LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING AGENDA

September 12, 2025 – 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 May 16, 2025, meeting (attachment 1).

2. Summer update: State Capitol Tour (attachments 2, 3).

3. Rules committee report: Potential amendments to Rule 16, Rules on Lawyers Professional Responsibility (attachments 4-7).

4. 2026 meeting dates (attachment 8).

BREAK

5. Update: working group on OLPR standard language for summary dismissals.

6. Petition update: public comments on proposed changes to rules 1.8 and 3.8, Rules on Lawyers Professional Conduct (attachment 9).

7. Director's report (attachment 10).

8. Complainant appeal and other appeal statistics (attachment 11).

9. Open discussion.

10. Adjournment.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING

OPEN MEETING MINUTES

May 16, 2025, 12:30 pm (In-person and via Zoom) – Minnesota Judicial Center

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Board member attendance:

- Benjamin Butler, Chair
- Daniel Cragg
- Kris Fredrick
- Michael Friedman
- Thomas Gorowsky
- Elizabeth Henderson
- Chad Hultgren
- Tommy Krause
- Paul Lehman
- Frank Leo
- Kevin Magnuson
- Melissa Manderschied
- Jill Nitke-Scott
- Kristi Paulson, Vice Chair
- Jill Prohofsky
- Abigail Rankin
- Amy Sweasy
- Sharon Van Leer
- Carol Washington

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. Chair Ben Butler called meeting into session at 12:31pm on Friday May 16th. He introduced Supreme Court liaison Justice Gordon Moore and welcomed back

returning members of the board and public. Butler also welcomed the four new attendees whom he said would be introduced later.

2. Thomas Gorowsky moved to approve the minutes of the January 2025 meeting. Jill Prohofsky seconded the motion. The motion passed unanimously. Chair Butler thanked the board admin Ava Shannon for her continued efforts with drafting the minutes.

3. As previously stated, the board had gained 4 new members since the January meeting. Attorney member Abigail Rankin was first to speak, Rankin is working as general council at the office of administrator hearing. Amy Sweasy is a professor at the University of Minnesota Law School where she teaches professional responsibility to potential attorneys. Sweasy worked as the assistant county attorney for Hennepin for 30 years and has a background in criminal prosecution and with working for the District Ethics Committee (DEC). Elizabeth Henderson is the office manager for 6th judicial district public defender's office. Kris Fredrick, the nominee of the Minnesota State Bar Association (MSBA) is a new attorney member. The final new member, Chad Hultgren was not yet at the meeting during introduction, but he arrived later. Hultgren is the second appointed public member. Returning board members followed these introductions with short introductions of their own.

4. Chair Ben Butler introduced the next order of business, an action item to draft changes to the Executive Committee Policy & Procedure #1 regarding late complaints. Until recently, before the board had their own admin assistant, the OLPR would determine what happened to late complaints. Board members were sometimes assigned late cases with the prompt:

> "Your appeal was received beyond the 14-day time limit for appealing the Director's determination. The reviewing Board member may determine that the appeal will not be allowed."

Last meeting board members decided they would prefer if the issue of tardiness was decided before the appeal was assigned to them. In accordance with this Chair Butler had made an amendment to the Executive Committee rules on assignment:

> "The Board views the 14-day deadline as one akin to a claim-processing rule rather than a jurisdictional rule. *See Rued v. Comm'r of Human Services*, 13 N.W.3d 42, 47-50 (Minn. 2024) (explaining differences between claim-processing and jurisdictional rules). If a complaint is submitted after the 14-day period has elapsed, then the Chair or the Chair's designee, after consulting with the Executive Committee, must determine whether good cause exists to accept the complaint and assign it to a Board member. The Chair or designee must consider all relevant facts, including but not limited

to the length of the delay, the reasons for the delay, the potential unfair prejudice to the respondent or the Director from accepting the complaint, and the potential unfair prejudice to the complainant from rejecting the complaint. The Chair or designee's decision on the timeliness of the appeal is final. The chair or designee will document the decision and the reason for the decision."

Last time some members also had issue with the shortness of 14-day appeal window. Chair Butler said he was not fully content with the deadline, but members were not unanimous on their want to change it. Butler explained his view that the deadline was not jurisdictional but is waivable in the opinion of the executive committee. He then explained the way appeals will be handled going forward: they will be received by the board's admin assistant who will send the tardy appeal to the executive board for a decision on timeliness. There have been significantly more than expected of these; about one a week. The board admin assistant Ava Shannon will then ask the late appellate for any reasoning behind the tardiness, the answers she sends to the executive committee to make their choice.

With this context given, Chair Butler opened the change for discussion. Susan Humiston asked about requests for extensions on the front end, something the OLPR receives frequently. Butler stated this front-end extension would be included with this rule change but would be treated with the same consideration as the normal late appeals with reason. Board member Melissa Manderschied asked about the documentation process for these denied appeals or similarly documentation of accepted appeals and a norming of what is good cause. Butler stated that if documentation was important, we could get some, but for now this process is a little more informal, all correspondences will be uploaded to SharePoint for the OLPR to keep in their file system. Chair Butler pointed out because this is an executive policy and procedure it is not technically up for vote by the board, but they wanted to bring it to their attention anyway. Butler also clarified the addition of "of board member decision" to the timeliness heading right under the new language. After some discussion it was decided the chair or designee will document the decision and the reason for the decision. With that William Pentelovitch moved to accept with Melissa Manderschied seconding. The board unanimously adopted the policy and procedure language.

5. Next the board discussed an important law update due to *in re Reinstatement of Selmer*, William Pentelovitch was the panel chair on the matter and had been asked to speak on the lengthy process. Scott Selmer was originally admitted to practice law in the 1970s in Wisconsin, gaining his Minnesota law license in 1984. He had a history of discipline beginning in the 1990s with an 18-month suspension for frivolous behavior and litigation. He was suspended in 2015 indefinitely, with 2 aborted applications for reinstatement in the time since. Pentelovitch stated that a

week before the hearing they received the briefings from both sides, with the brief from Mr. Selmer and his attorney claiming that all the discipline he had ever received both from the Minnesota and Wisconsin bar had been a result of racism. The panel was not able to reconsider old discipline and also had a public member who had to step out, forcing Wendy Sturm to step up at the last minute. Selmer's attorney gave his 15–20-minute opening solely about the racism Selmer had faced. After it was read onto record and to Mr. Selmer and council what burden it is he must prove here, and that his current argument was not addressing it. When the panel then asked council if they were able to proceed, they said they were unable to prove what was needed and asked for a recess. A recess was called and after that Mr. Selmer's attorney not only resigned from the case but from the bar. Mr. Selmer returned with a new attorney who was also his brother and a well-respected attorney in the twin cities. Several requests for continuance were granted with the hearing taking place the following March, containing 2 days of testimony which resulted in a split decision of 2 panelists being anti-reinstatement and 2 being pro-reinstatement. The Supreme Court upheld this decision and said Selmer should not be reinstated. Pentelovitch believed this meant three things that would impact our board members:

i. The language in *In re reinstatement of Trombley* which usually calls for the court to consider the behavior closest to the time of the hearing is a gradation. Selmer has been suspended for 8 years; the court does not believe it's unfair to look at this time as a whole as well as Selmer's potential recent change.
ii. The court clarified what "clear and convincing" evidence means in a case like this, with the panel adopting language from a 2019 Supreme Court hearing that claimed that clear and convincing needed to be "high probability".
iii. Intellectually competent means competent to practice law. Mr. Selmer is clearly generally competent; he was able to obtain a master's in journalism from Columbia University during his eight-year suspension. He also brought several sincere and credible witnesses, but none were able to testify directly to his ability to practice law.

The other panelists shared their thoughts, with Paul Lehman stating he agreed with Pentelovitch, he was not convinced that Mr. Selmer's change was genuine or warranted reinstatement, even after Selmer switched attorneys Lehman still thought his correspondence with the OLPR was disrespectful. John Zwier was the dissenting member, and the other attending panel members thanked him for his bravery to dissent on his very first case. Zwier was worried about following the legal standard set in *Trombley* and thanked the court for clarifying the standard. Pentelovitch also pointed out Zwier was the one to ask what counts as clear and convincing evidence, allowing for the court to clarify which will be helpful. Supreme Court Liaison

Gordon Moore commented on the case that the court's decision speaks for itself but there was room for clarification on *Trombley* and glad it was given. Finally Chair Butler thanked the group for their ability to disagree and remain respectful, which shows the system works.

6. A ten-minute recess was called.

7. Next working groups were asked to give their updates:

    a. Director Humiston had previously spoken to the board about the current summary dismissal template and her want to update some of the language and streamline the template. Since it's adoption in the 1980s the template has not been changed at all and according to Director Humiston is far more in-depth than similar documents other agencies have. Carol Washington asked if this would be an update to the whole process of summary dismissals or just how they articulate it. Director Humiston said it would be a change only to the template, not to how they investigate incoming cases. Michael Friedman, who is on the working group, said they would be meeting Monday the 19th for the first time and will reach out to the director following the meeting.
    b. The working group to update the LPRB website had convened by email already and have a draft of the website in front of them. The work group told director Humiston it would be useful for her to call for conference with them and the website designer, David.

8. Petitions and Public Hearings update, the LPRB and OLPR are filing a joint petition asking for substantive change to allow for lawyers to give nominal gifts to clients in special circumstances. The board has already said everything it will say on the matter officially, but if any other organizations want to speak up and give their opinion to the court that is encouraged. The deadline to be heard on this is June 23rd, the Supreme Court will assess the need for a hearing after this.

9. The Director began her report with an update on the OLPRs upcoming move. The move is a major downsize, which the Director described as an interesting challenge. Half of the space has been leased out to the new competency attainment board and civil legal aid; the other half is still looking for a lessee. The director reported aside from the move this is a very busy time of year for the OLPR. The OLPR have been working with the state finance department to create a budget that they will bring to the court in June. Director Humiston is working on the annual report and is always open to suggestions for things people want to see in the report or things people believe they should be reporting on, particularly relating to the system. Right now, the report is mostly just updating the numbers from the previous years, so she encouraged the board that this is their opportunity to report on the current state of professional responsibility.

Susan also reported on the quality workplace survey the OLPR took recently, it had 73% engagement. The results showed that OLPR employees felt connected to their work, cared about the quality of their work and believed their coworkers did as well. The environment overall and coworker relationships were rated highly, with the main issue being almost half of employees feeling overwhelmed and unable to keep up with their work in the time given, the director believed this was a training issue and could be improved upon.

The OLPR will have their all-day ethics seminar where they will have speakers including Justice Moore, a law professor, a disbarred attorney who went to prison and a section of the boards choosing.

The OLPR continues to receive a more than average number of complaints. So far, they have received 524 complaints they have opened, with 664 if you add the number of complaints sent in that do not respond when asked for more information. The number of nonresponses has doubled from this time last year from 74 to 140. With this influx of cases the OLPR is looking at how much they consider things, Humiston reported that Colorado only investigates 250 a year, that's 1/3 of what Minnesota is doing. The Director asked the board to consider maybe this is a good time to think about how we are doing things and how are we best serving people.

ABA Opinion 515 allows an attorney to disclose criminal conduct of a client when it is against them. Director Humiston wanted the board to be aware of this decision as it hasn't always been the advice they give but happy to follow it now. Chair Butler and Director Humiston have coauthored an article coming out in "Bench and Bar" on confidentiality and ineffective council claims. Humiston will be speaking next week about proposed rule changes at a seminar, this is the time to address any comments or concerns.

Finally, Humiston addressed "Lawyers Concerned for Lawyers" a small solo group started by the OLPR for attorneys. This has obviously brought up several questions concerning confidentiality. They have been working with a handful of attorneys and are working on creating an FAQ.

10. Board admin assistant Ava Shannon had a brief speech about her first year as the board's part time assistant, her role and how she is best able to help board members. She reminded board members that the board letterhead is on the LPRB SharePoint homepage. It is one of the blue links and comes in both PDF and word version. Most members are using an older letterhead that does not have the correct LPRB address, so members were asked to check to make sure they are using the most recent version.

    Board Admin Shannon also had the statistics for the first quarter of 2025. The number of average days to complete remains remarkably low, with DNW

investigations and admonition appeals averaging at 19 days and DNW's without investigation at 20 days.

11. Chair Butler opened the floor for discussion, when hearing none he reminded board members the next event the LPRB would be hosting is in July and is a tour of the capitol with Justice Gordon Moore.

12. William Pentelovitch moved to adjourn; the motion was seconded by Melissa Manderschied and passed.


PATRICK DUFFY MURPHY
CHIEF CLERK

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8043

IN RE MINNESOTA RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY

O R D E R

Rule 16 of the Minnesota Rules on Lawyers Professional Responsibility (RLPR) governs the temporary suspension of an attorney pending disciplinary proceedings. This court will benefit from consideration by the Lawyers Professional Responsibility Board as to whether Rule 16, RLPR should be amended to allow for an alternative "fast track" temporary suspension process in certain circumstances.

Based on all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. Consideration of amendments to Rule 16, RLPR is referred to the Lawyers Professional Responsibility Board.

2. The board should consult with the Director of the Office of Lawyers Professional Responsibility prior to filing its report with this court. The board must file its report and any amendment recommendations on or before January 31, 2026.

Dated: July 9, 2025

BY THE COURT:

Theodora K. Gaïtas
Associate Justice

From: Austad, Jana
To: Butler, Benjamin
Cc: Moore, Gordon; Humiston, Susan
Subject: Lawyer Professional Responsibility Rule 16: Temporary Suspension
Date: Wednesday, July 9, 2025 4:40:12 PM
Attachments: image001.png

Good afternoon, Mr. Butler-

As Chair of The Lawyer Professionally Responsibility Board, I am writing today to ask that Minnesota Rules on Lawyers Professional Responsibility Rule 16 on Temporary Suspension be reviewed.

In recent years violence has become an increasingly common response to personal and societal pressures. No profession has been spared. This has included circumstances involving attorneys in Minnesota. While evaluating appropriate responses to a situation in the 9th Judicial District, I learned about the current Lawyers Professional Responsibility Rule 16 on Temporary Suspension. As the rule is currently structured a timely temporary suspension process would take at least 2 months. Through a variety responses from differing agencies (including OLPR), a serious threat was interrupted and the situation calmed. No one in the branch was harmed. However, there was not an action available for immediate suspension of the attorney's license under the current rule.

After a quick review, there are other professional licensing boards in Minnesota and elsewhere that have alternative temporary suspension processes allowing for more timely action in the most urgent circumstances. I have attached a screen shot of the rule in North Dakota as an example. While our most recent circumstance was extreme, recent history indicates it will not be uncommon for professional license boards to respond to extreme behavior. I was happy to hear your name as the chair of this committee. I am confident this request will receive thoughtful consideration. Please do not hesitate to call or write if I can answer any questions or help in any way.

Best Wishes,
Jana Austad

Jana Austad

Chief Judge, Ninth Judicial District
Cass County Courthouse
P. O. Box 3000
300 Minnesota Ave.
Walker, MN 56484
218-330-4256

From: Austad, Jana
To: Butler, Benjamin
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Best Wishes,
Jana Austad

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Chief Judge, Ninth Judicial District
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P. O. Box 3000
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Walker, MN 56484
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RULE 3.4.THREAT OF PUBLIC HARM.

Effective Date: 8/1/2004

A. **Transmittal of Evidence**. Upon receiving sufficient evidence demonstrating that a lawyer subject to the jurisdiction of the court:

(1) has committed misconduct or is disabled and

(2) poses a substantial threat of irreparable harm to the public,

counsel shall transmit the evidence to the court together with a proposed order for interim suspension.

B. **Immediate Interim Suspension.** At any stage of any proceeding, the court may enter an interim order immediately suspending the lawyer pending final disposition of the proceeding predicated upon the conduct causing the harm or may order such other action as deemed appropriate. In the case of an interim suspension, the court may appoint a trustee under Rule 6.4 to protect the interests of clients. In the case of an interim suspension, the court may order that a lawyer participate in the lawyer assistance program. Upon the request of the lawyer who is subject to counsel's request for interim suspension, the court shall provide the lawyer an opportunity to be heard before determining counsel's request. Upon request by counsel or the lawyer after entry of an interim suspension order, the court shall within ten days provide an opportunity for the lawyer to demonstrate that the order should not remain in force. Counsel shall be present and appear at these hearings.

[Amended effective August 1, 2004.]

Explanatory Note

Version History

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

2026 PUBLIC MEETING DATES - PROPOSED

January 23, 2026

May 15, 2026

September 11, 2026

December 11, 2026

STATE OF MINNESOTA

IN SUPREME COURT

ADM1-08042

IN RE PROPOSED AMENDMENTS TO THE
MINNESOTA RULES OF PROFESSIONAL CONDUCT

COMMENTS OF THE PROFESSIONAL REGULATION COMMITTEE

In response to the Court's Order dated April 23, 2025, the Professional Regulation Committee (Committee) of the Minnesota State Bar Association (MSBA) respectfully submits the following comments regarding the Joint Petition of the Lawyers Professional Responsibility Board (LPRB) and the Office of Lawyers Professional Responsibility (OLPR) for Amendments to the Minnesota Rules of Professional Conduct. Specifically, the LPRB and OLPR seek to amend Rules 1.8 concerning financial assistance from lawyer to client, and Rule 3.8, concerning the special ethical duties of prosecutors.

Comments of the Committee re Rule 1.8

The Committee supports the LPRB and OLPR petition to amend Rule 1.8(e), permitting lawyers representing indigent pro bono clients to assist with basic needs that affect access to the justice system. This amendment aims to fill a critical humanitarian gap in the current rule. For many indigent clients, the inability to meet basic needs can severely limit their participation in legal

proceedings. By permitting limited, good-faith assistance, the amendment supports a more compassionate and practical approach to pro-bono representation while maintaining appropriate ethical safeguards.

The Committee observed that lawyers might have difficulty understanding the meaning of "modest" and that new Comments 11-12, while informative, did not cover certain practical applications. The Committee suggests that the LPRB and OLPR consider issuing an ethics opinion to assist attorneys in understanding the term "modest," which is inherently subjective and may be interpreted inconsistently across different practice settings. The Committee is not suggesting that a monetary amount be assigned to define modest. Guidance could address the duration and frequency of gifts. Can a gift exceed modest if repeated or multiple gifts are given to the same client? For example, a lawyer could reasonably conclude a one-time payment of a client's rent to avoid eviction falls within the definition of modest, but what if a lawyer does this multiple times over the course of a representation? Additionally, guidance regarding what records, if any, lawyers should maintain regarding gifts given in connection with Rule 1.8(e)(4) and how to handle a potential client who discusses the possibility of gifts with a lawyer prior to retention.

This Committee consulted with the MSBA Access to Justice Committee Pro Bono Council on its comments to Rule 1.8. The Pro Bono Council indicated its general support for the proposed amendment to Rule 1.8(e). Members of the

Pro Bono Counsel favored a policy of lessening the restrictions in the current version of the rule, which prevent Minnesota lawyers from making humanitarian gifts to clients that improve efficiency and access to justice for fear of professional discipline.

Comments of the Committee re Rule 3.8

The Committee also supports the LPRB and OLPR petition to amend Rule 3.8(d), (g), and (h). The proposed amendments represent a step in the right direction to reduce inconsistencies in practice within the state and clarify prosecutors' ethical duties when new or compelling evidence suggests a wrongful conviction. Importantly, the proposed amendments provide guidance on prosecutors' disclosure obligations for not only exculpatory evidence, but also evidence that tends to negate guilt or mitigate the offenses at various stages, including post-conviction. Though some proposed amendments depart from the ABA Model Rule or risk creating gaps in accountability or required remediation efforts, the updates improve fairness and integrity in the criminal justice system.

Proposed amendments to Rule 3.8(d)

Rule 3.8(d), defines prosecutors' ethical obligations to disclose evidence that may negate the guilt of the accused or mitigate the offense. The proposed amendment to Rule 3.8(d), requires that prosecutors disclose all evidence or information required "under applicable law and procedural rules" that the prosecutor "knows or reasonably should know" tends to negate guilt or mitigate the offense. The Committee is

cognizant this amendment departs from the ABA Model Rule 3.8(d), and supports the amendment as drafted. The proposed language accounts for the fact that disclosure obligations under *Brady* sit at the intersection of a prosecutor's legal and ethical duties. Therefore, the ethical rule should align, or at least not conflict, with constitutional and procedural standards applicable in this jurisdiction.

One area of potential ambiguity with Rule 3.8(d), concerns the proposed phrase "reasonably knows." There may be a question as to whether "reasonably knows" at Rule 3.8(d) would be interpreted as creating a higher standard for prosecutors than exists at Rule 9.01, Minnesota Rules of Criminal Procedure, which focuses on information in the prosecutor's possession and control.

Proposed amendments to Rule 3.8(g), and (h)

The proposed language for new Rule 3.8(g) and (h), share similarities where they both concern a prosecutors' ethical obligations to make disclosures and remediation efforts, which are triggered by a prosecutors' awareness of new, credible, and material evidence of wrongful conviction. The Committee supports these new paragraphs which activate heightened obligations for prosecutors to take appropriate steps to investigate and remedy potential injustices.

Under the proposed paragraph (g), a prosecutor who becomes aware of such new evidence that creates a reasonable belief that a convicted defendant may be innocent must promptly disclose the evidence to the appropriate court or authority. And if the conviction arose in the prosecutor's current jurisdiction the obligation

extends to disclosure to the defense and reasonable steps to initiate an investigation. The proposed new paragraph at Rule 3.8(h) goes further than paragraph (g), to require a prosecutor who knows of clear and convincing evidence which indicates a person in their current jurisdiction was wrongfully convicted must act to remedy the conviction.

While supporting these proposed amendments, the Committee observed paragraph (g)(2)'s proposed "current jurisdiction" limitation on a prosecutor's investigation or remedy obligations risks potential gaps in prosecutors' accountability for past cases for which convictions arose outside their current jurisdiction. Though prosecutors would still have a duty to notify the appropriate court or authority under (g)(1), the heightened objections to notify the defense at (g)(2) are inapplicable. The Committee reviewed past comments by stakeholders, but those submissions concerned prior iterations of the current proposed amendments, and none included comments on these issues. The Committee defers to the comments by County Attorney Offices and Public Defender Offices regarding other procedural or precedential applications that lessen concern of these potential accountability gaps.

Dated: June 17, 2025

Respectfully submitted,

By _____

Cassie Hanson (Attorney Lic. # 0303422), Chair
MSBA Professional Regulation Committee
Fredrikson & Byron, P.A.
60 South Sixth St, Suite 1500
Minneapolis, MN 55402-4400
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(612) 492-7041

Dated: June 17, 2025

By _____

Nicole S. Frank (ID # 0388822), Incoming Chair
MSBA Professional Regulation Committee
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OFFICE OF THE HENNEPIN COUNTY ATTORNEY
MARY F. MORIARTY COUNTY ATTORNEY

Minnesota Supreme Court
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

June 16, 2025

Re: Proposed Amendment to Rule 3.8 of the Minnesota Rules of Professional Conduct (No. ADM10-8005)

Dear Chief Justice Hudson and Justices of the Supreme Court:

On behalf of the Hennepin County Attorney's Office ("HCAO"), I write in support of the Joint Petition of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility to amend the Minnesota Rules of Professional Conduct dated January 22, 2025 (the "Petition"), specifically as the Petition relates to the proposed changes to Rule 3.8. The HCAO does not express an opinion concerning the Petition's proposed amendment to Rule 1.8.

As the state's largest prosecutor's office, the HCAO takes seriously the mandate for prosecutors to act not simply as ordinary litigants within an adversarial system, but as ministers of justice in the truest sense. The Minnesota Rules of Professional Conduct rightly recognize the unique role of prosecutors by setting out certain special responsibilities in Rule 3.8. The proposed amendment represents a reasonable expansion upon the existing Rule and one that is wholly consistent with the animating purpose of that Rule.

At its most simple, the role of the prosecutor is to see that justice is done. That responsibility does not suddenly dissipate when a conviction is obtained. Should information later come to light that casts serious doubt upon the validity of a conviction, a prosecutor who strives to promote justice cannot in good conscience simply ignore such information. Thus, the proposed Rules 3.8(g) and (h) impose modest, common-sense obligations on prosecutors. As the Petition notes, the proposed language is closely modeled on the American Bar Association's Model Rules, and variants of this language have been successfully incorporated in states around the country. We are aware of no

jurisdiction in which these Rules have imposed undue burdens upon or created substantial confusion among prosecutors.

Notably, the threshold for triggering these proposed Rules is relatively high. Rule 3.8(g) only comes into play when a prosecutor becomes aware of "[1] new, [2] credible, and [3] material evidence creating [4] a reasonable belief that a convicted defendant did not commit an offense of which the defendant was convicted." While it is not uncommon for convicted individuals and their advocates to proclaim their innocence, it is less common for prosecutors to encounter information that has each of the four characteristics contemplated under Rule 3.8(g). Thus, we would expect that most prosecutors would not find themselves in situations implicating this Rule with any regularity.

The flip side, however, is that, when these four requirements are satisfied, there is simply no justification for a prosecutor's inaction. What Rule 3.8(g) actually requires of the prosecutor in that situation is modest and reasonable. If the conviction is from a different jurisdiction than where the prosecutor currently works, they simply have to disclose the information to an appropriate authority in that jurisdiction. If the conviction is from that prosecutor's current jurisdiction, naturally more is expected of them. To start, the prosecutor must disclose the evidence to the defense, an act of negligible burden.

Arguably more demanding upon the prosecutor is the requirement that they "make reasonable efforts to cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit." Even there, however, the language is flexible and does not prescribe who should conduct such an investigation, the particular steps that must be taken in connection with that investigation, or what constitutes "reasonable efforts." The HCAO has established a Conviction Integrity Unit specifically for the purpose of investigating plausible claims of wrongful conviction. While we would certainly support other counties interested in incorporating such a model, nothing in the proposed Rule 3.8(g) would require any such formal structure. Indeed, the language does not even require that the investigation be conducted within the office of the prosecutor who receives the exculpatory information. A prosecutor could presumably satisfy their obligations under the proposed Rule by taking the exculpatory information to the Conviction Review Unit of the Attorney General's Office and encouraging them to investigate. That simply is not too much to ask of an ethical prosecutor who has been alerted to a potential wrongful conviction.

Rule 3.8(h) asks more of prosecutors than does Rule 3.8(g), but the standard for triggering that higher obligation is itself higher. Specifically, Rule 3.8(h) only comes into play when the "prosecutor knows of clear and convincing evidence establishing that a

defendant in the prosecutor's current jurisdiction was convicted of an offense that the defendant did not commit." In that case, the Rule requires the prosecutor to "seek to remedy the conviction." As a practical matter, we take that directive in most instances to mean supporting a petition for postconviction relief under Minnesota Statutes Section 590.01, although it might also be satisfied by supporting an innocence-based pardon petition before the Board of Pardons. It goes without saying that those are bold and uncommon actions for prosecutors to take under ordinary circumstances. But, again, prosecutors are only required to do so where they know of "clear and convincing evidence" of innocence, a very high standard. Frankly, we do not know any conscientious prosecutor who, possessing such compelling knowledge of innocence, would not be moved to remedy the injustice. This proposed Rule simply requires prosecutors to do the decent, ethical thing.

Finally, we also support the proposed change to the language of Rule 3.8(d) concerning prosecutors' pretrial disclosure obligations. We agree with the assertion in the Petition that the proposed change brings the language of this Rule into alignment with existing case law and will promote clarity and consistency.

We commend the Court for its thoughtful consideration of this issue and respectfully encourage the Court to grant the Petition as it relates to the proposed amendments to Rule 3.8 of the Minnesota Rules of Professional Conduct.

Respectfully submitted,

Mary Moriarty
Hennepin County Attorney

OFFICE OF THE RAMSEY COUNTY ATTORNEY
JOHN J. CHOI

June 18, 2025

Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

RE: Support for Proposed Amendment to Rule 3.8 of the Minnesota Rules of Professional Conduct (Case No. ADM10-8005)

Dear Chief Justice Hudson and Justices of the Supreme Court:

I am writing to express my strong support in favor of the Joint Petition of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility dated January 22, 2025 (the "Petition"), specifically and exclusively as that Petition relates to the proposed amendments to Rule 3.8 of the Minnesota Rules of Professional Conduct.

As the chief prosecutor for Ramsey County since 2011, I believe that the proposed changes to Rule 3.8 will greatly benefit Minnesota's prosecuting attorneys by clarifying our duties as ministers of justice related to the disclosure of evidence and the remedy of wrongful convictions. The proposed changes promote fairness and accountability – values that are essential to maintaining public trust in our criminal justice system. On a more personal and practical level, since the objectives sought by the proposed rule changes also reflect my long-held values of justice and have been incorporated into the practices of my office since 2011, I know that they work.

By enacting the proposed rule changes, Minnesota can join other jurisdictions in adopting clear, enforceable standards that reflect our collective commitment to justice and the rule of law. I respectfully urge the Minnesota Supreme Court to adopt the proposed amendments to Rule 3.8.

360 Wabasha Street North, Suite 100, Saint Paul, MN 55102-1418
TELEPHONE: 651-266-3079 • FAX: 651-266-3010

Thank you for your consideration of this letter and for your leadership and ongoing commitment to justice.

Sincerely,

John J. Choi
Ramsey County Attorney

cc: Associate Justice Anne K. McKeig
Associate Justice Paul C. Thissen
Associate Justice Gordon L. Moore, III
Associate Justice Karl C. Procaccini
Associate Justice Sarah E. Hennesy
Associate Justice Theodora Karin Gaïtas

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8005

Comments of the Minnesota Board of Public Defense Regarding Proposed Amendments to the Minnesota Rules of Professional Conduct

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TO: THE MINNESOTA SUPREME COURT

The Minnesota Board of Public Defense ("the Board") strongly supports the proposed amendments to Minnesota Rules of Professional Conduct 1.8 and 3.8. The proposed amendments to Rule 3.8 will clarify that prosecutors throughout the state have not just a legal or moral but an ethical obligation to disclose relevant evidence and take action to remedy wrongful convictions. The proposed amendment to Rule 1.8 will make our system fairer and more just to people of limited means – precisely the clients the Board's lawyers represent.

As the Court knows, the Board coordinates and oversees the statewide public defender system in Minnesota to ensure that all indigent clients are treated fairly by the criminal justice system and are provided with effective legal defense services. The vast majority of criminal cases in Minnesota, both in district court and on appeal, are handled by public defenders. Given the breadth of our statewide experiences in the areas directly affected by these amendments, the Board hopes that its comments will be particularly helpful to the Court's consideration of the petition.

I. The Court should adopt the amendments to Rule 3.8 to create and standardize prosecutors' ethical duties to timely disclose relevant evidence and take action to remedy wrongful convictions.

The Board endorses the rationales set forth in the Joint Petition and as stated in the request of the Great Northern Innocence Project. To be frank, Minnesota should have adopted these amendments long ago. As the ABA and many other states have recognized, making prosecutors' duty to disclose an ethical responsibility, rather than just a rules-based one or one based on the bare minimum protections of *Brady v. Maryland*, 373 U.S. 83 (1963), and similar cases, will help clarify and give substance to the oft-repeated maxim that a prosecutor is a minister of justice. *See State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006) ("as we have repeatedly said, a prosecutor 'is a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public.'" (citation omitted)); *see also Berger v. United States*, 295 U.S. 78, 88 (1935) (prosecutor's "interest…in a criminal prosecution is not that it shall win a case, but that justice shall be done").

The proposed amendment will help prosecutors realize their goals as ministers of justice in at least two practical ways. First, they will help standardize the practice of discovery across Minnesota. Right now, there are at least 87 different discovery policies in our state; one for each of the 87 county attorneys.[1] In reality, there are hundreds of different

[1] For example, at least one county attorney's office had a policy or practice of not disclosing conversations between its victim/witness staff and prosecution witnesses, even when those conversations related to the case, on the ground that disclosure was not required because the conversation was not with a lawyer. Numerous offices report conversations with witnesses by saying only that "nothing new was disclosed" while providing no guidance on what that office does and does not consider "new."

policies and practices as each prosecutor, while working under the guidelines of their offices and this Court's rules and caselaw, makes individual decisions about what (if anything) to disclose and when (if ever) to disclose it.

Prosecution discovery in Minnesota's criminal cases is an ongoing game of "hide the ball" that goes against the ideals of a prosecutor as a minister of justice. Far too often, prosecutors turn over important information on the eve of or during trial, forcing our clients to choose between proceeding unprepared or sitting in jail for even longer while their extremely busy public defender scrambles to make sense out of what has just been dropped on them.[2] The proposed amendment to Rule 3.8(d)[3] should help alleviate this problem by making timely disclosure of relevant information each prosecutor's personal ethical obligation. There should be no more defense to "office policy" or "common practice" when either allows for the kind of untimely disclosure which is far too common in our state.

These failures – which happen every day in courts throughout Minnesota – have real consequences. As just one example, an innocent man was convicted in Hennepin

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[2] In one recent metro area homicide case, the county attorney disclosed stacks of police reports to the defense on the morning jury selection was to begin, and claimed the disclosure was "pre-trial" and therefore timely.

[3] In fact, the Board supports amending Rule 3.8(d) to make prosecutors' ethically based disclosure obligations even plainer. Colorado's ethics rules, for example, require prosecutors to "timely disclose all information, *regardless of admissibility*, that a prosecutor knows or reasonably should know could negate the accused, mitigate the offense, *or would affect a defendant's decision about whether to accept a plea disposition*." Col. R. Prof. Conduct 3.8(d) (2022) (emphasis added). Since Colorado adopted that rule in 2022, prosecutors across that state have been trained on how to comply with it, seemingly without major issue. *See* Colorado Dist. Attorneys' Council, *New Rule 3.8*, *available at* https://coloradoprosecutors.org/new-rule-3-8/ (last accessed June 19, 2025). The same thing could no doubt happen in Minnesota.

County of first-degree murder and sentenced to life in prison in large part because "[p]rosecutors failed to disclose exculpatory and impeachment evidence to the defense." Carrie Sperling, *et al.*, *Conviction Review Unit Report and Recommendation: State of Minnesota v. Barrientos-Quintana, 27-CR-08-53942* (Minnesota Attorney General's Office 2024), at 162, *available at* https://www.ag.state.mn.us/Office/CRU/ (last visited June 19, 2025). "Other evidence was disclosed too late in the process to be used in a meaningful way by competent defense counsel." *Id.* at 163. Making prosecutors' ethical obligations in this area clear through the proposed amendments will help ensure that such tragedies do not occur.

Second, the proposed amendments will address something everyone in the system should be horrified by: the wrongful conviction of a factually innocent person. Not only should no one in our legal system support such a terrible outcome, but *everyone* in our system – especially including the ministers of justice who brought about this awful result – should have an ethical obligation to take affirmative actions to fix it. The proposed amendments to Rules 3.8(g) and (h) do no more than implement that basic truism.

Some prosecutors seem to realize this. The Minnesota Attorney General's Office's Conviction Review Unit (CRU) is respected but is small and currently only handles a few first-degree murder cases. A couple of county attorneys' offices have established their own similar units. But the *moral* obligation to take active steps to right a wrongful criminal conviction should be every prosecutor's *ethical* obligation, not just an obligation for those who work for certain elected county attorneys. A wrongful conviction in a county without a CRU is just as unjust as a wrongful conviction in a county with a CRU, but right now

only the latter set of prosecutors have any obligation to do anything about it. The ethical obligation of the ministers of justice to affirmatively act to right that wrong is clear. The Court should codify it into the Rules of Professional Conduct.

II. The Court should adopt the amendments to Rule 1.8 and allow lawyers to help the most vulnerable Minnesotans.

Public defenders represent some of the most financially desperate people in Minnesota. For our clients, things as simple as getting to court, meeting with a probation officer, or even logging onto a Zoom hearing can be financially difficult. This is particularly true in greater Minnesota, where courthouses can be miles and miles from clients' homes, winter weather gets in the way of travel, and public transportation is slim to none. All this to say nothing of our clients' need to arrange for time off from work or childcare.

One of the Board's goals is to provide client-centered representation. Our staff is dedicated to this goal because they want to help people. Right now, with regard to these basic human needs, they can't. Giving a client bus fare, or money for the meter, or $10 for lunch would arguably violate Rule 1.8(e) because that action could be deemed "provid[ing] financial assistance to a client." Even if the same might not be prosecuted as or deemed to be a violation, the chilling effect of a potential ethics issue prevents lawyers from providing basic human relief to people who desperately need it.

Accordingly, the Board supports the Joint Petition's recommendation and endorses its rationales and those provided by Hennepin County Adult Representation Services. Importantly, the recommended amendments do not require anyone to do anything they do not wish to do. They would simply provide that if a public defender chose to help a client

by providing "modest gifts," the lawyer would not be acting unethically. This amendment is common sense, and the Board urges the Court to adopt it.

Dated: June 23, 2025

Respectfully submitted,

MINNESOTA BOARD OF PUBLIC DEFENSE

WILLIAM WARD
Minnesota State Public Defender (0307592)

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OLPR Dashboard for Court And Chair

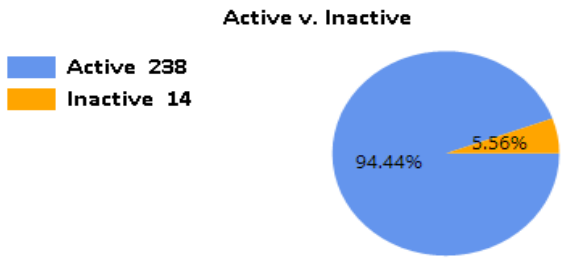
	Month Ending August 2025	Change from Previous Month	Month Ending July 2025	Month Ending August 2024
Open Files	676	28	648	566
Total Number of Lawyers	467	11	456	382
New Files YTD	1047	134	913	810
Closed Files YTD	971	106	865	798
Closed CO12s YTD	261	34	227	154
Summary Dismissals YTD	613	87	526	410
Files Opened During August 2025	134	1	133	112
Files Closed During August 2025	106	-31	137	149
Public Matters Pending (excluding Resignations)	32	3	29	27
Panel Matters Pending	13	-1	14	17
DEC Matters Pending	104	-2	106	106
Files on Hold	13	0	13	8
Advisory Opinion Requests YTD	1180	125	1055	1183
CLE Presentations YTD	24	3	21	17
Files Over 1 Year Old	252	19	233	181
Total Number of Lawyers	146	11	135	120
Files Pending Over 1 Year Old w/o Charges	152	16	136	124
Total Number of Lawyers	109	15	94	84

	2025 YTD	2024 YTD
Lawyers Disbarred	5	3
Lawyers Suspended	6	11
Lawyers Reprimand & Probation	1	2
Lawyers Reprimand	2	4
TOTAL PUBLIC	**14**	**20**
Private Probation Files	0	5
Admonition Files	58	67
TOTAL PRIVATE	**58**	**72**

FILES OVER 1 YEAR OLD

Year/Month	OLPR	AD	PAN	HOLD	SUP	S12C	SCUA	REIN	Total
2018-12	1								**1**
2019-04					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**
2021-03	1			1					**2**
2021-05	3								**3**
2021-06	1		1						**2**
2021-07	1								**1**
2021-08					1		1		**2**
2021-09	1						1		**2**
2021-10	1								**1**
2021-11	3		1						**4**
2022-01	1								**1**
2022-03	1						1		**2**
2022-04	3				1				**4**
2022-05	2								**2**
2022-07	1								**1**
2022-08	2				1		1		**4**
2022-09	1		1						**2**
2022-10	1			3		1			**5**
2022-11	2		1				1		**4**
2022-12	1								**1**
2023-01	1				3	1			**5**
2023-02	2			3	2		2		**9**
2023-03	3				2	1			**6**
2023-04	2				1				**3**
2023-05	3			1		1			**5**
2023-06	1		1						**2**
2023-07	6				1		7		**14**
2023-08	8						2		**10**
2023-09	4		1		23		1		**29**
2023-10	4			1	4			1	**10**
2023-11	6		1		1		1		**9**
2023-12	3								**3**
2024-01	2		1						**3**
2024-02	6		1		1		1		**9**
2024-03	6								**6**
2024-04	3		4	1			1		**9**
2024-05	9		1		3				**13**
2024-06	14								**14**
2024-07	13	1			3				**17**
2024-08	24				1				**25**
Total	**152**	**1**	**14**	**10**	**50**	**4**	**20**	**1**	**252**

	Total	**Sup. Ct.**
Sub-total of Cases Over One Year Old	232	55
Total Cases Under Advisement	20	20
Total Cases Over One Year Old	**252**	**75**



All Pending Files as of Month Ending August 2025

Year/Month	SD	DEC	REV	OLPR	AD	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	**Total**
2018-12				1										**1**
2019-04								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**
2021-03				1			1							**2**
2021-05				3										**3**
2021-06				1		1								**2**
2021-07				1										**1**
2021-08								1		1				**2**
2021-09				1						1				**2**
2021-10				1										**1**
2021-11				3		1								**4**
2022-01				1										**1**
2022-03				1						1				**2**
2022-04				3				1						**4**
2022-05				2										**2**
2022-07				1										**1**
2022-08				2				1		1				**4**
2022-09				1		1								**2**
2022-10				1			3		1					**5**
2022-11				2		1				1				**4**
2022-12				1										**1**
2023-01				1				3	1					**5**
2023-02				2			3	2		2				**9**
2023-03				3				2	1					**6**
2023-04				2				1						**3**
2023-05				3			1		1					**5**
2023-06				1		1								**2**
2023-07				6				1		7				**14**
2023-08				8						2				**10**
2023-09				4		1		23		1				**29**
2023-10				4			1	4			1			**10**
2023-11				6		1		1		1				**9**
2023-12				3										**3**
2024-01				2		1								**3**
2024-02				6		1		1		1				**9**
2024-03				6										**6**
2024-04				3		4	1			1				**9**
2024-05				9		1		3						**13**
2024-06				14										**14**
2024-07				13	1			3						**17**
2024-08				24				1						**25**
2024-09				12				1						**13**
2024-10				22	1			1						**24**
2024-11		1		20				3			1			**25**
2024-12			2	26									1	**29**
2025-01		1		30	1		1	1		1				**35**
2025-02		2		24										**26**
2025-03		6	6	24										**36**
2025-04		13	5	19							2			**39**
2025-05		14	3	13			2							**32**
2025-06		20	3	13										**36**
2025-07		23		21								6		**50**
2025-08	27	24		21							2	5		**79**
Total	**27**	**104**	**19**	**397**	**3**	**14**	**13**	**56**	**4**	**21**	**6**	**11**	**1**	**676**

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

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 517 **July 9, 2025**

Discrimination in the Jury Selection Process

A lawyer who knows or reasonably should know that the lawyer's exercise of peremptory challenges constitutes unlawful discrimination in the jury selection process violates Model Rule 8.4(g). It is not "legitimate advocacy" within the meaning of Model Rule 8.4(g) for a lawyer to carry out a trial strategy that would result in unlawful juror discrimination. A lawyer may not follow a client's directive or accept a jury consultant's advice or AI software's guidance to exercise peremptory challenges if the lawyer knows or reasonably should know that the conduct will constitute unlawful juror discrimination. However, a lawyer does not violate Rule 8.4(g) by exercising peremptory challenges on a discriminatory basis where not forbidden by other law.

I. Introduction

In a series of decisions beginning with *Batson v. Kentucky*, 476 US. 79 (1986), the Supreme Court has held that trial lawyers in both criminal and civil cases are forbidden from exercising peremptory challenges based on certain specified criteria such as the prospective juror's race or gender, because doing so violates prospective jurors' equal protection rights under the Fourteenth Amendment.[1] Some state laws or decisions expand on the U.S. constitutional restriction on exercising discriminatory peremptory challenges.[2] At the same time, it is clear that, under state and federal law, not all discrimination is forbidden in this context. For example, courts have permitted lawyers to exercise peremptory challenges based on a prospective juror's age, marital status, or socioeconomic status.[3]

Rule 8.4(g) provides:

> It is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept,

[1] Powers v. Ohio, 499 U.S. 400, 409 (1991); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); Flowers v. Mississippi, 588 U.S. 284 (2019). Although the Supreme Court has not addressed the issues, some lower courts have found that *Batson* also apples to peremptory challenges based on prospective jurors' religion or sexual orientation. *See* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 485 (9th Cir. 2014) (sexual orientation); United States v. Brown, 352 F.3d 654 (2d Cir. 2003) (religion).

[2] *See, e.g.*, CAL. CODE OF CIVIL PROCEDURE § 231.7; *see* note 1, *supra* (citing decisions applying *Batson* to jury challenges based on prospective jurors' religion and sexual orientation).

[3] *See, e.g.*, Sanchez v. Roden, 808 F.3d 85, 90 (1st Cir. 2015) ("Age is not a protected category under Batson"); United States v. McAllister, 693 F.3d 572, 579 (6th Cir. 2012) (unemployment is a permissible ground for striking a juror); United States v. Omoruyi, 7 F.3d 880, 881 (9th Cir. 1993) ("Peremptory challenges based on marital status do not violate Batson").

> decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Comment [5] to Rule 8.4 states, in pertinent part: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g)."[4]

Rule 8.4(g) presents two principal questions regarding discriminatory challenges. First, in light of Comment [5], when does a lawyer's unlawful exercise of peremptory challenges on a discriminatory basis violate Rule 8.4(g)? Second, given the statement that lawyers may engage in legitimate advocacy consistent with the Model Rules, does a lawyer violate Rule 8.4(g) by exercising peremptory challenges on discriminatory bases where not forbidden by other law?

II. Background

The Preamble to the Model Rules provides: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."[5] This captures the concept that, in the context of adjudications, lawyers are expected to serve as advocates within the bounds of the law. The applicable law includes statutes, judicial rules, and judicial opinions, including opinions issued pursuant to courts' supervisory authority, as well as rules of professional conduct.

Rules of professional conduct establishing limits on lawyers' advocacy in the adjudicative context are essentially of two kinds. Some rules simply incorporate other legal standards, thereby subjecting lawyers to professional discipline for violating other law.[6] Many other rules establish different or additional restrictions, whether because additional restrictions are needed to protect the truth-seeking process, to prevent overreaching, or to require lawyers to steer clear of lines drawn by the criminal law, or for other reasons.[7]

When considering whether to impose restrictions on advocacy beyond existing law, rules may reflect a balance between parties' interest in legitimate advocacy and countervailing considerations. In some contexts, constitutional provisions or other laws have been considered.

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[4] The guidance provided by the current Comment [5] predates the adoption of Rule 8.4(g) and initially related to Rule 8.4(d) which proscribes "conduct that is prejudicial to the administration of justice." Comment [3] to the earlier version of Rule 8.4 provided: "A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."

[5] ABA MODEL RULES OF PROF'L CONDUCT, Preamble, para. [2].

[6] For example, Rule 3.4(a) provides that "[a] lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."

[7] *See, e.g.*, Rule 3.4(f) (subject to exception, a lawyer may not request a witness not to voluntarily give relevant information to another party); Rule 3.6 (restricting lawyers' extrajudicial communications about pending litigation); Rule 4.2 (restricting lawyers' communications with represented persons); *see also* ABA Formal Op. 09-454 (explaining that Rule 3.8(d), requiring prosecutors to disclose evidence and information that tends to negate the guilt of the defendant, is more demanding than constitutional case law in some respects, and "thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution").

For example, rules such as Rule 3.6 restricting lawyers' extrajudicial speech reflect consideration of lawyers' First Amendment free speech rights,[8] and rules restricting criminal defense advocacy reflect consideration of criminal defendants' Sixth Amendment right to effective assistance of counsel.[9]

The drafters of Rule 8.4(g) intended that, as a general matter, the rule would not necessarily be coextensive with other law.[10] ABA Formal Opinion 493 (2020) approvingly cites cases where, without relying on other legal restrictions, courts have sanctioned lawyers for harassment. But at the same time, Comment [3] to Rule 8.4 recognizes that "[t]he substantive law of antidiscrimination and antiharassment statutes and case law may guide application of paragraph (g)."

III. Unlawful Discriminatory Peremptory Challenges

A. Use of Unlawful Discriminatory Peremptory Challenges is not Legitimate Advocacy Under Rule 8.4(g).

Rule 8.4(g) prohibits lawyers from engaging in "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." It permits "legitimate advice or advocacy consistent with these Rules." Striking prospective jurors on discriminatory bases in violation of substantive law governing jury selection is not legitimate advocacy. Conduct that has been declared illegal by the courts or a legislature cannot constitute "legitimate advocacy." Put another way, a lawyer who violates *Batson* has engaged in unlawful discrimination in the jury selection process which, by definition, cannot be deemed "legitimate" conduct.

Comment [5] states that a trial judge's finding of unlawful juror discrimination is not, alone, enough to prove a violation in a discipline proceeding. Paragraph [14] of the Scope section to the Rules explains that the Comments are guidance for how the Model Rules should be interpreted. Comment [5] to Rule 8.4 provides guidance on the evidentiary burden in a disciplinary prosecution. A judge's finding of a *Batson* violation, under the procedures set forth in the case

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[8] *See, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030 (1991) (addressing First Amendment limits on state rule of professional conduct corresponding to Model Rule 3.6).

[9] *Cf.* Grievance Comm. v. Simels, 48 F.3d 640 (2d Cir. 1995) (interpreting state counterpart to Model Rule 4.2 in light of the constitutional right to effective assistance of counsel).

[10] In Opinion 493 titled *Model Rule 8.4(g): Purpose, Scope and Application*, this Committee explained:

> Rule 8.4(g) prohibits conduct that is not covered by other law, such as federal proscriptions on discrimination and harassment in the workplace. Although conduct that violates Title VII of the Civil Rights Act of 1964 would necessarily violate paragraph (g), the reverse may not be true. For example, a single instance of a lawyer making a derogatory sexual comment directed towards another individual in connection with the practice of law would likely not be severe or pervasive enough to violate Title VII, but would violate Rule 8.4(g). The isolated nature of the conduct, however, could be a mitigating factor in the disciplinary process.

law,[11] does not automatically equate with a Rule 8.4(g) violation, particularly given the higher burden of proof that may apply in disciplinary proceedings.[12]

A disciplinary hearing may yield more complete information and enable the lawyer to offer a more fulsome explanation for exercising peremptory challenges than may have been available during jury selection in the trial in question.[13] For example, to preserve client confidentiality, the lawyer may have provided limited information about the reasons for peremptory challenges or the judge may have needed to make a quick ruling without a full and fair evidentiary hearing. In addition, the extent and severity of unlawful juror discrimination is relevant to a disciplinary authority's decisions, including whether to investigate the matter at all.

B. Rule 8.4(g) applies only if the lawyer knew or reasonably should have known that the lawyer's peremptory challenges were unlawful.

A lawyer's unlawful exercise of peremptory challenges does not violate Rule 8.4(g) unless the lawyer "knows or reasonably should know" that the exercise of a peremptory challenge is impermissibly discriminatory. Many rules incorporate a knowledge standard, and "knows" is a defined term in the Model Rules.[14] There may be situations where a lawyer violates *Batson* but does not know it, because the lawyer erroneously believes that the lawyer's genuine bases for exercising peremptory challenges do not discriminate based on impermissible attributes. In that event, the question will be whether the lawyer "reasonably should have known" that the lawyer's conduct was impermissible. Rule 1.0(j) defines "reasonably should know" to mean that "a lawyer of reasonable prudence and competence would ascertain the matter in question." Ordinarily, when a lawyer decides whether to exercise peremptory challenges, rather than deferring to or relying on someone else, the lawyer will know the genuine reasons for the challenges. Even so, the lawyer may be mistaken about the legal significance of these reasons. In that event, the question will be

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[11] Under *Batson*, if the objecting party at trial establishes a *prima facie* case that the opposing party purposefully discriminated in exercising peremptory challenges, the party exercising the challenges "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Batson*, 476 U.S. at 94, 98. The neutral explanation must be "based on something other than the race [or gender] of the juror" and must have "facial validity." Hernandez v. New York, 500 U.S. 352, 360 (1991). The trial judge will then decide whether the objecting party has proven "purposeful discrimination." *Batson*, 476 U.S. at 94. This requires the trial judge to determine "whether . . . the proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the striking party instead exercised peremptory strikes on the basis of race." *Flowers*, 588 U.S. at 2244.

[12] *Accord* ODC v. Anonymous, 2025 WL 524221 (Pa. Feb. 12, 2025) (holding that the ODC is required "to establish attorney misconduct with evidence that is sufficient to satisfy a clear and convincing evidence standard of proof"); 22 N.Y.C.R.R. 1240.8(b)(1) (requiring proof by a "fair preponderance of the evidence" to sustain disciplinary charges).

[13] The history of what is now Comment [5] to Model Rule 8.4 (previously Comment [3]) suggests that the "*Batson* exception" to Model Rule 8.4(g) was based on concerns voiced by the ABA Criminal Justice Section that a trial judge's subjective decision in the midst of trial to disbelieve a lawyer's neutral explanation for striking a juror should not become conclusive evidence in a later disciplinary prosecution over discriminatory conduct. *See* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 860 (Art Garwin ed. 2013). In addition, Comment [5] is limited to a "trial judge's" finding of juror discrimination. It says nothing about how a decision by another court (such as an appellate court or a court conducting a habeas review) based on a more fulsome record should be treated if that court finds that a lawyer engaged in unlawful juror discrimination. *See Flowers*, *supra* note 1.

[14] Rule 1.0(f) defines knowing conduct as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

whether "a lawyer of reasonable prudence and competence" would have known that the challenges were impermissible.

Whether the lawyer has the requisite culpability will be a more difficult question when, to promote the attorney-client relationship or for reasons of trial strategy, the lawyer defers to others' judgment. Suppose that a client directs a lawyer to exclude certain prospective jurors, or a lawyer's jury consultant recommends striking certain members of the jury venire, and those prospective jurors are members of a particular race or gender. If the client or jury consultant volunteers or acknowledges that the reason is race- or gender-based, then the lawyer who implements the client's instruction or the consultant's suggestion would be knowingly discriminating. That a lawyer acts at a client's direction does not make otherwise unlawful conduct legitimate. When clients ask lawyers to engage in unlawful conduct, the Model Rules require lawyers to refuse.[15]

A harder question is raised in this scenario when peremptory challenges, on their face, are or are reasonably likely to be discriminatory, but the client or jury consultant offers other, nondiscriminatory reasons for exercising them. Where the lawyer does not personally intend to discriminate on the basis of a protected class but may be advancing someone else's intent to do so, the "reasonably should know" standard imposes a duty of inquiry. If, upon inquiry, the lawyer ascertains that the client or consultant has sincere reasons that are legitimate, not impermissibly discriminatory, then the lawyer may exercise the peremptory challenges; if an objection is made, or the judge questions the lawyer's motivations *sua sponte*, the lawyer may advance those reasons. But if a reasonably competent and prudent lawyer would know that the reasons are pretextual, and that the proposed exercise of peremptory challenges is unlawful, then the lawyer must refrain from relying on the client or consultant. *Cf.* ABA Formal Op. 513 (2024) (discussing lawyers' duty of inquiry under Rule 1.16(a)).

A similar question about the lawyer's culpability may be raised when the lawyer relies on software in making decisions about jury selection. Suppose, for example, that a lawyer uses an artificial intelligence-assisted program to rank prospective jurors and, unbeknownst to the lawyer, the program applies rankings in a manner that would constitute unlawful discrimination (e.g., based on the prospective jurors' race or gender). It is conceivable that the lawyer could strike jurors for unlawfully discriminatory reasons, constituting purposeful discrimination in violation of *Batson*, even if the lawyer had no intention of doing so (for example, if the AI-assisted program

[15] Model Rule 1.2(a) states that "a lawyer shall abide by a client's decisions concerning the *objectives* of representation and, as required by Rule 1.4, shall consult with the client as to the *means* by which they are to be pursued." (emphasis added). Decisions about how and when to exercise peremptory challenges falls squarely within the "means" of carrying out the representation. *See* ABA CRIMINAL JUSTICE STANDARDS, THE DEFENSE FUNCTION, Standard 4-5.2(d) ("Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include . . . what jurors to accept or strike . . . and how evidence should be introduced."); *see also* United States v. Boyd, 86 F.3d 719 (7th Cir. 1996) (exercise of peremptory challenges is decision for lawyer). Therefore, even where unlawful juror discrimination is client-directed, the lawyer has no obligation under the Model Rules to follow that direction. On the contrary, the lawyer would have an obligation to consult with the client about the manner in which the lawyer is legally permitted to conduct jury selection and explain any relevant constraints on the lawyer's ability to carry out the client's desired strategy. *See* Model Rule 1.2(a); 1.4(a)(5) (requiring the lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law").

also provided seemingly neutral reasons for rankings).[16] Whether a lawyer "reasonably should know" that the peremptory challenges were impermissibly discriminatory will depend on the circumstances. In the context of an AI-assisted program, lawyers should conduct sufficient due diligence to acquire a general understanding of the methodology employed by the juror selection program. *See* ABA Formal Op. 512 (2024) ("lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations").

IV. Rule 8.4(g) Does Not Prohibit a Lawyer's Discriminatory, But Lawful, Exercises of Peremptory Challenges

As Opinion 493 recognized, the types of discrimination covered by Model Rule 8.4(g) extend beyond unlawful discrimination. But Model Rule 8.4(g) also permits "legitimate advocacy" provided the advocacy does not violate substantive law or other rules of professional conduct. In the context of jury selection, a trial lawyer whose peremptory challenges are discriminatory but lawful has not violated Model Rule 8.4(g).

This interpretation is consistent with both the history and purpose of Model Rule 8.4(g). As detailed above, Comment [5] to Model Rule 8.4 cautions against a finding of discrimination based solely on a trial court's finding about exclusion of a particular prospective juror. In addition, the drafters specifically considered, and referred to, the application of Rule 8.4(g) to trial lawyers' exercise of peremptory challenges but made no suggestion that the rule was meant to impose restrictions beyond those recognized in the law of peremptory challenges. The rule also specifically exempts legitimate advocacy.

The purpose of the Model Rules is to articulate clear and understandable standards of conduct to which lawyers can adhere. *See* Model Rules, Scope [14]. Applying Model Rule 8.4(g) to conduct that complies with the substantive laws of jury selection but still may constitute "discrimination" under a different definition would create a vague and unworkable standard for the interpretation of Model Rule 8.4(g) and would risk deterring conduct which could arguably be characterized as legitimate advocacy.

Courts recognize that jurors' attributes such as age and marital status that are not forbidden grounds for exercising peremptory challenges are, conversely, permissible, race-neutral bases for such challenges.[17] Although courts are empowered to supervise the conduct of lawyers – which includes amending and adopting rules of professional conduct – there is nothing in the text or

[16] To the extent the lawyer's intent impacts the analysis of whether the juror discrimination was "unlawful" under the applicable laws in the lawyer's jurisdiction, that is a question beyond the scope of this Opinion.

[17] *See supra* note 3. Other guidance encourages lawyers to refrain from striking jurors for reasons that may go beyond unlawful discrimination. *See* ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION AND DEFENSE FUNCTION 3-6.3(b) ("The prosecutor should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, applicable rules of the jurisdiction, or these standards, including race, sex, religion, national origin, disability, sexual orientation or gender identity.") and 4-7.3(b) (encouraging defense lawyers to avoid doing the same). These standards, however, are meant to be aspirational and are not intended to override existing law surrounding juror discrimination.

history of the Model Rules that suggests that Model Rule 8.4(g) was intended to establish further restrictions on the use of peremptory challenges in jury selection.

Conclusion

A lawyer who knows or reasonably should know that the lawyer's exercise of peremptory challenges constitutes unlawful discrimination in the jury selection process violates Model Rule 8.4(g). It is not "legitimate advocacy" within the meaning of Model Rule 8.4(g) for a lawyer to carry out a trial strategy that would result in unlawful juror discrimination. A lawyer may not follow a client's directive or accept a jury consultant's advice or AI software's guidance to exercise peremptory challenges if the lawyer knows or reasonably should know that the conduct will constitute unlawful juror discrimination. However, a lawyer does not violate Rule 8.4(g) by exercising peremptory challenges on a discriminatory basis where not forbidden by other law.

Confidentiality and ineffective assistance of counsel claims

BY SUSAN M. HUMISTON AND BENJAMIN J. BUTLER

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Maintaining client confidences is a core professional responsibility obligation and a pivotal part of gaining and maintaining client trust. The Office of Lawyers Professional Responsibility's ethics hotline fields numerous questions from lawyers navigating their confidentiality obligation, including queries from criminal defense lawyers wondering how to respond to a former client's claim of ineffective assistance of counsel. Those questions prompted this column, in which I am joined by Ben Butler, board chair of the Lawyers Professional Responsibility Board and managing attorney with the Office of the Minnesota Appellate Public Defender, as a contributing author.[1]

The starting point

Lawyers sometimes assume that because a client is complaining about them, the rules on confidentiality are waived. In believing as much, lawyers might be confusing confidentiality with attorney-client privilege and waiver of that privilege. These are two different concepts. Attorney-client privilege is an evidentiary privilege against compelled testimony that can be waived by the client. But such communications are a subset of the broader ethical obligation to keep *everything* related to the representation confidential—whatever its source, and irrespective of whether it is privileged. A client cannot "waive" a lawyer's confidentiality obligation.

Rule 1.6(a), Minnesota Rules of Professional Conduct (MRPC), directs that "a lawyer shall not knowingly reveal information relating to the representation of a client," except "when permitted under subparagraph (b)." Again, the obligation is broad; confidentiality covers everything related to the representation. Importantly, there is no exception for publicly available information. Just because information may be in a court file, for example, does not mean that it isn't subject to the confidentiality rule.[2] While there are several exceptions in Minnesota (even more than in the American Bar Association's model rules) permitting lawyers to disclose information relating to the representation, one cannot disclose information relating to the representation except under a specific exception.

Most permissible disclosures occur under the first three exceptions to Rule 1.6(b). Rule 1.6(b)(1) permits disclosure if "the client gives informed consent;" Rule 1.6(b)(2) permits disclosure when "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)(3) permits disclosure when "the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation." These rules are unlikely to come up much in ineffective-assistance cases unless the lawyer is assisting the client to show the lawyer's performance was deficient.

Ineffective assistance of counsel allegations

Criminal defendants have the constitutional right to the effective assistance of counsel. When a criminal defense lawyer's performance is objectively unreasonable, the client's constitutional rights may have been violated. In Minnesota, most ineffective-assistance claims are brought through a petition for postconviction relief under Minn. Stat. chapter 590. It is at this stage—after the former client has filed a petition—that most lawyers become concerned with their confidentiality obligations.

It is undisputed that the assertion of ineffective assistance of counsel claims waives the attorney-client privilege, meaning a client may not invoke the privilege to prevent a lawyer from testifying about communications relevant to the claim.[3] But this is different from permitting or authorizing a lawyer to voluntarily disclose information outside of that narrow context.

Rule 1.6(b)(8), sometimes referred to as the "self-defense exception," permits disclosure if:

> "the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client."

However, the existence of these seemingly broad exceptions may not allow as much disclosure as you think. ABA Formal Opinion 10-456 cautions that clauses one and two of Minnesota's rule (which is identical to Rule 1.6(b)(5) of the model rules) are not applicable to

ineffective-assistance claims.[4] The first clause is not applicable because the legal controversy is not between the client and the lawyer, although it may feel that way. The second clause is not applicable because postconviction petitions, appellate motions, or *habeas* cases in which the ineffective assistance claim is asserted are not proceedings against the lawyer.

The third clause may be relevant because ineffective-assistance claims concern the lawyer's representation of the client and are usually part of an official proceeding. But caution is still warranted. The exception permits disclosure "only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish" the purpose of the disclosure.[5] Thus, to fit within the exception, your response must be necessary (viewed objectively), narrowly tailored to the issue, and made in the context of a proceeding.

Of note, the ABA takes a very restrictive approach to how a disclosure can fit within the exception, essentially prohibiting non-court-supervised disclosures ("it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.")

Practical considerations

With that background, what a criminal defense lawyer may disclose, as well as when they can do so and under what circumstances, needs to be examined on a case-by-case basis. Here are some tips to help you through the process.

First, is your response *necessary*? For example, responding to a subpoena and testifying is necessary, and allows the judge to determine that the evidentiary privilege has been waived regarding the specific disclosures. But other types of disclosures, such as communicating with the prosecutor opposing the petition, are probably not necessary. You may want to defend yourself, but it is highly likely that such a defense is not necessary, because you are not a party to the proceeding. You are, at most, a potential witness to the former client's claim. And you almost certainly will have the opportunity to disclose what might be needed by testifying at an evidentiary hearing on the petition.[6] At that hearing, the court will learn "all of the facts concerning why defense counsel did or did not do certain things."[7]

Second, is whatever you are proposing to disclose narrowly tailored to respond to the specific alleged deficiency raised by the former client? Will there be a way for the client (or successor counsel) to raise objections to what you disclose before you disclose it? As comment [14] to Rule 1.6 states, "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose" of the exception. Even a necessary disclosure must be narrowly tailored to respond to the specific alleged deficiency at issue.

You will want to defend yourself against client allegations of ineffectiveness. In most cases, that opportunity will come at an evidentiary hearing. Taking care in how you do this is important, because your ability to defend yourself may not be as broad as you would like it to be.

Conclusion

This article is focused on the self-defense exception relevant to ineffective-assistance claims. Other client criticisms or claims of malpractice in different contexts may trigger different confidentiality exceptions. The main thing to remember is that your confidentiality obligation is broad, even when a former client criticizes your work, and defending yourself in a manner that's consistent with your ethical obligations requires analysis. If you need assistance in understanding your ethical obligations, please do not hesitate to call the Office at 651-296-3952. Every day a senior lawyer is available free of charge to answer your ethics questions. ▲

NOTES

[1] Susan Humiston wishes to thank Mr. Butler for his editorial contributions, and notes any opinions expressed are his personal opinions and not necessarily those of the Lawyers Board or Minnesota Board of Public Defense.

[2] American Bar Association Formal Opinion 479, "The 'Generally Known' Excep tion to Former-Client Confidentiality," 12/15/2017 (discussing when information is "generally known" under Rule 1.9(c), relating to a former client and may be permissively used, including that information is not generally known "simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.").

[3] *State v. Walen*, 563 N.W.2d 742, 753 (Minn. 1997) (holding that "a defendant who claims ineffective assistance of counsel necessarily waives the attorney-client privilege as to all communications relevant to that issue.")

[4] ABA Formal Opinion 10-456, "Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim (7/14/2010) ("When a former client calls the lawyer's representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b)(5) do not apply."

[5] Rule 1.6(b), MRPC, comment [14].

[6] *See* Minn. Stat. §590.04, subd. 1 (2024).

[7] *State v. Roby, 531 N.W.2d 482, 484 n.1 (Minn. 1985).*

ATTORNEY COMPLAINTS
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Complaint investigation and prosecution

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Individuals who file ethics complaints and lawyers who receive them often have questions about complaint investigation and prosecution of misconduct. Maybe you're curious, too. The Minnesota Supreme Court has adopted a set of procedural rules called the Rules on Lawyers Professional Responsibility (RLPR) that address how complaints are investigated and discipline proceedings are conducted. This article is not about these rules (although they govern what is covered) but rather is aimed at explaining generally how attorney ethics complaints are handled, and the various options available when rule violations are discovered.

The starting point

Before I jump into the process, a bit about the players involved. One of the confusing aspects of our discipline system is the role of various entities in the process. Many states have a mandatory bar association, to which all licensed lawyers must belong, that is both a trade association and a regulatory entity. In fact, most state bars function this way. Thus, individuals with complaints against lawyers are encouraged to file complaints with the "bar association." That is not the case in Minnesota. The MSBA serves many roles, but it does not have a regulatory role, with one exception that I'll discuss. Rather, attorney regulation is handled by several boards and offices created by the Minnesota Supreme Court.

For purposes of attorney discipline, there are two relevant entities—the Lawyers Professional Responsibility Board (LPRB) and the Office of Lawyers Professional Responsibility (OLPR). These entities are often collectively referred to as the "Lawyers Board," but the two have distinct roles in the discipline system. The LPRB is a volunteer body of lawyers and public members that assists the Court in rule- and policy-making in attorney ethics and discipline and performs other important decision-making roles within the process. The LPRB does not investigate complaints.

The OLPR, also sometimes referred to as the Director's Office—led by me—is the professionally staffed office created by the Court to investigate complaints and prosecute ethics violations. The OLPR is assisted in its investigation work by several district ethics committees (DECs) throughout the state that consist of volunteers—again, both lawyers and nonlawyers—established by the MSBA for this purpose. Consequently, although Minnesota is not a mandatory bar state, the bar association and its members play an important role in attorney discipline.

Another important fact is that no public moneys are spent to fund the Minnesota discipline system. The Minnesota Supreme Court assesses licensed Minnesota lawyers an annual fee that is used to cover the costs of attorney regulation, including but not limited to attorney discipline. The legal profession is often referred to as a self-regulated profession, and part of that process is that attorneys fund the regulatory function. If you are a member of the MSBA, similarly, no part of your annual membership fee goes to the attorney discipline system, except as necessary to support the district ethics committees within the MSBA.

Complaints

Anyone can file a complaint, and complaints can be filed by mail to the OLPR or online through our website (*lprb.mncourts.gov*). We usually receive 1100-1200 complaints each year (although we are on track to exceed those numbers this year). We do not investigate every complaint we receive. But every complaint is carefully reviewed by an attorney in the OLPR to determine whether its allegations provide a basis to investigate.

If we decide not to investigate, a determination is drafted that explains the decision. And there is a process for complainants to appeal the decision not to investigate. These appeals go to a reviewing LPRB member, who can direct the Office to investigate or affirm the decision not to investigate; this determination is final.

If we decide to investigate, or are directed to investigate by an LPRB member, the next question is, to whom the matter should be assigned? In many cases, a DEC will initially investigate the complaint allegations. However, some cases are investigated in-house by OLPR personnel. And there are several circumstances in which the Director's Office can investigate without the filing of a complaint, although most of our matters are initiated by a complaint. The Notice of Investigation will tell both the complainant and respondent attorney the individual or committee who has been assigned to investigate the matter (committees then make further investigator assignments), and sometimes the notice will narrow the investigation to particular rules or issues.

If a matter is investigated by a DEC investigator, that investigator will report the results to a committee, and the committee will vote on its recommendation. But it's important to note that the resulting recommendation of the committee is only a recommendation and is not binding on the OLPR. This is commonly misunderstood by both complainants and

respondent attorneys. All DEC investigation recommendations are reviewed by senior attorneys in the OLPR for thoroughness and consistency, and our DECs do excellent work. While we follow the recommendations of the DECs approximately 80 percent of the time, there are occasions where we depart, often after further investigation. And, as noted, some cases are not investigated by DECs at all.

Investigation timelines vary depending on several factors, such as the nature of the allegations, how cooperative witnesses may be, how promptly individuals respond to requests for information, and whether additional issues are discovered during the investigation that require additional followup, to name a few factors. Most DEC investigations take four to seven months, and in-house investigations can take longer. We aim to address dismissals or private discipline, whether DEC investigations or in-house, within one year. And many cases are dismissed sooner than that, with an average of seven months from complaint filing to dismissal for many of the cases we handle.

Determinations

At the conclusion of an investigation, there are several options. Dismissal is warranted if the investigation does not show facts demonstrating a rule violation that can be proven by clear and convincing evidence (the applicable standard of proof). Both the complainant and respondent attorney will receive a copy of the written dismissal, which can be appealed by the complainant to a reviewing LPRB member. Dismissal decisions are expunged from an attorney's record after three years.

If there is evidence of a rule violation that can be proven by clear and convincing evidence, the next issue is whether public or private discipline is warranted. The Director may issue a private admonition, which is a form of private discipline reserved for rule violations that are both isolated and non-serious. Or the Director may agree with a respondent attorney to place that attorney on private probation, if the respondent attorney has more than one matter with non-serious misconduct where probation might be appropriate. Private probation decisions must be approved by the chair of the LPRB. Complainants receive copies of admonitions and private probation decisions and may appeal the Director's decisions in those matters to a reviewing LPRB member. Thus, while private discipline is private in Minnesota, it is not secret; the complainant will receive a copy of the decision. Private discipline is not disclosed by the Director, except under certain circumstances, and is never expunged.

Respondent attorneys may appeal admonitions issued by the Director to the LPRB, and those appeals are heard by three-member panels (typically two lawyers and a public member) of the LPRB. There is currently a rule change pending before the Court to adopt a diversion program, which would create an option to enter into diversion agreements in lieu of discipline in some instances. This change, if adopted, may have a material impact on private discipline. Currently between 80-120 private discipline decisions are issued each year.

Public discipline

If an investigation discloses rule violations that are serious (as compared to isolated and non-serious), then the Director will pursue public discipline. The Director cannot just file a petition for public discipline, however. With limited exceptions, before filing a petition for public discipline, the Director presents charges to a panel of the LPRB for a probable cause determination. A panel of the LPRB (again, two lawyers and a public member) may dismiss the charges, determine there has been a rule violation but that an admonition is more appropriate, or approve the filing of the charges in whole or in part. This decision is generally based upon written filings with the panel.

If the panel finds probable cause, a petition is filed with the Minnesota Supreme Court. After probable cause is found, discipline proceedings are public. The case is assigned to a referee appointed by the Minnesota Supreme Court (usually a senior district court judge) to hold an evidentiary hearing and to make findings of fact, conclusions of law, and a recommendation for discipline. The Minnesota Supreme Court makes all final public discipline decisions, and may accept, modify, or reject the referee's recommendations after further briefing and oral argument. Similarly, the Director and respondent attorney may stipulate to a discipline recommendation, before or after an evidentiary hearing, which recommendation the Court may approve, disapprove, or modify as they see fit.

Public discipline options include dismissal, a public reprimand, public probation, suspension for a period from 30 days to five years, or disbarment, as well as other conditions the Court considers warranted by the facts. Public discipline remains public and is also not expunged. Approximately 30-40 attorneys are publicly disciplined by the Court each year.

Conclusion

The RLPR provide more details, but this is the general process. Minnesota has a robust attorney discipline system with lots of checks and balances and due process for both complainants and respondent attorneys. It can be confusing, and it is often slower than most would prefer, but for more than 50 years, the OLPR (along with the LPRB and the DECs) have carefully considered thousands of complaints, with discipline pursued where warranted, with the goal to protect the public, protect the legal profession, and deter misconduct. ▲

The no-contact rule and the *pro se* lawyer

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Rule 4.2, Minnesota Rules of Professional Conduct (MRPC), restricts a lawyer representing a client from communicating with a represented party about the subject of that representation. But how does this rule work if a lawyer is representing themselves, not another, in a matter? A Lawyers Professional Responsibility Board (LPRB) opinion, Opinion No. 25, and the text of the rule provide guidance.

The rule

Rule 4.2, MRPC, states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The purpose of the rule, as stated in the comments, is three-fold: to protect "a person who has chosen to be represented by a lawyer in a matter against [1] possible overreaching by other lawyers who are participating in the matter, [2] interference by those lawyers with the client-lawyer relationship and [3] the uncounselled disclosure of information relating to the representation." Comment [1] to Rule 4.2, MRPC.

The purposes of the rule remain present when a lawyer is representing themselves in a matter. However, the text of the rule clearly references an antecedent client/lawyer relationship that is not present when lawyers are representing themselves.

Conflicting opinions

This tension was on full display in American Bar Association Formal Opinion 502, entitled "Communications with a Represented Person by a *Pro Se* Lawyer," issued on September 28, 2022, which included, unusually, a majority opinion and a dissenting opinion. The majority opinion concluded that a *pro se* lawyer was representing a client—themselves—and as such was limited by the rule from contacting a represented person. Several states have ethics opinions and case law that are in accord. Because of the overriding purpose of the rule, the majority concluded that the general principle, also articulated in the comments, that "[p]arties to a matter may communicate directly with each other" was inapplicable to *pro se* lawyers. Comment [4].

The dissent was not swayed by the majority opinion due to the plain text of "In representing a client" found at the start of the rule. The dissent's takeaway was essentially, "does it mean what we wish it said," or does it mean what it says?

The Lawyers Professional Responsibility Board took up this debate in 2023. One of the authorized roles of the LPRB is to "issue opinions on questions of professional conduct." Rule 4(c), Rules on Lawyers Professional Responsibility. LPRB Opinion 25, issued on July 28, 2023, concurred with the dissent in ABA Opinion 502, opining that a *pro se* lawyer is not representing a client as the term is understood.

The Director's Office concurs with LPRB Opinion 25. Lawyers should be able to review the rule and understand from the text of the rule how to comply. As noted in the dissent to ABA Opinion 502, any differing interpretation is a trap for a lawyer. But it is also likely true, judging from the number of calls we receive on our ethics hotline, that most lawyers assume they cannot contact a represented party when they are representing themselves because the no-contact aspect of the rule is ingrained in them without regard for the text of the rule itself.

Thus, in Minnesota, a lawyer representing themselves in a matter *pro se* may contact the opposing party who is represented by counsel without running afoul of Rule 4.2, MRPC. But beware! If you are representing yourself in a matter in some other jurisdiction, make sure you understand how that jurisdiction approaches Rule 4.2 and the *pro se* lawyer. Under the ethics rules choice of law provision, Rule 8.5(b), MRPC, the ethics rules of the jurisdiction where a tribunal sits applies if the matter is before a tribunal, or where the conduct or its prominent effects occur. Many jurisdictions follow the ABA majority opinion.

Rule change?

While I concur with the text-based rationale for the position taken by the LPRB in Opinion 25, I'm not sure this is the optimal result. The purposes of the no-contact rule remain present when a lawyer represents themselves. A *pro se* lawyer contacting an opposing person represented by counsel presents the same opportunity for overreach, can interfere with the lawyer/client relationship on the opposing side, and presents a risk of disclosure of confidential information by the opposing, represented party. And those represented individuals likely have retained counsel because they are aware of the imbalance between the parties.

Oregon addressed this issue by amending the language of its rule—"In representing a client *or the lawyer's own interests*, a lawyer shall not communicate..." Oregon Rules of Prof'l Conduct 4.2 (emphasis supplied).

What do you think? Should Minnesota adopt a rule change to address this situation?

Practical advice

Just because you can contact a represented party when you are representing yourself, ask yourself if that is a good idea. If the represented party has indicated they want communications to occur through their counsel, what are you accomplishing by ignoring that request? Antagonizing the represented party? Delaying matters because the represented party will inevitably forward your communication to their lawyer for response? Just because the rule does not make such contact unethical, that does not mean it is a good idea. At the same time, there may be good reasons for principals to a matter to communicate directly even if one happens to be a lawyer. Professionalism while representing oneself is as important as when acting on behalf of a client, whether communicating with a represented person or their counsel.

Most of the time lawyers are not representing themselves, so the plain text of the rule governs their conduct. And unfortunately, every year several lawyers violate this rule, usually resulting in private discipline.

ABA Formal Opinion 503, issued in November 2022, opined on the "reply all" debate, providing that if you copy your client on an electronic communication sent to counsel representing others, you are implicitly consenting to "reply all" communications. Best practice is to blind copy or separately forward such communications to your client, unless you are okay with a "reply all" by the opposing attorney or are okay with your client weighing in on the email chain.

And remember, actual knowledge of the fact of representation may be inferred from the circumstances. Comment [8], Rule 4.2, MRPC. Thus, do not close your eyes to the obvious. At the same time, if a lawyer contacts you asking if you represent someone, have the courtesy to reply. So many times, we hear from lawyers on the ethics hotline who are struggling to advance a matter because they are unclear whether a representation is ongoing, do not get clarity from the lawyer involved when they reach out, and are (correctly) hesitant to ask the person because of Rule 4.2, MRPC. Please have the courtesy to reply.

Conclusion

The no-contact rule protects represented parties from contact by a lawyer representing a client. In Minnesota, according to LPRB Opinion 25, and the plain text of the rule, the no-contact rule does not prohibit *pro se* lawyers from communicating with a represented party. Would you support a rule change that would prohibit such communications by *pro se* lawyers, or do you concur that a self-represented lawyer should be able to do what any principal to a matter can do—that is, communicate directly with other persons in the matter, irrespective of whether they are represented? I can be reached at *susan.humiston@courts.state.mn.us.* ▲

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8002

ORDER ESTABLISHING INTERIM RULE CHANGE AND EXPANDING PUBLIC COMMENT PERIOD ON PETITION FOR PROPOSED AMENDMENTS TO THE RULES OF THE SUPREME COURT ON LAWYER REGISTRATION

On March 24, 2025, the Minnesota State Board of Continuing Legal Education filed a petition recommending amendments to the Rules of the Supreme Court on Lawyer Registration. The proposed amendments would (1) allow inactive status lawyers and judges to request that their home address not be displayed in the Minnesota Attorney Registration System (MARS), and (2) detail practices prohibited while on inactive status. The petition and proposed amendments are available on the public-access site for the Minnesota Appellate Courts, under case number ADM10-8002 – Petition of the Minnesota State Board of Continuing Legal Education for Amendment of the Rules of the Supreme Court on Lawyer Registration (filed Mar. 24, 2025).

On May 20, 2025, we filed an order amending the Rules of the Supreme Court on Lawyer Registration based on the newly created State Board of Civil Legal Aid. Following that order, on June 2, 2025, the Minnesota State Board of Continuing Legal Education filed a supplement to their March 24 petition that incorporated our court's May 20, 2025, amendments and added an additional proposed amendment to the March 24 petition. *See* Letter Re. Lawyer Registration Rules Petition, filed March 24, 2025 (Court File ADM10-8002) (filed June 2, 2025).

Accordingly, on June 27, 2025, we issued an order explaining that the court will consider the March 24 petition and proposed amendments to the Rules of the Supreme Court on Lawyer Registration, as supplemented by the June 2 correspondence and attachments, after providing a 60-day period for public comment and reviewing any comments on the proposed amendments.

Since that order was issued, in July 2025, safety and security concerns were raised related to the availability of some home addresses on the MARS website for both active status and inactive status lawyers. In light of these concerns, the court will also consider whether the proposed amendments to the Rules of the Supreme Court on Lawyer Registration should include a provision for active status lawyers who certify that the only address at which they currently receive mail is their home address, to request, based on safety concerns, that their home address not be displayed in MARS. This proposed amendment applies only to the posting and dissemination of this information online; it does not impact the public's ability to submit a written request for public information to the Lawyer Registration Office. Newly proposed Rule 23(I) of the Supreme Court on Lawyer Registration would provide as follows:

> **I. Display of Home Address in MARS.** If a lawyer or judge certifies that the only address at which they currently receive mail is their home address, and makes a written request to the Lawyer Registration Office based on safety concerns, then their postal address will not be displayed in the MARS online system. Addresses will still be provided as otherwise described above.

While the court considers these proposed amendments, the court also authorizes the Lawyer Registration Office to temporarily suppress the home address of any lawyer who submits a written request advising that the only address at which the lawyer currently

receives mail is their home address and who, based on safety concerns, requests suppression of that address. This applies only to the posting and dissemination of this information online; it does not impact the public's ability to submit a written request for public information to the Lawyer Registration Office. Addresses suppressed under this order will be suppressed until the lawyer changes the address to a distinct business or other address, requests to remove the suppression, or until the court issues an order promulgating rules related to the proposed petition, whichever occurs first.

IT IS HEREBY ORDERED that the Lawyer Registration Office may temporarily suppress the home address from the public MARS website of any lawyer who submits a written request advising that the only address at which the lawyer currently receives mail is their home address and who, based on safety concerns, requests suppression of that address. This applies only to the posting and dissemination of this information online; it does not impact the public's ability to submit a written request for public information to the Lawyer Registration Office. Addresses suppressed under this order will be suppressed until the lawyer changes the address to a distinct business or other address, requests to remove the suppression, or until the court issues an order promulgating rules related to the proposed petition, whichever occurs first.

IT IS FURTHER ORDERED that any person or organization that wants to provide comments in support of or in opposition to the proposed amendments to the Rules of the Supreme Court on Lawyer Registration may file those comments with the Clerk of Appellate Courts, consistent with the requirements of Minn. R. Civ. App. 125.01(a). The public

comment period is also extended by an additional 30 days. All comments, including comments related to expanding the proposed language to allow suppression of home addresses for active status lawyers, shall be received by the Clerk's Office no later than September 25, 2025.

Dated: August 15, 2025

BY THE COURT:

Natalie E. Hudson
Chief Justice

State of Minnesota
County of Ramsey

District Court
Second Judicial District
Court File Number: _____
Case Type: Discrimination

Stephen Michael Michuda,
Plaintiff,

vs.

Summons

Tim Walz, Governor; Peggy Flanagan, Lieutenant Governor; Keith Ellison, Attorney General; Minnesota House of Representatives Members and Minnesota Senate Members [as individual members and as a legislative body]; Minnesota Board of Public Defense; Kevin Kajer, Chief Administrator; William Ward, State Public Defender; Cathryn Middlebrook, Chief Appellate Public Defender; the Chief Public Defender of each Judicial District; the County Attorney of each Minnesota County; Lawyers Professional Responsibility Board; and Director of the Office of Lawyers Professional Responsibility, each/all sued in their individual and official capacities,
Defendants.

THIS SUMMONS IS DIRECTED TO Keith Ellison, Attorney General, at 445 Minnesota Street, Suite 1400, St. Paul, MN 55101-2131, as a Defendant and Counsel for all of the Defendants.

1. **YOU ARE BEING SUED.** The Plaintiff has started a [class action] lawsuit against you. The Plaintiff's Complaint against you is attached to this summons. Do not throw these papers away. They are official papers that affect your rights. You must respond to this lawsuit even though it may not yet be filed with the Court and there may be no court file number on this summons.

2. **YOU MUST REPLY WITHIN 60 DAYS TO PROTECT YOUR RIGHTS.** You must give or mail to the person who signed this summons **a written response** called an Answer within 60 days after June 24TH, 2025 [date request for waiver of service was sent]. You must send a copy of your Answer to the person who signed this summons located at:

Stephen Michuda
OID #182739
MCF-Rush City
7600 525th Street
Rush City, Minnesota 55069

3. **YOU MUST RESPOND TO EACH CLAIM.** The Answer is your written response to the Plaintiff's Complaint. In your Answer you must state whether you agree or disagree with each paragraph of the Complaint. If you believe the Plaintiff

should not be given everything asked for in the Complaint, you must say so in your Answer.

4. **YOU WILL LOSE YOUR CASE IF YOU DO NOT SEND A WRITTEN RESPONSE TO THE COMPLAINT TO THE PERSON WHO SIGNED THIS SUMMONS.** If you do not Answer within 60 days, you will lose this case. You will not get to tell your side of the story, and the Court may decide against you and award the Plaintiff everything asked for in the complaint. If you do not want to contest the claims stated in the complaint, you do not need to respond. A default judgment can then be entered against you for the relief requested in the complaint.

5. **LEGAL ASSISTANCE.** You may wish to get legal help from a lawyer. If you do not have a lawyer, the Court Administrator may have information about places where you can get legal assistance. **Even if you cannot get legal help, you must still provide a written Answer to protect your rights or you may lose the case.**

6. **ALTERNATIVE DISPUTE RESOLUTION.** The parties may agree to or be ordered to participate in an alternative dispute resolution process under Rule 114 of the Minnesota General Rules of Practice. You must still send your written response to the Complaint even if you expect to use alternative means of resolving this dispute.

Signed: Stephen Michuda

Dated: June 24, 2025

Stephen Michuda
OID 182739
MCF-Rush City
7600 525th Street
Rush City, MN 55069

State of Minnesota
County of Ramsey

District Court
Second Judicial District
Court File Number: _____
Case Type: Discrimination

Stephen Michael Michuda,
Plaintiff,

vs.

Tim Walz, Governor; Peggy Flanagan, Lieutenant Governor; Keith Ellison, Attorney General; Minnesota House of Representatives Members and Minnesota Senate Members [as individual members and as a legislative body]; Minnesota Board of Public Defense; Kevin Kajer, Chief Administrator; William Ward, State Public Defender; Cathryn Middlebrook, Chief Appellate Public Defender; the Chief Public Defender of each Judicial District; the County Attorney of each Minnesota County; Lawyers Professional Responsibility Board; and Director of the Office of Lawyers Professional Responsibility, each/all sued in their individual and official capacities,
Defendants.

Complaint

Jury Trial Demanded

This is a civil action filed by Stephen Michael Michuda seeking redress for unfair discriminatory practices, torts, and violations of constitutional, civil, and human rights; seeking redress for systemic problems that has persisted for decades; and demands judgment against the defendants for the sum of one billion, eight-hundred million dollars ($1.8 billion), interest, costs, and disbursements.

Michuda files this action on behalf of himself and other "Indigent Persons appointed a public defender while the Public Defender System was underfunded" (hereinafter "the indigent"). Most persons charged with a crime are poor and are legally entitled to a public defender.[1] Judges determine which persons are indigent.[2]

[1] Office of Legislative Auditor, *Evaluation of the Public Defender System* (1992) at page 4.
[2] *Id.*; also Minn. Stat. §611.17.

"The State", "State Officials", "Minnesota", or "Minnesota Officials" is used on occasion to refer to one or more of the defendants listed in this case.

"Public defender" is used throughout in place of "assistant public defender"; "counsel" and "attorney" is used occasionally as an alternate to "public defender". Likewise, "prosecutor" is used in place of "assistant county attorney".

The State (via State Officials)

1. The defendants have a long-standing practice of differential treatment by discriminating against the indigent.
   a. The defendants are part of an ingrained culture that have perpetuated discriminatory policies and attitudes toward the indigent.
   b. The defendants have practiced systemic, systematic or institutionalized discrimination for decades.
   c. The defendants are deliberately indifferent, consciously disregarding the harm their actions have done to the interests or rights of the indigent.
   d. The defendants are well aware that:
      i. The indigent are generally less able to effectively use the political process to ensure that indigent interests and rights are protected.[3]
      ii. Legislators rarely give high priority to the rights of [the indigent].[4]

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[3] Rutherford, Jeffrey H., *Dziubak v. Mott and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders* (1994), Minnesota Law Review, 1600, Vol. 78:977, at 987, suggesting reader to *see* Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. Miami L. Rev. 107 (1990).
[4] *Id.*, Rutherford, at 987.

iii. Court processes (such as postconviction relief) precludes the indigent from raising structural challenges to improve indigent defense systems.[5]

e. The State (via the defendants' actions, policies, rules, laws, etc.):

i. underfunds the Public Defender System;

ii. denies the indigent the right to reasonably effective-assistance-of-counsel;

iii. denies the indigent the right to challenge their conviction on grounds of incompetent legal assistance;

iv. time-bars the indigent that have been denied effective assistance-of-counsel;

v. procedurally-bars the indigent that have been denied the effective assistance-of-counsel.

2. The right to the [effective] assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights.[6]

3. [Former] Minnesota Attorney General, Walter F. Mondale, is generally credited with leading and organizing a carefully orchestrated and doggedly persistent campaign to urge fellow attorney generals to sign on in support of *Gideon*.[7] Since then, Minnesota Officials have long underfunded and repeatedly cut the budget of the Public Defender System.

4. Nationally, and in Minnesota, the move toward establishing public defender services did not solve the problem of ensuring fair and adequate legal

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[5] *Id.*, at 989, FN.69, citing Rodger Citron, Note, *(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 Yale L.J. 481, 486 (1991).

[6] *Gideon v. Wainwright*, 372 U.S. 335, 343 9 L. Ed.2d 799, 83 S. Ct. 792 (1963).

[7] *Gideon v. Wainwright and the Right to Counsel*, by Paul B. Wice, p.54.

representation for the indigent.[8]

5. Twenty-five years after *Gideon*, adequate legal representation for [the indigent] had not been obtained...For many of the nation's poor, therefore, the stark reality is that the legal system functions "as if *Gideon* had never been decided."[9]
6. The Minnesota Public Defender System is fast approaching a crisis, and that immediate relief is necessary in each district of the state.[10]
   a. The defendants consciously disregarded the "approaching crisis" in the 1990's.
   b. The judicial system reluctantly made a temporary fee increase to address the crisis in 2009,[11] and again in 2011.[12]
   c. The crisis continues well into the 2020's.
7. Multiple Legislative audits indicate the Public Defender System has long been underfunded, offices understaffed, and staff overburdened with high caseloads.[13]

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[8] Rutherford, at 984, citing Norman Lefstein, *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing* (1982), at ii; and citing The Spangenberg Group, *Weighted Caseload Study for the State of Minnesota Board of Public Defense—Draft Report 37* (1991) [hereinafter "Spangenberg Report"], at 6, As a result of changes in the criminal law landscape over the last three decades, "public defender caseloads have grown to be overwhelming in many jurisdictions, and the ability to provide 'effective representation' has bee stretched to the limit." *Id.*

[9] *Id.*, Rutherford, at 977, citing Michael B. Mushlin, *Forward, Gideon v. Wainwright Revisited: What does the Right to Counsel Guarantee Today?*, 10 Pace L. Rev. 327, 331 (1990).

[10] *Id.*, Rutherford, citing Spangenberg Report.

[11] *Order Temporarily Increasing Lawyer Registration Fees*, Minn.Lexis 975 (Minn.2009).

[12] *Order Extending Increase in Lawyer's Registration Fees*, 68-APR Bench & B. (Minn.4/30/11).

[13] Office of Legislative Auditor, *Evaluation of the Public Defender System* (1992); *Update* (1993); and *Evaluation Report* (2010) [hereinafter "Legislative Audit (*year*)"].

8. High caseloads are the direct result of underfunding.[14]
    a. Because of its legal mandate, the Public Defender System has no control over the volume of cases it must handle.[15]
    b. The level of crime, State sentencing policies, and the practices of judges, prosecutors, and police determines the workload for public defenders.[16]
    c. One judge commented about public defenders that were so overburdened, and were routinely scheduling up to five trials in a day, that such over-booking is extremely stressful and that he could not imagine having to prepare for several trials at once.[17]
    d. Judges, prosecutors, police, etc. are funded enough to handle the number of cases they are expected to handle; the Public Defender System is funded to handle a large fraction of the same cases, but are expected to handle it with far less resources.
    e. Public defenders, in an overburdened public defender office, are strongly presumed to be ineffective.
9. Even on the 60th anniversary of *Gideon*, the Public Defender System is still not adequately funded in Minnesota,[18] the State that led the charge to get other states to support the constitutional right to the [effective] assistance of counsel.

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[14] *Order Temporarily Increasing Lawyer Registration Fees*, Minn.Lexis 975 (2009), at concur by Justice Anderson.
[15] Legislative Audit (2010), at p.35.
[16] *Id.*
[17] *Id.*, at p.37.
[18] Session Daily, Minnesota House of Representatives *House Passes $96 Million Boost to Funding for MN Public Defenders*, by Tim Walker (2/6/23); and Star

10. The Minnesota Public Defender System, as a whole, is overworked.

a. The Public Defender System is underfunded, understaffed, and carry unreasonably high caseloads.[19]

b. Public defender offices are both "grossly underfunded" and understaffed; Increased claims of indigency and reduced state budgets limit the ability of public defenders to represent the indigent.[20]

c. Minnesota does not have an adversarial system of criminal justice.

d. The constitutional rights of the indigent have been sacrificed.

e. The status quo has continued for decades.

f. Ineffective representation has become the norm.

g. Ineffective representation has become expected.

h. Ineffective representation has become tolerated.

i. Because of excessive caseloads, public defenders cannot provide competent assistance to the indigent.

j. Excessive caseloads has been used to justify and perpetuate the inadequacy of the Public Defender System.

k. An underfunded Public Defender System is structural error.

l. Ineffective-assistance-of-counsel is structural error.

Tribune, Opinion Exchange *More Work to be Done on Behalf of Public Defenders*, by Brian Aldes and Chelsea Reinartz (2/19/23).

[19] Rutherford, at 985, FN.41 to FN.43; the 1990's statement still holds true today.

[20] *Id.*, at 997, citing *Dziubak v. Mott*, 503 NW2d 771 (Minn.1993), at 775-76.

m. The State created structural error in Minnesota courts by underfunding the Public Defender System.

11. The State of Minnesota is constitutionally required to adequately fund the Public Defender System.

a. The State is mandated to provide effective assistance-of-counsel to the indigent.

b. The defendants have failed to comply with the constitutional mandate of *Gideon* for decades.

c. The Governor's Office and the Legislature have failed to adequately fund the Public Defender System for decades; yet regularly fund, more adequately, the State's prosecutors.

d. All of the defendants have acquiesced in the underfunding of the Public Defender System, for decades.

e. There are many law reviews and articles concerning the deficiencies of the Minnesota Public Defender System; in one article and survey, Legislators, Senators, State Representatives, the Board of Public Defense, the State Public Defender and surveyed public defenders, all acknowledge the deficiencies of the Public Defender System;[21]

12. The State, via State Officials, does not protect the rights of the indigent.

a. The Public Defender System does not protect the rights of the indigent.

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[21] MinnPost, *Minnesota's Public Defenders Paint Bleak Picture of Justice for the Poor*, by Jeff Severns Guntzel, Tara Bannow, Kristin Lueck, Casey Peterson, and Marisa Washington (12/13/10) [hereinafter "Guntzel Article"]; and MinnPost *Minnesota Public Defenders Speak: Results of The Minnpost Survey*, by Jeff Severns Guntzel (12/13/10) [hereinafter "Guntzel Survey"].

b. The indigent are not capable of arguing effectively on their own behalf.[22]

c. Prosecutors, on behalf of the State, relies on the non-adversarial process to obtain a high rate of convictions.

d. Once the indigent are convicted, claims that their rights were violated usually fail, especially when public defenders refuse and/or fail to assist.

13. Statutes that underfund the Public Defender System is a violation of the Equal Protection, Due Process, and Effective Assistance of Counsel Clauses.

14. State funding for the Board of Public Defense has not kept pace with the increased workloads and responsibilities of the Public Defender System.

a. The budgets for indigent criminal defense did not grow commensurate with the rising caseloads in the public defender offices.[23]

b. Increases in the public defender budget over the last twenty years did not correspond to the increase in arrests and prosecutions or compare with the increase in the growth of law enforcement and prosecution agencies.[24]

15. The Public Defender System has no protection from repeated budget cuts that are not equally applied to prosecutor offices; the playing field is uneven.

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[22] Rutherford, at 981, citing *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938), The obvious truth that the average [indigent] does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious. *Id.* at 462-63.

[23] Rutherford, at 985; still holds true, in Minnesota, today.

[24] *Id.*, at 985-86; still holds true today.

16. Due to lack of funding, the State has control over how public defenders carry out their indigent clients' defense.

    a. The State controls the outcome in cases against the indigent by underfunding the public defender system while more adequately funding prosecutors.

    b. The Public Defender System is dominated by government underfunding.

    c. Minnesota spends a far greater amount of money on prosecution services than on public defense.[25]

    d. In early 1990's Minnesota spent $77,941,000 on prosecution, while spending only $17,941,000 on public defense.[26] The vast difference in funding has continued for decades.[27]

    e. Underfunding has compromised the independence of the Public Defender System and the interest of the indigent which it serves.

    f. An "uneven playing field" interferes with public defenders' independence of professional judgment and/or with the client-lawyer relationship.

17. The defendants have neglected to perform, or performs negligently, a ministerial duty imposed on them by federal mandate and/or State laws.

18. The defendants' failure to adequately fund the Public Defender System for decades is intentional, willful, malicious and constitutes intentional infliction of

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[25] *Id.*, at 986; still holds true today.

[26] *Id.*, citing *Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 1992* (1993), at 3.

[27] Session Daily, Minnesota House of Representatives *House Passes $96 Million Boost to Funding for MN Public Defenders*, by Tim Walker (2/6/23); and Star Tribune, Opinion Exchange *More Work to be Done on Behalf of Public Defenders*, by Brian Aldes and Chelsea Reinartz (2/19/23).

emotional distress.

19. By underfunding the Public Defender System, the defendants failed to ensure that the rights of the indigent are appropriately protected.

20. Adequately funding the Public Defender System is a ministerial act, mandated by law; is absolute, certain, and imperative involving merely the execution of a specific duty arising from fixed and designated facts.

21. Underfunding public defenders for decades while more adequately funding prosecutors, and limiting the indigents' ability to challenge convictions and ineffective-assistance-of-counsel claims:

    a. is systemic discrimination.

    b. discriminates against the indigent.

    c. violates the rights of the indigent.

    d. violates Minnesota Human Rights Act.

    e. is prejudicial to a personal right.

    f. violates clearly established statutory and/or constitutional rights of which a reasonable person would have known.

22. Minnesota Officials are reckless and negligent for failure to ensure that the Public Defender System has enough resources to provide a true adequate defense; for failure to comply with the constitutional mandate of *Gideon*.

23. The failure of Minnesota's public officials to adequately fund the Public Defender System is a wrongful, unlawful, or dishonest act.

24. The failure of Minnesota's public officials to adequately fund the Public Defender System is a lawful act performed in a wrongful manner.

25. The failure of Minnesota's public officials to adequately fund the Public Defender System is a tort of excessive, malicious, or negligent exercise of statutory powers by public officials.

26. The failure of Minnesota's public officials to adequately fund the Public Defender System is the failure to act when the duty to act exists.

27. State Officials have accepted and allow ineffective representation of the indigent as the norm.

28. State Officials expect and tolerate ineffective representation by public defenders.

29. State Officials (via actions, policies, rules, laws, etc.) protects public defenders against ineffective-assistance-of-counsel-claims.

30. The defendants have policies, rules, laws, etc. that unconstitutionally blocks all avenues for indigent ineffective-assistance-of-counsel-claims against public defenders; all avenues for indigent complaints against public defenders are effectively blocked.

31. The defendants have policies, rules, laws, etc. that unconstitutionally time-bars and/or procedurally-bars indigent parties that were denied the effective assistance-of-counsel at trial and/or review stages.

32. The defendants' decades of policies, rules, laws, etc. notably limits convicted persons' ability to challenge the State's convictions; without the effective

assistance-of-counsel, the indigent are more severely limited to challenge the State's convictions.

a. There has been a recent push by the Attorney General's Office and multiple County Attorney Offices to review cases.[28]

b. Most cases being reviewed are for convictions that were previously reviewed and affirmed on appeal and/or postconviction;

c. Some cases have been overturned;[29]

d. More cases are being reviewed.[30]

33. The defendants do not have a plan or process for ensuring the indigent have competent, effective-assistance-of-counsel.

a. The defendants do have a highly effective plan and process to prosecute and convict persons charged with a crime.

b. The playing field is not level.

c. The defendants' failure to adequately fund the Public Defender System, for decades, hinders the adversarial system of criminal justice.

d. The indigent cannot be assured a fair trial because the indigent are not always provided with effective counsel.

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[28] Attorney General and Hennepin County Attorney's Office has conviction review units; Ramsey County Attorney's Office is reviewing cases that may have been prejudiced by a medical examiner, Dr. McGee.

[29] i.e., *State v. Haynes*, 725 NW2d 524 (Minn.2007), *exonerated* (2024); also, *State v. Edgar Barrientos-Quintana*, 787 NW2d 603 (Minn.2010), *exonerated* (2024).

[30] i.e., *State v. Pippitt*, 645 NW2d 87 (Minn.2002) and *Pippitt v. State*, 737 NW2d 221 (Minn.2007), *Atty. Gen. recommends exoneration* (2024).

e. The indigent cannot be assured they will be provided with effective counsel because the defendants have underfunded the Public Defender System for decades, which is likewise a denial of due process within the meaning of the Fourteenth Amendment.

f. When trial or appellate public defenders are ineffective the indigent are effectively denied adequate, effective, and meaningful access to the courts.

34. The defendants rely on the indigent to be incapable of filing adequate, effective, or meaningful complaints against public defenders in order to uphold the status quo and continue underfunding the Public Defender System.

35. The State stands in the way of indigent's ability to get adequate legal assistance.

a. The State has underfunded the Public Defender System for decades.

b. The State regularly appoints public defenders with excessive caseloads to represent the indigent accused of a crime.

c. Trial public defenders are often ineffective.

d. The State blocks all avenues for indigent-ineffective-assistance-of-counsel-claims against public defenders.

e. Appellate public defenders typically refuse to assist on indigent-ineffective-assistance-of-counsel-claims on appeal and/or postconviction.

f. *Pro se* indigent-ineffective-assistance-of-counsel-claims against public defenders are usually dismissed for some defect or error.

g. Indigent-ineffective-assistance-of-counsel-claims against public defenders raised in federal habeas corpus petitions are usually dismissed for the same

defects or errors in State courts.

h. Without effective-assistance-of-counsel the indigent have very little chance of success to prove ineffective-assistance-of-counsel-claims against public defenders on appeal, postconviction, or habeas corpus.

36. The State stands in the way of the indigent's ability to do legal research.

a. Once the Public Defender System fails or refuses to assist the incarcerated indigent on any appellate or postconviction claim, the State provides no other legal assistance.

b. The State provides the incarcerated indigent with law libraries.

c. The indigent are untrained in legal research.

d. Most incarcerated indigent do not have college education or a degree.

e. Many incarcerated indigent do not have a high school diploma or GED.

f. Even Michuda, with a diploma and some college experience, has difficulties in comprehending caselaw, rules, statutes, etc.; every action he has prepared was dismissed for failure to meet a technical requirement.

g. The indigent are required to learn to do research on their own.

h. It would take the indigent longer than any statute of limitation allows to learn to do legal research adequately.

i. Time limits are usually 30 to 90 days for most motions, appeals, petitions, responses or other action.

ii. Time limits are only 1 to 2 years for postconviction, habeas corpus or other similar actions.

iii. The indigent cannot adequately learn to do legal research in 90 days.

iv. Most indigent cannot adequately learn to do legal research and file a meaningful motion, appeal or petition in two years.

v. Public defenders go to college 4 to 8 years to adequately learn law and be trained in legal research.

vi. Public defenders also are required to continue their legal education throughout their active practice of law.

i. The indigent usually file appeals or other actions that get dismissed because of a defect or error, or is otherwise time-barred and/or procedurally-barred; and the indigent are so unskilled and untrained in legal research they either give up, or continuously keep trying to be heard, unsuccessfully.

The Judicial System

37. The Minnesota Judicial System has expressed concern over the inadequate budget for the Public Defender System:

a. that some problems with providing adequate representation undoubtedly occurs.[31]

b. that high caseloads were harming the quality of representation.[32]

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[31] *State v. Machacek*, Minn.Unpub.Lexis 666 (Minn.App.2015), at Concur by Judge Minge—Machacek had been appointed four different attorneys, after public defender's office sought to withdraw due to insufficient resources to provide defense services; the fourth trial attorney volunteered that he had provided ineffective representation and identified serious reasons why his representation was deficient.
[32] Legislative Audit (2010), at p.42.

c. that the court system as a whole is suffering because the Public Defender System is dramatically underfunded.[33]

d. that the Governor and the Legislature have failed to adequately fund a constitutional mandate, the Public Defender System, by appropriate means.[34]

e. that extraordinary circumstances have led to an under-resourced Public Defender System that hinders the administration of justice.[35]

f. that the Governor and Legislature have failed to meet one of their fundamental responsibilities.[36]

38. One judge stated that the quality of representation by public defenders generally looked adequate, but also said it was impossible for him to tell what a case might be missing or if the public defender had done an appropriate investigation.[37]

a. Of 191 district judges interviewed and surveyed, 60% felt that public defenders they interacted with did not spend enough time with indigent clients.[38]

b. 25% of the district judges were concerned that public defenders did not have sufficient knowledge of their cases.[39]

c. 23% of the district judges felt that public defenders appearing before them were not thoroughly prepared for court.[40]

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[33] *Order Temporarily Increasing Lawyer Registration Fees*, Minn.Lexis 975 (2009).
[34] *Id.*, at concur by Justice Anderson.
[35] *Id.*
[36] *Id.*
[37] Legislative Audit (2010), at p.46.
[38] *Id.*, at p.43.
[39] *Id.*
[40] *Id.*

d. Despite 90% of the district judges' belief that public defenders were providing constitutionally adequate representation, 37% also said that public defenders appearing in their courtrooms had run into potential ethical issues with regard to competent and diligent representation.[41]

e. One judge commented "while [public defenders] have met constitutional and ethical standards, the increasing caseload, complexity of cases, and the difficulty of scheduling has resulted in lower quality of service. It is at a point where it will soon be that the services of the public defender will not meet these requirements."[42]

39. The judicial system is broken.

a. The judicial system as a whole is overworked.

b. The judicial system is not an adversarial system.

c. Judges and court staff reported that strain on the Public Defender System has had a detrimental effect on the efficient administration of criminal courts.[43]

d. Prosecutors' priority is to obtain convictions, and to defend those convictions.

e. Public defenders' priority is to be there, to close as many cases they can, and move on to the next case(s).

f. Public defenders' objective is to get through their caseload, and convince their indigent clients to take a plea bargain.

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[41] *Id.*
[42] *Id.*
[43] *Id.*, at p.47

g. The indigent have no voice in the courts; without the effective assistance-of-counsel most indigents' attempts to be heard are blocked and/or dismissed.

40. Though the Judicial System has expressed concern over inadequate funding, decisions like *Dziubak*[44] and *Kennedy*[45] allows the State to underfund the Public Defender System, allows public defenders to be less effective, or ineffective, and then protects public defenders from malpractice claims when they are ineffective.

a. Per *Dziubak*, public defenders are immune for acts of misconduct and/or malpractice.

b. The *Dziubak* decision asserted that public defender absolute immunity will improve representation, promote professionalism, and ease the burden on overworked public defenders.[46]

c. *Dziubak* also thought it unlikely that officials would commit abuses since the appellate review process is likely to prevent serious torts.[47]

d. The appellate review process does not prevent serious torts.

e. State Officials, including officials in the Public Defender System, at all levels, do commit abuses, taking advantage of the indigent.

i. Officials know the indigent are not likely to succeed on appellate review, especially without the assistance of counsel.

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[44] *Dziubak v. Mott*, 503 NW2d 771 (Minn.1993).
[45] *Kennedy v. Carlson*, 544 NW2d 1 (Minn.1996).
[46] Rutherford, at 980.
[47] *Dziubak*, at 774.

ii. Appellate public defenders usually refuse to assist on indigent-ineffective-assistance-of-trial-counsel-claims on appeal and/or postconviction.

iii. After appellate counsel refuses to assist, the indigent are then required to prove ineffective-trial-counsel, without the assistance of counsel, in order to then also prove ineffective-appellate-counsel.

iv. *Pro se* claims are usually dismissed for some flaw or another.

f. Almost immediately after *Dziubak* was finally decided, the number of complaints against public defenders started to rise.

g. Public defender absolute immunity did not improve representation.

h. Public defender absolute immunity did not promote professionalism.

i. Public defender absolute immunity has not eased the burden on overworked public defenders.

j. Public defender skill, competence, proficiency, efficiency, effectiveness, etc., has only further degraded since *Dziubak*.

k. The unconstitutional blocking of complaints against public defenders is the cause for the overturning of Hennepin County District Court's original ruling in *Kennedy*,[48] that the Public Defender System was unconstitutionally underfunded; because there were apparently no complaints or malpractice suits, Kennedy's claims failed.

[48] *Kennedy v. Carlson*, No.92-6860 (D. Minn. filed 4/2/92).

41. Everyone that has been convicted of a crime in Minnesota has a right to at least one review on appeal or postconviction,[49] except the indigent when public defenders are underfunded, overworked, and regularly refuse to assist on appeal and/or postconviction, especially on ineffective-assistance-of-counsel-claims against public defenders.

The Governor's Office

42. The Governor's Office has failed to ensure that the Public Defender System has enough resources to provide a true adequate defense.

43. The Governor's Office has failed to adequately fund the Public Defender System for decades; yet regularly funds, more adequately, the State's prosecutors.

44. The Governor's Office is aware of the deficiencies of the Public Defender System.

45. The Governor's Office has been aware of the deficiencies of the Public Defender System for decades.[50]

46. The Governor's Office has publicly acknowledged the deficiencies of the Public Defender System.[51]

47. Tim Walz, [current] Governor of the State of Minnesota, is aware of the deficiencies of the Public Defender System.

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[49] Art. I, §6 of MN Constitution; see *Deegan v. State*, 711 NW2d 89, 98 (Minn.2006), and *Spann v. State*, 704 NW2d 486, 491 (Minn.2005), quoting *State v. Knaffla*, 243 NW2d 737, 741 (1976), citing *Minn.Stat.§244.11*, subd.1 (2004); *Minn.R.Crim.P.*, Rule 28.02

[50] Legislative Audits (1992-93 and 2010), in addition to multitudes of law reviews, articles, etc.; and the deficiencies are so blatantly obvious of which reasonable State Officials would have known.

[51] Guntzel Article.

48. Peggy Flanagan, [current] Lieutenant Governor of the State of Minnesota, is aware of the deficiencies of the Public Defender System.

49. The Governor's Office has failed to address the Judicial System's concerns over the inadequate budget for the Public Defender System.

50. The Governor's Office has acquiesced in the underfunding of the Public Defender System, for decades.

The Attorney General's Office

51. The Attorney General's Office, acting in a *parens patriae* capacity on behalf of the people of Minnesota, has failed to ensure that the Public Defender System has enough resources to provide a true adequate defense.

52. The Attorney General's Office has failed to initiate legal actions to enforce civil laws of the State, preserve and enhance public safety, and protect civil and human rights.

53. The Attorney General's Office has failed to initiate legal actions to enforce State Officials to comply with the constitutional mandate of *Gideon*.

54. The Attorney General's Office has failed to protect the indigent which have been unable to act on their own behalf to correct the deficiencies of the Public Defender System.

55. The Attorney General's Office has failed to ensure that the rights of the indigent are appropriately protected.

56. The Attorney General's Office is aware of the deficiencies of the Public Defender System.

57. The Attorney General's Office has been aware of the deficiencies of the Public Defender System for decades.[52]

58. Keith Ellison, [current] Attorney General of the State of Minnesota, is aware of the deficiencies of the Public Defender System.

59. The Attorney General's Office has failed to address the Judicial System's concerns over the inadequate budget for the Public Defender System.

60. The Attorney General's Office has acquiesced in the underfunding of the Public Defender System, for decades.

The Legislature

61. Minnesota Senate Members, as individual members and as a legislative body, have failed to ensure that the Public Defender System has enough resources to provide a true adequate defense.

62. Minnesota House of Representatives Members, as individual members and as a legislative body, have failed to ensure that the Public Defender System has enough resources to provide a true adequate defense.

63. The Minnesota Senate and House of Representatives, as individual members and as a legislative body [hereinafter "the Legislature"] has failed to adequately fund the Public Defender System for decades; yet regularly funds, more adequately, the State's prosecutors.

64. The Legislature is aware of the deficiencies of the Public Defender System.

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[52] Legislative Audits (1992-93 and 2010), in addition to multitudes of law reviews, articles, etc.; and the deficiencies are so blatantly obvious of which reasonable State Officials would have known.

65. The Legislature has been aware of the deficiencies of the Public Defender System for decades.[53]

66. The Legislature has publicly acknowledged the deficiencies of the Public Defender System.[54]

67. The Legislature has publicly admitted the Public Defender System is broken.[55]

68. The Legislature has long been, and continues to be, resistant and indifferent to fulfilling the constitutional mandate of *Gideon*.

69. The Legislature does not adequately fund the Public Defender System.

70. The Legislature has underfunded the Public Defender System for decades.

71. The Legislature has been more concerned with keeping costs low than with providing quality defense services.

72. The Legislature has been more concerned with keeping costs low than with ensuring fair trials.

73. The Legislature has failed to address the Judicial System's concerns over the inadequate budget for the Public Defender System.

74. The Legislature undermines the integrity of the Judicial System by providing a greater amount of funding for prosecution than for public defense.

75. The Legislature provides expenditures to prosecution services that greatly exceeds the funds allocated to public defense.

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[53] *Id.*
[54] Guntzel Article.
[55] *Id.*

76. The Legislature will cut the Public Defender System budget long before considering cutting any prosecutors' budget.

77. The Legislature will take larger budget cuts from the Public Defender System, more often, than from prosecutor offices.

78. The Legislature will increase the budget for prosecutors, more often, with far less scrutiny, than the Public Defender System.

79. The Legislature has failed to remedy the denial of *equal* justice, to level the playing field.

80. The Legislature does perpetuate discriminatory policies and attitudes toward the indigent:

    a. that hinders the adversarial system of criminal justice.

    b. that assumes the indigent accused of criminal conduct is guilty, placing more value on efficient and cost-effective disposition of cases.

    c. that violates the fundamental principles of fairness in the courts.

    d. that deprives the indigent of a decent opportunity to defend themselves.

    e. that interferes with individual rights of the indigent.

    f. that interferes with fundamental principles of liberty and justice.

    g. that deprives the indigent of many rights guaranteed in the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, which are also guaranteed in the Minnesota Constitution.

81. The Legislature has acquiesced in the underfunding of the Public Defender System, for decades.

The Board of Public Defense

82. The Board of Public Defense [hereinafter "the Board"] has failed to ensure that the Public Defender System has enough resources to provide a true adequate defense.

83. The Board is aware of the deficiencies of the Public Defender System.

84. The Board has publicly acknowledged the deficiencies of the Public Defender System.[56]

85. The Board has publicly admitted the Public Defender System is broken.[57]

86. The Board has been aware of the deficiencies of the Public Defender System for decades.[58]

87. The Board has failed to address the Judicial System's concerns over the inadequate budget for the Public Defender System.

88. The Board has acquiesced in the underfunding of the Public Defender System, for decades.

89. The Board has created an atmosphere of mistrust between public defenders and many of the indigent.

90. The Board does interfere with the discretion, judgment or zealous advocacy of counsel in their handling of individual cases.[59]

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[56] *Order Temporarily Increasing Lawyer Registration Fees*, Minn.Lexis 975 (2009), citing the Minnesota Board of Public Defense petition; and Guntzel Article.
[57] *Id.*, Guntzel Article.
[58] Legislative Audits (1992-93 and 2010), in addition to multitudes of law reviews, articles, etc.; and the deficiencies are so blatantly obvious of which reasonable State Officials would have known.
[59] In violation of Minn. Stat. §611.215, Subd. 3, Limitation.

91. The Board has made it standard practice that public defenders do not assist on indigent-ineffective-assistance-of-counsel-claims against public defenders.

92. The Board allows ineffective representation of the indigent as the norm.

93. The Board expects and tolerates ineffective representation by public defenders.

94. The Board prohibits public defenders from challenging the deficiencies of the Board, the Public Defender System, or any public defender office.

    a. During Kennedy's suit against Governor Carlson and the Board, the Board tried to enforce a 1/13/94 resolution prohibiting all district public defenders from using resources, "including funds, staff time, office space, supplies, or equipment" in connection with "civil suits against the Board."[60]

    b. After *Kennedy*, the Board likely redrafted and/or reinforced a similar policy or resolution that prohibits public defenders from challenging or questioning any deficiencies, decisions or actions of the Board, the Public Defender System or any public defender office.

    c. Kennedy was likely forced out of office, as retribution, about a year after the lawsuit concluded;[61] it appears Kennedy went into private practice thereafter.

95. The Board prohibits public defenders from publicly challenging prosecutors.

    a. i.e., On about 7/10/20 [then] Hennepin County Chief Public Defender, Mary Moriarty, publicly stated she is considering a lawsuit against [then]

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[60] *Kennedy v. Carlson*, Lexis 913 (Minn.App.1994).

[61] Kennedy started part-time as the sole Hennepin County public defender in 1972, and served until allegations surfaced in 1997 that he used his office to dig up dirt about a political challenger, MPR Archive, *Former Hennepin County Public Defender Bill Kennedy Dies*, by Jayne Solinger (8/26/03).

Hennepin County Attorney, Mike Freeman and his office.[62] Moriarty wanted to know how long Freeman's Office had been withholding evidence favorable to [the indigent].

b. Moriarty accused Freeman's Office of violating the Constitution and Supreme Court rulings that require prosecutors to share information that could be helpful to the defense.[63]

c. [A] public defender said prosecutors withheld critical information and still pressed for a guilty plea from one [indigent] just days before the arresting State Trooper was formally charged with felony stalking.[64]

d. Moriarty and public defender Greg Renden insisted the lack of disclosure from Freeman's Office is not an isolated incident; "We continue to see this pattern of not disclosing what the law says they need to disclose to us."[65]

e. Chief Deputy County Attorney Andy LeFevour seemed to expect that public defenders know how prosecutors regularly conduct business, that public defenders are just suppose to cooperate, which raises questions about the integrity of the Judicial System and the adversarial process.[66]

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[62] KSTP 5 Eyewitness News, news broadcast *Public Defender Accuses prosecutors of withholding information in State Trooper investigation*, by Eric Rasmussen (7/11/20).
[63] KSTP.com *Public Defender Accuses prosecutors of withholding information in State Trooper investigation*, by Eric Rasmussen (7/10/20).
[64] *Id.*
[65] *Id.*, quoted statement from Moriarty.
[66] *Id.*, summation of article and statements made by LeFevour and former federal prosecutor and University of St. Thomas professor Rachel Paulose.

f. It seems Moriarty was shunned into silence and demoted; the Board eventually forced Moriarty out of office;[67] the lawsuit against Freeman's Office was never mentioned again.

g. It also raises questions about the integrity of the Judicial System and the adversarial process when the Board expected Moriarty to not question Freeman's Office or prosecutor tactics, "alleging Moriarty had fractured the relationship with prosecutors, and made systemic problems public."[68]

h. Moriarty is now the Hennepin County Attorney.

96. The Board is aware that public defenders are not always adversarial when "defending" the indigent.

97. The Board pays remuneration to public defenders for closing cases.

98. The Board does not pay remuneration to public defenders for "winning" cases.

99. The Board prefers public defenders to close cases rather than try to win cases.

100. The Board prefers that public defenders aid or assist prosecutors in closing cases.

101. The Board prefers that public defenders aid or assist prosecutors rather than be adversarial.

102. The Board protects public defenders against indigent-ineffective-assistance-of-counsel-claims.

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[67] MPR News *Hennepin County Public Defender Mary Moriarty Ousted*, by Matt Sepic (10/1/20).

[68] *Id.*, summation of article and the Board's actions and allegations.

103. The Board interferes with cases when it instructs public defenders to refuse to assist on indigent-ineffective-assistance-of-counsel-claims against public defenders.

104. The Board is aware the indigent regularly complain about ineffective-assistance-of-counsel.

105. The Board is aware that public defenders typically do not resolve attorney/client issues raised by the indigent, including those raised:

a. directly to the public defender.

b. in the district courts.

c. in district public defender offices.

d. in the Appellate Public Defender's Office.

e. in the State Public Defender's Office.

f. to the Board of Public Defense.

g. to the Office of Lawyers Professional Responsibility.

h. in appeal briefs.

i. in postconviction petitions.

j. in habeas corpus petitions.

k. in civil rights complaints.

l. in malpractice suits.

106. The Board is aware that once public defenders refuse to assist on indigent-ineffective-assistance-of-counsel-claims, the burden shifts entirely onto the indigents' shoulders to prove the claims, without the assistance of counsel.

107. The Board is aware the indigent are incapable of filing adequate, effective, or meaningful *pro se* ineffective-assistance-of-counsel-claims.

108. The Board is aware that *pro se* indigent-ineffective-assistance-of-counsel-claims are usually dismissed.

109. The Board is aware that all avenues for indigent complaints against public defenders are blocked, including and/or especially:

a. when/after public defenders refuse to assist on ineffective-assistance-of-counsel-claims raised in an appeal or postconviction petition, and

b. the indigent will likely also fail on habeas corpus because the indigent are not capable of raising meaningful grounds without the assistance of counsel.

110. With the lack of public defenders being disciplined in the State, only two assumptions can be made: either public defenders are without flaw or they are protected from their flaws. e.g., LexisNexis research shows:

a. one full-time public defender disciplined for misconduct as a public defender, *In Re Aitkin*, 787 NW2d 152 (Minn.2010) (public defender forged client's signature on a plea deal);

b. one part-time public defender disciplined for misconduct in personal life, *In Re Strunk*, 945 NW2d 379 (Minn.2020) (indefinitely suspended for criminal acts that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer);

c. one public defender was fired in 1991 for multiple infractions, but no disciplinary action found, *LeBaron v. MN Bd. Pub. Defense*, 499 NW2d 39 (Minn.App.1993);

d. other part-time public defenders were disciplined for actions in private practice, but not as public defenders, *In Re Klotz*, 909 NW2d 327 (Minn.2018); *In Re Fru*, 829 NW2d 379 (Minn.2013); *In Re DeSmidt*, 782 NW2d 252 (Minn.2010); *In Re Varrianno*, 654 NW2d 353 (Minn.2002); *In Re Varrianno*, 755 NW2d 282 (Minn.2008); *In Re Ostroot*, 551 NW2d 231 (Minn.1996); *In Re Onorato*, 794 NW2d 371 (Minn.2011) (private practice acts followed into new job as a public defender);

e. some attorneys appear to be discipline-free, without flaw, while working for city/county/state, then are disciplined regularly after enter into private practice, *In Re Coleman*, 679 NW2d 330 (Minn.2004) *and*, *In Re Coleman*, 793 NW2d 296 (Minn.2011) (was a city attorney in St. Paul in the 1980's, then was a public defender in Ramsey County in the 1990's, before becoming an attorney in private practice, where he received seven private and public reprimands).

f. Public defenders have more protections from complaints than judges and prosecutors;[69]

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[69] Compare to at least 15 judges disciplined 1978-2015; research shows prosecutors face constant barrage of claims of prosecutorial misconduct; at least 6 prosecutors disciplined 1988-2009, but there may be more because *In Re Graham*, 744 NW2d 19 (Minn.2008) and *In Re Backstrom*, 767 NW2d 453 (Minn.2009) did not pop up in initial research because they were not referred to as "prosecutor" or "county attorney" when disciplined.

111. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.[70]

112. The "pattern of misconduct" of public defenders remain unknown or hidden when complaints are blocked;

a. Nearly all complaints against public defenders are summarily dismissed without much of an investigation.

b. "Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct...Reporting a violation is especially important where the victim is unlikely to discover the offense", such as the indigent.[71]

c. Public defenders likely face repercussions from the Board if they initiate a disciplinary investigation against a prosecutor or another public defender.

113. District chief public defenders and managing attorneys rely on complaints from the indigent and others to determine whether public defenders are doing an adequate job, but this system may fail to catch problems having a negative impact on case outcomes.[72]

a. One district chief public defender reported that only after a public defender voluntarily terminated his employment did the chief begin to hear complaints from justice partners about the public defender's performance.[73]

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[70] Minnesota Rules of Professional Conduct, Rule 8.3, Comment—2005 [1].
[71] *Id.*
[72] Legislative Audit (2010), at p.46
[73] *Id.*

b. Another chief pointed out that some indigent do not complain, even when there are problems.[74]

c. Public defenders that are good with people may receive few indigent complaints, even if they are poor advocates.[75]

d. Conversely, very good public defenders with poor people skills may receive many indigent complaints.[76]

e. Based on the lack of disciplinary actions against public defenders, these incidents, just described, likely were not followed up by review of the cases affected.

114. More than half of all public defenders, current and former, have 2 or more complaints in their files.

a. Michuda estimates there were 40-70 complaints filed each year against public defenders (2000-2023), about an average of 47 claims per year, or a total of 1,100+ claims in 24 years.

b. There were 200+ claims in the 16 years prior (1984-1999), with about 145 claims spanning just 6 years (1994-1999).

c. Estimates are based on the number of *pro se* ineffective-assistance-claims in the court of appeals, and the number of claims summarily dismissed by the Office of Lawyers Professional Responsibility.

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[74] *Id.*
[75] *Id.*
[76] *Id.*

d. There are likely more complaints raised elsewhere, and many that were never raised at all because many indigent are not fully aware of if/when/how to raise an issue.

115. Many public defenders, current and former, have 8 or more complaints in their files.

a. i.e., Per the Board, as of 4/28/11 Kevin Shea of the Dakota County Public Defender's Office (Michuda's 2007-08 trial public defender) has had 8 complaints filed against him, none resulting in discipline.

b. The Board has been less forthcoming with information concerning Shea or any other public defender associated with Michuda's cases, perhaps because the information is very damning.

116. There is a conflict of interest for any public defender to investigate ineffective-assistance-of-counsel-claims against another public defender.

a. All levels of public defenders in Minnesota are overseen and controlled by the Board of Public Defense.

b. In general, lawyers do not like to sue other lawyers.

c. Public defenders do not like to investigate other public defenders.

d. Public defenders protect other public defenders from complaints.

e. Public defenders usually do not assist on indigent-ineffective-assistance-claims against public defenders.

f. Public defenders are not allowed to challenge the deficiencies of the Public Defender System.

The Administrative Services Office

117. The Administrative Services Office has failed to ensure that the Public Defender System has enough resources to provide a true adequate defense for the indigent.

118. The Administrative Services Office is aware of the deficiencies of the Public Defender System; and has been aware of the deficiencies for decades.

119. Kevin Kajer, the [current] Chief Administrator, has failed to keep the Board fully advised as to its financial condition.

120. Kevin Kajer has failed to present to the Board and the State Public Defender plans, studies, and reports, with recommendations for adoption measures necessary to enforce or carry out the powers and duties of the Board and the State Public Defender, i.e., comply with the constitutional mandate of *Gideon*.

121. Kevin Kajer has failed to recommend to the Board the adoption of rules and regulations necessary for the efficient operation of the Board and its functions that would be beneficial to the indigent; or has otherwise made recommendations for the adoption of rules and regulations that are directly adverse to the indigent.

122. The Chief Administrator (as a person appointed by the Board, with the advice of the State Public Defender) does interfere with the discretion, judgment or zealous advocacy of counsel in their handling of individual cases.[77]

[77] In violation of Minn. Stat. §611.215, Subd. 3, Limitation.

123. The Administrative Services Office has acquiesced in the underfunding of the Public Defender System, for decades.

124. The Administrative Services Office has helped create an atmosphere of mistrust between public defenders and many of the indigent.

125. The Administrative Services Office has failed to address the Judicial System's concerns over the inadequate budget for the Public Defender System.

The State Public Defender's Office

126. The State Public Defender's Office has failed to ensure that the Public Defender System has enough resources to provide a true adequate defense.

127. The State Public Defender's Office is aware of the deficiencies of the Public Defender System.

128. The State Public Defender's Office has publicly acknowledged the deficiencies of the public defender system.[78]

129. The State Public Defender has publicly admitted that the Public Defender System is broken.[79]

130. The State Public Defender's Office has been aware of the deficiencies of the Public Defender System for decades.[80]

131. John Stuart, [former] State Public Defender, was aware of the deficiencies of the Public Defender System.

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[78] Guntzel Article.
[79] *Id.*
[80] Legislative Audits (1992-93 and 2010), in addition to multitudes of law reviews, articles, etc.; and the deficiencies are so blatantly obvious of which reasonable State Officials would have known.

132. William Ward, [current] State Public Defender, is aware of the deficiencies of the Public Defender System.

a. William Ward demanded his offices be fully funded, then settled for a 6-year plan to increase funding up to 75% of the national standard.[81]

b. The "6-year plan" was a plan to continue being under-funded.

c. The "6-year plan" did not protect the Public Defender System from future budget cuts.

d. The "6-year plan" did not *level the playing field.*

e. Since the "6-year plan" expired, William Ward has not achieved any other plan to increase funding closer to the national standard.

133. The State Public Defender's Office has failed to address the Judicial System's concerns over the inadequate budget for the Public Defender System.

134. The State Public Defender's Office has acquiesced in the underfunding of the Public Defender System, for decades.

135. The State Public Defender's Office has created an atmosphere of mistrust between public defenders and many of the indigent.

136. The State Public Defender (as a person appointed by the Board) does interfere with the discretion, judgment or zealous advocacy of counsel in their handling of individual cases.[82]

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[81] Bench & Bar, *In Defense of Public Defenders*, by Jennifer Vogel (4/13/15).
[82] In violation of Minn. Stat. §611.215, Subd. 3, Limitation.

137. The State Public Defender has made it standard practice that public defenders do not assist on indigent-ineffective-assistance-of-counsel-claims against public defenders.

138. The State Public Defender allows ineffective representation of the indigent as the norm.

139. The State Public Defender expects and tolerates ineffective representation by public defenders.

140. State Public Defender prohibits public defenders from challenging deficiencies of the Board, the Public Defender System, or any public defender office.

141. The State Public Defender prohibits public defenders from publicly challenging prosecutors.

142. The State Public Defender is aware that public defenders are not always adversarial when "defending" the indigent.

143. The State Public Defender prefers public defenders to close cases rather than try to win cases.

144. The State Public Defender prefers that public defenders aid or assist prosecutors in closing cases.

145. The State Public Defender prefers that public defenders aid or assist prosecutors rather than be adversarial.

146. The State Public Defender protects public defenders against indigent-ineffective-assistance-of-counsel-claims.

147. The State Public Defender instructs public defenders to refuse to assist on indigent-ineffective-assistance-of-counsel-claims against public defenders.

148. The State Public Defender is aware the indigent regularly complain about ineffective-assistance-of-counsel.

149. The State Public Defender is aware that public defenders typically do not resolve attorney/client issues raised by the indigent.

150. The State Public Defender is aware that once public defenders refuse to assist on indigent-ineffective-assistance-of-counsel-claims, the burden shifts entirely onto the indigents' shoulders to prove the claims, without the assistance of counsel.

151. The State Public Defender is aware the indigent are incapable of filing adequate, effective, or meaningful *pro se* ineffective-assistance-of-counsel-claims.

152. The State Public Defender is aware that *pro se* indigent-ineffective-assistance-of-counsel-claims are usually dismissed.

153. The State Public Defender is aware that all avenues for indigent complaints against public defenders are blocked, including and/or especially when/after public defenders refuse to assist on ineffective-assistance-of-counsel-claims raised in an appeal or postconviction petition.

The Appellate Public Defender's Office

154. The Appellate Public Defender's Office has failed to ensure that their office has enough resources to provide a true adequate defense.

155. The Appellate Public Defender's Office is aware of the deficiencies of the Public Defender System.

156. The Appellate Public Defender's Office has been aware of the deficiencies of the Public Defender System for decades.[83]

157. Lawrence J. Hammerling, [former] Deputy State Public Defender/Chief Appellate Public Defender, was aware of the deficiencies of the Public Defender System.

158. Each [former] Interim/Acting Chief Appellate Public Defender, was aware of the deficiencies of the Public Defender System.[84]

159. Cathryn Young Middlebrook, [current] Chief Appellate Public Defender, is aware of the deficiencies of the Public Defender System.

160. The Appellate Public Defender's Office has failed to address the Judicial System's concerns over the inadequate budget for the Public Defender System.

161. The Appellate Public Defender's Office has acquiesced in the underfunding of the Public Defender System, for decades.

162. The Appellate Public Defender's Office has created an atmosphere of mistrust between public defenders and many of the indigent.

163. At times, on appeal or postconviction, when there is an attorney/client conflict, appellate public defenders tend to push their indigent clients to waive their right to counsel.[85]

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[83] Legislative Audits (1992-93 and 2010), in addition to multitudes of law reviews, articles, etc.; and the deficiencies are so blatantly obvious of which reasonable State Officials would have known.

[84] i.e., James R. Peterson, Marie L. Wolf, and David W. Merchant.

[85] The Appellate Public Defender's Office repeatedly tried to push Michuda to waive his right to counsel in 1995-96 and 2008-09, even sending him forms to sign; in each instance, the public defender refused to assist and Michuda refused to waive his right; Michuda could not have had a meaningful review under these conditions.

164. It is unconstitutional and unfair for the Appellate Public Defender's Office to push indigent clients to waive their right to counsel, on appeal and/or postconviction, especially after refusing to assist the indigent on a claim (i.e. ineffective-assistance-of-counsel), and the indigent want to pursue the claim.

165. It is standard practice for the Appellate Public Defender's Office to refuse to assist on indigent-ineffective-assistance-claims on appeal and postconviction.

a. Shortly after William Kennedy, Hennepin County Chief Public Defender, initially filed his suit against State officials and the Board of Public Defense,[86] it became the standard practice for the Appellate Public Defender's Office to refuse to assist on indigent-ineffective-assistance-claims.

i. In April 1992, Kennedy brought a declaratory judgment action alleging that Minn. Stat. §611.27 violated the constitutional rights of the indigent to the effective assistance-of-counsel by underfunding Kennedy's Office.

ii. The Hennepin County District Court ruled in Kennedy's favor finding that Minn. Stat. §611.27 was unconstitutional because it infringed upon public defenders' constitutional duty to provide criminal defense services to the indigent by establishing an arbitrary and inflexible cap on State spending for such services.

iii. The State appealed; during the appeal, the State Public Defender, John Stuart, submitted a letter on behalf of the Board of Public Defense

[86] *Kennedy v. Carlson*, 544 NW2d 1 (Minn.1996), began 1992, concluded 1996.

stating there were no complaints or malpractice suits against public defenders at the time.

a) By the time Stuart submitted his statement in *Kennedy*, all avenues for indigent complaint against public defenders were already blocked.

b) There were "no complaints against public defenders" because the Public Defender System was actively blocking any complaint they received; Appellate Public Defenders stopped assisting on indigent-ineffective-assistance-of-counsel-claims against public defenders on appeal and postconviction [sometime after April 1992].

c) The Appellate Public Defender's Office actively worked against Michuda, around the same time of Stuart's statement, when they refused to pursue ineffective-assistance-of-counsel-claims, protecting Stuart's position and statement submitted in *Kennedy*.

d) There were no disciplinary actions against public defenders because Office of Lawyers Professional Responsibility (OLPR) summarily dismisses indigent-ineffective-assistance-claims against public defenders without investigation [Rule 8(b), Minn. R. Law. Prof. Resp., enacted in 1991]; also, there is no record of judges referring indigent complaints against public defenders to OLPR Director [per Rule 8(b)].

e) There were no "malpractice suits against public defenders" because they were immune for acts of misconduct and/or malpractice suits

[*Dziubak v. Mott*, 503 NW2d 771 (Minn.1993), began 1991, concluded 1993].

f) Indigent-ineffective-assistance-of-counsel-claims against public defenders in 42 USC §1983 civil rights suits are usually dismissed with prejudice because public defenders are not State actors.[87]

iv. Despite Stuart's statement, there was a yearly average of 20 ineffective-assistance-claims/cases in the Minnesota Court of Appeals spanning the time of the *Kennedy* case (1992 through 1996): and,

a) there was a yearly average of 2 ineffective-assistance-claims/cases in the Minnesota Supreme Court.

b) on the majority of ineffective-assistance-claims/cases, the State [Appellate] Public Defenders Office was listed as appellant's counsel.

c) majority of ineffective-assistance-claims were not raised by the State [Appellate] Public Defenders Office on behalf of the indigent appellant.

d) the majority of ineffective-assistance-claims were raised *pro se*.

e) the majority of ineffective-assistance-claims raised in postconviction petitions are claims raised by an indigent against a public defender.

f) the majority of ineffective-assistance-claims raised in appeals are claims raised by an indigent against a public defender.

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[87] Though, public defenders in Minnesota *are* State actors if they have official immunity under *Dziubak* [?].

g) the majority of request for supreme court review of ineffective-assistance-claims in Minnesota are claims raised by an indigent against a public defender.

h) *pro se* indigent-ineffective-assistance-claims are usually dismissed.

v. The Court overturned the district court decision in *Kennedy*;

a) The Court failed to agree with the trial court's conclusions.

b) The Court held that the State constitutionally finances its Public Defender System.

c) Kennedy's flaw was a failure to enlist affected persons in his suit, and lacked complaints and malpractice suits to support his claims.

d) The Court abrogated the court's duty to protect the rights of the poor and to preserve the integrity of the adversarial system.[88]

b. Shortly after Kennedy filed his initial suit, indigent-ineffective-assistance-claims start being raised more in *pro se* supplemental briefs and *pro se* postconviction petitions, rather than by the Appellate Public Defender's Office on behalf of the indigent.

i. The proof is in the trend itself, in the research of cases.

ii. Before *Kennedy* began, the Appellate Public Defender's Office did assist

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[88] *Constitutional Law: Making a Case for Preserving the Integrity of Minnesota's Public Defender System: Kennedy v. Carlson, 544 NW2d 1 (Minn.1996)*, 22 Wm. Mitchell L.Rev. 1117 (1996).

on indigent-ineffective-assistance-claims.[89]

iii. After *Kennedy* began, the Appellate Public Defender's Office essentially stopped assisting on indigent-ineffective-assistance-claims, and such claims are then brought *pro se* in an appeal supplemental brief or postconviction petition.[90]

c. The Board of Public Defense and the State Public Defender did direct the Appellate Public Defenders Office to not pursue indigent-ineffective-assistance-claims against other public defenders.

Each District Public Defender's Office

166. *Each* District Public Defender's Office has failed to ensure that their offices have enough resources to provide a true adequate defense.

167. *Each* District Public Defender's Office is aware of the deficiencies of the Public Defender System.

168. At least one District Public Defender's Office (Hennepin County), at two different times, has publicly acknowledged the deficiencies of the Public Defender System:

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[89] i.e., *State v. Goodroad*, Lexis 475 (Minn.App.1992); *State v. LaDoucer*, 477 NW2d 905 (Minn.App.1991); *State v. Mason*, Lexis 840 (Minn.App.1989); *Brodell v. State*, 393 NW2d 674 (Minn.App.1986).

[90] i.e., *State v. Hines*, Lexis 947 (Minn.App.2015); *State v. Larson*, Lexis 276 (Minn.App.2014); *State v. Welton*, Lexis 130 (Minn.App.2014); *Maddox v. State*, Lexis 149 (Minn.App.2005); *State v. Porter*, Lexis 657 (Minn.App.2004); *State v. Al-Naseer*, 678 NW2d 679, 697 (Minn.App.2004); *State v. Casperson*, Lexis 734 (Minn.App.1995); *State v. Salitros*, Lexis 994 (Minn.App.1994); *State v. Wanli*, Lexis 939 (Minn.App.1994).

a. William Kennedy, Chief District Public Defender, brought a declaratory judgment action against State Officials and the Board of Public Defense in the 1990's.

b. Mary Moriarty, Chief District Public Defender, raised questions about the integrity of the Judicial System and the adversarial process, and other systemic, systematic or institutionalized discriminatory practices in the mid to late 2010's.

169. *Each* District Public Defender's Office has been aware of the deficiencies of the Public Defender System for decades.[91]

170. *Each* District Public Defender's Office has failed to address the Judicial System's concerns over the inadequate budget for the Public Defender System.

171. *Each* District Public Defender's Office has acquiesced in the underfunding of the Public Defender System, for decades.

172. *Each* District Public Defender's Office has created an atmosphere of mistrust between public defenders and many of the indigent.

County Attorney Offices (on behalf of the State)

173. A large percentage of the State's criminal cases are against indigent persons.

174. Prosecutors, on behalf of the State:

a. has taken advantage of the underfunding of the Public Defender System, for decades, to obtain convictions.

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[91] Legislative Audits (1992-93 and 2010), in addition to multitudes of law reviews, articles, etc.; and the deficiencies are so blatantly obvious of which reasonable State Officials would have known.

b. has taken advantage of the indigent being under represented, to obtain convictions.

c. has taken advantage of the indigent being incapable of making their own defense, to obtain convictions.

d. has taken advantage of the indigent being ignorant of their rights, to obtain convictions.

e. has taken advantage of the indigent being incapable of enforcing their rights, to obtain convictions.

f. has taken advantage of the indigent being incapable of adequately, effectively, or meaningfully challenging the State's convictions.

g. expect public defenders to know how prosecutors regularly conduct business.

h. expect public defenders to cooperate.

i. expect public defenders to be non-adversarial.

j. will manipulate or interfere in court proceedings in order to obtain convictions.

k. will violate constitutional rights in order to obtain convictions.

l. maliciously prosecute cases.

175. Though County Attorneys and prosecutors commit such acts as unauthorized practice, fraud upon the courts, coercion of victims, withholding of evidence, witness/jury tampering and case interference,[92] there has been little to no

[92] All of which is from just one prosecutor and two County Attorneys connected to Michuda's cases: Gemma Graham (Hennepin County prosecutor), Mike Freeman (Hennepin County Attorney), James Backstrom (Dakota County Attorney).

consideration of whether any opposing parties' rights were adversely affected, especially the indigent.[93]

176. The State protects its conviction rate at all costs, including maintaining unconstitutional convictions.

177. Though all lawyers should, County Attorneys, their offices, and prosecutors typically do not devote professional time and resources and use civic influence to ensure equal access to our system of justice for the indigent.

178. The Hennepin County Attorney's Office (the State, *officers of the court*) illegally employed Gemma Graham (*officer de facto*) for 20+ years while she was unauthorized to practice law.[94]

   a. The State cannot employ a person restricted or otherwise unauthorized to practice law to prosecute cases on the State's behalf;[95]

   b. nor can any court uphold a conviction by such person because "disbarred, suspended, or involuntarily inactive lawyers...[shall not be employed to] appear on behalf of [the State] in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer."[96]

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[93] i.e., Out of a multitude of cases spanning 20+ years, Michuda found only two cases that sought review shortly after Graham's discipline; Graham's discipline was withheld from Michuda (at 2008 sentencing) and he was time-barred when he sought review after discovering the discipline in 2014.

[94] *In Re (Discipline) Graham*, 744 NW2d 19 (Minn.2008).

[95] *Minn.R.Prof.Conduct*, Rule 5.8(b) (1985); also, only an attorney licensed to practice could represent [the State] in court pursuant to *Minn.Stat. §481.02*, subd.1, *State v. Fadden*, 397 NW2d 2, Lexis 5012 (Minn.App.1986).

[96] *Minn.R.Prof.Conduct*, Rule 5.8(b)(2).

179. Gemma Graham was hired as a prosecutor with Hennepin County on 8/22/83.

180. By State Supreme Court order dated 11/5/86, Graham was placed on restricted status for failure to report compliance with the rules governing continuing legal education (CLE).[97]

   a. Graham could not engage in the practice of law or represent any person or entity in any legal matter or proceedings within the State, other than herself.

   b. Graham hid the fact that she was restricted for fear of authorities discovering her restricted status[98]

181. Though the Hennepin County Attorney's Office (the State) is the proper authority to file a complaint, Graham could not act on behalf of the State.

   a. A person not authorized to practice law in any court but yet *prosecuted* hundreds of cases each year for 20+ years, *is* the prime definition of "such an error that affected the entire trial from beginning to end and undermines the structural integrity of the criminal tribunal itself."[99]

   b. Graham was *the* defect in the constitution of the trial mechanism that affected entire trial*s* from beginning to end and undermined the structural integrity of the criminal tribunal itself.

   c. Graham's unauthorized *prosecution* of cases for 20+ years *is* structural error.

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[97] As stated in OLPR Director's 12/21/07 *Petition for Disciplinary Action Against Graham*—but Supreme Court order not found in LexisNexis or State Law Library.
[98] *Hennepin County Attorney Administration Memorandum* (5/29/07), para.2 (available at Henn. Co. Atty. Office).
[99] *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

d. Any conviction obtained via Graham, an unauthorized prosecutor, especially over such a lengthy period, is a violation of due process.

182. In 1993, Graham received a stern verbal reprimand for failing to charge a number of domestic/family cases for over a year.[100]

a. This was an early sign in a disturbing pattern of misconduct and dereliction of Graham's duties and responsibilities as a prosecutor in Mike Freeman's Office (Hennepin County Attorney).

b. There is no evidence that this incident was referred to the Office of Lawyers Professional Responsibility (OLPR) Director for disciplinary proceedings where Graham's license status likely would have been discovered.

c. After the "stern verbal reprimand", Graham began to *over-prosecute* cases to satisfy office expectations and to continue hiding her restricted status.

183. Just months after being reprimanded for *not-prosecuting* cases for over a year, Graham prosecuted Michuda's 1994 case.

184. Graham had not been authorized to practice law for 7+ years while prosecuting Michuda's case.

185. Had the State employed a properly licensed attorney in Michuda's 1994 conviction, the case likely would never have been prosecuted.

a. Graham should never have been in a courtroom, Michuda's 1994 case should never have been prosecuted.

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[100] *Hennepin County Attorney Administration Memorandum* (9/15/09), para.5 (available at Henn. Co. Atty. Office).

b. Michuda was held illegally from 1/17/94 until recharged on 1/26/94.

c. Michuda never received the 1/17/94 complaint, was never informed of the initial allegations.

d. Initially, there was confusion/uncertainty by Graham and the Hennepin County Attorney's Office as to *who* was the victim/accuser/complainant.[101]

e. Between 1/17/94 and 1/26/94 the victim was coerced to change her allegations resulting in a change in Michuda's charge from a misdemeanor to a felony.

f. Graham either coerced the victim or knew of the coercion.

g. No one informed Michuda that the allegations had changed or that he was being held illegally (ten days) while Graham *made a case*.

h. Just before being charged with the felony, the misdemeanor public defender informed Michuda that he was being "railroaded"; Michuda was not capable of doing anything with this information.

i. Michuda's [felony] public defender, Constance Ebert was aware that the victim's statements had changed but did not inform Michuda.

j. After months without communication, Ebert coerced Michuda to plead guilty on 5/9/94 to the victim's coerced allegations.

186. A criminal trial's function fails if it allows an unauthorized attorney to prosecute cases, and/or if the prosecutor relied upon coerced victim statements to elicit a coerced guilty plea.

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[101] *State v. Michuda*, File No. 27-CR-94-006534, Transcript, *Hennepin County Felony Plea* (5/9/94), at p.17, Graham obfuscated and haphazardly discussed the subject, and the [misled] court dismissed it.

187. In mid-2007, the State learned Graham had actively practiced law while on CLE restricted status from 11/5/86 to 6/27/07.

188. On 2/1/08 the State Supreme Court disciplined Graham for the unauthorized practice of law.

189. Michuda was never informed of Graham's discipline and only discovered it the week of 7/14/14 while researching attorney disciplinary actions.

   a. Michuda only discovered Graham's disciplinary action by "extraordinary diligence" or "great diligence", both being far beyond "necessary diligence", "ordinary diligence", or "reasonable diligence".

   b. Michuda cannot be expected to know he could challenge prosecutorial misconduct after fourteen to sixteen years, especially if no one tells him and he has not had effective-assistance-of-counsel.

190. Graham's misconduct was egregious, continuous, and uncorrected by judicial intervention.

   a. On 5/12/09 and 6/2/09, during the pendency of Graham's attorney license probationary status, the State Appellate Court issued two decisions finding that Graham had committed prosecutorial misconduct four times in one case and one time in another.[102]

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[102] *Hennepin County Attorney Administration Memorandum* (9/15/09), para.2, citing *State v. Aweke*, Lexis 475 (Minn.App.2009), and *State v. Linse-Anderson*, Lexis 567 (Minn.App.2009)—a LexisNexis search did not link Graham to the decisions; Michuda only learned of these decisions in a 6/21/18 response to his data practices request.

b. There is no evidence that Graham's 2009 misconduct was referred to the OLPR Director for disciplinary proceedings.

191. Graham's last working day as a prosecutor was 2/22/10.

192. The United States Supreme Court has held that a court may not exercise its supervisory power to discipline the prosecutor or warn other prosecutors without considering whether the accused's rights were adversely affected.[103]

193. The State Supreme Court recognized that a trial conducted by Gemma Graham, a prosecutor unauthorized to practice law, has the potential to result in a deprivation of due process and an unfair trial to the accused.[104]

194. Despite the fact Graham's misconduct has the potential to result in a deprivation of due process and an unfair trial, and the fact Graham's cases must be reviewed to consider whether any [indigent's] rights were adversely affected, the State has placed it upon the indigent to prove they were prejudiced by Graham's misconduct,[105] likely without the assistance of counsel.

a. An indigent denied effective-assistance-of-counsel at trial, appeal, and/or postconviction cannot be expected to know he could challenge prosecutorial misconduct so many years after their trials have concluded.

b. The Hennepin County Attorney's Office should have informed every person prosecuted by Graham that Graham had been unauthorized to practice law.

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[103] *United States v. Martino*, 825 F.2d 754 (3rd Cir.1987), citing *United States v. Hasting*, 461 U.S. 499, 504, 76 L.Ed.2d 96, 103 S.Ct. 1974 (1983).
[104] *State v. Graham*, 764 NW2d 340 (Minn.2009).
[105] *State v. Ali*, 752 NW2d 98, 108 (Minn.App.2008).

c. The Public Defender System should have informed every client, where Gemma Graham was the prosecutor, and evaluated whether any indigent rights were adversely affected.

d. Because of policies, rules, laws, etc., the indigent are already time-barred because they were left in the dark, never informed of Graham's misconduct.

195. The State failed to protect the public from Graham's 20^+ years of unauthorized practice of law.

196. The State failed to prosecute Graham for the [aggravated] crimes (i.e. numerous acts of unauthorized practice of law, fraud, misrepresentation and misconduct, including fraud on the courts for 20^+ years).

197. The State violated the equal protection clause of the 14^{th} Amendment because the State is upholding convictions obtained by a prosecutor that was not authorized to practice law, but did not prosecute the same prosecutor for violating a State law hundreds of times per year for 20^+ years (aggravating the circumstances), a law that essentially says Graham was not authorized to be in a courtroom prosecuting cases.

198. Graham, restricted but acting on behalf of the State, committed prosecutorial misconduct that was prejudicial to Michuda.

a. Michuda did not commit the crime which he was accused;

b. Graham coerced the victim to change her statement, or was otherwise aware of such coercion;

c. Graham used coerced victim statements to unjustly convict Michuda;

d. Due process bars a prosecutor from making knowing use of false evidence;

e. Structural error occurred.

f. Michuda has been denied access to the [withheld] initial and changed 1994 victim (and her sister's) statements that would prove favorable to him.[106]

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199. Mike Freeman, [former] Hennepin County Attorney, is responsible for employing Gemma Graham for most of her career, a *prosecutor* that committed fraud, misrepresentation, and misconduct for 20+ years.

200. Freeman's office failed to report Graham's serious misconduct to the OLPR Director:

a. In 1993 Graham failed to charge a number of domestic/family cases for over a year.[107]

b. In 2009 the State Appellate Court issued two decisions finding that Graham had committed prosecutorial misconduct multiple times in two cases.[108]

201. Mike Freeman used his position/influence to interfere in Robert Freeman's criminal case(s).

a. Mike Freeman influenced another prosecuting office to overturn Rob Freeman's conviction, even after initially getting a lighter sentence.[109]

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[106] Ebert never provided Michuda with *any* of the statements; and, in mid to late 90's, when Michuda visited the Minneapolis Police, the Hennepin Co. Sheriff, and Hennepin Co. Court Records, the statements were not available or heavily redacted.
[107] *Hennepin County Attorney Administration Memorandum* (9/15/09), para.5.
[108] *Id.*, para.2, citing the *Aweke*, and *Linse-Anderson* cases.
[109] *Freeman v. State*, Stearns County District Court, File No.73-CR-13-347; see also *Freeman v. State*, 944 NW2d 488 (Minn.App.2020).

b. Both Rob Freeman and the alleged victim are related to Mike Freeman.

c. There was an obvious concerted effort for the victim to recant; Rob Freeman had presumed the victim had recanted.

d. Rob Freeman's conviction was overturned due to ineffective-assistance-of-counsel; actual innocence was not proven.

e. Because of Mike Freeman's position/influence, the prosecuting office *chose* not to retry the case and dismissed the charges against Rob Freeman.

f. It appears Rob Freeman was also allowed/forced to enlist in the Army in the early 1990's instead of facing criminal charges.

202. Rob Freeman and Michuda are very similar, but treated differently because of money and connections.

a. Both, Rob Freeman and Michuda, went to basic training in 1991 at Fort Benning, same platoon, one class apart.

b. Rob Freeman succeeds in the Army because he must, and Michuda fails because he was deemed untrainable.

c. Both ended up in MCF-Rush City, for similar convictions.

d. Both raise ineffective-counsel-claims; Rob Freeman is heard because he can afford an attorney and is related to Mike Freeman, while Michuda is unable to get his foot in the door.

e. Prosecutorial misconduct [or interference by an elected official] allows Rob Freeman to *escape* (at least twice), and Michuda is buried so far under the

deficiencies in the administration of justice and other insurmountable barriers that equal access to our system of justice is merely a myth.

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203. James C. Backstrom, Dakota County Attorney, is known to use his position to intimidate others to influence the outcome of cases.

204. Backstrom received a public reprimand for threatening to withdraw [political] support for an official appointed by the county board unless the official barred her subordinates from testifying as defense experts in criminal cases.[110]

a. Backstrom, and multiple State Officials, from multiple counties, interfered with the fundamental rights of an accused, which interference undermined the integrity of the judicial system in a case.[111]

b. Officials' interference, from multiple jurisdictions, of neutral medical examiners would have impacted cases throughout the State of Minnesota.

c. Backstrom is guilty of, but was never charged with, witness tampering and/or corruption because he [and other officials] unconstitutionally impacted witness testimony in a criminal proceeding, resulting in remand for new trial.

d. Backstrom's case interference occurs just months after Michuda's 2007-08 Dakota County case/conviction.

205. Plainly stated, Backstrom is willing to violate accused person's constitutional rights to obtain a conviction and get the media's attention.

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[110] *In Re Backstrom*, 767 NW2d 453 (Minn.2009).
[111] *State v. Beecroft*, 813 NW2d 814 (2012).

a. Public defender, Kevin Shea, told Michuda he worked under Backstrom as a prosecutor prior to being appointed as Michuda's 2007 trial counsel.

b. Shea feared and/or admired Backstrom.

c. Shea has an allegiance to Backstrom.

d. Shea told Michuda, more than once, that Backstrom is a "media hog".

e. Backstrom "wanted" jurisdiction of Michuda's case for the media attention and was willing to manipulate Michuda and his constitutional rights to get it.

f. Michuda's case was publicized and Backstrom did make public statements concerning Michuda's case.

g. Shea got Michuda to waive jurisdictional issues though much of the alleged crimes had not been committed in Dakota County.

h. Backstrom wanted to sentence Michuda to as much time as possible, and publicly took credit when he did.

i. Judge McManus, Shea, and Backstrom's office withheld Graham's discipline from Michuda, and the impact it had on Michuda's 2008 sentence.

j. Shea was "ready to go" to Michuda's sentencing, less than two weeks after Graham's discipline was decided.

k. Backstrom conspired with Shea, controlling outcome in Michuda's conviction.

l. Backstrom's "patterns of misconduct" remain unknown and hidden because the implications of a corrupt County Attorney, that would do anything to obtain convictions, is very damaging to the judicial system.

206. Backstrom's "discipline" (though only a slap on the wrist) shows he is/was willing to violate constitutional rights of those accused to obtain a conviction.

207. Backstrom's quick "reprimand" and lack of criminal charges allowed a less than thorough investigation of the impact Backstrom had on other cases;[112]

Lawyers Professional Responsibility Board; and Director of the Office of Lawyers Professional Responsibility

208. In Minnesota, complaining of attorney incompetence to the State board of professional responsibility does not provide a realistic remedy to dissatisfied indigent persons,[113] because the Minnesota Rules on Lawyers Professional Responsibility severely limit investigations of complaints by the indigent.[114]

209. The Lawyers Professional Responsibility Board [hereinafter "LPRB"] and the Director of the Office of Lawyers Professional Responsibility [hereinafter "OLPR Director"] has been aware of the deficiencies of the Public Defender System for decades.[115]

210. The LPRB and the OLPR Director has acquiesced in the underfunding of the Public Defender System, for decades.

211. The LPRB and the OLPR Director has a duty to assure that all lawyers are "professionally responsible" in the State of Minnesota...but has made an

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[112] An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover, *Rules of Professional Conduct 8.3, Comment (2005).*

[113] Rutherford, at 991.

[114] *Id.*.

[115] Legislative Audits (1992-93 and 2010), in addition to multitudes of law reviews, articles, etc.; and the deficiencies are so blatantly obvious of which reasonable State Officials would have known.

exception for indigent claims against public defenders.

212. The LPRB has deemed that it is not of primary importance, to the public nor to the members of the Bar, that cases of public defenders' alleged disability or unprofessional conduct be promptly investigated and disposed of with fairness and justice, especially claims raised by an indigent.

213. The LPRB administered rules, and established policies that allow the OLPR Director to summarily dismiss indigent-ineffective-assistance-of-counsel-claims against public defenders without an investigation.[116]

    a. A summary dismissal by the OLPR Director under Rule 8(b) is final and cannot be appealed to a Board member for review.[117]

    b. Though indigent complaints against a public defender can only be referred to OLPR by a judge in the matter,[118] there is little to no record of judges referring such claims to the OLPR Director for investigation.[119]

    c. Without an investigation, disability or disciplinary proceedings against public defenders are rarely commenced.

214. The OLPR receives about the same number of indigent-ineffective-assistance-claims against public defenders, per year, as claims raised in the Minnesota Court of Appeals.

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[116] Rule 8(b), Minnesota Rules of Lawyers Professional Responsibility.
[117] *Id.*, Rule 8(e).
[118] *Id.*, Rule 8(b).
[119] Based on responses from OLPR, multiple district court chief judges, district court administrators, a public defender office, and research of LexisNexis showing lack of public defenders being disciplined.

a. The OLPR Director summarily dismissed 48 indigent-ineffective-assistance-claims in 2015; and summarily dismissed 49 out of 50 indigent-ineffective-assistance-claims in 2016.

b. The number of complaints received, handled, dismissed, etc. are relatively unchanged from year to year according to OLPR annual reports.

c. OLPR statistics are minimal because the OLPR does not like to provide requested information by mail for information readily available on their website, even to those without internet access.

d. Inmates in Minnesota do not have access to the OLPR website.

215. Public defenders have a high rate of complaints filed against them each year.

a. In the Minnesota Court of Appeals, there are more than 1,300 *pro se* ineffective-assistance-claims/cases from 1984 through 2023.[120]

i. The total number of <u>all</u> ineffective-assistance-claims are nearly 2,600; more than 1,700 started as a postconviction action in the district courts.[121]

ii. When deciding an ineffective-assistance-claim, the keywords "public defender" or the attorney's name is rarely stated in appellate decisions.

iii. The keyword "public defender" is in about 1,500 cases, usually listed as appellate counsel.

iv. The 1,300+ *pro se* ineffective-assistance-claims are largely the indigent raising ineffective-assistance-claims against public defenders, either

[120] LexisNexis, Minnesota Appeals Court Cases From 1983.
[121] *Id.*, 1983 through 2023.

without counsel or in a supplemental brief without the assistance of counsel.

v. Appellate public defenders routinely have not assisted on ineffective-assistance-claims against public defenders since 1992.

vi. *Pro se* ineffective-assistance-claims raised in an appellate supplemental brief or a postconviction petition are usually dismissed due to some error that would not exist had a public defender assisted; subsequent filings or attempts to remedy the failure are typically time- and/or *Knaffla*-barred.

vii. Appellate public defenders recently *appear* to be assisting on some ineffective-assistance-claims, generally juvenile and female claimants.

b. In the Minnesota Court of Appeals, the number of *pro se* ineffective-assistance-claims averaged:

i. 6 claims per year from 1984 through 1993.

ii. 24 claims per year from 1994 through 1999.

iii. 42 claims per year from 2000 through 2003.

iv. 46 claims per year from 2004 through 2007.

v. 71 claims per year for 2008 and 2009.

vi. 50 claims per year from 2010 through 2014.

vii. 50 claims per year from 2015 through 2019.

viii. 37 claims per year from 2020 through 2023.

c. The number of *pro se* ineffective-assistance-claims increased dramatically starting 1994, reaching the highest number of claims in 2008 and 2009.

d. The decrease in the number of *pro se* ineffective-assistance-claims after 2009 is likely due to:

   i. The Public Defender System had downsized the number of public defenders due to budget cuts, likely causing the 2008-09 peak in number of complaints/claims.

   ii. The Minnesota Supreme Court granted an increase to lawyers' fees in 2009 to help with Public Defender System budget; extended in 2011.

   iii. With an increase in the budget, the number of complaints merely returned (slightly higher) to the number of complaints before the 2008-09 peak.

   iv. Clearly, improved funding and staffing reduced the number of complaints.

e. The substantial decrease in the number of *pro se* ineffective-assistance-claims after 2019 is likely due to:

   i. death of two correctional officers in MCF-Stillwater,[122] limiting inmate interactions, movement and programming, including law library access in all Minnesota prisons.

   ii. viral outbreaks, limiting inmate interactions, movement and programming, including law library access in all Minnesota prisons.

   iii. low staffing levels due to death of two correctional officers and viral outbreaks, causing many staff to retire or quit; lack of competitive wages

[122] One correctional officer murdered by an inmate; second correctional officer died from a medical condition while responding to a facility incident within weeks of the murdered officer.

made it difficult to gain and retain new staff,[123] overall, limiting inmate interactions, movement and programming, including law library access in all Minnesota prisons.

iv. changes in demographic of the indigent, less capable of raising a claim.[124]

v. the lack of indigents' *hope* for success of raising a claim, considering most claims have been blocked or denied.

vi. Clearly, limiting access to law libraries, and/or reducing capability and *hope*, decreased the number of complaints.

Public defenders

216. Public defenders have acquiesced in the underfunding of the Public Defender System, for decades.

217. Public defenders do not have enough resources to provide a true adequate defense for their indigent clients.

218. Public defenders, in an overburdened public defender office, are strongly presumed to be ineffective.

a. Public defenders described feeling "underwater", "bruised", "beat up", and being treated as "the help"; some managers described instances in which they

[123] Even after changes in wages, MCF-Rush City retained about 1 in 20 new hires in 2024; in a three-month span MCF-Rush City lost 17 new hires (terminated, quit, or transferred); five years after COVID, MCF-Rush City inmates still eat two-thirds of their meals in their cells, and programming/recreation periods have been greatly decreased and/or repeatedly canceled, due to understaffing.

[124] Viral outbreaks, civil unrest across country, school closures, deteriorating economic conditions, some societal breakdown, each contributing to ignorance, feeble mindedness, illiteracy or the like.

found public defenders showing signs of great emotional stress.[125]

b. One public defender commented "There are not enough attorneys, there is not enough time to meet with my clients. My schedule is so crazy with three counties that my clients end up waiting forever. I am not notified when I have got in-custody clients waiting for a long time for a hearing because MY schedule is a problem. I often do not have time to prepare for important hearings, so I am constantly requesting continuances and then the client's cases get dragged on and on."[126]

219. Overburdened public defenders' conduct cannot be presumed to fall within the range of reasonably effective assistance.

220. There is an atmosphere of mistrust between public defenders and many of the indigent.

a. High caseloads make it difficult for public defenders to spend enough time with the indigent to build trust, explain the system and charges, and make decisions with the indigent regarding their defense.[127]

b. One chief public defender pointed out that the indigents' trust in the fairness of the judicial system is linked to their decisions to abide by the law in the future.[128]

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[125] Audit (2010), at p.38.
[126] *Id.*
[127] *Id.*, at p.40.
[128] *Id.*

221. Public defenders overall have decidedly taken a less aggressive or less adversarial approach in their representation of their indigent clients.

222. Public defenders do not have the time or patience to represent all of their indigent clients' interests.

a. 67% of public defenders felt they did not have sufficient time with clients.[129]

b. 15% of public defenders felt they did not regularly visit clients in jail.[130]

c. 37% of public defenders felt they did not return client phone calls within a day.[131]

d. 42% of public defenders felt they were not well prepared for each of their cases in the past year.[132]

e. Despite 75% of public defenders feeling they had provided constitutionally adequate representation in the past year, 45% believed that they had ran into potential ethical issues surrounding their ability to provide competent and diligent representation.[133]

223. Public defenders do not have the time or resources to apply their skill and knowledge to the task of defending each of their individual clients.

a. Public defenders have been so underfunded, and so understaffed, especially in comparison to prosecutors, that public defenders are so overworked that

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[129] *Id.*, at p.41, Table 3.4.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*

their representation regularly falls below an objective standard of reasonableness.

b. Underfunding of the Public Defender System has so undermined the proper functioning of the adversarial process that many trials cannot be relied on as having produced a just result.

c. Underfunding of the Public Defender System creates a system of egregious dysfunction where public defenders are controlled by State underfunding, prosecutors expect public defenders to "toe the line", and public defenders are rarely disciplined because all avenues for indigent complaints against public defenders are unconstitutionally blocked.

d. If public defenders were as well-funded as prosecutors, there is a reasonable probability that public defenders would be truly adversarial to prosecutors and that the result of many indigents' proceedings would have been different.

e. If public defenders were more properly funded, it would be more likely the indigent would be assured of a fair trial.

224. A large percentage of surveyed public defenders have acknowledged the deficiencies of the Public Defender System.[134]

225. A large percentage of surveyed public defenders admit they cannot be effective attorneys.[135]

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[134] Guntzel Article, and Guntzel Survey.

[135] *Id.*

226. Some public defenders have publicly acknowledged the deficiencies of the Public Defender System.[136]

227. Some public defenders have contended that no one could competently represent hundreds of different clients a year, with each case involving different facts and legal issues.

228. Public defender workloads are too high and exceed State and national standards.[137]

   a. State and national standards call for public defenders to carry no more than 400 case units per year.[138]

   b. Minnesota's weighted caseloads per attorney far exceed State and national standards; e.g., statewide average weighted caseload per public defender ranged from 714 to 779 at the end of each fiscal year for 2007, 2008, and 2009.[139]

   c. Public defender caseloads are double what would be permitted by national standards; and many developments in criminal justice have made these cases more time-consuming.[140]

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[136] *Id.*, Rep. Tina Liebling (DFL-Rochester), a former public defender; in *Pippitt* the public defender publicly stated he was overburdened and inexperienced.
[137] Audit (2010), at p.35.
[138] *Id.*; also *Order Temporarily Increasing Lawyer Registration Fees*, Minn.Lexis 975 (2009), citing the Minnesota Board of Public Defense petition.
[139] Audit (2010), at p.35-36.
[140] *Id.*, at p.75, Board of Public Defense Response.

d. The number of public defenders in each district decreased over fiscal years 2007 through 2009 while all but two districts (2nd and 7th) the caseloads increased.[141]

e. It appears the number of public defenders in 2021 had returned to about the same number of public defenders in 2007; i.e. 4th district, the largest, had 118 public defenders in 2007, and 120 public defenders in 2021.[142]

f. At 10 and 15 years after the 2010 Audit, public defenders still handle an average of 700 case units, or more, per year.

g. Public defender caseloads in each judicial district, 10 and 15 years after the 2010 Audit, still range in excess of 600 case units to well over 800.

229. Public defenders cannot provide competent assistance to every indigent client because of excessive caseloads.

a. Questions have been raised concerning excessive caseloads, and public defender effectiveness as defense lawyers and the quality of representation their indigent clients received.

b. Public defenders and others described the current environment as one of practicing triage, moving from crisis to crisis rather than thoughtfully managing cases.[143]

c. Insufficient case preparation can result in mistakes.[144]

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[141] *Id.*, at p.36, Table 3.1.
[142] Per a snapshot of the Hennepin County Public Defender website.
[143] Audit (2010), at p.35.
[144] *Id.*

d. In general, attorneys have an obligation to not take on too many cases,[145] but public defenders may not reject a client, and are obligated to represent whomever is assigned to them, regardless of their current caseload or the degree of difficulty the case presents.[146]

e. By underfunding the Public Defender System, the State restricts a public defender's ability to be effective by preventing them from fully and zealously advocating on behalf of their indigent clients.

f. County Attorney Offices, on behalf of the State, has taken advantage of public defenders' excessive caseloads to obtain convictions; elected officials, including County Attorneys, get a political boost for high conviction rates.

g. The Board of Public Defense, State Public Defender, and each Public Defender Office accept underfunding and excessive caseloads as the norm, and thereby concede many convictions.

h. The Public Defender System relies on indigent ignorance, feeble mindedness, illiteracy, etc., and being intimidated by the complex and confusing nature of judicial proceedings, in order for public defenders to manage and dispense with excessive caseloads.

i. Excessive caseloads have served to justify and perpetuate our inadequate system for the delivery of defense services.

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[145] Audit (2010), at p.8; also *Minnesota Rules of Professional Conduct*, Rule 1.3, at Comment—2005 [2] A lawyer's workload must be controlled so that each matter can be handled competently.

[146] *Dziubak v. Mott*, 503 NW2d 771, 775 (Minn.1993).

230. A public defender with an overwhelming caseload violates the Rules of professional conduct.

231. A heavy caseload adversely effects a public defender's:

a. ability to provide competent representation to clients.

b. ability to act with reasonable diligence and promptness in representing clients.

c. reasonable communication with clients.

d. ethical standards of professional conduct.

e. quality of representation of indigent clients.

f. quality of personal life (career, family, divorce, overall stress).

232. A heavy caseload creates a public defender's concurrent conflict of interest:

a. one or more clients will be materially limited by the public defender's responsibilities to other clients.

b. the representation of so many clients will be directly adverse to other clients.

233. Public defenders aid prosecutors in closing cases by convincing the indigent to take plea bargains.

a. Public defender and prosecutor plea deals are intentionally targeted predatory practices at poor, undereducated persons (the indigent).

b. Plea deals for the indigent are usually worse than plea deals offered/negotiated for offenders that could afford adequate counsel.

c. One public defender stated she was so overworked that she routinely scheduled up to five trials in a day, anticipating that most would settle.[147]

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[147] Audit (2010), at p.37.

234. Public defenders are not spending enough time researching their legal arguments, reviewing physical evidence, and preparing clients and witnesses to testify.[148]

235. Public defenders frequently ask for extensions on hearings and trials, causing delays in an already overburdened court system.[149]

236. Public defenders rarely are able to substantially discuss a client's case with the client before their first court appearance together.[150]

237. Many public defenders have lost cases that they would have won if their workload would have allowed more time for legal research.[151]

238. Public defenders do not meet the same ethical standards of professional conduct as private attorneys.

239. Public defenders do fail, at times:

a. in providing their indigent clients with diligent and skillful representation.

b. in their responsibility for the quality of justice for the indigent.

c. to properly advise their indigent clients.

d. to zealously advocate on behalf of their indigent client's position.

e. to be adversarial on behalf of their indigent clients.

f. to seek a result advantageous to their indigent clients.

g. at being competent, prompt, or diligent.

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[148] Guntzel Article, and Guntzel Survey.
[149] *Id.*
[150] *Id.*
[151] *Id.*

h. to maintain communication with their indigent clients concerning the representation.

i. to keep in confidence information relating to the representation of indigent clients [excluding such disclosures required or permitted by rule or law].

j. in their duty to uphold the legal process on behalf of their indigent clients.

240. Public defenders regularly do not have the time or energy to examine indigent clients' legal affairs and report about them to the indigent or to others.

241. Public defenders do fail, regularly:

a. in their duty to challenge the rectitude of official action on behalf of their indigent clients.

b. to seek improvement of the law on behalf of the indigent they represent.

c. to seek improvement of access to the legal system on behalf of the indigent they represent.

d. to seek improvement in the administration of justice on behalf of the indigent they represent.

e. to seek improvement in the quality of service rendered by the Public Defender System.

f. to further the public's understanding of and confidence in the rule of law and the justice system, especially on behalf of the indigent, and funding of the Public Defender System.

g. to devote professional time, resources, and civic influence to ensure equal access to our system of justice for the indigent.

h. to meet the obligations of their professional calling.

242. Trial public defenders are often ineffective.

a. When taking a plea deal, the indigent are subjected to compulsion to say they had effective counsel or risk losing the purported "good deal" and face a longer, harsher sentence if go to trial.

b. Client/attorney issues usually are not resolved before the indigent client takes a plea deal.

c. Indigent-ineffective-assistance-claims against a public defender are usually dismissed without much of an investigation.[152]

d. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.

e. The "pattern of misconduct" of public defenders remain unknown or hidden when complaints against public defenders are blocked.

243. Public defenders are aware of the deficiencies in the administration of justice for the indigent.

244. Public defenders are aware that the indigent are often provided inadequate legal assistance.

245. Public defender offices often lose experienced attorneys to prosecutor offices

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[152] One judge commented "I get repeated complaints [from the indigent] that public defenders do not return calls and the pre-trial is the first time they have met with the public defender; although some of [the indigent] would complain no matter how good the services were, the complaints are legitimate." Audit (2010), at p.37.

and private practice for better pay and decreased caseloads.[153]

246. Prosecutor offices commonly pay their employees more than public defender offices.[154]

247. Minnesota generally employs about 3 to 5 people in its prosecution services for every one full-time public defense worker.

248. Public defender work is merely a stepping stone for many inexperienced attorneys.

249. Some otherwise unemployable attorneys (i.e. those that were reprimanded, disciplined, and/or not allowed to engage in solo practice), are compelled to work in public defense.[155]

250. Some attorneys in prosecutor or city attorney offices that perform poorly become public defenders.

   a. Attorneys that are doing well as a prosecutor or a city attorney do not willingly take a pay-cut to be a public defender.

   b. i.e. Kevin Shea (Dakota Co.) was a prosecutor, then became a public defender; as of 4/28/11 Shea had 8 complaints filed against him as a public defender (years later, the Board of Public Defense refused to provide any updated information concerning Shea or any other public defender).

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[153] Star Tribune, Opinion Exchange *More Work to be Done on Behalf of Public Defenders*, by Brian Aldes and Chelsea Reinartz (2/19/23).

[154] *Id.*

[155] i.e. *In Re Toberman*, 989 NW2d 894 (2023); *In Re Streff*, 977 NW2d 59 (2022); *In re Desmidt*, 782 NW2d 252 (2010); *In Re Evenson*, 453 NW2d 312 (1990); *In Re Murphy*, 325 N.W,2d 826 (1982).

c. i.e. Richard J. Coleman (Ramsey Co.) was a city attorney in St. Paul, then became a public defender, before becoming an attorney in private practice, where he received seven private and public reprimands.[156]

d. Poor performance as a public defender is well hidden, complaints are summarily dismissed, usually without much of an investigation, public defenders rarely ever face public discipline.

251. Public defenders in general are viewed as less than mediocre when compared to attorneys in prosecution and private practice.

a. Public defenders have an image of being second-class lawyers.[157]

b. Public defenders in general do not exemplify the legal profession's ideals of public service.

c. Public defenders do fail, regularly, to seek improvement in how public defenders are seen/viewed.

d. The public, and many indigent clients, at times are resentful or mistrustful of public defenders.

e. Public defenders at times have been referred to as "public pretenders", especially by the indigent they represent.

f. Public defenders are portrayed as laughing stock in sitcoms, movies and other media, compared to other attorneys.

g. Public defenders are not equals when compared to other attorneys.

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[156] *In Re Coleman*, 679 NW2d 330 (2004) *and*, 793 NW2d 296 (2011).
[157] Rutherford, at 979.

h. Public defenders are seen as unorganized and incompetent when compared to other attorneys.

i. Public defenders are more poorly dressed, compared to other attorneys.

j. Public defenders do not carry themselves the way other attorneys carry themselves.

k. Many public defenders admit they cannot be effective attorneys.

l. Public defenders are expected to almost always lose, compared to other attorneys.

The Indigent

252. "[The indigent] should receive diligent and skillful representation. The validity of the adversary system is said to depend on it, and a [public defender] is legally and ethically obliged to provide it."[158]

253. Many of the indigent waive their constitutional right to a speedy trial or contested hearing because of public defenders' workload.[159]

254. Many of the indigent remain in-custody longer than they should have because of delays related to public defender workload.[160]

255. Some of the indigent are going to prison or jail who should not be, or are staying longer than they should be, because of public defenders' workload.[161]

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[158] Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 Va. L. Rev. 927 (1973).
[159] Guntzel Article, and Guntzel Survey.
[160] *Id.*
[161] *Id.*; i.e., in *Pippitt* the public defender publicly stated he was overburdened.

256. The indigent cannot be assured a fair trial without the effective assistance-of-counsel; "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."[162]

257. The indigent are incapable of making their own defense because of ignorance, feeble mindedness, illiteracy, or the like.

258. The indigent are incapable of making their own defense because of the complex and often confusing nature of judicial proceedings to the ordinary citizen.

259. Most indigent are incapable of challenging their public defender's course of action or inaction because of ignorance, feeble mindedness, illiteracy, etc., or are intimidated because of the complex and confusing nature of judicial proceedings.

260. The indigent are deprived of their constitutional right to have the *effective* assistance-of-counsel appointed for their defense under the Sixth Amendment and the Due Process Clause.

a. Public defender offices have been understaffed for decades.

b. Public defenders have been overburdened with caseloads for decades.

c. The indigent are under-represented.

d. State Officials do not want the indigent to know their legal rights.

e. The constitutional rights of the indigent are being sacrificed.

f. Ineffective representation of the indigent has become the norm.

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[162] *State v. Dorsey*, 701 NW2d 238 (Minn.2005), citing *Arizona v. Fulminante*, 499 U.S. at 310, citing *Rose v. Clark*, 478 U.S. 570, 577-78 (1986).

g. Ineffective representation of the indigent is expected and tolerated.

h. Public defenders are protected from their own ineffectiveness.

i. The indigent are left without an enforceable right to effective representation.

261. The indigent are denied the right of access to the courts because:

a. the indigent are forced to prove ineffective-assistance-of-counsel *without* effective-assistance-of-counsel.

b. the indigent are incapable of properly using prison law libraries due to ignorance, feeble mindedness, illiteracy, or the like.

c. most indigent *pro se* actions will never be adequate, effective, or meaningful.

d. most indigent fail to comprehend standards, rules, exceptions, merit, burden of proof, etc.

e. most indigent *pro se* motions and petitions usually end in dismissal.

f. most indigent *pro se* claims eventually become time-barred and/or *Knaffla*-barred after filing ignorant fumbling of motions and petitions that are dismissed.

262. Many indigent defendants in a criminal case do not receive diligent and skillful representation.

263. Most indigent are presumed guilty until they are walked down the path to a guilty plea.

a. Many indigent take a "plea deal" because it is better than losing at trial with an overworked, unprepared public defender that the indigent has not had time to discuss the case with.

b. Many indigent usually *settle* into taking "plea bargains" because they were convinced or coerced, by the public defender, that that was the best or only option.

c. The indigent are forced to either accept a "plea offer" through a public defender they do not know or trust, or navigate a bewildering, intimidating judicial process with a public defender they do not know or trust; some indigent choose to represent themselves.

264. At times, there is an attorney/client conflict because some indigent know or believe their public defender can and should do more, but the public defender insists otherwise.

a. Public defenders usually do not resolve attorney/client conflicts before conclusion of the case.

b. After conclusion of a case, public defenders have no reason to follow up on, or resolve, attorney/client conflicts.

c. The indigent are incapable of adequately addressing or resolving attorney/client conflicts.

265. The indigent have to fend for themselves, even *force* their public defenders to *defend* them or they will not prevail on any issue.

266. Without effective-assistance-of-counsel, the indigent have no voice to speak for them.

267. When many of the indigent try to speak for themselves (i.e. *pro se* actions) they are shut down for failure to state a claim, claims lack merit, time-barred,

Knaffla-barred, failure to raise an exception...the list goes on.

268. The indigent cannot "show merit" or "state a claim" or "argue an exception", etc., if they do not *truly* understand the meaning or process.

Stephen Michael Michuda

269. Stephen Michael Michuda is an indigent person that had public defenders appointed to him at trial and review stages in 1994-96, 2004, and 2007-09.

a. Public defender (name unknown), Hennepin County Public Defender's Office (1994 Misdemeanor, dismissed/replaced with felony).

b. Constance Ebert, Hennepin County Public Defender's Office (1994 felony pre-trial, plea, 1st revocation).

c. David Cohoes, Hennepin County Public Defender's Office (1994 sentencing).

d. Kevin Des Lauriers, Hennepin County Public Defender's Office (1994 2nd revocation).

e. Ann McCaughan, Appellate Public Defender's Office (1995-96 postconviction).

f. James Grochal, Hennepin County Public Defender's Office (2004 misdemeanor).

g. Kevin Shea, Dakota County Public Defender's Office (2007-08 felony pre-trial, plea, sentencing).

h. F. Richard Gallo, Jr., Appellate Public Defender's Office (2008-09 appeal).

270. Michuda is easily manipulated and coerced.

a. Michuda is a shy, meek individual having been influenced by fear and intimidation his entire life.

b. Michuda is emotionally closed, unable to openly express his views or opinions.

c. It is difficult for Michuda to say "no" and he gives in easily to demands, especially to avoid confrontation.

d. Michuda shows a complete lack of anxiety about bad situations, taking no action to prevent negative outcomes.[163]

e. Michuda has been notably described as having a "flat affect" by several professionals in 1994-95[164] and 2008.[165]

f. Michuda was diagnosed with Dysthymic Disorder in 2008;[166] he experiences periods of marked emotional, cognitive or behavioral dysfunction; dysthymia is part of his characterological structure.[167]

g. Michuda was diagnosed with Avoidant Personality Disorder in 2010.[168]

271. Michuda has never had the effective assistance-of-counsel.

272. Michuda has never had a meaningful review of any conviction.

273. The Appellate Public Defender's Office has *always* refused to assist Michuda on his ineffective-assistance-of-counsel-claims.

274. Much of Michuda's legal arguments have been against appellate public

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[163] *State v. Michuda*, File No. 27-CR-94-006534, Hennepin County District Court records, Steve Allen, MA, LGSW (1995 letter to probation, paraphrased).
[164] *Id.*, Hennepin County District Court records, Marianne S. Keenan, probation officer (1994 PSI), Julie Smith, M. Ed., LP (1994 treatment intake), Steve Allen, MA, LGSW (1995 letter to probation).
[165] *State v. Michuda*, File No. K4-07-0636, Dakota County District Court records, Kimberly S. Harrison, PhD and Katie E. Connell, PhD, LP (2008 PSI).
[166] *Id.*, Dakota County District Court records, Patricia K. Orud, MA, LP (2008 PSI).
[167] *Id.*
[168] MCF-Rush City records, Mary Bergstad, MA, LPCC, and Nancy Staken, MA, LP, Psych Services Director (2010-12).

defenders refusing to assist him on appeal and/or postconviction, especially on ineffective-assistance-of-counsel claims.

275. Michuda's ineffective-assistance-of-counsel claims have been blocked unconstitutionally.

276. All of Michuda's claims have been unconstitutionally time-barred and/or procedurally-barred, despite never having the effective assistance-of-counsel.

277. Public defenders have never attempted to resolve any attorney/client conflict with Michuda.

278. Public defender conduct so undermines the adversarial process that trial and review stages cannot be relied on to produce a just result in Michuda's cases.

279. The State failed to fulfill its duty to provide adequate funding for the Public Defender System.

a. By underfunding the Public Defender System, the State stands in the way of Michuda's ability to have the effective assistance-of-counsel.

b. By standing in the way of Michuda's ability to have the effective assistance-of-counsel, the State has denied Michuda meaningful access to the courts.

c. Without meaningful access to the courts, Michuda has not had a fair trial, was presumed guilty while being walked down the path to guilty pleas, and has lost the opportunity to file a meaningful appeal, postconviction petition, or any other possible action.

280. The shortcomings in the Public Defender System hindered Michuda's efforts to pursue legal claims.

a. Appellate public defenders repeated refusals to assist Michuda on appeal and/or postconviction has hindered Michuda's efforts to pursue meaningful review of his convictions, including and especially complaints of ineffective-assistance-of-counsel, of trial and appellate counsel.

b. Each action filed by Michuda has been denied or dismissed for failure to meet a technical requirement; failure to state a claim, claims lack merit, time-barred, *Knaffla*-barred, failure to raise an exception, etc.; of which Michuda could not have known about, or overcame, because of the insufficient legal assistance provided by the State of Minnesota.

c. The injuries suffered by Michuda was systemic, a system-wide problem that has persisted for decades.

d. The injuries suffered by Michuda raises questions about the integrity of the Judicial System and the adversarial process, and other systemic, systematic or institutionalized discriminatory practices.

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281. Michuda was denied effective representation of counsel in 1994 during pre-trial, plea, sentencing and revocation hearings.

282. Michuda was held illegally from 1/17/94 until recharged on 1/26/94.

a. Michuda never received the 1/17/94 misdemeanor complaint, and was unaware of the initial allegations.

b. Initially, there was confusion/uncertainty by Graham and the Hennepin County Attorney's Office as to *who* was the victim/accuser/complainant.

c. Between 1/17/94 and 1/26/94 the victim was coerced to change her allegations resulting in a change in Michuda's charge from a misdemeanor to a felony.

d. As the misdemeanor was being dropped, before being charged with the felony, the misdemeanor public defender (name unknown) informed Michuda that he was being "railroaded"; Michuda was not capable of doing anything with this information.

e. Graham, a prosecutor that had been unauthorized to practice law for 7+ years at the time, maliciously prosecuted Michuda.

f. Freeman's Office maliciously prosecuted Michuda.

283. Michuda's felony public defender, Constance Ebert was aware that the victim's statements had changed but did not inform Michuda.

284. After months without communication, Ebert coerced Michuda to plead guilty on 5/9/94 to the victim's coerced allegations.

a. Ebert coerced Michuda to plead guilty to 2nd degree criminal sexual conduct, despite his repeated denial of the allegations.

b. Ebert told Michuda that he had been in jail too long already and that if he were to plead guilty he could go home that day, breaking Michuda down emotionally, he then agreed simply to go home.

c. Ebert coerced Michuda to plead guilty under duress of imprisonment.

d. Ebert manipulated Michuda into pleading guilty.

e. Ebert's objective was to obtain a guilty plea, avoid going to trial, and reduce her caseload; Ebert's objective is in conflict with representing Michuda's

rights and his best interest.

f. Ebert cooperated with Graham to convict Michuda.

285. Ebert never provided Michuda with any victim statement, or victim interview transcripts concerning the allegations against Michuda.

286. At sentencing, covering for the absent Ebert, David Cohoes coerced Michuda to reaffirm his guilty plea.

a. During the Pre-Sentence Investigation (PSI), Michuda continuously maintained his innocence, denying the allegations repeatedly in the psychological and probation interviews.

b. Michuda continued to deny the allegations at the sentencing hearing.

c. Cohoes threatened Michuda with a new charge of perjury and be immediately returned to jail.

d. Cohoes coerced Michuda to plead guilty under duress of imprisonment.

e. Cohoes bullied Michuda into pleading guilty.

f. Judge Ann Alton should not have accepted Michuda's guilty plea, should have delved more into why Michuda denied allegations during PSI.

287. Cohoes replacing Ebert at sentencing was a tactic/strategy to get Michuda to reaffirm his guilty plea.

a. Public defenders' goal is to obtain a quick end to proceedings and move on to the next case(s).

b. The Public Defender System is underfunded; public defenders cannot afford to spend too much time closing cases *they* do not intend to take to trial.

c. Public defenders' goal is to avoid going to trial.

d. Public defenders have an obligation [to the Public Defender System] to avoid going to trial.

e. The Public Defender System is underfunded; public defenders cannot afford to take too many cases to trial.

f. Public defenders have an obligation [to the Public Defender System] to obtain "plea bargains".

g. Taking back a guilty plea is counter-productive to public defenders' goal of closing case(s).

h. Taking back a guilty plea is time-consuming, and costly.

i. Michuda had a right to be represented by the same attorney at all stages (pre-trial, trial, plea, and sentencing).

j. Changing public defenders removed any familiarity Michuda might have had with Ebert.

k. Changing public defenders was used to offset Michuda's stubborn position that he wanted take back his guilty plea because he was in fact innocent of the alleged crime.

l. Cohoes easily coerced/convinced Michuda to waive fact that he could have waited until Ebert was available.

m. Cohoes easily coerced/bullied Michuda to reaffirm his guilty plea.

n. Public defender goals and obligations are, at times, in conflict with protecting the rights of their indigent clients.

288. Ebert and Cohoes failed to aggressively act on Michuda's behalf during trial and sentencing stages.

289. Ebert and Cohoes failed to represent Michuda's best interests during trial and sentencing stages.

290. Ebert and Cohoes failed to protect the rights of Michuda despite his continued denial of the allegations during trial and sentencing stages.

291. Had either Ebert or Cohoes sought the facts, certain behaviors still may have warranted the need for counseling, treatment or education, but would not have amounted to a criminal conviction.[169]

292. Michuda's continued denial of the allegations during treatment resulted in two probation violations, and serving the remainder of his prison sentence.

293. During revocation hearings Ebert and Kevin Des Lauriers' tactic/strategy was to obtain a quick end to proceedings.

    a. Both Ebert and Des Lauriers' (at separate hearings) convinced Michuda that he could not argue "why" he failed treatment, only that he did fail; convincing Michuda he had no choice but admit that he did in fact fail treatment.

    b. Ebert and Des Lauriers' were aware Michuda claimed innocence.

    c. Ebert and Des Lauriers' were aware that Michuda could not complete treatment because he claimed innocence.

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[169] During the 1994 PSI, multiple professionals noted Michuda's extreme lack of effect and significant history of childhood trauma.

d. Ebert and Des Lauriers' would not allow Michuda to argue his innocence, the cause for failure of treatment, at revocation hearings.

294. Ebert and Des Lauriers failed to aggressively act on Michuda's behalf during probation violation hearings.

295. Ebert and Des Lauriers failed to represent Michuda's best interests during probation violation hearings.

296. Ebert and Des Lauriers failed to protect the rights of Michuda during probation violation hearings.

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297. Michuda was denied effective representation of counsel 1995-96 on his [first] postconviction relief petition (review of his 1994 conviction).

298. The Appellate Public Defenders Office unconstitutionally refused to assist Michuda on his 1995-96 postconviction relief petition.

a. In 2006, the Minnesota Supreme Court ruled that denial of counsel at postconviction stage is structural error and Appellate Public Defenders' refusal to assist is unconstitutional.[170]

b. Appellate public defenders were already obligated to assist;[171] *Deegan* made the obligation "crystal-clear".[172]

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[170] *Deegan v. State*, 711 NW2d 89, 98 (Minn.2006).

[171] *State v. Myers*, 273 NW2d 656 (Minn.1978) (An [indigent] is entitled to at least one state correction process by direct appeal or post-conviction proceeding); and *State v. Seifert*, 423 NW2d 368 (Minn.1988) (Public defender could not refuse to represent an indigent on appeal [or post-conviction] who applied for representation).

[172] As stated in *Michuda v. State*, File No. 27-CR-94-006534, *Order Denying Motion to Compel Discovery, Denying Request for Appointment of Counsel, and Denying Petition for Postconviction Relief* (Henn.Co.Dist.Ct.2016), at item 29.

c. An indigent denied the effective-assistance-of-counsel cannot be expected to know he could challenge such denial ten to twelve years later.

d. Without the effective assistance of counsel Michuda could not meaningfully have appealed the 1996 order denying his postconviction petition.[173]

e. Without the effective assistance of counsel Michuda could not meaningfully have filed another postconviction petition within 2-years based upon his lack of counsel during his 1st postconviction proceeding.[174]

f. Without the effective assistance of counsel Michuda could not meaningfully have brought the ineffective-assistance-of-appellate-counsel-claim on postconviction within two years of *Deegan*.[175]

g. Michuda, an indigent unskilled in law, denied the effective assistance of counsel [at all stages], cannot possibly be expected to read, understand, or even keep up to date on new caselaw, such as *Deegan* or *In Re Graham*, and then know if, when, or how it applies to him or his decade(s) old conviction.

299. Ann McCaughan, under policies and instructions of the Board of Public Defense and the State Public Defender, intentionally refused to assist Michuda on his claims of innocence, ineffective-assistance-of-counsel, and coercion to plead guilty by his public defender(s).

300. McCaughan, under policies/instructions of the Board and State Public Defender, deprived Michuda of his right to one meaningful review of his 1994 conviction.

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[173] As was suggested, *id.*
[174] *Id.* (though, 2-year time limit was not added to *Minn.Stat.§590.01* until 2005).
[175] *Id.*

301. McCaughan, and the Appellate Public Defender's Office, repeatedly refused to assist Michuda on postconviction, including:[176]

- 10/9/95 letter from appellate public defender Mark F. Anderson, "there is probably nothing we can do for you", but sent Michuda intake forms.
- 10/25/95 letter from McCaughan, "if there were appealable issues, the appeal process takes about 8 to 12 months, which would be after your release date", "there is nothing our office can do for you."
- 11/2/95 letter from McCaughan, "there is nothing left for us to do in your case, and I don't believe there is anything you can accomplish either;" then asked that Michuda file a waiver of counsel form saying he was choosing to move forward against McCaughan's advice [of which was to do nothing].
- 12/28/95 letter from McCaughan, "I don't think a motion to withdraw your guilty plea could be prepared and ruled on before your release date", "I am frankly very puzzled why you would risk facing worse consequences so close to your release date", "If you plan to pursue withdrawing your plea against this professional advice, you will do so without any assistance from attorneys provided by the state"; McCaughan enclosed a waiver of counsel form. ***Note:*** *Though Michuda did request the waiver of counsel form, he had also stated*

[176] Each letter is on file at the Appellate Public Defender's Office.

that he would not file such a form if McCaughan did not refer Michuda to someone that could assist him.

- 1/16/96 letter from McCaughan, acknowledges that Michuda felt coerced into pleading guilty, but still cannot withdraw plea, "My best professional advice is to finish serving your time, let go of any hope of proving your innocence to a court", "I'm sorry this isn't the advice you want to hear."
- 2/22/96 letter from McCaughan, discussed Michuda's file with supervisor, "I will not be asking the court to withdraw your guilty plea", "there is no basis to do so", stating if Michuda were to proceed on his own the court will appoint McCaughan to appear with Michuda of which she would inform the court that petition has no merit, "I am taking no further action on your file."
- 4/24/96 letter from McCaughan, "Neither LAMP nor LAP can advise you on a *pro se* petition for post-conviction relief", "I have already advised you that it is in your best interest to refrain from filing a petition. I will not look it over to see if you have done it correctly, if you do decide to file a petition", "if you are proceeding *pro se*, I suggest you file a waiver of counsel form", "I have returned your file to a "closed" status."
- 5/31/96 letter from McCaughan, court sent her copy of the postconviction petition, McCaughan noted that Michuda was proceeding without counsel, that Michuda had not returned the waiver of counsel form;

McCaughan enclosed a new copy of waiver of counsel form. ***Note:*** *McCaughan never informed the court that Michuda's petition had no merit as she stated she would in 2/22/96 letter.*

- 6/7/96 letter from McCaughan, "You do have a right to file a petition for postconviction relief and an attorney will be assigned to represent you if you are indigent", "I am the attorney assigned to you, and the office will not assign a different attorney", "You have a right to effective assistance of counsel, but I also have a duty not to present meritless claims to the court", "my representation will not help you", "I will appear with you. I will not call witnesses and will not argue on behalf of your allegations"; McCaughan then stated she 'knows' Michuda's claims are untrue (though provided no proof or a basis why she believed this); "Your choices are: (1) to proceed with your petition with me present as counsel but not arguing on behalf of your allegations; (2) or you can sign a waiver of counsel form and represent yourself on your petition; (3) or you can withdraw your petition for post-conviction relief". ***Note:*** *each choice involved "no assistance from counsel."*
- 6/14/96 letter from McCaughan, "You wrote that this office does not have permission to represent you", taking out of context Michuda's statement that under the circumstances [described in the 6/7/96 letter], McCaughan does not have permission to represent Michuda in court "unless I am present"; McCaughan again urged Michuda to

sign/return waiver of counsel form, "Upon receipt, I'll be glad to provide you with a copy of your letters before I re-close your file", (essentially blackmailing Michuda into waiving his right to counsel by holding hostage copies of all correspondence with the Appellate Public Defender's Office). ***Note:*** *Michuda did not waive his right to counsel and McCaughan did not send him a copy of any correspondence—Michuda did eventually receive the correspondence well over a decade later.*

- 8/7/96 letter from McCaughan, she will not appeal the denial of the postconviction petition because Michuda filed *pro se*.

302. McCaughan repeatedly pushed Michuda to waive his right to counsel, despite fact it was McCaughan refusing to assist Michuda on his postconviction claims.

303. McCaughan unconstitutionally pushed Michuda to waive his right to appellate counsel after refusing to assist him.

304. Michuda repeatedly refused to waive his right to appellate counsel.

a. Michuda never intended to waive his right to appellate counsel.

b. Michuda never refused to have counsel, in fact he *wanted* counsel.

c. There is no court record of Michuda refusing counsel.

d. Counsel was refusing to assist Michuda.

e. Counsel's advice to "not challenge his conviction" was not in Michuda's best interest.

f. Any perceived waiver of appellate counsel is forcefully misconstrued.[177]

g. There were no facts or circumstances that demonstrated a valid waiver.

h. There was no written waiver, signed by Michuda.[178]

i. Counsel was never properly waived in Michuda's 1995-96 postconviction.

305. McCaughan did not have any information necessary to make the decision that Michuda's case "was without merit."

306. McCaughan never informed the court that Michuda's case "was without merit".

307. McCaughan made no attempt to assist in any research to support Michuda's arguments or advise Michuda on how to proceed.

308. McCaughan refused and failed to gather necessary information needed for an appropriate postconviction review.

309. McCaughan refused to prepare a postconviction petition on behalf of Michuda.

310. McCaughan refused to look over the petition Michuda prepared.

311. McCaughan failed to aggressively act on Michuda's behalf.

312. McCaughan failed to represent Michuda's best interests.

313. McCaughan failed to protect the rights of Michuda.

314. McCaughan simply just did not want to represent Michuda or take any action

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[177] Including in a 2016 [second] postconviction decision, William H. Koch, Judge of Hennepin County District Court, ruled Michuda did waive appellate counsel based solely on McCaughan's 6/14/96 letter, despite the court admitting "what Michuda's response was is unclear" (the court did not have Michuda's letter), which precipitated McCaughan's letter.

[178] *Id.*, the court did not have or review Michuda's letter; McCaughan also did not view the letter as a valid waiver as she again asked Michuda to sign a waiver form that she added in response, of which Michuda refused to sign because he in fact wanted the effective assistance of counsel.

on Michuda's behalf.

315. McCaughan clearly, and repeatedly stated she was not going to assist Michuda on his postconviction petition.

316. There is little to no history of McCaughan, or the Appellate Public Defender's Office, pursuing ineffective-assistance-of-counsel claims against public defenders on behalf of the indigent.

317. It is common practice that the Appellate Public Defender's Office does not pursue ineffective-assistance-of-counsel claims against public defenders.

318. McCaughan's advice "not to challenge his conviction" was not advice in Michuda's best interest.

a. It was/is in Michuda's best interest to challenge his 1994 conviction, no matter how "close he was to his release date".

b. Michuda did not commit the alleged crime.

c. Michuda was coerced to plead guilty by Ebert.

d. Michuda was coerced to reaffirm his guilty plea at sentencing by Cohoes.

e. Michuda was denied the effective assistance of counsel.

f. Michuda's conviction interfered with his ability to finish education in advertising design.

g. Michuda's conviction caused him to lose a job at Mystic Lake Casino.

h. Michuda's conviction caused him to be denied temp work in an office, an opportunity to move out of labor, warehouse, and fast food positions.

i. Michuda's conviction limited him to jobs and housing that did not have "felony" question on applications, or likely to not do a background check.

j. Michuda's conviction kept him in debt because he was unable to find decent work, repay his defaulted school loans so he could return to finish his education, eventually get a better job, start a career.

k. Michuda's conviction has held him down, kept his mind numb, making him more of a detriment to the world around him.

l. Michuda's conviction was used to increase/enhance/double the sentence in a later conviction.

319. McCaughan's "advice to finish serving your time, let go of any hope of proving your innocence to a court" is not advice, especially if it is not in Michuda's best interest.

a. McCaughan's "advice" only served the interest of the Appellate Public Defender's Office.

b. McCaughan's "advice" is not advice if the Public Defender System has taken the stance that public defenders will not assist on any indigents' complaint against any public defender, and any "advice" to achieve that outcome is a conflict of interest.

c. McCaughan's "advice" was part of an agenda to not "rock the boat" because John Stuart issued a statement in *Kennedy v. Carlson*, 544 NW2d 1 (1996), that there were no complaints or malpractice suits against public defenders.

320. McCaughan actively worked against Michuda when she refused to pursue ineffective-assistance-of-counsel-claims during the pendency of *Kennedy*.

321. The Appellate Public Defender's Office refused to assist on all ineffective-assistance-of-counsel-claims during the pendency of *Kennedy*.

322. All avenues for complaint against public defenders were/are blocked, especially when the Appellate Public Defender's Office refuses to assist on ineffective-assistance-of-counsel-claims.

323. Without proper representation, Michuda was not able to present his [first] postconviction claims to the court effectively.

324. Michuda's [first] post-conviction petition was erroneously dismissed because he was entitled to the *effective* assistance of a public defender.

325. McCaughan was a combative public defender that refused to assist Michuda on ineffective-assistance-of-counsel-claims because that was/is the standard of practice.

326. Because Michuda has never had the constitutionally required effective-assistance-of-counsel, at trial/sentencing and review stages, he has been unconstitutionally time-barred and/or *Knaffla*-barred.

   a. Michuda's claims asserting ineffective-assistance-of-counsel, trial or appellate, are not waivable.

   b. Michuda's claims asserting prosecutorial misconduct are not waivable.

   c. Michuda further asserts that if such claims cannot be waived or forfeited, then the same cannot be blocked or barred.

d. Michuda cannot waive or forfeit review of an illegal conviction/sentence.

e. Without the effective-assistance-of-counsel, Michuda is just simply "stuck".

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327. Michuda was denied effective representation of counsel in a 2004 misdemeanor.

328. James Grochal coerced Michuda to plead guilty to 5th degree domestic assault.

a. Michuda can easily be coerced.

b. Grochal manipulated Michuda into pleading guilty.

c. Grochal told Michuda that he was guilty because he was angry when he disciplined his son; there were no reported signs of harm to Michuda's son.

d. Grochal failed to inform Michuda of his parental right to discipline his son.

e. Grochal's objective was to obtain a guilty plea, avoid going to trial, and reduce his caseload; Grochal's objective is in conflict with representing Michuda's rights and his best interest.

f. Grochal cooperated with the Hennepin County Attorney's Office[179] to convict Michuda.

329. Grochal failed to represent Michuda's best interest or protect Michuda's rights.

330. Grochal did not aggressively act on Michuda's behalf.

331. Grochal failed to inform Michuda that a complaint was never filed.

332. Grochal failed to inform Michuda that there were no victim or witness statements.

333. Had Grochal represented the best interest of Michuda, there would not have been a conviction in 2004 because no crime had been committed.

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[179] Mike Freeman was replaced by Amy Klobuchar as County Attorney 1998-2007; wherein Freeman was eventually reelected, retiring January 2023.

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334. Michuda was denied effective representation of counsel in 2007-08 during pre-trial, plea, and sentencing hearings.

335. After months without communication, Kevin Shea coerced Michuda to plead guilty to five separate felonies.[180]

a. Michuda is easily coerced; Shea manipulated Michuda into pleading guilty.

b. Shea cooperated with Backstrom's Office to convict Michuda.

c. Shea conspired with Backstrom's Office to convict Michuda.

d. Shea told Michuda he worked under Backstrom as a prosecutor prior to being appointed as Michuda's 2007 trial counsel.

e. Shea feared and/or admired Backstrom.

f. Shea has an allegiance to Backstrom.

g. Shea had Michuda waive jurisdictional issues though much of the alleged crimes had not been committed in Dakota County.

h. Shea had Michuda waive rights to jury trial, and jurisdictional issues without any logical sense or strategy.

i. Michuda's waiver of jury trial and jurisdictional issues only benefitted Backstrom's Office.

j. Michuda's jurisdictional waiver was not accurate, voluntary, and intelligent; waiver was sought in the moment, in open court, without ability

[180] Two counts of First Degree Criminal Sexual Conduct, Failure to Register with the BCA, Deprivation of Parental Rights, and Terroristic Threats.

to consult with counsel.[181]

k. Shea took advantage of Michuda's emotional vulnerability by having him enter a straight plea of guilty without any logical sense or strategy.

l. Shea's objective was to obtain a guilty plea, avoid going to trial, and reduce his caseload; Shea's objective is in conflict with representing Michuda's rights and his best interest.

m. Michuda was incompetent to plead;[182] Shea withheld Michuda's mental status from the court.

n. The appellate court stated Michuda's admissions on record were awkwardly elicited.[183]

336. Shea failed to challenge DNA evidence taken from Michuda by threat of force if he did not give it freely.

a. Copy of warrant for DNA evidence was for another person, not Michuda.

b. Shea told Michuda "it was too late, you already gave it to them."

337. Judge McManus, Shea, and the prosecutor withheld Graham's discipline from Michuda, and the impact it had on Michuda's 2007 conviction/2008 sentence.

a. Backstrom's Office sought a departure from the sentencing guidelines.

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[181] *State v. Michuda*, File No. K4-07-0636, Dakota County District Court, Plea Transcript, page 19, at lines 13-25

[182] See *Estock v. Lane* (1988, CA7 Ill) 842 F.2d 184 (petitioner was incompetent at time he entered guilty plea; petitioner had attempted suicide 6 days before entry of plea unbeknownst to judge accepting plea, public defender, or prosecutor; and transcript of proceedings before judge at time guilty plea was taken revealed that petitioner was not acting in understanding and comprehensible manner).

[183] *State v. Michuda*, Minn.Unpub.Lexis 838 (Minn.App.2009), Case No. A08-1037.

b. The 1994 conviction was used to enhance/double Michuda's 2008 sentence.

c. Judge, Shea, and prosecutor knew Graham prosecuted Michuda in 1994.

d. Graham had actively practiced law while on CLE restricted status from 11/5/86 to 6/27/07; Graham had been unauthorized to practice law for 7+ years when she prosecuted Michuda's 1994 case.

e. Judge, Shea, and prosecutor were keenly aware of Graham's discipline.

f. Graham's misconduct has the potential to result in a deprivation of due process and an unfair trial.

g. Graham's prosecution of Michuda's 1994 case must be reviewed to consider whether Michuda's rights were adversely affected.

h. Shea was "ready to go" to sentencing, less than two weeks after Graham's discipline was decided, and he had *just* received Michuda's PSI Report.

i. Shea did not inform Michuda that Graham's discipline likely impacted the ability of Backstrom's Office to seek a sentencing departure.

j. Judge McManus, Shea, and Backstrom's Office conspired to convict and sentence Michuda to the maximum sentence possible.

338. Shea unethically moved forward with the 10/16/07 plea hearing despite an unresolved written complaint made by Michuda on 9/17/07.

a. Shea did not seek mutually acceptable resolutions of the disagreement before the plea process began.

b. Shea also knowingly allowed Michuda to commit perjury at the plea hearing when Michuda was asked about Shea's representation; Shea knew

of Michuda's written complaint, knew Michuda outwardly presented as having a "flat affect", knew Michuda was easily manipulated and coerced, knew Michuda was incapable of confronting Shea.

c. Shea did not seek mutually acceptable resolutions of the disagreement when the 9/17/07 complaint was attached to the PSI report Shea received on 2/14/08; in fact, on 2/15/08 Shea was "ready to go" to sentencing, despite the fact that he *just* received the PSI report/evaluations, and had not had any contact with Michuda for four months.

d. Shea did not seek mutually acceptable resolutions of the disagreement after the 2/20/08 Special Hearing called by Judge McManus about the issues.

339. Shea's workload was not controlled so that each matter could be handled competently.

a. On 7/11/07 Shea informed Michuda that he did not have time to deal with the three lesser charges, that he could only focus his time and effort on Michuda's two more serious charges.

b. On 2/20/08 Shea told Michuda that he had sixty other cases, that Michuda had every right to fire Shea.

340. Shea never provided Michuda with any victim or witness statement (discovery) concerning the allegations against Michuda:

a. On 3/12/07 Shea promised Michuda that he would send some victim statements by mail for Michuda's review.

b. Shea also told Michuda that he would later bring a laptop with all statements so that they could go over them line by line.

c. Shea never sent Michuda any victim statements.

d. Shea never visited Michuda with his laptop to review any statements.

341. Shea failed to provide any requested/promised information to Michuda, including:

- 3/12/07 Michuda gave Shea documents of which he promised to return, but failed to do so.
- 3/14/07 Michuda mailed Shea some court documents he had received, asking that they be returned after Shea reviewed them; the documents were never returned.
- 4/16/07 Michuda requested by mail for Shea to send the previous information requested/promised; Shea did not respond.
- 6/7/07 Michuda requested by mail for Shea to obtain information that could support diminished responsibility claims, and to send the previously requested/promised information and statements; Shea did not respond.
- 12/18/07 Michuda wrote a letter to Millie Godding, the PSI interviewer, that included complaints about Shea's failure to send information he had promised; Godding attached the letter to the PSI report of which Shea received on 2/14/08; Shea still failed to provide the promised materials.
- 2/19/08 Michuda met with and complained to Kristen Lee, Dispositional Advisor for the Dakota County Public Defender's Office, about Shea's failure to provide requested/promised information; no action

materialized from the complaint.

- 2/20/18 Though a Special Hearing was called by Judge McManus concerning the client-attorney issues, Shea still did not send Michuda the requested/promised materials (Judge McManus called for the hearing after Michuda phoned him on 2/19/08, before meeting with Kristen Lee, and left a message concerning the issues).
- 3/11/08 Michuda called, leaving a message, asking Shea to send information that concerned collateral attack issues; Shea ignored request.
- 3/13/08 Shea informed Michuda that he would give Michuda additional documents to review when they met again on 3/17/08 or 3/18/08;[184] Shea did not show up, did not provide the promised documents.
- 3/28/08 Michuda mailed a written request to Shea requesting a copy of the case file so Michuda could begin the appeal process; Shea and the Dakota County Public Defender's Office did not respond.

342. Shea failed to send Michuda necessary information, or otherwise notify Michuda in a timely manner:

- 9/17/07 Shea failed to inform Michuda in a timely manner of a written plea proposal from the prosecutor; dated 7/25/07; offer expired on 9/4/07; Shea had the plea proposal in his possession for nearly two months before giving it to Michuda on 9/17/07, two weeks after it expired!

[184] **Note:** Shea stated for example, "We will meet Monday or Tuesday"; Michuda merely recorded each day promised at the time when the promise was made.

- 1/11/08 Michuda was scheduled for sentencing, but Shea did not inform him that it had been continued nor the reason why; when Shea met with Michuda on 2/15/08 (after four months without any contact, and one month after a 1/17/08 letter complaining of not being informed), Shea stated he "thought" he mailed the order for continuance to Michuda; Shea still never provided Michuda a copy of the order.
- 3/13/08 Shea gave Michuda [another] order stating that the new sentencing date (2nd continuance, result of 2/20/08 Special Hearing) was scheduled for 3/20/08 (Blakely Hearing), and 3/21/08 (Sentencing); the order was dated 2/22/08, addressed to Shea's office and stamped as received on 2/27/08, but did not promptly send/give to Michuda for another two weeks.

343. Shea failed to respond to or acknowledge receipt of any mail from Michuda over a thirteen-month period, including:

- 3/14/07 Michuda asking if a therapists/psychologist could be appointed to get counseling for mental health concerns; also requested return of documents sent to Shea; no response.
- 3/21/07 Concerning plea negotiations with prosecutor and possible pleas negotiated directly with the judge; no response.
- 4/16/07 Concerning plea bargaining, negotiations; preparations for trial, options for defense; request for information; and raised questions concerning additional information being raised in CHIP's Hearings; no response.

- 5/15/07 Concerning possible plea negotiations; no response.
- 6/7/07 Request to obtain information that could support diminished responsibility claims, and to send Michuda the previously requested/promised information and statements; no response.
- 6/17/07 Questions concerning responsibility, diminished responsibility; pointed out that no previous letters had been answered; specifically asked that this letter be answered before the upcoming July 6 court date; no response.
- 9/17/07 Michuda's response to prosecutor's plea offer (delivered late by Shea after it had expired, see above at 9/17/07); also included written complaint about Shea's representation; no response; on 12/18/07 Michuda also mailed a copy of this letter to Millie Godding, PSI interviewer, of which was attached to the PSI report, of which Shea received on 2/14/08, but still did not respond to the letter or any of the issues complained of.
- 11/14/07 Michuda asking to be sent the PSI and psychological evaluation results when Shea received them; no response.
- 1/17/08 Michuda complaining that he had not been notified of [the first] continuance of the sentencing hearing date; no response; but Michuda did receive a verbal response on 2/15/08, one month after the complaint (and four months without any contact, including no response to the 11/14/07 and 1/17/08 letters), Shea stated he

"thought" he mailed the order for continuance.

- 1/18/08 Michuda mailed a letter to Millie Godding, PSI interviewer, complaining of Shea's failure to inform Michuda of [the first] continuance, of which was attached to the PSI report, of which Shea received on 2/14/08, but still did not respond to the letter or any of the issues complained of.
- 2/14/08 Michuda mailed a post-card requesting a copy of the PSI and psychological evaluations, and police interviews/statements; requesting that Michuda receive them by the following Monday or Tuesday; Shea did just happen to receive the PSI report/evaluations on 2/14/08, and did deliver them to Michuda on 2/15/08, but did not respond to any of the other requested information; in fact, on 2/15/08 Shea was "ready to go" to sentencing, despite the fact that he *just* received the PSI report/evaluations, and had not had any contact with Michuda for four months, and sentencing was just six days away, three of which were a holiday weekend.[185]
- 3/28/08 Michuda mailed a written request to Shea requesting a copy of the case file so Michuda could begin the appeal process; Shea and the Dakota County Public Defender's Office did not respond.

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[185] *U.S. v. Blythe*, 944 F.2d 356 (7th Cir. 1991): "*Blythe* informs us that, under 18 U.S.C. §3552(d), a presentence report must be given to the defendant and his counsel at least ten days prior to the date set for sentencing."

344. Shea could not be reached by phone and failed to respond to messages when Michuda was able to leave one, including:

- 2/28/07 Michuda attempted to call Shea at the phone number from the letter indicating that Shea was appointed as Michuda's public defender; Shea was not reachable.
- 3/1/07 Michuda again attempted to call Shea at the phone number provided; Shea was not reachable.
- 8/??/07 In late August, using the main Dakota County Public Defender's Office phone number, Michuda left a message concerning Shea's failure to show up for a planned meeting for the first week of August; no response.
- 9/??/07 In late September, again using the main number, Michuda left a message concerning the lack of any response to Michuda's 9/17/07 letter, his decision not to accept prosecutor's expired plea offer (see above at 9/17/07); message also included other possible solutions, and concerns about Shea's representation; no response.
- 2/19/08 Despite a phone message to Shea (left with receptionist) that Michuda's wanted to have Shea removed and replaced as counsel (the same message left for Judge McManus), and despite the Special Hearing called the very next day concerning the attorney/client issues, Shea still did not attempt to resolve any of those issues.

- 3/3/08 First time Michuda actually reached Shea by phone; Shea stated that he would meet with Michuda on 3/4/08 or 3/5/08; Shea did not show up for the promised/planned meeting.
- 3/11/08 Michuda left message, asking Shea to send information that concerned collateral attack issues, and asked when they might meet; Shea did meet with Michuda on 3/13/08, but never responded to the request (see also 3/13/08, above).

345. Shea failed to show up at planned meetings with Michuda, including:

- 3/12/07 Shea promised that he would meet with Michuda and use a laptop to go over all statements line by line; meeting did not occur.
- 7/11/07 Shea promised that he would meet with Michuda the first week of August, the whole day if needed; meeting did not occur.
- 2/20/08 At a Special Hearing concerning client-attorney issues, Judge McManus ordered on court record that Michuda would prepare a written decision concerning Shea's representation by 2/26/08, of which the judge presumed Shea would meet with Michuda, discuss their issues, and the judge would receive the written decision via Shea based upon that presumption; Shea did promise Michuda they would meet on 2/21/08 or 2/22/08; the judge did not receive the written decision because Shea failed to show up for the promised meeting; basically no decision was made, Michuda was in no position

to represent himself; per the judge, to terminate counsel would be viewed as a waiver of Michuda's right to counsel.

- 3/3/08 Shea promised he would meet with Michuda on 3/4/08 or 3/5/08; meeting did not occur.
- 3/13/08 Shea promised he would meet with Michuda on 3/17/08 or 3/18/08; meeting did not occur.

346. Shea failed in his promise to have Dispositional Advisor and other experts meet with Michuda to assist with his case, including:

- 3/12/07 Shea promised a meeting with a DNA Expert; no meeting occurred.
- 6/5/07 Shea promised a meeting with "People in [Shea's] office, such as Dispositional Advisor, that may be beneficial as far as getting [Michuda] into treatment and be rehabilitated instead of being thrown away like garbage, into prison"; no meeting occurred.
- 9/17/07 Shea promised a meeting with a Dispositional Advisor; no meeting occurred.
- 10/16/07 Shea informed Michuda that he was "hoping that the Dispositional Advisor would meet [Michuda] before today's Plea Hearing"; when that did not happen, Shea informed Michuda that he "hoped that the Dispositional Advisor would meet [Michuda] before the end of the day"; no meeting occurred; Shea was not reachable for four months following plea hearing.

- 2/19/08 The Dispositional Advisor finally met with Michuda long after it would do any good, just two days before the then scheduled Blakely and Sentencing Hearings, and the same afternoon after Michuda left a message for both Judge McManus and Shea, that he intended to have Shea removed and replaced as counsel; also, was long after the 11/8/07 PSI interview, and 12/17/07 and 1/18/08 psychological evaluations, of which the Dispositional Advisor's advice would have helped as Michuda would not have incriminated himself.

347. Shea failed to pursue Michuda's claim that he had been informed in 2004 by Hennepin County Probation Officer, Patrick Guernsey, that he was not required to register with the BCA.

    a. Guernsey confirmed this fact through the BCA.

    b. Michuda was incompetent to plead.

    c. Michuda is not guilty of failure to register with the BCA, yet Shea walked Michuda down the path to plead guilty.

    d. Shea told Michuda he did not have time to deal with his lesser charges, that he could only focus his time and effort on Michuda's more serious charges.

348. Shea failed to pursue Michuda's claims that his daughter left with him voluntarily, and that the mother had no parental rights over their daughter after kicking her out of the house on more than one occasion.

    a. Michuda was incompetent to plead.

b. Michuda is not guilty of deprivation of parental rights yet Shea walked Michuda down the path to plead guilty.

c. Shea told Michuda he did not have time to deal with his lesser charges, that he could only focus his time and effort on Michuda's more serious charges.

349. Shea improperly disregarded circumstances pertaining to collateral attack issues that would have negated any departure from the sentencing guidelines.

a. Shea's workload was not controlled so that each matter could be handled competently.

b. Shea informed Michuda that he did not have time to handle all of Michuda's charges, that he had sixty other cases.

c. Shea ignored Michuda's 3/11/08 request [phone message], asking for information concerning collateral attack issues.

d. Shea did meet with Michuda on 3/13/08, but did not respond to the request concerning collateral attack issues; Shea only promised he would give Michuda additional documents to review when they met again on 3/17/08 or 3/18/08; but Shea did not show up, did not provide the promised documents.

e. At the 3/21/08 sentencing hearing, Shea read Michuda's written statement into the court record bringing into question the circumstances of his 1994 conviction,[186] therefore the claim of collateral attack of his prior sentence was raised at sentencing, but Shea still did nothing, said nothing (all

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[186] *State v. Michuda*, File No. K4-07-0636, Dakota County District Court, Sentencing Transcript, page 17, lines 4-16

decisions appeared already made, the judge was busy printing his order/decision while Shea read Michuda's statement).

350. Shea failed to challenge an assessment used in Michuda's Blakely and Sentencing Hearings which was not completed in accordance with Minn. Stat. §609.3457, subd. 1a. (2005).

a. Backstrom's Office sought a departure from the sentencing guidelines.

b. By law an assessment is to be completed by the Minnesota security hospital and provide the court with recommendations.

c. After completion of an assessment by the Minnesota security hospital, Judge McManus ordered an outside evaluator to do a separate assessment.

d. At the 3/20/08 Blakely Hearing, Kimberly S. Harrison, PhD, stated on record that the Minnesota security hospital determined Michuda did not meet criteria for further evaluation.[187]

e. Even in sealed Trial Exhibit B, Judge McManus stated that Harrison made no recommendations.

f. The assessment done by Patricia K. Orud, MA, LP, was done outside of Minn. Stat. §609.3457, subd. 1a. (2005).

g. Orud is not a Minnesota security hospital qualified person to do an assessment per Minn. Stat. §609.3457, subd. 1a. (2005).

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[187] Blakely Hearing has not yet been transcribed; all attempts to obtain the transcript have failed or been denied (2009, 2010, and 2016).

h. Orud's assessment is not valid, was not completed in accordance with Minn. Stat. §609.3457, subd. 1a. (2005), and should not have been allowed to be used in Michuda's Blakely and Sentencing Hearings.

i. Orud's assessment should not have been used in Michuda's case to depart from the sentencing guidelines.

351. Shea failed to pursue mitigating factors at the 3/20/08 Blakely and 3/21/08 Sentencing Hearings.

a. At the 10/16/07 Plea Hearing, Shea stated on record he would pursue mitigating factors at the Blakely and Sentencing Hearings.

b. Shea did not communicate with Michuda for several months after the Plea Hearing; Shea got what he wanted, a guilty plea, communication was apparently unnecessary.

c. Shea did not discuss mitigating factors with Michuda.

d. Shea did not pursue any mitigating factor.

e. Shea did not pursue the fact that Michuda is amenable to probation and treatment.

f. Shea did not pursue Michuda's dysthymic disorder (diagnosed, 2008 PSI) as a mitigating factor.[188]

352. Shea failed to research or seek alternate sentencing at the 3/20/08 Blakely and 3/21/08 Sentencing Hearings.

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[188] *In Re Munns*, 427 N.W.2d 670, 671 (Minn. 1988) (dysthymic disorder symptoms described, used as a mitigating factor).

a. At the 10/16/07 Plea Hearing, Shea stated on record he would research and seek alternate sentencing at the Blakely and Sentencing Hearings.

b. Shea failed to research or seek alternate sentencing when Michuda made written arguments for an alternate sentence in letters to Shea dated 3/21/07, 4/16/07, and 5/15/07.

c. Shea failed to research or seek alternate sentencing as he stated when he met Michuda and discussed the same on 10/12/07.

d. Shea improperly disregarded circumstances pertaining to collateral attack issues of which would have affected sentencing.

353. Shea failed to pursue alternate defenses, such as diminished responsibility, at the 3/20/08 Blakely and 3/21/08 Sentencing Hearings.

a. On 10/12/07 Shea informed Michuda it would be better to pursue diminished responsibility arguments at sentencing.

b. On 2/15/08 Shea informed Michuda that it was too late for diminished responsibility arguments, should have been pursued before pleading guilty.

354. Shea failed to inform Michuda at 3/21/08 Sentencing that he should/could object to the 60-years incarceration, lifetime conditional release and the undetermined amount of restitution.

a. Shea did not object or act on behalf of Michuda.

b. Per the Petition to Enter a Guilty Plea, signed and dated 10/15/07, Michuda understood that he was only facing the maximum of 30 years incarceration, 10 years conditional release, and there was no mention of any restitution.

c. There was no mention of restitution in the courtroom.

d. Shea never discussed restitution with Michuda.

e. Michuda was incompetent to plead.

355. Shea failed to voice Michuda's objection at 3/21/08 Sentencing, to additional information presented by the prosecutor from the victim impact statement.

a. At the 10/16/07 Plea Hearing it was stated on record that it is Michuda's right to challenge any new information presented by the prosecutor at sentencing.

b. In a 4/16/07 letter to Shea, Michuda first raised questions concerning additional information that was being raised in CHIP's Hearings.

c. On 2/27/08 Michuda instructed the CHIP's public defender to give Shea a copy of the newly disclosed victim impact statement and that Michuda objected to the new/additional information.

d. When Shea and Michuda met on 3/13/08, Michuda again objected to the new information in the victim impact statement.

e. Shea did not object or act on behalf of Michuda.

356. Shea failed to communicate with Michuda for four months following the plea hearing, from 10/16/07 to 2/15/08.

a. Shea got what he wanted, a guilty plea, communication was apparently unnecessary.

b. During this time the 11/8/07 PSI interview occurred; Shea failed to inform Michuda that he should not reveal any self-incriminating information at the PSI interview, that the information would only support the prosecutor's

case for an enhanced sentence.

c. During this time the 12/17/07 and 1/18/08 psychological evaluations occurred; Shea failed to inform Michuda that he should not reveal any self-incriminating information at the psychological evaluations, that the information would only support prosecutor's case for an enhanced sentence.

d. During this time the 1/11/08 sentencing date was changed; Shea failed to inform Michuda of the continuance; Shea failed to inform Michuda of the reason for continuance; Shea failed to respond to or acknowledge receipt of Michuda's complaint that he had not been notified of the continuance; Shea failed to provide Michuda a copy of the order for continuance.

e. On 2/15/08 Shea was "ready to go" to sentencing, despite the fact that he *just* received the PSI report/evaluations, and had not had any contact with Michuda for four months.

357. Shea failed to follow a judge's order;

a. Shea never attempted to resolve any attorney/client conflict with Michuda.

b. Client/attorney issues usually are not resolved before the Plea Hearing; there was an unresolved written complaint made by Michuda on 9/17/07; Shea walked Michuda down the path to plead guilty on 10/16/07.

c. The 9/17/07 complaint was attached to the PSI report Shea received on 2/14/08; on 2/15/08 Shea was "ready to go" to sentencing without addressing the attorney/client issues.

d. On 2/19/08 Michuda left a phone message for Judge McManus and Shea that Michuda wanted to have Shea removed and replaced as counsel.

e. On 2/20/08 Judge McManus called a Special Hearing concerning the attorney/client issues between Shea and Michuda, just before the then scheduled 2/21/08 Blakely and 2/22/08 Sentencing Hearings.

f. Michuda was not allowed to gather his prepared materials (issues of complaint concerning Shea) for the unannounced hearing.

g. Judge McManus ordered on court record (but did not include in written order), that Michuda would prepare a written decision concerning Shea's representation by 2/26/08.

h. Judge McManus presumed Shea would meet with Michuda, discuss their issues, and that the judge would receive Michuda's written decision via Shea based upon that presumption.

i. Shea promised Michuda they would meet on 2/21/08 or 2/22/08.

j. Judge McManus did not receive the written decision because Shea did not show up for the promised meeting.

k. Shea did not seek mutually acceptable resolutions of the disagreement after the Special Hearing; Shea did not attempt to resolve any attorney/client issues raised by Michuda.

l. Basically, no decision was made, Michuda was in no position to represent himself; per Judge McManus, to terminate representation would be viewed as a waiver of right to counsel.

m. The court, the prosecutor, and Shea moved forward as if there were no issues to resolve; Michuda was "stuck", he could do nothing.

n. Shea took full advantage that Michuda was not able to speak for himself.

358. Shea purposely and deliberately kept Michuda's mental status hidden from the court.

a. Shea stated to Michuda on 3/13/08 that Michuda's mental status "is something we did not want the judge to know".

b. Michuda had been on Constant Observation Status (COS) on three occasions, for long periods of time while in the Dakota County Jail, and concerns continued into his prison sentence, including:

- 2/14/07-2/22/07 Morning following arrest, placed into COS after interview with Dakota County Jail Counselor; no personal possessions allowed, rounds every 13-15 minutes made by staff.
- 2/22/07-4/6/07 Placed in maximum custody unit (rather than regular population); continuation from COS, smaller unit, single cells, hourly rounds made by staff.
- 4/6/07-4/14/07 Paced in regular population; large unit, double-bunk cells.
- 4/14/07-4/27/07 Transferred to county jail in Redwing, MN (construction in Dakota County); placed into Special Housing Unit; no more than eight inmates, single cells, regular rounds made by staff.
- 4/27/07-10/17/07 Transferred back to Dakota County Jail; placed into Inmates Motivated to Change Program; less inmates than

regular population, required to participate in daily programs and educational groups.

- 10/16/07 Plea Hearing.
- 10/17/07 Placed into segregation for observation, until investigate concerns other inmates had that Michuda may be suicidal; behavior had been manifesting for several weeks.
- 10/17/07-10/23/07 Placed into COS due to suicidal concerns.
- 10/23/07-2/28/08 Placed into segregation, continuation from COS, Michuda was unable to be around other inmates.
- 2/28/08-3/25/08 Placed into COS after ingesting 73 Ibuprofen and Aspirin he had been hoarding.
- 3/25/08 Transferred to MCF-St. Cloud after being sentenced on 3/21/08.
- 3/25/08-3/27/08 Placed into COS; continuing from Dakota County Jail.
- 4/3/08-4/11/08 Placed into COS; suicidal concerns, Michuda expressed feelings of hopelessness in interview with psychologist, had tied a shoestring around his neck the night before, leaving marks.
- 8/??/08 Late August, transferred to MCF-Rush City.
- 10/2/08 Placed into segregation for refusing to stand and show his ID for count, after appellate counsel refused to assist.

- 10/3/08-10/13/08 Placed into COS after psychologist learned Michuda had not been eating, and because of previous history; Michuda reported later that he attempted to cut himself using the sharp corners of toothpaste tube.
- 10/13/08-2011 Placed into Supportive Living Services Unit; required to take his medication, and attend programming; smaller unit for those dealing with medical or mental health issues.

359. Shea failed to respond to Michuda's request to speak with a psychologist when they met on 3/12/07.

360. Shea failed to respond to Michuda's request to speak with a psychologist in letters dated 3/14/07 and 4/16/07.

361. Michuda's lack of confidence in Shea further contributed to Michuda's mindset; Michuda's mindset is relevant to his ability to make knowing, intelligent, and voluntary decisions.

362. Shea did not inform Michuda that he could/should object to and argue against the prosecutor's intent to seek an enhanced sentence

a. Shea did not act on Michuda's behalf, to object to and argue against the prosecutor's intent to seek an enhanced sentence.

b. Shea improperly disregarded circumstances pertaining to collateral attack issues that would have negated any departure from the sentencing guidelines.

363. On 10/15/07, Shea purposely and deliberately led Michuda to believe he did not want a jury to decide aggravating factors.

a. Michuda was not fully informed, the information given was misleading.

b. Michuda's waiver of right to have jury decide aggravating factors was not a knowing, intelligent, and voluntary decision, nor does it make any logical sense for case strategy.

c. There is no statute, rule of procedure, or constitutional provision in Minnesota that authorizes submitting sentencing factors to a jury.[189]

d. The only way to receive a departure from the sentencing guidelines is if Michuda did waive his right to trial by jury on the aggravating factors.[190]

e. Michuda was incompetent to plead.

f. Shea took advantage of Michuda's emotional vulnerability, particularly by walking Michuda off a virtual cliff by having him waive his rights and enter a straight plea of guilty without any logical sense or strategy.

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364. Michuda was denied effective representation of counsel in 2008-09 on his direct appeal (review of his 2007 conviction/2008 sentence).

365. The Appellate Public Defenders Office unconstitutionally refused to assist Michuda on his 2008-09 direct appeal.

a. Denial of counsel at appellate stage is structural error and Appellate Public Defenders' refusal to assist is unconstitutional.

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189 *A Memorandum to Minnesota Public Defenders: The Effect of Blakely v. Washington on Sentencing in Minnesota.* By Benjamin J. Butler, Assistant Public Defender, July 1, 2004.

190 *Id.*

b. Appellate public defenders are obligated to assist; Michuda is indigent and is entitled to at least one state correction process by direct appeal or post-conviction proceeding; the Appellate Public Defender's Office could not refuse to represent Michuda on direct appeal.

c. Without the effective assistance of counsel Michuda could not meaningfully have appealed his 2007 conviction/2008 sentence.

d. Without the effective assistance of counsel Michuda could not meaningfully have brought the ineffective-assistance-of-appellate-counsel-claim on postconviction within two years of his appellate proceeding.

e. Michuda, an indigent unskilled in law, denied the effective assistance of counsel [at all stages], cannot possibly be expected to read, understand, or even keep up to date on caselaw, rules, statutes, etc., and then know if, when, or how it applies to him or his conviction/sentence.

366. F. Richard Gallo, Jr., under policies and instructions of the Board of Public Defense and the State Public Defender, intentionally refused to assist Michuda on direct appeal and his ineffective-assistance-of-counsel claims.

367. Gallo, under policies and instructions of the Board and the State Public Defender, deprived Michuda of his right to one meaningful review of his 2007 conviction/2008 sentence.

368. Gallo, and the Appellate Public Defender's Office, repeatedly refused to assist Michuda on direct appeal, including:[191]

[191] Each letter is on file at the Appellate Public Defender's Office.

- 9/25/08 letter from Gallo, refusing to assist Michuda on his appeal and claims of ineffective assistance of trial counsel, concerning Kevin Shea of the Dakota County Public Defender's Office.
- 10/15/08 letter from Gallo, refusing to assist, and refused to prepare a brief on Michuda's behalf, leaving Michuda with only two weeks to prepare a pro se brief; Gallo did state, "After you have completed your [*pro se*] brief, and sent it to me for filing with the court, I will inform the court that I have no additional arguments to add."
- 11/5/08 third-party message, Gallo refused to file Michuda's pro se brief and attempted to blackmail Michuda into waiving his rights.

369. Gallo did not have any information necessary to make the decision that Michuda's case "was frivolous and without merit".

370. Gallo never informed the court that Michuda's case "was frivolous and/or without merit".

371. Gallo never informed the court that he had "no additional arguments to add."

372. Gallo made no attempt to assist in any research to support Michuda's arguments or advise Michuda on how to proceed.

373. Gallo refused and failed to gather necessary information needed for an appropriate appellate review.

a. Gallo did not have trial counsel's case file.

b. Gallo did not have sealed "Exhibit B", which is Judge McManus' reasons for departing from the sentencing guidelines.

c. Gallo did not have the 3/20/08 Blakely Hearing transcript, of which the judge's reasons would be derived.

374. Gallo refused to prepare a brief on behalf of Michuda.

375. Gallo failed to aggressively act on Michuda's behalf.

376. Gallo failed to represent Michuda's best interests.

377. Gallo failed to protect the rights of Michuda.

378. Gallo simply just did not want to represent Michuda or take any action on Michuda's behalf.

379. Gallo clearly, and repeatedly stated he was not going to assist Michuda on his direct appeal.

380. There is little to no history of Gallo, or the Appellate Public Defender's Office, pursuing ineffective-assistance-of-counsel claims against public defenders on behalf of the indigent.

381. It is common practice that the Appellate Public Defender's Office does not pursue ineffective-assistance-of-counsel claims against public defenders.

382. On 11/5/08, Gallo refused to file Michuda's *pro se* brief, via third-party phone call/message (Michuda's caseworker at MCF-Rush City), two days before it was due for filing.

a. Gallo also attempted to blackmail Michuda into waiving his rights via the same third-party phone call/message.

b. Gallo stated he would only file the *pro se* brief if Michuda waived his right to counsel.

c. Gallo only filed Michuda's *pro se* brief after threat of a lawsuit.

d. The appellate court did not respond to Michuda's written complaint of the incident.

e. There is no evidence that this incident was referred to the OLPR Director for investigation.[192]

383. On 11/6/08, Gallo made last minute email requests, from 12:01 PM to 3:28 PM, less than 24 hours before briefs were due, for sealed documents important to the appellate review.

a. Gallo's requests were denied due to failure to follow the correct procedures outlined in the order sealing the documents.

b. Gallo's email requests were part of a separate brief prepared by Gallo.

384. On 11/7/08, without consulting with Michuda, and without Michuda's consent, and despite Gallo's earlier refusal to do so, Gallo prepared and filed a separate brief in less than 24 hours.

a. Gallo filed the last-minute-brief with the purpose of undermining Michuda's *pro se* brief.

b. Gallo falsely relegated Michuda's brief as *supplemental*; Michuda did not prepare his brief as a supplement to Gallo's brief, as the rules indicate would be the process; Michuda prepared his *primary* brief after Gallo had refused to prepare a brief on Michuda's behalf.

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[192] Indigent complaints against a public defender can only be referred to OLPR by a judge in the matter, Rule 8(b), Minnesota Rules of Lawyers Professional Responsibility.

c. Gallo filed the last-minute-brief with the purpose of undermining complaints contained in Michuda's *pro se* brief concerning Gallo.

d. Gallo filed the last-minute-brief with the purpose of deceiving the appellate court by appearing to have done what was required of Gallo and the Appellate Public Defender's Office.

e. Gallo included the last-minute email requests in his last-minute-brief as part of his appearance of doing something, that he was required to have done, though should have done weeks or months before.

385. Gallo refused to answer Michuda's questions, including:

- 12/11/08 letter from Gallo, refusing to answer any question or request, including "why did [he] decide to file a separate last minute-brief."
- 2/17/09 letter from Gallo, "I will not waste time or resources to answer [Michuda's] questions."

386. Gallo deliberately delayed one week before informing Michuda of the appellate court's Notice of Non-Oral Argument.

a. Notice dated 3/27/09.

b. Gallo received Notice on 3/30/09.

c. Letter from Gallo to Michuda about the Notice is dated 4/7/09.

d. Gallo refused (4/14/09 and 4/24/09) to file Michuda's 4/9/09 response to the Notice, which needed to be filed within five days of receipt if oral argument was requested in the brief; Michuda did request oral argument in his brief.

e. Appellate court did not respond to Michuda's written complaint of incident.

f. There is no evidence that this incident was referred to the OLPR Director for investigation.

387. On 1/7/09, James R. Peterson, [then] acting Chief Appellate Public Defender, responded to Michuda's letters to Chief Appellate Public Defender, Lawrence Hammerling and State Public Defender, John Stuart, requesting review of issues concerning Gallo.

a. Peterson was Gallo's supervisor.

b. Peterson failed to respond to Michuda's questions.

c. Peterson failed to advise Michuda of his best interests in the matter.

d. After investigation, Peterson supported Gallo's [in]actions.

e. Peterson stated there was nothing more they can do.

Exhaustion of Remedies

388. Michuda has written complaints to public defenders, the Chief Appellate Public Defender, the State Public Defender, and the Board of Public Defense, complaining of the failures of individual public defenders.

389. Michuda's complaints for failures of individual public defenders have been raised, noted and/or written complaints were attached in Michuda's PSI reports, which were available to public defenders, the court, and prosecutors.

390. Michuda's complaints against a Dakota County public defender was raised and/or noted during Michuda's meeting with a Dispositional Advisor from the Dakota County Public Defender's Office.

391. Michuda has complained to district court judges in Dakota, Hennepin, and Chisago Counties, complaining of the failures of the Public Defender System, failures of individual public defenders, and prosecutorial misconduct, including a Special Hearing, multiple postconviction petitions, and a habeas petition.

392. Michuda moved the Hennepin County District Court to declare what are his rights, status, and other legal relations concerning his expired 1994 conviction and failures of the Public Defender System, failures of individual public defenders, and prosecutorial misconduct.

393. Michuda has filed complaints with the Minnesota Appellate and Supreme Courts complaining of the failures of the Public Defender System and individual public defenders.

394. Michuda has filed complaints with the Office of Lawyers Professional Responsibility (OLPR) complaining of the failures of the Public Defender System and individual public defenders; Michuda has also filed actions in the Appellate and Supreme courts challenging the constitutionality of Rule 8 that allows OLPR to summarily dismiss any complaint against public defenders without investigation.

395. Michuda has filed appeals, habeas corpus petitions, a civil rights complaint, and malpractice suits, complaining of the failures of the Public Defender System, failures of individual public defenders, and prosecutorial misconduct. Michuda has exhausted each of the court processes to the best of his ability.

396. Michuda has filed complaints with the Minnesota State Bar Association and the American Bar Association complaining of the failures of the Public Defender System and individual public defenders.

397. Michuda has filed complaints with the U.S. Department of Justice, Civil Rights Division complaining of the failures of the Public Defender System, failures of individual public defenders, and prosecutorial misconduct.

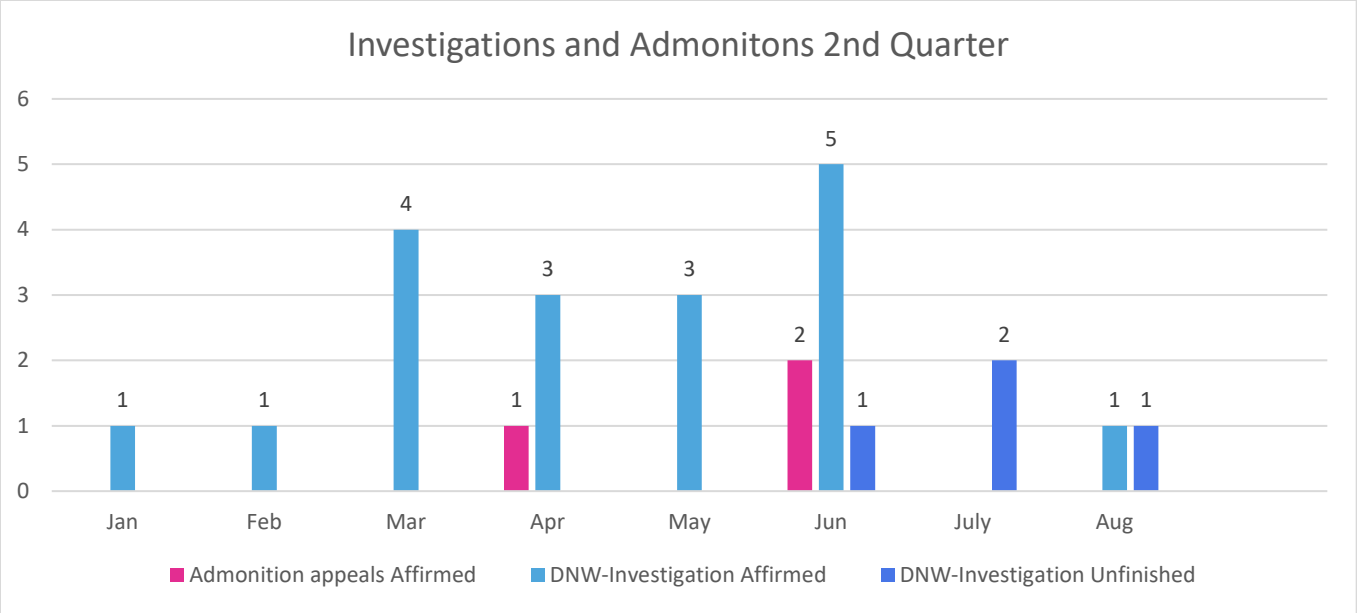
398. Overall, Michuda has complained he has never had the effective assistance of trial counsel and appellate counsel has always refused to assist on review; his complaints against public defenders are unconstitutionally blocked; and he has been unconstitutionally time-barred and procedurally-barred though he has never had a fair trial nor a meaningful review of his convictions. Failures of the Public Defender System, judicial bias, prosecutorial misconduct, and Michuda's inability to defend himself has largely determined Michuda's fate.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of one billion, eight-hundred million dollars ($1.8 billion), interest, costs, and disbursements.

Dated: April 16, 2025

Signed: Stephen Michuda

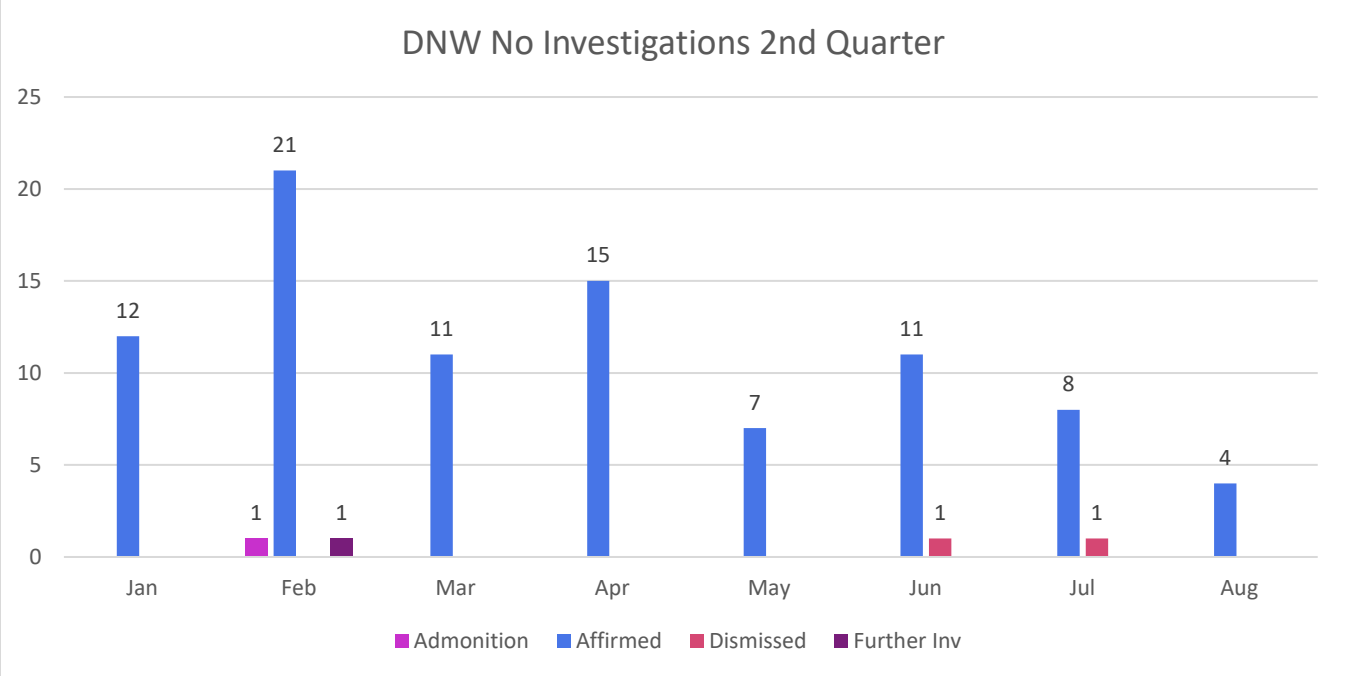
Stephen Michuda
OID 182739
MCF-Rush City
7600 525th Street
Rush City, MN 55069



Average Days to Complete: 23.27

3 Admonition Appeal

22 Investigations



Average Days to Complete: 24.23

Further Investigation: 2

Dismissed: 2

Total: 93

Affirmed: 89