

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
MEETING AGENDA

Friday, September 28, 2018 – 3:00 p.m. (following Seminar)

Earle Brown Heritage Center

6155 Earle Brown Drive

Minneapolis, Minnesota

1. Approval of Minutes of June 8, 2018, Lawyers Board Meeting (Attachment 1).
2. DEC Seminar Discussion/Feedback.
3. Lawyer Well-Being Supreme Court Initiative.
4. Committee Updates:
 - a. Rules Committee.
 - (i) MSBA Petition Update (Attachment 2);
 - (ii) LPRB Proposed Changes Update;
 - (iii) Joint Committee Proposal (Attachment 3).
 - b. Opinions Committee.
 - (i) Opinion No. 21.
 - c. DEC Committee.
 - (i) Save the Date: DEC Chairs Symposium, **May 17, 2019**.
5. Director's Report (Attachment 4).
6. Other Business:
 - a. *Michelle Lowney MacDonald v. Lawyers Board of Professional Responsibility* (Attachment 5).
 - b. Unclaimed Property—Wills; Commerce Department Update.
 - c. LPRB Well-Being Session, Friday, **November 30, 2018** (Time TBD).
 - d. Next meeting, Thursday, **January 31, 2019, 1:00 p.m.** (Attachment 6).
7. Quarterly Board Discussion (closed session).

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

**MINUTES OF THE 184th MEETING OF LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD JUNE 8, 2018**

The 184th meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, June 8, 2018, at the Town and Country Club, St. Paul, Minnesota. Board members present were: Board Chair Robin Wolpert, and Board members Joseph Beckman, Jeanette Boerner, James Cullen, Thomas Evenson, Roger Gilmore, Christopher Grgurich, Mary Hilfiker, Gary Hird, Peter Ivy, Bentley Jackson, Virginia Klevorn, Mark Lanterman, Michael Leary, Cheryl Prince, Gail Stremel, Bruce Williams, and Allan Witz. Present from the Director's Office were Director Susan Humiston, Deputy Director Timothy Burke, Senior Assistant Director Cassie Hanson and Assistant Director Rebecca Huting.

1. APPROVAL OF MINUTES.

The Minutes of the April 27, 2018, Board meeting were unanimously approved.

2. 2018 ANNUAL REPORT DRAFT.

Susan Humiston reported that this year's annual report continues her efforts to provide a more streamlined annual report, and talks about the key activities and functions the OLPR performs. Ms. Humiston stated that the report would be filed shortly after July 1, 2018, once the final statistics through June 30, 2018, are completed. Ms. Humiston also stated that the Executive Committee had asked Ms. Humiston to, and she did, elaborate in the annual report on the increased number of, and time committed by the Office's lawyers to, CLE seminars.

Ms. Humiston noted one interesting statistic, that between 2016 and 2017 more female lawyers were disciplined. Mary Hilfiker asked what proportion of lawyers are female. Ms. Humiston stated that she did not have that information immediately available, but that this information was maintained by the Board of Law Examiners. Virginia Klevorn inquired whether the increase appeared to be tied to an increase in issues such as substance use disorders. Ms. Humiston stated that she did not believe so. Ms. Humiston invited any additional recommendations for edits to the annual report before submission to the Supreme Court.

Bruce Williams discussed information contained in the annual report regarding the overdraft notification program. He noted that the number of trust account overdraft notifications received from banks has been declining, and that some of the overdrafts were caused by bank errors. Ms. Humiston confirmed that

although there may be bank errors in other instances, only when a bank error triggers an overdraft is there an overdraft notification to the Office.

Ms. Humiston confirmed the Office has spent significantly less time over the past couple of years on overdraft notifications. In 2015, the Office received 75 overdraft notifications from financial institutions; in 2016, the Director's Office received 52 such notifications; and in 2017, the Office received 43 such notifications.

Cassie Hanson observed that in the past year Ms. Humiston has prioritized education on trust account recordkeeping requirements and wondered whether this has helped prevent overdrafts. Ms. Humiston stated that she hoped this was the case, and also noted that the Office receives a number of requests for advisory opinions on this topic, as well. Ms. Humiston expressed her continued desire to do a trust account school, particularly for newer lawyers. By way of example of the demand for such education, Ms. Humiston reported that recently she did a trust account CLE with a representative of Minnesota Lawyers Mutual at which there were more than 300 attendees and over 60 questions.

Mr. Williams opined that the most unrecognized trust account rule was the requirement to perform monthly reconciliations. This is particularly true of solo practitioners who view this type of administrative requirement as last on the list of things to do.

Mr. Williams stated that he had read the draft annual report, found the report quite detailed and comprehensive, and thanked Ms. Humiston for her time and effort in preparing the report. Ms. Humiston thanked Mr. Williams for his comments and also noted that each lawyer in the Office writes the section of the report that relates to their particular department assignment.

Robin Wolpert noted the decline in complaints in recent years. Ms. Humiston stated that the decline in complaints from 2016 to 2017 was nine percent, and that there was a similar decline year over year from 2015 to 2016. Ms. Humiston stated that the decline in complaints appears to be a national trend, not one limited to Minnesota. Ms. Humiston also noted that, although the trend appears to be toward fewer complaints, there is not a substantial change in the total number of disciplines, particularly public disciplines. Anecdotally, this appears to be true nationally, as well. Ms. Humiston noted that the Minnesota trend toward fewer complaints appears to be continuing through the first five months of 2018.

A motion was made to approve the draft Annual Report included as Attachment 2 to the materials for the meeting, subject to completion based on the statistics as of the end of June 2018. Ms. Wolpert stated that she would add a note from the Board Chair to accompany delivery of the report to the Supreme Court, addressing topics such as the trend of a reduction in the number of complaints, the number of files in the disciplinary system, staff turnover, the strategic plan, and the like. The motion was seconded and passed unanimously.

3. COMMITTEE UPDATES.

A. Rules Committee.

Christopher Grgurich reported that the Board's Rules Committee will meet in June 2018 on a number of proposed rule changes, none of which appear to be objectionable, for presentation to the Board at its September meeting. Ms. Wolpert reported that the Minnesota State Bar Association expects to submit its petition on the MSBA's proposed changes to Rules 1.6(b) and 5.5, Minnesota Rules of Professional Conduct, at the end of this summer.

B. Opinions Committee.

Joseph Beckman reported that the ABA had issued Opinion No. 481, which addresses a lawyer's duty to self-report to current clients material errors. The Opinions Committee is considering whether Board Opinion No. 21 should be modified in light of ABA Opinion No. 481. Mr. Beckman, speaking for himself and not the Opinions Committee, opined that a change to Board Opinion No. 21 appears appropriate. Ms. Wolpert noted that given the interplay between ABA Opinion 481, Board Opinion No. 21, and the Rules of Professional Conduct, this issue may affect multiple areas.

Ms. Humiston and Mr. Beckman summarized the issue. ABA Opinion No. 481 requires disclosure of any material error to a current client. Opinion No. 21 also involves disclosure to current clients, but is limited to errors which could constitute malpractice. Additionally, ABA Opinion No. 481 gives greater clarity to the definition of "materiality."

Ms. Hanson noted that ABA Opinion 481 also gives guidance on defining the difference between a current and former client. Mr. Beckman stated that it may be appropriate to give similar guidance if the Board is

modifying Opinion No. 21. Ms. Wolpert stated that this issue would be on the agenda for the Board's fall meeting.

Ms. Humiston reported that she had talked with Ms. Hanson, as the Office's liaison to the Board's Opinions Committee, on two additional topics for the Committee to examine the appropriateness of a Board opinion. One topic is the issue of representing both parties in a dissolution matter, which presents a non-consentable conflict of interest in the view of the Office. The other topic relates to defining availability fees. Ms. Humiston noted that the Office still sees misuse and confusion regarding the definition of availability fees and believes that a Board opinion addressing this issue could help lawyers on this topic. Ms. Humiston stated that the Office will look at what other states have done on this issue.

Thomas Evenson inquired about the issue of representing both parties in a dissolution matter. Ms. Humiston noted that the Office had seen situations or received advisory opinion requests regarding situations where a lawyer says that the lawyer can represent both parties to a divorce, but could not help both parties if a dispute arose between the jointly-represented parties. However, by its very nature, a divorce is a dispute. More fundamentally, a lawyer may not represent opposing parties in a litigation matter. A dissolution matter is a litigation matter between parties, one spouse versus the other spouse.

Ms. Humiston also noted that similar concerns are seen with mediators who undertake to memorialize in writing agreements reached at mediation.

Mr. Williams stated that he understood that without doubt a lawyer can only represent one party to a dispute, not both. Thus, if an agreement is reached between a party represented by counsel and a *pro se* party, then the *pro se* party needed to execute some form of a waiver of counsel in connection with the stipulated agreement.

Cheryl Prince stated that as a family law practitioner, she has seen an increase in situations where *pro se* parties to a divorce want an attorney as the third party neutral. In such situations, the *pro se* parties can misunderstand the role of a neutral, believing the neutral can provide legal advice to a party, or the neutral may cross the line from acting as a neutral to providing legal advice to one or both parties.

Mr. Williams noted the significant increase in the number of *pro se* parties in dissolution actions. In particular, he noted a statistic provided at the Family Law Institute that 87% of the parties in dissolution proceedings are *pro se*. Ms. Humiston stated that district court self-centers see family law as the largest area in which they receive requests for assistance, as well.

James Cullen inquired whether the Office had received any requests for advisory opinions on whether a lawyer could represent more than one defendant in a criminal matter. Mr. Cullen noted that when he was a member of the Fourth District Ethics Committee, a number of complaints were investigated involving a lawyer representing multiple defendants in a criminal matter. Mr. Cullen expressed his opinion that such a situation creates a non-waivable conflict of interest.

Ms. Humiston stated that the Office has received complaints arising out of this situation, which presents a more difficult question. Jeanette Boerner concurred that such situations can be difficult. Ms. Humiston stated that at times a conflict of interest in representing multiple defendants in a criminal matter may be consentable. This is in contrast to family law matters, in which the parties have direct claims against each other, making any conflict non-waivable. Ms. Humiston further stated that the Comments to Rule 1.7 noted that in most instances conflicts in criminal matters are not waivable. Ms. Boerner agreed but stated that in some instances a waiver may be permissible. Mr. Cullen suggested that this topic could be added to the discussion of an opinion regarding conflicts in family law matters, and further noted that in federal criminal matters, the courts do not allow representation of multiple defendants in the same matter.

C. DEC Committee.

Ms. Wolpert congratulated the DEC Committee and Joshua Brand of the Office for putting on a terrific program at the recent DEC Chairs Symposium. Peter Ivy reported that the Symposium was a team effort. Mr. Ivy hoped that the Symposium helped DEC Chairs network, learn substantive information, and receive additional motivation for their work. Mr. Ivy also noted that preparations are underway for the DEC Seminar in September.

Mr. Ivy reported on the May DEC statistics. In particular, Mr. Ivy was happy to report that overall the DEC's (with the exception of the Fourth

DEC) are conducting their investigations in less than five months. Ms. Humiston opined that the DEC's do a great job in meeting the established timelines for investigations.

Roger Gilmore inquired as to the status of the position of Chair of the Fourth DEC. Ms. Humiston reported that the issue was on the calendar for the Supreme Court's June 2018 meeting. During the past year, the current Chair has been unable to perform the responsibilities as Chair for health reasons, and the two Vice-Chairs have been handling those responsibilities. Recently the Hennepin County Bar Association requested the Supreme Court appoint a new Chair and recommended Lisa Spencer, who currently is one of the Fourth DEC Vice-Chairs.

Ms. Wolpert reported on the feedback received in the surveys of attendees at the DEC Chairs Symposium. Ms. Wolpert reported that all presentations were viewed very favorably.

Ms. Wolpert reported that Ms. Humiston is working on the agenda for the DEC Seminar and requested Board members to let Ms. Humiston or Mr. Ivy know of any ideas for topics for the seminar. As to the DEC Seminar, Ms. Humiston stated that a hypothetical scenario, similar to that presented at the DEC Chairs Symposium, will be utilized at the DEC Seminar. She hoped that attendees would be able to work with other attendees from their DEC's. Ms. Humiston is also considering an "Ethics Jeopardy" or similar presentation. Ms. Wolpert noted that at a recent seminar she attended, pop-up topics of about 15 minutes at length were interspersed. Ms. Humiston stated this was under consideration for the DEC Seminar, as well. Gary Hird stated that he recently went to a seminar which had interactive feedback from an audience, and advised that it must be ensured in advance of the seminar the technology works smoothly.

Mr. Ivy inquired how many people usually attend the DEC Seminar. Ms. Humiston reported that attendance is usually about 130. Ms. Humiston also informed Board members that in the near future they will receive a request for nominations for the Volunteer of the Year Award.

4. DIRECTOR'S REPORT.

Ms. Humiston began with the budget update. The Office is in the middle of its biennial budget cycle, so in June the Office is providing a status report and Ms. Humiston will meet with the Supreme Court.

Overall, the Office's budget is doing well. Ms. Humiston noted that since the written update provided with the materials for the meeting was produced, revenue from lawyer registration fees has increased, so that the Office will be fine on revenue.

As to expenses, Ms. Humiston reported that most of the \$355,000 in savings are deferred expenses. These include items such as security upgrades, courtroom upgrades, and equipment required in connection with the Office's database management project. Savings have also been realized from the hiring of new lawyers at salaries lower than the salaries of the lawyers they replaced.

Ms. Humiston reported that the Office is approaching the end of the database project. It is coming in approximately on budget, although a few months behind schedule. Ms. Humiston noted that a number of change recommendations, totaling approximately \$50,000, have been proposed. Questions to be considered in connection with these change orders are whether the change orders cover services already included in the contract specification, and whether the Office wants the additional functionality. There is sufficient funding in the budget to pay for any of these change orders if approved.

Ms. Humiston summarized that income from all sources covers Office salaries, but rent, supplies and all other operating costs are paid from reserves.

Mr. Williams asked about the proposed courtroom upgrade. Ms. Humiston replied that there are two types of upgrades. One set of upgrades is to improve the ADA audio functionality in the courtroom. The other set of upgrades relates to technology. Ms. Humiston observed that the Office has many out-of-state witnesses who could testify remotely. If the testimony is through the Court system's ITV network, then the parties, judge and court reporter have to leave the courtroom and go to another conference room in the Minnesota Judicial Center which has ITV capability. The telephone audio in the courtroom is poor, and there is no freestanding technology in the courtroom.

Mr. Williams asked about the Office's annual rent payment on the courtroom. Ms. Humiston stated that the Office pays approximately \$24,000 per year, plus had paid the cost of building the courtroom when it was constructed in approximately 2002. There was then some discussion about why the Office paid rent on the courtroom and whether other judicial branch users could be charged for their occasional use of the courtroom, but also recognition that from time to time the Office uses other portions of the Minnesota Judicial Center for free.

Ms. Humiston noted that although the Minnesota Judicial Branch's ITD had stated it would bill the Office for services in fiscal year 2018 and despite multiple requests, no invoices have been received and it therefore appears the Office may not be charged for those services this fiscal year.

Ms. Boerner inquired whether there was a conflict of interest in the Office seeking to collect judgments, akin to concern about fees for public defender services included on matters. Ms. Humiston stated that no one had raised any such concerns, and that the amount of costs collected was a small percentage of the Office's budget.

Ms. Prince inquired whether there had been any talk of increasing the amount of costs awarded in lawyer discipline proceedings. Tim Burke stated that he has been considering this idea. The present amount of \$900 in costs was established in 1997. Mr. Burke reported that in today's dollars, that translates into approximately \$1,350. Ms. Prince inquired as to the process to change the amount of costs awarded. Ms. Humiston replied that this would require a rule change. Additionally, the New Jersey lawyer discipline office is in the process of finding out what other jurisdictions receive for cost awards. We will receive those results, and those results should provide substantial insight as to what, if any, change in the amount of costs awarded would be appropriate.

Mr. Cullen asked that as part of the scheduling of hearings in Panel matters, whether a conference room at the Minnesota Judicial Center could be reserved for the Panel members to use to then confer. Ms. Humiston stated that she would see if this would be possible.

Mr. Williams asked when the budget presentation would be made to the Supreme Court. Ms. Humiston stated that she would meet with the Court on or about June 20, 2018.

Ms. Humiston asked Rebecca Huting of the Director's Office to introduce herself, and she did so.

Ms. Humiston reported that May was a particularly busy month for the Office. Reviews were conducted in May for all Office personnel. Ms. Humiston reported that most reviews were quite positive and stated that she is extremely pleased with the team currently in place. In particular, Ms. Humiston stated that the newly hired lawyers are working very hard and working out very well.

Ms. Humiston reported that the statistics in May remained about the same. Ms. Humiston stated that Ms. Wolpert had shared the thoughts of the Board and Justice Lillehaug on case processing goals.

The Board has established two case processing targets for the Office for files in the disciplinary system. One is a total of no more than 500 open files, and the other is a total of no more than 100 files over one year old. Ms. Humiston believes these are appropriate targets.

Ms. Humiston noted that she keeps one additional target in mind. This is the number of cases on which the Office can complete investigation within one year of the complaint being filed. It is extremely rare to have a litigated public discipline matter completed within one year of when the complaint was filed. Ms. Humiston noted that certain types of files, particularly complex files such as files involving audits or multiple complaints which are received across time, can take more than one year to complete the investigation.

All that said, Ms. Humiston believes the targets are appropriate. The question therefore is whether the discipline system can get to no more than 100 files more than one year old in the near term. When analyzing a path as to what can be accomplished by the end of September, and then by the end of December, Ms. Humiston noted of the files more than one year old at this time, 16 are on hold, and 17 are the subject of proceedings pursuant to Rule 12(c), Rules on Lawyers Professional Responsibility, by which a lawyer is suspended for a year, with no proceedings occurring, and then proceedings return. Thus, there are at least 33 files which the Office cannot move.

Additionally, trusteeships consume a substantial amount of the Office's resources. Currently, there are five trusteeship files in the Office. Some involve more than 100 boxes of client files which must be inventoried. Thus, Ms. Humiston has been inquiring as to what really does the Office have to do to get to achieve the targets in light of these factors.

Mr. Williams opined that the target of 100 does not really give the Office much breathing room at all. Ms. Humiston replied that at this time she is unable to tell how realistic the target of 100 is in light of the fact that she does not know what the full capacity of the Office is. Factors causing this include attorney turnover, as a result not knowing what the full Office case management capabilities are until the Office has 12 full-time employees who are up to speed. Part of that development is providing skill training on multiple case handling of up to 50 files, which is currently the senior lawyer file assignment.

Mr. Hird inquired whether additional categories with different targets should be reported in light of the fact that certain cases simply cannot be completed or charged out within one year. Mr. Gilmore noted that years ago the Board had talked about deferring establishing firm goals until a new Director was in place and had time to assess the Office and implement changes. A new Director is on board, but given all the recent changes we are not in that position yet.

Ms. Prince opined that the Board should redefine what files are over one year old and over which the OLPR has control or responsibility (files not on hold, under advisement, etc.). This would narrow the categories for which the Office is responsible to the ones on which the Office is able to achieve movement on the files. To Ms. Humiston, she believes that getting the investigation completed on 80 percent of files within a year would feel successful.

Mr. Beckman agreed with Ms. Prince's comment, that the Board understands what the various categories of files are. Thus, is there a way to dashboard that to focus on subcategories the Office can control? Ms. Humiston noted that two files are with the Supreme Court right now. Ms. Boerner opined that the reports should be broken out in a way that recognizes the types of cases the Office cannot control and focuses on the cases the Office needs to be processing.

Ms. Prince stated that she understands this to be the focus of the Supreme Court, that the Board should encourage the Court to focus on what the Office can control and on what Ms. Humiston is trying to make movement on and what she is accomplishing. The way to do this may be through different reporting to track the movement of files the Office can control. This will give Ms. Humiston and the Office the credit they deserve for the progress which has been made. Ms. Prince noted that the Supreme Court likes the target of no more than 100 files in the system that are more than one year old, so suggested that 100 be defined by the types of cases on which the Office has the capability to make progress. Reports could be revamped or put into a different format to be consistent with this.

Mr. Gilmore stated that he believed it would be useful if Ms. Humiston came up with ideas as to how the reports could be modified, and met with the Executive Committee. Then, the Executive Committee could report to the Board at its next meeting.

Ms. Humiston reported that the Office has a plan for case management, there are many challenges to the plan, but overall the plan looks good, and she is pleased with what the Office is and will be accomplishing.

Mr. Hird stated that the reports currently do not show this. Ms. Prince stated that reports should be formatted to show this.

Mr. Beckman stated that everyone is pleased with how the Office is performing, and understands that the priority on cases is by the harm being caused. Ms. Humiston stated that the Office is focused on these types of cases, and Mr. Beckman stated that the Board supports Ms. Humiston in this effort.

Ms. Wolpert appreciated the substantial input the Board members provided on the details of the Office's reports. She stated that the Executive Committee can discuss what reports are generated and what information is in the reports, including whether to separate or to categorize matters based on those within or not within the Office's ability to take action on the matters. Notwithstanding the foregoing, Ms. Wolpert reminded the Board that Justice Lillehaug wants to see the case processing targets met by the end of the year. Therefore, Ms. Wolpert asked Board members to generate ideas on how cases can be moved and how the Office can meet the targets of the Supreme Court. Ms. Humiston has informed Ms. Wolpert that this will be difficult to accomplish, and therefore conversations among the Board members and Ms. Humiston should occur about how the case processing targets can be met. At this time, Ms. Wolpert does not believe a reevaluation of whether the case processing targets are realistic is appropriate. Only if after further discussion and deliberation it is determined the case processing targets are not achievable, then the Board can decide such is the case and have discussions with Justice Lillehaug. Ms. Wolpert reiterated that the Board and Office are not at that position yet. Mr. Beckman reiterated his opinion that it is important to separate in the reporting matters over which the Office has no control.

Ms. Humiston reiterated that the Office had a path toward meeting the case processing targets. As part of this, she has prepared a calendar for herself with deadlines for every separate case in the Office, and she has also redistributed work to achieve these targets.

Mr. Cullen asked about the expunction of wills the Office takes possession of during trusteeship matters. Mr. Cullen stated that he understands that after a period of time, the Office will destroy such wills. He is wondering whether these wills could be scanned before destruction. Ms. Humiston replied that substantial labor expense is involved in any such project. For example, in one matter alone, the Office has more than 700 wills in the trusteeship proceeding. Ms. Humiston is comfortable with the process the Court has put in place, because often the wills are of persons who died long ago. Ms. Humiston also reported that the Office

attempts to find people and return original wills; the wills under discussion are those of people the Office was unable to locate. Mr. Cullen and Mr. Hird inquired whether the wills, instead of being destroyed, could be delivered to the Department of Commerce as unclaimed property. Ms. Humiston stated that she would look into this issue.

5. **OTHER BUSINESS.**

Ms. Wolpert directed the Board's attention to the proposed 2019 meeting dates, and noted that the first Board meeting of 2019, currently scheduled for February 1, 2019, may be changed.

Ms. Wolpert also offered a preview of the July 27 Board offsite. There will be two presentations, each approximately 45 minutes in length, followed by a period for questions. There will then be a socialization period and lunch provided. The event will be at the Minnesota Judicial Center. The presenters are on the forefront of how law ought to be practiced and how it will be practiced in the future. Based on her recent attendance at a conference, Ms. Wolpert believes that Minnesota is technologically behind many areas of the country in the practice of law. The presenters at the Board offsite will talk about what people are and will be doing in the future in the practice of law. This will stimulate a conversation about how the Board and Office can get ahead of thinking about the professional responsibility issues arising from advances in technology.

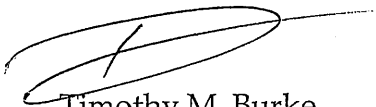
Ms. Wolpert stated that the third Board offsite will be a joint presentation with the Office to put together a plan to promote lawyer well-being for the lawyers of Minnesota. Ms. Wolpert wanted staff to be present at the July 27 Board offsite as she believes Office staff will benefit greatly from the technology presentations.

6. **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.]

FILED

September 21, 2018

**OFFICE OF
APPELLATE COURTS**

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8005

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

The Minnesota State Bar Association has filed a petition proposing amendments to the Minnesota Rules of Professional Conduct, specifically Rules 1.6(b) and 5.5. The court will consider the petition and the proposed amendments to the Rules of Professional Conduct after providing for a public-comment period.

IT IS HEREBY ORDERED that any person or organization that wants to provide written comments in support of or in opposition to the proposed amendments to Rules 1.6(b) and 5.5 of the Minnesota Rules of Professional Conduct shall file one copy of those comments with the Clerk of the Appellate Courts, using the appellate courts' electronic filing system if required to do so, *see* Minn. R. Civ. App. P. 125.01(a)(1). All comments shall be filed so as to be received by the Clerk on or before November 20, 2018.

IT IS FURTHER ORDERED that a hearing will be held before this court to consider the proposed amendments to the Rules of Professional Conduct. The hearing will be held at 10:00 a.m. on January 15, 2019, in the Supreme Court Courtroom, State Capitol, Saint Paul, Minnesota. Any person or organization that wants to make an oral presentation at the hearing, in support of or in opposition to the proposed amendments to the Rules of Professional Conduct, shall file a request with the Clerk of the Appellate Courts to appear at the hearing, using the appellate courts' electronic filing system if required to do so, *see*

Minn. R. Civ. App. P. 125(a)(1), along with one copy of the material to be presented at the hearing. All such requests shall be filed so as to be received by the Clerk on or before November 20, 2018.

Dated: September 21, 2018

BY THE COURT:

A handwritten signature in black ink, appearing to read "Lorie S. Gildea". The signature is written in a cursive, flowing style.

Lorie S. Gildea
Chief Justice

Case No. _____

**STATE OF MINNESOTA
IN SUPREME COURT**

In re the Minnesota Rules of Professional Conduct

**PETITION OF MINNESOTA STATE BAR ASSOCIATION TO AMEND
RULES 1.6(b) AND 5.5 OF THE
MINNESOTA RULES OF PROFESSIONAL CONDUCT**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF MINNESOTA:

Petitioner Minnesota State Bar Association (“MSBA”) respectfully submits this petition asking this Court to adopt the proposed amendments to Rules 1.6(b) and 5.5 4(c) of the Minnesota Rules of Professional Conduct attached hereto as Attachments 1 and 2, respectively. The proposed amendments would clarify and correct conflicting interpretations of the current Rule 1.6(b)(8) and conform the requirements for practice in Minnesota by lawyers licensed only in other jurisdictions to the needs of an increasingly nationwide practice of law.

In support of its petition, the MSBA would show the Court the following:

1. The petitioner MSBA is a not-for-profit association of lawyers admitted to practice before this Court and the lower courts of the State of Minnesota.
2. This Honorable Court has the exclusive and inherent power and duty to administer justice, to adopt rules of practice and procedure before the courts of this state,

to establish the standards for regulating the legal profession and to establish mandatory ethical standards for the conduct of lawyers and judges. This power has been expressly recognized by the Minnesota Legislature. *See* MINN. STAT. § 480.05 (2002).

3. This Court adopted the Minnesota Rules of Professional Conduct in 1985 in response to a petition of the MSBA. The Court adopted substantial revisions to the Rules in response to Petitions by the MSBA in 2005 and 2015. From time to time, the MSBA has petitioned the Court for amendments to individual rules because of changes to the ABA Model Rules of Professional Conduct, because of a perceived need to address new or changing issues in the practice of law, or to clarify or correct rules that were viewed as problematical. The Court has enacted numerous changes to the Rules since their initial adoption as a result of MSBA petitions.

4. The proposed amendments were recommended by the Rules of Professional Conduct Committee of the MSBA following a year-long study and after receiving input from MSBA sections, from the OLPR and from the LPRB. They were presented to the MSBA Assembly in December, 2017. The Assembly conducted an hour-long continuing legal education program on the proposed amendments to Rule 5.5 at its December 15, 2017 meeting. Attached to this Petition as Attachments 3 and 4 are the Reports and Recommendations of the MSBA Rules of Professional Conduct Committee on the proposed amendments. At its April 20, 2018 meeting the MSBA Assembly, the policy-making entity of the Association, adopted both Reports and Recommendations. A statement of the reasons for adopting the amendments is set forth in Attachments 3 and 4.

5. The interest of the MSBA in this matter is as follows. Key terms of Rule 1.6(b)(8), such as “establish a claim or defense” and “actual or potential controversy, are ambiguous. These ambiguities have been exacerbated by conflicting interpretations published by the Lawyers Professional Responsibility Board (“LPRB”) and the Office of Lawyers Professional Responsibility (“OLPR”) that make enforcement of the rule problematic. The MSBA respectfully urges amendments to Rule 1.6(b) to resolve the ambiguity and to provide clarity to Minnesota lawyers on responding to public criticism by clients and former clients. Second, the MSBA seeks to respond to the invitation of this Court, in *In re Panel File 39302*, 884 N.W.2d 661 (Minn. 2016) to amend and expand Rule 5.5 to better reflect the bar’s understanding of what practice areas are “reasonably related” to a lawyer’s field of practice and to amend the Rule to better reflect the realities of modern interstate practice of law. The MSBA thus asks this Court to publish the attached proposed Amendments to Rules 1.6(b) and 5.5 of the Minnesota Rules of Professional Conduct for notice comment and to adopt the Amendments after due consideration.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By /s/Paul W. Godfrey
Paul W. Godfrey (Attorney #0158689)
Its President
600 Nicollet Mall #380
Minneapolis, MN 55402
612-333-1183

(Signatures continued on the following page).

Minnesota State Bar Association
Standing Committee on the
Rules of Professional Conduct

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ATTACHMENT 1

Proposed amendments to Rule 1.6(b)(8), Minnesota Rules of Professional Conduct and comments thereto.

Rule 1.6(b) A lawyer may reveal information relating to the representation of a client if:

...

~~(8) the lawyer reasonably believes the disclosure is necessary to respond to a client's specific and public accusation, made outside a legal proceeding, of misconduct by the lawyer, where the accusation (a) raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects and (b) includes the client's disclosure of information or purported information related to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;~~

~~(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense in an actual or potential civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;~~

~~(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense by the lawyer in an actual or potential civil, criminal, or disciplinary proceeding based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;~~

~~(910) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order;~~

~~(1011) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3; or~~

(4412) the lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Comments to Rule 1.6.

[8] ~~Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(8) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. Paragraph (b)(8) does not permit disclosure to respond to a client's petty or vague critique, or general opinion, of a lawyer, such as those that are common in online rating services. Specific allegations are those which can be factually verified or corrected. Public accusations are those made to third persons other than the lawyer and those associated with the lawyer in a firm. Paragraphs (b)(8) and (b)(9) recognize the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.~~

[9] ~~A lawyer entitled to a fee is permitted by paragraph (b)(8) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim or charge involving the conduct or representation of a former client. Such a claim or charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(9) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding~~

directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. A lawyer entitled to a fee is permitted by paragraph (b)(9) to prove the services rendered in an action to collect it.

ATTACHMENT 2

Proposed amendments to Rule 5.5, Minnesota Rules of Professional Conduct and comments thereto.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so, except that a lawyer admitted to practice in Minnesota does not violate this rule by conduct in another jurisdiction that is permitted in Minnesota under Rule 5.5(c), ~~and (d), and (e)~~ for lawyers not admitted to practice in Minnesota.

(b) A lawyer who is not admitted to practice in ~~this jurisdiction~~ Minnesota shall not:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of Minnesota law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice Minnesota law ~~in this jurisdiction~~.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction which:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraph (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Such reasonably-related services include services which are within the lawyer's regular field or fields of practice in a jurisdiction in which the lawyer is licensed to practice law.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction Minnesota that are services that the lawyer is authorized to provide by exclusively involve federal law or the other law of this another jurisdiction in which the lawyer is licensed to practice law, provided the lawyer advises the lawyer's client that the lawyer is not licensed to practice in Minnesota.

(e) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are performed on behalf of a person who has a family, close personal, or prior professional relationship with the lawyer.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional misconduct in that person's jurisdiction. The exception is intended to permit a Minnesota lawyer, without violating this rule, to engage in practice in another jurisdiction as Rule 5.5(c) and (d) permit a lawyer admitted to practice in another jurisdiction to engage in practice in Minnesota. A lawyer who does so in another jurisdiction in violation of its law or rules may be subject to discipline or other sanctions in that jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the general practice of the law of this jurisdiction. Presence may be systematic and continuous even

if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] Prior versions of Rule 5.5 and prior interpretations of the Rule assumed that attorneys practice in fixed physical offices and only deal with legal issues related to the states in which their offices are located. The increased mobility of attorneys, and, in particular, the ability of attorneys to continue to communicate with and represent their clients from anywhere in the world, are circumstances that were never contemplated by the Rule. The adoption of Rules 5.5(b) and (c) in 2005 reflected the State's growing recognition that multi-jurisdictional practice is a modern reality that must be accommodated by the Rules.

The assumption that a lawyer must be licensed in Minnesota simply because he or she happens to be present in Minnesota no longer makes sense in all instances. Rather than focusing on where a lawyer is physically located, Minnesota's modifications of Rule 5.5(b)(1) and Rule 5.5(d) clarify that a lawyer who is licensed in another jurisdiction but does not practice Minnesota law need not obtain a Minnesota license to practice law solely because the lawyer is present in Minnesota.

Notwithstanding the Minnesota amendments to Rule 5.5(b)(1) and (2) and Rule 5.5(d)(2), Rule 8.5(a) still provides that a lawyer who is admitted in another jurisdiction, but not in Minnesota, "is also subject to the disciplinary authority of ... [Minnesota] if the lawyer provides or offers to provide any legal services in" Minnesota. In particular, such a lawyer will be subject to the provisions of Rules 7.1 through 7.5 regarding the disclosure of the jurisdictional limitations of the lawyer's practice. In addition, Rule 5.5(b)(2) continues to prohibit such a lawyer from holding out to the public or otherwise representing that the lawyer is admitted to practice Minnesota law.

[56] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraph (d), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[67] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[78] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia, and any state, territory, or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice because, for example, the lawyer is on inactive status.

[89] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[910] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

[1011] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[1112] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[1213] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac

vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[143] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraph (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[145] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

[16] Paragraph (e) recognizes that lawyers are often sought out by former clients, family members, personal friends, and other professional relationships for legal advice and assistance, even though the person is domiciled in a jurisdiction in which the lawyer is not licensed. The risk of harm to the public in such situations is very low and is outweighed by the value inherent in clients being able to choose lawyers they trust.

[157] Paragraph (d) identifies a circumstance in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. Except as provided in paragraph (d), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[168] Paragraph (d) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation, or judicial precedent.

[179] A lawyer who practices law in this jurisdiction pursuant to paragraph (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[1820] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraph (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, such notice may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b). An attorney who is not licensed in Minnesota but who limits his or her practice in Minnesota to federal law or the law of another jurisdiction in which the lawyer is licensed pursuant to Rule 5.5(d), must note the lawyer's jurisdictional limitations when identifying the lawyer on letterhead, on a website, or in other manners. See Rule 7.5(b).

[1921] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

ATTACHMENT 3

Report and Recommendation regarding amendment of Rule 1.6, Minn. R. Prof. Conduct, adopted by the Assembly of the Minnesota State Bar Association

April 20, 2018

No resolution presented herein reflects the policy of the Minnesota State Bar Association until approved by the Assembly. Informational reports, comments, and supporting data are not approved by their acceptance for filing and do not become part of the policy of the Minnesota State Bar Association unless specifically approved by the Assembly.

Report and Recommendation to the MSBA Regarding Proposed Amendments to MRPC 1.6, Confidentiality of Information

**Rules of Professional Conduct Committee
November 1, 2017**

RECOMMENDATION

RESOLVED, that the MSBA petition the Minnesota Supreme Court to adopt proposed amendments to Minnesota Rules of Professional Conduct 1.6(b)(8) and (9), and related comments, as set forth in this report.

Rule 1.6(b) A lawyer may reveal information relating to the representation of a client if:

(8) the lawyer reasonably believes the disclosure is necessary to respond to a client's specific and public accusation, made outside a legal proceeding, of misconduct by the lawyer, where the accusation (a) raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects and (b) includes the client's disclosure of information or purported information related to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

~~(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense in an actual or potential civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;~~

(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense by the lawyer in an actual or potential civil, criminal, or disciplinary proceeding based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

(910) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order;

(4011) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3; or

(4112) the lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Comments to Rule 1.6.

[8] ~~Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(8) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. Paragraph (b)(8) does not permit disclosure to respond to a client's petty or vague critique, or general opinion, of a lawyer, such as those that are common in online rating services. Specific allegations are those which can be factually verified or corrected. Public accusations are those made to third persons other than the lawyer and those associated with the lawyer in a firm. Paragraphs (b)(8) and (b)(9) recognize the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.~~

[9] ~~A lawyer entitled to a fee is permitted by paragraph (b)(8) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim or charge involving the conduct or representation of a former client. Such a claim or charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example,~~

a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(9) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. A lawyer entitled to a fee is permitted by paragraph (b)(9) to prove the services rendered in an action to collect it.

REPORT

Committee History, Mission, Procedures.

The Rule 1.6 subcommittee was appointed on April 25, 2017, by Mike McCarthy, then Chair of the MSBA Committee on the Rules of Professional Conduct (Committee). Initial members of the subcommittee were William J. Wernz, Fred Finch, David Schultz, Tim Baland, Jr., and Patrick R. Burns. On and after September 12, 2017, Timothy Burke replaced Patrick R. Burns.

Appointment of the subcommittee was requested by William J. Wernz in a memo dated April 17, 2017. The memo stated the purposes of the subcommittee would be (a) to study and make recommendations regarding a possible petition to amend Rule 1.6(b)(8), Minn. R. Prof. Conduct; and (b) to consider how the development of electronic social media and other electronic publication modes may affect the issues addressed by Rule 1.6(b)(8). The memo also stated, "The main occasion for this request is the issuance by the Lawyers Professional Responsibility Board (LPRB) of Opinion 24, on September 30, 2016." The memo also identified what Mr. Wernz regarded as serious problems with Opinion 24.

The subcommittee's recommendations were heard and considered at the Committee meeting held on September 26, 2017. At that meeting, the Committee voted to support the recommendations of the subcommittee absent any dissenting comments received from MSBA sections. Following that meeting, the proposed changes and background information were provided to all MSBA section chairs, with notice that comments were due October 27, 2017. The only comment received came from the New Lawyers Section, indicating they had reviewed and discussed the proposed changes to Rule 1.6 and voted to support them.

This information was brought back to the Committee when they met on October 31, 2017. It was noted by representatives of the Office of Lawyers Professional Responsibility (OLPR) that the LRPB would not be formally discussing the proposed amendments until their meeting in January, 2018. As a formality, the Committee again voted to support bringing the proposed changes to the MSBA Assembly at their December meeting. The Committee felt it important that these changes, along with the changes recommended to Rule 5.5, be combined in one petition to the Court.

Sources.

Sources reviewed by the subcommittee included Lawyers Board Opinion 24, the April 17, 2017, memo of Mr. Wernz, Patrick R. Burns, Client Confidentiality and Client Criticisms, Bench & B. of Minn., Dec. 2016 (“OLPR article”) and William J. Wernz, Board Forbids Lawyer-Self-Defense in Public Forum – a Further Look – Board Op. 24, Minn. Law., April 10, 2017 (“Wernz article”). The subcommittee also reviewed literature related to the advent and influence of electronic social media.

Minnesota and ABA Model Rules 1.6.

Since they were first adopted in 1985, the Minnesota Rules of Professional Conduct have followed the ABA Model Rules of Professional Conduct to a large degree. The 2005 amendments to the Minnesota Rules were generally designed to increase the overlap of the two sets of rules.

Nonetheless, Minnesota Rule 1.6 (“Confidentiality of Information”) has always had many variations from Model Rule 1.6. In 1985, the Court rejected ABA Model Rule 1.6 altogether, preferring to carry forward the confidentiality provisions of the Minnesota Code of Professional Responsibility into Minnesota Rule 1.6. From the 1980s to the early part of this century Minnesota adopted amendments to Rule 1.6 which generally enhanced the discretion of lawyers to disclose confidential information when necessary to rectify or respond to client misconduct. These amendments were usually not based on the Model Rules and in some cases the ABA rejected proposals similar to those adopted in Minnesota. Sometimes the Model Rules were later amended to permit disclosures similar to those permitted in Minnesota.

In 2005, Minnesota adopted several variations from Model Rule 1.6. The variations generally permitted more disclosures than the Model Rule. For example, Minnesota Rule 1.6(b) permits eleven types of disclosures, but Model Rule 1.6(b) permits only seven. Even where the Minnesota and Model Rules address the same types of permitted disclosures, the relevant provisions sometimes differ. For example, Minnesota added the words “actual or potential” to “controversy” in Model Rule 1.6(b)(8).

Based on this history, the Committee has not found it important to try to conform to ABA Model Rule 1.6(b).

Lawyers Board Opinion No. 24 and the OLPR Article

On September 30, 2016, the LPRB issued Opinion No. 24. The Board did not follow its customary procedures of seeking comment on a draft of the opinion and including a Board explanatory comment with the opinion. Opinion 24 did not address the meaning of Minnesota’s addition of “actual or potential” to “controversy.” Opinion 24 did not include any explanation of

its conclusion that Rule 1.6(b)(8) does not permit disclosure of information covered by rule 1.6(a), “when responding to comments posted on the internet or other public forum. . .”

It appears that Opinion 24 takes the position that there are no circumstances in which the “actual or potential controversy” provision of Rule 1.6(b)(8) permits disclosures. Mr. Wernz reported that he inquired of the OLPR and of the LPRB whether they believed there were any such circumstances, but did not receive a reply.

The OLPR article appears to take the position that the controversy provision would apply only in public debates, especially on the internet, “that have substantial ramifications for persons other than those engaged in [the debates].” The OLPR article regards such ramifications as “unlikely” in the case of internet ratings of a lawyer. The Committee considered, however, whether such ramifications would include decisions by prospective clients as to retaining lawyers who were the subject of such ratings. A majority of the Committee has concluded that there are circumstances, outside of legal proceedings, in which a lawyer should be permitted to disclose confidential information to respond to a client’s serious, specific allegations of the lawyer’s misconduct.

A majority of the Committee does not regard the status quo as satisfactory. The meaning of “actual or potential controversy” is debatable. It is not evident that Opinion 24 states the “plain meaning” of Rule 1.6(b)(8). The OLPR article is not consistent with Opinion 24 as to when disclosures are allowed in public controversies – OLPR would allow some disclosures, but Opinion 24 would allow none. A majority of the Committee regards its proposed rule amendments as not expanding disclosure permissions beyond those allowed under current rules.

Electronic Social Media.

Electronic social media (ESM) has developed after 2005. ESM has become a major fact of life. ESM provides important resources for information used in making everyday decisions, including selection of providers of various services. Developments include online rating services in which customers and clients rate the services of various providers, including lawyers. The Committee has reviewed online ratings of lawyers. The Committee has the following observations and conclusions.

Most online ratings of lawyers by clients express general opinions. Where ratings include allegations of fact, they are often fairly general and do not disclose confidential client information. Most factual allegations do not involve serious misconduct, but instead involve such matters as diligence, adequacy of communications, manners and the like. However, ESM postings can involve serious accusations of misconduct by lawyers.

Opinions, Rules and Cases in Other Jurisdictions.

The Committee reviewed ethics opinions from other jurisdictions, including those that were cited in the OLPR article and were apparently relied on by the LPRB in issuing Opinion 24.

The opinions cited in the OLPR article do not address the situation where the client's accusation includes disclosure of confidential information. Three of the cited opinions expressly state that they assume the client has not disclosed confidential information and the other cited opinions expressly rely on these three opinions.¹ Opinion 24 in effect takes a position that is not taken by these opinions, viz. that Rule 1.6(b)(8) does not permit disclosure even when the client's accusation includes disclosures. Insofar as opinions in other jurisdictions take the position that lawyers may not disclose confidential information to respond to critiques outside of legal proceedings when the critiques do not themselves disclose confidential information, the Committee agrees with them.

D.C. Ethics Opinion 370, *Social Media I: Marketing and Personal Use* (Nov. 2016) was issued after LPRB Op. 24 was issued. Op. 370 includes a section, "Attorneys May, With Caution, Respond to Comments or Online Reviews From Clients." This section applies a Rule of Professional Conduct, unique to the District of Columbia, that allows disclosure or use of otherwise protected client information, "to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." D.C. Rule 1.6(e). Op. 370 states, "Attorneys may respond to negative online reviews or comments from clients. However, Rule 1.6 does not provide complete safe harbor for the disclosure of client confidences in response to a negative internet review or opinion." For further explication, Op. 370 cites Comment 25 to D.C. Rule 1.6.² The committee inquired of D.C. Bar Counsel's office regarding

¹ Los Angeles County Bar Ass'n Op. No. 525 addresses a situation "when the former client has not disclosed any confidential information." San Francisco Bar Ass'n Op. 2014-1 states, "This Opinion assumes the former client's posting does not disclose any confidential information and does not constitute a waiver of confidentiality or the attorney-client privilege." New York State Bar Ass'n Op. 1032 addresses response to a client statement that "did not refer to any particular communications with the law firm or any other confidential information." Texas State Bar Op. No. 662 and Pennsylvania Bar Ass'n Formal Op. 2014-200 both rely on the Los Angeles, San Francisco and New York opinions.

² Comment 25 to D.C. Rule 16 states, "If a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose that client's confidences and secrets in establishing a defense, without waiting for formal proceedings to be commenced. The requirement of subparagraph (e)(3) that there be "specific" charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an example of such a general criticism would be an assertion by the client that the lawyer "did a poor job" of representing the client. But in this situation, as well as in the defense of formally instituted third-party proceedings, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and

its experience with D.C. Rule 1.6(e). Bar Counsel indicated that it generally advises lawyers to avoid disclosures in responding to online reviews, but did not provide specific information on rule interpretation issues.

Several attorneys in other jurisdictions have been publicly disciplined for disclosing confidential information in response to online reviews.³ Violations of confidentiality rules were clear in these cases. The conduct in these cases would violate both the current Minnesota Rule 1.6 and the rule as proposed for amendment.

The Committee believes it will be helpful to the bar and the public to address the situation in which the client has disclosed confidential information or purported information. Proposed Rule 1.6(b)(8) does address this situation.

Committee Comments on Drafting.

The proposed amendments bifurcate current Rule 1.6(b)(8) into proposed Rules 1.6(b)(8) and (9), to make clear when a lawyer may disclose information in legal proceedings and when disclosure may be made outside legal proceedings. Current Rules 1.6(b)(9), (10), and (11) would be re-numbered 1.6b(10), (11), and (12).

Proposed Rule 1.6(b)(8).

The proposed amendment does not retain the term “controversy,” because it has proved ambiguous. The OLPR article takes the position that “public controversy” refers to issues outside legal proceedings, that is, “issues that are debated publicly and that have substantial ramifications for persons other than those engaged in it.” A “debate” does not require a “proceeding” and proceedings are not normally called “debates.” The OLPR article cites opinions from other jurisdictions as “consistent.” However, the opinions in other jurisdictions that construe the term “controversy,” conclude that “controversy” requires a legal “proceeding.”⁴

appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.”

³ *People v. James C. Underhill Jr.*, 2015 WL 4944102 (Colo. 2015); *In the Matter of Tsamis*, Ill. Att’y Registration and Disciplinary Comm’n, Comm’n No. 2013PR00095 (Ill. 2014); *In the Matter of Margaret A. Skinner*, 295 Ga. 217, 758 S.E.2d 788 (Ga. 2014).

⁴ Texas construes the “controversy” exception to confidentiality as applying, “only in connection with formal actions, proceedings or charges.” Texas Op. 662. Pennsylvania relies for its conclusion on a comment that has no Minnesota counterpart. “Comment [14] makes clear that a lawyer’s disclosure of confidential information to ‘establish a claim or defense’ only arises in the context of a . . . proceeding.” Pa. Op. 2014-200. The other opinions cited by the OLPR article do not construe the term “controversy.” Another cited opinion finds that the term “accusation,” as used the governing rule, “suggests that it does

The proposal uses the term “accusation,” rather than “actual or potential controversy.” The proposal also makes clear that an accusation “made outside a legal proceeding” is covered.⁵ “Accuse” and similar terms were used for many decades before 2005. The term “accuse” was used in Rule 1.6(b)(5) from 1985 to 2005, in DR 4-101(C) of the Code of Professional Responsibility before 1985, and in Canon 37 of the ABA Canons that preceded the Code.⁶

The proposal uses the terms “specific and public” to modify “accusation.” The term “specific” is borrowed from D.C. Rule 1.6(e). The proposal includes the phrase “a substantial question as to the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” This phrase has been used for over thirty years in Minnesota and Model Rule 8.3, and has a reasonably well-understood meaning.

A client or former client who accuses a lawyer of serious misconduct in a representation will normally disclose confidential information or purported information in making the accusation. If a client made the accusation, “My lawyer stole my settlement proceeds,” the proposed rule would permit the lawyer to make disclosures necessary to show that the lawyer properly distributed the settlement proceeds. In contrast, disclosure would not be permitted if the client made the accusation, “Jane Doe is a terrible lawyer.”

Proposed Rule 1.6(b)(9).

The proposal associates the terms “actual or potential” with “proceeding,” rather than – as in current Rule 1.6(b)(8) - with “controversy.” This revision fits better with an important example of permission to disclose regarding a potential proceeding, viz. a lawyer’s report to a malpractice carrier of a client “claim,” which is not yet an actual lawsuit. Such claims are more accurately characterized as potential proceedings rather than potential controversies.

The proposal permits disclosure in relation to proceedings as necessary “to establish a claim or defense.” Current Rule 1.6(b)(8) associates establishment of a claim with a “controversy” only, and associates establishment of a defense with both a “controversy” and a “proceeding.” In

not apply to informal complaints, such as this website posting,” but instead applies only a formal “charge.” NYSBA Ethics Op. 1032.

⁵ Definitions chosen from Black’s Law Dictionary tend to have narrow meanings associated with legal usages. Definitions from more general dictionaries tend to have more general meanings. To avoid the issue of which dictionary to prefer, proposed Rule 1.6(b)(8) includes its own definition – a covered “accusation” is one made “outside a legal proceeding.”

⁶ Rule 1.6(b)(5) permitted disclosure “to defend the lawyer or employees or associates against an accusation of wrongful conduct.” DR 4-101 similarly permitted disclosure of confidential information by a lawyer **“to defend himself or his employees or associates against an accusation of wrongful conduct.”** Canon 37 provided, “If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation.”

Kidwell v. Sybaritic, 784 N.W.2d 220 (Minn. 2010), four justices associated regarded Kidwell's disclosures to establish a claim as permitted in a proceeding that Kidwell had commenced against his former employer.⁷

Proposed Comments 8 and 9.

The proposed comments make clear that the disclosure permission of proposed Rule 1.6(b)(8) does not apply to such disclosures as a client's mere expression of opinion, vague critique, and the like. "Specific accusation" is contrasted with "petty or vague critique," and "general opinion." "Public accusation" is defined in the proposed comment in a way that is consistent with the law of defamation.

Fairness, Attorney-Client Privilege, Client Waiver by Disclosure.

Current comment 9 to Rule 1.6 recognizes, as a basis for permission to disclose in connection with a fee dispute, "the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." Because this principle extends beyond a lawyer's contested claim to a fee, proposed comment [8] relates this principle to both Rule 1.6(b)(8) and (9), as amended.

The Committee took note of another application of a principle of fairness - the fact that a client's voluntary disclosure of privileged information operates as a waiver of the attorney-client privilege. "The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication." Restatement of the Law Governing Lawyers § 79. The policy reason for finding waiver in partial disclosure is that it would be "unfair for the client to invoke the privilege thereafter." McCormick on Evidence § 93 (7th ed. 2016), citing 8 Wigmore, Evidence (McNaughton rev.) § 2327 and Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 6.12.4 (2ed. 2010). A waiver of the privilege would occur if a client disclosed privileged information in accusing a lawyer of misconduct.

Although the law of confidentiality under the Rules of Professional Conduct overlaps with the law of privilege, the two bodies of law are in many ways distinct. Nonetheless, the Committee believes that it would be unfair for a client to disclose, or purport to disclose, confidential information to support serious accusations against a lawyer and thereafter to invoke confidentiality rules to prevent the lawyer's self-defense either in or outside a proceeding. As

⁷ The remaining three justices based their opinion on employment law and did not find it necessary to reach ethics issues. *Kidwell* dealt with a whistle-blower claim.

⁷ Restatement Sec. 59 cmt. d; Findings of Fact, Conclusions of Law, and Memorandum of Honorable John C. Lindstrom at 19, *In re Fuller*, 621 N.W.2d 460 (May 23, 2000).

noted above, some of the opinions of other jurisdictions on which the OLPR article and Opinion 24 rely expressly state that the opinions do not apply where the client's allegation involves a waiver of confidentiality or privilege.

Balancing Moral and Professional Issues.

Issues involving disclosure of confidential information in self-defense give rise to important moral and professional issues. A client's groundless, public accusation of serious professional misconduct, if apparently supported by disclosure of client information, may permanently damage a lawyer's reputation and income. A lawyer's unnecessary disclosure of client information may damage a client.

Electronic Court Filing.

An issue related to issues considered by the Committee arises with electronic court filings. Electronic filing has become standard in recent years in Minnesota court proceedings. Public access to court filings has been greatly enhanced. Under current Rule 1.6(b)(8) and (9), a lawyer may disclose confidential information as reasonably necessary to "establish a claim or defense." Lawyers may sue clients and other parties to establish a claim of defamation per se. If, as Opinion 24 concludes, Rule 1.6(b)(8) does not permit a lawyer to disclose information in self-defense outside a legal proceeding, the rule may create an incentive for a lawyer to defend his or her reputation against serious, false accusations by bringing a claim for defamation per se.

A lawyer may wish to call attention to filings in a defamation per se or other proceeding. The Committee has not attempted to resolve the issue of whether a lawyer Rule 1.6 permits the lawyer to make further public disclosures of information filed online in litigation. The Committee notes: (1) that such disclosure would apparently be permitted under the Restatement of the Law Governing Lawyers; (2) that a Supreme Court referee concluded that a lawyer's public disclosure of court records did not violate Rule 1.6 and OLPR did not appeal this conclusion; and (3) that OLPR does not currently take a position on when further disclosure by a lawyer of information available in court records does or does not violate Rule 1.6.⁸

The Committee believes that amending Rule 1.6(b)(8) to make clear a lawyer's permission to disclose to respond to serious accusations will reduce the lawyer's incentive to sue the client.

⁸ Restatement Sec. 59 cmt. d; Findings of Fact, Conclusions of Law, and Memorandum of Honorable John C. Lindstrom at 19, *In re Fuller*, 621 N.W.2d 460 (May 23, 2000).

Conclusion.

The Committee believes that the proposed amendments will not broaden the circumstances in which a lawyer may disclose confidential information beyond those provided by current Rule 1.6(b)(8). The current permission to disclose “in an actual or potential controversy” can be interpreted in a very broad way. OLPR interprets “controversy” to include a certain type of “debate.” The Committee’s proposal requires, for disclosures outside a litigation “proceeding,” that the client make an accusation that is specific, serious, and public, and that also discloses confidential information. These requirements will result in very few permissions to disclose. The proposed amendments are also clear enough to reduce or eliminate the uncertainty and controversy resulting from the current rule and from Lawyers Board Opinion 24⁹

ATTACHMENT 4

Report and Recommendation regarding amendment of Rule 5.5, Minn. R. Prof. Conduct, adopted by the Assembly of the Minnesota State Bar Association

April 20, 2018

No resolution presented herein reflects the policy of the Minnesota State Bar Association until approved by the Assembly. Informational reports, comments, and supporting data are not approved by their acceptance for filing and do not become part of the policy of the Minnesota State Bar Association unless specifically approved by the Assembly.

Report and Recommendation to the MSBA Regarding Proposed Amendments to MRPC 5.5, Unauthorized Practice of Law Rules of Professional Conduct Committee November 1, 2017

RECOMMENDATION

RESOLVED, that the MSBA petition the Minnesota Supreme Court to adopt proposed amendments to MRPC 5.5(b) and (d), 5.5(c)(4), 5.5(e), and related comments, as set forth in this report.

REPORT

Following the Court's decision in *In re Panel File 39302*, 884 N.W.2d 661 (Minn. 2016), the Rules of Professional Conduct Committee took up the question of whether Rule 5.5 of the Minnesota Rules of Professional Conduct should be amended in light of that decision and in light of changes in the practice of law since the rule was adopted in 2005. Rule 5.5 governs the unauthorized practice of law.

The Committee appointed a subcommittee in October of 2016 to review MRPC 5.5. The subcommittee's recommendations were considered by the Committee at multiple meetings. The proposed amendments were given preliminary approval in May, 2017, and forwarded to the Lawyers Professional Responsibility Board (LPRB) for their review and recommendations.

On September 9, 2017, the LPRB agreed with the proposed amendments to MPRC 5.5(b) and (d), with the addition of additional language to (d). The Board rejected the proposed amendment of Rule 5.5(c) and approved new Rule 5.5(e), but limited it to representation of persons with a family relationship with the lawyer.

On October 31, 2017, the Committee, after much discussion, voted to recommend to the Assembly the adoption of the portions of Rule 5.5 rejected by the LPRB. (The Committee accepted the additional language proposed by the LPRB in Rule 5.5(d).)

Here is an overview of the Committee proposal:

- The amendment to Rule 5.5(c)(4) is intended to respond directly to the Court's invitation in *In re Panel File 39302*, 884 N.W.2d 661 (Minn. 2016) to amend and expand that rule to better reflect the bar's understanding of the meaning of fields of practice that are "reasonably related" to a lawyer's practice in a jurisdiction in which the lawyer is licensed.
- Proposed new section 5.5(e) is intended to remove certain client relationships from the purview of Rule 5.5—including current and former clients, family members, close friends, and other professional relationships-- to both reflect the common current practices of lawyers and allow client selection of lawyers and client trust to take priority over the geographic restrictions that may otherwise be imposed by Rule 5.5.
- The proposed amendments to Rule 5.5(b) and (d) are intended to allow lawyers to continue to practice the law of the jurisdictions in which they are licensed when they relocate to Minnesota. This proposal follows recent similar amendments in Arizona and New Hampshire.

Each of the suggested amendments is explained below, followed by a full text, redlined version of the Rule. The amendments are all offered in the context of trying to ensure that Rule 5.5 is not interpreted to proscribe conduct that would otherwise be thought of by the practicing bar as "what good lawyers do."

I. Background.

In August, the Minnesota Supreme Court decided a private admonition appeal, *In re Panel File 39302*, 884 N.W.2d 661 (Minn. 2016). The case concerned a Colorado lawyer, not admitted in Minnesota, who was contacted by his mother and father-in-law regarding efforts to collect a judgment from them. The in-laws were Minnesota residents and the opposing party, the underlying lawsuit, and the opposing party's counsel were all in Minnesota.

The Colorado lawyer agreed to help his in-laws negotiate a resolution. The Colorado lawyer, from his office in Colorado, exchanged about two dozen e-mails

with the opposing party's Minnesota lawyer over a three-month period. The Minnesota lawyer became frustrated with the process and filed an ethics complaint against him with the Minnesota Office of Lawyers Professional Responsibility (OLPR). OLPR issued the lawyer a private admonition for violating Rule 5.5 by practicing law in Minnesota. The Colorado lawyer appealed to a three-person panel of the Lawyers Professional Responsibility Board (LPRB). After a hearing, the Panel affirmed the admonition, focusing predominately on the location of the parties to the matter. Committee member Eric Cooperstein represented the Colorado lawyer in an appeal to the Minnesota Supreme Court.

Two primary issues were presented to the Court: 1) whether a lawyer practices "in" a jurisdiction by sending e-mails to a lawyer in that jurisdiction and 2) whether the Colorado lawyer's conduct was permitted under the "temporary practice" provision of Rule 5.5(c)(4), which allows a lawyer to practice temporarily in a jurisdiction if the legal services provided "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

The Court ruled, 4-3, that the Colorado lawyer had engaged in the unauthorized practice of law in Minnesota. The Court stated that a lawyer could practice in a jurisdiction solely by sending e-mail communications to someone in that jurisdiction. The Court relied heavily on dicta in a 1998 California decision, *In re Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998), a fee dispute in which both physical and virtual presence in California were at issue. Ironically, *Birbrower* inspired significant changes to Rule 5.5 of the Model Rules of Professional Conduct, which changes were mostly adopted in Minnesota in 2005.

The Court also ruled that the Colorado lawyer's conduct was not permitted by Rule 5.5(c)(4) because although the lawyer did some collections work, that work was not part of a "particular body of federal, nationally-uniform, foreign, or international law. See Rule 5.5, cmt. 14. Hence, the Court determined that the representation of his in-laws was not "reasonably related" to his practice in Colorado. The Court stated in a footnote, however, that "If there are concerns that these [Rule 5.5(c)] exceptions do not adequately meet client needs, the better way to address such concerns would be through filing a petition to amend Rule 5.5(c)."

II. Rationale for Seeking Amendments to Rule 5.5.

Rule 5.5, which mostly follows the ABA Model Rule, presently enforces geographic restrictions on the practice of law. In the years since the present version of the rule was adopted in 2005, lawyers and clients have become increasingly mobile. Both lawyers' practices and their clients' legal matters

routinely cross state lines. *Panel File 39302* highlights some of the unintended consequences of the present rule and draws attention to how confusing it may be for lawyers to determine whether their conduct runs afoul of the rule.

For example, although the Minnesota Supreme Court has broadly defined when a lawyer may be practicing “in” a jurisdiction under Rule 5.5(a), the provisions of 5.5(c) are intended to allow a lawyer to practice “on a temporary basis” in a jurisdiction in which the lawyer is not licensed. The present rule leaves several questions unanswered:

- A Minnesota lawyer represents a Minnesota corporate client for many years. The client moves its main operations to another state where the lawyer is not licensed. Rule 5.5(c)(4) allows the lawyer to continue to represent the client, including meeting with the client in the other state, conducting transactions for and advising client, communicating with the client by phone and e-mail, etc. The legal work is essentially the same work that the lawyer performed while the client was in Minnesota. However, the exception in 5.5(c)(4) applies only on a temporary basis. May the lawyer continue representing the lawyer indefinitely? If not, how long will the “temporary exception” apply? What interest would be protected by forcing the lawyer to cease representing the client?
- A Minnesota lawyer with an office in Minnesota purchases a home outside Minnesota, such as in Hudson, Wisconsin or Fargo, North Dakota. The lawyer finds that he or she is more productive working from home on occasion. Working at home on a temporary basis would be permitted by Rule 5.5(c)(4). How many days a week may a lawyer work from home and still fall within rule 5.5(c)(4), rather than the prohibition in Rule 5.5(b) on establishing a “systematic and continuous presence” in a jurisdiction in which the lawyer is not licensed? A similar problem confronts lawyers who want to spend winters in other jurisdictions but continue working remotely during their time away.
- A Minnesota lawyer represents several long-time Minnesota clients in a variety of matters. The lawyer’s spouse obtains a “dream job” in another jurisdiction. The lawyer could easily continue all of the work for the Minnesota clients from outside the state, except for the prohibition in Rule 5.5(b) on establishing a “systematic and continuous presence” in a jurisdiction in which the lawyer is not licensed.

Note that for each of these examples, the issue could be presented in the opposite way, i.e. when a lawyer licensed in another state encounters one of these situations. The proposed amendments below would protect non-Minnesota lawyers from discipline by the OLPR; those lawyers could conceivably violate rules in their own states. Conversely, Rule 5.5(a) includes a safe harbor that states that a Minnesota lawyer does not violate the rule if his or her conduct in another jurisdiction conforms to what would be permissible for a lawyer licensed in another state who conducts business in Minnesota. Hence, these Rule amendments will protect Minnesota lawyers from Minnesota discipline, even if

another jurisdiction attempted to take disciplinary action against the Minnesota lawyer.

III. Proposed Amendments

A. Clarification of “reasonably related” in Rule 5.5(c)(4).

As noted above, Rule 5.5(c)(4) provides an exception that allows lawyers to practice in another jurisdiction temporarily, if the legal services “arise out of or are reasonably related to the lawyer’s practice” in a jurisdiction in which the lawyer is licensed. In 39302, the Minnesota Supreme Court interpreted the scope of the term “reasonably related” by relying on a portion of a comment to Rule 5.5 that limits the reach of the exception to legal services that are part of a “particular body of federal, nationally-uniform, foreign, or international law. See Rule 5.5, cmt. 14. As noted above, the Court invited an amendment to Rule 5.5(c).

“Reasonably” is defined in the MRPC as describing “the conduct of a reasonably prudent and competent lawyer.” Rule 1.0(i), R. Prof. Conduct. The proposed amendment is intended to codify what the subcommittee believes that prudent and competent lawyers currently recognize as the scope of what is “reasonably related” to their practices: those areas that are within the lawyer’s regular field or fields of practice. A lawyer’s expertise in a particular area, whether it be shopping-center leases, nonprofit financing, transgender rights, restaurant franchises, etc., may attract clients regionally or nationally even where the practice area is not subject to a nationally uniform or federal body of law. Clients may seek out lawyers for this expertise and the public is well-served by allowing clients to hire lawyers with subject-matter expertise that suits the client’s matter. A lawyer’s expertise, gained through regular practice in a field of law provides reasonable assurance of client protection in a temporary practice context.

During the Committee’s discussions, several Committee members described their experiences with prudent and competent lawyers who have been offering services in their fields of practice across state borders on a regular basis. Such conduct was noted in the practices of large firms, corporate law departments, small boutique firms, and others.

The Committee believes that people in Minnesota will be better served and protected by being able to choose among lawyers who regularly practice in a field of law, even without a Minnesota license, rather than by a lawyer who is licensed in Minnesota but has very little experience in the field of practice relevant to the client’s matter. The growing complexity of law often makes field of law a better indicator of competence than local licensure. Current comment 14 to Rule 5.5 recognizes “nationally-uniform” law as “reasonably related.” Many areas of law could be termed “nationally-similar,” without being uniform. For example,

the ABA Model Rules of Conduct have been adopted in almost all states, but Minnesota, like many states, has variations that make the law marginally less than “uniform.” A Minnesota resident with issues relating to these Rules would be well-served by retaining, for example, Geoffrey Hazzard or Ronald Rotunda, both nationally-recognized ethics experts who do not have Minnesota licenses.

The proposed amendment finds support in the 39302 dissent. The 39302 dissent, discussing the appropriate scope of Rule 5.5(c)(4), stated, “One factor provided in Rule 5.5, comment 14, relates to whether the lawyer’s temporary services draw on the lawyer’s ‘expertise developed through the regular practice of law.’” To the extent that Rule 5.5 seeks to protect the public by ensuring competence, experience that arises from a lawyer’s regular practice is more likely to accomplish that goal than a lawyer who has little experience in a federal or “nationally-uniform” area of law. Trying to determining what characteristics of a body of law make it “nationally-uniform” but still distinct from federal law would perpetuate uncertainty about when lawyers fall within the protection of Rule 5.5(c)(4).

The proposed amendment uses the term “field or fields of practice.” This term has been used in Rule 7.4 for over thirty years, without any reported difficulty in definition or enforcement.

During the subcommittee meetings, Pat Burns expressed his personal reservations that the amendment was too broad in its expansion of the rule and his concerns regarding how the OLPR would determine what a lawyer’s “regular” fields of practice include. Director Susan Humiston wrote a letter to then-Committee chair Michael McCarthy, expressing disagreement with several aspects of the proposed amendments. Those arguments are discussed in Section IV, below

Along with the proposed amendment, the Committee recommends amending comment 14 by deleting a phrase from the final sentence, as follows: “In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in ~~matters involving a particular body of federal, nationally-uniform, foreign, or international law.~~” Rule 5.5 cmt. 14 (cmt. 15 as renumbered below). This is intended to avoid confusion between the amended rule and the comment.

B. New section 5.5(e): representation of relatives and other personal referrals.

This new section is intended to directly address the *Panel 39302* decision and other potential problems related to the continuous (as opposed to temporary)

representation of current or former clients that are located in other jurisdictions. The proposal would add a new provision allowing a lawyer to perform legal services in a jurisdiction if the services:

are performed on behalf of a person who has a family, close personal, or prior professional relationship with the lawyer.

This amendment accomplishes two purposes. First, it addresses the conundrum in 39302 that the present language of the rule provides no mechanism by which lawyers may provide legal services to family members and friends who happen to reside in other jurisdictions and where the subject matter of the legal issue is not within the lawyer's regular field of practice. The Committee believes that there are many situations in which family members and close friends would turn to a lawyer with whom they have a personal relationship to seek assistance in a legal matter rather than be forced to hire a stranger in their own jurisdiction. This could apply, for example, to a lawyer whose child had a dispute in another jurisdiction with a landlord or a lawyer whose aged parent had a dispute regarding the care provided by a nursing home. In these situations, there is little or no risk of harm to the public of the lawyer conducting the representation because the lawyer is well-known to the client, even if the lawyer has not previously represented that person and even if the lawyer does not have experience in that area of the law.

Second, this amendment would address the scenarios discussed above in which lawyers seek to continue work for clients who have relocated to other jurisdictions or who themselves seek to work from homes in bordering jurisdictions or take extended vacations in other jurisdictions. It is in the public interest to allow clients, including Minnesota clients, to continue working with their lawyers despite changes in the lawyers' geographic locations.

The amendment follows the Court's footnote suggestion that it might entertain a petition to expand the coverage of Rule 5.5(c). In reviewing the rules, the subcommittee determined that the clearest amendment would remove certain trusted relationships from the prohibitions of Rule 5.5(a) entirely. The language "family, close personal, or prior professional relationship" is taken from Rule 7.3, which allows direct solicitation of legal business from persons in those categories, also under the theory that there is little risk of abuse in those situations. The language of Rule 7.3 has been in place for several decades and has not presented enforcement problems for OLPR. A new comment 16 addresses the new language.

- C. Amendments to Rules 5.5(b) and (d) to allow a lawyer to continue to serve existing clients from another jurisdiction.

Although not raised directly by 39302, the issues surrounding when lawyers may practice in other jurisdictions provides an appropriate occasion for Minnesota to consider following the efforts of Arizona and New Hampshire to relax the prohibitions in Rule 5.5(b) against establishing offices in other jurisdictions where the lawyer would only practice the law of the jurisdiction in which the lawyer is licensed.

The amendments would allow a lawyer to move to another state but continue representing clients from the lawyer's licensed state. This is important, for example, when a lawyer moves to another jurisdiction because of a spouse's new job, to be closer to ailing parents, etc. The risk to the public in these situations is very small because the lawyer is simply continuing to do the exact same work that the lawyer did before, just from a different location. Much like the existing exemption in Rule 5.5(d) for lawyers who practice Federal law, such as immigration, this amendment would allow lawyers from other jurisdictions to practice only the law of that jurisdiction. Because the lawyer may not hold out as being licensed in the new jurisdiction, the lawyer therefore does not compete with the lawyers licensed in the new jurisdiction for clients with matters related to the law of that jurisdiction.

These amendments are found in Rule 5.5(b) and (d) and new comment 5 in the attached version of Rule 5.5. The amendments follow the structure of the rule in Arizona, with the exception that the amendments do not adopt Arizona's provision that the lawyer must advise "the lawyer's client that the lawyer is not admitted to practice in Arizona, and must obtain the client's informed consent to such representation." Minnesota did not adopt these provisions in the 2005 amendments, including Rule 5.5(c). It would be inconsistent to adopt these notice and consent provisions only for the amendments that are now proposed. New Hampshire adopted slightly different amendments in October 2016 that implement the same policy change.

IV. Response to OLPR Director Humiston's Substantive Concerns

In her April 24, 2017 letter to then-Committee Chair Michael McCarthy, Ms. Humiston raised several concerns that merited additional discussion by the Committee.

Regarding the proposed amendment to Rule 5.5(c)(4) (fields of practice), the Director noted that the majority opinion in *Panel File 39302* rejected the dissent's argument that a field of practice need not be nationally-uniform to qualify as "reasonably related." The Director suggested that the proposed amendment is a "nonstarter" for a majority of the Court. The Committee believes that the Court was interpreting the rule as written to the facts before the Court. The Court's

footnote invited amendments and the Committee believes the Court will be open-minded in considering the concerns of the practicing bar.

The Director's letter stated that the proposed amendments would benefit lawyers in other states, but expressed doubt that the amendments will benefit Minnesota lawyers while increasing risk to Minnesota consumers of legal services. The Director may have overlooked that the safe-harbor provision in Rule 5.5(a) protects Minnesota lawyers from discipline in Minnesota. The amendments, by clarifying the scope of Rule 5.5, protect Minnesota lawyers. Moreover, the amendments benefit Minnesota consumers of legal service, by increasing their range of choices of counsel without exposing them to the primary danger that unauthorized practice regulation seeks to prevent – incompetent representation. If there are harms to consumers arising from these proposed amendments the Director's letter does not identify them.

Ms. Humiston's letter state that the amendments would "enhance a conundrum that already exists in Minnesota for non-Minnesota lawyers, because Minn. Stat. § 481.02, subdiv. 1, would currently prohibit the conduct even if Rule 5.5 would allow it." The Committee does not believe there is a "conundrum." If this concern had substance, it would have weighed against the adoption of Rule 5.5(c), in 2005. The Committee is similarly unaware of any policy by the Director's Office to refuse to apply Rule 5.5(c) because of a conflict with § 481.02. The Minnesota Supreme Court has long held that it, rather than the Legislature, has the ultimate authority to define the unauthorized practice of law. *Cardinal v. Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864, 867 (Minn. 1988), citing *Cowern v. Nelson*, 207 Minn. 642, 647, 290 N.W. 795, 797 (1940). Although Minn. Stat. § 481.02 was mentioned by Justice Lillehaug in the oral argument in 39302, the Court did not address it in their opinion.

The Director's letter stated that other states are already less permissive in multi-jurisdictional practice rules than Minnesota, citing as an example a North Carolina rule. The Committee's intent is to enhance benefits to Minnesota clients, by increasing their choices of counsel, without increasing their risk. That some other states have stricter rules does not indicate that the restrictions were adopted to benefit the public, rather than to protect local lawyers' interests.

[Text of proposed amendments to Rule 5.5 omitted. See Attachment 2].



August 29, 2018

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Dear Robin:

As I am sure you are aware, at its 2018 Annual Meeting in Chicago, the House of Delegates of the American Bar Association amended rules 7.1-7.5 of the ABA Model Rules of Professional Conduct. These rules deal with lawyer advertising and communication.

Because the Minnesota Rules of Professional Conduct follow the ABA Model Rules, the Minnesota State Bar Association standing committee on the Rules of Professional Conduct has made a practice of studying changes in the ABA Model Rules to determine whether the MSBA should petition the Minnesota Supreme Court to adopt the changes. In some cases, the Committee has recommended modifications to the language of the rules to conform them to established Minnesota law and practice.

And because the LPRB also has a strong interest in the Minnesota Rules of Professional Conduct, our committee has frequently cooperated with the LPRB and its Rules Committee in examining amendments to the ABA Model Rules and jointly presenting recommendations to the Supreme Court. The extent of the cooperation has ranged from inviting the LPRB to join in a petition to the Court after the MSBA has approved a rule amendment, to consulting with the LPRB before consideration of a proposed amendment by the MSBA Assembly, to creating a joint working group with the LPRB Rules Committee to analyze and evaluate the amended Model Rule and drafting a proposed amendment to the Minnesota Rules.

The purpose of this letter is to invite the LPRB to participate with the MSBA Rules of Professional Conduct Committee in the review of the newly adopted changes to Model Rules 7.1-7.5, with a view towards preparing a joint petition to amend the Minnesota Rules. The extent and mechanism of this effort is open for discussion. I would be happy to discuss options with you in detail.

Sincerely,

Frederick E. Finch, Chair
Rules of Professional Conduct Committee

cc: Susan Humiston, Esq.

OLPR Dashboard		
9/21/2018		
	Total Files	Total Lawyers
Total Open Matters	533	385
New Files YTD	819	
Closed Files YTD	803	
Closed C012s YTD	252	
Summary Dismissals YTD	391	
Files Opened in August 2018	112	
Files Closed in August 2018	104	
Public Matters Pending (excluding Resignations)	32	
Panel Matters Pending	13	
DEC Matters Pending	82	
Files On Hold	17	
Advisory Opinion Requests YTD	1512	
CLE Presentations YTD	50	
Total Files Over 1 Year Old	148	88
Matters Pending Over 1 Year Old w/o Charges	67	47
	Discipline YTD	Total # Lawyers
	Disbarred	6
	Suspended	17
	Reprimand & Probation	3
	Reprimand	5
	Total Public	31
		Total # Files
	Private Probation	9
	Admonition	82
	Total Private	91

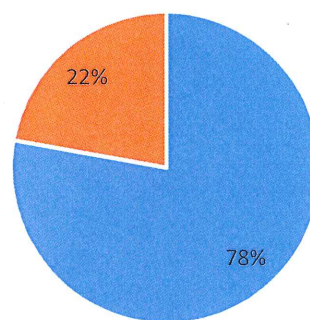
Files Over 1 Year Old as of 9/21/18

Year/Month	OLPR	ADAP	PROB	PAN	HOLD	SUP	S12C	SCUA	REIN	TRUS	Total
2015-01						1					1
2015-03					1						1
2015-05				2							2
2015-06										1	1
2015-08								1			1
2015-11					2	1					3
2015-12					1		1				2
2016-02	1			1		1					3
2016-03						2	1	1			4
2016-04	1										1
2016-05					1	1					2
2016-06	2			1	1	1					5
2016-07	2			1							3
2016-08	3				3	1	2	1			10
2016-09	3					1	2				6
2016-10	3				1		2				6
2016-11	2			1		1					4
2016-12	2					1	1				4
2017-01	4					1		3			8
2017-02	3		1			1	6				11
2017-03	5				1		1	2			9
2017-04	3					2	1	1			7
2017-05	1			1		2		1	1	1	7
2017-06	4	1		1		2	1				9
2017-07	5			1	1	1				1	9
2017-08	12						2	1			15
2017-09	11		2					1			14
Total	67	1	3	9	12	20	20	12	1	3	148

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	136	44
Total Cases Under Advisement	12	12
Total Cases Over One Year Old	148	56

Active	116
Inactive	32

Active v. Inactive



■ Active ■ Inactive

Year Over Year Comparison as of August 31, 2018

OLPR Dashboard for Court and Chair			
	Month Ending August 2018	Change From Previous Month	Month Ending August 2017
Open Matters	516	+8 / 508	460
New Files YTD	758	+112 / 646	738
Closed Files YTD	759	+104 / 655	745
Closed C012s YTD	236	+16 / 220	272
Summary Dismissals YTD	375	+49 / 326	354
Files Opened During August 2018	112	+21 / 91	116
Files Closed During August 2018	104	+5 / 99	122
Public Matters Pending (excluding Resignations)	34	-1 / 35	30
Panel Matters Pending	12	+4 / 8	7
DEC Matters Pending	83	-7 / 90	96
Files On Hold	17	-3 / 20	18
Advisory Opinion Requests YTD	1384	+184 / 1200	1416
CLE Presentations YTD	48	+5 / 43	43
Total Files Over 1 Year Old	144	0 / 144	109
Matters Pending Over 1 Year Old w/o Charges	58	-10 / 68	44

	2018 YTD	2017 YTD
Lawyers Disbarred	5	5
Lawyers Suspended	16	19
Lawyers Reprimand & Probation	3	4
Lawyers Reprimand	4	2
TOTAL PUBLIC	28	30
Private Probation Files	8	13
Admonition Files	73	70
TOTAL PRIVATE	81	83

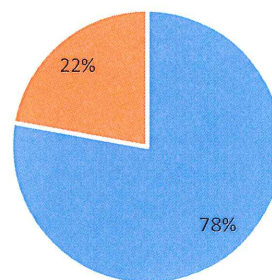
Files Over 1 Year Old as of Month Ending August 2018

Year/Month	OLPR	AD	ADAP	PROB	PAN	HOLD	SUP	S12C	SCUA	REIN	TRUS	Total
2015-01							1					1
2015-03						1						1
2015-05					2							2
2015-06											1	1
2015-08									1			1
2015-11						2	1					3
2015-12						1		1				2
2016-02	1				1		1					3
2016-03							3	1	1			5
2016-04	1	1										2
2016-05		1				1	1					3
2016-06	2				1	1	1					5
2016-07	2				1							3
2016-08	3					3	2	2	1			11
2016-09	3						1	2				6
2016-10	3					1		2				6
2016-11	3						1					4
2016-12	2						1	1				4
2017-01	4						3		1			8
2017-02	3			1			1	6				11
2017-03	5					1	1	1	2			10
2017-04	3	1					2	1	1			8
2017-05	1				1		2		1	2	1	8
2017-06	4	1	1	1	1		2	1				11
2017-07	5				1	1	1				1	9
2017-08	13							2	1			16
Total	58	4	1	2	8	12	25	20	9	2	3	144

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	135	50
Total Cases Under Advisement	9	9
Total Cases Over One Year Old	144	59

Active	112
Inactive	32

Active v. Inactive



■ Active ■ Inactive

All Files Pending as of Month Ending August 2018

Year/Month	SD	DEC	REV	OLPR	AD	ADAP	PROB	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	Total
2015-01										1						1
2015-03									1							1
2015-05								2								2
2015-06															1	1
2015-08												1				1
2015-11									2	1						3
2015-12									1		1					2
2016-02				1				1		1						3
2016-03										3	1	1				5
2016-04				1	1											2
2016-05					1				1	1						3
2016-06				2				1	1	1						5
2016-07				2				1								3
2016-08				3					3	2	2	1				11
2016-09				3						1	2					6
2016-10				3					1		2					6
2016-11				3						1						4
2016-12				2						1	1					4
2017-01				4						3		1				8
2017-02				3			1			1	6					11
2017-03				5					1	1	1	2				10
2017-04				3	1					2	1	1				8
2017-05				1				1		2		1	2		1	8
2017-06				4	1	1	1	1		2	1					11
2017-07				5				1	1	1					1	9
2017-08				13							2	1				16
2017-09				17	1		2			1						21
2017-10				13	1				2	2						18
2017-11				13					2			1				16
2017-12				17	2					2						21
2018-01			3	19						3		1				26
2018-02		2	1	18						1						22
2018-03		4		20	1								1			26
2018-04		3	5	30												38
2018-05		18		16					1	1		2				38
2018-06		13		20								2				35
2018-07		20		18									3			41
2018-08	11	23		34									1	1		70
Total	11	83	9	293	9	1	4	8	17	35	20	15	7	1	3	516

ALL FILES PENDING & FILES OVER 1 YR. OLD REPORTS STATUS KEY

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

Minnesota Judicial Center
Annual Employee Service Awards
Tuesday, September 18, 2018



2018 Service Award Recipients

5 Years

Daniel Arnold
A.J. Dordel
Nancy Humphrey
David Johnson
Lisa Jore
Thomas Kay
Elizabeth Keating
Mary Larsen
Daniel Lovejoy
Maggie O'Connell
Carmen O'Halloran
Linda Olson
AnnMarie O'Neill
Daniel Ostdiek
Mick Pagels
Don Rasinen
Tara Rausch
Phillip Riewer
Mark Schmidt
Erik Sczygelski

10 Years

Jessica Bienfang
Eltayeb Elhassan
Abby Kuschel
Michael Langr
Sarah Novak
Jennifer Schmidt
Katie Sutton-Malek

15 Years

Stacey Erickson
Trina Holland
Katie Jacoby
Maria Jost
Kris Wilkens

20 Years

Andrea Atkinson
Bonnie Carlson
Brent Carlson
Jeanine Chagnon
Rachel Dubej
Lee Ann Iverson
Paula Juris
Leanne Ruckmar
Heng Ven

25 Years

Timothy Burke
Lisa Haas
Helen Hughesdon
Mark Johnson
Judith Nord

30 Years

Matthew Keating
Karen Mareck
Rick Rewerts
Patrick Robertson
Linda Velasquez

35 Years

Diane Richmond

45 Years

LaVonn Nordeen

WELL-BEING TOOLKIT

FOR LAWYERS AND LEGAL EMPLOYERS

Created By Anne M. Brafford For
Use By The American Bar Association



We're In This Together.



Challenging the Status Quo:

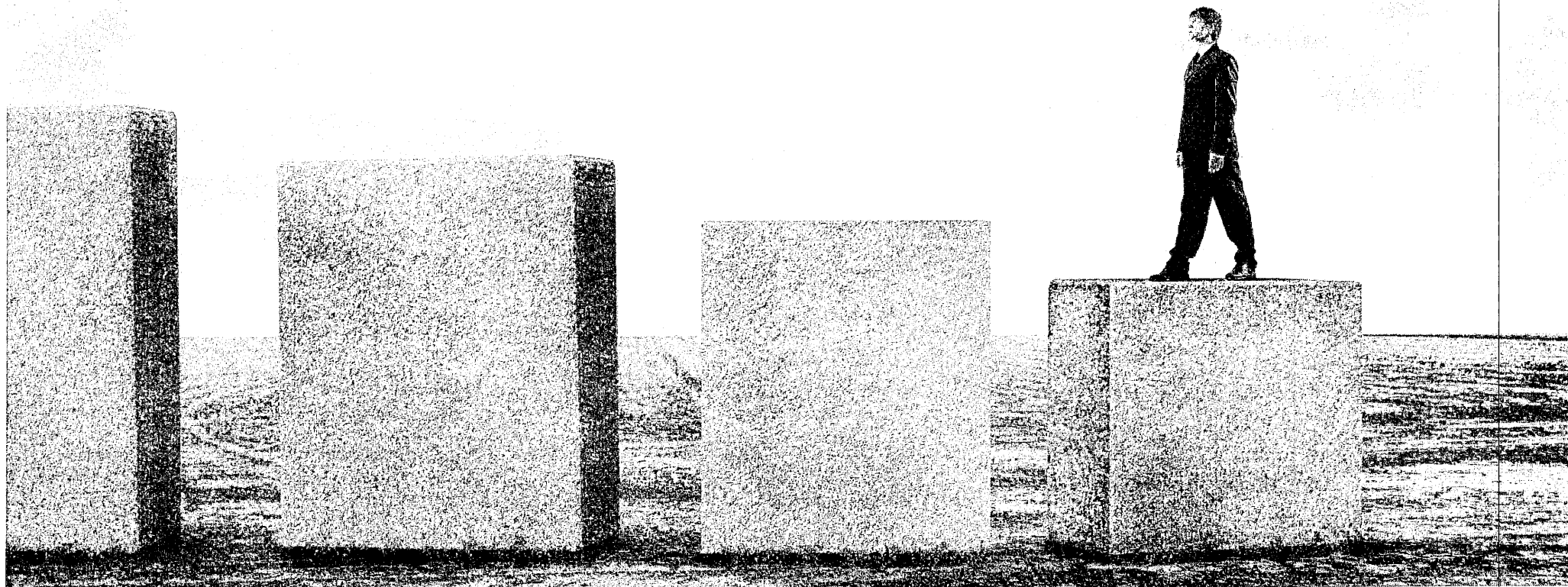
A Campaign of Innovation to Improve the Substance Use and Mental Health Landscape of the Legal Profession

To better support the vital role that lawyers play in the proper functioning of society, the economy, and government, and to ensure the long-term health and well-being of our members and our profession, our mission is to reduce the incidence of problematic substance use and mental health distress, challenge the stigma surrounding those issues, and improve the overall well-being of the profession.



STEPPING TOWARDS WELL-BEING:

A SEVEN-POINT FRAMEWORK TO REDUCE SUBSTANCE USE DISORDERS AND MENTAL HEALTH DISTRESS IN THE LEGAL PROFESSION



The Pledge:

Recognizing that high levels of problematic substance use and mental health distress present a significant challenge for the legal profession, and acknowledging that more can and should be done to improve the health and well-being of lawyers, we the attorneys of _____ hereby pledge our support for this innovative campaign and will work to adopt and prioritize its seven-point framework for building a better future.



- 1. Provide enhanced and robust education to attorneys and staff on topics related to well-being, mental health, and substance use disorders.**



2. Disrupt the status quo of drinking-based events:

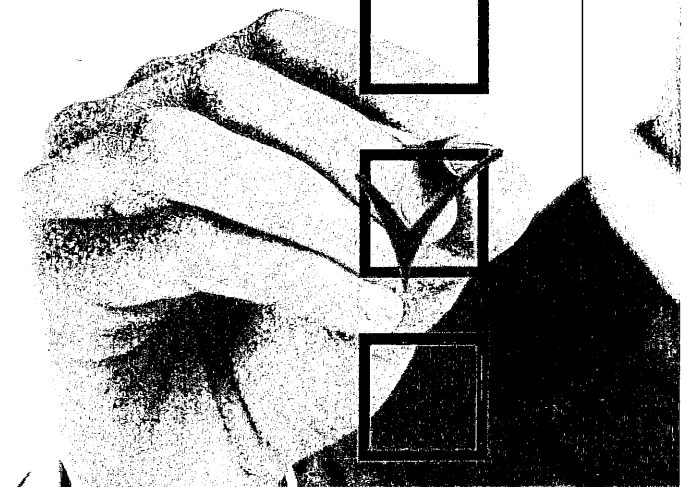
- **Challenge the expectation that all events include alcohol; seek creative alternatives.**
- **Ensure there are always appealing non-alcoholic alternatives when alcohol is served.**



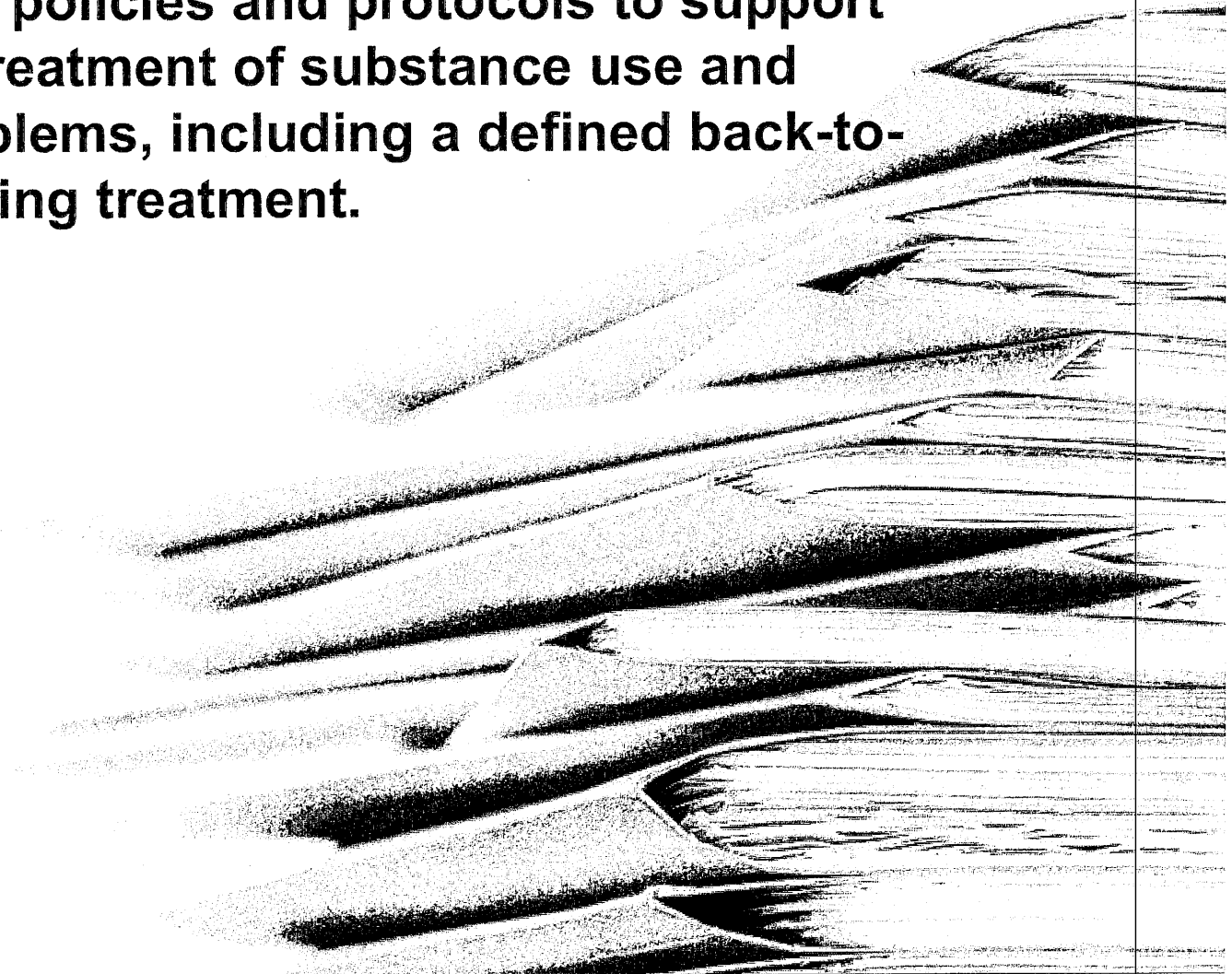
3. **Develop visible partnerships with outside resources committed to reducing substance use disorders and mental health distress in the profession: healthcare insurers, lawyer assistance programs, EAPs, and experts in the field.**



- 4. Provide confidential access to addiction and mental health experts and resources, including free, in-house, self-assessment tools.**

☐☐☐☐☒☐

5. **Develop proactive policies and protocols to support assessment and treatment of substance use and mental health problems, including a defined back-to-work policy following treatment.**



- 6. Actively and consistently demonstrate that help-seeking and self-care are core cultural values, by regularly supporting programs to improve physical, mental and emotional well-being.**



7. **Highlight the adoption of this well-being framework to attract and retain the best lawyers and staff.**



AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 482

September 19, 2018

Ethical Obligations Related to Disasters

The Rules of Professional Conduct apply to lawyers affected by disasters. Model Rule 1.4 (communication) requires lawyers to take reasonable steps to communicate with clients after a disaster. Model Rule 1.1 (competence) requires lawyers to develop sufficient competence in technology to meet their obligations under the Rules after a disaster. Model Rule 1.15 (safekeeping property) requires lawyers to protect trust accounts, documents and property the lawyer is holding for clients or third parties. Model Rule 5.5 (multijurisdictional practice) limits practice by lawyers displaced by a disaster. Model Rules 7.1 through 7.3 limit lawyers' advertising directed to and solicitation of disaster victims. By proper advance preparation and planning and taking advantage of available technology during recovery efforts, lawyers can reduce their risk of violating the Rules of Professional Conduct after a disaster.

Introduction¹

Recent large-scale disasters highlight the need for lawyers to understand their ethical responsibilities when those events occur. Extreme weather events such as hurricanes, floods, tornadoes, and fires have the potential to destroy property or cause the long-term loss of power. Lawyers have an ethical obligation to implement reasonable measures to safeguard property and funds they hold for clients or third parties, prepare for business interruption, and keep clients informed about how to contact the lawyers (or their successor counsel). Lawyers also must follow the advertising rules if soliciting victims affected by a disaster.

Much information is available to lawyers about disaster preparedness. The American Bar Association has a committee devoted solely to the topic and provides helpful resources on its website.² These resources include practical advice on (i) obtaining insurance, (ii) types and methods of information retention, and (iii) steps to take immediately after a disaster to assess damage and rebuild. Lawyers should review these and other resources and take reasonable steps

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

² ABA COMMITTEE ON DISASTER RESPONSE AND PREPAREDNESS, <https://www.americanbar.org/groups/committees/disaster.html> (last visited Sept. 6, 2018). ABA Committee on Disaster Response and Preparedness, *Surviving a Disaster A Lawyer's Guide* (Aug. 2011), https://www.americanbar.org/content/dam/aba/events/disaster/surviving_a_disaster_a_lawyers_guide_to_disaster_planning_authcheckdam.pdf.

to prepare for a disaster before one strikes the communities in which they practice. Lawyers should also review their disaster preparedness plans when a disaster threatens. Included within disaster planning, and of particular importance for sole practitioners, is succession planning so that clients and others know where to turn if a lawyer dies, is incapacitated, or is displaced by a disaster.

Despite the wealth of information available on preparing for a disaster and on the practical steps a lawyer should take to preserve the lawyers' and the clients' property and interests after a disaster, there is a dearth of guidance on a lawyer's ethical responsibilities (i) when a disaster threatens, and (ii) after a disaster occurs.³ This opinion addresses the lawyers' obligations in these circumstances.⁴

A. Communication

Model Rule 1.4 requires lawyers to communicate with clients.⁵ One of the early steps lawyers will have to take after a disaster is determining the available methods to communicate with clients. To be able to reach clients following a disaster, lawyers should maintain, or be able

³ There are three ethics opinions from state bars on a lawyer's obligations after a disaster: N.Y. City Bar Ass'n Formal Op. 2015-6 (2015) advises lawyers to notify clients of destruction of client files in a disaster if the destroyed documents have intrinsic value (such as a will) or if the lawyer knows the client may need the documents; La. Advisory Op. 05-RPCC-005 (2005) advises lawyers on providing pro bono assistance through a hotline or both; and State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166 (2004) advises lawyers not to participate in a mass disaster victims chat room because it is intrusive, but not because it is prohibited as in-person solicitation.

⁴ This opinion focuses primarily on the obligations of managers and supervisors within the meaning of Rule 5.1, recognizing that lawyers practice in a variety of contexts, including solo offices, small firms, large firms, government agencies and corporate offices. Subordinate lawyers may rely on the reasonable decisions of managers and supervisors on how to address the ethical obligations this opinion describes. Some of the obligations may be reasonably delegated or assigned to specific lawyers within a firm or organization. Methods of compliance with the obligations may vary depending on the practice context in which they arise. In addition, lawyers employed by governmental or other institutional entities may be subject to requirements imposed by law, or the policies of those entities. Reasonable implementation of the obligations described in this opinion satisfies the Model Rules. Opinion 467 provides examples of how to comply with obligations under several Model Rules in a variety of practice settings. See ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

⁵ MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018) provides:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

to create on short notice, electronic or paper lists of current clients and their contact information. This information should be stored in a manner that is easily accessible.⁶

In these early communications clients will need to know, for example, if the lawyer remains available to handle the client's matters, or, alternatively, if the lawyer is unavailable because of the disaster's effects, and may need to withdraw. In a situation in which a disaster is predicted, for example, with a hurricane or other extreme weather event, lawyers should consider providing clients with methods by which the lawyer may be reached in the event that emergency communication is necessary. Information about how to contact the lawyer in the event of an emergency may be provided in a fee agreement or an engagement letter.⁷

In identifying how to communicate with clients under these circumstances, lawyers must be mindful of their obligation under Rule 1.1 to keep abreast of technology relevant to law practice⁸ and Rule 1.6(c)'s requirement "to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."⁹

⁶ This opinion addresses a lawyer's ethical responsibilities. Lawyers should take similar steps to maintain communication with their own colleagues and staff. It is also good practice for a lawyer to maintain and update this information on a secure Internet website after the disaster so that colleagues and support staff will have a centralized location to find contact information. For information about the appropriate methods for storing electronic or paper records, lawyers may consult the ABA Committee on Disaster Response and Preparedness website. Also, many state bars and courts provide information on disaster preparedness.

⁷ Practical problems a lawyer may wish to consider in advance include whether (i) landline phones will be out of service, (ii) the U.S. Postal Service will be impaired, and (iii) electronic devices will lose battery power.

⁸ ABA Model Rule 1.1 provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] to Rule 1.1 provides: "... [A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology ..."

⁹ As this Committee has previously noted, lawyers may transmit confidential information over the Internet if the lawyer has made reasonable efforts to prevent accidental or unauthorized access to the information. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (May 22, 2017). *See also* Alaska Bar Ass'n Op. 98-2 (1998); State Bar of Ariz. Formal Op. 97-04 (1997); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2010-179 (2010); D.C. Bar Op. 281 (1998); Del. State Bar Ass'n Comm. on Prof'l Ethics Op. 2001-2 (2001); Haw. State Ethics Comm'n Formal Op. 40 (2001); Ill. State Bar Ass'n Advisory Op. 96-10 (1997); Iowa State Bar Ass'n Op. 15-01 (2015); N.C. State Bar Op. RPC 215 (1995); State Bar Ass'n of N.D. Advisory Op. 97-09 (1997); Ohio Bd. of Cmss'rs on Grievances & Discipline Op. 99-2 (1999); S.C. Bar Advisory Op. 97-08 (1997); Prof'l Ethics Comm. State Bar of Tex. Op. 648 (2015); Utah State Bar Advisory Op. 00-01 (2000); Vt. Advisory Op. 97-5 (1997); Wash. State Bar Ass'n Advisory Op. 2175 (2008).

B. Continued Representation in the Affected Area

Lawyers who continue to provide legal services in the area affected by a disaster have the same ethical obligations to their clients as before the disaster, although they may be able to provide advice outside their normal area of expertise.¹⁰

Lawyers may not be able to gain access to paper files following a disaster.¹¹ Consequently, lawyers must evaluate in advance storing files electronically so that they will have access to those files via the Internet if they have access to a working computer or smart device after a disaster. If Internet access to files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer.¹²

¹⁰ Comment [3] to Rule 1.1 allows: "In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. Ill-considered action under emergency conditions can jeopardize the client's interest."

¹¹ Rule 1.15 requires that lawyers take reasonable steps to preserve trust account records and documents and property of clients and third parties when a lawyer has notice of an impending disaster. *See also* subsection (E), *infra*, for a discussion of a lawyer's obligations when files are lost or destroyed in a disaster.

¹² Lawyers must understand that electronically stored information is subject to cyberattack, know where the information is stored, and adopt reasonable security measures. They must conduct due diligence in selecting an appropriate repository of client information "in the cloud." Among suggested areas of inquiry are determining legal standards for confidentiality and privilege in the jurisdiction where any dispute will arise regarding the cloud computing services. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (May 22, 2017) (Lawyer may send client information over the Internet if lawyer makes reasonable efforts to prevent inadvertent or unauthorized access, but may be required to take special security precautions when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security); Ala. State Bar Op. 2010-02 (2010) (Lawyer may outsource storage of client files through cloud computing if they take reasonable steps to make sure data is protected); State Bar of Ariz. Formal Op. 09-04 (2009) (Lawyer may use online file storage and retrieval system that enables clients to access their files over the Internet, as long as the firm takes reasonable precautions to protect the confidentiality of the information; in this case, proposal would convert files to password-protected pdf documents that are stored on a Secure Socket Layer server (SSL) which encodes the documents); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-184 (2012) (Lawyer may operate virtual law office "in the cloud" as long as the lawyer complies with all ethical duties such as confidentiality, competence, communication, and supervision; lawyer should check vendor credentials, data security, how information is transmitted, whether through other jurisdictions or third-party servers, the ability to supervise the vendor; and the terms of the contract with the vendor); Fla. Bar Op. 12-3 (2013) (Lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely); Ill. State Bar Ass'n Op. 16-06 (2016) (Lawyer may use cloud-based service to store client files as long as the lawyer "takes reasonable measures to ensure that the client information remains confidential and is protected from breaches"; lawyer should engage in due diligence in choosing the provider, including reviewing industry norms, determining the provider's security precautions such as firewalls, password protection and encryption, the provider's reputation and history, asking about any prior breaches, requiring that the provider follow confidentiality requirements, requiring that the data is under the lawyer's control, and requiring reasonable access if the contract terminates or the provider goes out of business); Iowa State Bar Ass'n Op. 11-01 (2011) (Due diligence a lawyer

As part of the obligation of competence under Rule 1.1 and diligence under Rule 1.3, lawyers who represent clients in litigation must be aware of court deadlines, and any extensions granted due to the disaster. Courts typically issue orders, usually posted on their websites, addressing extensions.¹³ Lawyers should check with the courts and bar associations in their jurisdictions to determine whether deadlines have been extended.

Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.¹⁴ Lawyers with notice of an

should perform before storing files electronically with a third party using SaaS (cloud computing) includes whether the lawyer will have adequate access to the stored information, whether the lawyer will be able to restrict access of others to the stored information, whether data is encrypted and password protected, and what will happen to the information in the event the lawyer defaults on an agreement with the third party provider or terminates the relationship with the third party provider); State Bar of Nev. Formal Op. 33 (2006) (Lawyer may store client files electronically on a remote server controlled by a third party as long as the firm takes precautions to safeguard confidential information such as obtaining the third party's agreement to maintain confidentiality); New York City Bar Report, *The Cloud and the Small Law Firm: Business, Ethics and Privilege Considerations* (Nov. 2013), <https://www2.nycbar.org/pdf/report/uploads/20072378-TheCloudandtheSmallLawFirm.pdf>; N.Y. State Bar Ass'n Op. 842 (2010) (Permissible to use an online computer data storage system to store client files provided the attorney takes reasonable care to maintain confidentiality; lawyer must stay informed of both technological advances that could affect confidentiality and changes in the law that could affect privilege); State Bar Ass'n of N.D. Advisory Op. 99-03 (1999) (Permissible to use electronic online data service to store files as long as the lawyer properly protects confidential client information, perhaps via password protected storage); Pa. Bar Ass'n Op. 2011-200 (2011) ("An attorney may ethically allow client confidential material to be stored in 'the cloud' provided the attorney takes reasonable care to assure that (1) all such materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks"); S.C. Bar Advisory Op. 86-23 (1988) (A lawyer can store files in a storage facility operated by a third party if the lawyer ensures that confidentiality is maintained); Tenn. Formal Op. 2015-F-159 (2015) (Lawyer may store information in the cloud if the lawyer takes reasonable measures to protect the information); Vt. Advisory Op. 2010-6 (2010) (Lawyers may use cloud computing if they take reasonable steps to ensure confidentiality of information and that information is accessible).

¹³ See, e.g., Sup. Ct. of Fla. Administrative Order No. AOSC17-57 (2017), <http://www.floridasupremecourt.org/clerk/adminorders/2017/AOSC17-57.pdf> (extending time periods in the wake of Hurricane Irma); N.D. Sup. Ct. Administrative Order 20 (2011), <http://www.ndcourts.gov/court/rules/administrative/ao20.htm> (staying deadlines due to flooding); N.D. Sup. Ct. Rules Section 6, Emergency Procedural Rule, Administrative Rule, or Administrative Order, available at <http://www.ndcourts.gov/court/rules/administrative/ao20.htm> (last visited Sept. 4, 2018); Sup. Ct. of Texas Emergency Order Suspending Criminal Court Proceedings in the Wake of Hurricane Harvey (2017), <http://www.txcourts.gov/media/1438759/179091.pdf>; Supreme Court of Texas Emergency Order on Statutes of Limitations in Civil Cases in the Wake of Hurricane Harvey (2017), <http://www.txcourts.gov/media/1438804/179098.pdf>.

¹⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.1 & 1.3 (2018). Designating a successor and adding trusted signatories are good practices that may already be in place as part of normal succession planning. Some states require designation of a successor counsel or inventory lawyer. See, e.g., Rules Regulating the Fla. Bar R. 1-3.8(e),

impending disaster should take additional steps. For example, a transactional lawyer should review open files to determine if the lawyer should transfer funds to a trust account that will be accessible after the disaster or even attempt to complete imminent transactions prior to the disaster if practicable.

A disaster may affect the financial institution in which funds are held, or the lawyer's ability to communicate with the financial institution. Consequently, lawyers should take appropriate steps in advance to determine how they will obtain access to their accounts after a disaster. Different institutions may have varying abilities to recover from a disaster.¹⁵ After a disaster, a lawyer must notify clients or third persons for whom the lawyer is holding funds when required disbursements are imminent and the lawyer is unable to access the funds, even if the lawyer cannot access the funds because the financial institution itself is inaccessible or access is beyond the lawyer's capability.¹⁶

C. Withdrawal from Representation After a Disaster

Lawyers whose circumstances following a disaster render them unable to fulfill their ethical responsibilities to clients may be required to withdraw from those representations. Rule 1.16(a)(1) requires withdrawal if representation will cause the lawyer to violate the rules of professional conduct. Rule 1.16(a)(2) requires withdrawal if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client," for example, if the lawyer suffers severe injury or mental distress due to the disaster. Rule 1.16(b)(7) allows termination of the representation when the lawyer has "other good cause for withdrawal." These conditions may be present following a disaster. In determining whether withdrawal is required, lawyers must assess whether the client needs immediate legal services that the lawyer will be unable to timely

Iowa Ct. Rule 39.18(1), Me. Bar R. 32(a), and Mo. R. 4-1.3 cmt. [5] & R. 5.26. Some states permit voluntary designation, including California, Delaware, Idaho, South Carolina, and Tennessee. *See Mandatory Successor Rule Chart* (June 2015), ABA, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mandatory_successor_rule_chart.authcheckdam.pdf. Lawyers should also be aware that, in most jurisdictions, a power of attorney to handle law firm affairs will be insufficient because it expires on the principal's death.

¹⁵ The rules do not require a lawyer to place funds in a large or national financial institution. *See* MODEL RULES OF PROF'L CONDUCT R. 1.15 (2018). However, a prudent lawyer in a disaster-prone area should inquire about a financial institution's disaster preparedness before placing funds there. The lawyer must comply with IOLTA requirements regardless of which financial institution the lawyer chooses.

¹⁶ MODEL RULES OF PROF'L CONDUCT R. 1.4 and 1.15(d) (2018).

provide. Lawyers who are unable to continue client representation in litigation matters must seek the court's permission to withdraw as required by law and court rules.¹⁷

D. Representation of Clients by Displaced Lawyers in Another Jurisdiction

Some lawyers may either permanently or temporarily re-locate to another jurisdiction following a disaster. Their clients and other residents of the lawyers' home jurisdiction may relocate to the same jurisdiction, or elsewhere, and still require legal services. Although displaced lawyers may be able to rely on Model Rule 5.5(c) allowing temporary multijurisdictional practice to provide legal services to their clients or displaced residents, they should not assume the Rule will apply in a particular jurisdiction. Comment [14] to Rule 5.5 provides:

... lawyers from the affected jurisdiction [by a major disaster] who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.

Displaced lawyers who wish to practice law in another jurisdiction may do so only as authorized by that other jurisdiction. Subdivision (c) of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster provides:

Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis if permitted by order of the highest court of the other jurisdiction. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.¹⁸

This ABA Model Court Rule further provides that lawyers:

- are required to register with the Supreme Court in the state where they are temporarily allowed to practice;

¹⁷ MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2018).

¹⁸ Full text of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (2007) can be found at:

https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/model_rule_disaster_katrina.authcheckdam.pdf. The ABA Standing Committee on Client Protection Chart on State Implementation of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (Sept. 8, 2017) can be found at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart.authcheckdam.pdf.

- are subject to the disciplinary authority in the jurisdiction of the Supreme Court in the state where they are temporarily allowed to practice; and
- must cease practice within 60 days after the Supreme Court in the state where they are temporarily allowed to practice determines the conditions of the disaster have ended.¹⁹

E. Loss of Files and Other Client Property

Some lawyers located in an area affected by a disaster may have their files destroyed. Lawyers who maintain only paper files or maintain electronic files solely on a local computer or local server are at higher risk of losing those records in a disaster. A lawyer's responsibilities regarding these files vary depending on the nature of the stored documents and the status of the affected clients.

Under the lawyer's duty to communicate, a lawyer must notify current clients of the loss of documents with intrinsic value, such as original executed wills and trusts, deeds, and negotiable instruments.²⁰ Lawyers also must notify former clients of the loss of documents and other client property with intrinsic value. A lawyer's obligation to former clients is based on the lawyer's obligation to safeguard client property under Rule 1.15.²¹ Under the same Rule, lawyers must

¹⁹ See ABA Model Court Rule Provision of Legal Services Following Determination of Major Disaster, *supra* note 17. For an example, see the emergency order entered by the Supreme Court of Texas in 2017, permitting the temporary practice of Texas law by lawyers displaced from their home jurisdictions after Hurricane Harvey. The Court adopted requirements and limitations similar to those in the ABA Model Court Rule. See Court of Texas Amended Emergency Order After Hurricane Harvey Permitting Out-of-State Lawyers to Practice Texas Law Temporarily, Misc. Docket No. 17-9101 (Aug. 30, 2017), available at <http://www.txcourts.gov/media/1438820/179101.pdf>.

²⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018); N.Y. City Bar Ass'n Formal Op. 2015-6 (2015); See also ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1384 (1977) (Lawyer should not dispose of client property without client consent, should not destroy information that would be useful to the client if the statute of limitations has not run, should not destroy information that the client may need and is not otherwise easily accessible by the client, should exercise discretion in determining which information might be particularly sensitive or require longer retention than others, should retain trust account records, should protect confidentiality in the destruction of any files, should review files before destruction to determine if portions should be retained, and should retain an index of destroyed files); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2001-157 (2001) (Regarding destruction of closed files, indicating that property of the client such as original documents (like wills) is subject to bailment law or other statute, lawyers may not destroy other file materials without making reasonable efforts to obtain client consent, lawyers may not destroy items required to be retained by law, lawyers may not destroy items if destruction would prejudice the clients' interests, and criminal case files should not be destroyed while the client is living); State Bar of Mich. Op. R-12 (1991) (Lawyers must give notice to clients regarding file destruction after 1998, files before 1998 may not be destroyed without reasonable efforts to notify the client, and lawyers are not required to notify clients of file destruction if the lawyer maintains a copy of the documents on microfilm (excluding original documents of the client or if destruction of the documents would prejudice the client's interests)). Lawyers should note that in some states, the client may be entitled to all substantive documents in the file at the client's request. See e.g., State Bar of Ariz. Op. 15-02 (2015).

²¹ See also N.Y. City Bar Ass'n Formal Op. 2015-6 (2015).

make reasonable efforts to reconstruct documents of intrinsic value for both current and former clients, or to obtain copies of the documents that come from an external source.²²

A lawyer need not notify either current or former clients about lost documents that have no intrinsic value, that serve no useful purpose to the client or former client, or for which there are electronic copies. The lawyer must respond honestly, however, if asked about those documents by either current or former clients.²³

The largest category of documents will fall in the middle; i.e., they are necessary for current representation or would serve some useful purpose to the client. For current clients, lawyers may first attempt to reconstruct files by obtaining documents from other sources. If the lawyer cannot reconstruct the file, the lawyer must promptly notify current clients of the loss. This obligation stems from the lawyer's obligations to communicate with clients and represent them competently and diligently.²⁴ A lawyer is not required either to reconstruct the documents or to notify former clients of the loss of documents that have no intrinsic value, unless the lawyer has agreed to do so despite the termination of the lawyer-client relationship.²⁵

ABA Model Rule 1.15(a) also requires lawyers to keep complete records accounting for funds and property of clients and third parties held by the lawyer and to preserve those records for five years after the end of representation. A lawyer whose trust account records are lost or destroyed in a disaster must attempt to reconstruct those records from other available sources to fulfill this obligation.

To prevent the loss of files and other important records, including client files and trust account records, lawyers should maintain an electronic copy of important documents in an off-site location that is updated regularly.²⁶ Although not required, lawyers may maintain these files solely as electronic files, except in instances where law, court order, or agreement require maintenance of paper copies, and as long as the files are readily accessible and not subject to inadvertent

²² Lawyers should consider returning all original documents and documents with intrinsic value created by the lawyer as a result of the representation to clients at the end of representation to avoid this situation.

²³ See MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2018); N.Y. City Bar Ass'n Formal Op. 2015-6 (2015).

²⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 & 1.4 (2018); N.Y. City Bar Ass'n Formal Op. 2015-6 (2015).

²⁵ Lawyers should consider including in fee agreements or engagement letters the understandings between the lawyer and the client about how the lawyer will handle documents once the representation is ended. In addition, lawyers should consult statutes, common law, and court rules that may also govern the retention of client files.

²⁶ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2018); MODEL RULES OF PROF'L CONDUCT R. 1.3 (2018).

modification or degradation.²⁷ As discussed above, lawyers may also store files “in the cloud” if ethics obligations regarding confidentiality and control of and access to information are met.

²⁷ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (May 22, 2017) (Lawyer may send client information over the Internet if lawyer makes reasonable efforts to prevent inadvertent or unauthorized access, but may be required to take special security precautions when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security); ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1127 (1970) (Lawyers may use company that stores attorney files on computer as long as the company is set up so that the material is available only to the particular attorney to whom the files belong and the employees of the company; lawyers must take care to choose an appropriate company that has procedures to ensure confidentiality and to admonish the company that confidentiality of the files must be preserved); State Bar of Ariz. Op. 07-02 (2007) (Lawyer may not destroy original client documents after converting them to electronic records without client consent, but may destroy paper documents if they are only copies); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct 2001-157 (2001) (Electronic records may be insufficient if originals are not accurately reproduced, and some documents cannot be copied by law); Fla. Bar Op. 06-1 (2006) (Lawyers may, but are not required to, store files electronically unless: a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client's interests; files stored electronically must be readily reproducible and protected from inadvertent modification, degradation or destruction); Me. Bd. of Overseers Op. 185 (2004) (Lawyers may maintain closed files electronically, rather than paper copies, if they are accessible to the client); Me. Bd. of Overseers Op. 183 (2004) (“If an attorney dispenses with the retention of paper files in favor of computerized records, the attorney must be mindful that the obligation to the client may require the attorney to maintain the means to provide copies of those records in a format that will make them accessible to both the attorney and the client in the future. Because the attorney is obligated to ensure that the client is able to make informed decisions regarding the disposition of the file and also must take care in destroying files to be sure that useful information is retained, an attorney will need to consider how new hardware or software will impact future access to old computerized records.”); Mo. Informal Advisory Op. 127 (2009) (Lawyer may keep client's file in exclusively electronic format except documents that are legally significant as originals and intrinsically valuable documents and providing that the appropriate software to access the information is maintained for the time period the file must be retained); State Bar of Mich. Op. R-5 (1989) (File storage via electronic means should be treated carefully to ensure confidentiality by limiting access to law firm personnel); N.J. Advisory Comm. on Prof'l Ethics Decisions Op. 701 (2006) (Documents may be stored electronically if sufficient safeguards to maintain confidentiality of the documents, particularly if they are stored outside the law firm, except for documents that are client property such as original wills, trusts, deeds, executed contracts, corporate bylaws and minutes); N.Y. County Lawyers Ass'n Op. 725 (1998) (General opinion on the ethical obligation to retain closed files, including that it may be proper for a lawyer to retain only electronic copies of a file if “the evidentiary value of such documents will not be unduly impaired by the method of storage”); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 680 (1996) (Although some items in a client's file may be stored electronically, some documents (such as original checkbooks, check stubs, cancelled checks, and bank statements) are required by the rules to be kept in original form; documents stored electronically should be stored in “read-only” form so they cannot be inadvertently destroyed or altered; and records must be readily produced when necessary); N.C. State Bar Op. RPC 234 (1996) (Closed client files may be stored electronically as long as the electronic documents can be converted to paper copies, except for “original documents with legal significance, such as wills, contracts, stock certificates, etc.”); S.C. Bar Advisory Op. 02-14 (2002) (General opinion on disposition of closed files when one member of a two-member firm retires, discussing various situations and notes that files may be placed on computer or other electronic media; Note: In South Carolina, the files are the property of the client); S.C. Bar Advisory Op. 98-33 (1998) (The committee declined to give an opinion on electronic retention of closed files as a legal question, but indicated there was no prohibition against retaining documents in electronic format as long as doing so did not adversely affect the client's interests and as long as the lawyer took reasonable precautions to make sure that third parties with access to the electronic records kept the records confidential); Va. State Bar Op. 1818 (2005) (Lawyer can maintain client files in electronic format with no paper copies as long as the method of record retention does not adversely affect the client's interests); Wash. State Bar Ass'n Op. 2023 (2003) (Lawyer may have firm file retention policy in which original documents are provided to the client and the lawyer keeps only electronic copies of file materials as long as documents “with intrinsic value” or that are the property of the client cannot be destroyed without client permission); State Bar of Wis. Op. E-00-3 (2000) (If lawyer has stored files electronically, lawyer should provide

F. Solicitation and Advertising

Lawyers may want to offer legal services to persons affected by a disaster. The existence of a disaster, however, does not excuse compliance with lawyer advertising and solicitation rules.²⁸ Of particular concern is the possibility of improper solicitation in the wake of a disaster. A lawyer may not solicit disaster victims unless the lawyer complies with Model Rules 7.1 through 7.3.²⁹ “Live person-to-person contact” that is generally prohibited means “in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection,”³⁰ and a significant motive for the lawyer’s doing so is pecuniary gain.³¹ In addition to ethical prohibitions, lawyers should be aware that there may be statutory prohibitions that may apply.³²

Lawyers may solicit in-person to offer pro bono legal services to disaster victims, because the lawyer’s motive does not involve pecuniary gain.³³ Additionally, lawyers may communicate with disaster victims in “targeted” written or recorded electronic material in compliance with Rules 7.1 through 7.3. Lawyers also should be mindful of any additional requirements for written or recorded electronic solicitations imposed by particular jurisdictions.³⁴

client copies on disk at client’s request. However, lawyer can bill client for time/expense if required to obtain information in format client wants. Attorney does not need to provide client with internal memos, personal notes, and the like).

²⁸ See MODEL RULES OF PROF’L CONDUCT R. 7.1 – 7.5 (all of these Rules were amended in August 2018).

²⁹ See MODEL RULES OF PROF’L CONDUCT R. 7.3 (2018). See also *The Florida Bar v. Wolfe*, 759 So. 2d 639 (Fla. 2000) (Lawyer suspended for one year for soliciting clients by passing out brochures in affected areas in wake of tornados); State Bar of Cal. Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 2004-166 (2004) (Solicitation of prospective clients in mass disaster victim chat room is not considered in person solicitation but nevertheless is prohibited because it is “intrusive”).

³⁰ MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. [2] (2018). Rule 7.3(b) contains some exceptions, and Rule 7.3(c) contains an additional prohibition. Both should be consulted.

³¹ *Id.*

³² See, e.g., FLA. STAT. §877.02 (Prohibiting solicitation on behalf of lawyers by hospitals, police, tow truck operators, insurance adjusters); 49 U.S.C. §1136(g)(2) (Prohibiting lawyer solicitation within 45 days of an air transportation accident).

³³ MODEL RULES OF PROF’L CONDUCT R. 7.3(a); La. Bd. of Ethics Op. 05-RPCC-005 (2005) (Lawyer may solicit disaster victims in person to provide pro bono legal services). Providing pro bono legal services is encouraged by, inter alia, Model Rules 6.1 and 6.2.

³⁴ See, e.g., Rules Regulating the Fla. Bar R. 4-7.18(b)(2) (requiring contrasting “advertisement” mark on envelope and enclosures; statement of qualifications and experience; information on where the lawyer obtained the information prompting the written solicitation; and specified first sentence, among others).

G. Out-Of-State Lawyers Providing Representation to Disaster Victims

Lawyers practicing in jurisdictions unaffected by the disaster who wish to assist by providing legal services to disaster victims must consider rules regulating temporary multijurisdictional practice.³⁵ Out-of-state lawyers may provide representation to disaster victims in the affected jurisdiction only when permitted by that jurisdiction's law or rules, or by order of the jurisdiction's highest court.

The ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster³⁶ provides that the Supreme Court of the affected jurisdiction must declare a major disaster and issue an order that allows lawyers in good standing from another jurisdiction to temporarily provide pro bono legal services in the affected jurisdiction through a non-profit bar association, pro bono program, legal services program, or other organization designated by the courts.³⁷ The Model Court Rule also requires those lawyers to register with the courts of the affected jurisdiction, and subjects those lawyers to discipline in the affected jurisdiction.³⁸

Conclusion

Lawyers must be prepared to deal with disasters. Foremost among a lawyer's ethical obligations are those to existing clients, particularly in maintaining communication. Lawyers must also protect documents, funds, and other property the lawyer is holding for clients or third parties.

³⁵ MODEL RULES OF PROF'L CONDUCT R. 5.5 (c), cmt. [14] (2018): "Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster."

Most states have adopted some form of ABA Model Rule 5.5 on Multijurisdictional Practice. A chart on state implementation of ABA Multijurisdictional Practice Policies compiled by the ABA may be found at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf.

³⁶ ABA MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER, available at https://www.americanbar.org/content/dam/aba/images/disaster/model_court_rule.pdf (last visited Sept. 7, 2018). The ABA Chart on State Implementation of ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster can be found at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart.authcheckdam.pdf.

³⁷ Providing pro bono legal services in this situation would assist the lawyer in meeting the suggested goal of 50 hours per year set forth in Model Rule 6.1(a).

³⁸ As noted above, the Supreme Court of Texas issued an emergency order in 2017 after Hurricane Harvey following the ABA Model Court Order. See *supra* note 18.

By proper advance preparation and taking advantage of available technology during recovery efforts, lawyers will reduce the risk of violating professional obligations after a disaster.

Dissent: Keith R. Fisher dissents.

**AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND
PROFESSIONAL RESPONSIBILITY**

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Divorce and conflicts

Divorce and conflict: two words that go easily together. But what about amicable or friendly divorces? Are they conflict-free?

Conflicts are a frequent source of questions on our ethics hotline. In 2017, 30 percent of hotline calls involved a conflict of interest question. One issue I have been routinely surprised to hear on the hotline involves attorneys representing both parties in a divorce. In these instances, the caller was not calling to see if this was permissible in the first place. In fact, the representation had been ongoing because the divorce was “friendly,” and the clients had signed a “waiver.” The callers were calling because of some other question and the joint representation was just the background, or they were calling because the “friendly” divorce was turning unfriendly, and they were trying to figure out if they had a conflict. Needless to say, the callers have been surprised when I explained that it is the longstanding position of this Office that representation of both parties in a divorce is a non-consentable conflict of interest and therefore not ethically permissible.¹ Given the surprising frequency with which this has arisen, I thought it would be helpful to outline the analysis.

Rule 1.7(a): Is there a conflict?

Rule 1.7, Minnesota Rules of

Professional

Conduct (MRPC) provides that, except where certain circumstances are met, “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”² The rule defines a concurrent conflict of interest as an instance where “the representation of one client will be directly adverse to another client”³ or “there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer’s responsibility to another client, a former client, or a third person or by a personal interest of the lawyer.”⁴

Divorce proceedings, even amicable ones, are the classic example of “directly adverse” representation, because divorce—even one proceeding by joint petition—is still litigation.⁵ Moreover, the “materially limited” prong is also met because even in the most amicable of divorces, there is a strong likelihood that differences will arise between the parties, usually in areas the parties have not thought about because they are not lawyers familiar with divorce law.

Given the presence of a concurrent conflict of interest under Rule 1.7(a), the next step is to review Rule 1.7(b), which describes the circumstances that must be met when a concurrent conflict is one to which consent can be provided.

Rule 1.7(b): Is it consentable?

Four specific conditions must be met to make a conflict consentable: (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.⁶ Because divorce, as noted, is a litigated matter before a tribunal even when jointly brought, Rule 1.7(b)(3) cannot be satisfied and consent is not permissible.

This makes sense. Even an amicable division of property is a “zero sum proposition.”⁷ Further, as many a caller to the hotline has realized belatedly, it is extremely difficult to serve both clients zealously without favoring one or the other when inevitable differences in point of view arise. Lawyers are not neutrals when they are representing clients, and they

should not pretend they are. You are not simply a disinterested authority on the law. Each client is entitled to your undivided loyalty and independent judgment.⁸ In this scenario, lawyers are even incentivized to moderate the representation and advice so as not to highlight or bring forward potential points of contention in order not to disrupt the common representation.

It is also no comfort to push the final responsibility for the fairness or adequacy of the representation to the judge who is approving the parties’ agreement. Courts are concerned about the integrity of the judgments they enter as well as their finality. Questions can and usually do arise when parties are not given the benefit of conflict-free advice, especially when they think that is what they paid for.

Alternatives?

Obviously, one alternative is to represent only one party to the divorce, and follow Rule 4.3 regarding contact with the unrepresented party. Rule 4.3 sets forth specific requirements in dealing with an unrepresented party. Paraphrased, they are: (1) Don’t act like you are disinterested; (2) tell the unrepresented party that the parties’ interests are adverse; (3) if you think there is a misunderstanding, clarify who you represent; and (4) don’t give the unrepresented party legal advice, other than the advice to secure counsel.⁹

I recognize that this may be an unsatisfactory alternative. When one party has a lawyer, the other party often feels the need to get a lawyer. Often there is simply no money for that.



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.



Or matters can become needlessly complicated if the attorney is the unhelpful kind that manages by their mere presence to make a mostly amicable matter something different.

Given the calls I have taken on this subject, it is also true that this has presumably worked out for some lawyers even if it is impermissible. One lawyer has told me he has been doing this on and off for a number of years; sometimes it works out, sometimes it doesn't. Fortunately for him, it has never resulted in a disciplinary complaint or malpractice claim.

Another alternative endorsed by the Restatement that really concerns me is the proposition that a lawyer can represent both parties (with informed consent) in the property negotiations portion of the matter where only property is at issue, but consent would not allow the lawyer to represent both parties before the court in securing the final decree. According to the Restatement, the parties could additionally agree that the lawyer will only represent one party before the tribunal, and the other party would be represented by another lawyer in the adjudicative phase or would appear as unrepresented.¹⁰ While I think this is theoretically possible, and avoids the Rule 1.7(b)(3) issue, I am not sure how you could obtain informed consent—because such consent would require an attorney to disclose and detail all of the ways in which the representation of both is materially limited. Remember, informed consent requires a lawyer to provide adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.¹¹ It is never sufficient to say—as most people do—we discussed the presence of a conflict, and you have given informed consent. Providing enough information to obtain ethically sufficient informed consent usually highlights for the parties the inadvisability of

the planned course of conduct. I certainly do not recommend it, and I bet your malpractice carrier does not either.

Conclusion

Do not add your own conflict to the conflicts present in a divorce proceeding by attempting to represent both spouses. As always, if you have any questions about your ethical obligations, call the ethics hotline for an advisory opinion at 651-296-2963.

Notes

¹ See Michael Hoover, "Report: Lawyers Professional Responsibility Board," *Bench & Bar* (March 1980) (applying Disciplinary Rule 5-105(c)); Marcia A. Johnson, "Conflict Admonitions 1995," *Bench & Bar* (March 1996) (applying Rule 1.7).

² Rule 1.7(a), MRPC.

³ Rule 1.7(a)(1), MRPC.

⁴ Rule 1.7(a)(2), MRPC.

⁵ See Illinois State Bar Association Advisory Opinion on Professional Conduct 98-06 January 1999, *aff'd* January 2010 ("A divorce, even when uncontested, is litigation. It involves the filing of a lawsuit and judgment being entered against both parties."); Hazard & Hodes, *The Law of Lawyering*, §12.05 ("Despite the fact that the relationship between the parties appears to be personally non-antagonistic, it is surely 'directly adverse' in the legal sense.").

⁶ Rule 1.7(b)(1)-(4), MRPC.

⁷ Hazard & Hodes, §12.05 at 12-19.

⁸ Rule 1.7, comment [1], MRPC.

⁹ Rule 4.3(a)-(d), MRPC.

¹⁰ Restatement of Law Third, §122, Illustration 8 at 274.

¹¹ Rule 1.0(f), MRPC.

File contents and retention

What makes up a client's file and how long do I need to keep it? These two questions have been asked frequently on our ethics hotline for decades. Minnesota's ethics rules speak to the first question but offer no direct guidance on the latter. Let's review the current lay of the land.

File contents

Calling it a client's "file" is a bit of a misnomer from an ethics perspective. The ethics rules instead frame the question in terms of the "papers and property" to which the client is entitled.¹ Surrendering such "papers and property" is part of a lawyer's ethical duty upon termination of the representation, and it exemplifies our obligation to take steps, to the extent reasonably practicable, to protect a client's interest after the representation ends.²

Somewhat helpfully, the rule describes what is included within "papers and property."³ I say somewhat helpfully because while Rule 1.16(e) covers a decent bit of ground, it doesn't answer every question that comes up when a lawyer is looking at her file and trying to figure out what should be "surrendered."⁴ While your best bet is to read the rule, "papers and property" (paraphrased) includes, whether printed or stored electronically:

- everything provided by the client or on behalf of the client to the lawyer;
- pleadings and other litigation materials that have been served or filed, regardless of whether the client has paid for the services involved in creating those documents;
- correspondence exchanged with others; and
- for litigation, all items for which the lawyer has advanced costs and expenses regardless of reimbursement, such as depositions, expert opinions and statements, business records, witness statements, and other items of evidentiary value.

"Papers and property" do not include:

- pleadings, litigation materials, and correspondence that have been drafted and not sent if the client has not paid for the legal services in drafting or creating those documents; or

■ in non-litigated matters, drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, and any other unexecuted documents that do not have legal effect, where the client has not paid for the services.⁵

However, there are two important caveats relating to the latter points. First, you should seriously consider not withholding these items if doing so will substantially prejudice the interests of the client—that is, if the statute of limitations is about to run or another deadline is imminent.⁶ This is the

position taken by ABA Opinion 471 (based upon Model Rule 1.16(d)), has long been the position of the LPRB (see LPRB Opinion No. 13), and is generally encompassed within the rule's mandate to "take steps to the extent reasonably practicable to protect a client's interest." Remember, the ethics rule is focused on protecting the client's interest upon termination of the representation. Surrendering defined papers and property is just one aspect of the obligation. Protecting the client's interest in a particular case may require you to provide more than just the defined papers and property.

Second, if you do withhold something as not the client's "papers or property" because it is not paid for, you cannot then assert a claim for fees in drafting the documents.⁷ This is because Minnesota does not allow retaining liens, which is a lien allowing the attorney to retain a client's papers or money until the client pays his bill.⁸ Basically, you cannot hold client documents hostage to get your bill paid. You may not have to give the documents for which payment has not been received to the client, but withholding them means you are relinquishing your right to payment for those items.

A few things are not expressly referenced in the rule. What about attorney notes and similar work product, like chronologies and legal research not reduced to memoranda? Such items appear well within the broadly worded "papers and property" for which the client has paid the lawyer's fees" set forth in Rule 1.16(e)(1), MRPC. What about administrative documents in the file such as conflict checks, work-in-progress reports, or internal firm communications regarding account creation and creditworthiness? This is also not expressly addressed, but likely such documents would fall outside of "papers and property," which is the conclusion reached by ABA Opinion No. 471.

File retention

Minnesota's ethics rules are silent as to retention periods for client files. The only retention period referred to in the ethics rules is in Rule 1.15(h), MRPC, which requires that both operating and trust account books and records be retained for six years following the end of the tax year to which they relate or completion of the representation, as applicable.



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.

In 2004, a former OLPR director wrote a column on file retention in this publication, which provides helpful guidance by identifying the issues you should keep in mind when determining what your file retention policies should look like.⁹ That article remains relevant today. Since then, however, several states have been amending their ethics rules to specify retention periods for client files.¹⁰

For example, Massachusetts' Supreme Court just approved a comprehensive rule amendment that sets a default six-year retention period for most cases—with specific exceptions such as files involving minors (six years after the minor reaches majority)—and, quite helpfully, addresses file retention standards for criminal defense files, an often overlooked category of documents in writings on this topic. For criminal defense files, Massachusetts' new rule requires retention for the life of the client if the matter resulted in a sentence of death or life imprisonment, with or without the possibility of parole, and in all other cases, allows destruction without notice to the client 10 years after the latest of: completion of the representation, the conclusion of all direct appeal, or the running of any incarcerated defendant's maximum period of incarceration.

I really like the specificity of Massachusetts' rule. It provides a lot of guidance on both file retention and file content. Food for thought for a potential rule change in Minnesota?

Lest I forget, if you do decide not to retain a client file, you should ensure file destruction is managed securely in order to protect client confidences.¹¹

Don't forget copying costs

In Minnesota, you can charge a client for the reasonable cost of duplicating or retrieving the client file *only* if the client has, prior to termination, agreed in writing to pay such a charge.¹² Also remember that you cannot make the return of the client file contingent on advance payment of copying costs, just as you cannot make return of the file contingent on payment of your fee.¹³

Minnesota's Rule 1.16(d) and (e) answer a lot of questions that arise when "surrendering" a client file. I also like what other states are doing to provide greater specificity and assistance to their lawyers. As always, if you have any ethics questions, please call our ethics hotline at 651-296-3952. ▲

Notes

¹ Rule 1.16(d), Minnesota Rules of Professional Conduct (MRPC).

² *Id.*; see also Rule 1.15(c) (4), MRPC, "A lawyer shall promptly pay or deliver to the client or third person as requested the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive."

³ Rule 1.16(e), MRPC.

⁴ Another resource is LPRB Opinion No. 13, which provides a bit more guidance and is still an active opinion, notwithstanding the fact that much of its content has been expressly incorporated into Rule 1.16. Lawyers Professional Responsibility Board (LPRB) Opinion No. 13 (amended 1/22/2010).

⁵ See generally Rule 1.16(e) (1)-(3), MRPC.

⁶ LPRB Opinion No. 13; ABA Opinion No. 471 "Ethical Obligations of Lawyers to Surrender Papers or Property to which Former Clients is Entitled" (7/1/2015).

⁷ Rule 1.6(g), MRPC, "A lawyer shall not condition the return of client papers or property on payment of the lawyer's fee or the costs of copying the lawyer's file" LPRB Opinion No. 13; "Board Opinion No. 13 Revisited" by Timothy M. Burke, Minnesota Lawyer (6/12/2000), available on the OLPR website at www.lprb.mncourts.gov/articles.

⁸ See *Village of New Brighton v. Jamison*, 278 N.W.2d 321, 324 (Minn. 1979) (holding that legislative revisions to Section 481.13 of Minnesota statutes in 1976 abolished the retaining lien in Minnesota, leaving only a statutory charging lien on causes of action).


⁹ "File Retention Policies and Requirements" by Kenneth L. Jorgensen, Bench & Bar (December 2004), available on the OLPR website at www.lprb.mncourts.gov/articles.

¹⁰ Mass. R. Prof. C. 1.15A, by Order of the Supreme Judicial Court dated 6/7/2018, effective 9/1/2018; see also Colorado Rules of Professional Conduct 1.16A (effective 3/15/2018); anecdotally, I understand one driver of this trend is the increasing number of aging solo or small firm lawyers with basements full of client files spanning decades, which too often fall to next of kin, partners, or disciplinary offices to address.

¹¹ Rule 1.9(c) (2), MRPC.

¹² Rule 1.16(f), MRPC.

¹³ Rule 1.16(g), MRPC.

		Search documents in this case: <input type="text"/>	<input type="button" value="Search"/>
No. 17-1457			
Title:	Michelle Lowney MacDonald, Petitioner v. Lawyers Board of Professional Responsibility		
Docketed:	April 23, 2018		
Lower Ct:	Supreme Court of Minnesota		
Case Numbers:	(A16-1282)		
Decision Date:	January 17, 2018		

DATE	PROCEEDINGS AND ORDERS
Apr 17 2018	Petition for a writ of certiorari filed. (Response due May 23, 2018) Petition Appendix Certificate of Word Count Proof of Service
Jun 05 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 25 2018	Petition DENIED.

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UPDATED MEETINGS OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD 2019

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

<u>Date</u>	<u>Location</u>
Thursday, January 31, 2019*	Town & Country Club, St. Paul, MN
Friday, April 26, 2019*	Town & Country Club, St. Paul, MN
Friday, June 21, 2019*	Town & Country Club, St. Paul, MN
Friday, September 27, 2019	Earle Brown Center, Brooklyn Center, MN (following seminar)

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

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