of the term "flat fee" or "fixed fee" does not transform the arrangement into a fee that is "earned when paid." "Flat" or "fixed" does not even mean that the fee must be paid at the commencement of the representation, although most lawyers who do not have an existing relationship with a client may want to ensure payment and may, therefore, ask for the fee to be paid in advance before committing to the representation. If they do, as will be emphasized below, then that fee must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Several courts and ethics opinions endorse the option of dividing the representation into segments such that certain portions of a flat fee advance are considered earned before completion

[13] As we have noted, courts scrutinize purported general retainers to ensure that the lawyer is not attempting to circumvent the ethics rules requiring refund of unearned fees upon termination of the representation. The same is true with what are sometimes called "hybrid" fees or retainers. Such a fee is "a putative general retainer that is denominated as both for availability and for services," and it is likely to be considered by courts to be "fully refundable to the extent not earned by services rendered." Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. CIN. L. REV. 11, 22 (1995). *See also* N.Y. City Bar Formal Op. 2015-2 (Nonrefundable Monthly Fee in a Retainer Agreement) (2015), *citing* Agusta & Ross v. Trancamp Contracting Corp., 193 Misc.2d 781, 785-86 (N.Y. Civ. Ct. 2002) for the proposition that "enforcement of a hybrid retainer 'should be subject to close scrutiny, governed by a rebuttable presumption that any moneys retained by counsel are for services, rather than availability.'"

[14] ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1389 (1977).

of all the contemplated work.[15] Some jurisdictions have codified this approach in their rules.[16] Thus, if agreed to, the lawyer may remove such earned portions of a flat fee advance from trust prior to the completion of the full scope of the legal services to be performed as certain "milestones" or stages of the representation are reached or completed. This approach allows the lawyer to be paid in part before the end of the representation and provides some assistance in determining the refund amount in case of early termination. Of course, "extreme 'front-loading' of payment milestones in the context of the anticipated length and complexity of the representation" may not be reasonable.[17]

C. So Called "Nonrefundable" and "Earned Upon Receipt" Fees

Some lawyers use labels like "nonrefundable retainer," "nonrefundable fee," or "earned on receipt" in the body or title of a fee agreement. These are not actual types of fees. And use of these descriptors does not, in and of itself, make a fee arrangement a general retainer. In fact, these terms are most often used in an attempt to make an advance fee nonrefundable.

The Model Rules of Professional Conduct do not allow a lawyer to sidestep the ethical obligation to safeguard client funds with an act of legerdemain: characterizing an advance as "nonrefundable" and/or "earned upon receipt." This approach does not withstand even superficial scrutiny. A lawyer may not charge an unreasonable fee. See Model Rule 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."). Comment [4] to Rule 1.5 provides this additional guidance: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." See also, Model Rule 1.15(c) and others discussed in connection with Hypothetical 1 below. Therefore, under the Model Rules, an advance fee paid by a client to a lawyer for legal services to be provided in the future cannot be nonrefundable. Any unearned portion must be returned to the client. Labeling a fee paid in advance for work to be done in the future as "earned upon receipt" or "nonrefundable" does not make it so.[18]

Hypothetical scenarios illustrating these concepts and applying the Model Rules are discussed in Section IV below.

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[15] *See, e.g.*, New Hampshire Bar Assoc. Ethics Committee Practical Ethics Article, *Practical Suggestions for Flat Fees or Minimum Fees in Criminal Cases* (Jan. 17, 2008). *See also In re* Mance, 980 A.2d 1196, 1202, 1204-1205 (D.C. 2009), *citing* Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where Should it be Deposited?*, 1 FLA. COSTAL L.J. 293, 323 (1999) for the proposition that some opinions "allow the lawyer to withdraw fees according to milestones 'based upon passage of time, the completion of certain tasks, or any other basis mutually agreed upon between the lawyer and client.'"

[16] *See, e.g.*, Colo. Rules of Prof'l Conduct R. 1.5(h) (defining a flat fee, explaining proper handling, setting forth required contents of the agreement, and appending an authorized form agreement).

[17] *In re* Mance, *supra* note 15.

[18] *See, e.g.*, *In re* O'Farrell, 942 N.E.2d 799, 803 (Ind. 2011) ("Regardless of the term used to describe a client's initial payment, its type is determined by its purpose, i.e., what it is intended to purchase."); Mo. Sup. Ct. Advisory Comm. Formal Op. 128 (Amended 2018) (labels not conclusive); *In re* Wintroub, 277 Neb. 787, 801; 765 N.W.2d 482 (2009) (citing cases from several jurisdictions for the proposition that "a lawyer may not retain an unearned fee, even if the fee agreement clearly provides that the fee is nonrefundable"); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Turner, 918 N.W.2d 130, 147 (Iowa 2018) (simply labeling payment of advance fees as "nonrefundable" does not relieve attorney from obligation to deposit them into trust accounts).

II. Model Rule of Professional Conduct 1.15: The Anti-commingling Rule and the Need to Protect Client Funds, Including Advances

Rules of professional conduct exist for the protection of the public. That purpose is well served when the rules are designed and enforced to prevent concrete financial harm to clients. The anti-commingling principle, embodied in Rule 1.15, is a longstanding and effective component in the client protection arsenal. This is why, since their inception in 1908, the American Bar Association's model codes and rules of ethics have prohibited lawyers from commingling their property (including funds) with the property of clients and third parties.[19]

Under the general anti-commingling rule, Model Rule 1.15(a), client property, which includes unearned fees paid in advance, must be held in an account separate from the lawyer's own property.[20] In 2002, Model Rule 1.15 was amended to address specifically the issue of advance fees in a new paragraph (c): "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." Therefore, advances must be placed into a lawyer's trust account until those fees are earned.

The Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission"), which recommended the addition of this paragraph, did so in response to reports "that the single largest class of claims made to client protection funds is for the taking of unearned fees."[21] Accordingly, paragraph (c) "provides needed practical guidance to lawyers on how to handle advance deposits of fees and expenses."[22] Stated simply, under the Model Rules advance fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Some jurisdictions have authorized lawyers to treat advances as the lawyer's property upon payment, so long as the client signs a fee agreement designating the sum as "nonrefundable" or

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[19] *See* ABA CANONS OF PROFESSIONAL ETHICS, Canon 11 (1908); ABA MODEL CODE OF PROF'L RESPONSIBILITY, DR 9-102 (1969); ABA MODEL RULES OF PROF'L CONDUCT R. 1.15 (1983, revised 2002). One treatise explains the nature and breadth of this key obligation:

> One of the core fiduciary duties of a lawyer is to safeguard the property that the lawyer receives from the client or from other sources but that belongs to the client or third persons. Property received from a client may include funds to be applied to a transaction, a payment in satisfaction of a judgment or settlement, an advance deposit against lawyer's fees, valuable documents to be analyzed, or property of evidentiary value. Under Rule 1.15(a) of the Model Rules of Professional Conduct, "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." The lawyer therefore must keep the property in a secure location and segregate those assets from the lawyer's own property. Gregory C. Sisk, Duties to Effectively Represent the Client, § 4-5.6 (The Duty to Safeguard Client Funds and Property), in Legal Ethics, Professional Responsibility, and the Legal Profession (West Academic Publishing, 2016).

[20] *In re* Kendall, 804 N.E.2d 1152, 1161 (Ind. 2004). Also, Rule 1.15(a)'s predecessor was applied to advance fees. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 477 (Iowa 2003) (failure to place advance fee in a trust account violated DR 9-102(A)).

[21] A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005 342 (ABA 2006).

[22] *Id.*

"earned on receipt" or some other variation on this theme.[23] This approach departs from the safekeeping policy of the Model Rules described herein and creates unnecessary risks for the client.[24]

III. Model Rule of Professional Conduct 1.16: Declining or Terminating Representation

Model Rule 1.16(d) requires that, upon termination of representation, a lawyer shall refund "any advance payment of fee or expense that has not been earned or incurred." This Rule, and Rule

[23] *See, e.g.*, Or. Rules of Prof'l Conduct R. 1.5(c)(3). That jurisdiction's version of Rule 1.15(c) contains an exception to the anti-commingling rule for advance fees when "the fee is denominated as 'earned on receipt,' 'nonrefundable' or similar terms and complies with Rule 1.5(c)(3)." Or. Rules of Prof'l Conduct R. 1.15-1(c). A considerable minority of U.S. jurisdictions have authorized this variant approach to advances by rule, ethics opinion, or judicial decree. *See, e.g.*, State Bar of Ariz. Op. 99-02 (1999) (non-refundable, earned-upon-receipt fee is ethical if reasonable under Rule 1.5 and client is fully informed about and expressly agrees to such a fee, preferably in writing; such a fee does not go into a lawyer's trust account); Fla. Rules of Prof'l Conduct R. 4-1.5(e)(2)(B) and Comment (nonrefundable flat fee is the property of the lawyer and should not be held in trust); Wash. State Rules of Prof'l Conduct R. 1.5(f)(2) (if agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt and shall not be deposited into a trust account); and N.Y. St. Bar. Assn. Comm. Prof'l Ethics Op. 816 (2007) (reaffirming 1985 opinion concluding that "fees paid to a lawyer in advance of services rendered are not necessarily client funds and need not be deposited in client trust account"). Such jurisdictions typically provide, via rule or otherwise, that advance fees must be refunded if unreasonable or work remains to be done even if language to the contrary is used and the funds have been taken by the lawyer pursuant to a rule and/or agreement.

[24] See *In re* Long, 368 Or. 452, 455–56, 474-75, 491 P.3d 783, 788–89, 798-99 (2021), cert. denied 142 S. Ct. 2685 (2022), in which the court candidly discussed the rule and its fallout:

> Respondent's limited financial resources also led to his extensive use of fee agreements that allowed him to access advance fees before completing the promised services. . . . The [Oregon] Rules of Professional Conduct allow for alternative fee agreements, under which advance fees become the lawyer's property at the time the fees are received—that is, before the lawyer has performed the promised services. RPC 1.5(c)(3). In those instances, the advance fees are not placed in the lawyer's trust account and are sometimes referred to as "earned on receipt." Fees may be "earned on receipt" only pursuant to a written fee agreement disclosing that "the funds will not be deposited into the lawyer trust account" and that "the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed." *Id.* [¶] According to respondent, because he frequently had pressing personal and business costs, he would not have been able to operate his legal practice if he could access a client's fees only after he completed the promised services. . . . [¶] Although respondent's handling of those advance fees did not itself violate a Rule of Professional Conduct, it nevertheless left respondent's clients vulnerable. "Earned on receipt" fee agreements shift the risk of loss to the client. If the client relationship ends before the lawyer has performed the services needed to keep the advance fees, then the lawyer is required to return the fees for the uncompleted work. If the lawyer has already spent the advance fees and has no other financial resources upon which to draw, then the lawyer may be unable to provide the client with the required refund. [¶] That is what happened to many of respondent's clients. . . . [¶] Respondent's misconduct caused extensive injuries, which were not merely financial. Many of respondent's clients had limited financial means and needed their advance fees returned before they could afford to hire new lawyers. When respondent failed to return those advance fees, some clients simply went without legal representation.

1.15, work in tandem to achieve the regulatory objective of protection of the public from financial harm caused by inattentive or unscrupulous lawyers.[25]

Advances are unearned because they are payment today for work to be performed in the future. They were unearned upon receipt and remain unearned until the work is performed. The Model Rules mandate that advances belong to the client, must be preserved until they are actually earned, and must be refunded if the representation terminates before the fees are earned.

As a practical matter it may be somewhat more difficult to determine what has been earned and what is unearned when a representation ends before completion of the contemplated services when the client pays a flat or fixed fee instead of an hourly rate. However, courts routinely apportion the services completed and sum earned when a representation terminates before a lawyer has completed all of the contemplated work.[26]

IV. Hypothetical Scenarios Involving Client Payments at the Commencement of a Specific Representation.

Hypothetical 1 ("Nonrefundable Retainer")

A lawyer is consulted by a client seeking to terminate her marriage. The lawyer informs the client that the lawyer requires a $6,000 "retainer" to cover the filing of a divorce complaint, preparing a motion to enjoin the transfer of assets and a possible motion for a protective order, attending hearings relative to those motions, and any negotiations or related work until the lawyer expends 20 hours. The client was also informed that additional "retainers" may be required to complete the matter, and that the retainers will be credited toward payment for the lawyer's services at the reasonable rate of $300 per hour. The lawyer's fee agreement states, in pertinent part:

> Client agrees to pay Lawyer a nonrefundable retainer fee of $6,000. Client understands that no portion of this fee shall be refunded or returned to Client for any reason.
>
> Client further agrees that should Lawyer expend more than 20 hours on Client's matter, Client shall pay additional retainers as requested by Lawyer which shall be

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[25] Nothing tarnishes the profession's reputation like a lawyer who takes an advance fee for legal services to be performed in the future, does not complete the work contemplated by the fee arrangement, and does not refund the money, perhaps because he or she cannot. Once the money has been spent by the lawyer, it may never be recovered by the client (or by the client protection fund which may have reimbursed the client). Even if a civil judgment or disciplinary order of restitution is entered it may do little good if the lawyer is impecunious, judgment-proof, or bankrupt. Discipline in that case may offer a measure of public protection through deterrence, but it does not recompense the client. That client's access to justice may also be impeded. The client may be unable to pay another advance fee and may, therefore, be unrepresented if legal aid or pro bono assistance is unavailable. Model Rules 1.15 and 1.16 exist to protect a client from these consequences.

[26] *See, e.g.*, *In re* O'Farrell, 942 N.E.2d 799, 808 (Ind. 2011) (quantum meruit available upon client termination of flat fee agreement). *Cf.* Plunkett & Cooney, PC v. Capitol Bancorp Ltd, 212 Mich. App. 325, 331; 536 N.W.2d 886 (1995) (discharged lawyer with fixed-fee agreement entitled to compensation for services rendered calculated by percentage of services required under contract, unless lawyer and client have agreed to other terms for valuing work completed).

applied to Lawyer's billing for this matter at a rate of $300 per hour and to any costs or expenses incurred in the representation.

Three weeks after signing the agreement and paying the $6,000, Client notified Lawyer that she wanted to reconcile with her husband and asked for an itemization of Lawyer's time and expenses and a refund of any unearned fees. Lawyer had filed the complaint, but it had not been served. Lawyer had also prepared but had not filed a motion to enjoin the transfer of certain assets. Lawyer had spent 5.5 hours on the file and $150 to file the complaint, but responded to the Client that no refund was due because the $6,000 was a nonrefundable fee.

Question: Does Lawyer owe Client a refund for any of the $6,000 paid to Lawyer and are any rule violations established by this scenario?

Answer: Yes, Lawyer owes Client a refund. First, the $6,000 paid by Client to the Lawyer are fees paid in advance not a general retainer. Under this agreement, Lawyer is rendering legal services at the rate of $300 per hour. This is true from the outset as is established by simply reading the portion of the agreement quoted above and performing some simple math. The $6,000 entitles Client to 20 hours of Lawyer's work on the matter.

Second, lawyer was required to have placed the $6,000 of advanced fees into the Lawyer's client trust account. Model Rule 1.15(c) provides that: "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by Lawyer only as fees are earned or expenses incurred." The so-called nonrefundable fee here is an advance payment of fees that may only be withdrawn from the client trust account as earned by Lawyer. The facts of this hypothetical are silent as to whether Lawyer placed the $6,000 in the trust, operating, or personal account and as to whether it was spent in whole or in part. Lawyers may be disciplined for treating advance fees as their own property before the fees are earned, i.e., before the contemplated legal services are rendered.[27] Commingling and perhaps misappropriation may have occurred here if Lawyer deposited the $6,000 into an account other than a client trust account and spent it.

In this scenario, assuming that the legal work performed was appropriate and useful, Lawyer has earned $1,650.00 in legal fees. Lawyer also spent $150 for the expense of filing the complaint. Failure to return the balance of $4,200 is a violation of Model Rule 1.16(d) (upon termination of representation, a lawyer shall refund any advance payment of fee or expense that has not been earned or incurred). Comment [4] to Rule 1.16(d) explains the fundamental legal principle underlying this requirement: "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." Lawyer's failure to provide an accounting for the fees paid in advance also constitutes a violation of Rule 1.15(d).

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[27] "A lawyer misappropriates client funds in violation of DR 1–102(A)(3), (4), (5), and (6)DR 1–102(A)(3), (4), (5), and (6) when special retainers and flat fees paid in advance are treated as money belonging to the lawyer and not maintained in a trust account until the fee has been earned." Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 475 (Iowa 2003). *See also In re* Fazande, 290 So. 3d 178, 185 (La. 2020) (lawyer violated Rule 1.15(c) by failing to deposit into his client trust account advance fees and costs).

Model Rule 1.5(a) provides: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Comment [4] to Rule 1.5 states: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." Thus, keeping the balance ($4,200) violates Rule 1.5(a) on these facts. Because Rule 1.5 precludes a lawyer from agreeing to an unreasonable fee, it is also violated by the Lawyer's inclusion of the following provision in the fee agreement: "Client agrees to pay Lawyer a nonrefundable fee of $6,000. Client understands that no portion of this fee shall be refunded or returned to Client for any reason."[28]

Finally, because a lawyer may, in fact, be required to refund an advance payment of fees in various situations, characterizing such an advance as "nonrefundable" may also amount to a violation of Rule 1.4 (communication) and Rule 8.4(c) (misrepresentation) as the mischaracterization of the funds may have a chilling effect on a client seeking a refund of unearned fees upon termination of the representation.[29]

Lawyer and the fee agreement use the words "retainer" and "fee" interchangeably. In this hypothetical it appears that the word "retainer" is used incorrectly to refer to the advance payment of legal fees at the initiation of a matter, or, really, at any time during the representation as is suggested by the agreement's provision that additional "retainers" may be required.

Hypothetical 2 (Purported General Retainer)

The facts are the same as in Hypothetical 1, except that the lawyer's standard fee agreement states, in pertinent part:

> Client agrees to pay Lawyer a non-refundable engagement fee of $6,000 which shall be deemed earned upon receipt by Lawyer. This engagement fee is for the purpose of retaining Lawyer and assuring the availability of Lawyer in this matter. Client understands that no portion of the engagement fee shall be refunded or returned to Client for any reason.
>
> Client further agrees that should Lawyer expend more than 20 hours, Client shall pay upon request an additional retainer in an amount determined by Lawyer which shall be applied to Lawyer's billing for this matter at a rate of $300 per hour and to any costs or expenses incurred in the representation.

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[28] *In re* Kendall, 804 N.E.2d 1152, 1160 (Ind. 2004) ("We hold that the assertion in a lawyer fee agreement that such advance payment is nonrefundable violates the requirement of Prof. Cond. R. 1.5(a) that a lawyer's fee 'shall be reasonable.'"). *See also* N.Y. City Bar Ass'n Formal Opinion 1991-3 (in light of reasonableness requirement, duty to refund unearned fees, and client's "essentially absolute" right to discharge counsel, "a lawyer may not properly denominate or characterize a fee as 'nonrefundable' or otherwise use words that could reasonably be expected to convey to the client the understanding that a fee paid before the services are performed will not be subject to refund or adjustment under any possible circumstance").

[29] *See, e.g.*, *In re* Sather, 3 P.3d 403, 415 (Colo. 2000) (knowing use of misleading language, i.e., describing flat advance fee as "nonrefundable," violated Colo. RPC 8.4(c)) and Ala. State Bar Op. RO-93-21 (1993) ("Any indication by the lawyer that the fee is non-refundable is inaccurate and inherently misleading and would violate Rule 1.4(b) Communication; Rule 1.5(b) Fees; and Rule 8.4(c) Misrepresentation."). *See also* Mo. Sup. Ct. Advisory Comm. Formal Op. 128 (Amended 2018) (in various situations "the description of the fee as 'nonrefundable' is misleading").

Again, the facts are the same: Lawyer spent 5.5 hours and a filing fee for the complaint, and Client reconciles and seeks a refund. Lawyer declines to refund any portion of the fee, claiming it is nonrefundable.

Question: Does Lawyer owe Client a refund for any of the $6,000 paid to Lawyer and are any rule violations established by this scenario?

Answer: Yes. The answer and analysis for Hypothetical 1 apply here as well. The only difference ("retainer" and "engagement fee" language) makes no difference at all. The fee arrangement still has the same basic structure and, for the reasons discussed above, the $6,000 is clearly an advance payment for the future performance of legal services, not an actual "retainer" because the lawyer contemplates billing time against the advance.[30] Accordingly, the $6,000 must be held in trust until earned and any unearned portion properly refunded to the client.

Under the Model Rules, there are no magic words that a lawyer can use to change what is actually an advance payment for fees into a general retainer: "an attorney cannot treat a fee as 'earned' simply by labeling the fee 'earned on receipt' or referring to the fee as an 'engagement retainer.'"[31] Notwithstanding the use of the terms "engagement fee," "retainer," and "availability," the fee in Hypothetical 2 is still not a general retainer fee and is, therefore, not deemed earned on receipt. The purpose of the fee dictates its character and treatment irrespective of labels or terminology used.

Courts examine the transaction and agreement very carefully to ensure that the purported general retainer is not an attempt to charge and retain unearned advance fees.[32] Accordingly, a lawyer claiming to have a general retainer must be prepared to demonstrate a valuable benefit to the client and/or an actual detriment to the lawyer.[33] It is easy to recite that the lawyer is prioritizing the client's work, turning away other work, keeping up on the relevant law, etc. However, it must be shown that such things were not only actually done, but that they were necessary for the representation and not part of the lawyer's basic responsibilities.[34]

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[30] *Cf. In re* Lais, No. 91-O-08572, 1998 WL 391171, at *14-15 (Cal. Bar Ct. July 10, 1998) (characterization as "'fixed, non-refundable retaining fee' paid 'for the purpose of assuring the availability of [respondent] in this matter'" was "not determinative" and the fee was not a "true" (general) retainer, but actually payment for the first 10 hours of lawyer's services).

[31] *In re* Sather, 3 P.3d 403, 412 (Colo. 2000). *See also* note 18, *supra*.

[32] Richmond, *supra* note 10, at 116: "As a practical matter, general retainers are rare. . .. The types of representations that justify or require general retainers are also scarce. Courts hearing fee related controversies are therefore properly skeptical of general retainer claims." *See also* RESTATEMENT, *supra* note 9, § 34 ("Engagement-retainer fees agreed to by clients not so experienced should be more closely scrutinized to ensure that they are no greater than is reasonable and that the engagement-retainer fee is not being used to evade the rules requiring a lawyer to return unearned fees.")

[33] Att'y Grievance Comm'n of Maryland v. Stinson, 428 Md. 147, 183-185, 50 A.3d 1222, 1244-1245 (2012) (purported engagement fee for "willingness and availability" to represent client not a true general retainer where no benefit to client or detriment to lawyer established and lawyer "produced no useable work").

[34] *See Stinson*, 50 A.3d at 1243 (benefits offered to the client in exchange for the nonrefundable fee were "nothing more than the ethical obligation imposed on all lawyers when they agree to provide legal services to a client. . . . A lawyer who agrees to perform legal services also necessarily agrees to be available to perform those services."), *citing* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited,* 72 N.C. L. REV. 1, 24 (1993), and Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 477 (Iowa 2003).

Hypothetical 3 (Flat Fee)

A client seeks to hire a lawyer for representation in a criminal matter. The fee agreement provides: "Client shall pay Lawyer the sum of $15,000 for representation in the matter of State v Client, and that no part of the flat fee shall be refunded for any reason. Client understands that the flat fee is the agreed upon amount due Lawyer regardless of the time expended on the matter or how it is resolved." Client signed the agreement and paid the full $15,000. Lawyer deposited the $15,000 into his firm's operating account. Lawyer reviewed the police report, left a message for the prosecutor and law enforcement officer, appeared on behalf of the defendant at the arraignment, and filed an appearance with the court. A few weeks after the arraignment, Client discharged Lawyer and requested an accounting and partial refund. Lawyer refused, stating that the flat fee was earned when it was paid.

As we noted above, flat fees paid in advance of performing the work are subject to Rule 1.15(c) and the other rules set forth in the analyses in Hypotheticals 1 and 2. In other words, the foregoing rules regarding safekeeping, refundability, and reasonableness apply.

Flat fees are not general retainers and must not be treated as such. That the price set for the representation is not based on hours worked but is instead based on the completion of certain described services does not mean that the fee must be considered earned on receipt or nonrefundable when there is work yet to be done. Of course, if the flat fee is paid *after* the work is completed, the funds are earned and are not deposited into the trust account.

V. Conclusion

The Model Rules protect a client's right to terminate the fiduciary relationship with a lawyer and have the money to which the client is entitled available to obtain successor counsel if desired. Rule 1.15 requires that fees paid in advance must be held in a trust account until the services for which the fees will be paid are actually rendered, thereby allocating various risks to lawyer and client. The lawyer does not have to bear the risk of nonpayment after the work is completed; Rule 1.15 provides a process for withdrawal of earned fees and even for disputes, should they arise. And the client does not have to bear the risk that the funds will be spent, attached by the lawyer's creditors, or otherwise dissipated before the legal work is performed due to a lawyer's unwillingness or inability to do so.

Other ethics opinions and resources discuss good billing practices and fee agreement drafting tips. However, we offer the following suggestions in relation to the matters addressed in this opinion. Use plain language. Thus, instead of "retainer" say "advance" and explain that it is a "deposit for fees."[35] Explain that the sum deposited will be applied to the balance owed for work on the matter, and how and when this will happen. For example, the fee agreement could provide

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[35] GEOFFREY C. HAZARD, JR., PETER R. JARVIS, TRISHA THOMPSON & W. WILLIAM HODES, THE LAW OF LAWYERING §9.07 (4th ed. 2022-2 Supp. 2014). Of course, the applicable Rules of Professional Conduct must be consulted, and it may be prudent or required to use certain terms. However, accurately translating legal terms of art is not only helpful to the client but also assists with interpretation and enforcement. So, if the term "advance" or "special retainer" is used in the applicable rules, the lawyer will want to use it in the fee agreement. However, consider also adding an explanation that it is functionally a deposit to cover fees for work in the future.

that on a monthly basis the client will be invoiced for the time expended by the lawyer and state when the sum reflected in the invoice will be withdrawn from the trust account. When the arrangement is for hourly billing, explain that if the deposit exceeds the final billing any balance will be remitted to the client. If the advance fee is fixed and the representation may continue for some time or involve several stages, consider dividing the representation into reasonable segments and providing for withdrawal of a reasonable portion of the deposited fee as the representation progresses and the fee becomes partially earned.[36] Finally, it may be wise to recognize the reality that many relationships do not last and include a provision explaining what will happen if the representation is terminated before the matter is completed.[37]

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328
CHAIR: Lynda Shely, Scottsdale, AZ ■ Mark A. Armitage, Detroit, MI ■ Melinda Bentley, Jefferson City, MO ■ Matthew Corbin, Olathe, KS ■ Robinjit Kaur Eagleson, Lansing, MI ■ Doug Ende, Seattle, WA ■ Hon. Audrey Moorehead, Dallas, TX ■ Wendy Muchman, Chicago, IL ■ Keith Swisher, Scottsdale, AZ ■ Charles Vigil, Albuquerque, NM

CENTER FOR PROFESSIONAL RESPONSIBILITY: Mary McDermott, Lead Senior Counsel

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[36] *See supra* notes 15 & 16.
[37] Again, see Colo. R. Prof'l Conduct R. 1.5(h) and accompanying flat fee form providing helpful language for dividing a representation into increments and explaining a method of calculating the fees the lawyer has earned should the representation terminate prior to completion of the tasks or events specified in the agreement.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 506 **June 7, 2023**

Responsibilities Regarding Nonlawyer Assistants

A lawyer may train and supervise a nonlawyer to assist with prospective client intake tasks including obtaining initial information about the matter, performing an initial conflict check, determining whether the assistance sought is in an area of law germane to the lawyer's practice, assisting with answering general questions about the fee agreement or process of representation, and obtaining the prospective client's signature on the fee agreement provided that the prospective client always is offered an opportunity to communicate with the lawyer including to discuss the fee agreement and scope of representation. Because Model Rule 5.5 prohibits lawyers from assisting in the unauthorized practice of law, whether a nonlawyer may answer a prospective client's specific question depends on the question presented. If the prospective client asks about what legal services the client should obtain from the lawyer, wants to negotiate the fees or expenses, or asks for interpretation of the engagement agreement, the lawyer is required to respond to ensure that the non-lawyer does not engage in the unauthorized practice of law and that accurate information is provided to the prospective client so that the prospective client can make an informed decision about whether to enter into the representation.[1]

I. Introduction

Nonlawyers[2] provide tremendous client and lawyer support for law firms. This Formal Opinion addresses a lawyer's ethical obligations when the lawyer delegates to a nonlawyer specific prospective client-intake tasks. Lawyers may train and supervise nonlawyers to assist with initial client intake tasks if the lawyers have met their obligations for management and supervision of the nonlawyers pursuant to ABA Model Rule of Professional Conduct 5.3 and prospective clients are given the opportunity to consult with the lawyers to discuss the matter.[3]

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2023. The laws, court rules and opinions, regulations, and rules of professional conduct, promulgated in individual jurisdictions are controlling.
[2] The term "nonlawyer" is used in this Opinion, consistent with the term as used in Rule 5.3, to include all law firm employees, agents, contractors, and vendors who are not licensed lawyers (or otherwise authorized to practice law) but work under the supervision of a licensed lawyer including, for instance, paralegals, legal assistants, case managers, firm administrators, intake staff, and clerks. This term does *not* refer to professionals who are licensed by a jurisdiction to provide legal services in that jurisdiction, such as Arizona Legal Paraprofessionals, Utah Regulatory Sandbox participants, Minnesota Legal Paraprofessional Pilot Project, New York Court Navigators, or Washington Limited License Legal Technicians.
[3] Because this Committee does not opine on substantive legal questions, this Formal Opinion assumes that the assistance provided by the nonlawyer does not violate applicable unauthorized practice of law regulations or statutes. Different jurisdictions may have different views on what constitutes the practice of law.

II. Analysis

A. Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

ABA Model Rule of Professional Conduct 5.3 addresses a lawyer's responsibilities regarding nonlawyer assistants.[4] Rule 5.3(a) provides that lawyers who are partners or managers in a firm must ensure that the firm has policies that assure a nonlawyer's conduct is "compatible" with the professional obligations of the lawyer. Paragraph (b) of the Rule requires that lawyers who directly supervise nonlawyer assistants must "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Comment [2] notes, "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment …."[5]

A lawyer's delegation of prospective client intake tasks to a nonlawyer or the lawyer's use of technology to assist with the initial intake of clients provides significant benefits and increased efficiency to lawyers. For example, nonprofit legal services organizations frequently train, supervise, and rely on nonlawyers to perform initial screening of prospective clients to determine whether there are conflicts of interest and whether the prospective clients are requesting services that fall within the organization's practice areas. Similarly, for-profit law firms have offered limited scope online legal services that provide website intake questions, a menu of available limited scope legal document completion services (such as simple powers of attorney, LLC formation, property deed transfers, and name changes), a conflict checking algorithm, and then "click-to-accept-terms" engagement agreements.[6] Delegating initial client intake to nonlawyers also is common in mass tort and class action practices. There, trained intake personnel may check for conflicts of interest, collect basic information from prospective plaintiffs or class members for lawyers to ascertain their eligibility to make a claim, and explain how fees and costs are charged in such cases. If the prospective client meets the eligibility criteria and specifics set forth by the lawyers, then the intake personnel send the prospective clients the standard fee agreement for consideration.

While the benefits of using nonlawyer assistants are many, without proper policies, training, and supervision in place, this delegation could lead to ethical violations and unfortunate consequences for clients and lawyers.[7] The practice must be "carefully and astutely managed."[8]

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[4] MODEL RULES OF PROF'L CONDUCT R. 5.3, cmt. [2] "Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services."
[5] For an extensive analysis of Rule 5.3, see ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).
[6] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 & MODEL RULES OF PROF'L CONDUCT R. 1.18, cmt. [2] for guidance regarding lawyer websites and when an individual becomes a prospective client.
[7] See *In re* Phillips, 226 Ariz. 112, 244 P.3d 549 (2010) (setting forth guidelines for use of nonlawyers in intake process, including applicability of Rule 5.3 and prohibiting nonlawyers from having clients sign engagement agreements without attorney involvement); *In re* Pinkins, 213 B.R. 818 (Bankr. E.D. Mich. 1997) (relying, in part, on State Bar of Mich. Informal Op. RI-128 (1992), superseded by RI-349).
[8] State Bar of Mich. Informal Op. RI-349 (2010).

B. Establishing the Client-Lawyer Relationship

When a prospective client contacts a lawyer for help in solving a legal matter, the lawyer and the prospective client discuss the scope of representation including the client's objectives for the representation and the actions the lawyer will take to achieve the client's goal.[9] Rule 1.5(b) requires a lawyer to communicate to the client the "scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible … preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate."[10] Essentially, the client must know what the client bargained for.[11]

Rule 1.4(b) mandates that a lawyer communicate with clients and provide the clients, to the extent reasonably necessary, with explanations that allow the clients to make informed decisions regarding their representation. Some of the communication duties set forth in Rules 1.5(b) and 1.4(b) also apply in the context of explaining fee agreements to prospective clients. We note that Rule 1.4(b) does not expressly apply to prospective clients. Indeed, some of Rule 1.4(a)'s requirements—such as providing updates, consulting about means being employed to address objectives, and responding promptly to requests for information regarding a representation—would not make sense in that context. But it would seem imprudent to wait until after engagement for a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" as required by Rule 1.4(b). ABA Formal Opinion 02-425 (2002) applied Rule 1.4(b) to lawyers who "ask prospective clients to execute retainer agreements that include provisions mandating the use of arbitration to resolve fee disputes and malpractice claims." This interpretation has been extended to explaining "certain implications of the joint representation" by at least one ethics committee.[12] Therefore, we apply Rule 1.4(b) to lawyers when they communicate with both current and prospective clients.

A lawyer may develop policies, train, and supervise a nonlawyer so that the lawyer may delegate to the nonlawyer client intake tasks assuming those tasks do not constitute the practice of law in the applicable jurisdiction. For example, a lawyer may delegate to the nonlawyer obtaining initial information about the matter,[13] performing an initial conflict check,[14] determining whether the assistance sought is in an area of law germane to the lawyer's practice,[15] answering general

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[9] MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

[10] Though the Model Rule states this obligation in the passive context, jurisdictions have interpreted the obligation to communicate this information to be a lawyer's obligation. *See*, *e.g.*, *In re* Freeman, 835 N.E.2d 494, 498 (Ind. 2005). That interpretation logically flows from the conclusion that the Model Rules govern the conduct of lawyers.

[11] GEOFFREY C. HAZARD, W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING § 9.02, 9-8 (4th ed. 2002); MODEL RULES OF PROF'L CONDUCT R. 1.5(b) ("requires" discussion of fees).

[12] N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2017-7 (2017).

[13] Nonlawyers can be trained to obtain the names of all relevant parties, the date(s) of the incident(s) involved, and the nature of the legal matter.

[14] Nonlawyers can be trained to run conflict checks with the firm's systems and to filter for not just parties, but witnesses, opposing counsel, vendors, and other individuals who may create a potential conflict of interest for the firm. However, when a relevant or closely related name comes up in the conflict checking process, the lawyer must be the one to review the similarities and make the final determination of whether or not a conflict exists and whether any such conflict or not it is a waivable conflict.

[15] Where the lawyer's services would involve a single transaction, such as helping companies register their corporation filing documents with the state, with the appropriate training, a nonlawyer would likely be able to

questions about the fee agreement or process of representation, and even obtaining the prospective client's signature on the fee agreement as long as the prospective client is offered an opportunity to communicate with the lawyer to discuss the matter.

While many client-intake tasks lawyers perform may be delegable with proper policies in place, training, and supervision, lawyers who delegate do not relinquish their responsibilities under the Model Rules. Once the attorney-client relationship is formed, lawyers still have the responsibility to reasonably consult with the client regarding the client's objectives and how to achieve them.[16] Lawyers also have the responsibility to "promptly comply with reasonable requests for information" and consult with clients who have engaged them regarding limits on the lawyers' conduct given applicable laws and ethical duties.[17] And, Rules 1.2, 1.4, and 1.5(b) require a lawyer to communicate with clients about fees, the scope of representation, and any limitations thereon.

Whether a nonlawyer may answer a prospective client's *specific question* depends on the question presented and what would be considered to be the practice of law in the jurisdiction. That is important because Model Rule 5.5(a) prohibits lawyers from assisting others in practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. As Comment [2] notes, the definition of the practice of law is established by law and varies from one jurisdiction to another. Lawyers should understand how it is defined in their jurisdiction and take care that the supervised nonlawyers understand that definition and how it limits what nonlawyers may do. For example, whether a nonlawyer may answer a question relating to fee or cost calculation or how payments can be made may depend on whether the question requires the application of law to the facts of the case, as opposed to a question that merely asks about a firm procedural matter. When the question presented would require the application of law to facts, a nonlawyer also may convey a client question to the lawyer, have the lawyer determine the answer to the question, and then relay the lawyer's answer to the client, again, depending on the complexity of the question posed. The lawyer will be responsible for determining if the inquiry is best answered by the lawyer communicating directly with the client, so the lawyer can gather more information to make an informed recommendation.

Nonlawyers may provide general information about how the firm charges legal fees, such as explaining that fees are charged hourly, or on a contingency basis, or the matter is billed at a fixed rate. Or, if the question merely relates to how payments can be processed or other administrative matters, then the nonlawyer may provide information to answer the inquiry. However, if the prospective client asks about what legal services the client should obtain from the lawyer to address the client's objectives, wants to negotiate the fees or expenses, or asks for an interpretation of the rights and responsibilities set forth in the engagement agreement, Model Rules 1.4(b), 1.5, and 5.5[18] require the lawyer to respond. Ultimately, the scope of what the nonlawyers may do in this context will depend on whether the services in question constitute the practice of law in the

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explain the type of services provided for a set fee. Allowing a nonlawyer to answer general questions related to the lawyer's services in such a situation would not require them to provide independent legal advice. However, the nonlawyer must be trained to recognize when the client's questions venture from discussing general services.

[16] MODEL RULES OF PROF'L CONDUCT R. 1.2(a) & 1.4(a)(2).

[17] MODEL RULES OF PROF'L CONDUCT R. 1.2 & 1.4(a)(4), (a)(5).

[18] Once the prospective client becomes a client, then Rules 1.2 and 1.4(a) would also be implicated.

jurisdiction where they are being provided.[19] Because Model Rule 5.5(a) precludes lawyers from assisting others in engaging in the unauthorized practice of law, and Model Rule 5.3(b) requires lawyers to reasonably ensure the supervised nonlawyers conduct themselves compatibly with the lawyer's professional obligations, the lawyers are responsible for making sure this line is not crossed.

As noted above, delegation of prospective client intake must be carefully and astutely managed. What appears to be a simple question about how long the lawyer will spend on the matter, may actually be a question about the representation itself and cannot be accurately answered without the lawyer's personal knowledge and expertise.[20] Therefore, a lawyer must provide nonlawyers who are performing client-intake tasks with policies, training, and supervision regarding which questions the nonlawyer may answer, how to respond to those questions, and which questions should be presented to the lawyer.

Conclusion

Nonlawyers provide significant client and lawyer support for law firms. A lawyer may train and supervise a nonlawyer to assist during prospective client intake screening by obtaining initial information about the matter, performing an initial conflict check, determining whether the assistance sought is in an area of law germane to the lawyer's practice, assisting with answering general questions about the fee agreement or process of representation, and even by obtaining the prospective client's signature on the fee agreement provided that these tasks do not constitute the practice of law in the applicable jurisdiction and that the prospective client always is offered an opportunity to discuss the fee agreement and scope of representation with the lawyer.

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CENTER FOR PROFESSIONAL RESPONSIBILITY: Mary McDermott, Lead Senior Counsel

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[19] Indeed, the question of which jurisdiction's definition of the practice of law should be applied may be subject to a legal analysis. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 504 (2023).

[20] THE LAW OF LAWYERING, *supra* note 11, at §9.04; *see also* ABA MODEL GUIDELINES FOR UTILIZATION OF PARALEGAL SERVICES, Guideline 3(b), at 9, *available at* https://www.americanbar.org/content/dam/aba/administrative/paralegals/aba-model-guidelines-for-utilization-of-paralegal-services-2021-web.pdf ("Many state guidelines prohibit paralegals from "setting fees" or "accepting cases. . . . NALA Ethics Canon 3 states that a paralegal must not establish attorney-client relationships or set fees.").

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 507 **July 12, 2023**

Office Sharing Arrangements with Other Lawyers

It is generally permissible for lawyers to participate in office sharing arrangements with other lawyers under the ABA Model Rules of Professional Conduct. At the same time, office sharing lawyers should appreciate that such arrangements will require them to take appropriate measures to comply with their ethical duties concerning the confidentiality of information, conflicts of interest, supervision of non-lawyers, and communications about their services. The nature and extent of any additional safeguards will necessarily depend on the circumstances of each arrangement.

I. Introduction[1]

Office sharing among lawyers comes in many forms—lawyers with separate law practices sharing office space, support staff, and equipment; law firms renting unused office space to unaffiliated lawyers; or even lawyers sharing an office suite, receptionist, and conference room as part of a virtual law practice or on a temporary basis. Lawyers participating in these arrangements must take appropriate steps to secure client information and clearly communicate the nature of the relationship to the public and their clients.[2] In addition, there are potential conflicts of interest issues that office sharing lawyers must appreciate, including imputed conflicts for lawyers "associated in a firm," representing clients with adverse interests, and consultations between lawyers. This opinion addresses some minimum ethical requirements and suggested practices arising in the office sharing context, particularly in the areas of confidentiality, conflicts of interest, supervision, and communications concerning a lawyer's services.

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2023. The laws, court rules and opinions, regulations, and rules of professional conduct, promulgated in individual jurisdictions are controlling.

[2] Compliance with the obligations imposed by the Model Rules of Professional Conduct, as discussed in this opinion, depends on a lawyer's role, level of authority, and responsibility in the law firm's operations. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483, at n. 6 (2018). *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014). *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 (2022) (Responsibilities of Partners, Managers, and Supervisory Lawyers); MODEL RULES OF PROF'L CONDUCT R. 5.2 (Responsibilities of a Subordinate Lawyer); and MODEL RULES OF PROF'L CONDUCT R. 5.3 (Responsibilities Regarding Nonlawyer Assistance).

II. Discussion

A. Protecting Client Information

Confidentiality is central to the practice of law.[3] Maintaining the confidentiality of client information is therefore imperative for lawyers in an office sharing arrangement.[4] The mere sharing of office space does not automatically equate with the disclosure of client information.[5] The physical arrangement of the shared office space, however, must not expose client information to other office-sharing lawyers and their staff. Everyone should also avoid discussing cases in or near common areas, which could lead to the disclosure of client information.[6]

Depending on the specific circumstances of the office sharing arrangement, lawyers may need to consider additional confidentiality safeguards. This could include separate lobby or waiting areas; refraining from leaving client files out on workspaces, conference rooms, or kitchen tables; installing privacy screens on computer monitors and locking down computers when not actively in use; clean desk policies; and regular training and reminders to staff of the need to keep all client information confidential.[7] Office sharing lawyers can also restrict access to client-related information by securing physical client files in locked cabinets or offices and using separate telephone lines and computer systems.[8] Lawyers, however, may overcome confidentiality concerns with shared telephone and computer systems with appropriate security measures, staff training, and client disclosures.[9]

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[3] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (providing that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)").

[4] State Bar of Cal. Comm. on Prof'l Responsibility & Conduct Op. 1997-150, 1997 WL 240818, at *3–4 (1997); Conn. Bar Ass'n Prof'l Ethics Comm. 2014-04, 2014 WL 12823983, at *1 (2014); D.C. Bar Ass'n Op. 303, at 1 (2001) [hereinafter D.C. Bar Op.]; La. State Bar Ass'n Rules of Prof'l Conduct Comm. Op. 07-RPCC-013, at 1 (2007); Mich. State Bar Comm. on Prof'l & Judicial Ethics Op. RI-249, 1996 WL 381521, at *2 (1996) [hereinafter Mich. State Bar Op. RI-249]; Mo. Bar Informal Op. 950169, at 1 (1995); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 498, 1982 WL 117856, at *1 (1982); Ohio Bd. of Prof'l Conduct Advisory Op. 2022-11, 2022 WL 10219976 (2022); Ohio Bd. of Prof'l Conduct Advisory Op. 2017-05, 2022 WL 10219976, at *1 (2017).

[5] Ill. St. Bar Ass'n Comm. on Prof'l Ethics Advisory Op. 85-14, 1986 WL 378934, at *4 (1986).

[6] State Bar of Cal. Comm. on Prof'l Responsibility & Conduct Op. 1997-150, 1997 WL 240818, at *3–4 (1997); Colo. Bar Ass'n Ethics Comm. Op. 89, at 5 (2018); Mich. State Bar, Comm. on Prof'l & Judicial Ethics Op. RI-313, 1999 WL 406884, at *1 (1999); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 794, 2006 WL 1386607, at *4 (2006).

[7] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498, at 3–7 (2021) [hereinafter ABA Formal Op. 498] (discussing technologies and related strategies to protect the confidentiality of client information in a virtual practice).

[8] Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 4–7; Ind. State Bar Ass'n Legal Ethics Comm. Op. 8, at 2–3 (1985); D.C. Bar Op. 303, *supra* note 4, at 1; Mo. Bar Informal Op. 980220, at 1 (1998); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op., 2012 WL 6087183, at *1–2 (2012); Ohio Bd. of Prof'l Conduct Advisory Op. 91-9, 1991 WL 717479, at *2 (1991); Va. State Bar Legal Ethics Comm. Op. 754, 1986 WL 1180470, at *1 (1986).

[9] Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 1, 5; D.C. Bar Op. 303, *supra* note 8, at 1; Mo. Bar Informal Op. 970192 (1997); Ohio Bd. of Prof'l Conduct Advisory Op. 92-13, 1992 WL 739420, at *3 (1992); Or. St. Bar Ass'n Op. 2005-50, 2005 WL 5679639, at *1 (2005). *See also* ABA Formal Op. 498, *supra* note 7, at 3–5 (discussing virtual practice technologies and other security measures to safeguard client information); Ohio Bd. of Prof'l Conduct Adv. Op. 2022-11, 2022 WL 10219976, at *2 (2022) (recommending that computers connected to a shared network "be secured by individual credentials and other security measures to prevent lawyers or staff from accessing the data and files on a network belonging to others").

Lawyers in an office sharing arrangement may decide to share support staff, such as receptionists, administrative assistants, and paralegals. In these situations, maintaining the confidentiality of client information is tested. Instructing all lawyers and employees, and particularly shared employees, on their confidentiality obligations and the office procedures in place to guard sensitive client documents and communications are examples of reasonable measures to protect client confidentiality.[10] Of course, appropriate supervision of shared personnel is also required under Model Rule 5.3.[11]

B. Clear Communication About the Relationship

Lawyers who share offices but do not practice together as a law firm must take appropriate steps to clearly communicate the nature of their relationship to the public and to their clients.

Model Rule 7.1 prohibits any "false or misleading communication about the lawyer or the lawyer's services."[12] Comment [7] to the Rule further explains that lawyers "may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading."[13] Accordingly, office-sharing lawyers must ensure that the public is not misled about the nature of their relationship, such as confusion about whether the lawyers are part of a law firm, partnership, or professional corporation when no such affiliation exists.[14]

Lawyers in an office sharing arrangement should use separate business cards, letterhead, and directory listings, as well as office signs, firm names, and advertisements that describe their distinct practices and do not suggest a close association between professionals operating within the same space.[15] It is desirable for lawyers sharing office space to have separate telephone lines, but a

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[10] State Bar of Cal. Comm. on Prof'l Responsibility & Conduct Op. 1997-150, *supra* note 4, at *3–4; D.C. Bar Op. 303, *supra* note 4, at 1; Mich. State Bar Op. RI-249, *supra* note 4, at *2; Mo. Bar Informal Op. 950169, *supra* note 4, at 1; Neb. Jud. Ethics Comm. Op. 89-2, 1989 WL 1803035, at *4 (1989); Ohio Bd. of Prof'l Conduct Advisory Op. 2022-11, *supra* note 4, at *3. *But see* Utah State Bar Advisory Op. 125, 1994 WL 631269, at *2 (1994) (finding it "difficult to see how it would be possible for shared secretarial arrangements not to put confidential information at risk").

[11] Model Rule 5.3 addresses both partner and supervisor responsibilities for ensuring that nonlawyer assistants' behavior is compatible with lawyers' professional obligations. MODEL RULES OF PROF'L CONDUCT R. 5.3. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498, at 3–4 (examining lawyers' supervisory obligations for nonlawyer assistants in a virtual practice); Ohio Bd. of Prof'l Conduct Advisory Op. 2022-11, *supra* note 4, at *3 (discussing the sharing of nonlawyer staff).

[12] MODEL RULES OF PROF'L CONDUCT R. 7.1.

[13] *Id.* at cmt. 7. *See also* MODEL RULES OF PROF'L CONDUCT R. 1.0(c) (defining "firm" or "law firm" as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization").

[14] MODEL RULES OF PROF'L CONDUCT R. 1.4 & 7.1; State Bar of Cal. Comm. on Prof'l Responsibility & Conduct Op. 1997-150, *supra* note 4, at *1; Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 2; D.C. Eth. Op. 303, *supra* note 4, at 1.

[15] State Bar of Cal. Comm. on Prof'l Responsibility & Conduct Op. 1997-150, *supra* note 4, at *1; Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 6; Conn. Bar Ass'n Prof'l Ethics Comm. Op. 97-9, 1997 WL 700580, at *2 (1997); D.C. Eth. Op. 303, at 1; Mich. State Bar Op. RI-249, *supra* note 4, at * 3; Mo. Bar Informal Adv. Op. 980220, *supra* note 8, at 1; N.Y. City Bar Ass'n Prof'l Ethics Comm. Advisory Op. 680, 1990 WL 677022, at *1 (1990); Ohio Bd. of Comm'rs on Grievances & Discipline Advisory Op. 89-36, 1989 WL 535040, at *2 (1989); Va. State Bar Legal Ethics Comm. Op. 874, 1987 WL 1379105, at *1 (1987).

receptionist may answer a common telephone line with a generic salutation such as "Law Offices" to avoid implying that the lawyers are practicing together in the same firm.[16]

It may not be possible to have separate signage where a law firm subleases excess space to unaffiliated lawyers or to lawyers with whom the firm works on a matter-by-matter basis, or where lawyers work in rented temporary space such as WeWork or Regus™ offices. Nevertheless, unaffiliated lawyers sharing space must take reasonable measures to ensure that clients are not confused about their associations with the other lawyers practicing in the immediate area. Office sharing lawyers must understand the need to clarify for their clients these distinct professional relationships. Any communications to the public should also signal that the law practices are not affiliated with one another, other than in their resource-sharing arrangement.[17]

C. Conflicts of Interest Considerations

Lawyers in shared office arrangements should pay particular attention to (1) avoiding the imputation of conflicts of interest, (2) taking on potential new matters that are adverse to clients represented by other office sharing lawyers, and (3) consulting with fellow office sharing lawyers.

1. Imputation of Conflicts

Model Rule 1.10(a) imputes conflicts of interest to all lawyers "associated in a firm."[18] Thus, imputation of a lawyer's conflict of interest to other lawyers in an office-sharing arrangement will pivot on whether the lawyers are, or appear to the public or their clients as, "associated in a firm."[19]

Under the Model Rules, office sharing lawyers are not automatically treated as a single law firm for conflicts of interest purposes.[20] This determination will depend on the facts and circumstances of each arrangement.[21] Office sharing lawyers who do not protect the confidentiality of their respective clients, regularly consult with each other on matters, share staff who have access to client information, mislead the public about their identity and services, or otherwise fail to keep

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[16] State Bar of Ariz. Op. 01-09 (2001); Conn. Bar Ass'n Prof'l Ethics Comm. Op. 97-9, *supra* note 15, at *2; D.C. Bar Op. 303, at 1; Mich. Eth. Op. RI-249, 1996 WL 381521, at *3; Ohio Adv. Op. 95-1, 1995 WL 813784, at *4 (Ohio Bd. of Comm'rs on Grievances & Discipline 1995); Wash. Adv. Op. 1304, at 1 (Wash. State Bar, Comm on Prof'l Ethics 1989).

[17] Conn. Eth. Op. 2014-04, 2014 WL 12823983, at *1; D.C. Bar. Op. 303, *supra* note 4, at 1; Mich. State Bar Op. RI-249, *supra* note 4, at *2; Mo. Bar Informal Op. 950169, *supra* note 4, at 1.

[18] MODEL RULES OF PROF'L CONDUCT R. 1.10(a).

[19] MODEL RULES OF PROF'L CONDUCT R. 1.10(a) & cmt. 1; Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 1; Mich. State Bar Op. RI-249, *supra* note 4, at *5.

[20] Mich. State Bar Op. RI-249, *supra* note 4, at *1; N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 794, *supra* note 6, at *1 (2011); *see* MODEL RULES OF PROF'L CONDUCT R. 1.0(c) & cmt. 2 (stating that "two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm," but "if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm" under the Model Rules).

[21] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 88-356, at 2–4 (1988) (explaining that whether a temporary lawyer should be treated as "associated in a firm" for conflicts imputation purposes requires "a functional analysis of the facts and circumstances involved in the relationship," with a particular focus on the temporary lawyer's access to information relating to the representation of other firm clients).

their practices separate, are more likely to be treated as "associated in a firm" for conflict imputation purposes.[22]

2. Representing Clients with Adverse Interests

Where lawyers in an office sharing arrangement properly shield the confidentiality of their respective clients and do not hold themselves out to the public as members of the same firm, it may be permissible under the Model Rules to represent clients with adverse interests—even in the same lawsuit or transaction.[23] Although this determination will ultimately turn on specifics of the office sharing arrangement and the nature of the proposed representations, Model Rules 1.4 and 1.7 may obligate lawyers to disclose the details of the office sharing arrangement to their respective clients, including their efforts to maintain confidentiality, and to obtain each clients' informed consent, confirmed in writing.[24]

In addition, any staff shared by the lawyers should not possess or otherwise have access to information from both adverse clients.[25] Implementing an adequate ethical screen between shared staff members can be an effective measure in this regard, and to avoid the sharing of client information more generally.[26]

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[22] *In re* Sexson, 613 N.E.2d 841, 843 (Ind. 1993); MODEL RULES OF PROF'L CONDUCT R. 1.0(c) & cmt. 2; Ariz. State Bar Comm. on the Rules of Prof'l Conduct Op. 01-09, at 1 (2001); Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 1, 4; D.C. Bar Op. 303, *supra* note 4, at 1; Ky. Bar Ass'n Ethics Comm. Op. E-418, at 4 (2001); Ind. State Bar Ass'n Legal Ethics Comm. Op. 8, *supra* note 8, at 3; La. State Bar Ass'n Rules of Prof'l Conduct Comm. Op. 07-RPCC-013, *supra* note 4, at 3; Mo. Bar Informal Op. 950169, *supra* note 4, at 1; N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 794, *supra* note 6, at *4; N.Y. City Bar Ass'n Prof'l Ethics Comm. Advisory Op. 680, *supra* note 15, at *2; Ohio Bd. of Prof'l Conduct Advisory Op. 2022-11, *supra* note 4, at *2; S.C. Bar Ethics Advisory Comm. Op. 08-11, 2008 WL 8089795, at *2 (2008); Utah State Bar Advisory Op. 125, *supra* note 10, at *2; Vt. Bar Ass'n Prof'l Responsibility Comm. Op. 79-22, at 1 (1979).

[23] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1486, at 1 (1982) [hereinafter ABA Informal Op. 1486] (lawyers who share space and represent adverse interests in pending lawsuits should explain fully the relationship to, and obtain the consent of, clients to continue to represent adverse interests).; Md. State Bar Ass'n Op. 1987-43, at 1 (1987); Mo. Bar Informal Adv. Op. 970192, *supra* note 9, at 1; N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 515, 1983 WL 106225, at *1–2 (1983); Ohio Bd. of Prof'l Conduct Advisory Op. 89-005, 1989 WL 535010, at *1 (1989); Or. St. Bar Ass'n Op. 2005-50, *supra* note 9, at *1; S.C. Bar Ethics Advisory Comm. Op. 08-11, *supra* note 22, at *2 (2008); S.C. Bar Ethics Advisory Comm. Op. 91-37, 1992 WL 810417, at *1–2 (1992); Vt. Bar Ass'n Prof'l Responsibility Comm. Op. 80-15, at 1–2 (1980); Va. State Bar Legal Ethics Comm. Op. 943, 1987 WL 1378998, at *1 (1987); Va. State Bar Legal Ethics Comm. Op. 799, 1986 WL 1180507, at *1 (1986); Wash. State Bar Comm. on Prof'l Ethics Op. 1793, at 1 (1997); Wash. State Bar Comm. on Prof'l Ethics Op. 1559, at 1 (1994).

[24] ABA Informal Op. 1486, *supra* note 23, at 1; Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 4; Md. Eth. Op. 1987-43, at 1; Mich. Eth. Op. RI-249, 1996 WL 381521, at *3; N.J. Eth. Op. 515, 1983 WL 106225, at *1–2; Ohio Adv. Op. 89-005, 1989 WL 535010, at *2 (Ohio Bd. of Comm'rs on Grievances & Discipline 1989); S.C. Bar Ethics Advisory Comm. Op. 91-37, *supra* note 23, at *1–2; Vt. Bar Ass'n Prof'l Responsibility Comm. Op. 80-15, *supra* note 23, at 1–2; Va. State Bar Legal Ethics Comm. Op. 943, *supra* note 23, at *1; Wash. State Bar Comm. on Prof'l Ethics Op. 1793, *supra* note 23, at 1.

[25] Ky. Bar Ass'n Ethics Comm. Op. E-406, at 3 (1998); Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n Op. 41, at 1 (2019); Or. St. Bar Ass'n Op. 2005-50, *supra* note 9, at *1; S.C. Bar Ethics Advisory Comm. Op. 91-37, *supra* note 23, at *1–2. The Committee does not believe it is possible for lawyers in an office sharing arrangement to maintain this kind of separation when representing clients with adverse interests if the lawyers together share only one staff member.

[26] *See generally* Cal. Lawyers Ass'n Ethics Comm. Formal Op. 2021-1 (2021) (discussing elements of effective ethical screens).

Notwithstanding the ability of office sharing lawyers to represent clients with adverse interests, some state ethics opinions understandably advise lawyers to avoid these situations entirely.[27] Potential pitfalls range from inadvertent disclosures of client information in a shared office to opposing parties coincidentally scheduling meetings at the same time. Before entering an office sharing arrangement, it is prudent for a lawyer to examine the nature of the other lawyers' practices to determine whether conflicts of interest are likely to arise.[28]

3. Consultations Between Office Sharing Lawyers

It is natural for lawyers in office sharing arrangements to informally consult one another about their respective client matters. Merely engaging in informal consultations from time to time, however, does not result in the lawyers being "associated in a firm" under Model Rule 1.10(a).[29] At the same time, lawyers who occasionally consult with other lawyers in shared office arrangements should not disclose "client information that may reveal the identity of a client or privileged information."[30] Lawyers may instead discuss issues using hypothetical facts. As comment [4] to Model Rule 1.6 explains, "[a] lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."[31]

Consultations between office sharing lawyers can also trigger unanticipated conflicts of interest, restricting a consulted lawyer's ability to represent a current or future client under Model Rule 1.7(a)(2).[32] For instance, if Lawyer A and Lawyer B share office space, and Lawyer A divulges client information to Lawyer B during an informal consultation to help Lawyer A prepare a case for trial, then Lawyer B may assume a responsibility not to use or reveal the information, which could materially limit Lawyer B's ability to represent a current or future client.[33] This situation parallels the confidentiality duties that lawyers owe to prospective clients under Model Rule 1.18 and the conflicts problems that can surface if a lawyer receives too much information from a prospective client during an initial consultation.[34]

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[27] Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 3; S.C. Bar Ethics Advisory Comm. Op. 08-11, *supra* note 22, at *2; Va. State Bar Legal Ethics Comm. Op. 943, *supra* note 23, at *1; *see also* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1474, at 1 (1982) (concluding that "representation of opposing sides by lawyers working in the same military office and sharing common secretarial and filing facilities should be avoided").

[28] Colo. Bar Ass'n Ethics Comm. Op. 89, *supra* note 6, at 3.

[29] Ohio Bd. of Prof'l Conduct Advisory Op. 2022-11, *supra* note 4, at *1.

[30] *Id.*

[31] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 4.

[32] MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411, at 7 (1998) [hereinafter ABA Formal Op. 98-411].

[33] MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2); ABA Formal Op. 98-411, at 9. *See also* Liebnow v. Boston Enterprises, 296 P.3d 108, 115 (Colo. 2013) (citing ABA Formal Op. 98-411, at 7) (concluding that where "one lawyer has consulted another lawyer and has revealed confidential information about her case, including her theory of the case and trial strategy, that could materially limit the consulted attorney's ability to represent the opposing party ... due to the consulted attorney's potential responsibility to keep the information confidential").

[34] MODEL RULES OF PROF'L CONDUCT R. 1.18. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 492 (2020) (discussing lawyers' obligations to prospective clients and the conflicts issues that can surface if lawyers receive "significantly harmful" information from a prospective client).

To prevent these issues, Lawyer B can conduct a standard conflict check prior to any informal consultation or collaboration with Lawyer A.[35]

III. Conclusion

The ABA Model Rules of Professional Conduct permit lawyers to participate in office sharing arrangements, but those doing so must fully consider and comply with their applicable ethical responsibilities, including confidentiality, conflicts of interest, supervision, and communications concerning a lawyer's services.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328
CHAIR: Lynda Shely, Scottsdale, AZ ■ Mark A. Armitage, Detroit, MI ■ Melinda Bentley, Jefferson City, MO ■ Matthew Corbin, Olathe, KS ■ Robinjit Kaur Eagleson, Lansing, MI ■ Doug Ende, Seattle, WA ■ Hon. Audrey Moorehead, Dallas, TX ■ Wendy Muchman, Chicago, IL ■ Keith Swisher, Scottsdale, AZ ■ Charles Vigil, Albuquerque, NM

CENTER FOR PROFESSIONAL RESPONSIBILITY: Mary McDermott, Lead Senior Counsel

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[35] *See generally* Conn. Bar Ass'n Prof'l Ethics Comm. Op. 98-11, 1998 WL 993681, at *1–2 (1998).