

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
MEETING AGENDA**

Friday, June 19, 2020 – 1:00 p.m.

Zoom meeting (invitation to follow for members)*

Call the Office at 651-296-3952 if you are not a member of the Board and wish to attend
the virtual meeting

1. Approval of Minutes of April 24, 2020, Lawyers Board Meeting (Attachment 1); Informational Item – Amended Minutes of the January 31, 2020 meeting (Attachment 2).
2. Recognition of Justice Lillehaug
3. Office and Board COVID-19 Response
 - a. Office Reopening
 - b. Remote Panel Hearings (Attachment 3)
4. Committee Updates:
 - a. Rules Committee
 - (i.) Status, Advertising Rule Petition (Attachment 4)
 - (ii.) Status, Rule 20, RLPR, Draft Changes (Attachment 5)
 - (iii.) Potential Comments, *Pro Bono* Reporting Petition
 - (iv.) Potential Comments, Paraprofessional Pilot Project
 - (v.) B. Wernz’ Suggestion for Rule Change, Rule 8(e)(4), RLPR
 - b. Opinions Committee
 - c. DEC and Training Committee
 - (i) DEC Seminar, September 25, 2020
 - d. Panel Manual Update
 - e. Mandatory Malpractice Insurance Committee
5. Director’s Report:
 - a. Statistics (Attachment 6)
 - b. Budget Update to the Court (Attachment 7)
 - c. Office Updates (Attachment 8)
6. Special Committee, Equity
7. 2020 Draft Annual Report (Attachment 9)

8. Proposed 2021 meeting dates (Attachment 10)
9. Quarterly Board Discussion (closed session)
10. Next Meeting, Friday, September 25, 2020

*If you are not a member of the LPRB and would like to attend the June virtual meeting, please call the number below to obtain the meeting information.

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

Attachment 1

**MINUTES OF THE 190TH MEETING OF LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD APRIL 24, 2020**

The 190th meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, April 24, 2020, electronically via Zoom. Present were: Board Chair Robin Wolpert, and Board Members Landon J. Ascheman, Jeanette M. Boerner, Daniel J. Cragg, Thomas J. Evenson, Michael Friedman, Gary M. Hird, Peter Ivy, Shawn Judge, Virginia Klevorn, Tommy A. Krause, Paul J. Lehman, Kristi J. Paulson, Susan C. Rhode, Susan T. Stahl Slieter, Gail Stremel, Mary L. Waldkirch Tilley, Bruce R. Williams, Allan Witz, and Julian C. Zebot. Present from the Director's Office were: Director Susan M. Humiston, Managing Attorneys Cassie Hanson and Jennifer S. Bovitz and Senior Assistant Director Binh T. Tuong. Also present were Minnesota Supreme Court Associate Justice David L. Lillehaug, Kenneth Jorgensen, Nicholas Ryan, and William Wernz.

Robin Wolpert commenced the meeting by informing those in attendance of the passing of former Board member Roger Gilmore on Tuesday April 21, 2020. Mr. Gilmore brought a great deal of common sense and fresh air to the Board and his passing is a great loss.

1. WELCOME TO NEW BOARD MEMBERS

Ms. Wolpert began the meeting by welcoming the new Board members and by having all Board members, Justice Lillehaug and the Director introduce themselves.

2. APPROVAL OF MINUTES

The minutes of the April 24, 2020, Board meeting were approved as amended.

Following a discussion of the minutes, Bruce Williams raised a concern relating to a public announcement being posted on the OLPR website advising the public of the LPRB meeting and how to access as discussed by the Executive Committee. Jeanette Boerner added that she also thought a link was going to be on the OLPR website. Ms. Boerner also identified that the ACLU is litigating issues relating to open meeting access. Director Humiston responded that information regarding public access to future meetings will be available through the OLPR announcement page as a separate notice from the posted meeting materials, which also contain the information.

3. PANEL & COMMITTEE ASSIGNMENTS (ATTACHMENT 2)

Ms. Wolpert advised that all Board members have been provided Panel and Committee assignments. If there are questions regarding these assignments, please email Ms. Wolpert.

4. OLPR & LPRB COVID-19 RESPONSE

Director Humiston discussed operational steps related to the COVID-19 response and detailed that a supplement was provided to the Board in the Board SharePoint site that includes both judicial branch orders and OLPR implementation plans. Ms. Humiston detailed that from a high level, over the course of two weeks, all employees, except one, were transitioned to work from home. This transition was a herculean effort as the Office did not have laptops on hand to distribute. Ms. Humiston noted that MJB IT provided excellent customer service in providing laptops and that the judicial branch did a very thorough job in coordinating and providing direction and coordinating with the OLPR which allowed the OLPR to move quickly.

Ms. Humiston detailed that public notices were provided at the Office and on the OLPR website detailing access. Additionally, DEC's have moved to remote only operations. The OLPR has implemented tools that have allowed the OLPR to keep work moving, including using Zoom which has recently been upgraded to a Zoom gov account. Ms. Humiston addressed that the judicial branch is comfortable with Zoom as long as a password is used.

In describing Office operations, Ms. Humiston explained that weekly Office-wide check-ins are held using Zoom, and that the Office is also making good use of Skype with audio or video. The LDMS data management system launch allowed work to occur in a seamless fashion including scanning and uploading. Ms. Humiston noted that file sharing has been successful and commented that Office Manager, Chris Wengronowitz, is a can do person, and has been able to help work through logistics.

Ms. Humiston reported that other logistical information includes that incoming mail was down significantly. Complaints are also down. Advisory Opinions were down initially, but are now picking up. Investigations are occurring electronically. Ms. Humiston commented that while things are going well, there are also day to day struggles.

Virginia Klevorn asked whether you are able to have supplies to make sure people are safe & secure?

Ms. Humiston replied that there are gloves and cleaning supplies, but no masks and the branch has not yet been able to supply masks. Ms. Humiston also identified that the OLPR has implemented social distancing. A part of the social distancing includes only allowing one attorney and one paralegal to come in daily after hours and it must be scheduled on the master calendar. Additionally, work place safety advisories have been posted in the Office.

Ms. Klevorn asked whether the routine cleaning staff has been continuing?

Ms. Humiston confirmed that the cleaning staff has been continuing and additionally the elevators have been locked down.

Mr. Williams asked about the restroom facilities. Ms. Humiston responded that the restroom facilities are open for personnel only, not the public, and are cleaned by same personnel.

(a) Profession Based COVID-19 Assistance.

Following the discussion of the OLPR's COVID-19 response, Ms. Wolpert addressed an additional issue to consider is what the Board and/or OLPR should be doing to help the profession during the pandemic. One option that was discussed in the Executive Committee meeting is that Ms. Humiston will author a Bench & Bar article addressing the topic.

Ms. Wolpert discussed another option is a weekly live Zoom or FaceBook chat on COVID-19 ethics topics. Ms. Wolpert mentioned her work with the National Task Force on Lawyer Wellbeing and opined that other potential participants may include the MSBA professional conduct committee and individual experts, such as Mark Lanterman, to discuss data privacy.

The question is how can we help the profession stay current with everything that is changing?

Ms. Wolpert added that the Executive Committee discussed adding a link on the Lawyers Board website with COVID-19 resources.

Ms. Klevorn posed that there may be questions relating to the economics of running a practice during COVID. Ms. Wolpert responded that the Board and OLPR's focus is on ethics, but an issue such as economics, may be an issue for the MSBA. Ms. Klevorn suggested that trust accounts should be addressed through the ethics lens.

Landon Ascherman added that the criminal defense bar is trying to ensure attorneys are meeting ethical standards, including meeting with clients, while dealing with peacetime emergency, mail delays, and ethical communication.

Ms. Wolpert stated that she will work with Ms. Humiston and the Executive Committee to find something reasonable in scope, to determine what is critical and not add another burden. Ms. Wolpert identified that the goal is for set topics occurring once per week or every couple of weeks. Ms. Wolpert would like to get Mr. Wernz or Mr. Lundberg to speak.

Ms. Humiston added that the OLPR is working with lawyers on an individual basis through the advisory opinion line, and as time permits in combination with other priorities, the OLPR is marshalling FAQs together.

5. CONDUCTING PANEL HEARINGS

Ms. Humiston reported that Panel proceedings are proceeding in the normal course. The first Panel hearing is the Tigie reinstatement and has been scheduled for the end of May and is time sensitive. There were a number of Referee hearings that individual Referees made a decision to continue. The judicial branch is looking at facilitating remote hearing and exploring what recommendations can be rolled out and the OLPR is working with the branch.

Justice Lillehaug was provided an opportunity to comment and stated that the first remote oral argument was conducted by Cisco WebEx and that there will be many more in May.

Managing Attorney Cassie Hanson raised an issue regarding accessibility in the remote hearing environment. Ms. Hanson shared that the issue arises when other participants do not have access to a computer, including in the impending matter, the petitioner.

Ms. Wolpert highlighted that Panel Chairs will be facing questions for matters coming up in May and June. Please send questions to Ms. Wolpert and Ms. Boerner so issues can be monitored.

(a) SharePoint for Panel Materials.

Ms. Wolpert explained that in SharePoint, individual, Panel and all-inclusive materials are available. Panels will receive materials via this SharePoint delivery. If there are difficulties, let Ms. Humiston know.

6. COMMITTEE UPDATES

(a) Rules Committee

Committee Chair Peter Ivy reported that the Rules Committee met recently and this included many new Committee members. Mr. Ivy thanked all Committee members past and present along with Jim Cullen for their contributions to the Rules Committee.

(i) Status, Advertising Rule Petition

Mr. Ivy reported that twice there have been votes by the LPRB to approve a petition for Rule 7 changes consistent with the ABA. Mr. Ivy extended a thank you to Fred Finch and Jim Cullen who forwarded a draft petition. The MSBA and LPRB's positions on the Rule 7 series are similar except for the specialist language. Mr. Ivy reported that under Rule 7 the difference is whether or not an attorney who is not certified can be referred to as a specialist. The LPRB position follows the ABA standard, which allows attorneys to refer to him/herself as a specialist as long as it is not misleading. Mr. Ivy reported that this is controversial and there are arguments that the public does not understand, including the difference between specialist and certified.

Mr. Ivy discussed that the Committee is addressing concerns relating to qualified attorney referral services. Mr. Ivy reported that there were concerns whether a fiscal note would be attached to monitoring or administering such a service. Mr. Ivy reported that the ABA has created standards and the Rules Committee is reviewing.

Michael Friedman asked whether there is a formal definition of specialist or whether that is a colloquial term that lawyers can assign? Mr. Ivy responded that it is the ordinary dictionary definition, but if an attorney uses certified specialist, it requires actual certification.

Mr. Williams added that he had to go through a lot of education to become a certified specialist and every year he maintains the required standards. Mr. Williams does not support the standard proposed by LPRB and thinks it is misleading.

Kristi Paulson also opposes the proposed specialist language and Ms. Paulson identified that she is also the Director of the Academy of Certified Trial Lawyers and has been working with certified trial lawyers

for 20 years. Ms. Paulson explained that amending the standard is shooting the concept of certification in the foot. Ms. Paulson opined that no one will do the education work for certification if they can just say they are a specialist. Ms. Paulson further stated that the public will not be able to tell the difference.

Mr. Ivy added that the Board of Law Examiners (BLE) - also raised an objection to the ABA/LPRB specialist position.

Thomas Evenson commented that looking at how practice has changed, maybe now certification is unattainable.

Anyone having further comments on Rule 7 issues should send those comments to Mr. Ivy.

(ii) Status, Rule 20, RLPR, Changes

Mr. Ivy explained that proposals relating to Rule 20, RLPR, amendments can be compared to classifying data like the Minnesota Government Data Practices Act.

Mr. Ivy also discussed data issues are being reviewed in the Rule 26, RLPR, context. The concerns related to Rule 26, RLPR, include non-complainant client data being public. Mr. Ivy mentioned that the OLPR does first try to work with lawyers on Rule 26, RLPR, issues and if a violation were to be pursued, it would be pursued as a new rule violation. Mr. Ivy also discussed that if the OLPR has to pursue discipline, there may also be an option to seek a protective order. Mr. Ivy mentioned that Ms. Boerner had additional suggestions.

As to other proposals, Binh Tuong is going to reach out to LCL regarding an amendment providing the OLPR one way communication to LCL regarding wellness issues. There would also be a provision for disclosure to law enforcement if there was a danger to the Office or Office personnel. However, the OLPR would not be permitted to disclose other criminal acts in non-public files, for example, if the OLPR became aware that a DANCO was being violated.

Mr. Ivy added that the MSBA will be addressing the proposals as well.

Justice Lillehaug sought clarification regarding the issue of not being able to report DANCO violations.

Ms. Humiston clarified that information the OLPR has relating to attorneys is private until it becomes public and the proposed Rule 20 RLPR, amendments allow certain things to be reported out to protect Office safety, but does not allow the OLPR to open the door to other information. Ms. Humiston added that they will still have a debate regarding criminal activity and that currently the OLPR encourages complainants or respondents to handle that reporting.

Ms. Tuong commented to provide clarity around the proposed Rule 20, RLPR, amendments and the time frame that applies along with the data impacted. Ms. Tuong explained that initially there is the investigation period where information is confidential to the public. Once there is probable cause, information is public except non-complainant client information. Finally, the amendments seek to address administrative processes such as Rule 26, RLPR, where there may be client information that is non-complainant related.

Mr. Williams inquired when will the revised Rule 20, RLPR, be made available?

Ms. Wolpert advised the revised Rule 20, RLPR, would be circulated and Ms. Wolpert and Mr. Ivy thanked Ms. Tuong for her assistance.

(iii) Status, Access to Justice *Pro Bono* Reporting

Mr. Ivy reported that there are strong opinions on the issue of mandatory *pro bono* reporting. Mr. Ivy reported that the MSBA ethics committee voted against the proposal, however, the general assembly approved the proposal. Mr. Ivy discussed whether this issue is within the Board's purview and discussed if it becomes required information and attorneys fail to provide the information, it could lead to discipline. Mr. Ivy commented that he does not think this proposal means a mandatory *pro bono* service requirement. Mr. Ivy offered perspectives shared, including that there are people who cannot do *pro bono* work, such as some government lawyers, and some question whether this proposal is shaming.

Justice Lillehaug added that the MSBA Assembly approval was overwhelming with hardly any dissenting voices and that the proposal is for mandatory *pro bono* reporting, but that he would not mind mandatory *pro bono* requirements as doing *pro bono* work is the profession's business.

Mr. Ivy added that comment would be under consideration in June.

Allan Witz added that he is a member of the Florida bar and is required to report *pro bono* service and that there is no mandatory requirement. Mr. Witz commented that it is a very easy, simple process.

Mr. Williams remarked that every day he touches a *pro bono* file and added that the aspirational goal is 50 hours of *pro bono* service, if there is a change, the next step is to determine if that is happening.

Gary Hird clarified *pro bono* work is intentional, not just work you do for free, many private attorneys point to receivables and say they are doing *pro bono* work. Mr. Ascheman added it is his belief it is based on the federal poverty guidelines.

(b) Opinion Committee

(i) Opinion No. 21

Opinion Committee Chair Mark Lanterman thanked Mr. Hird, Ms. Hanson, Mr. Wernz and Ms. Wolpert for feedback related to Opinion 21 and encouraged Ms. Hanson to provide background information.

Ms. Hanson explained that this is the third Opinions Committee working on a proposed amendment to Opinion 21, and that every angle has been researched accompanied with vigorous discussion. Ms. Hanson explained that there is no way forward that satisfies all stakeholders along with the goals of the Office. Ms. Hanson stated this mirrors the experience of the ABA and that of the drafter of ABA Opinion 481. Following ABA Opinion 481, there was pushback within the ABA from a lot of different segments. Finally, the current LPRB Opinion 21 is different than ABA Opinion 481.

Mr. Lanterman reported that the Opinions Committee met and discussed Opinion 21 and that Ms. Hanson was gracious with her time. Committee member Gail Stremel was briefed following the meeting. As a result of those discussions, Mr. Lanterman reported that the Opinions Committee recommends that Opinion 21 be rescinded. Mr. Lanterman reported the reason for this recommendation was that the Committee felt like wordsmithing was not going to accomplish the goals. Ms. Hanson added that the position of the Director's Office is to rescind Opinion 21. Ms. Humiston had nothing to add to the commentary.

Mr. Wernz was asked for comment and stated the MSBA rules committee did not take a position on the rescind language, but Mr. Wernz commented that in the past, the language has been to repeal.

Ms. Klevorn inquired what the difference is between repeal and rescind? Justice Lillehaug replied that both mean to revoke, however, he is not suggesting one over the other.

Mr. Hird made a motion to repeal Opinion 21, Mr. Williams and Julian Zebot seconded the motion. The motion was approved unanimously.

Ms. Humiston will update the LPRB opinion site on the OLPR website to reflect the repeal.

(c) DEC and Training Committee

(i) Onboarding Training

Ms. Wolpert reported that substantive training responsibilities are now with the Board. Ms. Wolpert reported that Committee Chair Allan Witz is working with the Office on content that has been delivered to new Board members and has had universally favorable feedback, a great compliment to Mr. Witz.

Mr. Witz thanked Ms. Wolpert, the Committee members, and Jennifer Bovitz. Mr. Witz reported that with Ms. Bovitz's help, he produced training documents that will be revised and added that a training manual will be developed with help from Ms. Bovitz and Ms. Wolpert. Mr. Witz encourages comments and feedback as Board members encounter the process. Once an updated training manual is developed, it will be presented to the Board.

Shawn Judge inquired how long was the Board member training? Mr. Witz responded that the training ranged from 45 minutes to 2 hours. Ms. Judge replied that she felt that her training was a whirlwind and she felt overwhelmed.

Mr. Witz added that he was trained by Pat Burns in a 4-hour session and that Mr. Burns advised him it would take him a year to learn the material.

Mr. Witz explained that his training focus was the most important Panel elements such as appeals, probable cause and reinstatement, and added that he did not send anyone the large training manual prior to the training because it is overwhelming and, instead, sent the manual after training was conducted.

Ms. Wolpert encouraged members who are interested in assisting with onboarding and the training manual committee to reach out.

(ii) Chairs Symposium, Date, Format and Content

Ms. Bovitz, Ms. Wolpert and the Committee had a discussion regarding the delivery of the Symposium amidst the backdrop of the pandemic.

Mr. Witz also reported that the OLPR DEC liaisons individually contacted DEC Chairs regarding resources and any urgent needs during pandemic transitioning. In addition, Mr. Witz contacted DEC Chairs seeking information and feedback regarding the Symposium, including a delivery method, and any urgent needs. One DEC Chair responded that he would not attend an online event. Mr. Witz collated this information and shared it with the Committee. Ultimately, a decision was made that the May 8, 2020, Symposium will not occur and programming will be rolled into the September Seminar event.

Ms. Bovitz provided the update from the OLPR DEC liaisons that all liaisons reached out to their assigned DEC Chairs. Overall, DEC Chairs reported that transitioning operations during the pandemic went smoothly. In particular, rural DEC's transitioned very smoothly because of their familiarity with remote operations. The urban DEC's experienced more transition issues, but are now adjusting well.

(iii) DEC Seminar, September 25, 2020

Ms. Humiston remarked that all should continue to think about what the September Seminar will look like.

(d) Panel Manual Update

Ms. Wolpert advised the Office has been working hard to update the Panel Manual. In January 2020 Ms. Humiston provided an updated Panel Manual to Ms. Wolpert, who then distributed the update to Panel Chairs, with

no comment from Panel Chairs to date. Ms. Wolpert will be seeking a committee to provide updates.

Ms. Humiston reported that she has a number of Panel Manual edits to finalize no sooner than the end of May. The Panel Manual updates were a target project for March, but the pandemic occurred requiring reprioritization.

(e) Mandatory Malpractice Insurance Committee

Ms. Wolpert reported that because of COVID-19, the work of this Committee continues to be on hold, but is hoping to launch in July or August. The Committee will be relying on a lot of out of state experts and resources and Ms. Wolpert is cognizant of competing demands on resources. Ms. Wolpert encouraged anyone new interested in the question of whether private attorneys should have mandatory malpractice insurance to contact Ms. Wolpert.

7. DIRECTOR'S REPORT

Ms. Humiston reported that 2019 was capped off in early February with a surprise party sponsored by the OLPR's Wellbeing Committee that celebrated accomplishments of 2019.

(a) Statistics (Attachment 3)

Ms. Humiston detailed that in reviewing Attachment 3, the Office is well under the 500 file benchmark for overall file inventory. Additionally, through the end of March, the amount of new files is the same as a year ago at 126. There are 62 files pending over one year old and it is important to keep this number lower. It is also important to note that anything that goes to the Court will go over the one year mark. Ms. Humiston added that it has been incredibly busy and the Office has closed a large number of cases. Generally, discipline remains the same. The second page of Attachment 3 breaks down where files are in the disciplinary process. Ms. Humiston commented that there are a lot more files headed to Court and it will be a busy year for discipline in 2020.

Kyle Loven inquired whether there is an anticipated return to normalcy or a boost in complaints? Ms. Humiston replied that the Office has seen a reduction, but it has started to pick up. Ms. Humiston also added that it will depend on whether people level off their need for legal services. If the demand for legal services proceeds as normal, the expectation is it would catch up.

(b) Office Updates (Attachment 4)

Ms. Humiston updated those in attendance that Tim Burke, who has been on leave since November, will be coming back on a part-time basis starting May 5, 2020. Additionally, Jennifer Bovitz was promoted to interim manager to assist managing with Cassie Hanson. Cassie Hanson, Binh Tuong and Jennifer Bovitz are staffing Committees of the Board in addition to their other duties.

In other Office operations news, Ms. Humiston explained that LDMS has been wonderful for the Office. Summary Dismissals and initial complaint reviews are now done electronically. This has also streamlined the process and reduced turnaround to no more than one week for duty work. Complaint forms have also been updated and complainants can now submit supplemental materials electronically. Ms. Humiston also congratulated the LDMS team including Office Administrator Chris Wengronowitz, who has been integral in the Office's technology success.

Another operational area of report is the OLPR's lease, which expires at the end of July. Ms. Humiston reported that the landlord's proposal was not satisfactory. As a result, the OLPR is in the process of finalizing an offer for space located in Town Square on the 20th floor, with a more efficient use of space. Ms. Humiston reported it is an advantageous offer that includes a build out to our spec, \$50,000 in moving costs with year over year increases of 2.6%. Ms. Humiston highlighted the Board will benefit from the new space with conference and training facilities and higher security. Ms. Humiston expects an October 1, 2020, occupancy, and is anticipating negotiating an extension to the current lease.

Ms. Humiston added that the Board materials were supplemented with the paraprofessional comment order. The executive summary is attached to the Chief Judge's order. Ms. Humiston also noted that May 4-8 is National Wellbeing Week and National Wellbeing Task Force materials were included and information includes how to celebrate remotely. The National Task Force on Lawyer Well-Being is linked on the OLPR's website.

Ms. Wolpert added that the paraprofessional project will be sent to the Rules Committee to determine whether the Board should be commenting with comments being due in July.

Ms. Wolpert also suggested moving well-being materials to an area other than announcements. Ms. Wolpert also stated that she will invite everyone to a weekly well-being chat.

8. **OTHER BUSINESS**

(a) **LPRB 50th Anniversary**

Ms. Wolpert addressed that the anniversary may need to be delayed due to the pandemic.

Justice Lillehaug added that it is challenging to get people excited about the 50th Anniversary of the Board during these times. Ms. Humiston contributed that 2021 may provide an opportunity to celebrate both the anniversary of the OLPR (founded in 1971) and the LPRB (founded in 1970).

Mr. Ascheman provided an update on the early bar exam proposal including that the Committee was divided. The Committee filed its recommendations on March 2, 2020. The Committee report noted the division in the Committee and a recommendation if moving forward is for a five-year pilot project.

Ms. Wolpert asked whether the LPRB would want to provide comments separate from Committee participation.

Ms. Humiston added that she does see a lot of discipline in initial years, but does not think that impacts making comments. Additionally, BLE and Ms. Humiston are working on a joint project regarding discipline and admission related issues.

9. **QUARTERLY BOARD DISCUSSION**

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

Thereafter, the meeting adjourned.

Respectfully submitted,

Jennifer S. Bovitz Bovitz, Jennifer
Jun 10 2020 3:46 PM

Jennifer S. Bovitz
Managing Attorney

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

Attachment 2

AMENDED MINUTES OF THE 189TH MEETING OF LAWYERS PROFESSIONAL RESPONSIBILITY BOARD JANUARY 31, 2020

The 189th meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, January 31, 2020, at the Town and Country Club, St. Paul, Minnesota. Present were: Board Chair Robin Wolpert, and Board Members Landon J. Ascheman, Jeanette M. Boerner, James P. Cullen, Thomas J. Evenson, Roger Gilmore (by phone), Gary M. Hird, Peter Ivy, Bentley R. Jackson, Shawn Judge, Virginia Klevorn, Tommy A. Krause, Susan C. Rhode, Susan T. Stahl Slieter, Gail Stremel, Bruce R. Williams and Allan Witz (by phone). Present from the Director's Office were: Director Susan M. Humiston, Managing Attorney Cassie Hanson, Senior Assistant Directors Jennifer S. Bovitz and Binh T. Tuong, and Assistant Director Jennifer Wichelman. Also present were Minnesota Supreme Court Associate Justice David L. Lillehaug and Kenneth L. Jorgensen.

1. APPROVAL OF MINUTES

The minutes of the September 27, 2019, Board meeting were unanimously approved.

2. FAREWELL TO RETIRING BOARD MEMBERS

Ms. Wolpert acknowledged and thanked Joseph Beckman, Mary Hilfiker, Bentley Jackson, James Cullen and Roger Gilmore, retiring Board members, for their service to the Board.

3. LPRB 50th ANNIVERSARY

Ms. Humiston provided an update on the LPRB 50th Anniversary. The first LPRB Board was appointed in 1970. Allen Saeks, who was admitted in 1956, continues to practice and is a tremendous source of knowledge. The Director's Office was established in 1971. Ms. Humiston encouraged Board members to read William Wernz's article, "Whence Lawyer Discipline?" included in the Board materials, which provides a good framework of the origin and evolution of Minnesota's lawyer discipline system. Ms. Humiston suggested that a portion of the annual seminar could be focused on celebrating the anniversary and encouraged members to begin thinking about that event and how to include others such as dignitaries. Ms. Wolpert pointed out that one such dignitary, Kenneth Jorgensen, was present at the Board meeting. Individuals are encouraged to contact Ms. Wolpert or Ms. Humiston with ideas surrounding the anniversary celebration.

4. UPDATED PANEL AND COMMITTEE ASSIGNMENTS

Ms. Wolpert reported there is no order yet from the Court regarding new Board appointments. Once an order is filed, Ms. Wolpert will file documents regarding Panel composition.

- Executive Committee Appointments: Ms. Wolpert reported that Jeanette Boerner will serve as Vice Chair and Bruce Williams, Shawn Judge and Virginia Klevorn will be appointed to the Executive Committee effective February 1, 2020.
- Committee Leadership: Ms. Wolpert reported that Peter Ivy will Chair the Rules Committee, Mark Lanterman will Chair the Opinions Committee and Allan Witz will Chair the re-named DEC & Training Committee, which will now include training of the Board. Mr. Witz and Mr. Ivy will put together training materials using materials previously used by Deputy Director Tim Burke with a goal of ensuring even implementation of the rules.
- Panel Composition: Ms. Wolpert addressed that if a matter is pending, the matter will stay with the currently assigned Panel. Ms. Wolpert also addressed that every Panel will be losing someone and Panel composition will change.
- Panel Status Updates: Ms. Wolpert reported that the prior week a disclosure was sent to Panel Chairs to update Chairs on the status of matters. Ms. Wolpert sought input and feedback from the Director on the form. Mr. Cullen responded that the form is a very good idea, that it is helpful and would appreciate a 90-day form to track with the Board meeting. Gary Hird also found the form helpful. Thomas Evenson asked if the update could be provided more frequently based on inquiries he receives. Ms. Humiston responded that it would not be a problem to provide updates more frequently and stated that Panels can always request status updates from both parties.

Mr. Cullen had questions about a specific notation that a respondent was taking a deposition. Mr. Cullen asked if this was being addressed in the Panel Manual? Mr. Cullen stated his concern was that to the extent there may be inconsistencies, it would be helpful for this issue to be addressed in the Manual. Ms. Wolpert responded that she is looking for input from Panel Chairs regarding the Panel Manual, which is a priority for this year. Ms. Wolpert identified that the Panel Manual is critical to communicate

procedures and often goes out to respondents who are *pro se*. Ms. Wolpert noted that comments from the Director's Office are still to be included and to look at the Panel Manual through a big picture lens. While Ms. Wolpert believes the Panel Chairs are the best place to start with the Panel Manual revisions, if anyone else should be included, contact Ms. Wolpert.

5. **COMMITTEE UPDATES**

A. **Opinions Committee.**

i. Amended Opinion 21 (Attachment 2).

Committee Chair Gary Hird provided the Committee report and Kenneth Jorgensen was present to provide the MSBA position. Mr. Hird stated there has been a long odyssey with Opinion 21 advising that a draft was circulated and also sent to the MSBA Rules Committee which was attached to the Board materials. Mr. Hird reported that after receiving comments from Fred Finch and a letter from William Wernz, the Committee met and discussed input and discussed changes to the proposed opinion. Mr. Hird reported that the Opinions Committee adopted some of the suggestions from Mr. Finch's letter relating to the 3(b) insert, "reasonably should know," and the Committee believed that would be a good addition to the opinion. Mr. Hird reported that the Committee also focused on 3(c) and removing "determines," stating "knows or reasonably should know" should be used to be consistent.

Managing Attorney Cassie Hanson reported that the purpose of the opinion is to give guidance to the average practitioner and when the Committee thought about Rule 1.4, MRPC, it is clear that it is a comprehensive set of obligations on the practitioner and they are informed, however, paragraph (b) represents the client perspective and that the average practitioners should be thinking about the client perspective. Ms. Hanson provided perspective that she recalls when the original Opinion 21 was adopted that a lot of thought was put into it, and if paragraph (b) was removed, the client perspective would be removed. Mr. Beckman, an Opinions Committee member, reported that Ms. Hanson was accurately reporting the Committee's thoughts.

Mr. Jorgensen on behalf of the MSBA reported that for 22 years he was in the Director's Office and in the last ten years, he spent a significant

amount of time counseling lawyers, and was the original staff to the Opinions Committee. Mr. Jorgensen stated when the Opinion first came out, it was very controversial and he was happy to see changes in responses, but it was a bit like doing cosmetic surgery on someone who was having a heart attack. Mr. Jorgensen stated that the standard is subjective and has no place in jurisprudence and remarked that the ABA's broad policy pronouncements were a problem because they are not tied to existing state legal standards. Mr. Jorgensen stressed that lawyers need to be able to rely on jurisprudence and focused his position on that the Opinion needs to be objective and that if not objective, the standard moves depending on the field of law. Mr. Jorgensen stated that historically the ABA stayed away from issues such as this and this Opinion addresses the breach of fiduciary duty stating if you do not do it you have liability which creates all sorts of quagmires.

Mr. Jorgensen urged that another thing to keep in mind is the purpose of opinions is not to add protection to clients, but to guide lawyers, to help lawyers to comply. Mr. Jorgensen provided the example of Opinion 13 where the Supreme Court specifically stated that the Opinion applied standards that were beyond what the rules require. Mr. Jorgensen also provided an example of Opinion 11 relating to liens on homesteads and associations with debt collection agencies, both of which were repealed. Mr. Jorgensen stated that the LPRB and the Director's Office observed that they were outside of their lanes and the opinions no longer exist because they were outside of their lane.

Mr. Jorgensen emphasized that the Opinion, as written, is going to create a bigger burden for certain lawyers, in particular, criminal and family lawyers. Mr. Jorgensen provided an example of confidential communication going to places that it should not. Mr. Jorgensen provided an example of such issues happening daily, for example, with clients who are sophisticated, this does not have to be disclosed, however, other types of clients, for example, defendants or volatile family law clients, the standard may vary based on the practice area. Mr. Jorgensen emphasized that from his perspective this is not fair.

Mr. Jorgensen continued to question what the utility of the Opinion is. Mr. Jorgensen also emphasized that the cases the Office is charging are easy violations of Rule 1.4 and an opinion is not necessary from an enforcement perspective. Mr. Jorgensen provided the background that

initially when working at the Director's Office, he was the only attorney who did advisory opinions for five years and that he did thousands and was never asked during those requests for opinions if an attorney needed to disclose. Mr. Jorgensen stressed that despite all its hard work, is the Board really staying in its lane? Mr. Jorgensen pointed out what is the standard to consider firing; firing is subjective, considering is even more subjective.

Mr. Williams asked Mr. Jorgensen if his suggestion was to eliminate Opinion 21? Mr. Jorgensen replied that he would, it was not a tool that he used very often.

Mr. Cullen commented that he is not on the Opinions Committee but is a part of the MSBA, and has listened to William Wernz, Ken Jorgensen and Eric Cooperstein and is totally confused regarding Opinion 21 and believes it needs to be studied with all of the criticisms expressed and the Committee needs to digest it more and commented that all of what Mr. Jorgensen said is right, and Bill Wernz is right. Mr. Cullen says some are saying to confirm to the ABA, others are saying no. Mr. Jorgensen responded that the ABA does not have to be enforced, that the ABA ignores the law in the jurisdiction and gave the example of ABA Opinion 489 which ignores partnership law and stated that we cannot address the problem with a simple solution when the issue is more complicated. Mr. Williams asked if the Opinion would cause more litigation? Mr. Jorgensen replied that Opinion 21 will be pled in affidavits in civil litigation. Mr. Jorgensen opined that he has not seen plaintiffs assert Opinion 21, but now could.

Ms. Klevorn responded that as a public member, she has heard the arguments from Mr. Jorgensen and believes that the perspectives being presented are those from the lawyers' perspectives. Mr. Jorgensen replied that the rules are for the protection of the public and that Opinion 21 does not assist with that.

Mr. Beckman posed a question seeking precedent confirmation for the repeal of Opinion 13 and confirmed that it was Panel Matter 99-42 (2001).

Justice Lillehaug asked what the standard of care was for disclosing when an attorney has committed malpractice. Mr. Jorgensen replied if

there has something to do with prejudice. Justice Lillehaug followed up inquiring whether Opinion 21 informs as to the standard of care. Mr. Jorgensen replied his concern is that plaintiffs are going to use Opinion 21 as the standard of care.

Senior Assistant Director Binh Tuong cited to Rule 1.4(b), MRPC, stating that Rule 1.4(b), MRPC, requires an informed consultation with clients focusing on attorneys' relationships with clients and that attorneys are required to know what is important to clients to allow them to make informed decisions. Ms. Tuong stated that Opinion 21 is to remind, not to expand or overreach, that everyday attorneys have to make decisions to communicate conflicts and other rules may come into play and that the purpose is how to best protect the client under the rule.

Ms. Boerner asked whether it was about the client and that the standard is very difficult. Ms. Boerner expressed that it was difficult to provide guidance to 200 lawyers and that it appears very irrational. Ms. Tuong responded that it is one of many decisions, isn't it the client's decision? Ms. Boerner replied that Opinion 21 seems to be about the free market world, not the appointed lawyer world. Ms. Tuong replied whether we want to be left with the ABA Opinion with the obligation already in the rules?

Mr. Hird contributed that some people are missing the reasonableness standard in the Opinion and are looking for absolutes. Mr. Hird stated he does not think the rules are absolutes and stated that he did spend 30 years representing the clients Mr. Jorgensen is talking about and still thinks it is important for clients to have trust in their lawyers and for lawyers to communicate with their clients.

Mr. Beckman opined that Opinion 21 is not used for discipline purposes but Mr. Jorgensen is opining that Opinion 21 will create a market for legal malpractice claims.

Managing Attorney Cassie Hanson pointed out that mistakes occur along a continuum, that this is an issue for the Bar, and the current Opinion 21 is not correct and has been under debate for two years and not taken lightly by the Committee and encouraged the Board to keep in mind that the current Opinion is not accurate.

Mr. Jorgensen reinforced his concerns that the MSBA is concerned about malpractice. Mr. Cullen asked Managing Attorney Cassie Hanson if she agreed with Senior Assistant Director Binh Tuong. Ms. Hanson stated she did agree with Ms. Tuong.

Mr. Cullen then inquired why do we need Opinion 21? Mr. Cullen then stated: It seems like the OLPR wants Opinion 21 when the ABA issued Opinion 481, the point is lawyers are frequently defaulted to be protectionists.

Landon Ascheman stated he had been listening and the harm and prejudice in (a) material errors increase costs, missing hearings, struggling to think of a situation where (b) would be guiding and is struggling to see where this would play out.

Mr. Ivy added that the aspirations in (b) are valuable but would be a challenge to enforce and would be really hard if it came before a Panel, assuming clients are going to be reasonable and inquired what if the Board just went with (a) with a further definition of harm/prejudice.

Mr. Hird asked what if a lawyer is just sloppy and the judge let the lawyer get away with it, shouldn't the client get notice and the Opinion provide guidance? Ms. Wolpert closed the discussion.

Mr. Hird moved for the adoption of Opinion 21, Susan Rhode seconded the motion.

During discussion, Mr. Beckman commented that the Opinion does have the potential to be abused with the stamp of an affidavit when Rule 1.4, MRPC, already has the same duty. Ms. Judge inquired who does the Board serve and stated that she is grappling with that.

Mr. Ascheman provided a clarification if there is no harm that does not meet the standard if the judge gives you a pass for missing a deadline.

Mr. Hird stated that the fact that you sent it by mistake makes it material, a lawyer who has made a mistake has the obligation.

Ms. Wolpert called the motion to adopt Opinion 21 failed. It was noted that the concern of the nay vote was (b). When the motion failed,

Ms. Wolpert sent the matter back to the Opinions Committee to evaluate the next steps, including rescission. There was a brief discussion about whether rescission was an option.

B. Rules Committee.

Committee Chair James Cullen reported that the Committee met in January. In addition to the identified areas of focus, the Committee is also seeking to address issues relating to respondents with ongoing civil or criminal matters.

i. Status, Advertising Rules Petition

Mr. Cullen reported that the MSBA took interest in reviewing Rules 7.1-7.3 and noted that the ABA enabled attorneys to use the term specialist without precondition. Mr. Cullen reported that Dan Cragg recommended the MSBA agree to amend its rules in two separate meetings occurring on April 26, 2019, and September 27, 2019. When the first meeting occurred, the MSBA had not yet had its assembly meeting, however, there was a belief that there would be a co-petition addressing the proposed amendments. Ultimately, the state bar assembly had a dispute regarding the specialist amendment with two votes carrying the state certification/specialist language defined differently from the ABA model rules. Mr. Cullen recapped the Board's September approval of the Board independently petitioning the Supreme Court to amend Rules 7.1-7.5, MRPC, to conform to ABA Model Rules 7.1-7.3. The Board will continue with the petition transitioning to the leadership of Mr. Ivy, who will be assisted by Mr. Cullen. Mr. Cullen acknowledged that the OLPR has different priorities right now, but following the Board's work on the petition, it will be turned over to the OLPR and ultimately there will be a co-petition between the LPRB and the OLPR.

ii. Status, Rule 20, RLPR, Changes

Mr. Cullen reported that the OLPR proposed amendments to Rule 20, RLPR, and that most of the proposed amendments were acceptable. Mr. Cullen identified that Mr. Wernz raised very persuasive comments regarding the potential abuse of the amendments surrounding Rule 20(f)(3), RLPR. Mr. Cullen and Ms. Humiston are reviewing the national practice and there is an entirely new proposal that is too new to

report at this meeting. The new proposal will be referred over to Mr. Ivy who will now be chairing the Rules Committee.

iii. Access to Justice *Pro Bono* Reporting Proposal

The Access to Justice Committee of the MSBA has been working on a mandatory *pro bono* reporting requirement that is going to the MSBA assembly in April. Ms. Humiston has been attending from a regulation perspective.

C. DEC Committee.

Mr. Ivy reported that Mr. Witz will be taking over as Chair. Mr. Ivy stated he advised Mr. Witz that Jennifer Bovitz, staff liaison to the Committee, is knowledgeable and approachable. The Committee will now handle new member training.

Ms. Wolpert reminded the Board that six new members will require onboarding and there may be a gap in time with the training. Ms. Wolpert encouraged Panel Chairs to look out for new members and coordinate appropriately.

Mr. Witz requested that Board members who are transitioning off the Board email Mr. Witz with training suggestions or if they are interested in assisting with training.

D. Mandatory Malpractice Insurance Committee.

Ms. Wolpert reported that she has had several conversations with leading practitioners and academics on the subject of mandatory malpractice, and is considering coordinating presentations with outside experts with the MSBA.

6. DIRECTOR'S REPORT

Ms. Humiston directed the Board to Attachment 3 as a high level summary of 2019. Ms. Humiston reported a strong ending to 2019 with 481 open files and 119 files over one year old, which was the result of a lot of hard work. New complaints were down by 104, but the same number of matters were investigated, for example, in 2018, 572 cases were investigated, and in 2019, 566 were investigated, with more complaints in 2019 meeting the threshold for investigation. Referee trials in 2019 increased to 11 as compared to four in 2018. Panel work remained consistent with ten matters in 2019 compared to eight in 2018.

Ms. Humiston discussed that in reviewing discipline over the decades, the 1990s had the largest number of disbarments and in 2010 there was overall higher discipline. Mr. Williams and Ms. Klevorn inquired what the number of licensed attorneys was over those time periods? Ms. Humiston responded that she does not think lawyers are behaving less badly, but believes the Court is treating cases differently. Ms. Humiston also noted there have been fewer public discipline matters this year, perhaps due to the timing of trials.

Ms. Humiston directed the Board to Attachment 4, illustrating how MARS has been updated to reflect current disciplinary status for public view. The update also provides a hotlink to the OLPR website, and identifies those not carrying malpractice insurance, identified in red.

Thank you notes contained in Attachment 4 were also noted, the first being a thank you received by Ms. Bovitz from an advisory opinion caller and a thank you Ms. Humiston received from the Hmong Bar Association, which she presented at and included non-lawyers.

Ms. Humiston provided Office updates, including the addition of Senior Assistant Director Jennifer Wichelman, who was in attendance. Ms. Wichelman brings 20 years of litigation experience to the Office, most recently at Bowman & Brooke, where she practiced in the area of products liability. Ms. Humiston also discussed that Gina Brovege has been hired as an investigator, a new position for the OLPR, and that she has a good skill set that is serving the Office well. Ms. Humiston also reported that Casey Brown has started law school and loves it. Ms. Humiston provided an update that the new Office database will be launching on February 19, 2020.

Ms. Humiston reported on Office challenges including three team members losing family members serially and a number of medical leaves impacting the Office. Ms. Humiston reported that one of those leaves includes Deputy Director Timothy Burke who has been out since November 2019.

Ms. Humiston reported on a mistake in the Mulligan petition that included two mistaken rule references. Ms. Humiston thanked Ms. Boerner for bringing the issue forward. Ms. Humiston stated she is taking responsibility for the mistake, is moving to amend the petition and she appreciates how many people outside the Office review the Office's work.

Ms. Humiston also updated the Board that the Office's current lease expires on July 31, 2020. The current landlord's proposal was a three year lease with an automatic out during the first year, which was a non-starter for negotiations. The landlord is

participating in the DEED RFQ, resulting in the terms the current landlord is proposing. Ms. Humiston is working with the state real estate leasing unit.

7. DIRECTOR'S REAPPOINTMENT

Ms. Humiston noted she prepared remarks and upon request of Board members, addressed her reappointment. Ms. Humiston stated there are many things to celebrate, including successfully driving numbers, in a sustainable way. Ms. Humiston stated that she tried to encourage results in a way that skills were learned while not neglecting other responsibilities, including integration of the strategic plan. Ms. Humiston reported that the Office continued to show progress and strengthened the quality of work product. Ms. Humiston shared that Referee Nelson, upon retirement, advised her that work product under her tenure was notably improved and that he was impressed with the talent the OLPR was recruiting.

Ms. Humiston reported that she has focused office culture on teamwork and accountability with the theme of rising and falling together, a message that is consistent with the Court's emphasis on continuous improvement and the mission of protecting the public. Ms. Humiston has required all staff to provide innovation suggestions as a part of the review process. In the vein of innovation, lawyers have been attending the CoLAP conference, increasing education and awareness on lawyer wellness issues. Attorney training has increased, including ensuring that every attorney has a mentor. Ms. Humiston also celebrated the success in creating the investigator position despite initial pushback from a segment of the Office.

Ms. Humiston reported on other updates to the Office including a revised probation department, updated DEC training, revised workflows, expanding collaboration with LCL, increased Office representation on MSBA committees, and an engaged Wellbeing Committee. Ms. Humiston documented expanded outreach with more staff members presenting at CLEs, Mr. Lanterman providing three separate presentations to the National Organization of Bar Counsel (NOBC), Ms. Humiston will be presenting on a panel at the Austin NOBC conference in February and Ms. Humiston was asked to join the NOBC subcommittee on regulation in the public interest.

Ms. Humiston closed her remarks by stating she is grateful for the opportunity to lead the Office, that it is her favorite job, that she finds it challenging and pulls on many different skills. Ms. Humiston commented that it is always a challenge and exciting to do every day, stating she works with a talented group of lawyers, that she is grateful and would love to be reappointed and is thankful for the opportunity to serve.

8. **NEW BUSINESS**

Mr. Ascheman reported on the early bar examination committee stating that the committee is compiling information from law schools to determine early bar exam impacts. The intent of the early bar examination is to allow students to take the examination before completing a JD with licensing occurring upon graduation, decreasing debt load.

Kyle Loven inquired how many other states have implemented an early exam? Mr. Ascheman responded that Georgia dropped the early exam, Arizona is fairly active with a 100% passage rate. Other states include Vermont and New York. New York allows applicants to take the exam early if 100 hours of *pro bono* work have been completed. Ms. Wolpert stated that once there is a final report it will be sent to the Rules Committee and the Board can make a decision.

9. **QUARTERLY BOARD DISCUSSION**

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

Thereafter, the meeting adjourned.

Respectfully submitted,

Jennifer S. Bovitz

Bovitz, Jennifer
Jun 10 2020 11:19 AM

Jennifer S. Bovitz
Managing Attorney

Attachment 3

Conducting OLPR Hearings with Zoom

Overview

Use this document to support the work associated with preparing for Zoom remote hearings. These steps are not meant to replace already established protocols and practices for running hearings but intended to help ensure the added use of remote technology is smooth and successful for all participants.

Conduct the remote hearing

- Find a quiet place to conduct your hearing.
- Start the hearing with your host 15 minutes before the hearing start time.
- Test your audio and video.
- Check for adequate lighting with your video. Lighting should come from in front of you or from the side.
- Close any unnecessary tabs in your internet browser; close other applications and documents not needed for the hearing.
- When ready, ask your host to move participants into the hearing from the waiting room.
- Review participants' names and ask the host to rename attendees as needed.
- Review with the participants on how to mute and unmute their audio and how to enable and disable their video. Ask participants to mute themselves when not speaking.
- Tell party participants to engage their video, if they can. For Zoom, use gallery view.
- Ask your host to lock the meeting (if confidential). If not confidential, ask host to admit public members, if any, from the waiting room.
- If public members are present, inform public members: 1) that this is a hearing much like a live hearing and therefore all those in virtual courtroom must act appropriately; 2) that nonparticipants must stay muted and are not permitted to speak at any time during the proceedings; and 3) if anyone engages in any disruptive behavior, the panel may ask the host to remove the disruptive person from the hearing; once removed, the disruptive person may not re-enter the meeting.
- Call the case.
- Acknowledge the court reporter.
- Conduct the hearing.
- Work with your host to utilize breakout rooms as needed for ad-hoc communications.
- Click the leave-meeting button to end the hearing.

OLPR Best Practices, Protocols and Etiquette for Remote Hearings For Participants

Until social distance requirements are lifted, attorney discipline proceedings will likely be conducted remotely. The Office of Lawyers Professional Responsibility (OLPR) has chosen to conduct remote hearings using the Zoom Application. Below are various best practices and points of etiquette that the OLPR has compiled from various resources that will help ensure OLPR proceedings conducted remotely run as smoothly and efficiently as possible. They are not exhaustive and the directions of the panel or referee judge conducting the hearing should always be followed.

- **Remember a remote hearing is still a hearing.** All participants should dress and act at a remote hearing as you would at a live hearing. These are formal proceedings and parties should be mindful to treat them as such. It is recommended that you dress in business attire and be mindful of what is behind you. Here are some other protocols that are practiced in live hearings that should also be followed in remote hearings. These protocols apply to everyone, including the parties, witnesses, and public observers. Attorneys may wish to discuss these protocols with their clients and witnesses so they also understand what is expected.
 - Turn off or silence your cell phone.
 - Refrain from speaking to or otherwise distracting participants in the hearing.
 - Hats or head coverings are not permitted, except for religious reasons.
 - Sunglasses are not permitted, except for medical reasons.
 - Photography, video, or audio recording of the hearing is not allowed unless the panel or referee has given permission.
 - Refrain from eating during the hearing.
 - Always obey the instructions from the panel members or referee.
 - The hearing will be transcribed by a court reporter in attendance. Everything you say in the hearing will be on the record.
 - All behavior during the hearing must be courteous and respectful.
 - Public proceedings are open to the public unless ordered otherwise by the panel or referee. If you would like information about how to attend a remote public hearing, please call the Office at 651-296-3952. If the panel or referee has ordered that the proceedings or part of the

proceedings not be public, members of the public in attendance will be removed from the hearing. Some panel proceedings are private and may not be attended by individuals not a party to the proceedings.

- **Be prepared.** Prior to the hearing, the parties should have discussed how exhibits should be exchanged and introduced, witness order, sharing exhibits with witnesses, the need for interpreters and other hearing logistics. Make sure you follow the procedures agreed upon by the parties. For example, if the parties agree that all participants should have access to exhibits prior to the hearing, make sure all exhibits are provided. Any accommodations needed at the remote hearing should be raised and addressed ahead of time, including whether parties will need to be granted permission to share screens during the hearing.
- **Find an appropriate space.** Find a quiet, well-lit place for clear and distraction-free audio and video. Turn off TVs, radios, and phone notifications. If there are others around you, try moving to a room with a door you can close. It is best to participate from a private, quiet space.
- **Test your equipment.** Before the hearing, familiarize yourself with your microphone, camera and speakers. You may wish to do a practice run with your client and your witnesses to make sure their equipment is working properly. Before the hearing, test your technology from the place where you plan to participate in the hearing. This will indicate whether your Internet connection is strong enough in that location. A videoconference can use a lot of bandwidth.
- **Familiarize yourself with the Zoom application.** If you have never participated in a Zoom meeting before, you may wish to test out the application so you are comfortable with all its functions. The Minnesota Judicial Branch has prepared a one-page “cheat sheet” that allows you to familiarize yourself with the Zoom App. That sheet is attached.
- **Take steps to avoid internet disruptions and other technical issues by doing the following (and lawyers should advise your client and witnesses to do the same):**
 - Ensure that your phone, computer or device is plugged in or that the necessary charger is handy. Hearings can go longer than you think and the technology can use up a lot of power.
 - To the extent possible, reduce the number of other devices using your Internet connection during the hearing.
 - Close any applications that you are not using during the hearing.
 - If you have one, consider using an external microphone and headphones. External microphone may pick your voice up more clearly than

the microphone built into your device. Headphones will provide the best sound quality and the fewest background noises. Some headphones include an external microphone, which is ideal.

- If joining by video, find your device's video camera and make sure it is uncovered. Position the camera at eye level so others can see you clearly.
- **Log into the hearing 15 minutes before the scheduled start time.** This will give you an opportunity to address last-minute technical issues and ensure that you join the hearing as soon as it begins.
- **Mute notifications on your computer/device.** These can interrupt the hearing and be distracting to you and others.
- **Exchange contact information.** No matter how much we plan and prepare, not all disruptions can be prevented and things can go wrong. Make sure all parties have each other's contact information and know who to contact should they face technical problems. Be sure to exchange contact information with your client and witnesses so that you have a means of communication outside the hearing. The OLPR has assigned a hearing host/administrator who is the contact person for hearing-related issues such as access to the hearing or accessing a break out room. Make sure you have her contact information (and give her yours) before the hearing. You can reach the remote hearing host by calling the OLPR at 651-296-3952. Please note: the hearing host cannot assist with any technical problems you may have with your computer, speaker, video or internet. You must secure your own tech support if you have such issues.
- **Your screen name should be your given name and surname.** You will be asked to provide a screen name upon signing on to the hearing. Please use your given name and surname for proper identification. All participants on the call, including the presiding panel members or referee, can see your screen name. Lawyers should remember to also instruct your client and witnesses to identify themselves properly in their screen name. The host may change any participant's screen name if it is incorrectly entered.
- **Speak slowly, clearly and one at a time.** Some participants' Internet connections and/or speakers might not allow them to hear others clearly. Speaking slowly and clearly will help everyone follow what you are saying and will assist any interpreters. Speak one at a time and pause before speaking in case there is audio or video lag. This also makes it easier for the court reporter to record the proceedings and provide a clean and clear record.
- **Mute your microphone when not speaking.** This reduces echo and background noise. But also, remember to unmute when you want to speak. Pay attention to the

mute icon so you know when you are on mute. Be aware of where that icon is so you can quickly access it as necessary.

- **Avoid using Chat function to communicate.** The Chat function will be disabled during OLPR remote proceedings. It is important to have a clean and clear record and the court reporter's record is the official record. Side comments using the Chat feature can be distracting and confusing. If you need to communicate with your client during proceedings, you could ask for a recess and a breakout room. The Chat function may only be used to communicate with the meeting host/administrator should you have issues during the hearing and cannot contact her by telephone or through other means.
- **Be patient.** For many participants (including the panel members and referees), this may be their first time participating in a remote hearing. Anything can happen at a hearing that may disrupt the proceedings. Working through problems and disruptions can take time.

Participating in Court Hearings with Zoom



Active speakers are indicated by a yellow box or underline.

Use options at the top to modify your screen view. Gallery View is preferred.

View participants of the hearing in the right panel. From there, mute or pause your personal audio and video. Hover over your name to rename or update your title.

Click Raise Hand to grab the host's attention.

- Use the Mute button to mute or unmute yourself.
- Use the Start Video button to pause or resume personal video.
- Do not use the Invite button to invite additional participants.
- Click the Participants button to view participants in the right panel.

Only hosts should use the Record button to start and stop recordings of the meeting or court hearing.

From the Participants view, click Unmute Me to ask the host to unmute you.

- Use the Share Screen button to share your screen or files with the host's permission.
- Avoid using the Chat or Reactions features in court hearings. Chat appears in the right panel.
- Click Leave Meeting to leave the court hearing.

Attachment 4

FILE NO. ADM10-8005

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition to Amend Rule 7 of the
Minnesota Rules of Professional Conduct.

**PETITION OF THE LAWYERS
PROFESSIONAL RESPONSIBILITY
BOARD**

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

Petitioners, Lawyers Professional Responsibility Board (LPRB) and the Director of the Office of Lawyers Professional Responsibility (Director), respectfully request this Court to adopt the amendment to Rule 7, Minnesota Rules of Professional Conduct (MRPC), as set forth below. In support of this petition, petitioners would show the Court the following:

INTRODUCTION

1. Petitioner LPRB is a Board established by this Court to oversee the lawyer discipline system. Petitioner Director is appointed by this Court to oversee the lawyer discipline system and seek enforcement of the MRPC.

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

3. This Court has adopted the MRPC to establish standards of conduct for lawyers licensed to practice law in the State of Minnesota. The MRPC, as adopted by this Court in 1985, are based upon the Model Rules of Professional Conduct (Model

Rules) published by the American Bar Association (ABA), as adapted and modified by the Court to conform to Minnesota standards and practices.

4. From time to time, the ABA has amended its Model Rules to adapt them to changing conditions and expectations in society and in the practice of law. When it has done so, petitioner LPRB has studied the amendments through its committee, and made recommendations to this Court on whether, and in what form, the amendments to the Model Rules should be incorporated into the MRPC. Petitioners have petitioned this Court to amend the MRPC to conform to changes in the Model Rules in 2003 and 2014. This Court has also amended the MRPC from time-to-time for good cause shown.

5. For the reasons set forth below, petitioners request this Court adopt the proposed amendment to Rule 7, MRPC, and the Comments thereto, as set forth in Attachment A.

BACKGROUND

6. In August 2018, the ABA amended Rule 7 of its Model Rules, which governs lawyer advertising and communications. The ABA significantly reworked Rule 7 of the Model Rules, eliminating what it believed were unnecessary provisions, and addressing changes in technology and the legal profession since the rule was first adopted. Following the ABA's amendments to Rule 7 of the Model Rules, petitioner LPRB's Rules Committee (LPRB Rules Committee) studied the amendments to determine whether to recommend the LPRB petition the Court to amend Rule 7, MRPC, to conform to the ABA's amendments to Rule 7. The LPRB Rules Committee also considered the benefits of adopting Rule 7 of the Model Rules in its entirety, including any provisions not previously adopted by this Court when it adopted Rule 7, MRPC.

7. The LPRB Rules Committee also worked closely with the Minnesota State Bar Association (MSBA) and its Standing Committee on the Rules of Professional Conduct in considering adoption of Rule 7 of the Model Rules. Based on its review of the ABA amended changes to Rule 7 of the Model Rules, the Rules Committee and the

MSBA determined that adoption of Rule 7 of the Model Rules would benefit the legal community by providing uniformity and clarity to Minnesota attorneys. The LPRB Rules Committee recommended that the LPRB petition the Court to adopt the amended Rule 7 and Comments thereto of the ABA Model Rules.

8. On April 26, 2019, the LPRB considered and approved amending Rule 7, MRPC to conform to the ABA amendments, and voted in favor of authorizing the filing of this petition.

9. In June 2019, the MSBA Assembly met to consider the language in Rule 7.2(c) of the amended ABA Model Rules governing when attorneys may refer to themselves as “certified specialists.” The MSBA Assembly voted to delete the words “certified as” in the first line of Rule 7.2(c) of the Model Rules, effectively prohibiting attorneys who are not certified from referring to themselves as specialists. This departed from the ABA amendments to the Model Rules, which allowed attorneys to refer themselves as “specialist” based on years of experience, education and focus on a specialized practice, even if such attorneys were not certified. The MSBA otherwise agreed that all other provisions under the amended Rule 7 of the Model Rules and the Comments thereto should be adopted.

10. On September 27, 2019, the LPRB considered the MSBA Assembly’s proposed amendment to Rule 7.2(c) of the Model Rules to delete the words “certified as.” The LPRB preferred the broader language as set forth in the Model Rules and therefore reaffirmed its approval of adopting Rule 7 of the Model Rules in its entirety and without adjustments to Rule 7.2(c). The LPRB voted again to authorize the filing of this petition.

11. Consequently, the LPRB and the MSBA are concurrently filing separate petitions. While both urge this Court to amend Rule 7, MRPC and the Comments thereto, to conform to Rule 7 of the Model Rules, the LPRB and the MSBA differ on the

single issue of completely adopting the language in Rule 7.2(c) of the Model Rules and the corresponding Comments.

THE NEED FOR THE AMENDMENTS

12. The practice of law has become increasingly complex in the years since the adoption of the Rule 7, MRPC, governing lawyer advertising and solicitation. The profession has experienced substantial growth in the number of law firms that practice on a national or global scale. Many local law practices are becoming absorbed into regional or national law firms. Clients often need legal services in multiple jurisdictions. Lawyers often find themselves competing for business with law firms from outside their own jurisdiction, and against providers outside the legal profession. The jurisdictions that have adopted complex, inconsistent and detailed advertising rules have effectively impeded lawyers' ability to expand their practices and thus potentially thwart clients' interests in obtaining needed services. The proposed rule amendments will free lawyers and clients from these constraints without compromising client protection.

13. One objective of changing Rule 7, MRPC, to conform to the ABA Model Rules, is to harmonize and simplify the advertising and client communication rules by offering a level of uniformity. Rule 8.5(a), MRPC, grants this Court jurisdiction over Minnesota lawyers regardless of where misconduct may occur. The Court is also empowered to regulate lawyers licensed in other jurisdictions if those lawyers provide or offer to provide legal services in Minnesota. Rule 8.5(b), MRPC, provides that depending on the circumstances, the choice of law may include the Rules of Professional Conduct in this jurisdiction or other jurisdictions. Changes in the legal profession, including an increasing multijurisdictional practice and the potential need to apply the rules of numerous jurisdictions, make uniformity in rules that govern advertisement and solicitation increasingly necessary to ensure and encourage compliance and consistent enforcement.

14. The updated rules on advertisement also cover the changes in how lawyers advertise and solicit since Rule 7, MRPC was first adopted. Changes in technology, particularly the advent and increased use of social media, have enabled clients and lawyers to find and communicate with each other in various new ways. The proposed amendments aim to address the changes that have emerged in an ever-evolving technology-based world, while continuing to protect the public. For example, lawyers are no longer limiting themselves to traditional ads or direct mailing campaigns to market their services; the practice is seeing an increase in the use of social media, such as blogs, websites, Twitter, Facebook, and LinkedIn, to advertise and market an attorney's services. As the use of social media to advertise and market has become the new norm across all industries, the public has also become more savvy about the use of social media as an advertising tool. These proposed amendments to Rule 7 are necessary to address the impact changes in technology and the digital age have had on how lawyers now market themselves to solicit business.

15. The proposed amendments also address the trends in the development of First Amendment law and antitrust law that disfavor regulation of truthful communication about the availability of professional services. For over 40 years, the federal courts have recognized that lawyer advertising is commercial speech protected by the First Amendment. *See Bates v. Arizona*, 433 U.S. 350 (1977) (establishing attorneys' First Amendment right to advertise as commercial speech, but supporting state regulation of attorney advertising that is false, deceptive or misleading).

16. Since Rule 7 of the Model Rules was first adopted, more recent cases have emerged, questioning the constitutionality of state regulations that are overly broad and impede upon an attorney's commercial speech rights. Rules that broadly restrict the ability of lawyers to truthfully communicate information about their qualifications and their practices have been successfully challenged as infringement on speech. *See Alexander v. Cahill*, 598 F.3d 79 (2nd Cir. 2010) (held New York's regulation to be

unconstitutional as a categorical ban that prohibited the use of the irrelevant attention-getting techniques unrelated to attorney competence.); *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011) (held Louisiana’s revised attorney advertising rule improperly infringed on commercial speech rights because restrictions were overly broad and failed to apply least restrictive means to protect the government’s interest); *Searcy v. Florida Bar*, 140 F. Supp. 3d 1290, 1299 (N.D. Fla. 2015) (enjoining the Florida Bar from enforcing its rule requiring an attorney to be board certified before advertising expertise in an area of law). The amendments to Rule 7 should be adopted to eliminate overly broad and unnecessary restrictions on speech, thereby limiting the risk of a constitutional challenge to Rule 7, MRPC.

17. The amended Rule 7 also addresses antitrust concerns stemming from overreaching limits on attorney advertisement. For nearly 20 years, the Federal Trade Commission (FTC) has actively opposed lawyer regulation where such regulations would restrict consumer access to factually accurate information regarding the availability of lawyer services. The FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may reduce competition, violate federal antitrust laws, and impermissibly restrict truthful information about legal services. Adoption of Rule 7 of the ABA Model Rules is necessary to eliminate potential antitrust claims that may be raised under the current Rule 7, MRPC, by removing overly broad restrictions.

18. Petitioners recommend adoption of the proposed amended rule because doing so will balance the dual objectives of protecting clients from false and misleading advertising, while avoiding constitutional challenges of infringement on commercial speech. The amended rule will also increase consumer access to accurate information about the availability of legal services by freeing lawyers to use expanding and innovative technologies to communicate the availability of legal services. Finally, by

providing uniformity, amending Rule 7, MRPC will allow for better understanding and clarification of the Rule, which will promote compliance and consistent enforcement.

BRIEF SUMMARY OF THE PROPOSED AMENDMENTS

19. The following are the principal changes to Minnesota's current Rule 7, MRPC, to conform with the amended ABA Model Rules, which petitioners recommend this Court adopt:

a. Rule 7.1: Communications Concerning a Lawyer's Services.

- Principal changes to this subsection are to the Comments, which are amended to address all false and misleading communications inclusive of specific false and misleading communications previously addressed in subsection 7.5, which the ABA amended Model Rules eliminate.

b. Rule 7.2: Advertising.

- Permits nominal "thank you" gifts under certain conditions as an exception to the general prohibition against paying for recommendations;
- Permits the use of a "qualified referral service";
- Adds to this section "certified specialist" language from the deleted Rule 7.4(d) and amends provision to permit lawyers who, by means of experience, specialized training, or education, have attained special competence in a field of law, to state that they are specialists or specialize in that field of law.

c. Rule 7.3: Solicitation of Clients.

- Defines solicitation as "a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows, or reasonably should know, needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter";
- Removes the requirement that all solicitations clearly and conspicuously include the words "Advertising Material," but continue to prohibit targeted mailings that are misleading, involve coercion,

duress or harassment, or that involve a target of the solicitation who has made known to the lawyer a desire not to be solicited;

- Adds provision specifying that the rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

d. Rule 7.4: Communication of Fields of Practice and Certification.

- Eliminates this subdivision as it relates to communication of fields of practice such as patent and admiralty; addresses false or misleading communications about the same in the amended comments to Rule 7.1, which prohibits false or misleading communication about a lawyer's services;
- Retains an amended "certified specialist" provision of this rule, but moves it to Rule 7.2.

e. Rule 7.5: Firm Names and Letterheads.

- Eliminates this subdivision concerning firm names and letterheads; addresses false or misleading communications about this in the amended comments to Rule 7.1, which prohibits false or misleading communication about a lawyer's services.

DISCUSSION OF THE PROPOSED AMENDMENTS

Rule 7.1: Communications Concerning a Lawyer's Services.

20. Rule 7.1 remains unchanged under the amended Model Rules (*see* Attachment B). The principal changes in Rule 7.1 are in the Comments, which clarify and expound on false and misleading communications in lawyer advertising as well as address potential false and misleading communications formerly covered under the deleted Rule 7.5. Those changes to the comments are as follows:

- a. Comment [2] to Rule 7.1 is amended to clarify that truthful information may be misleading if consumers are led to believe that they must act when, in fact, no action is required.
- b. Comment [3] to Rule 7.1 is amended to replace "advertising" with "communication" to make the Comment consistent with the title and

scope of the rule. The amendment expands the guidance in current Comment [3] by clarifying that an “unsubstantiated claim” may also be misleading.

- c. Comment [4] to Rule 7.1 is updated to also reference Rule 8.4(c), MRPC, which prohibits dishonest, fraudulent, deceptive, or misleading conduct. This is added to the Comment’s current reference to Rule 8.4(e), MRPC, which addresses misconduct in stating or implying an ability to influence government entities or officials.
- d. Comments [5] through [8] have been added to incorporate the black letter concepts from the current Rule 7.5, which has been eliminated under the amended Model Rule. The current Rule 7.5, MRPC addresses specific prohibitions regarding misleading communications in firm names and letterhead. Because the provisions of current Rule 7.5 are merely examples of possibly misleading communications, those concepts are already addressed by the black letter of Rule 7.1 and, therefore, presented as examples of misleading communication in the Comments to Rule 7.1. This change streamlines Rule 7 by eliminating redundancy or unnecessary language that may cause confusion.

Petitioners recommend adopting the above changes to Rule 7, MRPC, to conform to the ABA Model Rule.

Rule 7.2: Specific Rules on Advertising.

21. Under the amended Model Rules, all specific rules for advertising were consolidated in Rule 7.2 (*see* Attachment C). The rule was amended to namely address constitutional speech concerns, changes in advertising due to media changes, and to consolidate sections that were removed under the amended rule into this subsection.

Petitioners recommend the following changes to Rule 7.2, MRPC to conform to the ABA Model Rule:

- a. The amendment expands the means by which a lawyer may communicate about the lawyer’s services to include through “any media.” This change recognizes the expansive and ever-evolving ways technology allows attorneys to advertise, solicit and communicate about their services. Such means of communication are no longer limited to “written, recorded or

electronic communications” contained in the previous Model Rule and the current Rule 7.2, MRPC.

- b. Adoption of the amended Rule 7.2 and the Comments thereto would eliminate current Comments [1] and [3]. The reason for elimination of these Comments is that they provide no additional guidance to lawyers in fulfilling their ethical obligations and because advertising is constitutionally protected speech that needs no additional justification.
- c. Amended Comment [2] is updated to explain that the term “recommendations” does not include directories or other group advertising in which lawyers are merely listed by practice area. Amended Comment [3] clarifies that lawyers who advertise on television and radio may compensate “station employees or spokespersons” as reasonable costs for advertising. These costs are well in line with other ordinary costs associated with advertising that are listed in the Comment, i.e., “employees, agents and vendors who are engaged to provide marketing or client development services.”
- d. Adopting the ABA Model Rule would change Rule 7.2(b)(2), MRPC, to permit lawyers to use a “qualified lawyer referral service” in addition to a not-for-profit lawyer referral service. Petitioners find no reason to object to adopting these changes to Rule 7, MRPC to conform to the ABA Model Rule.
 - i. While this provision is not new to the Model Rules and was not a part of the recent amendments, in order to conform Rule 7, MRPC, to the ABA Model Rule, this change to Rule 7.2(b)(2) and the corresponding Comment [6] should be adopted.
 - ii. The proposed Comment [6] is amended to define “qualified referral services” as “one that is approved by an appropriate regulatory authority as affording adequate protections for the public. *See, e.g.,* the American Bar Association’s Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.”
 - iii. Petitioners request that Comment [6] to Rule 7.2(b)(2) also be amended to specify that in order for a referral service to be considered “qualified,” it must obtain certification to use the ABA Lawyer Referral Logo and Tagline. This will provide clarification

- and guidance to Minnesota lawyers and lawyer referral services as to what it means to be “approved by an appropriate regulatory authority” to be considered a “qualified referral service.”
- iv. In order to receive authorization to use the ABA Lawyer Referral Logo and Tagline, a referral service must undergo an application process that requires it to demonstrate that it is: 1) consumer-oriented; 2) provides unbiased referrals to lawyers with appropriate experience in the subject matter of the representation; and 3) affords other client protections, such as complaint procedures or malpractice insurance requirements. Only after approval by ABA can a referral service obtain authorization to use the ABA Lawyer Referral Logo and Tagline.
 - v. Defining “qualified referral services” as such will allow the Director to ensure only vetted referral services that meet the ABA Model Rules for qualified referral services meet the definition of “qualified” without adding additional administrative burdens to the Director.
- e. The amended Rule 7.2(b) continues the existing prohibition against giving “anything of value” to someone for recommending a lawyer. The new amended rule, however, adds a new subdivision (b)(5) that contains an exception to the general prohibition against paying for referrals. Petitioners have no objections to adopting these changes to Rule 7, MRPC to conform to the ABA Model Rule.
- i. This subsection permits lawyers to give a nominal gift to acknowledge a referral—a “thank you” to the person who referred a client to the lawyer. The new provision clearly states that such a nominal gift is permissible only where not expected as payment for a recommendation of the lawyer’s services.
 - ii. New Comment [4] expounds on what is considered nominal, including ordinary social hospitality. It also clarifies that a gift may not be given based on an agreement to receive referrals or to make future referrals. This concept is further supported by the addition of “compensate” and “promise” in Rule 7.2(b), which emphasizes these limitations: the thank you gift cannot be promised in advance and must be no more than a token item, i.e., not “compensation.”

- iii. The proposed additions acknowledge the reality that lawyers frequently give small tokens of appreciation after receiving a referral, and these tokens are neither intended to be a “payment” for the referral nor likely to induce future referrals. Neither is the behavior likely to result in the evils intended to be addressed by the rule: that referral sources might interfere with the independent professional judgment of the lawyer, interject themselves into the lawyer-client relationship, or engage in prohibited solicitation to gain more referrals for which they might be paid. Such token acknowledgements are common in other services industries.

- f. The proposed amendment adds to Rule 7.2 a subsection (c), concerning when lawyers may refer to themselves as a certified specialist. This provision was previously under Rule 7.4(c)(1) and (2), which has been removed (along with the rest of Rule 7.4) under the amended Model Rule, and moved to Rule 7.2 under subsection (c).
 - i. As amended by the ABA, adoption of Rule 7.2(c) of the Model Rules would now allow attorneys to refer to themselves as “specialist” in a particular field of law – without the need for certification – based on the lawyer’s experience, specialized training, or education.
 - ii. This change avoids potential speech restriction claims by removing an unnecessary restriction on truthful commercial speech. It is common knowledge within the bench and bar that many highly qualified lawyers limit their practices to particular fields of law in which they have attained an exceptional degree of competence and respect. These lawyers may be called upon and qualified to give expert testimony about matters within their field. Lawyers and judges commonly refer to such lawyers as “specialists” in their field. The public will not be harmed if lawyers whose education, experience, and specialized training, which qualify them as experts in their field, are allowed to truthfully state that they are specialists.
 - iii. Comment [9] is amended to provide additional guidance on the circumstances under which a lawyer might properly claim specialization by adding to that claim “based on the lawyer’s experience, specialized training or education.” Comment [9] is

also amended to remind attorneys that claims as a “specialist” are subject to the “false and misleading” standard applied in Rule 7.1, thus maintaining a level of protection for consumers, while loosening the rule to allow those who are not certified specialists to call themselves specialists under certain circumstances.

- iv. While Comment [9] makes it clear that a lawyer may truthfully claim that the lawyer is a “specialist” or “specializes in” a particular field of law based upon the lawyer’s experience, specialized training, or education, under the amended Rule 7.2, a lawyer still may not claim to be a “certified specialist” unless the lawyer is in fact certified by an organization described in the rule.
- v. The proposed amendments also describe which entities qualify to certify or accredit lawyers. The Court may choose to substitute the language in current Rule 7.4(c)(2), which specifies the Board of Legal Certification as the accrediting agency for legal specialization programs in Minnesota.
- vi. Petitioners recommend adoption of Rule 7.2(c) of the Model Rule to eliminate overly broad limitations on commercial speech. *See e.g. Searcy v. Florida Bar*, 140 F. Supp. 3d 1290 at 1299 (enjoining the Florida Bar from enforcing its rule requiring an attorney to be board certified before advertising expertise in an area of law).
- g. Amended Model Rule 7 removed subsection 7.4. Most of the black letter provisions under Rule 7.4, however, are now addressed in the addition of Comments [10] and [11] to Rule 7.2 of the amended Model Rule. The removal of Rule 7.4 in the amended Model Rule, the addition of Rule 7.2(c) and Comments [9] to [11] to Rule 7.2, work to streamline and clarify Rule 7 by eliminating the redundancy and overly broad restrictions on commercial speech.

Rule 7.3: Solicitation of Clients.

22. The amendments to Rule 7.3, MRPC, primarily aimed to address and accommodate the changes in how people communicate in the ever-evolving digital world (*see* Attachment D). Rule 7.3 of the Model Rules has been amended to offer some clarity and acknowledge technological advances that have changed how lawyers,

clients, and the general public communicate. Petitioners recommend adopting these changes to Rule 7.3, MRPC, to conform to the ABA Model Rule.

- a. Rule 7.3(a) has been added to the Model Rule 7 to provide a definition of solicitation. The MRPC do not, and the previous Model Rules did not, define solicitation. The ABA “borrowed” the definition of solicitation from Virginia and it is now defined as: “a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.”
- b. Rule 7.3(b) of the amended Rule continues to prohibit direct, in-person solicitation, but clarifies that the prohibition applies solely to live person-to-person contact. Comment [2] to the amended Rule 7.3 adds examples of prohibited solicitation including in-person, face-to-face, telephone, and real-time electronic or other communications which may include through use of applications such as Skype. Added commentary clarifies that prohibited solicitation does not include chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.
- c. Rule 7.3(b)’s exceptions to prohibited solicitation are slightly broadened under the Model Rule to include those who “routinely uses for business purposes the type of legal services offered by the lawyer.” Similarly, Comment [5] to the amended Rule 7.3 now explains that the potential for overreaching that justifies the prohibition against in-person solicitation is unlikely to occur when the solicitation is directed toward experienced users of the legal services in a business matter. Conversely, the prohibition is justified, and a lawyer may still not engage in live in-person solicitation, involving personal legal matters, such as criminal defense, family law, or personal injury, even if the person has been represented multiple times.
- d. The amendments keep in place the current Rule 7.3(b)(1) and (2) (but renumbered in the amended rule as 7.3(c)(1) and (2)), which prohibit solicitation when a target has made known his or her desire not to be solicited solicitations that involve coercion, duress, or harassment. These restrictions apply to both live in-person and written solicitations.

- e. The current Rule 7.3(c), MRPC, relating to the requirement that targeted written solicitations be marked as “advertising material,” is deleted in the amended Model Rule. The requirement is no longer necessary because consumers have become accustomed to receiving advertising material via many methods of paper and electronic delivery. Advertising materials are unlikely to mislead consumers simply due to the nature of the communications, and most consumers will not feel any compulsion to view the materials solely because they were sent by a lawyer or law firm. Further, no evidence was produced showing that consumers are harmed by receiving unmarked mail solicitations from lawyers, even if the solicitations are opened by consumers. If the solicitation itself or its contents are misleading, that harm is adequately addressed by Rule 7.1.
- f. The amended Model Rule adds a provision, 7.3(d), specifically providing that the advertising rules do not “prohibit communications authorized by law or ordered by a court or other tribunal.” The concept that solicitations authorized by law or court order are not prohibited under Rule 7 is currently addressed in Comment [4] of Rule 7.2. Under the amended rule, Comment [4] of Rule 7.2 would be deleted and moved to new subdivision (d) of Rule 7.3. This addition would address any First Amendment speech issues that may be raised and addressed by the courts. Moreover, new Comment [8] to Rule 7.3 is added, which gives class action notices as an example of a communication that is authorized by law or court order.

Rule 7.4: Communication of Fields of Practice and Certification.

23. Rule 7.4 was deleted from the amended Model Rule 7 (*see* Attachment E). In deleting this subsection to Rule 7 of the Model Rule, the ABA consolidated the provisions of this subdivision by adding them to other parts of Rule 7, either as a new subdivision or by addressing the concepts in the Comments as follows:

- a. The amended Model Rule 7 moved subdivisions 7.4(b) and (c) regarding references to a lawyer’s designation in patent or admiralty practice in advertisement, from the black letter to Comments [10 and [11] to Rule 7.2 of the Model Rules. This change would eliminate potential redundancy within the previous Model Rule 7 by consolidating the concept under Rule 7.2.
- b. The amended Model Rule 7 also moved Rule 7.4(c)(1) and (2) of the previous rule, relating to communication about the lawyer’s designation

as a certified specialist, to Rule 7.2(c) of the amended rule. The provision was also amended to clarify circumstances in which a lawyer may claim to be a “certified specialist” and broadened the ability of a lawyer to refer to themselves as a “specialist.” See paragraph 22(f) above.

Petitioners recommend adopting the above changes to Rule 7.4, MRPC, to conform to the ABA Model Rule.

Rule 7.5: Firm Names and Letterheads.

24. The current Rule 7.5, MRPC, addresses specific prohibitions regarding misleading communications in firm names and letterheads. The ABA removed Rule 7.5 from amended Model Rule 7 (see Attachment F) because the provisions of Rule 7.5 are merely examples of possibly misleading communications. Those concepts are already addressed by the black letter of Rule 7.1 and, therefore, in an effort to avoid redundancy and confusion, the previous Rule 7.5 is presented, under the amended Model Rule, as examples of misleading communications in the Comments to Rule 7.1. As discussed in further detail in paragraph 21(d) above, the Comments to Rule 7.1 have been amended in the Model Rule to add Comments [5] through [8] to address the black letter concepts previously contained in the now deleted Rule 7.5. Petitioners recommend deleting Rule 7.5, MRPC, and address those black letter concepts in the comments to Rule 7.1, MRPC to conform to the ABA Model Rule.

25. The ABA amended the Model Rules on advertising because, despite the state bars’ best intentions to revise attorney advertising regulations and offer guidance to address today’s digital challenges, attorneys and law firms are caught in a dizzying array of regulations and federal case law, especially if they practice in more than one jurisdiction. By adopting Rule 7 of the ABA Model Rules, Minnesota will simplify and streamline the rules on lawyer advertising. As amended, the rules will better serve the bench, the bar and the public by expanding opportunities for lawyers to use modern communications technology to advertise their services, increasing the public’s access to information about the availability of legal services, and continuing to protect the public.

CONCLUSION

For the foregoing reasons, petitioners Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility respectfully request this Court to adopt Rule 7 of the ABA Model Rules and the Comments thereto as set forth in Attachment A, and amend the Minnesota Rules of Professional Conduct accordingly.

Dated: _____, 2020 Respectfully submitted,

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INFORMATION ABOUT LEGAL SERVICES

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Misleading truthful statements are prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government

agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] 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.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

RULE 7.2: ADVERTISING.

a) A lawyer may communicate information regarding the lawyer's services through any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a

recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.

Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act. In order to constitute a qualified lawyer referral service in Minnesota, the referral service must show compliance with the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services by obtaining certification to use the American Bar Association Lawyer Referral Logo and Tagline.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education,

but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

RULE 7.3: SOLICITATION OF CLIENTS.

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel

overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This rule governs all communications about a lawyer's services, including advertising ~~permitted by Rule 7.2~~. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] ~~Truthful~~ Misleading truthful statements ~~that~~ are ~~misleading are also~~ prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is ~~also~~ misleading if ~~there is~~ a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] ~~An advertisement~~ A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with ~~the services or fees~~ those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to ~~influence~~ improperly influence a

government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name, such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] 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.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

RULE 7.2: ADVERTISING

(a) ~~Subject to~~ A lawyer may communicate information regarding the ~~requirements of Rules 7.1 and 7.3, a lawyer may advertise~~ lawyer's services through ~~written, recorded, or electronic communications, including public~~ any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17; ~~and~~

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; ~~and~~

(ii) the client is informed of the existence and nature of the agreement; ~~and~~

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made ~~pursuant to~~ under this rule ~~shall~~ must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment

~~[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.~~

[2] This rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.~~

~~4] Neither this rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.~~

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer's services ~~or for channeling professional work in a manner that violates Rule 7.3~~. A communication contains a recommendation if it

endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1), ~~however,~~ allows a lawyer to pay for advertising and communications permitted by this rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers. ~~Moreover,~~

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] ~~a~~A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. ~~Such~~Qualified referral services are ~~understood by the public to be~~ consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or

malpractice insurance requirements. Consequently, this rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act. In order to constitute a qualified lawyer referral service in Minnesota, the referral service must show compliance with the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services by obtaining certification to use the American Bar Association Lawyer Referral Logo and Tagline.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a ~~not for profit~~ lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. ~~See Rule 5.3.~~ Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. ~~Nor could the lawyer allow in person or telephonic contacts that would violate Rule 7.3.~~

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This rule does not restrict referrals or divisions of revenues or net income among lawyers within afirms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that

the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this rule.

[11] This rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[12] This rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

RULE 7.3: SOLICITATION OF CLIENTS

~~(a) A lawyer shall not~~ “Solicitation” or “solicit” denotes a communication initiated by in- or on behalf of a lawyer or law firm that is directed to a specific person or the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

~~(b) A lawyer shall not solicit professional employment by live telephone person-to-person contact solicit professional employment from anyone~~ when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the ~~person contacted:~~ contact is with a:

_____ (1) is a lawyer; or

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer ~~or law firm; or~~

~~(b) A lawyer shall not solicit professional employment by written, recorded, or electronic communication or (3) person who routinely uses for business purposes the type of legal services offered by in-person or telephone contact the lawyer.~~

~~(c) A lawyer shall not solicit professional employment~~ even when not otherwise prohibited by paragraph ~~(a)b)~~, if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, or harassment.

~~(c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall clearly and conspicuously include the words “Advertising Material” on the outside envelope, if any, and within any written, recorded, or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).~~

~~(d)~~ (d) This rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in ~~paragraph (a), this rule,~~ a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses ~~in-live person or telephone-to-person~~ contact to ~~solicit~~

~~members~~enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] ~~A solicitation is Paragraph (b) prohibits a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication typically does~~is not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to ~~Internet~~electronic searches.

[2] ~~There is a potential for abuse when a solicitation involves direct in person or live telephone contact by a lawyer with someone known to need legal services. These forms of contact subject~~[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and ~~over-reaching~~overreaching.

[3] ~~This~~The potential for ~~abuse~~overreaching inherent in ~~direct in live person or live telephone solicitation to person contact~~ justifies its prohibition, ~~particularly~~ since lawyers have alternative means of conveying necessary information ~~to those who may be in need of legal services~~. In particular, communications can be mailed or transmitted by email or other electronic means that do not ~~involve real-time contact and do not~~ violate other laws governing solicitations. These forms of communications ~~and solicitations~~ make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to ~~direct in live person or telephone to person~~ persuasion that may overwhelm a person's judgment.

~~[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in person or live telephone contact can be disputed and may not be subject to third-party scrutiny.~~ [4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in ~~abusive practices~~ overreaching against a former client, or a person with whom the lawyer has a close personal ~~or~~ family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for ~~abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(e) are not applicable in those situations. Also, paragraph (a) overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations.~~ Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal ~~service~~ organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~it~~ their members or beneficiaries.

[6] ~~But even permitted forms of~~ A solicitation ~~can be abused. Thus, any solicitation which that~~ contains ~~information which is~~ false or misleading information within the meaning of Rule 7.1, ~~which that~~ involves coercion, duress or harassment within the meaning of Rule 7.3 ~~(b)(c)(2)~~, or ~~which that~~ involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3 ~~(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b)(c)(1) is prohibited.~~ Live, person-to-person contact of individuals who may be especially

vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This ~~rule is~~Rule does not ~~intended to~~ prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or ~~lawyer's~~lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

~~[8]—The requirement in Rule 7.3(e) that certain communications be marked “Advertising Material” does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.~~

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (~~de~~) of this ~~rule~~Rule permits a lawyer to participate with an organization which uses personal contact to ~~solicit~~enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (~~de~~) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the ~~in-person~~ or telephone-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations ~~also~~ must not be directed to a person known to need legal services in a particular matter, but ~~is to~~must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(~~b~~). ~~See 8.4(a)~~ (c).

~~RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND CERTIFICATION~~

~~(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.~~

~~(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.~~

~~(c) A lawyer engaged in admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty,” or a substantially similar designation.~~

~~(d) In any communication subject to Rules 7.2, 7.3, or 7.5, a lawyer shall not state or imply that a lawyer is a specialist or certified as a specialist in a particular field of law except as follows:~~

~~(1) the communication shall clearly identify the name of the certifying organization, if any, in the communication; and~~

~~(2) if the attorney is not certified as a specialist or if the certifying organization is not accredited by the Minnesota Board of Legal Certification, the communication shall clearly state that the attorney is not certified by any organization accredited by the Board, and in any advertising subject to Rule 7.2, this statement shall appear in the same sentence that communicates the certification.~~

Comment

~~[1] Paragraph (a) of this rule permits a lawyer to indicate areas of practice in communications about the lawyer’s services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a “specialist,” practices a “specialty,” or “specializes in” particular fields, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.~~

~~[2] Paragraph (b) recognizes the long established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

~~[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization that has been accredited by the Board of Legal Certification. Certification signifies that an objective~~

~~entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~

~~[4] Lawyers may also be certified as specialists by organizations that either have not yet been accredited to grant such certification or have been disapproved. In such instances, the consumer may be misled as to the significance of the lawyer's status as a certified specialist. The rule therefore requires that a lawyer who chooses to communicate recognition by such an organization also clearly state the absence or denial of the organization's authority to grant such certification. Because lawyer advertising through public media and written or recorded communications invites the greatest danger of misleading consumers, the absence or denial of the organization's authority to grant certification must be clearly stated in such advertising in the same sentence that communicates the certification.~~

~~RULE 7.5: FIRM NAMES AND LETTERHEADS~~

~~(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.~~

~~(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~

~~(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~

~~(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.~~

Comment

~~[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.~~

~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.~~

Attachment 5

WORKING DRAFT (6/5/2020)

Rule 20. CONFIDENTIALITY; EXPUNCTION

(a) Records Before Determination of Probable Cause or Commencement of Referee or Court Proceedings.

The investigative files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint against or investigation of a lawyer prior to a determination of probable cause or commencement of referee or Court proceedings, including files resulting in private discipline, summary dismissal, or a determination that discipline is not warranted, shall be deemed confidential and shall not be disclosed, except:

(1) As between the Committees, Board and Director in furtherance of their duties;

(2) As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice or seeks to practice, or has a matter under investigation;

(3) Upon request of the lawyer affected, the file maintained by the Director shall be produced including any district committee report; however, the Director's work product shall not be required to be produced, nor shall a member of the District Ethics Committee or the Board, the Director, or the Director's staff be subject to deposition or compelled testimony, except upon a showing to the Court issuing the subpoena of extraordinary circumstance and compelling need. In any event, the mental impressions, conclusions, opinions and legal theories of the Director and Director's staff shall remain protected;

(4) If the complainant is, or at the time of the actions complained of was, the lawyer's client, the lawyer shall furnish to the complainant copies of the lawyer's written responses to investigation requests by the Director and District Ethics Committee, except that insofar as a response does not relate to the client's complaint or involves information as to which another client has a privilege, portions may be deleted;

(5) Where permitted by the Court;

(6) Where required or permitted by these Rules;

(7) As between the Director or District Ethics Committee and any witnesses, whether fact or expert as is necessary for the investigation of the complaint;

(8) As between the Director and the Client Security Board in furtherance of their duties to investigate and consider claims of client loss allegedly caused by the intentional dishonesty of a lawyer.

(9) As between the Director and the Board on Judicial Standards or its executive secretary in furtherance of their duties to investigate and consider conduct of a judge that occurred prior to the judge assuming judicial office;

(10) As between the Director and the Board of Law Examiners in furtherance of their duties under these rules;

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WORKING DRAFT (6/5/2020)

(11) From the Director to the Supreme Court approved lawyer assistance program in situations where, in the Director's discretion, such one way notification is necessary or appropriate to address concerns related to a lawyer's mental, emotional, or physical well-being;

(12) As between the Director and law enforcement or court personnel in situations where public safety and the safety of the Director and staff, Board, or District Court is at risk;

(13) Notwithstanding the provisions of this Rule, the following may be disclosed by the Director relating to records before a determination of probable cause or commencement of referee or Court proceedings:

- (i) The fact that a matter is or is not being investigated or considered by the Committee, Director, or Panel;
- (ii) With the affected lawyers consent, the fact that the Director has determined that discipline is not warranted;
- (iii) The fact that the Director has issued an admonition;
- (iv) The Panel's disposition under these Rules;
- (v) The fact that stipulated probation has been approved under Rule 8(d)(3) or 8(e);
- (vi) The fact that the terms of a conditional admission have been modified or extended under Rule 8(d)(5);
- (vii) Information to other members of the lawyer's firm or employer necessary for protection of the firm's or organization's clients or for the appropriate exercise of responsibilities under Rules 5.1 and 5.2, Rules of Professional Conduct.

(b) Records After Determination of Probable Cause or Commencement of Referee or Court Proceedings.

After probable cause has been determined under Rule 9(i)(1)(ii) or (iv) or proceedings before a referee or this Court have been commenced under these Rules, the files, records, and proceedings of the District Committee, the Board, and the Director are public and not confidential except:

- (1) As ordered by the referee or this Court;
- (2) Medical records and other documents containing sensitive or personal identifying information, including but not limited to social security numbers, birthdates, driver's license numbers, bank account numbers and medical information shall remain confidential and should, as administratively practicable, be redacted or removed from the file;
- (3) Information received from other disciplinary or government agencies classified by such agency as confidential, nonpublic information shall remain confidential and nonpublic.

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WORKING DRAFT (6/5/2020)

(4) The identity of non-complaining clients shall remain confidential and not subject to public disclosure unless such party waives confidentiality, is subpoenaed as a witness to testify under oath, provides a sworn affidavit, or files documents in compliance with a subpoena *duces tecum*.

(5) **Nothing** in this rule shall be construed to require the disclosure of work product or the mental processes or communications of the Committee or Board members made in furtherance of their duties.

(c) Administrative files: Advisory opinions, overdraft notification program files, Rule 26, RLPR compliance, Rule 24, RLPR collections, Rule 5.8, MRPC disclosures, trusteeship files, and probation files.

(1) All other files, notes, and records maintained by the Director and not specifically mentioned in Rule 20, RLPR, shall not be disclosed unless otherwise permitted or required under the Rules, or in the discretion of the Director, such disclosure is necessary to carry out the duties of the Director.

(2) The files, notes, and records maintained by the Director relating to advisory opinions, trust account overdraft notification, Rule 26, RLPR compliance, and monitoring of lawyers on probation shall be deemed confidential and shall not be disclosed except:

(i) in the course of disciplinary proceedings arising out of the enforcement of Rule 26, RLPR or arising out of the facts or circumstances of the advisory opinion, overdraft notification or probation; or

(ii) upon consent of the lawyer who requested the advisory opinion or was the subject of the overdraft notification, probation or Rule 26, RLPR requirements;

(3) Except for documents containing mental impressions or work product of the Director and Director's staff, the files, notes, and records maintained by the Director relating to efforts by the Director to collect costs and disbursements awarded pursuant to Rule 24 of these Rules are not deemed **confidential**.

(4) Correspondence received by the Director pursuant to Rule 5.8, Minnesota Rules of Professional Conduct, are not deemed **confidential**.

(d) Expunction of Records.

The Director shall expunge records relating to dismissed complaints as follows:

(1) *Destruction schedule.* All records or other evidence of the existence of a dismissed complaint shall be destroyed three years after the dismissal;

(2) *Retention of records.* Upon application by the Director to a Panel Chair chosen in rotation, for good cause shown and with notice to the respondent and opportunity to be heard, records which should otherwise be expunged under this Rule may be retained for such additional time not exceeding three years as the Panel Chair deems appropriate.

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REDLINE FROM ORIGINAL as of (6/5/2020)

Rule 20. CONFIDENTIALITY; EXPUNCTION

~~(a) General rule.~~

~~(a) Records Before Determination of Probable Cause or Commencement of Referee or Court Proceedings.~~

The investigative files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint ~~or charge of unprofessional conduct against or investigation of a lawyer against or investigation of a lawyer prior to a determination of probable cause or commencement of referee or Court proceedings, including files resulting in private discipline, summary dismissal, or a determination that discipline is not warranted,~~ shall be deemed confidential and shall not be disclosed, except:

(1) As between the Committees, Board and Director in furtherance of their duties;

~~(2) After probable cause has been determined under Rule 9(i)(1)(ii) or (iv) or proceedings before a referee or this Court have been commenced under these Rules;~~

~~(3)(2)~~ As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice or seeks to practice, or has a matter under investigation;

(4) Upon request of the lawyer affected, the file maintained by the Director shall be produced including any district committee report; however, the Director's work product shall not be required to be produced, nor shall a member of the District Ethics Committee or the Board, the Director, or the Director's staff be subject to deposition or compelled testimony, except upon a showing to the Court is suing the subpoena of extraordinary circumstance and compelling need. In any event, the mental impressions, conclusions, opinions and legal theories of the Director and Director's staff shall remain protected;

(5) If the complainant is, or at the time of the actions complained of was, the lawyer's client, the lawyer shall furnish to the complainant copies of the lawyer's written responses to investigation requests by the Director and District Ethics Committee, except that insofar as a response does not relate to the client's complaint or involves information as to which another client has a privilege, portions may be ~~deleted;~~

(6) Where permitted by ~~this the~~ Court; ~~or~~

(7) Where required or permitted by these ~~Rules~~;

~~(8) Nothing in this rule shall be construed to require the disclosure of the mental processes or communications of the Committee or Board members made in furtherance of their duties.~~

(9) As between the Director or District Ethics Committee and any witnesses, whether fact or expert as is necessary for the investigation of the complaint;

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~~(8)~~ As between the Director and the Client Security Board in furtherance of their duties to investigate and consider claims of client loss allegedly caused by the intentional dishonesty of a lawyer.

~~(10)~~ As between the Director and the Board on Judicial Standards or its executive secretary in furtherance of their duties to investigate and consider conduct of a judge that occurred prior to the judge assuming judicial office.

~~(10)~~ As between the Director and the Board of Law Examiners in furtherance of their duties under these rules.

~~(b) Special matters.~~

~~The (11) From the Director to the Supreme Court approved lawyer assistance program in situations where, in the Director's discretion, such one way notification is necessary or appropriate to address concerns related to a lawyer's mental, emotional, or physical well-being.~~

~~(12) As between the Director and law enforcement or court personnel in situations where public safety and the safety of the Director and staff, Board, or District Court is at risk.~~

~~(13) Notwithstanding the provisions of this Rule, the following may be disclosed by the Director relating to records before a determination of probable cause or commencement of referee or Court proceedings:~~

- ~~(1)~~ The fact that a matter is or is not being investigated or considered by the Committee, Director, or Panel;
- ~~(2)~~ With the affected lawyers consent, the fact that the Director has determined that discipline is not warranted;
- ~~(3)~~ The fact that the Director has issued an admonition;
- ~~(4)~~ The Panel's disposition under these Rules;
- ~~(5)~~ The fact that stipulated probation has been approved under Rule 8(d)(3) or 8(e);
- ~~(6)~~ The fact that the terms of a conditional admission have been modified or extended under Rule 8(d)(5);
- ~~(7)~~ Information to other members of the lawyer's firm or employer necessary for protection of the firm's or organization's clients or for the appropriate exercise of responsibilities under Rules 5.1 and 5.2, Rules of Professional Conduct.

~~Notwithstanding any other provision of this rule, the records of matters in which it has been determined that discipline is not warranted shall not be disclosed to any person, office~~

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~~or agency except to the lawyer and as between Committees, Board, Director, Referee or this Court in furtherance of their duties under these Rules.~~

~~(c) Records after determination of probable cause or commencement of referee or Court proceedings.~~

~~Except as ordered by the referee or this Court and except for work product, after~~

(b) Records After Determination of Probable Cause or Commencement of Referee or Court Proceedings.

After probable cause has been determined under Rule 9(i)(1)(ii) or (iv) or proceedings before a referee or this Court have been commenced under these Rules, the files, records, and proceedings of the District Committee, the Board, and the Director ~~relating to the matter~~ are public and not confidential. ~~except:~~

(d) Referee or Court proceedings.

Except as ~~(1) As~~ ordered by the referee or this ~~Court, the files,~~

(2) Medical records, and ~~proceedings before a referee or this Court under other documents containing sensitive or personal identifying information, including but not limited to social security numbers, birthdates, driver's license numbers, bank account numbers and medical information shall remain confidential and should, as administratively practicable, be redacted or removed from the file.~~

(3) Information received from other disciplinary or government agencies classified by such agency as confidential, nonpublic ~~information~~ shall remain confidential and nonpublic.

(4) The identity of non-complaining clients shall remain confidential and not subject to public disclosure unless such party waives confidentiality, is subpoenaed as a witness to testify under oath, provides a sworn affidavit, or files documents in compliance with a subpoena *duces tecum*.

(5) ~~Nothing~~ in this rule shall be construed to require the disclosure of work product or the mental processes or communications of the Committee or Board members made in furtherance of their duties.

(c) Administrative files: Advisory opinions, overdraft notification program files, Rule 26, RLPR compliance, Rule 24, RLPR collections, Rule 5.8, MRPC disclosures, trusteeship files, and probation files.

(1) All other files, notes, and records maintained by the Director and not specifically mentioned in Rule 20, RLPR, shall not be disclosed unless otherwise permitted or required under the Rules, or in the discretion of the Director, such disclosure is necessary to carry out the duties of the Director.

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(i) in the course of disciplinary proceedings arising out of the enforcement of Rule 26, RLPR or arising out of the facts or circumstances of the advisory opinion, overdraft notification or probation; or

(ii) upon consent of the lawyer who requested the advisory opinion or was the subject of the overdraft notification, probation or Rule 26, RLPR requirements;

(3) Except for documents containing mental impressions or work product of the Director and Director's staff, the files, notes, and records maintained by the Director relating to efforts by the Director to collect costs and disbursements awarded pursuant to Rule 24 of these Rules are not deemed confidential.

(4) Correspondence received by the Director pursuant to Rule 5.8, Minnesota Rules of Professional Conduct, are not deemed confidential.

(d) Expunction of records R[ecords].

The Director shall expunge records relating to dismissed complaints as follows:

(1) *Destruction schedule.* All records or other evidence of the existence of a dismissed complaint shall be destroyed three years after the dismissal;

(2) *Retention of records.* Upon application by the Director to a Panel Chair chosen in rotation, for good cause shown and with notice to the respondent and opportunity to be heard, records which should otherwise be expunged under this Rule may be retained for such additional time not exceeding three years as the Panel Chair deems appropriate.

~~(f) Advisory opinions, overdraft notification program files, and probation files.~~

~~The files, notes, and records maintained by the Director relating to advisory opinions, trust account overdraft notification, and monitoring of lawyers on probation shall be deemed confidential and shall not be disclosed except:~~

~~(1) in the course of disciplinary proceedings arising out of the facts or circumstances of the advisory opinion, overdraft notification, or probation; or~~

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Attachment 6

OLPR Dashboard for Court And Chair

	Month Ending May 2020	Change from Previous Month	Month Ending April 2020	Month Ending May 2019
Open Files	442	-23	465	505
Total Number of Lawyers	323	-12	335	
New Files YTD	363	49	314	419
Closed Files YTD	401	72	329	422
Closed CO12s YTD	81	6	75	114
Summary Dismissals YTD	179	24	155	184
Files Opened During May 2020	49	-24	73	83
Files Closed During May 2020	72	4	68	87
Public Matters Pending (excluding Resignations)	31	-1	32	41
Panel Matters Pending	18	2	16	16
DEC Matters Pending	82	-11	93	85
Files on Hold	6	0	6	12
Advisory Opinion Requests YTD	712	109	603	858
CLE Presentations YTD	12	0	12	32
Files Over 1 Year Old				
Total Number of Lawyers	121	-14	135	136
Files Pending Over 1 Year Old w/o Charges	81	-7	88	
Total Number of Lawyers	71	-5	76	47
Total Number of Lawyers	54	-6	60	

	2020 YTD	2019 YTD
Lawyers Disbarred	1	3
Lawyers Suspended	12	11
Lawyers Reprimand & Probation	2	2
Lawyers Reprimand	0	1
TOTAL PUBLIC	15	17
Private Probation Files	9	5
Admonition Files	33	49
TOTAL PRIVATE	42	54

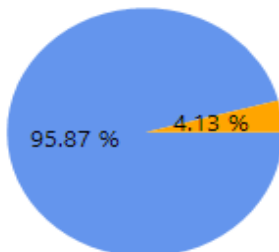
FILES OVER 1 YEAR OLD

Year/Month	OLPR	PAN	HOLD	SUP	SCUA	TRUS	Total
2016-02					1		1
2016-06			1				1
2016-07	1						1
2016-08		1					1
2016-12	1						1
2017-01					1		1
2017-02		1			1		2
2017-03	2		1		1		4
2017-04				1			1
2017-06				1			1
2017-07					2		2
2017-09	2			1			3
2017-10	1	1			1		3
2017-11	1	1					2
2017-12	1				1		2
2018-01	1						1
2018-02	1				3		4
2018-03			1	1	1		3
2018-04	3	1			2		6
2018-05					1		1
2018-06	1			1			2
2018-07	4						4
2018-08	4			1	2		7
2018-09					1		1
2018-10	2	1		1	2		6
2018-11	3				3		6
2018-12	4				1	1	6
2019-01	5	1	1				7
2019-02	6		1	1			8
2019-03	8			2			10
2019-04	13			2			15
2019-05	7					1	8
Total	71	7	5	12	24	2	121

	Total	Sup. Ct.
Total Cases Under Advisement	24	24
Sub-total of Cases Over One Year Old	97	14
Total Cases Over One Year Old	121	38

Active v. Inactive

■ Active 116
■ Inactive 5



All Pending Files as of Month Ending May 2020

Year/Month	SD	DEC	REV	OLPR	PAN	HOLD	SUP	SCUA	REIN	RESG	TRUS	Total
2016-02								1				1
2016-06						1						1
2016-07				1								1
2016-08					1							1
2016-12				1								1
2017-01								1				1
2017-02					1			1				2
2017-03				2		1		1				4
2017-04							1					1
2017-06							1					1
2017-07								2				2
2017-09				2			1					3
2017-10				1	1			1				3
2017-11				1	1							2
2017-12				1				1				2
2018-01				1								1
2018-02				1				3				4
2018-03						1	1	1				3
2018-04				3	1			2				6
2018-05								1				1
2018-06				1			1					2
2018-07				4								4
2018-08				4			1	2				7
2018-09								1				1
2018-10				2	1		1	2				6
2018-11				3				3				6
2018-12				4				1			1	6
2019-01				5	1	1						7
2019-02				6		1	1					8
2019-03				8			2					10
2019-04				13			2					15
2019-05				7							1	8
2019-06				17		1	2					20
2019-07		1		20	1		2		1			25
2019-08			2	16								18
2019-09				22								22
2019-10		4	1	19			3		1			28
2019-11		4		21			2					27
2019-12		8	2	10								20
2020-01		8	5	17					1		1	32
2020-02		19	4	14			1		3			41
2020-03	1	14		12								27
2020-04	1	12	1	16					1			31
2020-05	6	12		10					1	1		30
Total	8	82	15	265	8	6	22	24	8	1	3	442

ALL FILES PENDING & FILES OVER 1 YR. OLD

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

Attachment 7

**OFFICE OF
LAWYERS PROFESSIONAL RESPONSIBILITY**


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June 4, 2020

TO: The Honorable Lorie Skjerven Gildea, Chief Justice
The Honorable G. Barry Anderson, Associate Justice
The Honorable David L. Lillehaug, Associate Justice
The Honorable Natalie E. Hudson, Associate Justice
The Honorable Margaret H. Chutich, Associate Justice
The Honorable Anne K. McKeig, Associate Justice
The Honorable Paul C. Thissen, Associate Justice

FROM: Susan M. Humiston  Humiston, Susan
Director Jun 3 2020 3:31 PM

CC: Dan Ostdiek, Finance Director
Robin Wolpert, LPRB Chair
Stuart Williams, CSB Chair

SUBJECT: FY20/21 Budget Updates on behalf of The Lawyers Professional
Responsibility Board/Office of Lawyers Professional Responsibility and
the Minnesota Client Security Board

I respectfully submit the FY20/21 mid-biennium update for the Lawyers Professional
Responsibility Board/Office of Lawyers Professional Responsibility and the Minnesota
Client Security Board.

cmw



AT A GLANCE

- FY20 revenue is projected to be slightly favorable to budget based on additional registration receipts.
- FY20 expenses are on target; however, there is approximately \$250,000 of expenses which likely will be incurred in FY21 versus FY20, primarily related to the timing of expenses.
- The OLPR lease expires July 31, 2020. Potential new space is available with no increased cost if a 10-year lease is signed.
- The OLPR is currently budgeted for 13 attorneys (including the Director), 6 paralegals, one investigator, one Office Administrator, ten 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 29,500 licensed lawyers and the Minnesota public who consume legal services. In calendar 2019, the OLPR received 1,003 complaints, approximately 10% lower than in 2019. 35 lawyers were publically disciplined, down from the previous year of 45. Complaints year to date in 2020 were trending upward until March, but are now down approximately 7% from the prior year. Public discipline and private discipline for 2020 are comparable to prior years.

In addition to disciplinary functions, the OLPR performs several administrative functions, such as staffing an ethics hotline utilized more than 1,900 times annually, running a large probation department supervising approximately 100 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 serves as frequent speakers at CLEs throughout the State.

FY2020/21 Revenue Update:

The Court reallocated \$1M in Client Security Funds to the OLPR/LPRB, and \$6 per registration fee previously allocated to the CSB. Because the reserve is still adequate to cover expenses through the biennium, the \$1M transfer has been delayed until needed. The primary revenue resource for the OLPR is lawyer registration. Overall revenue projections are trending slightly higher than originally projected offset by a decline in receipts from CSB staffing (the OLPR staff supports the CSB and bills time to the CSB).

FY2020/21 Expenditures Update:

Expenses are estimated to be on target with budget with approximately \$250,000 in budgeted expenses, relating to technology, which may fall within FY21 versus FY20. One area of increased expenses was part-time salary, which reflects higher than usual judicial officer—referee—expenses (plus \$26k), due to more trials than usual (referee expenses typically average \$12-15k annually).

Conclusion:

Even without the reallocation of \$1M from the CSB reserves, the OLPR/LPRB has sufficient funds to cover expenditures through the end of the biennium. However, the reserve has been significantly depleted. Due to deficit spending, the Office will exhaust the reserve early in the next biennium if adjustments to revenue are not made.

FY2020/21 Budget Update

MN Lawyers Professional Responsibility Board

Appropriation: J650LPR

Account	FY16 Actual	FY17 Actual	FY18 Actual	FY19 Actual	FY20 Budget	FY20 Projected	FY21 Budget
	a	b	c	d	e	f	g
Balance In	3,446,907	3,388,267	2,911,444	2,346,087	2,036,201	2,036,201	1,306,541
Revenue:							
Law Prof Resp Attny Judgmnts 512416	57,757	26,422	24,001	28,310	23,910	29,745	24,628
Other Agency Deposits 514213	22,355	26,785	26,899	24,168	25,019	26,786	25,770
Law Prof Resp Misc 553093	57,462	61,239	49,880	42,771	54,503	23,561	56,138
Attorney's Registration 634112	3,163,603	3,201,155	3,150,783	3,283,340	3,218,131	3,314,012	3,245,142
Reallocaton of Attorney Registration Fees from the Minnesota Client Security Board				68,744	177,402	177,402	178,890
Transfer from Minnesota Client Security Board					1,000,000		
Law Prof Resp Bd Prof Corp 634113	89,800	74,851	72,425		73,459	69,015	75,663
Subtotal Revenue	3,390,977	3,390,452	3,323,988	3,447,332	4,572,424	3,640,521	3,606,230
Expenditures:	3,449,618	3,867,274	3,889,345	3,757,218	4,534,671	4,370,182	4,479,932
Balance Out (Ending Cash Balance)	3,388,267	2,911,444	2,346,087	2,036,201	2,073,955	1,306,541	432,839

FY21 Adjustment

-

Final FY21 Reserve Balance

432,839

Notes:

Transfer from Minnesota Client Security Board
Plan to delay transfer of previously allocated CSB funds until needed.

FY2020/21 Budget Update

MN Lawyers Professional Responsibility Board

Appropriation: J650LPR
 Findept. ID: J653500B

Account	FY16 Actual Expenditures	FY17 Actual Expenditures	FY18 Actual Expenditures	FY19 Actual Expenditures	FY20 Budget Expenditures	FY20 Projected Expenditures	FY21 Budget Expenditures
	a	b	c	d	e	f	g
Full Time 41000	2,636,719	2,758,682	2,815,371	2,800,141	3,337,798	3,218,474	3,544,341
PT, Seasonal, Labor Svc 41030	199,065	233,218	200,379	220,535	120,943	146,767	124,038
OT Pay 41050	2,851	532	3,022	2,845	3,000	342	3,000
Other Benefits 41070	44,334	15,475	66,139	41,688	13,000	11,384	30,000
PERSONNEL	2,882,969	3,007,907	3,084,910	3,065,209	3,474,741	3,376,968	3,701,379
Space Rental, Maint., Utility 41100	323,882	336,891	344,225	352,573	374,142	364,552	367,361
Printing, Advertising 41110	17,401	8,778	9,896	10,537	13,849	10,545	14,680
Prof/Tech Services Out Ven 41130	28,516	38,327	27,957	28,339	85,130	81,049	31,160
IT Prof/Tech Services 41145	26,748	266,943	165,964	41,108	282,000	302,291	64,500
Computer & System Svc 41150	6,161	4,679	38,835	41,483	53,373	45,342	56,576
Communications 41155	19,176	23,308	22,556	24,665	27,033	23,056	28,655
Travel, Subsistence In-St 41160	14,624	9,704	13,630	8,309	14,310	6,000	15,169
Travel, Subsistence Out-St 41170	10,270	15,044	18,998	16,925	37,149	16,500	40,864
Employee Dev't 41180	13,027	14,860	20,002	9,723	10,877	11,500	11,964
Agency Prov. Prof/Tech Svc 41190	-	100	-	-	-	-	-
Supplies 41300	57,597	66,502	60,435	48,326	62,123	56,617	68,335
Equipment Rental 41400	2,714	3,029	3,035	3,513	4,000	3,036	4,000
Repairs, Alterations, Maint 41500	8,052	7,074	6,921	11,218	33,460	31,860	9,056
Other Operating Costs 43000	29,925	40,512	69,636	47,776	58,774	35,701	62,300
Payment to Indiv. Med/Rehab Client 44100	-	365	-	-	-	-	-
Equipment Capital 47060	-	1,131	1,386	45,572	-	-	-
Equipment-Non Capital 47160	8,556	22,119	960	1,943	3,710	5,165	3,933
OPERATING	566,649	859,367	804,435	692,009	1,059,930	993,214	778,553
TOTAL	3,449,618	3,867,274	3,889,345	3,757,218	4,534,671	4,370,182	4,479,932

Notes:

Attachment 8

Legal ethics in a pandemic

In the “before time” most of us were comfortable with how the ethics rules applied to our day-to-day legal practice. A short while ago the world dramatically shifted around us, requiring us to do our jobs in very different ways. In the midst of these changes, lawyers and their staffs may not have thought through the ethics questions presented by the new normal. I certainly don’t have all the answers, but I do have some guidance.

What has not changed

We have received a lot of calls on our ethics line regarding how to address particular ethics issues relating to covid-19. While the topics vary, there is a general sense that some lawyers are hoping our response will be that whatever the court or client is asking them to do, it is incompatible with their ethical obligation in times of a pandemic. Invariably we must reply that, no, all of the ethics rules remain in full force and effect. The rules, particularly those that are nondiscretionary, generally do not have exigent circumstance exceptions. Even those rules that incorporate “reasonable” refer to “a reasonably prudent and competent lawyer.” The rules do not expect you to simply do your best under the circumstances, but rather set a minimum standard of conduct for lawyers irrespective of the circumstances. As attorneys, we must embrace the challenge of ensuring that the new manner of our practice is compliant. There are two general areas I would commend to your particular attention: remote work and issues of incapacity.

Remote work

Your duty of competence requires you to maintain the requisite knowledge and skill needed to practice, “including the benefits and risks associated with relevant technology.” Remote access to networks, video conferencing, and electronic signatures thereby join email, wifi, and cloud-based storage on the list of areas that lawyers are obliged to understand. All platforms have potential security issues, and compliance with this duty does not require systems to be infallible. But your ethical duty does require you to inform yourself of how to use the technology correctly and what vulnerabilities it may have as part of a continuous vetting process. Everyone asks, can you ethically use Zoom for client calls? Yes, provided you understand and follow the security recommendations (including password-protected meetings).

The main point is to continually assess your technology platforms to ensure you are using them correctly and understand and adjust to any needed corrections. I cannot emphasize this enough. Sometimes I feel that lawyers have managed the barest of basics—such as

only using secured networks and maintaining strong password protection. Other basics: Is your home network secured by a password? Does your computer have updated security patches? These are questions that we may not ask ourselves enough but certainly must be asking now. A lot is required of us to ensure technological competence in remote working environments.

Your duty of confidentiality requires you to protect client information. Much of this is encompassed under competent technology use, but old school basics are still important. Are you discussing client information around family members? Can your neighbor working in his yard hear your client call because your window is open? Do you have a secure place to maintain client files? Is Alexa listening in? Are you securely destroying client information? Are you taking pictures of your new work space and posting them to social media? A special note on that last point: Just don’t. If people can see your work space, stop and think about what might be disclosed when the pictured is zoomed in. Have you discussed all of this with your staff? Do you understand your staffers’ work environment, and believe they are doing what you are doing to protect client confidences? Your ethical duty of supervision requires you to make reasonable efforts to ensure that your nonlawyer staff’s conduct is compatible with your ethics obligations. This is particularly important now, when many on nonlawyer staff are working remotely for the first time. Remote working agreements that detail these ethical obligations (primarily around technology use and confidentiality) are a good way to assist in meeting this obligation.

Your duty of communication is also extremely important during these times. Do you know how to get hold of your client and have you effectively communicated how to best get hold of you? Have you updated your outward-facing materials to facilitate easy contact with you? Is someone staying on top of mail, and promptly getting it to remote workers? Have you explained how covid-19 will affect the matter you are handling? Do you know to whom you can speak if your client is incapacitated and you need direction? Does your client know who will contact them if you become incapacitated?

One of the most important things we do is communicate with our clients the information they need to make informed decisions about the representation. What makes our jobs difficult is that in many respects, our evolving grasp of the substantive law implications of covid-19 will lag our obligation to provide real-time advice and counsel. The guidance that ethics provides in times like this is that you must stay informed about the changing landscape, and you must communicate what is known and unknown to the client so that the client can make informed decisions. This requires you to discuss the client’s various options relating to the matter so that the client can make informed decisions about how they wish to proceed in the new circumstances, and the best practice is to document those discussions. If you do not know, you also should disclose that. If you think too much is unknown to provide competent guidance, you must raise those concerns with the client in order that objections can be raised, if that is the decision, or continuance can be sought until more guidance is available.



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.

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Your duty of diligence requires you to act with reasonable diligence and promptness in representing a client. Comment [1] to this rule requires us to pursue a matter despite “opposition, obstruction, or personal inconvenience to the lawyer.” You need to stay on top of your calendar, and pay particular attention (as always) to statutes of limitations and scheduling deadlines. Because actions may take longer to accomplish remotely, you must anticipate such challenges, such as figuring out how you will perform previously routine tasks such as e-filing or gathering affidavits. Your particular health circumstances may raise an issue of whether you can diligently continue representation.

Courts and opposing parties may work with your particular circumstances, or they may not. What is the backup plan for the representation if you have to self-isolate or become ill and critical deadlines are approaching? Lawyers are good at assisting clients with contingency plans and terrible at making their own. If you are experiencing a downturn in work as clients put off legal expenses (or even if you are not), use this time to think through contingency plans for specific matters, and for your practice in general. Also take the time to make sure your active files are in good shape. One of the most daunting things about this virus is all that we do not know about how it’s spread, so it’s difficult to accurately gauge our individual vulnerability. Now is the time to plan for a worst-case scenario

if you have not already. Such planning need not be complicated. It starts with identifying one or two people who agree to help temporarily if something happens to you, and keeping your files in good enough shape that someone can review them and understand the current status and next steps.

Conclusion

I wish I could provide more specifics or tell you not to worry because we all have enough on our plates, but I cannot. Your ethical obligations remain the same in the face of this pandemic or any other disaster. But you are well-suited to rise to this occasion if you know the basic ethics requirements and think through how they apply to new circumstances. Asking yourself the above questions will go a long way toward guiding you to compliance, and there is no substitute for just sitting down and reading the rules and thinking about the new ways in which you practice.

Remember, too, the adage that what goes around comes around. Now is not the time to forget basic kindness and civility. It is difficult to exaggerate the amount of stress that everyone is feeling. If any time called for professionalism, it is now. Also, remember we can help you with any specific ethics issues you have. The best way to contact us in these remote working times is through our website at lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinions.aspx. Take care. ▲



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STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 492

June 9, 2020

Obligations to Prospective Clients: Confidentiality, Conflicts and “Significantly Harmful” Information

A prospective client is a person who consults a lawyer about the possibility of forming a client-lawyer relationship. Model Rule 1.18 governs whether the consultation limits the lawyer or the lawyer’s firm from accepting a new client whose interests are materially adverse to the prospective client in a matter that is the same or substantially related to the subject of the consultation, even when no client-lawyer relationship results from the consultation. Under Model Rule 1.18 a lawyer is prohibited from accepting a new matter if the lawyer received information from the prospective client that could be significantly harmful to the prior prospective client in the new matter. Whether information learned by the lawyer could be significantly harmful is a fact-based inquiry depending on a variety of circumstances including the length of the consultation and the nature of the topics discussed. The inquiry does not require the prior prospective client to reveal confidential information. Further, even if the lawyer learned information that could be significantly harmful to the prior prospective client in the new matter, the lawyer’s firm can accept the new matter if the lawyer is screened from the new matter or the prospective client provides informed consent, as set forth in Model Rule 1.18(d)(1) and (2).¹

I. Introduction

Prospective clients often consult with a lawyer in anticipation of forming a client-lawyer relationship. These consultations give clients and lawyers an opportunity to get to know one another, to ascertain whether they will like working together, and to discuss preliminary matters like conflicts, fee arrangements, and the client’s legal needs. During these consultations it is likely that the prospective client will reveal information necessary for each to decide whether to proceed. Some of that information could create a conflict of interest that would prevent the lawyer from undertaking a future representation.

This opinion provides guidance on the types of information that could give rise to such disqualifying conflicts, what the prospective client should be asked to demonstrate in support of a claim that the lawyer has a conflict of interest in a subsequent matter, what precautions the lawyer and the lawyer’s firm might take to avoid receiving disqualifying information during an initial consultation with a prospective client, and how to minimize the consequences of receiving such information.²

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

² Unless otherwise indicated, “prospective client” (sometimes referred to in case law as a “former prospective client”) refers to an individual who has consulted with the lawyer about the possibility of forming a client-lawyer relationship with respect to a matter, but no client-lawyer relationship is subsequently established.

Prior to 2002, the Model Rules did not address obligations owed to individuals who consulted with a lawyer but never established a client-lawyer relationship with the lawyer.³ In 2002, as part of the Ethics 2000 amendments, the ABA adopted Model Rule 1.18, which establishes a lawyer's obligations to a "prospective client."⁴ Earlier, the ABA had provided guidance on ethical obligations to prospective clients in Formal Opinion 90-398 (1990).⁵

II. Analysis

A. Who is a "Prospective Client"?

Under Model Rule 1.18(a), a "prospective client" is "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter."⁶ Comment [2] to Model Rule 1.18 explains:

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response.⁷

Comment [2] clarifies, however, that not every contact between a lawyer and an individual regarding legal services makes that individual a "prospective client:"

[A] consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client."

³ See, e.g., ART GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 (2013).

⁴ *Id.* at 397-406. The only change to Rule 1.18 after 2002 was made in 2012, when the word "consults" was substituted for "discusses" in Rule 1.18(a) and in the Comments. This was not intended as a substantive change. The amendment clarified that communications that could constitute a "discussion" or a "consultation" could be written, oral or electronic. See MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. [2] (2019) [hereinafter MODEL RULES]; ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 309 (9th ed. 2019).

⁵ See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 90-358 (1990) ("Information imparted to a lawyer by a would-be client seeking legal representation is protected from revelation or use under Model Rule 1.6 even though the lawyer does not undertake representation of or perform legal work for the would-be client.").

⁶ MODEL RULES R. 1.18 (2019). As discussed below a client-lawyer relationship may be formed during the consultation. The lawyer should take the precautions discussed in this opinion to avoid that result if that is not the lawyer's intention.

⁷ MODEL RULES R. 1.18(b) cmt. [2].

Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a “prospective client.”⁸

Thus, a person who communicates information unilaterally to a lawyer after reviewing the lawyer’s website or other advertising describing the lawyer’s education and experience does not *for that reason alone* become a “prospective client” within the meaning of Model Rule 1.18.⁹ Additionally, as the last sentence of Comment [2] notes, if the person consulting with the lawyer does not have a reasonable intent to retain the lawyer, but instead is merely attempting to disqualify the lawyer from representing anyone else in the matter, the person is not a “prospective client.”¹⁰

B. The Obligation to Protect Confidential Information

Model Rule 1.18(b) imposes a duty of confidentiality with respect to information learned during a consultation, even when no client-lawyer relationship ensues. It provides:

Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.”¹¹

This duty includes protecting all information learned during the consultation, unless the lawyer has the informed consent of the prospective client to condition the consultation on the lawyer *not* maintaining the confidentiality of the information communicated. As stated by Comment [5] to Model Rule 1.18, “[a] lawyer may condition a consultation with a prospective

⁸ *Id.*

⁹ See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-457 (2010) (“not all initial communications from persons who wish to be prospective clients” result in such status); Ariz. State Bar, Advisory Op. 02-04 (2002) (no duty of confidentiality owed to person who unilaterally sends unsolicited information to a lawyer); Fla. Bar, Advisory Op. 07-3 (2009) (a person seeking legal services who sends information unilaterally to a lawyer has no reasonable expectation of confidentiality regarding that information); San Diego County Bar Ass’n, Advisory Op. 2006-1 (2006) (no duty of confidentiality owed to someone who sends information to a lawyer after obtaining the email address of the lawyer from a state bar website); Va. State Bar Op. 1842 (2008) (lawyer has no duty of confidentiality to person who unilaterally transmits unsolicited information in voice mail or email); Wis. State Bar Prof’l Ethics Comm., Formal Op. EF-11-03 (2011) (person seeking representation who sends unsolicited confidential information through email to a lawyer does not thereby establish a client-lawyer relationship or a duty of confidentiality).

¹⁰ *Bernacki v. Bernacki*, 1 N.Y.S.3d 761, 764 (Sup. Ct. 2015) (husband in a divorce sent an email to his wife titled “Attorneys Which [sic] Whom I Have Sought Legal Advice” and then listed “twelve of the most experienced matrimonial attorneys in the county,” each of whom the husband asserted “would conflict themselves out” or be subject to disqualification); RESTATEMENT OF THE LAW (THIRD), THE LAW GOVERNING LAWYERS § 15 cmt. c [hereinafter RESTATEMENT THIRD] (“a tribunal may consider whether the prospective client disclosed confidential information to the lawyer for the purpose of preventing the lawyer or the lawyer’s firm from representing an adverse party rather than in a good faith endeavor to determine whether to retain the lawyer”).

¹¹ MODEL RULES R. 1.18(b). See also N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1 (2013) (discussing the scope of protected information under Rule 1.18(b)); D.C. Bar Op. 374 (2018) (information from prospective client is protected from disclosure to the same extent as client information is protected by D.C. Rule 1.6); RESTATEMENT THIRD, *supra* note 10, § 59 cmt. c (2000) (“Information acquired during the representation or before or after the representation is confidential so long as it is not generally known . . . and relates to the representation. Such information, for example, might be acquired by the lawyer in considering whether to undertake a representation.”).

client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter."¹² Model Rule 1.0(e) defines "informed consent."¹³

C. Disqualifying Conflicts Based on the Acquisition of "Significantly Harmful" Information

Model Rule 1.18(c) provides for potential disqualification arising out of the consultation:

A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter *if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter*¹⁴

The phrase "significantly harmful" qualifies the lawyer's duties toward prospective clients where no client-lawyer relationship is established and distinguishes these duties from duties owed to clients. Comment [1] explains:

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, *prospective clients should receive some but not all of the protection afforded clients.*¹⁵

The notion that "prospective clients" receive "some but not all of the protections afforded clients" can be illustrated by comparing the application of Model Rule 1.9 with Model Rule 1.18 with respect to possible conflicts of interests. Under Model Rule 1.9, "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interest are materially adverse to the interests of the former client" unless certain conditions are met.¹⁶ As Comment [3] to Model Rule 1.9 explains, for former clients the question is whether confidential information *could have been* shared, not whether confidences were in fact shared, regardless of the harmful quality of the information. The Comment reads, in part,

¹² MODEL RULES R. 1.18 cmt. [5].

¹³ MODEL RULES R. 1.0(e).

¹⁴ MODEL RULES R. 1.18(c) (emphasis added).

¹⁵ MODEL RULES R. 1.18 cmt. [1] (emphasis added). *See also* Wis. State Bar Prof'l Ethics Comm., Formal Op. EI-10-03 (2011) (the "more lenient standard [in Rule 1.18] reflects the attenuated relationship with prospective clients"); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2013-1, *supra* note 11 ("The 'significantly harmful' test makes the [Rule 1.18(c)] restriction less exacting than the corresponding restriction on representations that are materially adverse to a former client."). A person and a lawyer may, of course, have as many consultations and discussions as they mutually find beneficial in order to determine whether to enter into a client-lawyer relationship. In such circumstances, however, the lawyer is more likely to receive information that could be "significantly harmful" in a later representation adverse to the prospective client.

¹⁶ MODEL RULES R. 1.9(a).

A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in a subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and the information that would in ordinary practice be learned by a lawyer providing such services.¹⁷

A former client need not reveal confidential information to satisfy the “substantial relationship” test. “Matters are ‘substantially related’ for purposes of [Model Rule 1.9] if they involve the same transaction or legal dispute or *if there otherwise is a substantial risk* that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.”¹⁸ As described by Judge Posner in *Analytica v. NPD Research*:

[A] lawyer may not represent an adversary of his former client if the subject matter of the two representations is “substantially related,” which means: if the lawyer *could have obtained confidential information* in the first representation that would have been relevant in the second. It is irrelevant whether he actually obtained such information and used it against his former client¹⁹

Model Rule 1.18 is different than Model Rule 1.9 because it imposes the additional requirement, not found in Model Rule 1.9, that the prospective client have communicated information that “could be significantly harmful” in a subsequent matter. As a result, the mere fact that a prospective client consulted with a lawyer in a substantially related matter is not sufficient, alone, to disqualify the lawyer from a later matter.²⁰ Nor is it sufficient to conclude that a conflict exists merely because a prospective client volunteers information to a lawyer because, as noted above, the unilateral transmission of information to a lawyer does not create a Model Rule 1.18 duty, nor will Model Rule 1.18 protect someone who contacts a lawyer with the intent to disqualify the lawyer from representing other parties in the matter.²¹

With respect to what must be shown to establish that a person is entitled to the protections of Model Rule 1.18, evidence beyond the mere fact of a consultation is generally required.²² The

¹⁷ MODEL RULES R. 1.9 cmt. [3]. See also N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1, *supra* note 11, at 5 (“Under Rule 1.9(a), the bar against adverse representation is automatic; if the relevant parties’ interests are materially adverse and the matters are the same or substantially related, the bar applies whether or not the lawyer received any information, harmful or otherwise from the former client.”) (footnote omitted); *Analytica Inc. v. NPD Research*, 708 F.2d 1263, 1267 (7th Cir. 1983) (“If the ‘substantial relationship’ test applies . . . it is not appropriate for the court to inquire into whether actual confidences were disclosed [by the former client].”).

¹⁸ MODEL RULES R. 1.9 cmt. [3] (emphasis added).

¹⁹ *Analytica, Inc.*, 708 F.2d at 1266 (emphasis added).

²⁰ *Bernacki v. Bernacki*, 1 N.Y.S.3d 761, 764 (Sup. Ct. 2015) (prospective client’s “reference to the information as ‘confidential’ without more is insufficient”); RESTATEMENT THIRD, *supra* note 10, § 15, cmt. c (after a consultation with a prospective client, “a lawyer is not always prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter”).

²¹ See MODEL RULES R. 1.18 cmt. [2]. See also *supra* note 9 (collecting opinions).

²² See *Thomson v. Duker*, 346 S.W.3d 390, 396 (Mo. Ct. App. 2011) (Rule 1.18 requires “at least some disclosure, either by the objecting prospective client or by the lawyer, of the scope of information discussed” during the consultation) (cites omitted); RESTATEMENT THIRD, *supra* note 10, § 15(c) (the prospective client “bears the burden

fact that the prospective client must come forward with some evidence concerning the contents of the consultation with the lawyer does not mean, however, that the prospective client must disclose confidential information or detail the substance of the discussions. The cases and other authorities support the conclusion that only certain disclosures are required, for example, the date, duration and manner of communication (*i.e.*, in person, email, over the phone, etc.), and a summary description of the topics discussed.²³

With respect to the “significantly harmful” test, information disclosed by the person invoking the protection of Model Rule 1.18 need not demonstrate that the harm is certain to occur in order to demonstrate a conflict. Instead, the Model Rule addresses information that “could be significantly harmful,” a standard that “focuses on the *potential* use of the information.”²⁴ Post-hoc promises by the lawyer not to use the information do not change the standard from one of potential use or harm to a standard that requires actual use or harm.²⁵

Information that is typically viewed as “significantly harmful” includes, for instance, “views on various settlement issues including price and timing”; “personal accounts of each relevant event [and the prospective client’s] strategic thinking concerning how to manage the situation”; an “18-minute phone call” with a “prospective client-plaintiff [during which a firm] “had ‘outlined potential claims’” against defendant and “discussed specifics as to amount of money needed to settle the case”; and a presentation by a corporation seeking to bring an action of “the underlying facts and legal theories about its proposed lawsuit.”²⁶ Other recognized categories of significantly harmful information include: “sensitive personal information” in a divorce case; “premature possession of the prospective client’s financial information”; knowledge of “settlement position”; a “prospective client’s personal thoughts and impressions regarding the facts of the case and possible litigation strategies,”²⁷ and “the possible terms and structure of a proposed bid” by one corporation to acquire another.²⁸

of persuading the tribunal that the lawyer received information “that could be significantly harmful to the prospective client in the matter”); *but see* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-457, *supra* note 9 (a lawyer’s website that “specifically encourages a website visitor to submit a personal inquiry about a proposed representation on a conveniently provided electronic form” may be deemed to invite the submission of confidential information and therefore provide information to the lawyer that could be “significantly harmful” to the prospective client in a subsequent adverse representation).

²³ The format could be similar to what is known as a “privilege log,” submitted to a court in connection with a claim of privilege. The information which is the subject of the privilege claim is not disclosed. Rather information sufficient to establish the claim of privilege is ordinarily all that is required. Federal Rule of Civil Procedure 26(b)(5) (requiring that privilege logs “describe the nature of the documents, communications, or tangible things not produced or disclosed --- and do so in a manner that, without revealing information itself privileged or protected will enable other parties to assess the claim [of privilege or other protection].” In appropriate instances, protected information can be disclosed to courts *in camera*. See *O Builders Associates, Inc. v. Yuna Corp. of N.J.*, 19 A.3d 966, 978 (N.J. 2011) (“the parties may protect the confidentiality of their information by, among other means, requesting that the record be subject to a protective order . . . and the movant may further request that the application be considered *in camera*”) (cites omitted); *Keith v. Keith*, 140 So.3d 1202, 1211-1212 (La. Ct. App. 2014) (discussing the use of *in camera* proceedings in Rule 1.18 decisions).

²⁴ N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1, *supra* note 11, at 5 (emphasis in original).

²⁵ *Id.*

²⁶ *Id.* at 8, note 9 (cites omitted).

²⁷ Wis. State Bar Prof’l Ethics Comm., Formal Op. EI-10-03, *supra* note 15, at 4-5 (cites omitted).

²⁸ See N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1, *supra* note 11, at 7 (discussion of “Scenario 3”).

The Restatement also offers helpful guidance. Section 15(2) of the Restatement provides for disqualification of a lawyer who, in discussing “the possibility of . . . forming a client-lawyer relationship” received “from the prospective client confidential information that could be significantly harmful to the prospective client” in a matter.”²⁹ Further, in the words of the North Dakota Supreme Court:

Information may be “significantly harmful” if it is sensitive or privileged information that the lawyer would not have received in the ordinary course of due diligence; or if it is information that has long-term significance or continuing relevance to the matter, such as motives, litigation strategies or potential weakness. “Significantly harmful” may also be the premature possession of information that could have a substantial impact on settlement proposals and trial strategy; the personal thoughts and impression about the facts of the case; or information that is extensive, critical, or of significant use.³⁰

As an illustration, the Restatement discusses an initial meeting between a lawyer and a prospective client seeking a divorce. The prospective client and the lawyer have an hour-long conversation in which they discuss the prospective client’s “reasons for seeking a divorce and the nature and extent of his and Spouse’s property interests.” The prospective client decides not to retain the lawyer because “the suggested fee [is] too high.” Thereafter, the spouse seeks to hire the lawyer. The Restatement concludes that the lawyer received “significantly harmful information” from the prospective client and cannot represent the opposing spouse.³¹

On the other hand, and as the New Jersey Supreme Court explained in *O Builders & Associates v. Yuna Corp.*, “significantly harmful” information under Rule 1.18 “cannot be simply detrimental in general to the former prospective client, but the harm suffered must be prejudicial in fact to the former prospective client within the confines of the specific matter in which disqualification is sought, a determination that is exquisitely fact-sensitive and -specific.”³²

So, for example, information that causes embarrassment or inconvenience “does not seem to be ‘significant’” while information relating to “[c]ivil or criminal liability would seem to easily

²⁹ RESTATEMENT THIRD, *supra* note 10, § 15 (2000). The language “information that could be significantly harmful to that person” in Rule 1.18(c) tracks the Restatement’s language.

³⁰ *Kuntz v. Disciplinary Bd. of Supreme Court of North Dakota*, 869 N.W.2d 117, 125 (N.D. 2015) (comparing duties under North Dakota Rule 1.18 with duties under North Dakota Rule 1.9, which are analogous to the corresponding Model Rules) (cites omitted). *See also In re Carpenter*, 863 N.W.2d 223 (N.D. 2015) ([a] lawyer can also violate Rule 1.18(b) if the lawyer misuses information gathered in connection with a consultation with a prospective client; discipline imposed for using information about owners of mineral rights learned as part of a consultation with a prospective client for the benefit of a subsequent client in a substantially related matter).

³¹ RESTATEMENT THIRD, *supra* note 10, § 15(2), at 142 (2000). *See also Sturdivant v. Sturdivant*, 241 S.W.3d 740, 742 (Ark. 2006) (prospective client provided “significantly harmful information” when he told divorce attorney “everything he knew regarding the children and his concerns about his former wife”). *See also* Wis. State Bar Prof’l Ethics Comm., Formal Op. EI-10-03, *supra* note 15, at 4-5 (collecting cases); N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1, *supra* note 11, at note 9 (collecting cases).

³² *O Builders Associates, Inc. v. Yuna Corp. of N.J.*, 19 A.3d 966, 978 (N.J. 2011) (cites omitted). *See also Kuntz*, 869 N.W.2d at 125.

qualify.”³³ Specific instances in which information was deemed *not* to be “significantly harmful” include: a lawyer who “avoided learning the details of the case in half-hour consultation”; a brief consultation that occurred ten years earlier and concerned a “tenuously related matter”; and a one-day “beauty contest” consultation where the prospective client’s in-house lawyer “regulated disclosures and there was no showing that confidential information disclosed could be detrimental to client.”³⁴

Context is important. In *Marriage of Perry*, for instance, the court concluded that information had been disclosed during the consultation but did not disqualify the lawyer pursuant to Montana’s Rule 1.18 because the prospective client “did not establish that any information [she disclosed to the challenged counsel] in telephone calls several years earlier could have any impact on the proceeding, particularly since [the challenged counsel] “was not associated as counsel until three years into the proceeding, by which time substantially more information had been disclosed.”³⁵ Further, information that may be on its face “significantly harmful,” may not be such if the court determines that it was generally known by the parties.³⁶

D. Limiting Information During an Initial Consultation and Avoiding Imputation of Conflicts.

In order to avoid receiving “significantly harmful information” from a prospective client, lawyers should warn prospective clients against disclosing detailed information. Comment [4] to Model Rule 1.18 states that a lawyer “should limit the initial consultation [with a prospective client] to only such information as reasonably appears necessary” for the purpose of “considering whether or not to undertake a new matter.”³⁷ This caution, however, is not intended to discourage lawyers from engaging in a thorough discussion with prospective clients in order to ascertain whether the lawyer wants to take on the representation. It is simply a reminder that the more information learned in a consultation, the more likely that the lawyer may be precluded from representing other parties in a substantially related matter. Comment [5] provides that a lawyer “may condition a consultation with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.”³⁸ If an agreement between the lawyer and the prospective client “*expressly*

³³ John M. Burman, *Waiving a Conflict of Interest and Revoking That Waiver Part III – Conflicts Involving Prospective and Former Clients*, 34 WYO. LAW. 45, note 53 (2011) (emphasis added).

³⁴ RESTATEMENT THIRD, *supra* note 10, § 15 cmt. c, Reporters Note (cites omitted).

³⁵ *Marriage of Perry*, 293 P.3d 170, 176 (Mont. 2013) *but see* Wis. State Bar Prof’l Ethics Comm., Formal Op. EI-10-03, *supra* note 15 (“the fact that information may be discoverable at some point in current or future litigation, does not by itself mean that the information should not be considered significantly harmful. [It] may be a factor in the analysis, but is not . . . determinative.”).

³⁶ *Mayers v. Stone Castle Partners*, 1 N.Y.S.3d 58, 62 (1st Dept. 2015) (information not significantly harmful because it was generally known, the adversary was aware of some of the details of the relevant transaction, and the motion to disqualify opposing counsel was made “a year into the litigation”).

³⁷ MODEL RULES R. 1.18 cmt. [4].

³⁸ MODEL RULES R. 1.18 cmt. [5]. With prospective clients who are inexperienced in legal matters, the burden will be on the lawyer to demonstrate that the discussions conformed to the agreed limitations or that the prospective client provided informed consent to the use of the information provided during the consultation. How the lawyer meets this burden depends on the circumstances. N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1, *supra* note 11 (“the adequacy [of the lawyer’s explanation and disclosure] will depend on the relevant facts, particularly the sophistication of the consenting party and [the party’s] familiarity with the retention of legal representation and

so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client."³⁹ This may include, for example, an explicit caution on a website intake link saying that sending information to the firm will not create a client-lawyer relationship and the information may not be kept privileged or confidential.

Once a lawyer receives confidential information from a prospective client that disqualifies the lawyer from future adverse representations imputation of the conflict to other lawyers in a firm may be avoided through screening, in some circumstances. Model Rule 1.18(d) reads:

When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if: (1) both the affected client and the prospective client have given informed consent, confirmed in writing; *or*: (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (ii) written notice is promptly given to the prospective client.⁴⁰

E. Resolving Disputes Related to “Significantly Harmful” Information

Finally, when the basic facts are contested, courts or disciplinary authorities may benefit from reviewing documents and/or holding a hearing to assess the facts and, if necessary, determine the credibility of the lawyer and of the person invoking Model Rule 1.18.⁴¹ However, evidentiary hearings may not be necessary and, when conducted, should avoid forcing the prospective client to reveal confidential information.⁴²

conflict waivers. For example, if the prospective client is an organization that frequently retains lawyers, particularly one with in-house legal advisors, it may need to be told little more than that the law firm would be free to use or reveal information received in the consultation or to represent others with materially adverse interests in the same or any related matter . . . in the event the organization does not retain the firm.”).

³⁹ MODEL RULES R. 1.18 cmt. [5] (emphasis added). *See also* N.Y.C. Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2013-1, *supra* note 11, at 5 (noting that the consent must be informed and confirmed in writing and recommending other steps to ensure the effectiveness of the waiver); MODEL RULES R. 1.0 cmt. [6] (discussing how adequacy of disclosure and explanation by the lawyer may depend on the sophistication of the client); Wis. State Bar Prof’l Ethics Comm., Formal Op. EI-10-03, *supra* note 15, at 6 (discussing how to avoid later disqualification through informed consent of the prospective client).

⁴⁰ MODEL RULES R. 1.18(d) (emphasis added). For the requirements of informed consent see Model Rule 1.0(e) and Comments [6] and [7] to Rule 1.0. Informed consent under Rule 1.18 may occur in different contexts. “Informed consent” may be obtained at the outset of a consultation containing a condition that any information provided by the prospective client “will not be disqualifying,” as set forth in Comment [5] to Model Rule 1.18. “Informed consent” may also allow a lawyer who has received “significantly harmful” information from a prospective client to represent an adverse party pursuant to Model Rule 1.18(d) above. In the former scenario, providing adequate disclosure at the outset of a consultation with a prospective client poses challenges for the lawyer who may not know much about the prospective client’s matter and may know even less about the opposing party’s potential claims.

⁴¹ *See, e.g.,* Marriage of Perry, 293 P.3d 170, 176-77 (Mont. 2013) (trial court held an evidentiary hearing and examined notes taken by the lawyer concerning the communications with the prospective client before ruling on whether “significantly harmful information” had been disclosed).

⁴² *See* Richman v. Eighth Judicial Dist. Court, No. 60676, 2013 WL 3357115 at *6 (Nev. May 31, 2013) (trial court did not abuse its discretion by ruling on affidavits and documents without an evidentiary hearing).

IV. Conclusion

A lawyer who receives information that “could be significantly harmful” from a prospective client and then represents a client in the same or a substantially related matter where that client’s interests are materially adverse to those of the prospective client violates Model Rule 1.18(c) unless the conflict is waived by the prospective client. Whether information that “could be significantly harmful” has been disclosed by a prospective client is a fact-specific inquiry and determined on a case-by-case basis. The test focuses on the potential harm in the new matter. The prospective client must provide some details about the time, manner and duration of communications with the lawyer and also some description of the topics discussed, but need not disclose the contents of the discussion or confidential information. Whether information conveyed is “significantly harmful” in the subsequent matter will depend on, for example, the duration of the discussion, the topics discussed, whether the lawyer reviewed documents, and whether the information conveyed is known by other parties, as well as the relationship between the information and the issues in the subsequent matter.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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Attachment 9

**ANNUAL REPORT OF THE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

**ANNUAL REPORT OF THE
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I. INTRODUCTION AND HIGHLIGHTS.

Pursuant to Rules 4(c) and 5(b), Rules on Lawyers Professional Responsibility (RLPR), the Lawyers Professional Responsibility Board (LPRB) and the Director of the Office of Lawyers Professional Responsibility (OLPR) report annually on the operation of the professional responsibility system in Minnesota. This report is made for the period from July 2019 to June 2020 (FY2020), which represents the Board's and the Office's fiscal year. The majority of the statistical information, however, is based upon calendar year 2019, unless otherwise noted.

A Note from Board Chair Robin Wolpert.

[To be provided]

Highlights.

Fiscal year 2019 was a solid year for the OLPR, capped by a highly unusual fourth quarter due to the COVID-19 pandemic. Prior to the pandemic, the Office and Board were engaged in several rule and opinion issues. Specifically, the Board considered the issue of whether to amend the Minnesota advertising ethics rules to conform to extensive revisions made by the America Bar Association (ABA) to its model rules. When first adopted, Minnesota accepted some and rejected some of the model rules on advertising. Given the changes in legal practice, the Board agreed that substantial revisions to the advertising rules were warranted, and in collaboration with the Minnesota State Bar Association Rules (MSBA) Rules of Professional Conduct Committee, voted to petition the Minnesota Supreme Court to amend those rules to conform to the model rules. The petition is currently in process. One open issue remains between various constituencies regarding the proposed amendments to the advertising rules on use of the term "specialist." The rules committee of the Board continues its review and substantial rewrite of Rule 20, Rules on Lawyers Professional Responsibility (RLPR), to address identified issues surrounding the confidential versus public nature of OLPR discipline files.

From an opinions perspective, the Board and Office continued to review and solicit feedback from the bar on LPRB Opinion No. 21 relating to a lawyer's duty to communicate errors to clients, in conjunction with ABA Opinion No 481 issued in 2018. LPRB Opinion No. 21 focused the duty of communication and conflict on errors that constitute malpractice; ABA Opinion 481 took a more expansive approach to include material errors that causes harm or loss of confidence in counsel, not just those that give rise to an actionable malpractice claim. After extensive consideration and debate, the Board was unable to reach consensus on revisions to LPRB Opinion No. 21, and ultimately voted to repeal LPRB Opinion No. 21 at its April 2020 meeting.

Calendar year 2019 was also a solid year in terms of case management for the Office and an "average" year for discipline. Public discipline decreased year over year, with 35 attorneys receiving public discipline, down from 45 attorneys in 2018. Disbarments were also down in 2018 with 5 disbarments, compared to 8 in the preceding year. Suspensions remained relatively high at 22, and 8 lawyers received public reprimands, some with, some without probation. Private discipline remained consistent with prior years, with 107 admonitions issued and 14 matters resulting in private probation.

The Office continued to focus its efforts on meeting the Board and Court goals of no more than 500 open files at any one time and no more than 100 files open more than one year. The Office ended calendar year 2019 with a file inventory of 482, only the sixth time since 1999 that the Office met the Board target of fewer than 500 open files at calendar year end. Most files close within 6-7 months of filing (Table IX), but in cases where there is likely discipline, it has continued to take the Office longer to get those files closed, resulting in more cases pending over one year than the target of 100.

The Office ended calendar year 2019 with 119 year old files, significantly better than the prior year's number of 145. The Office was aided modestly in its efforts due to the receipt of fewer new complaints. Notwithstanding the receipt of approximately 9%

fewer complaints, the Office conducted approximately the same number of new investigations in 2019 (566) as in 2018 (572). Another notable statistic from 2019 was the number of referee trials conducted: 11, compared to only 4 in 2018. The Office continues to focus on case management practices to ensure it is timely processing all cases.

As the Office ended the decade, it was also interesting to review discipline on a decade by decade basis. From 2010-2019, a total of 403 attorneys were publicly disciplined, an average of approximately 40 per year. During this decade, the yearly number of publicly disciplined lawyers ranged from a low of 26 (in 2010 and 2011) to a high of 65 in 2015. For reasons that remain unclear, this number is significantly higher than numbers for the prior decade. From 2000-2009, 327 lawyers were publicly disciplined, an average of 33 a year (from a low of 19 in 2004 to a high of 48 in 2006). The '90s saw more discipline than the '00s, but still produced numbers notably lower than the most recent decade. From 1990-1999, 365 attorneys were publicly disciplined—from a high of 55 in 1990 to a low of 20 in 2004. One thing to note about the '90s, however, is the total number of disbarments compared to other decades. In the '90s, 74 lawyers were disbarred, compared to 52 in the '00s, and 62 in the '10s. To date, the '90s have been the high point for disbarments, but the most recent decade saw the highest volume of public discipline overall. Unfortunately, the Minnesota Lawyer Registration Office does not have the ability to calculate total numbers of active lawyers by decade, making additional comparisons difficult.

A review of attorney demographics shows that attorneys practicing between 21-30 years received the most private and public discipline, followed by attorneys with 11-20 years of experience. More male attorneys received discipline than female attorneys, consistent with past trends. In 2018, 78% of private discipline was issued to male attorneys; 22% to female attorneys. In 2019, 81% of private and public discipline involved men; 19% involved women. Of active practitioners, roughly 40% of lawyers

are female and 60% are male, with a small percentage identifying as non-binary. The racial or ethnic identification of discipline recipients is neither known nor tracked.

Substantively, diligence (Rule 1.3) and communication (Rule 1.4) remain the most frequently violated rules, clients continue to submit the greatest number of complaints (followed by opposing parties), and the most frequent areas of practice generating complaints remain criminal law and family law, followed by general litigation and probate.

The first half of 2020 remains generally consistent with 2019 in matters of public attorney discipline. One attorney year to date has been disbarred. As of June 29, 2020, a total of 15 attorneys have been publicly disciplined: 1 disbarred, 12 suspended, and 2 reprimanded and placed on probation. Private discipline year to date remains consistent with prior years.

Along with everyone in the United States, the OLPR and Board found themselves in uncharted waters beginning in March 2020, with the issuance by the governor of a peacetime emergency order, and stay-at-home directives aimed at slowing the spread of the novel coronavirus. Over the span of two-weeks, the Office transitioned to working remotely, with the exception of one staff member in the Office managing incoming and outgoing mail. Due to the fortuitous timing of the Office's launch of a new database system in February 2020, and the availability of electronic signature software, the Office was able to continue case investigations and issuances of dispositions with little impact. Although most files continue to be in hardcopy, which has presented some logistically file-sharing issues, the Office has been able to quickly pivot to remote work, and its move to paperless files has been greatly advanced. On June 15, 2020, the Office will re-open to the public with reduced staff, while still working remotely and conducting investigations utilizing a variety of electronic means. The Board held its first fully remote proceeding (a reinstatement hearing) at the end of May, and the Board continues to meet via Zoom. While it has been challenging, it has

also been heartening to see the work of the Office and Board continue unabated through changed circumstances caused by the pandemic.

Complaint Filings.

The number of complaints received in 2019 was 1,003, down from 1,107 in 2018. Closings were also down slightly (1,029 vs. 1,115), for a calendar year-end file inventory of 482. Tables outlining these and related statistics are at A. 3 - A. 10.

Files open at start of 2019:	509
Complaints received in 2019:	1,003
Files closed in 2019:	1,029
Files open at end of 2019:	482

Complaint filings for the first five months of 2020 are down from 2019 numbers, after initially trending upward until March 2020.

Public and Private Discipline.

In 2019, 35 lawyers were publicly disciplined: 5 attorneys were disbarred, 22 were suspended, 4 were reprimanded and placed on probation, and 4 were reprimanded. The five disbarred attorneys were Craighton Boates, Boris Gorshteyn, Thomas Laughlin, Murad Mohammad and Israel Villanueva.

During 2019, 107 admonitions were issued. Pursuant to Rule 8(d)(2), RLPR, if “the Director concludes that a lawyer’s conduct was unprofessional but of an isolated and non-serious nature, the Director may issue an admonition.” Prior year totals are as follows:

	2012	2013	2014	2015	2016	2017	2018	2019
Admonitions	122	143	143	115	115	90	117	107
Total Files Closed	1287	1279	1248	1332	1264	1073	1115	1029
%	9%	11%	11%	8%	9%	8%	11%	10%

The areas of misconduct involved in the admonitions are set forth in Table V at A. 6. Fourteen matters closed with private probation, the same as in 2018.

Annual Professional Responsibility Seminar and Continuing Legal Education Presentations.

On September 27, 2019, the Board and the Director's Office hosted the 34th annual Professional Responsibility Seminar. Sessions included a presentation by Justice Lillehaug on key Supreme Court discipline cases; Ethics Issues in Immigration Cases by Kathleen Moccio, Visiting Assistant Clinical Professor at the University of Minnesota Law School, and Susan Humiston, Director of the Office of Lawyers Professional Responsibility; and a presentation by Robin Wolpert, Chair of the Lawyers Professional Responsibility Board, on Ethics and the Value of Sleep. Additional presentations covered lawyer well-being, a discussion on DEC departures, a hypothetical situation practice exercise, and a DEC investigator workshop. During the Seminar, Justice Lillehaug presented the Volunteer of the Year Award to Mary Hilfiker. As a public member volunteer, Ms. Hilfiker diligently and enthusiastically gave her time to support the Board.

Each year, attorneys in the Office devote substantial time to CLE presentations and other public speaking opportunities in an effort to proactively educate the bar about professional responsibility issues. A full list of those engagements can be found at A. 17 – A. 19. This year, staff spoke at 72 events, devoting over 310 hours to educating the profession. This is down significantly from prior years due to Covid-19 cancellations in Spring 2020.

II. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Board Members.

The Lawyers Professional Responsibility Board is composed of 23 volunteer members, which includes the Chair, 13 lawyers, and 9 nonlawyers. The terms of Board members are staggered so that there is roughly equal turnover in members each year. Board members are eligible to serve two three-year terms (plus any stub term if applicable). Terms expire on January 31.

Board members Joseph Beckman, James Cullen, Roger Gilmore, Mary Hilfiker and Bentley Jackson completed their second and final terms on the Board. Daniel Cragg, Paul Lehman, Kristi Paulson, Mary Waldkirch Tilley and Julian Zebot were appointed to the Board. Jeanette Boerner, Peter Ivy, Virginia Klevorn and Allan Witz were reappointed to second terms to expire in 2023. A complete listing of Board members and their backgrounds as of July 1, 2020, is attached at A. 1 – A. 2.

Executive Committee.

The Board has a five-member Executive Committee, charged with general oversight of the Director's Office and the Rules on Lawyers Professional Responsibility. The committee consists of Chair Robin Wolpert, Vice-Chair Jeanette Boerner, and members Shawn Judge, Virginia Klevorn and Bruce Williams. Two members of the Executive Committee are public members, demonstrating some of the significant contribution public members make to the Minnesota disciplinary system.

Each member of the Executive Committee has assigned tasks. The Chair directly oversees panel assignments pursuant to Rule 4(f), RLPR, and oversees the Director's review and reappointment process. The Vice-Chair oversees the timely determination of complainant appeals by Board members, reviews dispositions by the Director that vary from DEC recommendations, and reviews complaints against the Director or staff.

Panels.

All members of the Board, other than Executive Committee members, serve on one of six panels which make discipline probable cause determinations and reinstatement recommendations. The Board members who act as Panel Chairs are currently: Landon Ascheman, Thomas Evenson, Gary Hird, Peter Ivy, Susan Rhode, and Allan Witz.

Standing Committees.

The Board has three standing committees. The Opinion Committee, chaired by Mark Lanterman, makes recommendations regarding the Board's issuance of opinions

on issues of professional conduct pursuant to Rule 4(c), RLPR. The Rules Committee, chaired by Peter Ivy, makes recommendations regarding possible amendments to the MRPC and the RLPR. The DEC and Training Committee, chaired by Allan Witz, works with the DEC's to facilitate prompt and thorough consideration of complaints assigned to them, assists the DEC's in recruitment and training of volunteers, and in FY20 assumed the additional responsibility of training Board members. All committees were very active in FY20.

III. DIRECTOR'S OFFICE.

A. Budget.

In June 2020, the Office will complete the first year of the biennium budget approved by the Court in June 2019. Expenditures for the fiscal year ending June 30, 2020, are projected to be approximately \$4.3 million. The projected reserve balance at the end of FY20 is projected to be \$1.3 million. FY20 expenses were favorable to budget, but revenues were not due to the decision to delay a \$1 million transfer from the Client Security Fund, which had been budgeted for FY20. The Office continues deficit spending and projects ending the biennium with a reserve of approximately \$450,000. The Office's largest expenditure other than personnel costs was completed on budget in FY20 with the delivery and acceptance of the Office's new file management database.

The Director's Office budget is funded primarily by lawyer registration fees (\$128 for most lawyers), and therefore is not dependent upon legislative dollars. FY20 projected revenue from all sources is \$3.6 million. The Office will continue to utilize its reserve to fund the revenue shortfall, and will come close as noted above to exhausting its reserve over the biennium. To address the funding shortfall, in June 2019, the Court reallocated \$6 of the annual registration fee from the Client Security Board to the OLPR, in addition to approving the \$1 million transfer from the Client Security Fund as needed.

B. Personnel.

The Director's Office employs 13 attorneys including the Director, six paralegals, one investigator, an office administrator, ten support staff and one law clerk (*see* organizational chart at A. 20). Personnel highlights in FY20 include the retirement of one employee (Wenda Mason), the departure of an attorney (Aaron Sampsel) and the hiring of one attorney (Jennifer Wichelman). Alicia Smith was promoted to an Attorney II, Jennifer Bovitz and Binh Tuong were promoted to Managing Attorneys, and Bryce Wang moved from a temporary to a permanent employee. In addition, Tim Burke moved to a Senior Attorney position from the Deputy Director position, and Cassie Hanson will be moving from Managing Attorney to Senior Attorney in the near term. The Office also added the skill set of an investigator, Gina Bovege, who operated her own investigation firm for more than twenty years before moving to Minnesota. The Director, Susan Humiston, was also reappointed to a third, two-year term in 2020.

While the Office has continued its outreach efforts to the profession around well-being in the profession, it has also focused its efforts internally through the creation and active participation of a well-being committee. As part of its work, the OLPR well-being committee hosted a "surprise" Office party to celebrate the collective successes of 2019 and the teamwork necessary to make those successes happen. During the period where most of the Office was working remotely, the Office also celebrated National Lawyer Well-Being Week, the first full week of May 2020, by scheduling individual daily activities and a Zoom happy hour and slide show, to facilitate connectedness. One of the most challenging things about remote work, which is new to the Office, is finding authentic ways to connect to colleagues, which is so important to many people as part of a healthy workplace.

C. Website and Lawyers Professional Responsibility Board Intranet.

The OLPR website continues to be updated regularly to ensure it remains current. While the site contains a substantial amount of useful information regarding the discipline system, as well as services provided by the Director's Office, it is old and

not mobile-friendly. Work on a new website, however, was tabled to FY21 due to competing demands related to launching the Office’s updated file management database. Attached at A. 21 is a recent printout of the home page for the website.

The LPRB and DEC intranet (SharePoint) sites are widely used by Lawyers Board members, DEC chairs and volunteer investigators. The Director’s Office provides regular training to new and current Board members and DEC volunteers on the use and navigation of the sites. The Office also employs a DEC/SharePoint Coordinator as the main contact for volunteers regarding questions about the sites. In FY20, the Office updated the Board’s sharepoint site to include secure panel portals to facilitate the work of the panels.

D. Complainant Appeals.

Under Rule 8(e), RLPR, a dissatisfied complainant has the right to appeal most dismissals and all private discipline dispositions. Complainant appeals are reviewed by a Board member, other than members of the Board’s Executive Committee, selected in rotation. During 2019, the Director’s Office received 129 complainant appeals, compared to 152 appeals received in 2018. The breakdown of the 129 determinations made by reviewing Board members in 2019 is as follows:

		<u>%</u>
Approve Director’s Disposition	123	95
Direct Further Investigation	4	3
Instruct Director to Issue an Admonition	1	1
Instruct Director to Issue Charges	1	1

Approximately 120 clerical hours were spent in 2019 processing and routing of appeal files. A limited amount of attorney time was expended in reviewing appeal letters and responding to complainants.

E. Probation.

The probation department administers private and public probation in conjunction with attorney discipline. In 2019, the Director opened 21 new probations,

nine of which were public and 12 were private. Over three-fourths of the new public probations were supervised, whereas only about one-third of the new private probations were supervised. Nearly one quarter of the new probations were ordered as a condition of reinstatement to the practice of law. As with the prior year, 2019 had no extensions of a probation term.

This year, the Director filed seven petitions for revocation of probation and for further discipline. Strikingly, this figure marks a near-double increase over the four petitions for revocation filed in 2018. Three of the seven 2019 petitions for revocation are under advisement with the Court. The increase in petitions for revocations is worth observing to see if the trend continues.

Probations that involve lawyer wellness issues remain an ongoing concern. In keeping steady pace with 2018, approximately 28 percent of the new probations in 2019 involve lawyers with mental health issues and/or substance/alcohol use issues. Of the 81 open probations in 2019, approximately 21 percent (18 probations) implicated consideration of lawyer wellness issues—either as part of the underlying disposition, or as a specific term of probation monitoring.

This year, the Court transferred no probationers to disability inactive status. Nine of the new probations resulted from a lawyer's failure to properly maintain his or her trust account. Eleven of the new 2019 probations involved experienced lawyers who had 20 or more years of practice, including seven lawyers with 30 or more years of practice and three who had 40 or more years of practice.

During 2019, 24 Minnesota attorneys served as volunteer probation supervisors. Their volunteer service to assist lawyers in need is greatly appreciated. Four attorneys and six paralegals staff the probation department, and consistently commit between 40–50 hours collectively per week. Additional probation statistics are provided at A. 15–A. 16.

F. Advisory Opinions.

Advisory opinions are available to all licensed Minnesota lawyers and judges, and out-of-state attorneys with questions about Minnesota's rules. Advisory opinions are limited to prospective conduct. Questions or inquiries relating to past conduct, third-party conduct (i.e., conduct of another lawyer) or questions of substantive law are not answered. Advisory opinions are not binding upon the Lawyers Board or the Supreme Court; nevertheless, if the facts provided by the lawyer requesting the opinion are accurate and complete, compliance with the opinion would likely constitute evidence of a good faith attempt to comply with the professional regulations. As a part of Continuing Legal Education presentations by members of the Director's Office, attorneys are reminded of the advisory opinion service and encouraged to make use of it.

The number of advisory opinions requested by Minnesota lawyers and judges decreased modestly in 2019. In 2019, the Director's Office received 1,943 requests for advisory opinions, compared to 2,057 in 2018. (A. 11 - A. 12.) Table XIII at A. 13 shows the areas of inquiry of opinions.

In 2019, the Director's Office expended 396 assistant director hours in issuing advisory opinions. This compares with 441 hours in 2018. Dissolution/custody was the most frequently inquired about area of law. Client confidentiality (Rule 1.6) was the most frequent area of specific inquiry, along with conflicts of interest (Rule 1.7), conflicts-former clients (Rule 1.9) and trust accounts (Rule 1.15).

G. Overdraft Notification.

Pursuant to Rule 1.15(j) – (o), MRPC, lawyer trust accounts, including IOLTA accounts, must be maintained in eligible financial institutions approved by the Director's Office, and the bank must agree to report all overdrafts on trust accounts to the Director's Office. Administration of the trust account overdraft program includes books and records reviews and forensic auditing. Individualized education is also

provided through the overdraft program to target specific deficiencies and to ensure compliance with Rule 1.15, MRPC, and Appendix 1.

Forty-one trust account overdraft notices were reported to the Director in 2019, which was down significantly from the 63 reported in 2018. During 2019, the Director converted ten overdraft inquiries into disciplinary files. (Two of those ten resulted in the opening of disciplinary files against two separate lawyers.) The most common reasons for opening a disciplinary file are shortages found -- which is often the result of significant record-keeping deficiencies -- commingling of client and attorney funds and failure to cooperate. The Director closed 49 overdraft inquiries in 2019, which was comparable to the 54 closed in 2018. Of these closures, 39 were closed without a disciplinary investigation. In 36 of the 39 closures, or 92%, the Director made recommendations regarding the attorney's trust account practices. The most common such recommendations concerned a lack of strict compliance with the books and records requirements, and a failure to properly reconcile the account.

In 2019, the overdraft inquiries closed without a disciplinary investigation were closed for the following reasons:

Overdraft Cause	No. of Closings
Check written in error on TA	13
Bank error	11
Service or check charges	5
Late deposit	3
Mathematical/clerical error	2
Third party check bounced	2
Bank hold on funds drawn	1
Reporting error	1
Other	1

A total of 151.75 hours – 49.50 hours of attorney time and 102.25 of paralegal/staff time – was spent administering the overdraft program in 2019. This was a decrease from the 199.25 hours expended in 2018. Significant additional hours, not reflected in

the 151.75 hours accounting, were spent in 2019 in working with the LDMS project committee to convert the trust account overdraft file management system, and in collecting new “Trust Account Overdraft Notification and IOLTA Comparability Agreements” from banks in order to remind banks of the overdraft reporting requirements and interest obligations and to update the list of approved IOLTA institutions.

H. Judgments and Collections.

In 2019, judgments totaling \$31,214.67 were entered in 32 disciplinary matters. The Director’s Office collected a total of \$24,579.85 from judgments and orders entered during or prior to 2019. Of the amount collected in 2019, \$2,973.47 was received through the Department of Revenue recapture program.

In 2018, judgments were entered in 33 disciplinary matters totaling \$36,346.43 and the Director’s Office collected a total of \$24,008. Although the judgments entered in 2018 were \$5,131.76 less than in 2019, the Director’s Office collected modestly more in 2019 than in 2018.

I. Disclosures.

The disclosure department responds to written requests for attorney disciplinary records. Public discipline is always disclosed. Private discipline is disclosed only with an executed authorization from the affected attorney. In addition, the Director’s Office responds to telephone requests for attorney public discipline records. Public discipline information also is available through the OLPR website. Informal telephone requests and responses are not tabulated. The following formal requests were received in 2019:

	<u>No. of Requests</u>	<u>No. of Attorneys</u>	<u>Discipline Disclosed</u>	<u>Open Files</u>
A. National Conference of Bar Examiners	189	189	4	0
B. Individual Attorneys	464	464	20	9
C. Local Referral Services				

1. RCBA	16	44	1	1
2. Hennepin County	0	0	0	0
D. Governor's Office	21	69	1	0
E. Other State Discipline Counsels/State Bars or Federal Jurisdiction	92	92	1	1
F. F.B.I.	25	27	0	0
G. MSBA: Specialist Certification Program	6	48	4	1
H. Miscellaneous Requests	24	42	3	1
TOTAL	837	975	34	13
(2018 totals for comparison)	790	1079	53	16

J. Trusteeships.

Rule 27(a), RLPR, authorizes the Supreme Court to appoint the Director as trustee of an attorney's files or trust account when no one else is available to protect the clients of a deceased, disabled or otherwise unavailable lawyer. In June 2019, the Director was appointed trustee over the client files belonging to deceased attorney David Lingbeck. The Director has completed her inventory of client files and will begin contacting clients whose files are less than seven years old or contain a valuable original document.

In December 2018, the Director was appointed trustee over the client files and trust account belonging to one attorney who abandoned his practice, David J. Van House. This trusteeship remains open. The Director has returned 75 client files to date; gathered, reviewed and audited bank records for Mr. Van House's trust account in order to determine entitlement to the funds in the account; and (3) conducted additional investigation into the ownership of the trust account funds. The Director anticipates filing a final report and petition for discharge with the Court in the near future. In 2019-2020, the Director closed the trusteeship of Joel Ray Puffer.

The Director continues to retain the following client files:

- Michael Joseph Keogh trusteeship—121 files which are eligible for expunction in June 2020.

- John Wade Tackett trusteeship—97 files which are eligible for expunction in September 2020.
- Hugh P. Markley trusteeship—574 wills will be eligible for expunction in December 2020, pursuant to a request by Mr. Markley’s widow for an extension of the previously designated expunction date.
- Michael J. Corbin trusteeship—213 files which are eligible for expunction in March 2021.
- Roger Lincourt Belfay trusteeship—140 files which are eligible for expunction in April 2021.
- Rachel Bengtson-Lang trusteeship – 74 files are eligible for expunction in August 2021, with the exception of documents the Director determines to be of value, which are eligible for expunction in August 2023.
- Ronald Resnik trusteeship – 161 files are eligible for expunction in August 2021, with the exception of documents the Director determines to be of value, which are eligible for expunction in August 2023.
- Jan Stuurmans trusteeship – 37 files are eligible for expunction in June 2022, with the exception of documents the Director determines to be of value, which are eligible for expunction in June 2024.
- Francis E. Muelken trusteeship – 291 files are eligible for expunction in June 2024.
- Joel Ray Puffer trusteeship – 17 files are eligible for expunction in July 2022, with the exception of documents the Director determines to be of value, which are eligible for expunction in July 2024.

K. Professional Firms.

Under the Minnesota Professional Firms Act, Minn. Stat. § 319B.01 to 319B.12, professional firms engaged in the practice of law must file an initial report and annual reports thereafter demonstrating compliance with the Act. The Director’s Office has handled the reporting requirements under this statute since 1973. Annual reports are sought from all known legal professional firms, which include professional corporations, professional limited liability corporations and professional limited

liability partnerships. The filing requirements for professional firms are described on the OLPR website.

Professional firms pay a filing fee of \$100 for the first report and a \$25 filing fee each year thereafter. In reporting year 2018 (December 1, 2018 – November 30, 2019), there were 88 new professional firm filings. Fees collected from professional firm filings are included in the Board’s annual budget. As of June 4, 2020, the Director’s Office received \$66,350 from 2,386 professional firm filings during fiscal year 2020. There were 68 new professional firm filings for the period of December 2019 – June 4, 2020. The Director’s Office received \$68,050 during fiscal year 2019.

An assistant director, paralegal, and administrative clerk staff the professional firms department. For fiscal year 2020 (as of June 4, 2020), the total attorney work time for overseeing the professional firms department was 155 hours. The total non-attorney work time was 468.5 hours.

IV. DISTRICT ETHICS COMMITTEES (DECs).

Minnesota is one of only a few jurisdictions which continues to extensively use local volunteers to conduct the preliminary investigation of the majority of ethics complaints. The Supreme Court Advisory Committee considered the continued vitality of the DEC system in 2008 and determined that the Minnesota system works well and strongly urged its continuation. Each DEC corresponds to the MSBA bar district, and each is assigned a staff lawyer from the OLPR as a liaison to that DEC. Currently, there are approximately 249 DEC volunteers.

Initial review of complaints by practitioners and nonlawyers is valuable in reinforcing confidence in the system. The overall quantity and quality of the DEC investigative reports remain high. For calendar year 2019, the Director’s Office followed DEC recommendations in 83% of investigated matters which were closed during the year. Many of the matters in which the recommendation was not followed involved situations in which the DEC recommended a particular level of discipline, but the Director’s Office sought an increased level of discipline. This typically involved

attorneys with prior relevant discipline that was not considered by the DEC in making its recommendation. These matters are counted as not following the DEC recommendation.

In 2019, the monthly average number of files under DEC consideration was 92, fluctuating between a low of 85 and a high of 102. The year-to-date average for 2020 is 95, as of April 30, 2020. Rule 7(c), RLPR, provides a 90-day goal for completing the DEC portion of the investigation. For calendar year 2019, the DEC's completed 241 investigations, taking an average of 4 months to complete each investigation.

For calendar year 2019, of the completed DEC investigations statewide, the following dispositions were made (measured by the number of files, rather than lawyers):

Determination discipline not warranted	168
Admonition	59
Private probation	4

The annual seminar for DEC members, hosted by the Office and the Board, will be held this year on Friday, September 25, 2020. All DEC members, plus select members of the bench and bar with some connection to the discipline system, are invited. The seminar will likely be held virtually given uncertainty around public gatherings in the fall. Active DEC members attend the annual DEC Seminar at no cost.

Rule 3(a)(2), RLPR, requires that at least 20% of each DEC be nonlawyers. The rule's 20% requirement is crucial to the integrity of the disciplinary system and to the public's perception that the system is fair and not biased in favor of lawyers.

Compliance with that requirement has improved since 2011, when 11 of the 21 DEC's did not meet the 20% non-lawyer membership requirement. As of May 1, 2020, only one district is not in full compliance. Additionally, one DEC is focused on recruiting new members as several current members have exceeded their term limits. The Office and Board continue to work with these districts to bring them into compliance.

V. FY2021 GOALS AND OBJECTIVES.

The OLPR is very close to obtaining compliance with the Board and Court's case processing goals in a sustainable way and will strive to meet those goals in FY21 on a consistent basis. The OLPR also looks forward to updating its website, a much needed overall, and continuing to focus on implementation of the Strategic Plan, which prioritizes proactive educational outreach to the profession and public.

Dated: July 1, 2020.

Respectfully submitted,

SUSAN M. HUMISTON
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY

and

ROBIN M. WOLPERT
CHAIR, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

Attachment 10

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

ROBIN M. WOLPERT
CHAIR
LONDON J. ASCHEMAN
JEANETTE M. BOERNER
DANIEL J. CRAGG
THOMAS J. EVENSON
MICHAEL FRIEDMAN
GARY M. HIRD
KATHERINE A. BROWN HOLMEN
PETER IVY
SHAWN JUDGE
VIRGINIA KLEVORN
TOMMY A. KRAUSE
MARK LANTERMAN
PAUL J. LEHMAN
KYLE A. LOVEN
KRISTI J. PAULSON
SUSAN C. RHODE
SUSAN STAHL SLIETER
GAIL STREMEL
MARY L. WALDKIRCH TILLEY
BRUCE R. WILLIAMS
ALLAN WITZ
JULIAN C. ZEBOT

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MEETINGS OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD 2021

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

<u>Date</u>	<u>Location</u>
Friday, January 29, 2021*	TBD
Friday, April 23, 2021*	TBD
Friday, June 18, 2021*	TBD
Friday, September 24, 2021	Earle Brown Center, Brooklyn Center, MN (following seminar)

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

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