LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING AGENDA

May 17, 2024 – 12:30pm (in person and via Zoom) – Minnesota Judicial Center
Lunch provided for Board members 12:00pm

Zoom information:

https://courts-state-mn-us.zoomgov.com/j/1603232723?pwd=OXFkZ0sxTi9LdHVKY0xaZGF1TUVNUT09

Meeting ID: 160 323 2723
Passcode: 165391

---

1. Approval of minutes of January 14, 2024, meeting (attachment 1).

Personnel

2. Tribute to departing liaison Justice Margaret Chutich.

3. Introduction of new Board members Tom Gorowsky, Jill Nitke, and John Zwier.

4. Introduction of new Board administrative assistant Ava Shannon.

Action and Discussion Items

5. Rules committee report (attachment 2):

    a. Proposed amendment to Rule 1.8(e) (attachment 3);
    b. Consideration of ABA Model Rule 1.16 (*see* attachment 2).

6. Presentation by Minnesota State Bar Association's Professional Regulation Committee on respondent participation in complainant appeals.

Break – 10 minutes

7. 2025 Board proposed meeting dates (attachment 4).

8. Updates on Board projects and participation:

    a. Minnesota District Judge's Ass'n request to consult on Rule 6Z.
    b. Minnesota Supreme Court Advisory Committee on Rules of Lawyers Professional Responsibility.

9. Director's report.

10. 2024 statistics – first quarter (attachment 5).

11. Open discussion.

12. Adjournment.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING

OPEN MEETING MINUTES

January 26, 2024, 12:30 pm (In-person and via Zoom) – Minnesota Judicial Center

---

Board member attendance:

- Ben Butler, Chair
- Landon Ascheman
- Dan Cragg
- Michael Friedman
- Jordan Hart
- Katherine Brown Holmen
- Tommy Krause
- Mark Lanterman
- Paul Lehman
- Frank Leo
- Kevin Magnuson
- Melissa Manderschied
- Kristi Paulson
- Jill Prohofsky
- Matthew Ralston
- Susan Rhode, Vice-Chair
- Sharon Van Leer
- Carol Washington
- Antoinette Watkins, Executive Committee Member
- Bruce Williams

Other attendees:

- Minnesota Supreme Court liaison Justice Margaret Chutich
- Susan Humiston, Director of the Office of Lawyers Professional Responsibility
- Members of the OLPR staff
- Members of the public

Minutes:

1. Bruce Williams moved to approve the minutes of the October 27, 2023, meeting, as amended by Chair Butler to reflect correct attendance. Landon Ascheman seconded. The motion passed unanimously.

2. Chair Butler introduced Justice Chutich as the Board's new liaison Justice. The Board welcomed Justice Chutich, who expressed her enthusiasm for working on the important issues the Board and the OLPR are involved in. Justice Chutich particularly recognized the hard work of volunteer Board members, something rather unique to the supreme court's advisory and other committees and boards.

3. The Board recognized departing members Andrew Rhoades, Mark Lanterman, and Vice-Chair Susan Rhode. Justice Chutich thanked the departing members for their service. Director Humiston and OLPR staff presented departing members with certificates of service.

4. Chair Butler nominated Kristi Paulson to serve as the Board's new Vice-Chair. Mr. Williams, among others, seconded the motion. The motion passed unanimously.

5. Michael Friedman, chair of the Rule 3.8, working group, presented the group's latest proposal. Mr. Friedman explained that Kevin Magnuson had joined the working group and that the group had reached consensus on the following:

> **Rule 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR**
>
> The prosecutor in a criminal case shall:
>
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that <u>a prosecutor is required to disclose under applicable law and procedural rules which, a prosecutor knows or reasonably should know,</u> tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Mr. Williams moved to approved the proposed amendment to Rule 3.8. Mr. Ascheman seconded the motion. The motion was approved unanimously.

6. Rules committee chair Dan Cragg presented the report of that committee. The committee had adopted the following:

> **Rule 1.8: CONFLICT OF INTEREST; CURRENT CLIENTS; SPECIFIC RULES.**
>
> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (4) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:
>
> (i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;
> (ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and
> (iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Mr. Cragg reported that, after the committee made its recommendation, he had developed significant concerns that provision (iii) could have First Amendment implications. Discussion was had. Antoinette Watkins moved to eliminate (iii) from the recommendations. The motion was seconded and was approved unanimously.

Mr. Friedman questioned whether similar First Amendment concerns might apply to (i). Discussion was had. Mr. Friedman moved to delete (i) from the recommendations. At substantially the same time, Matt Ralston moved to approved the recommendations with (i) and (ii) included. The Chair heard Mr. Friedman's motion first. Frank Leo seconded that motion. Discussion was had, and the Board agreed that further committee work on the proposal was necessary. Mr. Friedman and Mr. Ralston withdrew their motions. Mr. Williams moved to return the matter to the rules committee. Paul Lehman seconded the motion, and the motion was approved unanimously.

Mr. Cragg next presented the rules committee's recommendation for a Board opinion on whether the Board and OLPR have jurisdiction over misconduct allegedly committed by lawyers appointed *pro hac vice* in the United States District Court for the District of Minnesota. The committee had proposed a draft opinion stating that, in most cases, no such jurisdiction existed or should be executed. Director Humiston reported that OLPR investigates such cases, often at the request of the federal bench. Mr. Cragg pointed out that a Board opinion on this topic might run afoul of the Rule 4(c), Rules on Lawyers Professional Responsibility, because it arguably does not involve "questions of professional conduct." Mr. Magnuson moved to refer the matter to the Executive Committee for further consideration. Mr. Ascheman seconded the motion, and it was approved unanimously.

7. Break – 10 minutes.

8. Chair Butler reported on a request from the Minnesota District Judges Association for help forming a working group on attorney- and judicial-ethics rules in light of the upcoming 2024 elections. Several members volunteered. Chair Butler said he would consult with MDJA and provide more information as available.

9. Chair Butler reported on the Board's 2024 statistics regarding complainant appeals and panel matters.

10. Chair Butler initiated a discussion into potential participation by respondents in complainant appeals. The matter had arisen because a respondent's counsel asked to present new information to a reviewing Board member; Chair Butler had declined to allow this and informed counsel that generally respondents did not participate in such appeals. Discussion was had. Several members said respondents had never participated in any meaningful way in complainant appeals before them. At least one member questioned whether respondent participation might be constitutionally required if complainant appeals were quasi-judicial adversarial proceedings. Chair Butler, other members, and Director Humiston reported that they did not see complainant appeals in that way. The Board informally suggested that the rules committee could take up the matter if Mr. Cragg or others on that committee saw fit to do so.

11. Mr. Williams moved to adjourn. Ms. Watkins seconded the motion, and it was approved unanimously. The meeting adjourned at approximately 2:54pm.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

RULES & OPINIONS COMMITTEE

COMMITTEE REPORT

MAY 17TH, 2024

I. SUMMARY OF MEETING

On March 18, 2024, the Rules & Opinions Committee met to discuss potential adoption of two ABA model rules:

(1) ABA Model Rule 1.8(e)(3) on gifts to indigent clients; and
(2) New amendments to ABA Model Rule 1.16 imposing an ongoing due diligence requirement with respect to clients.

II. BACKGROUND

a. ABA Model Rule of Professional Conduct 1.8

In August 2020, the ABA adopted a "humanitarian exception" at Model Rule of Professional Conduct 1.8(e)(3), which governs lawyers' (1) representation of and (2) ability to provide modest gifts to indigent clients pro bono. Modest gifts under this Rule may include, but are not limited to, food, rent, transportation, medicine and other basic living expenses. MODEL R. PROF. CONDUCT 1.8(e)(3). But under 1.8(e)(3)(iii), a lawyer "may not publicize or advertise a willingness to provide [modest] gifts to prospective clients." In effect, this provision prohibits a lawyer from publicizing or advertising any desire to provide gifts beyond court costs and expenses of litigation or administrative proceedings. *Id.* (see ABA commentary).

Minnesota has not acted on ABA's implementation of a humanitarian exception thus far. If the Supreme Court does choose to adopt ABA Model Rule 1.8(e)(3), it would be codified as 1.8(e)(4) because of a nonconforming rule Minesota has adopted as (e)(3) already. Minnesota's current Rule of Professional Conduct 1.8(e) proivides:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> > (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
> >
> > (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
> >
> > (3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client.

MINN. R. PROF. CONDUCT 1.8(e).

b. ABA Model Rule of Professional Conduct 1.16

In 2023, the ABA House of Delegates approved amendments to the Model Rule of Professional Conduct 1.16 ("Declining or Terminating Representation") in order to aid lawyers in detecting and preventing involvement in their clients' unlawful activities.[1]

Amendments to the Model Rule are as follows:

(1) "[a] lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation."
(2) Further, a lawyer shall withdraw from the representation of a client if "the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct."[2]

The amendments serve to impose a duty of due diligence on lawyers to inquire and assess representations of their clients throughout the entire representation. These duties may vary based on facts and circumstances, and requires lawyers to inquire into factors such as (1) the identity of the client; (2) the lawyer's "experience and familiarity with the client"; (3) the "nature of the requested legal services"; (4) the relevant jurisdictions involved in the representations, and whether such jurisdictions are "considered at high risk for money laundering and terrorist financing"; and (5) identities of those depositing into or receiving funds from the lawyers client trust account, or any other accounts in which client funds are held.[3] Further, the amendments add a mandatory (rather than merely permissive) duty for lawyers not to represent, or halt representation of, a client who attempts to utilize the lawyer's services for purposes of committing crime or fraud. These changes to Model Rule 1.16 have sparked debate across the legal profession.

III. COMMITTEE DECISIONS

a. Adopt humanitarian exception, but strike (e)(iii) from, ABA Model Rule 1.8

The Rules & Opinions Committee recomends to (1) adopt the humanitarian exception outlined under ABA Model Rule 1.8(e)(3), but (2) strike ABA Model Rule provision 1.8(e)(3)(iii),

---

[1] https://www.fmglaw.com/professional-liability/aba-passes-hotly-debated-amendments-to-model-rule-1-16/

[2] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation/

[3] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation/comment_on_rule_1_16_declining_or_terminating_representation/

which prohibits a lawyer from publicizing or advertising a willingness to provide modest gifts to prospective, indigent clients pro bono. If adopted, this would be codified as 1.8(e)(4).[4]

The Committee did not believe the advertising prohibition could survive First Amendment scrutiny, and to the extent this is a close question, the Committee did not see much utility in the restriction to justify risking a likely First Amendment challenge and the potential attorney's fee award to a successful plaintiff. Prior attorney's fee awards in successful First Amendment challenges have been paid out of OLPR funds.

b. Decline to implement ABA Model Rule 1.16 amendments

The Rules & Opinions Committee reasons that while prevention of crimes is obviously important, the due-diligence requirements of the ABA's amended Model Rule 1.16 represent overreaching by federal law enforcement. As the Rule is not "narrowly tailored," lawyers across solo and small firms may be adversely affected, as they are not always able to inquire into possible breaches of the law at every stage in a client's representation.[5] While the Rule particularly is meant to address the federal government's anti-money-laundering goals, the vague ABA language causes lawyers' due diligence duties to extend to a plethora of other issues.[6] Furthermore, the amendments do not tailor due diligence to particular fields of practice, which can pose particular difficulties for, among others, criminal defense lawyers. Accordingly, the Committee recommends against the adopted of amended ABA Model Rule 1.16.

[4] See attached redlines.
[5] https://www.abajournal.com/web/article/house-adopts-model-rule-changes-on-representation-after-heated-debate

[6] *Id*.

MN Rule of Professional Conduct 1.8 – Conflict of Interest: Current Clients: Specific Rules

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

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

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

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

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

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

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

1.8 Commentary

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

[11] Paragraph (e)(4) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(4) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for

receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

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

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

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

PROPOSED 2025 PUBLIC MEETING DATES

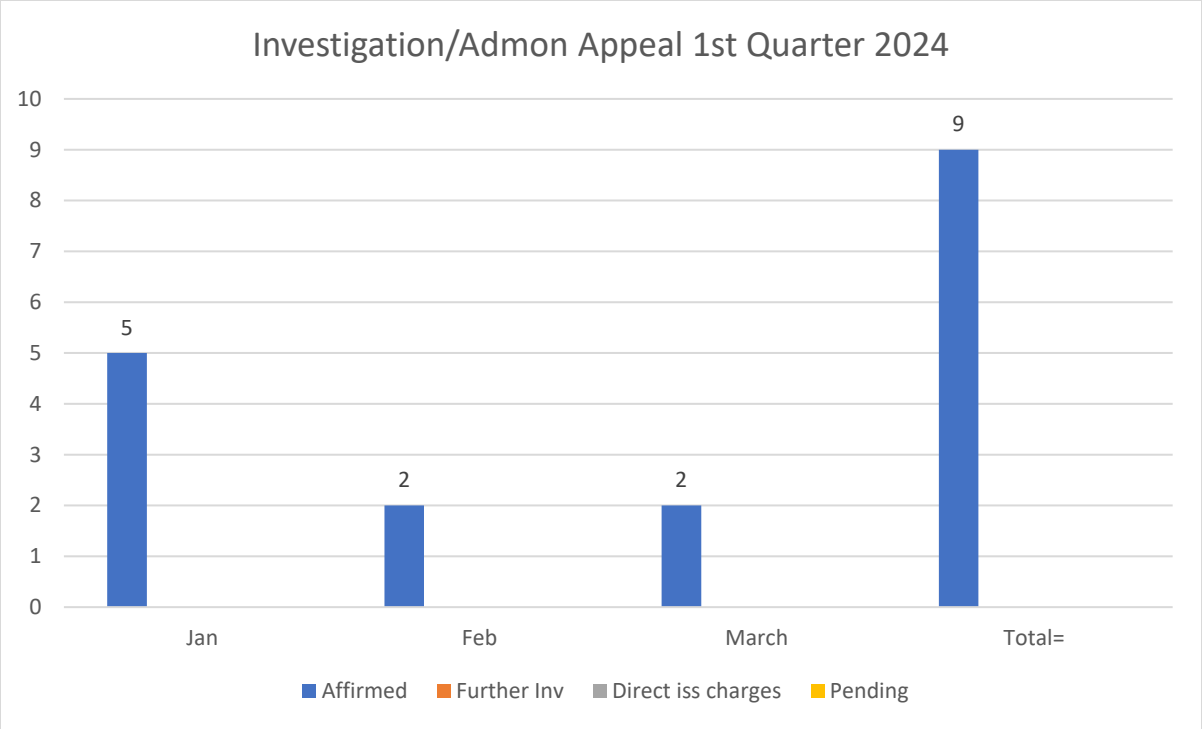
PRESENTED AT MAY 17, 2024 PUBLIC MEETING

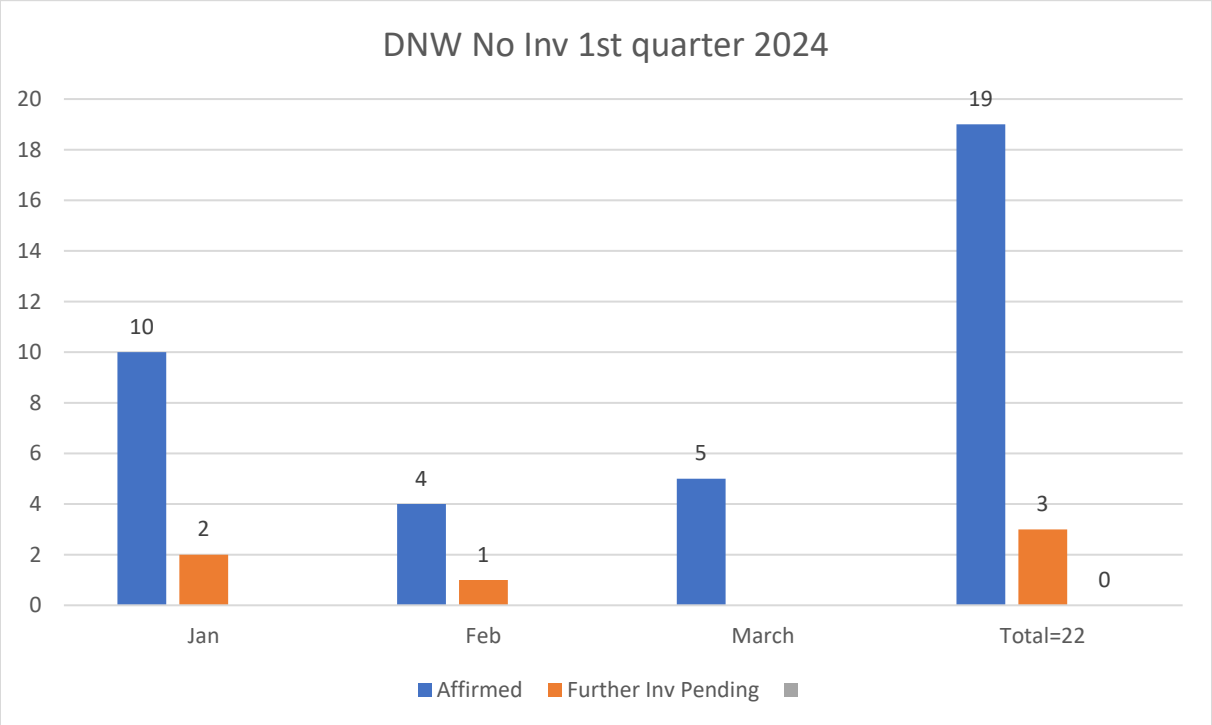
January 24, 2025

May 16, 2025

September 13, 2025

December 13, 2025


Investigation/Admon Appeal 1st Quarter 2024
10
9
8
7
6
5
4
3
2
1
0
5
2
2
9
Jan
Feb
March
Total=
Affirmed
Further Inv
Direct iss charges
Pending


DNW No Inv 1st quarter 2024
20
18
16
14
12
10
8
6
4
2
0
10
2
4
1
5
19
3
0
Jan
Feb
March
Total=22
Affirmed
Further Inv Pending

OLPR Dashboard for Court And Chair

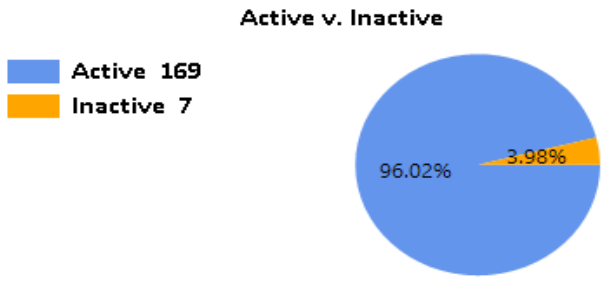
	Month Ending April 2024	Change from Previous Month	Month Ending March 2024	Month Ending April 2023
Open Files	581	-7	588	531
Total Number of Lawyers	394	-9	403	391
New Files YTD	385	90	295	357
Closed Files YTD	359	97	262	298
Closed CO12s YTD	74	19	55	83
Summary Dismissals YTD	189	51	138	134
Files Opened During April 2024	90	-7	97	95
Files Closed During April 2024	97	-9	106	71
Public Matters Pending (excluding Resignations)	28	3	25	29
Panel Matters Pending	9	2	7	14
DEC Matters Pending	105	11	94	112
Files on Hold	8	-3	11	8
Advisory Opinion Requests YTD	625	156	469	592
CLE Presentations YTD	13	4	9	5
Files Over 1 Year Old	176	1	175	152
Total Number of Lawyers	116	-1	117	91
Files Pending Over 1 Year Old w/o Charges	124	-1	125	90
Total Number of Lawyers	88	-2	90	60

	2024 YTD	2023 YTD
Lawyers Disbarred	1	2
Lawyers Suspended	6	11
Lawyers Reprimand & Probation	0	1
Lawyers Reprimand	2	0
TOTAL PUBLIC	**9**	**14**
Private Probation Files	2	5
Admonition Files	27	19
TOTAL PRIVATE	**29**	**24**

FILES OVER 1 YEAR OLD

Year/Month	OLPR	AD	PAN	HOLD	SUP	SCUA	REIN	Total
2018-10	2							**2**
2018-12	1							**1**
2019-04	1							**1**
2019-06				1				**1**
2019-07	1							**1**
2019-08	1							**1**
2020-01	1				3			**4**
2020-02	1				1			**2**
2020-05	1							**1**
2020-08	1							**1**
2020-09	1							**1**
2020-10						1		**1**
2021-01	1				1			**2**
2021-03	1			1	1	1		**4**
2021-04	2					1		**3**
2021-05	3					2		**5**
2021-06	3				3			**6**
2021-07	1				1	1		**3**
2021-08	4					1		**5**
2021-09	3							**3**
2021-10	2					2		**4**
2021-11	5							**5**
2021-12	1				1	2		**4**
2022-01	1							**1**
2022-02					1			**1**
2022-03	2				1	1		**4**
2022-04	4							**4**
2022-05	5			1				**6**
2022-07	4							**4**
2022-08	7	1			2	1		**11**
2022-09	7		1		2			**10**
2022-10	4			3				**7**
2022-11	6				1			**7**
2022-12	5					1		**6**
2023-01	7							**7**
2023-02	15		1				1	**17**
2023-03	9	2		1	2	1		**15**
2023-04	11	2	1			1		**15**
Total	**124**	**5**	**3**	**7**	**20**	**16**	**1**	**176**

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	160	21
Total Cases Under Advisement	16	16
Total Cases Over One Year Old	**176**	**37**



All Pending Files as of Month Ending April 2024

Year/Month	SD	DEC	REV	OLPR	AD	PAN	HOLD	SUP	SCUA	REIN	RESG	TRUS	**Total**
2018-10				2									**2**
2018-12				1									**1**
2019-04				1									**1**
2019-06							1						**1**
2019-07				1									**1**
2019-08				1									**1**
2020-01				1				3					**4**
2020-02				1				1					**2**
2020-05				1									**1**
2020-08				1									**1**
2020-09				1									**1**
2020-10									1				**1**
2021-01				1				1					**2**
2021-03				1			1	1	1				**4**
2021-04				2					1				**3**
2021-05				3					2				**5**
2021-06				3				3					**6**
2021-07				1				1	1				**3**
2021-08				4					1				**5**
2021-09				3									**3**
2021-10				2					2				**4**
2021-11				5									**5**
2021-12				1				1	2				**4**
2022-01				1									**1**
2022-02								1					**1**
2022-03				2				1	1				**4**
2022-04				4									**4**
2022-05				5			1						**6**
2022-07				4									**4**
2022-08				7	1			2	1				**11**
2022-09				7		1		2					**10**
2022-10				4			3						**7**
2022-11				6				1					**7**
2022-12				5					1				**6**
2023-01				7									**7**
2023-02				15		1				1			**17**
2023-03				9	2		1	2	1				**15**
2023-04				11	2	1			1				**15**
2023-05				15			1	4	1				**21**
2023-06			1	17	1				1				**20**
2023-07				23					1				**24**
2023-08		1	2	35				1					**39**
2023-09		2	2	43						1			**48**
2023-10		2		27				1		1	1	1	**33**
2023-11		7	1	19				1					**28**
2023-12		6	5	12									**23**
2024-01		15	3	18						1			**37**
2024-02		25		19									**44**
2024-03		18		12							1		**31**
2024-04	12	29		9						2	5		**57**
Total	**12**	**105**	**14**	**373**	**6**	**3**	**8**	**27**	**19**	**6**	**7**	**1**	**581**

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

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 509 **February 28, 2024**

Disqualification to Prevent the Misuse Use of "Confidential Government Information"

Model Rule of Professional Conduct 1.11(c) protects a person from the misuse of certain information about the person that the government used its authority to acquire. The confidential information protected by Rule 1.11(c) is defined by the Rule as information obtained under government authority about a person which the government is prohibited from disclosing to the public or has a legal privilege not to disclose and is not otherwise available to the public. The Rule provides that a lawyer who acquired the information while serving as a government officer or employee is disqualified from representing a "private client" whose interests are adverse to prevent the confidential government information from being used to the material disadvantage of that person. The Rule applies regardless of whether the lawyer seeking to represent the private client has left government employ or office or maintains a private law practice (e.g., a part-time practice) while still in government employ or office. The Rule applies to a lawyer representing a "private client," meaning a client whom the lawyer represents in private practice, regardless of whether the client is a public entity or private individual or entity.

Introduction

Rule 1.11 of the ABA Model Rules of Professional Conduct is titled "Special Conflicts of Interest for Former and Current Government Officers and Employees."[1] This Opinion clarifies the scope of Rule 1.11(c), a disqualification provision that protects against the misuse of "confidential government information."[2] The Opinion begins by explaining this provision and highlighting how it differs from the ordinary confidentiality obligations that the Model Rules establish for lawyers generally, including but not limited to current and former government lawyers. The opinion then addresses two areas of potential ambiguity: (1) whether the Rule applies to a current government lawyer representing a private client; (2) and the definition of "private client."

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

[2] When used in this opinion, the phrase "confidential government information" means "information that has been obtained under government authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public" as defined by Rule 1.11(c). Additional discussion of this concept can be found at section I of this opinion.

Opinion

I. Rule 1.11(c)

In general, under the Model Rules, lawyers representing a public or government entity or official[3] have the same confidentiality obligations as lawyers for private individuals and private entities, although statutes and regulations may establish additional confidentiality obligations. Rules 1.6(a), 1.8(b) and 1.9(c) generally provide that both during and after the representation, a lawyer may not reveal information relating to the client's representation or use such information to the client's disadvantage without the client's informed consent, unless an exception applies. Further, to prevent the misuse of such information, a former client's lawyer generally may not represent another person when that person's interest is materially adverse to the former client if the new matter is the same as or substantially related to the earlier one, unless the former client consents. Rule 1.18 imposes similar (although not entirely identical) obligations and restraints when a lawyer learns information from a prospective client.

In the case of a lawyer who serves, or served, in or on behalf of the government, there is an additional confidentiality provision that is the subject of this Opinion. ABA Model Rule of Professional Conduct 1.11(c) provides:

> (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

The objective of the Rule is to "prevent the lawyer's improper use of his or her official position" and to protect others from the exploitation of confidential government information, acquired by the lawyer while serving as a public officer or employee.[4]

Rule 1.11(c) differs in several significant respects from the ordinary confidentiality rules. First, Rule 1.11(c) provides for disqualification in some circumstances to protect against the misuse of

[3] When used in this opinion, both the adjectives "public" and "government" are used to describe officers and employees to whom this Rule applies. The title of Rule 1.11 uses the adjective "government" while the text of Rule 1.11 uses the term "public" to describe the officers and employees. The Committee believes they mean the same thing.

[4] ART GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1983-2013, 279 (2013).

certain government information adversely to any "person" (i.e., an individual or an entity)[5] to whom the information relates (which may or may not be the person from whom the government obtained the information), rather than adversely only to a former client.[6]

Second, Rule 1.11(c) refers to confidential government information about a person "acquired when the lawyer was *a public officer or employee*," indicating that the rule applies irrespective of whether lawyers served in a representational capacity when they acquired the confidential government information. This furthers the Rule's objective because there is the same need to protect the information from misuse regardless of the lawyer's role or status in the government when the lawyer obtained the information. For instance, a lawyer who also is a police officer is a public officer for purposes of Rule 1.11(c).[7] That lawyer is subject to Rule 1.11(c) when that lawyer possesses information, acquired when serving as a police officer, that the lawyer knows is confidential government information that could be used to the material disadvantage of a person whose interests are adverse to the lawyer's private client in a matter.[8]
Accordingly, the Rule applies to lawyers who acquire confidential government information while serving as legislators, public executives, and other public officers who are not representing the government as legal counsel.[9]

Third, Rule 1.11(c) does not protect all government information but only protects certain information about a person acquired by the lawyer while serving as a public officer or employee. In particular, it protects "information that has been obtained under governmental authority and which . . . the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public." Comment [4] to Rule 1.11 explains that government lawyers are prohibited from disclosing or using "confidential

---

[5] In general, the Model Rules use the term "person" to refer to anyone—e.g., an individual or an entity (such as a corporation or a public entity)—and not exclusively to an individual. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.2 & 4.4(a).

[6] Typically, Rule 1.11(c) applies when a lawyer, having acquired confidential government information while in government service, seeks to use the information adversely to a party other than the government. But the Rule can apply equally if the lawyer were to seek to use the information adversely to the government. For example, if a lawyer serving in public office were to learn confidential government information, the Rule would apply if the lawyer were to seek to use the information on behalf of a private client in litigation against the government, assuming the other requirements of the Rule were met.

[7] Whether a practicing lawyer who is also a police officer has a conflict of interest that would prohibit that lawyer from representing particular clients, such as criminal defendants, will depend on the facts and is not the subject of this opinion.

[8] N.Y.S. Bar Ass'n Comm. on Prof'l Ethics Op. 1187 (2020) ¶ 8 ("If the police officer-lawyer is aware of confidential government information such as unfavorable employment reviews or non-public job discipline imposed on another police officer who is a witness in a traffic court matter against the police officer-lawyer's private client and if that information "could be used to the material disadvantage" of the officer-witness in plea negotiations or for impeachment purposes, then the police officer-lawyer may not represent the traffic court defendant in that matter.")

[9] *See* N.Y.S. Bar Ass'n Comm. on Prof'l Ethics Op. 1169 (2019) (Rule 1.11(c) applies to a lawyer who gains confidential government information in the position of Town Supervisor, even when he did not work on the matter and came across the information by happenstance); Utah State Bar, Ethics Advisory Comm. Op. 15-01, 2015 WL 3513297, at *3 (2015) (opining that Rule 1.11(a)(2) applied to a lawyer who formerly served as a member of the Utah Board of Pardons and Parole; Philadelphia Bar Ass'n, Prof'l Guidance Comm. 2012-2, 2012 WL 7148213, at *1 (2012) ("Rule 1.11 does not contemplate whether the specific duties of the public officer or employee are categorized as attorney/non-attorney.").

government information about a person," as defined in the Rule, because the government itself has an obligation to protect such information.[10]

A lawyer serving as a government officer or employee may learn this information in various ways, whether because the lawyer is working on the particular matter or because another public officer or employee shares it with the lawyer in the course of the lawyer's work.[11] If the lawyer was serving in a representative capacity, Rule 1.11(c) protects information also protected by Rule 1.6. Rule 1.11(c) also may extend to information not protected under 1.6 if the information was acquired by a lawyer while serving as a public officer or employee, but not as a lawyer representing the government, meaning the lawyer learned the information in a nonrepresentational capacity.[12]

Fourth, Rule 1.11(c) limits confidential government information to information "obtained under government authority." This includes information obtained pursuant to a grand jury subpoena, a search warrant, a regulatory subpoena, or other government power. Further, Rule 1.11(c) does not apply to all information obtained under government authority, but only to information that, at the time the Rule is applied, the government is legally prohibited from disclosing to the public or has a legal privilege not to disclose if the information is not otherwise publicly available.[13] Whether government information is publicly available—e.g., whether it can be obtained through routine discovery—will be a question of fact. So is the question of whether the information "could be used to [the person's] material disadvantage."[14] The Rule does not require that the confidential

---

[10] MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. [4].

[11] *See* N.Y.S. Bar Ass'n Comm. on Prof'l Ethics Op. 1169 (2019) ¶ 16 & 17.

[12] *Id.*

[13] *See* Or. State Bar Formal Op. 2005-120 (2015) at 13. This conceptualization of "confidential government information" is analogous to the definition of "nonpublic information" in 5 C.F.R. § 2635.703(b) ("Use of nonpublic information"). This regulation stipulates that a federal government employee "shall not engage in a financial transaction using nonpublic information or allow the improper use of nonpublic information to further his own private interest or that of another[.]" Section 2635.703(b) defines "nonpublic information" as information that an employee obtains due to Federal employment and that he knows or reasonably should know: "(1) Is routinely exempt from disclosure under 5 U.S.C. 552 or is protected from disclosure by statute, Executive order or regulation; (2) Is designated as confidential by an agency; or (3) has not actually been disseminated to the general public and is not authorized to be made available to the public on request."

[14] In some circumstances courts have found that confidential government information providing "strategic insights" or "roadmaps" is disqualifying. *See, e.g.*, *In re* Nat'l Prescription Opiate Litigation, 2019 WL 1274555 (N.D. Ohio, E.D. 2019) (under 1.11(c) court disqualified former Executive Assistant United States Attorney from participation as plaintiff's private counsel in portions of Opioid Multi District Litigation where that attorney had previously received confidential government information shared in the "spirit of confidence and trust" that could now materially disadvantage the third-party); N.Y. State Bar Ethics Op. 1148 (2018) (knowing how agency usually handles child support enforcement matters, untethered to personal and substantial involvement in or confidential information about specific mater, insufficient to disqualify former agency lawyer from representing respondents against agency); United States v. Villaspring Health Care Ctr., 2011 WL 5330790 (E.D. KY. C.D. 2011) (based in part on Rule 1.11(c), disqualifying lawyer from defending facility (Villaspring) because as assistant attorney general he gained "strategic insights such as knowledge of the strengths and weaknesses of the evidence" by interviewing facility's former employees); *but see* Baltimore County v. Barnhart, 30 A. 3d 291 (Md. Ct. Spec. App. 2011) (former county attorney who dealt with county's pension obligations did not acquire confidential information she could use to county's detriment in representing county retiree in pension dispute); Kronberg v. LaRouche, 2010 U.S. Dist. Lexis 35050,*16, (E.D. Va. Apr. 9, 2010) (disqualification necessary to protect the integrity of the judicial system where former prosecutor obtained confidential government information that could be used to the material disadvantage of

government information has been or will be used by the lawyer, only that it *could* be used to the material disadvantage of a person.[15]

II. ABA Model Rule of Professional Conduct 1.11(c) applies to lawyers currently serving and those who formerly served as public officers or employees.

It is sometimes observed that Rule 1.11(c) applies to lawyers who are former public officers and employees, which is true. But the Rule does not apply *exclusively* to lawyers who formerly served as public officers or employees. Rule 1.11(c) applies equally to a full or part time lawyer who currently serves or formerly served as a government officer or employee when the lawyer (1) represents a private client outside of the lawyer's government employment and (2) possesses information, acquired when the lawyer was a government officer or employee, that the lawyer knows is confidential government information that could be used to the material disadvantage of a person whose interests are adverse to the lawyer's private client in a matter.

When proposed in 1983 by the Kutak Commission, Model Rule 1.11 initially aimed to establish guidelines for addressing conflicts of interest relating to the "revolving door" – i.e., lawyers moving from government service to private practice.[16] The original Rule 1.11 was titled, "Successive Government and Private Employment."[17] The Ethics 2000 Commission, however, recommended expanding the Rule's scope to address conflicts for lawyers *currently and formerly* serving the government as well as those "moving from one government agency to another."[18] In its report to the ABA House of Delegates the Ethics 2000 Commission explained, "an expanded Rule 1.11 … combines for the first time in a single rule a lawyer's duties when opposing a former client, and the special obligations of a government employee not to abuse the power of public office."[19] The Ethics 2000 Commission recommended, and the ABA House of Delegates adopted, the Rule's re-title to "Special Conflicts of Interest for Former and Current Government Officers and Employees" along with amendments to the text of the Rule.[20]

The wording of Model Rule 1.11(c) differs from that of the other provisions of Model Rule 1.11. Rules 1.11(a) and (b) apply explicitly and exclusively to "a lawyer who has *formerly* served as a

---

one or more defendants in spite of the passage of 20 years, because the information provided him at minimum with a "mental roadmap").

[15] Comment [8] explains that the disqualification requirement of Rule 1.11(c) applies only when the lawyer has "actual knowledge" of the confidential government information, not when the information merely can be imputed to the lawyer. *See* Babineaux v. Foster, 2005 WL 711604 (E.D. La. 2005) (defendant's motion to disqualify plaintiff's counsel from lawsuit against City based on counsel's previous employment as Assistant City Attorney denied in part because absent actual knowledge of confidential government information, presumption that attorney acquired confidential government information not sufficient to result in disqualification); N.Y.S. Bar Ass'n Comm. on Prof'l Ethics Op. 1169 (2019), para. 17.

[16] The Commission on the Evaluation of Professional Standards (Kutak Commission) was appointed in 1997 to review and revise the Model Code of Professional Responsibility. The 1983 Model Rules of Professional Conduct was its product. Garwin, *supra* note 4, at xii.

[17] *Id.* at 278.

[18] *Id.* at 291.

[19] ETHICS 2000 REPORT 401, ABA HOUSE OF DELEGATES, at 5 www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_hod_082001.pdf.

[20] Garwin, *supra* note 4, at 288 (2013); PREAMBLE AND SCOPE REPORTER'S EXPLANATION OF CHANGES, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/e2k_migated/10_85rem.pdf (see Ethics 2000 Commission Reporters Explanation of Changes at 40).

public officer or employee of the government."[21] These provisions require the former government lawyer to adhere to the confidentiality duty of Model Rule of Professional Conduct 1.9(c), governing the preservation of information relating to the representation of a former client. Paragraphs (a) and (b) also set out when the lawyer who formerly served as a public officer or employee of the government is disqualified from representing a client in a matter in which the lawyer participated personally and substantially as a government officer or employee and when the conflict is imputed to other lawyers in the personally disqualified lawyer's firm.[22]

Rule 1.11(d) applies explicitly to "a lawyer *currently* serving as a public officer or employee."[23] It subjects the currently serving lawyer to other conflict rules (Model Rules 1.7 and 1.9) and imposes other conflict-of-interest restrictions.[24]

---

[21] ABA Model Rule of Professional Conduct, Rule 1.11(a) and (b) provides:

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

[22] In general, to encourage lawyers to enter government service, the disqualification standards in these provisions are less restrictive than the standards for lawyers who move between private law firms. Comment [4] to Rule 1.11 explains, "a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially … The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substative issues on which the lawyer worked, serves a similar function." *See* Douglas R. Richmond, *As the Revolving Door Turns: Government Lawyers Entering or Returning to Private Practice and Conflicts of Interest*, 65 ST. LOUIS U. L.J. 325, 350 (2021).

[23] ABA Model Rule of Professional Conduct 1.11(d) provides:

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public office or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

[24] Notably, another difference between Rule 1.11 (a) and (d) and Rule 1.11(c) is that the conflict under Rule 1.11(c) is not consentable. Rule 1.11(c) does not authorize the government, the client, or person against whom the information might be used to waive the conflict arising under the Rule. *See, e.g.*, Pa. Bar Ass'n Legal Ethics and Prof'l Responsibility Comm. Op. 94-132 (1994) (former government lawyer who obtains confidential government information while employed by the Department of Justice may not represent a client in a matter in which she was involved as government lawyer, even with government consent); S.C. Bar Ethics Advisory Op. 97-41 (1998) (former special prosecutor may represent victims in civil suit against criminal defendant being prosecuted by solicitor's

Against this background, and for several reasons, the Committee reads the phrase "a lawyer having information that the lawyer knows is confidential government information about a person" to include not only lawyers formerly serving as public officers or employees but also lawyers who are *currently* serving as public officers or employees.

To begin with, unlike Rules 1.11(a), (b) and (d), the language of Rule 1.11(c) does not expressly limit the paragraph's application to lawyers who currently or formerly served as government officers or employees. Rather it provides, in pertinent part:

> [A] lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.

By its terms, the rule applies to any "lawyer having information that the lawyer knows is confidential government information about a person," without regard to whether that lawyer is currently or formerly in government service.

The phrase "acquired when the lawyer was a public officer or employee" refers to a lawyer who was in government service at the time the lawyer acquired the confidential government information, not to a lawyer who is no longer in service with the government when the information would be used for a private client's benefit. In other words, the clause in context does not refer to the lawyer's employment status when seeking to "represent a private client." Rather, it refers to the lawyer's employment status with the government at the time the lawyer "acquired" the confidential government information.

Further, this reading accomplishes the objective of the Rule and leads to the soundest result. There is no less need to restrict the misuse of confidential government information for private clients when the lawyer is still employed by the government or serving as an official of the government even if part-time. We do not perceive any countervailing considerations that would justify exempting current public officers and employees from a disqualification provision designed to prevent that lawyer from misusing confidential government information for a private client's benefit.

Other authorities have similarly concluded that Rule 1.11(c) applies not only to lawyers after they leave government service but also to lawyers currently serving as public officers or employees who, outside their government service, represent private clients. For example, the New York State Bar Association's ethics committee applied Rule 1.11(c) to a lawyer who concurrently served as a town supervisor and maintained a private law practice.[25] Citing an earlier opinion of its own, that ethics committee observed that the Rule is designed to disqualify even part-time public officers from accepting private clients. This application, the opinion recognized, would prevent

---

office if solicitor's office consents, unless she had access to confidential information that could lead to unfair advantage).

[25] *See* N.Y. State Bar Ethics Op. 1169 (2019), *supra* note 8.

the private client from retaining the lawyer to gain an improper advantage through the lawyer's public office and would also avoid public suspicion about the client gaining such an advantage.[26]

Likewise, the Nebraska State Bar Association's ethics committee concluded that part-time county attorneys may not represent private clients in family law matters that involve support of a minor where, through their public office, those part-time county attorneys have access to systems that contain a wealth of confidential government information that could be used against an adverse party.[27]

In sum, lawyers currently serving as public officers or employees are not exempt from Rule 1.11(c). Rule 1.11(c) applies, for example, to lawyers in private practice who are appointed to be special prosecutors and continue to represent private clients, to lawyers who represent private clients and are also part-time prosecutors or attorneys general, and to lawyers who represent private clients and are also hired as counsel for a town or municipality.

III. Defining "private client" as used in ABA Model Rule of Professional Conduct 1.11(c)

Model Rule 1.11(c) applies to "a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee" when that lawyer represents a "private client." This raises the question of whether a "private client" is a client whom the lawyer represents in the lawyer's private practice (i.e., outside the scope of the lawyer's public employment), or a client who is a private person or entity (as opposed to a government entity or public official), or both.

Rule 1.11(c) applies in the very least to private persons and entities whom a lawyer represents in private practice, whether that practice follows government service or is concurrent with it. This interpretation is consistent with the ABA Formal Opinion 342 (1975) in which the Committee determined that the term "private employment" in the text of ABA Model Code of Professional Responsibility Disciplinary Rule 9-101(B), the predesessor to Model Rule 1.11(a)'s disqualification provision, "refers to employment as a private practitioner."[28] The opinion explained, "If one underlying consideration is to avoid the situation where government lawyers may be tempted to handle assignments so as to encourage their own future employment in regard to those matters, the danger is that a lawyer may attempt to derive undue financial benefit from fees in connection with subsequent employment, and not that he may change from one salaried government position to another."[29]

Additionally, the term "private client" also includes *public* entities and officials whom the lawyer represents in private practice, if those clients are not legally entitled to employ the confidential

---

[26] *Id.*

[27] *See* Neb. Lawyers' Advisory Comm. Op. 22-01 (2022); *see also* R.I. Ethics Advisory Panel Op. 2016-03 (2016) (although "the rationale of the Rule applies as well to concurrent government and private employment," Rule 1.11 is inapplicable because "the inquiring attorney [who served as a part-time judge] has not acquired disqualifying confidential information about City in his role as municipal court judge").

[28] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 342 (1975) (issued to interpret DR 9-101(B) after the Model Code was amended to incorporate imputed disqualification. DR 9-101(B) read: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.").

[29] *Id.* at 2.

information.[30] This conclusion is consistent not only with the Rule's purpose but also with a federal appellate decision, General Motors Corp. v. City of New York,[31] which was well-known to the Ethics 2000 Commission when it drafted Rule 1.11. Applying New York's version of the Code of Professional Responsibility, the court disqualified a former United States Department of Justice lawyer—who had transitioned from government service to private practice in a law firm—from representing the city of New York. The city was suing General Motors and wanted to hire the lawyer and his firm. While assigned to the Department's Antitrust Division, the lawyer had substantial responsibility in a Department of Justice antitrust suit against General Motors. The Court, interpreting New York's Code of Professional Responsibility and Canon 9, found that the lawyer was engaged in "private employment" for purposes of DR 9-101(B) because the lawyer was practicing in a private firm.

The Rule is plainly intended, in part, to prevent a lawyer from using confidential government information on behalf of a private (i.e., non-governmental) individual or entity whom the lawyer represents in full-time or part-time private practice and who is not entitled to exploit the information. However, as the *General Motors* case illustrates, there is no less need to protect against the misuse of confidential government information on behalf of a *public* entity that differs from the one to whom the information belongs and that is not entitled to use the information.

Accordingly, a lawyer who served as a public officer or employee, and who obtained confidential government information about a person while working for the government, would be subject to the Rule when the lawyer, in private employment, represents any client that is not entitled to use the information. Typically, the new client will be a private person whom the lawyer represents in private practice, but the Rule is not limited to this scenario.[32]

The Rule does not apply, however, when a current government lawyer represents a party, including a private individual, in the lawyer's role as a government lawyer. For example, as permitted by law, a government lawyer may represent a government employee in the employee's personal capacity.[33] Likewise, the Rule by its terms does not apply to lawyers who transfer from one

[30] Rule 1.11(c) prefaces its disqualification requirement with the phrase, "Except as law may otherwise expressly permit." Regardless of whether the law specifically authorizes the lawyer's representation, the Rule should not apply in the situation in which the lawyer's client is legally permitted to use the information in question. When the law permits the client to use the confidential government information that the lawyer acquired while in government service, the reason for the disqualification provision – i.e., to prevent the improper use of confidential government information – is inapplicable, and the client's countervailing interest in counsel of choice outweighs any conceivable interest in a wooden application of the rule. *Cf.* MODEL RULES OF PROF'L CONDUCT, Scope, para. [14] ("The Rules of Professional Conduct are rules of reason.").

[31] 501 F.2d 639 (2d Cir. 1974).

[32] The Rule does not, however, apply to a lawyer who served as a public officer or employee, obtained confidential government information about a person while working for the government, and transitioned to work in private practice where the lawyer represents the same government entity (e.g., an agency, commission, bureau or board) as a client. Although the term "private client" might be read broadly to include any client whom the lawyer represents in private practice, it would not serve the Rule's purpose to disqualify a lawyer from representing a public entity that is legally entitled to use the information in question.

[33] *See, e.g.,* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); 28 C.F.R. §§ 50.15, 50.16.

government position to another and undertake a representation in their role as a government lawyer.[34]

Conclusion

Model Rule of Professional Conduct 1.11(c) applies to a lawyer who acquired confidential government information while the lawyer was employed by or an official of the government, regardless of whether the lawyer seeking to represent the private client has now left government employ or office or maintains a private law practice (e.g., a part-time practice) while still in government employ or office. The Rule applies to the representation of a "private client," which can be any client represented in the lawyer's private practice that is not legally entitled to use the confidential government information in question.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328
CHAIR: Bruce Green, New York, NY ■ Mark A. Armitage, Detroit, MI ■ Matthew Corbin, Olathe, KS ■ Robinjit Kaur Eagleson, Lansing, MI ■ Brian Shannon Faughnan, Memphis, TN ■ Hilary P. Gerzhoy, Washington, D.C. ■ Wendy Muchman, Chicago, IL ■ Hon. Jennifer A. Rymell, Fort Worth, TX ■ Tim Pierce, Madison, WI ■ Charles Vigil, Albuquerque, NM

CENTER FOR PROFESSIONAL RESPONSIBILITY: Mary McDermott, Lead Senior Counsel

©2024 by the American Bar Association. All rights reserved.

[34] Where the particular government lawyer possesses relevant "confidential government information" that the lawyer is not permitted to use, then wholly apart from the Rule, the government may opt to assign a different lawyer to the matter to protect against misuse of the information. Further, regardless of whether the disqualification rule applies, courts have discretion to disqualify lawyers as necessary to prevent the misuse of confidential information. *See, e,g.*, MODEL RULES OF PROF'L CONDUCT R. 1.10, cmt. 7 (recognizing that even when a law firm satisfies the rule's screening requirement for a personally disqualified lawyer who moved to the firm, "tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation"). And, of course, there are potential remedies, including employment sanctions and civil liability, if a lawyer were to misuse confidential government information.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 510 **March 20, 2024**

Avoiding the Imputation of a Conflict of Interest When a Law Firm is Adverse to One of its Lawyer's Prospective Clients

Under Rule 1.18 of the Model Rules of Professional Conduct, a lawyer who was consulted about a matter by a prospective client, but not retained, is disqualified from representing another client who is adverse to the prospective client in the same or a substantially related matter if the lawyer received from the prospective client "disqualifying information"—i.e., information that could be significantly harmful to the prospective client in the matter. But, if the lawyer "took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client," and the firm takes specified procedural precautions, then the lawyer's conflict of interest is not imputed to others in the lawyer's firm.

This opinion addresses the "reasonable measures" necessary to avoid the imputation of conflicts of interest under Rule 1.18.[1] First, information that relates to "whether to represent the prospective client" includes information relating to (1) whether the lawyer may undertake or conduct the representation (e.g., whether a conflict of interest exists, whether the lawyer can conduct the work competently, whether the prospective client seeks assistance in a crime or fraud, and whether the client seeks to pursue a nonfrivolous goal), and (2) whether the engagement is one the lawyer is willing to accept. Second, to avoid imputation, even if information relates to "whether to represent the prospective client," the information sought must be "reasonably necessary" to make this determination. Third, to avoid exposure to disqualifying information that is not reasonably necessary to determine whether to undertake the representation, the lawyer must limit the information requested from the prospective client and should caution the prospective client at the outset of the initial consultation not to volunteer information pertaining to the matter beyond what the lawyer specifically requests.

Introduction

ABA Model Rule of Professional Conduct 1.18 establishes a lawyer's duties to a prospective client, a "person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter."[2] A prospective client who does not ultimately form a client-lawyer relationship with a lawyer is entitled to confidentiality protections similar to those afforded to a former client. Model Rule 1.18(b) forbids a lawyer from using or revealing information learned from a prospective client except as Rule 1.9 would permit with a former

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

[2] MODEL RULE OF PROF'L CONDUCT R. 1.18(a) provides that "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."

client.[3] Consequently, a lawyer who learns confidential information from the prospective client generally may not disclose that information or use it adversely to the prospective client unless, either during the consultation or thereafter, the prospective client gives informed consent confirmed in writing.

Rule 1.18 includes a disqualification provision that is less restrictive than Rule 1.9's provision governing adversity to a former client. Under Rule 1.9(a), without the former client's informed consent confirmed in writing, a lawyer may not undertake a new representation that is materially adverse to the former client if the new matter is the same as, or substantially related to, the earlier one. The premise is that, in this situation, the lawyer will ordinarily have learned significant confidential information in the earlier representation that could be used to the former client's disadvantage in the same or a substantially related matter.

By comparison, under Rule 1.18(c), a lawyer is disqualified from undertaking a representation in the same or a substantially related matter against a prospective client only if the lawyer received "disqualifying information"–i.e., "information from the prospective client that could be significantly harmful to" the prospective client.[4] The premise underlying this less restrictive provision is that a consultation with a prospective client may be brief and that it cannot be presumed that the prospective client provided the lawyer with information that could later be significantly harmful to the prospective client, particularly given that lawyers may have taken precautions to avoid learning such disqualifying information.

ABA Formal Opinion 492 discusses the type of information that could be disqualifying for a lawyer who has communicated with a prospective client. Disqualifying information could potentially include views on the potential resolution options, personal accounts of relevant events, sensitive personal information, and strategies. Determining whether a lawyer received disqualifying information necessitates a fact-based inquiry that may depend on a variety of factors including the length of the communication and the nature of the topics discussed.

Opinion 492 left open the further question, on which we now focus, of the circumstances under which a personally disqualified lawyer's conflict of interest under Rule 1.18(c) will be imputed to others in the lawyer's firm such that they too would be disqualified from representing other parties in the same or substantially related matter when those parties' interests are materially adverse to the prospective client's interests.

---

[3] MODEL RULE OF PROF'L CONDUCT R. 1.18(b) provides that "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." Comment [5] also provides that not only may a lawyer 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, but a prospective client may also expressly consent to the lawyer's later use of information received from the prospective client.

[4] MODEL RULE OF PROF'L CONDUCT R. 1.18(c) provides that "[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, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)." For additional discussion of whether information is "significantly harmful" s*ee* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 348-350 (10th ed. 2023).

Conflict Imputation under Rule 1.18

Generally, under Rule 1.10(a), when lawyers practice in a law firm, one lawyer's conflict of interest, including one arising under Rule 1.9(a), is imputed to other lawyers of the firm. This is the general principle for conflicts involving prospective clients as well. Rule 1.18(c) provides: "If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)."

Paragraph (d) provides, however, that the conflict of the individual lawyer will not be imputed to that lawyer's firm in two situations.[5] The first is when both the potential client and the affected client provide informed consent, confirmed in writing. The second, the focus of this opinion, is when:

- the personally disqualified lawyer took "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client,"
- the personally disqualified lawyer is timely screened from any participation in the matter, and receives no portion of the fee, and
- written notice is promptly given to the prospective client.

To date, little guidance has been provided regarding what constitutes "reasonable measures" under Rule 1.18(d). Like the determination of whether information is disqualifying, this calls for a fact-intensive inquiry. Whether a lawyer took "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client" may depend on the lawyer's background and experience, the client's identity, and the nature of the engagement. This opinion offers general guidance to a lawyer in a law firm seeking to minimize the risk that a meeting with a prospective client will later give rise to an imputed conflict of interest.[6] It also offers guidance to a lawyer who undertakes an inquiry under Rule 1.18(d) to determine whether the law firm is disqualified because of its lawyer's earlier meeting with a prospective client who did not retain that lawyer.

Importantly, failing to take "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client" is not misconduct. Lawyers may seek to learn a great deal of detail regarding the potential representation that goes far beyond what is reasonably necessary to determine whether to take on the engagement. But doing so means that the personally disqualified lawyer's conflict would later

[5] MODEL RULE OF PROF'L CONDUCT R. 1.18(d) provides that "[w]hen 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."

[6] As a reminder, MODEL RULE OF PROF'L CONDUCT R. 1.0(c) provides that a "law firm" can refer to a law partnership, a professional corporation, a sole proprietorship, or another association authorized to practice law; or to lawyers employed in a legal services organization or the legal department of a corporation or other organization.

be imputed to other lawyers in the same firm and would need to be addressed by means other than a nonconsensual screen and written notice to the prospective client. That could be obtaining informed written consent from the prospective client or declining the new matter.

Information relevant to assessing a potential representation

The initial question is whether particular information that a lawyer elicited from a prospective client at a preliminary meeting relates to "whether to represent the prospective client." Not all information solicited from or provided by a prospective client will relate to this determination. The type of information that lawyers may obtain to determine "whether to represent the prospective client" principally falls into two categories, which may overlap: first, information may relate to the lawyer's professional responsibilities (i.e., whether the rules permit the lawyer to take on a matter),[7] and, second, information may relate to the lawyer's more general business decisions (i.e., whether the lawyer wants to accept the matter).[8] The former category would naturally include information that is necessary to ensure compliance with legal and ethical obligations, including those set forth in the Model Rules of Professional Conduct. This could conceivably include, among other things, sufficient information to determine whether the lawyer could handle the matter competently (Rule 1.1), whether the client or prospective client seeks to use the lawyer's services to commit or further a crime or fraud (Rules 1.2(d) and 1.16(a)(4)), whether the lawyer would be able to communicate effectively with the prospective client (Rule 1.4), whether the lawyer has a conflict of interest (Rules 1.7-1.12 and 1.18), and whether all of the prospective client's potential claims would be frivolous (Rule 3.1). But it is very possible that less than all information that is responsive to these factors—particularly the merits of potential claims—is reasonably necessary to determine whether to undertake the representation.

Determining whether a conflict of interest would preclude the representation or would require one or more clients' informed consent is most obviously required to determine whether a representation may be accepted. To ascertain whether the representation would entail a conflict of interest, the lawyer would ordinarily seek the identity of other relevant parties, witnesses, and counsel. If a conflict check reveals a current or former representation of one of the parties, additional information may be needed to determine how the conflict rules apply.

The latter category (i.e., information regarding the business decision) would potentially include information to enable the lawyer to assess the amount of time the engagement will take, the range of anticipated compensation for that time, the potential expenses, and the likelihood of being fully compensated. It might also include whether the matter aligns with the lawyer's abilities and interests, such as whether it is within an area of specialization or an area in which the lawyer

[7] *See, e.g.*, Jimenez v. Rivermark Cmty. Credit Union, No. 3:15-CV-00128-BR, 2015 BL 140013, 2015 U.S. Dist. LEXIS 61745, *16-17 (D. Or. May 11, 2015) (the lawyer sought information from a prospective client to ascertain whether the matter would give rise to a conflict of interest).

[8] *See, e.g.*, Vaccine Ctr., LLC v. Glaxosmithkline LLC, No. 2:12-cv-01849-JCM-NJK, 2013 BL 414523, 2013 U.S. Dist. LEXIS 60046, *4-5 (D. Nev. Apr. 25, 2013) (finding that a lawyer sufficiently limited exposure to disqualifying information where the lawyer requested information necessary to assess whether a contingency matter may be economically feasible, even though such a determination "requires a thorough analysis and understanding of liability and damages issues because the attorney must weigh the significant amount of money and time that will be invested in representing the plaintiff with the ultimate likelihood of prevailing and recovering damages").

seeks more experience. Additionally, lawyers may have other considerations regarding whether to take on a representation. For example, a law firm's internal policy, such as one limiting contingency matters or limiting the representation of parties in certain industries, may preclude accepting an engagement.

Certain purposes for learning disqualifying information would be unrelated to the lawyer's determination "whether to represent the prospective client." For example, a lawyer might elicit detailed information about the matter so the lawyer could persuade the prospective client to retain the lawyer. Details about the prospective client's litigation or transaction might enable the lawyer to impress the prospective client by offering strategic insight into how to conduct the representation or by relating the matter to the lawyer's past experience. It is generally permissible for lawyers to promote themselves in this manner (although they must avoid giving incompetent advice or making false statements to the prospective client). However, a legitimate factual inquiry toward this end would not relate to the lawyer's determination "whether to represent the prospective client." Rather, the inquiry would relate to the prospective client's decision whether to retain the lawyer.

When disqualifying information is "reasonably necessary" to the lawyer's determination

The more difficult question under Rule 1.18(d)(2) is whether it is "reasonably necessary" for the lawyer to learn disqualifying information about a proposed lawsuit, transaction, or other matter to enable the lawyer to make the determination whether to represent the prospective client.

A lawyer might permissibly undertake a very detailed inquiry into the matter before deciding whether to accept it. But such a permissible inquiry may not be the same as an inquiry that is "reasonably necessary" such that the lawyer's conflict is not imputed to the firm. In general, the rules distinguish situations where lawyers' conduct serves a legitimate or permissible purpose and those where the conduct is "necessary" to serve that purpose.[9] It is easier to show that the lawyer's conduct was intended to serve a legitimate purpose than to show that it was *necessary* to serve that purpose.[10]

Some inquiry into the facts of a potential lawsuit may be "reasonably necessary," not because it is compelled by Rule 3.1, which forbids filing a frivolous complaint, but because it could potentially prejudice a client for the lawyer to accept the representation and then withdraw to avoid filing a frivolous complaint. The lawyer ordinarily—but not necessarily in every instance—can ascertain after modest inquiry whether a proposed lawsuit would likely be frivolous. Such reasonable inquiries would mitigate against the risk of a later need to withdraw, although they would not entirely eliminate that risk: after undertaking to represent a plaintiff, a lawyer may

[9] On one hand, lawyers may impose incidental burdens on third parties to serve some other "substantial purpose" (Rule 4.4(a)), and prosecutors may make certain extrajudicial statements that would be otherwise forbidden to serve "a legitimate law enforcement purpose" (Rule 3.8(f)). On the other hand, the exceptions to confidentiality permit disclosures information relating to clients' representation only "to the extent the lawyer reasonably believes necessary" to serve a purpose identified by the rule (Rule 1.6(b)).

[10] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) (when a former client brings an ineffective assistance of counsel claim, "[i]t will be rare to confront circumstances where trial counsel can reasonably believe that . . . prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer").

learn additional information that convinces the lawyer that it would be impermissible to file a lawsuit.

In such instances, a more extensive inquiry would not be reasonably necessary. Although Rule 3.1 requires a lawyer to ensure, before bringing or defending a proceeding, or asserting or controverting an issue therein, that "there is a basis in law and fact for doing so that is not frivolous," the lawyer can analyze this further throughout a representation. More thorough investigation of facts and research of the law are ordinarily undertaken after commencing the representation, not only to comply with Rule 3.1, but to advise the client about whether to proceed with a pleading, motion, or argument, as required by Rule 1.4, and, if so, to do so competently, as required by Rule 1.1.

A lawyer considering whether to enter into a lawyer-client relationship with a potential plaintiff may have other reasons to investigate the potential claim. For example, the lawyer may be inclined to substantially investigate the matter before committing to accept it on a contingent fee basis, not because of concerns that the claim may be frivolous, but to assess the likelihood of prevailing and the likely recovery. It would be permissible to conduct this detailed inquiry to make the business decision whether to accept the representation, but it may not be "reasonably necessary" to do so.

Rule 1.16(a) mandates, in part, that a lawyer "inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept . . . the representation." It further provides that "a lawyer shall not represent a client . . . if: . . . (4) the . . . prospective client seeks to use . . . the lawyer's services to commit or further a crime or fraud despite the lawyer's discussion . . . regarding the limitations on the lawyer assisting with the proposed conduct."[11] This restriction aligns with Rule 1.2(d), which forbids a lawyer from assisting a client "in conduct that the lawyer knows is criminal or fraudulent." (Rule 1.16(a) imposes additional obligations even after the representation is permissibly accepted.) The nature and extent of the inquiry required by Rule 1.16(a) to ascertain whether a "prospective client seeks to use . . . the lawyer's services to commit or further a crime or fraud" is discussed in Comments [1] and [2]. The latter provides in relevant part:

> [I]nquiry into and assessment of the facts and circumstances will be informed by the risk that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. This analysis means that the required level of a lawyer's inquiry and assessment will vary for each client or prospective client, depending on the nature of the risk posed by each situation. Factors to be considered in determining the level of risk may include: (i) the identity of the client, such as whether the client is a natural person or an entity and, if an entity, the beneficial owners of that entity, (ii) the lawyer's experience and familiarity with the client, (iii) the nature of the requested legal services, (iv) the

[11] The ABA House of Delegates amended Rule 1.16 adding paragraph (a)(4) in August 2023. *See* ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY AND ABA STANDING COMMITTEE ON PROFESSIONAL REGULATION REVISED RESOLUTION AND REPORT 100 (2023), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20230805-revised-resolution100report.pdf.

> relevant jurisdictions involved in the representation (for example, whether a jurisdiction is considered at high risk for money laundering or terrorist financing), and (v) the identities of those depositing into or receiving funds from the lawyer's client trust account, or any other accounts in which client funds are held.

Thus, the facts and circumstances of a prospective representation required by Rule 1.16(a) necessitates eliciting information from the prospective client. Such inquiry is not just permissible, but "reasonably necessary to determine whether to represent the prospective client."

Once a lawyer has sufficient information to decide whether to represent the prospective client, further inquiry may be permissible, but it will no longer be "necessary." That means once a lawyer has decided there is any basis on which the lawyer would or must decline the representation, stopping inquiry on all subjects would place the lawyer in the best position to avoid potential imputation of a conflict to other lawyers in their firm. *See* Comment [4] to Rule 1.18.

This understanding is consistent with the premise of Rule 1.18(d), which is that, as a general matter, even if a lawyer learns some disqualifying information from a prospective client, that amount will presumptively be limited compared to what would be required should an engagement ensue. Additionally, prospective clients will not have a reasonable apprehension that their information will be misused because the lawyer with whom the prospective client met will be screened. The imputation provision strikes a balance between the prospective client's interest in being assured that the lawyer will comply with the confidentiality obligation, on one hand, and other clients' interest in access to counsel as well as the law firm's legitimate business interests, on the other. *Compare* Rule 1.10(a)(2) (permitting screening to avoid imputation of a conflict "aris[ing] out of the disqualified lawyer's association with a prior firm").

Reasonable measures to avoid exposure to additional information

The remaining question is what constitute "reasonable measures" to limit exposure to more information than reasonably necessary.[12] This is another question on which there is limited guidance in prior opinions.

Initial interactions between lawyers and prospective clients can unfold in various ways. The lawyer could allow the potential client to talk freely about the matter. And the lawyer might even follow up on the interview with additional investigation before deciding whether to accept the matter. But such a free-flowing conversation is unlikely to involve reasonable measures to limit the information being provided. Alternatively, lawyers can strictly limit the scope of the conversation. But it would be unreasonable to require lawyers to tell prospective clients not to reveal any information, since some is needed for the lawyer to determine whether to accept or decline the representation.

[12] Under Rule 1.18(d)(2), if the lawyer who received disqualifying information in a meeting with a prospective client took "reasonable measures" to avoid learning more disqualifying information than reasonably necessary, and the requisite procedural measures are taken, the lawyer's conflict would not be imputed to the lawyer's firm. Conversely, even if, in retrospect, the disqualifying information received by the lawyer was no more than reasonably necessary to determine whether to represent the prospective client, the lawyer's conflict will be imputed to the firm if the lawyer failed to take the prescribed "reasonable measures."

Balancing these interests, Rule 1.18(d)(2)'s "reasonable measures" standard means that lawyers must exercise discretion throughout the initial communications, while the lawyer and prospective client are considering whether to enter into a lawyer-client relationship. Lawyers must limit the information sought from prospective clients, and those who seek and obtain information without limitations fall short of that standard.[13]

One further measure to avoid exposure to more disqualifying information than is reasonably necessary is for the lawyer to warn the prospective client that the lawyer has not yet agreed to take on the matter and that information should be limited only to what is necessary for the lawyer and client to determine whether to move forward with an engagement.[14] The warning need not have particular wording. The reasonableness of a lawyer's measures depends on whether they are designed to limit the information received before a lawyer-client relationship is established.

When a prospective client is interviewing more than one firm, lawyers may be motivated to elicit or receive extensive information to evaluate the litigation and explain why they are a good fit for the potential client's needs. Lawyers are welcome to review and elicit extensive disqualifying information, recognizing that if the prospective client does not retain them, they and other lawyers in their firm will forgo the possibility of representing a client with interests that are materially adverse in the same or a substantially related matter. Alternatively, if the lawyers want to preserve the possibility of representing such a person, they will have to take reasonable measures to limit the amount of disqualifying information obtained from the prospective client, such as by cautioning against providing prejudicial information.

"Timely" screening from participation in the later matter

The timely screening of a lawyer who has interviewed a prospective client, but declined to take on the matter, likely need not occur until the law firm becomes aware of information that there is a potential conflict. The alternative of erecting an appropriate screen for each potential client would be an unnecessary and unreasonable burden and is not required by Rule 1.18. Rather,

[13] For example, in Skybell Technologies, Inc. v. Ring, Inc., No. SACV 18-00014 JVS (JDEx), 2018 BL 481288, 2018 U.S. Dist. LEXIS 217502 (C.D. Cal. Sep. 18, 2018), the lawyer performed a conflict check before any substantive communications and with the direction from counsel to provide no more information than necessary to conduct a conflicts search. But after ensuring there was not a conflict, the lawyer did not limit the information to be shared and encouraged the potential client to be as open as possible with information related to a potential lawsuit. The lawyer conducted a one-hour telephone conversation with the company's CEO, CFO, and two outside counsel to discuss key patents, theories of the case that they were being infringed, issues concerning validity and prior art, the prospective client's financial position, and settlement strategy. After preparing a 40-page proposal for the representation and an enforcement proposal, the lawyer then participated in a three-hour meeting with at least the CEO, CFO, and one outside lawyer for the prospective client wherein they discussed the same topics, and a proposed budget. The District Court disqualified the lawyer's firm from a subsequent adverse representation, noting that while the lawyer did take reasonable steps to limit information imparted before the conflict check, the lawyer took no further steps afterward.

[14] *See*, *e.g.*, Vaccine Ctr., LLC v. GlaxoSmithKline LLC, *supra* note 7, at *1 (concluding that reasonable measures were taken when a lawyer warned the prospective client from the outset that his firm did not normally take cases on a contingency basis, but that he would review any material or documents in order to assess whether it would be economically viable to represent the client).

screening is timely when it takes place once a law firm becomes aware there is a potential conflict in representing someone adverse to the former potential client.[15]

Conclusion

When obtaining preliminary information before undertaking a representation, a lawyer who seeks to minimize the risk of law firm disqualification should obtain from the prospective client only information reasonably necessary to determine whether the engagement is one permitted under the rules (including whether the engagement is one within the lawyer's capabilities), and whether it is one which the lawyer is willing to accept. The prospective client should be cautioned at the outset of the initial consultation not to volunteer information pertaining to the matter until after the lawyer has determined whether the rules would permit the representation, whether the lawyer is able to handle the matter, and whether the client and lawyer can come to terms. If the lawyer learns disqualifying information and has failed to take reasonable measures to avoid receiving more disqualifying information than reasonably necessary for these purposes, and no representation ensues, the lawyer's conflict will be imputed to the lawyer's firm: not only the lawyer but also other lawyers in the firm will be disqualified from representing a client adverse to the prospective client in the same or a substantially related matter without the prospective client's informed consent.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328
CHAIR: Bruce Green, New York, NY ■ Mark A. Armitage, Detroit, MI ■ Matthew Corbin, Olathe, KS ■ Robinjit Kaur Eagleson, Lansing, MI ■ Brian Shannon Faughnan, Memphis, TN ■ Hilary P. Gerzhoy, Washington, D.C. ■ Wendy Muchman, Chicago, IL ■ Hon. Jennifer A. Rymell, Fort Worth, TX ■ Tim Pierce, Madison, WI ■ Charles Vigil, Albuquerque, NM

CENTER FOR PROFESSIONAL RESPONSIBILITY: Mary McDermott, Lead Senior Counsel

©2024 by the American Bar Association. All rights reserved.

[15] *See* Vaccine Ctr., LLC v. Glaxosmithkline LLC, *supra* note 7, at *2 (finding timely screening of disqualified lawyers when the lawyers were promptly screened as soon as the lawyers learned that Rule 1.18 was implicated); Beckenstein Enterprises-Prestige Park, LLC v. Lichtenstein, No. X06cv030183486S, 2004 Conn. Super. LEXIS 2179, 2004 WL 1966863, at *6 (Conn. Aug. 11, 2004) (finding screening was timely when the disqualified attorney was screened "[a]s soon as [the defendant's counsel] was notified by plaintiffs' counsel of [the disqualified attorney's] discussion with [the plaintiff.]").

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 511 **May 8, 2024**

Confidentiality Obligations of Lawyers Posting to Listservs

Rule 1.6 prohibits a lawyer from posting questions or comments relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's informed consent if the lawyer's contributions will not disclose, or be reasonably likely to lead to the disclosure of, information relating to a client representation.

Introduction

This opinion considers whether, to obtain assistance in a representation from other lawyers on a listserv discussion group, or post a comment, a lawyer is impliedly authorized to disclose information relating to the representation of a client or information that could lead to the discovery of such information.[1] Without the client's informed consent, Rule 1.6 forbids a lawyer from posting questions or comments relating to a representation—even in hypothetical or abstract form—if there is a reasonable likelihood that the lawyer's posts would allow a reader then or later to infer the identity of the lawyer's client or the particular situation involved, thereby disclosing information relating to the representation. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, if the lawyer's contributions do not disclose information relating to any client representation. The principles set forth in this opinion regarding lawyers' confidentiality obligations when they communicate on listservs apply equally when lawyers communicate about their law practices with individuals outside their law firms by other media and in other settings, including when lawyers discuss their work at in-person gatherings.[2]

Relevant Principles Regarding the Duty of Confidentiality

Subject to exceptions not applicable here,[3] ABA Model Rule of Professional Conduct 1.6(a) provides that: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023.
[2] *See* ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 480 (2018) for a discussion of other forms of lawyer public commentary including blogs, writings, and educational presentations.
[3] This opinion does not discuss the exceptions to the confidentiality obligation provided for in paragraph (b) because we cannot envision a recurring situation in which any of the exceptions are likely to authorize disclosures of information relating to a representation on a lawyer's listserv.

out the representation or the disclosure is permitted by paragraph (b)."[4] Comment 3 explains that Rule 1.6 protects "all information relating to the representation, whatever its source" and is not limited to communications protected by attorney-client privilege.[5] A lawyer may not reveal even publicly available information, such as transcripts of proceedings in which the lawyer represented a client. As noted in ABA Formal Opinion 04-433 (2004), "the protection afforded by Model Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer." Among the information that is generally considered to be information relating to the representation is the identity of a lawyer's clients.[6]

Because Rule 1.6 restricts communications that "could reasonably lead to the discovery of" information relating to the representation,[7] lawyers are generally restricted from disclosing such information even if the information is anonymized, hypothetical, or in abstracted form, if it is reasonably likely that someone learning the information might then or later ascertain the client's identity or the situation involved.[8] Comment 4 explains, that without client consent, Rule 1.6 prohibits:

> disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

The breadth of Rule 1.6 was emphasized in ABA Formal Opinion 496 (2021), which cautioned lawyers about responding to online criticism: Lawyers "who choose to respond online must not disclose information that relates to a client matter *or that could reasonably lead to the discovery of confidential information by another*." (Emphasis added).

Lawyers may disclose information relating to the representation with the client's informed consent. "Informed consent" is defined in Rule 1.0(e) to denote "the agreement by a person to a

---

[4] Comment 2 to Model Rule 1.6(a) emphasizes that a "fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."

[5] The attorney-client privilege is an evidentiary rule applicable to judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence about a client. The duty of client-lawyer confidentiality is not limited to those circumstances, nor is it limited to matters communicated in confidence by the client. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [3].

[6] Comment 2 to Rule 7.2, for example, notes that in lawyer advertising, client consent is required before naming regularly represented clients. *See also* Wis. Formal Op. EF-17-02 (2017) (lawyer may not disclose current or former client's identity without informed consent; not relevant that representation is matter of public record or case is long closed); Ill. State Bar Ass'n Advisory Op. 12-03 (2012) (lawyer must obtain informed consent before disclosing client names to professional networking group); Ill. State Bar Ass'n Advisory Op. 12-15 (2012) (lawyer may take part in an online discussion group if no information relating to the representation is disclosed and there is no risk that the client could be identified); ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 133-134 (10th ed. 2023).

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

[8] *See, e.g.*, Colo. Bar Ass'n Formal Op. 138 (2019) ("Consultations using hypotheticals do not implicate [Rule] 1.6 provided that the hypotheticals do not create a 'reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.'").

proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Comments 6 and 7 to Rule 1.0 advise that the necessary communication will ordinarily require the lawyer to confer with the client and explain the advantages and disadvantages of the proposed course of conduct. And obtaining consent will usually require a client's affirmative response; a lawyer generally may not assume consent from a client's silence.[9]

Additionally, Rule 1.6(a) permits a lawyer to reveal information relating to the representation of a client if "the disclosure is impliedly authorized in order to carry out the representation."[10] Comment 5 to Rule 1.6 explains that "[l]awyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers." Conversely, lawyers are generally not authorized to disclose information relating to the representation to lawyers outside the firm, including lawyers from whom the engaged lawyers seeks assistance. Rather, as a general matter, lawyers must obtain the client's informed consent before engaging lawyers in the representation other than lawyers in their firm.[11]

---

[9] Lawyers who anticipate using listservs for the benefit of the representation may seek to obtain the client's informed consent at the outset of the representation, such as by explaining the lawyer's intention and memorializing the client's advance consent in the lawyer's engagement agreement. Rule 1.0(e) provides that for a client's consent to be "informed," the lawyer must "communicate[] adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Therefore, the lawyer's initial explanation must be sufficiently detailed to inform the client of the material risks involved. It may not always be possible to provide sufficient detail until considering an actual post.

[10] Comment 5 to Rule 1.6 explains that a lawyer is impliedly authorized to make disclosures "when appropriate in carrying out the representation." In many situations, by authorizing the lawyer to carry out the representation, or to carry out some aspect of the representation, the client impliedly authorizes the lawyer to disclose information relating to the representation, to the extent helpful to the client, for the purpose of achieving the client's objectives. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.3, cmt. [5] ("In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation."). For example, when a client authorizes a lawyer to conduct settlement negotiations or transactional negotiations, the client impliedly authorizes the lawyer to disclose information relating to the representation insofar as the lawyer reasonably believes that doing so will advance the client's interests. What is impliedly authorized will depend "upon the particular circumstances of the representation." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at 135. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) (lawyer experiencing data breach may reveal information relating to representation to law enforcement if lawyer reasonably believes disclosure is impliedly authorized, will advance client's interests, and will not adversely affect client's material interests); N.C. Formal Op. 2015-5 (2015) ("[p]roviding a client's new appellate counsel with information about the client's case, and turning over the client's appellate file to the successor appellate counsel, is generally considered appropriate to protect the client's interests in the appellate representation" and impliedly authorized); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421 (2001) (lawyer hired by insurance company to defend insured normally has implied authorization to share with insurer information that will advance insured's interests); *see also* RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 61 (3d ed. 2001) (A lawyer is impliedly authorized to disclose information that "will advance the interests of the client in the representation."). In at least one situation, the Rules themselves impliedly authorize the disclosure, even without the client's implicit approval. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14, cmt. [8] ("When taking protective action" on behalf of a client with diminished capacity pursuant to MODEL RULES OF PROF'L CONDUCT R. 1.14(b), "the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.").

[11] Comment 6 to Rule 1.1 states that "[b]efore a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent…"

Seeking Advice or Assistance from a Listserv Discussion Group

ABA Formal Opinion 98-411 (1998) addressed whether a lawyer is impliedly authorized to disclose information relating to the representation to another lawyer, outside the inquiring lawyer's firm and without the client's informed consent, to obtain advice about a matter when the lawyer reasonably believes the disclosure will further the representation. The opinion contemplated that the lawyer seeking assistance would share information relating to the representation, in anonymized form, with an attorney known to the consulting lawyer. It further contemplated that the consulted attorney would both ensure there was no conflict of interest between the consulting lawyer's client and the consulted attorney's clients and would keep the information confidential even in the absence of an explicit confidentiality obligation. The opinion concluded that, in general, a lawyer is impliedly authorized to consult with an unaffiliated attorney in a direct lawyer-to-lawyer consultation and to reveal information relating to the representation without client consent to further the representation when such information is anonymized or presented as a hypothetical and the information is revealed under circumstances in which "the information will not be further disclosed or otherwise used against the consulting lawyer's client." The opinion explained, "Seeking advice from knowledgeable colleagues is an important, informal component of a lawyer's ongoing professional development. Testing ideas about complex or vexing cases can be beneficial to a lawyer's client." However, the opinion determined that the lawyer has implied authority to disclose only non-prejudicial information relating to the representation for this purpose and may not disclose privileged information.

In this opinion, the question presented is whether lawyers are impliedly authorized to reveal similar information relating to the representation of a client to a wider group of lawyers by posting an inquiry or comment on a listserv. They are not. Participation in most lawyer listserv discussion groups is significantly different from seeking out an individual lawyer or personally selected group of lawyers practicing in other firms for a consultation about a matter. Typical listserv discussion groups include participants whose identity and interests are unknown to lawyers posting to them and who therefore cannot be asked or expected to keep information relating to the representation in confidence. Indeed, a listserv post could potentially be viewed by lawyers representing another party in the same matter. Additionally, there is usually no way for the posting lawyer to ensure that the client's information will not be further disclosed by a listserv participant or otherwise used against the client. Because protections against wider dissemination are lacking, posting to a listserv creates greater risks than the lawyer-to-lawyer consultations envisioned by ABA Formal Ethics Opinion 98-411.

Without informed client consent, a lawyer participating in listserv groups should not disclose any information relating to the representation that may be reasonably connected to an identifiable client. Comment 4 to Rule 1.6 envisions the possibility of lawyers using hypotheticals to discuss client matters. However, a lawyer must have the client's informed consent to post a hypothetical to a listserv if, under the circumstances, the posted question could "reasonably lead to the discovery of" information relating to the representation because there is a "reasonable likelihood" that the reader will be able to ascertain the identity of the client or the situation involved. Although this opinion focuses on lawyers' efforts to obtain information from other lawyers for the benefit of a legal representation, the obligation to avoid disclosing information relating to a representation applies equally when lawyers post on listservs for other purposes, such

as to reply to requests for help, to develop their practices by networking, or simply to regale their professional colleagues with "war stories."[12]

Not all inquiries to a listserv designed to elicit information helpful to a representation will disclose information relating to the representation. In some situations, because of the nature of the lawyer's practice, the relevant client or the situation involved will never become known, and therefore the lawyer's anonymized inquiry cannot be identified with a specific client or matter. In other cases, the question may be so abstract and broadly applicable that it cannot be associated with a particular client even if others know the inquiring lawyer's clientele. In circumstances such as these, a lawyer may post general questions or hypotheticals because there is no reasonable possibility that any listserv member, or anyone else with whom the post may be shared, could identify the specific client or matter.[13]

Illustratively, the authors of Oregon Bar Opinion 2011-184 explained that "[c]onsultations that are general in nature and that do not involve disclosure of information relating to the representation of a specific client" do not require client consent under Rule 1.6. Careful lawyers will often be able to use listservs to ask fellow practitioners for cases and articles on topics, for forms and checklists, and for information on how various jurisdictions address a court-connected concern without enabling other lawyers to identify the lawyer's client or the situation involved. Posting this sort of inquiry on a listserv, to the extent possible without disclosing information relating to the representation, may have advantages over a lawyer-to-lawyer consultation precisely because it is broadly disseminated. Maryland State Bar Association Ethics Opinion 2015-03 described peer-to-peer lawyer listservs as a "powerful tool" providing "the opportunity for a

[12] Lawyers should keep in mind that the confidentiality obligation continues after the representation ends. *See* Rule 1.9(c)(2) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client."). This restriction on the disclosure of information relating to a former representation applies even if the information is generally known. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 479 (2017) (discussing the "generally known" exception to the use of confidential information adversely to a former client allowed under Rule 1.9(c)(1) and distinguishing it from the broader prohibition against disclosure of that information). Unlike the counterpart provision (Disciplinary Rule 4-101) of the earlier Code of Professional Responsibility, Rule 1.6 does not permit disclosure of non-privileged information relating to a representation or former representation if its disclosure would not embarrass or harm a client and the client has not specifically asked the lawyer not to disclose it. Consequently, lawyers may not tell "war stories" about a former representation without the former client's consent if the former client or situation can be identified. As we have noted in the past, the restriction imposed by Rule 1.6 may have First Amendment implications, but the constitutional right to freedom of speech has historically been interpreted consistently with lawyers' confidentiality obligations to clients. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018) (commenting on First Amendment considerations when lawyers act in representative capacities).

[13] For example, a general question requesting case law on whether a warrantless search of a garbage bin outside a residence violates the Fourth Amendment is less likely to allow a reader to infer the client's identity than a hypothetical revealing the precise facts of a specific search. But if there is a reasonable likelihood that readers can correctly infer the client's identity, then even the general question discloses information relating to the representation, requiring informed consent. For example, a reader could infer that a lawyer who posts a question to a listserv about the constitutionality of searches of garbage bins located outside of a residence is representing a client whose garbage bin was searched, evidence was found, the lawyer would like to move to suppress the evidence, and the lawyer is unsure of all the relevant case law. Regardless of whether the implicit disclosure of this "information relating the representation" is prejudicial to the client, Rule 1.6 provides that if the client's identity could be ascertained, it is the client's decision whether to disclose this sort of information broadly via a listserv to assist the lawyer in conducting useful legal research.

lawyer to test his or her understanding of legal principles and to clarify the best way to proceed in unique situations."

The more unusual the situation, however, the greater the risk that the client can be identified, and therefore the greater the care that must be taken to avoid inadvertently disclosing client information protected by Rule 1.6. Oregon Bar Opinion 2011-184 makes the point. Matters "[w]hen the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer's client even without the client being named," are among those in which "the lawyer must first obtain the client's informed consent for the disclosures."

Additionally, when lawyers represent only one client (as in the case of in-house counsel or government lawyers) or their client's identity can be readily inferred (as in the case of a litigator seeking assistance with a pending or contemplated action), "a description of specific facts or hypotheticals that are easily attributable to the client likely violates Rule 1.6 in most contexts."[14] Also, if a matter is receiving media coverage or the group of listserv participants is comprised of a small, closely connected legal community, the risk of a Rule 1.6 violation is likely to be too great to permit the lawyer to post a hypothetical relating to the matter without the informed consent of the client. For example, where the listserv participants are familiar with each other's practice because they practice in a limited geographic area or a specialized practice setting, posting a hypothetical based on information relating to the representation of the client will be more likely to lead to disclosure of the client's identity to some other participant on the listserv. The lawyer should err on the side of caution and avoid specific hypotheticals, refrain from posting, or obtain the client's informed consent if there is any reasonable concern.[15]

Finally, it bears emphasizing that lawyer listservs serve a useful function in educating lawyers without regard to any particular representation. Lawyers use listservs to update one another about newly published decisions and articles or to share recommendations for helpful contractors or fellow practitioners. Comment 8 to Rule 1.1 advises lawyers to "keep abreast of changes in the law and its practice," and lawyer listservs can help in doing so. These uses, unrelated to any particular representation, would not require a lawyer to secure the informed consent of a client. A lawyer must, however, remain aware of the possible risks to confidentiality involved in any posts to a listserv. Even a general question about the law, such as a request for cases on a specific topic, may in some circumstances permit other users to identify the client or the situation involved. Therefore, before any post, a lawyer must ensure that the lawyer's post will not jeopardize compliance with the lawyer's obligations under Rule 1.6.

[14] Md. State Bar Ass'n Ethics Comm. Op. 2015-3 (2015).

[15] When seeking a client's informed consent to post an inquiry on a listserv, the lawyer must ordinarily explain to the client the risk that the client's identity as well as relevant details about the matter may be disclosed to others who have no obligation to hold the information in confidence and who may represent other persons with adverse interests. This may also include a discussion of risks that the information may be widely disseminated, such as through social media. A lawyer should also be mindful of any possible risks to the attorney-client privilege if the posting references otherwise privileged communications with the client. Whether informed consent requires further disclosures will depend on specific facts.

Conclusion

Rule 1.6 prohibits a lawyer from posting comments or questions relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's posts will disclose information relating to the representation that would allow a reader then or later to recognize or infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's consent if the lawyer's contributions will not disclose information relating to a client representation.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328
CHAIR: Bruce Green, New York, NY ■ Mark A. Armitage, Detroit, MI ■ Matthew Corbin, Olathe, KS ■ Robinjit Kaur Eagleson, Lansing, MI ■ Brian Shannon Faughnan, Memphis, TN ■ Hilary P. Gerzhoy, Washington, D.C. ■ Wendy Muchman, Chicago, IL ■ Tim Pierce, Madison, WI ■ Hon. Jennifer A. Rymell, Fort Worth, TX ■ Charles Vigil, Albuquerque, NM

CENTER FOR PROFESSIONAL RESPONSIBILITY: Mary McDermott, Lead Senior Counsel

©2024 by the American Bar Association. All rights reserved.

Consider a firm operations self-assessment

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

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

Last month's column walked readers through a sample self-assessment of their trust account management practices. This month's column expands the approach to other areas of your legal practice. A few states have created practice self-assessments to help lawyers proactively create policies and procedures that enhance their ability to consistently meet their ethical obligations. Colorado has such a self-assessment, which is generously made available to the public.[1] We have permission to borrowed from it to help lawyers in Minnesota who participate in our probation program to create enhanced office procedures. For this self-assessment, let's focus on a couple of areas of legal practice that give rise to ethics complaints.

Avoiding conflicts of interest

We see a lot of complaints involving conflicts of interest. When we dig into those complaints, we often find inadequate conflict management systems in place. There are several questions you can ask yourself to determine whether you have adequate conflict screening processes in place.

- Have you clearly identified who is, and who is not, the client? This sounds simple but is often the source of issues, particularly if your client is a business entity. Do you include names of related parties and witnesses in your conflict management system? Do you include prospective clients whose representation was declined? Do you keep track of the type and scope of matters for which representation was undertaken? All this information is necessary to make screening effective.
- Do you periodically rescreen when new parties, witnesses, or individuals are added to a matter?
- Do you have a documented process (attorney-led, preferably by an attorney other than the originating lawyer) to review and sign off on matters that are flagged as potential conflicts?
- Do you use engagement, declination, and closing letters regularly? Engagement letters can clarify the scope of representation and help you analyze conflicts. Closing letters help clarify if you are analyzing conflicts under Rule 1.7, Minnesota Rules of Professional Conduct (MRPC) (concurrent conflicts) or Rule 1.9, MRPC (former client conflicts).
- Do you represent multiple clients in a single matter? Have you worked through potential joint representation issues?
- Does your system capture personnel matters that might give rise to potential conflicts of interest, such as business transactions with clients, or community or volunteer activities?
- If a conflict is identified, what is the process to determine if consent can be obtained? Do you understand what informed consent is? Hint: Consult Rule 1.0(f), Minnesota Rules of Professional Conduct (MRPC). Sometimes your confidentiality obligation to a current or former client makes it difficult to provide sufficient information to obtain consent. Do you have a process that is sensitive to ongoing confidentiality obligations?
- How do you ensure that informed consent is obtained in writing and copies retained in every matter where it is applicable?
- How do you capture changed circumstances in a matter to ensure any potential new conflicts are addressed?
- If a conflict arises, do you have withdrawal procedures to ensure compliance with Rule 1.16, MRPC?

Ethical disengagement

Withdrawing ethically is a frequent area of inquiry on our ethics hotline as well as one of the areas where we see more discipline than we would like. Have you asked yourself the following lately:

- Before you take on a matter, have you thought carefully about whether this is a good matter for you to undertake? This includes considering any potential red flags related to the client, your competency (and interest) in the matter under consideration, your current availability and capacity, and the ability of the client to pay for the representation.
- Is withdrawal consistent with the ethics rules, if available or required?[2]
- Do you have a standard procedure to address return of the client file (or file closing) and return of any unearned fees with the client upon withdrawal (or termination of the representation)? Recently we have had law firms state that they do not address unearned fees on flat fee engagements unless the client requests some form of refund. If you did not complete the flat fee representation, you need to make a refund of unearned fees and should have a process in place to do so automatically upon disengagement.
- Do you have a procedure for collecting accounts receivable? Lawyers have been disciplined

for suing current clients as well as for disclosing confidential information related to the representation that is not necessary to collect the debt. Having a good policy and pre-approval process before becoming adverse to a former client can prevent self-inflicted errors en route to collecting your fee.

Charging appropriate fees

Fee agreement issues make up a good percentage of discipline. Some things to consider:

- Do you have a written fee agreement for every matter? If not, is there a good reason for this? Can you still demonstrate that you have clearly explained the scope of the representation and the basis for your fee?
- Are you providing limited scope representation? Remember, you are ethically obligated to get the client's informed consent to a limited scope representation, and the limitation must be reasonable. You cannot just tell the client what you are willing to do. *See* Rule 1.2(c), MRPC.
- If the matter is a flat fee engagement, have you complied with Rule 1.5(b)(1), MRPC?
- For contingency engagements, have you complied with Rule 1.5(c), MRPC?
- If the matter is litigated, do you have a process where you explain that courts can assess costs and disbursements against your client in certain circumstances?
- Do your clients understand what expenses they will be responsible to pay? How do you know this?
- Do you have policies in place to address how best to work on a file with lawyers who practice outside of your firm? This might include fee-sharing (*see* Rule 1.5(e), MRPC). Also, remember, you cannot fee-share with non-lawyers, nor can you pay finder's fees. *See* Rule 5.4, MRPC; Rule 7.2, MRPC.
- Do you have a process in place to alert clients to changes in key fee terms, such as annual rate increases? And are you billing your client regularly? I believe strongly that our communication obligations under Rule 1.4, MRPC, require us to communicate rate and accounts receivable balances proactively and promptly as part of the client's ability to make informed decisions about the representation. Getting paid is important to you; ensuring your client understands what you are doing and what that is costing them is important to them. Remember that the ethics rules are client-centered and your customer service practices should be client-centered as well to ensure good risk management.

Other areas that can benefit from a self-assessment include ensuring competency in client matters; communicating in an effective, timely, and professional manner; ensuring diligent representation; protecting client confidences; law firm organization and personnel supervision; file management, retention, and security; and trust accounts and fiscal practices.

Resources

The above questions are just a few from Colorado's self-assessment, which cites to Colorado's ethics rules. Minnesota's ethics rules are similar in many respects to Colorado's rules since both are based upon the American Bar Association's model rules. If you are reviewing Colorado's self-assessment and have questions on application in Minnesota, review Minnesota's comparable ethics rule, and if you still have questions, give us a call. We are available every day to answer your ethics questions at 651-296-3952. I know there is never enough time in the day to do everything that needs to get done, but I hope that this column inspires you to invest some time to ensure you have in place good policies and procedures that support your ethical obligations. The time spent will pay dividends by elevating your professional development. ▲

NOTES

[1] Colorado Consolidated Lawyer Self-Assessment, *https://www.coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp*.

[2] *See* Susan Humiston, *Withdrawing as counsel (ethically)*, Bench & Bar of MN (Nov. 2019).

A year of public discipline

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

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

Each year a summary of the prior year's public discipline appears in this column. The purpose of this summary is largely a cautionary tale for lawyers—one of the reasons for public discipline, after all, is to deter misconduct by other lawyers. Public discipline also demonstrates to the public that the profession takes ethical misconduct seriously. The legal system's standing in the eyes of the public is harmed when lawyers do not follow the rules, and individual lawyers acting unethically can cause great harm.

Determining the appropriate discipline for misconduct is often difficult. The Minnesota Supreme Court has decades of case law on discipline in particular cases. The abundance of case law, however, does not always yield clear answers. Perspectives on the adequacy of disciplinary measures change over time. Determining the level of discipline to recommend to the Court in public cases is one of the more challenging tasks of the Director's Office, and something that is not approached lightly. Let's review some matters resolved in 2023.

The numbers

The Court issued 46 decisions in public matters in 2023, the majority involving the imposition of discipline. Three lawyers were disbarred, 24 suspended, one reprimanded, and two placed on disability inactive status in lieu of discipline. Four attorneys had their reinstatement petitions denied, while another 12 were reinstated to the practice of law: two following resignations, two after a reinstatement hearing process, and most from short suspensions.

THERE ARE MORE THAN 25,000 LAWYERS IN MINNESOTA WITH ACTIVE LICENSES. OUT OF THOSE THOUSANDS, 28 RECEIVED PUBLIC DISCIPLINE FOR VIOLATIONS OF THE ETHICS RULES IN 2023.

The 2023 numbers are generally in line with the prior year's numbers, but one in particular stands out—there was only one public reprimand, the lowest form of public discipline. Usually there are a handful of public reprimands, often for trust account misconduct. Another notable number involved the reinstatements denied by the Court in 2023. While two lawyers were reinstated following reinstatement proceedings, four were unable to meet the heavy burden of moral change and a renewed commitment to the ethical practice of law that the Court imposes on petitioners.

Disbarment

The three lawyers who were disbarred in 2023 were John Hernandez, Brad Ratgen, and Ignatius Udeani. Mr. Hernandez was disbarred for the type of misconduct that typically leads to disbarment—misappropriation of client funds and dishonest conduct. Across 11 matters, Mr. Hernandez violated numerous ethics rules. Notably, Mr. Hernandez was only admitted to the practice of law in 2017, but in his short legal career, he caused a lot of havoc. He did not have prior discipline, but once complaints started arriving, the situation escalated fairly quickly into several public matters that ultimately culminated in his disbarment.

Mr. Ratgen once enjoyed an extensive personal injury practice, but was indicted and pleaded guilty to conspiracy to commit health care fraud relating to his law practice. In 2023, he was sentenced to 16 months in federal prison for participating in a scheme where he used runners to recruit auto accident victims, who were then billed for chiropractor services not needed or incurred through chiropractors who participated in the scheme.

Mr. Udeani was disbarred for misconduct related to his representation of clients in immigration matters. At one point or another, I believe that Mr. Udeani violated all or almost all of the ethics rules; Mr. Udeani was a particularly troubling case because he was an immigrant to the United States himself and ended up creating havoc in a lot of vulnerable immigrant clients' lives. Mr. Udeani was suspended for three years in 2020, but after his suspension, additional misconduct came to light that led to his ultimate disbarment. The Director's Office was also appointed trustee of Mr. Udeani's client files (which he mostly abandoned after his suspension and subsequent disbarment) and is still in the process of getting hundreds of files back to clients. Even after he was disbarred, we continued to hear from clients who had complaints against Mr. Udeani, and the Minnesota Client Security Board is handling claims from his clients.

Suspensions

Twenty-four lawyers were suspended for periods ranging from 30 days to five years (the maximum suspension short of disbarment). A couple of the matters stand out. Julie Bruggeman was suspended for 90 days for misconduct that occurred in private practice before she became the Mahnomen County Attorney. The misconduct included multiple acts of dishonesty to cover up delay and mistakes in a civil matter. Ms. Brugge-

EACH YEAR, 1,000-PLUS COMPLAINTS ARE FILED WITH THE DIRECTOR'S OFFICE. MOST DO NOT RESULT IN DISCIPLINE BECAUSE MOST LAWYERS TAKE VERY SERIOUSLY THEIR ETHICAL OBLIGATIONS. THANK YOU TO ALL WHO DO.

man offered mitigation evidence that reduced the length of the suspension, but given the extent and nature of the misconduct, a reinstatement hearing was appropriate. The old saying that the coverup is worse than the crime often holds true in discipline cases, and I cannot emphasize enough the advice that if something happens, just acknowledge it. The harm can always be managed, and it is often not as bad as you think. But dishonesty has a way of taking on a life of its own.

Samuel McCloud has been a lawyer in Minnesota since 1977. During his career, Mr. McCloud has received seven admonitions, a public reprimand, one private probation, and two suspensions—one for his conviction for tax evasion, and one for intentional failure to attend court hearings. Mr. McCloud was suspended for 90 days in 2023 for engaging in the unauthorized practice of law while suspended, failing to act with competence and diligence in a matter, and disclosing client confidences in a matter. This misconduct, standing alone, might not warrant a 90-day suspension, but in light of Mr. McCloud's history of misconduct, the Director felt strongly (and the Court agreed) that Mr. McCloud should be required to petition for reinstatement to show moral change and a renewed commitment to the ethical practice of law. Some lawyers are a constant challenge for the discipline system, demonstrating a pattern of failing to follow the rules, while at the same time engaging in the type of misconduct that typically warrants discipline but perhaps not severe discipline. This case is an example of why the Court considers prior discipline to be an aggravating factor in determining discipline.

Ryan McLaughlin was suspended for two years for misappropriation of client funds and dishonest conduct. Although Mr. McLaughlin was admitted to practice in 2012, he did not begin practicing until 2018. When he began practicing, he had a trust account but chose not to use it; instead, he put funds that should have been in trust in his business account, and then, at various points in time, spent the funds he should have been holding in trust, thus misappropriating client funds. Mr. McLaughlin also made false and misleading statements to a judge and during the Director's investigation. This misconduct was particularly serious and often results in disbarment. Mr. McLaughlin offered mitigating factors, and stipulated to a two-year suspension, which the Court approved. Mr. McLaughlin did not have any prior misconduct, and as is often the case, the Director learned of Mr. McLaughlin's trust account violations—the most serious misconduct—while investigating another complaint.

Reinstatement denied

When a lawyer is suspended for a period that meets or exceeds a stipulated length of time (currently 90 days, soon to be 180 days), the lawyer must petition for reinstatement and undergo a rigorous process to be reinstated to the practice of law, not unlike the original character and fitness review required for application to the bar. Reinstatements are different from original admission, however, because the lawyer must not only prove good character and fitness, but also rehabilitation through a showing of moral change and a renewed commitment to the practice of law, to a panel of the Lawyers Professional Responsibility Board, and ultimately to the Court. Last year was notable because the Court denied four reinstatement petitions—those of Mark Greenman, Adam Klotz, Michelle McDonald, and William Mose. Each petition was denied for different reasons, but each shows the care that is taken by the Court and the Board in considering these petitions and ensuring that those who are reinstated following serious misconduct once again merit the court's confidence. Having a law license is a privilege. By that license, the Court represents to the public that the licensed lawyer can be trusted with the client's most personal and serious legal matters.

Conclusion

There are more than 25,000 lawyers in Minnesota with active licenses. Out of those thousands, 28 received public discipline for violations of the ethics rules in 2023. Each year, 1,000-plus complaints are filed with the Director's Office. Most do not result in discipline because most lawyers take very seriously their ethical obligations. Thank you to all who do. The lawyers who receive public discipline are definitely outliers in the profession; at the same time, it could be any one of us. If you need assistance understanding your ethical obligations, please do not hesitate to call our Office. In 2023 we provided 1,792 ethics opinions, and we're available every weekday to help. ▲

CLE

WEDNESDAY, MARCH 27

ETHICS: AN UPDATE FROM THE DIRECTOR OF THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY

Susan Humiston reviews recent attorney discipline cases and shares lessons from recent cases.

1.0 ETHICS CLE CREDIT

REGISTER AT MNBAR.ORG/CLE-EVENTS

Lessons from private discipline in 2023

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

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

Private discipline is nonpublic discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are isolated and nonserious. Several lessons can be learned from reviewing the mistakes and situations that led to private discipline last year.

Contact with a represented party

Every year lawyers are disciplined for contacting represented parties in violation of Rule 4.2, MRPC. Rule 4.2 is generally referred to as the no-contact rule; it states:

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

Last year, Zoom hearings brought a new twist to this age-old rule.

Courts often have large court calendars, and use online breakout rooms for parties to discuss matters before the court or, particularly in calendars involving lots of unrepresented parties with ancillary issues, such as in housing court, financial assistance or other services might be available.

In one matter, a tenant was represented by a legal services provider in a housing matter. It's clear the lawyer for the landlord knew of this representation, because the parties had been attempting to negotiate a resolution of the dispute. At one point, the client chose to attend the financial assistance breakout room, while her attorney assisted another client in a matter before the court. The lawyer for the landlord, however, chose to join the financial assistance breakout room and proceeded to ask the tenant substantive questions to gather information without the tenant's lawyer being present. The tenant's lawyer returned to the breakout room to join her client to find opposing counsel speaking with her client on matters relating to the dispute. This is a straightforward violation of Rule 4.2, MRPC, and the lawyer received an admonition.

The lesson is to be mindful of the different ways in which court hearings are taking place and the different ways in which you might encounter a represented party unaccompanied by their lawyer. Saying hello to a represented party is not prohibited, nor is asking that individual where their lawyer may be or if they will be joining soon, or discussing the weather if you cannot handle silence, but communicating about the subject of the representation—even if you don't think the communication is material—is off-limits.

In another Rule 4.2 admonition, co-defendants in a criminal matter (a burglary) were separately represented by defense counsel. Although the state had made a motion to try the cases together, the court denied the joinder, and the cases proceeded to trial separately. One day, one co-defendant called counsel for his co-defendant to discuss the upcoming trial of the co-defendant. Counsel discussed the facts and circumstances surrounding the alleged crime for which both individuals had been charged, and determined she wanted to call the co-defendant in the upcoming trial of her client. Counsel reached out to counsel for the co-defendant and acknowledged the prior contact. Opposing counsel brought a complaint and a Rule 4.2 admonition was issued.

Counsel appealed the admonition, arguing that the co-defendant reached out to her, and she was not talking about the co-defendant's matter but rather her client's matter. After an evidentiary hearing, a panel of the Lawyers Professional Responsibility Board affirmed the admonition. Because the representations arose out of the same facts and circumstances, the fact that they resulted in two separate court files was not dispositive. Because of the interrelated nature of the facts, you cannot discuss one matter without discussing the other. And whether the opposing party reaches out or you do is not material to the rule violation; the main inquiry is whether there is communication regarding the subject of the representation.

The lesson here is that if someone is represented in the same or related proceedings, just work through counsel and don't take the represented party's calls. Trying to parse "matters" might make sense to you, but it often results in your thinking too narrowly about the subject matter of the opposing party's representation (the key part of the rule), and forgetting that the point of the rule is protecting the opposing lawyer-client relationship and preventing the uncounseled disclosure of information.

Conflicts

Each year a few lawyers receive admonitions for conflicts that were nonconsentable, or in which no informed consent was obtained.

Rule 1.8(c) is not a rule that most lawyers run into frequently, but it is an important rule to remember. It is one of a series of rules that address transactions with clients. Rule 1.8(c) prohibits a lawyer to "prepare an instrument giving the lawyer... any substantial gift from a client, including a testamentary gift, except where the lawyer is related to the donee." Rule 1.8(k) provides that "[w]hile lawyers are associated in a firm," the prohibition of Rule 1.8(c) "that applies to any one of them shall apply to all of them."

At his client's request, a lawyer asked an associate in his firm to draft a will for a long-time firm client that left 25 percent of the remainder of the client's estate after taxes, expenses, and payment of debts to the lawyer. Among other defenses the lawyer raised, one was that although he was familiar with Rule 1.8(c), he thought having another attorney represent the client and staying out of the matter was sufficient to address the conflict concerns raised. Unfortunately, the lawyer had not read the entirety of Rule 1.8 when making this decision, because the associate in his firm was also prohibited. In many instances, lawyers have been publicly disciplined for this rule violation. In this matter, private discipline was imposed because the lawyer repudiated the gift and had attempted to convince his client to do something different over the years on numerous occasions, indicating a lack of self-interest and harm. The lesson here is obvious: If a client wishes to give you a substantial gift, whether testamentary or otherwise, neither you nor anyone in your firm should represent the client in that transaction.

Rule 1.7, MRPC, defines concurrent conflicts of interest. There are two kinds of concurrent conflicts: direct adversity under Rule 1.7(a)(1), and substantial risk conflicts under Rule 1.7(a)(2). Both kinds of conflicts can be consented to under most circumstances unless the requirements of Rule 1.7(b) cannot be met. The key, however, when there is a concurrent conflict that is consentable, is that "each affected client gives informed consent, confirmed in writing." As many lawyers who simultaneously represent corporations and individuals as well as generations of family members know, this is an important part of advising clients, and it can be overlooked when things are going well. Several lawyers received admonitions in 2023 for failing to get informed consent in circumstances where informed consent was required.

In one matter, for example, a lawyer who had represented several family members in various estate planning and real estate transactions over the course of a decade agreed to represent siblings in the sale of property from one to the other. The lawyer represented both parties in the transaction, giving both tax and corporate structure advice. Although it is tempting to think of oneself as a scrivener in these types of largely amicable transactions, that is rarely the case, as lawyers ultimately end up providing advice to both parties regarding transaction details. This conflict was consentable, although the lawyer did not obtain informed consent from each party in writing. Sibling relationships being what they are, adversity did arise between the siblings regarding their parents' trust, and a complaint was filed, resulting in an admonition for lack of informed consent confirmed in writing.

The lesson is to remember that if you are representing multiple parties in a matter, you must analyze for conflicts and whether consent can be obtained, and then obtain that informed consent confirmed in writing. A corollary to this lesson is to make sure you have properly identified who is and who is not your client, and that this is clear to the individuals you are interacting with on the matter. And remember, clients never consent to an actual conflict—that is, where you put the interest of one party before the other; rather, they consent to the risk that a conflict might arise and the lawyer-client relationship might fail.

Other common mistakes

The most common reasons for private admonitions year over year are lack of diligence (Rule 1.3) and lack of communication (Rule 1.4). Every year, several lawyers are also admonished for errors in withdrawing under Rule 1.16(d). The mistakes that lead to discipline when withdrawing include failure to refund unearned fees promptly, failing to provide reasonable notice or to take steps necessary to protect the client's interest, or failing to promptly provide the client's file upon request.

Collecting fees or subsequently suing your client can lead to discipline. In one case, a lawyer sought a harassment restraining order against a former client for conduct that occurred after the representation concluded. The lawyer was perfectly within his rights to do so, and the motion was warranted by the client's harassing post-termination conduct. But when providing evidence in support of the harassment motion, the lawyer disclosed significant confidential information relating to the representation that was not relevant to the motion the lawyer was making. Rule 1.6(b) includes exceptions to the confidentiality rule, including one that allows a lawyer to disclose information the lawyer reasonably believes is necessary to establish the claim in issue, with one of the key words being *necessary*.

Conclusion

Most attorneys care deeply about compliance with the ethics rules. Please take some time each year to reread the Minnesota Rules of Professional Conduct. They can be found on our website and in the Minnesota Rules of Court. You will find the time well spent. And remember, we are available to answer your ethics questions: 651-296-3952. ▲