LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
MEETING AGENDA

Friday, October 29, 2021 – 1:00 p.m.
Zoom meeting (invitation to follow for members)
If you are not a member of the Board and wish to attend the virtual meeting, call the Office at 651-296-3952

1. Approval of Minutes of June 18, 2021, Lawyers Board Meeting (Attachment 1)

2. Office and Board COVID-19 Response
   a. Hybrid Work and Vaccine Verification Program
   b. Order Governing the Continuing Operations of the Minnesota Judicial Branch, Updated Preparedness Plan and Court FAQ (Attachment 2)

3. Bar Exam Work Group Representatives

4. Committee Updates:
   a. Update on Committee Restructure (Attachment 3)
   b. Rules and Opinions Committee- Peter Ivy
      (i.) Advertising and Confidentiality Rule Change Petitions Public Comment Order (Attachment 4)
      (ii.) Info Item: MSBA Resolution for Personal Leave (Attachment 5)
      (iii.) Cryptocurrency
      (iv.) Probable Cause
   c. Training, Education and Outreach Committee- Allan Witz
      (i.) Annual Seminar Video and Feedback (Attachment 6)
      (ii.) New Member Training Manual
      (iii.) Updated Panel Manual
   d. Equity, Equality, and Inclusion Committee-Michael Friedman
      (i.) Workplan and Priorities

5. Panel assignment changes (Attachment 7)

6. Director's Report: (Attachment 8)
   a. Statistics
   b. Office Updates

7. Proposed 2022 Meeting Dates (Attachment 9)

8. New Business

9. Quarterly Closed Session

10. Next Meeting, January 28, 2022

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

Attachment 1

MINUTES OF THE 195th MEETING OF THE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

June 18, 2021

The 195th meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, June 18, 2021, electronically via Zoom. Present were: Board Chair Robin Wolpert, and Board Members Landon J. Ascheman, Benjamin J. Butler, Daniel J. Cragg, Michael Friedman, Katherine Brown Holmen, Peter Ivy, Virginia Klevorn, Tommy A. Krause, Mark Lanterman, Paul J. Lehman, Kristi J. Paulson, William Z. Pentelovitch, Andrew N. Rhoades, Susan C. Rhode, Geri Sjoquist, Susan Stahl Slieter, Mary L. Waldkirch Tilley, Antoinette M. Watkins, Bruce R. Williams, Allan Witz, and Julian C. Zebot. Present from the Director's Office were: Director Susan M. Humiston and Managing Attorneys Jennifer S. Bovitz and Binh T. Tuong. Also present was Minnesota Supreme Court Associate Justice Natalie E. Hudson and Nicholas Ryan.

Board Chair Robin Wolpert shared that she attended the ABA Center for Professionalism conference. One of the presentations she attended was on remote bias, which included a focus on technical difficulties and blame that can be attributed as a result of those difficulties. Ms. Wolpert also shared that bias can occur with the framing that is used and the cues you take from only the face. Additionally, anxieties can also increase from seeing your own face. Individuals may also be less likely to ask questions and the lack of eye contact may demonstrate to some a lack of ability to demonstrate empathy and warmth.

Ms. Wolpert also shared that she was having drinks with a retired judge who asked how the Board was performing. Ms. Wolpert explained that she compared the work of the Board to virtuosos and considered herself the conductor. Ms. Wolpert announced that this is going to be her last meeting and that Justice Hudson will speak to the issue more later.

1. APPROVAL OF MINUTES (ATTACHMENT 1).

Director Susan Humiston addressed that we received a correction from Bill Wernz relating to the draft minutes as to his years of experience. A motion was made to approve the minutes of the April 23, 2021, Board meeting with the amendment reflecting Mr. Wernz's correct years of experience. The motion passed unanimously.

2. OFFICE AND BOARD COVID-19 RESPONSE.

a. Return to the Office.

Director Humiston reported that office personnel are is gradually returning, however, the Office is fully open, and the public is visiting. Ms. Humiston reported that she is waiting for guidance from the Branch on how managers should make decisions regarding our physical space as a part of real estate considerations. For example, if employees are not in the office full time, should the employee have a dedicated space or a swing space? Ms. Humiston expects the Branch will have more guidance in July or August.

b. Minnesota Judicial Branch COVID-19 Order and Updated Preparedness Plan (Attachment 2).

Ms. Humiston noted that the Judicial Council moved to lift restrictions effective July 6, 2021, and that per the Council, everyone is free to return to in-person activities as it makes sense or is in the best interest. The Chief Justice recommends barriers stay up and advised that individuals can continue to wear masks based on preference.

Landon Ascheman inquired whether the Judicial Council information was conveyed via email and clarified that it was not an order.

Justice Hudson confirmed that an email was sent to the Judicial Branch as a follow-up on the Judicial Council meeting.

Jeanette Boerner commented that the Judicial Council meetings are public.

Ms. Wolpert inquired what are the implications for Panel proceedings?

Ms. Humiston replied that matters should be considered on a case-by-case basis and stated that Panels can resume proceedings as normal.

Ms. Wolpert commented that for Panels, the matter can also be discussed in the closed session. Ms. Wolpert observed that this is an opportunity to leverage technology.

3. COMMITTEE UPDATES:

a. Rules Committee.

(i) Status, Rule 7, MRPC, Series Petition and Status, Rule 20, RLPR, Petition.

Ms. Wolpert reported that the LPRB Rule 7 & Rule 20 petitions were filed June 17, 2021.

Justice Hudson confirmed the filings were received and believes they will be put out for public comment with notification to everyone soon.

(ii) Status, Rules 4-5, RLPR.

Justice Hudson thanked all, especially the Rules Committee for their comments. Justice Hudson noted the Court discussed the amendments and comments and had lengthy discussion. Ultimately, the Court did not make a decision, but does plan to decide on June 29, 2021.

b. Opinions Committee.

Committee Chair Mark Lanterman provided the Committee update.

Ms. Wolpert noted that there will be a vote on the Panel assignment process that will include input from the Rules Committee.

(i) Panel Assignment Process.

Mr. Lanterman introduced that the inequitable distribution of work has been a continuous topic of discussion and, as a result, Mr. Lanterman created a random Panel generator with the goal to help smooth out Panel matter distribution. The Rules Committee helped vet Rule 4(f), RLPR. The proposed change to Rule 4(f), RLPR, strikes "Director," adds "The Chair" and strikes "in rotation" and adds "randomly."

Ms. Wolpert commented that this does not reflect a change in practice, noting the Chair has always done Panel assignments.

Mr. Lanterman added that the tool is to assist the Chair and is not intended to take discretion away from the Chair or Vice Chair.

Ms. Wolpert stated this tool addresses the number of cases to make assignments more equitable and added that maintaining discretion is important to make adjustments to workloads.

Bruce Williams suggested the operative language should be "will" rather than "shall."

Ms. Wolpert requested that Mr. Lanterman explain the random Panel generator.

Mr. Lanterman explained that the Chair can use the generator and input assignments that have already occurred and generate future assignments. The benefit is that it allows the Chair to immediately begin relying on the tool. The generator creates a number equal to 10 billion x 10 billion and uses the same math that casinos use to keep our money. The formulas are locked so they cannot be bumped or modified and if anyone would like to see it, Mr. Lanterman advised he is happy to share. The Chair will open the generator and it will automatically assign matters with extreme randomness.

Ms. Wolpert asked if there were any questions?

Andrew Rhoades asked: Does the generator take into account weighting?

Mr. Lanterman replied it does not take complexity into account. There is no way to do that. Mr. Lanterman explained that is why it is important to still allow modifications if needed. If modification needs to take place, it needs to occur in the generator which allows for tracking.

Peter Ivy noted the Rules Committee also reviewed the proposal, commenting that it was a straightforward proposal, and the Rules Committee was unanimous in thinking this is a good idea. Mr. Ivy stated the Committee wanted to use simple language and did not discuss will vs. shall. Mr. Ivy and the Committee believe the generator should be implemented now, noting it is a great and useful change.

Ms. Wolpert noted there is a proposal from both Committees.

Mr. Williams made a friendly amendment to change shall to will; Mr. Ivy seconds.

Daniel Cragg inquired whether other rules contain shall?

Benjamin Butler commented that when he worked on other rules, the language was changed to must.

Virginia Klevorn added that she agrees that the Board should look at which is better, must or will.

Mr. Butler stated that he would hate to have the substance delayed and supports taking a vote. If it passes, put the random generator to work and further noting it may not be a good use of time to delay.

Ms. Wolpert called attention to Robert's Rules of Order and the pending amendment.

Mr. Williams calls the question on the proposed amendment that "shall" be changed to "will" passed with 13 in favor and six opposed.

The motion to amend Rule 4(f), RLPR, passed unanimously, with immediate implementation by the Chair of the random panel generator.

(ii) Cryptocurrency.

Mr. Lanterman reported the Committee is considering the acceptance of cryptocurrency for payment and thanked Mr. Cragg who did a lot of work on this issue.

(iii) Livestreaming.

Mr. Lanterman reported that the Committee has no appetite to look at the livestreaming issue further.

c. <u>DEC Committee</u>.

Allan Witz, Committee Chair, is going to spend time discussing the Board Training Manual, which he has been working on for several years.

(i) New Member Training Manual.

Last year, when Judge Thilmony spoke about accessibility and plain language, my objective was to make the training manual accessible to all coming on the Board. The document itself is intended to be broadly

based and is intended also for any Board members who may need to access information. Last week there was a DEC Committee meeting with recommendations from Drew and Landon. The manual includes important documents. This document is 24 pages versus the old document which was over 300 pages. Mr. Witz presented the document and scrolled and highlighted specific areas noting the following highlights: There are 14 parts to the manual. Calibri font was used to add to accessibility. Mr. Witz illustrated his use of blocking, colors, and headings to ease accessibility and noted it also includes charts for reference in each section.

Mr. Witz explained that he has received examples from the OLPR that are incorporated and that have been very helpful.

Mr. Witz explained the timeline is included to give guidance on procedure and the reinstatement section will include relevant quotes from recent precedent.

Areas of continued development include stipulations, bifurcation, by-pass, and examples of documents.

Mr. Witz thanked Ms. Wolpert, the DEC Committee, Ms. Humiston and Jennifer Bovitz for their assistance and support of the project.

Mr. Witz noted that this is the day he sends his third child out to the world.

Ms. Wolpert added that the Executive Committee met and discussed the project, and the next step will be to send it to the Rules Committee, then back to the DEC Committee and portions will go to the OLPR by November 1, 2021, and back to Committees for final approval. Ms. Wolpert added that the Panel will not be a part of the public materials today noting that in January 2022, the final product will be in place. Ms. Wolpert thanked Mr. Witz.

Ms. Humiston remarked that she loves the format and can make similar changes to the Panel Manual, which is more rule based. Ms. Humiston added that simplifying and making documents accessible is a huge task—thank you to Mr. Witz.

Ms. Boerner agreed stating that she remembers when she started and remembered feeling like she wanted to cry.

(ii) Chairs Symposium Feedback and DEC Ad (Attachment 3)

Mr. Witz explained that the Symposium feedback was provided to everyone and noted that it was a very big project that worked well, noting the work of Ms. Wolpert, Ms. Humiston, Ms. Paulson, and Ms. Bovitz. Mr. Witz added that the event would not have worked well without the support of the OLPR and the Board.

Ms. Humiston noted that there is a standard addition to the OLPR's CLE slide deck promoting additional volunteer opportunities.

(iii) Seminar, September 17, 2021.

Ms. Humiston noted the Seminar will be in person at Earle Brown Heritage Center and seminar topics are welcomed. Ms. Humiston stated that there will also be a remote option. The Seminar is free for all DEC members and is shared widely with other Judicial Branch partners.

d. Equity, Equality, and Inclusion Committee.

Jeanette Boerner chaired the Committee in Ms. Wolpert's absence and reported that the initial discussion involved public member recruitment and the discussion included developing a contact list. Ms. Boerner reported that when public members were asked how they learned about the work, all learned about the work from someone who does the work. The Committee is also interested in learning how to support new Board members. Other topics included how to develop an environment that fosters recruitment. Ms. Boerner noted there is an updated Committee list on the OLPR SharePoint site and added that Nicole Frank joined as the OLPR liaison and had a lot of insight. Ms. Boerner reported some of the issues that are being worked on include recruiting in proximity to vacancies and working on marketing.

One salient recommendation was that the vision should be framed in two buckets—participation and impact, including: How do we get data and make evidence-based decisions? The Committee is looking for all members to provide feedback.

Mr. Ascheman included that the Fourth DEC announced openings.

Ms. Humiston noted that the MSBA pushed out the YWCA equity challenge, which is open to all, not just MSBA members, explaining that it is a 21-day challenge that includes information every day to help people grow in

issues of equity and inclusion. Ms. Humiston reported that many in the Office who are non-lawyers are participating. Information about the challenge was provided in the Zoom chat.

Mr. Ascheman added that he currently serves as president elect of HCBA and his wife, Mara Ascheman, is involved in YWCA as a board member. The mission of YWCA is empowerment in women and eliminating racism. The 21-day challenge is information you can obtain in short bits. Speakers have also been arranged to expand on the topics. This year the challenge is being provided at a reduced or no cost. HCBA took the lead, and got the MSBA and RCBA on board. This is great for the legal community and the YWCA and hopefully we can work to eliminate racism through education.

4. DIRECTOR'S REPORT: (ATTACHMENT 4).

a. Statistics.

Ms. Humiston reported the numbers remain very strong and reported that year old cases continue to decline. Ms. Humiston noted that the Office has not gone back to pre-pandemic levels in terms of new complaint filings, but some areas are increasing such as advisory opinions.

b. Office Updates.

Keshini Ratnayake resigned and is making the full transition from public defender to prosecutor at Washington County. We are able to immediately back fill, but we are not able to provide the names due to allowing for the transition and notice with former employers. Those onboarding will include a public defender, an assistant county attorney working in the child protection area, and a former federal law clerk who is now a current law firm associate.

c. Quality Court Workplace Survey.

Ms. Humiston also reported on the Quality Court Workplace Survey, administered every four or five years, the last time being in 2016. Ms. Humiston reported overall improved favorability in every category, with the exception of five, that were consistent across the Branch. The survey was administered in the pandemic, in the midst of winter, and had a good response rate.

One of the highest areas of agreement was to the statement: "My co-workers care about the quality of service and programs we provide."

An area of improvement with an 87% approval rate was "My workplace is engaged in creating an environment where all persons are valued and treated with respect regardless of differences in individual characteristics (i.e., age, gender, religion, race/ethnicity, sexual orientation, disability, etc.).

The highest level of disagreement was with the statement, "I am able to keep up with my workload without feeling overwhelmed." Approximately half of respondents feel they have a workload they cannot manage. This was a common response throughout the Judicial Branch. Both the Branch and OLPR are engaged in planning around this topic, and the survey results in general, along with managers and supervisors who are digging into the details.

d. 2022-23 Budget Update.

Ms. Humiston reported that the budget meeting was on June 16, 2021, in person with the Court. Ms. Humiston advised the Court approved the budget and advised that information in the materials reflects the modified plan noting the Court met in May to discuss funding for all boards.

Ms. Humiston reported that the Court planned to raise attorney registration fees by 3% with an additional allocation to the OLPR in 2022 and 2023, and the budget is reflective of those decisions. The Court's budget approval came with a strong caution that we need to be exemplary stewards including controlling costs, looking for synergies between boards and looking for ways to do what we do in an affordable way. An example of additional expenses is that health care costs were raised by 6% so other expenses need to be cut.

Ms. Humiston also added the Court had questions around trusteeships, noting the Chief Justice is considering asking the bar to step forward more to support lawyers in succession planning efforts. Ms. Humiston added that trusteeships are something the Office can manage, but it is labor intensive.

Ms. Humiston highlighted articles provided in the materials and positive feedback received on the *MythBusters* article. The articles are included for public members and those who do not receive *Bench & Bar*, an MSBA publication. Ms. Humiston reported that the OLPR's 50th anniversary is this year and the LPRB's 50th anniversary was last year, and the 50th anniversary of the OLPR will be the focus of her next article.

Ms. Humiston is currently working on the Annual Report and is also working on the Panel Manual. Ms. Humiston also congratulated Nicholas Ryan,

former OLPR law clerk, who is present, and is a new father to a son born last month.

Ms. Waldkirch asked what the survey rate of response was?
Ms. Humiston replied that it high with approximately 80% and that the Branch also saw high response rate.

Ms. Klevorn asked: What are the stretch spaces?

Ms. Humiston replied the issue is people feeling like they can handle their workload, having the appropriate training, skill set and having the right people. Ms. Humiston noted the job requires a lot of skills including trial and appellate advocacy and teaching. There are also administrative responsibilities and case management skills along with writing. Ms. Humiston noted the quality workplace survey showed high marks for having regular meetings with supervisors and that supervisors are available when there are questions or need help. We also speak with employees about areas of growth.

Ms. Klevorn asked as it relates to training and skill set development, do people feel uncomfortable identifying training they need? How do we create the space for people to ask and identify?

Ms. Humiston noted that efficient caseload management is necessary for everyone, and stated that one attorney has requested not to litigate, which is something that is under consideration but is difficult to address because of the needs of the position but we continue to look at ways to make changes where we can.

Mr. Ascheman observed that he views caseload at the OLPR in many ways like a prosecutor's office. Mr. Ascheman asked, where does prosecutorial discretion come in? How does that work at the OLPR?

Ms. Humiston commented that she has continued the uniform application of rules. Because in every instance, public discipline needs to be approved by the Court, there is not the ability to compromise matters in the ways prosecutors might be able to as the Court would disagree. Because of those two principles, the OLPR takes cases as they come. Ms. Humiston added that in initial screening procedures, the Office is being judicious in those cases it does investigate. Ms. Humiston also noted that she has resisted compromising on cases because it would be easier, noting that the Office should be willing to try a case and observed the most time-consuming case is one file that goes all the way to the

Court.

Mr. Ascheman asked, when it comes to case selection, every case is different, some cases may not fit the mold. Who is making that interpretation?

Ms. Humiston answered that individual attorneys are making those determinations.

Ms. Klevorn asked whether the survey and individual statistics were available? Ms. Humiston and Justice Hudson replied they are not.

Mr. Williams asked if the air conditioning in the Office is back on and inquired about the auditor hiring process?

Ms. Humiston replied that the air is back on and that the auditor is close to being hired.

5. 2021 DRAFT ANNUAL REPORT (IN PROCESS).

Ms. Humiston reported that the Annual Report is in process and will be provided to the Board within a week of the meeting and is due to the Court on July 1, 2021.

6. PROPOSED 2022 MEETING DATES (ATTACHMENT 6).

October 29, 2021: Ms. Humiston noted that Town & Country has been booked for the October meeting pursuant to the request of the Executive Committee, and is also available for the 2022 dates proposed.

A note was made that the current meeting list contained an incorrect date for the October meeting date. The correct date is October 29, 2021.

7. OLD BUSINESS.

a. DEC, Board and OLPR Consistency, Efficiency.

Ms. Wolpert noted this item reflects a continuing conversation and asked if there was any conversation noting it is not usually something that is expressed at this meeting.

8. NEW BUSINESS.

Justice Hudson announced that Ms. Wolpert will be stepping down effective June 30, 2021. Justice Hudson advised the Court is appointing Jeanette Boerner as interim Chair effective July 1, 2021. Ms. Boerner will serve out the remainder of Ms. Wolpert's term. Justice Hudson thanked Ms. Wolpert for her service on behalf of the Court, noting in addition to leading the day-to-day work of the Board, Ms. Wolpert has also engaged in outstanding work surrounding wellbeing and guiding the Board's work during the pandemic.

Ms. Wolpert replied that she has been on the Board so long and has been working with people since 2013 who are tremendous to know. As Bar President, Ms. Wolpert noted that what she found missing was systemic leadership and bringing all the talent to the table. Ms. Wolpert thanked everyone on the Board and the Executive Committee and Ms. Boerner, noting that it can be a part-time job. Ms. Wolpert reflected that she was able to pick the entire Executive Committee and that she has never had a chance to appoint an entire Executive Committee, Committee Chairs and Panel Chairs. Ms. Wolpert thanked all for their contributions.

9. QUARTERLY CLOSED SESSION.

10. NEXT MEETING, OCTOBER 29, 2021 (IN-PERSON IF POSSIBLE).

Thereafter, the meeting adjourned.

Respectfully submitted,

Jennifer S. Bovitz
Managing Attorney

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

Attachment 2

STATE OF MINNESOTA

IN SUPREME COURT

ADM20-8001

ORDER GOVERNING THE CONTINUING OPERATIONS OF THE MINNESOTA JUDICIAL BRANCH

O R D E R

The operations of the Minnesota Judicial Branch are currently governed by the order filed on June 28, 2021, which has been extended and modified in part by the order filed on July 30, 2021. *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001 (Minn. filed July 30, 2021) (modifying provisions of the June 28 order and extending that order indefinitely). Since the last operations order, the COVID-19 pandemic has continued, the positivity rate and positive case numbers in Minnesota have increased significantly, and the entire State of Minnesota is currently experiencing a high level of community transmission. Thus, some exposure prevention and mitigation measures must be reinstituted to ensure the continued safe operations of the Minnesota Judicial Branch consistent with evolving conditions and public health guidance.

IT IS HEREBY ORDERED THAT:

1. Effective October 19, 2021, every person entering a court facility must wear a face covering at all times when in public areas served by the Judicial Branch or other common areas of the facility and in the courtroom during proceedings. The requirements of this paragraph apply to Judicial Branch staff and judges, attorneys, parties, witnesses, case participants including jurors, those who attend in-person hearings, and any person who enters a court facility to use public services provided by the Judicial Branch. The

presiding judge has the discretion to permit individuals to remove a face covering during an in-person proceeding for case-specific reasons. This paragraph supersedes the orders of June 28, 2021, and July 30, 2021, to the extent provisions in those orders are inconsistent with the terms of this paragraph.

2. Effective October 19, 2021, proceedings in the Judicial Branch should be conducted by implementing when possible the guidance provided by the Judicial Branch COVID-19 Preparedness Plan (revised as of October 18, 2021), as appropriate in light of the particular proceeding. It is the specific intent of this paragraph that Judicial Branch operations including in-person proceedings shall continue as currently scheduled, with the decision to implement the guidance provided by the Preparedness Plan to be made as appropriate for the proceeding and as the presiding judge is able to do so.

3. The order filed on June 28, 2021, and the order filed on July 30, 2021, both of which govern the continuing operations of the Minnesota Judicial Branch, remain in effect unless expressly superseded by the provisions of this order.

Dated: October 18, 2021

BY THE COURT:

Lorie S. Gildea
Chief Justice

MINNESOTA JUDICIAL BRANCH
STATE COURT ADMINISTRATOR'S OFFICE

Minnesota Judicial Branch COVID-19 Preparedness Plan
REVISED: October 18, 2021

Under Supreme Court Order No. ADM 20-8001 (October 18, 2021), the Minnesota Judicial Branch continues operations consistent with evolving conditions and public health guidance as more people become vaccinated against COVID-19 and the Delta variant cases surge. The Minnesota Judicial Branch's top priority continues to be protecting the health and safety of judicial officers, staff, and court users. This plan outlines the health and safety parameters that every court facility must maintain or implement to the extent possible and as appropriate, as in-person operations continue. It is based on guidance from the Minnesota Department of Health (MDH) and the Centers for Disease Control and Prevention (CDC), and on the monitoring of three key indicators:

1. Positivity Rate: The Minnesota Department of Health (MDH) releases a 7-day rolling average positivity rate for COVID-19 statewide Monday through Friday. Due to reporting lag time this rate is 7-10 days behind current trends.
2. Employee Case Rates: The Judicial Branch utilizes a SharePoint reporting form to capture reported positive cases of COVID-19.
3. Juror Postponement Rates: The Judicial Branch initiated the COVID-19 Postponement Code in WebGen to track the number of jurors granted a postponement due to COVID-19.

Suspected COVID-19 Cases Must Stay Home: People must stay home when sick or experiencing symptoms of coronavirus. People who have symptoms compatible with COVID-19 must stay home and follow the CDC's quarantine guidance. Additionally, if a household member or close contact has tested positive for COVID-19, people not fully vaccinated must stay home per CDC guidelines. People who are fully vaccinated or have had COVID-19 within the past 3 months, do not need to quarantine unless they are experiencing symptoms of COVID-19. The CDC has provided guidance for fully vaccinated people experiencing COVID-19 symptoms.

Face Coverings: Face coverings must be worn in public spaces, including but not limited to meeting rooms, customer service counters, hallways, breakrooms, and shared workspaces. The Judicial Branch may require the removal of face coverings for reasons of health, safety, or decency, or for purposes of conducting a court proceeding. Any person who claims that a health condition prevents them from wearing a face covering when required must present written medical documentation that the health condition prevents that person from wearing a

face covering. A face shield will be provided for those with corresponding medical documentation.

Signage: Signage must be posted at exterior entrances to court facilities to remind customers and justice partners NOT to enter if they are experiencing any COVID-19 related symptoms, have recently been exposed to someone with COVID-19, or are otherwise feeling sick. This signage should direct them to a location, i.e., a webpage or a call-in number, with instructions on what to do if they cannot enter. Judicial Branch template signage is available on the Judicial Branch COVID-19 SharePoint site.

Distancing Measures: Measures to maintain distancing among people while in Judicial Branch facilities should be considered to the extent possible, especially in communal areas such as court counters and hallways and in judge and employee shared workspaces.

Personal Hygiene: People in Judicial Branch facilities are encouraged to frequently wash their hands with soap and water for 20 seconds, or to use hand sanitizer with a minimum of 60% alcohol when soap and water are not available. People should also cover any coughs and should avoid touching their faces.

Cleaning and Disinfecting Surfaces: Shared spaces should be cleaned once a day, with priority given to high-touch surfaces. If there has been a sick person or someone who tested positive for COVID-19 within the last 24 hours, the space must be both cleaned and disinfected. See Cleaning and Disinfecting Your Facility for additional guidance.

Preparedness Plan Internal Addendum:

Judicial officers and employees must follow these program and travel restrictions in court facilities to support in-person court operations:

Vaccination Status Verification Program: Judicial officers and employees are required to participate in the Vaccination Status Verification Program, which allows judicial officers and employees to self-report their vaccination status to the Judicial Branch. This information will be treated as non-public personnel records and only shared with those people with a business need to know.

COVID-19 Testing Program: Beginning November 1, 2021, judicial officers and employees who are not fully vaccinated or wish not to disclose their vaccination status when completing their vaccination submission form will be required to complete a PCR (polymerase chain reaction) test when attending in-person conferences, trainings, and meetings where there are no

distancing measures, when engaged in Judicial Branch-sponsored travel, when deemed a close contact to COVID-19 exposure, or when displaying symptoms while in the workplace. All test results must be submitted through the Judicial Branch's COVID-19 Testing Sharepoint form. This information will be treated as non-public personnel records and only shared with those people with a business need to know.

1. **Conferences/Trainings/Meetings:** Convene Judicial Branch-sponsored conferences, trainings and meetings in a virtual environment. A meeting consists of a group convened to discuss court-related matters, composed in part or entirely of court employees or judicial officers, lasting more than 15 minutes, and in which participants are not able to maintain at least six feet of distance between attendees. Meetings do not include in-person court proceedings or routine court operational tasks. If a virtual environment is not conducive to the conference, training, or meeting, all participants are required to provide proof of full vaccination or negative test result prior to attending. Only those without proof of full vaccination reported through the Vaccination Status Verification Program are required to complete COVID-19 testing as follows:
    a. The judicial officer or employee must complete a PCR (polymerase chain reaction) test 1-3 days before departing for the conference, training, or meeting.
    b. Test results must be submitted through the COVID-19 Testing SharePoint form.
    c. Only those with a negative test result will be permitted to depart for the conference, training, or meeting.
    d. The judicial officer or employee must complete a PCR test 3-5 days after attending. Judicial officers and employees may return to work during this time; however, they must be masked indoors.
    e. Test results must be submitted through the COVID-19 Testing SharePoint form.
2. **Travel:** Only those without proof of full vaccination are required to complete COVID-19 testing prior to and after Judicial Branch-sponsored travel. Travel, for the purposes of this testing requirement, is the use of planes, buses, trains, or other forms of public transportation traveling within the United States and indoor U.S. transportation hubs such as airports and stations, excluding a judicial officer or employee's regular commute.
    a. Before travel:
        i. The judicial officer or employee must complete a PCR test 1-3 days prior to departure.
        ii. Test results must be submitted through the COVID-19 Testing SharePoint form.
        iii. Only those with a negative test result submitted through the COVID-19 Testing SharePoint form will be permitted to travel.
    b. After travel:
        i. The judicial officer or employee must complete a PCR test 3-5 days after travel.

ii. Test results must be submitted through the COVID-19 Testing SharePoint form.
iii. The judicial officer or employee must quarantine for a full 7 days after travel.
iv. Before returning to work, the judicial officer or employee must submit a negative test result.
v. Test results must be submitted through the COVID-19 Testing SharePoint form.

3. **Judicial officers and employees who (1) are not fully vaccinated and (2) are deemed a close contact to COVID-19 exposure or are displaying symptoms while in the workplace:**
    a. Immediately upon notification of close contact or the onset of symptoms, whichever occurs first, the judicial officer or employee must leave the workplace and complete an initial PCR test.
    b. Test results must be submitted through the COVID-19 Testing SharePoint form.
    c. For negative test results:
        i. The judicial officer or employee must complete a second PCR test in 3-5 days.
        ii. Following quarantine and isolation guidance, judicial officers and employees must not return to in-person work until advised by their human resources manager.
    d. For positive test results:
        i. Following CDC isolation guidance, the judicial officer or employee must not return to in-person work.
        ii. The judicial officer or employee must notify their supervisor and/or their human resources manager.

Additional Recommended Mitigation Strategies:
The following measures are recommended to ensure court facilities operate following the best practices listed above:

1. Increase physical distance between staff at the worksite when practical.
2. Maintain distance even during breaks, lunch, and other social contacts.
3. Implement staggered work schedules if practical, to allow for distancing measures.
4. Consider conducting meetings and delivering services remotely to reduce the number of people who must be physically present in court facilities.

Building and Work Environment Ventilation
Ventilation is an important factor in preventing COVID-19 transmission indoors. Tenants should consult with facility owners and operators to evaluate the operational capacity of ventilation systems provided throughout the building.

Ventilation Exposure Control Measures:

1. Bring in fresh outdoor air as much as possible.
2. Limit air recirculation if able to.
3. Confirm steps are being taken to minimize air flow blowing across people.
4. If available, ensure exhaust fans in restroom facilities are functional and operating when the building is occupied.
5. If feasible, disable demand-control ventilation controls that reduce air supply based on temperature or occupancy.
6. If accessible, run the HVAC at least two hours before and after spaces are occupied to purge air and allow extra circulation.

Partitions or Barriers:

Continue to utilize existing physical barriers, such as plexiglass at customer service counters and in courtrooms.

Reminder: Employee Notification Protocol

1. Encourage judicial officers and employees to do a daily personal health check and to stay home when feeling ill.
2. Judicial officers and employees are encouraged to reach out to local Human Resources staff with questions on current quarantine and isolation guidelines should they become ill or exposed to a known case of COVID-19. Information on quarantine protocols is also found on the CDC website (Quarantine-Isolation).
3. If a judicial officer or court employee reports a positive COVID-19 test, they shall notify their supervisor or local HR office and the Employee Notification Protocol shall be followed.

MJB Preparedness Plan Frequently Asked Questions

This document is intended to provide additional information about the Judicial Branch Preparedness Plan and Internal Addendum. This is a "living" document and will be edited and updated frequently as we learn more and if circumstances change.

Overview

1. **What are the new requirements?**
   The Chief Justice Order issued October 18, 2021, requires face coverings statewide in all public spaces inside court facilities. The Judicial Branch may permit the removal of face coverings for reasons of health, safety, or decency, or for the purposes of conducting a court proceeding.

   The Preparedness Plan Internal Addendum requires that all judicial officers and employees participate in the Vaccination Status Verification Program and that those with COVID-19 symptoms stay home. Judicial officer and employees not fully vaccinated may be required to be tested for COVID-19 in certain circumstances.

2. **Do these requirements apply to contractors, interns, volunteers working in court facilities?**
   The requirement to complete the Vaccination Status Verification form does not apply to contractors, interns, or volunteers.

3. **Why were these requirements put in place now?**
   COVID-19 case rates and hospitalizations are above cautionary levels in Minnesota, and we are moving into the higher-transmission winter months. The Judicial Council's decision to reinstate a face covering mandate and a Preparedness Plan is aligned with our top priority of protecting the health and safety of judicial officers, staff, and court users.

4. **What sources and indicators are the Judicial Branch using to make decisions about pandemic safety and mitigation measures?**
   The Judicial Branch's decisions are based on guidance from the Minnesota Department of Health (MDH) and the Centers for Disease Control and Prevention (CDC), and on the monitoring of MDH reported positivity rates, judicial officer and employee case rates, and juror postponement rates.

5. **What happens when a judge or employee refuses to submit their vaccination status AND refuses to get tested? Will they be able to come to work? Will they be able to participate in Branch-convened training, meetings, conference and/or Branch-related travel?**
   Employees who refuse to comply with the Preparedness Plan may face disciplinary action, and judges may be reported to the Board on Judicial Standards.

6. **As judges are elected officials, can MJB require their participation in the vaccination verification program and the testing requirements for the circumstances defined by the Preparedness Plan?**
   Judges are expected to comply with the Chief Justice's order, including the directive to comply with the Preparedness Plan. Noncompliance with the Chief Justice's order may be reported to the Board on Judicial Standards.

7. **Does the Chief Justice Order require me to wear a face covering at my office? When and where do I have to wear it? What about at my own desk?**
   At your own desk, in your own workspace, you do not need to wear a face covering. If you get up to move outside of that area, you need to put on your face covering.

8. **The Preparedness Plan mentions cleaning. What is required?**
   Shared spaces should be cleaned once a day, with priority given to high-touch surfaces like doorknobs and public countertops. If it is known that a sick person or someone who tested positive for COVID-19 has been present within the last 24 hours, the space must be both cleaned and disinfected. See Cleaning and Disinfecting Your Facility for additional guidance.

9. **The Preparedness Plan mentions distancing. What is recommended?**
   Because court facilities vary in physical set up and space, the plan does not mandate a specific distance. Although CDC and MDH no longer require six feet of distancing, remembering to keep space between people is always a good practice.

10. **Does the Preparedness Plan or Order say that everyone should transition back to working remotely?**
    Operations, including in-person proceedings, shall continue as currently scheduled, with the decision to implement the guidance provided by the Preparedness Plan to be made as appropriate for the proceeding and as the presiding judge is able to do so.

    The plan encourages maintaining current operations with a heightened level of awareness, and additional protection measures including limited testing. The plan recommends conducting business virtually when business needs permit to reduce exposure and spread.

Mandatory Completion of COVID-19 Vaccination Status Form

11. **Why is it mandatory to complete the COVID-19 Vaccination Status Form?**
    The information on completed forms is used to determine when testing is required and identify areas of greater risk of spread within the Judicial Branch.

12. **What happens if I don't comply with the requirement to complete the COVID-19 Vaccination Status Form?**
    Employees who do not complete the form by November 1 will be contacted and encouraged to do so. Refusal to complete the form may result in discipline.

13. **The form includes an option to "choose not to disclose" whether I am vaccinated or not. If this form is mandatory, why is that option there? Am I complying with the requirement if I select that option?**
    The option exists to give those who do not wish to disclose their vaccination status a way to comply with the requirement to complete the form. Individuals who select this option will be regarded as not vaccinated for purposes of determining when testing is required.

14. **If I'm a fully remote employee do I have to complete the COVID-19 Vaccination Status Form?**
Yes, all judicial officers and employees are required to complete the form regardless of work status or location. Per the Remote Work Policy 322, fully remote employees may be required on-site up to five percent of the time.

15. **Are Senior Judges required to complete the COVID-19 Vaccination Status Form? If so, how?**
Yes, senior judges are required to complete the Vaccination Status Verification form. The form is located in the HR Center and a quick reference guide is available with instructions. If additional assistance is needed, contact your local HR Office.

16. **Who will see my information and what will they do with it?**
The information collected is non public personnel records and only shared with those people with a business need to know. Local human resources staff have access to reported information and will use it to determine when testing is required.

17. **How does getting or not getting a booster shot impact someone's vaccination status?**
At this time, booster shots are not required to sustain full vaccination status. The Vaccination Verification Submission form does allow for the booster shot to be entered into your submission form, but it is not required at this time.

18. **If I have tested positive for COVID-19 within the last 90 days, am I still required to complete the Vaccination Status Submission form?**
Yes, all judicial officers and employees are required to complete the form regardless of status.

Testing Requirements

19. **Who is required by the Preparedness Plan to get a COVID-19 test?**
Judicial officers and employees who report that they are fully vaccinated are not required to test by the Preparedness Plan.

All other judicial officers and employees must complete testing if they:

- *Are attending an in-person Branch-sponsored conference, training, or meeting that is not implementing distancing measures*
- *Are conducting Branch-sponsored travel*
- *Have been deemed a close contact to someone with COVID-19 or are displaying symptoms while in the workplace.*

20. **When do testing requirements go into effect?**
Testing will begin to be required on Monday, November 1, 2021. Prior to that time, more information will be provided about how testing will work.

21. **Why is testing not required for fully vaccinated people if they can still get and transmit COVID-19?**
MJB follows the CDC's Interim Public Health Recommendations for Fully Vaccinated People so testing is not required at this time.

22. **What constitutes a meeting? What are routine operational tasks?**
A meeting consists of a group convened to discuss court-related matters, composed in part or entirely of court employees or judicial officers, lasting more than 15 minutes, and in which participants are not able to maintain at least six feet of distance between attendees.

Meetings do not include in-person court proceedings or routine operational tasks. Routine operational tasks are duties that are short in duration, and part of regular day-to-day work, e.g. working at the public counter, preparing a courtroom, sorting the mail, preparing a deposit, working in a shared copy room, etc.

23. **How can I safely have an in-person meeting?**
The best way to meet safely is to meet virtually. If a meeting must be in person, attendees should wear a face covering and maintain at least six feet of distance from other attendees.

24. **What about conferences and trainings that are offered by entities other than the Judicial Branch, or in locations other than a Judicial Branch facility?**
The Preparedness Plan applies to all conferences and trainings sponsored by the Judicial Branch, regardless of location. Currently, the Preparedness Plan does not apply to conferences and trainings put on by other entities. However, choosing to test after engaging in higher risk activities like traveling and attending large events is encouraged and appreciated, and testing is required of those who are not fully vaccinated after work-related travel.

25. **What constitutes travel?**
Travel, for the purposes of this testing requirement, is the use of planes, buses, trains, or other forms of public transportation traveling within the United States and indoor U.S. transportation hubs such as airports and transit stations, excluding a judicial officer or employee's regular commute.

26. **Do I have to test before returning to work if I travel for personal reasons?**
Currently, the Preparedness Plan only requires testing after travel for work-related reasons. However, choosing to test after engaging in higher risk activities like traveling and attending large events is encouraged and appreciated.

27. **If we have in-person trainings and we can maintain distance between attendees, is testing required?**
No, testing is not required when participants can maintain at least six feet of distance between attendees.

28. Should upcoming in-person events through the end of 2021 be rescheduled?
Yes! All upcoming trainings, conferences and meetings should be shifted to virtual or rescheduled to the greatest extent possible.

Attachment 3

EXECUTIVE COMMITTEE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Rule 4(d), Rules on Lawyers Professional Responsibility, provides:

> The Executive Committee, consisting of the Chair, and two lawyers and two non-lawyers designated annually by the Chair.

The following members of the Lawyers Professional Responsibility Board are appointed to the Executive Committee for the period July 1, 2021, through January 31, 2022:

Jeanette Boerner, Chair
Virginia Klevorn
Tommy Krause
Bruce Williams

Jeanette Boerner, in addition to the Chair's responsibility for oversight of the Board and OLPR as provided by the RLPR, will handle Panel Assignment matters in accordance with Rule 4(f) and Executive Committee Policy & Procedure No. 2.

Due to the need to keep panels fully staffed, Jeanette Boerner will also perform the duties of Vice-Chair, including that she shall receive reports from the Director's Office of tardy complainant appeals in accord with Executive Committee Policy & Procedure No. 10; shall be responsible for reviewing dispositions by the Director that vary from the recommendations of a District Ethics Committee; and shall be responsible for review of complaints against LPRB and Client Security Board members, the Director, members of the Director's staff or DEC members based solely upon their participation in the resolution of a complaint, pursuant to Section 4, Executive Committee Policy & Procedure No. 5.

Virginia Klevorn will oversee the Executive Committee process for reviewing file statistics, and the aging of disciplinary files.

Bruce Williams will consider former employee disqualification matters in accord with Executive Committee Policy & Procedure No. 3.

Effective July 1, 2021

Jeanette Boerner, Chair
Lawyers Professional Responsibility Board

RULES AND OPINIONS COMMITTEE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

The Rules and Opinions Committee is a standing committee of the Lawyers Professional Responsibility Board responsible for making recommendations regarding the Board's positions on possible amendments to the Minnesota Rules of Professional Conduct and the Minnesota Rules on Lawyers Professional Responsibility, and regarding the Board's issuance of opinions on questions of professional conduct, pursuant to Rule 4(c), Rules on Lawyers Professional Responsibility The Committee shall be constituted with the following members:

Peter Ivy, Chair
Ben Butler
Daniel Cragg
Susan Rhode
Susan Slieter
Julian Zebot

Effective July 14, 2021

Jeanette Boerner, Chair
Lawyers Professional Responsibility Board

EQUITY, EQUALITY & INCLUSION COMMITTEE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

The Equity, Equality and Inclusion Committee is a standing committee of the Lawyers Professional Responsibility Board responsible for evaluating and making recommendations for ways in which the Board can enhance equity, equality, and inclusion within the attorney disciplinary system. The Committee shall be constituted with the following members:

Michael Friedman, Chair
William Pentelovitch
Andrew Rhoades
Geri Sjoquist
Mary Waldkirch Tilley
Antoinette Watkins

Effective July 14, 2021

Jeanette Boerner, Chair
Lawyers Professional Responsibility Board

TRAINING, EDUCATION AND OUTREACH COMMITTEE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

The Training, Education and Outreach Committee is a standing committee of the Lawyers Professional Responsibility Board responsible for all education and training content related to or promoted by the Board. This committee shall develop and maintain effective onboarding and training programs to orient new members to the Board; develop recommendations, implement and monitor continuing education and training activities for current Board members; promote and participate in outreach programs addressing ethics and ethical policies for the general public; and assist with developing and maintaining effective training and educational programs for members of the District Ethics Committees (DECs).

Allan Witz, Chair
Landon Ascheman
Katherine Brown Holmen
Mark Lanterman
Paul Lehman
Kristi Paulsen

Effective July 14, 2021

Jeanette Boerner, Chair
Lawyers Professional Responsibility Board

Attachment 4

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8005

ORDER ESTABLISHING PUBLIC COMMENT PERIOD AND HEARING ON PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF PROFESSIONAL CONDUCT AND THE MINNESOTA RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

The Minnesota State Bar Association and the Lawyers Professional Responsibility Board with the Director of the Office of Lawyers Professional Responsibility have each filed petitions that propose amendments to Rule 7 of the Minnesota Rules of Professional Conduct, which governs lawyer advertising and communications with potential clients. The petitioners support amendments to Rule 7 to provide uniformity and clarity in the regulation of lawyer advertising and client communications, but they differ on the need for language in the rule that addresses advertising claims that asserts "specialist" or "specialty" status.

The Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility have filed a second, separate, petition that proposes amendments to Rule 20 of the Rules on Lawyers Professional Responsibility, which governs public access to documents and information maintained by the Office. The proposed amendments would reorganize provisions of the rule and classify the public or non-public status of documents and information held by the Director.

The petitions to amend Rule 7, Minnesota Rules of Professional Conduct, and the petition to amend Rule 20, Rules on Lawyers Professional Responsibility, are available on the public access site for the Minnesota Appellate Courts, P-MACS, under case number

ADM10-8005. The court will consider the proposed amendments to Rule 7 of the Minnesota Rules of Professional Conduct and Rule 20 of the Rules on Lawyers Professional Responsibility after providing a period for public comment on those proposed amendments. Given the different positions taken by the petitioners regarding language in Rule 7 of the Rules of Professional Conduct to address advertising claims regarding specialist or specialty status, the court invites comments on these proposed amendments from the Minnesota State Board of Legal Certification.

IT IS HEREBY ORDERED THAT:

1. Any person or organization wishing to provide written comments in support of or in opposition to the amendments proposed to Rule 7 of the Minnesota Rules of Professional Conduct, or to the amendments proposed to Rule 20 of the Rules on Lawyers Professional Responsibility, shall file those comments with the Clerk of the Appellate Courts, using the appellate courts' e-filing application, E-MACS, if required to do so. *See* Minn. R. Civ. App. P. 125.01(a)(1). All comments shall be filed so as to be received by the Clerk's office no later than December 20, 2021.

2. A hearing will be held before this court to consider the proposed amendments to Rule 7 of the Minnesota Rules of Professional Conduct and Rule 20 of the Rules on Lawyers Professional Responsibility. The hearing will take place in the Supreme Court Courtroom, State Capitol, Saint Paul, Minnesota, on January 26, 2022, at 10 a.m. Any person or organization who wishes to make a presentation at the hearing in support of or in opposition to the proposed amendments to these rules shall file a request to so appear along with one copy of the material to be presented with the Clerk of the Appellate Courts,

using the appellate courts' e-filing application, E-MACS, if required to do so. *See* Minn. R. Civ. App. P. 125.01(a)(1). All requests and accompanying materials shall be filed so as to be received by the Clerk's office no later than December 20, 2021.

Dated: October 21, 2021

BY THE COURT:

Lorie S. Gildea
Chief Justice

Attachment 5

MSBA Parental Leave Working Group
Report and Recommendation Regarding a Personal Leave Rule

May 20, 2021

RESOLVED, that the MSBA petition the court for amendments to the Rules of General Practice, Rules of Civil Procedure, and Rules of Appellate Procedure, to facilitate personal leave requests by attorneys and adoption of related forms as outlined on pages 20-27 of this report.

REPORT

INTRODUCTION

> The legal profession is already struggling. . . We are at a crossroads. . . . Change will require a wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.[1]

In 2017, the National Task Force on Lawyer Well-Being issued a report which included staggering and rather dismal statistics regarding the status of lawyer well-being. The report noted a myriad of issues impacting lawyer well-being including depression, anxiety, stress, and problem-drinking. Among the "parade of difficulties" impacting attorneys' well-being, was a consistent complaint of "work-life conflict." Discussions around "work-life conflict" are not new.

[1]ABA *National Task Force on Lawyer Well-Being, Creating a Movement to Improve Well-Being in the Legal Profession*, August 14, 2017, Bree Buchanan, Esq. (Task Force Co-Chair), James C. Coyle, Esq. (Task Force Co-Chair), https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf (last visited on December 21, 2020).

Fortunately, these discussions have gained a renewed focus following the Lawyer Well-Being Report.

The conflict between an attorney's professional and personal life becomes even more profound when starting a family. Law firms and corporations have made significant steps towards addressing this issue by offering increasingly generous paid-leave policies for attorneys. But even with these parental leave policies in place, the negative stigma associated with taking parental leave persists.

A 2018 report prepared for the American Bar Association's Commission on Women in the Profession and the Minority Corporate Counsel Association, entitled "You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession" reported that 47% of men of color, 50% of women of color, 57% of white women, and 42% of white men say taking family leave would have a negative impact on their career. Simply put, the fear of potential fallout from taking advantage of parental leave exists equally across races and genders.

A recent Bench & Bar article authored by Michael Boulette summarized the conundrum, citing to Florida's parental leave examination analysis:

> The attorney preparing to take leave must determine the best time to discuss the issue with partners, staff, and clients, and the timing of these discussions is impacted by many factors, including trial strategy, discovery conferences, deadlines, extensions, and continuances. Attorneys often must consider when to stop taking on new matters and may be forced to seek substitute counsel to monitor their caseload. In a profession in which success relies heavily on client service and caseload, attorneys forced to seek substitute counsel due to parental leave are put at a professional disadvantage that can hinder careers. Workers face tensions when trying to balance their roles as professionals and parents, especially when there are adverse professional consequences to prioritizing family over work.
>
> Facing all these hurdles, it's no wonder that so many parents, particularly mothers, choose to leave traditional legal practice, while

> many male attorneys simple forgo much of the leave they're offered. Frankly, it's a miracle lawyers have children at all.

Third child. First parental leave. What's wrong with this picture? Michael Boulette (February 2020, Bench & Bar).

In addition to the workplace pressures, predetermined court deadlines are often at odds with written parental leave policies. Currently, there is no rule or standard which permits an attorney any presumptive continuance or leave for any reason. Instead, if personal leave is required, the attorney is left to negotiate with opposing counsel to stipulate to an extension or move the court for leave to amend the scheduling deadlines. More often than not, attorneys opt to avoid these conflicts (and the increased expense to their client) and, instead, are forced to reassign their cases to other attorneys. The impact of case reassignments in private practice is detrimental to an attorney's career (especially a newer attorney) due to the pressure of client development, billable hour requirements, financial incentives, and managing internal and external relationships.

The result: Women's professional careers are negatively impacted when they take leave and men choose not to take leave for fear of its negative impact on their career (which further exacerbates the former).

But change is possible. Making court leave is possible. Other states have already implemented changes in courts to address and provide presumptive parental leave. It is time for Minnesota to join these states.

BACKGROUND

In the February 2020 issue of Bench & Bar, Michael Boulette authored an article entitled, *Third child. First parental leave. What's wrong with this picture? Why Minnesota should join the ranks of states making it easier for lawyers to take parental leave.* The article aptly sets out the disparity between the relative commonality of employer parental leave policies and the dearth of

court rules permitting a continuance or reprieve for parental leave. The article also acknowledged the unmistaken disparity of impact that this lack of flexibility has on women versus men in the legal community. From that article, the MSBA leadership created the Parental Leaving Working Group ("the working group") and issued it a charge to study and make recommendations regarding parental leave and court rules.

The working group consists of the following members: Jessica Klander, Bassford Remele (Chair); Honorable Carolina Lamas, Fourth Judicial District; Honorable Sarah McBroom, Ninth Judicial District; John Zwier, U.S. District Court; Michael Boulette, Barnes & Thornburg, LLP; Christine Courtney, Courtney Law Office, PLLC; Amanda Schlitz, US Bank; Cally Kjellberg-Nelson, Quinlivan & Hughes PA; Sarah Soucie Eyberg, Soucie Eyberg Law, LLC.

The working group met for the first time on June 10, 2020 and thereafter met monthly. During these meetings, the working group analyzed other states' rules, feedback from a survey of MSBA members, solicited feedback from other MSBA committees, sections, and stakeholders, and discussed at length the language of the proposed rule. Most significantly, the working group disseminated a survey in the Fall of 2020 to MSBA members, asking for attorneys' experience with parental/family leave requests. The feedback and anecdotes from those attorneys who responded is included throughout this report and recommendation.

The following report and recommendation was drafted based on the working group's careful analysis of the rules, survey results from MSBA members, and stakeholders who provided feedback.

JUSTIFICATION

Dual income households have comprised a majority of American households for the last two decades.[2] Because of the increased prevalence of women in the work force, the need for parental leave has also grown. Women currently account for more than one in three attorneys, according to the United States Census Bureau.[3]

A rule change promotes equity and diversity in our profession. If the pandemic has shown us anything, it has highlighted the deep inequities that exist in our societal norms and systems. When millions of children and their families had to suddenly transition to distance learning models, women left the work force in droves. "According to the U.S. Labor Department, 865,000 women—four times the number of men—dropped out of the workforce in September as families faced patchy school reopening plans."[4]

Large firms are already making the shift to more generous, and equitable, parental leave policies. Some firms offer up to 12 weeks of paid leave for the birth, adoption or foster care placement of a child.[5] Firms are seeing increased retention of employees with implementation of these policies and are extending the policies to their staff as well.[6]

The move away from maternity or paternity leave to "parental leave" is deliberate, aimed at reducing the disparity between men and women who become parents and return to work. Right now, there exists a "motherhood penalty," where women see a decrease of approximately 4% in

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[2] https://www.bls.gov/opub/mlr/2020/article/comparing-characteristics-and-selected-expenditures-of-dual-and-single-income-households-with-children.htm

[3] https://www.census.gov/library/stories/2018/05/women-lawyers.html

[4] "Work-Life Imbalance: Pandemic Stresses Places New Stresses on Women Lawyers" https://www.americanbar.org/groups/diversity/women/publications/perspectives/2021/december/worklife-imbalance-pandemic-disruption-places-new-stresses-women-lawyers/

[5] https://abovethelaw.com/2019/12/biglaw-firm-wows-with-new-parental-leave-policy-for-all-employees/

[6] https://www.thine.co/in-discovery/more-generous-gender-neutral-leave-policies-are-fast-becoming-the-new-norm-in-biglaw

their earnings after they become parents, whereas men often see a 6% increase in pay after the same life event.[7] A 2010 study in Sweden—where fathers are mandated to take at least some of the 16 months of paid parental leave—found "that for each month a father takes off, the mother's earnings rise 6.7% (as measured four years later).[8]

The stigma of parental leave and the "motherhood penalty" persists among attorneys in private practice. As one MSBA survey respondent succinctly stated:

> Right now, there is a stigma about requesting a continuance for reasons of personal or family health; many lawyers consider it a display of weakness or unprofessionalism, which they understandably do not wish to make.

Another MSBA survey respondent aptly commented:

> "The pressure to avoid inconveniencing your client or the Court with a request to delay or accommodate a pregnancy/birth runs rampant. Women are forced to disclose the fact of their pregnancy early for fear that it will somehow negatively impact their client if they don't and to plan to have someone else take over the case in their absence should the Court decline the request (even if a request is ever made). The default is to just offload your cases on to someone else so no one is "inconvenienced" by the birth/pregnancy. The reality is that it takes an unbelievable toll on a women's practice and professional trajectory. It forces women to take a step back and I believe adds to the incredible attrition rates of women in private practice. It is one of the many obstacles women (in particular) face when choosing to stay in private practice."

These experiences are not unique and have real consequences on an attorney's professional career (especially women). Another MSBA survey respondent shared her experience when she requested an accommodation for a hearing (to have the matter heard in a different, closer location) due to a concern about traveling late (9 months) in her pregnancy. The request was denied, and she was told "to have someone else at the office cover it." She stated "I was an associate at the time, and would have loved to have had the opportunity to cover the hearing. However, the partner had to cover it instead and I lost that opportunity."

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[7] *Id*.
[8] *Id*.

The American Bar Association passed a resolution at their 2019 midwinter meeting. The resolution reads as follows:

> Resolved, that the American Bar Association urges the enactment of a rule by all state, local, territorial, and tribal legislative bodies or their highest courts charged with the regulation of the legal profession, as well as by all federal courts, providing that a motion for continuance based on parental leave of either the lead attorney or another integrally involved attorney in the matter be granted if:
>
> a) Consented to by all parties
>
> b) Or if not consented to by all parties and the movant demonstrates:
>
> 1. the motion is made within a reasonable time after the reason for the Continuance has been discovered;
>
> 2. there is no substantial prejudice to another party;
>
> 3. the criminal defendant's speedy trial rights are not prejudiced; and
>
> 4. the judge finds that the request was not made in bad faith, including for purposes of undue delay.[9]

The rule changes proposed by this working group encompass more than just parental leave. Often attorneys face significant, unplanned adverse life events like a chronic illness or sudden death in the family. Under the proposed rule herein, these would also qualify for the presumptive continuance. This makes the rule even more equitable and accessible to all.

As we learned through the National Task Force on Lawyer Well-Being from 2017, "well-being is an indispensable part of a lawyer's duty of competence."[10] That task force has charged bar associations—as major stakeholders in the profession—to "tak[e] small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the

[9] ABA House of Delegates Resolution 101B (1/29/2019).

[10] "National Task Force on Lawyer Well-Being Report" Aug 2017 https://lawyerwellbeing.net/

profession."[11] The proposed rule changes endeavor to accomplish that task. After reading the working group's proposed rule, one MSBA member commented:

> The working group's proposed rule "acknowledges that lawyers are human beings subject to the same limitations the rest of the world faces – and that the court can, simply by legitimatizing and routinizing continuances, help lawyers become better and healthier practitioners and people."

RULES ENACTED IN OTHER JURISDICTIONS

In North Carolina, a parental leave rule was enacted in the fall of 2019.[12] The rule allows attorneys to be excused from court appearances for up to 12 weeks after the birth or adoption of a child.[13]

Florida also passed a parental leave continuance rule in January of 2020. Their rule provides for up to three months of parental leave, unless the opposing party can show substantial prejudice. The rule arose from the Florida Bar's Diversity and Inclusion Committee, as well as a subcommittee of the Florida Bar's Rules of Judicial Administration. A special committee was appointed by the Florida Bar President. In the Special Committee's Final Report and Recommendation, they stated "Adopting and expanding policies that promote parental leave would serve as a meaningful step towards closing the gender gap as well as encourage more male attorneys' participation in paternity leave. When fathers take leave, it increases the opportunity and ability of mothers to engage in paid work, with a positive effect on female labor force participation as well as women's wages."[14]

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[11] *Id*.

[12] https://www.abajournal.com/news/article/new-rules-in-this-state-give-break-from-court-appearances-to-lawyers-who-are-new-parents

[13] https://news.bloomberglaw.com/business-and-practice/north-carolina-lawyers-get-parental-leave-from-litigation

[14] "The Parental Leave Rule: A Procedural Rule for Effecting Change" Palermo, Anthony *YLD Corporate Counsel Committee* Fall 2017.

THE WORKING GROUP'S PROPOSED RULE

To address the concerns and objectives discussed above, the working group proposes four specific rule changes, one to the Minnesota Rules of General Practice, two to the Rules of Civil Appellate Procedure, and one to the Rules of Civil Procedure. Each of these rule amendments is attached in the **Appendix** and discussed in turn below.

1. Rules of General Practice

The working group considered a variety of current and contemplated rules from Florida, North Carolina, and Texas to create a new, proposed Rule of General Practice 17 intended to facilitate attorneys taking personal leave. Ultimately, the working group did not adopt the approach of any one jurisdiction but, instead, adopted portions of each to create a rule intended to encourage equity, attorney well-being, and the effective administration of justice.

In drafting Proposed Rule 17, the working group first needed to decide placement of the rule. Ultimately, the working group rejected drafting a specialized rule for different case types (civil, criminal, juvenile, family, etc.) in favor of a broad-based rule which would apply to as many practices and practitioners as possible. As a result, the working group chose to craft the rule as one of general practice applicable to all district court proceedings.

In determining the scope of the rule, the working group began with a proposal intended to facilitate parental leave upon the birth or adoption of a child. However, it quickly became clear that presumptive leave only around the arrival of a child was insufficient to foster the goals of equity and well-being already discussed. While the period immediately after a new child arrives is undoubtedly challenging, so too are the care responsibilities that continue well after birth. Likewise, while childbirth undoubtedly creates real personal health concerns, these concerns may arise earlier in pregnancy, or well after a child is born. The working group also recognizes that

health conditions other than pregnancy and childbirth may necessitate a period of leave which should be accounted for in the rules. Finally, the working group recognizes that caring for a child is only one of the forms of caregiving for which an attorney may be responsible. A comprehensive leave rule also needs to account for care responsibilities for parents, spouses, and other dependents, as well as the loss of a family member.

Because of the nature of personal leave, it is impossible to set a hard-and-fast requirement for when a leave request must be submitted. Accordingly, the working group's judgment was that the rule should simply require the application to be made within a "reasonable period of time" where reasonableness should be a fairly lenient standard. It is not the working group's opinion that to secure a period of leave an attorney must make the request immediately upon learning of a pregnancy or illness. Rather, it is anticipated that attorneys will act with reasonable diligence while also respecting that the personal nature of these circumstances may make it undesirable, unreasonable, or impractical to seek a continuance immediately upon learning of the need.

Similarly, the length of a personal leave continuance will vary from case-to-case. However, attorneys are most likely to feel pressured to take less leave rather than more. As a result, rather than prescribing a maximum length of leave (or a minimum) the proposed rule provides for a presumptive continuance of 90 days, though the leave-taking attorney may request a different length based on individual circumstances. In this respect, the proposed rule breaks with counterparts in other states which specify a maximum leave duration, but no minimum or presumptive length. This places undue strain on attorneys to take the shortest possible leave and does not foster the basic goals for which the rule is intended.

In deciding upon the mechanics of how leave will be requested, the working group wanted to facilitate ease and confidentiality for the leave-seeking attorney. Thus, the proposed rule permits

an attorney to secure leave merely by submitting a declaration, which may be a simple form specifying the amount of leave requested and the basis. In crafting these requirements, the working group attempted to avoid requiring attorneys to divulge personal or sensitive information about their lives to secure leave or be subject to undue scrutiny. Attorneys decline to take personal leave out of embarrassment or fear and, thus, the rule is intentionally crafted to respect their privacy to the greatest extent possible. The working group also acknowledges that these requests would be publicly available documents which further supports minimal disclosure of personal information. Accordingly, the working group has attempted to craft an application capable of ensuring Courts have the necessary information to assess the continuance (and thus guard against prejudice or abuse) while respecting attorneys' privacy under sensitive and personal circumstances.

Ideally, personal leave continuances should be routinely granted and rarely objected to. For that reason, the proposed rule provides for the automatic grant of a continuance where it complies with the appropriate requirements and is not excluded. However, the working group also recognizes there will be limited instances in which a personal leave continuance cannot be accommodated because of prejudice to a party or extraordinary circumstances. By design the grounds to challenge a leave continuance are narrow and require more than mere inconvenience or expense. Additionally, the party challenging a personal leave continuance bears the burden of bringing a motion to contest the leave continuance within a relatively short period of time. These provisions are intended to discourage frivolous or tactical attempts to interfere with personal leave during what are necessarily sensitive and difficult times for the leave-taking attorney. In order to promote the expeditious resolution of leave challenges, the Court will provide a ruling on any objection withing 21 days of receiving the opposing party's motion.

Relatedly, there are also instances in which a personal leave continuance simply cannot be accommodated because of prejudice to a substantial right in the proceeding. While it would be impractical to delineate every such right, they likely include the defendant's right to a speedy trial, permanency timelines in juvenile court matters, statutory deadlines which cannot be modified by the court, and emergency proceedings. In such instances personal leave would not be available.

Finally, while continuing a hearing or trial may remove one professional hurdle to personal leave, it is not the only one. Attorneys' obligations under discovery orders may make leave impractical or allow an opposing party to impose on a period of personal leave by other means. To protect these leave periods, the proposed rule also provides for an automatic suspension of discovery during a period of personal leave. This suspension not only applies to discovery served on the leave-taking attorney and their client, but discovery served by any party on any person or entity.

In crafting the proposed rule the working group received significant feedback from the bench and bar—much of which has been incorporated into the rule. The work group reviewed all comments, and that feedback was a topic of considerable discussion for the working group. The comments received share some commonality that can be summarized as follows: (1) commenters were appreciative of efforts to promulgate such a rule and echoed the need and positive impact such a rule would have on the legal profession as a whole; (2) commenters provided suggestions for how the rule might be better clarified or improved; (3) commenters expressed concerns that the proposed rule is ripe for abuse and worried attorneys would use it in such a manner; and (4) commenters expressed their view that such a rule is unnecessary because the courts and attorneys in Minnesota have, and will continue to accommodate leave requests.

Many stakeholders who reviewed the proposed rule, praised the initiative and proposed rule and provided personal anecdotes and comments further emphasizing its need. The comments demonstrated the demand for a rule that would support lawyers' well-being during difficult, private (and often unplanned) personal times by reducing unnecessary stress on lawyers in those situations. The comments also point out that the rule would discourage the waste of judicial and client resources, and ensure lawyers are not forced to compromise the quality or zealousness of representation to which their clients are entitled. The rule would also reassure lawyers that might otherwise be reluctant to seek leave out of fear that it would be viewed and reported as professional misconduct.

By way of further example, members of the bar offered the following comments:

- "What a huge relief it will be to have these new rules on the books. No attorney should need to 'power through' the death of a loved one, the birth of a child, as I and so many others have done."

- "I can think of no better way to support solo and small firm lawyers (who are often women and people of color), and to secure their ability to competently represent their clients (who are often women and people of color), than by allowing attorneys time to manage personal and family health events. The rule has the potential to level the playing field between large firms (which have an easier time swapping in another lawyer when one gets sick or needs to act as caregiver) and small ones that can't. Even at bigger firms, the rule promotes better representation by eliminating the need for a different lawyer to swap in and come up to speed (often at cost to the client) when a continuance will solve the problem."

- "I worried . . . that [a leave request would result] in a report to the Board that I had failed somehow in my duties or in my professional responsibility or such."

- "I had only given birth days prior and . . . because I was exhausted from having so little sleep, I overslept for the morning hearing and was late."

- "Even when planning months in advance our profession makes it difficult to have family time during the typical work week."

- "There simply must be a reprieve so that both parents can assist and bond with their child/children in the critical first few months of life. If new mothers and fathers are not allowed leave, we are not bringing our best selves to work, and not giving 100% for out clients. Thus, the entire system suffers."

- "I opted not to ask for the continuance as my partners expressed the view that I had been on 'vacation.'"

- "In retrospect, if the court had clear language allowing a stay of proceedings, I think I would have taken advantage of it."

- "This proposed rule plays an even more important role for attorneys in rural areas of our state[.]"

- "I did not request additional time to complete matters when my [family member] died, as I did not feel the court would approve my request or, at least, that the court would not look kindly upon the request. . . . I wish I had, because it was a very difficult time for me and it saddens me to think that I prioritized work and others' needs above my own grieving process following the relatively sudden death of my beloved [family member]."

- "An important settlement conference was scheduled during my maternity leave. I was concerned about [the client] missing out on the opportunity to resolve the case in advance of the trial ready date, . . . so I attended."

- "[During very contentious litigation,] I didn't want to jeopardize my health or the health of my child, . . . [but] if the court had clear language allowing a stay of proceedings, I think I would have taken advantage of it."

- "I took a call from the hospital [after the birth of a child] . . . . I also handled a telephonic discovery hearing for another matter while on leave. I did not even consider asking for leave. I don't think I would have felt comfortable doing so."

Some commenters called for greater specificity or clarity, which the working group endeavored to provide while still crafting a rule broad enough to cover the variety of individuals and circumstances to whom it might apply. While the proposed rule is an important framework, it cannot anticipate every possible circumstance, and thus a certain amount of discretion must continue to be granted to courts to address each proposed leave on its own terms.

Other commenters questioned the need for a leave rule or raised concerns about its potential for abuse. The working group was unpersuaded by these comments. Significant experience in Minnesota and nationally demonstrates the importance of leave periods as both a matter of gender-equity and attorney well-being. While some attorneys are able to successfully navigate requests

for personal leave on their own; birth, sickness and death impact everyone. There should not be a need to reinvent the proverbial wheel each time an attorney is affected. There is also at least anecdotal evidence indicating that attorneys are more hesitant to request leave and more likely to take shorter leave without the structure of a formal rule.

With respect to potential abuse, the working group is mindful that any rule can be manipulated or abused for improper ends. However, the dangers of manipulation (which the working group contends are small) are far outweighed by the benefits to the profession of recognizing the important goals a leave rule advances. Moreover, the leave-seeking attorney is an officer of the court having not only a significant investment in their professional reputation, but specific ethical and professional responsibilities relative to the practice of law.[15] The stigma surrounding personal leave creates a far greater danger that this rule will be underutilized rather than abused.

A number of commenters expressed the view that this rule is unnecessary because Minnesota courts and attorneys have, and will continue to, accommodate such leave requests. For example, one commenter stated "in my experience, judges and opposing counsel are generally accommodating of such requests. And I certainly always would be." Another said "[i]n cases that I have had where opposing counsel has a health issue . . . , we have been able to work together and reset deadlines for discovery responses and (if necessary) ask for a modification of the scheduling order." The working group was likewise unpersuaded by these (and similar) comments.

[15] *See, e.g.,* Minn. R. Prof. Conduct 1.3 (a lawyer "shall act with reasonable diligence and promptness"); Minn. R. Prof. Conduct 3.2 (a lawyer "shall make reasonable efforts to expedite litigation"); Minn. R. Prof. Conduct 3.3 (candor toward the tribunal). Comments to those rules further speak to this: "Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates." Minn. R. Prof. Conduct 3.2, Comment [1].

The working group recognizes that counsel are frequently able to work together to manage case deadlines in a way that accommodates leave requests when possible, and does not anticipate this rule would disrupt that practice. However, commenters make clear the distinctive need for this rule in those situations where professional/judicial courtesies are lacking, or where the need for leave is urgent or immediate.

Moreover, the need for this rule was exemplified in the comments the working group received from the MSBA survey of its members:

- "I asked for a hearing to be postponed because I had . . . given birth . . . days prior and the request was denied."

- "I had my opposing counsel inform the judge when [the court] set a trial date months down the road that the first day of trial was her due date. She asked that trial be pushed back . . . to allow her time to give birth and still try the case. I agreed. [The judge] refused and, as you might expect, she went in to labor while preparing at the office days before trial, and it was postponed anyway."

- "I asked opposing counsel to stipulate to amend the scheduling order to move the trial date out a few months [to accommodate my maternity leave]. The opposing counsel refused, stating that we would need a court order and that counsel needed to protect the client's right to moving the case along quickly. Ultimately, I moved to amend the scheduling order and was forced to provide details of my pregnancy, due date, and leave plans to the Court. The Judge approved my request. The whole ordeal was humiliating, time consuming, and a waste of judicial (and client) resources."

- "I felt [opposing counsel] would object to a delay, so tried to find a replacement attorney for the case."

- "[I] asked for a trial continuance when my [family member] was dying, which was denied by the trial judge. . . . Felt like if I took [issue with that] . . . I'd get punished in the future by the trial judge."

- "[During] scheduling . . . I told the court that I was pregnant and would likely be on maternity leave. Opposing counsel said 'can't someone else in your office handle it in your absence.' The Court asked me for my response and I said that I could do it."

- "The court made it clear that . . . other attorneys at the firm could cover for me while on leave."

- "Before my child was born I requested short continuances on a couple of cases which would require me to go to hearings and to do a significant amount of work to prepare for the hearings just before and just after my child was born. Opposing counsel objected in both cases. In one case the court granted the continuance. In another, the court denied the continuance, reasoning that I should not have taken on the case if I was unavailable for the hearing."

- "I work in an office with other attorneys, so the court will likely just tell me to have one of my colleagues cover for me. But we are not fungible and each have knowledge of our own cases."

- "[I did not seek leave out of] concern that because we are a 'big firm' there would be an assumption that someone else . . . could just step in. That didn't acknowledge staffing concerns from a client perspective (limiting billers for cost efficiency)."

2. <u>Rules of Civil Appellate Procedure</u>

Recognizing the distinctions between district and appellate court practice, more modest changes to the appellate rules can be made to provide the necessary framework for personal leave continuances. Specifically, the working group proposes that necessary extensions to briefing deadlines be addressed through the existing framework of Minn. R. Civ. App. P. 126.02, which provides for the extension of briefing deadlines upon motion by a party. Unlike other continuances, however, personal leave continuances based on any of the four qualifying events would be presumptively eligible for a 90-day extension. This provision differs from the more discretionary standard currently provided by the rule for other extensions, which would still remain in effect. These amendments do not impact jurisdictional deadline.

With respect to oral argument, the working group anticipates that counsel may continue to note their unavailability for oral argument prior to arguments being set to account for any anticipated leave periods. However, the working group also recognizes that events may change after oral argument is set which would require a continuance. While such continuances are not normally granted absent compelling circumstances, the rule amendment provides for a

postponement for up to 90 days based on one of the four qualifying events triggering a personal leave period. As with extensions to briefing deadlines, attorneys would obtain a postponement by way of a motion filed with the appellate court.

3. Rules of Civil Procedure

As discussed above, a personal leave continuance under proposed Minn. R. Gen. Prac. 17 would automatically suspend discovery for the duration of the continuance. However, there may be instances in which no continuance under Proposed Rule 17 is required (such as where no trial our court hearing is imminent) but a party still requires the suspension of discovery for a period of personal leave. By way of example, a party may be taking a period of leave following a medical procedure, but a case in which they are involved has no imminent hearings and thus no continuance is required. However, the attorney may nonetheless be unavailable to respond to discovery or participate in depositions, thus necessitating a suspension of discovery. To address these circumstances, the working group recommends an amendment to Minn. R. Civ. P. 26.04.

Under the proposed amendment, any attorney may seek a suspension of discovery for a period of personal leave which would be triggered by the same circumstances as those under which Proposed Rule 17 would permit a continuance. Just as with Proposed Rule 17 the suspension would last up to 90 days unless the leave-taking attorney specified a shorter period in their notice. Unlike a continuance however, the leave-taking attorney would not be required to seek permission from the Court. Instead, the suspension would be trigger simply by service of an appropriate notice on all parties. As with any other discovery dispute, the party objecting to the notice would then be required to seek court intervention if necessary.

As with the continuance rules, most commenters expressed their support for a rule which would facilitate attorney's taking leave in appropriate circumstances. Those few commenters who

raised concerns suggested either that a leave rule was unnecessary or (less commonly) that a leave rule would be abused to delay discovery. With respect to objections based on necessity, it is the working group's hope that attorneys in Minnesota all regularly facilitate their colleagues taking leave when appropriate and extending the same professional courtesy to their opposing counsel. However, experience cautions that while that may often be the case, personal leave is significantly facilitated by formal structure within the rules. A formal rule also discourages others from attempting to leverage an attorney's leave to their own advantage (or allowing their client to do so). With respect to concerns about abuse, the working group is not persuaded that the risks of abuse are substantial. The vast majority of feedback the working group received discussed the continuing stigma leave-taking attorneys face, and the corresponding hesitance attorneys have to take leave.

The working group believes attorneys, as officers of the court, will use periods of leave judiciously, reasonably, and for the purpose for which they were intended. To the extent there are outlier cases in which the rule is being abused, the working group is confident individual judicial officers will be in the best position to address and remedy those abuses.

CONCLUSION

The life of the lawyer must change to foster diversity, inclusion, equity, and overall lawyer well-being. One significant step that can and should be taken is to implement changes to court rules to provide presumptive personal leave. Specifically, the working group recommends proposing four specific rule changes, one to the Minnesota Rules of General Practice, two to the Rules of Civil Appellate Procedure, and one to the Rules of Civil Procedure.

[Proposed New] Minnesota Rule of General Practice 17 – Personal Leave Continuance

(a) **Generally.** Subject to an exclusion under paragraph (g) or an objection under paragraph (e), a party's timely application for a continuance of a trial, evidentiary hearing, pretrial, or motion hearing is immediately and automatically granted in connection with any of the following by an attorney substantially involved in the party's representation:

(1) A health condition which makes the attorney temporarily unable to represent the party;
(2) The birth or adoption of a child regardless of the gender of the attorney; ~~or~~
(3) The need to care for a spouse, household member, dependent, or family member who has a serious health condition; or
(4) The death of a family or household member

(b) **Time for Making Request.** An application for a personal leave continuance shall be made within a reasonable period of time after the attorney on whose circumstances the request is based learns of the need for a continuance.

(c) **Presumptive length.** A personal leave continuance shall be for a presumptive length of 90 days absent a showing of good cause that a different time is appropriate.

(d) **Form of Continuance Application.** A personal leave continuance may be granted without hearing upon application by an attorney for any party. An attorney applying for a personal leave continuance shall file a declaration with the court setting forth the following:

(1) Affirming the applicant is an attorney substantially involved in the party's representation;

(2) That personal leave is required for one of the reasons set forth in paragraph (a)(1) – (4) above;

(3) That the application is timely under paragraph (b);

(4) The length of the continuance requested, if different from the presumptive length in paragraph (c);

(5) That the applicant will remain substantially involved in the party's representation following any personal leave continuance;

(6) That the client consents to the continuance; and

(7) That the continuance is sought in good faith and not merely for delay.

(e) **Challenge to Continuance Request.** Upon proof of substantial prejudice or extraordinary circumstances, the court may deny or modify the application for a personal leave continuance. A party challenging an application for a personal leave continuance shall

bear the burden of demonstrating substantial prejudice or extraordinary circumstances which should preclude or limit the continuance. A challenge to a personal leave continuance shall be brought by motion within 14 days and shall be subject to the meet and confer requirement. The applicant shall be permitted a reply within 7 days of the service of objection. The court shall rule on the objection within 21 days of filing of the objection.

(f) **Effect on Discovery.** Unless otherwise ordered by the court for good cause shown, all discovery, shall be suspended for the duration of any personal leave continuance, and deadlines for discovery served during any period of personal leave shall not begin to run until the conclusion of the leave period.

(g) **Exclusions.** The court shall not grant an application for a personal leave continuance if it would impact a substantial right in the proceeding, and alternative arrangements can be made to ensure the party is represented in the attorney's absence.

(h) **Settlement Efforts.** Although the parties are not required to comply with Minn. R . Gen. Prac. 115.10 prior to filing, this rule is not meant to preclude or discourage the parties from agreeing to a continuance or alternative arrangement. If an agreement is reached, the parties must file the agreement as a stipulation with reference to this rule.

[Proposed Amendments to] Minnesota Rule of Appellate Procedure 126.02 - Extension or Limitation of Time

(a) The appellate court for good cause shown may by order extend or limit the time prescribed by these rules or by its order for doing any act, and may permit an act to be done after the expiration of that time if the failure to act was excusable under the circumstances.

(b) The appellate court shall extend the deadline for filing a party's brief for a period of up to 90 days based on the any of the following circumstances impacting a party's attorney during the pendency of an appeal:

1. A health condition which makes the attorney temporarily unable to represent the party;
2. The birth or adoption of a child regardless of the gender of the attorney;
3. The need to care for a spouse, household member, dependent, or family member who has a serious health condition; or
4. The death of a family or household member.

(c) The appellate court may not extend or limit the time for filing the notice of appeal or the time prescribed by law for securing review of a decision or an order of a court or an administrative agency, board, commission or officer, except as specifically authorized by law.

[Proposed Amendments to] Minnesota Rule of Appellate Procedure 134.02 - Notice of Hearing; Postponement

When filing the party's initial brief, counsel must provide written notice of any conflicts which limit counsel's availability for argument. Counsel are required to file written notice of updated conflict information as soon as that information is reasonably available to counsel and until the case is scheduled for argument. The clerk of the appellate courts shall notify all parties of the time and place of oral argument. A request for postponement of the hearing must be made by motion filed immediately upon receipt of the notice of the date of hearing, with the motion identifying the specific circumstances that support the requested postponement. A postponement shall be granted for a presumptive period of up to 90 days if the request is based on any of the following circumstances impacting a party's attorney:

1. A health condition which makes the attorney temporarily unable to represent the party;
2. The birth or adoption of a child regardless of the gender of the attorney;
3. The need to care for a spouse, household member, dependent, or family member who has a serious health condition; or
4. The death of a family or household member.

[Proposed Amendments to] Minnesota Rule of Civil Procedure 26.04 - Timing and Sequence of Discovery

***

(d) **Suspension of Discovery for Personal Leave.**

(1) **In General.** Unless otherwise limited by order of the court, discovery shall be suspended during a period of personal leave designated by a party's attorney. During such suspension, neither party may seek discovery from any source, and deadlines for discovery served during any period of personal leave shall not begin to run until the conclusion of the leave period

(2) **Triggering Events.** A period of personal leave shall be allowed following any of the following events impacting a party's attorney:

A. A health condition which makes the attorney temporarily unable to represent the party;
B. The birth or adoption of a child regardless of the gender of the attorney;
C. The need to care for a spouse, household member, dependent, or family member who has a serious health condition; or
D. The death of a family or household member.

(3) **Length.** Unless otherwise agreed by the parties or ordered by the court for good cause shown, a period of personal leave shall extend for 90 days after any event in Rule 26.04(2)(A)–(C) unless a shorter time period is designated by the attorney.

(4) **How Designated.** A period of personal leave shall be designated by serving notice on all parties within a reasonable period of time after the attorney learns of the circumstances necessitating the leave. The notice shall include the date upon which the personal leave shall begin, a brief statement explaining the basis of the personal leave, and the length of leave designated if less than 90 days.

(5) Disputes. Upon motion by a party demonstrating substantial prejudice or extraordinary circumstances, the court may modify or deny a period of personal leave.

~~(d)~~(e) Expedited Litigation Track.

Expedited timing and modified content of certain disclosure and discovery obligations may be required by order of the supreme court adopting special rules for the pilot expedited civil litigation track.

STATE OF MINNESOTA
COUNTY OF [COUNTY]

DISTRICT COURT
[DISTRICT] JUDICIAL DISTRICT
[FAMILY COURT DIVISION]
CASE TYPE: [Case Type]

[Judicial Officer: [Judge or Referee Name]]

[PETITIONER NAME],

Petitioner,

and

[RESPONDENT NAME],

Respondent.

DECLARATION IN SUPPORT OF REQUEST FOR A PERSONAL LEAVE CONTINUANCE

Court File No. [...]

STATE OF MINNESOTA
COUNTY OF [COUNTY NAME]

1. I am [identification of declarant].

2. I submit this declaration in support of and to request a continuance pursuant to Minnesota Rule of General Practice 17.

3. I am an attorney substantially involved in the above-entitled matter; I represent [identification of party].

4. Personal leave is required due to one of the following: a health condition that makes me temporarily unable to represent the party; the birth or adoption of a child; the need to care for a spouse, household member, dependent, or family member who has a serious health condition; or the death of a family or household member.

5. This declaration is within a reasonable period of time after I learned of the need for a continuance.

6. I request a continuance for:

   □ the presumptive length of 90 days.

   □ [number of] days.

7. I will remain substantially involved in [identification of party]'s representation following this continuance.

8. I have consulted with my client consistent with Minnesota Rule of Professional Conduct 1.4, and my client consents to the continuance.

9. This continuance is sought in good faith and not merely for delay.

[FIRM NAME]

Dated: _____ _____

[Attorney Name]
MN# [Attorney ID]
[Attorney Address]
Telephone: [Attorney Telephone]
Facsimile: [Attorney Facsimile]

ATTORNEY FOR [PARTY TITLE]

STATE OF MINNESOTA
COUNTY OF [COUNTY]

DISTRICT COURT
[DISTRICT] JUDICIAL DISTRICT
CASE TYPE: MISCELLANEOUS

Court File No. [Court File No.]
Assigned Judge: [Judge Name]

[PLAINTIFF NAME],

Plaintiff,

vs.

[DEFENDANT NAME],

Defendant

.

NOTICE OF SUSPENSION OF DISCOVERY

TO: [OPPOSING PARTY OR COUNSEL AND ADDRESS]

NOTICE OF SUSPENSION OF DISCOVERY

PLEASE TAKE NOTICE that, [name of Attorney] is providing notice of suspension of discovery in the above-captioned case, pursuant to Minnesota Rule of Civil Procedure 26.04(d). During this suspension, neither party may seek discovery from any source, and deadlines for discovery served during any period of personal leave shall not begin to run until the conclusion of the leave period.

The suspension of discovery shall begin on [date] for [the presumptive length of 90 days] [*number of* days].

The Declaration in Support of Request for a Personal Leave Continuance is attached to this Notice.

[FIRM NAME]

Dated: _____ _____

[Attorney Name]
MN# [Attorney ID]
[Attorney Address]

Telephone: [Attorney Telephone]
Facsimile: [Attorney Facsimile]

ATTORNEY FOR [PARTY TITLE]

Attachment 6

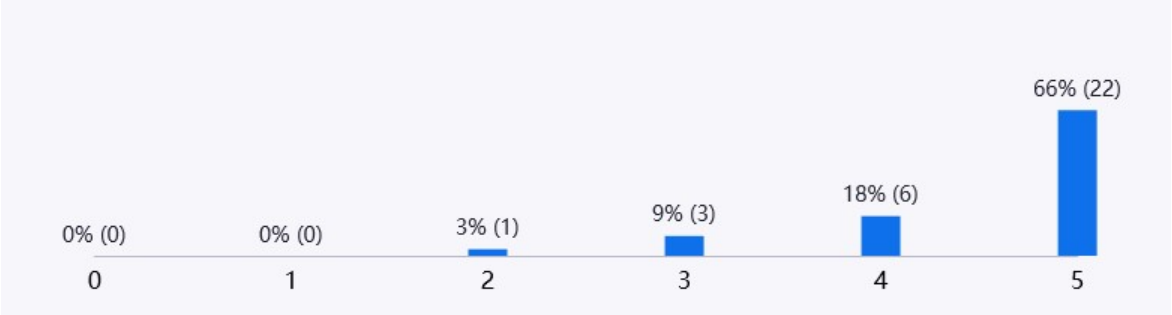
Webinars

< Back (https://courts-state-mn-us.zoomgov.com/webinar/1600486291)

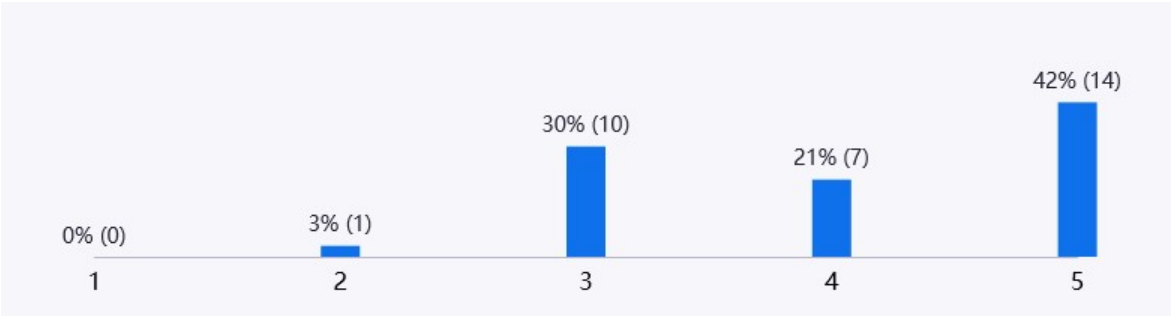
36th Annual Lawyers Professional Responsibility Seminar

Download CSV Report

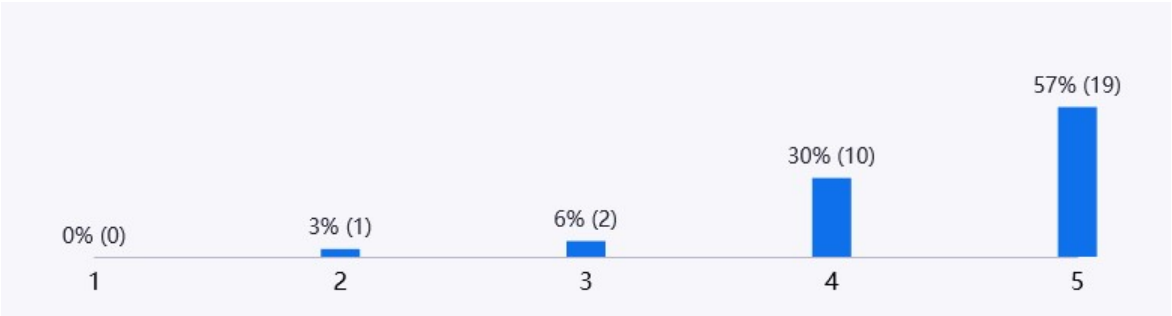
1. First session: Redemption: Reinstatement - The content and presentation was interesting and engaging.



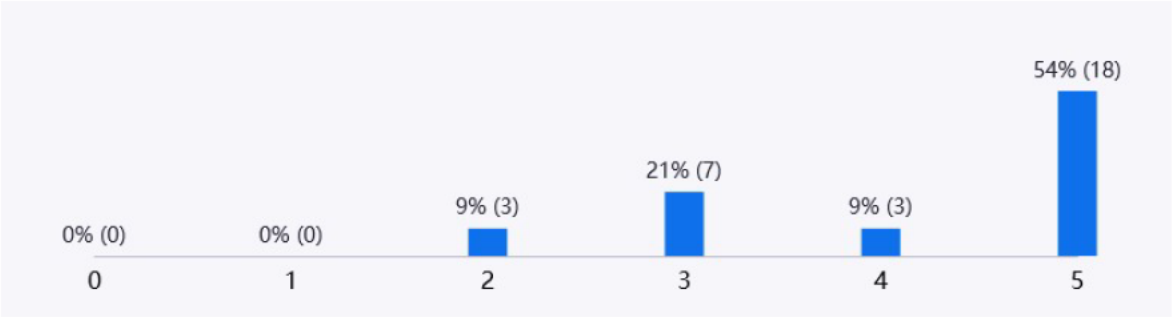
2. First session: Redemption: Reinstatement - The information provided will be helpful to me.



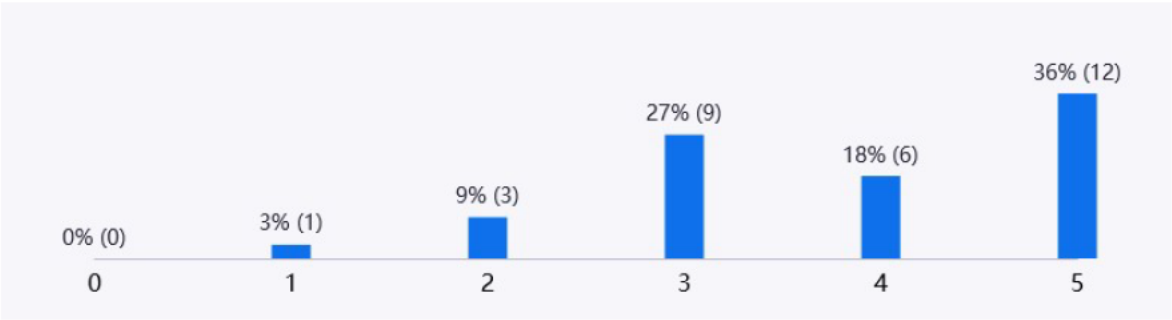
3. First session: Redemption: Reinstatement - Rate the overall session.



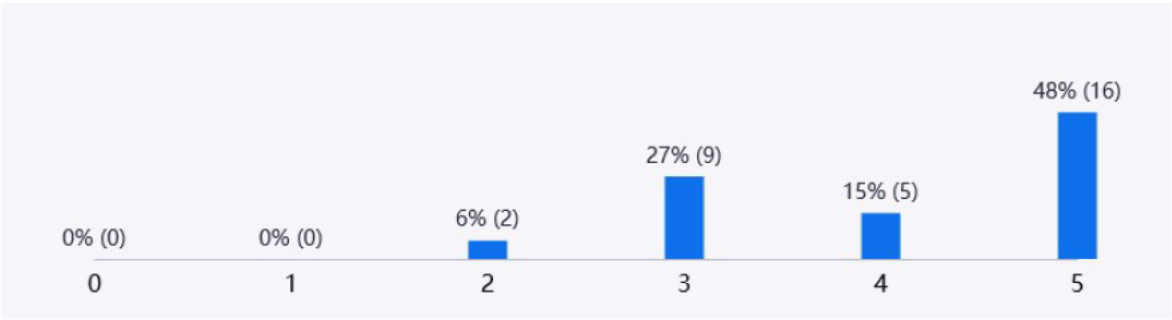
4. Second session: The Racial Equity Impact Tool - The content and presentation was interesting and engaging.



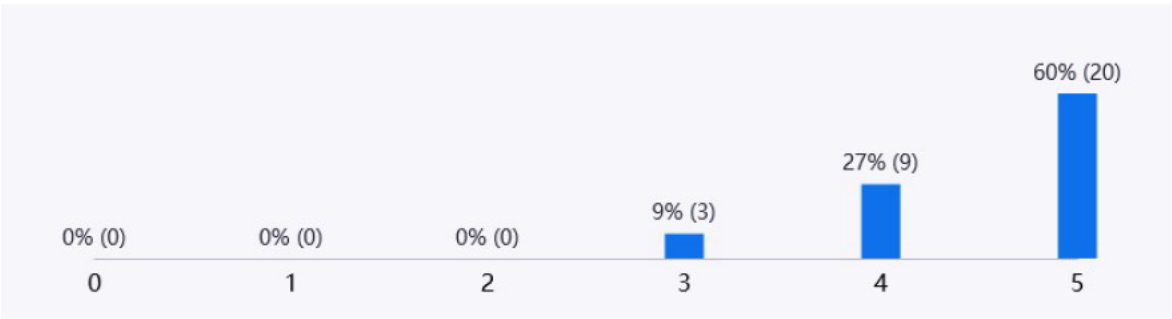
5. Second session: The Racial Equity Impact Tool - The information provided will be helpful to me.



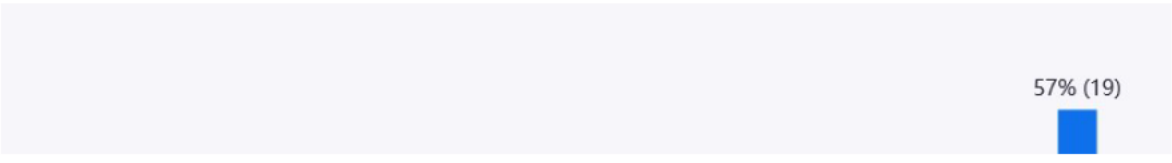
6. Second session: The Racial Equity Impact Tool - Rate the overall session



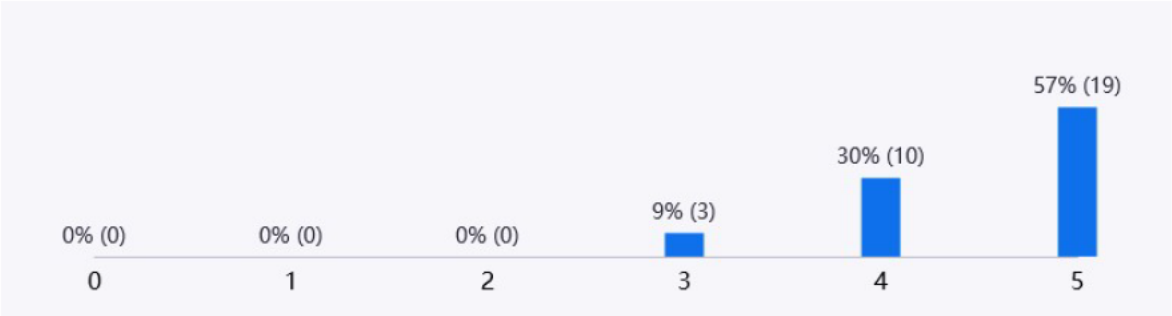
7. Third session: Update from the Minnesota Supreme Court - The content and presentation was interesting and engaging.



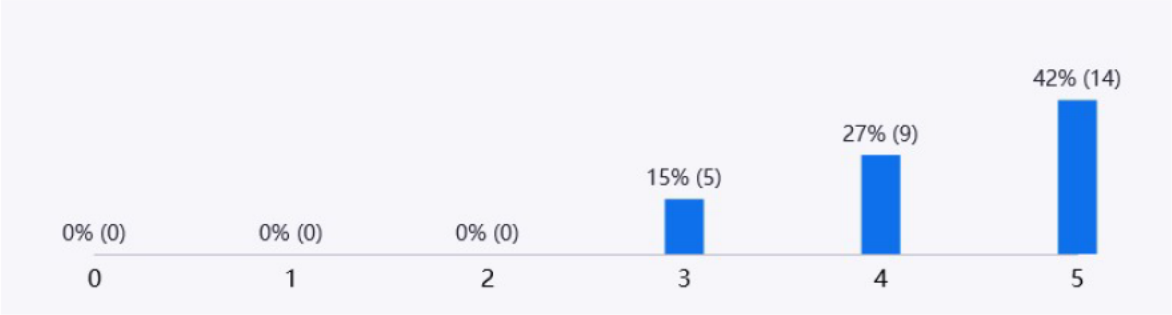
8. Third session: Update from the Minnesota Supreme Court - The information provided will be helpful to me.



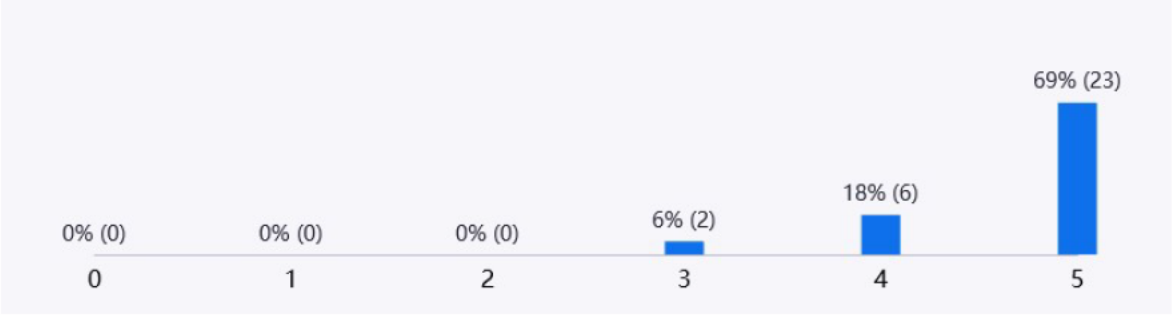
9. Third session: Update from the Minnesota Supreme Court - Rate the overall session.



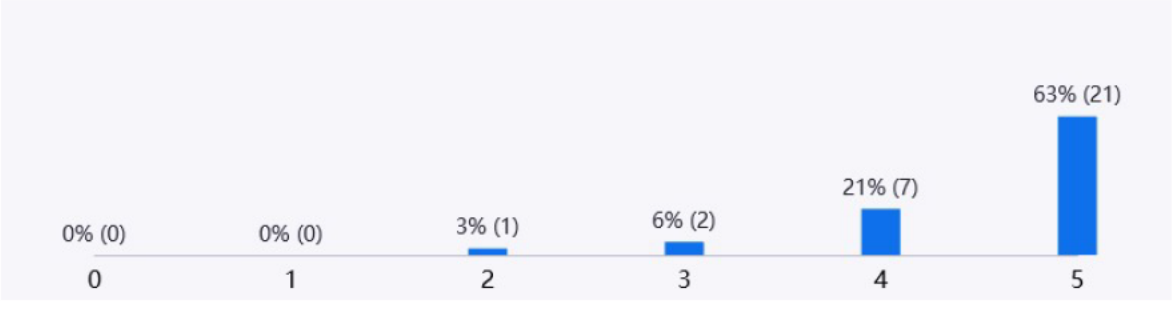
10. Resource Quick Hit - The information provided will be helpful to me.



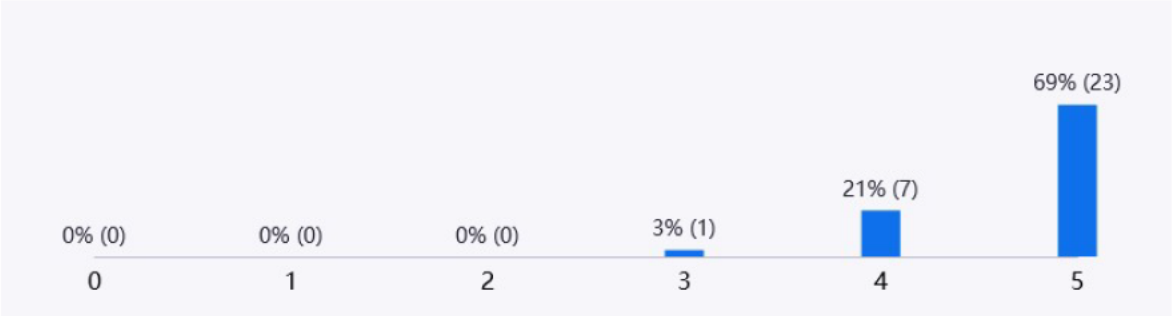
11. Fourth session: When the Office Departs - The content and presentation was interesting and engaging.



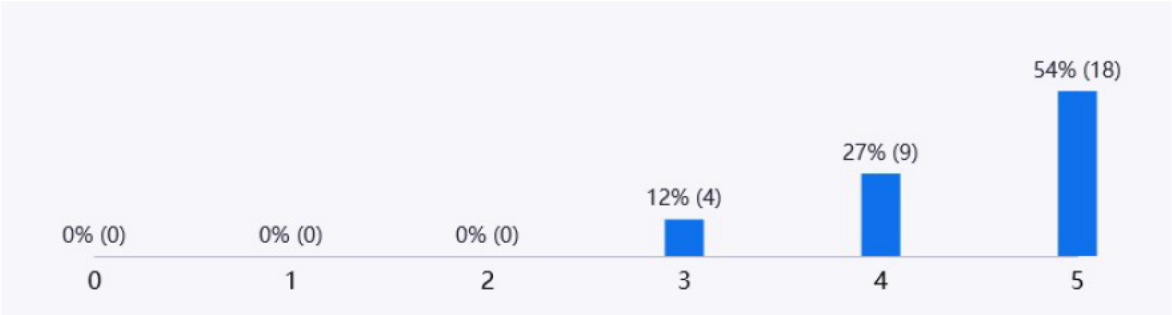
12. Fourth session: When the Office Departs - The information provided will be helpful to me.



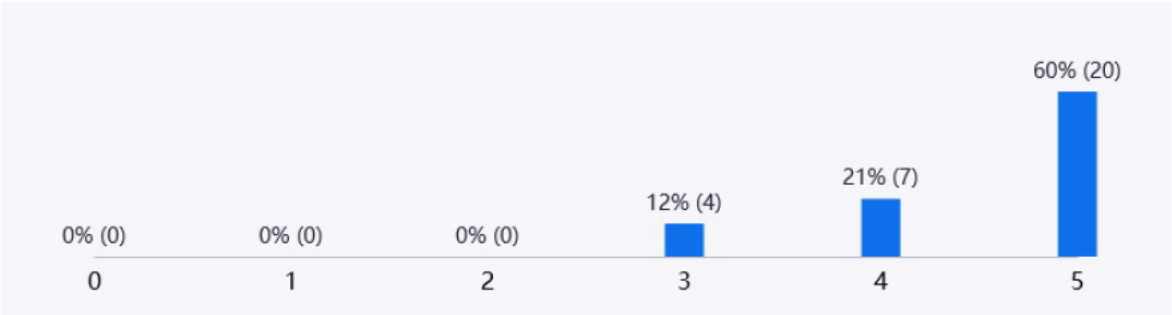
13. Fourth session: When the Office Departs - Rate the overall session.



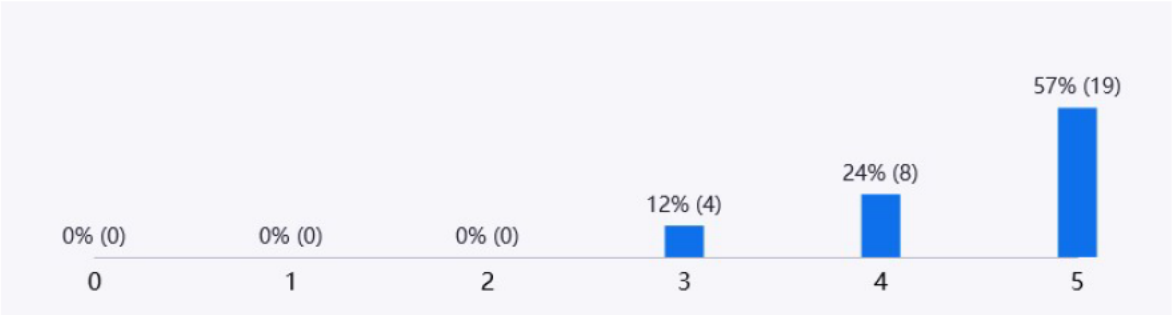
14. Fifth session: Commonly Misunderstood or Misapplied Rules - The content and presentation was interesting and engaging.



15. Fifth session: Commonly Misunderstood or Misapplied Rules - The information provided will be helpful to me.



16. Fifth session: Commonly Misunderstood or Misapplied Rules - Rate the overall session.



17. Please indicate any other topics you think should be included or expanded upon for future programs.

- [Empty]

- Case studies showing the rules in action are the most useful, both as an investigator and as an attorney. :)

- I thought this was good and it was obviously focused more on people who are involved in the discipline proces s so I think the format and content was good. I am an immigration attorney and would like to see a separate CLE focused on things immigration lawyers should be doing (or not doing).

- [Empty]

- [Empty]

- More about the technical process from complaint through disbarment and what can be done to make the proc ess more efficient and timely.

- [Empty]

- [Empty]

- [Empty]

- [Empty]

- [Empty]

- I'm an Old Fart Lawyer (40 + years in a litigation practice), and I've seen some outrageous behavior and / or ru le violations over the years. Since some of those instances involved former partners, or well-known opposing la wyers, how do you convince those of us in the trenches: 1. it's for the good of the profession AND general publi c for the offending attorney to be investigated, and, 2. what to do when the retaliation begins? Thx, Lou Jungba uer (jungbauerlou@gmail.com)

- [Empty]

- Sessions on racial inequities are extremely important and I hope to see additional sessions on this in future yea rs. Thank you!

- [Empty]

- [Empty]

- [Empty]

- [Empty]

- [Empty]

- [Empty]

Show More

18. Did you experience any technical difficulties? If so, what happened?

- [Empty]

- The Q&A was significantly delayed. When the moderator read questions from the online attendees, the questi on didn't appear on our Q&A screen for 10-15 minutes.

- No

- [Empty]

- [Empty]

- no problems with remote attendance

- [Empty]

- [Empty]

- No

- [Empty]

- I had to break out at noon, so I hope it lets me back for the afternoon.

- Yes, but your Staff was fantastic in responding to my issues.

- [Empty]

- [Empty]

- [Empty]

- [Empty]

- [Empty]

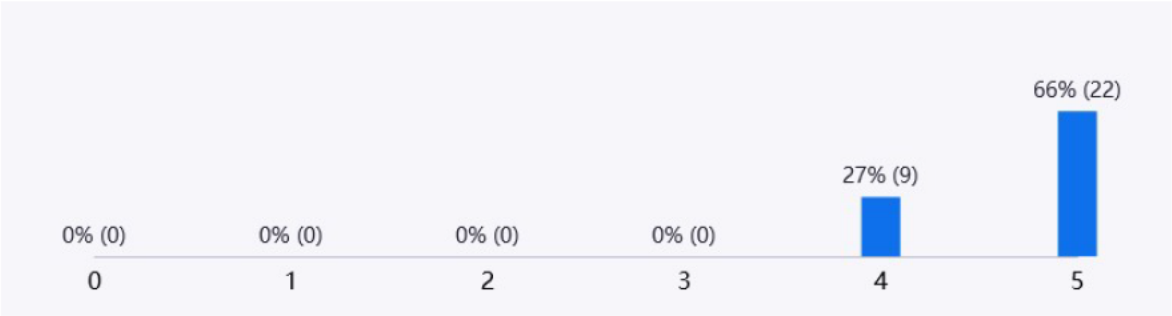
- [Empty]

- NO TECHNICAL DIFFICULTIES

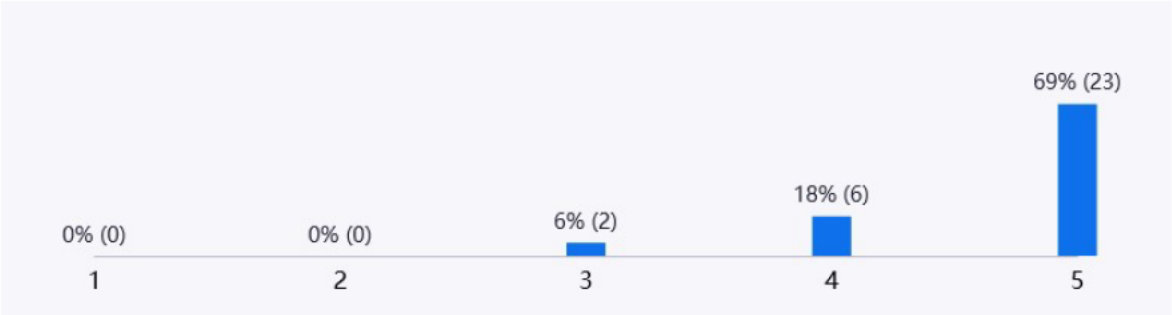
- [Empty]

Show More

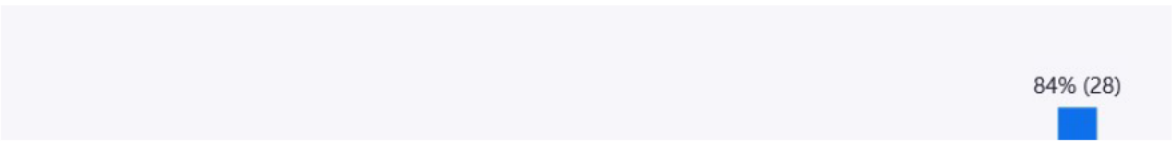
19. REMOTE PARTICIPANTS: Please rate your satisfaction with the video quality of the webinar.

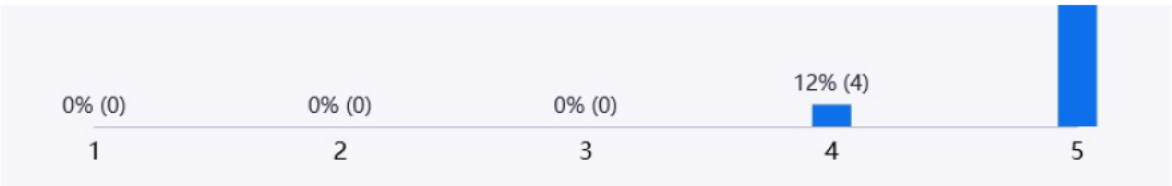


20. REMOTE PARTICIPANTS: Please rate your satisfaction with the audio quality of the webinar.

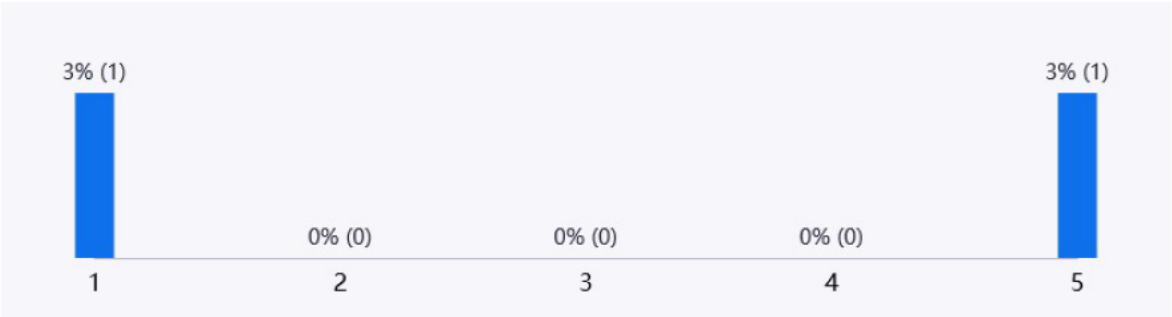


21. REMOTE PARTICIPANTS: Please rate your satisfaction with the ease of use of the webinar.

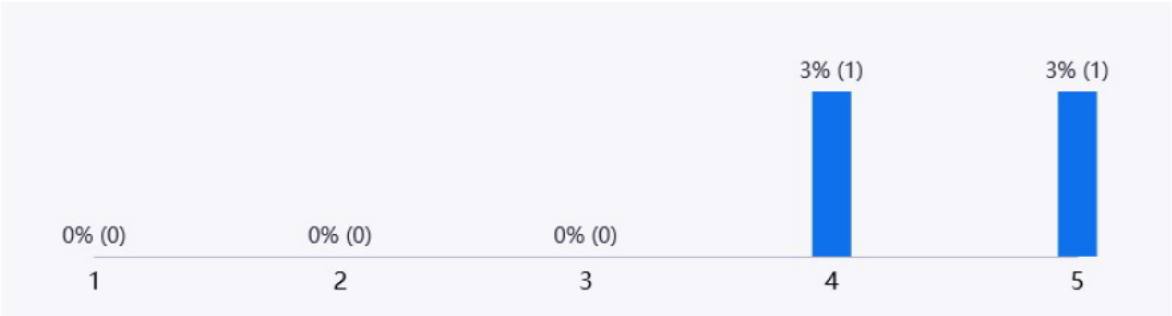




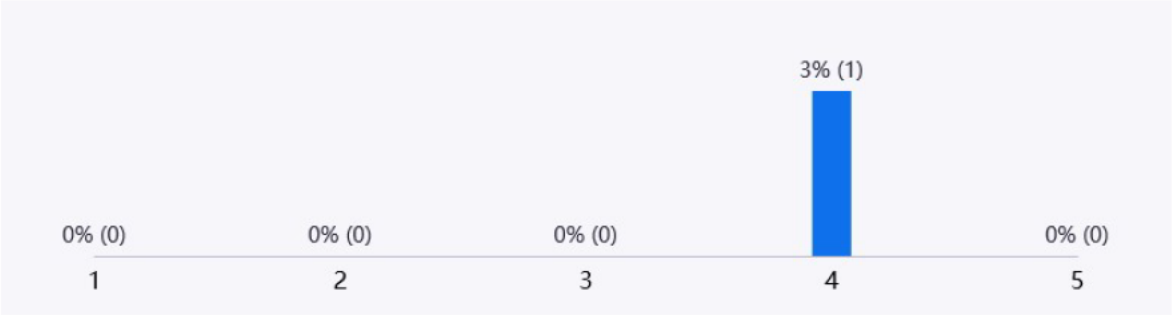
22. IN PERSON ATTENDEES: Please rate your satisfaction with the venue.



23. IN PERSON ATTENDEES: Please rate your satisfaction with the audio quality.



24. IN PERSON ATTENDEES: Please rate your satisfaction with the catering.



25. Other Comments

- [Empty]

- The overall seminar was great, but I really enjoyed Karin Ciano's presentation. She has a wonderful presence a nd speaking ability.

- Thank you for this event. I hope you will continue to offer it via zoom and in-person. I think it increases attend ance and the remote access (technical issues) were good.

- [Empty]

- [Empty]

- Nice event. Thank you!

- [Empty]

- [Empty]

- Speakers for 2d (Hennepin REIT) and 4th (Joan Bibelhausen) flat out excellent.

- [Empty]

- [Empty]

- Overall, another great seminar. Informative and interesting. I look forward to this Seminar every year. I especia lly send kudos to Mr. Sand for having the courage to tell his story.

- [Empty]

- There is one PowerPoint presentation that is not available as a download. This is unfortunate as it may not be available long-term online.

- [Empty]

- [Empty]

- [Empty]

- Thank you.

- VERY INFORMATIVE SEMINAR!!!

- [Empty]

- [Empty]

- [Empty]

- [Empty]

- [Empty]

- [Empty]

- [Empty]

- All around very well done. Great presentations/presenters and great job facilitating for both in-person and re mote attendees.

- [Empty]

- Thank you so very much! I appreciate all of the time and energy you give to offer this high-quality, super infor mative event. And I really appreciated being able to appear via webinar from the comfort of my office and (savin g four plus hours of drive time on a beautiful day). Thank you! Thank you!

- [Empty]

- [Empty]

- [Empty]

- [Empty]

All answers have been listed

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Attachment 7

LAWYERS BOARD PANELS
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Rule 4(e), Rules on Lawyers Professional Responsibility provides that 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 non-lawyer, and shall designate a Chair and a Vice-Chair for each Panel.

Effective July 13, 2021, the following Panels are appointed:

Panel No. 1.
Daniel J. Cragg, Chair
Julian C. Zebot, Vice-Chair
Susan T. Stahl Slieter (p)

Panel No. 2.
Susan C. Rhode, Chair
Ben Butler, Vice-Chair
Michael Friedman (p)

Panel No. 3.
Landon J. Ascheman, Chair
Katherine Brown Holmen, Vice-Chair
Andrew Rhoades (p)

Panel No. 4.
Kristi J. Paulson, Chair
William Z. Pentelovitch, Vice-Chair
Mark Lanterman (p)

Panel No. 5.
Allan Witz, Chair
Mary L. Waldkirch Tilley (p), Vice-Chair
Antoinette M. Watkins (p)

Panel No. 6.
Peter Ivy, Chair
Geri Sjoquist, Vice-Chair
Paul J. Lehman (p)

Dated: July 12, 2021

Jeanette Boerner, Chair
Lawyers Professional Responsibility Board

Attachment 8

OLPR Dashboard for Court And Chair

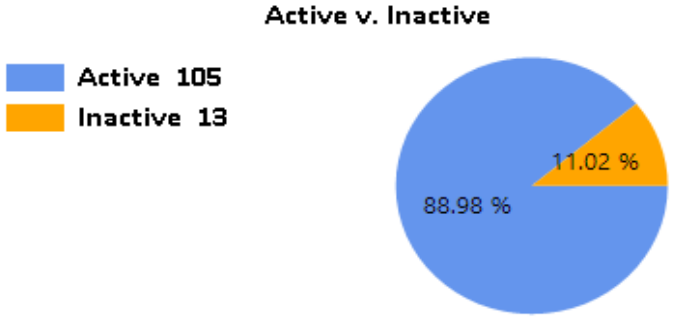
	Month Ending September 2021	Change from Previous Month	Month Ending August 2021	Month Ending September 2020
Open Files	475	35	440	467
Total Number of Lawyers	356	31	325	359
New Files YTD	727	101	626	699
Closed Files YTD	693	66	627	713
Closed CO12s YTD	83	4	79	136
Summary Dismissals YTD	314	32	282	325
Files Opened During September 2021	101	10	91	105
Files Closed During September 2021	66	-3	69	81
Public Matters Pending (excluding Resignations)	39	0	39	33
Panel Matters Pending	11	1	10	14
DEC Matters Pending	110	2	108	83
Files on Hold	15	0	15	10
Advisory Opinion Requests YTD	1572	170	1402	1271
CLE Presentations YTD	40	6	34	24
Files Over 1 Year Old	118	3	115	131
Total Number of Lawyers	82	-2	84	96
Files Pending Over 1 Year Old w/o Charges	57	2	55	85
Total Number of Lawyers	44	1	43	62

	2021 YTD	2020 YTD
Lawyers Disbarred	4	3
Lawyers Suspended	12	19
Lawyers Reprimand & Probation	4	3
Lawyers Reprimand	3	0
TOTAL PUBLIC	**23**	**25**
Private Probation Files	8	14
Admonition Files	75	57
TOTAL PRIVATE	**83**	**71**

FILES OVER 1 YEAR OLD

Year/Month	OLPR	ADAP	PAN	HOLD	SUP	S12C	SCUA	REIN	Total
2017-03				1	1				**2**
2017-11					1				**1**
2018-04					2				**2**
2018-06					1				**1**
2018-07	1				1				**2**
2018-08	1				1		1		**3**
2018-10				2					**2**
2018-12	1				1				**2**
2019-01			1	1					**2**
2019-03	1				3				**4**
2019-04	2			3	1		1		**7**
2019-05					4				**4**
2019-06				1	1				**2**
2019-07	1				1	1	1		**4**
2019-08	1								**1**
2019-09	1		2						**3**
2019-10	3	1			2				**6**
2019-11	1	1		1					**3**
2019-12	2								**2**
2020-01	4								**4**
2020-02	1			2	2			1	**6**
2020-03	3				1				**4**
2020-04	1				1				**2**
2020-05			1	1	2			1	**5**
2020-06	3				1				**4**
2020-07	11				2				**13**
2020-08	8		1		3				**12**
2020-09	11				3		1		**15**
Total	**57**	**2**	**5**	**12**	**35**	**1**	**4**	**2**	**118**

	Total	**Sup. Ct.**
Sub-total of Cases Over One Year Old	114	38
Total Cases Under Advisement	4	4
Total Cases Over One Year Old	**118**	**42**



All Pending Files as of Month Ending September 2021

Year/Month	SD	DEC	REV	OLPR	AD	ADAP	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	**Total**
2017-03								1	1						**2**
2017-11									1						**1**
2018-04									2						**2**
2018-06									1						**1**
2018-07				1					1						**2**
2018-08				1					1		1				**3**
2018-10								2							**2**
2018-12				1					1						**2**
2019-01							1	1							**2**
2019-03				1					3						**4**
2019-04				2				3	1		1				**7**
2019-05									4						**4**
2019-06								1	1						**2**
2019-07				1					1	1	1				**4**
2019-08				1											**1**
2019-09				1			2								**3**
2019-10				3		1			2						**6**
2019-11				1		1		1							**3**
2019-12				2											**2**
2020-01				4											**4**
2020-02				1				2	2			1			**6**
2020-03				3					1						**4**
2020-04				1					1						**2**
2020-05							1	1	2			1			**5**
2020-06				3					1						**4**
2020-07				11					2						**13**
2020-08				8			1		3						**12**
2020-09				11					3		1				**15**
2020-10		1		11				1	2						**15**
2020-11			1	11					1						**13**
2020-12				14	1				2			1			**18**
2021-01				20					1			1		1	**23**
2021-02		1		9					3			1			**14**
2021-03		2	1	24				1	2			1		1	**32**
2021-04		4	1	20				1	2						**28**
2021-05		13	3	17											**33**
2021-06		23	3	11										1	**38**
2021-07		19	1	7								1			**28**
2021-08	1	22		20										1	**44**
2021-09	28	25		15									3		**71**
Total	**29**	**110**	**10**	**236**	**1**	**2**	**5**	**15**	**48**	**1**	**4**	**7**	**3**	**4**	**475**

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 499 **September 8, 2021**

Passive Investment in Alternative Business Structures

A lawyer may passively invest in a law firm that includes nonlawyer owners ("Alternative Business Structures" or "ABS") operating in a jurisdiction that permits ABS entities, even if the lawyer is admitted to practice law in a jurisdiction that does not authorize nonlawyer ownership of law firms.[1] *To avoid transgressing Model Rule 5.4 or other Model Rules and to avoid imputation of conflicts under Model Rule 1.10, a passively investing lawyer must not practice law through the ABS or be held out as a lawyer associated with the ABS and cannot have access to information protected by Model Rule 1.6 without the ABS client's informed consent or compliance with an applicable exception to Rule 1.6 adopted by the ABS jurisdiction. The fact that a conflict might arise in the future between the investing lawyer's practice and the ABS's work for its clients does not mean that the lawyer cannot make a passive investment in the ABS. If, however, at the time of the investment the lawyer's investment would create a personal interest conflict under Model Rule 1.7(a)(2), the lawyer must refrain from the investment or appropriately address the conflict under Model Rule 1.7(b).*

Introduction

ABA Model Rule of Professional Conduct 5.4 features a number of prohibitions designed to preserve the professional independence of lawyers. In general, the Rule prohibits a lawyer or law firm from sharing legal fees with a nonlawyer, forming a partnership with a nonlawyer (if any of the activities of the partnership consist of the practice of law), and practicing in a business structure in which a nonlawyer owns any interest in the business or serves as a corporate director or officer.

Model Rule 5.4 or its close equivalent has been adopted in nearly every U.S. jurisdiction; to date only Arizona, the District of Columbia, and Utah have modified their jurisdiction's Rule 5.4 to permit business structures that allow nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers.[2] Since 1991, the District of Columbia's version of Rule 5.4 has, in circumstances defined in and limited by that rule, permitted individual nonlawyer partners in law firms, as long as such nonlawyers are providing professional services that assist the firm in delivering legal services. The District of Columbia does not permit passive investment in law firms. In 2020 the Utah Supreme Court launched a two-year pilot legal-regulatory "sandbox" project whereby Court-approved entities may include nonlawyer owners in firms that provide legal

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] In 2015 the Washington State Supreme Court authorized Limited License Legal Technicians to share fees and form business structures with lawyers. *See* WASH. R. OF PROF'L CONDUCT R. 5.9 (Business Structures Involving LLLT and Lawyer Ownership). The United States Patent and Trademark Office permits parent agents to be partners in a law firm practicing before the Office. 37 C.F.R. § 11.1 (definition of practitioner); 37 C.F.R. § 11.504.

services.[3] In 2021 Arizona eliminated Rule 5.4 altogether, substituting a system in which Arizona law firms that include nonlawyer owners or investors may be certified by the Arizona Supreme Court as "alternative business structures" ("ABS"). Given these changes, the question raised is whether a lawyer admitted to practice law in a jurisdiction adhering to Model Rule 5.4 (i.e., a jurisdiction that strictly prohibits nonlawyer ownership of law firms) (hereinafter "Model Rule Lawyer") may acquire a "passive" investment interest in an ABS?[4]

For purposes of this opinion, a "passive" investment interest means that a lawyer contributes money to an ABS with the goal of receiving a monetary return on that investment. Passive investment does not include scenarios in which the investing lawyer practices law through the ABS, manages or holds a position of corporate or managerial authority in the ABS, or is otherwise involved in the daily operations of the ABS.

Further, passive investment, as used in this Opinion, means that the investing lawyer does not have access to information protected by Model Rule 1.6 without the ABS client's informed consent.

Under these circumstances, a Model Rule Lawyer who makes a passive investment in an ABS does not violate Model Rule 5.4. However, in some circumstances the Model Rule Lawyer may have a conflict of interest, arising from the Model Rule Lawyer's own practice. The conflict might arise at the time the investment is made or thereafter. The potential for a conflict does not prohibit a Model Rule Lawyer from making the passive investment, but it does require the Model Rule Lawyer to address a conflict that later materializes. If, however, at the time of the investment the Model Rules Lawyer's investment would create a personal interest conflict under Model Rule 1.7(a)(2), the Model Rule Lawyer must refrain from the investment or appropriately address the conflict pursuant to Model Rule 1.7(b).

Analysis

A. A Lawyer May Have Business Interests Separate from the Practice of Law

In general, a lawyer may own a business or an investment interest that is separate from and unrelated to the lawyer's practice of law. For instance, a lawyer may have an ownership interest in a restaurant, be a partner in a consulting business, invest in a mutual fund, or buy stock in a publicly traded company (collectively "unrelated personal investments").

An unrelated personal investment does not intrinsically implicate the Model Rules, except to the extent that the lawyer's activities vis-à-vis the investment present a conflict of interest under Model Rule 1.7 or 1.8. For example, if a lawyer were to ask a client to invest in the lawyer's separate business or offer to refer ancillary business services to a client, the lawyer would need to comply with the disclosure and writing requirements in Model Rule 1.8(a).[5]

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[3] In May 2021, the Utah Supreme Court extended the term of the Utah legal-regulatory sandbox to seven years.

[4] This Opinion only addresses "passive investment" in an ABS and is not, at this time, evaluating other scenarios involving a Model Rule lawyer practicing in an ABS.

[5] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 484 (2018) (offering litigation funding services to a client when the lawyer has a financial interest in the offered services requires informed consent). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. [10] (a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial

Similarly, the Rules do not prohibit a lawyer from making unrelated personal investments, albeit in some circumstances the Rules require the client's informed consent. When the lawyer invests in an entity that is a client or accepts an interest in a client's business as a fee, the lawyer must comply with Rule 1.8(a).[6] And if a lawyer owns a significant investment interest in a business that is an adversary of the lawyer's client, that interest could materially limit the lawyer's representation as discussed in Part C, below.

B. Choice of Law Considerations

If a Model Rule Lawyer is a passive investor in an entity operating in a jurisdiction that permits investment in an ABS, there is a choice-of-law question about which jurisdiction's ethics rules apply to the Model Rule Lawyer's passive-investment conduct: the rules of the Model Rule jurisdiction or the rules of the ABS-friendly jurisdiction. Model Rule 8.5(b) resolves the conflict of laws that arises when a lawyer is potentially subject to more than one set of rules of professional conduct that impose different obligations.

Under Model Rule 8.5(b)(1), the rules to be applied depend on whether the conduct relates to a matter pending before a tribunal, in which case the rules of the jurisdiction in which the tribunal sits apply. In other circumstances, the applicable rules are those of the jurisdiction in which the lawyer's conduct occurred, unless the predominant effect of that conduct is in another jurisdiction.[7]

In the Committee's view, the conflict-of-law issue in the passive investment context is resolved by applying the law of the jurisdiction in which the ABS is authorized to operate because under Rule 8.5(b)(2), the predominant effect of a Model Rule Lawyer's *passive* investment in an ABS would be in the jurisdiction(s) where the ABS would be permitted. That conclusion follows from the fact that the investment is passive and is made in order to fund the activities of an ABS in a jurisdiction that permits such entities.[8] Assuming the Model Rule Lawyer's investment is genuinely passive, the lawyer cannot be deemed to be practicing law in the ABS-permissive jurisdiction, just as a lawyer who is an investor in a mutual fund that includes widget company stock in its portfolio is not deemed to be making widgets. Accordingly, when the Model Rule Lawyer is passively investing, the only relevant "conduct" and the only meaningful "effect" of that conduct occurs in the ABS-permissive jurisdiction. As to that conduct, the Model Rule Lawyer's passive investment does not violate the rules of professional conduct of the ABS-permissive jurisdiction.

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interest); MODEL RULES OF PROF'L CONDUCT R. 5.7, cmt. [5] (noting that when a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, the lawyer must comply with Rule 1.8(a)).

[6] *See* MODEL RULES OF PROF'L CONDUCT R. 1.8, cmt. [1].

[7] *See* MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2).

[8] *Cf.* NY State Bar Ass'n Comm. on Prof'l Ethics Op. 1093 (2016) (predominant effect of New York-admitted lawyer practicing in England was in the latter jurisdiction). The analysis does not change if the passive investment funds, in whole or in part, litigation before a tribunal. In order for Rule 8.5(b)(1) to apply, instead of Rule 8.5(b)(2), the conduct at issue must be before a tribunal. A lawyer making a passive investment in an ABS-firm is not engaged in "conduct in connection with a matter pending before a tribunal." *See* MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. [4] (conduct by litigating lawyer "in anticipation of a proceeding not yet pending before a tribunal" is governed by Rule 8.5(b)(2).)

This outcome is, from a policy standpoint, consistent with this Committee's earlier opinion on cross-border fee dividing between lawyers. In ABA Formal Opinion 464 (2013), the issue was whether a lawyer in a Model Rules jurisdiction could serve as co-counsel in a matter and divide legal fees with a Washington, D.C. lawyer who practiced in a firm that included a non-lawyer partner as permitted under the District of Columbia's Rule 5.4(b). The Committee concluded that such a fee division did not violate the Model Rules because the lawyer would be dividing a legal fee only with "another lawyer," and a lawyer may divide legal fees with a lawyer admitted in another jurisdiction. In the Committee's view, the possibility that the District of Columbia firm might eventually "share" some fraction of that firm's portion of the fee with a nonlawyer because a portion of it becomes part of that firm's overall revenues was not a basis upon which to expose the lawyer in the Model Rules jurisdiction to discipline. Just as the Committee previously concluded that a Model Rule Lawyer can jointly represent a client and ethically divide a fee with a lawyer practicing in a firm whose structure is not permitted by Model Rule 5.4 but allowed by the local jurisdiction's rules, so too the Committee concludes that a Model Rule Lawyer's passive investment in such a firm is likewise allowed where ABS's are permitted by a jurisdiction's rules.

C. Conflict of Interest Risks Presented by Passive Investment

A passive investment in an ABS, without more, does not mean that the Model Rule Lawyer is practicing law through the ABS. To avoid any appearance of practicing law through the ABS, the investing Model Rule Lawyer must ensure that the ABS does not identify the Model Rule Lawyer as a lawyer or hold out the Model Rule Lawyer as a lawyer associated with the ABS.

A passive investment does not create an "of counsel" relationship where conflicts are imputed to other lawyers. Nothing about a passive investment necessarily creates the "close, regular and personal relationship" characteristic of "of counsel" arrangements.[9]

As a result, the mere fact of a passive investment by a Model Rules Lawyer in an ABS does not require imputation of conflicts under Model Rule 1.10 between the Model Rule Lawyer (or that lawyer's firm) and the ABS.

However, even if a Model Rule Lawyer is only a passive investor with no other relationship to the ABS, that Model Rule Lawyer still must consider the possibility of the concurrent conflicts of interest that could arise from the Model Rule Lawyer's representation of clients in the Model Rule jurisdiction.

For example, a Model Rule 1.7(a)(2) concurrent conflict of interest based on the Model Rule Lawyer's personal interest in the investment in the ABS would likely exist if, when the Model Rule Lawyer made the investment the Model Rule Lawyer also represented a client whose interests were adverse to a client of the ABS. Such a conflict would exist if the Model Rule Lawyer were to act as an advocate against a client of the ABS or represent a business in a transactional matter requiring negotiation with a client of the ABS. In these situations, among others, the Model Rule Lawyer's investment interest in the ABS could "create a significant risk" that the Model Rule

[9] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Ops. 90-357 & 94-388.

Lawyer's representation of the client would be "materially limited" by the lawyer's investment interest in the ABS.[10]
In most circumstances, such a conflict will only preclude the investing Model Rule Lawyer from representing the client, because personal interest conflicts are generally not imputed to other lawyers in the same firm unless those interests create a significant risk of materially limiting the representation of a client by the remaining lawyers in the Model Rule Lawyer's firm.[11]

The fact that a conflict might arise in the future between the Model Rule Lawyer's practice and the ABS firm's work for its clients does not mean that the Model Rule Lawyer cannot make a passive investment in the ABS. If, however, the Model Rule Lawyer's investment in an ABS will create a conflict of interest at the time of the investment, the Model Rule Lawyer would need to refrain from the investment unless the conflict can be resolved appropriately under Model Rule 1.7(b).[12]

D. ABS Client Confidential Information

While it is hard to assess what information might be requested by investors or potential ABS investors, it is unrealistic to assume that there will be no investor requests for information about the ABS operations or revenue. The issue of disclosure of confidential information by an ABS is a developing area of the law and beyond the scope of this opinion; when investing in an ABS, the Model Rule Lawyer should exercise due care to avoid exposure to confidential client information held by the ABS or other associations that could result in a determination that the Model Rule Lawyer is part of the ABS "firm."

Conclusion

A lawyer admitted to practice law in a Model Rule jurisdiction may make a passive investment in a law firm that includes nonlawyer owners operating in a jurisdiction that permits such investments provided that the investing lawyer does not practice law through the ABS, is not held out as a lawyer associated with the ABS, and has no access to information protected by Model Rule 1.6 without the ABS clients' informed consent or compliance with an applicable exception to Rule 1.6 adopted by the ABS jurisdiction. With these limitations, such "passive investment" does not run afoul of Model Rule 5.4 nor does it, without more, result in the imputation of the ABS's client conflicts of interest to the investing Model Rule Lawyer under Model Rule 1.10. The fact that a conflict might arise in the future between the Model Rule Lawyer's practice and the ABS firm's work for its clients does not mean that the Model Rule Lawyer cannot make a passive investment in the ABS. If, however, at the time of the investment the Model Rules Lawyer's investment would create a personal interest conflict under Model Rule 1.7(a)(2), the Model Rule Lawyer must refrain from the investment or appropriately address the conflict pursuant to Model Rule 1.7(b).

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[10] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. R. 1.7, cmt. [10] (a "lawyer's own interests should not be permitted to have an adverse effect on representation of a client").
[11] ABA MODEL RULES OF PROF'L CONDUCT R. 1.10(a)(1).
[12] The potential inability of the Model Rule Lawyer to redeem or liquidate her investment at any time may create difficulties in resolving conflicts that arise post-investment. The Model Rule Lawyer may not be able to withdraw from the passive investment at any time, absent simply giving up the interest, and that leaves informed consent from the Model Rule Lawyer's client or withdrawal from the representation of that client as the only options.

Abstaining: Norman W. Spaulding

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 500 **October 6, 2021**

Language Access in the Client-Lawyer Relationship

Communication between a lawyer and a client is necessary for the client to participate effectively in the representation and is a fundamental component of nearly every client-lawyer relationship.[1] *When a client's ability to receive information from or convey information to a lawyer is impeded because the lawyer and the client do not share a common language, or owing to a client's non-cognitive physical condition, such as a hearing, speech, or vision disability, the duties of communication under Model Rule 1.4 and competence under Model Rule 1.1 are undiminished. In that situation, a lawyer may be obligated to take measures appropriate to the client's circumstances to ensure that those duties are capably discharged. When reasonably necessary, a lawyer should arrange for communications to take place through an impartial interpreter or translator*[2] *capable of comprehending and accurately explaining the legal concepts involved, and who will assent to and abide by the lawyer's duty of confidentiality. The lawyer also should use other assistive or language-translation technologies, when necessary. In addition, particularly when there are language considerations affecting the reciprocal exchange of information, a lawyer*

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] For purposes of this opinion, an interpreter is a person who converts "speech from a source language into a target language" while a translator "works with the written word." *Translator vs. Interpreter: What's the Difference*, AMERICAN TRANSLATORS ASSOCIATION (last visited Sept. 23, 2021), https://www.atanet.org/client-assistance/translator-vs-interpreter/. The Committee recognizes that there are existing and emerging technologies that in some circumstances may enable a lawyer and client to partially or fully address language access issues. For example, closed captioning, live transcription, screen readers, refreshable braille displays, and speech recognition software, are examples of the assistive technologies that may address access issues for some individuals with a non-cognitive physical condition, such as a hearing, speech, or vision disability. *See Assistive Devices for People with Hearing, Voice, Speech or Language Disorders*, NATIONAL INSTITUTE ON DEAFNESS AND OTHER COMMUNICATION DISORDERS, https://www.nidcd.nih.gov/health/assistive-devices-people-hearing-voice-speech-or-language-disorders (last visited Sept. 23, 2021). Electronic text and voice translation software and devices, including text-to-text, text-to-speech, and speech-to-speech translators such as telecommunications relay service (TRI) (free - dial 7-1-1), video relay service (VRS) (free - subscriber based) and video remote interpreting (VRI) (fee based), have the capacity to translate from one language to another in close to real time. Brian Heater, *Interpreter, Google's real-time translator, comes to mobile*, TECH CRUNCH (Dec. 12, 2019, 9:00 AM), https://techcrunch.com/2019/12/12/interpreter-googles-real-time-translator-comes-to-mobile/. Depending on the circumstances, use of such technologies in lieu of or in addition to the engagement of a human interpreter or translator may be appropriate and sufficient to satisfy the ethical obligations of communication and competence. Owing to the rapid evolution of these technologies and the variability of client needs in the context of language access, an analysis of whether and when a technology will address a particular language-access quandary is beyond the scope of this opinion. The Committee notes that the availability of assistive and translation technologies is another example of the ever-increasing impact of technology on the practice of law and underscores the duty of lawyers to develop an understanding of relevant technology. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. [8] ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . .").

must ensure that the client understands the legal significance of translated or interpreted communications and that the lawyer understands the client's communications, bearing in mind potential differences in cultural and social assumptions that might impact meaning.

I. INTRODUCTION

As the population of the United States continues to become ever more diverse and multicultural, communication issues stemming from language differences, as well as physical disabilities, are increasing.[3] Between 1990 and 2013, the population of persons having limited English proficiency grew 80 percent, from nearly 14 million to 25.1 million.[4] The adoption of the Americans with Disabilities Act in 1990, coupled with ongoing advocacy by and on behalf of persons with disabilities, has led to the profession's growing awareness that clients seeking representation may not be able to hear, speak, or read without accommodation.[5] For these reasons, with increasing frequency lawyers are called upon to communicate with clients who do not speak the lawyer's native language or speak the lawyer's language with limited proficiency, or for whom the conventional written or spoken word is not an accessible form of communication.[6]

The foundational rules of competence (Rule 1.1) and communication (Rule 1.4) in the ABA Model Rules of Professional Conduct establish a baseline for a lawyer's duties when there is a barrier to communication because the lawyer and the client do not share a common language, or when a client is a person with a non-cognitive physical condition that affects how the lawyer communicates with a client, such as a hearing or speech disability.[7] This baseline prescribes that when a lawyer and client cannot communicate with reasonable efficacy, the lawyer must take steps to engage the services of a qualified and impartial interpreter and/or employ an appropriate assistive or language-translation device to ensure that the client has sufficient information to

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[3] In 2013, approximately 61.6 million individuals, foreign and U.S. born, spoke a language other than English at home. While the majority of these individuals also spoke English with native fluency or very well, about 41 percent (25.1 million) were considered as having Limited English Proficiency (LEP), which is defined as speaking English "less than very well." Jie Zong & Jeanne Batalova, *The Limited English Proficient Population in the United States in 2013*, MIGRATION POLICY INSTITUTE (July 8, 2015) [hereinafter *Limited English Proficient Population*], https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states-2013. 2019 data from the U.S. Census bureau estimates that 22% of households in the U.S. speak a language other than English in the home. U.S. CENSUS BUREAU SELECTED SOCIAL CHARACTERISTICS IN THE UNITED STATES (2019), https://data.census.gov/cedsci/table?d=ACS%201-Year%20Estimates%20Data%20Profiles&tid=ACSDP1Y2019.DP02&hidePreview=false.

[4] *See Limited English Proficient Population*, *supra* note 3.

[5] *See generally* Alex B. Long, *Reasonable Accommodation As Professional Responsibility, Reasonable Accommodation as Professionalism*, 47 U.C. DAVIS L. REV. 1753 (2014) (evaluating ethical and professional obligations to reasonably accommodate disabilities).

[6] For an excellent discussion of issues facing lawyers due to the changing demographics of the United States population and the increase of language diversity, see Muneer I. Ahmad, *Interpreting Communities, Lawyering Across Language Difficulties,* 54 U.C.L.A. L. REV. 999 (2007).

[7] Some mental conditions may affect the traditional client-lawyer relationship or the lawyer's customary means of delivering legal services in other ways. For example, a client may suffer from a diminished mental capacity or a non-sensory cognitive condition. The legal obligation to accommodate a client's mental disability and the ethical duties applicable to representing clients with diminished capacity are addressed in Model Rule 1.14 and beyond the scope of this opinion.

intelligently participate in decisions relating to the representation and that the lawyer is procuring adequate information from the client to meet the standards of competent practice.[8]

This opinion analyzes the duties of Rules 1.1, 1.4, and 5.3 in the context of language access and explains in more detail (1) the lawyer's obligation to evaluate the need for a translator or interpreter or interpretive device, (2) the appropriate qualifications for a person or service providing translation or interpretive services, and (3) a lawyer's supervisory duties when engaging or directing a translator or interpreter. The opinion also provides additional guidance on the advisability of maintaining awareness of potential differences in cultural and social assumptions, particularly those based on national origin or ethnicity, which may affect the way in which legal advice is sought or understood.[9]

II. ANALYSIS

Lawyers must communicate with clients in a manner that is reasonably understandable to those clients. This is a central tenet of the duties applicable to the client-lawyer relationship under the Model Rules of Professional Conduct. In 1983, the ABA Commission on Evaluation of Professional Standards (commonly known as the Kutak Commission) recommended the adoption of Model Rule 1.4, codifying the importance of communication with clients so that clients know what is happening on their matters and can participate intelligently in the representation.[10]

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[8] In addition to the ethical duties analyzed in this opinion, law firms and other legal organizations may be legally required to provide and pay for auxiliary aids and services in order to provide a client with reasonable accommodation under the ADA. Law offices are explicitly included in the definition of public accommodations under Title III of the ADA, 42 U.S.C. § 12181(7)(f), and as a general rule, ADA Title III entities cannot pass along the costs of auxiliary aids and services to the person with the disability. *See* 28 C.F.R. § 36.301(c). Although particulars of a lawyer's duties under the ADA are beyond the scope of this opinion, a lawyer, law firm, and legal organization should be aware of the legal risks and responsibilities related to ADA compliance. *See generally* Elana Nightingale Dawson, *Lawyers' Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 VAL. U. L. REV. 1143 (2011); Janine Robben, *You Are Us What Every Lawyer Needs to Know About Representing Disabled Clients*, OR. ST. B. BULL. 19 (Feb./Mar. 2008); National Ass'n of the Deaf Law Center, *Attorneys, Deaf Clients, and the Americans with Disabilities Act*, W. VA. LAW. 30 (Jan. 2004); Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155 (1994).

[9] The role of interpreters for parties and witnesses is well established in U.S. criminal, civil, and administrative justice systems, and use of interpreters for individuals with limited English proficiency in adjudicative proceedings may be required by the Constitution, a statute, or a court rule. United States ex rel. Negron v. New York, 434 F.2d 386, 390–91 (2d Cir. 1970) (defendant's Sixth Amendment rights violated when interpreter not appointed); U.S. Court Interpreters Act, 28 U.S.C. § 1827 (right to an interpreter applied to all "judicial proceedings," including pretrial hearings in federal district court); EXEC. ORDER NO. 13166, IMPROVING ACCESS TO SERVICES FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY DEPARTMENT OF JUSTICE ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, NATIONAL ORIGIN DISCRIMINATION AGAINST PERSONS WITH LIMITED ENGLISH PROFICIENCY (2000), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/eolep.pdf. "While the Court Interpreters Act provides a singular guideline for use in the federal courts, there is much greater variation among state interpreter laws. Some states mirror the federal scheme, requiring the appointment of an interpreter upon a judicial determination that a defendant cannot comprehend the proceedings. Other states afford even more discretion to judicial officers." Kate O. Rahel, *Why the Sixth Amendment Right to Counsel Includes an Out-of-Court Interpreter*, 99 IOWA L. REV. 2299 (2014).

[10] ART GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, 72 (2013). There was no direct counterpart to Rule 1.4 in the predecessor Model Code of Professional Responsibility, but because a lawyer's failure to communicate was a frequent source of disciplinary complaints, the Commission believed it was important to clarify the obligation to keep a client reasonable informed.

The duty of communication under current Model Rule 1.4 includes a number of communicative components, including duties: (1) to promptly inform the client of information when the client's informed consent is required; (2) to "reasonably consult" with the client about the representation; (3) to "keep the client reasonably informed" about the status of a matter; (4) to promptly comply with "reasonable requests for information"; and (5) to "consult with" the client on relevant limitations on the lawyer's ability to provide legal assistance.[11] Additionally it is incumbent on the lawyer to ensure that the client has sufficient information to participate intelligently in the client-lawyer relationship, to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[12]

Reasonably understandable client-lawyer communication is not only necessary to enable the client to make informed decisions; it is also an element of the lawyer's obligation to provide the client with competent representation under Model Rule 1.1.[13] If a lawyer does not communicate with a client in a mutually understood language, it is doubtful that the lawyer is exercising the thoroughness and preparation necessary to provide the client with competent representation.[14]

In short, communication between a lawyer and a client is both the means by which a client is provided with the advice and explanations needed to make informed decisions and the vehicle through which the lawyer obtains information required to address the client's legal matter appropriately.

In general, the information that must be provided when discharging the duty to explain a matter reasonably is "that appropriate for a client who is a *comprehending* and responsible adult."[15] The

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Id. The black letter of Model Rule 1.4 has been amended only once since its adoption in 1983—in 2002 as part of Ethics 2000 amendments. The Ethics 2000 Commission explained that Rule 1.4(a) was amended to "specifically identify five different aspects of the duty to communicate." *Id.* at 77.

[11] MODEL RULES OF PROF'L CONDUCT R. 1.4(a).

[12] MODEL RULES OF PROF'L CONDUCT R. 1.4(b) & cmt. [5]. *See* N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010) (obligations of Rule 1.4 "require that the attorney and the client be able to exchange information and understand one another").

[13] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. [5] ("Competent handling of a matter includes inquiry into and analysis of the factual and legal elements of the problem . . .."). *See* N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010) (noting that attorney's obligation to provide competent representation to clients requires that the attorney gather sufficient facts regarding the client's problem from the client and that the attorney develop a strategy, in consultation with the client, for solving the legal problems of the client); State Bar of Cal., Formal Op. 1984-77 (1984) (sensitivity to a non-English or limited English-speaking client's communication barriers in explaining their legal problem and in understanding legal advice provided is an important aspect of competence); Alex B. Long, *Reasonable Accommodation As Professional Responsibility, Reasonable Accommodation As Professionalism*, 47 U.C. DAVIS L. REV. 1753, 1760 (2014) ("Competent representation lies at the heart of every lawyer's professional obligation to clients. Law firms should view the reasonable accommodation requirement as a means of complying with this obligation.").

[14] *See* N.Y. City Bar Formal Op. 1995-12 (1996) (noting that adequate preparation requires that a lawyer gather information material to the client's claims or defenses: "The lawyer's inability, because of a language barrier, to understand fully what the client is telling him or her may unnecessarily impede the lawyer's ability to gather the information from the client needed to familiarize the lawyer with the circumstances of the case.").

[15] MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. [6] (emphasis added). Comment [6] addresses the impracticability of this standard when the client is a child or suffers from diminished capacity. Duties arising from representation of a client with diminished capacity are governed by Model Rule 1.14. *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-404 (Client Under a Disability) (1996). This opinion does not address the manifold ethics issues that arise when representing a client with diminished capacity, except to the extent that there are

Model Rule 1.1 and 1.4 obligations do not change when a client's ability to receive information from or convey information to a lawyer is impeded because the lawyer and the client do not share a common language, or when a client is a person with a non-cognitive physical condition, such as a hearing, speech, or vision disability.[16]

If communications issues are such that the client cannot adequately comprehend the lawyer's advice and other communications, and thus, cannot participate intelligently in the representation, or the lawyer is unable to ascertain the information needed to competently assist the client, the lawyer must take measures to establish a reasonably effective mode of communication. Ordinarily, this will require engagement of a qualified impartial interpreter or translator (or, in some situations, the use of an appropriate assistive or language-translation device) so that the lawyer and client can reasonably understand one another to a degree that is compatible with the lawyer's professional obligations.[17]

A. Evaluating Whether an Interpreter or Translator Is Required

Once a lawyer determines that there is a language-access issue affecting the ability to communicate sufficiently with a client, the lawyer must evaluate whether engagement of an interpreter, translator, and/or the use of other assistive or language-translation technologies is needed to satisfy the lawyer's professional obligations.[18] This is true regardless of whether the language-access issue is attributable to limited language proficiency or a non-cognitive disability.[19]

Ordinarily, the mode of communication to be used during a representation is a matter to be decided between the lawyer and the client,[20] and, in the case of language-access issues, consultation with the client is appropriate if possible. A lawyer may not, however, passively leave the decision to the client or thrust the responsibility to make arrangements for interpretation or translation entirely

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language, speech, hearing, or visual considerations also affecting the reciprocal exchange of information between lawyer and client.

[16] *See* State Bar of Ariz. Op. 97-05 (1997) (presence of interpreters to facilitate communication between lawyers and clients who do not share a common language furthers the purposes of Rule 1.4); Utah Ethics Advisory Op. Comm., No. 96-06 (1996) ("A language barrier does not reduce the attorney's duty to communicate adequately with the client, as required by Rule 1.4."); N.Y. City Bar Formal Op. 1995-12 (1996) (Rule 1.4 obligation applies to client with whom the only means of effective communication is through a sign language interpreter).

[17] *See* N.Y. City Bar Formal Op. 1995-12 (1996) (a language barrier may make the use of an interpreter "the only practical way that a free-flowing dialogue can be maintained with the client, and the only means by which the lawyer can actually and substantially assist the client"); N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010) ("When the attorney cannot communicate directly and fluently with the client in a language that the client can understand—whether the inability to engage in a direct communication is because the attorney and the client do not speak the same language, or because either the client or attorney is deaf or hearing impaired—the attorney must make use of the services of a qualified, impartial interpreter"); Utah Ethics Advisory Op. Comm., No. 96-06 (1996) ("If the attorney cannot communicate fluently in the client's own language, the attorney should communicate through an interpreter skilled in the client's particular language or dialect.").

[18] *See* N.Y. City Bar Formal Op. 1995-12 (1996) ("When the need for an interpreter is apparent or it is reasonable to conclude that an interpreter is required for effective communication, failure to take steps with the client to secure an interpreter may be a breach of the duty to represent the client competently.").

[19] *See* N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010); N.Y. City Bar Formal Op. 1995-12 (1996).

[20] MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (a lawyer shall consult with the client as to the means by which the objectives of the representation are to be pursued).

upon the client.[21] Once it is reasonably apparent that, without an interpreter, translator, or an appropriate assistive or language-translation device, there cannot be a reliably understandable reciprocal exchange of information between the lawyer and the client, the lawyer must take steps to help the client understand the need for and purpose of an interpreter or translator, and, when reasonably necessary, take steps to secure such services.[22]

In this as in other contexts requiring client-lawyer communication, it is the lawyer's affirmative responsibility[23] to ensure the client understands the lawyer's communications and that the lawyer understands the client's communications.[24] In situations where there is doubt about the efficacy of client-lawyer communication, that doubt should be resolved in favor of engagement of an interpreter, translator, or an appropriate assistive or language-translation device.[25] Furthermore even in situations when an interpreter is used to facilitate spoken communication between a lawyer and a client, it may also be necessary to secure the translation of specific written documents to satisfy the duties of communication and competence in a particular case.[26]

B. Qualifications of a Person Providing Translation or Interpretive Services

In general, an individual engaged to facilitate communication between a lawyer and a client must be qualified to serve as an interpreter or translator in the language or mode required, familiar with and able to explain the law and legal concepts in that language or mode, and free of any personal

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[21] Attorney Grievance Comm'n v. Aita, 181 A. 3d 774 (Md. 2016) (lawyer failed to fulfill obligation to enable client to make informed decision by sending a letter in English to client who did not read or write in English and telling client to get letter translated); N.Y. City Bar Formal Op. 1995-12 (1996) ("once the lawyer agrees to represent a client with whom effective and meaningful direct communications can only be maintained through an interpreter, the need for qualified interpreter services cannot be ignored").

[22] *See* State Bar of Cal., Formal Op. 1984-77 (1984) (though client may have selected the lawyer knowing that direct communication may be limited, or even not possible, this does not reduce the lawyer's duty to communicate adequately).

[23] The ADA generally obligates the lawyer to bear the cost of procuring such services when they are necessary to accommodate a disability. *See* note 5, *supra*. In other language-access situations, lawyers should confer with the prospective client about the expense of providing needed language access and address the issue of responsibility for that expense in the initial fee agreement. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(a) & (b) & cmt. 2 (prohibiting unreasonable amounts for expenses and requiring the basis for expenses for which the client will be responsible be communicated to the client; noting desirability of furnishing client with a writing that states "to what extent the client will be responsible for any costs, expenses or disbursements").

[24] *See* State Bar of Cal., Formal Op. 1984-77 (1984) ("On any matter which requires client understanding, the attorney must take all reasonable steps to insure that the client comprehends the legal concepts involved and the advice given, irrespective of the mode of communication used, so that the client is in a position to make an informed decision.").

[25] Even if a client speaks *some* English in informal contexts, an interpreter may be needed to ensure that the client understands the legal concepts involved in client-lawyer communications. *See In re* Welke, 131 N.E.3d 161, 163 (Ind. 2019) (respondent violated Rule 1.4 by failing to hire an interpreter to communicate with client with "extremely poor English language skills"; court rejected respondent's argument, based on testimony of a kitchen supervisor at the client's workplace, that the "client may have had a marginally better English-language proficiency than other evidence indicated" on grounds that communicating with a supervisor of a kitchen staff and communicating about legal matters are very different things); Attorney Grievance Comm'n of Maryland v. Landeo, 132 A.3d 196, 215 (Md. 2016) (in representing an immigration client who could speak English but preferred Spanish, lawyer failed to comply with Rule 1.4 obligations by sending client documents and letters about her Abused Spouse Petition and Adjustment of Status without explaining process to client).

[26] State Bar of Cal., Formal Op. 1984-77 (1984) (providing as examples a contingent fee agreement, a general release of claims, or a written consent to a conflict of interest).

or other potentially conflicting interest that would create a risk of bias or prevent the individual from providing detached and impartial interpretive or translation services.

In assessing the qualifications of a prospective interpreter or translator, a lawyer should verify that the individual is skilled in the particular language or dialect required. In addition, the lawyer should confirm that the individual has the expertise needed to comprehend the legal concepts/terminology at issue so that the legal advice being provided is communicated accurately in a language or format accessible to the client.[27]

In most situations, the verification of a prospective interpreter's or translator's level of skill and capacity to convey legal concepts is best achieved through engagement of the services of an outside professional to assist the lawyer in the delivery of legal services.[28] Depending on the circumstances, alternative arrangements may suffice.[29] For example, a lawyer may look to a multilingual lawyer or nonlawyer staff member within the firm to facilitate communication with a client. If a nonprofessional interpreter is contemplated, however, the lawyer should proceed cautiously in light of the reduced ability to assess the nonprofessional's level of proficiency and the concomitant increased risk of inaccuracies in interpretation or translation.[30]

In some instances, a client's friend or a family member may function as a viable interpreter or translator.[31] But particular care must be taken when using a client's relatives or friends because of the substantial risk that an individual in a close relationship with the client may be biased by a personal interest in the outcome of the representation.[32] In such situations, a lawyer must exercise appropriate diligence to guard against the risk that the lay-interpreter is distorting or altering communications in a way that skews the information provided to the lawyer or the advice given to the client.[33] Lacking accountability to the lawyer or firm derived from an employment or other

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[27] *See* N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010).

[28] A lawyer should be able to verify a prospective translator's or interpreter's professional qualifications in the same manner used when engaging the services of an expert, i.e., by evaluating the individual's training, experience, certifications, and professional standing. *See* N.Y. City Bar Formal Op. 1995-12 (1996) (noting "obvious benefits to communicating through professionals, who have formal training in languages, experience with legal terminology and concepts, and skill" and who provide greater assurance of accuracy in translation because often they belong to professional associations that adhere to professional and ethical standards); N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010).

[29] "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and the law itself." MODEL RULES OF PROF'L CONDUCT Preamble, Scope [14].

[30] N.Y. City Bar Formal Op. 1995-12 (1996). The mere fact that the person selected is bilingual is insufficient to establish compliance with the lawyer's ethical duties. The person must have a reasonable degree of competence and fitness to serve as an interpreter or translator. *See In re* Welke, 131 N.E.3d 161, 163 (Ind. 2019) (failure to hire appropriate interpreter violated Rule 1.4(b) when lawyer "brought an untrained and unpaid woman who needed community service credit for her own criminal conviction to serves as an interpreter, and through that woman . . . attempted to [discuss client's case]").

[31] *See* Attorney Grievance Comm'n of Maryland v. Ibebuchi, 241 A.3d 870, 881 (Md. 2020) (holding respondent did not violate Rule 1.4(b) "in connection with the language barrier issue" with Spanish-speaking client where client relied on a friend to interpret at every client meeting because client "trusted" friend).

[32] *See* N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010) (using relatives or friends of clients as interpreters carries substantial risks).

[33] *See* Utah Ethics Advisory Op. Comm., No. 96-06 (1996) (lawyer must be "cautious in insuring [*sic*] that the attorney and client are communicating with each other through the interpreter, rather than the interpreter giving legal advice independent of the attorney"). N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010) (lawyer "should watch for cues that indicate that the interpreter is speaking for the client or filtering the attorney's

contractual relationship, relatives and friends of the client may also be less reliable in providing interpretation or translation services when needed.[34]

Finally, if obtaining necessary services would place an unreasonable financial burden on the lawyer or the client[35] or if necessary services are unavailable, the lawyer should ordinarily decline or withdraw from the representation[36] or associate with a lawyer or law firm that can appropriately address the language-access issue,[37] such as a multilingual lawyer. In an emergency situation where the need for legal action is exigent—for example, if a client or potential client is subject to an expedited removal action in an immigration proceeding—and the lawyer reasonably believes that necessary interpretive services cannot obtained expeditiously, a lawyer should take steps to prevent immediate and irreparable harm to the client.[38]

C. Supervisory Duties When Engaging or Directing the Work of a Translator or Interpreter

Model Rule 5.3 governs a lawyer's responsibilities for nonlawyers employed, retained by, or associated with a lawyer. In general, a lawyer is responsible to ensure that the conduct of a nonlawyer service provider is compatible with the professional obligations of the lawyer.[39] This principle applies with equal force to individuals serving as interpreters or translators to facilitate communications within the client-lawyer relationship, i.e., the lawyer must make reasonable efforts to ensure that the interpretive or translation services are provided in a manner that is compatible with the lawyer's ethical obligations, particularly the Rule 1.6 duty of confidentiality.[40]

In this regard, the terms of any arrangement between the lawyer and the interpreter or translator should address the protection of client information, and when retaining or directing the work of an

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statements rather than impartially conveying the communications"). In these situations, it would be prudent for the lawyer to consult with the client about the risks and benefits of using a family member as an interpreter or translator. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2, cmt. 1 ("With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) . . . ."). The Committee recognizes the potential circularity of this dilemma, which further suggests that use of the client's friends or family members to solve a language access problem is ethically fraught.

[34] *Cf. In re* Howe, 843 N.W.2d 325, 331 (N.D. 2014) (rejecting lawyer's defense that he "tried to communicate the date, but confusion persisted because the [client's] daughter was not there to translate," and holding that "[r]easonable efforts to ensure the client is informed of the status of the matter include assuring the [clients] understood their hearing was rescheduled despite their daughter not being available to translate").

[35] MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(6) (authorizing withdrawal if representation "will result in an unreasonable financial burden on the lawyer").

[36] MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1).

[37] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. [2] ("Competent representation can also be provided through the association of a lawyer of established competence in the field in question.").

[38] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. [9] (authorizing lawyer to take emergency legal action on behalf of person with seriously diminished capacity where person's health, safety, or a financial interest is threatened with imminent and irreparable harm, even though person is unable to establish a client-lawyer relationship or to make or express considered judgments about matter, but only to extent reasonably necessary to maintain status quo or otherwise avoid imminent and irreparable harm).

[39] MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [1].

[40] N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010) ("Attorneys representing clients through interpreters should ensure that the interpreter has a clear understanding of the obligation to keep the client's communications confidential.") (citing Utah Ethics Advisory Op. Comm., No. 96-06 (1996)).

interpreter or translator, the lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the interpreter or translator understands the lawyer's ethical duty of confidentiality and agrees to abide by it.[41]

D. Guidance Regarding Social and Cultural Differences

In addressing language access issues within the client-lawyer relationship, the duty of competence requires close attention to social and cultural differences that can affect a client's understanding of legal advice, legal concepts, and other aspects of the representation.[42] When a lawyer and a client do not share a common language, there may be other significant cultural differences bearing on the representation including, but not limited to, ethnicity, religion, and national origin.[43] The client may view the representation and choices it entails through the lens of cultural and social perspectives that are not shared by or familiar to the lawyer. Beyond language differences, the ability to understand, effectively communicate, gather information, and attribute meaning from behavior and expressions are all affected by cultural experiences.[44] Competently mediating these differences to achieve the ends of the representation for the client requires: (i) identifying these differences; (ii) seeking to understand them and how they bear upon the representation; (iii) paying attention to implicit bias and other cognitive biases that can distort understanding; (iv) adapting the framing of questions to help elicit information relating to the representation in context-sensitive ways; (v) explaining the matter in multiple ways to promote better client insight and comprehension; (vi) "allow[ing] for additional time for client meetings and ask[ing] confirming questions to assure that information is being exchanged accurately and completely";[45] and (vii) conducting additional research or drawing upon the expertise of others when that is necessary to ensure effective communication and mutual understanding.[46]

A lawyer should not assume that a translator has this deeper cultural expertise merely because the translator is adept with the client's language. Awareness of, and ability to understand, issues of culture and disability that might affect communication techniques and influence client objectives is inextricably intertwined with providing effective legal advice to a client. Communication is a two-way street. To convey information about the representation in a meaningful way, it is essential that the lawyer understands the client and the client understands the lawyer. Client-lawyer communication is not merely a translation of words but a determination by the lawyer that the client understands the relevant law and legal, institutional, and social contexts of the communication.

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[41] *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [3].
[42] *See* Utah Ethics Advisory Op. Comm., No. 96-06 (1996); *see also* Flowers v. Bd. of Prof'l Responsibility, 314 S.W.3d 882, 889 (Tenn. 2010) (imposing discipline, court found clients were "vulnerable victims" because they did not speak or write English and did not often have "a solid understanding of the broader culture").
[43] For an overview of the impact of implicit cultural bias on the delivery of legal services, see Debra Chopp, *Addressing Cultural Bias in the Legal Profession,* 41 N.Y.U. REV. LAW & SOCIAL CHANGE 367 (2017).
[44] *See* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, CUNY SCHOOL OF LAW (2001) [hereinafter *The Five Habits*], *available at* https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1257&context=cl_pubs.
[45] N.H. Bar Ass'n Ethics Comm., Advisory Op. 2009-10/02 (2010).
[46] *The Five Habits*, *supra* note 44.

III. CONCLUSION

A lawyer's fundamental obligations of communication and competence are not diminished when a client's ability to receive information from or convey information to a lawyer is impeded because the lawyer and the client do not share a common language, or owing to a client's non-cognitive physical condition, such as a hearing, speech, or vision disability. Under such circumstances, a lawyer may be obligated to take measures appropriate to the client's situation to ensure that those duties are properly discharged. When reasonably necessary, a lawyer should arrange for communications to take place through an impartial interpreter or translator capable of comprehending and accurately explaining the legal concepts involved, and who will assent to and abide by the lawyer's duty of confidentiality. In addition, particularly when there are language considerations affecting the reciprocal exchange of information, a lawyer must ensure that the client understands the legal significance of translated or interpreted communications and that the lawyer understands the client's communications, bearing in mind potential differences in cultural and social assumptions that might impact meaning.

The OLPR turns 50!

As I mentioned last month, this year is the 50th anniversary of the creation of the Office of Lawyers Professional Responsibility. In 1971, the Minnesota Supreme Court appointed the first administrative director of the Office, Richey Reavill of Duluth, having created the Lawyers Professional Responsibility Board in 1970. The first meeting of the Board also occurred in early 1971. With half a century of experience, let's take a look at what has changed and what remains the same.

Before the Board and Office

Prior to 1971, the Board of Law Examiners functioned as the bar's primary disciplinary body. This responsibility was shared with the Practice of Law Committee of the Minnesota State Bar Association.[1] Interestingly, BLE also included judicial ethics in its purview until the Minnesota Legislature created the Board of Judicial Standards in 1972. Starting up separate organizations responsible for different aspects of lawyer regulation was largely the byproduct of a seminal 1970 publication from the American Bar Association known as the Clark Report[2] and the passage in 1969 of the ABA Model Code of Professional Responsibility.

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The Clark Report was very critical of existing efforts by states to discipline attorneys, pointing out large disparities in the handling of discipline from jurisdiction to jurisdiction and within jurisdictions. The report identified 36 separate and significant problems that each state was encouraged to address in its attorney discipline system. Thereafter, many states, including Minnesota, put in place professional staff tasked with discipline and gave thoughtful consideration to the issues raised in the Clark Report and the Model Code.

The beginning

The Office started with a staff of three and received, directly or through the district ethics committees, 400 complaints that first year. At the time, there were approximately 5,000 members of the bar. In that first year the Board held seven panel proceedings involving 10 lawyers, and provided significant support to the various district ethics committees.[3] Approximately 12 percent of complaints resulted in some level of discipline, whether by a district ethics committee—which then could impose discipline—or the Board, which could also impose discipline, or the Court. The primary area of concern raised in complaints was neglect. One of the first orders of business for the Board, it appears, was to recommend a rule change to add public members to the Board. The Court accepted this recommendation and thereafter added three public members, beginning Minnesota's long tradition of active public participation in the attorney discipline process.

The first 10 years of the OLPR saw a quick succession of directors—four in all—until 1979, when that succession slowed down. During that first decade, the Board continued to expand the public's role in the process, implementing the rule—still in effect today—that 20 percent of ethics committee members be nonlawyers. The Rules on Lawyers Professional Responsibility were also changed in 1977 to remove dispositional authority from the district ethics committees, modifying their role to consist of a report and recommendation process that remains in place today.[4] In 1977, the Office first started advertising to the bar the availability of free ethics advice on an informal basis just by phoning us.[5] Then as now, the advice was to review the rules first, but when in doubt, call. We continue to offer this valuable service to all members of the bar.

The '80s and '90s

The 1980s and '90s were decades of expansion. The early '80s saw growth in the Office staff as well as the number of licensed lawyers (approximately 13,000 by 1982) and complaints (up to approximately 1,200 a year), and produced the first signs of a backlog in case processing. By 1989, the Office had grown to a staff of 20 and a budget of $1 million. The attorney population was also rising during this time, as were the services of the Office. The Director was appointed to serve as the director of the newly formed Client Security Board in 1987, and the trust account overdraft program was launched in 1990.

The '80s also saw significant changes in the applicable rules. In 1985, the Court adopted the Minnesota Rules of Professional Conduct, replacing the Code of Professional Conduct. With modest amendments over time, the rules comprising the MRPC have largely stood the test of time, and are the ones we still apply today. The '80s also saw a change in the Rules of Lawyers Professional Responsibility (RLPR)—specifically, a change to require that any investigation initiated by the Director without a complaint receive approval from the Board's executive committee (another rule that remains in place today).

The '90s saw continued growth in the number of attorneys, exceeding more than 20,000 by the end of the decade, an approximately four-fold increase in the first 25 years of the Office's history. The early '90s also saw the appointment of the first woman director, Marcia Johnson, who served from 1992-1997. In a very interesting twist of fate, Ms. Johnson was a Nebraskan, and a products liability lawyer who worked at a large firm.[6] Nineteen years later, I would become the second woman director, and also happened to be originally from Nebraska, and a products liability lawyer from a large firm!

The '90s remain the decade that yielded the most disbarments: 75.

2000 to the present

The last two decades have seen much slower growth in the number of licensed attorneys than during the first half of the Office's existence. The current number of active lawyers is around 25,000, out of approximately 30,000 licensed lawyers. These numbers have remained remarkable steady for much of the last decade. The Office spent 20 years at one location, its longest period of time in one space, before its recent move at the end of December 2020.

The last two decades have been active ones in terms of discipline. From 2000-2009, 327 lawyers were publicly disciplined, an average of 33 a year (from a low of 19 in 2004 to a high of 48 in 2006). From 2010-2019, a total of 403 attorneys were publicly disciplined, an average of approximately 40 per year. During the most recent decade, the annual number of publicly disciplined lawyers ranged from a low of 26 (in 2010 and 2011) to a high of 65 in 2015. Total complaints throughout this period varied by year but were very similar to the average number of complaints received in the 1980s and 1990s (1,100 - 1,200).

Throughout these decades, the Board remained the same size (23 members, with nine public members) and maintained its same structure, sitting in six disciplinary panels. The Office staff grew modestly, from the full time equivalent of 24 in 1999 to the current full time equivalent of 30 in 2021. We have also maintained a robust district ethics committee structure, with strong public participation in each of the 21 district ethics committees.

The last two decades also saw the largest number of claims paid out in one year by the Client Security Board (67 in fiscal year 2017) as well as two years in which payouts exceeded $750,000 in a single fiscal year (2004 and 2017).

Conclusion

This is a very general overview of the last 50 years. But I hope it gives you a sense of how much has changed and how much remains the same. If you have questions about what we do and how we do it, please let me know. More importantly, if you have suggestions for improvement, please let me know that as well. And, remember, we are available to answer your ethics questions: 651-296-3952—a phone number that we have had since the earliest days of the Office, save for an area code change. ▲

Notes

[1] *For the Record, 150 Years of Law and Lawyers in Minnesota, An Illustrated History,* Minnesota State Bar Association, June 1999.

[2] American Bar Association Special Committee on Evaluation of Discipline Enforcement, June 1970 (the "Clark Report").

[3] Professional Responsibility and Discipline, Progress Report, R.B. Reavill, Bench & Bar (Feb. 1972).

[4] Cleary, Edward J. and Wernz, William J. (1999) "Ethics and Enforcement," William Mitchell Law Review: Vol. 25: Iss. 1, Article 14. Available at: *http://open.mitchellhamline.edu/wmlr/vol25/iss1/14* .

[5] R. Walter Bachman, Jr, "Check with Lawyers Professional Responsibility Board Staff on Legal Ethics Question," Bench & Bar (Dec. 1977).

[6] Marcia A. Johnson, "Changes at the Board," Bench & Bar (Dec. 1992).

Supervising probation is a great way to volunteer

Probation, private or public, is an important form of discipline. Discipline in attorney misconduct cases is not to punish the lawyer; its purpose is to protect the public and the profession, and to deter misconduct by the lawyer and others. Probation fits well within this model.

There are three ways that lawyers are placed on probation. An attorney may agree to private probation generally in lieu of public discipline. This form of discipline requires the attorney's agreement and the Lawyers Board chair's approval, and is used for instances where an admonition is not appropriate because the misconduct is not isolated and non-serious, but a period of supervised practice is warranted. Public probation is ordered as part of public discipline, and lawyers are frequently placed on public probation following reinstatement to the practice of law after a period of suspension or disbarment. Probation terms are generally two years, but this can vary. They can be unsupervised or supervised.

In 2020, there were 88 open probations, most of them supervised. Recently a reader wrote me to suggest a column on probation supervisors. I thought this was a fantastic idea, because I know that many people are not aware of this part of the attorney discipline system, and we are always looking for volunteers to serve as probation supervisors. Let's cover what is involved in this process and why you might want to consider volunteering in this manner. I would also like to highlight the work of three probation supervisors, who share in their own words why you might want to consider volunteering.

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Selection

In all cases, lawyers are asked to nominate their own probation supervisor, subject to approval by the Office. Because this is an important relationship, it helps if the supervising lawyer already knows or has otherwise worked with the probationer in some capacity. This is how attorney Jeff Jacobs came to be a probation supervisor. Mr. Jacobs has more than 40 years of experience as an attorney, and is with the law firm of Wilkerson, Hegna, Kavanaugh & Johnston in Edina. Mr. Jacobs was approached in 2020 by an attorney he knew from the community to serve as the attorney's probation supervisor.

Mr. Jacobs was unfamiliar with the process but was happy to try to help. After discussions with our Office about what probation entails, Mr. Jacobs agreed to serve as a probation supervisor for two years and is very glad he did. Mr. Jacobs reports that his supervisee has taken the Board's probation order and the requirements to heart, and this experience has been equally as rewarding for Mr. Jacobs, who has used this opportunity to improve his own practice. Communication deficiencies were the issue that troubled Mr. Jacobs' supervisee, and through regular quarterly meetings, Mr. Jacobs has seen improvement in his supervisee's practice.

Sometimes probationers are unable to find a volunteer, and in those cases the Office turns to a roster of volunteers who have previously served as volunteer supervisors. One such volunteer is Judith Rush, director of mentor externship programs at the University of St. Thomas School of Law. Ms. Rush, a former LPRB chair, has successfully supervised several probationers with an emphasis on lawyers who struggle with lawyer wellness issues that affect their ability to competently and ethically practice law. Ms. Rush, having worked as a solo practitioner for many years, understands the unique challenges, both professional and personal, that solo practitioners face.

Role of a supervisor

The role of a probation supervisor varies depending on the type of probation involved. Most probation supervisors focus on implementation of and compliance with office procedures and review of active case management procedures. All probations generally involve at least quarterly meetings with a supervisor, a quarterly report to our Office, and sometimes monthly reviews of active case files to ensure compliance with probation terms. Most probationers embrace the opportunity to refine client-related practices, and after initial meetings the time spent in active supervision is often minimal. Mr. Jacobs estimates that he spends three to five hours on a quarterly basis now that he and his supervisee have gotten into a groove and reports that it has not been an imposition on his time at all. Other probations can be more challenging.

For example, immigration attorney Leslie Karam, managing attorney at Karam Law in the south metro, was recruited to supervise another immigration attorney. Ms. Karam dedicated a lot of time to assist her supervisee in setting up good office practices that would help to assure an ethically compliant practice. Ms. Karam believes strongly that "we are all human and humans make mistakes. We do not have to be defined by our mistakes; rather we should be judged by our response when things go wrong." Ms. Karam approached her probation role as an observer, mentor, and ally, aiming to help her supervisee develop better approaches to lawyering. Despite receiving the gift of a lot of Ms. Karam's time and guidance, her supervisee was unable or unwilling to make the improvements that were needed; ultimately her supervisee continued to have issues and received additional discipline. Sometimes, as Ms. Karam notes, a career change may be best for all involved.

Why volunteer?

"Lawyers who agree to probation are not 'bad' lawyers—they are typically lawyers who haven't had mentoring or haven't been able to take the time from practice to institute and internalize best practices, or have encountered significant challenges in their lives that have impacted their ability to serve clients," according to Ms. Rush. "Supervising their probation gives me an opportunity to assist them in taking the time to focus on practice management, client service, and integration and internalization of the Rules of Professional Conduct." Ms. Karam agrees: "Probation supervisors introduce the opportunity to learn from past mistakes and grow professionally into stronger advocates and advisors to our clients." Each volunteer I spoke with for this column believed the investment of time was well worth it as a service to the profession and as a way to strengthen their own practices. It is also a concrete and meaningful way to strengthen the quality of service rendered by the legal profession as highlighted in the Preamble (para. 6) to the Rules of Professional Responsibility.

Most probations end successfully for both the supervisee and the supervisor. Only a few probationers have issues while on probation, and everyone is sorry to see this happen. Supervisors serve without compensation, but as noted by several volunteers, it is a rewarding form of service to the profession. Another statistic that is important to note—most discipline is received by experienced attorneys. In typical years, practitioners with between 11-30 years of experience receive the most discipline. I'm not sure we know all the reasons for this, but I will always be a strong believer in "there but for the grace of God go I."

Conclusion

If you are looking for a way to invest in the profession, consider volunteering as a probation supervisor. Mistakes happen, life can be hard, and practicing law is a challenging career. Many of us have benefited greatly from mentors and advisors who have helped us course-correct when needed. Who among us does not need encouragement, support, and a helping hand at times? If you would like to learn more, please call our Office at 651-296-3952.

And if you are approached by a lawyer to serve as their supervisor, consider saying yes. Thank you to everyone who has answered the call to serve as a probation supervisor within the discipline system—the profession is stronger because of you. If being a probation supervisor is not your cup of tea, consider volunteering for a local district ethics committee. It is a fantastic way to learn the ethics rules as well as a great service to the profession. Please don't forget we are always looking for non-lawyers to volunteer. If you know a non-lawyer who is interested in the law and ethics, send them our way. Finally, thanks to Bob Beutel for recommending this topic. If you have suggestions for future columns, please let me know. ▲

Pandemic legal ethics, part 2

In the May/June 2020 issue of this publication, I wrote about legal ethics in a pandemic.* More than a year later, we remain in a pandemic that not only presents continuing personal safety and well-being challenges; professional challenges also remain. Lots of guidance has been issued from various sources and I want to make sure you have information to help you continue to navigate these issues in our new normal.

First, remember: All ethics rules remain in full force and effect. The rules, particularly those that are nondiscretionary, generally do not have exigent circumstance exceptions. Even those rules that incorporate the word "reasonable" refer to "a reasonably prudent and competent lawyer." The rules do not expect you to simply do your best under difficult and challenging circumstances, but rather set minimum standards of conduct for lawyers irrespective of the circumstances. As attorneys, we must embrace the challenge of ensuring that our legal practice remains ethically compliant—notwithstanding the changes to our practice made necessary by the seemingly never-ending spread of covid-19. The good news is that the rules provide a framework to help you navigate changing circumstances and the application of those rules to your practice can help you competently handle many pandemic-related situations. As an example, let's consider the issue of vaccinations.

Implications of vaccination status

Vaccination status has become a contentious and emotional subject. A client's vaccination status can have implications for how you approach a representation. For example, how comfortable are you meeting with a client in person? Can you refuse to meet in person with an unvaccinated client? What about hearings? Say your unvaccinated client wants an in-person hearing but you think the remote hearing option the court is also offering is better since you don't want to sit next to your unvaccinated client even with required masks. The ethics rules of course do not mention vaccination status, but they can help you answer such questions ethically.

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You may or may not know if your client is vaccinated. Can you ethically ask? Sure. Can they decline to tell you? Sure. What you do with the answer or lack thereof is then up to you. Lawyers make determinations all the time regarding whether they are comfortable or available to meet in person with a client or prospective client, whether it's a question of physical safety, cost savings, competing schedules, or something else. Vaccination status is no different. Can you competently represent the client using available alternatives, such as the many secure communication technology options we have been required to learn? Most likely the answer is yes. Of course this can be complicated, because not all clients have access to a lot of technology. This just means we must think about how to communicate effectively with clients or prospective clients given the particulars of their circumstances and what we need to know to represent them.

The ethics rules do not tell you specifically how to do this, but again provide the framework. Can you competently represent the client with the information you have under Rule 1.1, Minnesota Rules of Professional Conduct (MRPC)? Can you keep the client reasonably informed about the status of the matter under Rule 1.4(a)(3), MRPC? Can you promptly comply with reasonable requests for information under Rule 1.4(a)(4), MRPC? Can you explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation under Rule 1.4(b), MRPC? Chances are pretty good that no matter what type of law you practice, you can find a way to do most if not all of these things (short of a criminal jury trial) without physically being in the same room with your client if you are comfortable with technology—an essential requirement of modern practice.

Similarly, regarding the question of in-person versus remote hearings, remember as a starting point that the rules address allocation of authority between client and lawyer. Rule 1.2(a), MRPC, provides "a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they [the objectives] are to be pursued." What is the purpose of the hearing that you want to attend remotely? Have you discussed with your client the available options as they relate to your client's objectives? Is the court offering a remote option and can you effectively present your case through that means? Through consultation, can you find a mutually available resolution if there is a disagreement between you and your client? If not, is withdrawal warranted and can you do so ethically under Rule 1.16, MRPC?

Lawyers call our hotline hoping the ethics rules will afford them specific and unambiguous answers to the problem at hand. While the rules provide several prohibitions—for example, don't lie—what I find most rewarding about working with the ethics rules is they give you the tools to address a lot of challenging and dynamic situations. They are logical and client-centered, and through their interplay, help you effectively and ethically navigate all kinds of difficult and unprecedented situations. As usual, this statement comes with the caution that there may be other substantive laws or court rules that also bear on a particular topic, so do not forget those considerations.

Resources

As lawyers, we know the answer is often "it depends." But we also know that knowledge is power. And that asking the right questions often provides the necessary clarity to navigate difficult times. In addition to my prior article, we have prepared a list of frequently asked questions related to covid. That list can be found on our website, *www.lprb.mncourts.gov*. The American Bar Association has also published two opinions you might find relevant: ABA Formal Opinion 495, "Lawyers Working Remotely" (December 2020) and Formal Opinion 498, "Virtual Practice" (March 2021). The first looks at working remotely through the lens of the unauthorized practice of law; the second examines ethics rules typically implicated by remote or virtual practice. Even if you are not a member of the American Bar Association, the ABA makes its copyrighted ethics opinions available free of charge for one year following issuance, so download them now if this is a topic of interest to you.

Conclusion

I'm pleased to report that we have not seen a spike in discipline due to pandemic-related ethics mistakes. The complaints we see now are the same ones we have always seen, although it's fair to say that the pandemic has exacerbated already challenging situations for some lawyers, especially those related to substance use and mental health issues. The pandemic has also taken its toll on civility, from anecdotal reports I have received. The practice of law has always been challenging, and the profession continues to be challenged by this pandemic. Taking time to review your practices against the ethics rules is always time well spent, and that remains true as we continue to navigate day-to-day changes in the world necessitated by the pandemic. Please call our ethics hotline (651-296-3952) if you have a question about how to ethically handle a particular client situation or let us know if there is something else the Office can do to help you in the ethical practice of law. Take care. ▲

* Susan Humiston, *Legal Ethics in a Pandemic*, Bench & Bar (May/June 2020). *https://www.mnbar.org/resources/publications/bench-bar/columns/2020/05/27/legal-ethics-in-a-pandemic*

Trust account overdrafts: what you need to know

For more than 30 years, the Office of Lawyers Professional Responsibility has administered a trust account overdraft program. In fact, Minnesota was one of the first states to implement such a program (in 1990, following the American Bar Association's adoption of a model rule on the topic in 1988). This important early warning tool is now in place in all but a couple of states, but I'm not sure how familiar the practicing bar is with the rules, the program, and what to do if you receive a trust account overdraft notice.

The rule and the program

Rule 1.15(m), Minnesota Rules of Professional Conduct, provides that every lawyer practicing or admitted in Minnesota has consented to overdraft reporting by any financial institution holding client trust accounts. Lawyers can only hold client funds in trust accounts.[1] Those accounts, in turn, can only be with banks approved by the OLPR.[2] The bank, as part of its agreement with the OLPR, must report to our Office any time a check or debit is presented against a trust account containing insufficient funds.[3] This is true whether the withdrawal is honored or dishonored. Because the bank is reporting to us, the rules do not require you to report such notices to our office.

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

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When our Office receives an overdraft notification, we send an inquiry letter to the attorney or firm on the account, requesting an explanation and three months of the required books and records. We request and expect a timely response to the request, generally within 14 days. If you receive an overdraft notice, you should immediately turn your attention to discovering the cause of the overdraft and providing the books and records requested. Too often we see lawyers brush off the request by offering a cursory explanation of what happened. Don't do that. Nothing raises the antennae of regulators more than partial responses accompanied by no records or incomplete ones. If there is an issue with your trust account, don't panic! Do seek counsel if you need help with the request, and please do so sooner rather than later. If you need additional time, let us know. Be candid about why additional time is needed but also remember we consider this a critical ethics obligation—so you should prioritize addressing any potential issue accordingly.

Importantly, and please remember this, most overdraft inquiries result in no discipline. Forty-one trust account overdraft notices were reported to the Director in 2020. The Director converted only seven of the resulting inquiries into disciplinary files. One of the most beneficial things about this program is that it allows us to continue to educate lawyers on proper record keeping; it's a concrete example of our recognition that mistakes happen. People write checks on their trust account when they mean to write them from their business account. Banks also make mistakes. Unexpected service charges may be assessed to the account. Deposits may not clear when you expect them to. You might forget to record a disbursement or make a duplicate disbursement. Third party checks may bounce. Strict compliance with the trust account rules, including the provisions set forth in Appendix 1 to the Rules, would eliminate most of these scenarios as potential problems, but again, falling a little short of perfection is not what may trigger further investigation.

When inquiry becomes investigation

There are several reasons we may open a discipline investigation after the initial trust account inquiry. A non-exhaustive list of those reasons includes:

- you do not respond despite our efforts to follow up, or your responses are so incomplete that it is apparent you are not keeping the required books and records on a regular basis;
- the records show you have shortages in the account that persisted over time (less money on hand than you should have, if everyone whose money you are holding asked for their money at the same time); or
- you regularly have more than $200 of your own funds in your trust account.

This last issue is called *commingling* and it means you have client funds and your own funds in the account—often because you want to keep a cushion in place to avoid an overdraft in the first place! Please do not do this as the rules require you to, within a "reasonable time," withdraw earned fees and account to the client for that withdrawal.[4] Commingling can also put client funds at risk by giving creditors a basis to attach funds in the trust account. Thus, commingling gets our attention. As the closing numbers demonstrate, however, the inquiry is focused on the overall adequacy (or inadequacy) of record keeping and rule compliance and should not be a cause for panic. Please know that we also expunge our overdraft records after three years if no investigation is commenced.

Public protection

In addition to the educational benefits of the program, there is no question that it is one of our most effective tools in preventing and detecting trust account misuse and misappropriation of client funds. In the first 15 years of the program, 14 lawyers were disbarred in cases that started

with a trust account overdraft notice, and others received discipline—some private, some public.[5] I have not totaled the overall numbers for the program—something we will do for the board's next annual report—but the program routinely uncovers serious misconduct that otherwise might not come to light from client complaints. Just this month, we discovered intentional misappropriation of client funds in a matter that started with an overdraft notice. I've come to learn that it happens more than you would think, but it still surprises me. And I remain proud that Minnesota was an early adopter of this effective and now widespread program.

Conclusion

The duty to safekeep client property—particularly money—is a fundamental fiduciary obligation. Although Rule 1.15 is the most detailed rule with the most subparts, do not be intimidated. But it does take time to understand the requirements and to comply with them on a day-to-day basis, time I know you would rather spend on billable client work or at leisure. It can't be helped—the consequences of failing to give this ethics obligation the time it requires are serious. Because we want to help you with this important requirement, we have a lot of resources on our website devoted to the topic. Each year an OLPR lawyer and a forensic auditor devote significant time to administering the overdraft notification program. Time well-spent, in my view, due to its strong educational component, as well as the significant public protection benefits. Please call our ethics hotline (651-296-3952) if you have a question about how to satisfy your trust account obligations. ▲

Notes

[1] Rule 1.15(e), MRPC; Rule 1.15(f), MRPC.
[2] Rule 1.15(d), MRPC; Rule 1.15(k), MRPC.
[3] Rule 1.15(k), MRPC.
[4] Rule 1.15(b), MRPC.
[5] Betty M. Shaw, Overdraft Notification, Bench & Bar (April 2006).

Attachment 9

OFFICE OF
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TOLL-FREE 1-800-657-3601

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MEETINGS OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD 2022

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

Date	Location
Friday, January 28, 2022*	TBD
Friday, April 29, 2022*	TBD
Friday, June 24, 2022*	TBD
Friday, October 28, 2022*	TBD

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

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

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MEETINGS OF THE EXECUTIVE COMMITTEE OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
2022

Executive Committee meetings of the LPRB are scheduled for the following dates:

Friday, January 21, 2022
Friday, April 22, 2022
Friday, June 17, 2022
Friday, October 21, 2022

Meetings will be held at 10:00 a.m. via telephone conference call or in-person at the Director's Office.