LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING AGENDA

December 13, 2024 – 12:30pm (in person and via Zoom)
Minnesota Judicial Center
Lunch provided for Board members 12:00pm

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1. Approval of minutes of September 13, 2024, meeting (attachment 1).

2. Personnel updates – existing members.

3. Personnel updates – new member appointments Feb. 1, 2025.

4. Rules committee report.

    a. Board opinion regarding ABA Opinion 511 on Listservs and Rule 1.6, Minnesota Rules of Professional Conduct (attachments 2-3).

    b. Response to Justice Paul Thissen's concurrence in *In re Udeani* (attachment 4) and *In re Nelson* (attachment 5).

5. Discussion item: How to handle late complainant appeals.

BREAK IF NEEDED

6. Updates on Board projects and participation:

    a. Board comment on recommendations of Minnesota Supreme Court Advisory Committee on Rules of Lawyers Professional Responsibility.

    b. Working group between Lawyers Board, Minnesota District Judges Association, and Board of Judicial Standards considering rules regarding judicial elections.

7. Director's report.

8. 2024 statistics – third quarter (attachment 6).

9. 2025 meeting date reminder (attachment 7).

10. Open discussion.

11. Adjournment.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING

OPEN MEETING MINUTES

September 13, 2024, 2024 12:30 pm (In-person and via Zoom) – Minnesota Judicial Center

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Board member attendance:

- Landon Ascheman
- Katherine Brown Holmen
- Daniel Cragg
- Michael Friedman
- Tom Gorowsky
- Jordan Hart
- Tommy Krause
- Paul Lehman
- Kevin Magnuson
- Melissa Manderschied
- Jill Nitke Scott
- Kristi Paulson, Vice Chair
- Jill Prohofsky
- Sharon Van Leer
- Carol Washington
- Bruce Williams

Other attendees:

- Minnesota Supreme Court liaison Justice Gordon Moore
- Susan Humiston, Director of the Office of Lawyers Professional Responsibility
- Members of the OLPR staff
- Members of the public

Minutes:

1. Vice-Chair Kristi Paulson substitution as Chair called meeting into session at 12:30pm on Friday September 13th, introduced new Supreme Court liaison Justice Gordon Moore.

2. Bruce Williams moved to approve the minutes of the May 2024, meeting. With two slight corrections to the minutes, Paul Lehman seconded. The motion passed unanimously.

3. The rules committee spoke briefly about the changes made to 511, which Director Humiston said was primarily to add trademarks in where necessary. Discussion was had briefly by members about the various issues had with ABA Opinion 511 including its lack of real-world practicality, the harm it does to smaller firms and how much public disclosure is not being taken into place.

4. Rules Committee chair Daniel Cragg spoke about Committee Meetings discussion regarding 1.6B2 about informed consent and the significant overlap it had with ABA Opinion 511, which may give MN some leeway to work with regarding the decision.

5. Antoinette Watkins held a breakfast over the summer break to meet with other public members about how to get more to join the board. Posting the position to volunteer job boards online was suggested by Frank Leo.

6. Court continues to express great support for OLPR, there is work being done on client security board website, a LPRB website and the OLPR website, all are moving along and should be working by Spring 2025.

7. Director Humiston discussed proposed additional rules changes including raising the $900 fine for public discipline, this outdated charge could assist with the previously raised issues concerning the spending deficit.

8. The OLPR seminar will be held Friday September the 27th, all members are encouraged to attend. Registration deadline was September 13, 2024.

9. Director Humiston warned that numbers of appeals would continue to be challenging. We have officially survived the IT issues from earlier this summer but should be seeing more admonition appeals. DEC is in desperate need of volunteers and has asked to not take any more cases currently.

10. Kristi Paulson opened the meeting for discussion, when no other issues were raised she moved to close, seconded by Tommy Krause, approved unanimously.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

OPINION NO .#

LAWYER CONFIDENTIALITY OBLIGATIONS WHEN COMMUNICATING ON LISTSERVS

Subject to the restrictions contained within Rule 1.6(b)(2), MRPC, practitioners do not need to obtain informed consent from their clients to post about that client's matter on a Listserv.

Comment

The American Bar Association has recently opined in Formal Opinion 511R that, under Model Rule 1.6, informed consent of a client is required when posting questions or comments to a Listserv relating to a representation of the client. The ABA's opinion is quite broad, prohibiting posts "in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved." (ABA Formal Opinion 511R at 1.)

In view of Rule 1.6 of the Minnesota Rules of Professional Conduct, the Minnesota Lawyers Professional Responsibility Board disagrees with the overly broad restriction proposed by the American Bar Association in Formal Opinion 511R regarding the confidentiality obligations of lawyers posting to a Listserv.

Rule 1.6, MRPC establishes several restrictions on what information a lawyer may disclose regarding their representation and their client. Rule 1.6(a), MRPC, states:

> Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.

Rule 1.6(b)(2), MRPC, provides for qualified exceptions of disclosure where a lawyer may reveal information relating to the representation of a client.

Rule 1.6(b)(2), MRPC, states:

> (b) A lawyer may reveal information relating to the representation of a client if:
> …
> (2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;

Rule 1.6(b)(2), MRPC, as presented above, was amended into the Minnesota Rules of Professional Conduct in 2005. This clause was implemented to remove the previous language of "confidence"

and "secret" that was used throughout the rule to describe the scope of information protected under Rule 1.6.

Prior to 2005, Rule 1.6(a), MRPC (2004), stated:

> (a) Except when permitted under paragraph (b), a lawyer shall not knowingly:
> (1) reveal a confidence or secret of a client;
> (2) use a confidence or secret of a client to the disadvantage of the client;
> (3) use a confidence or secret of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

Prior to 2005, Rule 1.6(d), MRPC (2004), stated:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Prior to 2005, the comment titled "Authorized Disclosure" to Rule 1.6, MRPC (2004), stated in part:

> A lawyer must always be sensitive to the client's rights and wishes and act scrupulously in making decisions which may involve disclosure of information obtained in the professional relationship. Thus, in the absence of the client's consent after consultation, a lawyer should not associate another lawyer in handling a matter; *nor, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the client's identity or confidences or secrets would be revealed to that lawyer.* Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning clients.

(emphasis added). Comparing the pre-2005 language the current language of Rule 1.6, MRPC, shows that the "scope of information" protected under this rule was previously provided for in Rule 1.6(d) (2004) as a definition. This limitation on scope was then amended into Rule 1.6(b)(2) as a qualified exception.

Comment [4] to Rule 1.6, MRPC, states:

> Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. *A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.*

(emphasis added). What the language of Rule 1.6, as amended, demonstrates, is that Minnesota takes a measured, practical approach to client confidentiality as compared to the ABA Model Rule.

Rule 1.6, MRPC, allows for a lawyer to reveal certain information relating to the representation of a client if it is not privileged, held inviolate, or reasonably believed to be embarrassing or likely detrimental to the client. The ABA does not have an equivalent clause under Section 1.6 of the Model Rules of Professional Conduct that allows for the disclosure of this type of information. Therefore, the ABA's guidance in Formal Opinion 511R on the confidentiality obligations of lawyers posting to a Listserv is overly restrictive with regards to what is currently allowed for in Minnesota under Rule 1.6(b)(2), MRPC.

We recognize that other jurisdictions have found ethics violations for lawyers who post on Listservs or other public forums. *See In re Peshek*, M.R. 23794, 09 CH 89 (May 18, 2010); *Office of Lawyer Regulation v. Peshek,* 334 Wis.2d 373, 798 N.W.2d 879 (2011) (lawyer published a public blog containing confidential information about her clients and for failing to inform a court of a client's misstatement of fact); *In Re Quillinan,* 20 DB Rptr. 288 (2006) (lawyer revealing client confidences on a bar Listserv where two aggravators and three mitigators applied); *In re Tsamis*, No. 2013PR00095, Ill. Att'y Registration & Disciplinary Comm'n (Jan. 15, 2014) (lawyer published adversarial response to negative review); *People v. Isaac*, 470 P.3d 837, 839 (Colo. O.P.D.J. 2016) (lawyer responded to negative review and listed specific client information).

However, in each of those instances, the lawyers would also have violated Rule 1.6, MRPC because the information posted was protected by attorney client privilege, was embarrassing to client, or breached other confidentiality obligations. As such, we do not find that those precedents weigh on the proper application of Rule 1.6, MRPC to Listservs.

If a lawyer reasonably believes the disclosure of information not protected by attorney client privilege would not be embarrassing or likely detrimental to the client, it is not a breach of the confidentiality ethical obligation provided for in Rule 1.6 of the Minnesota Rules of Professional Conduct.

Adopted:

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 511 **May 8, 2024**

Confidentiality Obligations of Lawyers Posting to Listservs

Rule 1.6 prohibits a lawyer from posting questions or comments relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's informed consent if the lawyer's contributions will not disclose, or be reasonably likely to lead to the disclosure of, information relating to a client representation.

Introduction

This opinion considers whether, to obtain assistance in a representation from other lawyers on a listserv discussion group, or post a comment, a lawyer is impliedly authorized to disclose information relating to the representation of a client or information that could lead to the discovery of such information.[1] Without the client's informed consent, Rule 1.6 forbids a lawyer from posting questions or comments relating to a representation—even in hypothetical or abstract form—if there is a reasonable likelihood that the lawyer's posts would allow a reader then or later to infer the identity of the lawyer's client or the particular situation involved, thereby disclosing information relating to the representation. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, if the lawyer's contributions do not disclose information relating to any client representation. The principles set forth in this opinion regarding lawyers' confidentiality obligations when they communicate on listservs apply equally when lawyers communicate about their law practices with individuals outside their law firms by other media and in other settings, including when lawyers discuss their work at in-person gatherings.[2]

Relevant Principles Regarding the Duty of Confidentiality

Subject to exceptions not applicable here,[3] ABA Model Rule of Professional Conduct 1.6(a) provides that: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023.
[2] *See* ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 480 (2018) for a discussion of other forms of lawyer public commentary including blogs, writings, and educational presentations.
[3] This opinion does not discuss the exceptions to the confidentiality obligation provided for in paragraph (b) because we cannot envision a recurring situation in which any of the exceptions are likely to authorize disclosures of information relating to a representation on a lawyer's listserv.

out the representation or the disclosure is permitted by paragraph (b)."[4] Comment 3 explains that Rule 1.6 protects "all information relating to the representation, whatever its source" and is not limited to communications protected by attorney-client privilege.[5] A lawyer may not reveal even publicly available information, such as transcripts of proceedings in which the lawyer represented a client. As noted in ABA Formal Opinion 04-433 (2004), "the protection afforded by Model Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer." Among the information that is generally considered to be information relating to the representation is the identity of a lawyer's clients.[6]

Because Rule 1.6 restricts communications that "could reasonably lead to the discovery of" information relating to the representation,[7] lawyers are generally restricted from disclosing such information even if the information is anonymized, hypothetical, or in abstracted form, if it is reasonably likely that someone learning the information might then or later ascertain the client's identity or the situation involved.[8] Comment 4 explains, that without client consent, Rule 1.6 prohibits:

> disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

The breadth of Rule 1.6 was emphasized in ABA Formal Opinion 496 (2021), which cautioned lawyers about responding to online criticism: Lawyers "who choose to respond online must not disclose information that relates to a client matter *or that could reasonably lead to the discovery of confidential information by another*." (Emphasis added).

Lawyers may disclose information relating to the representation with the client's informed consent. "Informed consent" is defined in Rule 1.0(e) to denote "the agreement by a person to a

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[4] Comment 2 to Model Rule 1.6(a) emphasizes that a "fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."

[5] The attorney-client privilege is an evidentiary rule applicable to judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence about a client. The duty of client-lawyer confidentiality is not limited to those circumstances, nor is it limited to matters communicated in confidence by the client. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [3].

[6] Comment 2 to Rule 7.2, for example, notes that in lawyer advertising, client consent is required before naming regularly represented clients. *See also* Wis. Formal Op. EF-17-02 (2017) (lawyer may not disclose current or former client's identity without informed consent; not relevant that representation is matter of public record or case is long closed); Ill. State Bar Ass'n Advisory Op. 12-03 (2012) (lawyer must obtain informed consent before disclosing client names to professional networking group); Ill. State Bar Ass'n Advisory Op. 12-15 (2012) (lawyer may take part in an online discussion group if no information relating to the representation is disclosed and there is no risk that the client could be identified); ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 133-134 (10th ed. 2023).

[7] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [4].

[8] *See, e.g.*, Colo. Bar Ass'n Formal Op. 138 (2019) ("Consultations using hypotheticals do not implicate [Rule] 1.6 provided that the hypotheticals do not create a 'reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.'").

proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Comments 6 and 7 to Rule 1.0 advise that the necessary communication will ordinarily require the lawyer to confer with the client and explain the advantages and disadvantages of the proposed course of conduct. And obtaining consent will usually require a client's affirmative response; a lawyer generally may not assume consent from a client's silence.[9]

Additionally, Rule 1.6(a) permits a lawyer to reveal information relating to the representation of a client if "the disclosure is impliedly authorized in order to carry out the representation."[10] Comment 5 to Rule 1.6 explains that "[l]awyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers." Conversely, lawyers are generally not authorized to disclose information relating to the representation to lawyers outside the firm, including lawyers from whom the engaged lawyers seeks assistance. Rather, as a general matter, lawyers must obtain the client's informed consent before engaging lawyers in the representation other than lawyers in their firm.[11]

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[9] Lawyers who anticipate using listservs for the benefit of the representation may seek to obtain the client's informed consent at the outset of the representation, such as by explaining the lawyer's intention and memorializing the client's advance consent in the lawyer's engagement agreement. Rule 1.0(e) provides that for a client's consent to be "informed," the lawyer must "communicate[] adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Therefore, the lawyer's initial explanation must be sufficiently detailed to inform the client of the material risks involved. It may not always be possible to provide sufficient detail until considering an actual post.

[10] Comment 5 to Rule 1.6 explains that a lawyer is impliedly authorized to make disclosures "when appropriate in carrying out the representation." In many situations, by authorizing the lawyer to carry out the representation, or to carry out some aspect of the representation, the client impliedly authorizes the lawyer to disclose information relating to the representation, to the extent helpful to the client, for the purpose of achieving the client's objectives. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.3, cmt. [5] ("In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation."). For example, when a client authorizes a lawyer to conduct settlement negotiations or transactional negotiations, the client impliedly authorizes the lawyer to disclose information relating to the representation insofar as the lawyer reasonably believes that doing so will advance the client's interests. What is impliedly authorized will depend "upon the particular circumstances of the representation." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 6, at 135. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) (lawyer experiencing data breach may reveal information relating to representation to law enforcement if lawyer reasonably believes disclosure is impliedly authorized, will advance client's interests, and will not adversely affect client's material interests); N.C. Formal Op. 2015-5 (2015) ("[p]roviding a client's new appellate counsel with information about the client's case, and turning over the client's appellate file to the successor appellate counsel, is generally considered appropriate to protect the client's interests in the appellate representation" and impliedly authorized); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421 (2001) (lawyer hired by insurance company to defend insured normally has implied authorization to share with insurer information that will advance insured's interests); *see also* RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 61 (3d ed. 2001) (A lawyer is impliedly authorized to disclose information that "will advance the interests of the client in the representation."). In at least one situation, the Rules themselves impliedly authorize the disclosure, even without the client's implicit approval. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14, cmt. [8] ("When taking protective action" on behalf of a client with diminished capacity pursuant to MODEL RULES OF PROF'L CONDUCT R. 1.14(b), "the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.").

[11] Comment 6 to Rule 1.1 states that "[b]efore a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent…"

Seeking Advice or Assistance from a Listserv Discussion Group

ABA Formal Opinion 98-411 (1998) addressed whether a lawyer is impliedly authorized to disclose information relating to the representation to another lawyer, outside the inquiring lawyer's firm and without the client's informed consent, to obtain advice about a matter when the lawyer reasonably believes the disclosure will further the representation. The opinion contemplated that the lawyer seeking assistance would share information relating to the representation, in anonymized form, with an attorney known to the consulting lawyer. It further contemplated that the consulted attorney would both ensure there was no conflict of interest between the consulting lawyer's client and the consulted attorney's clients and would keep the information confidential even in the absence of an explicit confidentiality obligation. The opinion concluded that, in general, a lawyer is impliedly authorized to consult with an unaffiliated attorney in a direct lawyer-to-lawyer consultation and to reveal information relating to the representation without client consent to further the representation when such information is anonymized or presented as a hypothetical and the information is revealed under circumstances in which "the information will not be further disclosed or otherwise used against the consulting lawyer's client." The opinion explained, "Seeking advice from knowledgeable colleagues is an important, informal component of a lawyer's ongoing professional development. Testing ideas about complex or vexing cases can be beneficial to a lawyer's client." However, the opinion determined that the lawyer has implied authority to disclose only non-prejudicial information relating to the representation for this purpose and may not disclose privileged information.

In this opinion, the question presented is whether lawyers are impliedly authorized to reveal similar information relating to the representation of a client to a wider group of lawyers by posting an inquiry or comment on a listserv. They are not. Participation in most lawyer listserv discussion groups is significantly different from seeking out an individual lawyer or personally selected group of lawyers practicing in other firms for a consultation about a matter. Typical listserv discussion groups include participants whose identity and interests are unknown to lawyers posting to them and who therefore cannot be asked or expected to keep information relating to the representation in confidence. Indeed, a listserv post could potentially be viewed by lawyers representing another party in the same matter. Additionally, there is usually no way for the posting lawyer to ensure that the client's information will not be further disclosed by a listserv participant or otherwise used against the client. Because protections against wider dissemination are lacking, posting to a listserv creates greater risks than the lawyer-to-lawyer consultations envisioned by ABA Formal Ethics Opinion 98-411.

Without informed client consent, a lawyer participating in listserv groups should not disclose any information relating to the representation that may be reasonably connected to an identifiable client. Comment 4 to Rule 1.6 envisions the possibility of lawyers using hypotheticals to discuss client matters. However, a lawyer must have the client's informed consent to post a hypothetical to a listserv if, under the circumstances, the posted question could "reasonably lead to the discovery of" information relating to the representation because there is a "reasonable likelihood" that the reader will be able to ascertain the identity of the client or the situation involved. Although this opinion focuses on lawyers' efforts to obtain information from other lawyers for the benefit of a legal representation, the obligation to avoid disclosing information relating to a representation applies equally when lawyers post on listservs for other purposes, such

as to reply to requests for help, to develop their practices by networking, or simply to regale their professional colleagues with "war stories."[12]

Not all inquiries to a listserv designed to elicit information helpful to a representation will disclose information relating to the representation. In some situations, because of the nature of the lawyer's practice, the relevant client or the situation involved will never become known, and therefore the lawyer's anonymized inquiry cannot be identified with a specific client or matter. In other cases, the question may be so abstract and broadly applicable that it cannot be associated with a particular client even if others know the inquiring lawyer's clientele. In circumstances such as these, a lawyer may post general questions or hypotheticals because there is no reasonable possibility that any listserv member, or anyone else with whom the post may be shared, could identify the specific client or matter.[13]

Illustratively, the authors of Oregon Bar Opinion 2011-184 explained that "[c]onsultations that are general in nature and that do not involve disclosure of information relating to the representation of a specific client" do not require client consent under Rule 1.6. Careful lawyers will often be able to use listservs to ask fellow practitioners for cases and articles on topics, for forms and checklists, and for information on how various jurisdictions address a court-connected concern without enabling other lawyers to identify the lawyer's client or the situation involved. Posting this sort of inquiry on a listserv, to the extent possible without disclosing information relating to the representation, may have advantages over a lawyer-to-lawyer consultation precisely because it is broadly disseminated. Maryland State Bar Association Ethics Opinion 2015-03 described peer-to-peer lawyer listservs as a "powerful tool" providing "the opportunity for a

[12] Lawyers should keep in mind that the confidentiality obligation continues after the representation ends. *See* Rule 1.9(c)(2) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client."). This restriction on the disclosure of information relating to a former representation applies even if the information is generally known. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 479 (2017) (discussing the "generally known" exception to the use of confidential information adversely to a former client allowed under Rule 1.9(c)(1) and distinguishing it from the broader prohibition against disclosure of that information). Unlike the counterpart provision (Disciplinary Rule 4-101) of the earlier Code of Professional Responsibility, Rule 1.6 does not permit disclosure of non-privileged information relating to a representation or former representation if its disclosure would not embarrass or harm a client and the client has not specifically asked the lawyer not to disclose it. Consequently, lawyers may not tell "war stories" about a former representation without the former client's consent if the former client or situation can be identified. As we have noted in the past, the restriction imposed by Rule 1.6 may have First Amendment implications, but the constitutional right to freedom of speech has historically been interpreted consistently with lawyers' confidentiality obligations to clients. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480 (2018) (commenting on First Amendment considerations when lawyers act in representative capacities).

[13] For example, a general question requesting case law on whether a warrantless search of a garbage bin outside a residence violates the Fourth Amendment is less likely to allow a reader to infer the client's identity than a hypothetical revealing the precise facts of a specific search. But if there is a reasonable likelihood that readers can correctly infer the client's identity, then even the general question discloses information relating to the representation, requiring informed consent. For example, a reader could infer that a lawyer who posts a question to a listserv about the constitutionality of searches of garbage bins located outside of a residence is representing a client whose garbage bin was searched, evidence was found, the lawyer would like to move to suppress the evidence, and the lawyer is unsure of all the relevant case law. Regardless of whether the implicit disclosure of this "information relating the representation" is prejudicial to the client, Rule 1.6 provides that if the client's identity could be ascertained, it is the client's decision whether to disclose this sort of information broadly via a listserv to assist the lawyer in conducting useful legal research.

lawyer to test his or her understanding of legal principles and to clarify the best way to proceed in unique situations."

The more unusual the situation, however, the greater the risk that the client can be identified, and therefore the greater the care that must be taken to avoid inadvertently disclosing client information protected by Rule 1.6. Oregon Bar Opinion 2011-184 makes the point. Matters "[w]hen the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer's client even without the client being named," are among those in which "the lawyer must first obtain the client's informed consent for the disclosures."

Additionally, when lawyers represent only one client (as in the case of in-house counsel or government lawyers) or their client's identity can be readily inferred (as in the case of a litigator seeking assistance with a pending or contemplated action), "a description of specific facts or hypotheticals that are easily attributable to the client likely violates Rule 1.6 in most contexts."[14] Also, if a matter is receiving media coverage or the group of listserv participants is comprised of a small, closely connected legal community, the risk of a Rule 1.6 violation is likely to be too great to permit the lawyer to post a hypothetical relating to the matter without the informed consent of the client. For example, where the listserv participants are familiar with each other's practice because they practice in a limited geographic area or a specialized practice setting, posting a hypothetical based on information relating to the representation of the client will be more likely to lead to disclosure of the client's identity to some other participant on the listserv. The lawyer should err on the side of caution and avoid specific hypotheticals, refrain from posting, or obtain the client's informed consent if there is any reasonable concern.[15]

Finally, it bears emphasizing that lawyer listservs serve a useful function in educating lawyers without regard to any particular representation. Lawyers use listservs to update one another about newly published decisions and articles or to share recommendations for helpful contractors or fellow practitioners. Comment 8 to Rule 1.1 advises lawyers to "keep abreast of changes in the law and its practice," and lawyer listservs can help in doing so. These uses, unrelated to any particular representation, would not require a lawyer to secure the informed consent of a client. A lawyer must, however, remain aware of the possible risks to confidentiality involved in any posts to a listserv. Even a general question about the law, such as a request for cases on a specific topic, may in some circumstances permit other users to identify the client or the situation involved. Therefore, before any post, a lawyer must ensure that the lawyer's post will not jeopardize compliance with the lawyer's obligations under Rule 1.6.

[14] Md. State Bar Ass'n Ethics Comm. Op. 2015-3 (2015).

[15] When seeking a client's informed consent to post an inquiry on a listserv, the lawyer must ordinarily explain to the client the risk that the client's identity as well as relevant details about the matter may be disclosed to others who have no obligation to hold the information in confidence and who may represent other persons with adverse interests. This may also include a discussion of risks that the information may be widely disseminated, such as through social media. A lawyer should also be mindful of any possible risks to the attorney-client privilege if the posting references otherwise privileged communications with the client. Whether informed consent requires further disclosures will depend on specific facts.

Conclusion

Rule 1.6 prohibits a lawyer from posting comments or questions relating to a representation to a listserv, even in hypothetical or abstract form, without the client's informed consent if there is a reasonable likelihood that the lawyer's posts will disclose information relating to the representation that would allow a reader then or later to recognize or infer the identity of the lawyer's client or the situation involved. A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions, or changes in the law, without a client's consent if the lawyer's contributions will not disclose information relating to a client representation.

STATE OF MINNESOTA

IN SUPREME COURT

A21-0754

Original Jurisdiction

Per Curiam
Concurring, Thissen, J.

In re Petition for Disciplinary Action
against Ignatius Chukwuemeka Udeani,
a Minnesota Attorney,
Registration No. 0300615

Filed: January 25, 2023
Office of Appellate Courts

Susan M. Humiston, Director, Jennifer D. Peterson, Senior Assistant Director, Office of Lawyers Professional Responsibility, Saint Paul, Minnesota, for petitioner.

Ignatius Chukwuemeka Udeani, Minneapolis, Minnesota, pro se.

S Y L L A B U S

Disbarment is the appropriate discipline for an attorney with a significant disciplinary history who engaged in serious and prolonged misconduct across multiple matters that harmed vulnerable clients and who failed to cooperate with the Director's investigations.

Disbarred.

O P I N I O N

PER CURIAM.

The Director of the Office of Lawyers Professional Responsibility filed a petition for disciplinary action against respondent Ignatius Chukwuemeka Udeani. The petition alleged that Udeani breached his ethical duties to five clients, three of whom were vulnerable immigrants, including by misappropriating client funds and providing incompetent representation, and then did not cooperate with the Director's investigations into those activities. After a hearing, the referee concluded that Udeani committed the alleged misconduct and that multiple aggravating factors were present, including Udeani's extensive experience as a lawyer, long discipline history, lack of remorse, and the vulnerable nature of his clients who were harmed. The referee found no mitigating factors. The referee recommended that Udeani be disbarred. We agree. Based on Udeani's misconduct, we disbar Udeani from the practice of law.

FACTS

Udeani was admitted to practice law in Minnesota in 2000. He has an extensive disciplinary history: he was put on private probation in 2007; admonished in 2012 and 2013; suspended for 30 days in 2017 and, when reinstated, placed on supervised probation for a period of 2 years; indefinitely suspended for a minimum of 3 years in 2020; and admonished four more times in 2020. This prior discipline was for multiple instances of misconduct concerning Udeani's fee arrangements with clients, trust accounts, and failure to competently and diligently represent clients.

The Director filed this petition for disciplinary action against Udeani on June 15, 2021, alleging misconduct consisting of nine separate rule violations and involving five clients. The Director alleged, and the referee concluded, that Udeani committed misconduct in numerous ways. He failed to return unearned fees to two clients, and for one of those clients, the referee concluded that the failure was misappropriation. Udeani committed additional financial misconduct by failing to get receipts for cash payments countersigned by a third client. He created costly and time-consuming delays by not acting with diligence and promptness for one client. He failed to represent three clients competently in immigration-related matters. And for one of those three clients, he did not promptly reply to the client's reasonable requests for information. Finally, he failed to cooperate with the Director's investigation into seven complaints.

Following a hearing on the petition—for which Udeani failed to appear[1]—the referee concluded that Udeani's actions and failures to act violated Minn. R. Prof. Conduct

[1] Udeani's only appearance before the referee was for a telephonic scheduling conference held 6 months before trial. Following the referee's findings, Udeani did not file a brief with the court, nor did he appear for oral argument.

1.1,[2] 1.3,[3] 1.4(a)(3)[4] and (a)(4),[5] 1.15(c)(4),[6] 1.15(h),[7] 1.16(d),[8] 8.1(b),[9] and 8.4(c).[10] The referee hearing in this matter was held while Udeani was suspended for other misconduct.

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[2] Rule 1.1 states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

[3] Rule 1.3 states: "A lawyer shall act with reasonable diligence and promptness in representing a client."

[4] Rule 1.4(a)(3) states: "A lawyer shall . . . keep the client reasonably informed about the status of the matter."

[5] Rule 1.4(a)(4) states: "A lawyer shall . . . promptly comply with reasonable requests for information."

[6] Rule 1.15(c)(4) states: "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."

[7] Rule 1.15(h) states in relevant part: "Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis, books and records sufficient to demonstrate income derived from, and expenses related to, the lawyer's private practice of law, and to establish compliance with paragraphs (a) through (f)."

[8] Rule 1.16(d) states: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has not been earned or incurred."

[9] Rule 8.1(b) states in relevant part: "An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not . . . knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6."

[10] Rule 8.4(c) states: "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

In re Udeani (*Udeani I*), 945 N.W.2d 389, 399 (Minn. 2020) (imposing indefinite suspension with no right to petition for reinstatement for three years). In *Udeani I*, the referee and the Director recommended that we suspend Udeani for the misconduct at issue there. *Id*. at 396. In this matter, the referee recommended that we disbar Udeani, and the Director agrees with that recommendation.

ANALYSIS

The only issue before us is the appropriate discipline for Udeani. In considering this issue, the referee's findings of fact and conclusions of law are deemed conclusive because neither party ordered a transcript of the proceedings. Rule 14(e), Rules on Lawyers Professional Responsibility (RLPR); *In re Fru*, 829 N.W.2d 379, 387 (Minn. 2013). The purpose of attorney discipline is "not to punish the attorney but rather to protect the public, to protect the judicial system, and to deter future misconduct by the disciplined attorney as well as by other attorneys." *In re Rebeau*, 787 N.W.2d 169, 173 (Minn. 2010). In determining the appropriate discipline for an attorney, we consider four factors: "(1) the nature of the misconduct; (2) the cumulative weight of the disciplinary violations; (3) the harm to the public; and (4) the harm to the legal profession." *In re Nelson*, 733 N.W.2d 458, 463 (Minn. 2007). We also consider aggravating or mitigating circumstances in determining the discipline to impose. *Fru*, 829 N.W.2d at 388. We address each of these in turn.

First, the nature of Udeani's misconduct is serious; it includes failure to return unearned fees—which the referee concluded was misappropriation in one instance[11]—lack of diligence, lack of competence, failure to communicate, and failure to cooperate with the Director's investigations. "Misappropriation of client funds alone is particularly serious misconduct and usually warrants disbarment absent clear and convincing evidence of substantial mitigating factors." *In re Sayaovong*, 909 N.W.2d 575, 581–82 (Minn. 2018) (citation omitted) (internal quotation marks omitted). Failure to return unearned fees is another form of financial misconduct and also constitutes "serious misconduct" because, "from the clients' perspectives, they [are] deprived of the use of their funds without any explanation." *In re Taplin*, 837 N.W.2d 306, 312 (Minn. 2013). Udeani's misconduct also placed two clients at risk of deportation—one for several months and the other for a period of years. We have issued serious discipline—including disbarment—for actions that place immigration clients at risk of deportation. *See In re Kaszynski*, 620 N.W.2d 708, 711, 713-14 (Minn. 2001). In addition, Udeani failed to cooperate with the Director's investigation into seven disciplinary complaints filed against him. We have explained that "failure to cooperate with a disciplinary investigation, in and of itself, constitutes an act of misconduct that warrants indefinite suspension." *In re Brooks*, 696 N.W.2d 84, 88 (Minn. 2005). And finally, we view "other disciplinary rule violations" more severely when paired

[11] Our case law supports the referee's determination that the failure to return unearned fees to the clients was misappropriation, *see, e.g., In re Lundeen*, 811 N.W.2d 602, 608 (Minn. 2012)—a determination that was not challenged here. But the failure to return client funds is not always misappropriation. For example, in *Udeani I*, the referee did not conclude that the failure to return the client funds at issue was misappropriation. *See Udeani I,* 945 N.W.2d at 397.

with "serious client neglect and incompetence," *Fru*, 829 N.W.2d at 389, and "have disbarred attorneys in cases involving serious client neglect," *In re Fahrenholtz*, 896 N.W.2d 845, 848 (Minn. 2017). Udeani acted incompetently and neglectfully with respect to three clients, and this—paired with his failure to cooperate, failure to return unearned fees, failure to get cash receipts countersigned, and failure to communicate—is serious misconduct. In short, the nature of Udeani's misconduct weighs toward serious discipline.

Next, we consider "the cumulative weight of all of the professional misconduct in determining the appropriate sanction." *In re Rhodes*, 740 N.W.2d 574, 580 (Minn. 2007). Even if "a single act standing alone would not have warranted such discipline," we recognize that "the cumulative weight and severity of multiple disciplinary rule violations may compel severe discipline." *In re Oberhauser*, 679 N.W.2d 153, 160 (Minn. 2004). Udeani's misconduct here, like the misconduct that previously gave rise to his indefinite suspension, was not a "brief lapse in judgment or a single, isolated incident." *Udeani I*, 945 N.W.2d at 397. Rather, there are "multiple instances of misconduct occurring over a substantial amount of time." *Id.* Indeed, his ethical violations in this case were committed over 9 years and against multiple clients. This factor also weighs toward serious discipline.

We also measure harm to the public based on the quantity (" 'the number of clients harmed' ") and quality (" 'the extent of the clients' injuries' ") of the harm. *In re Coleman*, 793 N.W.2d 296, 308 (Minn. 2011) (quoting *In re Randall*, 562 N.W.2d 679, 683 (Minn. 1997)). Udeani caused widespread harm here. His misconduct injured five clients and their families. Similarly, the extent of the clients' injuries is extensive. Two clients were

placed at risk of deportation—a "most perilous fate." *In re Muenchrath*, 588 N.W.2d 497, 501 (Minn. 1999). The amount of money that Udeani failed to return was a substantial amount to one of his clients. Indeed, four clients faced financial hardship because of Udeani's misconduct—one of those clients was forced to move back in with parents, and others struggled to support their families. This factor weighs toward serious discipline.

Finally, we consider the harm to the legal profession. In addition to the harm Udeani caused his clients directly, much of his misconduct also undermined the reputation of and public confidence in the legal profession. In the immigration context, neglect and misconduct that threatens a client's immigration status undermines the "public's trust in the competence, diligence, and integrity of lawyers." *Fru*, 829 N.W.2d at 390. That is precisely what occurred here. Udeani's misconduct threatened the legal status of two clients. The referee found that Udeani's conduct left one of those clients "skeptical of lawyers" and the other "skeptical and afraid to trust attorneys." A third client from whom Udeani misappropriated funds felt "scammed" and "los[t] trust in lawyers." This factor also points toward serious discipline.

In addition to the four factors discussed above, we also consider aggravating or mitigating circumstances in determining the discipline to impose. *Id.* at 388. The referee found that no mitigating factors and five aggravating factors apply to Udeani's misconduct. The aggravating factors are Udeani's: (1) failure to cooperate after the Director served the petition for discipline;[12] (2) failure to acknowledge the wrongfulness of his misconduct or

[12] Failing to cooperate can be either an independent ground for discipline or an aggravating factor, depending on when in the proceeding it occurred, but the same conduct

show remorse; (3) harm to vulnerable immigrant clients; (4) substantial experience in the practice of law having been licensed since 2000; and (5) history of prior, similar misconduct. Our case law recognizes all of these factors as aggravating factors.[13]

Although each of these aggravating factors is significant, we take particular note of Udeani's disciplinary history, which is extensive and involves misconduct similar to his current misconduct. *See In re MacDonald*, 962 N.W.2d 451, 467 (Minn. 2021) (giving "serious weight" to disciplinary history that "involved the same type of misconduct"). Udeani was placed on private probation in 2007, based in part on his failure "to competently and diligently represent a client in an immigration matter." His admonishments in 2012 and 2013 were based on misconduct that included missing a hearing and not depositing funds into a client's trust account. We suspended him for 30 days in 2017 based, in part, on failing to handle client matters diligently. Finally, the 2020 suspension was for wide ranging misconduct, addressed in 16 counts, including refusing to refund unearned fees, failing to act competently and with diligence, and failure

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cannot be both. *Taplin*, 837 N.W.2d at 313. Here, the referee properly accounted for Udeani's noncooperation. His noncooperation before the petition was filed was an act of misconduct, as alleged in count five of the petition. The aggravating factor does not include that noncooperation but is instead limited to Udeani's noncooperation after the petition was filed. Specifically, after attending a telephonic scheduling conference with the referee, Udeani has taken no further part in the proceedings.

[13] *See Taplin*, 837 N.W.2d at 313 (recognizing failure to cooperate as an aggravating factor); *In re Severson*, 860 N.W.2d 658, 670 (Minn. 2015) (recognizing lack of remorse as an aggravating factor); *Kaszynski*, 620 N.W.2d at 712–13 (recognizing both vulnerability of clients—particularly including immigration clients who were dependent on their attorney in legal proceedings—and substantial experience in the practice of law as aggravating factors); *Rhodes*, 740 N.W.2d at 580 (recognizing prior history of misconduct as an aggravating factor).

to cooperate with the Director's investigations.[14] *See Udeani I*, 945 N.W.2d at 401. Overall, Udeani's previous discipline was for similar misconduct and harm to vulnerable victims. These factors aggravate Udeani's misconduct in this case.

In sum, Udeani failed to return unearned client funds, failed to get countersigned cash receipts, failed to act competently and diligently on behalf of his clients, failed to properly communicate with them, and failed to cooperate with the Director's investigations. His actions caused extensive harm to several clients and their families and damaged the legal profession. When the weight of these violations is combined and considered in light of Udeani's prior professional discipline for similar misconduct, the other aggravating factors found by the referee, and the lack of mitigating factors, we hold that the appropriate discipline in this case is disbarment.

CONCLUSION

For the foregoing reasons, respondent Ignatius Chukwuemeka Udeani is disbarred from the practice of law in the State of Minnesota, effective on the date of this opinion. Respondent shall comply with Rule 26, RLPR (requiring notice to clients, opposing counsel, and tribunals), and shall pay $900 in costs under Rule 24(a), RLPR.

[14] Much of Udeani's misconduct in this case happened at the same time as the misconduct for which we suspended and admonished him in 2020. It was largely because of Udeani's noncooperation that the Director had to proceed separately with the misconduct committed here from that at issue in *Udeani I*.

C O N C U R R E N C E

THISSEN, Justice (concurring).

I agree that Ignatius Chukwuemeka Udeani should be disbarred. I write separately to note my continued concern with the practice of relying on noncooperation with the disciplinary proceedings (which is an independent rule violation) as an aggravating factor. *See In re Nelson*, 933 N.W.2d 73, 75–77 (Minn. 2019) (Thissen, J., concurring). I suggest that the Lawyers Professional Responsibility Board review the question of whether the recent practice of bringing in noncooperation with disciplinary proceedings through the back door of aggravating circumstances is appropriate and whether the rules should be clarified on that issue.

STATE OF MINNESOTA

IN SUPREME COURT

A18-1149

In re Petition for Disciplinary Action against
Christopher J. Nelson, a Minnesota Attorney,
Registration No. 0259779.

ORDER

The Director of the Office of Lawyers Professional Responsibility filed a petition for disciplinary action and a supplementary petition alleging that respondent Christopher J. Nelson committed professional misconduct warranting public discipline, namely: failure to pay a law-related judgment, failure to respond to court orders, and failure to comply with court orders to show cause why he should not be held in contempt; failure to appear for a court hearing, failure to communicate with a client, and making improper solicitations to provide legal services; and failure to cooperate with the Director's investigation. *See* Minn. R. Prof. Conduct 1.4(a)(4), 3.4(c), 7.3(c), 8.1(b), and 8.4(d); and Rule 25, Rules on Lawyers Professional Responsibility (RLPR). We referred the matter to a referee.

Respondent failed to appear for proceedings before the referee. As a result, the referee struck respondent's answer and deemed the allegations of the petition and the supplementary petition admitted. Following a hearing on the harm caused by respondent's misconduct and the presence of any aggravating factors, the referee made findings, conclusions, and a recommendation. The referee concluded that respondent committed the misconduct alleged in the petition and supplementary petition, that the harm caused was substantial, and that five aggravating favors were present. The referee recommended that

respondent be indefinitely suspended with no right to petition for reinstatement for 6 months.

Because no party ordered a transcript of the proceedings before the referee, the referee's findings and conclusions are conclusive. *See* Rule 14(e), RLPR. We issued a briefing schedule. In her brief, the Director recommends that the court impose the 6-month suspension recommended by the referee. Respondent did not file a brief with this court.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. Respondent Christopher J. Nelson is indefinitely suspended from the practice of law, effective 14 days from the date of the filing of this order, with no right to petition for reinstatement for 6 months.

2. Respondent may petition for reinstatement pursuant to Rule 18(a)–(d), RLPR. Reinstatement is conditioned on successful completion of the written examination required for admission to the practice of law by the State Board of Law Examiners on the subject of professional responsibility, *see* Rule 18(e)(2), RLPR, and satisfaction of continuing legal education requirements, *see* Rule 18(e)(4), RLPR.

3. Respondent shall comply with Rule 26, RLPR (requiring notice of suspension to clients, opposing counsel, and tribunals), and shall pay $900 in costs pursuant to Rule 24(a), RLPR.

Dated: September 11, 2019

BY THE COURT:

David L. Lillehaug
Associate Justice

CONCURRENCE

HUDSON, Justice (concurring).

I concur in the court's disposition of this case. The court recites that among other things, respondent failed to pay a law-related judgment, failed to respond to court orders, and failed to comply with orders to show cause. Such misconduct is indeed serious, but the abbreviated description in the court's order does not do justice to the outrageousness of respondent's actions. According to the allegations of the petition, which were deemed admitted because of respondent's failure to appear, one of respondent's former clients secured a money judgment against him based on respondent's failure to resolve the client's case. Respondent refused to respond to or comply with court orders intended to facilitate collection of the judgment; avoided service of an order to show cause why he should not be held in contempt for failing to comply with the previous orders; and failed to appear before the court when he eventually was successfully served, leading the court to issue a bench warrant for his arrest. By his repeated failure to comply with his obligations to the court, respondent was successful in avoiding satisfaction of the judgment for 10 years until the judgment expired.

In my view respondent's flouting of the legal system, conducted in service of an effort to avoid responsibility for respondent's own professional failing, and sustained for a decade, merits a lengthy suspension. The Director recommends that we impose a minimum 6-month indefinite suspension. In my view, that is the absolute floor of possible sanctions that could be considered appropriate for respondent's misconduct. It is only because respondent, if he seeks reinstatement, will be required to demonstrate by clear and

convincing evidence that he has undergone the requisite moral change to render him fit to practice law, *see In re Griffith*, 883 N.W.2d 798, 799 (Minn. 2016), that I concur.

McKEIG, Justice (concurring).

I join in the concurrence of Justice Hudson.

CONCURRENCE

THISSEN, Justice (concurring).

I concur in the discipline imposed in this case. Christopher J. Nelson's conduct in failing to pay a law related judgment, failing to respond to court orders, failing to show cause why he should not be held in contempt, failing to appear for a court hearing, failing to communicate with his client, making improper solicitations to provide legal services, and failing to cooperate with the Director's investigation warrant a suspension with no right to seek reinstatement for 6 months. Minn. R. Prof. Conduct 1.4(a)(4), 3.4(c), 7.3(c), 8.1(b) and 8.4(d); Rule 25, Rules on Lawyers Professional Responsibility (RLPR).[1] Because the 6-month suspension imposed in this case is appropriate based on Nelson's violations of the rules and his prior disciplinary history without any need to resort to consideration of other aggravating factors, I write separately to express concern regarding several aggravating factors the referee found to be present in this case.

First, the referee cited Nelson's substantial legal experience as an aggravating factor. As I have discussed elsewhere, *see In re Sea*, 923 N.W.2d 28, 43 (Minn. 2019) (Thissen, J., concurring in part & dissenting in part), I find the invocation of legal experience as an aggravating factor to be problematic without an analysis of why an

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[1] For example, we imposed indefinite suspensions of at least 90 days in *In re Ruffenach*, 486 N.W.2d 387, 391 (Minn. 1992), and *In re Pokorny*, 453 N.W.2d 345, 349 (Minn. 1990), for similar conduct—failure to pay malpractice or law-related debts and failure to appear at court hearings. In each case, the disciplined lawyer, like Nelson, had prior disciplinary history. In *Pokorny*, the court also found aggravating factors ("no contrition, no remorse, and no willingness to make amends"), but also found those aggravating factors were somewhat counterbalanced with a mitigating factor ("no evidence of a selfish or dishonest motive"). 453 N.W.2d at 348. Nelson's conduct here was more egregious.

attorney's legal experience actually aggravates either the wrongfulness of the attorney's conduct or the harm it causes. In particular, I see nothing in this case that would explain why Nelson's legal experience makes the particular conduct at issue in this matter worse than similar conduct by other, less experienced, lawyers. Certainly neither the Director nor the referee provided such an explanation. In my view, a greater showing should be made before legal experience is treated as an aggravating factor.

Second, the referee points to Nelson's selfish motive in failing to pay the law-related judgment entered against him as an aggravating factor. Certainly, not paying money plainly owed to someone else is selfish, but that is true in most situations where a debt is unpaid. I see no reason to conclude that Nelson's conduct was particularly selfish compared to any other lawyer who failed to repay a debt in violation of the Rules of Professional Conduct, and again, neither the Director nor the referee provided an explanation. Accordingly, I cannot agree that selfish motive should be an aggravating factor in this case.

Finally, the referee determined that Nelson's failure to participate in the disciplinary proceedings before the referee is an aggravating circumstance that requires additional discipline. As noted earlier, the referee also and separately determined that Nelson violated Minn. R. Prof. Conduct 8.1(b) and Rule 25, Rules on Lawyers Professional Responsibility, for failing to cooperate with the Director's investigation.[2] In short, the findings in this case

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[2] A lawyer's failure to cooperate with an ethics investigation has been considered a professional ethics violation requiring discipline in Minnesota since the 1930s. We reasoned that the failure of a lawyer to respond to important letters and notices—like letters from the ethics committee—called into question the lawyer's competence and

call for us to impose discipline on Nelson for failing to cooperate with disciplinary proceedings and then to also treat his non-cooperation with the disciplinary proceedings as an aggravating circumstance requiring an even greater sanction.

I acknowledge that our past decisions have condemned double counting of non-cooperation while simultaneously allowing that very double-counting where one act of non-cooperation (usually non-cooperation with an investigation) is used to support the imposition of discipline for violating Minn. R. Prof. Conduct 8.1 and Rule 25, RLPR, and a different act of non-cooperation (usually non-cooperation in the proceedings before a referee) is used as an aggravating factor to augment the sanction. *See In re Villanueva*, 931 N.W.2d 816, 824 (Minn. 2019); *In re Gorshteyn*, 931 N.W.2d 762, 771–72 (Minn. 2019);

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professionalism. *See In re Larson*, 298 N.W. 707, 708–09 (Minn. 1941); *In re Chmelik*, 280 N.W. 283, 284–85 (Minn. 1938); *In re Breding*, 247 N.W. 694, 694–95 (Minn. 1933); *In re Gurley*, 239 N.W. 149, 149 (Minn. 1931). In 1979, we reaffirmed that "it is incumbent upon an attorney to cooperate with disciplinary authorities in their investigation and resolution of complaints against him" and that failure to do so "constitute[s] a separate act of professional misconduct." *In re Cartwright*, 282 N.W.2d 548, 551–52 (Minn. 1979). We also encouraged the Lawyers Professional Responsibility Board to adopt a rule that delineates the scope of a lawyer's duty of cooperation. *Id.* at 552.

In 1981, Rule 25 of the Rules on Lawyers Professional Responsibility was adopted. Rule 25 currently provides that "[i]t shall be the duty of any lawyer who is the subject of an investigation or proceeding under these Rules to cooperate with the District Committee, the Director, or the Director's staff, the Board, or a Panel, by complying with reasonable requests" including requests to appear for conferences and hearings. The Rule further provides that violation of Rule 25 "is unprofessional conduct and shall constitute a ground for discipline." The Minnesota Rules of Professional Conduct adopted in 1985 included Rule 8.1(a)(3). That language, now found in Rule 8.1(b), currently provides that "a lawyer . . . in connection with a disciplinary matter, shall not . . . knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority." We have employed Minn. R. Prof. Conduct 8.1 and Rule 25, RLPR, interchangeably as a basis for disciplining lawyers for lack of cooperation with disciplinary proceedings. *In re Aitken*, 787 N.W.2d 152, 161 (Minn. 2010).

In re Hulstrand, 910 N.W.2d 436, 444 (Minn. 2018); *In re O'Brien*, 809 N.W.2d 463, 466–67 (Minn. 2012); *see also In re Albrecht*, 845 N.W.2d 184, 193 n.16 (Minn. 2014) (reversing a referee's reliance on acts of non-cooperation to support both a determination of a Rule 8.1(b) violation and an aggravating factor finding); *In re Jones*, 834 N.W.2d 671, 680 n.9 (Minn. 2013) (same). I believe this practice of allowing non-cooperation to count as both an independent rules violation and an aggravating factor is improper.

First, we have long held that failure to attend a panel hearing is a "serious violation" of Rule 8.1 that itself merits a suspension. *In re Thedens*, 557 N.W.2d 344, 350 (Minn. 1997). If a lawyer fails to participate in the panel hearing, the Director should assert a formal violation of the rules rather than side-stepping normal processes and urging instead a finding of aggravating circumstances. *Cf. In re Charges of Unprofessional Conduct in Panel File 42735*, 924 N.W.2d 266, 273 (Minn. 2019) (stating that "to comport with due process, lawyers facing discipline must be given notice of the charges against them" (quoting *In re Taplin*, 837 N.W.2d 306, 311 (Minn. 2013))). Indeed, before 2002, we never cited failure to cooperate with a disciplinary proceeding as an *aggravating circumstance*. We only disciplined an attorney for failure to cooperate when the Director charged and litigated the non-cooperation as a substantive rule violation.[3]

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[3] Over the two decades following the adoption of Minn. R. Prof. Conduct 8.1 and Rule 25, RLPR, we held on numerous occasions that failure to cooperate in a disciplinary proceeding constituted an independent rule violation and ground for discipline:

> Failure to cooperate with the disciplinary process constitutes separate misconduct warranting discipline independent from the conduct underlying the petition. We have stressed that failure to cooperate with a disciplinary

Second, our jurisprudence that non-cooperation can be both an independent rules violation and/or an aggravating factor emerged without any meaningful analysis. In *In re Westby*, 639 N.W.2d 358, 370-71 (Minn. 2002), we affirmed the imposition of discipline for failure to cooperate under Rule 8.1 and then, at the end of a string of six "aggravating factors" and without citation, we noted that the lawyer's "lack of candor and cooperation throughout the disciplinary proceedings is also an aggravating factor." In *In re Pierce*, 706 N.W.2d 749, 757 (Minn. 2005), we cited *Westby* in holding that failure to cooperate in disciplinary proceeding may be an independent violation of Minn. R. Prof. Conduct 8.1

> investigation, in and of itself, constitutes an act of misconduct that warrants indefinite suspension.

In re Brooks, 696 N.W.2d 84, 88 (Minn. 2005) (citations omitted). At times, we used somewhat imprecise language when imposing discipline for an independent non-cooperation violation in combination with other conduct that violates the Rules of Professional Responsibility. For instance, in *In re Nelson*, we stated that "noncooperation with the disciplinary process, by itself, may warrant indefinite suspension and, when it exists in connection with other misconduct, noncooperation increases the severity of the disciplinary sanction." 733 N.W.2d 458, 464 (Minn. 2007) (citing *In re Samborski*, 644 N.W.2d 402, 407 (Minn. 2002)); *see also In re De Rycke*, 707 N.W.2d 370, 375 (Minn. 2006); *In re Davis*, 585 N.W.2d 373, 377–78 (Minn. 1998). Our point was not surprising: a violation of Rule 8.1 and Rule 25 for non-cooperation may warrant indefinite suspension by itself and, if other professional ethics violations are also established, non-cooperation can support an even heavier sanction. In a few later cases, the latter part of this conclusion referring to a heavier sanction has been read without close analysis as supporting the notion that "non-cooperation is an aggravating factor" rather than an independent rules violation that the Director must prove. *See, e.g., In re Aitken*, 787 N.W.2d 152, 162 (Minn. 2010) (stating that non-cooperation is an aggravating factor despite the fact that the court had a few paragraphs earlier affirmed the referee's conclusion that the lawyer's non-cooperation was a violation of Rule 8.1 and Rule 25). In my opinion, that reading of the prior cases is incorrect.

and Rule 25, RPLR, and an aggravating factor as well.[4] *See also In re Mayrand*, 723 N.W.2d 261, 269 (Minn. 2006) (citing *In re Brooks*, 696 N.W.2d 84, 88 (Minn. 2005), for the proposition that "failure to cooperate with the disciplinary process constitutes *separate misconduct* warranting discipline independent from the conduct underlying the petition" despite the fact that in *Brooks* the Director asserted failure to cooperate as an independent violation of Rule 8.1 and not as an aggravating factor) (emphasis added); *In re Rhodes,* 740 N.W.2d 574, 580 (Minn. 2007) (stating that repeated failure to cooperate with the disciplinary process is a significant aggravating factor, again without citation). Notably, we have expressly overruled *Westby*, *Pierce*, and *Mayrand*. *In re Jones*, 834 N.W.2d at 680 n.9.

In my view, the proper response to this since-overruled evolution of our jurisprudence is not the course first charted in *O'Brien*—allowing double counting of non-cooperation where different acts of non-cooperation in the course of a single disciplinary proceeding can be put into different boxes to support a rule violation on the one hand and a finding of aggravating circumstances on the other. The better course would be to return to the state of the law before *Westby*, *Pierce*, and *Mayrand*. Non-cooperation should not be used as an aggravating factor.

There are practical reasons for my position. The *O'Brien* rule has caused confusion among referees requiring repeated warnings from us about the proper application of the rule. *See In re Albrecht*, 845 N.W.2d at 193 n.16; *In re Jones*, 834 N.W.2d at 680 n.9.

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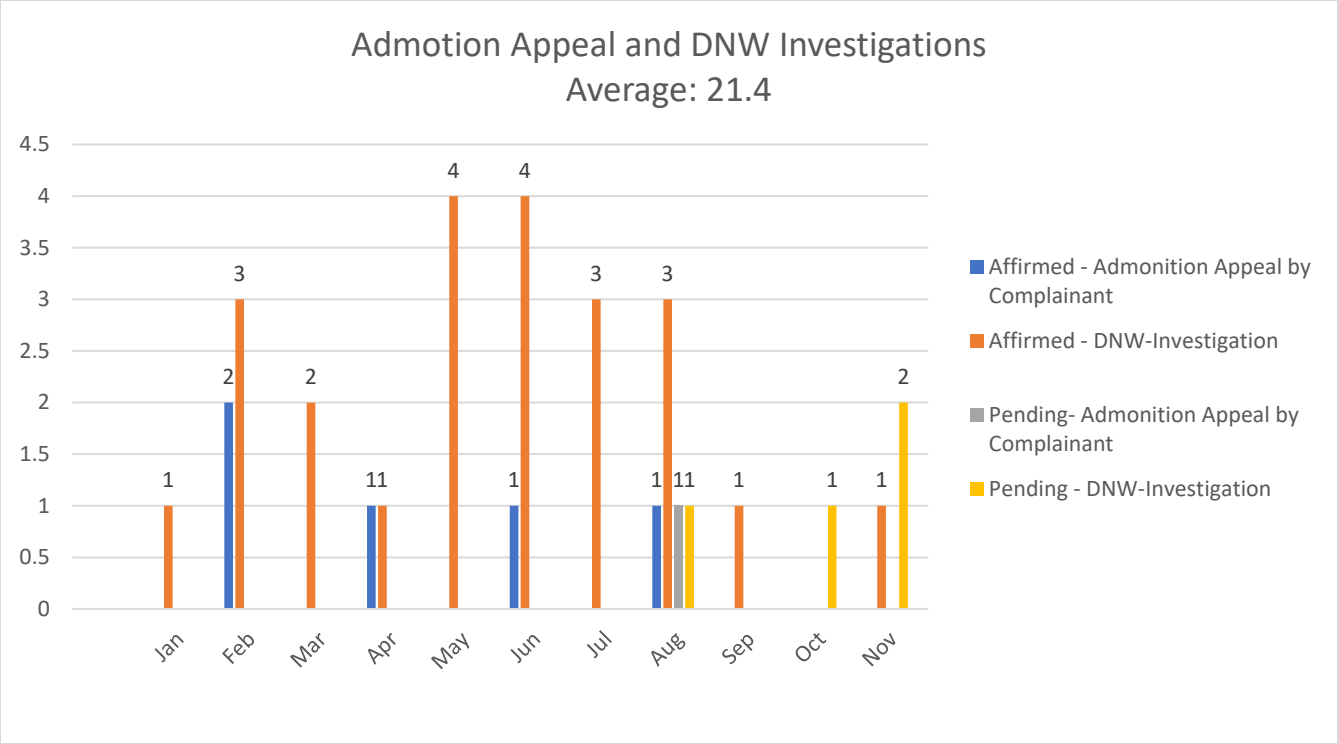
[4] In *Pierce*, we also cited *In re Engel*, 538 N.W.2d 906, 907 (Minn. 1995). There was no finding of aggravating circumstances in *Engel.*

Further, a referee and our court have many tools to hold accountable a lawyer who fails to cooperate or participate in a hearing. Most significantly, when a lawyer fails to show up for his hearing, the Director's allegations against him are deemed admitted. *In re Gorshteyn*, 931 N.W.2d at 762. Finally, a clear rule that non-cooperation is a violation of the professional conduct rules, that the violation must be alleged and proved, and that non-cooperation cannot also be treated an aggravating factor, makes our system of lawyer discipline seem less arbitrary, more understandable, and fairer. And that in the end serves the public interest.


Admotion Appeal and DNW Investigations
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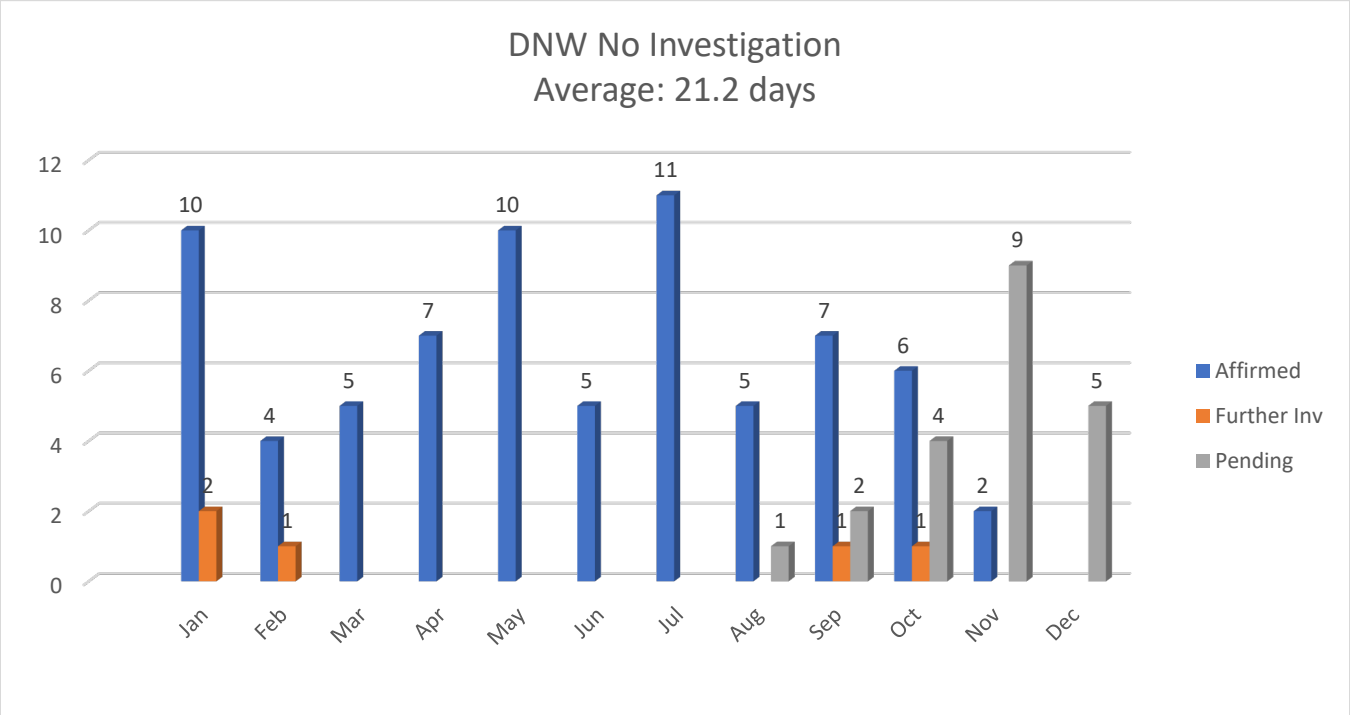
Affirmed - DNW-Investigation
Pending- Admonition Appeal by Complainant
Pending - DNW-Investigation


DNW No Investigation
Average: 21.2 days
12
10
8
6
4
2
0
Jan
Feb
Mar
Apr
May
Jun
Jul
Aug
Sep
Oct
Nov
Dec
Affirmed
Further Inv
Pending

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

2025 PUBLIC MEETING DATES

January 24, 2025

May 16, 2025

September 12, 2025

December 12, 2025

OLPR Dashboard for Court And Chair

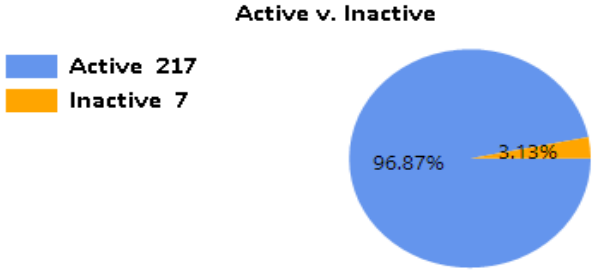
	Month Ending November 2024	Change from Previous Month	Month Ending October 2024	Month Ending November 2023
Open Files	599	15	584	588
Total Number of Lawyers	409	15	394	403
New Files YTD	1150	113	1037	1075
Closed Files YTD	1106	98	1008	959
Closed CO12s YTD	226	24	202	215
Summary Dismissals YTD	591	68	523	482
Files Opened During November 2024	113	-26	139	84
Files Closed During November 2024	98	-47	145	88
Public Matters Pending (excluding Resignations)	30	-2	32	23
Panel Matters Pending	15	-1	16	9
DEC Matters Pending	101	4	97	99
Files on Hold	9	-2	11	12
Advisory Opinion Requests YTD	1603	133	1470	1679
CLE Presentations YTD	30	6	24	43
Files Over 1 Year Old	224	8	216	163
Total Number of Lawyers	128	1	127	102
Files Pending Over 1 Year Old w/o Charges	165	14	151	107
Total Number of Lawyers	92	8	84	79

	2024 YTD	2023 YTD
Lawyers Disbarred	5	3
Lawyers Suspended	14	22
Lawyers Reprimand & Probation	2	1
Lawyers Reprimand	5	0
TOTAL PUBLIC	**26**	**26**
Private Probation Files	7	8
Admonition Files	80	59
TOTAL PRIVATE	**87**	**67**

FILES OVER 1 YEAR OLD

Year/Month	OLPR	AD	PAN	HOLD	SUP	SCUA	REIN	TRUS	Total
2018-10		2							**2**
2018-12	1								**1**
2019-04					1				**1**
2019-06					1				**1**
2019-07	1								**1**
2019-08	1								**1**
2020-01	1								**1**
2020-02					1				**1**
2020-09	1								**1**
2021-01	1					1			**2**
2021-03	1			1					**2**
2021-04	2								**2**
2021-05	3								**3**
2021-06	3					2			**5**
2021-07	1								**1**
2021-08	2		1						**3**
2021-09	1		1			1			**3**
2021-10	1								**1**
2021-11	5								**5**
2021-12						1			**1**
2022-01	1								**1**
2022-03	1				1				**2**
2022-04	3				1				**4**
2022-05	4								**4**
2022-07	1								**1**
2022-08	6				1	1			**8**
2022-09	3				1				**4**
2022-10	4			3					**7**
2022-11	4		1			1			**6**
2022-12	1								**1**
2023-01	5				1				**6**
2023-02	2			3	4	1			**10**
2023-03	4		1		2	1			**8**
2023-04	4				2				**6**
2023-05	5		1		2				**8**
2023-06	2	1							**3**
2023-07	10		6						**16**
2023-08	14	1	3			1			**19**
2023-09	32		1				1		**34**
2023-10	15				1		1	1	**18**
2023-11	19	1							**20**
Total	**165**	**5**	**15**	**7**	**19**	**10**	**2**	**1**	**224**

	Total	**Sup. Ct.**
Sub-total of Cases Over One Year Old	214	22
Total Cases Under Advisement	10	10
Total Cases Over One Year Old	**224**	**32**



All Pending Files as of Month Ending November 2024

Year/Month	SD	DEC	REV	OLPR	AD	PAN	HOLD	SUP	SCUA	REIN	RESG	TRUS	**Total**
2018-10					2								**2**
2018-12				1									**1**
2019-04								1					**1**
2019-06								1					**1**
2019-07				1									**1**
2019-08				1									**1**
2020-01				1									**1**
2020-02								1					**1**
2020-09				1									**1**
2021-01				1					1				**2**
2021-03				1			1						**2**
2021-04				2									**2**
2021-05				3									**3**
2021-06				3					2				**5**
2021-07				1									**1**
2021-08				2		1							**3**
2021-09				1		1			1				**3**
2021-10				1									**1**
2021-11				5									**5**
2021-12									1				**1**
2022-01				1									**1**
2022-03				1				1					**2**
2022-04				3				1					**4**
2022-05				4									**4**
2022-07				1									**1**
2022-08				6				1	1				**8**
2022-09				3				1					**4**
2022-10				4			3						**7**
2022-11				4		1			1				**6**
2022-12				1									**1**
2023-01				5				1					**6**
2023-02				2			3	4	1				**10**
2023-03				4		1		2	1				**8**
2023-04				4				2					**6**
2023-05				5		1		2					**8**
2023-06				2	1								**3**
2023-07				10		6							**16**
2023-08				14	1	3			1				**19**
2023-09				32		1				1			**34**
2023-10				15				1		1		1	**18**
2023-11				19	1								**20**
2023-12				14	1								**15**
2024-01				19				2	1				**22**
2024-02			1	23				1					**25**
2024-03				20				1					**21**
2024-04		1	3	15					1	1			**21**
2024-05		3		18			1	1	2	1			**26**
2024-06		5		23									**28**
2024-07		6	2	23					1	2			**34**
2024-08		22		14			1						**37**
2024-09		13		10									**23**
2024-10	1	29		17							1		**48**
2024-11	36	22		12						1	4		**75**
Total	**37**	**101**	**6**	**373**	**6**	**15**	**9**	**24**	**15**	**7**	**5**	**1**	**599**

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

Ethics guidance for generative AI use

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

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

On July 29, 2024, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 512, entitled "Generative Artificial Intelligence Tools." This opinion joins good ones from Florida and California in providing helpful guidance to lawyers on how to ethically incorporate generative AI—a subset of AI technology—into your practice.[1] Opinion 512 is recommended to all who have even a minor interest in this topic, have considered using generative AI tools, or have already been using such tools in their practice. Because Minnesota generally follows the model rules of relevance on this topic, Opinion 512 is particularly instructive for Minnesota lawyers. This column presents a high-level summary.

The opinion starts with a good reminder to us all: Artificial intelligence tools have long been used in legal practice—electronic discovery, data analytics, and legal research, to name a few. Thus, lawyers are or should be familiar generally with how to ethically incorporate technology tools into their legal practice. Generative AI takes those technologies further by creating new content from large data sets of information, and continues to evolve in scope and use. But understanding the ethical implications of generative AI follows the same path as one would take toward the incorporation of any new technology tool into your practice, and is a good reminder that we should be analyzing all technology and other third-party or vendor support through the same lens.

Ethics issues to consider

The opinion summary hits the ethics duties implicated: "To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethics obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees."

The opinion starts with your duty of competence. Of note, the opinion does not expect us to be experts in the technology to be able to use it in our practice, but does say we must have a "reasonable understanding of the capabilities and limitations" before doing so. Self-study could satisfy this obligation, but remember that the technology is rapidly advancing, so this is not a one-and-done task.

The opinion next takes on confidentiality, a topic that has been much discussed with generative AI since many forms retain inputs as part of its learning, and thus could lead to unauthorized disclosure of confidential client information. In particular, the opinion covers some ways that information can be improperly disclosed even when using in-house-only generative tools, a topic that I admit I had not previously given much thought. The opinion posits, and I tend to agree, that the use of many generative AI tools (beyond simple idea-generation tools) will generally require a client's informed consent. And remember, you have to explain information with particularity in order to be able to characterize a client's consent as "informed."[2] Generic, boiler-plate language in engagement agreements is an insufficient way to obtain informed consent.

Your communication obligation comes into play as well with generative AI tools. Clients may want to know (and thus you must be able to explain) your use of generative AI in your practice, but sometimes you must communicate your use unprompted even when informed consent is not required. One example provided in the opinion is when a lawyer uses generative AI to evaluate and advise on jury selection, as a client would reasonably expect to be advised of how much the lawyer is deferring to generative AI outputs versus the lawyer's own independent judgment. In general, the opinion recommends explaining to clients how you use generative AI tools to assist in your delivery of legal services as part of effective client communications.

The opinion next covers risks of generative AI use that lead to issues of candor to tribunals (such as case "hallucinations," or arguments without merit). You should review all output that is going to be incorporated into work product presented to a tribunal for accuracy, just as you would any other sources you cite. Further, we can rely on the work of others, but we must take steps to ensure it is accurate. Failure to do so may implicate several rules.

The opinion also covers the duty of supervision. Whether generative AI use is permitted in your workplace should be the subject of a firm or office policy. Training should be

provided if generative AI tools are used, and you should understand if outside vendors or service providers are employing generative AI tools; if so, you must make efforts to ensure they are only doing so in a manner that is consistent with your ethical obligations.

And finally, the opinion covers the important but often overlooked issue of fees. If clients are paying for particular tools or services, including generative AI tools, that must be explained at the beginning of the representation, preferably in writing. If your use of generative AI makes you more efficient, your hourly billing—if you are billing hourly—should reflect that efficiency, as you can never bill for more time than actually spent. In this regard, the opinion cites to one of my favorite ABA opinions—Opinion 93-379, an oldie but still relevant regarding billing practices.[3] The opinion reminds us, "Lawyers must remember that they may not charge clients for time necessitated by their own inexperience."

Conclusion

Your duty of competence includes an obligation to understand the benefits and risks of any technology you use in your legal practice. Generative AI is more sophisticated and varied in its applications than most technology we use, and therefore requires that we take the time to carefully assess its compatibility with our ethical obligations. On our ethics hotline, it has been exciting to hear how lawyers are exploring specific products to better serve clients and maximize available resources, and it has been interesting to help them through the various rules as they relate to a particular use. Opinion 512 is an additional reference to help you in this task. Remember also that ABA ethics opinions are free to all within one year of publication, but thereafter you will have to pay for the opinion if you are not an ABA member. Be sure to download ABA Opinion 512 now if you are exploring generative AI use in your practice. ▲

NOTES

[1] Florida Bar Ethics Opinion 24-1 (1/19/2024), and California's "Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law," both of which are available through a Google search, are also good references for Minnesota lawyers, although lawyers should be wary of modest variations between the applicable Florida, California, and Minnesota ethics rules.

[2] Rule 1.0(f), Minnesota Rules of Professional Conduct (MRPC), defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

[3] ABA Formal Ethics Opinion 93-379 "Billing for Professional Fees, Disbursements and Other Expenses" (12/6/1993).

ETHICS QUESTIONS?
Call 651-296-3952
or visit
lprb.mncourts.gov

LIGHTNING ROUND: ETHICS TIPS

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

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

Got a few minutes? Here are several legal ethics tips to improve your practice.

Want to avoid an ethics complaint? Communicate often and well with your client, even (especially) the bad news.

Even if there is no news, have a system that allows for periodic check-ins with your clients on open matters. This is good customer service and allows you to stay on top of updates like changed addresses or emails. Clients will appreciate hearing from you, and this will help you spot (or stay on top of) emerging issues in the relationship that could give rise to a complaint.

Acknowledge and apologize when you make a mistake.

You will make mistakes, big and small, and how you choose to handle those situations makes a difference.

Sit on that angry or reactive response email.

Incivility is on the rise everywhere and you will do well to take a step back when you read something that prompts a strong reaction. It is far too easy to respond nowadays, and it may feel like an immediate response is required. I bet it is not necessary. And I promise that most if not all your communications will benefit from a period of reflection.

Take care when choosing "reply all." Similarly, stop copying your client on emails to opposing counsel unless you are okay with a "reply all" that includes your client.

ABA Opinion 503 (November 2022) opines that copying your client on communications with opposing counsel implicitly authorizes a "reply all" unless you have advised opposing counsel to the contrary. Use the "bcc" option, or forward communications to clients separately. And always pay attention to whom your electronic communications are directed, whether you are hitting "reply all" or choosing recipients. Situational awareness is critical!

Use a good representation agreement.

So many issues can be avoided by a simple retainer agreement that discusses your fees, the scope of representation, and mutual expectations. And remember, nonrefundable fees are not permissible in Minnesota, so stop describing your fees as nonrefundable. If you are charging a flat fee and want to deposit that flat fee into your business account and not your trust account, make sure you have a compliant fee agreement *signed by the client* before that fee hits your business account. Review Rule 1.5(b)(1), Minnesota Rules of Professional Conduct (MRPC). Take time today to review your standard representation agreement.

Read all of Rule 1.5, MRPC, entitled "Fees," if you haven't lately to ensure your fee practices are in line with your ethics obligations.

While you are at it, it never hurts to review the rules in their entirety. They are a quick read if you skip the comments.

Send bills regularly and discuss with your clients any surprises or unexpected fees.

One of the things that really bothers me is when a lawyer does not bill clients promptly or fails to address client concerns regarding bills. Your clients should not be surprised, and if something unexpected happens, get in front of it through effective communication. To me, this isn't just a customer service issue but part of an ethical practice.

Use a reliable calendaring system.

And don't forget to have a process that ensures someone else is double-checking that things are calendared appropriately, particularly critical dates such as statutes of limitations or other key deadlines. Effective safeguards are what make a system reliable.

Review your conflicts-checking practice.

Is your process robust? Do you have an effective process to ensure that a conflicts check is re-run when new names and entities enter the relationship after the matter has commenced?

Make today the day you pick up that task or matter that you have been avoiding.

There is never an end to work that needs to get done, so it can be easy to use other work to avoid those problematic tasks or matters. That is a slippery slope, my friend. Start small. You can do this.

Use good matter-ending practices.

It can be easy to just move onto the next matter but ensuring you have appropriately closed out an engagement will pay dividends. Have you refunded any unearned fees or unused costs? Does the client know what you are going to do with their file? Does the client think you are doing something when you consider the engagement complete?

Create a succession plan if you are a solo attorney or not associated with someone who could step in if something dire happens.

I'm on a Minnesota State Bar Association committee charged with preparing materials that we hope will make this easy for you. In the meantime, my Bench & Bar article from November 2016, "What happens to clients upon your death or disability," and Martin Cole's April 2010 article, "Succession planning and trusteeships," both of can be found on our website, are great places to start.

Take time to recharge.

Legal practice is challenging and stressful. Taking time away allows you to be your best for your clients. Try to practice this if it does not come naturally to you!

Have an ethics question or concern? Don't guess or ask a friend. Call us.

Every day an experienced ethics lawyer in our office is available to give you free advice to help you through a specific ethics situation. Call 651-296-3952, or if the situation is complicated, send us a note with the details through our website at *lprb.mncourts.gov* (under the Advisory Opinions tab).

I hope you are enjoying Fall. If you have a topic you would like to see covered in this space, please email me at *susan.humiston@courts.state.mn.us.* I am always looking for ways to assist you in complying with your ethics obligations. ▲

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8042
ADM10-8043

In Re Minnesota Rules on Lawyers
Professional Responsibility

COMMENTS OF THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBLITY ON THE REPORT AND PROPOSED AMENDMENTS TO THE MINNESOTA RULES ON LAWYERS PROFESSIONAL RESPONSIBLITY

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

The Director of the Office of Lawyers Professional Responsibility (OLPR) submits these comments pursuant to the Court's order dated October 1, 2024, on the proposed amendments recommended by the Advisory Committee on the Rules on Lawyers Professional Responsibility (RLPR Committee). The Director requests the opportunity to make a presentation at any public hearing on the proposed amendments.

A. INTRODUCTION

The OLPR appreciates the opportunity to comment on the June 28, 2024, report of the RLPR Committee. The OLPR wishes to thank the RLPR Committee for its excellent work and thoughtful consideration of the issues referred to it by the Court in its August 23, 2023, order. The Rules on Lawyers Professional Responsibility (RLPR) have needed an overhaul for some time as recommended by the ABA Standing Committee's review of the Minnesota discipline system.

The proposed amendments are an improvement upon the existing rules, and with only a few exceptions, as set forth in the Director's minority opinions in the report, the OLPR recommends their adoption. The OLPR does not recommend the Court expunge records of diversion agreements, and, primarily due to resource constraints but also for policy reasons, the OLPR does not recommend the Court adopt the amendments to Rule 8(a)(3) that establish a deadline for completing investigations.

B. COMMENTS

1. Records of Diversion Agreements Should Not Be Expunged.

The OLPR supports the diversion rule recommended by the RLPR Committee, with minor revisions. The OLPR does not recommend the change in Rule 20(e)(1), RLPR, that diversion agreements be destroyed five years after successful completion of the diversion agreement, and related language in Rule 31 that would lead to expungement of diversion records. (Report at 41.) The Director believes that to appropriately exercise her discretion to enter into a diversion agreement in lieu of discipline, she should have access to prior instances of diversion if they exist. (Minority Report at 78-79.)

The states differ on how they handle diversion agreements with a few expunging diversion agreements but others, the majority, keeping a record of diversion. *See* Levin & Fortney, "They Don't Know What They Don't Know": A Study of Diversion in Lieu of Lawyer Discipline, 36 Geo. J. Legal Ethics 309, 337 (2023) ("Although the majority of jurisdictions treat diversion information as confidential, most interviewees reported that information related to completed diversions remained available to discipline counsel."). The ABA model language on alternatives to discipline does not include expungement of records and recommends a factor for consideration be whether diversion has already been

tried, necessitating that records be available to discipline counsel. *See* Rule 11(G)(3)(d), ABA Model Rules of Disciplinary Enforcement. The OLPR recommends the Court follow most jurisdictions and the ABA in allowing the OLPR to keep a record of diversion completion but otherwise keeping such records confidential.

The goal of diversion is to educate the lawyer regarding the ethics rules so that future issues of misconduct do not occur. Many lawyers who receive private discipline learn from the experience and do not repeat the prior misconduct nor have other discipline issues. However, this fact is not always true; some lawyers have multiple instances of prior discipline. To the OLPR, it is material if a lawyer has completed diversion and encounters subsequent practice issues, whether the same or different ethics rules are involved, just as it is currently material whether a lawyer has prior discipline when new misconduct is encountered. The Director will continue to dismiss complaints that are not substantiated and agrees that those records should be expunged. And the Director does not plan to enter into diversion agreements unless she believes she can substantiate a rule violation. Diversion is in lieu of discipline, but it is not a dismissal. Some record of its existence is relevant and should be available for use in determining how to handle subsequent provable rule violations.

The minority report gives the example of trust account violations. (Minority Report at 78-79.) It is material to the Director in considering a lawyer for diversion for trust account issues whether they had already completed diversion for trust account issues, even if it was eight or ten years ago. Arguably, the lawyer has not shown the commitment to the ethical practice of law that is expected. Why should the discipline system expend time and energy toward remediation (again) in this circumstance? And how is public confidence in the discipline system and legal profession enhanced when lawyers allow trust

account issues to reoccur notwithstanding prior interventions? There might be good reasons why diversion a second time is warranted, but this information must be retained to be valuable. This is particularly true as the proposed diversion program covers conduct that has traditionally been considered serious such as would lead to a public reprimand.

The OLPR supports keeping diversion confidential, and importantly, supports a disclosure rule that would prohibit the Director from disclosing files closed with a diversion disposition as part of discipline history, because the OLPR agrees, as set forth in the new Rule 31, that "diversion is not a form of discipline." The revisions the OLPR proposes are as follows:

> Rule 31(c)(5) **Appeal**. Notwithstanding any other rule, a complainant cannot appeal a file closed with a diversion agreement ~~and cannot appeal a dismissal under Rule 8(d)(1) following successful completion of a diversion agreement~~.
>
> Rule 31(d) **Effects of Diversion.**
>
> (3) Upon successful completion of a diversion agreement program, the Director shall acknowledge to the lawyer the completion of the program ~~must issue a determination that discipline is not warranted under Rule 8(d)(1)~~.
>
> Rule 20. **CONFIDENTIALITY; EXPUNCTION**.
>
> Rule 20(b)(5) The fact that stipulated probation has been approved under Rule 8(d)(3) or 8(e), or that a file has been closed with a diversion agreement under Rule 8(d)(6), and whether the diversion program was successfully completed;
>
> ***
>
> Notwithstanding any other provision of this Rule the records of matters in which it has been determined that discipline is not warranted or where a file has been closed with a diversion agreement and diversion successfully completed shall not be disclosed to any person, office or agency except to the lawyer and as

between Committees, Board, Director, Referee or this Court in furtherance of their duties under these rules.

Diversion is in lieu of discipline, but it is not a dismissal and should not be treated as a dismissal. These changes will allow the Director to have the confidential information relevant to making an informed decision regarding the appropriate use of diversion as an alternative to discipline.

2. The OLPR Does Not Recommend a 270-Day Deadline for Investigations.

The RLPR Committee proposed amendments to Rule 8(a)(3) that would incorporate a 270-day deadline for investigations, with a non-appealable dismissal when that deadline, with any approved extensions, is not met. For the reasons set forth in the Director's minority report including primarily that the ABA Standing Committee expressly urged the Court not to incorporate such time limits into the rules, there is no equivalent in any other jurisdiction, it is unfair to complainants, would involve the Lawyers Professional Responsibility Board extensively in OLPR operations—something the Court has determined to separate—and would necessitate significant additional resources in an already resource limited system, the OLPR does not recommend these proposed amendments. (Minority Report at 80-81.)

a. The ABA Committee advised the Court to avoid similar Rule 8(a)(3) time limits.

The ABA Committee report recommended against incorporating time limits into the discipline rules, particularly ones that would result in dismissal. The ABA Committee expressly urged "the Court not to incorporate time metrics or guidelines into its Rules on Lawyers Professional Responsibility." (American Bar Association Standing Committee on Professional Regulation Report on the Minnesota Lawyer Discipline System "ABA Report" at 52.) The ABA Committee also recommended against, and stated its express disagreement with, any rule

that would allow for the dismissal of complaints for failing to meet such timelines. (ABA Report at 54, "The Professional Regulation Committee is not aware of other jurisdictions [other than Maryland where the sanction is not enforced] where failure to meet time metrics can result in the dismissal of a matter, and does not agree with or support such provisions.")

Instead, the ABA Committee recommended the development of revised, internal case processing metrics, prioritized by categories, which recommendation the Court adopted in its August 23, 2023, order. (ABA report at 54-55; August 23, 2023, order at 34.) This recommendation is still in process and should be finalized once the impact of diversion on workload is known. At the present time, a significant number of resources are spent investigating, drafting, and prosecuting (where there is an appeal) private admonitions. Each year, the OLPR issues between 80-120 admonitions, with some of those appealed to full evidentiary hearings, and some including appeals to the Court. This process is resource intensive. Once the diversion program is developed and implemented, the OLPR hopes that there is a resource savings in personnel time, which can be redirected toward improving public discipline timelines and other case processing improvements. Until the diversion program is implemented, however, it is difficult to improve case processing standards with current resources. Moreover, technology changes are needed to be able to create reports and measure compliance with internal case processing metrics, funding which is going to be proposed in the next biennium budget.

The RLPR Committee disregarded the ABA Committee's opinion (and the approach of all other jurisdictions) when recommending to the Court a 270-day deadline for investigations, which could ultimately result in dismissal. While the OLPR understands the appeal of such timelines, the ABA Committee's opinion is based solidly upon the fact that it is imperative for public confidence that

complaints be decided on their merits, even if it takes time to do so. While delays negatively impact public trust and confidence, the alternative—dismissal of claims—would be more detrimental. And simply implementing timelines that the OLPR has for decades been unable to meet for many of its cases without other systematic changes and significant increases in personnel does not resolve the issue of timely resolution of cases and may impede the process with unintended negative consequences.

b. The Rule 8(a)(3) deadline entangles the LPRB in OLPR operations, contrary to recent Court rule changes.

Under the new Rule 31 diversion rule, the use of diversion requires Board Chair approval. *See* Proposed Rule 31(c)(1)(ii). This is a significant change in process, and while the volume is presently unknown, presumably a significant number of the current 80-120 admonitions will instead result in a diversion agreement. This requirement will place a material burden on the volunteer Board Chair; however, the Director believes this check on the discretionary use of diversion is important to ensure that diversion is not over-utilized.

Additionally, the proposed Rule 8(a)(3) deadline places an added burden on the Board Chair to review and consider good cause extension requests to continue any investigation where a disposition is not issued within 270 days; a burden that implicates OLPR operations beyond just the merits of individual cases. At the end of October 2024, there were 150 files over one year old without a disposition determination by the Director. For each of those, the Board Chair would have to review good cause requests for extensions under circumstances where any good cause denial cannot be challenged by the Director. Investigations can take time to complete, depending on the complexity of an investigation, and the cooperation or lack thereof from complainants, witnesses and respondents, to name a couple of reasons, but sometimes the reasons for

delay are the need to address competing priorities or issues that have nothing to do with good cause in an individual case, such as a leave of absence by personnel or staff turnover or complications in a different matter that consume resources, or the unavailability of paralegal resources to prepare the voluminous materials necessary for probable cause (now reasonable cause) determinations. Inevitably, there may be disagreements relating to the Director's allocation of resources among competing priorities, and information the Director is not able to share.

Over the last couple of years, the Court has amended Rule 4(c) to revise the Board's previous supervisory authority over the OLPR and its Director to provide "recommendation and guidance to the Director regarding the operations" of the OLPR. *See* Rule 4(c), RLPR (2019); Rule 4(c), RLPR (2024). From all reports, these changes have positively impacted the operation of the two entities. The Rule 8(a)(3) proposed amendments run counter to the direction the Court has been moving, in addition to significantly adding to the workload of a volunteer.

c. Without significant additional resources or material rule changes, the proposed deadline cannot be met.

For decades, the OLPR has had a goal to maintain open file inventory below 500 cases, and to have no more than 100 cases more than one year old. The Office has rarely if ever met these goals since their adoption. On average, dismissals are decided between 7-11 months, admonitions take between nine months to a year, and it takes at least one year to get to the point of charges in a single case, longer if there are more complaints involved. Although there have been variations over the years, these numbers remain roughly the same, and they are averages such that some take less time, but many take more time. *See* 2024 LPRB/OLPR Annual Report A.9; 2005 LPRB/OLPR Annual Report Table IV, available on the lprb.mncourts.gov, under About Us. These average time frames

remain the case even though cases in general continue to grow more complex and challenging to address, whether due to the prevalence of respondent's counsel, the litigiousness of individual respondents, the more complex nature of the underlying legal matters or the expectations regarding the resulting work product. It is also true that the number of complaints within a given year can vary widely.

While the proposed rule changes are a significant improvement over the current version of the rules, none of the rule changes, apart from (hopefully) diversion, decrease the work of the OLPR, or create efficiencies. The rules are clearer and provide better guidance to participants, but the discipline process remains procedurally complex and time consuming, with lots of factors outside of the OLPR control. The Director considered ways to limit the Rule 9 requirements as it relates to reasonable cause determinations, but ultimately concluded that the time taken to prepare the detailed materials for contested reasonable cause determinations (annotated charges, affidavits, exhibits and briefing) is work that needs to be done if a matter is to be litigated, and that the benefits to preparing such materials before the matter goes public outweigh the time necessary to put them together. Accordingly, to materially improve timelines, as would be required to regularly meet the proposed Rule 8(a)(3) deadline, significant additional resources would be needed. And, as the Court is aware through recent budgeting efforts, annual registration fees need to increase significantly even without consideration for these additional resources, which are not currently in the ABA recommendations. The Director has no objection to additional resources but does not recommend that the Court adopt the Rule 8(a)(3) deadline without a commitment to fund the personnel and technology necessary to successfully meet them.

The OLPR understands the appeal of timelines and dislikes the backlog of cases. Staff does not believe the deadlines are achievable under current circumstances, particularly where there are multiple complaints and given the myriad of requests for extensions of time and delays that currently exist, all of which fall short of non-cooperation, and the numerous ways that investigations can go sideways. The lack of timelines or deadlines is not the problem. The OLPR must address every complaint it receives under circumstances where all decisions are subject to review. Without efficiencies gained through changed rules or significantly more resources, the proposed rule only adds administrative burdens to the OLPR and a volunteer Board Chair, with the potential downside of non-merit dismissals that are not appealable.

The recommended deadline also does not improve transparency. The OLPR has in place a policy of updating the complainant every three months regarding the status of their case and provides substantive information to the extent they can within the confines of confidentiality. Respondents can obtain their entire investigative file upon request, and the Director often discloses the position on discipline to respondents so there is significant transparency into the investigation that is being conducted by the OLPR under the present rules. The participants have access to case status information, albeit no promise when the matter will be concluded. Adding a deadline does not increase transparency on the status of the investigation, the express direction of the Court when it asked the RLPR Committee to "recommend amendments to the rules that will establish response deadlines and promote transparency on the status of an investigation." August 2023 order at 7. For all these reasons, the OLPR does not recommend adoption of the Rule 8(a)(3) deadline.

C. CONCLUSION

The OLPR remains appreciative of the Court's commitment to the discipline system, and its dedication to ensuring a fair, transparent, and efficient system. The OLPR also appreciates the outstanding work of the RLPR Committee and recommends the Committee's proposed amendments except as outlined in the minority reports and these comments.[1]

Respectfully submitted,

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[1] The OLPR also concurs with the comments of Emily Eschweiler regarding the recommended amendment to Rule 11 and the recommended deletion of the reference to the Rules for Admission to the Bar since those are the wrong rules.

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December 2, 2024
OFFICE OF
APPELLATE COURTS

ADM10-8042
ADM10-8043

STATE OF MINNESOTA

IN SUPREME COURT

**Comments of the
Lawyers Professional Responsibility Board
Regarding the Proposed Amendments to the Rules on Lawyers Professional Responsibility**

ORAL ARGUMENT REQUESTED[1]

I. Executive summary.

The Lawyers Professional Responsibility Board supports all but one of the amendments to the Rules on Lawyers Professional Responsibility (RLPR) recommended by the Minnesota Supreme Court's advisory committee[2] on the same. The Board and its all-volunteer members have a unique relationship with these rules, which they apply every time they serve. The Board knows from that experience what works, what does not work, and how the two can be aligned. The Board used that expertise to form these positions, which were reached after consultation, debate, and thought. Not every Board member supported every position, and this comment strives to account for concerns

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[1] Board Chair Benjamin J. Butler respectfully requests permission to appear before the Minnesota Supreme Court on the Board's behalf.

[2] Two Board members – Chair Butler and attorney member William Pentelovitch – served on the committee.

expressed by all members. In the end, the Board believes that, with one exception, adopting the committee's recommendations will create a fairer, more transparent, and more just attorney-regulation system.

This comment first discusses the committee's recommendations on the Board's petition, almost all of which the committee recommended. Next, the comment discusses the areas of disagreement between the committee and the Director of the Office of Lawyers Professional Responsibility. The Board supports the committee's positions on those matters. Finally, the comment addresses the one place the Board differs from the committee: the recommendation that an attorney who is out of compliance with license fees and/or continuing legal education requirements be prohibited from resigning their law license.

II. The Board recommends that the Court adopt the committee's proposed amendments brought in the Board's petition.

In February 2023, the Board filed with the Minnesota Supreme Court a petition seeking several changes to the RLPR. The Court referred that petition to the committee. The committee, in turn, recommended that the Court adopt almost all of the Board's recommendations. The Board is grateful for the committee's position and, perhaps obviously, seconds that recommendation.

Particularly helpful would be the recommended changes to Rule 4 and 5. Committee Rpt. at 47-49. These amendments will mostly codify existing

practice. They will also further the goals the Court articulated in its earlier amendments to Rules 4 and 5 concerning separation between the Board and the OLPR and its Director. The Board agrees with those goals.

The Board also welcomes the committee's agreement on the need to redesign the reinstatement process. Committee Rpt. at 24-27. As the Court knows, Board panels preside over reinstatement hearings and make recommendations on whether the Court should allow a petitioning attorney to practice law in Minnesota. The Board is certain that the committee's recommendations, if adopted, will streamline and make more transparent that process.

Finally, the Board supports the committee's recommended amendments concerning the authority of Board Panels to make charge-by-charge reasonable-cause (currently styled "probable cause") determinations, even though the committee did not wholly adopt the Board's suggestion on the matter. Committee Rpt. at 8-9, 19-22. The recommended amended definition of "Count" and the recommended clarification that the Panel must make a determination on "each Count" is consistent with Minnesota Supreme Court caselaw and gives guidance to the OLPR, Board Panels, and respondent attorneys on the Panel's responsibility.

III. The Board supports the committee's recommended diversion program, including its record-retention provisions.

The Board recommends that the Court adopt the committee's diversion program and record-retention recommendations.[3]

A. The Board recommends that the Court adopt the committee's recommended diversion program.

The committee's recommended diversion program serves the goal of Minnesota's attorney-regulation system: protecting the public. Allowing lawyers whose behavior may have violated a Rule of Professional Conduct to resolve that question in a non-adversarial way that does not result in discipline but *does* result in corrective behavior, self-learning, and accountability, will protect Minnesotans from being harmed by attorneys who require only education and support to avoid breaking our rules. The corrective provisions of the proposed diversion rule – monitoring, compliance checks, and the like – will protect the public by ensuring that such behavior does not reoccur.

Relatedly, the fact that the committee's recommended diversion program is an alternative *to* discipline rather than an alternative *form* of discipline complies with the Court's long-stated maxim that the regulation system does not exist to punish the attorney. *See e.g., In re Roach*, 982 N.W.2d 699, 710

[3] As discussed further *infra.*, the Board unanimously supports the Committee's recommended diversion program. The Board recommends, with some division, the committee's recommended record-keeping amendments.

(Minn. 2022). The fact that an attorney who may (or may not) have violated a rule can correct their behavior without the finding of an ethical violation should be a feature, not a bug, of our attorney-regulation system.

The committee's recommended diversion program will also serve Minnesota's attorneys whose mental-health or drug or alcohol issues contribute their alleged misbehavior. This Court has long recognized that psychological disorders can, in certain circumstances, mitigate an attorney's ethical violations in terms of identifying appropriate sanctions. *In re Weyhrich*, 339 N.W.2d 274, 279 (Minn. 1983). The committee's recommended program takes the logic behind *Weyhrich* one step further, recognizing that an attorney's circumstances should be considered when determining whether "discipline" is required in the first place.

Finally, the Board appreciates that the committee's recommended diversion program does not mandate anything in any particular case. Instead, the program gives the Director broad discretion to fashion dispositions appropriate to each situation. The Board is confident that any Director will exercise with great care and fairness the discretion afforded by the rule.

B. The Board supports the committee's record-retention recommendations.

The Board supports the committee's position on the record-retention portion of the recommendation. Diversion rests somewhere between

traditional dismissals without finding of violation and traditional findings of violation and resulting discipline. Accordingly, the Board supports the committee's compromise proposal, allowing the Director to keep such records for at least *eight years* (at least the three years of diversion plus an additional five years) after a diversion agreement is reached. Given the length of time that may be required to investigate potential misconduct before even entering into a diversion agreement, the provision will allow the Director to maintain records for many, many years after the alleged conduct that led to the agreement. If the attorney allegedly engages in subsequent misconduct, then the Director will have years and years to examine the diversion records to get a full measure of the attorney's history.

But as the committee wisely maintains, diversion is *not* discipline. Records of diversion participation, therefore, should not be treated like records of discipline cases. A lawyer who successfully completes a diversion program should, at some point, be able to rest assured that the OLPR does not maintain a file on a long-ago alleged transgression that was not a violation of our ethics rules.

The Board was not unanimous on the record-retention matter. Some members were supportive of the Director's position. Members presented innovative ideas for further compromise, such as permanently maintaining a record of findings of completion of a diversion program while purging the

details of the alleged conduct and the diversion requirements. In the end, however, the Board determined that the committee's compromise position best accounts for all concerns on all sides of the issues.

The Director's minority report seems premised on a disagreement with the fundamental premise that diversion is not discipline. The Director repeatedly refers to the behavior prompting diversion as "misconduct," and opines on the importance of keeping evidence of a "[h]istory of lawyer misconduct."[4] Committee Rpt. at 78 (minority report). This position misses the point. A lawyer who successfully completes a diversion program has not committed misconduct. Instead, the lawyer has engaged in questionable behavior but has acknowledged and corrected that behavior. The records of such a lawyer should not be treated equally to the records of a lawyer who is found to have committed misconduct and is disciplined for doing so.

The Board is particularly troubled by one aspect of the Director's report. She writes:

> Under the proposed expungement requirement, however, the Director would be without [evidence of prior successful completion of diversion] if the information is expunged after 5 years. Accordingly, the Director might lean toward discipline in the first instance on many matters, rather than diversion, to ensure a record of the misconduct is kept.

[4] To be sure, the Director acknowledges that "diversion is not discipline." Committee Rpt. at 78 (minority report). The Director's record-retention position, however, would treat the two identically.

Committee Rpt. at 79 (minority report). The Director goes on to say that "[i]f the Director has access to the appropriate history, the incentive to discipline is minimized and the diversion program maybe broadly utilized." *Id.*

The Director's insinuation that, if the Court does not agree with her position, then she will withhold diversion from attorneys for whom it would otherwise be appropriate, is highly troubling. As discussed above, the recommended program would vest in the Director wide discretion to determine who can and cannot enter into diversion agreements. That recommendation is based upon the assumption that the Director would exercise her discretion fairly, prudently, and based on the facts of an individual case, not based upon a systemic disagreement with how any record-retention rule this Court might enact. Record-retention is not necessarily a categorically improper thing for the Director to consider when deciding whether to offer a diversion agreement. But the Director's position puts paperwork over people. This Court should not do so.

IV. The Board supports the committee's recommendations concerning timelines and transparency of investigations.

The Board supports the committee's recommended changes to Rule 8, which establish soft deadlines for investigations and promote transparency in the investigation process. In addition to the reasons stated by the committee,

with which the Board agrees, the Board offers the following additional rationales for the recommendations.

Context is important: OLPR investigations are currently unlimited and unchecked. The Director may initiate an investigation as she sees fit, with or without a complaint. Once initiated, the investigation can last indefinitely. And an attorney under investigation cannot sit passively and wait for the process to play out. During that endless investigation, the respondent attorney must promptly respond to requests by the Director for information; failure to do so can constitute an additional disciplinary infraction. Minn. R. Lawyers Prof. Resp. 25.

This open-ended, endless investigation is almost completely opaque. Nothing requires the Director to update the respondent attorney or the complainant, at any point, on the status of the investigation. [5] This secrecy leaves everyone, including the public, in the dark – potentially forever – on the status of an investigation.

The type of open-ended, essentially secret investigations authorized by the current rules are far outside the norm in other situations. For example,

[5] The respondent attorney and some complainants can request certain limited information related to investigative steps already taken. Minn. R. Lawyers Prof. Resp. 20(a)(4), (5). None of that information tells anyone about any next steps, timelines, or expected resolutions of the investigation. A complainant who is not a current or former client of the lawyer – such as opposing counsel or a presiding judge – cannot request or receive any information about an investigation. *Id.* at 20(a)(5).

virtually every type of criminal or civil investigation is bound by, if nothing else, a statute of limitations on the underlying conduct. But there is no statute (or rule) of limitations on alleged attorney misconduct, meaning that OLPR can undertake a years-long investigation of allegations that are themselves years old.

In addition, and particularly important to the Board, is the fact that unlike most other types of investigations, being under investigation by OLPR is a status in and of itself. An attorney under investigation ordinarily must report the same to potential employers, to the government when applying for a judgeship, to errors-and-omissions insurance providers, and to other jurisdictions when applying for an attorney license outside Minnesota or seeing *pro hac vice* status. The Board is aware of numerous situations where the status of being "under investigation" has hindered lawyers' professional plans in this regard. The fact that the investigation may end in dismissal is cold comfort to the lawyer whose professional (and sometimes personal) life is placed on hold by the existence of the endless investigation itself.

Endless investigations also do not protect the public. An attorney under investigation in almost all situations continues to practice law while the investigation is pending. If the conduct that prompted the investigation is, in fact, misconduct, then public is best protected by a speedy process in which the behavior can be corrected and, if necessary, discipline can be imposed.

Requriing timely investigations will also benefit complainants, who become frustrated when their complaints disappear into a black hole from which no information emerges for months or years. As the ABA noted, "[t]he impact on the lawyers who are the subject of these older investigations, and on complainants is noteworthy." ABA Report at 50. Speedily resolving complaints will increase public confidence in the Court's ability to self-regulate the practice of law in Minnesota.

Soft deadlines are also necessary because other measures have been unsuccessful at achieving the Court's goal of reducing the number of lengthy investigations. The Minnesota Supreme Court has long requested that the Director have less than 100 without-charge files open for one year or longer.[6] In 2020, the Director reported that OLPR was "very close to obtaining compliance" with that goal. 2020 OLPR Annual Report at 21. Not only has the OLPR failed to do so, but the situation has worsened. In October 2024, the Director reported that OLPR had 151 open files pending for over one year without charges.[7] Those files dated back to 2018. This represents more than one-quarter of *all open files* at OLPR in *any* stage of investigation or litigation.

[6] The Board's concern lies not in any particular number – 100 vs. 90 vs. 110 open year-long investigations – but in the indisputable fact that OLPR decisions routinely take, by any measure, too long.

[7] The Director reported 215 total files over one year old. But only pre-charge files are within OLPR's control. Accordingly, the Board focuses on those files.

It also represented a nearly *40% increase* from the number of year-old files that were under investigation in October 2023.

The above facts are not a comment on the Director's job performance; such comments are outside the Board's purview.[8] It is a comment, however, on the fact that current rules have not achieved this Court's goals. It is also a comment on the fact that unreasonably lengthy investigations remain far from the exception to the rule. Opaque, endless investigations occurring on a regular basis do not protect the public and are not commensurate with due process.

The minority report implies that large number of year-old pre-decision cases has resulted from "the pandemic and a period of staff turnover." Committee Rpt. at 80 (minority report). Any such implication is incorrect. As far back as 2014, the OLPR reported 180-190 open files that were more than one year old and recognized the need to reduce "those matters that are more than a year old and still in investigation." OLPR/LPRB 2014 Annual Report at 2, 30.

[8] The rules as they currently exist do not place any time limit on OLPR investigations, and the Director can hardly be faulted for conducting investigations as the rules allow. The Board believes the solution lies in setting transparent, rules-based standards for the length of investigations. Once those rules are in place, the Court will have much more accurate data by which to measure any Director's performance.

The Board believes that the committee's proposed rule gives all parties, including the Director, the flexibility to ensure that the public is protected while the due-process interests of respondents and complainants are protected. The proposal gives the Director ample time to complete an investigation in an average case. This is particularly true because delays caused by a respondent's non-cooperation are not counted against the initial 270-day timeline – thus, the primary source of delays outside the Director's control will not hamper the Director's ability to investigate in a timely manner. The proposal's provisions for extensions will ensure that public protection will not be compromised by timelines. At the same time, the fact that the timelines are mandatory rather than merely directory will guard against rogue Directors who, were the deadlines not enforceable, might be tempted to ignore them.[9]

The Board's position on this matter was divided. Some members, including at least one member with experience as an investigator in other contexts, disagreed with the need for or wisdom of such timelines. Some members were concerned that the proposal prioritized finality or the interests of respondents over public protection. Members also questioned whether

[9] Directory rules can be violated with no consequence. *See Heller v. Wolner*, 269 N.W.2d 31, 33 (Minn. 1978). Such rules are essentially dead letters. *See, e.g., Resendiz v. State*, 832 N.W.2d 860, 864 (Minn. App. 2013), *rev. denied* (Minn. Aug. 20, 2023) (recognizing that even though petitioner "properly undertook to do everything required of him," directory nature of statutory requirement deprived petitioner of relief).

having the Board Chair evaluate extension requests improperly or unwisely involved the Board in the OLPR's investigative process. Finally, some members questioned whether exempting delays caused by non-cooperating respondents without explaining what non-cooperation meant or who would decide whether it had occurred was clear enough to avoid potential problems or inconsistent application.

Other Board members strongly supported the committee's recommendations. Members reported personal and professional experiences with unreasonably lengthy OLPR investigations, explaining the stress placed on and dissatisfaction expressed by complainants, respondents, and members of the public as a result of those investigations. The Board also determined that the involvement of the Board Chair is not much different than the Chair's longstanding involvement in OLPR investigations via evaluating requests for investigative subpoenas. Minn. R. Lawyers Prof. Resp. 8(c). The Board also agreed with the committee that having the Director decide whether to extend the deadline would mean there is really no deadline at all, while having the Chair make that decision is the best available option.

In sum, the Board recommends that the Court adopt the committee's proposed amendments concerning investigation timelines.

V. The Board disagrees with the committee's recommended changes to the attorney-resignation rule.

The Board respectfully parts company with the committee on only one matter: one part of the recommended changes to Rule 11 concerning resignation of a law license. The Board agrees that the Court should amend Rule 11 to clarify that an attorney cannot resign while under investigation or while public-discipline charges are pending. The Board disagrees, however, that a lawyer should not be able to resign "when the lawyer is not in good standing under the Rules [of the Supreme Court on Lawyer Registration]."[10] This restriction is not supported by caselaw and unwisely and unjustly traps people into licensure they do not want or need.

Being in good standing has three components: payment of license fees; satisfying continuing legal education (CLE) requirements; and not serving a suspension or disbarment. *See* Minn. R. Lawyer Reg. 2.A, 2.B (describing compliance requirements for active or inactive law-license status); 2.F (defining "Non-Compliant Status" as being out of compliance with requirements for active or inactive status). A lawyer who does not satisfy all three requirements "is not in good standing and is not authorized to practice law in this state." Minn. R. Lawyer Reg. 2.F.

[10] The committee's recommendation refers to the "Rules for Admission to the Bar." The Board's understanding is that this was an error that will be commented upon by others, and that the operative rules are the Rules of the Supreme Court on Lawyer Registration. This comment refers to the latter set of rules.

Under these rules, a person who has not paid a license fee or has not complied with CLE requirements is not in good standing. The proposed change would bar such a person from resigning their law license. This is unwise and unjust. Being a lawyer is a choice. If a person no longer wishes to work as a lawyer, then unless the person is running from a misconduct allegation the attorney-regulation system should not prevent that action. To the contrary, allowing people who no longer wish to work as lawyers to stop doing so will protect the public from interacting with "lawyers" who no longer wish to be lawyers.

The fact that such a person is in arrears on fees or CLE requirements does not change the result. The lack of CLE compliance is particularly irrelevant. The point of requiring lawyers to be educated on developments in the law is to ensure that they can represent clients under modern conditions. That goal serves no purpose when applied to a person who no longer wants to be a lawyer. That person will not represent clients and therefore has no need to be educated in current legal developments. If anything, a person's failure to stay abreast of legal developments should incentivize the Court to allow that person to resign a law license.

The same is true for being in arrears in attorney-license fees. License fees are not an end unto themselves. Those fees help defer the cost of running our judicial and lawyer-regulation system, and they are justly imposed. But

the fees are forward-looking: attorneys pay for the privilege of the working as a lawyer during the ensuing year. A person who does not pay the fee dos not "owe" money for some past performance or privilege. They only owe money if they intend to work as a lawyer going forward.

And unless they pay the fee, a person cannot work as a lawyer in the ensuing year because an attorney's license is suspended shortly after going into arrears. Minn. R. Lawyer Reg. 14. Accordingly, the Court need not worry about people "freeloading" by practicing law without paying for the privilege to do so and then resigning, because a person in arrears cannot practice law. If someone in arrears wishes to make their noncompliant status permanent by resigning the license, then the attorney-regulation system should not stand in their way.

Furthermore, preventing people who are in arrears from resigning will lead to a vicious circle of debt. Unless a license is resigned, a person in arrears accrues license-fee obligations for six years starting with the first non-payment. *See* Minn. R. Lawyer Reg. 16.A(3). Such a person will not be practicing law in Minnesota. It is illogical to prevent such a person from making that decision final by resigning.

The only rationale for the change articulated by the committee is the contention that the "amendments codify and explain existing legal standards

and [OLPR] practices."[11] Committee Rpt. at 66. This is incorrect. Nothing in the current rule or in Minnesota Supreme Court caselaw prevents a person behind on license fees or CLE requirements from resigning a law license.

The committee cites *In re Mose*, 993 N.W.2d 251, 264 n.12 (Minn. 2023), for the contrary proposition, but that is not what *Mose* holds. The Court in *Mose* considered "a question of first impression[.]" *Id.* at 253-54. Mose had been suspended for misconduct, and he argued that the Court should reinstate him even though he could not show that he had the intellectual capacity to practice law normally required for such actions because he wished to immediately resign his law license. *Id.* at 260-62. The Court declined to do so. *Id.* at 262-64.

In explaining its holding, the Court compared Mose's situation to that of an attorney attempting to resign to avoid a disciplinary investigation:

> Our decision not to loosen our traditional test for attorney reinstatement is further supported by our rule that we do "not allow a lawyer to resign with charges pending." * * * "We do not allow resignation when allegations of serious misconduct are pending because to do so 'would not serve the ends of justice

[11] Based upon discussions the Board Chair had with the Director and other stakeholders, it appears that another concern animating the proposal is the idea that a person whose license is not in good standing should not be allowed to resign because the Rules on Lawyer Registration do not expressly allow such a person to come into good standing again. Even if true, that does not justify requiring people to pay for a license they do not want to use or become educated about legal topics that are not relevant to their future. The relevant offices can simply warn folks who are not in good standing about the consequence of resigning. Or, if the Court is concerned about this situation, then it can amend the Rules on Lawyer Registration to account for it.

> nor deter others from legal misconduct.' * * * To be sure, the charges against Mose are far from "pending." But allowing an attorney to be reinstated pursuant to a relaxed standard because the attorney agrees to resign from the practice of law would run afoul of some of the same concerns that the no-resignation-with-charges-pending rule is designed to avoid. Specifically, it would not serve the ends of justice nor deter misconduct if we were to allow an attorney to hold themselves out as resigned from the practice of law – which we allow **only for an attorney in good standing** – when, in fact, their standing was anything but good.

Id. at 264 n.12 (citations omitted) (emphasis added).

The *Mose* Court's reference to "good standing" referred to a particular type of good standing: the lack of a disciplinary investigation or sanction. In other words, *Mose* was about a person who committed misconduct, not people who did not commit misconduct but simply no longer wish to be attorneys. While some of the latter group may not be in "good standing" because they do not wish to pay a fee or attend classes to support a license they will not use, they are not in a position equivalent to Mose, who was not in good standing because he repeatedly committed misconduct.

The Board could not locate a single case in which this Court denied a petition to resign a law license because the petitioner was behind on license-fee payments or CLE requirements. Instead, every case the Board could locate in which the Court denied resignation came because the petitioner was trying to avoid a disciplinary investigation or sanction. *See, e.g., In re Bloomquist*,

958 N.W.2d 904, 911-12 (Minn. 2021) (citing cases). The Board endorses that position and agrees with the committee that the Court should codify it. But the Board opposes expanding that prohibition to prevent resignation by people who have not committed misconduct but simply want to stop being lawyers in Minnesota. The Board believes the Court should not "stand in the way of [such a person] getting on with [their] life in a non-lawyer capacity." *Mose*, 993 N.W.2d at 266 (Thissen, J., dissenting).

The Board respectfully disagrees with this aspect of the committee's recommendation. It urges the Court to reject it.

CONCLUSION

The Lawyers Professional Responsibility Board thanks the Minnesota Supreme Court for its attention to these important issues.

Dated: December 2, 2024

LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

/s/ *Benjamin J. Butler*

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THE SUPREME COURT OF MINNESOTA
BOARD OF LAW EXAMINERS

December 2, 2024

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Re: Order for Public Comment on Proposed Amendments to the Minnesota Rules on Lawyers Professional Responsibility, ADM10-8042 and ADM10-8043

Honorable Justices of the Minnesota Supreme Court:

I submit this correspondence in response to the Order for Public Comment on Proposed Amendments to the Rules on Lawyer Professional Responsibility, ADM10-8042 and ADM10-8043. I have reviewed my proposed comments with the Minnesota State Board of Law Examiners, which supports these comments. The Minnesota State Board of Continuing Legal Education, which oversees the Rules of the Board of Continuing Legal Education and the Rules of the Supreme Court on Lawyer Registration, will not meet before the comments are due, and I submit these comments on behalf of the Board in my administrative capacity.

1. Currently, Rule 18(b)(2) and 18(c) in the Minnesota Rules on Lawyers Professional Responsibility ties the fee for reinstatement to the "same amount as that required by Rule 12(B), Rules for Admission to the Bar, timely filing." Rule 12(B) of the Rules for Admission to the Bar is the lowest application fee under the Board's rules and is applicable only to Rule 6 examination applicants not admitted to practice in another jurisdiction. The lower fee is reflective of these applicants mostly being new law school graduates and the fee does not cover the true costs of the examination and character and fitness investigation. By contrast, applicants licensed in another jurisdiction for more than six months must pay $1050 to apply by examination and all applicants applying for admission on motion are required to pay $1150. In addition to the fee amount, the Board anticipates making changes to the Rules for Admission to the Bar prior to implementation of the NextGen examination in July 2027. I would recommend setting a specific fee amount for reinstatement in the Rules on Lawyers Professional Responsibility instead of tying the amount to the Rules for Admission to the Bar and would recommend that the Court set the fee closer to the admission on motion fee of $1150.

2. Rule 18, Reinstatement Rules, states that if an individual on conditional admission has their conditional admission revoked, they need to reapply through the Board of Law Examiners. In Rule 18(d), the language states that occurs "pursuant to Rule

16." Rule 16 does not contain a provision for reapplication. Accordingly, I recommend that the language in 18(d) be amended to read, ""shall be filed with the Board of Law Examiners pursuant to ~~Rule 16,~~ the Rules for Admission to the Bar."

3. A recommendation has been made to amend Rule 11, Resignation, to include:
   Unless otherwise ordered by the Court, no petition to resign from the Minnesota bar shall be granted while a lawyer is under investigation for misconduct, when one or more charges of misconduct are pending that, if true, would warrant public discipline, or when the lawyer is not in good standing under the Rules for Admission to the Bar.

   The Rules for Admission to the Bar are not applicable to good standing for licensed attorneys in the state of Minnesota. Good Standing is determined by the Lawyer Registration Office based on the lawyer's fee status, CLE status, and disciplinary status. As a result, separate from any disciplinary matters, this proposed rule would require lawyers to be compliant with their lawyer registration and CLE requirements in order to resign, unless otherwise ordered by the Court.

   Currently, on occasion, a lawyer will elect to resign their license instead of resolving their past due lawyer registration fees or addressing their continuing legal education obligations. One reason lawyers will elect to do this is they no longer practice in Minnesota, they are applying in another jurisdiction, and the other jurisdiction has advised that they need to resolve their suspended license status before they are eligible for admission in the other jurisdiction. However, if a lawyer has resigned not in good standing, when they request a certificate of good standing, they will instead receive a letter that states that at the time of resignation they were not in good standing. Once they have resigned, there is no longer a way to resolve the issue, which can create issues for them in the other jurisdiction.

   This proposed change to Rule 11 would require that the lawyer resolve the issue before resigning or allow the Court to waive that requirement in circumstances where warranted and the lawyer could be required to affirm that they understand the potential consequences. In addition, there is currently ambiguity as to what past due lawyer registration fees, if any, a lawyer has to pay if seeking reinstatement following resignation. By requiring that issue to be resolved before resigning, this would address that issue as well.

   During my discussions on this issue, a question arose as to whether a lawyer not in good standing for failure to complete CLEs would need to take courses prior to resigning. Under Rule 12 of the Rules of the Board of Continuing Legal Education, there is a provision that allows for a lawyer to move from involuntary restricted status (not in good standing) to voluntary restricted status (in good standing) by payment of a fee to process the paperwork. This defers completion of CLE credits until such time as the lawyer seeks authorization to practice law. It would not delay requestions for resignation.

   If the Court adopts this recommendation, I would recommend that the language be amended to read as follows:

> Unless otherwise ordered by the Court, no petition to resign from the Minnesota bar shall be granted while a lawyer is under investigation for misconduct, when one or more charges of misconduct are pending that, if true, would warrant public discipline, or when the lawyer is not in good standing ~~under the Rules for Admission to the Bar~~ at the time of filing the petition with the Court. (Strike through language as compared to proposed submission)

4. Proposed revisions to Rule 28 state:

> Scope of Rule and Standard for Transfer to Disability Inactive Status. Lawyers may voluntarily select inactive or permanent disability status through the Minnesota Lawyer Registration Office according to the Rules of the Supreme Court on Lawyer Registration. For the purposes of this rule, the Director may proceed under this rule when a lawyer's disability raises public protection issues.

Under the Lawyer Registration Rules, Rule 6 addresses Inactive Status Fees and Rules 8 addresses Permanent Disability Status: Inactive. Additionally, Rule 7, Retired Status, is also an Inactive Status.

It may be helpful to add additional clarity to Rule 28 as to which statuses a lawyer may elect.

Thank you for the opportunity to submit these comments. If you have any questions, please do not hesitate to let me know.

Very truly yours,

MINNESOTA BOARD OF LAW EXAMINERS

Emily Eschweiler, Director

MSBA

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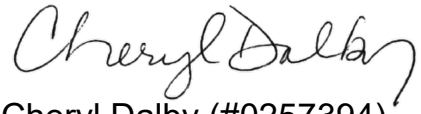
Re: Order for Public Comment on Proposed Amendments to the Minnesota Rules on Lawyers Professional Responsibility, ADM10-8042 and ADM10-8043

Honorable Justices of the Supreme Court:

The Minnesota State Bar Association (MSBA) submits this letter to inform the Court that it supports the recommendations of the Court's Advisory Committee on the Rules on Lawyers Professional Responsibility (RLPR) to amend the Minnesota RLPR as delineated in the Committee's Report filed on June 28, 2024.

Sincerely,



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