

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
MEETING AGENDA**

Friday, September 25, 2020 – 3:00 p.m. (following Virtual Seminar)
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 19, 2020, Lawyers Board Meeting (Attachment 1)
2. Welcome Justice Natalie Hudson, Associate Justice, Minnesota Supreme Court
3. Open Posting for Attorney Member (Attachment 2)
4. Committee Updates:
 - a. Rules Committee
 - (i.) Status, Advertising Rule Petition
 - (ii.) Status, Rule 20, RLPR, Petition
 - b. Opinion Committee
 - c. DEC and Training Committee
 - (i) Seminar Feedback
 - (ii) Panel Manual Process Update
 - (iii) Logo (Attachment 3)
 - d. Mandatory Malpractice Insurance Committee (on hold)
 - e. Equity, Equality and Inclusion Committee
5. Director's Report:
 - a. Statistics (Attachment 4)
 - b. Office Updates
6. New Business:
 - a. Live Streaming Board Meetings
7. Proposed 2021 meeting dates (Attachment 5)
8. Quarterly Board Discussion (closed session)
9. Next Meeting, January 29, 2021

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 191st MEETING OF THE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

June 19, 2020

The 191st meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, June 19, 2020, electronically via Zoom. Present were: Board Chair Robin Wolpert, and Board Members Landon J. Ascheman, Jeanette M. Boerner, Daniel J. Cragg, Thomas J. Evenson, Michael Friedman, Gary M. Hird, Peter Ivy, Bentley R. Jackson, Shawn Judge, Virginia Klevorn, Paul J. Lehman, Tommy A. Krause, Kristi J. Paulson, Susan C. Rhode, Susan T. Stahl Slieter, Gail Stremel, Mary L. Waldkirch Tilley, Bruce R. Williams, Allan Witz, and Julian C. Zebot. Present from the Director's Office were: Director Susan M. Humiston, Managing Attorneys Cassie Hanson, Jennifer S. Bovitz and Binh T. Tuong. Also present were Minnesota Supreme Court Associate Justice David L. Lillehaug and Nicholas Ryan.

1. APPROVAL OF MINUTES (ATTACHMENTS 1 AND 2)

The minutes of the April 24, 2020, Board meeting were unanimously approved which included the amended minutes of the January 31, 2020, Board meeting.

2. RECOGNITION OF JUSTICE LILLEHAUG

Chair Robin Wolpert explained that Justice Lillehaug has served as the OLPR, LPRB and CSB Liaison Justice since 2017. Through his time as Liaison Justice, Justice Lillehaug was available for coffee meetings, countless phone calls, served as a terrific ambassador and ensured that mission and objectives aligned. Justice Lillehaug has become known as a coalition builder, building consensus on Court and serving as an important voice. Ms. Wolpert thanked Justice Lillehaug from the Board and the Chair, for all of his wisdom energy, and advised that the Board will be thinking of Justice Lillehaug and his guidance as the Board moves forward.

Director Susan Humiston echoed Ms. Wolpert's comments. To honor Justice Lillehaug's service, a contribution in his name was made to Mid-Minnesota Legal Aid. Ms. Humiston concluded by stating, "Thank you for being a fabulous liaison justice."

Justice Lillehaug addressed those in attendance by thanking them for the work they do and reminding them of the importance of their work. Justice Lillehaug remarked that he knows those working in this area put their heart and souls into it. Justice Lillehaug commented that the rule of law is under attack from a variety of sources and it is like a shotgun blast to the face. Justice Lillehaug commented that the

rule of law is the bedrock to society, and ethics and integrity of lawyers are paramount. Justice Lillehaug opined on the importance of the attorney regulation system, stating that the work you do, the fair notice provided, the fair hearing provided and discipline imposed, is extraordinarily important. Justice Lillehaug further explained that building trust and confidence is important and thanked everyone for all of their work. All of those in attendance expressed their gratitude through applause.

3. OFFICE AND BOARD COVID-19 RESPONSE

a. Office Reopening.

Director Susan Humiston provided an update on the physical OLPR Office reopening. Ms. Humiston detailed that the OLPR Office reopened to the public on June 15, 2020, with very limited staff. Those staff include reception, a few staff, and a few others splitting their time between the Office and home. Ms. Humiston explained that some office members returned to the office because the nature of the work requires in-office presence. In discussing safety, Ms. Humiston stated that the Office has secured the necessary PPE and that there are good measures in place to comply with the preparedness plan.

Ms. Humiston commented that it is nice to have the phone answered live and described that the phone system did not allow for forwarding with live answering. In addition, the public has visited since the Office has reopened. Ms. Humiston discussed that it is also important to discuss caution fatigue and have a good plan for easing back to physical presence while remaining safe.

b. Remote Panel Hearings (Attachment 3).

Remote Panel hearings were addressed by both Panel members and by the Director's Office. Landon Ascheman, Panel Chair, provided a report on challenges that should be addressed.

Mr. Ascheman reported that an email has been circulated detailing lessons learned. Mr. Ascheman further described that in a reinstatement matter he chaired, he was very proactive on the remote hearing issue which included having several meetings with both parties and advised there was a lot of discussion in the pre-planning. In future hearings, Mr. Ascheman suggests there be more discussion about responsibilities relating to witnesses. Mr. Ascheman explained from his perspective, there was a disconnect with witnesses, particularly ensuring witnesses had familiarity with technology. From Mr. Ascheman's perspective, it appeared witnesses were not taking the remote

hearing as seriously as they would take a typical hearing which is integral to ensure respect for the system and the process. Mr. Ascheman noted that on the issue of objections, it is important to make sure objections were heard and not stated while on mute. Mr. Ascheman noted in the matter in which he presided there were not any significant evidentiary issues. Mr. Ascheman also opined that when a party has counsel, be prepared to address how the hearing is being conducted, including optics. In Mr. Ascheman's opinion, in future hearings, one of the Panel members should be hosting and controlling the hearing, including control of recording and chat features.

Daniel Cragg also offered comments from a Panel perspective. Mr. Cragg explained that he did not learn lessons regarding the use of exhibits during a Zoom format, because they were not used during the hearing he participated in. However, Mr. Cragg believes Zoom would be a great platform for the use of exhibits, it just did not occur in the case he was involved in.

Ms. Wolpert posed a question about witness coordination in response to Mr. Ascheman's suggestion that the Panel coordinate and handle hearings. Ms. Wolpert asked, "Who is going to do witness coordination?" Ms. Wolpert also opined that it seems improper for the Office to coordinate the other party's witnesses and sought input from the group.

Mr. Ascheman responded that in the Panel matter he chaired, the Office served as the host. Mr. Ascheman stated that the Office was to coordinate which was ultimately summed up with a Zoom invite and no coordination regarding how to use Zoom or the timing of witness arrival. Mr. Ascheman acknowledged that part of those logistics is on the parties, but some more basic format should be provided to witnesses. Mr. Ascheman suggested that by switching the responsibility to the Panel, issues that occur with witnesses will be easier to identify. Mr. Ascheman states that in the case he chaired, it was hard to identify where the issue was and who was responsible.

Mr. Cragg, who participated in the same Panel matter, suggested that witness coordination should be the responsibility of the parties, not the responsibility of the Office or the Panel. Mr. Cragg suggested that if the person running the hearing can create and run the hearing, but should not be responsible for anything outside of platform piece.

Mr. Ascheman responded that in this particular Panel matter it was not clear where the witness issue was created. For this reason, Mr. Ascheman

suggested moving hosting the hearing to the Panel, because it then becomes clear that each party is responsible for its own witness coordination.

Ms. Wolpert addressed access to justice issues, noting such issues are minimized when a respondent/petitioner has a lawyer, but recognizes a gap can occur in other cases. Ms. Wolpert asked who is going to bridge the access to justice gap, including resource issues?

Director Susan Humiston addressed Ms. Wolpert's question as well as remote hearings from the Office's perspective. Ms. Humiston reported that remote hearings have been conducted in both the Panel setting on a petition for reinstatement and in a Referee hearing. Ms. Humiston reported that in the Referee matter, the respondent was not tech savvy, and the matter included outstate witnesses. Ultimately, in the referee matter everyone was pleased with the remote platform. Ms. Humiston explained that in both the Referee and Panel matter all materials were pre-exchanged. Ms. Humiston feels that looking at both hearings that occurred, it is clear there does need to be additional information available, which have been created by the Office and are included in the Board materials at Attachment 3. In the future this information can be shared in advance with witnesses and parties. Ms. Humiston agreed that coordination with witnesses is key. Ms. Humiston expressed a concern with someone other than the Office hosting, including an issue with the availability of a full Zoom license, that is not available for all Panel Chairs. Ms. Humiston explained that the Office is prepared to perform hosting functions and will continue to do so for Referees. Ms. Humiston encouraged the Board to think about issues as it moves forward to decision on this issue. Ms. Humiston enforced that the Office encourages formality and if the Board suggests or needs any resources, please let us know.

Ms. Wolpert inquired how supplementary materials regarding the remote hearing would be available?

Ms. Humiston responded that materials would be attached to the meeting notice, and provided to participants. Ms. Humiston also suggested that the materials could be put on the website, and would be specifically provided in each hearing.

Ms. Wolpert asked about managing remote hearings and whether it is recommended for Panel Chairs to coordinate with Lynda Nelson regarding the conduct of hearings.

Ms. Humiston replied that Panel Chairs are free to reach out to Ms. Nelson. Ms. Humiston explained that in the reinstatement Panel matter, some of the gap occurred between party and witness and Ms. Humiston is not sure what would have eliminated that gap by adding contact with Ms. Nelson. Ms. Humiston advised that Ms. Nelson did not do other things other than run the meeting.

Cassie Hanson added that she participated in the reinstatement Panel matter and that the petitioner did not provide accurate emails or telephone numbers to the host and, as a result, the witnesses did not receive the Zoom invites.

Mr. Cragg added that Panels want to be able to say to parties, "Call your next witness." The point is having the next witness be available to be called.

Mr. Ascheman stated the issues could have been interpreted multiple ways, and if you remove the Director's Office, the onus is on parties, and it becomes easy to identify where disconnects are. Mr. Ascheman added one does not want to hold an issue against a party, but one does want to identify the source of the disconnect.

Mr. Cragg circled back to the Zoom licensing issue adding that the Director's Office just needs to delegate hosting.

Ms. Wolpert suggested that these issues can be addressed on a hearing by hearing basis noting that as a part of general comments, Panels should be clearly communicating to the respondent/petitioner, that if contact information for witnesses is inaccurate, those witnesses will not be getting invites for the hearing.

Gail Stremel, who also served on the reinstatement Panel matter, echoed the comments of Mr. Cragg and Mr. Ascheman. Ms. Stremel also noted that there was good cooperation from both parties and Ms. Stremel noted the petitioner was cooperative which helped the process.

Mr. Ascheman further addressed technology issues that impacted the hearing and could impact future hearings, such as bad internet signals resulting in a lag in testimony, or resulting in failing to hear a full response or not providing a full response. Mr. Ascheman commented that he really likes Attachment 3 as a resource and also encourages Panels to consider how to respond if one of the parties drops from connectivity, specifically, identifying where the break occurred and how to rewind.

Gary Hird compared Lynda Nelson's role to a courtroom bailiff, directing traffic, or perhaps a calendar clerk, not a role where she is responsible for when people were to be present.

Ms. Humiston added, to address comments relating to recording, that the official record is the transcript and that the Office is not using the recording function.

Binh Tuong discussed that Attachment 3 is a best practices protocol document, that is intended to address appropriate decorum, and to the extent it does not, to please let Ms. Tuong know. The checklist originated with the judicial branch and was adjusted based on our proceedings. Based on the conversations and lessons discussions, issues, such as notes on handling objections, can be included in the checklist.

Ms. Hanson added that from a technology perspective, an issue arises when two people participating remotely are participating in the same room.

Susan Stahl Slieter commented that from her work as court administrator, she also was trainer for WebEx. From that experience and instruction, Ms. Stahl Slieter noted that training suggests that the hosts should not also serve as a Panel member. Ms. Stahl Slieter stated that she would find it very distracting to serve as a Panel member and also serve as a host. Ms. Stahl Slieter suggested that the more we do this, the more the host will become an expert.

Ms. Wolpert suggested that Panel Chairs reach out to Ms. Stahl Slieter on the training she has done and tap her experience on this issue.

4. **COMMITTEE UPDATES:**

a. **Rules Committee.**

i. Status, Advertising Rule Petition (Attachment 4).

Peter Ivy, Rules Committee Chair, provided the report of the Rules Committee. Mr. Ivy began by recognizing the Rules Committee, the good discussions that have been occurring, and noting that OLPR liaison, Binh Tuong, has been helpful and prompt.

Mr. Ivy discussed the Rule 7, MRPC, series amendments and noted that twice the Board has approved the rule in new format. Specifically, the LPRB position allows for lawyers to be referred to as a specialist

without certification. Mr. Ivy stated he is uncertain if the Board's petition will be filed at the same time as the MSBA's petition or not. The discussion on the issue is now closed.

ii. Status, Rule 20, RLPR, Draft Changes (Attachment 5).

Mr. Ivy explained the proposed amendments to Rule 20, RLPR, as follows: Data prior to a probable cause determination would be confidential; data following probable cause would be public. Administrative status data would be categorized according to its procedural status. Mr. Ivy explained that a great deal of discussion focused on non-complaining clients, potentially facing embarrassment if their names became public and, as such, the amendments provide that the identity of non-complaining clients shall remain confidential. Mr. Ivy discussed that the Director may also seek protective orders in cases where confidentiality is not addressed. Mr. Ivy advised that the Rules Committee unanimously approves and recommends approval of the proposed Rule 20, RLPR, amendments and proposed bringing the redlined Rule 20, RLPR, to a vote. Ms. Tuong was provided an opportunity to comment from the Director's Office and indicated she had no comments unless there were questions, which there were none.

Jeanette Boerner made a motion to approve the redlined Rule 20, RLPR. Bruce Williams seconded the motion. The motion passed unanimously.

iii. Potential Comments, *Pro Bono* Reporting Petition.

Mr. Ivy reported that the Rules Committee thinks the *pro bono* reporting petition demonstrates great initiatives, but there are no specific comments for the Board to advance. Mr. Ivy also thanked Justice Lillehaug for his calm steady leadership in this area.

iv. Potential Comments, Paraprofessional Pilot Project.

Mr. Ivy reported that the Rules Committee met to consider whether the Board should comment on the Pilot Project petition and determined that this was not within our purview to provide further comment or analysis in response to the petition and recommended that the Board not provide comment.

v. Bill Wernz's Suggestion for Rule Change, Rule 8(e)(4), RLPR.

Mr. Ivy outlined that Mr. Wernz's primary concern is that a Board member has the ability to recommend public discipline and it impairs the fair administration of justice. Mr. Wernz suggested that if a Board member was considering public discipline, the parties should brief the Board member. Mr. Ivy reported that Mr. Wernz would withdraw his request if the data did not support his concern. Mr. Ivy stated the data was reviewed and in ten years, the scenario described has been invoked by a Board member approximately one time per year, three of which resulted in public discipline.

Mr. Ivy noted that a respondent still has the ability to contest the matter at a Panel hearing, where the issues are fully vetted and, as such, reduces the likelihood of proceeding in the absence of precedent supporting public discipline.

Mr. Ivy reported the Rules Committee felt this amendment would increase cost. Mr. Ivy cited Executive Committee Policy & Procedure No. 10, which provides that appeals are to be concluded in 30 days. Mr. Ivy reported that the Committee did not think the data was sufficient to support a rule change.

Ms. Wolpert added that the Pennsylvania Supreme Court adopted amendments to Rule 8.4(g), related to discrimination. Ms. Wolpert suggests that any improvements or enhancements may be a part of a list for Minnesota's Rules Committee to consider and that Pennsylvania's rule is available on its Bar's website.

b. Opinions Committee

Opinions Committee Chair Mark Lanterman provided the Opinion Committee's report noting the Committee met to discuss two issues. The first issue was that Mr. Wernz sent an email discussing why it was a bad idea for Minnesota to follow ABA Opinion 481. Mr. Lanterman reported that after a good discussion, the Committee had no appetite to revisit this topic. Mr. Lanterman remarked that the Committee does not write opinions to say we don't agree with opinions.

Mr. Lanterman reported the second topic the Committee addressed was what obligations does the Board have to give guidance on COVID? Mr. Lanterman addressed a Pennsylvania Opinion on COVID that was perhaps overly detailed. Mr. Lanterman shared that the consensus from the Committee

was that drafting would take too long and attorneys need help now with the discussion focusing on providing the help now. Mr. Lanterman reported that the Director's Office is including information on its website including FAQs and Ms. Hanson will be sharing *Bench & Bar* articles. The Committee opined that instead of an opinion, help should be provided through education, for example, a couple of short videos that could easily be put together and posted on the website.

Ms. Hanson added that OLPR has been busy drafting FAQs and is going to be sharing those FAQs with the Board and an article is already posted on the website.

Ms. Humiston added that FAQs will be finalized next week and if a topic is not covered, we can do this and the FAQs will be posted to the Board SharePoint site. Ms. Humiston also noted that we continue to refer people to the advisory opinion line and confirmed that an opinion would delay the ability to provide advice to the profession.

Ms. Wolpert raised the issue that various bars across the country are engaging in this conversation including the issue of UPL. For example is it UPL if an attorney is quarantining in one state and working in another? Ms. Wolpert encouraged anyone who has COVID-related questions to send those questions via email to Ms. Wolpert, Ms. Humiston and Ms. Hanson.

c. DEC and Training Committee.

DEC and Training Committee Chair Allan Witz provided the Committee update.

i. DEC Seminar, September 25, 2020.

Mr. Witz explained that based on an Executive Committee decision, the DEC Seminar will be in a Zoom format. Mr. Witz reported working with Jennifer Bovitz, whom he thanked and noted the Committee will work on programming.

ii. Training Manual.

Mr. Witz reported that the Committee will also be working on a training manual organized by subject matter.

iii. Practical Training.

Mr. Witz reported that he is considering launching monthly practical trainings as a form of continuing education. Ms. Wolpert noted this could also include wellness training incorporating LCL, including implicit bias training and rethinking how wellbeing training is delivered. Mr. Witz has also been provided with materials, including learning experiences from recent Panel matters that progressed through oral argument. Anyone with thoughts on practical training ideas should reach out to Mr. Witz and Ms. Bovitz.

d. Panel Manual Update.

Ms. Wolpert reported that there has not been feedback from Panel Chairs on the Panel Manual that was circulated. As a result, Ms. Humiston is moving forward to provide the revised Panel Manual to the entire Board. Ms. Wolpert explained that the training manual that Mr. Witz is working on is an internal document to help Panel members do the job. The Panel Manual is an external document which also explains the process to other stakeholders and it should not be considered a training manual. The training manual will serve as a companion piece to the Panel Manual. The Panel Manual has not been updated since 1985 and the goal is to modernize and streamline the document. Ms. Humiston will circulate the updated Panel Manual to Panel Chairs and to the DEC Committee. Ultimately, the updated Panel Manual will come before the full Board for approval as it is a statement on how Board proceedings proceed.

Ms. Wolpert commented that the updated Panel Manual transcends any committee and the goal is to have it before the Board in September citing it as an access to justice issue. Ms. Wolpert clarified that Panel Chairs will conduct the first review and then the entire Board, noting that everyone brings experience and enhances the Board's ability to perform in all aspects. Ms. Wolpert noted there will be a call out in August with a deadline. Ms. Wolpert also noted that after Chairs take a look, she is going to send it over to the MSBA professional conduct committee.

e. Mandatory Malpractice Insurance Committee.

Ms. Wolpert addressed the issue of the Mandatory Malpractice Committee and sought input from the group on the appropriate timetable when priorities seem to have shifted due to COVID and racial justice issues.

Justice Lillehaug inquired whether the Court had imposed a timetable? Ms. Wolpert responded it had not.

Justice Lillehaug responded that he believes studying mandatory malpractice is a good idea, but that it does not need to be done today.

Ms. Wolpert commented that she does view this as an access to justice issue noting that the Client Security Board is not there to bridge the gap for those uninsured and that the issue may impact equity issues.

Mr. Hird opined that on the flip side, if smaller practitioners are required to obtain malpractice insurance, those attorneys may be required to raise rates.

Ms. Wolpert responded that it is a microeconomics issue and a macro access to justice issue.

5. **DIRECTOR'S REPORT:**

a. Statistics (Attachment 6).

Director Humiston provided the Director's report noting that May 2020, was most notable for how far complaints were down. In comparison, complaints were half of what the Office normally receives. Ms. Humiston noted this quickly changed in June with 68 complaints already as of the Board meeting. Overall, last year complaints were down. Ms. Humiston reported that the Office continues to make progress on case inventory and Ms. Humiston believes in the 80/20 rule if case inventory is down. Ms. Humiston reported discipline is on pace including steady public discipline.

b. Budget Update to the Court (Attachment 7).

Ms. Wolpert requested background on the \$128 allocation from lawyer registration. Ms. Humiston clarified that the Office budget is not subject to legislative funds, but does follow the legislative biennium budget. Ms. Humiston noted that the Office is tracking very well on budget and observed that the Office was in deficit spending for a while as revenue is less than annual expenses. Ms. Humiston also clarified that the once healthy reserve has been exhausted and noted that the Court approved a one-time \$1 million transfer from CSB, however, the Office has not yet had to make that transfer and it will likely not be needed during this biennium. Fiscally, financial oversight is provided by the Branch.

Justice Lillehaug commented at a meeting last week, the Court approved the budget or at least noted no substantial problems.

c. Office Updates (Attachment 8).

Ms. Humiston announced that Ms. Tuong has been promoted to Managing Attorney. Ms. Humiston also shared a thank you to Ms. Bovitz from the client in the Kennedy matter. Ms. Humiston thanked Ms. Bovitz and Ms. Nelson for their work on the Kennedy matter, involving issues of harassment. Ms. Humiston reported that the Office is moving forward with a lease on the Town Square property with a move no sooner than November 1, 2020.

6. SPECIAL COMMITTEE, EQUITY

Ms. Wolpert introduced the Equity Committee by discussing the spirit of the Executive Committee meeting, including rethinking and reimagining how the disciplinary system is working for everyone. Ms. Wolpert explained that we are living in a paradigm that is completely new, where we can seize this moment and rethink how we do business. Ms. Wolpert suggested the discussion could focus on opportunity for ideas. For example, what would such a committee be called and what would it do?

Mr. Ivy asked if the focus was on training and outreach or changes in the rules?

Ms. Wolpert explained that efforts regarding diversity in Board and DEC composition have not been successful. Ms. Wolpert further explained that the ABA Center for Professional Responsibility has collected data related to bias based on the number of complaints and discipline based on gender and race.

Michael Friedman stated that he would want to be a part of such a committee, and as a new public member, he has no knowledge of how new rules get into print. Mr. Friedman explained that he works at a legal rights center which is at the center of a lot of things, and a lot of organizations are asking what can we do differently? Mr. Friedman also addressed prosecutors prosecuting police in the jurisdiction in which they serve and referenced the letter County Attorney Choi signed. Mr. Friedman indicated it is a suggestion that such conduct be included in the ethics rules. Mr. Friedman also discussed *Brady* requirements and perceptions of bias of complainants.

Mr. Hird stated that the group must look at where Board members are coming from, for example, MSBA is nominating a number of Board members. Mr. Hird also stated, that the Board needs to reach out to the minority bars specifically to promote change and stated there is a similar issue with staff at the Director's Office. Mr. Hird

questioned, what are we doing to promote this career path earlier in people's legal thoughts?

Mr. Williams discussed Mr. Wernz's email addressing three disciplinary opinions raised in short succession that involved dishonesty and lawyers of underrepresented groups. Mr. Williams noted that he had mentors, and asked if mentors are available. Mr. Williams recommended Kassius Benson.

Ms. Boerner commented that she had been thinking about how non-diverse the Board is and also mentioned that Kassius is a good friend and had not previously been interested in serving on the Board.

Shawn Judge inquired what the response has been when organizations have been reached out?

Ms. Wolpert responded that Athena Hollins is her point person at the MSBA and in working with the affinity bars. Ms. Wolpert reported that she attends the diversity and inclusion awards ceremony, works the room and such work has not produced any applicants. Ms. Wolpert also noted that the DEC application has been reviewed by the diversity and inclusion section. Ms. Wolpert commented that diversity and inclusion starts at the DEC as well. Email Ms. Wolpert if you want to be part of the committee and ultimately the goal is for the whole Board to be engaged.

Mr. Ascherman commented that each bar association has its own announcement regarding DEC recruitment, but these recruitment efforts have not been observed from the affinity bars.

Ms. Bovitz commented that when considering issues of equity, it is important to first look inward at ourselves and recognize our own implicit and actual bias along with acknowledging, for many of us, our own white privilege. Perhaps outreach efforts need to expand beyond the known bar association institutions to reach underrepresented groups, with consideration given to community and faith organizations.

Ms. Tuong also commented that self-reflection is a good place to start.

Ms. Judge added that as an African American, she does not want to play this role and suggested there may be several reasons people are not coming forward.

7. 2020 DRAFT ANNUAL REPORT (ATTACHMENT 9)

Ms. Wolpert reported that the report is due to the Supreme Court July 1, 2020. Any comments should be sent to Ms. Humiston or Ms. Wolpert.

8. **PROPOSED 2021 MEETING DATES (ATTACHMENT 10)**

Ms. Wolpert noted that the proposed meeting dates are usually cleared with the MSBA, MWL and other affinity bars. Ms. Wolpert noted the proposed dates are likely fine with the exception of April and June noting a number of Board members also serve on the assembly. Ms. Wolpert does not want to inhibit participation on the MSBA.

Ms. Boerner inquired whether a meeting must occur on the same date as the Seminar? Ms. Wolpert responded that it does not need to be and now that the seminar will be virtual there are options.

9. **QUARTERLY BOARD DISCUSSION (CLOSED SESSION)**

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

Thereafter, the meeting adjourned.

Respectfully submitted,

Jennifer S. Bovitz Bovitz, Jennifer
Sep 11 2020 1:39 PM

Jennifer S. Bovitz
Managing Attorney

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

Attachment 2



MINNESOTA JUDICIAL BRANCH

Face coverings required in court facilities.

The response to COVID-19 has impacted access to courthouses and may change the way cases are handled.

[Learn more »](#)

Public Notice Detail

The Minnesota Supreme Court Announces an Attorney Member Vacancy on the Lawyers Professional Responsibility Board

Posted: Friday, August 28, 2020

One attorney member is being sought to fill a vacancy on the 23-member Lawyers Professional Responsibility Board.

The all-volunteer Board is made up of 14 attorneys and 9 public members. The Board is responsible for the oversight and administration of the Office of Lawyers Professional Responsibility. The Office is part of the Judicial Branch and is administered by a Director and a staff of 31.

The Board meets four times per year to consider issues involving the lawyer discipline system, including rule changes and policy implementation. Board members also preside over hearings concerning allegations of unprofessional conduct on the part of lawyers. Panels meet approximately three to four times per year. In addition, Board members consider appeals of dismissed complaints.

The current vacancy is for a partial term ending on January 31, 2022. No member

may serve more than two three-year terms. The Minnesota Supreme Court will make the appointments.

Compensation is limited to reimbursement for costs. All applicants interested in appointment must submit a letter of interest and resume. In addition, attorney applicants must include a screen print from the **Minnesota Attorney Registration System (MARS)** demonstrating an active Minnesota attorney license.

Please submit application materials to AnnMarie S. O'Neill, Clerk of Appellate Courts, via e-mail to **mjcappellateclerkofcourt@courts.state.mn.us** or by mail to 305 Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Boulevard, St. Paul, MN 55155. Applications must be received no later than 4:30 pm on Monday, September 28, 2020. **Email applications are preferred.**

Attachment 3



LPRB/OILPR

2020 Annual Seminar

Protecting the Public • Strengthening the Profession

Attachment 4

OLPR Dashboard for Court And Chair

	Month Ending August 2020	Change from Previous Month	Month Ending July 2020	Month Ending August 2019
Open Files	439	11	428	487
Total Number of Lawyers	329	5	324	374
New Files YTD	594	73	521	678
Closed Files YTD	635	62	573	699
Closed CO12s YTD	120	11	109	193
Summary Dismissals YTD	281	37	244	298
Files Opened During August 2020	73	0	73	89
Files Closed During August 2020	62	-32	94	73
Public Matters Pending (excluding Resignations)	32	1	31	39
Panel Matters Pending	15	-3	18	14
DEC Matters Pending	75	13	62	90
Files on Hold	7	1	6	10
Advisory Opinion Requests YTD	1123	142	981	1320
CLE Presentations YTD	15	0	15	45
Files Over 1 Year Old				
Total Number of Lawyers	90	5	85	85
Files Pending Over 1 Year Old w/o Charges	73	5	68	61
Total Number of Lawyers	56	3	53	48

	2020 YTD	2019 YTD
Lawyers Disbarred	1	5
Lawyers Suspended	18	14
Lawyers Reprimand & Probation	3	3
Lawyers Reprimand	0	3
TOTAL PUBLIC	22	25
Private Probation Files	13	8
Admonition Files	52	78
TOTAL PRIVATE	65	86

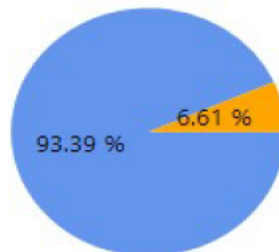
FILES OVER 1 YEAR OLD

Year/Month	OLPR	AD	PAN	HOLD	SUP	S12C	SCUA	REIN	TRUS	Total
2016-02							1			1
2016-06			1							1
2016-07	1									1
2016-08					1					1
2016-12	1									1
2017-02			1							1
2017-03	1			1						2
2017-04					1					1
2017-06					1					1
2017-07							1			1
2017-09	2									2
2017-10	1									1
2017-11	1				1					2
2017-12	1									1
2018-01	1									1
2018-02	1									1
2018-03				1	1					2
2018-04	2				2					4
2018-06	1				1					2
2018-07	2		1				1			4
2018-08	3				2					5
2018-10	2				2					4
2018-11	2				2					4
2018-12	4								1	5
2019-01	2		1	1	2					6
2019-02	4		1	1			1			7
2019-03	6				1					7
2019-04	9			1		1	1			12
2019-05	4			1					1	6
2019-06	6			1	2					9
2019-07	8		1		4			1		14
2019-08	8	1	1		1					11
Total	73	1	7	7	24	1	5	1	2	121

	Total	Sup. Ct.
Total Cases Under Advisement	5	5
Sub-total of Cases Over One Year Old	116	28
Total Cases Over One Year Old	121	33

Active v. Inactive

■ Active 113
■ Inactive 8



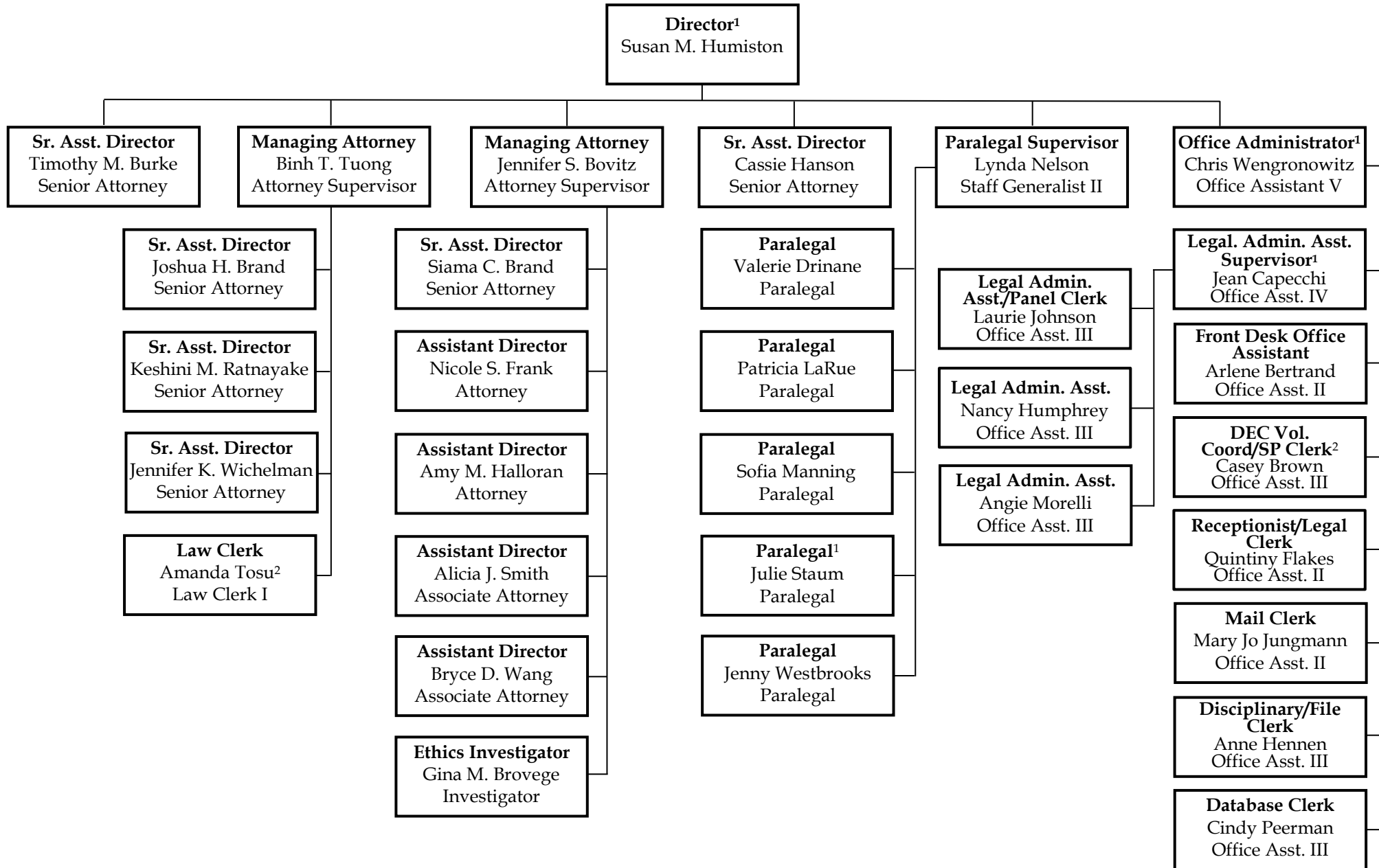
All Pending Files as of Month Ending August 2020

Year/Month	SD	DEC	REV	OLPR	AD	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	Total
2016-02										1				1
2016-06						1								1
2016-07				1										1
2016-08								1						1
2016-12				1										1
2017-02						1								1
2017-03				1			1							2
2017-04								1						1
2017-06								1						1
2017-07										1				1
2017-09				2										2
2017-10				1										1
2017-11				1				1						2
2017-12				1										1
2018-01				1										1
2018-02				1										1
2018-03							1	1						2
2018-04				2				2						4
2018-06				1				1						2
2018-07				2		1				1				4
2018-08				3				2						5
2018-10				2				2						4
2018-11				2				2						4
2018-12				4									1	5
2019-01				2		1	1	2						6
2019-02				4		1	1			1				7
2019-03				6				1						7
2019-04				9			1		1	1				12
2019-05				4			1						1	6
2019-06				6			1	2						9
2019-07				8		1		4			1			14
2019-08				8	1	1		1						11
2019-09				18				1						19
2019-10				19				4			1			24
2019-11				22				2						24
2019-12		1		16				1						18
2020-01		1		18		1		1			1		1	23
2020-02		7	2	23				1			2			35
2020-03		4		15										19
2020-04		3	1	17				2			1			24
2020-05		12		11							1			24
2020-06		11	1	17							1			30
2020-07		18		15				1						34
2020-08	9	18		16								1		44
Total	9	75	4	280	1	8	7	37	1	5	8	1	3	439

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

Office of Lawyers Professional Responsibility FY21 Organizational Chart



¹ Also Client Security Board Staff

² Part-time position

³ Not administratively subject to Director's Office.
Office pays percentage of their salary

Supreme Court Employees³
Accounting
Lisa Pasqualini (.1 FTE allocated to OLPR)
Tracy Wendel (.2 FTE allocated to OLPR)

Prospective clients and the ethics rules

You have a conversation with someone who is considering hiring you for a legal matter. You decide not to undertake the representation. Because no fee agreement was signed, the conversation does not have any future implications for you, right? Well, not exactly. Understanding your ethical obligations to prospective clients is an important part of ensuring an ethical practice.

Rule 1.18, Minnesota Rules of Professional Conduct, addresses duties to “prospective clients:” individuals who consult with a lawyer about the possibility of forming an attorney-client relationship. In 2005, Minnesota adopted the ABA model rule on prospective clients, and on June 9, 2020, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 492 addressing this rule. The opinion provides a good look at this little-discussed rule (you might not even know it exists if you went to law school more than 15 years ago), and it’s worth your time to review this rule and the opinion to make sure you are handling such encounters in accordance with the rules.

Client, prospective client, or neither

Let’s start with definitions. “Prospective client” is “[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.”¹ The consultation must be more than a unilateral outreach to the lawyer for someone to become a prospective client. Where “a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship,” the person is not a prospective client.² What if you invite the contact, though? The comments to the rule indicate that if

you invite the submission of information without a clear warning about terms, that may be sufficient to constitute a consultation.³ The comments also provided this helpful caveat: “a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a ‘prospective client.’”⁴ This is the case because that individual does not fit the definition of a prospective client, which specifically incorporates the purpose of the consultation—to form a client-lawyer relationship.

On the other hand, we all know who is a client, right? Certainly when you have entered into an agreement for representation, someone is a client. But don’t forget that in Minnesota, you can also form a client-lawyer relationship under circumstances in which a lawyer gives advice and the individual reasonably relies upon the same.⁵

Known as the “tort” theory of attorney-client formation, it means you don’t need to have been paid or executed a

written fee agreement for a client relationship that imposes ethical obligations to arise. Such obligations go beyond those listed in Rule 1.18 toward prospective clients, so it is important to watch for those inadvertent relationships.

Prospective client obligations

What ethical duty is owed to a prospective client? There are two. The first relates to confidentiality: You must keep the confidences of the prospective client just as you would those of a former client, irrespective of whether a relationship is formed.⁶ Remember too that as with keeping former client confidences, the proscription is that you must not “use or reveal” the information; including the term “use” means the obligation is broader than just nondisclosure.

The second obligation is one of conflict: You may not represent someone else with interests materially adverse to those of the prospective client in the same or a substantially related matter if you received significantly harmful information from the prospective client.⁷ A lot is happening in this sentence, which is largely the focus of ABA Opinion 492, so let’s pull it apart. Before we start, however, the comments provide an additional option for consideration: You might consider conditioning any consultation with a prospective client on the person’s informed consent that no information disclosed during the representation will prohibit the lawyer from representing a different client in a matter. This is expressly discussed in comment 5 to Rule 1.18, but a strong caution is noted to this approach. Informed consent is a defined term in the rules (Rule 1.0(f), MRPC), and depending on the facts and circumstances—including the sophistication of the consulting party—it might not be obtainable.

Assuming a lack of informed consent, let’s further discuss conflict and disqualification. Remember that representation against a former client is always prohibited if the representation involves the same or a substantially related matter.⁸ This is true regardless of the confidential information available to the lawyer. Rule 1.18 does not provide the same degree of protection to a prospective client but rather focuses on the nature of the information obtained. A disqualifying conflict exists where the lawyer receives information that “could be significantly harmful” to the prospective client. “Significantly harmful” is not a defined term and must be determined on a case-by-case basis in light of the specific facts of the matter. Much of ABA Opinion 492 describes what “significantly harmful” might look like, but a non-exhaustive list includes information such as views on settlement, personal accounts of relevant events, strategic thinking on how to manage a situation, discussion of potential claims and the value of such claims, or premature receipt of information that might affect strategy or settlement.⁹

If you receive information from a prospective client that “could be significantly harmful” to that prospective client, you are prohibited from accepting representation of another whose interests are adverse to the prospective client in the same or a substantially related matter. In my experience answering calls on the ethics hotline, lawyers often take an over-cautious approach to such situations, meaning they decline representation because they had a preliminary consult with the opposing party, irrespec-



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tive of the information provided. That is certainly the lawyer's prerogative, but it's not dictated by the ethics rules. Rather, the inquiry turns on the type of information obtained and the potential for significant harm to the prospective client.

For those in a firm, Rule 1.18 also provides protection against imputation of a conflict to the firm even if the consulting lawyer has a conflict due to receipt of potentially significantly harmful information. While the lawyer who received the information may have a disqualifying conflict, if the lawyer receiving the information (1) took "reasonable measures to avoid exposure to disqualifying information than was reasonably necessary to determine whether to represent the prospective client," (2) is timely screened, (2) is apportioned no part of the fee, and (4) notice is provided to the prospective client, the firm can nevertheless undertake representation adverse to the prospective client.¹⁰ As is often the case, if both the affected client and prospective client provide informed consent confirmed in writing, the intake lawyer can proceed notwithstanding the receipt of potentially harmful information.¹¹

Lessons

There are several lessons here. First, have a disciplined approach to limit intake calls to only information necessary to determine if you can or want to accept the engagement, such as limiting information collection to identifying all parties (including entities if relevant) involved in the representation, the general nature of the representation, and fees for the work you would undertake. Train all lawyers in the firm on this approach. Advise potential clients that it is important to refrain from sharing sensitive or potentially adverse information until both parties decide to go forward with a representation. Don't be afraid to stop someone when they start telling you the whole backstory; wait until you have determined there is no conflict and they can afford your fees. Understand that the more information you gather before making a determination on the engagement, the more likely you may be disqualified from undertaking representation of others in a substantially related matter. Keep

a record of prospective clients and the information obtained, but keep access to that information limited so you can quickly implement a screen if needed.

Rule 1.18, MRPC, strikes a nice balance in affording prospective clients some protections under the rules but not all of the protections afforded to clients, and is clear that contact made simply to disqualify counsel does not afford that individual even the subset of protections afforded prospective clients. The rule also affords to those who take care the ability to avoid imputation to the rest of the firm. As always, if you have a specific question regarding the application of the ethics rules to your practice, please call our ethics line at 651-296-3952, or send an email through our website at lprb.mncourts.gov. ▲

Notes

¹ Rule 1.18(a), MRPC.

² Rule 1.18, cmt. [2].

³ *Id.*

⁴ *Id.*

⁵ See *In re Severson*, 860 N.W.2d 658 (Minn. 2015).

⁶ Rule 1.18(b), MRPC ("Even when no client-lawyer relationship ensues, a lawyer who has consulted with a prospective client shall not use or reveal information obtained in the consultation, except as Rule 1.9 would permit with respect to information of a former client.").

⁷ Rule 1.18(c), MRPC.

⁸ Rule 1.9(a), MRPC.

⁹ ABA Formal Opinion 492 at 4-8.

¹⁰ Rule 1.18(d) (2), MRPC.

¹¹ Rule 1.18(d) (1), MRPC.

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Challenging clients in challenging times

We all know these are not the typical halcyon days of summer. Between the continuing covid-19 pandemic, community wounds from George Floyd's death, and the economic recession, people are struggling in many ways. Recently I was talking with Joan Bibelhausen, the executive director of Lawyers Concerned for Lawyers, and she suggested an article on a topic she knows some lawyers find particularly challenging these days: clients and boundaries. Joan approaches this topic from a wellbeing perspective; I will address it from an ethics perspective.

The preamble to the Minnesota Rules of Professional Conduct (MRPC) identifies four main representational functions performed by attorneys. Most people understand that lawyers act as advocates for their client's interests and negotiators on their client's behalf, and these are two of the four roles set out in the preamble.¹ Lawyers also act as evaluators of their client's legal affairs. The fourth function that lawyers are expected to perform is to serve as counselor or advisor to their clients. Often overlooked is Rule 2.1, MRPC, which provides good guidance regarding this role.

The advisor's duty

What does it mean to be an advisor consistent with the ethics rules? Rule 2.1 provides that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." The comments to Rule 2.1 expand on what this looks like.



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■ In general, a lawyer is not expected to give advice until asked by the client.

■ A lawyer ordinarily has no duty to initiate investigation of a client's affairs or give advice that the client has indicated is unwanted.

■ A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

■ Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations such as cost or effects on other people are predominant.

■ When a request is made by a client inexperienced in legal matters, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

■ When a matter is likely to involve litigation, it may be necessary to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

■ Where consultation with a professional in another field is something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations from experts.

Boundary issues

All this probably seems straightforward enough. Because we are problem solvers at heart, however, our role as advisor can lead to blurred lines and boundary issues with clients. This may be particularly true in times of upheaval. It's very difficult to give candid advice that may be unpalatable to someone who is already struggling. Perhaps this means you put off that difficult conversation. Time passes and it becomes even more difficult to have that conversation, because you also have to acknowledge your lack of diligence in not calling sooner. No matter how many times we tell ourselves that bad news does not get better with age, the self-talk does not make it easier to pick up the phone. While most clients appreciate your candor, some do not—a fact that should not deter you from your ethical obligation to give that candid advice. Nothing good comes from attempting to shelter a client from news they may not like.

Challenging times lead to other forms of boundary issues. Sometimes lawyers, when business slows down, take on matters they know in their heart they should not undertake. Good client screening remains as important today as at any time. Listen to those internal warning signs. Are you lawyer number three? Is the main complaint about prior counsel fee-related? Are you having a difficult time getting enough information to really understand the status of the matter? Even though business may be slow, think very carefully before you ignore your instinct just because someone is willing to pay you.

Another boundary issue is the urge to discount your services in challenging times. So many people are struggling, and of course it is difficult to afford a lawyer. I have been fortunate to make a good living and I would hate to have to pay any rate I have ever charged for my legal services. While you may be tempted to discount your fees, think twice before doing so. A bad financial arrangement between a lawyer and client can end poorly, and all too often proves the maxim that no good deed goes unpunished. This is not to say that financial adjustments should not be made as a courtesy, given the extraordinary times in which we find ourselves; just be careful.

Zealous advocacy has its own boundary challenges. Sometimes in discipline cases we see lawyers who are so invested in their client's matter that they forget their own role, as stated in Rule 2.1, MRPC: to exercise independent professional judgment. Should you really be supporting your client's desire to

leave no stone unturned and only rubble behind you? As the comments to Rule 2.1 suggest, have you discussed with your client reasonable alternatives? I know it's nice to have someone paying you to turn over all those stones, but is that consistent with the exercise of your independent judgment? And have you provided your candid advice on the topic? The first comment to Rule 1.3, MRPC, reminds us that "[a] lawyer is not bound... to press for every advantage that might be realized for a client." Pursuing a matter with "commitment and dedication" does not mean no holds barred, and it certainly does not include offensive tactics or preclude courtesy and respect toward all.

This is always true, but it takes on particular import in these times when almost everyone is struggling in some manner. Do not forget to afford others the courtesies you hope will be afforded to you. Your opposing counsel may be caring for stir-crazy minor children, bad-tempered teens, or parents who are not taking the care they should. Or your opposing counsel may be alone, sad, and feeling disconnected. I know your client might not care, but you have professional discretion. Are you exercising it wisely and appropriately?

Boundaries are necessary not only to manage our own well-being but as a precaution against complaints and discipline. Each year the most frequently violated rules are Rule 1.3, MRPC, on diligence, and Rule 1.4, MRPC, on communication. This makes sense. It's hard to force yourself to work on a file where the client is a challenge, you have

to deliver bad news, or nothing can really be done to help. If you are losing money on the deal, it becomes even more challenging. If you have not established good boundaries, it can be particularly difficult. Each time I speak on this topic, my advice is to pick up the file you hate that sits on the corner of your desk and just face it, warts and all. Sometimes, if boundaries are really an issue, the best thing you can do for yourself and your client is to withdraw, provided you can do so consistent with Rule 1.16, MRPC.

We have an ethical duty as advisors to exercise independent professional judgment and render candid advice. This is not an easy task, and can be particularly hard in challenging times. Please make sure you are taking care of your own well-being and maintaining good client boundaries. If you need assistance, be sure to check out the resources of Lawyers Concerned for Lawyers at www.mnlcl.org. (And remember, all communications with Lawyers Concerned for Lawyers are confidential, and Rule 8.3(c), MRPC, exempts communications with lawyer assistance programs from the duty to report professional misconduct.) They have several resources related to covid-19 and well-being. You also can always call our ethics hotline at 651-296-3952. We are here to help you navigate these boundaries ethically. ▲

Notes

¹ See also Martin Cole, *The Lawyer as Advisor*, Minnesota Lawyer, at [lprb.mncourts.gov/articles](http://prb.mncourts.gov/articles)



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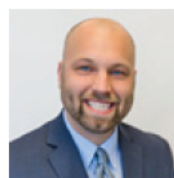
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Caution is warranted; scams are afoot

During the recession of 2008, lawyers lost jobs and suffered economic loss. Some lawyers, due to their own economic straits, poor judgment or a combination of both, found themselves embroiled in improper loan modification schemes and other debt-relief actions that were basically consumer scams. Several lawyers were disciplined as a result. The 2020 pandemic is again creating economic havoc for lawyers and consumers. With economic strife come more scams and more opportunities for lawyers to get caught, both wittingly and unwittingly, in schemes that serve no purpose but to defraud. Please be cautious.

Nationwide regulatory counsel are already seeing covid schemes, the first wave of which has comprised targeted phishing attempts directed at lawyers and law firms. Other than an increase in frequency, however, such attacks should be well-known to lawyers and law firms, and hopefully your guard is already up. It is never too late to brush up on your cybersecurity practices, but that is not

the purpose of this article.

The ABA Center for Professional Responsibility recently sent an alert to regulatory counsel warning of a potential increase in money laundering schemes. This caught my attention. For the last couple of years, efforts to combat money laundering have focused on the role lawyers may be playing (or not playing, as the case may be) in such transactions.

Due to client confidentiality and the legal nature of the transactions, it is not surprising that lawyers are involved in such activity. The last thing you want to be involved with is anyone's criminal conduct, whether knowingly or unknowingly. How do you avoid this? Let's review the rules and a recent ABA opinion on point.

Rule 1.2(d), Minnesota Rule of Professional Conduct, is pretty straightforward:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determinate the validity, scope, meaning, or application of the law.

You should note the word "knows" is doing a lot of lifting in the rule. Per Rule 1.0(g), "knows" "denotes actual knowledge of the fact in question," and, more broadly, "knowledge may be inferred from circumstances." The first part is easy: When the facts before you demonstrate "actual knowledge" of criminal or fraudulent activity, your obligation is clear. You must explain to your client that professional ethics do not allow you to assist in such conduct, and you must withdraw if the client persists in the course of conduct.¹

Clients rarely confide their criminal or fraudulent intent, however. What does it mean for knowledge to be inferred from the circumstances? In April 2020, the ABA issued Formal Opinion 491, entitled "Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings." In the opinion, the ABA cautions lawyers to inquire when known facts indicate a *high probability* that a client is seeking to use the lawyer's services

for criminal or fraudulent activity. The duty to inquire is important because a lawyer's conscious, deliberate failure to inquire (willful blindness) can amount to knowing assistance of criminal or fraudulent conduct. The ABA opinion cites noted ethics scholar Charles Wolfram in this regard: "[A]s in the criminal law, a lawyer's studied ignorance of a readily ascertainable fact by consciously avoiding it is the functional equivalent of knowledge of the fact.... As a lawyer, one may not avoid the bright light of a clear fact by averting one's eyes or turning one's back."²

Opinion 491 takes care to explain that the ethical duty is not "reasonably should have known," but does reject a standard that imposes no duty of inquiry as contrary to well-settled ethics principles. Thus, you cannot avoid "knowledge" by not looking too closely. A duty to inquire in high-probability situations is an important safeguard—and a wise course of action even if it were not ethically required. The last thing a lawyer wants to do is get caught up in allowing a client to use their legal services to further a client's potentially criminal or fraudulent conduct. There are pitfalls enough in the practice of law to add the risk of flying that close to sun.

Opinion 491 provides some examples of situations that would impose a duty of inquiry, and refers to another good ABA resource: a 2010 guide entitled "Voluntary Good Practice Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing." The latter resource includes a description of numerous red flags that suggest your client may be engaged in money laundering. If you engage in transaction work, particularly involving cross-border transactions, you should review these resources to refine your ability to spot red flags, particularly as they relate to money laundering.

As in-house counsel for a corporation that engaged in international sales of highly controlled goods, I'm no stranger to due diligence or red flags, both by training and natural skepticism.



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I'm frequently surprised in my current position to find that is not universally true. I have seen too many lawyers who either do not have good instincts for when a transaction may be "off," or more frequently, choose not to care if there is something "off" about a transaction, due to their own financial interest in being retained for the work. Do not be that person. Do not let economic pressures—from the pandemic or otherwise—cause you to ignore your instincts or to set aside your natural skepticism that something that is too good to be true. Liability for ethical misconduct is the least of a lawyer's worries in these situations, because law enforcement is often involved, looking to hold individuals accountable. (Or, if you are a victim, you can suffer significant losses not covered by insurance.)

There is no doubt that tough economic times are likely ahead for the profession due to the pandemic. Prior experience has taught us that during such times lawyers are vulnerable, as targets of scams or witting or unwitting participants in the scams of clients. These scams continue to grow in sophistication, and more and more are involving lawyers outside of large cities. Ethically, you cannot assist a client in any fraudulent or criminal activity, and you cannot close your eyes to evidence of such activity. The ABA is pursuing a website to consolidate known pandemic schemes targeting or involving lawyers, and we will be sure to include a link to the site on our website if it gets up and running. Economic uncertainty brings out the scammers. Caution is warranted. ▲

Notes

¹ Rule 1.4(a)(5), MRPC ("A lawyer shall... consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."); Rule 1.16, MRPC.

² ABA Opinion 491 at 4 fn. 13.

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Attachment 5

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MEETINGS OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD 2021

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

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

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

If you have a disability and anticipate needing an accommodation, please contact Susan Humiston at 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.