

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD  
MEETING AGENDA**

Friday, September 27, 2019 – 3:00 p.m. (following Seminar)  
Earle Brown Heritage Center  
6155 Earle Brown Drive  
Minneapolis, Minnesota

1. Approval of Minutes of June 21, 2019, Lawyers Board Meeting (Attachment 1)
2. Public Member Recruitment (Attachment 2)
3. Committee Updates:
  - a. Rules Committee
    - (i) Status, Comments, Rule 5.5, MRPC
    - (ii) Advertising Rule Changes (Attachment 3)  
Guest speakers
    - (iii) LPRB Rule Changes (Attachment 4)
  - b. Opinions Committee
    - (i) Status, Opinion No. 21 (Attachment 5)
  - c. DEC Committee
    - (i) Feedback, Seminar
    - (ii) Chair Symposium Feedback
4. Director's Report:
  - a. Office Statistics (Attachment 6)
  - b. Office Updates (Attachment 7)
5. Other Business:
  - a. *Ex parte* communications/DEC Reports
  - b. Panel Assignment Check-In (Attachment 8)
  - c. CLE Rule Change Petition
  - b. Approval of 2020 Meeting Dates (Attachment 9)
6. New Business
7. Quarterly Board Discussion (closed session)
8. Next meeting, Friday, January 31, 2020

REMINDER: Please contact Chris in the Director's Office at 651-296-3952 if you were confirmed for the Board meeting and are now unable to attend. Thank you.

If you have a disability and anticipate needing an accommodation, please contact Susan Humiston at [lhprada@courts.state.mn.us](mailto:lhprada@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](http://www.mncourts.gov/ADAAccommodation.aspx) for information on how to submit an ADA Grievance form.

# Attachment 1

**MINUTES OF THE 188<sup>TH</sup> MEETING OF LAWYERS PROFESSIONAL  
RESPONSIBILITY BOARD JUNE 21, 2019**

The 188<sup>th</sup> meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, June 21, 2019, at the Town and Country Club, St. Paul, Minnesota. Present were: Board Chair Robin Wolpert, and Board Members Landon J. Ascheman, Jeanette M. Boerner, James P. Cullen, Thomas J. Evenson, Roger Gilmore, Christopher A. Grgurich, Mary L. Hilfiker, Gary M. Hird, Katherine A. Brown Holmen, Peter Ivy, Bentley R. Jackson, Virginia Klevorn, Mark Lanterman, Kyle A. Loven, Susan C. Rhode, Susan T. Stahl Slieter, Gail Stremel, and Bruce R. Williams. Present from the Director's Office were: Director Susan M. Humiston, Deputy Director Timothy M. Burke, Managing Attorney Cassie Hanson, Senior Assistant Directors Jennifer S. Bovitz and Binh T. Tuong and Assistant Director Amy M. Halloran. Also present were Minnesota Supreme Court Associate Justice David L. Lillehaug, and Nicholas Ryan.

1. **APPROVAL OF MINUTES.**

Robin Wolpert began the meeting by welcoming Susan Stahl Slieter to her first Board meeting. Ms. Slieter introduced herself to the Board.

The minutes of the April 26, 2019, Board meeting were unanimously approved.

2. **UPDATED PANEL AND COMMITTEE ASSIGNMENTS.**

Ms. Wolpert informed the Board that she had added Mr. Krause as a member to the Panel chaired by Peter Ivy. Ms. Wolpert requested Board members to contact her with feedback on how things are going, and reminded Board members that she would reach out to them in January to review Board member assignments. Ms. Wolpert also reminded the Board that Panel Chairs act as mentors for other Panel members, so Board members with issues, questions or concerns regarding their work should contact their Panel Chair, and also should feel free to contact Ms. Wolpert or Christopher Grgurich, Board Vice Chair.

3.

a. **Rules Committee.**

(i) (ii) Consideration of these matters was deferred until later in the meeting.

- (iii) Draft petition regarding Rule 1.15(o), MRPC, and Rule 20, RLPR.

James Cullen refreshed the Board's memory that at the April 2019 Board meeting the Board had approved the proposals contained in the draft petition. The question for the Board now was whether any Board member had questions about the petition as drafted by the Director's Office. There were none. A motion to approve the draft petition was made, seconded, and unanimously approved.

b. Opinions Committee.

- (i) Update on Opinion No. 21.

Ms. Wolpert stated that at the April 2019 Board meeting, the Board had discussed the best approach to giving notice about potential revisions to LPRB Opinion No. 21. Susan Humiston believes changes are appropriate to address the differences between LPRB Opinion No. 21 and American Bar Association (ABA) Formal Opinion 481, and the committee had prepared an amended opinion. Ms. Humiston anticipates that the draft opinion will then be sent to the MSBA and others, with a comment period from mid-July to August 16, 2019.

Ms. Hanson also reported that she and Timothy Burke were working on a proposed policy for solicitation of input on proposed rule and opinion changes before the Board. Ms. Wolpert stated that no such Board policy exists now, and she believes a comment period in July and August should be created. Ms. Hanson reported that Ms. Humiston's next Bench & Bar article is regarding Opinion No. 21 and stated that the proposed changes to LPRB Opinion No. 21 will be on the Office's website. Ms. Wolpert opined that it is appropriate to provide the draft for the proposed changes to LPRB Opinion 21 to the MSBA and it is terrific to provide the draft opinion to other interested stakeholders. Ms. Hanson stated that the draft opinion would also be provided to Minnesota Lawyers Mutual. Ms. Humiston summarized that the Board and Office are on a path to have a final draft of proposed changes to LPRB Opinion No. 21 presented to the Board as an action item at its September 2019 meeting.

c. DEC Committee.

- (i) Feedback on DEC Chair's Symposium.

Mr. Ivy reported that he received very positive feedback regarding the substantive presentations at the May 2019 DEC Chair's Symposium. Mr. Ivy was disappointed that the majority of attendees were Board members and Office

attorneys. Several months before the symposium, Mr. Ivy had sent to all DEC Chairs a detailed save-the-date email with information about the program and the date and had followed up with phone calls to all DEC Chairs to promote their attendance.

Mr. Ivy suggested that a way to improve DEC Chair attendance would be to have one seminar in the fall, as the Board now has with the professional responsibility seminar, with an afternoon breakout session for DEC Chairs and investigators. Other possibilities would be to have this be an all-day seminar, or to have a dinner in connection with the seminar, or to have an awards ceremony. Mr. Ivy succinctly stated that the present course is not a sustainable model. Ms. Humiston and Mr. Ivy reported that 14 DEC Chairs, or designees, attended the DEC Chairs Symposium.

Ms. Wolpert stated that the feedback she had received about the May 2019 DEC Chairs Symposium was that the programming was fantastic and very effective for the people who were there. The purpose of the Symposium, however, is to get information to the DEC Chairs, who then can provide that information to their investigators. Ms. Wolpert complimented Mr. Ivy for going above and beyond to try to achieve maximum attendance for the recent Symposium. This is critical training, which two-thirds of DEC Chairs attended. Ms. Wolpert applauded the tremendous effort of Mr. Ivy and the Director's Office to produce the Symposium and that almost all of the attorneys from the Director's Office were present, as well as the substantial cost, in money and time, of producing the Symposium.

Ms. Wolpert wondered if there was another way without having a separate event to get the critical information provided at the Symposium to the DEC Chairs.

Virginia Klevorn asked if contact had been made with DEC Chairs who did not attend to ask why. Ms. Hanson stated that the two Vice Chairs of the Fourth District Ethics Committee had planned to attend, but were unable to do so due to last minute issues. Ms. Hanson opined that lack of attendance appeared to be more of an issue among outstate Chairs.

Jeanette Boerner opined that, if geography is at least part of the reason, the public defenders have at times rotated the locations of events, which has helped attendance. Also, livestreaming may be a potential option for attendees.

Ms. Wolpert appreciated the feedback, and believes that the inquiry can also include how to make it easier for Chairs to attend.

Gary Hird concurred that remote attendance should be considered. Mr. Ivy stated that he would call both DEC Chairs who attended and those who did not attend for ideas.

Ms. Wolpert reiterated that the information provided at the Symposium is critical for Chairs to do their work effectively. She also noted that a benefit of the Symposium is for the Chairs to gather together and have conversations with each other about issues they face.

Roger Gilmore suggested that if a Chair fails to attend, then that person should be removed as Chair. Mr. Williams opined that it is challenging enough to get people to volunteer, even without such a requirement. The sense of the Board was that this was not a viable option. Ms. Humiston noted the fact that the voluntary service DEC Chairs provide already requires a lot of work.

Mr. Cullen noted that when the Symposium was held in St. Cloud and Duluth, most Chairs attended. He believes that this speaks to the importance of the location of the Symposium. Ms. Humiston reminded the Board the most recent Symposium in Brooklyn Park cost about \$6,000, but the Symposium held in Duluth a few years ago cost about \$15,000.

Mr. Williams concurred with Mr. Cullen. Mr. Williams recalled the informal open discussion at the St. Cloud DEC Chairs Symposium and found it very valuable. Mr. Williams noted that the Symposium has now moved to a more academic presentation, with reduced conversation among DEC Chairs. Mr. Williams believes that the Symposium has transitioned away from involving and listening to Chairs, and that the Chairs need to be re-integrated into the Symposium.

Ms. Wolpert appreciated the feedback of the Board and stated that Mr. Ivy could take this feedback to the DEC Committee. Ms. Wolpert stated that the September 2019 professional responsibility seminar is set, and so any changes to the format of the DEC Chairs Symposium would be for 2020.

Susan Rhode noted that Mitchell Hamline Law School has effective classroom chats, and perhaps the Board could utilize the technology to allow for effective conversations. Ms. Klevorn wondered whether there could be two locations for the Symposium, with a moderator at the second location to facilitate

discussion. Ms. Wolpert stated that there may be technology available which the Board could leverage. She noted that the issue of securing attendance from persons in greater Minnesota arises in many other contexts, as well.

Mr. Ivy asked for how many years the Symposium had been conducted. Mr. Burke reported that, to his memory, the Symposium started about ten years ago. Originally, the attendees were the First Assistant Director and DEC Chairs, and over time the present format has emerged. Ms. Humiston stated that the Office is happy to support whatever format is best for the DEC Chairs.

Ms. Wolpert reiterated that the feedback from the Chairs will be very helpful. She thanked Mr. Ivy for his willingness to undertake follow-up and for a fantastic Symposium with great presentations and an opportunity to know the newest Supreme Court Associate Justice.

ii. September 2019 Professional Responsibility Seminar.

Ms. Humiston asked Board members to let her know if they had ideas for topics for the seminar. So far, the topics include Justice Lillehaug speaking on the year in review, Ms. Wolpert speaking on the importance of sleep and well-being, and a hypothetical for training of investigators. All suggestions for other topics for the balance of the program are welcome.

4. **DIRECTOR'S REPORT.**

Ms. Humiston reported that as of June 1, the Office was very close to the goal of no more than 500 open files. As of June 1, 136 files were more than one year old and, of those, 47 were with the Office. Ms. Humiston noted that the substantial progress which has been made, reflecting that the numbers are much better than one year ago, although not yet where they need to be.

Ms. Humiston reported that when she met with the Supreme Court recently at the budget meeting, the Court was very interested in the number of lawyers involved, in addition to the numbers of files. As of the time of the Board meeting, there were about 140 open files more than one year old involving 92 attorneys. The Office will include the number of attorneys involved to certain categories of the Director dashboard as a result of this conversation with the Court.

Ms. Humiston reported that since the April Board meeting, some of the oldest files have been moved off of "hold," where they had been while the Office waited for a decision by law enforcement authorities on whether criminal charges should be issued. Mr. Williams asked if this was the matter which arose in Texas, and Ms. Humiston



answered in the affirmative. Ms. Humiston stated that the Office is moving these files, although recognizing there may be potential Fifth Amendment issues in trying to get a respondent to respond if criminal charges are a possibility, but it is important for the Office to make the effort.

Ms. Humiston noted that the staff in the Office is working very hard. In the current fiscal year, the Office had 8.45 FTE for lawyers, although staffed for 12 full-time lawyers. What the Office has accomplished with this reduced staffing shows how hard everyone has worked, but Ms. Humiston noted that this is not a sustainable model. Ms. Humiston is very proud and thankful of the hard work of everyone in the Office.

Ms. Humiston reported that the Office has hired a new receptionist, Arlene Bertrand, who will replace the retiring Wenda Mason. Siana Brand will return to the Office on a full-time basis on July 1.

The Office's well-being committee continues its work. Ms. Humiston noted that two main points had come out of a survey of office staff members. First, that people believe there are many unnecessary interruptions and, second, that there is substantial unnecessary stress. The well-being committee is working to understand what this all means and is in the process of soliciting staff feedback on these issues.

Ms. Humiston reported that reviews have just been finalized. Looking forward to fiscal year 2020, Ms. Humiston is challenging everyone in the Office, as part of their individual development objectives, to identify one innovation or change to a process or other improvement to the Office. The goal is to get everyone involved in thinking about how processes and procedures in the Office can be improved. Both the Office and the judicial branch are very focused on innovation and improvement.

Ms. Humiston reported that the largest non-case focus in the Office right now is the Lawyer Data Management System (LDMS). This will replace the Office's current case information system, ADRS. Ms. Humiston reported that the Office hopes that the software will be delivered about August 1, which will begin a testing and acceptance phase. The development phase of the project is finishing. Ms. Humiston really likes the LDMS system. Although it is not a full case management system, it will have a SharePoint document repository behind it and will be a much more robust data management system. When the Office fully converts to using LDMS, about 40% of the files will go paperless. Ms. Humiston stated that she is very pleased with the value the Office is receiving. The Office made the decision not to spend one million dollars or more for a full-fledged case management system. Instead, the Office spent about \$500,000 and will receive very good value for the money spent. LDMS will allow for much greater visibility on case-related data, including more real time data on where

particular stages of the work of the Office is at. LDMS will also soon incorporate the Board's goal statistics. Ms. Humiston expressed kudos to Mr. Burke and Chris Wengronowitz, Office Administrator, for their work with the vendor, as well as the work of the others in the Office who have devoted substantial time to the project.

#### 5. JUNE BUDGET SUBMISSION TO COURT.

Ms. Humiston reported that she and Ms. Wolpert met with the Supreme Court the prior week. The budget presented to the Court will have the Office spending all of its reserves during the biennium without some transfer of funding to the Office. Salaries and fixed expenses are now greater than the funds received from the portion of the attorney registration fee allocated to the Office. The proposed budget included an increase of 2.7 FTEs. 0.2 of this was to increase a 0.8 position to full-time. 0.5 of this was to convert a half-time paralegal position into a full-time investigator position. In fiscal year 2021, another investigator will be added as a forensic auditor, and another full-time lawyer position will also be created. To assist with the funding shortfall, funds from the Client Security Board would be transferred to the Office.

The Supreme Court approved the proposed budget. Ms. Humiston will be moving forward on starting the hiring process for an investigator and another lawyer next week. Ms. Humiston plans to hire a senior attorney.

Justice Lillehaug stated that Ms. Wolpert and Ms. Humiston had made to the Court a very impressive budget presentation, which they had developed working closely with the Court's chief financial officer. The Court approved the proposed budget, as well as the transfer of funds from the Client Security Board to the Office. Together with this, the message of the Court is that cases must be moved along faster. Justice Lillehaug harkened back to a conversation he had with the Board in September 2018, during which he stated that the Court is bound and determined to improve the case processing. Additional full-time employees is one way to do that. Justice Lillehaug expressed his full confidence in Director Humiston, expressed his appreciation to Chair Wolpert for her excellent work, and reiterated that the Court wants the Office's caseload to be reduced.

Ms. Klevorn asked how Ms. Humiston would solicit staff feedback regarding stress and disruption in a manner which would allow people to give blunt feedback without feeling threatened. Ms. Humiston reported that there is an office chalkboard on which ideas can be submitted, together with an anonymous suggestion box.

Ms. Humiston reported to the Board that she had told the Office what Justice Lillehaug had said here about the importance of moving cases promptly.

Mary Hilfiker asked where the excess funds in the Client Security Board account had come from. Justice Lillehaug reported that the Court's chief financial officer gave the Court information on what the appropriate level of reserves should be for the Client Security fund, based on predictions particularly for the next year, and opined that the Board has an excess reserve. The funds will be moved in increments to the account of the Office over the next year. Ms. Humiston stated that the Client Security Board has reserves of more than four million dollars, and paid approximately \$350,000 in claims in the current fiscal year. The fund has no per attorney cap, but has a per claim cap of \$150,000. Ms. Humiston reported that the Client Security fund is outside the parameters established by the Court for the reserve, and noted that Minnesota is very fortunate to have a healthy Client Security fund.

Mr. Cullen asked Ms. Humiston what information she had received from Aaron Sampsel during his exit interview. Ms. Humiston stated that she had not done an exit interview, but that Mr. Sampsel's departure is very disappointing. Mr. Sampsel returned to the law firm he was at before he joined the Director's Office. When he announced he was departing, Mr. Sampsel told Ms. Humiston that he had received a great offer to go back and that throughout his time with the Office he was recruited by his former employer. Ms. Humiston saw this as a great opportunity for him. When Mr. Sampsel was hired, he made it clear that he anticipated he would be with the Office for about three to five years. Ms. Humiston accepted this, as she understands there is a mobile workforce, and that a job which meets a person's needs at one point in time may not necessarily do so at another point in time. Although she would prefer for obvious reasons people to be long-tenured, she also recognizes that people new to the Office can bring fresh ideas. Ms. Hilfiker said Mr. Sampsel had told her there was a substantial difference in pay with his new job.

Mr. Cullen asked if Josh Brand had returned to the Office yet, and Ms. Humiston stated he has not.

Ms. Humiston reported that the ABA has issued two new formal opinions. Formal Opinion No. 486 deals with the obligations of prosecutors in negotiating plea bargains in misdemeanor offenses. This has proved to be a very interesting opinion to lawyers involved in the criminal justice system. Keshini Ratnayake of the Office had talked to the Minneapolis city attorney's office, who expressed concern about their ability to meet the requirements of the opinion. Ms. Humiston stated that the opinion does not necessarily provide new authority, but rather makes clear and real what already exists in Rule 3.8. She views the opinion as providing great guidance for prosecutors to think about in their staffing and training to meet their obligations under Rule 3.8.

The ABA also issued Formal Opinion No. 487, which deals with fee divisions with a client who had prior counsel in the same matter. This opinion discusses the applicability of Rule 1.5, and is particularly pertinent to representation of plaintiffs in personal injury cases.

6. **DRAFT ANNUAL REPORT.**

Ms. Humiston reported that the draft annual report will be provided to Ms. Wolpert early next week, and then to the Board for its consideration.

7. **OTHER BUSINESS.**

a. **Panel Assignments Update.**

At the April 2019 meeting, the Board discussed the issues raised by Mr. Cullen about the distribution of workload between Panels. As a result, Mark Lanterman provided to Ms. Wolpert a program to run for 54 cases that at the end would result in all Panels receiving an equal number of assignments. The program did not mean that at all times all Panels would have an equal number of matters assigned to them. Instead, this would result in equality over time.

The Executive Committee discussed the issue and decided to proceed pursuant to the existing Executive Committee policy. The Board Chair will continue to follow the purely random assignment model, monitoring assignments over the short-term. With communication between the Board Chair and the Panel Chairs, Ms. Wolpert can modify assignments if a particular Panel has too much work. Mr. Cullen asked to clarify whether assignments were being made pursuant to the paradigm Mr. Lanterman provided. Ms. Wolpert replied that they are not, and that she is comparing Panel assignments pursuant to the purely random model with the weighted paradigm. She recognizes that over the short term assignments are unequal, but over the long term, Panel assignments will even out.

Mr. Cullen noted that the last several Panel assignments appear to be more evenly distributed among all panels. Mr. Cullen asked if Ms. Wolpert had taken any action to ensure this had happened. Ms. Wolpert replied she had not, that this was the current result of the random process. Ms. Boerner asked why the Board Chair was not using the paradigm provided by Mr. Lanterman. Ms. Wolpert replied that she believed Panel workloads can be managed within the existing Executive Committee's policies. Concerns about uneven workloads can be addressed through Panel Chair monitoring and more communication

among Panel Chairs and the Board Chair. Ms. Wolpert stated that after this year, people may wish to revisit the issue.

Mr. Lanterman clarified to the Board that over the 54 assignments generated, each Panel would have an equal number, but it did not mean that Panel assignments would necessarily be equal during any subgroup of that. Ms. Wolpert concurred, reiterating that Mr. Lanterman's paradigm as well may generate short-term imbalances in Panel workloads.

Mr. Grgurich opined that the sample size of one year simply is not much to work with. He believes that a five-year sample size may be better, but most of the Board members would have turned over during that period.

Mr. Ascheman concurred that revisiting the issue at the January Board meeting was a good idea, and Ms. Wolpert pledged to do so.

Ms. Klevorn noted that Panel workloads are a function not only of the number of assignments, but the amount of work in any particular matter. A Panel which is assigned fewer matters may nevertheless have a substantial workload due to the nature of the matters assigned to it. Ms. Klevorn expressed concern that spending substantial time focused solely on the number of matters assigned to Panels may not accomplish the stated goal. Ms. Wolpert concurred that this is an excellent point.

Mr. Lanterman offered to provide the spreadsheet and formula to a Board member who desired to receive it. Ms. Wolpert concurred, expressing her belief in the importance of transparency in the process. Ms. Wolpert thanked Mr. Lanterman and Mr. Ascheman for the substantial time they have devoted to this issue, and to Mr. Cullen for raising this issue.

Ms. Humiston reminded the Board that the Director is not part of Panel assignments. It is of great importance that the Director's Office not be involved in the assignment of Panel matters, or the determination of how matters are assigned to Panel. Ms. Wolpert concurred that this is an important goal.

b. Proposed 2020 Meeting Dates.

Ms. Wolpert noted the proposed 2020 meeting dates. Ms. Humiston noted that the proposed April 24 meeting date is also the same date as the MSBA General Assembly, and Ms. Wolpert stated that this meeting date therefore may likely change.

Finally, Ms. Wolpert reported that she, Justice Lillehaug and Ms. Humiston had recently attended a conference in Vancouver on the topic of professional responsibility. Ms. Wolpert said there was an incredible set of topics, a lot of learning to be had on important topics facing the profession, and that Ms. Hanson and other staff from the Director's Office were there, as well.

At this point, Justice Lillehaug left the meeting.

3. **COMMITTEE UPDATES (CONTINUED).**

a.(i). May 3, 2019, Order on MSBA Petition. Ms. Wolpert reported that on May 19 the Supreme Court issued its order on the MSBA petition to amend Rules 1.6 and 5.5, Minnesota Rules of Professional Conduct. The Court denied in its entirety the petition to amend Rule 1.6, and granted in part the request to amend Rule 5.5. The Court's order also asked for the Board and MSBA to jointly submit proposed comments by June 14. Between May 19 and June 14, the MSBA made efforts to draft proposed comments for the review of the Director and Office to respond to proposed comments. The MSBA, the Director and the Board Chair then worked to bridge gaps. Ultimately, a joint submission was made on June 14, stating that the MSBA recommended these proposed comments, and the LPRB Executive Committee would recommend the Board adopt them at its June 21 meeting.

Ms. Humiston noted that the language defining "family member" as used in Rule 5.5 to mean "by blood, marriage or court order" as proposed had been changed. Mr. Grgurich had proposed language to say "family member" means by blood or marriage or as a parent, child, etc. The concern was that without the additional language, in-laws might not be included in "parent."

The MSBA Rules of Professional Conduct Committee Chair thought adding this "court order" language would add substantial ambiguity, but agreed with the proposed addition of "by blood or marriage." Ms. Humiston's concern is this may not include adopted children.

Ms. Wolpert reported that in the end, there was easy agreement on most of the proposed comments, and more extended discussion on the definition of family member. Ultimately, a compromise which defined a family member as "by blood or marriage" was filed jointly.

Ms. Humiston said that she would like to add "by law" as appropriately encompassing a broad range of family relationships. Ms. Humiston also noted

that this proposal is in a comment to a rule, not the text of a rule itself, thus, it simply provides guidance, although the Director's Office would rely on that in determining an enforcement position.

Ms. Wolpert reported that because the proposed comments were due before the Board met, the Board was put in an awkward position. Therefore, the Executive Committee worked with Ms. Humiston to come up with proposed comments, worked with the MSBA to reserve the right to do a letter to the Court if the full Board did not agree with those comments. Thus, this is the Board's chance to opine on the proposed comments.

Ms. Hilfiker noted that in native families, many persons who are viewed as family members may not be defined as such by blood, marriage or law. Ms. Hilfiker believes it was important to consider non-European definitions or models of family member. Ms. Humiston agreed and noted that even the language "court order" would not encompass these family relationships.

Mr. Grgurich wanted to ensure any definition avoided a slippery slope of becoming too expansive.

Ms. Humiston concurred and wondered whether the perfect definition exists. Ms. Hilfiker noted that in education, family is defined as persons who are "viewed as" family. Mr. Grgurich said he was surprised that the MSBA was opposed to inclusion of "by court order" to define family member. Ms. Humiston stated that she too was surprised at this.

Ms. Humiston said one proposal would be to simply defer to the Supreme Court on the appropriate definition. Mr. Grgurich stated that the idea of "by law" appears to open the definition back up.

Ms. Wolpert stated that she believed any proposed definition would simply be a baseline, establishing certain family members as in family, without limiting the definition of family.

Ms. Klevorn stated that she believed the definitional language of family is antiquated because so many people cohabitate without being related by blood, marriage, or court order. She expressed concern that any of these proposed definitions were too limiting and wondered about the proper definition of family. Ms. Boerner agreed, citing the example of a foster child who lives with foster parents for a long time but is never adopted.

Ms. Wolpert reminded the Board of the context in which the amendments to Rule 5.5 arose. In that matter, a lawyer in Colorado assisted his mother-in-law in Minnesota with a Minnesota matter. That lawyer was found to have engaged in the unauthorized practice of law. After that decision, the MSBA made the proposed amendments, many of which the Board disagreed with. Ms. Humiston noted that the Board concurred with adding the term "family member" without definition, although there was conversation around the issue of the definition at that time. Ms. Humiston stated that she was not too worried about the lack of a formal definition of "family member" because a comment could be used to look at a definition in the circumstances a non-Minnesota lawyer providing services here. The chances that in such a case the person the lawyer is helping was of such a distant relationship that it would be arguable as to whether or not that person could be considered a family seemed remote.

Ms. Wolpert noted that a definition would help to quiet some concern as to whether the term "family member" included in-laws. She also noted that a comment is not the same as a rule, and believed it was important to make the obvious family relationships clear.

Ms. Humiston reported that she had proposed a definition to include parent or child; Mr. Grgurich added related by blood, marriage or court order. This latter phrase was not accepted by the MSBA.

Mr. Cullen stated that he agrees with Ms. Hilfiker that the proposed definition of family member is too limiting and, that the issue of Native American and other communities is important to the Supreme Court, and urge the Board to accommodate this to understand and accommodate this by removing the phrase "blood or marriage" from the definition.

Mr. Gilmore asked what action was being requested of the Board today. Ms. Wolpert replied that the Supreme Court had requested proposed comments on June 14, the timing of Board meetings would not allow for this, and the proposed rule goes into effect July 1, so this was the Board's opportunity to inform the Court of the Board's position on the proposed comments. Ms. Wolpert stated that there could be a motion to approve the comments which was sent to the Court, or a motion to modify those comments. The Executive Committee recommendation was to approve those comments.

Mr. Cullen made a motion to support the proposed comments, but deleting the phrase "by blood or marriage," accompanied by an explanation to the Court that the Board wanted to facilitate and accommodate the Native



American and other non-traditional family structures. The motion was seconded. Ms. Klevorn offered a friendly amendment to ensure that the consideration of non-traditional family members was not limited to Native and indigenous communities. This motion was seconded.

Ms. Boerner concurred with Ms. Klevorn's point and asked if Mr. Cullen's motion was limited to removing the phrase "by blood or marriage" from the proposed comments. Mr. Cullen stated that he accepted the friendly amendment, and that his motion would be to delete "by blood or marriage" without further explanation. This motion was seconded.

Mr. Grgurich stated that he had listened intently to the many great points made during the meeting, and noted that if the definition is removed it could always be determined through litigation should the situation arise in the future.

Kyle Loven agreed, noting that it would be up to the advocates to lend full context toward a decision.

A vote on Mr. Cullen's motion, as amended, was taken, and the motion passed unanimously. Ms. Wolpert's summarized direction is that she as Board Chair would prepare a letter to the Supreme Court saying the Board considered the proposed comments submitted on June 14 and agreed with all except for the words "by blood or marriage" in the definition of family member, which the Board does not believe should be included.

9. **QUARTERLY BOARD DISCUSSION**

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

Thereafter, the meeting adjourned.

Respectfully Submitted,



Timothy M. Burke  
Deputy Director

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

# **Attachment 2**

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Until January 31, 2022, or Further Order of the Court (orig. appt. 10/17/17)

Chair – Robin M. Wolpert  
(Nominated by MSBA)

Terms Expiring January 31, 2020

|   |                      |
|---|----------------------|
| † Beckman, Joseph P.<br>(Nominated by MSBA) | (orig. appt. 2/1/14) |
| Boerner, Jeanette M.                        | (orig. appt. 2/1/17) |
| † Cullen, James P.<br>(Nominated by MSBA)   | (orig. appt. 2/1/14) |
| *† Gilmore, Roger                           | (orig. appt. 2/1/14) |
| *† Hilfiker, Mary L.                        | (orig. appt. 2/1/14) |
| Ivy, Peter                                  | (orig. appt. 2/1/17) |
| *† Jackson, Bentley R.                      | (orig. appt. 2/1/14) |
| * Klevorn, Virginia                         | (orig. appt. 2/1/17) |
| Witz, Allan                                 | (orig. appt. 5/1/16) |

Terms Expiring January 31, 2021

|   |                       |
|---|-----------------------|
| † Evenson, Thomas J.<br>(Nominated by MSBA) | (orig. appt. 2/1/15)  |
| † Hird, Gary M.<br>(Nominated by MSBA)      | (orig. appt. 5/22/14) |
| *† Judge, Shawn                             | (orig. appt. 2/1/15)  |
| * Lanterman, Mark                           | (orig. appt. 2/1/18)  |
| Rhode, Susan C.                             | (orig. appt. 3/16/17) |
| *† Stremel, Gail                            | (orig. appt. 2/1/15)  |

Terms Expiring January 31, 2022

|   |                       |
|---|-----------------------|
| Ascheman, Landon J.<br>(Nominated by MSBA)        | (orig. appt. 2/1/19)  |
| † Grgurich, Christopher A.<br>(Nominated by MSBA) | (orig. appt. 2/1/16)  |
| Holmen, Katherine A. Brown                        | (orig. appt. 2/1/19)  |
| * Krause, Tommy A.                                | (orig. appt. 4/22/19) |
| Loven, Kyle A.                                    | (orig. appt. 2/1/19)  |
| * Slieter, Susan T. Stahl                         | (orig. appt. 2/1/19)  |
| Williams, Bruce R.                                | (orig. appt. 7/1/17)  |

\* Public Members

† Not eligible for reappointment

## Lawyers Professional Responsibility Board (LPRB)

### Roles and Responsibilities—Public Members

The LPRB helps the Minnesota Supreme Court oversee the lawyer ethics and discipline system in Minnesota. The Board is composed of public members and lawyers. Public members play a critical role in bringing their perspectives and experiences to important issues such as the delivery of legal services and the quality of legal services. Because attorneys are self-regulated (by the Court, not an outside entity overseeing attorney regulation), it is important for public confidence in the system that the interests of the public are represented.

As a board member, you will:

- Receive training on attorney ethics and the related rules;
- Learn how the discipline system works to address lawyer misconduct;
- Review complainant appeals if someone is dissatisfied with how their complaint was handled;
- Sit on a panel that reviews charges of professional misconduct to determine if probable cause exists for public discipline against a lawyer (sort of like a grand jury system);
- As a panel member, make recommendations to the Court on whether attorneys who have been previously disciplined and are petitioning for reinstatement should be reinstated;
- As a panel member, review private discipline issued to attorneys;
- Provide your thoughts on potential changes to the ethics rules, bringing forward the perspective of the public.

The time commitment varies but is generally 3-5 hours per month, plus 4 meetings per year.


Lawyers must abide by strict ethics rules, and are disciplined if they do not. You can be a part of a system that works hard to protect the public and legal profession from attorneys who do not follow the rules.

# Attachment 3

**OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY**  
**MEMORANDUM**

---

TO: Lawyers Professional Responsibility Board

FROM: Timothy M. Burke   
Deputy Director, Office of Lawyers Professional Responsibility

CC: Susan M. Humiston  
Director, Office of Lawyers Professional Responsibility  
Binh T. Tuong  
Senior Assistant Director, Office of Lawyers Professional Responsibility

DATE: September 20, 2019

RE: September 17, 2019, LPRB Rules Committee Meeting  
Rule 7.1-7.5, Minnesota Rules of Professional Conduct

This memorandum will briefly follow-up the portion of the Rules Committee's September 17, 2019, meeting discussing Rules 7.1-7.5, Minnesota Rules of Professional Conduct (MRPC). Present were Committee members James Cullen, Chair, Jeanette Boerner, and Gail Stremel. Also present were Board Chair Robin Wolpert, William Wernz as a representative of the Minnesota State Bar Association Rules of Professional Conduct Committee, and Timothy Burke and Binh Tuong of the Director's Office.

Mr. Cullen set forth the procedural history of proposed amendments to Rules 7.1 through 7.5, MRPC. The ABA amended Rules 7.1 through 7.5 of the Model Rules of Professional Conduct, and renumbered to Rules 7.1 through 7.3. Thereafter, the MSBA Rules of Professional Conduct Committee recommended that the MSBA General Assembly approve all of these proposed amendments and file a rule amendment petition with the Supreme Court. Then at its April 2019 meeting, the Board also recommended all of these proposed amendments. At that time, there was an idea that a MSBA/LPRB joint petition could be filed.

However, the MSBA General Assembly did not approve the proposed amendments which relates to the issue of specialization and certification. Thereafter, the matter was back before the Rules Committee to get a sense of the Committee's recommendation to the Board on how to proceed on this issue.

Ms. Wolpert stated that the MSBA did not want to do a joint petition with the Board. The issue therefore is should the Board reaffirm what the Board approved previously or accede to the MSBA's modification to the proposed amendments. Mr. Burke informed the Committee that the Board of Legal Certification (BLC) has requested Minnesota retain the language of current Rule 7.4(d), MRPC. BLC believes the current rule is best. Also, BLC is concerned that a rule without language similar to Rule 7.4(d)(2), MRPC, could be challenged as unconstitutional.

Ms. Wolpert stated that the item could be put on the agenda for the upcoming Board meeting as an informational item, with opportunity for a motion for consideration should a Board member wish to do so. Ms. Wolpert asked about the sense of the Committee regarding this. It was the sense of the Committee members present to recommend that the Board make no change to the position it adopted at its April 2019 meeting, that the Supreme Court should amend Rules 7.1-7.5, MRPC, to conform to ABA Model Rules 7.1-7.3.

Rule 7.4(d), MRPC, currently provides:

In any communication subject to Rules 7.2, 7.3, or 7.5, a lawyer shall not state or imply that a lawyer is a specialist or certified as a specialist in a particular field of law except as follows:

- (1) the communication shall clearly identify the name of the certifying organization, if any, in the communication; and
- (2) if the attorney is not certified as a specialist or if the certifying organization is not accredited by the Minnesota Board of Legal Certification, the communication shall clearly state that the attorney is not certified by any organization accredited by the Board, and in any advertising subject to Rule 7.2, this statement shall appear in the same sentence that communicates the certification.

ABA Model Rule 7.2(c) provides:

A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

- (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state of the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
- (2) the name of the certifying organization is clearly identified in the communication.

The MSBA General Assembly deleted the words “certified as” from ABA Model Rule 7.2(c). It does not appear that a corresponding change was made to the comment to Rule 7.2(c).

jmc



## Humiston, Susan

---

**From:** Emily Eschweiler <eeschweiler@mbcle.state.mn.us>  
**Sent:** Monday, July 01, 2019 10:17 AM  
**To:** Robin M. Wolpert  
**Cc:** Patricia Beety; Humiston, Susan  
**Subject:** [EXTERNAL] Rule 7.4  
**Attachments:** Rule 7 Response.pdf

Good morning –

I understand from the General Assembly meeting last week that the Board of Professional Responsibility intends to file a Petition in September to adopt changes to Rule 7 of the Rules of Professional Conduct consistent with the ABA's Model Rule amendments. The Board of Legal Certification opposes the change that would eliminate the language that promotes the strength of certification in the state of Minnesota. I am interested in knowing whether the General Assembly's determination last week will impact at all the Board's Petition. I have also included for you correspondence that Pat Beety and I had submitted to the Committee on Rules of Professional Conduct when the Committee was reviewing this issue.

If you think it would be helpful to hear from Pat or I before the Board proceeds with your Petition, we would be happy to meet and discuss why the Board opposes this piece of the proposed amendments. Please let me know if you have any questions. Thank you.

Emily J. Eschweiler | Director

Minnesota Board of Law Examiners | Board of Continuing Legal Education | Board of Legal Certification | Office of Lawyer Registration  
180 East 5<sup>th</sup> Street, Suite 950 | St. Paul, MN 55101

☎: 651.201.2719 | 📠: 651.297.1196 | ✉: Email: [eeschweiler@mbcle.state.mn.us](mailto:eeschweiler@mbcle.state.mn.us)

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THE SUPREME COURT OF MINNESOTA  
BOARD OF LEGAL CERTIFICATION

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Emily Eschweiler  
Director

May 20, 2019

Frederick E. Finch, Chair  
Committee on Rules of Professional Conduct  
600 Nicollet Mall  
Suite 380  
Minneapolis, MN 55402

Dear Mr. Finch:

The Rules of Professional Conduct Committee seeks to propose amendments to Rule 7 of the Minnesota Rules of Professional Conduct that would move the language of Rule 7.4 into Rule 7.2 and would eliminate language that promotes the strength of certification in the state of Minnesota. We join the Director of Legal Certification of the MSBA and the MSBA Certification Board Chairs and Interested Parties in opposition to these changes.

The Minnesota Supreme Court has stated:

The purpose of the Minnesota State Board of Legal Certification (Board) is to accredit agencies that certify lawyers as specialists, so that public access to appropriate legal services may be enhanced. In carrying out its purpose, the Board shall provide information about certification of lawyers as specialists for the benefit of the profession and the public.<sup>1</sup>

In December 2006, the Supreme Court Task Force on Legal Certification filed its Final Report on its review of the policy options in the area of legal specialist certification. The Court had sought the review to consider the continuing value to the public of specialty certification, the continuing professional demand for certification, the appropriateness of the "board initiated areas of certification," and the effectiveness of the various certification models.<sup>2</sup>

As part of the process, the University of Minnesota Center for Survey Research conducted a public opinion survey that found that it was important to over 80% of those responding that "an attorney who advertised as a specialist had in fact been certified as

<sup>1</sup> Rule 100, Rules of the Minnesota State Board of Legal Certification.

<sup>2</sup> See Legal Certification Review Task Force Final Report, filed December 5, 2006. Court File: CX-84-1651

a specialist by an accredited organization that had been approved by the State of Minnesota or the State Bar Association.”<sup>3</sup>

The current language of Rule 7.4(d) reads:

- (d) In any communication subject to Rule 7.2, 7.3, or 7.5, a lawyer shall not state or imply that a lawyer is a specialist or certified as a specialist in a particular field of law except as follows:
- (1) the communication shall clearly identify the name of the certifying organization, if any, in the communication; and
  - (2) if the attorney is not certified as a specialist or if the certifying organization is not accredited by the Minnesota Board of Legal Certification, the communication shall clearly state that the attorney is not certified by any organization accredited by that Board, and in any advertising subject to Rule 7.2, this statement shall appear in the same sentence that communicates the certification.

The Rules of Professional Conduct Committee recommends that the language be amended as follows:

- ~~(d) In any communication subject to Rule 7.2, 7.3, or 7.5, a~~ A lawyer shall not state or imply that a lawyer is a specialist or certified as a specialist in a particular field of law ~~except as follows, unless:~~
- (1) The lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
  - ~~(2) the communication shall clearly identify the name of the certifying organization, if any, is clearly identified in the communication; and~~
  - ~~(2) if the attorney is not certified as a specialist or if the certifying organization is not accredited by the Minnesota Board of Legal Certification, the communication shall clearly state that the attorney is not certified by any organization accredited by that Board, and in any advertising subject to Rule 7.2, this statement shall appear in the same sentence that communicates the certification.~~

The Board does not object to moving Rule 7.4(d) to Rule 7.2, but does object to the removal of the prohibition against lawyers calling themselves “specialists” as well as the requirement that if a lawyer is certified as a specialist by an agency not approved by the Board, that the lawyer clearly state that in the communication.

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<sup>3</sup> Id. at page 3.

Mr. Finch  
May 20, 2019  
Page 3

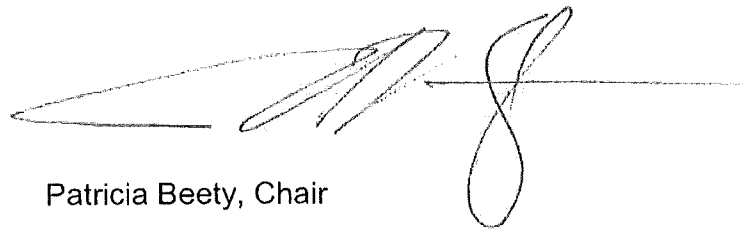
Certification and agency accreditation under the Board's longstanding rules provides the public with a way to determine whether the lawyer has met clear and articulated standards to verify expertise. Lawyers must demonstrate substantial involvement (defined as at least 25% of practice in the field of law); pass a written examination of the lawyer's substantive, procedural, and ethical law in the field; be admitted in good standing; receive favorable peer reviews; and demonstrate adequate continuing legal education in the certified specialist's field of law. The Board's accreditation process verifies that the agencies have taken this responsibility seriously and that they have in place the mechanisms to provide assurances that the individuals certified are true specialists in those fields.

Based on the public opinion survey and long standing tradition, a lawyer who states that he or she is a "specialist" creates an implication that the lawyer is certified in that field of law. To remove "specialist" from the rule language would create unnecessary confusion. Further, the requirement that a lawyer indicate if the entity has not been accredited by the Board reflects the Board's role in the process of verifying that the agency meet Minnesota's high standards. For those reasons, we oppose the revised language.

If you have any questions related to the Board's decision, you may contact me at 651-201-2719 or [blc@mbcle.state.mn.us](mailto:blc@mbcle.state.mn.us).

Very truly yours,

MINNESOTA STATE BOARD OF LEGAL CERTIFICATION

A handwritten signature in black ink, appearing to read 'Patricia Beety', written over a horizontal line.

Patricia Beety, Chair

A handwritten signature in black ink, appearing to read 'Emily Eschweiler', written in a cursive style.


Emily Eschweiler  
Director

# Attachment 4

**OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY**  
**MEMORANDUM**

---

TO: Lawyers Professional Responsibility Board

FROM: Timothy M. Burke   
Deputy Director, Office of Lawyers Professional Responsibility

CC: Susan M. Humiston  
Director, Office of Lawyers Professional Responsibility  
Binh T. Tuong  
Senior Assistant Director, Office of Lawyers Professional Responsibility

DATE: September 20, 2019

RE: September 17, 2019, LPRB Rules Committee Meeting  
Rule 20, Rules on Lawyers Professional Responsibility

This memorandum will briefly follow-up the portion of the Rules Committee's September 17, 2019, meeting discussing Rule 20, Rules on Lawyers Professional Responsibility (RLPR). Present were Committee members James Cullen, Chair, Jeanette Boerner, and Gail Stremel. Also present were Board Chair Robin Wolpert, William Wernz as a representative of the Minnesota State Bar Association Rules of Professional Conduct Committee, and Timothy Burke and Binh Tuong of the Director's Office.

This issue relates to materials the Director's Office receives from a suspended, disbarred or disabled lawyer pursuant to Rule 26, RLPR. These materials include letters which contain client names and addresses.

Currently, these materials are part of the Director's public file pursuant to Rule 20(a)(2), RLPR, which provides in pertinent part:

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

\* \* \*

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

Because these materials arise out of disciplinary charges against a respondent lawyer in a public discipline matter, these materials are publicly available.

Mr. Cullen laid out the procedural history. In April 2019, the Board approved a series of proposed amendments to Rule 20, RLPR, and other rules. One of the proposed changes to Rule 20, RLPR, dealt with the confidentiality of documents received pursuant to Rule 26, RLPR, with client names and addresses. This proposed amendment approved by the Board reads as follows:

**RULE 20. CONFIDENTIALITY; EXPUNCTION**

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

\* \* \*

(3) Rule 26 affidavits, attachments thereto, and letters and other communications regarding Rule 26 and/or efforts by the Director to collect costs and disbursements awarded pursuant to Rule 24 of these Rules.

Mr. Cullen reported that at the Board's June 21, 2019, meeting, concerns about this provision were raised. Therefore, the Rules Committee is again considering this issue.

Mr. Cullen invited Mr. Wernz to address the issue. Mr. Wernz summarized concerns about allowing this client information to be non-confidential. Specifically, clients may have hired lawyers under confidential circumstances, but this information would then be available to the media, other lawyers, and the public at large. This

information which would be confidential under the Rules of Professional Conduct when held by the lawyer should retain that confidentiality in the Director's files.

Mr. Cullen then invited Mr. Burke to address the issue. Mr. Burke noted that there already exists in the Director's files much third-party client information which is not confidential, such as in trust account matters. Rarely if ever does anyone other than a respondent or respondent's counsel seek to review a file. It should also be noted that the proposed amendment was designed to confirm existing practice.

Mr. Cullen invited the Committee members present to express their views. Both Ms. Boerner and Ms. Stremel strongly oppose the idea that this information can be publicly available.

Because it was the sense of the Committee members present that this client information should remain confidential in the Director's files, Mr. Cullen requested Mr. Burke to draft proposed rule language. Mr. Cullen also invited Mr. Wernz to communicate with Mr. Burke regarding the specific rule language.

jmc



# **Attachment 5**

# LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

## AMENDED OPINION NO. 21

### A Lawyer's Duty to Consult with a Current or Former Client About the Lawyer's Material Error

A lawyer who ~~commits~~knows or should know that he or she has committed a material error involving a current client has one or more duties to act under the Minnesota Rules of Professional Conduct. The requirements of Rules 1.4 and 1.7, Minnesota Rules of Professional Conduct (MRPC), are implicated in such a circumstance and the lawyer must determine what actions may be required under the Rules. The lawyer must inform a current client of the material error. An error is considered material if a disinterested lawyer would find that it is (a) reasonably likely to harm or prejudice a client; or (b) ~~could~~would reasonably cause a client to consider terminating the lawyer even in the absence of apparent harm or prejudice.

Since a lawyer's disclosure of a material error to a client may be disruptive to the lawyer-client relationship, the provisions of Rule 1.7, MRPC, dealing with a "concurrent conflict of interest" must be considered to determine whether the personal interest of the lawyer poses a significant risk that the continued representation of the client will be materially limited.<sup>1</sup> Under Rule 1.7, MRPC, the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present.<sup>2</sup> Assuming continued representation is not otherwise prohibited, to continue the representation ~~the lawyer~~the lawyer must reasonably believe he or she may continue to provide competent and diligent representation.<sup>3</sup> If so, the lawyer must obtain the client's "informed consent," confirmed in writing, to the continued representation.<sup>4</sup> Whenever the rules require a client to provide "informed consent," the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent.<sup>5</sup> In this circumstance, "informed consent" requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the continued representation.<sup>6</sup>

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<sup>1</sup> Rule 1.7(a)(2), MRPC.

<sup>2</sup> Rule 1.7(a), MRPC.

<sup>3</sup> Rule 1.7(b)(1) and (2), MRPC.

<sup>4</sup> Rule 1.7(b)(4), MRPC.

<sup>5</sup> Rule 1.4(a)(1), MRPC.

<sup>6</sup> Rule 1.0(f), MRPC.

Regardless of whether a material error creates a conflict of interest under Rule 1.7, MRPC, the lawyer also has duties of communication with a current client under Rule 1.4, MRPC, that may apply. When the lawyer knows or should know that he or she has committed a material error involving a current client, the lawyer shall inform the client about that conduct to the extent necessary to achieve each of the following objectives:

- 1) keeping the client reasonably informed about the status of the representation,<sup>7</sup>
- 2) permitting the client to make informed decisions regarding the representation,<sup>8</sup>
- 3) assuring reasonable consultation with the client about the means by which the client's objectives are to be accomplished.<sup>9</sup>

All three of these objectives require that a lawyer promptly notify a current client of a material error under Rule 1.4(a), MRPC, even in the absence of apparent harm or prejudice. In disclosing a material error to a current client, the lawyer should bear in mind Comment 5 to Rule 1.4, which provides that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."

If a lawyer discovers that he or she has materially erred after the representation has concluded, the lawyer is not required to inform the former client of the error under the Rules of Professional Conduct.<sup>10</sup> Business relations, risk management or general best practice standards may make disclosure of the lawyer's material error to a former client the preferred course of conduct in order for the lawyer to avoid or mitigate potential harm or prejudice to the former client. However, this obligation is not one mandated by the Rules of Professional Conduct.

### **Comment**

The issue of when and what to say to a client; when a lawyer determines a material error has been committed is difficult and may create inherent conflicts. The Board is amending Opinion No. 21 ~~this opinion~~ to apprise the Bar of the Board's position on the matter and to conform Opinion 21 with ABA Formal Opinion 481 (April

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<sup>7</sup> Rule 1.4 (a)(3), MRPC.

<sup>8</sup> Rule 1.4 (b), MRPC.

<sup>9</sup> Rule 1.4 (a)(2), MRPC.

<sup>10</sup> See ABA Opinion 481 (April 7, 2018).

7, 2018) (lawyer must inform current client of a material error; which is defined as “(a) reasonably likely to harm or prejudice a client; or (b) of such nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice”).

Adopted: October 2, 2009.

Amended: \_\_\_\_\_, 2019.

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Robin M. Wolpert, Chair  
Lawyers Professional Responsibility Board

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

**AMENDED OPINION NO. 21**

**A Lawyer's Duty to Consult with a Current or Former Client  
About the Lawyer's ~~Own Malpractice~~ Material Error**

A lawyer who ~~knows that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim by a current client~~ commits a material error that materially affects the involving a current client's interests has one or more duties to act under the Minnesota Rules of Professional Conduct. The requirements of Rules 1.4 and 1.7, Minnesota Rules of Professional Conduct (MRPC), are implicated in such a circumstance and the lawyer must determine what actions may be required under the Rules, ~~with particular attention to Rules 1.4 and 1.7.~~ The lawyer must inform a current client of the material error. An error is considered material if a disinterested lawyer would find that it is (a) reasonably likely to harm or prejudice a client; or (b) could reasonably cause a client to consider terminating the lawyer even in the absence of apparent harm or prejudice.

Since ~~the possibility of a malpractice claim that arises during representation may cause a lawyer to be concerned with the prospect of legal liability for the malpractice, a lawyer's disclosure of a material error to a client may be disruptive to the lawyer-client relationship,~~ the provisions of Rule 1.7, MRPC, dealing with a "concurrent conflict of interest" must be considered to determine whether the personal interest of the lawyer poses a significant risk that the continued representation of the client will be materially limited.<sup>1</sup> Under Rule 1.7, MRPC, the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present.<sup>2</sup> Assuming continued representation is not otherwise prohibited, to continue the representation the lawyer must reasonably believe he or she may continue to provide competent and diligent representation.<sup>3</sup> If so, the lawyer must obtain the client's "informed consent," confirmed in writing, to the continued representation.<sup>4</sup> Whenever the rules require a client to provide "informed consent," the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent.<sup>5</sup> In this circumstance, "informed consent" requires that the lawyer communicate adequate

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<sup>1</sup> -Rule 1.7(a)(2), MRPC.

<sup>2</sup> -Rule 1.7(a), MRPC.

<sup>3</sup> - Rule 1.7(b)(1) and (2), MRPC.

<sup>4</sup> - Rule 1.7(b)(4), MRPC.

<sup>5</sup> -Rule 1.4(a)(1), MRPC.

information and explanation about the material risks of and reasonably available alternatives to the continued representation.<sup>6</sup>

Regardless of whether ~~the possibility of a malpractice claim~~ a material error creates a conflict of interest under Rule 1.7, MRPC, the lawyer also has duties of communication with ~~the a current~~ client under Rule 1.4, MRPC, that may apply. When the lawyer ~~knows the lawyer's conduct may reasonably be the basis for a non-frivolous malpractice claim by a current client~~ has committed a material error that materially affects the involving a current client's interests, the lawyer shall inform the client about that conduct to the extent necessary to achieve each of the following objectives:

- 1) keeping the client reasonably informed about the status of the representation,<sup>7</sup>
- 2) permitting the client to make informed decisions regarding the representation,<sup>8</sup>
- 3) assuring reasonable consultation with the client about the means by which the client's objectives are to be accomplished.<sup>9</sup>

All three of these objectives require that a lawyer promptly notify a current client of a material error under Rule 1.4(a), MRPC, even in the absence of apparent harm or prejudice. In consulting with the disclosing a material error to a current client about the possible malpractice claim, the lawyer should bear in mind Comment 5 to Rule 1.4, which provides that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."

If a lawyer discovers that he or she has materially erred after the representation has concluded, the lawyer is not required to inform the former client of the error under the Rules of Professional Conduct.<sup>10</sup> Business relations, risk management or general best practice standards may make disclosure of the lawyer's material error to a former client the preferred course of conduct in order for the lawyer to avoid or mitigate potential harm or prejudice to the former client. However, this obligation is not one mandated by the Rules of Professional Conduct.

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<sup>6</sup> -Rule 1.0(f), MRPC.

<sup>7</sup> -Rule 1.4 (a)(3), MRPC.

<sup>8</sup> -Rule 1.4 (b), MRPC.

<sup>9</sup> -Rule 1.4 (a)(2), MRPC.

<sup>10</sup> See ABA Opinion 481 (April 7, 2018).

## Comment

The issue of when and what to say to a client; when a lawyer knows that the lawyer's conduct described in Opinion 21 could reasonably be expected to be the basis for a malpractice claim determines a material error has been committed is difficult and may create inherent conflicts. The Board is ~~issuing amending~~ Opinion No. 21 ~~this opinion~~ to apprise the Bar of the Board's position on the matter and to ~~provide~~ guidance to lawyers who may confront the issue. ~~conform~~ Opinion 21 with ABA Formal Opinion 481 (April 7, 2018) (lawyer must inform current client of a material error; which is defined as "(a) reasonably likely to harm or prejudice a client; or (b) of such nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice").

~~In consulting with the current client about the possible malpractice claim, the lawyer should bear in mind Comment 5 to Rule 1.4, which provides that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."~~

Other jurisdictions have recognized a lawyer's ethical duty to disclose to the client conduct which may constitute malpractice. *See, e.g., Tallon v. Comm. on Prof'l Standards*, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him."); Colo. B. Ass'n Ethics Comm., Formal Op. 113 (2005) ("When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client."); Wis. St. B. Prof'l Ethics Comm., Formal Op. E-82-12 ("[A]n attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission."); N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 734 (2000), 2000 WL 33347720 (Generally, an attorney "has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim."); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 684 ("The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney's own interest."):

*In re SRC Holding Corp.*, 352 B.R. 103 (Bankr. D. Minn. 2006), *aff'd in part and rev'd in part In re SRC Holding Corp.*, 364 B.R. 1 (D. Minn. 2007), reversed *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir. 2009) discuss certain matters addressed in Opinion 21. In *Leonard*, the Eighth Circuit held that the bankruptcy court had relied too

heavily on ethics rules in determining whether the law firm had violated a legal duty to consult with its client about the law firm's possible malpractice. The Eighth Circuit said "[d]emonstrating that an ethics rule has been violated, by itself, does not give rise to a cause of action against the lawyer and does not give rise to a presumption that a legal duty has been breached." 553 F.3d 628. In predicting how the Minnesota Supreme Court would rule on an attorney's legal duty to consult with a client about the law firm's possible malpractice, the Eighth Circuit did not opine on a law firm's ethical duties to consult about such a claim. Recognizing the distinction, this Opinion does not opine on a law firm's legal duties to consult about such a claim.

A lawyer's obligation to report a possible malpractice claim to the lawyer's client also is discussed in a local article written by Charles E. Lundberg, entitled *Self Reporting Malpractice or Ethics Problems*, 60 Bench & B. of Minn. 8, Sept. 2003, and more recently and extensively in Benjamin P. Cooper's article, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 Baylor L. Rev. 174 (2009) and Brian Pollock's article, *Surviving a Screwup*, 34 ABA Litig. Mag. 2, Winter 2008.

Adopted: October 2, 2009.

Amended: \_\_\_\_\_, 2019.

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Kent A. Gernander, Robin M. Wolpert, Chair  
Lawyers Professional Responsibility Board



# Disclosing errors

Everyone makes mistakes. Law is a challenging field, and the stakes are often high for our clients. It has long been the position of the Lawyers Professional Responsibility Board that lawyers have an ethical duty to their clients to disclose errors that may provide a reasonable basis for a non-frivolous malpractice claim.<sup>1</sup> The American Bar Association has provided additional guidance on this topic. ABA Formal Opinion 481, issued last year, provides:

[Rule] 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the [rules] to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation.<sup>2</sup>

## Basis of this obligation

This obligation arises from our fundamental duty to communicate with our clients. Rule 1.4, Minnesota Rules of Professional Conduct, mirrors the ABA Model Rule, and sets forth our communication obligations. As a refresher, lawyers must "promptly inform" clients of any "decision or circumstance" where the client's informed consent is required.<sup>3</sup> We must "reasonably consult with the client about the means by which the client's objectives are to be accomplished."<sup>4</sup> We must "keep the client reasonably informed about the status of" her matter, and must "promptly comply with reasonable requests for information."<sup>5</sup> We must also consult with the client about any limitation imposed by the ethics rules on our ability to assist the client, and, importantly, we must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>6</sup> Given the breadth of our communication obligation with our clients—particularly the requirement that we must explain matters such that clients can make informed decisions about their case—it is unsurprising that we have an ethical obligation to report to our client a material error.<sup>7</sup>



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

## What is material?

When the Lawyers Board reviewed this subject in 2009, the board focused on "a non-frivolous malpractice claim" as the event triggering the disclosure obligation. In doing so, the board focused in part on Rule 1.7, concurrent conflicts of interest. Certainly it is true that the possibility of a malpractice claim presents a potential concurrent conflict of interest if the lawyer is concerned about avoiding liability such that it may materially limit the representation of that client.<sup>8</sup> The recent ABA opinion posits, however, that "it is unreasonable to conclude that a lawyer must inform a current client of an error only if that error may support a colorable legal malpractice claim, because a lawyer's error may impair a client's representation even if the client will never be able to prove all of the elements of malpractice."<sup>9</sup> I agree, and the Lawyers Board is proposing to amend Opinion No. 21 to bring it into line with ABA Opinion 481.

As the opinion notes, errors occur on a continuum. For purposes of your disclosure obligation, if the error is material, you have a duty to inform a current client. As noted above, an error is material if a disinterested lawyer would conclude that it is reasonably likely to harm or prejudice the client or of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. Errors on the ends of the continuum are generally easy to discern (missing the statute of limitations, for example—disclosure obligation; missing a non-substantive deadline that causes no issues—no disclosure obligation), but between the two ends, each matter will need to be reviewed on a case-by-case basis from an objective perspective. Remember, too, that your disclosure must be "prompt" under the circumstances, which again will be a fact-specific inquiry.

## What about former clients?

Because this duty springs from Rule 1.4, which is limited to current clients, the ABA Opinion limits its application to current clients. Accordingly, if you discover a material error after the representation has concluded, you do not have an ethical obligation to communicate that material error to your former client. There may be reasons, for risk management purposes or otherwise, that might counsel toward disclosure to a former client (such as the ability to mitigate harm), but that would be a matter of choice, not ethics, for the lawyer. Practitioners may also wish to review ABA Opinion 481 for its discussion of when a current client becomes a former client for additional guidance.

## Obligation to self-report to the Lawyers Board?

One of the most persistent myths I have encountered as Director is the wide-spread belief that we have an ethical duty to report our own misconduct to the Lawyers Board. There is no duty to self-report ethical violations, whether it is your commission of a material error while handling a matter or otherwise. You do have an ethical duty to report the misconduct of another lawyer if you know that a lawyer has



committed a rule violation that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer.<sup>10</sup> While there may be reasons you may wish to self-report an ethical violation, you do not have an ethical duty to do so.

### Conclusion

The Lawyers Board has issued an amended draft of Opinion No. 21 on its website to bring it into conformity with ABA Opinion 481.<sup>11</sup> You may comment on the proposed amendment through August 16, 2019, by sending an email to me at [susan.humiston@courts.state.mn.us](mailto:susan.humiston@courts.state.mn.us), or writing to the board c/o Office of Lawyers Professional Responsibility, 1500 Landmark Tower, 345 St. Peter St., St. Paul, MN 55102. The board will vote on the proposed amended Opinion No. 21 at its quarterly meeting on September 27, 2019. If you have a question as to whether you have an ethical duty to disclose an error in a particular circumstance, you can call the ethics hotline at 651-296-3952 or 1-800-657-3601. ▲

### Notes

<sup>1</sup> Lawyers Board Opinion No. 21 (2009).

<sup>2</sup> ABA Formal Opinion 481 (4/17/2018).

<sup>3</sup> Rule 1.4(a)(1), Minnesota Rules of Professional Conduct (MRPC).

<sup>4</sup> Rule 1.4(a)(2), MRPC.

<sup>5</sup> Rule 1.4(a)(3), MRPC; Rule 1.4(a)(4).

<sup>6</sup> Rule 1.4(a)(5), MRPC; Rule 1.4(b), MRPC.

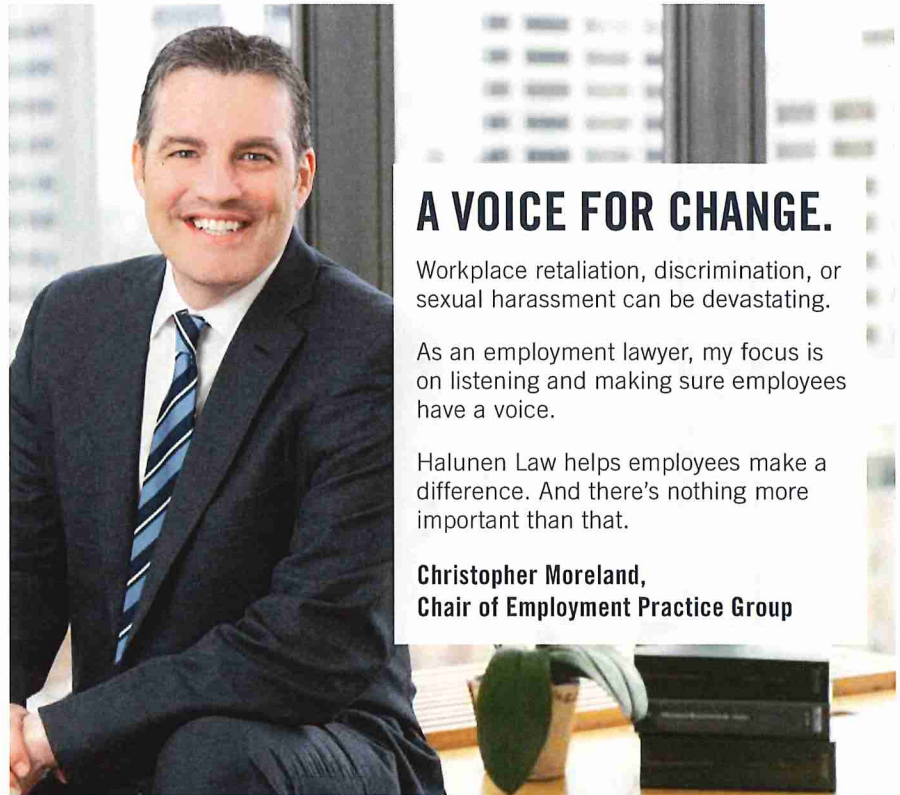
<sup>7</sup> "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Rule 1.4, Comment [5].

<sup>8</sup> Rule 1.7(a)(2), MRPC, defining a "concurrent conflict" to include "a significant risk that the representation of one or more clients will be materially limited... by a personal interest of the lawyer."

<sup>9</sup> ABA Formal Opinion 481 at 4.

<sup>10</sup> Rule 8.3(a), MRPC.

<sup>11</sup> [www.lprb.mncourts.gov/rules/pages/pendingrules](http://www.lprb.mncourts.gov/rules/pages/pendingrules).



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## Humiston, Susan

---

**From:** Rich Thomas <thomas@burkeandthomas.com>  
**Sent:** Wednesday, July 17, 2019 9:04 AM  
**To:** Humiston, Susan  
**Cc:** Gretchen Ryan  
**Subject:** [EXTERNAL] Support for Amendment to Opinion 21

Ms. Humiston,

I write in support of your recommendation to amend Opinion 21 to bring it into conformity with ABA Opinion 481. Much of my practice is devoted to the defense of attorney malpractice cases and has for more than 30 years. I think the salient reasons to disclose potential legal malpractice claims are clear enough and really don't require additional discussion except perhaps to note that, given the fiduciary duty a lawyer has to a client, and its concomitant duty to advise and inform, a failure to make this disclosure may result in a tolling of any statute of limitations period for such a claim based upon a theory of "fraudulent concealment" given the duty to advise. I would like to address the second change, that is the duty to disclose matters which may not support a malpractice claim in negligence but may nevertheless implicate a client's desire to continue the relationship. What is frequently misunderstood in the context of a legal malpractice actions, and a lawyer's potential exposure as a result, is the distinction between negligence claims and claims for a breach of fiduciary duty. They are not the same and concern potentially different damages. A fiduciary duty requires full disclosure to a client of that type of information contemplated by Opinion 481. While such conduct may not support a negligence action in tort, it may support a breach of fiduciary duty claim which, even in the absence of consequential damage, could potentially support a claim for a return of fees under *Perl v. St. Paul Fire and Marine Ins. Co.*, 345 N.W.2d 209 (Minn. 1984). A failure to disclose this may also have statute of limitations tolling consequences. In the end, and more importantly, it represents better practice.

Richard J. Thomas  
Burke and Thomas, PLLP  
3900 Northwoods Drive  
Suite 200  
St. Paul, MN 55112  
(651) 789-2208  
[thomas@burkeandthomas.com](mailto:thomas@burkeandthomas.com)

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## Humiston, Susan

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**From:** Todd Scott <tscott@mlmins.com>  
**Sent:** Wednesday, August 14, 2019 12:35 PM  
**To:** Hanson, Cassie; Humiston, Susan  
**Cc:** Paul Ablan  
**Subject:** [EXTERNAL] RE: Amendments to Opinion 21.

Cassie & Susan:

Thank you for the information on the proposed amendment to LPRB Opinion 21 and the opportunity to submit comments regarding proposed changes to the Opinion. After giving it some thought, MLM has decided not to submit any comments for consideration by the Board at this time.

Again, we thank you for alerting us to this opportunity regarding this important matter, and we value our relationship with the Office of Lawyers Professional Responsibility.

Regards,

Todd

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**[tscott@mlmins.com](mailto:tscott@mlmins.com) | [www.mlmins.com](http://www.mlmins.com)**

**From:** Hanson, Cassie <Cassie.Hanson@courts.state.mn.us>  
**Sent:** Wednesday, July 10, 2019 1:00 PM  
**To:** Todd Scott <tscott@mlmins.com>  
**Subject:** Amendments to Opinion 21.

Hi Todd:

Susan Humiston wanted me to make you aware of a proposed amendment to LPRB Opinion 21. The Lawyers Board plans to vote on the amendment in September. The Lawyers Board is soliciting comments on or before August 16, 2019 to the proposed amendment. You may submit any comments directly to Susan Humiston by email.

The redline and clean line version of both may be accessed below.

<http://lprb.mncourts.gov/Pages/Instructions%20on%20Comments%20to%20Op.%2021.pdf>

Thank you.

Cassie Hanson  
Managing Attorney

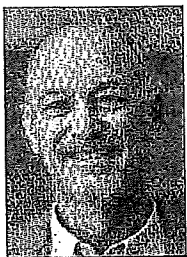
# Board proposes amending Op. 21 on disclosing malpractice

By William Wernz  
Special to Minnesota Lawyer

The Minnesota Lawyers Professional Responsibility Board is soliciting comments on its proposal to amend Board Opinion 21, on a lawyer's duties to consult with a client regarding the lawyer's material errors in representation. Comments are due by August 16 and the board will vote on the proposal on Sept. 27. An article by the director gives the rationale for amendment.<sup>1</sup> The proposal

raises several important questions – but first, some background to frame the questions.

The board issued Opinion 21 in 2009. Op. 21 explained lawyers' duties of consultation under Rule 1.4 (reasonable commu-



William Wernz

nication) and Rule 1.7(a)(2) (conflicts of interest arising from materially limited representations) with respect to the lawyers' own possible malpractice.

In 2009, the board's process for issuing opinions included consultations with stakeholders. Board Opinion Committee Chair Stuart Williams met with numerous groups. In 2009, the board clearly wished to engage with lawyers and learn from their perspectives. The process resulted in a refined board opinion.<sup>2</sup>

To a considerable degree, Op. 21 explained an important case law holding in Minnesota law on the duty of client consultation regarding a lawyer's own possible malpractice.<sup>3</sup> Proposed Opinion 21 does not mention this case.<sup>4</sup> Instead, the proposed opinion seeks "conformity with ABA Opinion 481," issued in 2018.

Proposed Op. 21 would broaden the subject of consultation from a lawyer's malpractice to a lawyer's "material error." Proposed Op. 21 states, "An error is considered material if a disinterested lawyer would find that it is (a) reasonably likely to harm or prejudice a client; or (b) could [sic] reasonably cause a client to consider terminating the lawyer even in the absence of apparent harm or prejudice."

The first question raised by proposed Op. 21 is what mental state of the lawyer is required to trigger an obligation to disclose and consult. The 2009 version of Op. 21 requires that the lawyer "know" of the malpractice. ABA Op. 481 requires that the lawyer, "believes that he or she may have materially erred in the client's representation."<sup>5</sup> Proposed Op. 21 rejects both knowledge and belief. The board's comment to Op. 21 refers to communication duties "when a lawyer determines a material error has been committed," but "determines" does not appear in proposed Op. 21 itself.

If the board expressly intends to "conform" Op. 21 to ABA Op. 481, why does proposed Op. 21 reject the material, indeed crucial, mental state requirement provided by Op. 481? Why does proposed Op. 21 make no provision for mental state? The result appears to create a strict ethics liability for lawyers who are unaware of their own mistakes.

Consider a hypothetical. A lawyer does research in a litigated case but fails to find the leading authority in the jurisdiction. The lawyer has arguably committed a "material error." However, the lawyer is unable to consult with the client, because the lawyer does not know of the error. Under current Op. 21 and under ABA Op. 481, the lawyer would not violate Rules 1.4 or 1.7 by failing to consult. Under proposed Op. 21, the lawyer would violate both rules. The rules define both "knows" and "believes," but proposed Op. 21 rejects both.<sup>6</sup>

I recently wrote, "I believe that in Minnesota the discipline system is only rarely 'a gotcha game.'" I would amend my assessment if proposed Op. 21 is adopted without conforming to the ABA position that lawyers must "believe" they may have materially erred before they had duties of disclosure and consultation.

The second question raised by proposed Op. 21 again relates to an inconsistency between announced intent to conform to ABA Op. 481 and rejection of a key term. Op. 481 defines "material error" to arise when there is malpractice or another error, "of such a nature that it *would* reasonably cause a client to consider terminating the representation. ..." Proposed Op. 21 deletes "would" and substitutes the much broader term "could."

## Editor's note

The Minnesota Lawyers Professional Responsibility Board has been invited to respond to this article.

In ABA Op. 481, the terms "believes" and "would cause" are the triggers that require disclosure and consultation. They are absolutely essential and pivotal terms. Neither the director's article nor the board's official comment to amended Op. 21 explain why the board announces its intent to "conform" to ABA Op. 481 while rejecting Op. 481's key terms.

Were the board's deletions of ABA Op. 481's triggers intentional? The first sentence of the director's article acknowledges, "Everyone makes mistakes." Proposed Op. 21's substitution of "could" for "would" might well have been a mistake. However, the deletion of a state-of-mind standard may well be intentional. The redlined version of proposed Op. 21 shows that the board systematically deleted "knows" throughout current Op. 21. And the "believes" state-of-mind standard of ABA Op. 481 is hard to miss, because "believes" appears in both its prefatory synopsis and its conclusion.

A third question arises from the different warrants and authority of the groups that issue ABA and Minnesota ethics opinions. The ABA Standing Committee on Ethics and Professional Responsibility issues ABA formal opinions. The Minnesota Lawyers Board may "issue opinions on questions of professional conduct."<sup>8</sup> However, the Minnesota Supreme Court has greatly limited the scope of board opinions, while ABA opinions have no such limits.

## Endnotes

The board once affirmed an admission issued to a lawyer for purported violation of a board opinion. The court reversed, holding that only violations of ethics rules, not alleged violations of board opinions, suffice for discipline. The Court explained, “[B]oard opinions that interpret preexisting rules without either effectively creating new rules of professional conduct or exceeding the scope or plain meaning of the rules are entitled to careful consideration.”<sup>9</sup>

Does the “plain meaning” of the reasonable communication duty of Rule 1.4 or Rule 1.7 include that a lawyer must disclose an error that, “could [or would] reasonably cause a client to consider terminating the lawyer even in the absence of apparent harm or prejudice?” Minnesota lawyers have no doubt failed to disclose harmless errors, but no discipline has ever been reported for such failures.

To return to the hypothetical above, suppose that the lawyer prevails on a motion for plaintiff’s summary judgment, even though the lawyer failed to find or cite the leading authority. Before the court actually enters judgment, the lawyer learns of the uncited precedent. Must the lawyer disclose the error to the client?

The director’s article explains that answers to such questions will be determined on a “case-by-case” basis. Put differently, the “plain meaning” of Rules 1.4 and 1.7 will not be apparent in many cases. Because there is no disciplinary precedent cited in Op. 481 or proposed Op. 21, lawyers will have to make educated guesses.

Is there any case law or other resource for determining when a disinterested lawyer would reasonably expect a client to consider firing a lawyer for harmless error? I do not know of any precedent. Proposed Op. 21 and the director’s article do not cite any such authority, or any Minnesota authority whatsoever. The director has frequently opposed expert testimony in discipline cases, but such testimony would appear necessary for such determinations in all but the most obvious cases.

Based on my experience of nearly 40 years in legal ethics, I do not believe that even competent and prudent lawyers disclose harmless errors, even where the error could have caused serious harm. I do not believe other professionals make such disclosures.

I would be very surprised, for example, to be told in a recovery room, “The surgery was successful, but you should know that we almost amputated the wrong limb due to a nurse’s pre-op error, which we caught just in time.”

Over 30 years ago, a Lawyers Board member told me, “The rules should be interpreted to codify what good lawyers do.” The rules themselves adopt this perspective through two related statements: (1) “The Rules of Professional Conduct are rules of reason.” (2) “Reasonable’ or ‘reasonably’ when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.”<sup>10</sup>

The board and the director do not claim that the board has determined that prudent and competent Minnesota lawyers disclose their harmless errors. The board apparently wishes to elevate the standards of conduct for Minnesota lawyers. The board may undertake such efforts, by petition to the Supreme Court for amendment of the Rules of Professional Conduct. However, Minnesota lawyers may ask the board: “Would you please explain how proposed Op. 21 complies with the Supreme Court’s directive against ‘exceeding the scope or plain meaning’ of the rules? If proposed Op. 21 fits the plain meaning of Rules 1.4 and 1.7, why have these rules never before been interpreted as proposed Op. 21 now interprets them?”

1. The proposed amendment is at <http://lprb.mncourts.gov/rules/Pages/PendingRules.aspx>. The article is Susan Humiston, *Disclosing Errors*, Bench & B. of Minn., July 2019.

2. See Barbara L. Jones, *Proposed Ethics Opinion on Reporting Malpractice Proves Controversial*, Minn. Law., July 13, 2009; Barbara L. Jones, *Board Passes Much-Debated Ethics Opinion on Self-Reporting Malpractice*, Minn. Law., Oct. 12, 2009.

3. *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir. 2009). *Leonard* dealt directly with a lawyer’s fiduciary duties of disclosure and consultation and only indirectly with ethical duties.

4. ABA Opinions include a standard caution: “The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.”

5. Op. 481 and Op. 21 use “discovers” to define the state of the lawyer’s mind regarding an error in a former client representation. Errors do not have to be disclosed to former clients under Op. 481 or Op. 21.

6. “Belief’ or ‘believes’ denotes that the person involved actually supposed the fact in question to be true.” Rule 1.0(a). “Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question.” Rule 1.0(g). Both belief and knowledge “may be inferred from circumstances.” *Id.*

7. William J. Wernz, *Is Attorney Discipline a “Gotcha Game?”* Minn. Law., Oct. 4, 2018.

8. Rule 4(c), R. Law. Prof. Resp.

9. *In re Panel File 99-42*, 621 N.W.2d 240 (Minn. 2001).

10. SCOPE [14]; Rule 1.0(i), Minn. R. Prof. Conduct.



# Disclosing errors and malpractice: Input requested

By Robin M. Wolpert

Lawyers Professional Responsibility Board

In 2009, the Lawyers Board issued Opinion 21, stating that lawyers have an ethical duty to their clients to disclose errors that may provide a reasonable basis for a non-frivolous malpractice claim. This year, the board is considering revisions to Opinion 21 to bring it into conformity with ABA Opinion 481. We would like the input of the bar and all stakeholders regarding the parameters of the duty to disclose.

Your input is not just "nice to have," it is critical to the board's decision-making process. We make better decisions when we get the input of the legal community. We therefore welcome the comments recently published by William Wernz and ask others in the legal community to take a few moments to review our proposed amendments and provide feedback.

You can find the amended draft of Opinion 21 here: <http://lprb.mncourts.gov/rules/Pages/PendingRules.aspx>. You should direct your comments on the proposed amendments to Susan Humiston, Director of the Office of Lawyers Professional Responsibility at [Susan.Humiston@courts.state.mn.us](mailto:Susan.Humiston@courts.state.mn.us). The deadline for providing comments is August 16, 2019. Thank you in advance for your attention to these important issues.

# Attachment 6



## OLPR Dashboard for Court and Chair

|  | Month Ending<br>August 2019 | Change From<br>Previous Month | Month Ending<br>August 2018 |
|--|-----------------------------|-------------------------------|-----------------------------|
| Open Matters                                       | 487                         | +16/471                       | 516                         |
| Total # of Lawyers                                 | 374                         | +14/360                       | 373                         |
| New Files YTD                                      | 678                         | +89/589                       | 758                         |
| Closed Files YTD                                   | 699                         | +73/626                       | 759                         |
| Closed C012s YTD                                   | 193                         | +32/161                       | 239                         |
| Summary Dismissals YTD                             | 298                         | +46/252                       | 374                         |
| Files Opened During August 2019                    | 89                          | +3/86                         | 112                         |
| Files Closed During August 2019                    | 73                          | -44/117                       | 104                         |
| Public Matters Pending (excluding Resignations)    | 39                          | -1/40                         | 34                          |
| Panel Matters Pending                              | 14                          | 0/14                          | 12                          |
| DEC Matters Pending                                | 90                          | -6/96                         | 83                          |
| Files On Hold                                      | 10                          | +1/9                          | 17                          |
| Advisory Opinion Requests YTD                      | 1320                        | +132/1188                     | 1377                        |
| CLE Presentations YTD                              | 45                          | +5/40                         | 48                          |
| <b>Total Files Over 1 Year Old</b>                 | <b>127</b>                  | <b>+17/110</b>                | <b>144</b>                  |
| <b>Total # of Lawyers</b>                          | <b>85</b>                   | <b>+15/70</b>                 | <b>88</b>                   |
| <b>Matters Pending Over 1 Year Old w/o Charges</b> | <b>61</b>                   | <b>+14/47</b>                 | <b>58</b>                   |
| <b>Total # of Lawyers</b>                          | <b>48</b>                   | <b>+13/35</b>                 | <b>43</b>                   |

|                               | 2019 YTD  | 2018 YTD  |
|-------------------------------|-----------|-----------|
| Lawyers Disbarred             | 5         | 5         |
| Lawyers Suspended             | 14        | 16        |
| Lawyers Reprimand & Probation | 3         | 3         |
| Lawyers Reprimand             | 3         | 4         |
| <b>TOTAL PUBLIC</b>           | <b>25</b> | <b>28</b> |
| Private Probation Files       | 8         | 8         |
| Admonition Files              | 78        | 73        |
| <b>TOTAL PRIVATE</b>          | <b>86</b> | <b>81</b> |

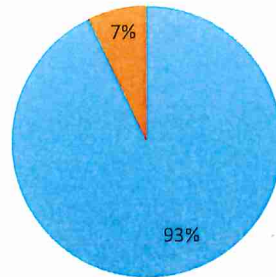
## Files Over 1 Year Old as of Month Ending August 2019

| Year/Month   | OLPR      | AD       | PAN      | HOLD     | SUP       | S12C     | SCUA      | REIN     | Total      |
|--------------|-----------|----------|----------|----------|-----------|----------|-----------|----------|------------|
| 2015-03      |           |          |          | 1        |           |          |           |          | 1          |
| 2015-11      | 2         |          |          |          |           |          |           |          | 2          |
| 2015-12      | 1         |          |          |          |           |          |           |          | 1          |
| 2016-02      |           |          |          |          | 1         |          |           |          | 1          |
| 2016-05      | 1         |          |          |          |           |          |           |          | 1          |
| 2016-06      | 1         |          |          | 1        |           |          |           |          | 2          |
| 2016-07      | 1         |          |          |          |           |          |           |          | 1          |
| 2016-08      | 3         |          |          |          |           |          | 1         |          | 4          |
| 2016-09      |           |          |          |          | 1         |          |           |          | 1          |
| 2016-10      | 1         |          |          |          | 1         |          |           |          | 2          |
| 2016-12      | 1         |          |          |          | 1         |          |           |          | 2          |
| 2017-01      |           |          |          |          |           |          | 1         |          | 1          |
| 2017-02      |           |          |          |          | 1         |          | 1         |          | 2          |
| 2017-03      | 1         |          |          | 1        | 2         |          |           |          | 4          |
| 2017-04      | 1         |          |          |          | 1         |          |           |          | 2          |
| 2017-06      |           |          |          |          | 2         |          |           |          | 2          |
| 2017-07      | 1         |          |          |          | 3         |          |           |          | 4          |
| 2017-08      | 1         |          |          |          | 3         |          | 1         |          | 5          |
| 2017-09      | 3         |          |          |          | 1         |          | 2         |          | 6          |
| 2017-10      | 2         |          | 1        |          | 2         |          |           |          | 5          |
| 2017-11      | 2         |          |          | 1        |           |          |           |          | 3          |
| 2017-12      | 4         |          |          |          | 1         |          | 2         |          | 7          |
| 2018-01      | 1         |          |          |          | 1         |          |           |          | 2          |
| 2018-02      | 1         |          |          | 1        | 4         |          |           |          | 6          |
| 2018-03      |           |          | 1        | 1        |           | 1        |           | 1        | 4          |
| 2018-04      | 4         |          |          |          | 6         |          | 1         |          | 11         |
| 2018-05      | 2         |          | 1        |          | 2         |          |           |          | 5          |
| 2018-06      | 4         |          |          | 1        |           | 1        | 1         |          | 7          |
| 2018-07      | 6         |          |          |          |           |          |           | 1        | 7          |
| 2018-08      | 17        | 1        |          |          | 7         |          |           | 1        | 26         |
| <b>Total</b> | <b>61</b> | <b>1</b> | <b>3</b> | <b>7</b> | <b>40</b> | <b>2</b> | <b>10</b> | <b>3</b> | <b>127</b> |

|                                      | Total      | Sup. Ct.  |
|--------------------------------------|------------|-----------|
| Sub-total of Cases Over One Year Old | 117        | 45        |
| Total Cases Under Advisement         | 10         | 10        |
| <b>Total Cases Over One Year Old</b> | <b>127</b> | <b>55</b> |

|          |     |
|----------|-----|
| Active   | 118 |
| Inactive | 9   |

**Active v. Inactive**



■ Active ■ Inactive

**ALL PENDING FILES AS OF MONTH ENDING AUGUST 2019**

| <i>Year/Month</i> | <i>SD</i> | <i>DEC</i> | <i>REV</i> | <i>OLPR</i> | <i>AD</i> | <i>PROB</i> | <i>PAN</i> | <i>HOLD</i> | <i>SUP</i> | <i>S12C</i> | <i>SCUA</i> | <i>REIN</i> | <i>RESG</i> | <i>TRUS</i> | <i>Total</i> |
|-------------------|-----------|------------|------------|-------------|-----------|-------------|------------|-------------|------------|-------------|-------------|-------------|-------------|-------------|--------------|
| 2015-03           |           |            |            |             |           |             |            | 1           |            |             |             |             |             |             | 1            |
| 2015-11           |           |            |            | 2           |           |             |            |             |            |             |             |             |             |             | 2            |
| 2015-12           |           |            |            | 1           |           |             |            |             |            |             |             |             |             |             | 1            |
| 2016-02           |           |            |            |             |           |             |            |             | 1          |             |             |             |             |             | 1            |
| 2016-05           |           |            |            | 1           |           |             |            |             |            |             |             |             |             |             | 1            |
| 2016-06           |           |            |            | 1           |           |             |            | 1           |            |             |             |             |             |             | 2            |
| 2016-07           |           |            |            | 1           |           |             |            |             |            |             |             |             |             |             | 1            |
| 2016-08           |           |            |            | 3           |           |             |            |             |            |             | 1           |             |             |             | 4            |
| 2016-09           |           |            |            |             |           |             |            |             | 1          |             |             |             |             |             | 1            |
| 2016-10           |           |            |            | 1           |           |             |            |             | 1          |             |             |             |             |             | 2            |
| 2016-12           |           |            |            | 1           |           |             |            |             | 1          |             |             |             |             |             | 2            |
| 2017-01           |           |            |            |             |           |             |            |             |            |             | 1           |             |             |             | 1            |
| 2017-02           |           |            |            |             |           |             |            |             | 1          |             | 1           |             |             |             | 2            |
| 2017-03           |           |            |            | 1           |           |             |            | 1           | 2          |             |             |             |             |             | 4            |
| 2017-04           |           |            |            | 1           |           |             |            |             | 1          |             |             |             |             |             | 2            |
| 2017-06           |           |            |            |             |           |             |            |             | 2          |             |             |             |             |             | 2            |
| 2017-07           |           |            |            | 1           |           |             |            |             | 3          |             |             |             |             |             | 4            |
| 2017-08           |           |            |            | 1           |           |             |            |             | 3          |             | 1           |             |             |             | 5            |
| 2017-09           |           |            |            | 3           |           |             |            |             | 1          |             | 2           |             |             |             | 6            |
| 2017-10           |           |            |            | 2           |           |             | 1          |             | 2          |             |             |             |             |             | 5            |
| 2017-11           |           |            |            | 2           |           |             |            | 1           |            |             |             |             |             |             | 3            |
| 2017-12           |           |            |            | 4           |           |             |            |             | 1          |             | 2           |             |             |             | 7            |
| 2018-01           |           |            |            | 1           |           |             |            |             | 1          |             |             |             |             |             | 2            |
| 2018-02           |           |            |            | 1           |           |             |            | 1           | 4          |             |             |             |             |             | 6            |
| 2018-03           |           |            |            |             |           |             | 1          | 1           |            | 1           |             | 1           |             |             | 4            |
| 2018-04           |           |            |            | 4           |           |             |            |             | 6          |             | 1           |             |             |             | 11           |
| 2018-05           |           |            |            | 2           |           |             | 1          |             | 2          |             |             |             |             |             | 5            |
| 2018-06           |           |            |            | 4           |           |             |            | 1           |            | 1           | 1           |             |             |             | 7            |
| 2018-07           |           |            |            | 6           |           |             |            |             |            |             |             | 1           |             |             | 7            |
| 2018-08           |           |            |            | 17          | 1         |             |            |             | 7          |             |             | 1           |             |             | 26           |
| 2018-09           |           |            |            | 6           |           |             |            |             | 1          |             |             |             |             |             | 7            |
| 2018-10           |           |            |            | 25          |           |             |            |             | 2          |             |             | 1           |             |             | 28           |
| 2018-11           |           |            |            | 9           |           | 1           |            |             | 2          |             |             | 1           |             |             | 13           |
| 2018-12           |           |            |            | 20          |           |             |            | 1           | 1          |             |             |             |             | 1           | 23           |
| 2019-01           |           |            | 1          | 26          |           |             |            |             |            |             |             |             |             |             | 27           |
| 2019-02           |           | 4          |            | 28          |           | 1           |            |             |            |             | 1           | 1           |             |             | 35           |
| 2019-03           |           | 3          | 2          | 18          |           |             | 1          |             | 2          |             |             | 1           | 1           |             | 28           |
| 2019-04           |           | 11         | 2          | 23          |           |             |            |             |            |             | 1           |             |             |             | 37           |
| 2019-05           |           | 12         | 3          | 15          |           |             |            | 1           |            |             |             |             |             | 1           | 32           |
| 2019-06           |           | 19         | 1          | 18          |           |             |            | 1           |            |             |             |             |             |             | 39           |
| 2019-07           |           | 21         |            | 19          |           |             |            |             |            |             |             | 2           |             |             | 42           |
| 2019-08           | 13        | 20         |            | 11          |           |             |            |             |            |             |             |             | 5           |             | 49           |
| <b>Total</b>      | <b>13</b> | <b>90</b>  | <b>9</b>   | <b>279</b>  | <b>1</b>  | <b>2</b>    | <b>4</b>   | <b>10</b>   | <b>48</b>  | <b>2</b>    | <b>12</b>   | <b>9</b>    | <b>6</b>    | <b>2</b>    | <b>487</b>   |

**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   |

# **Attachment 7**



# On civility and ethics

## Remember this?

**[I]** do swear that [I] will support the Constitution of the United States and that of the state of Minnesota, and will conduct [myself] as an attorney and counselor at law in an *upright and courteous manner*, to the best of [my] learning and ability, with all good fidelity as well to the court as to the client, and that [I] will use no falsehood or deceit, nor delay any person's cause for lucre or malice. So help [me] God. (Emphasis added.)

For more than a century, this has been the oath taken by attorneys upon admittance to the bar in Minnesota.<sup>1</sup> In fact, Minnesota is one of 21 states with an attorney oath that contains a specific reference to civility.<sup>2</sup> While Minnesota's oath appears to have always mentioned civility, some states, such as Texas, added civility to their oath as recently as 2015. A majority of states' oaths are silent on civility.<sup>3</sup>

Notwithstanding our solemn promise of courtesy, I do not need to tell you that many Minnesota lawyers fall short of consistent uprightness and courtesy. Nor is this a particularly new insight. You may remember the Professionalism Aspirations approved and endorsed by the Minnesota Supreme Court in January 2001.<sup>4</sup> Many states enacted such guidelines



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beginning in the 1990s in response to concerns about deteriorating professionalism. I remember well those conversations and concerns when I first started practicing in the mid-1990s. This Office wrote frequently about the subject in the 1990s as well.<sup>5</sup>

While there are certainly several ethics rules in Minnesota that may be implicated by uncivil conduct (which I will discuss shortly), the persistent nature of this issue has prompted some states to do more with their ethics rules. For example, Michigan has an ethics rule, which can serve as the basis for discipline, which states: "A lawyer shall treat with courtesy and respect all persons involved in the legal process."<sup>6</sup> This rule has withstood constitutional scrutiny.<sup>7</sup> South Carolina added a civility clause to its oath, required all lawyers to retake the new oath, and specifically included violation of the oath as a grounds for discipline.<sup>8</sup>

Minnesota has not experienced a push to do more with its ethics rules on civility, but I have received several requests over the last year to write an

article regarding ethics and civility. As we look at some of the challenges in the profession, including lawyer well-being, and see reports on the pervasive nature of bullying and harassment in the profession,<sup>9</sup> there is no doubt that the lack of civility is damaging the profession. As Chief Justice Burger observed almost 50 years ago, "Lawyers who know how to think but have not learned how to behave are [a] menace and a liability, not an asset, to the administration of justice."<sup>10</sup>

## Crossing the line

All unethical conduct is unprofessional, but not all unprofessional conduct is a violation of the ethics rules warranting discipline. As Judge Cleary (then OLPR Director) noted in 1999, a lot of "ill-mannered" conduct—general rudeness or name-calling that is coarse but not hostile in terms of race or gender, for example—is typically outside of the reach of the ethics rules.<sup>11</sup> Certain misconduct, however, is unquestionably both unprofessional and unethical.

For example, Rule 3.1, Minnesota Rules of Professional Conduct (MRPC), prohibits frivolous claims of law or fact. Rule 3.3, MRPC, prohibits lying to the court or the submission of false evidence (or failing to correct previously submitted false evidence). Rule 4.1, MRPC, prohibits a lawyer from making a knowingly false statement on behalf of a client, and Rule 8.4(c) prohibits dishonest or deceitful conduct generally.

Other rules may be less obvious or may not occur to practitioners. For example, there is an entire rule specifically denoted to fairness to the opposing party and counsel. Rule 3.4, MRPC, has many subparts and is worth a refresher. A lawyer shall not, or counsel another to, "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value."<sup>12</sup> A lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."<sup>13</sup> While the first two clauses of this rule are well-known, don't forget the third clause. It is not improper to pay a witness's expenses or to compensate an expert witness—but otherwise, take care. A lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."<sup>14</sup>

One of my personal favorites (due to painful memories of ridiculous discovery disputes): A lawyer shall not "in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party."<sup>15</sup> Discovery is to gather information to support or defend a case; it not supposed to be a pitched battle or war of attrition. Prosecutors are well aware of this next rule, but general litigators may not be: A lawyer shall not "in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a



personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.”<sup>16</sup> From the first clause, take care when trying to use “bad facts” you know about the opposing party that have little to do with the dispute at hand. You may think it is fair leverage, but if it’s unrelated to the matter at hand, it may not be. Finally, a lawyer shall not “request a person other than a client to refrain from voluntarily giving relevant information to another party” unless the person is a relative or an employee.<sup>17</sup>

Rule 4.4(a), MRPC, is particularly on point for some uncivil conduct: “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use means of obtaining evidence that violate the legal rights of such a person.”<sup>18</sup> Every year, lawyers violate this rule and are disciplined. One example of recent public discipline involved intentionally grabbing opposing counsel by the arm during a deposition.<sup>19</sup> For a variety of reasons, there is probably no good reason to touch anyone you work with, except for a handshake. A related Rule, 8.4(g), prohibits harassment based on protected status in connection with a lawyer’s professional activities.<sup>20</sup> Rule 8.4(h) prohibits discriminatory acts that violate federal, state or local law.<sup>21</sup> Remember also that Rule 8.2, MRPC, prohibits a lawyer from making “a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.” Truthful statements regarding the judiciary are protected; knowing or reckless false claims are not. While this overview is brief, the text of the rules denotes the type of conduct that crosses the line from uncivil to unethical.

### Conclusion

To quote Judge Cleary again, “Good lawyers are not only ethical, they are also professional, and they do not need to resort to misbehavior to get our attention.”<sup>22</sup> Incivility demeans the profession, wastes time and resources, interferes with the efficient resolution of disputes, and contributes to the toxicity of the profession. Just because it might not be unethical does not mean incivility should be practiced. Please remember your oath and work at not being that person. ▲

### Notes

- <sup>1</sup> See Minn. Stat. §358.07 (2019) (emphasis supplied). Legislative history disclosed same oath in 1905 as well.
- <sup>2</sup> David A. Grenardo, *A Lesson in Civility*, 32 Geo. J. Legal Ethics 135, 149 (2019).
- <sup>3</sup> *Id.* (Texas added the words “with integrity and civility in dealing with and communication with the court and all parties” to its oath in 2015.)
- <sup>4</sup> These Aspirations can be found in the Minnesota Rules of Court at 1197 (2019).
- <sup>5</sup> See, e.g., Edward J. Cleary, “Professionalism: More than Civility,” *Bench & Bar* (October 1999). The OLPR website contains numerous article on the topic of civility and ethics under the “Articles” tab.
- <sup>6</sup> Rule 6.5(a), Michigan Rules of Professional Conduct.
- <sup>7</sup> *General Administrator v. Fieger*, 719 N.W.2d 123 (Mich. 2006); *Fieger v. Michigan Supreme Court*, 553 F.3d 955 (6th Cir. 2009).
- <sup>8</sup> Rule 7(a)(6), South Carolina Rules for Lawyer Disciplinary Enforcement.
- <sup>9</sup> “Us too? Bullying and Sexual Harassment in the Legal Profession,” International Bar Association (May 2019).
- <sup>10</sup> *A Lesson in Civility*, 32 Geo. J. Legal Ethics at 138.
- <sup>11</sup> Edward J. Cleary, “Professionalism: More than Civility,” *Bench & Bar* (October 1999); see also Martin A. Cole, “When Incivility Crosses the Line,” *Bench & Bar* (January 2014).
- <sup>12</sup> Rule 3.4(a), MRPC.
- <sup>13</sup> Rule 3.4(b), MRPC.
- <sup>14</sup> Rule 3.4(c), MRPC.
- <sup>15</sup> Rule 3.4(d), MRPC.
- <sup>16</sup> Rule 3.4(e), MRPC.
- <sup>17</sup> Rule 3.4(f), MRPC.
- <sup>18</sup> Rule 4.4(a), MRPC.
- <sup>19</sup> *In re Williams*, 917 N.W.2d 423 (Minn. 2018).
- <sup>20</sup> Rule 8.4(g), MRPC, states “It is professional misconduct for a lawyer to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer’s professional activities.”
- <sup>21</sup> Rule 8.4(h), MRPC, states “It is professional misconduct for a lawyer to commit a discriminatory act prohibited by federal, state or local statute or ordinance that reflects adversely on the lawyer’s fitness as a lawyer.”
- <sup>22</sup> Edward J. Cleary, “Professionalism: More than Civility,” *Bench & Bar* (October 1999).

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# The justice gap is driving a legal ethics reform movement

This is a very exciting time to be in the business of attorney regulation. No, really—I mean it. More than ever people are asking, “Are the ethics rules striking the right balance between protection of the public and access to justice?” And: “How do the ethics rules inhibit innovation in the delivery of legal services?”

Several states are exploring revisions to their ethics rules in response to the growing access to justice gap and general challenges in the legal profession. As many of you already know, Minnesota has established a Legal Paraprofessional Pilot Project, the aim of which is to permit greater use of legal paraprofessionals in chronically underserved areas of consumer law such as housing disputes, family law, and creditor-debtor disputes. Washington and Utah have already taken action in this area.

Several other states are focused on broader ethics changes. Most notably, California—which finally adopted a set of ethical rules similar to the American Bar Association’s model rules in November 2018—has charged straight ahead to considering significant changes to those just-adopted rules. Arizona, Utah, and Illinois are considering changes as well. I thought you might be as interested as I am to see the changes under consideration.

## California

In July 2018, California formed a Task Force on Access through Innovation of Legal Services (ATILS).<sup>1</sup> The focus of the task force was to remove regulatory barriers to innovation in the delivery of legal services, keeping in mind the dual goals of consumer protection and increased access to legal services. In July 2019, ATILS issued a 251-page (!) report to the trustees of the California bar.<sup>2</sup> The report includes 16 reform options upon which ATILS is seeking public comment through September 2019.<sup>3</sup> Most of the recommendations relate to ethics Rule 5.5 (the unauthorized practice of law) and Rule 5.4 (fee-sharing).

As it relates to Rule 5.5 (generally, who can practice law), the options—similar to the ones Minnesota is considering—include allowing non-lawyers to offer certain legal services within varying regulatory frameworks. The types of regulation under consideration include (1) entity regulation of where the non-lawyer works, (2) creating a new licensing scheme for providers who are not lawyers, and (3) certifying paraprofessionals to allow them to provide limited legal advice. Perhaps most interestingly, the options also include allowing approved entities to provide technology-driven legal services under a yet-to-be-developed regulatory

scheme—that is, authorizing technologies that perform the analytic work of lawyers, and regulating the companies that sell these products as well as the products themselves.

As it relates to Rule 5.4 (fee-sharing), there are two options. Alternative 1—the narrower rule change—would allow a lawyer to share fees with a non-lawyer under certain circumstances, such as sharing with a nonprofit that employed the lawyer, and would allow a non-lawyer to hold a financial interest in a legal entity whose purpose was to provide legal services, provided the non-lawyer has no power to direct or control the professional judgment of a lawyer. This alternative resembles the unsuccessful proposed revisions to Rule 5.4 by the ABA Ethics 20/20 Commission. The broader Alternative 2 basically scraps Rule 5.4 and allows fee sharing with any non-lawyer or non-legal entity as long as the client gives informed written consent. This option does not contemplate any additional ownership or entity regulation. While ATILS proposed some “illustrative” rule language, the task force is mainly seeking input at this point on the concepts rather than any specific rule language. ATILS plans to submit its final report by December 31, 2019.

## Arizona

In November 2018, the Arizona Supreme Court created a Task Force on the Delivery of Legal Services, and tasked it with (1) examining legal document-preparer programs, (2) recommending whether certain non-lawyers should be allowed to provide limited legal services before limited-jurisdiction courts, administrative hearings, and family courts, (3) proposing any rule changes that would encourage broader use of limited scope representations under Rule 1.2; and (4) weighing whether co-ownership by lawyers and non-lawyers in entities providing legal services should be allowed.<sup>4</sup> The Arizona task force continues its work, but the most recent draft materials on its website disclose that it plans to recommend substantial changes to its ethics rules. These include allowing lawyers and non-lawyers to form legal entities for the provision of legal services, recommending adoption of limited-license practitioners, and possibly authorizing Domestic Violence Lay Advocates to assist in the preparation of court documents. The task force is expected to finalize its recommendations by the end of December 2019.

## Utah

Last year, Utah created a program to license paralegal practitioners. Like California and Arizona, Utah also formed a work group to look at lawyer regulation and its impact on innovation and access to justice. The work group was tasked specifically with (1) loosening restrictions on lawyer advertising, solicitation, and fee arrangements, including referral fees and fee-sharing; (2) reviewing the merits of non-lawyer investment and ownership of various legal service business models; and (3) creating a regulatory body under the court (Utah is a unified bar) designed to regulate and test innovative legal service models and delivery systems. The work group had hoped to complete its report by June 2019, but its work is still in progress.



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## Illinois

Illinois focused its initial efforts on client-lawyer matching services. In 2018, the Illinois Attorney Regulation and Disciplinary Commission (ARDC) issued a study and sought comment on a draft framework to regulate entities that connect clients and lawyers (largely in response to Avvo and related services). The proposal included a framework for regulating for-profit and non-profit referral services and permitting fee-splitting with registered matching services. The ARDC is in the process of reviewing the comments received.

### Association of Professional Responsibility Lawyers (APRL)

APRL is a bar association for legal ethics lawyers. Most recently, APRL spurred a movement to change lawyer advertising rules that was embraced by the ABA and resulted in several changes to the advertising rules, which are currently under consideration in Minnesota. APRL has also formed a Future of Lawyering Committee focused on technology, the delivery of legal services, and the access to justice gap.<sup>5</sup> This committee is specifically looking at changes to the ethics rules and regulatory process. The committee has several subcommittees, including (1) referral fees/fee sharing (Rule 5.4/7.2); (2) multijurisdictional practice/unauthorized practice of law (Rule 5.5); (3) alternative business structures (Rule 5.4); and (4) firm management and related legal services (Rules 5.6/5.7). The committee has several liaisons members—including members from the National Organization of Bar Counsel (NOBC), a bar

association for ethics regulation counsel like me. This committee anticipates its work will take approximately two years, likely wrapping up in mid-2020.

### Conclusion

Exciting, huh? The law is undeniable hidebound in many respects, but the trade winds are blowing strong toward regulatory reforms that aim to improve access to justice for the many consumers who cannot afford counsel for basic legal services. It is also true that tech companies and other business service providers see this as an opportunity to break into the “practice of law” juggernaut that has been closely guarded, and rightly so, by the legal profession. I’m not sure what the right mix of changes will be, given the paramount regulatory goal of protecting legal consumers. But I’m excited to see the deep dives taking place, and I’m very glad the questions are being asked and debated. ▲

### Notes

<sup>1</sup> <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Task-Force-on-Access-Through-Innovation-of-Legal-Services>

<sup>2</sup> <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024450.pdf>

<sup>3</sup> <http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/board-approves-public-comment-on-tech-task-forces-regulatory-reform-options-under-consideration>

<sup>4</sup> <https://www.azcourts.gov/cscommittees/Legal-Services-Task-Force>

<sup>5</sup> <https://aprl.net/aprl-future-of-the-legal-profession-special-committee/>

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DEPOSIT PHOTOS

# Well-being and the group

“We cannot solve our problems with the same level of thinking that created them.”

—Albert Einstein

By Robin M. Wolpert  
Lawyers Professional Responsibility Board

As I travel around the country, speaking about well-being, the question that inevitably comes up is this: “I am learning a lot about well-being and I am working on being healthier. But there is only so much I can do. My organization, colleagues, and clients expect me to do things and meet deadlines that simply do not allow me to consistently live a healthier life. I am often stressed and anxious. I do not have time to work out or sleep enough. What do I do?”

To be a good lawyer, you have to be a healthy lawyer. The legal profession, however, is the most hazardous of all professions to our health. In 2017, the National Task Force on Lawyer Well-Being issued a call to action, asking us to step forward and transform our profession. The task force declared that we could create a thriving legal profession through cultural change. One of the most important messages from the task force report is that no one person can do this alone. The profession must act. All stakeholders must act. This article focuses on the role of “we” in creating well-being for ourselves and others.

The opening question is based on several unstated, but widely shared experiences, as a lawyer. These experiences include (1) I have little or no say in my work schedule, which is driven by others’ needs, and (2) I am all alone here in creating my own well-being. For the person asking this question, it does

not matter that the Task Force Report outlines strategies and action plans for organizations and stakeholders because we are in the process of doing that work. We have not yet created a thriving, healthy legal profession and culture. We are in transition. We are at the foot of the mountain, or maybe one ledge up. The mountain is high. And there is pain right now.

In “The 7 Habits of Highly Effective People,” Stephen Covey asserts that the way we see a problem is the problem. Similarly, in “The Three Laws of Performance,” Steve Zaffron and Dave Logan declare that how people perform correlates to how situations occur to them. “Occur” means the reality that arises within and from your perspective on a situation. The authors explain that there is a significant difference between the objective facts of the matter and the way those facts occur to each of us. Our actions relate to how the world occurs to us, not to the way that it actually is.

The opening question is based, in part, on the view that I have little or no say in my work schedule, which is driven by others’ needs. Covey calls this “environmental determinism,” and urges us to consider another way of viewing the situation. Covey describes the story of Victor Frankl, a psychiatrist and Jew imprisoned in the death camps of Nazi Germany. One day, naked and alone in the death camp, Frankl became aware of what he later called “the last of human freedoms,” a freedom that could not be taken away by his captors. Even though they could

control his entire environment and even his body, they could not take away his freedom or power to choose his response to what they did to him.

According to Covey, a fundamental principal about the nature of man is that “between stimulus and response, man has the freedom to choose.” Covey urges us to follow this fundamental principle and develop the habit of proactivity. Proactivity, says Covey, means to take responsibility for our own lives, choose our response, and make things happen. Instead of behaving based on our feelings and environment, we have the freedom to choose. Of course, the habit of proactivity does not answer the opening question—but perhaps it gives us another way of thinking about the question that provides openings for action.

The opening question is also based, in part, on the view that I am alone in creating my well-being. I ask you to try on the idea that the way things occur to us is that everyone can take care of themselves, and should take care of themselves, and the well-being of others is not our responsibility. I am not saying this is true, I am asking you to consider it. In the context of this belief system, the opening question has no satisfying answer—at least not right now, the way things are. That’s because I am in a zero-sum game. I am trying to win for me and I am not responsible for others.

But what if I choose a different way to think about this issue? Suppose I am committed to something bigger than me, to the well-being of the profession.

This means that if someone in my group fails, I fail too. Leaving others behind means I lose. I am responsible for others, not as a burden, but because the group is a source of my own success. The group creates power beyond itself resulting in performance, even peak performance, beyond the capacity of the individual. For those of you who have been fortunate enough to work on fantastic teams, you know exactly what I mean. In this context, the opening question seems answerable. The question itself could disappear if everyone in the group is playing for everyone to win, where no one gets left behind.

I began this conversation with the quotation from Albert Einstein because the opening question appears irresolvable as we raise awareness about well-being and begin to build the future envisioned in the National Task Force Report. The question itself speaks to the pain our lawyers are experiencing right now from stress, anxiety, chemical dependency, and mental health challenges. In this period of transition, we seem to be in a trap. We know more about how to enhance our well-being, but we have not yet created the environment around us to support that change. How to we reconstitute our environment to help us? Perhaps the way out of the trap is to consider that it is our way of seeing things that gets in the way of taking action to enhance our well-being and those of others.

Robin M. Wolpert is the chair of the Lawyers Professional Responsibility Board.

# **Attachment 8**

# **Attachment 9**

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**UPDATED MEETINGS OF THE LAWYERS  
PROFESSIONAL RESPONSIBILITY BOARD  
2020**

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

| <u>Date</u>                | <u>Location</u>  |
|----------------------------|--|
| Friday, January 31, 2020*  | Town & Country Club, St. Paul, MN                              |
| Friday, April 17, 2020*    | Town & Country Club, St. Paul, MN                              |
| Friday, June 19, 2020*     | Town & Country Club, St. Paul, MN                              |
| Friday, September 25, 2020 | Earle Brown Center, Brooklyn Center, MN<br>(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](mailto: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](http://www.mncourts.gov/ADAAccommodation.aspx) for information on how to submit an ADA Grievance form.*