**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**
**MEETING AGENDA**

October 28, 2022 - 1:00 p.m. (via Zoom)

**If you are not a member of the Board and wish to attend the virtual meeting, please email Board Chair, Jeanette Boerner, jeanette.boerner@hennepin.us**

1. Approval of Minutes of July 22, 2022, Lawyers Board Meeting (Attachment 1)

2. LPRB Reports

   a. Committees
      i) Diversity and Inclusion–Michael Friedman
      ii) Rules and Opinions–Dan Cragg
         a. Approve Amendments to Opinion 20 (Attachment 2)
         b. Further discussion about proposed rule changes (Attachment 3)
      iii) Training, Education and Outreach-Landon Ascheman

   b. Chair
      i) Complainant Appeals & Panel Hearing Stats 1-1-22 to 9-30-22 (Attachment 4)
      ii) Merging committees to streamline work
      ii) Open Board positions in January 2023

3. New Business

   a. Board Approval of FAQ for panel proceedings (Attachment 5)
   b. OLPR update–Director Humiston (Attachment 6)
   c. ABA report–next steps

4. Open discussion

# Lawyers Professional Responsibility Board Meeting Minutes
# July 22, 2022

The July 29, 2022, meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. via Zoom. Adjourned at 2:30 p.m.

Board attendees:
Chair, Jeanette Boerner
Landon J. Ascheman
Benjamin J. Butler
Daniel J. Cragg
Michael Friedman
Cliff Greene
Jordan Hart
Katherine Brown Holmen
Virginia Klevorn
Mark Lanterman (not in attendance from 2 p.m. to end of meeting)
Paul J. Lehman
Kristi J. Paulson
Andrew N. Rhoades
Susan C. Rhode
Geri C. Sjoquist
Mary L. Waldkirch Tilley
Antoinette M. Watkins
Bruce R. Williams
Allan Witz
Julian C. Zebot

Other meeting participators in attendance:
Natalie Hudson, Supreme Court Justice- LPRB liaison
Susan Humiston, OLPR Director

Agenda Items:
1. **Approval of January 28, 2022 minutes**

Unanimously approved

2. **LPRB Reports**

a. **Committees**

**i) Diversity and Inclusion-Michael Friedman**

a. Projected recruitment calendar- we are seeking to post for open positions in October. Mr. Friedman will reach out to board members to assist in recruitment

b. Commitment statement- committee wants statement in order to: 1) organization to be affirmative about its values. Will be used for onboarding and part of our public website 2) Board affirmed statement provides our committee authority for projects we may envision for the future such as a data audit or review.

Statement drafted by Antoinette Watkins with assistance from OLPR Nicole Frank. Sought feedback from entire board informally. Some concerns were raised about length of list but ultimately approved by the committee.

Mr. Williams expressed appreciation and gratitude- noting that he and Shawn Judge tried to get this done a few years ago. Ms. Watkins acknowledged that OLPR attorney Ms. Frank was extremely helpful in getting this done.

Ms. Rhode commented that we just take another look at this for plain language/accessibility. No amendment to the motion was made.

*Motion to approve Commitment statement passed unanimously.*

ii) **Rules and Opinions-Dan Cragg**

a. Proposed rule changes

Mr. Cragg noted that he did not add the previously recommended changes to the Rules but highlights those changes that have been voted on previously.

Goal of proposed rule changes is to improve impartiality of the Board and make it clear that there is separation between adjudicator (Board) and the Prosecutor (OLPR). Also trying to give more independence to panels and panels chairs to govern procedure of cases.

Not part of these changes is whether panels should have their own panel clerk. Board received feedback that it would be best not done by rule and hope that we can accomplish this outside of a rule change since this has funding implications.

Discussion: Mr. Friedman inquired about whether in 8(d)3 private probation will now become a panel matter. Mr. Cragg noted that this change was done to keep the executive committee to focus on administrative matters and other matters to go to the panel. Mr. Friedman noted that this was already a negotiated settlement between the parties. Purpose of the rule is to have a result approved by the Board. Mr. Friedman also asked if there was some consideration to move Executive Committee to 3 members. Mr. Cragg noted that the Committee didn't consider shrinking the Executive Committee.

Mr. Butler raised concern about 5(a) to make recommendation about the continuing service of the Director. Board has unique ability to provide information about Director's service. Mr. Butler noted that It is inconsistent with our position in 2021 and earlier when we actively supervised for decades. In 2021, when there was an amendment to change the rules, this Board aggressively opposed the rule change and filed an opinion as to why we should continue to supervise. When the Court changed the rule regarding supervision, the Court did not change this rule. Mr. Butler supports in general that the Board and Ms. Humiston should and could be as separate as possible. That is a radical governance change. Perhaps when ABA reports comes back there will be proposals to do that with funding and staffing strategies. This rule does not separate

the Board from the Director's office. The Board is still reliant on OLPR for administrative and technological support. Mr. Butler is not convinced that we should change our position with regard to 5(a) at this time.

*Motion to approve rule changes made and seconded*.

*Mr. Butler offered an Amendment to the motion to strike changes to rule 5(a) and to adopt the rest of the rule changes. Motion seconded.*

Ms. Humiston expressed concerns about timing, process and substance with regard to rules. Willing to comment at any point or not but unsure of when.

Chair opened floor for discussion on Mr. Butler's amendment. Ms. Klevorn feels Mr. Butler's comments are valid and there might have been reason why court did not change, and we should look into it more or Mr. Cragg can address.

Mr. Cragg said this was a big part of the rule change discussion. Given mission to increase separation with the OLPR because of perception problem. Many cannot tell the difference between our entities which is our overarching goal to fix.

Mr. Friedman supports the change because it takes away requirement of input but doesn't prohibit board from providing input. He noted that getting rid of the requirement of input is achieving the goal that Dan laid out. The second change regarding the State court and the Board shall make a recommendation. This takes this away as mandatory. Mr. Friedman is more concerned about speed of process and wants to hear what Ms. Humiston says. We will just find out later and it would be better to understand now.

Ms. Rhode noted that this feedback can be part of a formal process and that all parties should be able to weigh in, not just the OLPR.

Ms. Paulsen noted that she was the vote against Mr. Butler's position at the last Rules Committee meeting. Noted her appreciation for Mr. Cragg's work on this. Changes in these rules are consistent with what we are charged with to do. This isn't final – sending to the court. The divisiveness created from the process before needs to be avoided and this accomplishes that.

Mr. Cragg suggested we resolve the outstanding motion to amend 5(a). Mr. Butler concurred however inquired whether Ms. Humiston had input on that before a vote was taken. Ms. Humiston confirmed she did not. Motion to amend fails.

Invited Ms. Humiston to offer feedback. Ms. Humiston understands perspectives of the board – she noted when she started, they answered the phone as the "Lawyers Board," and she understands and agrees that this should be clarified. She noted concerns about timing and process in that more input is necessary and that it should be more collaborative. Ms. Humiston noted she saw proposals on Wednesday and the committee liaison Ms. Tuong didn't see until Tuesday. Ms. Humiston wants to provide perspective and gave example of Rule 18 as an area of concern. Specifically, the change of "may" to "shall" have a hearing in Rule 18 as proposed would apply to all reinstatements including resignations not being ideal giving example of lawyer who went to Connecticut to be a judge and came back.

Ms. Klevorn noted she understands Ms. Humiston's position, however, is concerned that she is asking that the Board wait to hear what ABA recommends placing our proposals as secondary. Ms. Klevorn noted that these are merely proposals and there is a process for the public and everyone to

comment. It is within our purview to have this meeting and move changes forward.

Mr. Ascheman would like to hear input from the OLPR but also the MSBA and the legal community as a whole. These are great recommendations, but he wants global input so that it carries the most weight when we petition to the court. Mr. Ascheman inquired about the Rule 18 matter inquiring why there is a need to dig further if it is obvious the individual is very deserving of reinstatement

Mr. Cragg responded to Mr. Ascheman' s Rule 18 inquiry. He noted that as the fact finders who are making a recommendation to the Supreme Court, we should have a hearing to fulfill this obligation. The current rule does not provide that if the parties stipulate the recommendation can be sent along. We have to evaluate and make a decision.

Ms. Watkins thanked Mr. Cragg for the work. Asking about the process. Wants to move forward but what is next. Can we share our redline with other parties?

Mr. Cragg said that if Board approves, we petition to court. This doesn't stop us from seeking additional feedback. The Court might hold on to this and wait for the ABA. We should have our say first.

Mr. Butler wanted to respond to the concerns the Ms. Humiston raised about timing and not having an opportunity to review these materials. A portion of these changes (Rule 18 notably) was discussed at Rules committee at 4-19-22. Ms. Tuong was at that meeting, it was discussed with her, and we asked information about standard practices, information and etc. from the OLPR. The OLPR was well aware, and we never got a response. It would not be fair to say that this was not on everyone's radar.

Mr. Cragg confirmed that this was discussed at the April Rules and Opinions committee meeting. OLPR staff attended in April, could not attend in June, but attended in July.

Ms. Boerner commented that the rule change proposals are in no way an attempt not to be collaborative. Many of the proposed changes have been discussed with the OLPR over the last year and are ministerial. The changes are necessary because the current rules do not reflect our practice and are not appropriate. Many of the changes were voted on more than a year ago and the OLPR noted it was not their priority to move them forward, which is understandable. The Board has a mission to fulfill, and this is a reflection of forwarding our mission.

Mr. Ascheman moved to amend motion to first reach out to other organizations for feedback. No discussion. Motion fails.

*Original motion to change rules as proposed passes by a majority vote*.

b) 7.2 (c) comment- the use of the word specialist in the rule; working with the MSBA and OLPR on this. Rules Committee asking today for approval of two comments as attached to the agenda.

Ms. Watkins asked whether the Board is approving language proposed as displayed and in agenda and whether OLPR agrees as well.

Mr. Greene asked whether a comment on the certification issue was timely. Mr. Cragg noted it is still before the group but that we don't have time to tinker with it because of the Court's deadline for comment. Mr. Greene noted that the whole specialization process is strange given that people will use the word in a variety of ways. It is not a distinction that is meaningful and not helpful to protect the public. Mr. Cragg

agreed and relayed that he made this argument to the Court on behalf of the Board and lost so we are at the drive on phase.

*Motion to adopt proposed comments approved unanimously.*

**iii) Training, Education and Outreach-Landon Ascheman**
Mr. Ascheman reported that we have completed first training series and have them recorded. Working on future trainings.

b. **Chair report**

i) **Complainant Appeals** – Ms. Boerner referenced the data provided. Noted similar trends in cases as OLPR. Completing appeals on an average of 22 days. Some files are more complicated with a lot of documentation. Ms. Boerner thanked board for all the work on these panel matters and complainant appeals.

ii) **Board meeting dates-** reviewed dates proposed and discussed any conflicts. None noted. Dates confirmed

3. **New business**

a. **OLPR update**

i**) Client Security Board** – LPRB Paul Lehman elected as chair. Second public member in history of board to be Chair. CSB elects among its members who will be chair.

ii) **Annual report for Client Security Board** attached- undergone a thorough review of rules changes. CSB soliciting feedback. Posting for a public member position in September. Great introduction into system that is a substantially lower time commitment.

iii) **Budget report** was provided to court in June. Received notice from Chief Judge today that they approved a 6% one-time bonus for staff versus year over year raises because the Legislature did not fund part of the package for raises. OLPR follows judicial branch HR rules of compensation even though not

legislative dollars allocated. Would have preferred year over year increase but happy to get something.

iv) **Annual report**-Ms. Humiston noted that it was a really high year for disclosures (requests for lawyers files to be disclosed)- most notably disclosing more discipline and open files. This is also a trend in Colorado Trusteeships taking a lot of OLPR bandwidth. Also in report is the overdraft program- only 12% of overdraft result in investigation but a significant amount of the 12% results in investigation.

v) **September 23, 2022 Seminar** – new location at Wilder Foundation. J. Paul Harris will speak on implicit bias in decision-making. A Board presentation on DEC perspective on investigations.

vi) **Other-**Ms. Humiston speaking at a conference regarding the 1st amendment.

Mr. Butler- asked about 6% bonus. Ms. Humiston clarified that it is a onetime payment that is taxed at supplemental tax level for staff with successful rating and at branch for 1 year. 6% of last year's salary in your paycheck. Ms. Humiston doesn't know where the money was found but it is very appreciated.

*Meeting adjourned.*

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

**OPINION NO. 20**
**USE OF THE WORD "ASSOCIATES"**
**IN A LAW FIRM NAME**

The use of the word "Associates" or the phrase "& Associates" in a law firm name, letterhead or other professional designation is false and misleading if the use conveys the impression the law firm has more attorneys practicing law in the firm than is actually the case.

**Comment**

Subject to qualifications below, the use of the word "Associates" in a law firm name, letterhead or other professional designation—such as "Doe Associates"—is false and misleading if there are not at least two licensed attorneys practicing law with the firm. Similarly, the use of the phrase "& Associates" in a firm name, letterhead or other professional designation—such as "Doe & Associates"—is false and misleading if there are not at least three licensed attorneys practicing law with the firm. ~~Rule 7.5(a), Minnesota Rules of Professional Conduct ("MRPC"), states:~~

~~A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it . . . is not otherwise in violation of Rule 7.1.~~

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~~Comment 1 to Rule 7.5, MRPC, states, in pertinent part, that "the use of trade names . . . is acceptable so long as it is not misleading."~~ Rule 7.1, MRPC, states:

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

Comment 2 to Rule 7.1, MRPC, provides:

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

~~to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.~~

Comment 5 to Rule 7.1, MRPC, provides in part:

> Firm names, letterhead and professional designations are communications concerning a lawyer's services.

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While the word "Associates" and the phrase "& Associates" undoubtedly have other meanings and connotations in other contexts, in the practice of law the word and the phrase have been used and are perceived as referring to an attorney practicing law in a law firm. *See In re Sussman*, 405 P.2d 355, 356 (Or. 1965) ("Principally through custom the word ["associates"] when used on the letterheads of law firms has come to be regarded as describing those who are employees of the firm. Because the word has acquired this special significance in connection with the practice of law the use of the word to describe lawyer relationships other than that of employer-employee is likely to be misleading."); St. B. of N.M. Ethics Advisory Comm., Formal Op. 2006-1 (2006) ("It is well accepted in the legal community that an 'associate' is an attorney that works for a firm. 'Associates,' at least in the legal context, do not include support staff such as legal assistants or investigators."); Ass'n of the B. of the City of N.Y. Comm. on Prof'l & Jud. Ethics, Formal Op. 1996-8 (1996), 1996 WL 416301 ("[T]he term ['associate'] has been interpreted by courts and other ethics committees to mean a salaried lawyer-employee who is not a partner of a firm."); Utah St. B. Ethics Advisory Op. Comm., Op. 04-03 (2004), 2004 WL 1304775 ("We believe that, if a member of the public examined a firm name such as 'John Doe & Associates,' he would conclude that John Doe works regularly with at least two other lawyers.").

While some members of the public may care little about the number of attorneys practicing law at a law firm, clearly some members of the public seeking legal counsel do care whether there is more than one attorney at a firm available to provide legal services. "A client may wish to be represented by a law firm comprised of several or many lawyers, and the implications of the law firm name may affect the client's decision. Any communication that suggests multiple lawyers creates the appearance that the totality of the lawyers of the law firm could and would be available to render legal counsel to any prospective client . . . ." Cal. St. B. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1986-90 (1986), 1986 WL 69070 (opining that solo practitioners may not ethically advertise using a group trade name such as "XYZ Associates" unless the advertisement affirmatively discloses they are solo practitioners). A law firm name which suggests there are multiple attorneys to service a client's needs when there is only one attorney is inherently misleading.

The Board's opinion is consistent with decisions and ethics opinions from other jurisdictions which have held that the use of "associates" in the name of a law firm with one practicing lawyer is false and misleading. *See*, *e.g.*, *In re Mitchell*, 614 S.E.2d 634 (S.C. 2005) (holding a solo practitioner made false and misleading communications by using the word "associates" in his firm name); *In re Brandt*, 670 N.W.2d 552, 554-55 (Wis. 2003) (solo practitioner holding himself out as "Brandt & Associates" was in violation of ethics rule prohibiting false and misleading communications); *Portage County B. Ass'n v. Mitchell*, 800 N.E.2d 1106 (Ohio 2003) (solo practitioner engaged in misleading conduct by holding himself out as "Mitchell and Associates"); *Office of Disciplinary Counsel v. Furth*, 754 N.E.2d 219, 224, 231 (Ohio 2001) (a solo practitioner's use of letterhead referring to his firm as "Tom Furth and Associates, Attorneys & Counselors at Law" was misleading); S.C. B. Ethics Advisory Comm., Op. 05-19 (2005), 2005 WL 3873354 (opining that a solo practitioner's use of a firm name such as "John Doe and Associates, P.A." is misleading); Utah St. B. Ethics Advisory Op. Comm., Op. 138 (1994), 1994 WL 579848 ("[A] sole practitioner may not use a firm name of the type 'Doe & Associates' if he has no associated attorneys, even if the firm formerly had such associates or employs one or more associated nonlawyers such as paralegals or investigators.").

The use of "Associates" or "& Associates" in a firm name, letterhead or other professional designation by lawyers who share office space or who associate with other lawyers on a particular legal matter but who do not otherwise practice together as a law firm is false and misleading.

Whether or not a law firm name using the word "Associates" or the phrase "& Associates" is false and misleading will depend on the particular facts and circumstances of each case. For example, there may be circumstances where three attorneys with a law firm name such as "Doe & Associates" may lose one of the firm's attorneys. In that event, if another attorney joins the firm within a reasonable period of time thereafter, or if the firm reasonably and objectively anticipates another attorney joining the firm within a reasonable period of time, it is not false or misleading for the firm to continue using "& Associates" in its name during the interim period. If neither circumstance exists, the continued use of "& Associates" would be considered false and misleading. In addition, there may be circumstances where one or more of the attorneys practicing with a firm may be working part-time. As long as the requisite minimum number of attorneys, parttime or otherwise, regularly and actively practice with the firm, the use of "Associates" or "& Associates" would not be considered false or misleading.

~~The proper use of "Associates" or "& Associates" in a firm name, letterhead or other professional designation previously has not been the subject of guidance from the Board. Therefore, the Office of Lawyers Professional Responsibility will defer invoking this opinion in disciplinary proceedings under Rules 7.1 and 7.5, MRPC, until January 1, 2010. For the same reason, to the extent a lawyer has already contracted for an advertisement or other promotional material using a name contrary to Opinion No. 20, the continued availability of the advertisement or other material for the duration of the contract term should not be the basis for discipline.~~

Adopted: June 18, 2009.
Amended: October 28, 2022

**MINNESOTA RULES ON LAWYERS**

**PROFESSIONAL RESPONSIBILITY**

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Effective January 1, 1989

Including Amendments Received Through
**July 14, 2021**

**INDEX**



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**RULE 1. DEFINITIONS**

As used in these Rules:

(1) "Board" means the Lawyers Professional Responsibility Board.

(2) "Chair" means the Chair of the Board.

(3) "Executive Committee" means the committee appointed by the Chair under Rule 4(d).

(4) "Director" means the Director of the Office of Lawyers Professional Responsibility.

(5) "District Bar Association" includes the Range Bar Association.

(6) "District Chair" means the Chair of a District Bar Association's Ethics Committee.

(7) "District Committee" means a District Bar Association's Ethics Committee.

(8) "Notify" means to give personal notice or to mail to the person at the person's last known address or the address maintained on this Court's attorney registration records, or to the person's attorney if the person is represented by counsel.

(9) "Panel" means a panel of the Board.

**RULE 2. PURPOSE**

It is of primary importance to the public and to the members of the Bar that cases of lawyers' alleged disability or unprofessional conduct be promptly investigated and disposed of with fairness and justice, having in mind the public, the lawyer complained of and the profession as a whole, and that disability or disciplinary proceedings be commenced in those cases where investigation discloses they are warranted. Such investigations and proceedings shall be conducted in accordance with these Rules.

**RULE 3. DISTRICT ETHICS COMMITTEE**

**(a) Composition.** Each District Committee shall consist of:

(1) A Chair appointed by this Court for such time as it designates and serving at the pleasure of this Court but not more than six years as Chair; and

(2) Four or more persons whom the District Bar Association (or, upon failure thereof, this Court) may appoint to three-year terms except that shorter terms shall be used where necessary to assure that approximately one-third of all terms expire annually. No person may serve more than two consecutive three-year terms, nor more than a total of four three-year terms, in addition to any additional shorter term for which the person was originally appointed and any period served as District Chair. At least 20 percent of each District Committee's members shall be nonlawyers. Every effort shall be made to appoint lawyer members from the various areas of practice. The Board shall monitor District Committee compliance with this objective and the District Committee shall include information on compliance in its annual report to the Court.

**(b) Duties.** The District Committee shall investigate complaints of lawyers' alleged unprofessional conduct and make reports and recommendations thereon as provided in these Rules in a format prescribed by the Executive Committee. It shall meet at least annually and from time to time as required. The District Chair shall prepare and submit an annual report to the Board and this Court in a format specified by the Executive Committee and make such other reports as the Executive Committee may require.

**RULE 4. LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

**(a) Composition.** The Board shall consist of:

(1) A Chair appointed by this Court for such time as it designates and serving at the pleasure of this Court but not more than six years as Chair; and

(2) Thirteen lawyers having their principal office in this state, six of whom the Minnesota State Bar Association may nominate, and nine nonlawyers resident in this State, all appointed by this Court to three-year terms except that shorter terms shall be used where necessary to assure that as nearly as may be one-third of all terms expire each February 1. No person may serve more than two three-year terms, in addition to any additional shorter term for which the person was originally appointed and any period served as Chair. To the extent possible, members shall be geographically representative of the state and lawyer members shall reflect a broad cross section of areas of practice.

**(b) Compensation.** The Chair, other Board members, and other panel members shall serve without compensation, but shall be paid their reasonable and necessary expenses incurred in the performance of their duties.

**(c) Duties.** The Board is responsible for administering these rules, and for establishing the policies that govern the lawyer discipline system~~, and for providing recommendations and guidance to the Director regarding the operations of the Office of the Lawyers Professional Responsibility.~~.. The Board may, from time to time, issue opinions on questions of professional conduct. ~~The Board shall prepare and submit to this Court an annual report covering the operation of the lawyer discipline and disability system. The Board~~The Chair may ~~elect~~appoint a Vice-Chair and specify the Vice-Chair's duties. Board meetings are open to the public, except the Board may go into closed session not open to the public to discuss matters protected by Rule 20 or for other good cause.

**(d) Executive Committee.** The Executive Committee, consisting of the Chair, and two lawyers and two nonlawyers designated annually by the Chair, shall be responsible for carrying out the duties set forth in these Rules. The Executive Committee shall act on behalf of the Board between Board meetings. ~~If requested by the~~ The Executive Committee~~, it~~ shall have the assistance of the State Court Administrator's office in carrying out its responsibilities. Members shall have served at least one year as a member of the Board prior to appointment to the Executive Committee. Members shall not be assigned to Panels during their terms on the Executive Committee.

**(e) Panels.** The Chair shall divide the Board into Panels, each consisting of not less than three Board members and at least one of whom is a nonlawyer, and shall designate a Chair and a Vice-Chair for each Panel. Three Panel members, at least one of whom is a nonlawyer and at least one of whom is a lawyer, shall constitute a quorum. No Board member shall be assigned

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to a matter in which disqualification would be required of a judge under ~~Canon 3~~Rule 2.11 of the Code of Judicial Conduct. The Board's Chair or the Vice-Chair may designate substitute Panel members from current or former Board members or current or former District Committee members for the particular matter, provided, that any panel with other than current Board members must include at least one current lawyer Board member. A Panel may refer any matters before it to the full Board, excluding members of the Executive Committee.

**(f) Assignment to Panels.** The ~~Director~~Chair or a member of the Executive Committee designated by the Chair shall assign matters to Panels ~~in rotation.~~ randomly. The Executive Committee may, however, redistribute case assignments to balance workloads among the Panels, appoint substitute panel members to utilize Board member or District Committee member expertise, and assign appeals of multiple admonitions issued to the same lawyer to the same Panel for hearing.

**(g) Approval of Petitions.** Except as provided in these Rules or ordered by this Court, no petition for disciplinary action shall be filed with this Court without the approval of a Panel or the Board.

## RULE 5. DIRECTOR

**(a) Appointment.** The Director is an employee of the Judicial Branch, appointed by and serving at the pleasure of this Court. The State Court Administrator will evaluate the Director's performance~~, with input from the Board,~~ annually or at such times as this Court directs. Every 2 years the State Court Administrator ~~and the Board~~ shall make recommendations to this Court concerning the continuing service of the Director.

**(a) Duties.** The Director is responsible for the day-to-day operations of the Office of Lawyers Professional Responsibility, shall supervise the employees of that Office, shall prepare and submit to the ~~Board~~Court an annual report covering the operation of the Office of Lawyers Professional Responsibility, and shall make such other reports to the ~~Board as the Board or this Court through the Board~~Court that it may require the Director to provide.

~~(a)~~**(b) Employees.** The Director ~~when authorized by the Board~~ may employ, on behalf of this Court persons at such compensation as the ~~Board shall recommend and as this~~ Court may approve.

~~(b)~~**(c) Client Security Board Services.** Subject to the approval of this court, ~~the Client Security Board and the Lawyers Board,~~ the Director may provide staff investigative and other services to the Client Security Board. Compensation for such services may be paid by the Client Security Board to the Director's office upon such terms as are approved by the ~~Lawyers Board~~Court and the Client Security Board. ~~The Lawyers Board and the Client Security Board may also establish further terms for the provision by the Director of such services.~~

## RULE 6. COMPLAINTS

**(a) Investigation.** All complaints of lawyers' alleged unprofessional conduct or allegations of disability if investigated, shall be investigated pursuant to these Rules. No District Committee investigator shall investigate a matter in which disqualification would be required of a judge under ~~Canon 3~~Rule 2.11 of the Code of Judicial Conduct. No employee of the ~~office~~Office of Lawyers Professional Responsibility shall be assigned to a matter if the employee's activities



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outside the Office are such that a judge with similar activities would be disqualified under ~~Canon~~ ~~3~~Rule 2.11 of the Code of Judicial Conduct ~~.~~

**(b) Notification: Referral.** If a complaint of a lawyer's alleged unprofessional conduct is submitted to a District Committee, the District Chair promptly shall notify the Director of its pendency. If a complaint is submitted to the Director, it shall be referred for investigation to the District Committee of the district where the lawyer's principal office is located or in exceptional circumstances to such other District Committee as the Director reasonably selects, unless the Director determines to investigate it without referral or that discipline is not warranted.

**(c) Copies of Investigator's Report.** Upon the request of the lawyer being investigated, the Director shall provide a copy of the investigator's report, whether that investigation was undertaken by the District Committee or the Director's Office.

**(d) Opportunity to respond to statements.** The District Committee or the Director's Office shall afford the complainant an opportunity to reply to the lawyer's response to the complaint.

**RULE 6Z. COMPLAINTS INVOLVING JUDGES**

**(a) Jurisdiction.** The Lawyers Professional Responsibility Board has jurisdiction to consider whether discipline as a lawyer is warranted in matters involving conduct of any judge occurring prior to the assumption of judicial office and conduct of a part-time judge, including referees of conciliation court, not occurring in a judicial capacity. The Board on Judicial Standards may also exercise jurisdiction to consider whether judicial discipline is warranted in such matters.

**(b) Procedure for Conduct Occurring Prior to Assumption of Judicial Office.**

**(1) Complaint; Notice.** If either the executive secretary or the Office of Lawyers Professional Responsibility makes an inquiry or investigation, or receives a complaint, concerning the conduct of a judge occurring prior to assumption of judicial office, it shall so notify the other. Notice is not required if all proceedings relating to the inquiry, investigation or complaint have been resolved before the judge assumes judicial office.

**(2) Investigation.** Complaints of a judge's unprofessional conduct occurring prior to the judge assuming judicial office shall be investigated by the Office of Lawyers Professional Responsibility and processed pursuant to the Rules on Lawyers Professional Responsibility. The Board on Judicial Standards may suspend a related inquiry pending the outcome of the investigation and/or proceedings.

**(3) Authority of Board on Judicial Standards to Proceed Directly to Public Charges.** If probable cause has been determined under Rule 9(j)(ii) of the Rules on Lawyers Professional Responsibility or proceedings before a referee or the Supreme Court have been commenced under those rules, the Board on Judicial Standards may, after finding sufficient cause under Rule 6 of the Rules of the Board on Judicial Standards, proceed directly to the issuance of a formal complaint under Rule 8 of those rules.

**(4) Record of Lawyer Discipline Admissible in Judicial Disciplinary Proceeding.** If there is a hearing under Rule 9 or Rule 14 of the Rules on Lawyers Professional Responsibility, the record of the hearing, including the transcript, and the findings and conclusions of the panel, referee, and/or the Court shall be admissible in any hearing convened pursuant to Rule 10 of the Rules of the Board on Judicial Standards. Counsel for the judge and the Board on Judicial Standards may be permitted to introduce additional evidence, relevant to violations of the Code of Judicial Conduct, at the hearing under Rule 10.

**Advisory Committee Comment—1999 Amendment**

Rule 6Z outlines the process for handling complaints concerning conduct by a judge before assuming judicial office. Rule 6Z(a) grants the Lawyers Professional Responsibility Board jurisdiction to consider whether such conduct warrants lawyer discipline, while the Board on Judicial Standards retains jurisdiction to consider whether the same conduct warrants judicial discipline. R.Bd.Jud.Std. 2.

The procedural provisions of Rule 6Z(b)(1)-(4) are identical to those in R.Bd.Jud.Stds. 6Z(a)-(d). The committee felt that repetition of the significant procedural provisions was more convenient and appropriate than a cross-reference.

Rule 6Z(b)(1) is identical to R.Bd.Jud.Std. 6Z(a) and requires the staff of the Lawyers Professional Responsibility Board and the Judicial Standards Board to notify each other about complaints concerning conduct by a judge occurring before the judge assumed judicial office. Notice is not required if all proceedings relating to the inquiry, investigation or complaint have been resolved before the judge assumed judicial office.

Rule 6Z(b)(1) neither increases nor decreases the authority of the executive secretary or Office of Lawyers Professional Responsibility to investigate or act on any matter. That authority is governed by other rules. Rule 6Z(b)(1) merely establishes a mutual duty to provide notice about complaints or inquiries concerning conduct of a judge occurring before the judge assumed judicial office.

Although a fair number of complaints received by the executive secretary and the Office of Professional Responsibility are frivolous, there have been relatively few complaints concerning conduct occurring prior to a judge assuming judicial office. Thus, the committee believes that this procedure will not result in a needless duplication of efforts.

Under Rule 6Z(b)(2) and its counterpart R.Bd.Jud.Std. 6Z(b), it is contemplated that complaints about the conduct of a judge occurring prior to the judge assuming judicial office will be investigated in the first instance by the Office of Lawyers Professional Responsibility, and the results would be disclosed to the Board on Judicial Standards. R.Bd.Jud.Std. 5(a)(4); R.L.Prof.Resp. 20(a)(10).

This allows for efficient and effective use of investigative resources by both disciplinary boards.

Rule 6Z(b)(3) is identical to R.Bd.Jud.Std. 6Z(C) and authorizes the Board on Judicial Standards to proceed directly to issuance of a formal complaint under R.Bd.Jud.Std. 8 when there has been a related public proceeding under the Rules on Lawyers Professional Responsibility involving conduct of a judge that occurred prior to the judge assuming judicial office. In these circumstances the procedure under R.Bd.Jud.Std. 7 may only serve to delay the judicial disciplinary process.

Rule 6Z(b)(3) does not prohibit the Board on Judicial Standards from proceeding to public disciplinary proceedings in cases in which only private discipline (e.g., an admonition) has been imposed under the Rules on Lawyers Professional Responsibility for conduct of a judge occurring prior to the judge assuming judicial office. In these cases, the Board on Judicial Standards would be required to follow R.Bd.Jud.Std. 7 (unless, of course, the matter is resolved earlier, for example, by dismissal or public reprimand).

Rule 6Z(b)(4) is identical to R.Bd.Jud.Std. 6Z(d) and authorizes the use of the hearing record and the findings and recommendations of the lawyer disciplinary process in the judicial disciplinary process. This is intended to streamline the judicial disciplinary hearing when there has already been a formal fact finding hearing in the lawyer disciplinary process, and permits the Supreme Court to rule on both disciplinary matters as quickly as possible.

Under Rule 6Z(b)(4) it is contemplated that the hearing record and the findings and conclusions of the lawyer disciplinary process will be the first evidence introduced in the judicial disciplinary hearing. Counsel for the Board on Judicial Standards and the judge may be permitted to introduce additional evidence relevant to alleged Code of Judicial Conduct violations at the judicial disciplinary hearing. Counsel must be aware that there may be situations in which the introduction of additional evidence will not be permitted. *See, e.g., In re Gillard*, 260 N.W.2d 562, 564 (Minn. 1977) (after review of hearing record and findings and conclusions from lawyer disciplinary process, Supreme Court ruled that findings would not be subject to collateral attack in the related judicial disciplinary proceeding and that additional evidence may be introduced only as a result of a stipulation or order of the fact finder); *In re Gillard*, 271 N.W.2d 785, 809 (Minn. 1978) (upholding removal and disbarment where Board on Judicial Standards as factfinder refused to consider additional testimony but allowed filing of deposition and exhibits and made alternative findings based on those filings). Although the Rules of the Board on Judicial Standards do not expressly provide for a pre-hearing conference, it is contemplated that admissibility issues will be resolved by the presider of the fact finding panel sufficiently in advance of the hearing to allow the parties adequate time to prepare for the hearing.

**RULE 7. DISTRICT COMMITTEE INVESTIGATION**

**(a) Assignment; Assistance.** The District Chair may investigate or assign investigation of the complaint to one or more of the Committee's members, and may request the Director's assistance in making the investigation. The investigation may be conducted by means of written and telephonic communication and personal interviews.

**(b) Report.** The investigator's report and recommendations shall be submitted for review and approval to the District Chair, the Chair's designee or to a committee designated for this purpose by the District Chair, prior to its submission to the Director. The report shall include a recommendation that the Director:

(1) Determine that discipline is not warranted;
(2) Issue an admonition;
(3) Refer the matter to a Panel; or
(4) Investigate the matter further.

If the report recommends discipline not warranted or admonition, the investigator shall include in the report a draft letter of disposition in a format prescribed by the Director.

**(c) Time**. The investigation shall be completed and the report made promptly and, in any event within 90 days after the District Committee received the complaint, unless good cause exists. If the report is not made within 90 days, the District Chair or the Chair's designee within that time shall notify the Director of the reasons for the delay. If a District Committee has a pattern of responding substantially beyond the ~~90day~~90-day limitation, the Director shall advise the Board and the Chair shall seek to remedy the matter through the President of the appropriate District Bar Association.

**(d) Removal.** The Director may at any time and for any reason remove a complaint from a District Committee's consideration by notifying the District Chair of the removal.

**(e) Notice to Complainant.** The Director shall keep the complainant advised of the progress of the proceedings.

**RULE 8. DIRECTOR'S INVESTIGATION**

**(a) Initiating Investigation.** At any time, with or without a complaint or a District Committee's report, and upon a reasonable belief that professional misconduct may have occurred, the Director may make such investigation as the Director deems appropriate as to the conduct of any lawyer or lawyers; provided, however, that investigations to be commenced upon the sole initiative of the Director shall not be commenced without the prior approval of the Executive Committee.

**(b) Complaints ~~by Criminal Defendants.~~Against Court-Appointed Counsel in Pending Matters.** No investigation shall commence on a complaint by or on behalf of a party represented by court appointed counsel, insofar as the complaint against the court appointed attorney alleges incompetent representation by the attorney in the pending matter. Any such complaint shall be summarily dismissed without prejudice. The Director's dismissal shall inform the complainant that the complaint may be sent to the chief district judge or trial court judge involved in the pending matter.

The judge may, at any time, refer the matter to the Director for investigation. The Director may communicate with the appropriate court regarding the complaint and its disposition.

(c) **Investigatory Subpoena.** With the Board Chair or Vice-Chair's approval upon the Director's application showing that it is necessary to do this before issuance of charges under Rule 9(a), the Director may subpoena and take the testimony of any person believed to possess information concerning possible unprofessional conduct of a lawyer. The examination shall be recorded by such means as the Director designates. The District Court of Ramsey

~~(c)~~(d) County shall have jurisdiction over issuance of subpoenas and over motions arising from the examination.

~~(d)~~(e) **Disposition.**

**(1) Determination Discipline Not Warranted.** If, in a matter where there has been a complaint, the Director concludes that discipline is not warranted, the Director shall so notify the lawyer involved, the complainant, and the Chair of the District Committee, if any, that has considered the complaint. The notification shall:

(i) Set forth a brief explanation of the Director's conclusion;

(ii) Set forth the complainant's identity and the complaint's substance; and

(iii) Inform the complainant of the right to appeal under subdivision (e).

**(2) Admonition.** In any matter, with or without a complaint, if the Director concludes that a lawyer's conduct was unprofessional but of an isolated and non-serious nature, the Director may issue an admonition. The Director shall issue an admonition if so directed by a Board member reviewing a complainant appeal, under the circumstances identified in Rule 8(e). The Director shall notify the lawyer in writing:

(i) Of the admonition;

(ii) That the admonition is in lieu of the Director's presenting charges of unprofessional conduct to a Panel;

(iii) That the lawyer may, by notifying the Director in writing within fourteen days, demand that the Director so present the charges to a Panel which shall consider the matter de novo or instruct the Director to file a Petition for Disciplinary Action in this Court; and

(iv) That unless the lawyer so demands, the Director after that time will notify the complainant, if any, and the Chair of the District Committee, if any, that has considered the complaint, that the Director has issued the admonition.

If the lawyer makes no demand under clause (iii), the Director shall notify as provided in clause (iv). The notification to the complainant, if any, shall inform the complainant of the right to appeal under subdivision (e).

**(3) Stipulated Private Probation**

(i) In any matter, with or without a complaint, if the Director concludes that a lawyer's conduct was unprofessional and that a private probation is appropriate, and the Board Chair or Vice-Chair approves, the Director and the lawyer may agree that the lawyer will be subject to private probation for a specified period up to two years, provided the lawyer throughout the period complies with specified reasonable conditions. At any time during the period, with the Board Chair or Vice-Chair's approval, the Director and the lawyer may agree to modify the agreement or to one extension of it for a specified period up to two additional years. The Director shall maintain a permanent disciplinary record of all stipulated probations.

(ii) The Director shall notify the complainant, if any, and the Chair of the District Committee, if any, that has considered the complaint, of the agreement and any modification. The notification to the complainant, if any, shall inform the complainant of the right to appeal under subdivision (e).

(iii) If it appears that the lawyer has violated the conditions of the probation, or engaged in further misconduct, the Director may either submit the matter to a Panel or upon a motion made with notice to the attorney and approved by a Panel Chair ~~chosen in rotation~~, file a petition for disciplinary action under Rule 12. A lawyer may, in the stipulation for probation, waive the right to such consideration by the Panel or Panel Chair.

**(4) Submission to Panel.** The Director shall submit the matter to a Panel under Rule 9 if:

(i) In any matter, with or without a complaint, the Director concludes that public discipline is warranted;

(ii) The lawyer makes a demand under subdivision (d)(2)(iii);

(i) A reviewing Board member so directs upon an appeal under subdivision (e); or

(iii) The Director determines that a violation of the terms of a conditional admission agreement warrants revocation of the conditional admission.

**(5) Extension or Modification of a Conditional Admission Agreement.** If, in a matter involving a complaint against a conditionally admitted lawyer the Director determines that the conditional admission agreement was violated, the Director may enter into an agreement with the lawyer and the Board of Law Examiners to modify or extend the terms of the agreement for a period not to exceed two years.

**(e) Review by Lawyers Board.** If the complainant is not satisfied with the Director's disposition under Rule 8(d)(1), (2) or (3), the complainant may appeal the matter by notifying the Director in writing within fourteen days. The Director shall notify the ~~lawyer~~Chair of the appeal and the Chair or a member of the Executive Committee designated by the Chair shall assign the matter ~~by rotation~~ to a ~~board~~ member of the Board, other than an Executive Committee member~~, appointed by the Chair~~. The reviewing Board member may:

(1) approve the Director's disposition; or

(2) direct that further investigation be undertaken; or

(3) if a district ethics committee recommended discipline, but the Director determined that discipline is not warranted, the Board member may instruct the Director to issue an admonition; or

(4) in any case that has been investigated, if the Board member concludes that public discipline is warranted, the Board member may instruct the Director to issue charges of unprofessional conduct for submission to a Panel other than the Board member's own.

The reviewing Board member shall set forth an explanation of the Board member's action. A summary dismissal by the Director under Rule 8(b) shall be final and may not be appealed to a Board member for review under this section.

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## RULE 9. PANEL PROCEEDINGS

**(a) Charges.** If the matter is to be submitted to a Panel, the matter shall proceed as follows:

(1) The Director shall prepare charges of unprofessional conduct, ~~assign them to~~receive a Panel ~~by rotation~~assignment from the Chair, and notify the lawyer of the Charges, the name, address, and telephone number of the Panel Chair and Vice Chair, and the provisions of this Rule. Within 14 days after the lawyer is notified of the Charges, the lawyer shall submit an answer to the Charges to the Panel Chair and the Director and may submit a request that the Panel conduct a hearing. Within ten days after the lawyer submits an answer, the Director and the lawyer may submit affidavits and other documents in support of their positions.

(2) The Panel shall make a determination in accordance with paragraph (j) within 40 days after the lawyer is notified of the Charges based on the documents submitted by the Director and the lawyer, except in its discretion, the Panel may hear oral argument or conduct a hearing. If the Panel orders a hearing, the matter shall proceed in accordance with subdivisions (b) through (i). If the Panel does not order a hearing, subdivisions (b) through (i) do not apply.

(3) The Panel Chair may extend the time periods provided in this subdivision for good cause.

**(b) Setting Pre-Hearing ~~Meeting~~Conference.** If the Panel orders a hearing, the ~~Director~~Panel Chair shall schedule a Pre-Hearing Conference, and the Panel Chair shall then notify the Director and the lawyer of:

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(1) The time and place of the pre-hearing ~~meeting~~conference; and

(2) The Director's and lawyer's obligation to appear at the time set unless the meeting is rescheduled ~~by agreement of the parties or~~ by order of the Panel Chair or Vice-Chair.

**(c) Request for Admission.** Either party may serve upon the other a request for admission. The request shall be made before the pre-hearing ~~meeting~~conference or within ten days thereafter. The Minnesota Rules of Civil Procedure ~~for the District Courts~~are applicable to requests for admissions ~~govern~~, except that the time for answers or objections is ten days and the Panel Chair or Vice-Chair shall rule upon any objections. If a party fails to admit, the Panel may award expenses as permitted by the Minnesota Rules of Civil Procedure ~~for District Courts~~.

**(d) Deposition.** Either party may take a deposition as provided by the Minnesota Rules of Civil Procedure ~~for the District Courts.~~. A deposition under this Rule may be taken before the ~~prehearing meeting~~pre- hearing conference or within ten days thereafter. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas and over motions arising from the deposition. The lawyer shall be denominated by number or randomly selected initials in any District Court proceedings.

**(e) Pre-hearing ~~Meeting~~Conference.** The Director and the lawyer shall attend a pre-hearing ~~meeting~~conference. At the ~~meeting:~~conference:

~~(e)~~

(1) The parties shall endeavor to formulate stipulations of fact and to narrow and simplify the issues in order to expedite the Panel hearing; and

(2) Each party shall mark and provide the other party with a copy of each affidavit or other exhibit to be introduced at the Panel hearing. The genuineness of each exhibit is admitted unless objection is served within ten days after the pre-hearing meeting. If a party objects, the Panel may award expenses of proof as permitted by the Minnesota Rules of Civil Procedure ~~for the District Courts~~. No additional exhibit shall be received at the Panel hearing without the opposing party's consent or the ~~Panel's~~Panel Chair's permission.

**(f) Setting Panel Hearing.** Promptly after or at the pre-hearing ~~meeting~~conference, the ~~Director~~Panel Chair shall schedule a hearing ~~by the Panel~~ on the charges and ~~the Director~~notify shall then notify the lawyer of:

(1) ~~(1)~~ The time and place of the hearing;

(2) The lawyer's right to be heard at the hearing; and

(3) The lawyer's obligation to appear at the time set unless the hearing is rescheduled ~~by agreement of the parties or~~ by order of the Panel Chair or Vice-Chair. The Director shall also notify the complainant, if any, of the hearing's time and place. The Director shall send each Panel member a copy of the charges, of any stipulations, and of the prehearing statement. Each party shall provide to each Panel member in advance of the Panel hearing, copies of all documentary exhibits marked by that party at the ~~prehearing meeting~~pre- hearing conference, unless the parties agree otherwise or the Panel Chair or



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Vice-Chair orders to the contrary.

**(g) Referee Probable Cause Hearing.** Upon the certification of the Panel Chair and the Board Chair to the Court that extraordinary circumstances indicate that a matter is not suitable for submission to a Panel under this Rule, because of exceptional complexity or other reasons, the Court may appoint a referee with directions to conduct a probable cause hearing acting as a Panel would under this Rule, or the Court may remand the matter to a Panel under this Rule with instructions, or the Court may direct the Director to file with this Court a petition for disciplinary action under Rule 12(a). If a referee is appointed to substitute for a Panel, the referee shall have the powers of a district court judge and Ramsey County District Court shall not exercise such powers in such case. If the referee so appointed determines there is probable cause as to any charge and a petition for disciplinary action is filed in this Court, the Court may appoint the same referee to conduct a hearing on the petition for disciplinary action under Rule 14. If a referee appointed under Rule 14 considers all of the evidence presented at the probable cause hearing, a transcript of that hearing shall be made part of the public record.

**(h) Form of Evidence at Panel Hearing.** The Panel shall receive evidence only in the form of affidavits, depositions or other documents except for testimony by:

(1) The lawyer;

(2) A complainant who affirmatively desires to attend; and

(3) A witness whose testimony the Panel Chair or Vice-Chair authorized for good cause. If testimony is authorized, it shall be subject to cross-examination and the Rules of Evidence and a party may compel attendance of a witness or production of documentary or tangible evidence as provided in the Rules of Civil Procedure for the District Courts. The District Court of Ramsey County shall have jurisdiction over issuance of subpoenas, motions respecting subpoenas, motions to compel witnesses to testify or give evidence, and determinations of claims of privilege. The lawyer shall be denominated by number or randomly selected initials in any district court proceedings.

**(i) Procedure at Panel Hearing.** Unless the Panel for cause otherwise permits, the Panel hearing shall proceed as follows:

(1) The Chair shall explain the purpose of the hearing, which is:

(i) to determine whether there is probable cause to believe that public discipline is warranted, and the Panel will terminate the hearing on any charge whenever it is satisfied that there is or is not such probable cause;

(ii) if an admonition has been issued under Rule 8(d)(2) or 8(e), to determine whether the Panel should affirm the admonition on the ground that it is supported by clear and convincing evidence, should reverse the admonition, or, if there is probable cause to believe that public discipline is warranted, should instruct the Director to file a petition for disciplinary action in this Court; or

(iii) to determine whether there is probable cause to believe that a conditional admission agreement has been violated, thereby warranting revocation

of the conditional admission to practice law, and that the Panel will terminate the hearing whenever it is satisfied there is or is not such probable cause.

(2) The Director shall briefly summarize the matters admitted by the parties, the matters remaining for resolution, and the proof which the Director proposes to offer thereon;

(3) The lawyer may respond to the Director's remarks;

(4) The parties shall introduce their evidence in conformity with the Rules of Evidence except that affidavits and depositions are admissible in lieu of testimony;

(5) The parties may present oral arguments;

(6) The complainant may be present for all parts of the hearing related to the complainant's complaint except when excluded for good cause; and

(7) The Panel shall either recess to deliberate or take the matter under advisement.

**(j) Disposition.** The Panel shall make one of the following determinations:

(1) ~~(1)~~ In the case of charges of unprofessional conduct, the Panel shall~~:~~ separately with respect to each charge:

(i) determine that there is not probable cause to believe that public discipline is warranted, or that there is not probable cause to believe that revocation of a conditional admission is warranted;

(ii) if it finds probable cause to believe that public discipline is warranted, instruct the Director to file in this Court a petition for disciplinary action. The Panel shall not make a recommendation as to the matter's ultimate disposition;

(iii) if it concludes that the attorney engaged in conduct that was unprofessional but of an isolated and nonserious nature, the Panel shall state the facts and conclusions constituting unprofessional conduct and issue an admonition. If the Panel issues an admonition based on the parties' submissions without a hearing, the lawyer shall have the right to a hearing de novo before a different Panel. If the Panel issues an admonition following a hearing, the lawyer shall have the right to appeal in accordance with Rule 9(m). If the Panel finds probable cause to believe that public discipline is warranted on any charge, it may not issue an admonition as to any other charge; or

(iv) if it finds probable cause to revoke a conditional admission agreement, instruct the Director to file in this Court a petition for revocation of conditional admission.

(2) ~~(2)~~ If the Panel held a hearing on a lawyer's appeal of an admonition that was issued under Rule 8(d)(2), or issued by another panel without a hearing, the Panel shall affirm or reverse the admonition, or, if there is probable cause to believe that public

discipline is warranted, instruct the Director to file a petition for disciplinary action in this Court.

**(k) Notification.** The Director shall notify the lawyer, the complainant, if any, and the District Committee, if any, that has the complaint, of the Panel's disposition. The notification to the complainant, if any, shall inform the complainant of the right to petition for review under subdivision (l). If the Panel affirmed the Director's admonition, the notification to the lawyer shall inform the lawyer of the right to appeal to the Supreme Court under subdivision (m).

**(l) Complainant's Petition for Review.** If not satisfied with the Panel's disposition, the complainant may within 14 days file with the Clerk of the Appellate Courts a petition for review. The complainant shall, prior to or at the time of filing, serve a copy of the petition for review upon the respondent and the Director and shall file an affidavit of service with the Clerk of the Appellate Courts. The respondent shall be denominated by number or randomly selected initials in the proceeding. This Court will grant review only if the petition shows that the Panel acted arbitrarily, capriciously, or unreasonably. If the Court grants review, it may order such proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may dismiss the petition or, if it finds that the Panel acted arbitrarily, capriciously, or unreasonably, remand the matter to the same or a different Panel, direct the filing of a petition for disciplinary action or a petition for revocation of conditional admission, or take any other action as the interest of justice may require.

**(m) Respondent's Appeal to Supreme Court.** The lawyer may appeal a Panel's affirmance of the Director's admonition or an admonition issued by a Panel by filing a notice of appeal, with proof of service, with the Clerk of Appellate Courts and by serving a copy on the Director within 30 days after being notified of the Panel's action. The respondent shall be denominated by number or randomly selected initials in the proceeding. The Director shall notify the complainant, if any, of the respondent's appeal. This Court may review the matter on the record or order such further proceedings as it deems appropriate. Upon conclusion of such proceedings, the Court may either affirm the decision or make such other disposition as it deems appropriate.

**(n) Manner of Recording.** The Director shall arrange for a court reporter to make a record of the proceedings as in civil cases.

**(o) Panel Chair Authority.** Requests or disputes arising under this Rule before the Panel hearing commences may be determined by the Panel Chair or Vice-Chair. For good cause shown, the Panel Chair or Vice-Chair may shorten or enlarge time periods for discovery under this Rule.

**RULE 10. DISPENSING WITH PANEL PROCEEDINGS**

**(a) Agreement of Parties.** The parties by written agreement may dispense with some or all procedures under Rule 9 before the Director files a petition under Rule 12.

**(b) Admission.** If the lawyer admits some or all charges, the Director may dispense with some or all procedures under Rule 9 and file a petition for disciplinary action together with the lawyer's admission. This Court may act thereon with or without any of the procedures under Rules 12, 13, or 14.

**(c) Criminal Conviction or Guilty Plea.** If a lawyer pleads guilty to or is convicted

of a felony under Minnesota statute, a crime punishable by incarceration for more than one year under the laws of any other jurisdiction, or any lesser crime a necessary element of which involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful extortion, misappropriation, theft, or an attempt, conspiracy, or solicitation of another to commit such a crime, the Director may either submit the matter to a Panel or, with the approval of the Chair of the Board, file a petition under Rule 12.

**(d) Other Serious Matters.** In matters in which there are an attorney's admissions, civil findings, or apparently clear and convincing documentary evidence of an offense of a type for which the Court has suspended or disbarred lawyers in the past, such as misappropriation of funds, repeated non-filing of personal income tax returns, flagrant non-cooperation including failure to submit an answer or failure to attend a pre-hearing meeting as required by Rule 9, fraud and the like, the Director may either submit the matter to a Panel or upon a motion made with notice to the attorney and approved by the Panel Chair, file the petition under Rule 12.

**(e) Additional Charges.** If a petition under Rule 12 is pending before this Court, the Director must present the matter to the Panel Chair, or if the matter was not heard by a Panel or the Panel Chair is unavailable, to the Board Chair or Vice-Chair, for approval before amending the petition to include additional charges based upon conduct committed before or after the petition was filed.

**(f) Discontinuing Panel Proceedings.** The Director may discontinue Panel proceedings for the matter to be disposed of under Rule 8(d)(1), (2) or (3).

**RULE 11. RESIGNATION**

This Court may at any time, with or without a hearing and with any conditions it may deem appropriate, grant or deny a lawyer's petition to resign from the bar. A copy of a lawyer's petition to resign from the bar shall be served upon the Director. The petition with proof of service shall be filed with this Court. If the Director does not object to the petition, the Director shall promptly advise the Court. If the Director objects, the Director shall also advise the Court, but then submit the matter to a Panel, which shall conduct a hearing and make a recommendation to the Court. The recommendation shall be served upon the petitioner and filed with the Court.

**RULE 12. PETITION FOR DISCIPLINARY ACTION**

**(a) Petition.** When so directed by a Panel or by this Court or when authorized under Rule 10 or this Rule, the Director shall file with this Court a petition for disciplinary action or a petition for revocation of conditional admission, with proof of service. The petition shall set forth the unprofessional conduct charges. When a lawyer is subject to a probation ordered by this Court and the Director concludes that the lawyer has breached the conditions of the probation or committed additional serious misconduct, the Director may file with this Court a petition for revocation of probation and further disciplinary action with proof of service.

**(b) Service.** The Director shall cause the petition to be served upon the respondent in the same manner as a summons in a civil action. If the respondent has a duly appointed resident guardian or conservator service shall be made thereupon in like manner.

**(c) Respondent not found.**

**(1) Suspension.** If the respondent cannot be found in the state, the Director shall mail a copy of the petition to the respondent's last known address and file an affidavit of mailing with this Court. Thereafter the Director may apply to this Court for an order suspending the respondent from the practice of law. A copy of the order, when made and filed, shall be mailed to each district court judge of this state. Within one year after the order is filed, the respondent may move this Court for a vacation of the order of suspension and for leave to answer the petition for disciplinary action.

**(2) Order to Show Cause.** If the respondent does not so move, the Director shall petition this Court for an order directing the respondent to show cause to this Court why appropriate disciplinary action should not be taken. The order to show cause shall be returnable not sooner than 20 days after service. The order may be served on the respondent by publishing it once each week for three weeks in the regular issue of a qualified newspaper published in the county in this state in which the respondent was last known to practice or reside. The service shall be deemed complete 21 days after the first publication. Personal service of the order without the state, proved by the affidavit of the person making the service, sworn to before a person authorized to administer an oath, shall have the same effect as service by publication. Proof of service shall be filed with this Court. If the respondent fails to respond to the order to show cause, this Court may proceed under Rule 15.

**(d) Reciprocal Discipline.** Upon learning from any source that a lawyer licensed to practice in Minnesota has been publicly disciplined or is subject to public disciplinary charges in another jurisdiction, the Director may commence an investigation and, without further proceedings, may file a petition for disciplinary action in this Court. A lawyer subject to such charges or discipline shall notify the Director. If the lawyer has been publicly disciplined in another jurisdiction, this Court may issue an order directing that the lawyer and the Director inform the Court within thirty (30) days whether either or both believe the imposition of the identical discipline by this Court would be unwarranted and the reasons for that claim. Without further proceedings this Court may thereafter impose the identical discipline unless it appears that discipline procedures in the other jurisdiction were unfair, or the imposition of the same discipline would be unjust or substantially different from discipline warranted in Minnesota. If this Court determines that imposition of the identical discipline is not appropriate, it may order such other discipline or such other proceedings as it deems appropriate. Unless the Court determines otherwise, a final adjudication in another jurisdiction that a lawyer had committed certain misconduct shall establish conclusively the misconduct for purposes of disciplinary proceedings in Minnesota.

**RULE 13. ANSWER TO PETITION FOR DISCIPLINARY ACTION**

**(a) Filing.** Within 20 days after service of the petition, the respondent shall file an answer with in this Court, with proof of service. The answer may deny or admit any accusations or state any defense, privilege, or matter in mitigation.

**(b) Failure to File.** If the respondent fails to file an answer within the time provided or any extension of time this Court may grant, the allegations shall be deemed admitted and this Court may proceed under Rule 15.

**RULE 14. HEARING ON PETITION FOR DISCIPLINARY ACTION**

**(a) Referee.** This Court may appoint a referee with directions to hear and report the evidence submitted for or against the petition for disciplinary action or petition for revocation of conditional admission.

**(b) Conduct of Hearing Before Referee.** Unless this Court otherwise directs, the hearing shall be conducted in accordance with the rules of civil procedure applicable to district courts and the referee shall have all the powers of a district court judge.

**(c) Subpoenas.** The District Court of Ramsey County shall issue subpoenas. The referee shall have jurisdiction to determine all motions arising from the issuance and enforcement of subpoenas.

**(d) Record.** The referee shall appoint a court reporter to make a record of the proceedings as in civil cases.

**(e) Referee's Findings, Conclusions, and Recommendations.** The referee shall make findings of fact, conclusions, and recommendations, file them with this Court, and notify the respondent and the Director of them. In revocation of conditional admission matters, the referee shall also notify the Director of the Board of Law Examiners. Unless the respondent or Director, within ten days, orders a transcript and so notifies this Court, the findings of fact and conclusions shall be conclusive. If either the respondent or the Director so orders a transcript, then none of the findings of fact or conclusions shall be conclusive, and either party may challenge any findings of fact or conclusions. A party ordering a transcript shall, within ten days of the date the transcript is ordered, file with the clerk of appellate courts a certificate as to transcript signed by the court reporter. The certificate shall contain the date on which the transcript was ordered, the estimated completion date (which shall not exceed 30 days from the date the transcript was ordered), and a statement that satisfactory financial arrangements have been made for the transcription. A party ordering a transcript shall order and pay for an original transcript for the Court plus two copies, one copy for the respondent and one for the Director. A party ordering a transcript shall specify in the initial brief to the Court the referee's findings of fact, conclusions and recommendations that are disputed.

**(f) Panel as Referee.** Upon written agreement of an attorney, the Panel Chair and the Director, at any time, this Court may appoint the Panel which is to conduct or has already conducted the probable cause hearing as its referee to hear and report the evidence submitted for or against the petition for disciplinary action. Upon such appointment, the Panel shall proceed

under Rule 14 as the Court's referee, except that if the Panel considers evidence already presented at the Panel hearing, a transcript of the hearing shall be made part of the public record. The District Court of Ramsey County shall continue to have the jurisdiction over discovery and subpoenas in Rule 9(d) and (h).

**(g) Hearing Before Court.** This Court within thirty days of the referee's findings, conclusions and recommendations, shall set a time for hearing before this Court. The order shall specify times for briefs and oral arguments. ~~In all matters in which the Director seeks discipline, the cover of the main brief of the Director shall be blue; the main brief of the respondent, red; and any reply brief shall be gray. In a matter in which reinstatement is sought pursuant to Rule 18 of these Rules, the cover of the respondent's main brief shall be blue; that of the main brief of the Director, red; and that of any reply brief, gray.~~ The matter shall be heard upon the record, briefs, and arguments.

**RULE 15. DISPOSITION; PROTECTION OF CLIENTS**

**(a) Disposition.** Upon conclusion of the proceedings, this Court may:

(1) Disbar the lawyer;

(2) Suspend the lawyer indefinitely or for a stated period of time;

(3) Order the lawyer to pay costs:

(4) Place the lawyer on a probationary status for a stated period, or until further order of this Court, with such conditions as this Court may specify and to be supervised by the Director;

(5) Reprimand the lawyer;

(6) Order the lawyer to successfully complete within a specified period such written examination as may be required of applicants for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility;

(7) Make such other disposition as this Court deems appropriate;

(8) Require the lawyer to pay costs and disbursements; in addition, in those contested cases where the lawyer has acted in the proceedings in bad faith, vexatiously, or for oppressive reasons, order the lawyer to pay reasonable attorney fees;

(9) Dismiss the petition for disciplinary action or petition for revocation of conditional admission, in which case the Court's order may denominate the lawyer by number or randomly selected initials and may direct that the remainder of the record be sealed; or

(10) Revoke, modify or extend a conditional admission agreement.

**(b) Protection of Clients.** When a lawyer is disciplined or permitted to resign, this Court may issue orders as may be appropriate for the protection of clients or other persons.

**(c) Petition for Rehearing.** A petition for rehearing may be filed regarding an order of the Court under this rule, by following the procedures of Rule 140, Rules of Civil Appellate Procedure. The filing of a petition for rehearing shall not stay this Court's order.

**RULE 16. TEMPORARY SUSPENSION PENDING DISCIPLINARY PROCEEDINGS**

**(a) Petition for Temporary Suspension.** In any case where the Director files or has filed a petition under Rule 12, if it appears that a continuation of the lawyer's authority to practice law pending final determination of the disciplinary proceeding poses a substantial threat of serious harm to the public, the Director may file with this Court a petition for suspension of the lawyer pending final determination of the disciplinary proceeding, with proof of service. The petition shall set forth facts as may constitute grounds for the suspension and may be supported by a transcript of evidence taken by a Panel, court records, documents or affidavits.

**(b) Service.** The Director shall cause the petition to be served upon the lawyer in the same manner as a petition for disciplinary action.

**(c) Answer.** Within 20 days after service of the petition or such shorter time as this Court may order, the lawyer shall file in this Court an answer to the petition for temporary suspension, with proof of service. If the lawyer fails to do so within that time or any extension of time this Court may grant, the petition's allegations shall be deemed admitted and this Court may enter an order suspending the lawyer pending final determination of disciplinary proceedings. The answer may be supported by a transcript of any evidence taken by the Panel, court records, documents, or affidavits.

**(d) Hearing; Disposition.** If this Court after hearing finds a continuation of the lawyer's authority to practice law poses a substantial threat of serious harm to the public, it may enter an order suspending the lawyer pending final determination of disciplinary proceedings.

**(e) Interim Suspension.** Upon a referee disbarment recommendation, the lawyer's authority to practice law shall be suspended pending final determination of the disciplinary proceeding, unless the referee directs otherwise or the Court orders otherwise.

**RULE 17. FELONY CONVICTION**

**(a) Duty of the Court Administrator.** Whenever a lawyer is convicted of a felony, the court administrator shall send the Director a certified copy of the judgment of conviction.

**(b) Other Cases.** Nothing in these Rules precludes disciplinary proceedings, where appropriate, in case of conviction of an offense not punishable by incarceration for more than one year or in case of unprofessional conduct for which there has been no criminal conviction or for which a criminal conviction is subject to appellate review.

**RULE 18. REINSTATEMENT**

**(a) Petition for Reinstatement.** A copy of a petition for reinstatement to practice law shall be served upon the Director. The petition, with proof of service, shall then be filed with this Court. Together with the petition served upon the Director's Office, a petitioner seeking reinstatement shall pay to the Director a fee in the same amount as that required by Rule 12(B), Rules for Admission to the Bar, for timely filings. Applications for admission to the bar following a revocation of conditional admission shall be filed with the Board of Law Examiners pursuant to Rule 16, Rules for Admission to the Bar.

**(b) Investigation; Report.**

(1) The Director shall publish an announcement of the petition for reinstatement in a publication of general statewide circulation to attorneys soliciting comments regarding the appropriateness of the petitioner's reinstatement. Any comments made in response to such a solicitation shall be absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person making the statement.

(2) The Director shall investigate and report the Director's conclusions to a Panel.

~~**Recommendation.**~~

**(c) Hearing Before Panel.**

(1) The Panel ~~may~~shall conduct a hearing and shall make its findings of fact, conclusions, and recommendations. ~~The recommendation~~ However, the Panel may dispense with the hearing for good cause shown. The recommendations shall be served upon the petitioner and filed with this Court. Unless the petitioner or Director, within ten days of the date of service, orders a transcript and so notifies this Court, the findings of fact and conclusions shall be conclusive. If either the petitioner or the Director so orders a transcript, then none of the findings of fact or conclusions shall be conclusive, and either party may challenge any findings of fact or conclusions. A party ordering a transcript shall, within ten days of the date the transcript is ordered, file with the clerk of the appellate courts a certificate as to transcript signed by the court reporter. The certificate shall contain the date on which the transcript was ordered, the estimated completion date (which shall not exceed 30 days from the date the transcript was ordered), and a statement that satisfactory financial arrangements have been made for the transcription. A party ordering a transcript shall order and pay for an original transcript for the Court plus two copies, one for the petitioner and one for the Director. A party ordering a transcript shall specify in the initial brief to the Court the Panel's findings of fact, conclusions, and recommendations that are disputed.

(2) Promptly after the Panel assignment , the Panel Chair shall hold a pre-hearing scheduling conference with the Petitioner and the Director and issue a scheduling order with a date certain for the Panel Hearing and for any further pre-hearing conference(s) as the Panel Chair deems prudent for the fair and efficient handling of the matter. The Scheduling Order may be modified for good cause shown upon motion made more than thirty days before the Panel Hearing. The motion may be made orally at any pre-hearing conference. Any motion to modify the Scheduling Order made less than 30 days before the Panel Hearing may only be granted upon

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a showing of exceptional circumstances or to prevent a manifest injustice. The Panel Chair shall have authority to consider and make orders on any matter provided for by Minnesota Rules of Civil Procure Rule 16 that are not inconsistent with these rules.

~~(3)~~

**~~(c)~~(d) Hearing Before Court.** There shall be a hearing before this Court on the petition unless otherwise ordered by this Court. Should this Court determine further consideration on the petition is necessary, this Court may appoint a referee and the same procedure shall be followed as under Rule 14, except subdivision (f) will not apply.

**~~(d)~~(e) General Requirements for Reinstatement.**

(1) Unless such examination is specifically waived by this Court, no lawyer, after having been disbarred by this Court, may petition for reinstatement until the lawyer shall have successfully completed such written examinations as may be required of applicants for admission to the practice of law by the State Board of Law Examiners.

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(2) No lawyer ordered reinstated to the practice of law after having been suspended or transferred to disability inactive status by this Court, and after petitioning for reinstatement under subdivision (a), shall be effectively reinstated until the lawyer shall have successfully completed such written examination as may be required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility.

(3) Unless specifically waived by this Court, any lawyer suspended for a fixed period of ninety (90) days or less, and any suspended lawyer for whom the Court waives the requirements of subdivisions (a) through (d), must, within one year from the date of the suspension order, successfully complete such written examination as may be required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility. Except upon motion and for good cause shown, failure to successfully complete this examination shall result in automatic suspension of the lawyer effective one year after the date of the original suspension order.

(4) Unless specifically waived by this Court, no lawyer shall be reinstated to the practice of law following the lawyer's resignation, suspension, disbarment, or transfer to disability inactive status by this Court until the lawyer shall have satisfied (1) the requirements imposed under the rules for Continuing Legal Education on members of the bar as a condition to a change from a restricted to an active status and (2) any subrogation claim against the lawyer by the Client Security Board.

~~(e)~~**(f) Reinstatement by Affidavit.** Unless otherwise ordered by this Court, subdivisions (a) through (d) shall not apply to lawyers who have been suspended for a fixed period of ninety (90) days or less. Such a suspended lawyer, and any suspended lawyer for whom the Court waives the requirements of subdivisions (a) through (d), may apply for reinstatement by filing an affidavit with the Clerk of Appellate Courts and the Director, stating that the suspended lawyer has complied with Rules 24 and 26 of these rules, is current in Continuing Legal Education requirements, and has complied with all other conditions for reinstatement imposed by the Court. After receiving the lawyer's affidavit, the Director shall promptly file a proposed order and an affidavit regarding the lawyer's compliance or lack thereof with the requirements for reinstatement. The lawyer may not resume the practice of law unless and until this Court issues a reinstatement order.

**RULE 19. EFFECT OF PREVIOUS PROCEEDINGS**

**(a) Criminal Conviction.** A lawyer's criminal conviction in any American jurisdiction, even if upon a plea of nolo contendere or subject to appellate review, is, in proceedings under these Rules, conclusive evidence that the lawyer committed the conduct for which the lawyer was convicted. The same is true of a conviction in a foreign country if the facts and circumstances surrounding the conviction indicate that the lawyer was accorded fundamental fairness and due process.

**(b) Disciplinary Proceedings.**

**(1) Conduct Previously Considered And Investigated Where Discipline Was Not Warranted.** Conduct considered in previous lawyer disciplinary proceedings of

any jurisdiction, including revocation of conditional admission proceedings, is inadmissible if it was determined in the proceedings that discipline was not warranted, except to show a pattern of related conduct, the cumulative effect of which constitutes an ethical violation, except as provided in subsection (b)(2).

**(2) Conduct Previously Considered Where No Investigation Was Taken And Discipline Was Not Warranted.** Conduct in previous lawyer disciplinary proceedings of any jurisdiction, including revocation of conditional admission proceedings which was not investigated, is admissible, even if it was determined in the proceedings without investigation that discipline was not warranted.

**(3) Previous Finding.** A finding in previous disciplinary proceedings that a lawyer committed conduct warranting discipline or revocation, modification or extension of conditional admission is, in proceedings under these Rules, conclusive evidence that the lawyer committed the conduct.

**(4) Previous Discipline.** The fact that the lawyer received discipline in previous disciplinary proceedings, including revocation, modification or extension of conditional admission, is admissible to determine the nature of the discipline to be imposed, but is not admissible to prove that a violation occurred and is not admissible to prove the character of the lawyer in order to show that the lawyer acted in conformity therewith; provided, however, that evidence of such prior discipline may be used to prove:

(i) A pattern of related conduct, the cumulative effect of which constitutes a violation;

(ii) The current charge (e.g., the lawyer has continued to practice despite suspension);

(iii) For purposes of impeachment (e.g., the lawyer denies having been disciplined before); or

(iv) Motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

**(c) Stipulation.** Unless the referee or this Court otherwise directs or the stipulation otherwise provides, a stipulation before a Panel remains in effect at subsequent proceedings regarding the same matter before the referee or this Court.

**(d) Panel proceedings.** Subject to the Rules of Civil Procedure for District Courts and the Rules of Evidence, evidence obtained through a request for admission, deposition, or hearing under Rule 9 is admissible in proceedings before the referee or this Court.

**(e) Admission.** Subject to the Rules of Evidence, a lawyer's admission of unprofessional conduct or of violating a conditional admission agreement is admissible in proceedings under these Rules.

**RULE 20. CONFIDENTIALITY; EXPUNCTION**

**(a) General Rule.** The files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of a lawyer, shall be deemed confidential and shall not be disclosed, except:

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

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

(3) As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice or seeks to practice;

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

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

(6) Where permitted by this Court; or

(7) Where required or permitted by these Rules.

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

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

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

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

**(b) Special Matters.** The following may be disclosed by the Director:

(1) The fact that a matter is or is not being investigated or considered by the Committee, Director, or Panel;

(2) With the affected lawyer's consent, the fact that the Director has determined that discipline is not warranted;

(3) The fact that the Director has issued an admonition;

(4) The Panel's disposition under these Rules;

(5) The fact that stipulated probation has been approved under Rule 8(d)(3) or 8(e);

(6) The fact that the terms of a conditional admission agreement have been modified or extended under Rule 8(d)(5);

(7) Information to other members of the lawyer's firm necessary for protection of the firm's clients or appropriate for exercise of responsibilities under Rules 5.1 and 5.2, Rules of Professional Conduct.

Notwithstanding any other provision of this Rule, the records of matters in which it has been determined that discipline is not warranted shall not be disclosed to any person, office or agency except to the lawyer and as between Committees, Board, Director, Referee or this Court in furtherance of their duties under these Rules.

**(c) Records after Determination of Probable Cause or Commencement of Referee or Court Proceedings.** Except as ordered by the referee or this Court and except for work product, after probable cause has been determined under Rule 9(j)(1)(ii) or (iv) or proceedings before a referee or this Court have been commenced under these Rules, the files, records, and proceedings of the District Committee, the Board, and the Director relating to the matter are not confidential.

**(d) Referee or Court Proceedings.** Except as ordered by the referee or this Court, the files, records, and proceedings before a referee or this Court under these Rules are not confidential.

**(e) Expunction of Records.** The Director shall expunge records relating to dismissed complaints as follows:

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

**(2) Retention of Records.** Upon application by the Director to a Panel Chair chosen in rotation, for good cause shown and with notice to the respondent and opportunity

to be heard, records which should otherwise be expunged under this Rule may be retained for such additional time not exceeding three years as the Panel Chair deems appropriate.

**(f) Advisory Opinions, Overdraft Notification Program Files, and Probation Files.** The files, notes, and records maintained by the Director relating to advisory opinions, trust account overdraft notification, and monitoring of lawyers on probation shall be deemed confidential and shall not be disclosed except:

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

(2) upon consent of the lawyer who requested the advisory opinion or was the subject of the overdraft notification or probation.

**Advisory Committee Comment—1999 Amendment**

Rule 20 has been modified to permit the exchange of information between the two disciplinary boards and their staff in situations involving conduct of a judge that occurred prior to the judge assuming judicial office. *See also* R.L.Prof.Resp. 20(a)(10). Both the Board on Judicial Standards and the Lawyers Professional Responsibility Board have jurisdiction in such cases. R.Bd.Jud.Std. 2(b); R.L.Prof.Resp. 6Z.

**RULE 21. PRIVILEGE: IMMUNITY**

**(a) Privilege.** A complaint or charge, or statement relating to a complaint or charge, of a lawyer's alleged unprofessional conduct, to the extent that it is made in proceedings under these Rules, or to the Director or a person employed thereby or to a District Committee, the Board or this Court, or any member thereof, is absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person who made the complaint, charge, or statement.

**(b) Immunity.** Board members, other Panel members, District Committee members, the Director, and the Director's staff, and those entering into agreements with the Director's Office to supervise probations, shall be immune from suit for any conduct in the course of their official duties.

**RULE 22. PAYMENT OF EXPENSES**

Payment of necessary expenses of the Director and the Board and its members incurred from time to time and certified to this Court as having been incurred in the performance of their duties under these Rules and the compensation of the Director and persons employed by the Director under these Rules shall be made upon vouchers approved by this Court from its funds now or hereafter to be deposited to its credit with the State of Minnesota or elsewhere.

**RULE 23. SUPPLEMENTAL RULES**

The Board and each District Committee may adopt rules and regulations, not inconsistent with these Rules, governing the conduct of business and performance of their duties.

**RULE 24. COSTS AND DISBURSEMENTS**

**(a) Costs.** Unless this Court orders otherwise or specifies a higher amount, the prevailing party in any disciplinary proceeding or revocation of conditional admission proceeding decided by this Court shall recover costs in the amount of $900.

**(b) Disbursements.** Unless otherwise ordered by this Court, the prevailing party in any disciplinary proceedings or revocation of conditional admission proceedings decided by this Court shall recover, in addition to the costs specified in subdivision (a), all disbursements necessarily incurred after the filing of a petition for disciplinary action or a petition for revocation of conditional admission under Rule 12. Recoverable disbursements in proceedings before a referee or this Court shall include those normally assessed in appellate proceedings in this Court, together with those which are normally recoverable by the prevailing party in civil actions in the district court.

**(c) Time and Manner for Taxation of Costs and Disbursements.** The procedures and times governing the taxation of costs and disbursements and for making objection to same and for appealing from the clerk's taxation shall be as set forth in the Rules of Civil Appellate Procedure.

**(d) Judgment for Costs and Disbursements.** Costs and disbursements taxed under this Rule shall be inserted in the judgment of this Court in any disciplinary proceeding wherein suspension, disbarment, or revocation of conditional admission is ordered. No suspended attorney shall be permitted to resume practice and no disbarred attorney may file a petition for reinstatement if the amount of the costs and disbursements taxed under this Rule has not been fully paid. A lawyer whose conditional admission has been revoked may not file an application for admission to the bar until the amount of the costs and disbursements taxed under this Rule has been fully paid.

**RULE 25. REQUIRED COOPERATION**

**(a) Lawyer's Duty.** It shall be the duty of any lawyer who is the subject of an investigation or proceeding under these Rules to cooperate with the District Committee, the Director, or the Director's staff, the Board, or a Panel, by complying with reasonable requests, including requests to:

(1) Furnish designated papers, documents or tangible objects;

(2) Furnish in writing a full and complete explanation covering the matter under consideration;

(3) Appear for conferences and hearings at the times and places designated;

(4) Execute authorizations and releases necessary to investigate alleged violations of a conditional admission agreement.

Such requests shall not be disproportionate to the gravity and complexity of the alleged ethical violations. The District Court of Ramsey County shall have jurisdiction over motions arising from Rule 25 requests. The lawyer shall be denominated by number or randomly selected initials in any District Court proceeding. Copies of documents shall be permitted in lieu of the original in all proceedings under these Rules. The Director shall promptly return the originals to the respondent after they have been copied.

**(b) Grounds of Discipline.** Violation of this Rule is unprofessional conduct and shall constitute a ground for discipline; provided, however, that a lawyer's challenge to the Director's requests shall not constitute lack of cooperation if the challenge is promptly made, is in good faith and is asserted for a substantial purpose other than delay.

**RULE 26. DUTIES OF DISCIPLINED, DISABLED, CONDITIONALLY ADMITTED, OR RESIGNED LAWYER**

**(a) Notice to Clients in Nonlitigation Matters.** Unless this Court orders otherwise, a disbarred, suspended or resigned lawyer, a lawyer whose conditional admission has been revoked, or a lawyer transferred to disability inactive status, shall notify each client being represented as of the date of the resignation or the order imposing discipline or transferring the lawyer to disability inactive status in a pending matter other than litigation or administrative proceedings of the lawyer's disbarment, suspension, resignation, revocation of conditional admission, or disability. The notification shall urge the client to seek legal advice of the client's own choice elsewhere, and shall include a copy of the Court's order.

**(b) Notice to Parties and Tribunal in Litigation.** Unless this Court orders otherwise, a disbarred, suspended or resigned lawyer, a lawyer whose conditional admission has been revoked, or a lawyer transferred to disability inactive status, shall notify each client, opposing counsel (or opposing party acting pro se) and the tribunal involved in pending litigation or administrative proceedings as of the date of the resignation or the order imposing discipline or transferring the lawyer to disability inactive status of the lawyer's disbarment, suspension, resignation, revocation of conditional admission, or disability. The notification to the client shall urge the prompt substitution of other counsel in place of the disbarred, suspended, or resigned, disabled lawyer, or a lawyer whose conditional admission has been revoked, and shall include a copy of the Court's order.

**(c) Manner of Notice.** Notices required by this Rule shall be sent by certified mail, return receipt requested, within ten (10) days of the Court's order.

**(d) Client Papers and Property.** A disbarred, suspended, resigned or disabled lawyer, or a lawyer whose conditional admission has been revoked, shall make arrangements to deliver to each client being represented in a pending matter, litigation or administrative proceeding any papers or other property to which the client is entitled.

**(e) Proof of Compliance.** Within fifteen (15) days after the effective date of the Court's order, the disbarred, suspended, resigned or disabled lawyer, or a lawyer whose conditional admission has been revoked, shall file with the Director an affidavit showing:

(1) That the affiant has fully complied with the provisions of the order and with this Rule;

(2) All other State, Federal and administrative jurisdictions to which the affiant is admitted to practice; and

(3) The residence or other address where communications may thereafter be directed to the affiant.

Copies of all notices sent by the disbarred, suspended, resigned or disabled lawyer, or lawyer whose conditional admission has been revoked, shall be attached to the affidavit, along with proof of mailing by certified mail. The returned receipts from the certified mailing shall be provided to the Director within two months of the mailing of notices.

**(f) Maintenance of Records.** A disbarred, suspended, resigned or disabled lawyer, or a lawyer whose conditional admission has been revoked, shall keep and maintain records of the actions taken to comply with this Rule so that upon any subsequent proceeding being instituted by or against the lawyer, proof of compliance with this Rule and with the disbarment, suspension, resignation, disability, or revocation of conditional admission order will be available.

**(g) Condition of Reinstatement.** Proof of compliance with this Rule shall be a condition precedent to any petition or affidavit for reinstatement made by a disbarred, suspended, resigned or disabled lawyer, or to an application for admission submitted to the Board of Law Examiners after revocation of a lawyer's conditional admission.

**RULE 27. TRUSTEE PROCEEDING**

**(a) Appointment of Trustee.** Upon a showing that a lawyer is unable to properly discharge responsibilities to clients due to disability, disappearance or death, or that a suspended, disbarred, resigned, or disabled lawyer, or a lawyer whose conditional admission has been revoked, has not complied with Rule 26, and that no arrangement has been made for another lawyer to discharge such responsibilities, this Court may appoint a lawyer to serve as the trustee to inventory the files of the disabled, disappeared, deceased, suspended, disbarred or resigned lawyer, or a lawyer whose conditional admission has been revoked, and to take whatever other action seems indicated to protect the interests of the clients and other affected parties.

**(b) Protection of Records.** The trustee shall not disclose any information contained in any inventoried file without the client's consent, except as necessary to execute this Court's order appointing the trustee.

**RULE 28. DISABILITY STATUS**

**(a) Transfer to Disability Inactive Status.** A lawyer whose physical condition, mental illness, mental deficiency, senility, or habitual and excessive use of intoxicating liquors,

narcotics, or other drugs prevents the lawyer from competently representing clients shall be transferred to disability inactive status.

**(b) Immediate Transfer.** This Court may immediately transfer a lawyer to disability inactive status upon proof that the lawyer has been found in a judicial proceeding to be a mentally ill, mentally deficient, incapacitated, or inebriate person.

**(c) Asserting Disability in Disciplinary Proceeding.** A lawyer's assertion of disability in defense or mitigation in a disciplinary proceeding or a revocation of conditional admission proceeding shall be deemed a waiver of the doctor-patient privilege. The ~~referee~~Referee may order an examination or evaluation by such person or institution as the ~~referee~~Referee designates. If a lawyer alleges disability during a disciplinary investigation or proceeding or a revocation of conditional admission proceeding, and therefore is unable to assist in the defense, the Director shall inform the Court of the allegation and of the Director's position regarding the allegation. The Court may:

(1) Transfer the lawyer to disability inactive status;

(2) Order the lawyer to submit to a medical examination by a designated professional;

(3) Appoint counsel if the lawyer has not retained counsel and the lawyer is financially eligible for appointed counsel. Financial eligibility shall be determined by the referee appointed by the Court to hear the disciplinary or disability petition in the same manner as eligibility for appointment of a public defender in a criminal case;

(4) Stay disciplinary proceedings or revocation of conditional admission proceedings until it appears the lawyer can assist in the defense;

(5) Direct the Director to file a petition under Rule 12;

(6) Appoint a referee with directions to make findings and recommendations to the Court regarding the disability allegation or to proceed under Rule 14;

(7) Make such or further orders as the Court deems appropriate.

**(d) Reinstatement.** This Court may reinstate a lawyer to active status upon a showing that the lawyer is fit to resume the practice of law. The parties shall proceed as provided in Rule 18. The lawyer's petition for reinstatement:

(1) Shall be deemed a waiver of the doctor-patient privilege regarding the incapacity; and

(2) Shall set forth the name and address of each physician, psychologist, psychiatrist, hospital or other institution that examined or treated the lawyer since the transfer to disability inactive status.

**(e) Transfer Following Hearing.** In cases other than immediate transfer to disability inactive status, and other than cases in which the lawyer asserts personal disability, this Court may transfer a lawyer to or from disability inactive status following a proceeding initiated by the Director and conducted in the same manner as a disciplinary proceeding under these Rules. In such proceeding:

(1) If the lawyer does not retain counsel, counsel may be appointed to represent the lawyer; and

(2) Upon petition of the Director and for good cause shown, the referee may order the lawyer to submit to a medical examination by an expert appointed by the referee.

**RULE 29. EX PARTE COMMUNICATIONS**

Ex parte communications to any adjudicatory body including panels, referees and this Court are strongly disfavored. Such communications should not occur except after first attempting to contact the adversary and then only if the adversary is unavailable and an emergency exists. Such communications should be strictly limited to the matter relating to the emergency and the adversary notified at the earliest practicable time of the prior attempted contact and of the ex parte communication.

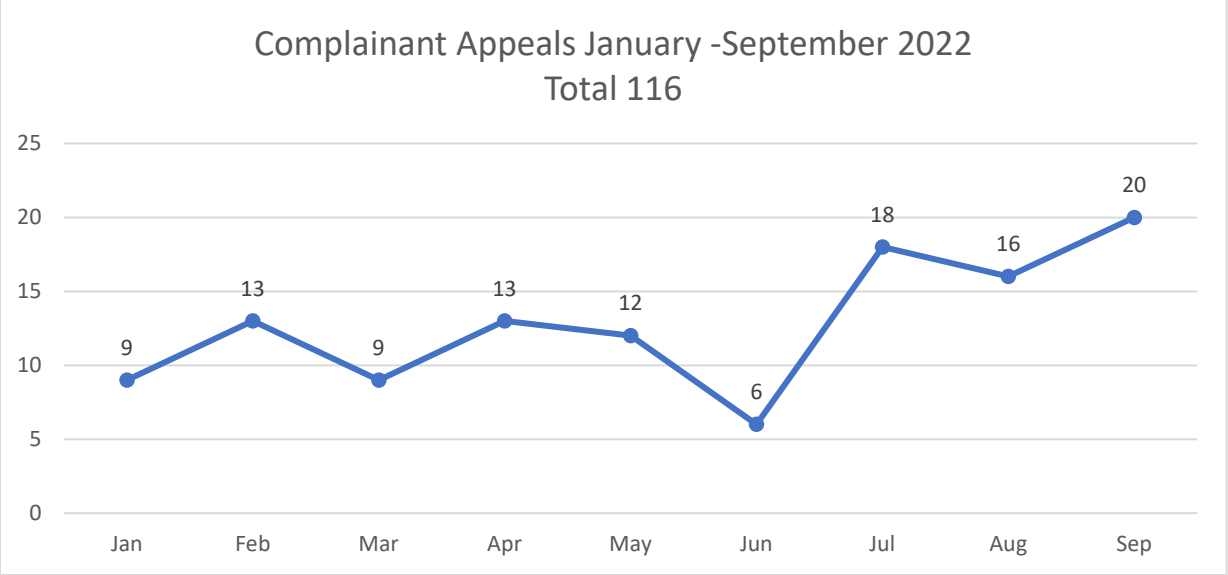
**RULE 30. ADMINISTRATIVE SUSPENSION**

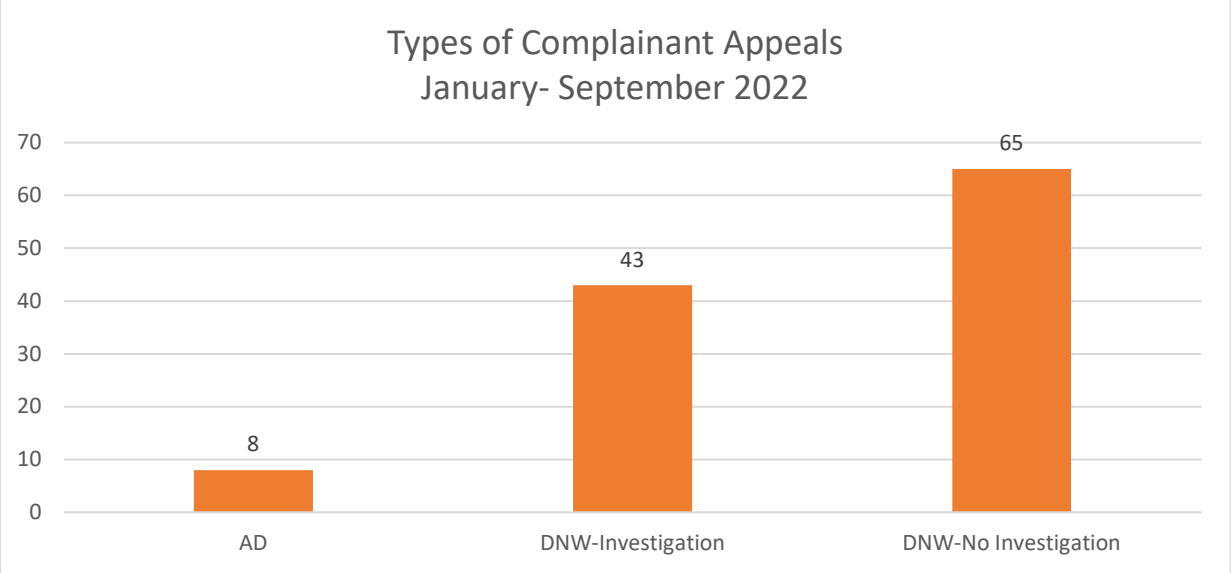
(a) Upon receipt of a district court order or a report from an Administrative Law Judge or public authority pursuant to Minn. Stat. § 518A.66 finding that a licensed Minnesota attorney is in arrears in payment of maintenance or child support and has not entered into or is not in compliance with an approved payment agreement for such support, the Director's Office shall serve and file with the Supreme Court a motion requesting the administrative suspension of the attorney until such time as the attorney has paid the arrearages or entered into or is in compliance with an approved payment plan. The Court shall suspend the lawyer or take such action as it deems appropriate.

(b) Any attorney administratively suspended under this rule shall not practice law or hold himself or herself out as authorized to practice law until reinstated pursuant to paragraph (c). The attorney shall, within 10 days of receipt of an order of administrative suspension, send written notice of the suspension to all clients, adverse counsel and courts before whom matters are pending and shall file an affidavit of compliance with this provision with the Director's Office.

(c) An attorney administratively suspended under this rule may be reinstated by filing an affidavit with supporting documentation averring that he or she is no longer in arrears in payment of maintenance or child support or that he or she has entered into and is in compliance with an approved payment agreement for payment of such support. Within 15 days of the filing of such an affidavit the Director's Office shall verify the accuracy of the attorney's affidavit and file a proposed order for reinstatement of the attorney requesting an expedited disposition.

(d) Nothing in this rule precludes disciplinary proceedings, if the attorney's conduct also violates the Minnesota Rules of Professional Conduct.


Complainant Appeals January -September 2022
Total 116
25
20
15
10
5
0
9
13
9
13
12
6
18
16
20
Jan
Feb
Mar
Apr
May
Jun
Jul
Aug
Sep


Types of Complainant Appeals
January- September 2022
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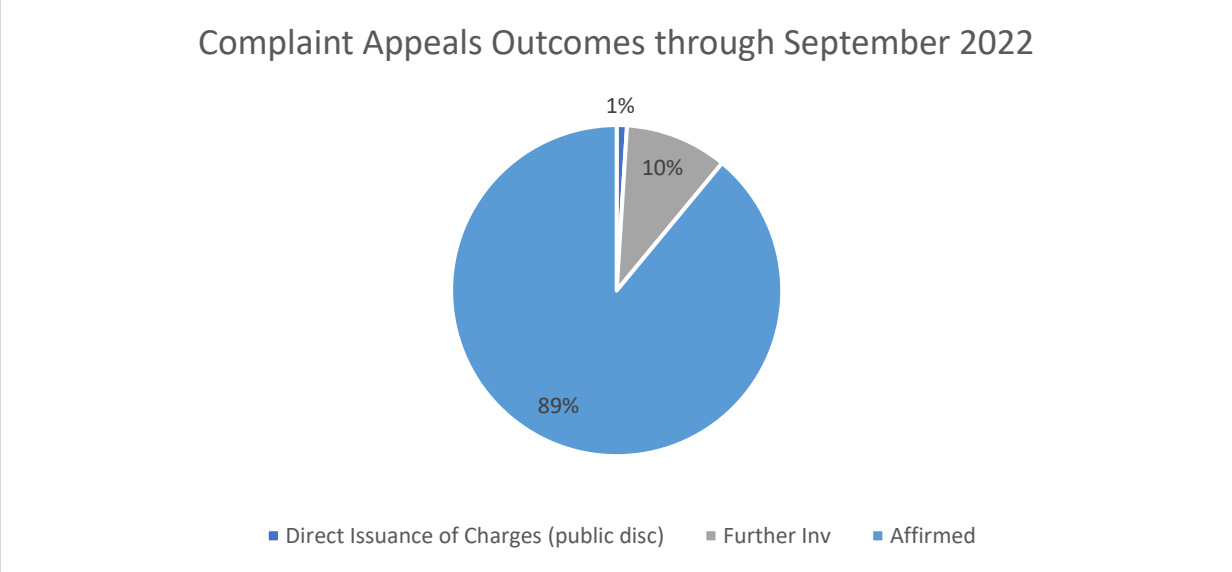
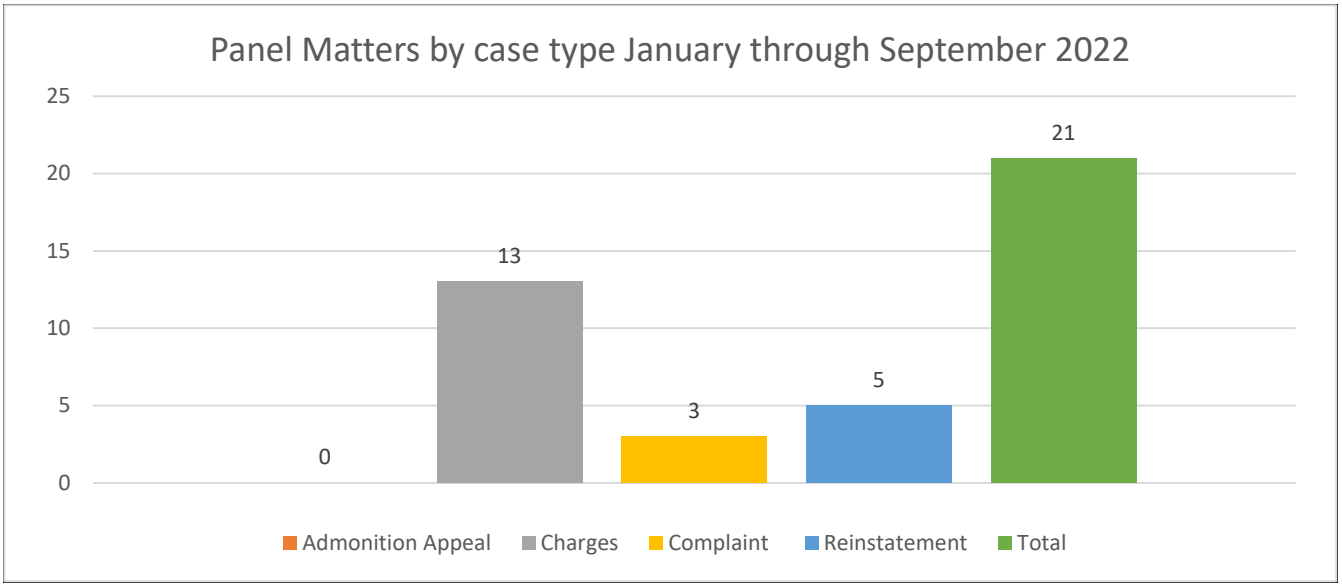
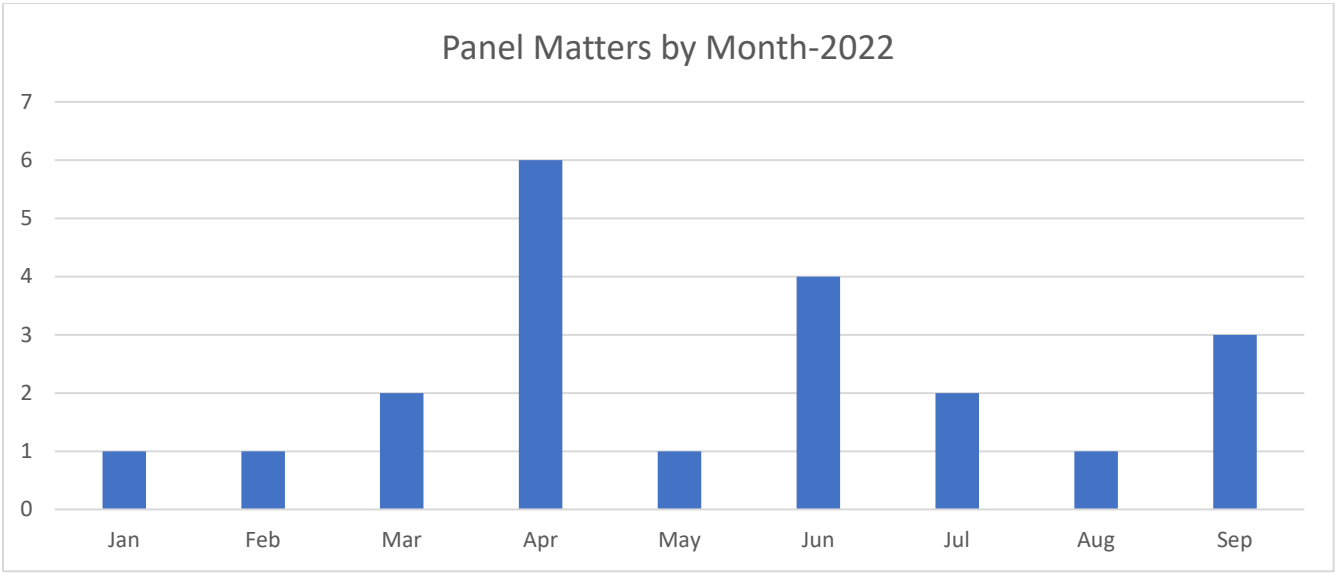
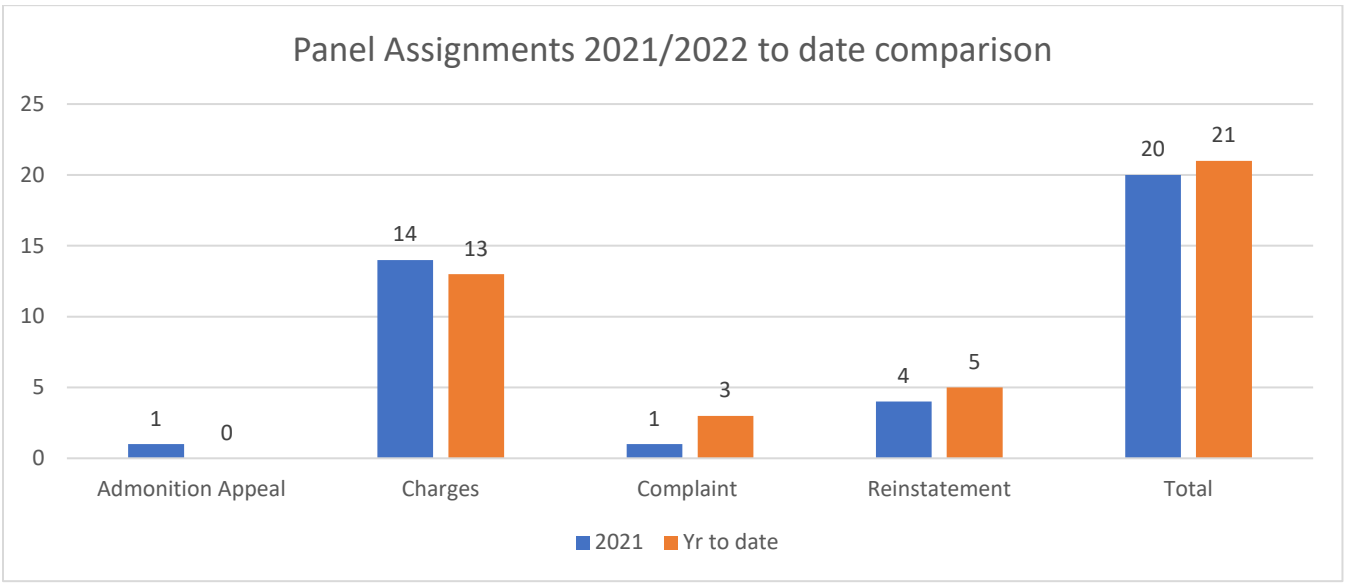
60
50
40
30
20
10
0
8
43
65
AD
DNW-Investigation
DNW-No Investigation


Complaint Appeals Outcomes through September 2022
1%
10%
89%
Direct Issuance of Charges (public disc)
Further Inv
Affirmed


Panel Matters by case type January through September 2022
25
20
15
10
5
0
0
13
3
5
21
Admonition Appeal
Charges
Complaint
Reinstatement
Total


Panel Matters by Month-2022
7
6
5
4
3
2
1
0
Jan
Feb
Mar
Apr
May
Jun
Jul
Aug
Sep


Panel Assignments 2021/2022 to date comparison
25
20
15
10
5
0
1
0
14
13
1
3
4
5
20
21
Admonition Appeal
Charges
Complaint
Reinstatement
Total
2021
Yr to date

Lawyers Professional Responsibility Board

# FAQ for Panel Proceedings

Last modified 10/10/22

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## INTRODUCTION

The Minnesota Lawyers Professional Responsibility Board (LPRB) has prepared these Frequently Asked Questions (FAQ) to assist individuals appearing before an LPRB Panel. This FAQ does not replace the Minnesota Rules of Professional Conduct (MRPC) or the Rules on Lawyers Professional Responsibility (RLPR) which respectively govern Panel proceedings substantively and procedurally.

The LPRB has an adjudicatory role in disciplinary proceedings. As such, this FAQ is not intended as legal advice. Instead, the intent is to provide an overview for participants in preparation for and during Panel proceedings. A glossary is also provided to assist participants.

## LPRB PANELS

### *1. In What Circumstances will a Matter be Assigned to a Panel?*

Matters will be assigned to an LPRB Panel under one of three circumstances: (a) if the Director of the Office of Lawyers Professional Responsibility (OLPR) files charges of unprofessional conduct; (b) if a respondent attorney appeals an admonition issued by the OLPR; or (c) if an attorney petitions for reinstatement.

### *2. What is a Panel and How is it Formed?*

LPRB members are unpaid volunteers appointed to three-year terms by the Minnesota Supreme Court. A Panel typically consists of three LPRB members including the Panel Chair, who is an attorney, a non-attorney public member of the LPRB, and another attorney or public member of the LPRB. Panels must have one attorney and one non-attorney member; the third member may be a lawyer or non-attorney member. The LPRB Chair assigns members of the Board to one of six Panels. The Panel composition may be changed from time to time as members retire, resign or move to other assignments within the LPRB.

### *3. How will the Panel be Chosen for a Matter?*

Panel proceedings will be assigned to a Panel by the LPRB Chair using a blind random assignment method adopted by the LPRB. Sometimes, the Panel's composition may change after assignment as in the following examples.

- If there is a conflict of interest between a Panel member and a participant, then concerns regarding conflicts of interest can be raised with the Panel Chair or LPRB Chair.

- If a Panel member is not available to participate on the assigned date for the Panel hearing, the LPRB Chair will appoint a substitute member.
- If one Panel's workload does not permit consideration of the matter, a new Panel will be assigned.
- If special expertise would be beneficial, a former member or current LPRB member that has the expertise may be assigned.

***4. How will I Know which LPRB Members are Assigned to the Panel?***

You will be notified via email or U.S. Mail of the Panel assignment and the members that will be on the Panel in a document entitled "Notice of Panel Assignment."

***5. Will there be a Hearing Before the Panel and What Can I Expect?***

As discussed in these guidelines, not every issue before a Panel requires a hearing. However, if a hearing is scheduled, then no matter the nature of the proceeding, the general procedures at the hearing will be the same. The LPRB Panel will not decide constitutional issues or other procedural claims which are outside the purview of the LPRB. Those issues may be addressed by the Minnesota Supreme Court. The general procedures include:

- The hearing may be held virtually or in person depending on the Court requirements at the time. In-person hearings are held at the Minnesota Judicial Center in a courtroom specifically designated for LPRB hearings and other related proceedings. Hearings before a Panel, except reinstatement proceedings, are closed to the general public.

- Panel hearings are conducted much like evidentiary hearings under the Rules of Civil Procedure. There will be a court reporter, witnesses will be sworn in, and the Panel Chair will control the proceedings.
- The hearing typically starts with the Panel Chair introducing the matter under consideration and identifying the parties and anyone else present. Except for hearings for reinstatement, the hearings are closed to the general public.
- The parties, typically the respondent/petitioner attorney and the Director, may make opening statements or they may waive these statements. Complainants are witnesses but are not parties to the proceedings. Opening statements should be brief and succinctly summarize the issues under consideration.
- Typically, the parties will offer exhibits into evidence all at once. The Panel Chair will try to resolve objections to exhibits at the start of the hearing. Most evidentiary issues are resolved well before the day of the hearing. If a party offers a late exhibit, the Panel Chair will decide the issue considering the volume of the late exhibit(s), why the exhibit(s) were not available earlier, and whether if admitting the exhibit causes unfair surprise and prejudice to the other party.
- At the end of the hearing, the Panel Chair will invite closing arguments. The Panel Chair may also request additional briefing if there are complex matters.

### *6. If there is a Hearing, What Prehearing Procedures will Occur?*

If a hearing is scheduled, the Panel Chair will conduct one or more scheduling conferences with the Director and respondent/petitioner to set timelines for the various steps in disclosure and preparation, as well as schedule the hearing. Specific scheduling requirements may depend on the type of proceeding in which you participate. Rule 9, RLPR, governs charges of unprofessional conduct, whether for public discipline or admonition appeals. Rule 18, RLPR, governs reinstatement proceedings. Actions at the scheduling conferences may include:

- Setting a schedule for an exchange of exhibits and for agreeing on a stipulation between respondent and the Director as to the admissibility of exhibits. Exhibits as to which no objection is made will be admitted into evidence at the beginning of the hearing.
- If there is a dispute as to admissibility based on the volume of documents, relevance, or other grounds, or if there are other discovery issues, those will be resolved by the Panel Chair in a conference which will typically occur prior to the hearing.
- The Panel Chair in consultation with the Director and respondent/petitioner will set a hearing date for the matter. Any subsequent request for a continuance by the respondent/petitioner or Director will be at the discretion of the Panel Chair.

### *7. What Discovery Procedures are Available?*

- There is limited discovery available for Rule 9 Panel hearings which includes charges for public discipline and admonition appeals. If a

discovery procedure is allowed, it will be according to Rules 9(c) and (d), RLPR, and the applicable Rules of Civil Procedure.

- Rule 9(c) allows the Director or respondent/appellant to request admissions up to or 10 days after the prehearing meeting. The responding party then has 10 days to answer. Any objections to an admission or the sufficiency of the answer is determined by the Panel Chair.
- If a party wants to take a deposition, Rule 9(d) applies. The parties may agree to take depositions. If the parties do not agree to take a deposition, any motions or issues arising out of depositions are resolved by the Ramsey County District Court.
- A respondent can request that the file maintained by the Director be produced. Rule 20(a)(4), RLPR, specifies what the Director can provide and what the Director cannot provide.

### *8. Who are the Witnesses at a Panel Hearing?*

The nature of the case and the respective burdens of proof determine which witnesses will be permitted to testify at Panel hearings. In a Rule 9 hearing the complainant and respondent are always permitted to testify in person. Affidavits may be received from other witnesses. But additional witnesses may be permitted to testify in person if authorized by the Panel Chair for good cause such as special or crucial knowledge of a matter.

Witnesses as to mitigation and character are not permitted at hearings on charges because such testimony relates to the ultimate issue, rather than the initial

burdens of proof. Mitigation and character witnesses may be allowed at a reinstatement hearing.

Note that the Panel Chair cannot issue a subpoena or compel witnesses to testify. These are matters for the Ramsey County District Court.

### *9. What Evidence is Admissible at a Panel Hearing?*

Evidence admissible at a Panel hearing is limited by the nature of the Panel hearing. Some general guidelines are:

- Under Rule 9(h), RLPR, certain hearsay evidence is admissible.
- Evidence of prior discipline is admissible under Rule 19(b)(4), RLPR, if relevant to a current charge to show a pattern of misconduct, to impeach a respondent attorney's testimony, or to establish motive, opportunity, intent, preparation, plan, knowledge, and identity, or absence of mistake or accident. However, evidence of prior discipline is not admissible to prove that a present claimed violation occurred or to demonstrate the character of the lawyer.
- Evidence of a previous disciplinary proceeding that concluded a lawyer committed misconduct warranting discipline is conclusive evidence that the respondent committed the misconduct. *See* Rule 19(b)(3), RLPR. Prior discipline cannot be reargued.
- Prior findings in a civil matter to which the attorney was a party may be sufficient to determine probable cause.

- Evidence regarding mitigation is typically not admissible at a probable cause hearing. This evidence is relevant to the discipline imposed, which is outside the scope of the LPRB's authority.

### *10. How will We Know the Panel's Decision?*

Panels' decisions are issued in one or more formats:

- The Panel may announce its decision at the hearing after deliberation followed by a written decision.
- The Panel may take the matter under consideration and invite additional briefs and proposed orders.
- The written decision by the Panel will typically not include findings and conclusions unless the Panel is issuing an admonition.
- There is no requirement that the Panel inform the respondent of the reasoning for the decision regarding charges or whether the decision was unanimous. Decisions of the Panel are by majority decision.
- If the Panel determines that an admonition is the appropriate disposition, then the Panel may announce this on the record or as a written determination. If the Panel decides to issue an admonition based solely on written submissions, then the respondent may request a hearing de novo before another Panel. Rule 9(j)(1)(iii), RLPR.

## Charges of Unprofessional Conduct – Special Considerations

The Director may issue charges of unprofessional conduct which are referred to a Panel of the LPRB. This is often referred to as a "probable cause" proceeding. The specific process for this proceeding includes the following:

### *1. How Does the Process for Public Discipline Start?*

- After investigation, the Director will transmit to the respondent and the Panel Chair a copy of the charges of unprofessional conduct typically referred to as the "charges." The charges will include the facts the Director relies on and the alleged rule violations. The charges may include one or more acts which are alleged to be a violation and may include multiple matters.
- Once the Director issues the charges, the respondent attorney has 14 days to submit an answer. A party may refer to Rule 6.01, Minnesota Rules of Civil Procedure, for computation of time periods.
- If a respondent cannot meet the 14-day deadline, then the respondent may request from the Panel Chair an extension for good cause. The Panel Chair will decide the issue after consultation with both parties. The relevant considerations will be the need for expediency versus fundamental fairness to both parties.
- The rules do not require that the respondent "serve" the answer, only that it be "submitted" to the Director and the Panel Chair. Email is the preferred method of transmission.

- There is no specific format for an answer but generally the answer should, by paragraph, admit or deny the factual allegations and rule violations and assert any relevant defenses.
- After the answer is submitted, both parties have 10 days to provide the Panel exhibits, affidavits, and memoranda. Each party must copy the other party and the Panel Chair on all submissions. There is no requirement that a party make additional submissions.

### *2. Once All the Submissions are Made, How is the Decision Made by the Panel?*

Once all information is received, the Panel will decide whether probable cause has been established. This will include:

- Typically, the charges are decided by the Panel based on the written submissions. The decision is issued within 40 days from the date of the Director's notice of charges absent good cause. Rule 9(a)(2), RLPR.
- The respondent attorney or the Director has the right to request a hearing or oral argument on the charges. After hearing from both parties, the Panel Chair determines whether to have a hearing or oral argument and will notify the parties of the decision. If a hearing is held, it is conducted according to Rule (9)(b) – (j), RLPR. The procedures and schedule for the hearing are set by the Panel Chair after consultation with the parties.
- Panel determinations are by majority vote. The determination will not disclose individual Panel member views on the issues. Typically, the

Panel will not make findings and conclusions except in the case of an admonition as described below.

### *3. What Does the Panel Decide?*

The Panel has several options for its decision, but generally the Panel decides whether there is probable cause to believe public discipline is warranted. *See* Rule 9(j), RLPR. The Panel will conclude one of the following:

- The Panel may conclude there is no probable cause to believe public discipline is warranted. If the Panel finds that the Director has not established probable cause on any of the counts charged if there are multiple counts, then the Panel can dismiss the charges.
- The Panel may conclude that there is probable cause to believe that public discipline is warranted on at least one count. The Panel will instruct the Director to file a petition for disciplinary action with the Supreme Court. The Panel cannot recommend the ultimate disposition.
- The Panel can determine that the unprofessional conduct was isolated and nonserious. In this instance, the Panel can determine that one or more counts are supported by clear and convincing evidence of isolated, nonserious conduct. The Panel cannot bifurcate its decision to both allow for a petition on certain counts and an admonition on others.
- If the respondent is practicing under a conditional admission agreement, the Panel can authorize the Director to file a petition for revocation.

## Admonitions

The Director issues an admonition in lieu of charges of unprofessional conduct if they conclude that the respondent has engaged in conduct that is an ethical rule violation but is isolated and nonserious. Rule 8(d)(2), RLPR, outlines this process.

### *1. What Must I Do if the Director Issues an Admonition?*

- The respondent will receive from the Director an admonition, which will allege the facts and applicable rules the respondent violated that warrant the admonition. The respondent may accept the admonition, or the respondent may appeal the admonition which appeal results in a de novo review by an LPRB Panel. The manner in which the respondent may appeal the admonition is to write the Director within 14 days of the date of the admonition and demand that charges be presented to a Panel. The written demand may, but is not required, to state the reasons for the appeal. The Director will then convert the admonition to charges of unprofessional conduct.
- Upon receipt of the charges, the respondent has 14 days to submit an answer. There is no specific format for the answer, but it should admit/deny the factual allegations in the admonition and the conclusions. A party may refer to Rule 6.01, Minnesota Rules of Civil Procedure, for computation of time periods.
- The admonition and the answer are submitted to the Panel Chair as well. Formal service is not required. The Panel will then conduct a de

novo review and decide if there is clear and convincing evidence of a rule violation.

### *2. What Happens During an Admonition Appeal?*

An admonition appeal has some unique aspects to be considered by all participants although the procedures referenced above relating to Rule 9, RLPR, are applicable.

- The respondent may request a hearing and a hearing is typically held to resolve factual disputes under the clear and convincing standard of review. On occasion, if there are no factual disputes, the Panel may choose to decide the appeal on the written submissions.
- The hearing is conducted in the same format as a probable cause hearing.
- Generally, the witnesses are limited to the respondent and complainant unless good cause is shown for additional witnesses. To the extent other witnesses are needed, the evidence is typically presented in the form of affidavits and potentially depositions in lieu of in-person testimony. *See* Rule 9(h), RLPR.
- The Panel is not limited to the facts or reasoning relied upon by the Director, but the Panel is limited to the specific rule violations alleged by the Director.
- When considering the matter de novo the Panel does not give deference to the district ethics committee determination if one was made (nor is

this generally admissible), nor does the Panel give deference to the Director's determination.

### *3. What are the Panel's Possible Determinations after the Hearing?*

The Panel has several options available for its determination including:

- Affirm the admonition because it is supported by clear and convincing evidence.
- Find that there is probable cause to believe that public discipline is warranted and direct the Director to file a petition for disciplinary action.
- Reverse the admonition and dismiss the complaint.

### *4. How will I Receive the Decision and What will it Include?*

You may receive the Panel's decision in one of several formats:

- The Panel may announce the decision orally the same day as the hearing and the Panel's deliberation.
- The Panel may take the appeal under advisement and issue a decision later.
- In all instances you will receive a written decision which will be provided to the respondent and Director by the Panel Chair. The Director will provide a copy of the determination to the complainant.

The specificity of the Panel's decision will depend on the nature of the decision.

- If the Panel affirms the Director, then the decision may be brief and simply adopt the Director's findings and conclusions. The Panel will

advise the respondent of their appeal rights pursuant to Rule 9(m), RLPR.

- If the Panel reverses the Director and dismisses the admonition, then the Panel will make specific findings and conclusions, and advise the complainant of their right to appeal under Rule 9(l), RLPR.
- If the Panel determines that probable cause exists and directs the Director to file a petition for disciplinary action, the Panel will issue specific findings and conclusions.

## Reinstatement Hearings

One of the most important responsibilities of the Panel is to make recommendations to the Supreme Court about reinstatement of an attorney to the practice of law. These recommendations are required if the attorney has resigned their license, has been placed on disability status in lieu of discipline, has been suspended for more than 90 days and a reinstatement hearing has been ordered, or has been disbarred. When a petition for reinstatement has been filed, the Director will investigate the matter and issue a report. After the Director's report is issued, the matter proceeds to a Panel to make findings and conclusions and issue its recommendation to the Supreme Court. Rule 18, RLPR, governs reinstatements.

### *1. How Does the Reinstatement Process Work?*

There are several steps that occur before the reinstatement issue is presented to a Panel. They include:

- The attorney (petitioner in this instance) serves a petition for reinstatement along with the required fee, upon the Director and then files the petition with an affidavit of service, with the Clerk of Appellate Courts.
- The LPRB Chair assigns the matter to a Panel and a notice of Panel assignment will issue.
- Before the Director can investigate the matter, the attorney must meet all the preconditions for reinstatement which include:
    - The petitioner has paid the reinstatement fee.
    - Provide proof that all preconditions for reinstatement set by the Court have been met.
- The Panel Chair will confer with the Director and petitioner to set timelines for completion of the investigation (ideally in four months), any discovery matters, exchange of exhibits, witness lists and a hearing date.

### *2. What Can I Expect During the Investigation?*

The Director will typically conduct an exhaustive investigation to support or refute as to whether petitioner has shown rehabilitation so that they are fit to be reinstated. If the investigation follows resignation, and not discipline or disability, a different investigation is warranted. An investigation may include:

- Interviewing witnesses who have knowledge of the petitioner's competency and conduct since the suspension, disbarment or period of disability.

- Reviewing petitioner's medical records and consulting with any treating professionals.
- Confirming petitioner has completed the Multistate Professional Responsibility Exam (MPRE) and is current with all CLE requirements.
- Determining any outstanding obligations to the Client Security Board.

At the conclusion of the investigation the Director will issue a report of the investigation to the Panel. The Director may take a position on reinstatement in the report or may reserve or modify that position based upon evidence offered by the petitioner. The report is then provided to the Panel Chair and the petitioner.

***3. Is there Always a Panel Hearing?***

A Panel hearing is typically conducted for all reinstatements. In rare instances, such as a reinstatement after a resignation, the Panel may make its recommendations without a hearing based upon the petition and the Director's report.

***4. What are the Procedures for the Hearing?***

The general hearing procedures described in these guidelines apply to reinstatement hearings. The three main differences are:

- Reinstatement proceedings are open to the public.
- Witness testimony is not as limited and will include character evidence, affidavits and letters of recommendation which will be received with the approval of the Panel Chair.
- Petitioner has the burden of proof.

At the end of the hearing, the Panel Chair may request additional briefing or investigation if needed. The Panel Chair may also request that each party provide proposed findings and conclusions.

### *5. What Does the Panel Consider and Decide?*

In making its decision, the Panel must decide whether the petitioner has shown by clear and convincing evidence that the petitioner has undergone such a moral change as to render the petitioner a fit person to enjoy the public confidence and trust that the petitioner once forfeited. Generally, the Panel will recommend that the petitioner's petition for reinstatement should be granted or denied. The Panel may also recommend that the reinstatement include conditions such as a period of probation or such other terms as may protect the public. The inquiry upon a petition from resignation focuses on the current fitness to practice of the petitioner, and the inquiry upon a petition from disability status in lieu of discipline focuses on whether the disability has abated, and the lawyer is currently fit to practice law.

In making its decision on a petition after discipline, the Panel will make findings and conclusions that consider the following:

- What is the petitioner's present character and fitness to practice law?
- Is the petitioner aware of the wrongfulness of their conduct?
- What is the length of time since the disbarment or suspension?
- Are there any physical or psychological illnesses or pressures which can and were corrected?
- What was the seriousness of the misconduct?

- Has there been a showing of a true moral change?

### *6. How will I Know what the Panel Decides?*

The Panel may confer and decide the day of the hearing by first issuing an oral decision. The Panel may also take the matter under advisement for further briefing and proposed findings and conclusions.

Ultimately, the Panel will issue findings of fact, conclusions of law and a recommendation to the Supreme Court. The findings and conclusions must be sufficiently detailed to allow the Supreme Court to fully review and consider the recommendations.

The Panel's decision does not have to be unanimous, and a dissenting Panel member may also issue findings and conclusions and a recommendation but does not have to do so.

### *7. What Happens Next?*

Once the Panel has completed its written findings and conclusions and recommendations, copies will be provided to the Director and the petitioner. The Director then files the decision with the Clerk of Appellate Courts and serves the decision on the petitioner.

Either the petitioner or the Director may challenge the Panel's findings, conclusions or recommendation. To challenge the findings and conclusions, a party must order a transcript within 10 days of the date of service of the recommendation as set forth in Rule 18(c), RLPR. If neither party orders a transcript, then the Panel's findings and conclusions are conclusive. If one party orders a transcript, then either party may challenge any findings and conclusions.

If no transcript is ordered, a party may still challenge the recommendation based upon the conclusively determined findings and conclusions.

After the decision is served and filed, then any further issues are addressed to the Supreme Court. Rule 18(d), RLPR. The Supreme Court considers the Panel recommendations but is not bound by the recommendation.

# GLOSSARY

**Admonition:** Private discipline for conduct that the Director has determined is isolated and non-serious. Admonitions are generally issued by the Director and may be appealed to a Panel of the LPRB. A Panel of the LPRB considering charges of unprofessional conduct presented to it by the Director can also issue an admonition if it finds that the unprofessional conduct was isolated and nonserious and not a matter for public discipline.

**Admonition Appeal:** Appeal to a Panel by a respondent from an admonition by the Director. Panels hold evidentiary hearings on admonition appeals.

**Board Chair:** The chairperson of the LPRB, who is appointed to that position by the Court. The Board Chair appoints Panel members, Committee members, and Executive Committee members, communicates with the Director and the Court Liaison on behalf of the LPRB, and presides over both Board and Executive Committee meetings.

**Bypass:** If a respondent admits that probable cause exists for some or all charges, then the Director may file with the Court a petition for disciplinary action together with the respondent's admissions. In such cases the respondent may still dispute whether respondent violated the rules. The disciplinary process bypasses the LPRB, and the Court determines whether or not to impose discipline without LPRB involvement.

**Charge(s) of Unprofessional Conduct (Charges):** Written allegations by the Director that a respondent has violated the MRPC.

**Clear and Convincing Evidence:** Clear and convincing evidence is the standard of proof required in disciplinary proceedings. This standard requires more than the preponderance of the evidence standard in civil cases but less than beyond a reasonable doubt standard in criminal cases. Court decisions establish that this standard is met when the truth of the facts asserted is highly probable.

**Complaint:** A complaint is a document filed with the OLPR by a complainant alleging that a respondent has engaged in unprofessional conduct that may violate the MRPC. Most matters start with a complaint, but there are a handful of ways a matter may be opened without a complaint.

**Complainant:** A person or entity who has filed a complaint with the OLPR against a respondent.

**Complainant Appeal:** A complainant may appeal any decision of the Director with which the complainant is dissatisfied.

**Conditional Admission Agreement:** A confidential agreement signed by an applicant for admission to practice law in Minnesota with the Minnesota Board of Law Examiners (BLE), agreeing that the applicant may be admitted to practice law in Minnesota only on certain conditions that the applicant must fulfill. If a lawyer does not comply with their conditional admission agreement, the BLE will forward the matter to the OLPR to investigate and, if appropriate, pursue revocation of the conditional admission.

**Court:** The Supreme Court of the State of Minnesota, the highest authority within the constitutionally established Judicial Branch of Minnesota state government. The Court is responsible for the operations of the Judicial Branch. Only the Court can license lawyers in Minnesota and only the Court can suspend or disbar a lawyer for violation of the MRPC.

**Court Liaison:** A Justice of the Court assigned to interact with the LPRB. The Court Liaison typically attends public meetings of the LPRB and interacts with the Board Chair on a regular basis regarding LPRB matters. The Court Liaison usually, but not always, signs Court orders relating to the LPRB or respondent discipline.

**DEC:** There are 21 District Ethics Committees (DEC) in Minnesota, all composed of volunteers. DECs investigate complaints of respondents' alleged unprofessional conduct referred to them by the Director and make reports and recommendations thereon as provided in the RLPR in a format prescribed by the Executive Committee. DECs meet from time to time as required and must meet at least annually.

**Director:** The Director of the OLPR. The Director is an employee of the Judicial Branch and is appointed for a two-year term. The Director manages the OLPR. The Director is responsible and accountable to the Court.

**DNW:** Discipline Not Warranted (DNW) is a determination by the Director that discipline is not warranted. This can be after an investigation or with no investigation.

**Executive Committee:** The Executive Committee of the LPRB, consisting of the Board Chair plus two lawyers and two non-lawyers, designated annually by the Board Chair. The Executive Committee is responsible for the activities of the LPRB and acts on behalf of the LPRB between meetings. The Board Chair shall appoint an attorney on the Executive Committee to be a Vice-Chair.

**Judicial Branch:** One of the three co-equal branches of Minnesota state government established by the Minnesota Constitution. The Judicial Branch includes the Court, the court of appeals, the district courts, the OLPR, and various boards and committees established by the Court including the LPRB.

**LPRB:** The Lawyers Professional Responsibility Board (LPRB) is a part of the Judicial Branch's disciplinary system. The LPRB was created by the Court and operates pursuant to rules established by the Court. LPRB members are appointed by the Court. The LPRB is composed of a Board Chair, thirteen lawyers and nine public members, who are not lawyers, who reside in Minnesota. LPRB members are appointed for a three-year term and can be reappointed once for a second three-year term. If the LPRB member is appointed to complete the unexpired term of a previous member, the appointee may subsequently be appointed to two full terms after completion of the unexpired term. Volunteer LPRB members serve without compensation but are entitled to reimbursement of expenses such as mileage and postage. The LPRB has no separate budget and no staff but LPRB activities such as meeting expenses and training are included within the OLPR's budget.

**MRPC:** The Minnesota Rules of Professional Conduct (MRPC) are the rules adopted by the Court which set forth the ethical obligations of lawyers practicing in the State of Minnesota. A violation of the MRPC can result in discipline by the Director (private admonitions and private probation), a Panel (private admonitions) or the Court (all public discipline).

**OLPR:** The Office of Lawyers Professional Responsibility (OLPR) is the part of the Judicial Branch that investigates and prosecutes allegations of misconduct by respondents. The OLPR receives complaints. The OLPR may summarily dismiss complaints, investigate complaints, or assign complaints to DECs for investigations. The OLPR prosecutes cases against lawyers in matters where the Director determines public discipline is warranted.

**OLPR Liaison:** An OLPR staff member assigned to provide administrative, research, and other support to an LPRB Committee.

**Panel:** The LPRB is divided into six Panels of three members each. Each Panel must have at least one lawyer member and one public member, and each Panel must have a Panel Chair and a Vice-Chair. Executive Committee members do not serve on Panels.

**Panel Chair:** A Panel member appointed by the Board Chair to lead Panel operations.

**Probable Cause:** Probable Cause means that a reasonable person would conclude that it is more likely than not that an alleged violation can be proven by clear and convincing evidence.

**Reinstatement:** An attorney who has been suspended for more than 90 days, disbarred, placed on disability status, or who has resigned may petition the Court for reinstatement and must go through an LPRB hearing process. Lawyers suspended for 90 days or less may seek reinstatement by affidavit and do not have to go through an LPRB hearing process.

**Respondent:** A lawyer against whom a complaint has been filed with or by the OLPR. A respondent need not be licensed to practice law in Minnesota to be the subject of a complaint.

**Respondent Appeal:** A respondent to whom the Director has issued an admonition may appeal the admonition to a Panel.

**RLPR:** The Rules on Lawyers Professional Responsibility (RLPR) issued by the Court to govern attorney discipline proceedings before the OLPR, the LPRB, and the Court.

**SharePoint:** The secure Judicial Branch website to which all LPRB documents are posted, including all appeal documents. Each LPRB member is issued a username and password for accessing SharePoint.

**Stipulation for Discipline:** An agreement between the Director and a respondent for public discipline entered into in writing and approved by the Court.

**Stipulation for Probation:** An agreement between the Director and a respondent for private probation entered into in writing and approved by the Board Chair or Vice-Chair. Private probation is a form of discipline but cannot be imposed by the Director or the LPRB without the consent of a respondent.

**SD:** Summary Dismissal (SD) is a determination made by the Director, without any investigation being conducted by a DEC or the OLPR, that discipline is not warranted. These are not appealable pursuant to Rule 8(b) of the Minnesota Rules on Lawyers Professional Responsibility.

## OLPR Dashboard for Court And Chair

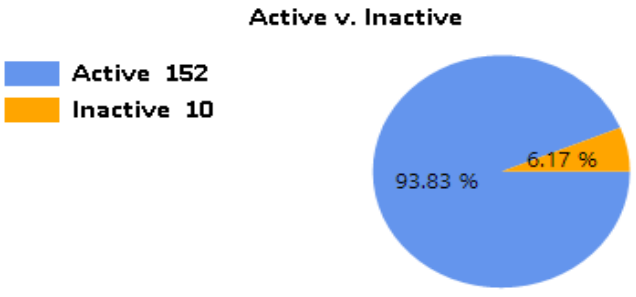
| | Month Ending September 2022 | Change from Previous Month | Month Ending August 2022 | Month Ending September 2021 |
|---|---|---|---|---|
| **Open Files** | 498 | 1 | 497 | 475 |
| **Total Number of Lawyers** | 333 | -4 | 337 | 352 |
| **New Files YTD** | 782 | 84 | 698 | 723 |
| **Closed Files YTD** | 765 | 83 | 682 | 690 |
| **Closed CO12s YTD** | 115 | 15 | 100 | 82 |
| **Summary Dismissals YTD** | 390 | 49 | 341 | 314 |
| **Files Opened During September 2022** | 84 | -18 | 102 | 100 |
| **Files Closed During September 2022** | 83 | -16 | 99 | 65 |
| **Public Matters Pending (excluding Resignations)** | 42 | -2 | 44 | 39 |
| **Panel Matters Pending** | 13 | -1 | 14 | 11 |
| **DEC Matters Pending** | 94 | -2 | 96 | 110 |
| **Files on Hold** | 14 | -6 | 20 | 15 |
| **Advisory Opinion Requests YTD** | 1277 | 133 | 1144 | 1572 |
| **CLE Presentations YTD** | 35 | 5 | 30 | 40 |
| | | | | |
| **Files Over 1 Year Old** | 162 | 2 | 160 | 118 |
| **Total Number of Lawyers** | 92 | -2 | 94 | 82 |
| **Files Pending Over 1 Year Old w/o Charges** | 76 | -3 | 79 | 57 |
| **Total Number of Lawyers** | 50 | -3 | 53 | 44 |

| | 2022 YTD | 2021 YTD |
|---|---|---|
| **Lawyers Disbarred** | 3 | 4 |
| **Lawyers Suspended** | 14 | 12 |
| **Lawyers Reprimand & Probation** | 5 | 4 |
| **Lawyers Reprimand** | 1 | 3 |
| **TOTAL PUBLIC** | **23** | **23** |
| **Private Probation Files** | 3 | 8 |
| **Admonition Files** | 62 | 75 |
| **TOTAL PRIVATE** | **65** | **83** |

# FILES OVER 1 YEAR OLD

| Year/Month | OLPR | AD | PAN | HOLD | SUP | S12C | SCUA | TRUS | Total |
|---|---|---|---|---|---|---|---|---|---|
| 2017-03 | | | | 1 | | | 1 | | **2** |
| 2018-06 | | | | | 1 | | | | **1** |
| 2018-07 | | | | | 2 | | | | **2** |
| 2018-08 | | | | | 1 | | | | **1** |
| 2018-10 | 2 | | | | | | | | **2** |
| 2018-12 | 1 | | | | | | | | **1** |
| 2019-03 | | | | | 1 | | 1 | | **2** |
| 2019-04 | 2 | | 2 | | | | | | **4** |
| 2019-05 | | | | | 3 | | | | **3** |
| 2019-06 | | | | 1 | | | | | **1** |
| 2019-07 | 1 | | | | 1 | | 1 | | **3** |
| 2019-08 | 1 | | | | | | | | **1** |
| 2019-09 | | | | | 3 | | | | **3** |
| 2019-10 | | | | | 1 | | 2 | | **3** |
| 2019-11 | 1 | | | | | | | | **1** |
| 2019-12 | | | | | 1 | | | | **1** |
| 2020-01 | 4 | | | | | | | | **4** |
| 2020-02 | 3 | | | | | | 1 | | **4** |
| 2020-03 | | | | | | | 1 | | **1** |
| 2020-04 | | | | | 1 | | | | **1** |
| 2020-05 | 1 | | | | 2 | | | | **3** |
| 2020-06 | | | 1 | | 2 | | | | **3** |
| 2020-07 | 1 | | | | | | | | **1** |
| 2020-08 | 1 | | | | 2 | | 3 | | **6** |
| 2020-09 | 2 | | 1 | | 3 | | | | **6** |
| 2020-10 | | | | | 2 | 1 | 1 | | **4** |
| 2020-12 | 1 | | | | 3 | | 1 | | **5** |
| 2021-01 | 3 | | 1 | | 2 | | | | **6** |
| 2021-02 | 1 | | | | 2 | | 1 | | **4** |
| 2021-03 | 5 | | | 1 | 2 | | 2 | | **10** |
| 2021-04 | 6 | | | | 3 | | | | **9** |
| 2021-05 | 5 | | 1 | 6 | 4 | | 1 | | **17** |
| 2021-06 | 10 | | | | | | | | **10** |
| 2021-07 | 6 | | 1 | | 1 | | 1 | | **9** |
| 2021-08 | 11 | 1 | 3 | | 2 | | | 1 | **18** |
| 2021-09 | 8 | | | | | | 2 | | **10** |
| **Total** | **76** | **1** | **10** | **9** | **45** | **1** | **19** | **1** | **162** |

| | **Total** | **Sup. Ct.** |
|---|---|---|
| Total Cases Under Advisement | 19 | 19 |
| Sub-total of Cases Over One Year Old | 143 | 47 |
| **Total Cases Over One Year Old** | **162** | **66** |



# All Pending Files as of Month Ending September 2022

| Year/Month | SD | DEC | REV | OLPR | AD | PAN | HOLD | SUP | S12C | SCUA | REIN | RESG | TRUS | **Total** |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2017-03 | | | | | | | 1 | | | 1 | | | | **2** |
| 2018-06 | | | | | | | | 1 | | | | | | **1** |
| 2018-07 | | | | | | | | 2 | | | | | | **2** |
| 2018-08 | | | | | | | | 1 | | | | | | **1** |
| 2018-10 | | | | 2 | | | | | | | | | | **2** |
| 2018-12 | | | | 1 | | | | | | | | | | **1** |
| 2019-03 | | | | | | | | 1 | | 1 | | | | **2** |
| 2019-04 | | | | 2 | | 2 | | | | | | | | **4** |
| 2019-05 | | | | | | | | 3 | | | | | | **3** |
| 2019-06 | | | | | | | 1 | | | | | | | **1** |
| 2019-07 | | | | 1 | | | | 1 | | 1 | | | | **3** |
| 2019-08 | | | | 1 | | | | | | | | | | **1** |
| 2019-09 | | | | | | | | 3 | | | | | | **3** |
| 2019-10 | | | | | | | | 1 | | 2 | | | | **3** |
| 2019-11 | | | | 1 | | | | | | | | | | **1** |
| 2019-12 | | | | | | | | 1 | | | | | | **1** |
| 2020-01 | | | | 4 | | | | | | | | | | **4** |
| 2020-02 | | | | 3 | | | | | | 1 | | | | **4** |
| 2020-03 | | | | | | | | | | 1 | | | | **1** |
| 2020-04 | | | | | | | | 1 | | | | | | **1** |
| 2020-05 | | | | 1 | | | | 2 | | | | | | **3** |
| 2020-06 | | | | | | 1 | | 2 | | | | | | **3** |
| 2020-07 | | | | 1 | | | | | | | | | | **1** |
| 2020-08 | | | | 1 | | | | 2 | | 3 | | | | **6** |
| 2020-09 | | | | 2 | | 1 | | 3 | | | | | | **6** |
| 2020-10 | | | | | | | | 2 | 1 | 1 | | | | **4** |
| 2020-12 | | | | 1 | | | | 3 | | 1 | | | | **5** |
| 2021-01 | | | | 3 | | 1 | | 2 | | | | | | **6** |
| 2021-02 | | | | 1 | | | | 2 | | 1 | | | | **4** |
| 2021-03 | | | | 5 | | | 1 | 2 | | 2 | | | | **10** |
| 2021-04 | | | | 6 | | | | 3 | | | | | | **9** |
| 2021-05 | | | | 5 | | 1 | 6 | 4 | | 1 | | | | **17** |
| 2021-06 | | | | 10 | | | | | | | | | | **10** |
| 2021-07 | | | | 6 | | 1 | | 1 | | 1 | | | | **9** |
| 2021-08 | | | | 11 | 1 | 3 | | 2 | | | | | 1 | **18** |
| 2021-09 | | | | 8 | | | | | | 2 | | | | **10** |
| 2021-10 | | | | 11 | | | | | 1 | | | | | **12** |
| 2021-11 | | | | 13 | 1 | | | 1 | | 1 | | | | **16** |
| 2021-12 | | 1 | | 14 | 1 | | | | 2 | | 1 | | | **19** |
| 2022-01 | | | | 14 | | 1 | 1 | | | 1 | | | 1 | **18** |
| 2022-02 | | | | 15 | 1 | | 1 | | | | | | | **17** |
| 2022-03 | | 2 | | 17 | | | | 1 | | 2 | 1 | | | **23** |
| 2022-04 | | 7 | | 25 | | 1 | | 1 | | | 2 | | | **36** |
| 2022-05 | | 8 | 1 | 17 | | | 1 | | | 3 | | | | **30** |
| 2022-06 | | 14 | 3 | 19 | 1 | | 1 | | | 1 | | 1 | 1 | **41** |
| 2022-07 | | 20 | | 8 | | 1 | | | | 1 | | 1 | | **31** |
| 2022-08 | 1 | 23 | | 20 | | | | | | | 1 | | | **45** |
| 2022-09 | 9 | 19 | | 14 | | | 1 | | | | | 5 | | **48** |
| **Total** | **10** | **94** | **4** | **263** | **5** | **13** | **14** | **48** | **4** | **28** | **5** | **7** | **3** | **498** |

| ALL FILES PENDING & FILES OVER 1 YR. OLD | |
|---|---|
| SD | Summary Dismissal |
| DEC | District Ethics Committees |
| REV | Being reviewed by OLPR attorney after DEC report received |
| OLPR | Under Investigation at Director's Office |
| AD | Admonition issued |
| ADAP | Admonition Appealed by Respondent |
| PROB | Probation Stipulation Issued |
| PAN | Charges Issued |
| HOLD | On Hold |
| SUP | Petition has been filed. |
| S12C | Respondent cannot be found |
| SCUA | Under Advisement by the Supreme Court |
| REIN | Reinstatement |
| RESG | Resignation |
| TRUS | Trusteeship |

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 502** **September 28, 2022**

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

*Under Model Rule 4.2,*[1] *if a person is represented in a matter, lawyers for others in the matter may not communicate with that represented person about the subject of the representation but instead must communicate about the matter through the person's lawyer, unless the communication is authorized by law or court order or consented to by the person's lawyer.*

*When a lawyer is self-representing, i.e., pro se, that lawyer may wish to communicate directly with another represented person about the subject of the representation and may believe that, because they are not representing another in the matter, the prohibition of Model Rule 4.2 does not apply. In fact, both the language of the Rule and its established purposes support the conclusion that the Rule applies to a pro se lawyer because pro se individuals represent themselves and lawyers are no exception to this principle.*

*Accordingly, unless the pro se lawyer has the consent of the represented person's lawyer or is authorized by law or court order to communicate directly with the other represented person about the subject of the representation, such communication is prohibited. In this context, if direct pro se lawyer-to-represented person communication about the subject of the representation is desired, the pro se lawyer and counsel for the represented person should reach advance agreement on the permissibility and scope of any direct communications.*

## I. Introduction

Model Rule 4.2, Communication with Person Represented by Counsel, is commonly known as the "no-contact" or "anticontact" rule.[2] It has been part of the ABA Model Rules of Professional

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] ELLEN J. BENNETT & HELEN W. GUNNARSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 454 (9th ed. 2019).

Conduct since their 1983 inception in largely its present form.[3] The rule is "universally followed" in American jurisdictions.[4] It provides as follows:

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

Viewed broadly, the rule requires that a lawyer's communications about a legal matter be routed through a represented person's lawyer; direct communication with the represented person about the subject of the representation is prohibited unless the lawyer has the consent of the represented person's lawyer or is authorized to engage in the communication by law or a court order. The rule "contributes to the proper functioning of the legal system" by preventing lawyers from overreaching, from interfering in other lawyers' relationships with their clients, and from eliciting protected information via "uncounselled disclosure."[5]

When a lawyer engages in self-representation in a legal matter in which that lawyer is personally involved, in other words, when a lawyer is acting pro se,[6] application of Model Rule 4.2 is less straightforward. Such a lawyer might not appear to be "representing a client" in the matter because the lawyer is acting solely on the lawyer's own behalf, i.e., "without a lawyer."[7] Moreover, the commentary to Rule 4.2 specifically states that "Parties to a matter may communicate directly with

[3] In 1995, an amendment proposed by the ABA Standing Committee on Ethics and Professional Responsibility changed the term "party" to "person" in the text of the rule and revised the Comment. In 2002, amendments proposed by the ABA Ethics 2000 Commission added a reference to "court order" in the text of the rule and revised the Comment. *See* ART GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, 558-66 (2013). Model Rule 4.2 can be traced back to Canon 9 of the 1908 ABA Canons of Professional Ethics, which stated that "[a] lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." The concept carried forward into the 1969 ABA Model Code of Professional Responsibility, DR 7-104(A)(1), which provided that a lawyer should not "communicate . . . on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396, at 3-4 (1995) (recounting long history of anti-contact rule); Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward A Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 799 (2009).

[4] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §99 cmt. b (2000) [hereinafter RESTATEMENT THIRD].

[5] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [1]; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995) ("the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests"). *See also* RESTATEMENT THIRD, *supra* note 4 (purpose is to "protect against overreaching and deception of nonclients," protect "the relationship between the represented nonclient and that person's lawyer" and "assure [] the confidentiality of the nonclient's communications with the lawyer").

[6] Pro se is defined as "For oneself; on one's own behalf; without a lawyer." BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* definition of propria persona as "In his own person." *Id.*

[7] Carl A. Pierce, *Variations on A Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321, 325 (2003) ("On its face, the reference in the Rule to a lawyer 'representing a client' can be read to suggest a negative inference that it does not apply to communication by a lawyer who is acting pro se, or is represented by another lawyer, in a matter in which she is interested.").

each other . . . ."[8] However, a pro se lawyer *is* representing a client. Pro se individuals represent themselves and lawyers are no exception to this principle.[9]

This opinion analyzes applicability of Model Rule 4.2 and the rationale for the anticontact rule in the context of a lawyer engaged in self-representation. The opinion also provides guidance on the advisability in these situations of reaching advance agreement on the permissibility and scope of any direct pro se lawyer-to-represented person communications.[10]

## II. ANALYSIS

Although the general prohibition of Model Rule 4.2 is ubiquitous in U.S. jurisdictions, as applied to pro se lawyers the scope of the rule is less clear.[11] Interpretation of the Rule in this circumstance involves consideration of both its plain language and policy purposes.

The language in the Rule that is primarily at issue in this analysis is its first clause: "*In representing a client*, a lawyer shall not . . . ."[12] The key evils intended to be managed by Model Rule 4.2 are (1) overreaching and deception; (2) interference with the integrity of the client-lawyer relationship; and (3) elicitation of uncounselled disclosures, including inappropriate acquisition of confidential lawyer-client communications.[13] In the context of pro se lawyers, balanced against these policy goals is the principle that, as a general proposition, parties to a matter may communicate directly with each other.[14]

Yet, both the language of the Model Rule and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers. Pro se lawyers represent themselves as "a client," and direct pro se lawyer-to-represented person communication in such circumstances can result in a substantial risk of overreaching, disruption of the represented person's client-lawyer relationship, and acquisition of uncounselled disclosures. That risk outweighs the sometimes-salutary benefit of direct communication. That said, it is important to remember that Model Rule 4.2 applies only when a communication is "about the subject of the representation," i.e., the Rule is matter specific, and a lawyer may speak with another represented person about matters that do not constitute the subject

[8] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [4].

[9] *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS – THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-5 (2021-2022 ed.) ("when a lawyer represents himself pro se, Rule 4.2 can be interpreted to prohibit the lawyer-party from communicating directly with an opposing represented party"); *In re* Haley, 156 Wash. 2d 324, 338, 126 P.3d 1262, 1269 (2006) ("we hold that a lawyer acting pro se is 'representing a client' for purposes of RPC 4.2(a)").

[10] This opinion does not address the related question of applicability of Rule 4.2 when a lawyer is represented by another lawyer and the represented lawyer wishes to communicate with another represented person about the matter.

[11] Samuel J. Levine, *The Law and the "Spirit of the Law,"* 2015 Prof. Law. 1, 17 (2015) (noting the Model Rules do not expressly address a case in which a lawyer is proceeding as a pro se party to a matter) [hereinafter *Spirit of the Law*]; Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 37 (2011) (issue of whether a lawyer who is pro se is constrained by the no-contact rule when the opposing party is represented by counsel was not explicitly addressed in Model Rule 4.2).

[12] MODEL RULES OF PROF'L CONDUCT R. 4.2 (emphasis added).

[13] *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [1]; RESTATEMENT THIRD, *supra* note 4.

[14] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [4]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-362 (1992) (noting that Rule 4.2's prohibition on the lawyer does not purport to govern communications by the lawyer's client and observing that in some circumstances a lawyer is obligated to explain to the client the freedom to communicate with an opposing party).

of the representation. *See* Model Rules R. 4.2, cmt. [4] ("This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.").[15]

### A. Model Rule 4.2 and Pro Se Lawyers

Application of the Rule 4.2 anticontact principle to pro se lawyers is a well-documented ethical dilemma. There are decades worth of disciplinary cases,[16] civil cases,[17] and ethics opinions[18] concluding that a lawyer acting in a pro se capacity may not communicate directly with a represented adversary or other represented person about the subject of the representation without the consent of that person's lawyer, unless the communication is authorized by law or court order.[19] These authorities reason that a pro se lawyer is "representing a client" for purposes of Model Rule 4.2, and that the policy underlying the prohibition makes it clear that such communications are "ripe with potential for overreaching and exploitation,"[20] and that "the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se."[21]

Viewed in this light, it is not possible for a pro se lawyer to "take off the lawyer hat" and navigate around Rule 4.2 by communicating solely as a client. Consequently, the proposition, set forth in Comment [4] to Model Rule 4.2, that "[p]arties to a matter may communicate directly with each

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[15] Note, however, that perspectives can differ in this context about whether a lawyer's effort to communicate with a represented person is beyond the scope of the rule. *See In re* Steele, 181 N.E.3d 976 (Ind. 2022) (rejecting respondent's contention that an email was not "about the subject of the representation" but rather "spoke only of matters involving friendship," a contention that was belied both by the language of the email itself, which thrice explicitly requested that the adverse party bypass their lawyer, and by the context in which it was sent, after two weeks of unsuccessful discussions with opposing counsel and the filing of a lawsuit).

[16] *In re* Steele, 181 N.E.3d 976 (Ind. 2022); The Florida Bar v. Faro, Report of Referee, Florida Bar File 2014-70, 913 (11J) (July 24, 2017), *available at* https://lsg.floridabar.org/dasset/DIVADM/ME/MPDisAct.nsf/DISACTVIEW/68D12AE245D19BFB852582AA000A78F3/$FILE/_461.PDF, aff'd as modified, Case No. SC16-1408, 2018 WL 4691179 (Fla. Sept. 28, 2018); *In re* Hodge, 407 P.3d 613 (Kan. 2017); Medina County Bar Association v. Cameron, 958 N.E.2d 138 (Ohio 2011); *In re* Lucas,789 N.W.2d 73 (N.D. 2010); *In re* Haley, 126 P.3d 1262 (Wash. 2006); *In re* Schaefer, 25 P.3d 191 (Nev. 2001); Vickery v. Comm'n for Lawyer Discipline, 5 S.W.3d 241 (Tex. Ct. App. 1999); Office of Disciplinary Counsel v. Donnell, 684 N.E.2d 36 (Ohio 1997); Runsvold v. Idaho State Bar, 925 P.2d 1118 (Idaho 1996); *In re* Smith, 861 P.2d 1013 (Or. 1993) (application to corporate representation)*; In re* Segall, 509 N.E.2d 988 (Ill. 1987) (application to corporate representation).

[17] Fichelson v. Skorupa, 13 Mass. L. Rptr. 458 (Mass. Super. Ct. July 31, 2001) (citing ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (4th ed.)); Sandstrom v. Sandstrom, 880 P.2d 103 (Wyo. 1993).

[18] Ala. State Bar Op. RO-85-52 (1985); Alaska Bar Ass'n Op. 95-7 (1995); D.C. Bar Op. 258 (1995); Haw. Disciplinary Bd. Op. 44 (2003); Mass. Bar Ass'n Op. 97-1 (1997); State Bar of Mich. Op. CI-1206 (1988); State Bar of Nev. Standing Comm. On Ethics & Prof 'l Responsibility, Formal Op. 8 (1987); N.Y. City Bar, Formal Op. 2011-01 (2011); Va. State Bar Op. 1527 (1993) (application to corporate representation); Va. State Bar Op. 1890 (2020).

[19] Oregon has adopted a modified version of Model Rule 4.2 to address this issue. Or. Rules of Prof'l Conduct R. 4.2 ("In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject . . . .").

[20] The Florida Bar v. Faro, Report of Referee, Florida Bar File 2014-70, 913 (11J), at 10 (July 24, 2017), https://lsg.floridabar.org/dasset/DIVADM/ME/MPDisAct.nsf/DISACTVIEW/68D12AE245D19BFB852582AA000A78F3/$FILE/_461.PDF, aff'd as modified, Case No. SC16-1408, 2018 WL 4691179 (Fla. Sept. 28, 2018).

[21] *In re* Schaefer, 25 P.3d 191, 199 (Nev. 2001).

other"[22] does not apply to pro se lawyers. This proposition recognizes that, in general, the rules of professional conduct establish limits on lawyer behavior, not that of their clients.[23]

The first clause of Model Rule 4.2— "*In representing a client*, a lawyer shall not . . . ."[24]—may be seen as creating an ambiguity as applied to lawyers representing themselves. The conclusion of many jurisdictions is more persuasive and consistent with the purposes of Model Rule 4.2.[25] A pro se lawyer is self-representing, i.e., "representing a client" for purposes of Model Rule 4.2. The risk in this situation of overreaching, disruption of the represented person's client-lawyer relationship, and acquisition of uncounselled disclosures, is acute, outweighing the potential benefit of direct client-to-client communication.[26] Accordingly, unless a pro se lawyer has the consent of the other represented person's lawyer or is authorized by law or court order to communicate directly with the other represented person about the subject of the representation, such communication is prohibited.[27]

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[22] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. [4]; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011) ("Even though parties to a matter are represented by counsel, they have the right to communicate directly with each other.").

[23] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-362 (1992) (noting that Model Rule 4.2's prohibition on the lawyer does not purport to govern communications by the lawyer's client); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS – THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-5 (2021-2022 ed.) ("The rule governs lawyer, not their clients . . . ."). It is well established, however, that a lawyer cannot direct client-to-client communication as a way of evading Model Rule 4.2's prohibition. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (2011) (when advising a client about direct client-to-client communication, the line between permissible advice and impermissible assistance "must be drawn on the basis of whether the lawyer's assistance is an attempt to circumvent the basic purpose of Rule 4.2"). In the pro se lawyer situation, it is not feasible to parse the distinction between a lawyer acting as a lawyer and a lawyer acting as a client.

[24] MODEL RULES OF PROF'L CONDUCT R. 4.2 (emphasis added).

[25] *See, e.g.*, Md. Bar Ass'n Ethics Comm., *Can Pro Se Lawyer Speak with A Represented Party over the Objection of the Party's Lawyer?*, MD. B.J., Sept./Oct. 2006, at 57, 59 ("We believe the opinions that prohibit a lawyer from having contact with a represented party opponent to be the most persuasive."). We recognize that a handful of authorities, including the Restatement of the Law Governing Lawyers, have come to a different conclusion. *See* RESTATEMENT THIRD, *supra* note 4, cmt. e, at 73 ("[a] lawyer representing his or her own interests pro se may communicate with an opposing represented non-client on the same basis as any other principals."). The Reporter's Note, however, recognizes that "The position of the ABA ethics committee is probably contrary to that in the Section and Comment . . . ." *Id.* Reporter's Note on Illustration 3 (citing ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 982 (1967)). *See also In re* Benson, 275 Kan. 913, 918, 69 P.3d 544, 548 (2003); Texas Ethics Comm'n Advisory Op. 653 (Jan. 2016); Cal. Rules of Prof'l Conduct R. 4.2, cmt. 3 ("The rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person* in that matter."). *Cf.* N.Y. Rules of Prof'l Conduct R. 4.2(c) ("A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.").

[26] *See generally Spirit of the Law*, *supra* note 11 ("The methodologies courts have employed to expand the scope of the no-contact rule to include pro se lawyers exemplify the potential relevance of a spirt of the law approach for the interpretation of ethics codes."). Recognizing the significance of Rule 4.2's underlying public policy, an Illinois appellate court upheld application of Rule 4.2 to a non-lawyer pro se plaintiff in a civil case. *See* Zemater v. Village of Waterman, 157 N.E.3d 1069, 1074 (Ill. App. 2020) ("Protecting defendant under these circumstances also furthered public policy regarding the confidential and fiduciary nature of the attorney-client relationship.").

[27] This conclusion is consistent with this Committee's 1967 analysis of Canon 9 of the former Canons of Professional Ethics. *See* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 982 (1967) (attorney who is a

### B. Obtaining Consent for Client-to-Client Communication

In certain situations, otherwise prohibited client-to-client communications involving a pro se lawyer may be beneficial.[28] If a pro se lawyer wishes in good faith to communicate with another represented person about the subject of the representation, that lawyer should contact the represented person's counsel and seek to obtain consent, providing an opportunity for that lawyer to object, consent, or consent by agreement to conditions under which such communications are to take place. If a lawyer receives such a request from a pro se lawyer, it is prudent to discuss with the client in advance the advisability of such communication, along with the risks and benefits of such communication.[29] In some circumstances it may be appropriate to advise the client not to communicate with the pro se lawyer.

Although a lawyer's decision to consent to a pro se lawyer's communication with the lawyer's client is within the lawyer's discretion and will depend on the circumstances, there are certain situations in which direct communication between a pro se lawyer and the represented person are likely necessary or appropriate such that consenting to the communication makes sense.

Conversely, consenting to a communication where the pro se lawyer appears to be overreaching for a strategic advantage—such as seeking the communication for a concession to an extension of time to produce documents, renegotiating terms of an agreed-upon contract, or calling to elicit disclosures—is not advisable.

Advance agreements between counsel for the represented person and the pro se lawyer are important to avoid disputes about compliance and ensure no disruption of Model Rule 4.2's protections. Thus, the agreement should be clear about the scope of any direct pro se lawyer-to-represented person communications. It would be prudent to memorialize the agreement in writing.

## III. CONCLUSION

Under Model Rule 4.2, in representing a client, a lawyer may not communicate with a person the lawyer knows is represented by counsel about the subject of the representation, unless that person's counsel has consented to the communication, or the communication is authorized by law or court order. When a lawyer is participating in a matter pro se, that lawyer is engaged in self-representation and is therefore subject to Model Rule 4.2's prohibition.

## DISSENT

I must respectfully dissent from the conclusion of the well-written majority opinion because I cannot agree that "both the language of the Model Rule and its purpose lead to the conclusion that the no-contact rule applies to pro se lawyers." While the *purpose* of the rule would clearly be

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defendant in a case may not settle the case directly with the plaintiff who is represented by counsel without the knowledge of the plaintiff's counsel).

[28] *See* Att'y Grievance Comm'n of Maryland v. Trye, 444 Md. 201, 221, 118 A.3d 980, 991 (2015) (noting that "direct communication between the principals—leaving the lawyers out of the room—is sometimes the path to settlement of a dispute").

[29] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-362 (1992) (in some circumstances a lawyer is obligated to explain to the client the freedom to communicate with an opposing party).

served by extending it to self-represented lawyers, its language clearly prohibits such application. Again, Model Rule 4.2 states:

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

Our majority opinion thoughtfully and candidly discusses the split of authority interpreting the rule. It is not uncommon for ethics committees to weigh in when there is such a split. But it is, I hope, unusual for a committee to nullify plain language through interpretation, especially when the committee has jurisdiction to propose rule amendments.

The interpretation of our majority opinion and the ethics and discipline opinions cited therein depend upon the conclusion that, "A pro se lawyer is self-representing, i.e., 'representing a client' for purposes of Model Rule 4.2." Majority Opinion, at p. 5. This logic provides the rationale for cases holding that the rule applies to pro se lawyers.[1] The number of opinions following this approach is not convincing if the analysis is not persuasive; error compounded is still error.

Applying Rule 4.2 to pro se lawyers is supported by compelling policy arguments. It is not the result I object to, it is the mode of rule construction that I cannot endorse. Self-representation is simply not "representing a client," nor will an average or even sophisticated reader of these words equate the two situations. See *In re Haley*, 126 P.3d 1262, 1267, 1272 (Wash. 2006) (majority and concurring opinions referencing definitions and authorities). Rather, this is an "ingenious bit of legal fiction." *Haley*, at p. 1272 (Sanders, J., concurring). Further, this approach to construing the rule's language renders the phrase "in representing a client" surplusage, contrary to a basic canon of construction.[2]

It is also simply wrong to perpetuate language that *was* clear but has been made misleading by opinions effectively reading that language out of the rule. When an attorney consults the rule, it is highly unlikely that the phrase "in representing a client" will be considered to include self-representation. If the attorney goes further and consults Comment [4], the Comment will assure the attorney that, "Parties to a matter may communicate directly with each other." Given this apparent clarity, what will tip off the attorney that further research is required? The lesson here must be that nothing is clear. Clear text cannot be relied upon but may only be understood by reading ethics opinions and discipline decisions. Does the text mean what it actually says, as it

[1] *See, e.g., In re* Haley, 126 P.3d 1262 (Wash. 2006) (forthrightly summarizing authorities and all of the reasons one might think the rule means what it says, but noting that jurisdictions considering the question "have generally concluded that the policies underlying the rule are better served by extending the restriction to lawyers acting pro se"). *See also* Runsvold v. Idaho State Bar, 129 Idaho 419, 421, 925 P.2d 1118, 1120 (1996) ("We thus construe the phrase of Rule 4.2, 'in representing a client' to include the situation in which an attorney is acting pro se because this interpretation better effectuates the purpose of Rule 4.2.").

[2] *See* "Surplusage canon," BLACK'S LAW DICTIONARY (11th ed. 2019) ("if possible, every word and every provision in a legal instrument is to be given effect"), citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) ("it is no more the court's function to revise by subtraction than by addition").

does in Connecticut, Kansas, and Texas?[3] Or, does it mean what we wish it said, as several other states have declared?

Model Rule 4.2's plain language making it applicable only to lawyers who represent clients has also been recognized by the Restatement,[4] cases applying the rule prospectively because to do otherwise would amount to a deprivation of due process,[5] and by courts modifying the Model Rule to make it expressly applicable to pro se lawyers.[6]

Thoughtful commentators have identified the problems with Model Rule 4.2's language and inconsistent interpretations, and have recommended fixing the rule rather than straining to achieve its purposes when lawyers represent themselves.[7] By leaving this rule in place, we are also leaving in place a trap. The rule should be amended to achieve the result advocated for in the majority opinion.

Mark Armitage
Robinjit Eagleson

[3] *See* Pinsky v. Statewide Grievance Comm., 216 Conn. 228, 236, 578 A.2d 1075, 1079 (1990) ("plaintiff's letter was a communication between litigants and that the plaintiff had a right to make such a communication because he was not representing a client"); *In re* Benson, 275 Kan. 913, 918, 69 P.3d 544, 548 (2003) ("violation of KRPC 4.2 was not shown to have occurred, as the rule applies only to acts done '[i]n representing a client.'"); and Texas Comm. on Prof'l Ethics Op. 653 (2016) ("Under the Texas Disciplinary Rules of Professional Conduct, a lawyer who is a party in a legal matter but who does not represent any other party in the matter may communicate concerning the matter directly with a represented adverse party without the consent of the adverse party's lawyer.").

[4] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §99(1)(b), and cmt. (e) thereto ("A lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals").

[5] *See, e.g.*, *In re* Discipline of Shaeffer, 25 P.3d 191, 199-202 (Nev. 2001), and *In re* Disciplinary Proceeding Against Haley, 156 Wash. 2d 324, 1267-69; 126 P.3d 1262 (2006).

[6] *See, e.g.*, Or. Rules of Prof'l Conduct R. 4.2: "In representing a client *or the lawyer's own interests*, a lawyer shall not communicate . . ." (emphasis added).

[7] *See, e.g.*, Carl A. Pierce, *Variations on A Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321, 324-329 (2003) (tracing the Ethics 2000 Commission's failure to address the problem pointed out by the author and others and recommending that states adopt a rule with language clearly prohibiting contact by pro se lawyers); Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 38 (2011) (recognizing the split, asserting that the rule does not answer the question and consulting the purpose should be done, but stating: "It would, of course, be optimal for rule drafters to consider explicitly whether particular rules apply to pro se lawyers."); and Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward A Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 831 (2009) (also recognizing this mess and concluding: "We therefore propose changing the text of the Rule from 'In representing a client, a lawyer shall not . . . .' to 'A lawyer participating in a matter shall not . . . .'").

# DUE DILIGENCE *ON LAWYERS*

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

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

Each year the Office of Lawyers Professional Responsibility files with the Minnesota Supreme Court an annual report covering the operations of the discipline system. This year's report, filed on July 1, 2022, can be found on our website, along with all annual reports going back to 1999.[1] One notable aspect of the report is that it provides information about regulation-related activities undertaken by the OLPR other than investigating ethics complaints and prosecuting ethics violations. The topic of this column is one of those activities: disclosures.

## Disclosures

"Disclosures" is the term we use to refer to disclosure of an attorney's disciplinary history. Obviously, all public discipline is public and is available to be viewed on our website. Using the Lawyer Search quick link on the home page of the website, you can look up a lawyer and see if they have any public discipline. Notably, our website is the only place you can find public disciplinary history (aside from whatever might pop up in a web search). When you search the Minnesota Attorney Registration System (MARS), only *current* discipline status is disclosed. Accordingly, if the lawyer has completed any public discipline, the line for "current discipline status" in MARS will show "none," notwithstanding the history of public discipline. Just below that line, however, MARS also refers the individual to our website for further information. If you are looking for a complete list of a lawyer's prior public discipline, the place to search is our website.

But what about private disciplinary history? Minnesota has a category of discipline described as private, which is reserved for ethics violations that are considered isolated and nonserious. Many states do not have private discipline, preferring to disclose even admonitions, but Minnesota does, and we issue far more private discipline each year than we do public discipline. How can someone see if a lawyer has private discipline?

Private discipline, which includes admonitions and private probations, can be disclosed by our Office upon a signed authorization of the lawyer. Each year, our Office responds in writing to hundreds of disclosure requests. The most frequent requests come from individual lawyers seeking disciplinary history as part of their application to the bar of another state. Certifying organizations also regularly seek disciplinary history, as do certain nonprofits vetting volunteer lawyers. The Governor's Office vets the disciplinary history of judicial candidate finalists. One area from which we do not receive regular requests, however, is hiring organizations. This chart lists the inquiring entities/individuals.

I've always found this information interesting. Private discipline is not in itself disqualifying because of its nature: It was issued for a rule violation that was isolated and nonserious. Further, private discipline is for most lawyers an isolated incident—most never have any contact with the

| | No. of Requests | No. of Attorneys | Discipline Disclosed | Open Files |
|---|---|---|---|---|
| **A.** National Conference of Bar Examiners | 239 | 239 | 14 | 3 |
| **B.** Individual Attorneys | 442 | 442 | 19 | 5 |
| **C.** Local Referral Services | | | | |
| 1. RCBA | 1 | 1 | 0 | 0 |
| 2. Hennepin County | 0 | 0 | 0 | 0 |
| **D.** Governor's Office | 27 | 67 | 2 | 3 |
| **E.** Other State Discipline Counsels/State Bars or Federal Jurisdiction | 115 | 115 | 1 | 0 |
| **F.** F.B.I. | 35 | 36 | 1 | 0 |
| **G.** MSBA: Specialist Certification Program | 13 | 128 | 6 | 5 |
| **H.** Miscellaneous Requests | 17 | 28 | 2 | 0 |
| **TOTAL** | 889 | 1056 | 45 | 16 |
| (2020 totals for comparison) | 646 | 868 | 36 | 3 |



Attachment 6c

discipline system again. It always seemed to me, however, that the vetting organization should be in the position to make that determination for itself.

## What is not disclosed

Another interesting aspect of Minnesota's attorney discipline system is the fact that we never disclose to third parties complaints that result in a determination that discipline is not warranted. We frequently advise other jurisdictions requesting complaint history that we cannot disclose this information or even verify if what a lawyer disclosed as their complaint history is accurate. Pursuant to our rules, we can disclose to an affected lawyer their own disciplinary history, including dismissed complaints, so that they can respond to inquiries accurately, but to no one else.

Further, in Minnesota, we also expunge completely any record of dismissals after three years. This is often welcome news to lawyers who receive a complaint they view as frivolous and are glad that there is no permanent record of the complaint. One tip you may wish to consider, however, is to keep a copy of any dismissal you receive. Once three years has passed, we will no longer have a record of that dismissal, and disgruntled complainants have been known to resurface again.

## A cautionary tale

A recent disciplinary case prompted the idea for this column. Lawyers are expected to be trustworthy, and it should not be necessary to corroborate information provided to you by a lawyer. Unfortunately, sometimes corroboration pays off. A local law firm has as part of its hiring process receipt of law school transcripts. Lawyers are asked to provide copies of their law school transcripts as part of the application process. If the interview process continues to the point of an offer, candidates are then required to provide authorizations to verify the information provided as part of a hiring background check.

Much to the surprise of the hiring department, the law firm learned during this process that a candidate they were considering had made material changes to their transcript that included altering class rank and GPA. The transcript submitted with the application reported a class rank of 39 out of 192 and a cumulative GPA of 3.71. In truth, the candidate's class rank was 129 out of 192 and her GPA was 3.08. A subsequent investigation by our Office disclosed the lawyer had made false statements in the process of applying to and being hired at other law firms that had gone undetected.[2] While this is not a case about disciplinary history, the moral of the story remains the same: Vetting basic information about a lawyer's background through the hiring process is worth one's time. I recommend including a lawyer's disciplinary history in that process. It is a very quick process, as disciplinary history is provided within a few days of request and often can be provided the next day.

## Conclusion

When someone hires a lawyer, basic vetting is a good idea, whether it is an employer or a client doing the hiring. Please encourage everyone you know who hires lawyers to use our website to confirm whether someone has public disciplinary history; if you are an organization, you may wish to include private discipline in that process. I have spoken to numerous individuals complaining about their lawyer whom I wish had looked that lawyer up on our website before hiring them. One high priority for our Office is updating our website to continue to make it more user-friendly; at present it is not very mobile-friendly. If you have questions about our disclosure process or suggestions for our website, please contact our office or send me an email. The purpose of discipline is not to punish the lawyer but to protect the public and the profession, and to deter future misconduct by the lawyer and others, and one way those purposes are satisfied is through disclosure of disciplinary history. ▲

**NOTES**

[1] *www.lprb.mncourts.gov/aboutus/annualreports*

[2] *In re Ballard*, A22-0698 (Order dated 6/30/2022), and Petition for Disciplinary Action found at *lprb.mncourts.gov* under Ballard, Lillian.

**ETHICAL OBLIGATIONS**
If you have questions regarding your ethical obligations, please call the ethics help line at 651-296-3952

# YOUR ETHICAL DUTIES IN DEALING WITH *UNREPRESENTED PERSONS*

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

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

It's a fact of legal practice that you will frequently encounter unrepresented individuals in the course of your work for a client. Many litigants or opposing parties in transactions are *pro se* for a variety of reasons, including lack of access to affordable legal representation. Witnesses are often unrepresented. Lately we have seen an uptick in complaints where lawyers have failed to be mindful of their ethical obligations to unrepresented persons. Because of this fact, I thought a refresher on the rules would be helpful.

## Rule 4.3, Minnesota Rules of Professional Conduct (MRPC)

Rule 4.3, MRPC, conveniently entitled "Dealing with Unrepresented Person," sets out several requirements that a lawyer must meet. The rule seeks to avoid misunderstandings by the unrepresented person about the lawyer's role, and thus implicitly to prevent any overreaching by the lawyer.

First, Minnesota's Rule 4.3(a) forbids a lawyer to state or imply that the lawyer is disinterested. That last term doesn't mean bored or uncaring; it means, as the comment to the rule explains, that a person not experienced in dealing with legal matters might incorrectly assume that a lawyer is disinterested in his or her loyalties or serves as a disinterested or neutral authority on the law. If the lawyer's client's interests are in fact adverse to the unrepresented person, a lawyer may not falsely state or imply anything to the contrary.

Minnesota's Rule 4.3(b) states that a lawyer shall clearly disclose that her client's interests are adverse to the unrepresented person if the lawyer knows, or reasonably should know, that those interests are adverse. Importantly, the rule is framed as obligatory and the obligation is not only triggered when there may be a misunderstanding about the lawyer's role—but rather is present whenever the interests are adverse. As the plain language of the rule indicates, the obligation is measured objectively and encompasses a lawyer who either actually knows the interests are adverse or *should know* the interests are adverse. If the interests of your client are adverse to those of the unrepresented person, you must clearly state this fact.

Rule 4.3(c) adds that whenever a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role, the lawyer shall make reasonable efforts to correct the misunderstanding. Again the obligation is placed on the lawyer to recognize and correct.

## No legal advice

Finally, the rule adds a special obligation concerning legal advice when dealing with an unrepresented person. Rule 4.3(d) prohibits an attorney from giving legal advice to the unrepresented person, except for the limited advice to secure their own legal counsel, if the lawyer knows or reasonably should know that the person's interests conflict with the interests of the lawyer's client. The rule does not require an attorney to advise an unrepresented person in all instances to secure counsel, although since Rule 4.3(c) places the obligation upon a lawyer to reasonably know if the person misunderstands the lawyer's role, caution is advised.

Easy enough, right? These are the professional responsibility rules many of us learned in law school, and they make sense. Do not state or imply you are neutral/disinterested, clearly disclose any adversity in interests, clarify if there may be a misunderstanding, and do not give legal advice other than to advise the unrepresented person to get their own lawyer. Let's review some scenarios in which failing to follow this rule can lead a lawyer astray.

## Problem situations

Certain situations lend themselves to misunderstandings more readily than others. Say, for example, a lawyer previously represented two individuals jointly, but the parties then had a falling out and the lawyer chose to represent one of the parties in an unrelated matter. Rule 1.9, MRPC, allows lawyers to represent client interests adverse to a former client unless the matter is the same or substantially related to the prior representation, and informed consent is not needed. The former clients, if now unrepresented, may misunderstand their former lawyer's role, believing the lawyer is neutral/disinterested or even still protecting the former client's rights. A clear statement by the lawyer setting out who they represent, and the nature of any adversity, can avoid confusion.

Other situations present the temptation to give legal advice. Many family law matters, landlord-



Attachment 6d

tenant matters, or consumer collection actions, to name a few, may involve a dispute with an unrepresented person. The difficulty may not be that the adverse party is unaware that the lawyer's client has interests adverse to the unrepresented individual, or that the individual is confused by the lawyer's role. In these situations, the chances are high that you will be asked for your legal advice and inclined to offer an opinion to move the matter along.

What if, for example, the unrepresented person asks questions of the lawyer that involve an explanation of the available rights (Do I have the right to...? What if I...?)? While a lawyer may negotiate the resolution of a matter with an unrepresented person, it is a fine line between negotiating and advising about the terms of an agreement. In these situations, it may be permissible to state, for example, "It is my opinion that the law allows XYZ (state client's position regarding the applicable matter), however, I am not your lawyer, this is my client's position, and the only advice I can give you is to secure your own legal counsel." As comment [2] to Rule 4.3, MRPC, states, a lawyer may "explain the lawyer's own view of the meaning of a document or the lawyer's view of the underlying legal obligations."

Similarly, you might be tempted to answer procedural or other legal questions posed by a *pro se* adverse party, or a witness. When is my answer due? Do I need to comply with this subpoena? If I do not want to comply with this subpoena, what can I do? While you might be able to provide general legal information (such as would be provided by the clerk's office or in the summons as required by rule), when you start providing advice that incorporates legal analysis (applying the law to the facts of a given situation), not only are you likely violating Rule 4.3(d), MRPC, but you run the risk of establishing an attorney-client relationship–which, according to the Court, can be formed whenever a lawyer gives legal advice to an individual seeking advice under circumstances where it is reasonable for the individual to rely upon the advice.* Always double-check your statements to unrepresented persons to ensure you are not providing legal advice. Everyone benefits when you state clearly that you cannot provide legal advice and the unrepresented person should secure counsel of their own choice if they have questions or concerns.

## Conclusion

Lawyers often find themselves dealing with an unrepresented adversary or witness. Avoiding misunderstandings is the key component in any such dealing. Following the requirements of Rule 4.3, MRPC, prevents misunderstandings and is your ethical obligation. You can never say "I am not your lawyer" too often–and, where applicable, "my client's interests are adverse to your interest." Even if the unrepresented person understands the lawyer's role, giving legal advice, except the advice to secure counsel, is not allowed. If you have questions regarding your ethical obligations, please call our ethics help line at 651-296-3952, or visit our website at *www.lprb.mncourts.gov*.

* *In re Severson*, 860 N.W.2d 658, 666 (Minn. 2015) (discussing the contract and tort theory of creating an attorney-client relationship).

BENCH+BAR of Minnesota

# Your ethical duties in dealing with unrepresented persons

***BY SUSAN HUMISTON***

*[An **author's note** was added to this article on September 21, 2022. See below.]*

It's a fact of legal practice that you will frequently encounter unrepresented individuals in the course of your work for a client. Many litigants or opposing parties in transactions are *pro se* for a variety of reasons, including lack of access to affordable legal representation. Witnesses are often unrepresented. Lately we have seen an uptick in complaints where lawyers have failed to be mindful of their ethical obligations to unrepresented persons. Because of this fact, I thought a refresher on the rules would be helpful.

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Minnesota's Rule 4.3(b) states that a lawyer shall clearly disclose that her client's interests are adverse to the unrepresented person if the lawyer knows, or reasonably should know, that those interests are adverse. Importantly, the rule is framed as obligatory and the obligation is not only triggered when there may be a misunderstanding about the lawyer's role—but rather is present whenever the interests are adverse. As the plain language of the rule indicates, the obligation is measured objectively and encompasses a lawyer who either actually knows the interests are adverse or *should know* the interests are adverse. If the interests of your client are adverse to those of the unrepresented person, you must clearly state this fact.

Rule 4.3(c) adds that whenever a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role, the lawyer shall make reasonable efforts

to correct the misunderstanding. Again the obligation is placed on the lawyer to recognize and correct.

## No legal advice

Finally, the rule adds a special obligation concerning legal advice when dealing with an unrepresented person. Rule 4.3(d) prohibits an attorney from giving legal advice to the unrepresented person, except for the limited advice to secure their own legal counsel, if the lawyer knows or reasonably should know that the person's interests conflict with the interests of the lawyer's client. The rule does not require an attorney to advise an unrepresented person in all instances to secure counsel, although since Rule 4.3(c) places the obligation upon a lawyer to reasonably know if the person misunderstands the lawyer's role, caution is advised.

Easy enough, right? These are the professional responsibility rules many of us learned in law school, and they make sense. Do not state or imply you are neutral/disinterested, clearly disclose any adversity in interests, clarify if there may be a misunderstanding, and do not give legal advice other than to advise the unrepresented person to get their own lawyer. Let's review some scenarios in which failing to follow this rule can lead a lawyer astray.

## Problem situations

Certain situations lend themselves to misunderstandings more readily than others. Say, for example, a lawyer previously represented two individuals jointly, but the parties then had a falling out and the lawyer chose to represent one of the parties in an unrelated matter. Rule 1.9, MRPC, allows lawyers to represent client interests adverse to a former client unless the matter is the same or substantially related to the prior representation, and informed consent is not needed. The former clients, if now unrepresented, may misunderstand their former lawyer's role, believing the lawyer is neutral/disinterested or even still protecting the former client's rights. A clear statement by the lawyer setting out who they represent, and the nature of any adversity, can avoid confusion.

Other situations present the temptation to give legal advice. Many family law matters, landlord-tenant matters, or consumer collection actions, to name a few, may involve a dispute with an unrepresented person. The difficulty may not be that the adverse party is unaware that the lawyer's client has interests adverse to the unrepresented individual, or that the individual is confused by the lawyer's role. In these situations, the chances are high that you will be asked for your legal advice and inclined to offer an opinion to move the matter along.

What if, for example, the unrepresented person asks questions of the lawyer that involve an explanation of the available rights (Do I have the right to...? What if I...?)? While a lawyer may negotiate the resolution of a matter with an unrepresented person, it is a fine line between negotiating and advising about the terms of an agreement. In these situations, it may be permissible to state, for example, "It is my opinion that the law allows XYZ (state client's position regarding the applicable matter), however, I am not your lawyer, this is my client's position, and the only advice I can give you is to secure your own legal counsel." As comment [2] to Rule 4.3, MRPC, states, a lawyer may "explain the lawyer's own view of the meaning of a document or the lawyer's view of the underlying legal obligations."

Similarly, you might be tempted to answer procedural or other legal questions posed by a *pro se* adverse party, or a witness. When is my answer due? Do I need to comply with this subpoena? If I do not want to comply with this subpoena, what can I do? While you might be able to provide general legal information (such as would be provided by the clerk's office or in the summons as required by rule), when you start providing advice that incorporates legal analysis (applying the law to the facts of a given situation), not only are you likely violating Rule 4.3(d), MRPC, but you run the risk of establishing an attorney-client relationship—which, according to the Court, can be formed whenever a lawyer gives legal advice to an individual seeking advice under circumstances where it is reasonable for the individual to rely upon the advice.* Always double-check your statements to unrepresented persons to ensure you are not providing legal advice. Everyone benefits when you state clearly that you cannot provide legal advice and the unrepresented person should secure counsel of their own choice if they have questions or concerns.

## Conclusion

Lawyers often find themselves dealing with an unrepresented adversary or witness. Avoiding misunderstandings is the key component in any such dealing. Following the requirements of Rule 4.3, MRPC, prevents misunderstandings and is your ethical obligation. You can never say "I am not your lawyer" too often—and, where applicable, "my client's interests are adverse to your interest." Even if the unrepresented person understands the lawyer's role, giving legal advice, except the advice to secure counsel, is not allowed. If you have questions regarding your ethical obligations, please call our ethics help line at 651-296-3952, or visit our website at *www.lprb.mncourts.gov*.

* *In re Severson*, 860 N.W.2d 658, 666 (Minn. 2015) (discussing the contract and tort theory of creating an attorney-client relationship).

**Author's Note**: This article is an update of Martin Cole's 2015 article entitled "Dealing with Unrepresented Persons," published in Bench & Bar in July 2015, and available on our website at lprb.mncourts.gov, as are all prior articles written by this Office. My failure to highlight that fact and provide the appropriate attribution was an error, which I regret. Thank you to Mr. Cole for graciously accepting my apology for this mistake. Also, to clarify any potential confusion caused by the statement, "The rule does not require an attorney to advise an unrepresented person in all instances to secure counsel," Rule 4.3(d), MRPC, permits but does not require a lawyer to advise an unrepresented person to secure counsel. (Posted September 21, 2022.)

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

**ETHICAL OBLIGATIONS**
If you have questions regarding your ethical obligations, please call the ethics help line at 651-296-3952

# ETHICS NEWS
## *from around the country*

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

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

The National Organization of Bar Counsel (NOBC) is a professional organization dedicated to enhancing the effectiveness of lawyer discipline counsel. Formed in 1965, before most states even had professional discipline counsel or operations, NOBC includes representatives from 75 state, federal, and international jurisdictions. The Office of Lawyers Professional Responsibility has long been a member of this valuable organization, and I and another lawyer in the Office recently attended the annual NOBC conference. I thought you might be interested to learn a bit about what is happening around the country in the area of attorney ethics.

### Rule changes

Many jurisdictions are considering or have passed rule changes. While rule changes are always in play across the country, the volume of changes being pursued across various jurisdictions felt notable to many attendees. For example, effective July 1, 2022, Colorado significantly modified its Rule 3.8(d), relating to obligations of a prosecutor. Colorado's Rule 3.8(d) now states:

> (d) timely disclose to the defense all 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 mitigate the offense, or would affect a defendant's decision about whether to accept a plea disposition, except when the prosecutor is relieved of this responsibility by 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.[1]

> COUNSEL FROM OKLAHOMA SHARED THE STARTLING STATISTIC THAT THERE ARE MORE LICENSED LAWYERS OVER 80 THAN UNDER 30 IN THE STATE!

Florida recently expanded its emergency suspension rules to more directly address incapacity unrelated to specific misconduct, an issue Minnesota should examine closely in my view.[2] Like Minnesota, Georgia is looking at adopting the ABA model rules to streamline lawyer advertising, and similarly Tennessee has adopted several advertising rule changes.[3] Louisiana, on the other hand, has gone in the opposite direction, expanding its lawyer advertising rules significantly, including the added requirement that lawyer advertisements, unless exempt, be approved by Louisiana's Professional Conduct Committee.[4] Kentucky amended its rules to eliminate private reprimands, making all attorney discipline public.[5] Missouri adopted a new requirement that lawyers convicted of any felony and certain misdemeanors have a duty to self-report their conviction to the Office of Discipline Counsel.[6]

The American Bar Association's Standing Committee on Ethics and Professional Responsibility is considering significant changes to Rule 5.5 relating to multijurisdictional practice. This review was prompted in part by a proposal from the Association of Professional Responsibility Lawyers (APRL) toward a more "national" license, and in part due to changes in the profession prompted by remote practices that cross jurisdictional borders.

The ABA is informally soliciting feedback on a working draft that would allow a lawyer licensed to practice in one state/jurisdiction to practice in any other state/jurisdiction as long as the lawyer discloses in writing to the prospective client where the lawyer is actually licensed and that the lawyer is not actively licensed to practice in the jurisdiction, and complies with any *pro hac* or other requirements of the jurisdiction. Multijurisdictional practices are often challenging because each state regulates the practice in their state, as do other "jurisdictions" (such as federal or tribal jurisdictions). As you might expect, lots of regulator concerns were expressed over a proposed draft rule that flips the licensing paradigm. This is only a small sampling of rule changes or proposed changes that were discussed, with lots of rule-making activity across the country.



Attachment 6e

### High-profile cases and complaints

Several jurisdictions discussed the challenges arising from the volume of higher-profile cases they are seeing. Many arose from the 2020 election (matters concerning Rudy Giuliani, L. Lin Wood, and Sidney Powell, to name a few), but some of this is part of a trend that started before 2020. One legal scholar who presented at the conference calls it "The Ethics Resistance"[7] to denote the use of legal ethics complaints to hold lawyers to account for ethics failures in their professional capacity that affect the nation or the public as a whole rather than a specific client. Examples in this category include complaints against the former Attorney General William Barr or Kellyanne Conway, a special assistant to former President Donald Trump.

High-profile cases have not been limited to election or political issues. For example, South Carolina's legal community (and general population) has had one surprise after another due to the many criminal charges lodged against attorney Alex Murdaugh. Mr. Murdaugh's alleged crimes run the gamut from allegedly stealing money from clients and money-laundering with a client in a painkiller scheme to a recent indictment for the 2021 murders of his wife and son.

The South Carolina Supreme Court disbarred Mr. Murdaugh on July 12, 2022, having previously suspended him in September 2021. In its order, the court noted that since September 2021, Mr. Murdaugh "has been indicted on more than eighty criminal charges arising from various ongoing investigations. Additionally, Respondent has admitted in various court proceedings and filings that he engaged in financial misconduct involving theft of money from his former law firm; that he solicited his own murder to defraud his life insurance carrier; and that he is liable for the theft of $4,305,000 in settlement funds."[8] Mr. Murdaugh did not contest his disbarment.

### Changing demographics and operations

Counsel from Oklahoma shared the startling statistic that there are more licensed lawyers over 80 than under 30 in the state! This is a stark example of the "aging" that has been widely discussed in recent years as fewer new lawyers join the profession. Illinois reported that over the last several years, annual complaints have dropped by approximately 40 percent, leading to a similar reduction in regulatory personnel. Many other jurisdictions reported a return to complaint filings similar to pre-pandemic levels, but still modestly down from prior-year highs, similar to Minnesota. A common theme of the conference was staffing turnover, with many jurisdictions experiencing a lot of turnover and most experiencing the challenge of hiring and training new employees over the pandemic. And it looks like Hawaii has become the first lawyer regulation office in the country to go fully remote and fully digital.

### Conclusion

As you can see, a lot is happening around the country in attorney ethics. Before accepting this job in 2016, I had no idea what an interesting and dynamic area of law professional regulation is, and it remains interesting to me how much the jurisdictions differ and yet how much the jurisdictions are the same. If you have questions regarding your ethical obligations, please call our ethics help line at 651-296-3952, or visit our website at *www.lprb.mncourts.gov*. ▲

#### NOTES

1 Rule 3.8(d), Colorado Rules of Professional Conduct, Amended and Adopted by the Court, En Banc, 2/24/2022, effective 7/1/2022.

2 Rule 3-5.2, Rules Regulating the Florida Bar (RRTFB), effective 8/1/2022.

3 Tennessee Supreme Court Rule 8, Rules of Professional Conduct 7.1-7.5, effective 9/1/2021.

4 Rules 7.1-7.10, Louisiana Rules of Professional Conduct, with amendments through 1/1/2022.

5 Kentucky Supreme Court Rule 3.380, effective 4/1/2022.

6 Missouri Supreme Court Rule 5.21(a), adopted 5/31/2022, and effective 1/1/2023.

7 Brian Sheppard, *The Ethics Resistance*, 32 Georgetown Journal of Legal Ethics 235 (2019).

8 Order of the Court dated 7/12/2022, *In the Matter of Richard Alexander Murdaugh*, Respondent, Case No. 2022-000812.

# International Survey of Attorney Licensing Fees

***Ranked By Mandatory Annual Fee and Attorney Population***

**Compiled July 1, 2022 by Office of Attorney Ethics of New Jersey**

## A. UNITED STATES

***Maximum Fee*** **=$3,917;** ***Average Fee*** **= $428;** ***Minimum Fee*** **= $98**

| Rank By Attorneys | Rank By Fees | Jurisdiction | Total Attorneys | Maximum Mandatory Annual Fee | Earmarked For Discipline- | Earmarked For Client Protection | Mandatory Malpractice Fee | Inactive Fee | |
|---|---|---|---|---|---|---|---|---|---|
| 26 | 1 | Oregon* | 20,069 | $3,917 | | $20 | $3,300 | $150 | z |
| 48 | 2 | Alaska* | 4,653 | $660 | | $10 | | $215 | |
| 19 | 3 | Connecticut | 39,700 | $640 | | $75 | | | yy |
| 47 | 4 | South Dakota* | 4,800 | $615 | | | | $200 | |
| 41 | 5 | New Hampshire* | 7,500 | $580 | $203 | $20 | | $175 | |
| 21 | 6 | Tennessee+ | 28,895 | $570 | $140 | $10 | | $85 | w |
| 40 | 7 | Hawaii* | 8,130 | $559 | $250 | $50 | | $173 | |
| 2 | 8 | California* | 285,596 | $544 | $25 | $40 | | $183 | |
| 22 | 9 | Arizona* | 25,348 | $505 | | $20 | | $265 | |
| 25 | 10 | Wisconsin* | 20,190 | $504 | $150 | $25 | | $134 | |
| 45 | 11 | Montana* | 5,107 | $495 | $125 | $20 | | $190 | |
| 17 | 12 | Washington* | 40,085 | $478 | | $20 | | $200 | |
| 34 | 13 | Nevada* | 13,001 | $450 | | $25 | | $125 | |
| 23 | 14 | Louisiana* | 23,000 | $435 | $235 | | | | |
| 33 | 15 | Utah* | 13,372 | $430 | | $5 | | $105 | |
| 42 | 16 | Idaho* | 7,006 | $425 | | | | $150 | |
| 43 | 17 | Rhode Island* | 6,522 | $425 | $200 | $25 | | $190 | |
| 37 | 18 | New Mexico* | 10,350 | $420 | $150 | $15 | | $100 | |
| 13 | 19 | Michigan*+ | 46,523 | $415 | $140 | $15 | | $218 | |
| 16 | 20 | Missouri* | 41,206 | $410 | $101 | | | $100 | |
| 7 | 21 | Illinois | 97,115 | $385 | $210 | $25 | | $121 | |
| 51 | 22 | North Dakota* | 3,070 | $380 | $75 | | | | |
| 46 | 23 | Delaware | 4,819 | $367 | | | | $80 | |
| 35 | 24 | Mississippi* | 11,129 | $360 | | | | $50 | |
| 49 | 25 | Wyoming* | 4,487 | $355 | | | | $238 | |
| 15 | 26 | Colorado | 44,438 | $325 | | $25 | | $130 | |
| 18 | 27 | North Carolina* | 39,791 | $325 | | $25 | | | x |

| Rank By Attorneys | Rank By Fees | Jurisdiction | Total Attorneys | Maximum Mandatory Annual Fee | Earmarked For Discipline~ | Earmarked For Client Protection | Mandatory Malpractice Fee | Inactive Fee | |
|---|---|---|---|---|---|---|---|---|---|
| 29 | 28 | Alabama* | 18,882 | $325 | | $25 | | $163 | |
| 32 | 29 | South Carolina* | 15,836 | $325 | $50 | $20 | | $175 | |
| 3 | 30 | Dist. of Columbia* | 111,326 | $324 | $84 | | | $202 | |
| 28 | 31 | Kentucky* | 19,581 | $310 | | $7 | | | |
| 10 | 32 | Massachusetts | 71,284 | $300 | | | | $150 | |
| 11 | 33 | Georgia* | 53,564 | $286 | | $15 | | $130 | v |
| 12 | 34 | Virginia* | 52,052 | $285 | | $5 | | $130 | |
| 9 | 35 | Pennsylvania | 75,680 | $275 | $195 | $50 | | $100 | |
| 30 | 36 | Oklahoma* | 18,382 | $275 | | $50 | | | |
| 27 | 37 | Iowa | 19,743 | $270 | $200 | $50 | | $50 | |
| 4 | 38 | Florida* | 110,959 | $265 | | $25 | | $175 | |
| 44 | 39 | Maine | 5,389 | $265 | | $20 | | | |
| 20 | 40 | Minnesota+ | 29,986 | $256 | $128 | | | $211 | |
| 39 | 41 | West Virginia* | 9,645 | $250 | | | | $100 | |
| 5 | 42 | Texas*- | 108,816 | $235 | | | | $50 | y |
| 6 | 43 | New Jersey | 98,957 | $212 | $148 | $50 | | | |
| 50 | 44 | Vermont | 3,400 | $210 | | | | $85 | |
| 31 | 45 | Kansas | 16,370 | $200 | $180 | | | $65 | |
| 36 | 46 | Arkansas | 10,955 | $200 | | $17 | | $100 | |
| 1 | 47 | New York | 345,766 | $188 | $9,090 | $30 | | | |
| 24 | 48 | Indiana | 22,708 | $180 | $108 | | | $90 | |
| 8 | 49 | Ohio- | 80,787 | $175 | | | | | |
| 14 | 50 | Maryland | 45,962 | $130 | $110 | $20 | | | |
| 38 | 51 | Nebraska* | 10,142 | $98 | $60 | | | $49 | |

| | |
|---|---|
| **TOTAL LAWYERS** | 2,212,074 |
| NJ Percentage | 4.47% |

~ Several disciplinary system budgets specifically earmark in advance the dollar amount of the annual fee allocated to discipline.

* Mandatory Bar State

\+ Proposed future increase/decrease pending or approved

v Bar Facility Assessment ($50) and CPF Assessment ($25) for 4 years.

w State tax on attorney licenses ($400).

x $50 of this amount is a mandatory Judicial Campaign Surcharge which the State Bar collects but receives no benefit from. Money is disbursed to State Board of Elections.

y State tax on attorney licenses was $65. This tax was repealed by the legislature.

yy State or local tax on attorney licenses ($565).
z $3,300 average mandatory malpractice fee. Average Nationwide Annual Fee excluding Oregon malpractice charge is $363.

| | |
|---|---|
| **Michigan** | On June 8, 2022, the Michigan Supreme Court adopted Administrative Order No. 2022-3 which increased the State Bar portion of the annual registration fee by $80. This was the first increase in 18 years. |
| **Minnesota** | Effective October 1, 2022, active fee will increase from $248 to $256, inactive fee will increase from $205 to $211. Effective October 1, 2023, active fee will increase from $256 to $263. Inactive fee will increase from $211 to $217. |
| **Ohio** | There is a net decrease of $4 to the overall member fee for 2022. At the House of Delegates meeting in October, the HOD voted to move funding for the Diversity & Inclusion program into the general OSB budget (discontinuing it as a separate assessment), and increase its allocation by $6. The Client Security Fund assessment was decreased by $10. |
| **Tennessee** | The Tennessee Lawyers Fund for Client Protection filed a petition on March 11, 2022 with the Court to increase their $10 portion of the annual attorney registration fee. The Court accepted comments until June 10, 2022. No order has been issued to date. |
| **Texas** | Attorney Occupation Tax of $65 repealed by legislature. |

# National Survey of Attorney Licensing Fees

## *Voluntary States In Order of Fee Amounts*

**Compiled July 1, 2022 by Office of Attorney Ethics of New Jersey**

Maximum Fee = **$640** Average Fee = **$286** Minimum Fee = **$130**

| Rank By Attorneys | Rank By Fees | Jurisdiction | Total Attorneys | Maximum Mandatory Annual Fee | |
|---|---|---|---|---|---|
| 9 | 1 | Connecticut | 39,700 | $640 | yy |
| 11 | 2 | Tennessee+ | 28,895 | $570 | w |
| 3 | 3 | Illinois | 97,115 | $385 | |
| 17 | 4 | Delaware | 4,819 | $367 | |
| 8 | 5 | Colorado | 44,438 | $325 | |
| 6 | 6 | Massachusetts | 71,284 | $300 | |
| 5 | 7 | Pennsylvania | 75,680 | $275 | |
| 13 | 8 | Iowa | 19,743 | $270 | |
| 16 | 9 | Maine | 5,389 | $265 | |
| 10 | 10 | Minnesota+ | 29,986 | $256 | |
| 2 | 11 | New Jersey | 98,957 | $212 | |
| 18 | 12 | Vermont | 3,400 | $210 | |
| 14 | 13 | Kansas | 16,370 | $200 | |
| 15 | 14 | Arkansas | 10,955 | $200 | |
| 1 | 15 | New York | 345,766 | $188 | |
| 12 | 16 | Indiana | 22,708 | $180 | |
| 4 | 17 | Ohio- | 80,787 | $175 | |
| 7 | 18 | Maryland | 45,962 | $130 | |
| | | **TOTAL LAWYERS** | 1,041,954 | | |

\+ Proposed future increase pending or approved
w State tax on attorney licenses ($400).
yy State or local tax on attorney licenses ($565).

## Future Annual Fee Increase Approved or Proposed

**Minnesota** Effective October 1, 2022, active fee will increase from $248 to $256, inactive fee will increase from $205 to $211. Effective October 1, 2023, active fee will increase from $256 to $263. Inactive fee will increase from $211 to $217.

**Ohio** There is a net decrease of $4 to the overall member fee for 2022.
At the House of Delegates meeting in October, the HOD voted to move funding for the Diversity & Inclusion program into the general OSB budget (discontinuing it as a separate assessment), and increase its allocation by $6. The Client Security Fund assessment was decreased by $10.

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# National Survey of Attorney Licensing Fees

## *Mandatory States In Order of Fee Amounts*

**Compiled July 1, 2022 by Office of Attorney Ethics of New Jersey**

Maximum Fee = **$3,917** Average Fee = **$505** Minimum Fee = **$98**

| Rank By Attorneys | Rank By Fees | Jurisdiction | Total Attorneys | Maximum Mandatory Annual Fee | |
|---|---|---|---|---|---|
| 14 | 1 | Oregon* | 20,069 | $3,917 | z |
| 31 | 2 | Alaska* | 4,653 | $660 | |
| 30 | 3 | South Dakota* | 4,800 | $615 | |
| 26 | 4 | New Hampshire* | 7,500 | $580 | |
| 25 | 5 | Hawaii* | 8,130 | $559 | |
| 1 | 6 | California* | 285,596 | $544 | |
| 11 | 7 | Arizona* | 25,348 | $505 | |
| 13 | 8 | Wisconsin* | 20,190 | $504 | |
| 29 | 9 | Montana* | 5,107 | $495 | |
| 9 | 10 | Washington* | 40,085 | $478 | |
| 20 | 11 | Nevada* | 13,001 | $450 | |
| 12 | 12 | Louisiana* | 23,000 | $435 | |
| 19 | 13 | Utah* | 13,372 | $430 | |
| 27 | 14 | Idaho* | 7,006 | $425 | |
| 28 | 15 | Rhode Island* | 6,522 | $425 | |
| 22 | 16 | New Mexico* | 10,350 | $420 | |
| 7 | 17 | Michigan*+ | 46,523 | $415 | |
| 8 | 18 | Missouri* | 41,206 | $410 | |
| 33 | 19 | North Dakota* | 3,070 | $380 | |
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| 2 | 25 | Dist. of Columbia* | 111,326 | $324 | |
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| 5 | 27 | Georgia* | 53,564 | $286 | v |
| 6 | 28 | Virginia* | 52,052 | $285 | |
| 17 | 29 | Oklahoma* | 18,382 | $275 | |
| 3 | 30 | Florida* | 110,959 | $265 | |
| 24 | 31 | West Virginia* | 9,645 | $250 | |
| 4 | 32 | Texas* | 108,816 | $235 | y |
| 23 | 33 | Nebraska* | 10,142 | $98 | |
| | | | 1,170,120 | | |

\+ Proposed future increase/decrease pending or approved

v Bar Facility Assessment for 5 years ($75).

x $50 of this amount is a mandatory Judicial Campaign Surcharge which the State Bar collects but receives no benefit from. Money is disbursed to State Board of Elections.

y State tax on attorney licenses was $65. This tax was repealed by the legislature.

z $3,300 average mandatory malpractice fee. Average Nationwide Annual Fee among Mandatory Bar States excluding Oregon malpractice charge is $405.

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