LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING AGENDA

October 27, 2023 – 12:30pm (in person and via Zoom) – Minnesota Judicial Center

Lunch provided for Board members 12:00pm

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

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1. Approval of minutes of July 28, 2023, meeting (attachment 1).

2. Introduction of new member Jiff Prohofsky.

3. Rule 3.8 Working Group – Michael Friedman (attachments 2 – 7);

4. Break – 10 minutes.

5. Chair – Update on Advisory Committee on Rules of Lawyers Professional Responsibility.

6. Director's report.

7. Open discussion.

8. Adjournment.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING

OPEN MEETING MINUTES

July 28, 2023 – 1:00 pm In-person and via Zoom) – Minnesota Judicial Center

Lunch will be provided to Board members at 12:00 pm

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The following members were present either in-person or via Zoom:

- Ben Butler
- Landon Ascheman
- Dan Cragg
- Michael Friedman
- Jordan Hart
- Katherine Brown Holman
- Tommy Krause
- Mark Lanterman
- Paul Lehman
- Frank Leo
- Kevin Magnuson
- Melissa Manderschied
- Kristi Paulson
- William Pentelovitch
- Matthew Ralston
- Andrew Rhoades
- Susan Rhode
- Wendy Sturm
- Carol Washington
- Antoinette Watkins

Not Present:

- Bruce Williams

Minnesota Supreme Court Liaison

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

Other attendees:

- Susan Humiston, Director of the Office of Lawyers Professional Responsibility

- Members of the OLPR staff

Minutes:

Honorable mention that Minnesota Attorney Susan Rhode retired after 35 years at her law firm. She has a new email address, so please note this.

Approval of prior meeting minutes:

The Board approved the minutes from the April 27, 2023 open meeting.

Rules and Opinion Committee Update:

Rules and opinions committee update from Board Member Dan Cragg. There are two items on our agenda. One item is for a final decision, and the other needs additional discussion. The opinion we are seeking approval for is a response to ABA formal opinion 502 regarding the no-contact Rule found in The ABA Model Rule 4.2. The ABA opinion stated that a pro-se lawyer could not contact a represented party on the opposing side. OLPR Lawyer Binh Tuong provided suggestions to the opinions committee, which were accepted.

OLPR Director Susan Humiston questioned whether the Board should comment at all on this matter, inferring it might make sense to avoid commenting.

Michael Friedman: Asked that if the Board does not comment, why is it presumed we would default to the ABA opinion?

Dan Cragg: If a matter is unclear, lawyers seek an ABA opinion. It is reasonable to conclude the ABA is the dominant or appropriate opinion. People are entitled to notice. Dan mentioned a scenario where pro-se lawyers might communicate with the other party in a divorce, which might invite conflict.

Bill Pentelovitch wanted clarification of the last two paragraphs of Dan Cragg's proposed amendment.

In response to Bill Pentelovitch's request for clarification, Dan Cragg stated that the purpose of the last two paragraphs is to establish clear notice.

Susan Rhode argued that using divorce is a bad example of this proposal. There could be coercive people seeking to control others in a relationship. She is concerned about what this opinion communicates to the public. Will this lead to more mischief?

Andrew Rhoades: Will this reduce or increase the chances of lawyers getting into conflict or committing violations leading to discipline? In other words, how does the proposal impact the likelihood of an increase or decrease in complaints or ethical violations? Was this considered as far as the impacts of this proposal?

Dan: Yes, the clear notice idea is meant to communicate acceptable behaviors to avoid conflicts leading to discipline.

Landon Ascheman: Does this open the door to pro-se attorneys to push the envelope?

Cragg: This tells lawyers what the current Rule is now. The opinion in question clarifies the law and provides notice to lawyers now.

Bill Pentelovitch moved to amend the Rule by deleting the last two paragraphs. The idea is that it would allow the Board to remain neutral.

Landon: How are violations such as those discussed here supported by case law?

Susan Humiston: I cannot remember a Supreme Court decision on this. There might be. The Court has ruled a pro-se lawyer can have a frivolous claim. To her knowledge, the office has not disciplined anyone absent a court order. If there has been an order where a lawyer was told not to contact someone and s/he has, there might have been a case when the office has disciplined that lawyer.

Susan Rhode: This does not preclude discipline if a pro-se lawyer decides to contact a represented client, correct? If someone gets disciplined for this, would they not have clear notice?

Susan Humiston: I do not believe there has been an occasion to address this scenario.

After hearing all sides, Ben Butler called for a vote on this matter. Is there a motion for Dan's proposal? Is there a second for Dan's motion? We have a proposed opinion and a motion for a friendly amendment.

Bill Pentelovitch supported Dan Cragg's motion and suggested the deletion of the last two paragraphs.

Mark Lanterman seconds the motion to delete the last two paragraphs of the opinion.

Melissa Manderschied asked for clarification.

Ben Butler then asked for a friendly amendment. The friendly motion has passed with all members in support except four. Any motions for the Board to adopt the draft opinion 5.2? He mentioned that the rules committee moves to adopt it.

Andrew Rhoades supported the motion proposed by Ben Butler.

Mark Lanterman seconded the motion.

Carrie Washington asked for clarification. She asked if the choices are to: 1) adopt what the rules committee proposes and 2) asked what is the alternative?

Ben Butler: The Board is to adopt the opinion.

Melissa Manderschied: Can we discuss whether the amendment if passed, is substantive enough to change the opinion of the rules committee?

Dan Cragg mentioned that the substance of the opinion had not changed.

Ben Butler: Called for a vote. He verbalized that 13 members voted in favor, with four opposed.

The Board then adopted the opinion after deleting the last two paragraphs of attachment two.

Item #2 is a referral from Justice Thissen: This issue came up at the last meeting by Justice Thissen. He was concerned about double counting non-cooperation being used as an aggravating factor in addition to a substantive charge. Dan Cragg stated that our rules are not clear. You must go to case law to understand this topic. Cragg explained that Justice Thiessen recommends clarifying the Rule or using a new charge.

Bill Pentelovitch's idea is to make it a matter for the referee. A referee has sanction power to levy against a party for misconduct.

Susan Humiston: I understand Justice Thiessen's argument where he has raised these questions. Caselaw is clear. Since the last decade, the Court has been deliberate in clarifying its caselaw whenever something is aggravating or not. ABA standards are clear about non-cooperation in post-petition matters. Because of the caselaw, I am not sure where the Rule would have the support of the majority of the Court.

Michael Friedman: Is this inconsistent about fair notice?

Ben Butler: Does the recent caselaw discuss differences between pre-charges and post-charges for lack of cooperation? The phrase aggravating factors bothers me. It seems to relate to the original misconduct, but it does not.

Susan Humiston: By necessity, the Supreme Court addresses it. They address post-petition conduct. OLPR does not go back and amend charges. It never relates back. OLPR does not have an aggravating factor in the way the misconduct happened that made the situation worse. Aggravating factors before discipline are just circumstances that relate to the matter before the person making a decision to decide what the appropriate discipline will be taken. It rarely includes anything pertaining to the original misconduct.

Dan Cragg: Does this mean when a lawyer does not cooperate before a referee?

Susan: No. I am not sure how you get there. If someone wasn't participating, was charged for something, and was not found guilty but lied. The way the Rule works, I have to have a recommendation from the referee to get to misconduct.

Frank Leo: What sanctions are available to a referee? As a point of clarity, can you speak to that?

Susan Humiston: They are district court judges serving as referees. We have had referees issue litigation sanctions. Sometimes a lawyer's answers were struck because they were not participating. Referees would look to the Court for guidance. The OLPR would have to go back to a panel for separate charges. There is a practical challenge to this.

Carrie Washington: Do referees have more or less authority than District Judges?

Susan Humiston: Referees are appointed by Courts. Their authorities are not fully articulated.

Ben Butler: Does the respondent get notice if the alleged lack of cooperation is pre-petition? If OLPR alleges a lack of cooperation post-petition, what notice does a lawyer get? In another example, if a person lied to the referee, what notice does the respondent get?

Susan Humiston: Lack of cooperation post-petition generally results in no discipline. In instances of lying, the matter is briefed before a referee. The lawyer gets the ability to challenge the lying

charge. People have requested additional evidentiary hearings, but I have not seen a referee do that. Lawyers have also had the chance to explain themselves. Referees would then consider that.

Justice Natalie Hudson: The Supreme Court looks at the findings and conclusions of the referee. It gets confusing. In criminal law, aggravating is related to the crime they committed. You are going back to the original conduct. In non-criminal cases, aggravating is not associated with the original conduct.

Susan Humiston: What can get complicated is the acceptance or remorse as aggravating factors. In one example, a lawyer filed motions to recuse the Board, and referees, and impede discovery. His motions were frivolous. There isn't a case to reflect the disrespect for proceedings. The rare case is where someone is not truthful. We resisted, and the Court has resisted this…the person holding public trust. Is this double-counting or fair?

Ben Butler: We should return this matter to the rules committee. Please update the Board at the next meeting.

Rule 3.8 Update:

Rule 3.8 Working group: Michael Friedman. We wanted to compare a Minnesota Rule with a similar Rule that was amended in Colorado. The OLPR Director provided the committee with what Rule 3.8 looks like in other jurisdictions. We sought feedback from the MSBA, prosecution, defense organizations, and the OLPR. Only one organization has provided comments – the state public defenders. Michael met with them to develop their positions on rule changes. Others agreed to get back by August 1. Michael is seeking feedback, and once he gets it, he will update the Board.

Michael mentioned the Colorado Rule addresses matters relating to Rule 3.8 in a meticulous way. It clarifies the affirmative obligations of a prosecutor.

Rule 1.8 (ethical rules on gifts):

Ben Butler: Should we make amendments to Rule 1.8? There was interest, but no one agreed to join a working group to address this matter. There was an informal poll taken of the Board. There was a solid majority to consider whether to recommend this amendment. Matthew Ralston is interested in it. He works for Adult Representation Services.

Susan Rhode: What is the recommendation from the Rules Committee?

Dan: This predates my time on the Board. MSBA recommended not to proceed with this. How does Rule 1.8 affect a county organization?

Matthew Ralston: We apply for funds to represent indigent clients.

Michael: Is the avenue a rule or an opinion to state the distribution of grant money should not be construed as money given out as rent money? Is it more about defining a gift?

Review of Supreme Court Decision In Re Mose, A20-0198:

The subject then changes to a review of the Supreme Court decision in the Mose case. A PowerPoint presentation is displayed ***In Re*** **Mose, A20-0198.**

Ben Butler: The Supreme Court made several decisions in the last couple of weeks. By way of background, Mose had 19 disciplinary sanctions. The Supreme Court denied his request for reinstatement. In February 2020, Mose petitioned for reinstatement but stated that he would resign his law license immediately upon being reinstated to work as an ADR Neutral. He wanted to be placed on Minnesota's rosters of neutrals as a mediator. In December 2021, a panel recommended reinstatement conditioned that he immediately resign. In December 2021, The OLPR and Moses stipulated, and the Supreme Court took this matter into advisement. The Court denied Mose's petition for reinstatement. The Court agreed with the panel that Mose showed remorse but disagreed he had the intellectual capacity to practice law. He was suspended for 30 years. There was a pattern of incompetence.

Ben Butler summarized succinctly the standards the Supreme Court uses when granting reinstatements. Salient points from a PowerPoint presentation are included below.

The petitioning lawyer must prove the following:

1. Moral change;
2. Intellectual capacity to practice law;
3. Compliance with the conditions of the suspension; and
4. Compliance with Rule 18, OLPR.

In addition to these, the Court weighs:

1. The attorney's recognition that the conduct was wrong;
2. The length of time since the misconduct and suspension;
3. The seriousness of the misconduct; and
4. Any physical or mental pressures susceptible to the correction.

Justice Hudson shared that the Court was concerned about the appearance it was endorsing Mose by including his name on the State Court Administration's website. Justice Hudson clarified for public members that when you heard he did not have the intellectual competence, the Court was saying he did not have the ***legal skills or reasoning skills*** to practice law. Working as a Neutral, there is high conflict in that area. The Court is responsible for the regulation of the profession. We are not required to accept the panel's recommendation. Mose had not shown the legal or reasoning skills the Court thought was necessary to be reinstated. This is a public protection issue. Why, then, did the Court flex its muscles? It would be good to read the dissenting view.

Antoinette Watkins: this was an excellent overview. Will this (PowerPoint presentation) be kept on our share point site?

Ben Butler: Yes, I will ensure it is placed there.

Susan Rhode: From the opinion, I did not gleam he did any of the ADR qualified neutral requirements for reinstatement. You work with vulnerable populations as a Neutral.

Jordan Hart: most of the complaints we receive involve some of what Mose struggled with.

Justice Hudson: Mose had done several of the ADR Neutrals training requirements. A Neutral testified on his behalf in support of his reinstatement.

Susan Humiston: You must have a plan outlining how you will ethically practice law. He had taken all the required training and had a mentor who testified at his hearing to support his reinstatement… For 30 years, he has been trying to get back into the practice of law.

Justice Hudson: When reading the dissent, Justice Thiessen's and Chutich's points were there are systemic oversight measures to monitor ADR neutral requirements.

Paul Lehman: I was a panel member on the Mose case. The panel debated whether Mose should be reinstated to practice law. They also debated whether or not Mose met the requirements to be reinstated.

Matthew Ralston: There are so many barriers to becoming an ADR Neutral.

Justice Hudson: Five of us felt those barriers to becoming an ADR Neutral were insufficient. The Court did not feel comfortable that Mose should be listed on the Minnesota Judicial website. It was a close call.

Kristi Paulson: When the panel heard this in 2021, the requirements we are discussing were not in place. The criteria to be placed on an ADR Neutral was simply taking a course. We struggled with this. We felt there was a moral change, but struggled with his competency to practice law.

Bill Pentelovitch: Our jobs just got really much harder. It is hard to prove moral change. Now we are being asked by clear and convincing evidence that a person is intellectually capable of practicing law. This might change the nature of hearings to show clear and convincing evidence. In Minnesota, we rarely disbar people, but suspend lawyers indefinitely. Suspensions are almost like disbarments. Why aren't we disbarring more people if we are making it so hard to be reinstated?

Justice Hudson: We are talking about a few attorneys to which this issue would apply. Recall that he was suspended for 30 years. You will not see that many examples like Mose. You are supposed to show competency to practice law, but this becomes difficult when suspended. He could have done volunteer work. The ABA and office stated the office and Court be more specific when telling attorneys what they need to do to be reinstated in matters like this. Remember that the Court looks to the panels for their assessments. Panel members must spell out how they considered evidence when arriving at a conclusion.

Bill Pentelovitch: If examining ten briefs someone has written that were poor, could that be used as the basis for not reinstating? There could be ten good briefs someone has written that support reinstatement.

Wendy Sturm: Are there standards when determining competence to practice law?

Ben Butler: The Director's office and petitioner's Bar must convince the petitioner has met those burdens.

The Number of Panels on the Board:

Ben Butler: How many panels should we have? A new member must become a panel chair if we move to six panels.

Bill Pentelovitch: Having four panel members afford us flexibility whenever there are unexpected changes, which we recently experienced. It has made an enormous difference.

Dan Cragg: Panel one has no hearing experience.

Matthew Ralston: I have not experienced a panel hearing.

Carrie Washington: What is the difference between four and three-member panels?

Susan Rhode: When having four member panels, three hear matters, but the fourth can listen in to gain experience.

Andrew Rhoades: Should we, as a Board, better share our experiences on panels? It appears that some panels are experienced, and some are not. Like murder boards and after-action reviews done in business, should we share our learnings in reinstatements? It would appear some of the more nuanced cases, such as the MacDonald reinstatement, could be shared, both positive and mistakes panel members made.

Ben Butler: I have some ideas on how we can address this issue and will take this on for action.

Director Humiston Update:

Susan Humiston: The Board of Law Examiners (BLE) addresses the essential characteristics for lawyers in Rule 5 of the BLE rule. The Board might want to read this Rule to educate itself on the standards the Bar expects lawyers to possess to practice law. This matters because these standards are separate from those to pass the Bar exam.

I had the chance to travel to an annual conference where Ben Butler, Justice Hudson, and Justice Thiessen attended an ABA annual conference in New Orleans.

There will be a meeting at the National Organization of Bar Counsels in Minneapolis on August 4, 2023. Board Member Mark Lanterman and I will present topics at the seminar there.

Next, I want to present information related to our budget. I submitted our proposed budget to the Supreme Court. This next biennial, I expect that we will exhaust our reserves. Our expenses exceed our revenues. The Court agreed to transfer funds from the Client Security Board to us. Our employees have enjoyed anywhere between a six and nine percent raise. These increases are not guaranteed. When there is money in the budget, our employees receive raises.

Lawyer registration fees fund the OLPR. In Minnesota, fees are $378, of which $78 does for Civil Legal Aid. By comparison, lawyer registration fees in Colorado are between $325 and $395, and all those funds are devoted to their OLPR office. Should reinstatement fees be raised? The $900 reinstatement fee has not been increased in 25 years.

Andrew Rhoades: We must examine how Susan's office is better funded. Her employees deserve raises and salary increases. If not, she cannot attract talented lawyers. Maybe we should raise lawyer registration fees. How can we expect her to whittle down the number of outstanding cases when she is constrained by the resources she is provided? Do we, as a Board, share responsibility in this matter? Who should advocate for the OLPR? I know we are constrained for time, but I would like to set aside this matter on an agenda item for a future Board meeting.

Susan Humiston: What does the OLPR need? We need revenue sources and perhaps Rule changes. We keep kicking the can down the road. Lastly, I always seek comments for articles that I write for the Bench and Bar. I am asking for input from the community and welcome them.

No further issues remained, and discussions ended.

Ben Butler: I motion to adjourn this meeting.

All: Aye.

Mark Lanterman: I second the motion.

Report to the LPRB: Consideration of Changes to Rule 3.8 - (10/27/23)

Background

At its April 2023 meeting, the LPRB reviewed a letter received from the Great Northern Innocence Project (GNIP) in which LPRB interest was sought for amending MRPC 3.8 to align with the ABA Model Rule by adopting the latter's 3.8(g) and 3.8(h). At the same meeting, the Director of the OLPR shared the text of Colorado's recent update to its Rule 3.8, which differs from both the MN and the ABA Model Rule in several sections, most notably in 3.8(d).

The LPRB set up an ad hoc committee (Committee) – composed of Michael Friedman, Landon Ascheman, Melissa Manderschied, and Frank Leo – to explore whether the LPRB might recommend changes to 3.8.

At the Committee's first meeting, we decided to share both the ABA and Colorado versions of 3.8 to a select group of stakeholders and invite feedback. (See Appendix A for a sample letter.)

Over the summer, written feedback was received from the following: the OLPR, the Minnesota State Bar Association (MSBA), the Minnesota County Attorney's Association (MCAA), the League of Minnesota Cities (LMC), the Minnesota Association of Criminal Defense Lawyers (MACDL), the State Public Defender (SPD), the NAACP-Minneapolis (NAACP) and the GNIP. (See Appendix B.) The MACDL further provided a complete version of their recommended Rule 3.8 (which included wording changes not explained in their letter), and the State Public Defender provided a snapshot of examples that demonstrate inconsistent interpretation of discovery requirements (pertinent to 3.8(d)) across the state.

We were unsuccessful in our attempts to receive feedback from the American Civil Liberties Union-MN and the Minnesota Justice Research Center.

Current Status and Views of Committee

The Committee has reviewed the feedback and held multiple discussions to clarify and sharpen our views. The goal of this report is to share such views while identifying decisions that the LPRB could make, in regard both to Rule language changes and processes for moving towards a petition to recommend changes. That this report carries some length is intended to allow for the best prepared and efficient LPRB discussion.

MRPC 3.8 is comprised of an introductory line followed by sections (a) through (f). As noted, the ABA Model Rule adds sections (g) and (h). The OLPR has alerted us to the addition of section (i) in some states, offering our consideration of that as well. Given the uncertainty that our process would end with an LPRB petition to recommend Rule changes – and, if so, which changes – the Committee considered it premature to take a deep look at Comments, though there were instances in which possible changes to Comments were discussed, as will be explained below.

At this stage (and detailed below), the committee has isolated the following sections for which all of us believe language should change: 3.8(d), 3.8(g) and 3.8(h). The Committee is unanimous in not recommending any changes to: the introductory line, 3.8(a), 3.8(b), 3.8(c), 3.8(e), and 3.8(f). We also agree that the proposed content of 3.8(i) should be considered as an addition to the Comments if 3.8(g) and 3.8(h) are adopted, but not added as its own Rule section.

Introductory Line, 3.8(a), 3.8(b), 3.8(c)

Board Action: None. (The Committee recommends no changes.)

Current: **The prosecutor in a criminal case shall:**

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

Discussion

Neither of the alternative models – ABA and Colorado – proposed any changes to (a), (b), or (c), and no feedback provided to the Committee suggested any need to do so.

However, both the OLPR and MACDL proposed adding a new introductory line. (The OLPR stated that, alternatively, the line could be incorporated into a Comment.)

OLPR: *The duty of a public prosecutor is to seek justice, not merely to convict.* (Used by Illinois.)
MACDL: *The prosecutor in a criminal case shall act as a minister of justice rather than as an advocate.* (Moving an edited version of the first line of Comment 1 into the Rule.)

The Committee believes that a declaration of this type reflects the nature of Comments and does not belong as part of the Rule. A problem with the OLPR offered line from Illinois is that it can be read more narrowly than "minister of justice". For instance, *to seek justice, not merely to convict* misses a prosecutor's role in establishing effective diversion programs.

3.8(d)
Board Action: Amend the Rule but consider alternatives for language changes. (The Committee had varied opinions regarding preferred language and offers for LPRB consideration the following Options as starting points.)

Current: **make timely disclosure to the defense of all evidence or information known to the prosecutor that 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;**

Option 1: Leave the above intact but add the following at the end. **A prosecutor may not condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused.** (Two members of the Committee preferred this option.)

Option 2: Leave the above intact but add the following at the end. **A prosecutor may not:**
(1) condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused, or
(2) intentionally delay production of exculpatory evidence or information in order to gain advantage in plea negotiations. (One member of the Committee preferred this option.)

Option 3: Redraft the section in its entirety so that it reads as follows.
After timely and diligent inquiry to agencies known to have participated in investigating and/or providing evidence for the case:

1) **Timely disclose to the defense all evidence, witness information, and other information that may be required to be disclosed by applicable law, rules of procedure, or court opinions including, but not limited to, any information that could negate the guilt of the accused or which mitigates the offense.**
2) **Alert the defense about any information sought from each agency that was not received.**
3) **In connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor which could affect a defendant's decision about whether to**

accept a plea disposition, except when the prosecutor is relieved of this responsibility by a statute, rule, or protective order of the tribunal.

A prosecutor may never:

4) **Condition the content of a proposed plea agreement on the defendant's waiver of any of the above requirements. (Comment will clarify that a prosecutor may offer a plea disposition in advance of completing required disclosure, but cannot revoke or amend the offer due to a defendant delaying decision until discovery can be reviewed.)** (One member of the Committee preferred this option.)

Discussion

The ABA Model Rule 3.8(d) is identical to the current MRPC 3.8(d). Colorado updated its 3.8(d) after a process which involved the prosecution and defense bars coming to agreement. Key additions included:

A prosecutor may not condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused. A prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists by making timely disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecutor is unable to obtain it;

As can be seen, the first sentence has been added to Option 1. The concerns of both sentences have been incorporated in both Option 2 and Option 3 but with the language reoriented. (Option 2 does so more narrowly, finding violation only with the intentional misuse of not diligently securing discovery rather than the lack of diligence itself.)

The Committee generally all shared the concern that the MRPC not address substantive aspects of Brady/Giglio or otherwise use language that could end up in conflict with future court rulings or changes to procedural rules. But there was disagreement as to whether Option 3's use of language referencing the need to adhere to legal guidance, but without specifying the current content of such, meets this goal. (The language in Option 3 – **applicable law, rules of procedure, or court opinions –** was borrowed from North Carolina's update to 3.8(d).)

In feedback about changes to 3.8 overall, the MCAA and LCM took the approach that can be paraphrased as: if it's not broken, there's nothing to fix. However, neither offered specific criticism of the expansions of the rule undertaken in Colorado other than implying that, as prosecutors are already aware of their disclosure requirements, no amendment is needed.

For both the SPD and MACDL, changing Section (d) was their primary focus for amending MRPC 3.8. Both asserted that the current rule has not been consistently understood nor effective in its fundamental purpose. Each clarified that the need for changes is not just about ensuring adherence to the current caselaw (Brady/Giglio) in regard to police witnesses (i.e. availing officer impeachment due to a record of behavior not necessarily related to the case at hand), but relevant for other witnesses as well (which may include the victim and victim advocates). The SPD provided examples which demonstrated that prosecution beliefs about ethical discovery requirements vary considerably across the state, emphasizing the urgency to bring greater specificity to the MN Rule, believing that even Colorado's example did not do this well enough. (That view influenced the choice to reframe the entire section in Option 3, and the addition offered in Option 2.)

The OLPR Director provided a similar perspective about discovery practices, writing that – from the experience of several conversations she has undertaken with prosecutors and defense counsel – she has been: "struck by how much policies and procedures seem to vary by offices." Several other jurisdictions have amended 3.8(d) to make discovery obligations more precise.

The OLPR also reported that their equivalent office in Colorado believes its new rule has helped clarify the necessary timeliness of disclosures so as to avoid preemption of defendant rights at the pre-plea stage. (All of the Options share this goal.) However, the OLPR does find Colorado's language repetitive and counterproductively wordy. They provided the North Carolina updated language as an alternative to Colorado's while also suggesting that language changes orient to the obligations contained within the MN Rules of Criminal Procedure. NC language:
"after reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that 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."

The MSBA declined to take a position regarding 3.8(d) absent better knowledge of the actual rules and caselaw that guides MN prosecutors. Other feedback either omitted mention of 3.8(d) or found favor with Colorado's changes without providing any helpful rationale.

3.8(e)
Board Action: None. (The Committee recommends no changes.)

Current: **not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:**

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;

The ABA Model Rule (and Colorado among other states) have added:

(3) there is no other feasible alternative to obtain the information;

Discussion

While the Committee understands the potential for abuses which motivates #3, we all opposed the addition. Our primary concern is that "feasible" (or, in the alternative "reasonable") could leave too much room for interpretation. One of us further wondered if the addition could be misused by lawyers under investigation for participating in a client's criminal conduct; can there be arguments over the necessary particularity of the lawyer's testimony even if facts could otherwise be found? (Consider, for example, the prosecution of lawyers working with the former U.S. President.)

All of the organizations providing feedback didn't address the addition, other than the OLPR which indicated that the situation the Section describes has not been an issue in Minnesota. (The MACDL included the addition in its proposed revision of the full Rule without explaining why it prefers this change.)

3.8(f)
Board Action: The Committee recommends no change to this section of the Rule. The Committee is divided as to whether Comment 5 should be edited.

Current Rule: **exercise reasonable care to prevent employees or other persons assisting or associated with the prosecutor in a criminal case and over whom the prosecutor has direct control from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.**

Comment 5 (with possible edit): **Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused or any group within the community. Nothing in this comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).**

Discussion

If MN added the language of the ABA Model Rule, the edits would look like this:
except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case and over whom the prosecutor has direct control from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

The key prohibited element provided by the change is whether the statement foreseeably led to "heightening public condemnation." The problem is that this makes the basis of discipline not the prosecutor's act itself (the statement) but the effect the prosecutor's act (statement) has had on the public, its impact. Therefore, an amended Rule would not clearly guide or forewarn a prosecutor about what wording in a statement is permissible and what would be prohibited.

The MSBA, LMC and MCAA all focused their feedback about proposed changes to 3.8 in general on their opposition to the ABA Model Rule 3.8(f), persuasively arguing that the changes could be unfairly overbroad. There are real world limitations on the ability of prosecution offices to control statements made by police agencies and what "reasonable care" could prevent that is anyone's guess. (The MCAA further points out that law enforcement is obligated to comply with public data laws.)

The OLPR has not experienced any shortcomings in the current rule and implies there is no benefit in amending it.

In favor of the change, the MACDL included the ABA version in its proposed update of the MN Rule but did not clarify why. The GNIP also preferred the ABA version but found the issue it concerns outside of its purposes.

The NAACP-MPLS, while not addressing the language of (f) specifically, focused its concerns about 3.8 generally on areas this Section appears to address, namely the problem of prosecutors and law enforcement casting negative aspersions, or making extrajudicial statements, that inappropriately burden defendants, often reflecting and extending racial bias that has pernicious impact not only on the individuals referenced but on community trust of the justice system.

The proposed expansion of Comment 5, favored by half of the Committee, is intended to respond to such concerns by adding the consideration of the impact on community, and not just the defendant, when a prosecutor is making extrajudicial statements that do not serve law enforcement purposes. The other half of the Committee finds the use of the word "group" too ambiguous, and the addition overall overbroad and potentially conflicting with the first amendment.

3.8(g)
Board Action: The Committee recommends adoption of the ABA Model Rule after a few edits.

Current Rule: None.

ABA Model Rule (with proposed edit in markup): **When a prosecutor ~~knows of~~ <u>is provided with</u> new, credible and material evidence creating ~~a reasonable likelihood~~ <u>probable cause to believe</u> that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:**
(1) promptly disclose that evidence to an appropriate court or authority, and
(2) if the conviction was obtained in the prosecutor's <u>current</u> jurisdiction,
(i) promptly disclose that evidence to the ~~defendant~~ <u>defense</u> unless a court authorizes delay, and
(ii) ~~undertake further investigation, or~~ make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

Several states have added an additional subsection under 3.8(g)(2) along the lines of: **if the defendant is not represented by counsel, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.**

Discussion

Quick explanation of edits:

1) "is provided with" – Forces prosecutors to be subject to the rule upon receipt of information, which is more provable than determining what one "knows".
2) "probable cause" – A standard well understood in criminal law that is both higher and less subject to argument than "reasonable likelihood".
3) "current" – A prosecutor may not be able to take needed steps if no longer practicing in the jurisdiction in which the conviction took place, and therefore meets ethical requirements by disclosing the information to an appropriate authority, which presumably means the prosecutor in that jurisdiction. (If not obviously implied, a Comment to the effect could be considered.)
4) "defense" – A style change for consistency in 3.8 when it can mean the defendant or their attorney.
5) "undertake further investigation" – There can be reasonable concerns about prosecutor capacity and impartiality for investigating in-house.

The Committee finds it important that a defendant affected by this rule receives advice of counsel and that the prosecutor is not an obstacle to such, but is unclear how to frame a proactive rule requirement on prosecutors to ensure such. (For instance, what is the prosecutor's obligation if the defendant never qualified for a public defender?) The additional subsection seems oriented to cases of incarcerated individuals, but the rule would apply to all convictions regardless of sentence or current status of the defendant.

The GNIP has found that the absence of this rule in MN has led MN prosecutors to lack clarity about their ethical obligations post-conviction when new credible exculpatory information becomes available.

Neither the LMC nor the MCAA offered a specific basis for opposing adoption of this section of the ABA Model Rule, and focused their feedback on other proposed amendments.

The OLPR offered the Oklahoma modification of the ABA Rule as its preference, which includes the additional subsection regarding appointed counsel.

The MACDL advocated for the inclusion of an obligation to move the court to appoint counsel for unrepresented defendants, but did not include any reference to further investigation.

<u>3.8(h)</u>
Board Action: The Committee recommends adoption of the ABA Model Rule after a few edits.

Current Rule: None.

ABA Model Rule (with proposed edit in markup): **When a prosecutor ~~knows of~~ <u>is provided with</u> clear and convincing evidence establishing that a defendant in the prosecutor's <u>current</u> jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.**

Discussion

The GNIP has found that the absence of this rule in MN has led MN prosecutors to lack clarity about their ethical obligations post-conviction when evidence of innocence becomes available.

Neither the LMC nor the MCAA offered a specific basis for opposing adoption of this section of the ABA Model Rule, and focused their feedback on other proposed amendments.

The OLPR supports the addition of the Model Rule as written, but notes that some jurisdictions have chosen to substitute for the word choice of "remedy." For example, North Dakota uses "undo." The MACDL, without explanation, prefers: "set aside".

Our discussion noted the advantage of "remedy" offering broader options for a prosecutor, but also a concern that a commutation to time served should not be considered a suitable remedy. We suspect that elaboration of "remedy" could be the proper subject of a new Comment.

<u>Comment for 3.8(i)</u>
Board Action: The Committee recommends using the language several states have adopted in 3.8(i) in a new Comment if 3.8(g) and (h) are added to the MRPC.

Current Rule: None.

Language of 3.8(i): **A prosecutor's judgment, made in good faith, that evidence does not rise to the standards stated in paragraphs (g) or (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.**

Discussion

While the intent of this section is supported by the Committee, we find it consistent with the MRPC to use the language in a Comment instead of a Rule, as it essentially is explanatory of other Rules and not something that could itself be violated.

<u>MRPC 3.8 –Decisions About Process</u>

1) If the LPRB seeks changes to MRPC 3.8, a decision will have to be made regarding our interest in moving forward with our own voted upon language changes, or first inviting a new round of feedback and coordination with outside groups. If the latter, a further decision concerns whether we seek to engage with: a) only the OLPR, b) only the OLPR and MSBA (or adding also the MCAA) c) all of the groups previously contacted, or d) other (?).
2) Given that proposed changes to Rules often involve unresolvable disagreement which, in this instance, seems inevitable both internally and externally, it will need to be decided what level of advance agreement is required to comfortably proceed with a petition to the MN Supreme Court, allowing debate to move to that level.

APPENDIX A

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
445 MINNESOTA STREET, SUITE 2400
ST. PAUL, MINNESOTA 55101-2139

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TOLL-FREE 1-800-657-3601
FAX (651) 297-5801

6/28/23

Sara Jones, Executive Director

Re: Requesting your comments concerning possible changes to MRPC 3.8, regarding the special responsibilities of prosecutors

To the Great Northern Innocence Project:

The Lawyers Professional Responsibility Board (LPRB) is considering whether to recommend that the Minnesota Supreme Court amend Minnesota Rule of Professional Conduct (MRPC) 3.8, which regards the special responsibilities of prosecutors. Our committee has been charged with soliciting comments that may inform how (or whether) we recommend such a change, and we write to see if your organization might helpfully offer us its views.

The LPRB has historically considered it a core function to inform the Minnesota Supreme Court when we believe changes to the MRPC would be beneficial. Recently, the Great Northern Innocence Project shared with us their concern that MRPC 3.8 lacks some of the language of the American Bar Association's model rule. The LPRB has also been made aware of the Colorado version of Rule 3.8, which appears to be more directive regarding prosecutor obligations to learn of, and timely disclose, information that may be helpful to a defendant.

The attachments show how Minnesota's current rule would change if amended to align with either the ABA model rule or the Colorado version of the rule. However, we are looking at the rule in its entirety and are also open to comments about other potentially amended language.

Please keep in mind that a successful rule not only achieves its desired objective but does so without creating unfair challenges for compliance or technical burdens for fair review.

Subsequent to receiving your reply, we might request a direct conversation to further our understanding, and we welcome your initiation of such a dialogue if you believe that to be helpful.

Please let us know by return email how long it may take to provide us with feedback. We look forward to your input and welcome your contacting us regarding any questions or concerns along the way.

Sincerely,

Michael Friedman (Committee Chair)
Mfrie55405@gmail.com

Landon Ascheman
landon@aschemanlaw.com

Melissa Manderschied
mmanders@bloomingtonmn.gov

Francis Leo
Francis.j.leo@gmail.com

CC: Benjamin Butler (Chair of the LPRB)

Rule 3.8 Special Responsibilities of a Prosecutor (MN→ABA Model)

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that 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;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case ~~and over whom the prosecutor has direct control~~ from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Rule 3.8 Special Responsibilities of a Prosecutor (MN→CO)

The prosecutor in a criminal case shall:
(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) ~~make~~ timely ~~disclosure~~ disclose to the defense ~~of~~ all ~~evidence or~~ information known to the prosecutor, regardless of admissibility, that the prosecutor also knows or reasonably should know 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~~ or would affect a defendant's decision about whether to accept a plea disposition, except when the prosecutor is relieved of this responsibility by ~~a~~ statute, rule, or protective order of the tribunal~~;~~. This information includes all unprivileged and unprotected mitigation information the prosecutor knows or reasonably should know could affect the sentence. A prosecutor may not condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused. A prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists by making timely disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecutor is unable to obtain it;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused unless such comments are permitted under Rule 3.6(b) or 3.6(c) or other law, and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case ~~and over whom the prosecutor has direct control~~ from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6. or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) disclose that evidence to an appropriate court or prosecutorial authority, and

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority

> **(A)** disclose the evidence to the defendant, and
>
> **(B)** if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in a court in which the prosecutor exercises prosecutorial authority, of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside the conviction.

APPENDIX B

Gmail

Michael Friedman <mfrie55405@gmail.com>

Request for Public Defender Feedback

Ward, William <William.Ward@pubdef.state.mn.us> Wed, Jun 28, 2023 at 12:44 PM
To: Michael Friedman <mfrie55405@gmail.com>
Cc: Landon Ascheman <landon@aschemanlaw.com>, "Manderschied, Melissa" <mmanderschied@bloomingtonmn.gov>, Frank Leo <Francis.j.leo@gmail.com>, "Butler, Benjamin" <Ben.Butler@pubdef.state.mn.us>

Michael -

It has been my position that Minnesota should have adopted Colorado's version of 3.8 some time ago.

I also believe that even Colorado's version doesn't go far enough with respect to disclosing exculpatory information including compiling/maintaining/updating and tendering Brady/Giglio lists containing the names and details of law enforcement officers who have had sustained incidents of untruthfulness, criminal convictions, candor issues, or some other specific act of conduct placing their credibility into question.

The failure to tender Brady material – of all kinds – is an ongoing game of hide the ball that goes against the ideals of a prosecutor as a minister of justice. Yet it continues in too many counties in an unfettered way.

More than happy to discuss.

Bill

We the People

William M. Ward

He/Him/His

State Public Defender

Minnesota Board of Public Defense

Michael Friedman, Committee Chair
Landon Ascheman
Melissa Manderschied
Francis Leo
Lawyers Professional Responsibility Board
445 Minnesota Street, Suite 2400
St. Paul, MN 55101

July 31, 2023

Dear Committee Members,

I write on behalf of the Great North Innocence Project ("GNIP") in response to your letter dated June 28, 2023, concerning a potential amendment to Minnesota Rule of Professional Conduct 3.8. That letter was in response to my letter to the Lawyers Professional Responsibility Board ("LPRB") dated April 21, 2023, encouraging the LPRB to recommend that the Minnesota Supreme Court amend Rule 3.8 so as to add Rule 3.8 (g) and (h) of the American Bar Association's Model Rules of Professional. In your letter, you pointed to Colorado's version of Rule 3.8 as representing another alternative and sought GNIP's feedback.

In short, GNIP's position is that either the ABA model rule or the Colorado version of Rule 3.8 would represent an improvement as compared the version of the Minnesota rule. As to Rule 3.8(g) and (h), the specific provisions that were the subject of my original letter, GNIP has a modest preference in favor of the ABA model rule. Our opinions is that the minor differences in wording between the ABA model rule and the Colorado rule are unlikely to be material in the overwhelming majority of cases. Therefore, while we would view the Colorado version as equally acceptable, we would default in favor of the ABA model rule since that is a version that has gained widespread acceptance in states around the country.

The Colorado version of Rule 3.8, however, does include certain other provisions that GNIP supports and encourages the LPRB to endorse. Colorado's version of Rule 3.8 includes additional language in subsection (d) concerning the disclosures that prosecutors are required to make in advance of trial. Specifically, the additional language in Colorado's Rule 3.8(d): (1) requires pretrial disclosure of mitigation information that could affect sentencing; (2) precludes prosecutors from conditioning plea negotiations on postponing disclosure of exculpatory information; and (3) requires prosecutors to make diligent efforts to obtain from relevant agencies information otherwise subject to disclosure that they know or reasonably should know to exist. Each of these requirements is reasonable in scope and consistent with Rule 3.8's animating principle concerning the special role of prosecutors as ministers of justice. Therefore, GNIP encourages the LPRB to include the language from

Colorado's version of Rule 3.8(d) in any forthcoming recommendation to the Minnesota Supreme Court.

The Colorado version of Rule 3.8 also includes additional language in subsection (f) prohibiting prosecutors from making certain extrajudicial statements that could heighten public condemnation of the accused. This rule strikes us as sensible. While this provision less directly relevant to GNIP's mission as an innocence organization, we would support a version of the rule that includes that language.

Please let us know if you have additional questions or if there is anything we can do to assist with your process. We appreciate your attention to these important issues.

Sincerely

Sara Jones
Executive Director

CC: Benjamin Butler

Gmail

Michael Friedman <mfrie55405@gmail.com>

MSBA Professional Regulation Committee Comments re LPRB letter on Rule 3.8

Hanson, Cassie <CHanson@fredlaw.com> Tue, Aug 1, 2023 at 5:40 PM
To: "Mfrie55405@gmail.com" <Mfrie55405@gmail.com>, "landon@aschemanlaw.com" <landon@aschemanlaw.com>, "Francis.j.leo@gmail.com" <Francis.j.leo@gmail.com>, "mmanders@bloomingtonmn.gov" <mmanders@bloomingtonmn.gov>
Cc: "Nancy K. Mischel" <nmischel@mnbars.org>

Dear Mr. Friedman, Mr. Ascheman, Ms. Manderschied and Mr. Leo:

The MSBA Professional Regulation Committee met last week to discuss the LPRB's June 28, 2023, letter requesting the Committee's feedback on proposed changes to Rule 3.8 of the Minnesota Rules of Professional Conduct. The Committee reviewed your June 28 letter as well as both versions of Rule 3.8 (ABA Model Rules and Colorado). After much discussion, the Committee was not able to take a position on the matter at this time for the following reasons:

- Several states have not adopted the ABA amendment because the amendment is inconsistent with existing Brady law in those states. Disclosure of exculpatory information is both a legal and an ethics issue. Has there been any research into Minnesota Brady law to determine whether the proposed amendments are consistent with, or at least not inconsistent with, Minnesota law on the obligation to disclose exculpatory information? An ethics standard that is inconsistent with the legal obligation covering the same conduct would be problematic.

- In 2005, some of the proposed amendments to Rule 3.8 (f) were rejected by the Joint Committees that recommended changes to the Minnesota Rules of Professional Conduct. For example, the Committees determined that holding the County Attorney responsible for the conduct of the Sheriff, who is also an elected official, does not recognize the reality of the relationship in Minnesota. While County Attorneys do possess charging authority, they do not have supervision or any other type of authority over public speech of law enforcement. Several Committee members expressed that this remains a serious concern, and it was not clear from the LPRB's letter what circumstances have changed since this part of Rule 3.8(f) was rejected in 2005.

- The proposed addition of the ABA's "heightening public condemnation of the accused" standard in Rule 3.8 (f) is also problematic because of the significant differences between the Minnesota and ABA versions of Rule 3.6 governing trial publicity. Minnesota rejected the ABA version of Rule 3.6 in 2005 due to concerns about constitutional free speech issues. Minnesota's Rule 3.6 was intentionally limited in its application to public comments involving a pending criminal jury trial. Unlike ABA Rule 3.6, it does not apply to criminal bench trials or civil matters, nor does it include the safe harbor statements for criminal matters. The addition of the *heightening public condemnation of the accused* standard would create a much broader restriction than Minnesota Rule 3.6 and would create inconsistency between Minnesota Rule 3.6 and 3.8. Some MSBA Rules Committee members also have 1st Amendment concerns about the *heightening public condemnation of the accused* standard. Other Committee members wondered whether the LPRB was also considering an amendment to Minnesota's Rule 3.6 if adoption of ABA Model Rule 3.8(f) is pursued.

The MSBA Rules Committee is willing to look at this again but believes further consideration of these concerns is warranted. If someone from the LPRB would like to come to the Committee to offer commentary on these concerns, please reach out to Nancy Mischel regarding future meeting dates.

Cassie Hanson (she/her)

THE MINNESOTA
COUNTY ATTORNEYS
ASSOCIATION

August 4, 2023

Michael Friedman (Committee Chair)
Lawyers Professional Responsibility Board
445 Minnesota Street, Suite 2400
St. Paul, Minnesota 55101-2139

Sent via email: Mfrie55405@gmail.com

Dear Mr. Friedman:

Thank you for the opportunity to comment on the proposed changes to MRPC Rule 3.8, the Special Responsibilities of Prosecutors.

First, our Association questions the need to change the current rule. Without an understanding of the reason to change it, we oppose any changes to the current rule.

Secondly, we would specifically oppose any proposal that deletes "and over whom the prosecutor has direct control" from the current rule. As you know, law enforcement information may be released in accordance with the provisions of Minn. Stat. § 13.82, subd. 15 and § 13.825 (body cam data) requires release to the public when there is an officer involved death. The proposed changes to the rule unduly restrict the release by law enforcement of data permitted or required pursuant to statute. One recent example of information released to the public by personnel over whom the prosecutor had no direct control was the release to the public of traffic camera video of law enforcement pursuing a vehicle travelling at 140 mph and release of a law enforcement report which indicated that the driver said he was travelling at that speed due to a dog emergency. Another recent example of information being released to the public by law enforcement over whom the prosecutor had no direct control is the release of body cam video and other video of a law enforcement encounter on Interstate 94 which resulted in a fatal shooting. To hold the prosecutor ethically responsible for the speech and conduct of investigators and law enforcement personnel over whom the prosecutor has no direct control is both unfair and unrealistic.

Thirdly, our County Attorneys and Assistant County Attorneys are well aware of their disclosure responsibilities and the current rule adequately covers any ethical lapses in carrying out those responsibilities.

We would be happy to have any further discussions.

Sincerely,

Robert M. Small
Executive Director

CC: Frank Leo Francis.j.leo@gmail.com; Landon Ascheman landon@aschemanlaw.com
Melissa Manderschied mmanderschied@bloomingtonmn.gov

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August 4, 2023

Mr. Michael Friedman
Lawyers Professional Responsibility Board

BY EMAIL ONLY
mfrie55405@gmail.com

Re: Rule 3.8, Minnesota Rules of Professional Conduct

Dear Michael:

Thank you for your letter of June 28, 2023, soliciting comments on potential changes to Rule 3.8, MRPC. You have advised that your committee is looking at Rule 3.8 as a whole and are in the process of evaluating whether and to what extent changes may be warranted. The Board's interest in this topic has been prompted by a request from the Great North Innocence Project to adopt ABA Model Rules 3.8(g) and (h), which were not adopted by Minnesota when first promulgated by the ABA, and work in other jurisdictions such as Colorado to specifically address issues relating to prosecutor's discovery obligations. I'm pleased that the Board is engaging in this review, appreciate the opportunity to comment, and have several thoughts for your consideration.

First, I believe that current events have demonstrated the importance of strong ethical rules that reflect the important "minister of justice" role that prosecutors serve. Public confidence in our justice system is severely undermined when prosecutors engage in misconduct. A recent high-profile discipline example from Massachusetts demonstrates this point.

In 2013, a criminal lab chemist was arrested for tampering with and personally using drug samples she was charged with testing. Although she was arrested and prosecuted, the scope of her drug use was not disclosed by the prosecution during her case or in other prosecutions, presumably for fear of how many cases would be impacted. The assistant AG prosecuting the case maintained that the drug use was limited to six months, although she had records that suggested that it was a years long

issue that the prosecutor did not disclose in other cases. Ultimately tens of thousands of criminal cases were overturned due to the misconduct of the chemist, the scope of which only later came to light, after the undisclosed exculpatory evidence surfaced. At this time, the Massachusetts Supreme Judicial Court has under advisement the recommended discipline for three prosecutors involved in the case, following oral argument in April 2023. Similarly, much has been written locally about the challenges relating to, and potential failures to, disclose adverse information relating to police conduct.

Prosecutors are in a unique position given their access to information and the important individual liberty interests at stake. Further, the courts are only able to address discovery issues if they are raised, but it can be difficult for defense counsel to raise such issues because "you don't know what you don't know."

I have had the opportunity over the last few years (in particular since the *Pertler* disbarment case) to discuss these issues at length with both prosecutors and defense counsel and I am struck by how much policies and procedures seem to vary by offices, and by the fact that there is a lot of debate about what should be or must be produced in discovery, even though the Minnesota Rules of Criminal Procedure (Rule 9.01 and 9.03, Minn. R. Crim. Pro.) are extremely broad. It also seems that constitutional issues muddy the issue, but such decisions should not set the standard for discovery but rather are relevant to assess the consequences for failure of discovery. For these reasons, as more fully described below, I believe that the ethics rules (primarily Rule 3.8(d)) should clearly reinforce the broad discovery obligations set out in the criminal rules, and consistent with the truth-seeking function of the justice systems.

Second, I think it is important for confidence in the judicial system that the public understands that prosecutors have a duty to take action if new information arises that suggests a defendant did not commit the crime for which they have been convicted. With no ethical obligation or other requirement, it may be easier to not take action given the passage of time, and pressing present day obligations. For this reason, I'm in favor of adopting ABA Rule 3.8(g), as requested by the Innocence Project, but perhaps a modified version of the rule. I also support adoption of ABA Rule 3.8(h), and have no objection to adding an additional provision that addresses the good faith nature of a prosecutor's actions relative to (g) and (h), as more fully discussed below.

Third, I do not believe that any changes need to be made to Rule 3.8(e) or (f), MRPC. I am not aware and have not seen any issues that are not effectively addressed by the current version of those subdivisions, nor has anyone raised any issue that the current subdivisions of the rule provide inadequate guidance.

A. ABA and Minnesota Rule 3.8(d).

1. Colorado.

I brought Colorado's newly-adopted version of Rule 3.8(d) to the Board's attention, not because I really liked the specific language of the new rule (which I think has a lot of words) but rather because I applauded Colorado's effort to provide guidance that I believe is needed to make the general nature of the current rule more impactful and meaningful for prosecutors.

Some additional background regarding how the rule came about in Colorado may be helpful. I have gathered this information from conversations with Colorado's Regulation Counsel, Jessica Yates. For a few years, the Colorado legislature was attempting to take action that both prosecutors and defense counsel generally found undesirable, so a committee was formed to see if changes could be agreed to, in keeping with the profession's longstanding self-regulation tradition. Stakeholders included regulation counsel as well as prosecutors, both federal and state, and defense attorneys, both federal and state. The final product was actually a compromise between the members of the committee and was not something that was drafted by any specific constituent. As one would expect, there was some opposition to the rule change, including by the Colorado United States Attorney, but for the most part, the position presented to the Colorado Supreme Court was one of unity between prosecutors and defense counsel. Further, at oral argument, the U.S. Attorney's Office largely walked back their concerns—an AUSA had been a member of the committee, in fact. After a lengthy oral argument, the court adopted the rule change within about a week with no comment.

Implementation has gone relatively smoothly due to the fact that key stakeholders within prosecution and defense organizations collaborated on the text of the rule, and the regulation office has spent significant time in outreach primarily to prosecution offices throughout the state. Colorado has not seen an influx of complaints

following the updated rules enactment, but they have received a lot of calls from districts seeking assistance with compliance, primarily around how to ensure compliance with the "timeliness" obligation (which has always been in the rule but now is more clearly linked to the decision to accept a plea), and the duty to supplement the fact that information sought is *not* obtained.

2. Other states.

Most states adopt the Model Rule 3.8(d) language with minor, typically non-material changes if any changes are made. A small handful of states, approximately four or so, include language in their version of Rule 3.8(d) that is more limiting than the model rule language. For example, Alabama includes the word "willfully" at the start of its rule, which is stated in the negative, "not willfully fail to make timely disclosure...." The District of Columbia include the word "intentionally" before "fail to disclose" in their version of the rule. New Jersey and Virginia delete the term "information" and only require disclosure of "evidence."

In addition to Colorado, two states incorporate the concept of a diligent inquiry into the language of the rule, Maine and North Carolina. North Dakota includes language expanding upon timeliness, namely, at the "earliest practical time."

North Carolina's rule is interesting. Its Rule 3.8(d) states:

"after reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that 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."

3. Minnesota Criminal Procedure Rules.

In considering amendments to the rule, I believe it is important to incorporate key concepts that are already in the Minnesota criminal procedure rules, and thus reflect current legal obligations of prosecutors. Rule 9.01, subd. 1(6), requires disclosure

of "exculpatory information" defined as "material or information in the prosecutor's possession and control that tends to negate or reduce the defendant's guilt." This provision specifically does not refer to evidence, a term that incorporates potential issues of admissibility. The scope of the obligation to produce material or information extends beyond the prosecutor and her staff but to "any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case, have reported, to the prosecutor's office." Rule 9.01, subd. 1a(1). The timing of such disclosures is "in time to afford counsel the opportunity to make beneficial use of it." Rule 9.03, subd. 2(a). Each party has a continuing duty of disclosure before and after trial, Rule 9.03, subd. 2(c), and must "promptly" notify the other party of newly discoverable disclosable information. Rule 9.03, subd. 2(b).

Given the broad disclosure obligations in Minnesota, and the importance of the disclosures, I support amending Minnesota's Rule 3.8(d) language. I believe there is merit to both the language adopted in North Carolina and Colorado. North Carolina's language incorporates the law in a way that may make support from the federal government more likely, but does not provide specific direction in the rule that Colorado's language provides, such that one just needs to look at Colorado's rule to know the ethical obligation, which are co-extensive with the obligation imposed by procedural rule in Minnesota.

I also support the knows or reasonably should know language in the Colorado rule. With regard to the exculpatory evidence, the Minnesota procedural requirement is just that the information be within the prosecutor's "possession and control," not known to be in the possession or control of the prosecutor or "known by the prosecutor," such as it would encompass an obligation to diligently search. Why should the ethics rule be limited to actual knowledge, when that is not what a prosecutor's legal discovery obligation entails? Such language in the rule also eliminates mistakes or failure to turn up information as a basis for discipline because one can argue that one did not know of the information, and could not reasonably know of it because they diligently looked, and it was not discovered.

I also like how the Colorado rule expressly incorporates the requirement that the information be produced in a timely manner that is further defined to tie to guilty plea decisions. By procedure rule, the discovery obligation timing is before the Rule 11

omnibus hearing, and thereafter promptly when discovered, and generally in sufficient time to make "beneficial use of it."

I do have a couple of questions regarding the Colorado rule. While I understand the value of having the express statement "A prosecutor may not condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused," this statement seems duplicative of the requirement already included in the obligation to disclose information in a timely manner so that a defendant may consider a plea. Similarly, I see the value in the last sentence, but wonder if it is also already covered by the "reasonably should know" language in the rule, which incorporates the concept of a diligent inquiry. While I am still considering the issue, perhaps those statements could be in the comment versus the text of the rule for easier readability.

In general, the OLPR supports changes to Rule 3.8(d), and believes both North Carolina's and Colorado's rules are an improvement on Minnesota's rules. Ethics rules should provide good guidance to practitioners of what is proper and required conduct on topics of such importance in the practice of law that the failure to follow the required conduct merits professional consequences in the form of discipline. Colorado's rule does that better in my opinion than North Carolina's rule, and I think shows leadership on a very important rule. I am cautious about fully endorsing Colorado's rule, however, because I believe some of the language is not necessary and the rule overall is wordy. I have not taken the opportunity to attempt to draft alternative language at this point. We would be happy to give this further consideration if the Board wishes to move in that direction.

B. ABA Rule 3.8(g).

As previously stated, I have not been able to ascertain why Minnesota did not adopt a version of model rule 3.8(g) when it was originally adopted given the general discussion by several parties regarding that rule, the endorsement of the Minnesota County Attorney's Association of a modified version of Rule 3.8(g), and given the significant importance of such a requirement, both in terms of impact relative to an individual and the public's perception, as noted above, of the justice system. I appreciate the Innocence Project raising this issue again.

1. Other states.

Roughly 17 jurisdictions have adopted some form of Rule 3.8(g). Most of those jurisdictions have made some modifications to the model rule language with only a couple adopting the model rule language verbatim. The most common change is the one suggested by the MCAA in 2009, to focus on disclosure but not requiring further investigation by the prosecution. While I concur with the challenges relating to a prosecutor conducting an investigation as stated by the MCAA, I do not believe that disclosure alone is sufficient, and found persuasive those jurisdictions that required the prosecutor to move the court to appoint counsel if the defendant was not represented, as well as to request an investigation or make reasonable efforts to cause the appropriate authority to undertake an investigation.

2. Proposal for revised Rule 3.8(g).

Oklahoma, in my view, makes the appropriate modifications to Rule 3.8(g)—codified by Oklahoma in their Rule 3.8(h):

When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) disclose that evidence to an appropriate court and prosecutorial authority in the jurisdiction where the conviction occurred, and

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority,

(i) unless a court authorizes delay, make reasonable efforts to disclose that evidence to the defendant's attorney or if the defendant is not represented by counsel to the defendant, and

(ii) if the defendant is not represented by counsel, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence, and

(iii) request an appropriate authority to investigate whether the defendant was convicted of an offense that the defendant did not commit.

Ok. St. RPC Rule 3.8(h). This revised Rule 3.8(g) does not require a prosecutor to undertake an investigation, the primary objection of the MCAA, but does require them

to take steps likely to ensure that one takes place, consistent with the obligation to preserve the quality of justice. The OLPR supports adoption of the model rule language as modified by Oklahoma. I would note, however, that I have not spoken with discipline counsel in Oklahoma regarding their experience with the rule. I will plan to do so if the Board choses to continue to pursue consideration of ABA Rule 3.8(g).

C. ABA Rule 3.8(h).

Approximately 13 states have adopted some form of model rule 3.8(h), with most states adopting the language of the model rule verbatim. MCAA's concern relating to the adoption of (h) is that the phrase "remedy the conviction" is unclear. I'm not sure how it is unclear, but a couple of jurisdictions such as Colorado and North Dakota have been more explicit by changing the language to "seek to undo the conviction" (North Dakota) or "consistent with applicable law, to set aside the conviction" (Colorado). While I prefer the model rule language, I do not object to either Colorado's or North Dakota's tweak to (h). I support Minnesota's adoption of Model Rule 3.8(h).

D. New provision, Rule 3.8(i).

Several states have adopted an additional provision, not contained in the model rules, which warrants consideration:

> (i) A prosecutor's judgment, made in good faith, that evidence does not rise to the standards stated in paragraphs (g) or (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

MCAA supported the inclusion of this provision in 2009, as does the Office given the fact that "credible," "material," and "clear and convincing" language in these rules is language that involves weighing of evidence that reasonable minds may potentially disagree upon, and can do so in good faith. This additional provision is a good addition to adoption of Rule 3.8(g) and (h), and very few states that adopt some form of model rule 3.8(g) or (h) do not also add a version of (i).

For what it is worth as the Board looks at Rule 3.8 as a whole, Illinois has chosen to add an introductory statement to the text of their rule "The duty of a public

prosecutor is to seek justice, not merely to convict." I support the reiteration of this point, if not in the text of the rule, in any revised comments that may also be considered.

Thank you for the opportunity to share the OLPR's perspective on Rule 3.8. Although we have given a great deal of thought to this issue, we are continuing to review and consider these issues, and would be very interested in the feedback from other stakeholders. I look forward to continuing this dialog with the Board. Thank you for undertaking this important review.

Very truly yours,

Humiston, Susan
Digitally signed by Humiston, Susan
Date: 2023.08.04 22:08:49 -05'00'

Susan M. Humiston
Director

cc: Landon Ascheman, Melissa Manderschied, and Francis Leo

ndh

Minnesota Association of Criminal Defense Lawyers
Oleisky & Oleisky

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August 11, 2023
To the Lawyers Professional Responsibility Board
Michael Friedman, Committee Chair

Re: Request for comment concerning possible changes to MRPC 3.8— Special Responsibilities of a Prosecutor

Thank you for requesting input regarding potential amendment of the Minnesota Rule of Professional Conduct (MRPC 3.8)—Special Responsibilities of a Prosecutor. In MACDL's view, the rule should be amended in several ways. First, the rule must include more specific language regarding a prosecutor's duty to seek out and disclose information before a case is set for trial. Second, the rule must provide specific language regarding a prosecutor's duties post-conviction. The proposed amended rule has 4 subdivisions versus the current 1 subdivision and some other language changes. The proposed rule language is attached.

Proposed changes to 3.8 sub.1(d)—Discovery Process

Recently, both the Department of Justice of the United States and the Minnesota Department of Human Rights have censured the disciplinary practices of the Minneapolis Police Department[1]—the largest law enforcement agency in the State.[2] Both the DOJ and the MNDHR also reported that the Hennepin County Attorney's Office and the Minneapolis City Attorney's Office knew that *Brady* materials were not being properly disclosed by the MPD.[3]

Nor are these agencies the only ones that have not complied with *Brady* and its progeny. Carlton County Attorney Thomas Pertler was disbarred for failing to train his staff on *Brady* materials and for failing to disclose impeachment materials on a law enforcement officer in his jurisdiction. *In re. Pertler*, 948 N.W.2d 146 (Minn. 2020).

Despite two reports from two separate oversight agencies, both HCAO and MCAO have spent the past several years fighting requests by defense attorneys for information regarding law enforcement officers. The two prosecutorial bodies have particularly

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[1] *Investigation of the City of Minneapolis and the Minneapolis Police Department*, U.S. DEP'T. JUST., at 67 https://www.justice.gov/opa/press-release/file/1587661/download; *Investigation into the City of Minneapolis and the Minneapolis Police Department*, MN DEPT. H. RTS. 48-64, (Apr. 27, 2022), https://mn.gov/mdhr/assets/Investigation%20into%20the%20City%20of%20Minneapolis%20and%20the%20Minneapolis%20Police%20Department_tcm1061-526417.pdf.

[2] https://mn.gov/post/assets/Agency%20Statistics%202022_tcm1189-563872.pdf.

[3] DOJ at ; MNDHR at 65.

resisted providing impeachment information until a case is set for trial. They have also resisted requests to turn over information/recordings from victim witness specialists (VWS) that tend to negate guilt or mitigate offenses. Some county attorneys have even lied to court officials to avoid disclosing communications with victim witness specialists.[4]

Proposed subdivision 1 part d addresses this deficiency by clarifying a prosecutor's duty to seek out information from law enforcement and other agencies that are part of the "prosecution team" that are not currently turned over in discovery prior to the Rule 11 hearing to criminal defense attorneys.

Proposed additions to 3.8—Post-conviction Duties

MACDL also endorses the addition of language addressing the duty of a prosecutor to seek justice *after* a person has been convicted of a crime. The proposed language of subdivisions 2-4 would require prosecutors to not only disclose exculpatory evidence but also to initiate proceedings to overturn convictions.

The prosecutor is a minister of justice—not a seeker of convictions. The prosecutor is a minister of justice—not an enforcer of unjust convictions. The case is rare that a prosecutor acknowledges the infirmities of a conviction or even evidence of outright innocence.[5] The suggested language should compel prosecutors to reflect upon their duty to investigate and reexamine suspect convictions.

The MACDL welcomes the opportunity to discuss the attached proposed rules further.

Sincerely,
Alicia Granse
Stacy Bettison
Barry Edwards
Jill Oleisky, Executive Director

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[4]Jennifer Hoff, *Hennepin County prosecutor under investigation for lying to a judge*, KARE11 (Jan. 9, 2023), https://www.kare11.com/article/news/local/hennepin-county-prosecutor-catherine-mcenroe-under-investigation-for-lying-to-a-judge/89-e367197a-c64c-47d1-850d-9c06baa590c6.

[5] *See, e.g.*, Emily Haavik, *After Another Man Confessed to the Crime, Hennepin County Offered Deal to Preserve Conviction*, KARE11 (May, 31, 2021), https://www.kare11.com/article/syndication/podcasts/record-of-wrong/hennepin-county-offered-deal-to-preserve-conviction-sherman-townsend/89-b56c3153-fbc4-4d00-98e9-181774f375d9

LMC LEAGUE of MINNESOTA CITIES

August 11, 2023

Michael Friedman (Committee Chair)
Lawyers Professional Responsibility Board
445 Minnesota Street, Suite 2400
St. Paul, MN 55101

Dear Mr. Friedman,

Thank you for reaching out to the League of Minnesota Cities seeking input on potential recommended changes to MRPC 3.8. Our organization has a voluntary membership of 832 out of 854 Minnesota cities, all of whom employ or contract with prosecution attorneys. In consultation with an advisory group of city prosecutors, the immediate question raised was what behavior or concerns would any proposed changes to this rule seek to correct? It may be helpful to have direct conversations with your committee to get more clarity on this. However, based on our reading of the specific modifications being considered, the following are our immediate comments and feedback:

The League of Minnesota Cities recognizes and supports the LPRB's important mission in regulating the responsibilities of all lawyers especially prosecutors who represent the state's interest. We also appreciate and support the opportunities LPRB is providing to city attorneys as stakeholders to give their input prior to any recommended rule changes to the Minnesota Supreme Court.

We generally have no objections to aligning the Minnesota Rules and the American Bar Association Model Rules but would like more clarity on the objectives for the specific changes being considered for Rule 3.8. We do NOT believe the red-lined changes based off the Colorado Rules would be appropriate as they would result in unfair and unreasonable rule changes. For a number of reasons, we believe the Colorado Rule 3.8 includes language that is not reasonably workable for prosecutors in Minnesota.

As to the considered modifications based off the ABA Model Rule 3.8, we have identified a few areas of concerns including:

- The proposed rule changes under the ABA Model Rule 3.8(f) as currently written seem to create an unachievable ethical standard. We understand and agree that prosecutors should not make extrajudicial comments that could potentially impact a case. However, the language under consideration would extend the current rules to police officers and other non-lawyers outside the direct control of city prosecutors. Any proposed rule with this language presupposes a relationship between law enforcement/investigators and city prosecutors that does not exist in reality. While law enforcement and prosecutors work closely and effectively in many regards and during the vast majority of prosecutions in this state, prosecutors by no means have controlling or managerial authority over investigators or other law enforcement agents. It is fair and appropriate for a licensed attorney to have an ethical responsibility over those who work for that lawyer. There are already rules for such situations. In contrast, placing the responsibility of other professions and agencies' actions on prosecutors is not practical nor reasonable. For example, prosecutors do not supervise or control law enforcement officers or agencies. They are not in a position to enact and enforce policies and procedures governing law enforcement's actions, nor do prosecutors have authority to take disciplinary actions against members of law enforcement when they act contrary to ethical rules. Police officers in this state are subject to their own licensing and discipline framework through the POST Board. In sum, as currently written, the changes suggested to MRPC 3.8(f) would result in an unworkable standard for prosecutors to ensure the ethical rules are followed because it unreasonably extends responsibility for others outside of their direct control.

- The proposed rule changes under the ABA Model Rule 3.8(f) as currently written are also repetitive and potentially ambiguous. Minnesota Rule 3.6 already creates an ethical responsibility on prosecutors to refrain from making extrajudicial statements that the lawyer knows or reasonably should know could have a prejudicial impact.[1] We do not necessarily disagree with having redundant rules, though we disagree with certain parts of the additional language. Specifically, the language suggested creates a discretionary standard that will make it difficult and confusing for prosecutors to ensure they are complying with the rules. The proposed rule adds that prosecutors must not make extrajudicial comments that have a "substantial likelihood of heightening public condemnation" and must "exercise reasonable care" to prevent others from doing the same. As noted above, Minnesota Rule 3.6 already addresses prosecutors making extrajudicial comments that may prejudice a jury. Further, these two additional phrases without further explanation create confusion and leave open to interpretation what comments create a "heightening public condemnation," or what actions are or are not "reasonable care" to prevent these comments. As written, this proposed rule would likely create confusion and ambiguity for prosecutors and the LPRB.

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[1] Minn. R. Lawyers Prof. Resp. 3.6.

Finally, I think it should be stated that city prosecutors are well aware of their disclosure responsibilities and take them very seriously. Current MRPC rules already encompass these responsibilities in detail. These factors make it difficult to surmise the conduct the considered rule changes are hoping to address.

I hope the feedback we have provided is helpful to you in your work. Please do not hesitate to contact me directly should you have questions about this feedback and/or if you would like to set up a meeting for further conversation. Thank you.

Sincerely,

Patricia Y. Beety
General Counsel
League of Minnesota Cities

Michael Friedman, Committee Chair
Landon Ascheman
Melissa Manderschied
Francis Leo
Lawyers Professional Responsibility Board
445 Minnesota Street, Suite 2400
St. Paul, MN 55101
Sept 21, 2023

Dear Committee Members,

We write on behalf of the Minneapolis NAACP in response to your letter concerning a potential amendment to the Minnesota Rules of Professional Conduct 3.8. We highly recommend that Rule 3.8 be amended following the American Bar Association's Model Rules of Professional and/or adhere to Colorado's version of Rule 3.8 as representing another alternative.

Either the ABA model rule or the Colorado version of Rule 3.8 would represent an improvement as compared to the version of the Minnesota rule. We do not want prosecutors to be able to cast any negative aspersions or make extrajudicial. statements that will put pressure on the defendant. These kinds of tactics will dehumanize, disenfranchise, and further mistrust the system. These enforcement and compliance systems have disproportionately harmed Black and Indigenous communities historically and presently.

We further recommend that all language, such as "the accused" is removed from usage and documents. The defendant should not be subjected to accusatory language before all facts are examined and thoroughly litigated. Many prosecutors and enforcement and compliance systems often put pressure on the defendant to settle by using their power through extrajudicial statements to earn public condemnation before courts are allowed to make a decision after observing the process to its entirety.

Prosecutors, often establish their brand by chalking up victories. In the pursuit of victories, historically marginalized and discriminated communities have been harmed by prosecutors and enforcement and compliance agencies, throughout the country and in MN. One of the ways prosecutors win cases is by having a comfortable and easeful relationship with Law Enforcement personnel and the department at large. These kinds of comfy and sheltered relationships tend to work against the defendant. We recommend that the Minnesota Supreme Court strongly recommend that prosecutors be aware of their relationship with Law Enforcement. These relationships if not consciously examined will amplify implicit biases. The MN Supreme Court must put in strong parameters and hold prosecutors across the state accountable if these cozy and comfortable relationships are seemingly leading to the mass incarceration and punishment of Black and Indigenous communities.

Please let us know if you have additional questions or if there is anything we can do to clarify our heartful request. We appreciate your attention to these vital and equity-centered concerns.

Sincerely

Cynthia Wilson

President of Minneapolis NAACP

Rule 3.8: Special Responsibilities of a Prosecutor

Share:

Advocate

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that 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;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

> (1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

LPRB Choices Regarding Rule 3.8: A Summary Guide (10/27/23)

Committee recommendations are in **bold.**

3.8(d)
1) Amend based on alternative option 1.
2) Amend based on alternative option 2.
3) Amend based on alternative option 3.
4) Amend-other.
5) Do not amend.

3.8(g)
1) Adopt the ABA model rule with Committee edits.
2) Adopt the ABA model rule without the Committee edits.
3) Adopt the ABA model rule with other edits.
4) Do not adopt.

3.8(h)
1) Adopt the ABA model rule with Committee edits.
2) Adopt the ABA model rule without the Committee edits.
3) Adopt the ABA model rule with other edits.
4) Do not adopt.

3.8(e)
1) Add #3 from the ABA model rule.
2) Do not amend.

3.8(f)
1) Amend to the language of the ABA model rule.
2) Amend-other.
3) Do not amend.

Introductory Line/Comment 1
1) Move 1st line of Comment 1 to the introductory line.
2) Use the OLPR suggested introductory line from Illinois.
3) Replace the 1st line of Comment 1 with the OLPR suggested line from Illinois.
4) **Do not amend.**

Comment 5
1) Add "or any group within the community".
2) Do not amend.

3.8(i)
1) Adopt 3.8(i)
2) Do not adopt 3.8(i) but use its language as a new comment if 3.8(g) and 3.8(h) are adopted.
3) Do not adopt 3.8(i) or use its language as a new comment.

Process
1) No further steps needed.
2) Prepare for comments review and petition to the MN Supreme Court.
3) Have further discussion with the OLPR about agreed upon language and joining a petition.
4) Have further discussion with the OLPR and MSBA about agreed upon language and joining a petition.
5) Have further discussion with the OLPR, MSBA and others(?) about agreed upon language and joining a petition.

Current Version

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that 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;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege; and

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;

(f) exercise reasonable care to prevent employees or other persons assisting or associated with the prosecutor in a criminal case and over whom the prosecutor has direct control from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Committee Recommendations

Rule 3.8(d)

Option 1

The prosecutor in a criminal case shall…(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that 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. A prosecutor may not condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused;

Option 2

The prosecutor in a criminal case shall…(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that 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. A prosecutor may not

(1) condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused; or
(2) intentionally delay production of exculpatory evidence or information in order to gain advantage in plea negotiations;

Option 3

The prosecutor in a criminal case shall…(d) ~~make timely disclosure to the defense of all evidence or information known to the prosecutor that 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~~ after timely and diligent inquiry to agencies known to have participated in investigating and/or providing evidence for the case:

1) timely disclose to the defense all evidence, witness information, and other information that may be required to be disclosed by applicable law, rules of procedure, or court opinions including, but not limited to, any information that could negate the guilt of the accused or which mitigates the offense;

2) alert the defense about any information sought from each agency that was not received; and
3) in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor which could affect a defendant's decision about whether to accept a plea disposition, except when the prosecutor is relieved of this responsibility by a statute, rule, or a protective order of the tribunal;

A prosecutor must never

4) condition the content of a proposed plea agreement on the defendant's waiver of any of the above requirements.

Potential Rule 3.8(g)

When a prosecutor is provided with new, credible, and material evidence creating probable cause to believe that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority; and
(2) if the conviction was obtained in the prosecutor's current jurisdiction,
    i. Promptly disclose that evidence to the defense unless the court authorizes delay, and
    ii. Make reasonable efforts to cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.

Potential Rule 3.8(h)

When a prosecutor is provided with clear and convincing evidence establishing that a defendant in the prosecutor's current jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

OLPR Dashboard for Court And Chair

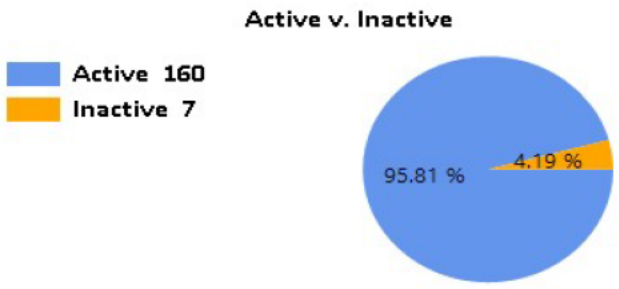
	Month Ending September 2023	Change from Previous Month	Month Ending August 2023	Month Ending September 2022
Open Files	589	28	561	501
Total Number of Lawyers	411	4	407	336
New Files YTD	879	125	754	781
Closed Files YTD	762	97	665	761
Closed CO12s YTD	194	27	167	115
Summary Dismissals YTD	373	60	313	389
Files Opened During September 2023	125	-2	127	84
Files Closed During September 2023	97	21	76	82
Public Matters Pending (excluding Resignations)	20	-2	22	42
Panel Matters Pending	8	1	7	13
DEC Matters Pending	106	-2	108	94
Files on Hold	10	1	9	14
Advisory Opinion Requests YTD	1391	145	1246	1277
CLE Presentations YTD	34	6	28	35
Files Over 1 Year Old	167	7	160	163
Total Number of Lawyers	106	6	100	93
Files Pending Over 1 Year Old w/o Charges	108	7	101	76
Total Number of Lawyers	85	10	75	50

	2023 YTD	2022 YTD
Lawyers Disbarred	3	3
Lawyers Suspended	21	15
Lawyers Reprimand & Probation	1	5
Lawyers Reprimand	0	1
TOTAL PUBLIC	**25**	**24**
Private Probation Files	8	3
Admonition Files	47	61
TOTAL PRIVATE	**55**	**64**

FILES OVER 1 YEAR OLD

Year/Month	OLPR	AD	PAN	HOLD	SUP	SCUA	TRUS	Total
2018-07						1		**1**
2018-08						1		**1**
2018-10	2							**2**
2018-12	1							**1**
2019-04	1							**1**
2019-05					1			**1**
2019-06				1				**1**
2019-07	1							**1**
2019-08	1							**1**
2019-09						1		**1**
2019-11						1		**1**
2020-01	1				3			**4**
2020-02	1				1			**2**
2020-05	1				1			**2**
2020-06						1		**1**
2020-08	1							**1**
2020-09	1							**1**
2020-10					2			**2**
2021-01	1		1			1		**3**
2021-02						1		**1**
2021-03	1			1	2			**4**
2021-04	2				2	1		**5**
2021-05	5			1	2			**8**
2021-06	4		2					**6**
2021-07	2				1			**3**
2021-08	4		1		2	1		**8**
2021-09	3				1			**4**
2021-10	3				3			**6**
2021-11	6							**6**
2021-12	2				2			**4**
2022-01	1			1				**2**
2022-02			1	1	1			**3**
2022-03	3				2			**5**
2022-04	9					1		**10**
2022-05	9			1	1	1		**12**
2022-06	2		1				1	**4**
2022-07	9							**9**
2022-08	14	1	1	1	1			**18**
2022-09	17	1			3			**21**
Total	**108**	**2**	**7**	**7**	**31**	**11**	**1**	**167**

	Total	Sup. Ct.
Total Cases Under Advisement	11	11
Sub-total of Cases Over One Year Old	156	32
Total Cases Over One Year Old	**167**	**43**



All Pending Files as of Month Ending September 2023

Year/Month	SD	DEC	REV	OLPR	AD	PAN	HOLD	SUP	SCUA	REIN	RESG	TRUS	**Total**
2018-07									1				**1**
2018-08									1				**1**
2018-10				2									**2**
2018-12				1									**1**
2019-04				1									**1**
2019-05								1					**1**
2019-06							1						**1**
2019-07				1									**1**
2019-08				1									**1**
2019-09									1				**1**
2019-11									1				**1**
2020-01				1				3					**4**
2020-02				1				1					**2**
2020-05				1				1					**2**
2020-06									1				**1**
2020-08				1									**1**
2020-09				1									**1**
2020-10								2					**2**
2021-01				1		1			1				**3**
2021-02									1				**1**
2021-03				1			1	2					**4**
2021-04				2				2	1				**5**
2021-05				5			1	2					**8**
2021-06				4		2							**6**
2021-07				2				1					**3**
2021-08				4		1		2	1				**8**
2021-09				3				1					**4**
2021-10				3				3					**6**
2021-11				6									**6**
2021-12				2				2					**4**
2022-01				1			1						**2**
2022-02						1	1	1					**3**
2022-03				3				2					**5**
2022-04				9					1				**10**
2022-05				9			1	1	1				**12**
2022-06				2		1						1	**4**
2022-07				9									**9**
2022-08				14	1	1	1	1					**18**
2022-09				17	1			3					**21**
2022-10				14									**14**
2022-11				13	1			2					**16**
2022-12		2		18									**20**
2023-01				17						1			**18**
2023-02		4	1	26			2			1			**34**
2023-03		1		31				2					**34**
2023-04		6	6	23				1					**36**
2023-05		11	4	18			1	3					**37**
2023-06		8	2	16									**26**
2023-07		18		19									**37**
2023-08		36		25									**61**
2023-09	21	20		39						1	8		**89**
Total	**21**	**106**	**13**	**367**	**3**	**7**	**10**	**39**	**11**	**3**	**8**	**1**	**589**

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
STANDING COMMITTEE ON PROFESSIONAL REGULATION

REPORT TO THE HOUSE OF DELEGATES

REVISED RESOLUTION

RESOLVED, That the American Bar Association amends ABA Model Rule of Professional Conduct 1.16 and its Comments [1], [2], and [7] as follows (insertions underlined, deletions struck through):

Rule 1.16: Declining or Terminating Representation

(a) 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. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; ~~or~~

(3) the lawyer is discharged; or

(4) 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.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

~~(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;~~

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the facts and circumstances of the representation before accepting it. The obligation imposed by Paragraph (a) continues throughout the representation. A change in the facts and circumstances relating to the representation may trigger a lawyer's need to make further inquiry and assessment. For example, a client traditionally uses a lawyer to acquire local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the lawyer to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's

funding through the lawyer's trust account. Another example is when, during the course of a representation, a new party is named or a new entity becomes involved. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.1, 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Under paragraph (a)(4), the lawyer's inquiry 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 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. For further guidance assessing risk, see, e.g., as amended or updated, Financial Action Task Force Guidance for a Risk-Based Approach for Legal Professionals, the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, A Lawyer's Guide to Detecting and Preventing Money Laundering (a collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe), the Organization for Economic Cooperation and Development (OECD) Due Diligence Guidance for Responsible Business Conduct, and the U.S. Department of Treasury Specially Designated Nationals and Blocked Persons List.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may

be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. ~~Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it~~. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

REVISED REPORT

Introduction

The Standing Committee on Ethics and Professional Responsibility (the "Ethics Committee") and the Standing Committee on Professional Regulation (the "Regulation Committee") propose amendments to the Black Letter and Comments to ABA Model Rule of Professional Conduct 1.16, Declining or Terminating Representation.

This Resolution constitutes another piece of the ABA's longstanding and ongoing efforts to help lawyers detect and prevent becoming involved in a client's unlawful activities and corruption, as described in this Report. In February 2023, the ABA House of Delegates adopted Resolution 704 proposed by the Working Group on Beneficial Ownership. Resolution 704 updates ABA policy on entities providing the federal government with information about the identity of the entity's beneficial owners. Resolution 704, like this Resolution, represents a compromise among those with diverse and strongly held views. This Resolution presents a balanced approach to ensuring that lawyers conduct inquiry and assessment ~~client due diligence~~ - appropriate to the circumstances - to detect and prevent involvement in unlawful activities and corruption.

The proposed amendments to the Black Letter clearly state for lawyers their ~~client due diligence~~ obligations to inquire about and assess the facts and circumstances when considering whether to undertake a representation and their ongoing obligations throughout the representation. The amendments further state that the lawyer must decline the representation or withdraw when the prospective client or client seeks to use or persists in using the lawyers' services to commit or further a crime or fraud after the lawyer has advised of the limitations on the lawyer's services.

These are not new obligations. Lawyers already perform these inquiries and assessments ~~client due diligence~~ every day to meet their ethical requirements. For example, they do so to identify and address conflicts of interests. They also do so to ensure they represent clients competently (Rule 1.1); to develop sufficient knowledge of the facts and the law to understand the client's objectives and to identify means to meet the client's lawful interests (Rule 1.2(a)); and, if necessary, to persuade the client not to pursue conduct that could lead to criminal liability or liability for fraud (Rule 1.2(d)).[1] Implicit duties – like unwritten rules – do not serve lawyers or the public well. Therefore, the Committees present these amendments to the Black Letter of Model Rule 1.16 from which both lawyers and the public will benefit.

In addition to the proposed changes to the Black Letter of Rule 1.16, proposed new language in Comment [1] elaborates on the duty to inquire about and assess the facts

[1] *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 463 (2013) & 491 (2020).

and circumstances of the representation. The Comment makes clear that the duty is one that continues throughout the course of the representation.[2]

New language proposed in Comment [2] explains that under new Black Letter paragraph (a)(4) of Rule 1.16, the scope of the lawyer's inquiry and assessment ~~client due diligence~~ is informed by the risk that the prospective client or current client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. The use of a risk-based inquiry and assessment of the facts and circumstances of each representation set forth in Comment [2] ensures that the scope and depth of the inquiry and assessment a lawyer must make will be based on the unique facts and circumstances presented by each client or prospective client. There is no "one-size-fits-all" ~~client due diligence~~ obligation. Proposed amendments to Comment [2] provide examples for lawyers to consider in assessing the level of risk posed to determine whether lawyers must decline the representation or withdraw from an ongoing representation.

While the impetus for these proposed amendments was lawyers' unwitting involvement in or failure to pay appropriate attention to signs or warnings of danger ("red flags") relating to a client's use of a lawyer's services to facilitate possible money laundering and terrorist financing activities, it is clear that lawyers' ~~client due diligence~~ existing obligations to inquire and assess apply broadly to all lawyers. The proposed amendments will help lawyers avoid entanglement in criminal, fraudulent, or other unlawful behavior by a client, including tax fraud, mortgage fraud, concealment from disclosure of assets in dissolution or bankruptcy proceedings, human trafficking and other human rights violations, violations of U.S. foreign policy sanctions and export controls, and U.S. national security violations.

In developing this Resolution, the Standing Committees on Ethics and Professional Responsibility and Professional Regulation circulated widely for comment, inside and outside the ABA, three Discussion Drafts of possible amendments to the Model Rules of Professional Conduct addressing ~~lawyers' client due diligence~~ these obligations. The Committees held four public roundtables to obtain testimony regarding the Discussion Drafts.[3] The Committees are grateful to all who commented. Their comments and testimony informed the substance of this Resolution and Report.[4]

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[2] GEOFFREY C. HAZARD JR., W. WILLIAM HODES & PETER R. JARVIS, LAW OF LAWYERING § 21.02 (4th ed. 2021) ("Rule 1.16 often plays a role *during* representation of a client as well. By focusing attention on situations in which the lawyer either may or must withdraw, it serves as a reminder to lawyers and clients alike that they must continually communicate with each other and monitor their relationship, to minimize the likelihood that such withdrawals will occur.").

[3] These meetings were held in February and August 2022 and February 2023.

[4] Comments received and recordings of the public roundtables are available on the Center for Professional Responsibility website for public viewing at: www.americanbar.org/groups/professional_responsibility/discussion-draft-of-possible-amendments-to-model-rules-of-profes/ (last visited Apr. 28, 2023).

Background

Concerns Underlying This Resolution

As noted, the impetus for this Resolution related to lawyers' unwitting involvement in money laundering and terrorist financing or their failure to pay appropriate attention to "red flags" relating to the proposed course of action by a client or prospective client. Money laundering occurs when criminals obscure the proceeds of unlawful activity (dirty money) using "laundering" transactions so that the money appears to be the "clean" proceeds of legal activity. Terrorist financing is just that, providing funds to those involved in terrorism.[5] The proceeds of money laundering are used to facilitate terrorism and other illegal activities, including human trafficking, drug trafficking, and violations of U.S. government sanctions.

Lawyers' services can be used for money laundering and other criminal and fraudulent activity. One common way to do so is by asking a lawyer to hold money in a client trust account pending completion of the purchase of real estate or equipment, or to fund another transaction. After a period of time, the client asks the lawyer to return the funds because the "transaction" has fallen apart. By holding money in a law firm trust account then disbursing the money back to the client when the transaction does not close, the money has been laundered through the lawyer's client trust account. Of course, more sophisticated means exist by which individuals seek to use lawyers' services to launder money, either with or without the lawyer's knowledge. It is illegal and unethical for lawyers to knowingly launder money, finance terrorism, or knowingly assist another in doing so. It is also unethical for a lawyer to ignore facts indicating a likelihood that the client intends to use the lawyer's services to assist the client in engaging in illegal or fraudulent conduct.

Domestic and international laws and regulations are designed to prevent, detect, and prosecute money laundering. Anti-money laundering and counter terrorism financing laws and regulations applicable to lawyers are a complex subject.[6] Generally, the issues can be divided into three overarching topics: (1) client due diligence; (2) disclosure of entity beneficial ownership information; and (3) suspicious activity reporting.

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[5] The U.S. Department of Treasury's 2018 National Money-Laundering Risk Assessment estimated that $300 billion is laundered every year in the U.S. alone, with that amount growing and methodologies of money-launderers ever evolving and becoming more sophisticated according to the Department's 2022 National Money-Laundering Risk Assessment. *See* U.S. DEPARTMENT OF THE TREASURY NATIONAL MONEY LAUNDERING RISK ASSESSMENT (2018), https://home.treasury.gov/system/files/136/2018NMLRA_12-18.pdf and U.S. DEPARTMENT OF THE TREASURY NATIONAL MONEY LAUNDERING RISK ASSESSMENT (Feb. 2022), https://home.treasury.gov/system/files/136/2022-National-Money-Laundering-Risk-Assessment.pdf.

[6] Additional resources may be found at ABA TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, https://www.americanbar.org/groups/criminal_justice/gatekeeper/ (last visited Apr. 19, 2023); ABA GATEKEEPER REGULATIONS ON ATTORNEYS, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/ (last visited Apr. 19, 2023).

In the U.S., the primary anti-money laundering laws are the Bank Secrecy Act ("BSA") and the Money Laundering Control Act. The U.S. Department of Treasury created the Financial Crimes Enforcement Network ("FinCEN") to implement, administer, and enforce compliance with the BSA. Most recently, Congress enacted the Corporate Transparency Act ("CTA") to enhance the identification and disclosure of certain beneficial ownership information. The CTA is part of the Anti-Money Laundering Act of 2020, which is part of the National Defense Authorization Act for Fiscal Year 2021.[7]

Outside the U.S., the Financial Action Task Force ("FATF") is a powerful inter-governmental entity that coordinates efforts to prevent money laundering or terrorism financing among and between its member countries. The U.S. is a charter member of the FATF. The FATF exerts tremendous pressure on member countries, even though it has no "official" legislative or enforcement power. A primary way in which it does so is through its Mutual Evaluation Reports of countries' compliance with the FATF Recommendations.[8] The most recent Mutual Evaluation Report of the U.S. was in 2016, and the FATF found the US. noncompliant in four areas, including the lack of sufficient client due diligence by the legal profession and lack of enforceable obligations in that regard.[9]

The Organization for Economic Cooperation and Development ("OECD") is another international organization that has been active in this arena. The OECD is not a standard-setting entity like the FATF. While a primary focus of the OECD is fighting international tax evasion, it is supportive of the FATF's critiques of the legal and other professions on the subjects of money laundering and other white-collar crime.

These groups, along with U.S. and international governments, continue to focus in very public ways on lawyers as facilitators of money laundering, terrorism financing, and other related illegal and fraudulent conduct. They point to the 2016 FATF Report's recommendations, and events like the Paradise Papers, the Panama Papers, and the more recent Pandora Papers and FinCEN Files, as necessitating further and enforceable action by the legal profession.[10]

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[7] The full name of the NDAA is the WILLIAM M. (MAC) THORNBERRY NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2021, Pub. L. No. 116-283 (H.R. 6395), *available at* https://www.congress.gov/116/plaws/publ283/PLAW-116publ283.pdf. 116th Cong. 2d Sess. Congress' override of the President's veto was taken in Record Vote No. 292 (Jan. 1, 2021). The CTA consists of §§ 6401-6403 of the NDAA. Section 6402 of the NDAA sets forth Congress' findings and objectives in passing the CTA and § 6403 contains its substantive provisions, primarily adding § 5336 to Title 31 of the United States Code.

[8] *See* THE FATF RECOMMENDATIONS, https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html (last visited Apr. 28, 2023).

[9] FATF UNITED STATES' MEASURES TO COMBAT MONEY LAUNDERING AND TERRORIST FINANCING (2016), https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-united-states-2016.html.

[10] *See, e.g.,* PARADISE PAPERS: SECRETS OF THE GLOBAL ELITE, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/paradise-papers/ (last visited Apr. 28, 2023); THE PANAMA PAPERS: EXPOSING THE ROGUE OFFSHORE FINANCE INDUSTRY, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/panama-papers/ (last visited Apr. 28, 2023); PANDORA PAPERS, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/pandora-papers/ (last visited Apr. 28, 2023); and FINCEN FILES,

The ABA has long supported state-based judicial regulation of lawyers and the practice of law and opposed federal legislative or executive branch efforts to regulate the practice of law at the federal level.[11] National and international concerns about lawyers unwitting involvement in client crimes like money laundering and terrorism finance greatly raise the risk of federal legislative and regulatory action.

The U.S. Congress has demonstrated its willingness to act in this regard. For example, initial versions of the Corporate Transparency Act ("CTA") would have required lawyers to disclose beneficial ownership information relating to their clients to the federal government, in contravention of their ethical obligations under ABA Model Rule 1.6. Additionally, various Members of Congress have sought enactment of the ENABLERS Act, which would have regulated many lawyers and law firms as "financial institutions" under the BSA.[12] Such regulation could require those lawyers and law firms to report to the federal government information protected by the attorney-client privilege or Model Rule 1.6 by requiring them to comply with some or all of the BSA's requirements for financial institutions, such as submitting Suspicious Activity Reports (SARs) on clients' financial transactions and establishing due diligence policies.[13]

To date, the ABA has successfully advocated against such incursion on the regulatory authority of state supreme courts. In response to concerns raised by the ABA and others, the sponsors of the final version of the CTA that became law omitted the language from previous versions of the bill that would have directly regulated lawyers. Therefore, the final version of the CTA passed by Congress in early 2021 only requires

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INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/fincen-files/ (last visited Apr.19, 2023).

[11] *See, e.g.*, COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY 2 (1992) [hereinafter MCKAY REPORT], *available at* http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html; AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE REPORT TO THE HOUSE OF DELEGATES Report 201A (2002), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/201a.pdf; and JUDICIAL OVERSIGHT OF THE LEGAL PROFESSION, https://www.americanbar.org/advocacy/governmental_legislative_work/letters_testimony/independence/ (last visited Apr. 19, 2023).

[12] The original ENABLERS Act legislation, introduced on October 8, 2021, by Rep. Tom Malinowski (D-NJ) as H.R. 5525, is available at https://www.congress.gov/bill/117th-congress/house-bill/5525/text?s=1&r=1. A revised version of the ENABLERS Act, sponsored by Rep. Maxine Waters (D-CA) and included in the House-passed version of the FY 2023 National Defense Authorization Act (H.R. 7900) as Section 5401, is available at https://amendments-rules.house.gov/amendments/GATEKEEPERS_NDAA_xml%20v3220711190941114.pdf. A third version of the ENABLERS Act, sponsored by Sen. Sheldon Whitehouse (D-RI) and offered as an amendment to the Senate version of the FY 2023 National Defense Authorization Act (H.R. 7900 and S. 4543) as SA 6377, is available at https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/whitehouse-enablers-act-amendment-to-ndaa-september2022.pdf.

[13] *See* ABA URGES SENATORS TO OPPOSE ENABLERS ACT AMENDMENT TO DEFENSE AUTHORIZATION BILL, ABA WASHINGTON LETTER (Oct. 31, 2022), *available at* https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/oct22-wl/enablers-1022wl/.

"reporting companies"—not their lawyers or law firms—to report the companies' beneficial ownership information to the government.[14] Similarly, in response to objections by the ABA[15], numerous state and local bar associations, and many small business groups, Congress declined to include the ENABLERS Act in the final version of the FY 2023 National Defense Authorization Act (P.L. 117-263, H.R. 7776) or the FY 2023 Consolidated Appropriations Act (P.L. 117-328, H.R. 2617) that were signed into law in December 2022.

ABA Responses in the Context of the Model Rules of Professional Conduct

2013 Ethics Opinion

In 2013, the Ethics Committee issued ABA Formal Ethics Opinion 463 focusing on efforts to require U.S. lawyers to perform "gatekeeping" duties to protect the domestic and international financing system from criminal activity arising out of worldwide money-laundering and terrorism financing activities. Opinion 463 explained that "[i]t would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. . . . [16] An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold."[17]

2020 Ethics Opinion

In 2020, the Ethics Committee issued Formal Ethics Opinion 491 in response to ongoing concerns regarding lawyers' ~~client due diligence~~ obligations to inquire and assess. As explained in the Formal Opinion, a lawyer's duty to inquire into and assess the facts and circumstances of each representation is not new and is applicable before the representation begins and throughout the course of the representation. This obligation already is implicit in the following Rules:

- Rule 1.1 and the duty to provide competent representation. Comment [5] explains, "Competent handling of a particular matter requires inquiry into and analysis of the factual and legal elements of the problem."

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[14] *See* Corporate Transparency Act (CTA), available at H.R.6395 - 116th Congress (2019-2020): William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 | Congress.gov | Library of Congress (contained in Title LXIV of the National Defense Authorization Act for FY 2021, P.L. 116-283) (Jan. 1, 2021). Division F of the FY 2021 National Defense Authorization Act is the Anti-Money Laundering Act of 2020, which includes the CTA.

[15] *See* ABA letter to Senate leaders opposing the ENABLERS Act amendment to the FY 2023 National Defense Authorization Act and urging them not to include it in the final version of the legislation. Letter to Majority Leader Schumer, et al. re: Opposition to ENABLERS Act Amendment to the FY 2023 National Defense Authorization Act (H.R. 7900 and S. 4543) (Oct. 5, 2022), *available at* https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-letter-to-senate-leaders-opposing-enablers-act-amendment-to-ndaa-october52022.pdf.

[16] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 463 (2013).

[17] *Id.*

- Rule 1.2(d) and the prohibition against knowingly assisting a client in a crime or fraud.
- Rule 1.3 and the duty to be diligent which "requires that a lawyer ascertain the relevant facts and law in a timely and appropriately thorough manner."
- Rule 1.4 and the duty to communicate which requires "consultation with the client regarding 'any relevant limitation on the lawyer's conduct' arising from the client's expectation of assistance that is not permitted by the Rules of Professional Conduct or other law."
- Rule 1.13 which requires "further inquiry to clarify any ambiguity about who has authority and what the organization's priorities are."
- Rule 1.16(a) and the duty to withdraw when the representation will result in a violation of the law or the Rules.
- Rule 8.4(b) and (c) in the prohibition against committing a criminal act or engaging in dishonesty, fraud, deceit, or misrepresentation.

The Proposed Amendments to Model Rule 1.16 and Its Comments

After careful consideration over several years of concerns raised by ABA members and outside groups that the ABA Model Rules of Professional Conduct lacked sufficient clarity on lawyers' ~~client due diligence~~ obligations to inquire about and assess the facts and circumstances relating to a matter, the Committees concluded that Model Rule of Professional Conduct 1.16 should be amended to make explicit that which is already implicit.

Amendments to Paragraph (a)

The proposed amendments to the Black Letter of Rule 1.16(a) include a statement addressing the nature and scope of lawyers' inquiry and assessment ~~client due diligence~~ obligations when the lawyer is deciding whether to accept a representation, deciding whether to terminate the representation, and considering the matter throughout the course of a representation. The following statement is added to the beginning of Rule 1.16(a):

> 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.

In addition to the proposed change to the Black Letter of Rule 1.16(a), new language in Comment [1] provides guidance on the duty to inquire about and assess the facts and circumstances of the representation. The addition to Comment [1] reads:

> Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the facts and circumstances of the representation before accepting it. The obligation imposed by Paragraph (a) continues throughout the representation. For example, a client traditionally uses a lawyer to acquire

> local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the lawyer to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's funding through the lawyer's trust account. Another example is when, during the course of a representation, a new party is named or a new entity becomes involved.

This additional language in Comment [1], that the obligation continues throughout the representation, helps lawyers understand that if changes in the facts and circumstances occur during a representation, lawyers must inquire and evaluate whether they can continue the representation. A new cross-reference to Model Rule 1.1 (Competence) also is added.

Creating a new provision for mandatory withdrawal in paragraph (a)(4)

Current Model Rule 1.16(a)(1) requires a lawyer to decline or withdraw from a representation if "the representation will result in violation of the Rules of Professional Conduct or other law."

Current Comment [2] explains: "A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation." Model Rule 1.4(a)(5), regarding communications obligations, explains that lawyers must consult with the client about any relevant limitation on the lawyer's conduct. Rule 1.2(d) tells lawyers that one of those limitations on what a lawyer may do is counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent.

But these statements appear in three different Rules and their respective Comments. As a result, lawyers must hunt for this guidance – that when a client suggests a course of conduct that is criminal, fraudulent, or otherwise illegal or violates the Rules, a lawyer must consult with the client about the limits of the lawyer's representation and that the lawyer is prohibited from engaging or assisting a client in a crime or fraud. After the conversation, if the client is not deterred from the suggested conduct, the lawyer must decline the representation or withdraw if already in the matter.

The Committees believe that lawyers deserve clear direction regarding inquiry about and assessing the facts and circumstances ~~conducting client due diligence~~, and have clear advice on what to do when concerns or questions arise about the scope, goals, and objectives of the representation. Therefore, the Committees recommend clarifying the Black Letter of Rule 1.16(a) to provide that the lawyer must decline or withdraw from the representation if:

(4) 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.

Expanding the guidance provided in Comment [2]

New language proposed for Comment [2] explains that the lawyer's obligation to inquire and assess ~~client due diligence requirement~~ is 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. The use of a risk-based inquiry and assessment of the facts and circumstances of each representation set forth in Comment [2] ensures that the scope and depth of the inquiry and assessment a lawyer must perform will be based on the unique facts and circumstances presented by each client or prospective client. There is no "one-size-fits-all" ~~client due diligence~~ obligation, and this risk-based approach is the least burdensome for lawyers. The proposed amendments take a balanced approach to the issue.

To assist lawyers, new language in Comment [2] provides examples for lawyers to consider in assessing the level of risk posed to determine whether they must decline the representation or withdraw from an ongoing representation. This risk-based approach differs from a rules-based approach that requires compliance with every element of detailed laws, rules, or regulations irrespective of the underlying quantum or degree of risk. As noted in ABA Formal Ethics Opinion 463, implementing risk-based control measures helps a lawyer avoid being caught up in a client's illegal activities, while decreasing the burden on lawyers whose practice does not expose them to the problems sought to be addressed.

In addition to these exemplary factors, new language in Comment [2] provides lawyers with a range of additional resources to guide their inquiry and assessment. For example, the new language references the 2010 ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, which provides excellent practice examples that help lawyers using the risk-based approach better identify situations that should be considered "red flags" and provides "practice pointers" to offer further insight.

The U.S. Department of Treasury's Specially Designated Nationals and Blocked Persons List is another sample resource to assist lawyers in conducting their inquiry and assessment ~~due diligence~~, which is comprised of "individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists

individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific."[18]

~~**Deleting permissive withdrawal under (b)(2) and applicable guidance in Comment [7]**~~

~~The recommended amendments to Model Rule 1.16(a) and the creation of Model Rule 1.16(a)(4) on mandatory withdrawal make the provisions on permissive withdrawal under Rule 1.16(b)(2) unnecessary for two reasons. Therefore, the Committees recommend deleting Model Rule of Professional Conduct 1.16(b)(2) and its corresponding guidance in Comment [7].~~

~~Current Model Rule 1.16(b)(2) provides that a lawyer may withdraw from the representation if the client "persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." With the addition of the now explicit duty to conduct a risk-based inquiry and assessment, the lawyer who reasonably believes that a client seeks to use or is using the lawyer's services to commit or further a crime or fraud will have the facts necessary to decide whether withdrawal is mandatory under new paragraph (a)(4). Therefore, paragraph (b)(2) is no longer necessary.~~

~~Additionally, deleting the permissive withdrawal under current Rule 1.16(b)(2) does not remove the option for a lawyer to withdraw from a representation. This is true because Model Rule 1.16(b)(4) allows a lawyer to withdraw when the client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement" or because Model Rule 1.16(b)(7) allows the lawyer to withdraw "when other good cause for withdrawal exists." Both exceptions can be used by lawyers who withdraw from the representation when the client "persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." Therefore, paragraph (b)(2) is no longer necessary.~~

Conclusion

The proposed changes to Model Rule 1.16 will benefit lawyers and the public by making explicit the nature and scope of lawyers' existing ~~client due diligence~~ obligations to inquire about and assess the facts and circumstances regarding a matter in the enforceable Black Letter of the Rule. Doing so will help lawyers avoid unwittingly becoming involved in clients' criminal and fraudulent conduct and will help them better identify and respond to "red flags." In doing so, this Resolution also will demonstrate to the U.S. Government, entities like the FATF, and the public that the profession takes seriously its obligations to ~~perform client due diligence to~~ avoid becoming involved in a client's criminal and fraudulent conduct, including money laundering, terrorist financing,

[18] *See* OFFICE OF FOREIGN ASSETS CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST (SDN) HUMAN READABLE LISTS (last updated Apr. 27, 2023), https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists.

human trafficking and human rights violations, tax related crimes, sanctions evasion, and other illicit activity.

The ABA Standing Committees on Ethics and Professional Responsibility and Professional Regulation respectfully request that the House of Delegates approve this Resolution to amend the Black Letter of Model Rule 1.16 and its Comments.

Respectfully submitted,

Lynda C. Shely, Chair
ABA Standing Committee on Ethics
and Professional Responsibility

Justice Daniel J. Crothers, Chair
ABA Standing Committee on
Professional Regulation

August 2023

Preview of Client Trust Account Annual Self-Assessment

Cal. Rules of Court, Rule 9.8.5(a)(3)

NOTE: These questions are for reference only. Please complete the actual self-assessment beginning December 1, 2022, in My State Bar Profile.

Client trust account rules are designed to protect client interests and ensure that attorneys fulfill their fiduciary and ethical obligations to clients. This annual self-assessment is designed to highlight key elements of those rules and support attorneys in meeting their client trust account responsibilities. The following self-assessment is a series of "yes" or "no" responses, with references to corresponding authorities and sources of information for context. If you are a subordinate attorney in a firm with some but not all of the responsibilities for complying with rule 1.15 of the Rules of Professional Conduct, then one or more of your responses to this self-assessment may be provided based on information you have received from a supervising attorney (see rules 5.1 and 5.2 of the Rules of Professional Conduct).

1. I affirm that any funds held in an IOLTA account are maintained in an IOLTA-eligible institution identified on the State Bar of California's website.

   California Business and Professions Code sections 6091.2, 6211, 6212, and 6213
   State Bar Rules, Title 2, Division 5, Chapter 1, rules 2.100, 2.110 and 2.117

   Yes | No

2. I affirm that the registration of client trust account information is updated annually in the manner prescribed by the State Bar.

   State Bar Rules, Title 2, Division 1, rule 2.2(B)(8) and (C)
   State Bar Rules, Title 2, Division 5, rule 2.114
   2023 Handbook on Client Trust Accounting for California Attorneys, footnote 2

   Yes | No

3. I affirm that all client funds or funds entrusted by others to me or to my firm or organization under the provisions of rule 1.15 of the Rules of Professional Conduct are held in one or more accounts labeled as a "Trust Account," or similar designation, and are maintained separate from any accounts held by me, by other individual attorneys in my firm/organization, or by the firm/organization that primarily hold personal or business funds.

Business and Professions Code sections 6210 et seq.
Rule of Professional Conduct 1.15(a) and (c)

Yes | No

4. For each client trust account maintained by me or my firm, I affirm that the following records are maintained:
   - Client Ledger
   - Account Journal
   - Bank Statements
   - Canceled Checks

   Rule of Professional Conduct 1.15(d)(3)
   Recordkeeping standards adopted by the Board of Trustees pursuant to Rule of Professional Conduct 1.15(e)
   2023 Handbook on Client Trust Accounting for California Attorneys, Sections VII-VIII

   Yes | No

5. I affirm that a written, monthly reconciliation of the bank statement, client ledger, and account journal are completed and maintained for each client trust account.

   Rule of Professional Conduct 1.15(d) and (e)
   Recordkeeping standards adopted by the Board of Trustees pursuant to Rule of Professional Conduct 1.15(e)
   2023 Handbook on Client Trust Accounting for California Attorneys, Section VIII

   Yes | No

6. I affirm that timely reports are provided to clients or other persons accounting for funds, securities, or other property held in their name, including deposits, withdrawals, and other transactions.
   Rule of Professional Conduct 1.15(d)(4)

   Yes | No

7. If a fee agreement involves advances for costs, expenses, or fees, such funds are held in a client trust account prior to being expensed or earned, unless subject to an exception.

   Rule of Professional Conduct 1.15(a), (b), and (c); Comment [2]

   Yes | No

8. I affirm that fees are withdrawn from client trust accounts at the earliest reasonable time once the fees, or a portion thereof, become fixed and earned.

   Rule of Professional Conduct 1.15(c)(2)

   Yes | No

9. I affirm that in 2022, clients or other persons with an interest in funds, securities, or other property received are promptly notified about the receipt of the funds, securities, or other property, and I affirm that, effective January 1, 2023, absent good cause, clients or other persons with an interest in the funds, securities, or other property received are notified about the receipt of the funds, securities, or other property no later than 14 days after receipt.

   Rule of Professional Conduct 1.15(d)(1)

   Yes | No

10. I affirm that client funds are NOT used to pay for bank charges or service fees and sufficient funds belonging to me or the law firm are deposited in the client trust account for this purpose or other steps are taken so client funds are not used to pay for bank charges.

    Rule of Professional Conduct 1.15(c)(1)

    Yes | No

11. If a dispute arises as to rights to any funds I hold in trust for clients, I affirm that the disputed portion of these funds are not withdrawn until the dispute is resolved.

    Rule of Professional Conduct 1.15(c)(2)

    Yes | No

12. I affirm that policies and procedures, such as training and supervision practices, are in place and are followed to ensure that client trust accounts are managed consistent with the California Rules of Professional Conduct.

    Rule of Professional Conduct 1.15
    2023 Handbook on Client Trust Accounting for California Attorneys.
    In the Matter of Respondent E (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716
    Palomo v. State Bar (1984) 36 Cal.3d 785.

    Yes | No

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 508 **August 5, 2023**

The Ethics of Witness Preparation

A lawyer's role in preparing a witness to testify and providing testimonial guidance is not only an accepted professional function; it is considered an essential tactical component of a lawyer's advocacy in a matter in which a client or witness will provide testimony. Under the Model Rules of Professional Conduct[1] *governing the client-lawyer relationship and a lawyer's duties as an advisor, the failure adequately to prepare a witness would in many situations be classified as an ethical violation. But, in some witness-preparation situations, a lawyer clearly steps over the line of what is ethically permissible. Counseling a witness to give false testimony or assisting a witness in offering false testimony, for example, is a violation of at least Model Rule 3.4(b). The task of delineating what is necessary and proper and what is ethically prohibited during witness preparation has become more urgent with the advent of commonly used remote technologies, some of which can be used to surreptitiously "coach" witnesses in new and ethically problematic ways.*

Introduction

> **Jack McCall:** Well, I'm a hard case for you, counselor. And no mistake, everyone in there saw me shoot him.
> **Lawyer:** If you'll let me set our strategy, I don't think we'll dispute what people saw.
> **Jack:** Now, I guess you're here to break me out.
> (*Lawyer chuckles*)
> **Lawyer:** Son, did James Butler Hickok ever kill a -- relative of yours?
> **Jack:** James Butler Hickok?
> **Lawyer:** Wild Bill Hickok. Did he ever kill a brother of yours or -- or the like?
> **Jack**: A brother?
> **Lawyer:** I'm asking you if what happened in that saloon was vengeance, for the death of a family member? Possibly a brother in Abilene. Or the like.
> **Jack:** (*Jack smirks, cocks head pensively*) A brother in Abilene . . . .
> (*Lawyer smiles, pats Jack twice on the knee, and exits*).[2]

Preparing a witness or a client to testify in advance of a deposition or adjudicative proceeding – or in some situations providing a client or witness with midstream guidance during the testimonial process – is such a familiar component of a lawyer's trial-advocacy repertoire that it

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through 2023. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.
[2] THE TRIAL OF JACK MCCALL, DEADWOOD, season 1, episode 5 (Home Box Office, Inc. 2010).

needs little introduction or explanation. Many would condemn a lawyer's failure to prepare a client or witness.[3] Failure to do so competently and diligently can constitute an ethics violation.[4] But, in some witness-preparation situations, a lawyer clearly steps over the line of what is ethically permissible. Certain categories of lawyer activity are firmly established as unethically interfering with the integrity of the justice system and unethically obstructing another party's access to evidence. Among the rules applicable to such conduct are Rule 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer), Rule 3.3 (Candor Toward the Tribunal), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 4.4 (Respect for Rights of Third Persons), and Rule 8.4 (Misconduct).

The distinction between legitimate witness preparation and guidance versus unethical efforts to influence witness testimony, a practice sometimes known as coaching, horseshedding, woodshedding, or sandpapering,[5] can be ambiguous owing in large part to the concurrent ethical duties to diligently and competently represent the client and to refrain from improperly influencing witnesses.[6] For purposes of this opinion, the term coach is used to signify unethical or ethically questionable conduct. The task of delineating what is necessary and proper and what is ethically prohibited during witness preparation has become more urgent with the advent of commonly used remote technologies, some of which can be used to surreptitiously "coach" witnesses in new and ethically problematic ways.

Analysis

Some quantum of client and witness preparation is appropriate and an affirmative ethical responsibility. But lawyers "must respect the important ethical distinction between discussing

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[3] William Hodes, *The Professional Duty to Horseshed Witnesses Zealously Within the Bounds of the Law*, 30 TEXAS TECH. L. REV. 1343 (1999) ("Journey not far enough, and a lawyer deserves sanction for failing to carry out the most basic duties encompassed by the client-lawyer relationship.") (footnote omitted); Roberta K. Flowers, *Witness Preparation: Regulation of the Profession's Dirty Little Secret*, 38 HASTINGS CONST. L.Q. 1007, 1009 (2011) ("Witness preparation is considered by most criminal attorneys—prosecutors and criminal defense attorneys alike—to be an essential part of trial advocacy.") (footnote omitted); Adam Liptak, *Crossing a Fine Line on Witness Coaching*, N.Y. TIMES (Mar. 16, 2006) ("[L]awyers often spend hours preparing witnesses to testify, a practice that is not only accepted but also generally considered necessary. Lawyers have been punished for incompetent representation for failing to interview and prepare witnesses.").

[4] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (Competence) & cmt. [5]; MODEL RULES OF PROF'L CONDUCT R. 1.3 (Diligence).

[5] BLACK'S LAW DICTIONARY 885 (11th ed. 2019) (defining horseshedding as "The instruction of a witness favorable to one's case (esp. a client) about the proper method of responding to questions while giving testimony."). To be sure, a witness can be coached to tell the truth, which would not ordinarily be unethical. The practice of emphasizing continuously the importance of telling the truth, and that truthfully and accurately recounting facts is ultimately the witness's responsibility, is a useful guardrail to avoid coaching. *See* Resolution Tr. Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993) (district court's disbarment of two lawyers for aggressively pushing witness regarding choice of words was an abuse of discretion where there was no evidence that conduct was in bad faith or testimony was false; evidence that lawyers told witness to read the affidavit carefully before signing it undermined allegation that lawyers' conduct was an attempt to cause witness testify falsely under oath).

[6] Many commentators have underscored this tension. *See, e.g.*, Tom Barber, *Restrictions on Lawyers Communicating with Witnesses During Testimony: Law, Lore, Opinions, and the Rule*, 83 FLA. BAR JOURNAL 58 (July-Aug. 2009) (noting that "there is considerable disagreement as to the definition of 'coaching' as opposed to legitimate preparation").

testimony and seeking improperly to influence it."[7] There is, in general, a distinction between manipulative conduct during client/witness preparation and active interference with or attempts to influence testimony while a witness is testifying. This opinion addresses both, because either can implicate a lawyer's ethical duties.

With remote proceedings having become commonplace, the sense that brazen witness-coaching behaviors are occurring or could easily occur has been validated by a number of reported instances of misconduct.[8] This development should guide the manner in which courts and lawyers are superintending the use of remote technology.

A. What Preparatory Conduct is Ethical?

Providing a witness with effective preparatory guidance is undoubtedly a component of the "thoroughness and preparation" element of Model Rule 1.1.[9] It is accepted that lawyers can engage in, for example, the following activities:

- remind the witness that they will be under oath
- emphasize the importance of telling the truth
- explain that telling the truth can include a truthful answer of "I do not recall"[10]
- explain case strategy and procedure, including the nature of the testimonial process or the purpose of the deposition
- suggest proper attire[11] and appropriate demeanor and decorum
- provide context for the witness's testimony
- inquire into the witness's probable testimony and recollection
- identify other testimony that is expected to be presented and explore the witness's version of events in light of that testimony

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[7] *See* Geders v. United States, 425 U.S. 80, 90 n.3 (1976) (citing Ethical Consideration 7-26 of the ABA Code of Professional Responsibility (1975)); *see also* Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) ("The goal of obtaining the facts of a case is defeated when the lawyer and not the witness is answering questions or influencing the answers to them.").

[8] The risk of witness-preparation misconduct is not particularly augmented in a remote environment because such interactions still occur "behind closed doors," so to speak. Technology-driven efforts to influence in-progress witness testimony—signaling or messaging a witness testifying remotely, out of the sight of opposing counsel and the adjudicative officer—has generated increased scrutiny.

[9] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (Competence) & cmt. [5]. Other germane rules include MODEL RULES OF PROF'L CONDUCT R. 1.3 (Diligence), 1.4 (Communication), and 2.1 (Advisor). *See, e.g.*, Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (an attorney has right and duty to prepare a client for deposition); Maryland v. Earp, 571 A.2d 1227, 1234 (Md. 1990) ("[a]ttorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be witnesses."); John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 287-88 (1989), ("The practical literature uniformly views the failure to interview witnesses prior to testimony as a combination of strategic lunacy and gross negligence.").

[10] Telling a witness that a truthful answer of "I do not recall" is an acceptable response and ethically distinguishable from telling a witness, "The less you recall the better." The latter is a statement that affirmatively encourages a witness to "forget" information, i.e., to lie under oath about what is remembered. It is the ethical equivalent of telling a witness affirmatively to testify to something that is contrary to fact. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (a lawyer shall not counsel or assist a witness to testify falsely).

[11] Vanessa Friedman, *Caroll, Clothes and Credibility*, N.Y. TIMES (May 9, 2023) (noting that witness's attire and demeanor were so effective that people wondered if someone was stage-managing the style: "Well, her lawyers, duh. It has long been understood that appearance is part of any courtroom drama.").

- review documents or physical evidence with the witness, including using documents to refresh a witness's recollection of the facts
- identify lines of questioning and potential cross-examination
- suggest choice of words that might be employed to make the witness's meaning clear[12]
- tell the witness not to answer a question until it has been completely asked
- emphasize the importance of remaining calm and not arguing with the questioning lawyer
- tell the witness to testify only about what they know and remember and not to guess or speculate
- familiarize the witness with the idea of focusing on answering the question, i.e., not volunteering information.[13]

When it comes to preparation of a client or witness for a testimonial event such as a trial or deposition, there is a fair amount of latitude in the types of lawyer-orchestrated preparatory activities that are recognized as permissible.[14]

B. Unethical Pre-Testimony Coaching

Within the broad class of lawyer conduct directed at a client's or witness's future testimony, certain categories of lawyer activity are firmly established as unethically interfering with the integrity of the justice system and unethically obstructing another party's access to evidence. A lawyer violates ethical obligations by counseling a witness to give false testimony, assisting a witness in offering false testimony, advising a client or witness to disobey a court order regulating discovery or trial process, offering an unlawful inducement to a witness, or procuring a witness's absence from a proceeding.[15]

Prominent among the ethics rules in this area is Model Rule 3.4(b), which prohibits a lawyer from advising or assisting a witness—whether a client or not—to give false testimony.[16]

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[12] THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 116, cmt. b (2000), emphasizes that in suggesting choice of words "a lawyer may not assist the witness to testify falsely as to a material fact," which would constitute knowingly counseling or assisting a witness to testify falsely or otherwise to offer false evidence. *Id*. (citing RESTATEMENT § 120(1)(a)).

[13] Many of these techniques are expressly referenced in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §116, cmt. b.

[14] *See generally* JONATHAN L. ROSNER, PREPARING WITNESSES (2022-23 ed.); DANIEL I. SMALL, PREPARING WITNESSES: A PRACTICAL GUIDE FOR LAWYERS AND THEIR CLIENTS (5th ed. 2020); Video: Jan Mills Spaeth, *Become a Strong and Credible Witness: Witness Preparation for Deposition and Trial* (2019) (streaming HD video); JAMES M. MILLER, FROM THE TRENCHES II: MASTERING THE ART OF PREPARING WITNESSES (2019); KENNETH R. BERMAN, REINVENTING WITNESS PREPARATION: UNLOCKING THE SECRETS TO TESTIMONIAL SUCCESS (2018).

[15] *See, e.g.*, *In re* Stroh, 97 Wash. 2d 289, 300, 644 P.2d 1161, 1167 (1982) (disbarring lawyer following conviction for tampering with a witness; "Under no circumstances may false testimony knowingly be introduced into a hearing by an officer of the court.").

[16] MODEL RULES OF PROF'L CONDUCT R. 3.4(b). Such conduct might also constitute assisting the client to engage in conduct that the lawyer knows is criminal, i.e., perjury, in violation of Model Rule 1.2(d), as well as offering false evidence in violation of Model Rule 3.3(a)(3). MODEL RULES OF PROF'L CONDUCT R. 1.2(d) & 3.3(a)(3). For examples of discipline for transgressing these rules, *see, e.g.*, *In re* Peasley, 90 P. 3d 764 (Ariz. 2004) (lawyer who coached witness to lie disbarred); *In re* Paul Storment, 873 S.W.2d 227 (Mo. 1994) (lawyer disbarred in Missouri and reciprocally suspended for two-years in Illinois for advising client during recess to deny material facts of

Instigating a witness to lie can occur in ways beyond an outright instruction to fabricate testimony. For example, it is unethical to tell a witness to "downplay" the number of times a witness and a lawyer met to prepare for trial[17] or to encourage a client to misrepresent a location of a slip and fall accident to have a viable claim.[18] Other representative examples of unacceptable witness coaching and influencing behaviors include programming a witness's testimony,[19] knowingly violating sequestration orders,[20] and encouraging a witness to present fabricated testimony.[21]

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another witness's testimony that lawyer knew were true and prompting client on redirect to testify to known false testimony); *see also In re* Attorney Discipline Matter, 98 F.3d 1082 (8th Cir. 1996) (affirming reciprocal disbarment of same Missouri lawyer); *In re* Mitchell, 244 Ga. 766, 262 S.E.2d 89 (1979) (disbarring lawyer who had instructed six witnesses to say that a fictitious man by the name of "David Thompson" was the real father of a child whose paternity was disputed); *In re* Oberhellmann, 873 S.W.2d 851, 852 (Mo. 1994) (disbarring lawyer who, during client's deposition, instructed client to lie about a number of things, including client's place of residence).

[17] *In re* Meltzer, 21 N.Y.S.3d 63, 64 (2015) (accepting lawyer's resignation and ordering disbarment in matter arising from lawyer's instructions that witness "downplay" the number of times they met to discuss testimony to prepare for trial in the event witness was asked such a question on cross-examination).

[18] *In re* Rios, 965 N.Y.S.2d 418, 421, 423-24 (2013) (lawyer disciplined for violation of New York RPC 8.4(c)).

[19] *In re* Brooke P. Halsey, Jr., Case No. 02-O-10195-PEM (State Bar of California Hearing Dep't, Aug. 1, 2006) (prosecutor's secret pre-trial coaching of forensic pathologist who had performed autopsy of victim was so intrusive and extensive that it "tampered with the heart of [the witness's] testimony"). Except in extreme cases of witness programming such as *Halsey*, the extent to which a lawyer can "script" or "prefabricate" otherwise truthful witness testimony has not been definitively resolved. Compare United States v. Welton, 2009 U.S. Dist. Lexis 138113 (C.D. Cal. 2009) ("While directing a witness to use (or avoid using) particular words when phrasing an answer is unacceptable conduct, particularly for a prosecutor . . . there is no evidence that [the witness] testified falsely . . . as a result of the advice she received from the [prosecuting attorney]") with Resolution Tr. Corp. v. Bright, 6 F.3d 336 (5th Cir. 1993) (drawing distinction between asking witness to swear to facts which are knowingly false and placing statements in draft affidavit that have not been previously discussed with witness). *See generally* Matthew Hector, *The Beau Brindley Case: Witness Preparation v. Coaching*, 103 ILL. BAR JOURNAL 11, 11 (2015) (analyzing federal district court for the Northern District of Illinois's decision that use of question-and-answer scripts to prepare witnesses for trial was not prohibited coaching, and noting that there is "no bright line" between rigorous witness preparation and improper witness coaching).

[20] Transcript of Evidentiary Hearing Before the Honorable Leonie M. Brinkema, U.S. District Court Judge, United States v. Zacarias Moussaoui, No. 01-692 (E.D. Va. Mar. 14, 2006) (lawyer representing Transportation Security Administration emailed trial transcripts to a group of potential witnesses who were under a sequestration order; the court barred the government from introducing that evidence, and the lawyer was referred to the Pennsylvania Disciplinary Board). *See also* Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981) (court ordered exclusion of witness testimony *where* lawyer violated sequestration order by allowing an expert witness to view the transcripts of other witness contrary to an order based on Fed. R. Evid. 615). *But see* State v. Blakeney, 137 Vt. 495, 408 A.2d 636 (1979) (sequestration order excluding witnesses from courtroom in no way restricted the right of counsel to confer with their clients or witnesses; purpose of the order was not to segregate witnesses from counsel who called them, although issuance of such an order would be within the sound discretion of the trial judge in an appropriate case).

[21] *In re* Edson, 108 N.J. 464, 471-73 (1987) (lawyer disbarred after providing an undercover detective posing as a client with a memo fabricating facts to be used as the detectives' testimony, in violation of New Jersey RPC 1.2(d), RPC 8.4(a), (b), (c), and (d)). Even merely permitting a client to testify to fabricated evidence is sanctionable as offering false evidence. *See* Attorney Griev. Comm'n v. Elmendorf, 404 Md. 353, 946 A.2d 542 (2006) (leaving person with the impression that they could mislead the court in a divorce action by attesting to compliance with 6-month waiting period violated Rule 8.4(d)); Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No.98 CIV 10175(JSM), 2002 WL 59434 (S.D.N.Y. Jan 16, 2002) (citing Rule 3.3(a)(3), court sua sponte sanctioned law firm for permitting client to submit false affidavit; although client insisted affidavit was true, where "no reasonable lawyer would believe it" in light of other evidence known to law firm).

It is also unethical to compensate a lay witness for the substance of their testimony or to condition such payment on the content of the witness's testimony,[22] even if that payment is for "truthful" testimony.[23] Other types of unlawful inducements are similarly unethical.[24] For example, donating money to a witness's favorite charity was held to be an improper attempt to influence testimony.[25] In addition, offering a witness money or other incentives *not* to testify is a species of witness tampering and flatly prohibited by the Model Rules.[26]

C. Unethical Conduct During Witness Testimony

While the methods of advance witness preparation are variable and there is a broad range of acceptable methods, the equation changes when a lawyer's efforts to refine witness testimony happen during a trial or deposition. Overtly attempting to manipulate testimony-in-progress would in most situations constitute at least conduct prejudicial to the administration of justice in violation of Model Rule 8.4(d). Violation of a court rule or order restricting such coaching behaviors would be knowing disobedience of the rules of a tribunal in violation of Model Rule 3.4(c).[27]

Winking at a witness during trial testimony, kicking a deponent under the table, or passing notes or whispering to a witness mid-testimony are classic examples of efforts to improperly influence a witness's in-progress testimony.[28] Other more subtle types of signaling also implicate ethical

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[22] MODEL RULES OF PROF'L CONDUCT R. 3.4, Comment [3] ("The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee."). Most states permit "reasonable" compensation to occurrence witnesses for time and expenses in preparing to testify, although some jurisdictions place restrictions on testimony for actual courtroom time. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-402 (1996) (nonexpert witness may be compensated for time spent attending trial or deposition or preparing for testimony if payment is not conditioned upon the content of testimony and does not violate any law). *See generally* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4, at 425-27 (10th ed. 2023) (discussion of Witness Fees).

[23] *In re* Discipline of Callister, No. 70901 (Nev. 2017) (lawyer suspended for offering to pay a witness $7,000 for his "honest testimony" in support of certain facts and threatening the witness with personal liability and "the legal implications of perjury" if he testified the other way).

[24] *E.g.*, People v. Gifford, 76 P.3d 519 (Colo. O.P.D.J. 2003) (advising client to offer ex-wife real estate in exchange for favorable testimony in criminal case). *See generally* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4, at 424 (10th ed. 2023) (discussion of Offering Illegal Inducement to Witness).

[25] Christopher v. DePuy Orthopaedics, Inc., 888 F.3d 753 (5th Cir. 2018) (granting relief from judgment under FED. R. CIV. P. 60(b) where lawyer had represented that experts were non-retained and serving "pro bono," but lawyer had secretly donated $10,000 to one expert's private school alma mater before trial and collectively paid the two experts $65,000 after trial).

[26] *See, e.g.*, *In re* Discipline of Kronenberg, 155 Wash.2d 184, 198 (2005) (disbarment appropriate for lawyer who gave victim-witness $3,000 and a one-way bus ticket to Oklahoma so witness would not testify against defendant in a criminal case, in violation of Washington State RPC 8.4(a)-(d) bribing and tampering with a witness and 8.4(c) for deceiving prosecutors about procuring the witness's absence; lawyer also deemed unfit to practice law).

[27] In some cases, such conduct may also be a violation of MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (unlawfully obstructing another party's access to evidence). *See generally* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4, at 422 & 427-29 (10th ed. 2023) (discussions of Obstructing Another Party's Access to Evidence and Obeying Obligation to Tribunal).

[28] *See, e.g.*, Vnuk v. Berwick Hospital Co., No. 3:14-CV-01432, 2016 WL 907714, at *4 (M.D. Pa. Mar. 2, 2016) (finding lawyer violated court rules by conferring with witness over break, passing notes and whispering during deposition). One commentator likened lawyer-to-witness gesturing to the catcher's signal to the pitcher in a baseball

obligations and at times result in court-ordered sanctions. A familiar type of covert coaching is the so-called "speaking objection," or "suggestive objection." These are "statements that go beyond just stating the objection or the basis for the objection and are intended—or at least suspected of being intended—to coach the witness and impede the deposing attorney's discovery."[29] The rules in many state and federal jurisdictions prohibit objections that have the effect of coaching a witness, and may also prohibit lawyers from instructing a witness not to answer a question unless specifically authorized to do so.[30] Some jurisdictions have enacted rules for the conduct of depositions that expressly restrict speaking objections.[31]

Relatedly, when a witness's testimony is underway, lawyers sometimes attempt to exercise midcourse testimonial influence and undertake damage control during a break or recess and may even seek or insist upon such breaks while a question is pending for the apparent purpose of coaching the witness in a private conference. Although there is no express ethical prohibition on communications between witness and counsel during a break in testimony, adjudicative officers have, at times, exercised control over these circumstances, including entering specific orders and imposing deposition guidelines and/or sanctions.[32]

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game advising what pitch to throw. Holland & Hart, *Witnesses: Don't Rely on 'Catcher Signals'*, JDSUPRA (Apr. 26, 2021), available at https://www.jdsupra.com/legalnews/witnesses-don-t-rely-on-catcher-signals-5364552/.

[29] Michael Roundy, *Speaking Objections Risk Sanctions*, ABA LITIGATION SECTION PRACTICE POINTS, *available at* https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2019/speaking-objections-risk-sanctions/?login (May 31, 2019). Openly asking a witness to correct an inadvertent misstatement when the witness obviously misunderstood a question or simply misspoke is not a coaching concern. In some circumstances involving false witness testimony, a lawyer may have an ethical duty to take reasonable remedial measures to correct the testimony. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3, cmt. [10]. *See generally* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.3, at 412-13 (10th ed. 2023) (discussion of Remedial Measures).

[30] *E.g.*, FED. R. CIV. P. 30(c)(2) ("An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)."); Sec. Nat. Bank of Sioux City, Iowa v. Day, 800 F.3d 936, 942 (8th Cir. 2015) (lawyers should not use an objection to instruct the witnesses how to answer or not answer a question); Deville v. Givaudan Fragrances Corp., 419 F. App'x 201, 209 (3d Cir. 2011) (affirming imposition of sanctions upon finding that attorney "testified on behalf of witness by way of suggestive speaking objections"); Goode v. Ramsaur, No. 20-cv-00947-DDD-KLM, 2023 U.S. Dist. LEXIS 80236 *13-24 (D. Colo. May 8, 2023) (finding sanctionable counsel's conduct involving countless speaking objections during deposition); Sec. Nat. Bank of Sioux City, Iowa v. Abbott Laboratories, 299 F.R.D. 595, 604 (N.D. Iowa 2014) (objections must be stated in a non-suggestive manner).

[31] Brightman v. Corizon, Inc., 2021 NY Slip Op 50735(U), ¶ 2, 72 Misc. 3d 1213(A), 150 N.Y.S.3d 233 (Sup. Ct. 2021) (referencing New York's Uniform Rules for the Conduct of Depositions, which expressly limit speaking objections: "Speaking objections are thus singled out as undesirable: they are not necessary to preserve an objection to form, they disrupt and impede the conduct of the deposition, and they risk coaching the deponent on how to answer a pending question.").

[32] *See, e.g.*, Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (holding that a lawyer and client "do not have an absolute right to confer during the course of the client's deposition"; noting that deposition guidelines restricting private conferences would be undermined "by a lawyer's making of lengthy objections which contain information suggestive of an answer to a pending question," i.e., speaking objections); Brightman v. Corizon, Inc., 2021 NY Slip Op 50735(U), ¶ 2, 72 Misc. 3d 1213(A), 150 N.Y.S.3d 233 (Sup. Ct. 2021) (discussing prohibition in Uniform Rules for the Conduct of Deposition on a lawyer interrupting the deposition for the purpose of communicating with the deponent, as well as the trial court's discretion to bar consultation between a party and counsel while the party is testifying to the extent consistent with the party's constitutional rights). *See also Deville v. Givaudan Fragrances Corp.*, 419 F. Appx. 201, 207 (3rd Cir. 2011) (upholding sanctions for abusive, unprofessional and obstructive conduct during deposition); *Specht v. Google, Inc.*, 268 F.R.D. 596, 598-599, 603 (N.D. Ill. 2010)

Lawyers should both refrain from efforts to physically signal witnesses when testimony is in progress and attend closely to the strictures imposed by court rule, local rule, or court order.

1. Misconduct in Remote Settings

The use of remote communications platforms and other technologies in adjudicative proceedings and depositions, provides opportunities and temptations for lawyers to surreptitiously tell or signal witnesses what to say or not say in the proceedings of a tribunal.

This is not a novel phenomenon. When the ubiquity of cell phone technology made it convenient to communicate with another person covertly, some lawyers began to abuse it. In a troubling example of text-message-based coaching, a Florida lawyer, in a worker's compensation case, was disciplined for sending text messages to a witness regarding the witness's testimony while a deposition was in progress, which texts included coaching and specific directions on how to respond to questions.[33] Similarly, it is improper for a lawyer to text a witness who is testifying at trial.[34]

The logistics of trials and depositions using remote meeting technologies are such that a lawyer and a witness may be in one location, with the opposing lawyer at another location, and, in trial situations, an adjudicative officer in yet another. In these circumstances, many things can happen that cannot readily be monitored by participants in the other remote locations.[35] It would be relatively easy for an off-camera lawyer or someone acting at the lawyer's behest to signal a witness with undetectable winks, nods, thumbs up or down, passed notes, or the like. Surreptitious off-camera activities such as texting the witness or other real-time electronic messaging are possible and easily done.

Allegations of misconduct in remote proceedings have been addressed by regulators and the judiciary. A lawyer has been disciplined for providing a client with answers to questions while

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(imposing sanctions for speaking objections that obstructed deposition); *BNSF Ry. Co. v. San Joaquin Valley RR Co.*, 2009 WL 3872043, *3 (E.D. Cal. Nov. 17, 2009) (imposing sanctions for inappropriate and burdensome objections).

[33] When confronted about the text messages by counsel taking the deposition, the lawyer falsely denied texting the witness and stated he was only receiving a text from his daughter. Then, after agreeing to put his cellphone away, the lawyer continued sending texts, and inadvertently sent text messages intended for the witness to deposing counsel. The Florida Bar v. James, 329 So.3d 108, 109-112 (Fla. 2021) (finding violation of Florida Bar Rules 3-4.3 (commission of any act that is unlawful or contrary to honesty and justice), 4-3.4(a) (obstructing another party's access to evidence), Rule 4-8.4(d) (conduct prejudicial to the administration of justice)).

[34] *See* Sky Dev. Inc v. Vistaview Dev. Inc., 41 So. 3d 918 (Fla. Dist. Ct. App. 2010) (lawyer who texted witness while witness was testifying at trial constituted a "blatant showing of fraud, pretense, collusion or other similar wrongdoing"); Wei Ngai v. Old Navy, No. 07-5653 (KSH) (PS), 2009 U.S. Dist. LEXIS 67117, at 4 (D.N.J. July 31, 2009) (during remote video-conference deposition with lawyer in one state while deponent was in another, lawyer and deponent exchanged five text messages; because lawyer also accidentally sent a text meant for deponent to opposing counsel, the texting came to light; in ordering production of the text messages, court rejected assertion of attorney-client privilege for the texts, which violated FED. R. CIV. P. 30(c) ("depositions are to be conducted in the same manner as trial examination") because texts were equivalent to passing notes to client with the intent "to influence the fact finding goal of the deposition process").

[35] *See* Wei Ngai v. Old Navy, Civil Action No. 07-5653 (KSH) (PS), 2009 U.S. Dist. LEXIS 67117, at *2 (D.N.J. July 31, 2009) (in dispute over defense counsel's sending of text messages to witness during remote deposition, plaintiff's counsel noted that the deponent and defense counsel were only visible from the "chest up" and that she was unable to observe defense counsel's hands during the deposition).

off camera during a remote proceeding.[36] Another example involved a lawyer representing the defendant in a federal lawsuit, who, during a remote deposition, was overheard by opposing counsel providing the client with an answer to a question, after which the client repeated the answer as the client's own. After reviewing the deposition footage, opposing counsel found 50 additional circumstances where the lawyer had provided the client with answers to questions while off-camera during the remote deposition.[37]

Lawyers have a duty to comply with the rules of professional conduct and rules of court that prohibit witness coaching, in all testimonial contexts regardless of the format of the deposition, hearing, or trial. Remote coaching, like its historical antecedents, puts the perpetrating lawyer at risk of adjudicative rebukes and court-ordered sanctions,[38] as well as disciplinary sanctions.[39]

2. Systemic Precautions for Addressing Such Misconduct

All lawyers have an ethical obligation to understand how relevant technology works.[40] Some degree of sophistication regarding the nature of the technology used in remote proceedings will help avoid inadvertent missteps.[41] An understanding of the coaching-related risks of remote technology will also enable lawyers and adjudicative officers concerned about potential surreptitious coaching to structure remote proceedings in ways that will deter its occurrence and enhance the ability to detect it.

What systemic precautions will prove useful in helping to prevent and detect incidences of problematic remote coaching and empower adjudicators to intervene as appropriate to control questionable lawyer conduct during remote trials and depositions? The following suggested

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[36] *In re* Claridge, PDJ 2021-9088 (Ariz. Jan. 21, 2022) (suspending lawyer for 60 days by consent where lawyer used chat feature to instruct client during cross-examination at trial using GoToMeeting platform, in violation of Arizona Ethics Rule 3.4(a) ER 8.4(c), and ER 8.4(d)).

[37] Barksdale School Portraits, LLC v. Williams, 339 F.R.D. 341 (D. Mass. 2021) (disqualifying lawyer from case, ordering that jurors be allowed to hear both the deposition witness's testimony and the lawyer's coaching and draw their own conclusions regarding the credibility of the testimony, and referring matter to another federal district court judge to evaluate potential discipline); *see also In re* Jeffrey Rosin, No. 21-mc-91571-LTS (U.S. Dist. Ct. for the Dist. of Mass., Jan. 19, 2022) (ordering lawyer in *Barksdale School Portraits* case to contact a group called Lawyers Concerned for Lawyers "for the limited purpose of receiving and completing counseling on better management of emotions and judgment in the face of adversity").

[38] *See, e.g.*, *Barksdale School Portraits*, *supra* note 37; Johnson v. Statewide Investigative Services Inc., No. 20-C-114 (N.D. Ill., March 4, 2021) (magistrate judge accepted lawyer's explanations of questionable conduct during Zoom deposition, finding that what happened during deposition was the result of a lack of professionalism and collegiality rather than an unethical attempt to coach witness).

[39] The most severe sanctions to date were the disciplinary suspensions in the *James* and *Claridge* cases, discussed *supra* at notes 33 & 36. *See* Zack Needles, *Ethics Authorities Go Relatively Easy on Virtual Witness Coaching—For Now*, LAW.COM (Feb. 2, 2022) (noting that "ethics authorities have shown a fair amount of mercy to the offending lawyers, perhaps in recognition of the fact that virtual litigation is still pretty weird for everyone involved.").

[40] MODEL RULES OF PROF'L CONDUCT R. 1.1, cmt. [8].

[41] In Johnson v. Statewide Investigative Services Inc., No. 20-C-114 (N.D. Ill., March 4, 2021), a dispute over what appeared to be remote coaching, the trial judge firmly rejected a lawyer's proffered explanation that the problems occurred because he was not "technologically savvy," noting that at the time of the deposition, lawyers across the country had been primarily conducting their practices using technology for ten months: "This has included a host of different videoconferencing platforms for court hearings, depositions, and appellate arguments. Thus, while [a lawyer's] lack of technology expertise may have sufficed as an explanation at one point in time, it is no longer valid or credible."

approaches—though not ethically required under the Model Rules—provide a starting point:

- Skillful cross-examination[42]
- Court orders directing uninterrupted testimony[43]
- Motions to terminate or limit a deposition or for sanctions[44]
- Inclusion of protocols in remote deposition orders, scheduling orders, and proposed discovery plans[45]
- Administrative orders governing the conduct of remote depositions[46]
- Inclusion of remote protocols in trial plans and pretrial orders[47]

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[42] This remedy was recommended by the United States Supreme Court. *See* Geders v. United States, 425 U.S. 80, 89-90 (1976) ("The opposing counsel in the adversary system is not without weapons to cope with 'coached' witnesses. A prosecutor may cross-examine a defendant as to the extent of any 'coaching' during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.").

[43] This remedy also was recommended by the United States Supreme Court as a component of the judge's power to control the progress and shape of the trial. *See* Geders v. United States, 425 U.S. 80, 90 (1976) ("[T]he trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. If the judge considers the risk high he may arrange the sequence of testimony so that direct- and cross-examination of a witness will be completed without interruption. That this would not be feasible in some cases due to the length of direct- and cross-examination does not alter the availability, in most cases, of a solution that does not cut off communication for so long a period as presented by this record. Inconvenience to the parties, witnesses, counsel, and court personnel may occasionally result if a luncheon or other recess is postponed or if a court continues in session several hours beyond the normal adjournment hour. In this day of crowded dockets, courts must frequently sit through and beyond normal recess; convenience occasionally must yield to concern for the integrity of the trial itself.").

[44] *See* FED. R. CIV. P. 30(d); STEVEN BAIKER-MCKEE & WILLIAM M. JANSSEN, FEDERAL CIVIL RULES HANDBOOK 871 (2022 ed.) (a party may move to terminate a deposition if it is being conducted in bad faith or in an unreasonably annoying, embarrassing, or oppressive manner; a court may impose an "appropriate sanction" on a person engaging in obstructive behavior). *See* ADVISORY COMMITTEE NOTES TO THE FEDERAL RULES OF CIVIL PROCEDURE, 1980 AMENDMENT TO FED. R. CIV. P. 26, Subdivision (f) (1980) ("In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.").

[45] Such protocols can be agreed to as part of a stipulation to a deposition by remote means or ordered by the court when authorizing that a deposition be taken by remote means. *See* FED. R. CIV. P. 30(b)(4). Protocols could also be included in a proposed discovery plan. *See* FED. R. CIV. P. 26(f). A number of courts routinely require that depositions be conducted in accordance with the stringent procedures set forth in *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993). *E.g.*, Kelleher v. Wells Fargo Ins. Servs., No. 10-6247-NLH-KMW, 2011 U.S. Dist. LEXIS 13074, at *2 (D.N.J. Feb. 10, 2011). For an example of a remote deposition protocol, see Uniform Civil Rules for New York State Trial Courts, Rule 202.70(g), Appendix G, STIPULATION AND PROPOSED ORDER CONCERNING PROTOCOL FOR CONDUCTING REMOTE DEPOSITIONS, *available at* https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/202.70(g)%20-%20Rule%2037-Appendix%20G.pdf (last visited Aug. 25, 2023).

[46] *See, e.g.*, SUPREME JUDICIAL COURT OF MASSACHUSETTS UPDATED ORDER REGARDING REMOTE DEPOSITIONS (Oct. 23, 2020), *available at* https://www mass.gov/supreme-judicial-court-rules/supreme-judicial-court-updated-order-regarding-remote-depositions.

[47] *See* FED. R. CIV. P. 16(c) & (e). *See, e.g.*, STATE OF NEW YORK UNIFIED COURT SYSTEM, VIRTUAL BENCH TRIAL PROTOCOLS AND PROCEDURES (including Proposed Stipulation and Order for Virtual Bench Trial Protocols and Procedures), *available at* https://www.nycourts.gov/whatsnew/pdf/VirtualBenchTrial-Protocols-2112021.pdf (last visited Aug. 25, 2023).

- Development of guidelines and best practices for conduct in remote proceedings[48]
- Professionalism/Civility/Courtesy Codes[49]

Structuring remote proceedings in advance by way of agreement, court order, or collectively adopted behavioral norms will create greater transparency and provide helpful guardrails to guide lawyers away from unethical conduct.

Conclusion

Under the Model Rules of Professional Conduct, a lawyer's failure to prepare and guide a witness would in many situations violate the ethical duties of competence and diligence. Witness preparation becomes unethical when the conduct transgresses Model Rules governing prohibiting interference with the integrity of the justice system and obstructing another party's access to evidence. The use of technology in the profession, particularly remote-meeting technologies, presents distinct opportunities for surreptitious witness coaching. But the Model Rules that constrain unethical witness coaching extend to all testimonial contexts, regardless of format. It is prudent for lawyers and adjudicators to consider prophylactic measures designed for use in remote proceedings to prevent and detect incidences of unethical coaching conduct.

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[48] *See* NATIONAL CENTER FOR STATE COURTS, REMOTE PROCEEDINGS TOOLKIT 47-50 (Proceedings Conduct) (2002), *available at* https://www.ncsc.org/__data/assets/pdf_file/0027/82377/Remote-Proceeding-Toolkit-Final.pdf; WASHINGTON STATE SUPREME COURT, REMOTE JURY TRIALS WORK GROUP BEST PRACTICES IN RESPONSE TO FREQUENTLY ASKED QUESTIONS (FAQ) (June 2021) (including links to resources such as sample orders for remote/virtual jury trials), *available at* https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo remotejurytrialsworkgroup.

[49] *See, e.g.*, COLORADO PRINCIPLES OF PROFESSIONALISM, PRINCIPLE 7.2.5 (2011) ("We will refrain from coaching deponents by objecting, commenting, or acting in any other manner that suggests a particular answer to a question."), *available at* https://www.cobar.org/For-Members/Committees/Professionalism-Coordinating-Council/Principles-of-Professionalism#9712573-colorado-principles-of-professionalism (2011). A compilation of Professionalism Codes from around the United States can be found on the ABA Center for Professional Responsibility Resources page of the ABA website, *available at* https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes/.

UNPROFESSIONAL RELATIONSHIPS *with clients*

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Recently, the Minnesota Supreme Court suspended a family law lawyer for engaging in explicit sexual conversations with a client he was representing in a divorce.[1] This case is certainly a cautionary tale and I wanted to take this opportunity to share some important ethical reminders.

The case

Mr. Winter (respondent) was hired by his client to represent her in a divorce. Before retaining counsel, the parties had generally agreed to custody and parenting time terms for their minor children. They had few assets. Due to strained finances, in fact, the client and her husband continued to cohabitate notwithstanding their separation. From the beginning, the client reported, the respondent conducted himself in what she described as a flirtatious manner, such as complimenting her appearance and eyes. This conduct continued through mediation, where respondent told his client that she was beautiful, and made other suggestive statements. At this point, the client had exhausted the initial $5,000 retainer (advanced by her husband against the equity in the family home) and had paid respondent an additional $3,000 at the time of mediation. After the matter failed to resolve at mediation, the client expressed her anxiety about the lack of progress and the ongoing attorney's fees.

In a meeting following the mediation to discuss next steps, respondent apologized to his client for being "really flirty" but said that she was "sexy," so he was unable to help himself. This made the client uncomfortable, but she did not believe she could terminate the representation. She didn't have the funds to hire new counsel, particularly given that the divorce petition had not yet been filed. Things escalated from there to a sexually explicit email chain that I will not summarize here but is set forth in the petition for disciplinary action. Close in time to this exchange, respondent also invited his client on a couple of occasions to come into his office, including on the weekend for a haircut (the client was a stylist). Shortly thereafter, the client consulted with another attorney, who agreed to take her case without an advance fee retainer, and terminated the representation. The matter came to the attention of the director upon the client complaint and, following a contested probable cause hearing, ultimately resulted in a petition alleging that respondent engaged in misconduct—namely, engaging in explicit sexual conversations with a client, including contemporaneous efforts to meet in person, causing a conflict of interest; failing to recognize that conflict of interest; and attempting to engage in sexual relations with his client in violation of Rules 1.1, 1.7(a)(2) and 8.4(a), Minnesota Rules of Professional Conduct.

Respondent ultimately admitted the misconduct and stipulated to recommending to the Court the imposition of a public reprimand. Whether a public reprimand was the appropriate briefing, however, was a matter of some debate. In fact, the Court requested additional briefing on this topic from the parties. After briefing, the Court suspended respondent for 30 days, with one justice stating separately that she believed more discipline was warranted.

Sex with clients is prohibited

Rule 1.8(j), MRPC, prohibits a lawyer from having sexual relations with a client unless a consensual sexual relationship predated the lawyer-client relationship. The comments to the rule articulate several bases for this prohibition, namely (1) potential unfair exploitation of the lawyer's fiduciary role; (2) potential interference with the exercise of independent professional judgment when a lawyer becomes personally involved; and (3) blurred lines potentially impacting client confidentiality and privilege.[2] Because most states teach the model rules in law school professional responsibility classes, this prohibition is likely not a surprise to any reader. Minnesota is one of 39 states that expressly prohibit sex with clients through adoption of some form of the American Bar Association's model rules, but you might be surprised to know that there are several states that do not have such a bright-line rule.[3] Because of the strict prohibition in the rule, even when a relationship is consensual, it is unethical if it started after the attorney-client relationship began.

While I was not surprised to learn that there are states that do not have such an express prohibition, I confess I'm surprised that there is a contingent of states and lawyers that do not think affairs with clients should be prohibited or who think that if there are no "sexual relations," a defined term in Minnesota's rules, there is no ethics violation. Perhaps I should not be, because

NOTES

[1] *In re Petition for Disciplinary Action against William A. Winter*, 991 N.W.2d 278 (Minn. 2023) (Mem).

[2] Rule 1.8(j), MRPC, comment [17].

[3] Hanna Albarazi, *Are Attorneys Being Held Accountable for Client Sexual Contact*, Law360 (6/28/2023) (reporting that 11 states plus the District of Columbia have not adopted a form of the model rule: Georgia, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, Rhode Island, Tennessee, Texas, and Virginia).

Minnesota has a unique provision in its rule—Rule 1.8(j)(4), MRPC, which requires the director to consider the client's statement regarding whether the client would be unduly burdened by the investigation or charge if someone other than the client files the complaint. This provision is not found in the model rule, which simply states: A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

The prohibition applies with organization clients as well—specifically, to any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization, pursuant to Rule 1.8(j)(2), MRPC. This provision is also narrower than the model rule—which covers, per the comment, any individual who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters.

Conduct short of sex can be problematic

As the Winter matter demonstrates, conduct short of sex can also raise ethical issues and lead to discipline. Rule 1.7(a)(2), MRPC, defines a conflict as a "significant risk that the representation of one or more clients will be materially limited by... a personal interest of the lawyer." Rule 8.4(a), MRPC, prohibits an attempt to violate the rules. Sexual harassment also violates the ethics rules (Rule 8.4(g), MRPC)—as it should. I have no idea why someone would believe that it is okay to flirt with their client or engage in sexually explicit texts or emails with a client. Do not do this. If you are personally interested, terminate the fiduciary representation and then there is no issue. Part of the #MeToo movement reflected an improved society-wide understanding of power dynamics. Due to the fiduciary nature of the lawyer-client relationship, as the comment to Rule 1.8(j) indicates, such relationships are almost always "unequal." Competency is also at issue when a lawyer fails to recognize when a personal interest may burden the attorney-client relationship with a conflict.

The Court's decision to impose a suspension in Winter recognizes the harm that such conduct can cause to the client and to the public's perception of the profession and should serve as a strong deterrent to those lawyers who do not have a personal bright line on this point. The Court had not previously had occasion to articulate the appropriate discipline where a lawyer engaged in sexually explicit communications with a client and attempted to engage in sexual relations, but did not have sex with the client. In suspending respondent, the Court imposed more discipline than other courts that have had occasion to impose discipline in such cases, where the more typical discipline is a public reprimand. A strong message indeed.

Conclusion

It goes without saying that any sexual assault or quid pro quo involving sex with a client will result in significant discipline. Sex with clients is a type of conflict that usually results in a suspension, although each case is considered on its unique facts. The Court's recent decision in the Winter matter provides a warning to lawyers that certain conduct short of sex, such as sexting, creates a conflict that can give rise to public discipline. ▲

DO YOU HAVE A FILE RETENTION POLICY? IF NOT, YOU SHOULD PUT ONE IN PLACE.

FILE RETENTION AND RETURN

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

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File retention and return is a frequent topic on our attorney ethics help line.[1] The Office of Lawyers Professional Responsibility has addressed the topic in this column on previous occasions,[2] but refreshers are helpful, and new readers likely have questions.

The starting point

You should start from the perspective that the client's file belongs to the client. While the ethics rules do not use the term "file," the Minnesota Supreme Court did in the course of a discipline case almost 30 years ago (*In re XY*, 529 N.W.2d 688 (Minn. 1995)), stating: "[t]he file belonged to the client and was appropriately returned to her upon her request." The Court further stated that copies of the file were for the *lawyer's* benefit. Starting from the proper perspective about whose property it is usually helps resolve a lot of client-lawyer issues relating to the return and retention of the client file.

The rules

The issue of document retention often comes up when addressing an attorney's obligation to return the client file after termination of representation, covered by Rule 1.16(d), Minnesota Rules of Professional Conduct (MRPC).[3] In 2005, Minnesota adopted ABA model rule 1.16(d) for the most part but went on to adopt additional provisions, not contained in the model rule, to provide further ethical guidance to lawyers on the topic of file return obligations. This guidance was framed with the phrase "papers and property to which the client is entitled," which is defined in Rule 1.16(e), MRPC. You should review that rule, as well as my 2018 article and Martin Cole's 2015 article (see note 2) on the topic, if you have questions about what to return.

One thing we get a lot of questions about is whether providing copies of documents to the client as the representation progresses as necessary under Rule 1.4 (your communication obligation), relieves you from providing a copy of the entire client file upon their request at the conclusion of the representation or at a time thereafter when the client seeks a copy of their file. This Office has consistently taken the position that it does not. Even if you have provided copies as you go, if the client requests a copy of their file, you should provide it, most notably because the papers and property to which the client is entitled under the rule are broadly defined, and may not be co-extensive with what has already been provided.

Because of your Rule 1.16 obligation, you should have good systems in place to be able to convey the client's file to them easily and accurately at the conclusion of the representation. We see so many complaints that start with the allegation that the lawyer did not timely provide a copy of the file upon request. Such a complaint will prompt an investigation, and can be a basis for discipline, but it can also lead us to uncover additional issues. Thus, good file return practices allow you to comply with the ethics rules and can serve as an effective risk management technique.

Retention obligations

The ethics rules do not, however, expressly tell you how long you must keep the client's file. You should be careful not to read into this absence of a specific timeline the prerogative to destroy client files at will because, as noted above, the file is presumptively the client's and they have a right to obtain it upon request. What should a lawyer do?

The best advice I can give you on this topic is to establish reasonable file retention procedures in your retainer agreement so that the client knows what your practices are and can plan accordingly. You can reiterate those retention policies in your file-closing letter, if you send one. With more and more files being maintained electronically, storage capacity is usually not an issue, but it's also important to have in place safeguards for backing up electronically stored files and procedures for ensuring that files are not inadvertently deleted. Your malpractice carrier may have retention guidelines that you can take into consideration, usually dictated by the time period under which a malpractice claim can be stated against the lawyer. In setting retention time policies, however, do not forget to consider the client's potential need for the documents.

If you do not have retention policies that have been clearly communicated to your client, you may be left to wonder whether you are able to ethically destroy client files, and if so, when you may do so. Kenneth Jorgenson's article from 2004 (see note 2) provides some good guidance for your consideration.

You should also take care with original items provided to you by the client or items that you prepare that have intrinsic value or legal effect. Rule 1.15(c), MRPC, requires you to safekeep client property provided to you; this rule is not limited in time. You should always return client originals or other property you received from the client or a third party to the client or third party at the time the representation ends, so that you are not ethically obligated to safekeep them indefinitely. The same goes for items created by you where the original has independent value or legal effect. This is the client's property. Wills and trusts are the main items that come to mind for me in this category. I recommend you do not keep them for the client because, if so, you are undertaking a commitment that will be difficult if not impossible to modify as time goes by.

Do you have a file retention policy? If not, you should put one in place.

Other related questions

A couple of other questions that we get frequently: Do the ethics rules require you to provide multiple copies of the client's file to the client? The answer is no. If you have provided to the client a complete copy at the conclusion of the representation, we have taken the position that you are not ethically obligated to keep providing file copies to the client. That said, having good records of prior file productions is a good idea to avoid a dispute regarding what was produced and when.

Am I required to provide a paper copy of the client file since it is maintained electronically? The ethics rules do not expressly address this question, but we have generally taken the position that providing a copy of the file as maintained by the lawyer, provided it is usable and accessible to the client, satisfies the ethics rules. Thus, if you only have an electronic copy of the file, you can provide the file electronically provided it is produced in a form that is accessible and usable by the client. Similarly, if you only have a paper copy of the file, the rules do not require you to scan it and provide an electronic copy just because the client asks for an electronic copy.

Can I charge the client for providing copies of their file, whether in paper form or electronically? The answer is maybe. Pursuant to Rule 1.16(g), MRPC, you may charge for copies only if the client, prior to termination of the lawyer's services, has agreed in writing to pay such a charge. Having this provision in your fee agreement may also moot a lot of disputes regarding production of the file. Most lawyers are happy to accommodate multiple and varied requests relating to return of the client file if they can charge for duplicating and retrieving the file.

Finally, always remember that you cannot condition payment of fees or copying costs on the return of the client file. In 2005, Minnesota adopted Rule 1.16(g), MRPC, which makes such conduct unethical. Notwithstanding this express prohibition, lawyers continue to receive discipline for requiring payment on production. I know it is frustrating to be required to provide the client with their file when they owe you money, but it is short-sighted to pick this battle with your client.

Conclusion

Lawyering creates a lot of paper, mostly electronic nowadays. Having good policies and procedures regarding the handling of that paper for your law practice—particularly relating to file return and retention—really pays dividends. It is not only a crucial element of customer service, but part of your ethical obligation. If you have questions regarding this topic, please call our Office. ▲

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[1] Attorneys who have questions about their ethical obligations under the Minnesota Rules of Professional Conduct may call us at 651-296-3952 for confidential ethics advice free of charge

[2] Prior Director columns on this topic can be found on the *lprb.mncourts.gov* website under Articles For example, Susan Humiston, *File Contents and Retention*, Bench & Bar (August 2018); Martin Cole, *Client Files: The ABA Weighs In*, Bench & Bar (September 2015); Kenneth Jorgensen, *File Retention Policies and Requirements*, Bench & Bar (December 2004)

[3] Rule 1 16(d), MRPC, provides "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, *surrendering papers and property to which the client is entitled*, and refunding any advance payment of fees or expenses that has not been earned or incurred " (emphasis supplied)

Court issues order on ABA discipline system recommendations

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

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In August, the Minnesota Supreme Court issued its order regarding the recommendations it received from the American Bar Association's Standing Committee on Professional Regulation.[1] In past columns I've discussed the lengthy report prepared by the ABA at the Court's request, as well as some of the report's 25 recommendations.[2] Following a comment period and public hearing, the Court's order reflects careful and thoughtful consideration of the various recommendations. We are fortunate in Minnesota to have an active and engaged Court willing to commit significant time to attorney discipline matters. The order is lengthy, so I think an overview of the Court's decisions and next steps is in order.

Recommendations adopted

The order begins by acknowledging a core strength of Minnesota's discipline system: the many talented volunteers and other participants who are "engaged, committed, and take their responsibilities and work seriously."[3] I could not agree more. Thank you to everyone who cares about and contributes to this important work. We all share the belief that because lawyers hold an important role in society, the legal profession is diminished when lawyers fall short of the applicable ethical standards. To that end, a well-functioning discipline system helps to protect the public and to maintain confidence in the profession.

The order adopts a number of changes that in turn necessitate procedural rule changes to the Rules on Lawyers Professional Responsibility (RLPR). To assist, the Court is appointing a 10-person Advisory Committee, chaired by Judge Lucinda Jesson of the Minnesota Court of Appeals, to make recommendations on particular rule amendments by June 30, 2024.[4]

One recommendation that the Court has adopted—and perhaps the most impactful—is the decision to implement a diversion program. In Minnesota, we issue a lot of private discipline, which is generally reserved for conduct deemed isolated and non-serious. The Office spends a lot of time on those private admonitions. And, as the Office indicated in its public comments, there is more recidivism than one would like to see. Roughly one in three Minnesota lawyers who has received an admonition has received more than one. Perhaps something different is necessary to help the lawyer modify their conduct such that misconduct is unlikely to happen in the future? This is where diversion can fit in—the hope is that education or other programming will have a more significant impact on the lawyer's practice than a private discipline decision. Most states have some form of diversion program. I'm excited to explore with the Advisory Committee what a diversion program should look like in Minnesota.

One key thing to keep in mind is that educational programs will need to be created for diversion to be effective, and I hope stakeholders currently engaged in educational programming for lawyers answer the call to develop effective and targeted law office management programming to which lawyers can be diverted.

Another consequential recommendation adopted by the Court is to change the presumptive suspension period from 91 days to six months for cases in which a reinstatement hearing is required. The Court adopted other recommendations to streamline and make transparent the requirements and timing of reinstatement proceedings. In doing so, the Court articulated a new and important rule—lawyers who have previously been suspended for any period and engage in conduct that warrants another suspension will be required to petition for reinstatement and will not be reinstated by affidavit, no matter the length of the subsequent suspension.

The Court adopted other changes, such as the recommendation to define "probable cause" as that term is used to determine whether public discipline is warranted for misconduct. The Court changed this term to "reasonable cause" and directed the Advisory Committee to make recommendations for defining this standard and streamlining reasonable-cause proceedings. The Court adopted the ABA recommendations to make changes to several specific procedural rules.

The Court also referred several recommendations to the State Court Administrator, Board, and Director for consideration; most of them involved recommendations that had budgetary impact.

As I have discussed previously in this space, the portion of annual attorney registration dollars allocated to the discipline system compares quite favorably to the amounts allocated in other jurisdictions. We do a lot in Minnesota for the dollars allocated. And even lawyers are often surprised, since we are part of the taxpayer-funded judiciary, that no taxpayer dollars are used to cover attorney-regulation activities. As a consequence, we are constantly weighing and balancing competing priorities, and because annual registration fees have remained quite steady for long periods of time, we are currently stretched for resources, as the ABA report recognized.

Recommendations rejected

The Court rejected several recommendations. A few are notable. The Court rejected the ABA recommendation to create a separate Administrative Oversight Committee. In doing so, the Court noted its recent (2021) changes to Rules 4 and 5, RLPR, relating to the division of responsibilities between the Board and Office and decided a longer period of adjustment was appropriate. The Court asked the Advisory Committee to consider whether some clarifying amendments to Rules 4 and 5 may be appropriate.

The Court also rejected the recommendation to transfer Rule 18, RLPR (reinstatement hearings), to referees versus a panel of the Board, preserving public member participation in this important process. The Court further rejected the recommendation that the Office relinquish to some other entity the advisory opinion service currently operated by the Office. While the Court noted this service is time-consuming, the benefits to the practicing bar outweighed the issues raised in the Court's estimation. The Court likewise rejected the recommendation to appoint the Director as trustee less often when a lawyer dies, is disabled, or abandons their practice, but recommended the Director work with the state bar on resources for succession planning. I'm pleased to report that this effort is already underway; a subcommittee of the MSBA's Professional Regulation Committee—of which I am the chair—is currently working on succession planning resources. Finally, the Court rejected the ABA's recommendations to provide for discretionary review of referee reports and to eliminate the ability of Board panels to issue admonitions.

Conclusion

This short article is a selective summary of the Court's decisions, just as prior articles were not able to discuss all the many ABA recommendations. As one can surmise from the length of each of the referenced documents—the ABA report is 88 pages; the Court's order is 36 pages, plus a concurrence/dissent from Justice Thissen and a summary attachment—there is a lot more to the recommendations and the Court's decision.

What I hope is clear, however, is that a lot of very engaged stakeholders have given careful consideration to a lot of ideas and recommendations, and in doing so, have demonstrated a deep commitment to the quality of Minnesota's discipline system. A periodic system review process has been a hallmark of Minnesota's discipline system since its creation in 1970. Thanks to the ABA Standing Committee on Professional Regulation, the Lawyers Professional Responsibility Board, OLPR personnel, members of the MSBA Professional Regulation Committee, district ethics committee (DEC) members, and the Court for the time and continuing attention given to this important subject. As always, feel free to contact me if you have recommendations or concerns. I welcome your input as we strive to operate the best system possible. ▲

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[1] Order Regarding the Report and Recommendation of the American Bar Association Standing Committee on Professional Regulation on the Minnesota Discipline System dated 8/23/2023, located in Supreme Court File No. ADM10-8042.

[2] *See* Susan Humiston, "ABA Issues Consultation Report on Minnesota's Discipline System," Bench & Bar (November 2022); Susan Humiston, "More on the ABA Consultation Report," Bench & Bar (December 2022), both available at *lprb.mncourts.gov/articles*.

[3] Order dated 8/23/2023, at 2.

[4] The Court established a 9/15/2023 deadline to apply to be a member of the Advisory Committee; a date that will have passed before this article is published. In addition to the chair, Lawyers Board Chair Ben Butler or his designee will be on the Advisory Committee, as will I or my designee.