LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
MEETING AGENDA

Friday, April 24, 2020 – 1:00 p.m.
Zoom meeting (invitation to follow)*

1. Approval of Minutes of January 31, 2020, Lawyers Board Meeting (Attachment 1)

2. Welcome new Board members Kristi Paulson, Dan Cragg, Michael Friedman, Paul Lehman, Mary Waldkirch, and Julian Zebot

3. Panel and Committee Assignments (Attachment 2)

4. OLPR and LPRB Covid-19 Response

5. Conducting Panel Hearings
   a. Sharepoint for Panel materials

6. Committee Updates:
   a. Rules Committee
      (i.) Status, Advertising Rule Petition
      (ii.) Status, Rule 20, RLPR, Changes
      (iii.) Status, Access to Justice *Pro Bono* Reporting
   b. Opinion Committee
      (i.) Opinion No. 21
   c. DEC and Training Committee
      (i) Onboarding Training
      (ii) Chairs Symposium, Date, Format and Content
      (iii) DEC Seminar, September 25, 2020
   d. Panel Manual Update
   e. Mandatory Malpractice Insurance Committee

7. Director's Report:
   d. Statistics (Attachment 3)
   e. Office Updates (Attachment 4)

8. Other Business:
   a. LPRB 50th Anniversary

9. Next Meeting, Friday, June 19, 2020

*If you are not a member of the LPRB and would like to attend the April virtual meeting, please call the number below to obtain the meeting information.

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

Attachment 1

MINUTES OF THE 189TH MEETING OF LAWYERS PROFESSIONAL RESPONSIBILITY BOARD JANUARY 31, 2020

The 189th meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, January 31, 2020, at the Town and Country Club, St. Paul, Minnesota. Present were: Board Chair Robin Wolpert, and Board Members Landon J. Ascheman, Jeanette M. Boerner, James P. Cullen, Thomas J. Evenson, Roger Gilmore (by phone), Gary M. Hird, Peter Ivy, Bentley R. Jackson, Shawn Judge, Virginia Klevorn, Tommy A. Krause, Susan C. Rhode, Susan T. Stahl Slieter, Gail Stremel, Bruce R. Williams and Allan Witz (by phone). Present from the Director's Office were: Director Susan M. Humiston, Managing Attorney Cassie Hanson, Senior Assistant Directors Jennifer S. Bovitz and Binh T. Tuong, and Assistant Director Jennifer Wichelman. Also present were Minnesota Supreme Court Associate Justice David L. Lillehaug and Kenneth L. Jorgensen.

1. **APPROVAL OF MINUTES.**

The minutes of the September 27, 2019, Board meeting were unanimously approved.

2. **FAREWELL TO RETIRING BOARD MEMBERS.**

Ms. Wolpert acknowledged and thanked Joseph Beckman, Mary Hilfiker, Bentley Jackson, James Cullen and Roger Gilmore, retiring Board members, for their service to the Board.

3. **LPRB 50th ANNIVERSARY.**

Ms. Humiston provided an update on the LPRB 50th Anniversary. The first LPRB Board was appointed in 1970. Allen Saeks, who was admitted in 1956, continues to practice and is a tremendous source of knowledge. The Director's Office was established in 1971. Ms. Humiston encouraged Board members to read William Wernz's article, "Whence Lawyer Discipline?" included in the Board materials, which provides a good framework of the origin and evolution of Minnesota's lawyer discipline system. Ms. Humiston suggested that a portion of the annual seminar could be focused on celebrating the anniversary and encouraged members to begin thinking about that event and how to include others such as dignitaries. Ms. Wolpert pointed out that one such dignitary, Kenneth Jorgensen, was present at the Board meeting. Individuals are encouraged to contact Ms. Wolpert or Ms. Humiston with ideas surrounding the anniversary celebration.

4. **UPDATED PANEL AND COMMITTEE ASSIGNMENTS.**

Ms. Wolpert reported there is no order yet from the Court regarding new Board appointments. Once an order is filed, Ms. Wolpert will file documents regarding Panel composition.

- Executive Committee Appointments: Ms. Wolpert reported that Jeanette Boerner will serve as Vice Chair and Bruce Williams, Shawn Judge and Virginia Klevorn will be appointed to the Executive Committee effective February 1, 2020.

- Committee Leadership: Ms. Wolpert reported that Peter Ivy will Chair the Rules Committee, Mark Lanterman will Chair the Opinions Committee and Allan Witz will Chair the re-named DEC & Training Committee, which will now include training of the Board. Mr. Witz and Mr. Ivy will put together training materials using materials previously used by Deputy Director Tim Burke with a goal of ensuring even implementation of the rules.

- Panel Composition: Ms. Wolpert addressed that if a matter is pending, the matter will stay with the currently assigned Panel. Ms. Wolpert also addressed that every Panel will be losing someone and Panel composition will change.

- Panel Status Updates: Ms. Wolpert reported that the prior week a disclosure was sent to Panel Chairs to update Chairs on the status of matters. Ms. Wolpert sought input and feedback from the Director on the form. Mr. Cullen responded that the form is a very good idea, that it is helpful and would appreciate a 90-day form to track with the Board meeting. Gary Hird also found the form helpful. Thomas Evenson asked if the update could be provided more frequently based on inquiries he receives. Ms. Humiston responded that it would not be a problem to provide updates more frequently and stated that Panels can always request status updates from both parties.

  Mr. Cullen had questions about a specific notation that a respondent was taking a deposition. Mr. Cullen asked if this was being addressed in the Panel Manual? Mr. Cullen stated his concern was that to the extent there may be inconsistencies, it would be helpful for this issue to be addressed in the Manual. Ms. Wolpert responded that she is looking for input from Panel Chairs regarding the Panel Manual, which is a priority for this year. Ms. Wolpert identified that the Panel Manual is critical to communicate

procedures and often goes out to respondents who are *pro se*. Ms. Wolpert noted that comments from the Director's Office are still to be included and to look at the Panel Manual through a big picture lens. While Ms. Wolpert believes the Panel Chairs are the best place to start with the Panel Manual revisions, if anyone else should be included, contact Ms. Wolpert.

5. **COMMITTEE UPDATES.**

A. Opinions Committee.

i. Amended Opinion 21 (Attachment 2).

Committee Chair Gary Hird provided the Committee report and Kenneth Jorgensen was present to provide the MSBA position. Mr. Hird stated there has been a long odyssey with Opinion 21 advising that a draft was circulated and also sent to the MSBA Rules Committee which was attached to the Board materials. Mr. Hird reported that after receiving comments from Fred Finch and a letter from William Wernz, the Committee met and discussed input and discussed changes to the proposed opinion. Mr. Hird reported that the Opinions Committee adopted some of the suggestions from Mr. Finch's letter relating to the 3(b) insert, "reasonably should know," and the Committee believed that would be a good addition to the opinion. Mr. Hird reported that the Committee also focused on 3(c) and removing "determines," stating "knows or reasonably should know" should be used to be consistent.

Managing Attorney Cassie Hanson reported that the purpose of the opinion is to give guidance to the average practitioner and when the Committee thought about Rule 1.4, MRPC, it is clear that it is a comprehensive set of obligations on the practitioner and they are informed, however, paragraph (b) represents the client perspective and that the average practitioners should be thinking about the client perspective. Ms. Hanson provided perspective that she recalls when the original Opinion 21 was adopted that a lot of thought was put into it, and if paragraph (b) was removed, the client perspective would be removed. Mr. Beckman, an Opinions Committee member, reported that Ms. Hanson was accurately reporting the Committee's thoughts.

Mr. Jorgensen on behalf of the MSBA reported that for 22 years he was in the Director's Office and in the last ten years, he spent a significant

amount of time counseling lawyers, and was the original staff to the Opinions Committee. Mr. Jorgensen stated when the Opinion first came out, it was very controversial and he was happy to see changes in responses, but it was a bit like doing cosmetic surgery on someone who was having a heart attack. Mr. Jorgensen stated that the standard is subjective and has no place in jurisprudence and remarked that the ABA is a problem. Mr. Jorgensen stressed that lawyers need to be able to rely on jurisprudence and focused his position on that the Opinion needs to be objective and that if not objective, the standard moves depending on the field of law. Mr. Jorgensen stated that historically the ABA stayed away from issues such as this and this Opinion addresses the breach of fiduciary duty stating if you do not do it you have liability which creates all sorts of quagmires.

Mr. Jorgensen urged that another thing to keep in mind is the purpose of opinions is not to add protection to clients, but to guide lawyers, to help lawyers to comply. Mr. Jorgensen provided the example of Opinion 13 where the Supreme Court specifically stated that the Opinion applied standards that were beyond what the rules require. Mr. Jorgensen also provided an example of Opinion 11 relating to liens on homesteads and associations with debt collection agencies, both of which were repealed. Mr. Jorgensen stated that the LPRB and the Director's Office observed that they were outside of their lanes and the opinions no longer exist because they were outside of their lane.

Mr. Jorgensen emphasized that the Opinion, as written, is going to create a bigger burden for certain lawyers, in particular, criminal and family lawyers. Mr. Jorgensen provided an example of confidential communication going to places that it should not. Mr. Jorgensen provided an example of such issues happening daily, for example, with clients who are sophisticated, this does not have to be disclosed, however, other types of clients, for example, defendants or volatile family law clients, the standard may vary based on the practice area. Mr. Jorgensen emphasized that from his perspective this is not fair.

Mr. Jorgensen continued to question what the utility of the Opinion is. Mr. Jorgensen also emphasized that the cases the Office is charging are easy violations of Rule 1.4 and an opinion is not necessary from an enforcement perspective. Mr. Jorgensen provided the background that initially when working at the Director's Office, he was the only attorney

who did advisory opinions for five years and that he did thousands and was never asked during those requests for opinions if an attorney needed to disclose. Mr. Jorgensen stressed that despite all its hard work, is the Board really staying in its lane? Mr. Jorgensen pointed out what is the standard to consider firing; firing is subjective, considering is even more subjective.

Mr. Williams asked Mr. Jorgensen if his suggestion was to eliminate Opinion 21? Mr. Jorgensen replied that he would, it was not a tool that he used very often.

Mr. Cullen commented that he is not on the Opinions Committee but is a part of the MSBA, and has listened to William Wernz, Ken Jorgensen and Eric Cooperstein and is totally confused regarding Opinion 21 and believes it needs to be studied with all of the criticisms expressed and the Committee needs to digest it more and commented that all of what Mr. Jorgensen said is right, and Bill Wernz is right. Mr. Cullen says some are saying to confirm to the ABA, others are saying no. Mr. Jorgensen responded that the ABA does not have to be enforced, that the ABA ignores the law in the jurisdiction and gave the example of ABA Opinion 489 which ignores partnership law and stated that we cannot address the problem with a simple solution when the issue is more complicated. Mr. Williams asked if the Opinion would cause more litigation? Mr. Jorgensen replied that Opinion 21 will be pled in affidavits in civil litigation. Mr. Jorgensen opined that he has not seen plaintiffs assert Opinion 21, but now could.

Ms. Klevorn responded that as a public member, she has heard the arguments from Mr. Jorgensen and believes that the perspectives being presented are those from the lawyers' perspectives. Mr. Jorgensen replied that the rules are for the protection of the public and that Opinion 21 does not assist with that.

Mr. Beckman posed a question seeking precedent confirmation for the repeal of Opinion 13 and confirmed that it was Panel Matter 99-42 (2001).

Justice Lillehaug asked what the standard of care was for disclosing when an attorney has committed malpractice. Mr. Jorgensen replied if there has something to do with prejudice. Justice Lillehaug followed up

inquiring whether Opinion 21 informs as to the standard of care. Mr. Jorgensen replied his concern is that plaintiffs are going to use Opinion 21 as the standard of care.

Senior Assistant Director Binh Tuong cited to Rule 1.4(b), MRPC, stating that Rule 1.4(b), MRPC, requires an informed consultation with clients focusing on attorneys' relationships with clients and that attorneys are required to know what is important to clients to allow them to make informed decisions. Ms. Tuong stated that Opinion 21 is to remind, not to expand or overreach, that everyday attorneys have to make decisions to communicate conflicts and other rules may come into play and that the purpose is how to best protect the client under the rule.

Ms. Boerner asked whether it was about the client and that the standard is very difficult. Ms. Boerner expressed that it was difficult to provide guidance to 200 lawyers and that it appears very irrational. Ms. Tuong responded that it is one of many decisions, isn't it the client's decision? Ms. Boerner replied that Opinion 21 seems to be about the free market world, not the appointed lawyer world. Ms. Tuong replied whether we want to be left with the ABA Opinion with the obligation already in the rules?

Mr. Hird contributed that some people are missing the reasonableness standard in the Opinion and are looking for absolutes. Mr. Hird stated he does not think the rules are absolutes and stated that he did spend 30 years representing the clients Mr. Jorgensen is talking about and still thinks it is important for clients to have trust in their lawyers and for lawyers to communicate with their clients.

Mr. Beckman opined that Opinion 21 is not used for discipline purposes but Mr. Jorgensen is opining that Opinion 21 will create a market for legal malpractice claims.

Managing Attorney Cassie Hanson pointed out that mistakes occur along a continuum, that this is an issue for the Bar, and the current Opinion 21 is not correct and has been under debate for two years and not taken lightly by the Committee and encouraged the Board to keep in mind that the current Opinion is not accurate.

Mr. Jorgensen reinforced his concerns that the MSBA is concerned about malpractice. Mr. Cullen asked Managing Attorney Cassie Hanson if she agreed with Senior Assistant Director Binh Tuong. Ms. Hanson stated she did agree with Ms. Tuong.

Mr. Cullen then inquired why do we need Opinion 21? Mr. Cullen then stated: It seems like the OLPR wants Opinion 21 when the ABA issued Opinion 481, the point is lawyers are frequently defaulted to be protectionists.

Landon Ascheman stated he had been listening and the harm and prejudice in (a) material errors increase costs, missing hearings, struggling to think of a situation where (b) would be guiding and is struggling to see where this would play out.

Mr. Ivy added that the aspirations in (b) are valuable but would be a challenge to enforce and would be really hard if it came before a Panel, assuming clients are going to be reasonable and inquired what if the Board just went with (a) with a further definition of harm/prejudice.

Mr. Hird asked what if a lawyer is just sloppy and the judge let the lawyer get away with it, shouldn't the client get notice and the Opinion provide guidance? Ms. Wolpert closed the discussion.

Mr. Hird moved for the adoption of Opinion 21, Susan Rhode seconded the motion.

During discussion, Mr. Beckman commented that the Opinion does have the potential to be abused with the stamp of an affidavit when Rule 1.4, MRPC, already has the same duty. Ms. Judge inquired who does the Board serve and stated that she is grappling with that.

Mr. Ascheman provided a clarification if there is no harm that does not meet the standard if the judge gives you a pass for missing a deadline.

Mr. Hird stated that the fact that you sent it by mistake makes it material, a lawyer who has made a mistake has the obligation.

Ms. Wolpert called the motion to adopt Opinion 21 failed. It was noted that the concern of the nay vote was (b).

B. Rules Committee.

Committee Chair James Cullen reported that the Committee met in January. In addition to the identified areas of focus, the Committee is also seeking to address issues relating to respondents with ongoing civil or criminal matters.

i. Status, Advertising Rules Petition

Mr. Cullen reported that the MSBA took interest in reviewing Rules 7.1-7.3 and noted that the ABA enabled attorneys to use the term specialist without precondition. Mr. Cullen reported that Dan Cragg recommended the MSBA agree to amend its rules in two separate meetings occurring on April 26, 2019, and September 27, 2019. When the first meeting occurred, the MSBA had not yet had its assembly meeting, however, there was a belief that there would be a co-petition addressing the proposed amendments. Ultimately, the state bar assembly had a dispute regarding the specialist amendment with two votes carrying the state certification/specialist language defined differently from the ABA model rules. Mr. Cullen recapped the Board's September approval of the Board independently petitioning the Supreme Court to amend Rules 7.1-7.5, MRPC, to conform to ABA Model Rules 7.1-7.3. The Board will continue with the petition transitioning to the leadership of Mr. Ivy, who will be assisted by Mr. Cullen. Mr. Cullen acknowledged that the OLPR has different priorities right now, but following the Board's work on the petition, it will be turned over to the OLPR and ultimately there will be a co-petition between the LPRB and the OLPR.

ii. Status, Rule 20, RLPR, Changes

Mr. Cullen reported that the OLPR proposed amendments to Rule 20, RLPR, and that most of the proposed amendments were acceptable. Mr. Cullen identified that Mr. Wernz raised very persuasive comments regarding the potential abuse of the amendments surrounding Rule 20(f)(3), RLPR. Mr. Cullen and Ms. Humiston are reviewing the national practice and there is an entirely new proposal that is too new to report at this meeting. The new proposal will be referred over to Mr. Ivy who will now be chairing the Rules Committee.

iii. Access to Justice *Pro Bono* Reporting Proposal

The Access to Justice Committee of the MSBA has been working on a mandatory *pro bono* reporting requirement that is going to the MSBA assembly in April. Ms. Humiston has been attending from a regulation perspective.

C. DEC Committee.

Mr. Ivy reported that Mr. Witz will be taking over as Chair. Mr. Ivy stated he advised Mr. Witz that Jennifer Bovitz, staff liaison to the Committee, is knowledgeable and approachable. The Committee will now handle new member training.

Ms. Wolpert reminded the Board that six new members will require onboarding and there may be a gap in time with the training. Ms. Wolpert encouraged Panel Chairs to look out for new members and coordinate appropriately.

Mr. Witz requested that Board members who are transitioning off the Board email Mr. Witz with training suggestions or if they are interested in assisting with training.

D. Mandatory Malpractice Insurance Committee.

Ms. Wolpert reported that she has had several conversations with leading practitioners and academics on the subject of mandatory malpractice, and is considering coordinating with the MSBA, who may also take up this issue.

6. DIRECTOR'S REPORT.

Ms. Humiston directed the Board to Attachment 3 as a high level summary of 2019. Ms. Humiston reported a strong ending to 2019 with 481 open files and 119 files over one year old, which was the result of a lot of hard work. New complaints were down by 104, but the same number of matters were investigated, for example, in 2018, 572 cases were investigated, and in 2019, 566 were investigated, with more complaints in 2019 meeting the threshold for investigation. Referee trials in 2019 increased to 11 as compared to four in 2018. Panel work remained consistent with ten matters in 2019 compared to eight in 2018.

Ms. Humiston discussed that in reviewing discipline over the decades, the 1990s had the largest number of disbarments and in 2010 there was overall higher discipline.

Mr. Williams and Ms. Klevorn inquired what the number of licensed attorneys was over those time periods? Ms. Humiston responded that she does not think lawyers are behaving less badly, but believes the Court is treating cases differently. Ms. Humiston also noted there have been fewer public discipline matters this year, perhaps due to the timing of trials.

Ms. Humiston directed the Board to Attachment 4, illustrating how MARS has been updated to reflect current disciplinary status for public view. The update also provides a hotlink to the OLPR website, and identifies those not carrying malpractice insurance, identified in red.

Thank you notes contained in Attachment 4 were also noted, the first being a thank you received by Ms. Bovitz from an advisory opinion caller and a thank you Ms. Humiston received from the Hmong Bar Association, which she presented at and included non-lawyers.

Ms. Humiston provided Office updates, including the addition of Senior Assistant Director Jennifer Wichelman, who was in attendance. Ms. Wichelman brings 20 years of litigation experience to the Office, most recently at Bowman & Brooke, where she practiced in the area of products liability. Ms. Humiston also discussed that Gina Brovege has been hired as an investigator, a new position for the OLPR, and that she has a good skill set that is serving the Office well. Ms. Humiston also reported that Casey Brown has started law school and loves it. Ms. Humiston provided an update that the new Office database will be launching on February 19, 2020.

Ms. Humiston reported on Office challenges including three team members losing family members serially and a number of medical leaves impacting the Office. Ms. Humiston reported that one of those leaves includes Deputy Director Timothy Burke who has been out since November 2019.

Ms. Humiston reported on a mistake in a petition that included two mistaken rule references. Ms. Humiston thanked Ms. Boerner for bringing the issue forward. Ms. Humiston stated she is taking responsibility for the mistake, is moving to amend the petition and she appreciates how many people review the Office's work.

Ms. Humiston also updated the Board that the Office's current lease expires on July 31, 2020. The current landlord's proposal was a three year lease with an automatic out during the first year, which was a non-starter for negotiations. The landlord is participating in the DEED RFQ, resulting in the terms the current landlord is proposing. Ms. Humiston is working with the state real estate leasing unit.

7. **DIRECTOR'S REAPPOINTMENT.**

Ms. Humiston noted she prepared remarks and upon request of Board members, addressed her reappointment. Ms. Humiston stated there are many things to celebrate, including successfully driving numbers, in a sustainable way. Ms. Humiston stated that she tried to encourage results in a way that skills were learned while not neglecting other responsibilities, including integration of the strategic plan. Ms. Humiston reported that the Office continued to show progress and strengthened the quality of work product. Ms. Humiston shared that Referee Nelson, upon retirement, advised her that work product under her tenure was notably improved and that he was impressed with the talent the OLPR was recruiting.

Ms. Humiston reported that she has focused office culture on teamwork and accountability with the theme of rising and falling together, a message that is consistent with the Court's emphasis on continuous improvement and the mission of protecting the public. Ms. Humiston has required all staff to provide innovation suggestions as a part of the review process. In the vein of innovation, lawyers have been attending the CoLAP conference, increasing education and awareness on lawyer wellness issues. Attorney training has increased, including ensuring that every attorney has a mentor. Ms. Humiston also celebrated the success in creating the investigator position despite initial pushback from a segment of the Office.

Ms. Humiston reported on other updates to the Office including a revised probation department, updated DEC training, revised workflows, expanding collaboration with LCL, increased Office representation on MSBA committees, and an engaged Wellbeing Committee. Ms. Humiston documented expanded outreach with more staff members presenting at CLEs, Mr. Lanterman providing three separate presentations to the National Organization of Bar Counsel (NOBC), Ms. Humiston will be presenting on a panel at the Austin NOBC conference in February and Ms. Humiston was asked to join the NOBC subcommittee on regulation in the public interest

Ms. Humiston closed her remarks by stating she is grateful for the opportunity to lead the Office, that it is her favorite job, that she finds it challenging and pulls on many different skills. Ms. Humiston commented that it is always a challenge and exciting to do every day, stating she works with a talented group of lawyers, that she is grateful and would love to be reappointed and is thankful for the opportunity to serve.

8. **NEW BUSINESS.**

Mr. Ascheman reported on the early bar examination committee stating that the committee is compiling information from law schools to determine early bar exam

impacts. The intent of the early bar examination is to allow students to take the examination before completing a JD with licensing occurring upon graduation, decreasing debt load.

Kyle Loven inquired how many other states have implemented an early exam? Mr. Ascheman responded that Georgia dropped the early exam, Arizona is fairly active with a 100% passage rate. Other states include Vermont and New York. New York allows applicants to take the exam early if 100 hours of *pro bono* work have been completed. Ms. Wolpert stated that once there is a final report it will be sent to the Rules Committee and the Board can make a decision.

9. **QUARTERLY BOARD DISCUSSION.**

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

Thereafter, the meeting adjourned.

Respectfully submitted,

Jennifer S. Bovitz Bovitz, Jennifer
Apr 10 2020 3:35 PM

Jennifer S. Bovitz
Interim Managing Attorney

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

Attachment 2

LAWYERS BOARD PANELS
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Rule 4(e), Rules on Lawyers Professional Responsibility, provides,

> The Chair shall divide the Board into Panels, each consisting of not less than three Board members and at least one of whom is a non-lawyer, and shall designate a Chair and a Vice-Chair for each Panel.

The following Panels are appointed. Those with a single asterisk before their names are appointed Chair, and those with a double asterisk are appointed Vice-Chair.

Panel No. 1.
* Tom Evenson
** Julian Zebot
Mark Lanterman (p)

Panel No. 2.
* Susan Rhode
** Katherine Brown Holmen
Michael Friedman (p)

Panel No. 3.
* Landon Ascheman
** Daniel Cragg
Gail Stremel (p)

Panel No. 4.
* Gary Hird
** Susan Stahl Slieter (p)
Paul Lehman (p)

Panel No. 5.
* Allan Witz
** Kyle Loven
Mary Waldkirch Tilley (p)

Panel No. 6.
* Peter Ivy
** Kristi Paulson
Tommy Krause (p)

Effective April 1, 2020

/s/ Robin M. Wolpert
Robin M. Wolpert, Chair
Lawyers Professional Responsibility Board

* Chair
** Vice Chair
(p) Public member

BOARD MEMBERS REVIEWING COMPLAINANT APPEALS
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Pursuant to Rule 8(e), Rules on Lawyers Professional Responsibility, the Chair appoints members of the Board, other than Executive Committee members, to review appeals by complainants who are not satisfied with the Director's disposition of complaints.

The reviewing Board members appointed for the period April 1, 2020, through January 31, 2021, are:

LANDON ASCHEMAN

KATHERINE BROWN HOLMEN

DANIEL CRAGG

THOMAS EVENSON

MICHAEL FRIEDMAN

GARY HIRD

PETER IVY

TOMMY KRAUSE

MARK LANTERMAN

PAUL LEHMAN

KYLE LOVEN

KRISTI PAULSON

SUSAN RHODE

SUSAN STAHL SLIETER

GAIL STREMEL

MARY WALDKIRCH TILLEY

ALLAN WITZ

JULIAN ZEBOT

If Board members are unavailable for periods of time the Board Chair may instruct the Director not to assign further appeals to such members until they become available.

Effective April 1, 2020

/s/ Robin M. Wolpert

Robin M. Wolpert, Chair
Lawyers Professional Responsibility Board

DEC AND TRAINING COMMITTEE

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

A Lawyers Board Committee charged with working with the District Ethics Committees (DECs) to facilitate prompt and thorough consideration of complaints assigned to them, to assist the DECs in recruitment and training of volunteers, and to assist the Office in training Board members, shall be constituted with the following members:

Allan Witz, Chair
Tom Evenson
Tommy Krause
Katherine Brown Holmen
Kyle Loven

Effective April 1, 2020.

/s/ Robin M. Wolpert

Robin M. Wolpert, Chair
Lawyers Professional Responsibility Board

OPINION COMMITTEE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

A Lawyers Board Committee for making recommendations regarding the Board's issuance of opinions on questions of professional conduct, pursuant to Rule 4(c), Rules on Lawyers Professional Responsibility, shall be constituted with the following members:

Mark Lanterman, Chair
Gary Hird
Gail Stremel
Landon Ascheman
Julian Zebot
Michael Friedman

Effective April 1, 2020

/s/ Robin M. Wolpert
Robin M. Wolpert, Chair
Lawyers Professional Responsibility Board

RULES COMMITTEE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

A Lawyers Board Committee for making recommendations regarding the Board's positions on possible amendments to the Minnesota Rules of Professional Conduct and the Minnesota Rules on Lawyers Professional Responsibility, shall be constituted with the following members:

Peter Ivy, Chair
Susan Rhode
Mary Waldkirch Tilley
Virginia Klevorn
Daniel Cragg
Paul Lehman
Kristi Paulson

Effective April 1, 2020

/s/ Robin M. Wolpert
Robin Wolpert, Chair
Lawyers Professional Responsibility Board

Attachment 3

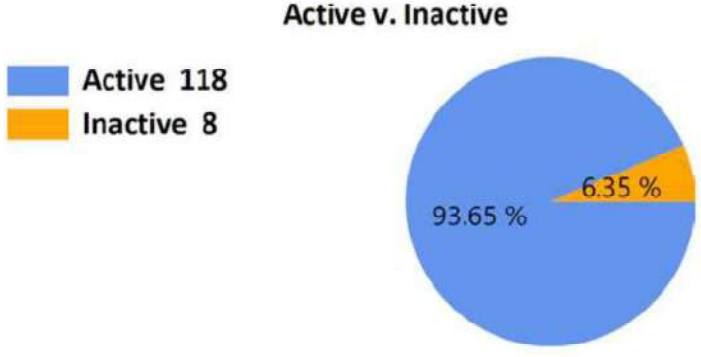
OLPR Dashboard for Court & Chair

	Month Ending March 2020	Change from Previous Month	Month Ending February 2020	Month Ending March 2019
Open Files	459	-44	503	506
Total Number of Lawyers	331	-44	375	361
New Files YTD	242	63	179	238
Closed Files YTD	262	106	156	240
Closed CO12s YTD	60	15	45	66
Summary Dismissals YTD	122	51	71	101
Files Opened During March 2020	63	-30	93	74
Files Closed During March 2020	106	45	61	74
Public Matters Pending (excluding Resignations)	34	-1	35	41
Panel Matters Pending	11	-1	12	15
DEC Matters Pending	91	-3	94	85
Files on Hold	9	2	7	22
Advisory Opinion Requests YTD	490	136	354	526
CLE Presentations YTD	11	4	7	16
Files Over 1 Year Old	126	-6	132	136
Total Number of Lawyers	81	-9	90	81
Files Pending Over 1 Year Old w/o Charges	62	-9	71	41
Total Number of Lawyers	49	-9	58	14

	2020 YTD	2019 YTD
Lawyers Disbarred	0	2
Lawyers Suspended	7	5
Lawyers Reprimand & Probation	1	0
Lawyers Reprimand	0	1
TOTAL PUBLIC	**8**	**8**
Private Probation Files	4	1
Admonition Files	20	25
TOTAL PRIVATE	**24**	**26**

Year/Month	OLPR	AD	PROB	PAN	HOLD	SUP	S12C	SCUA	REIN	TRUS	Total
2015-11								2			2
2015-12								1			1
2016-02						1					1
2016-05								1			1
2016-06					1						1
2016-07	1										1
2016-08	1	1									2
2016-10								2			2
2016-12	1										1
2017-01						1					1
2017-02				1		1					2
2017-03	2				1	1					4
2017-04						1					1
2017-06						1					1
2017-07						2					2
2017-08								2			2
2017-09	3					1					4
2017-10	1			1				1			3
2017-11	2										2
2017-12	2					2					4
2018-01	1										1
2018-02						3					3
2018-03					1	1	1		1		4
2018-04	4					2		1			7
2018-05						1					1
2018-06	1		1			1	1				4
2018-07	4										4
2018-08	3				1	4					8
2018-09						1					1
2018-10	3					3		1			7
2018-11	4					2		1			7
2018-12	5					1		1		1	8
2019-01	7		1		1						9
2019-02	8		2		1	1					12
2019-03	9					3					12
Total	**62**	**1**	**4**	**2**	**6**	**34**	**2**	**13**	**1**	**1**	**126**

	Total	Sup. Ct.
Total Cases Under Advisement	13	13
Sub-total of Cases Over One Year Old	113	38
Total Cases Over One Year Old	126	51



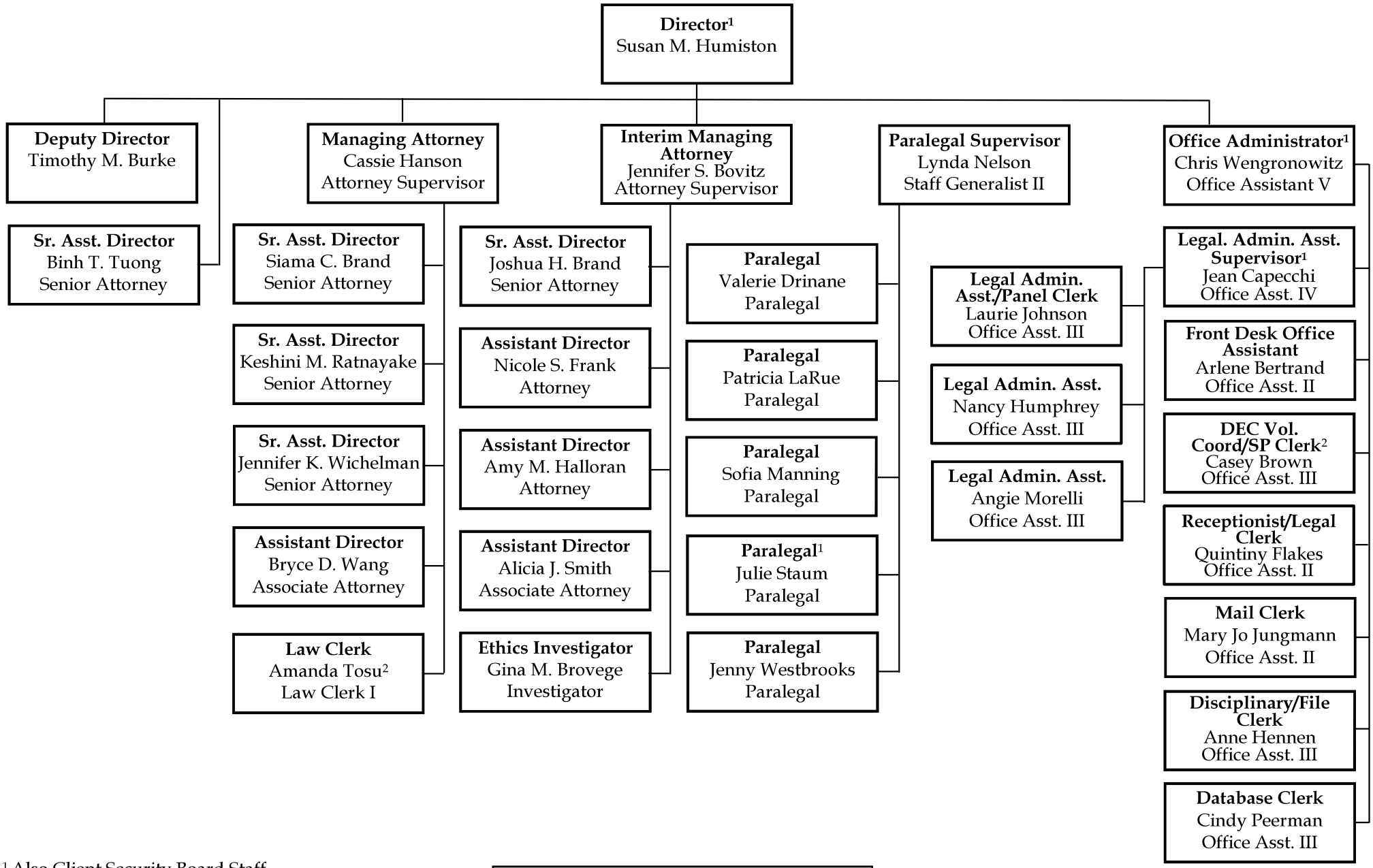
All Pending Files as of Month Ending March 2020

Year/Month	SD	DEC	REV	OLPR	AD	PROB	PAN	HOLD	SUP	SCUA	REIN	RESG	TRUS	Total
2015-11										2				2
2015-12										1				1
2016-02									1					1
2016-05										1				1
2016-06								1						1
2016-07				1										1
2016-08				1	1									2
2016-10										2				2
2016-12				1										1
2017-01									1					1
2017-02							1			1				2
2017-03				2				1	1					4
2017-04									1					1
2017-06									1					1
2017-07									1	1				2
2017-08										2				2
2017-09				3						1				4
2017-10				1			1			1				3
2017-11				2										2
2017-12				2					2					4
2018-01				1										1
2018-02										3				3
2018-03								1	1	2				4
2018-04				4						3				7
2018-05									1					1
2018-06				1		1			1	1				4
2018-07				4										4
2018-08				3				1	1	3				8
2018-09										1				1
2018-10				3					1	3				7
2018-11				4						3				7
2018-12				5						2			1	8
2019-01				7		1		1						9
2019-02				8		2		1	1					12
2019-03				9					3					12
2019-04				21	1				1					23
2019-05				9	1	1			1				1	13
2019-06				19				1	2					22
2019-07		1	1	23					1		1			27
2019-08		3	1	14	1			1						20
2019-09		5		21		1								27
2019-10		5		23				1	1		1			31
2019-11		7	3	23										33
2019-12		13	1	9										23
2020-01		19		17							1		1	38
2020-02		24		17							3			44
2020-03	3	14		13							1	1		32
Total	**3**	**91**	**6**	**271**	**4**	**6**	**2**	**9**	**23**	**33**	**7**	**1**	**3**	**459**

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

Attachment 4

Office of Lawyers Professional Responsibility
FY20 Organizational Chart



[1] Also Client Security Board Staff
[2] Part-time position
[3] Not administratively subject to Director's Office. Office pays percentage of their salary

Supreme Court Employees[3]
Accounting
Lisa Pasqualini (.1 FTE allocated to OLPR)
Tracy Wendel (.2 FTE allocated to OLPR)

Ethical fee agreements

The start of a new year is a good time to dust off your standard fee agreement to ensure it complies with the ethics rules. Every year attorneys receive discipline for noncompliant fee agreements. Let's make sure it doesn't happen to you in 2020.

The basics

The ethics rules require you to have a written fee or retainer agreement signed by the client in three situations: contingency fee cases, flat fee cases in which you place the advance fee in your business account rather than your trust account, and cases in which you charge an availability fee.[1] In all other cases, written fee agreements are strongly encouraged but not expressly required by the ethics rules.

If you do not have a written fee agreement, you still must communicate to your client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible.[2] Under the rules, the client must sign the agreement in the cases where written fee agreements are required—not a family member or friend, but the client. And a "signed" writing can "include[] an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing."[3]

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The content

The rules also establish content requirements and prohibitions. Of course, fees must be reasonable.[4] And this rule is expansive—it prohibits making an agreement for, charging, or collecting an unreasonable fee. The agreement for an unreasonable fee can itself be an ethics violation, even if it's unpaid.

Describing any fee as nonrefundable or earned upon receipt is expressly prohibited by the ethics rules.[5] This rule has been in place since 2011, yet every year discipline is imposed for flouting it. Please help us spread the word. If you see anyone with such agreements, remind them of the rules. You do not need to report them to this Office; just help out your fellow bar member. It would be deeply gratifying if 2020 was the year that no one received discipline for violating this rule.

FLAT FEE HINT!

Watch your language: Telling a client they "might" receive a refund if all of the work is not performed is inconsistent with the required notification that the client "will" receive a refund if all of the work is not performed.

In the case of a flat fee, you may ethically describe the advance fee payment as the lawyer's property subject to refund, but it cannot be earned upon receipt, unless the client is actually paying after all work has been completed. Ordinarily, all fees paid in advance of legal services being performed must be placed in trust, and only withdrawn as earned with notice to the client.[6] In order to treat a flat fee paid in advance as the lawyer's property subject to refund (and thus eligible to be placed in a business account and spent rather than placed in a trust account until work is complete), Minnesota's ethics rules require that the written fee agreement signed by the client notify the client of five specific things.[7] The required notifications are set forth in the rule, and you must include all five. Please review the text of the rule to ensure your flat fee agreement is compliant. And—hint!—watch your language: Telling a client they "might" receive a refund if all of the work is not performed is inconsistent with the required notification that the client "will" receive a refund if all of the work is not performed. Please do not try to mislead your clients by needlessly wordsmithing the notifications required by the rule.

If you wish to charge an availability fee, please consult the rule,[8] and do yourself the favor of consulting experienced ethics counsel. I have yet to see a compliant availability fee agreement that someone is willing to pay; too often they are just impermissible attempts to designate a portion of a flat fee as nonrefundable. Remember, if you agree to represent someone on a particular matter that is pending, you are already agreeing to be available for representation. Availability fees are separate and apart from any compensation for legal services to be performed, which is why they are rarely valuable to a client.

If you use a contingency fee agreement, make sure to specify the kinds of expenses that will be deducted from any recovery, and whether the expenses will be deducted before or after the contingent fee is calculated.[9] Most contingency fee agreements we see have the first requirement covered, but attorneys sometimes omit the second. I'm sure it will not surprise you that clients expect you to deduct expenses from the award, and then calculate your percentage recovery on the lower remaining sum, but that is rarely how you plan to do the math. The rule requires you to be specific.

If you plan to charge clients for the cost of copying or retrieving their files, remember that a client must agree to that in writing prior to termination, so your fee agreement is a good place to secure your client's agreement to this expense.[10] You also cannot ask your client to prospectively limit liability for your malpractice unless the client is independently represented.[11]

(The rule does not say you should tell your client to consult another lawyer; it expressly requires that the client be represented by someone else in order to make a prospective agreement of this kind.)

You should also take care if you plan to insert an arbitration provision in your fee agreement. In 2002, the ABA opined that it is permissible to require a client to arbitrate fee disputes or malpractice claims, but to be ethical, such a provision should apprise the client of the advantages and disadvantages of arbitration to ensure informed consent.[12] Whether an arbitration provision that does not do so is rendered unenforceable or preempted by the Federal Arbitration Act, if applicable, is a subject for another day, but I do recommend that you familiarize yourself with the law and ethics opinions in this area if you wish to include an enforceable and ethical arbitration clause in your fee agreement.

Also take care in attempting to obtain security for payment of fees in your fee agreement (or otherwise). The conflict rules have specific requirements for the manner in which you can acquire a security interest adverse to your client.[13] You should follow those rules to avoid an unethical business transaction with your client. Nor can you acquire a proprietary interest in the cause of action or subject matter of the litigation, except for an attorney's lien authorized by the law or a reasonable contingent fee.[14]

Finally, double-check if you plan to charge interest on your accounts receivable. You must comply with state usury and lending laws regarding the interest you charge, because an illegal fee is an unreasonable fee.[15]

Conclusion

Fee agreements are central to the attorney-client relationship. Done well, they provide great clarity to clients and counsel alike. The ethics rules include a lot of information on how you may, or in some cases must, structure your fee agreement. Do not be so focused on contract law that you forget the ethical rules that also apply. Happy 2020, and as always, please call our advisory opinion service at 651-296-3952 if you need ethics advice. ▲

Notes

[1] Rule 1.6(c), Minnesota Rules of Professional Conduct (MRPC) ("A contingent fee agreement shall be in a writing signed by the client...."); Rule 1.5(b)(1), MRPC ("If agreed to in advance in a written fee agreement signed by the client, a flat fee shall be considered to be the lawyer's property upon payment of the fee, subject to refund as described in Rule 1.5(b)(3)."); Rule 1.5(b)(2), MRPC ("Such an availability fee shall be reasonable in amount and communicated in a writing signed by the client.").

[2] Rule 1.5(b), MRPC.

[3] Rule 1.0(o), MRPC.

[4] Rule 1.5(a), MRPC; *see also* ABA Formal Opinion 93-379 providing guidance on ethically reasonable fees and expenses.

[5] Rule 1.5(b)(3), MRPC.

[6] Rule 1.15(c)(5), MRPC ("except as specified in Rule 1.5(b)(1) and (2), deposit all fees received in advance of the legal services being performed into a trust account and withdraw the fees as earned"); Rule 1.15(b), MRPC (requiring withdrawal of earned fees within a reasonable time of being earned as well as written notice of the withdrawal from trust).

[7] Rule 1.5(b)(1), MRPC.

[8] Rule 1.5(b)(2), MRPC.

[9] Rule 1.5(c), MRPC.

[10] Rule 1.16(f), MRPC.

[11] Rule 1.8(h), MRPC.

[12] ABA Formal Opinion 02-425 (2/20/2002) ("It is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires the binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement.")

[13] Rule 1.8(a), MRPC; *see also* Rule 1.8(a), Cmt. [4] ("a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with a client.")

[14] Rule 1.8(i), MRPC.

[15] *See* Patrick R. Burns, *Interest on Legal Fees: Usury is Illegal, Unreasonable, and Just Plain Bad*, Minn. Lawyer, 8/27/2001, available at *http://lprb.mncourts.gov/articles/Articles*.

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Public discipline in 2019

Since we have entered a new decade, I thought it would be interesting to start the annual review of public discipline with a look back at discipline numbers by decade. From 2010-2019, a total of 403 attorneys were publicly disciplined, an average of approximately 40 per year. During this decade, the yearly number of publicly disciplined lawyers ranged from a low of 26 (in 2010 and 2011) to a high of 65 in 2015.

For reasons that remain unclear, this number is significantly higher than numbers for the prior decade. From 2000-2009, 327 lawyers were publicly disciplined, an average of 33 a year (from a low of 19 in 2004 to a high of 48 in 2006). The '90s saw more discipline than the '00s, but still produced numbers notably lower than the most recent decade. From 1990-1999, 365 attorneys were publicly disciplined—from a high of 55 in 1990 to a low of 20 in 2004. One thing to note about the '90s, however, is the total number of disbarments compared to the other decades. In the '90s, 74 lawyers were disbarred, compared to 52 in the '00s, and 62 in the '10s. To date, the '90s have been the high point for disbarments, but the most recent decade saw the highest volume of public discipline overall. It will be interesting to see where the next decade trends—if it yields a trend at all. Due to the vagaries of human nature, I'm never sure what to expect.

Discipline in 2019

Thirty-five attorneys received discipline in 2019. Public discipline is imposed not to punish the attorney, but to protect the public, the profession, and the judicial system, and to deter misconduct by the attorney and others. As I wrote in last year's column on this subject, the most notable trends in 2018 involved the high number of disbarments and a higher than usual number of disability transfers. This past year saw a year-over-year decrease in disbarments (down from eight to five), as well as a significant decrease in disability transfers. In 2019, only one attorney was transferred to disability inactive status, compared to six in 2018—a welcome change, although we still see wellbeing issues playing a prominent role in discipline cases.

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The most visible trend in 2019 was reciprocal discipline. If an attorney licensed in Minnesota is disciplined in another jurisdiction, Minnesota will impose reciprocal discipline to ensure that the lawyer is not able to avoid the consequences of misconduct in another state by simply moving their practice. In 2019, eight reciprocal disciplines were imposed, as compared to the typical one or two annually. The discipline imposed spanned the gamut from disbarment to reprimands. The basis for this significant year-over-year increase is unknown, but perhaps it speaks to the increased mobility and multijurisdictional practice of lawyers. It's too soon to see what 2020 will bring for reciprocal discipline, although once again we have several such cases in the office as I write.

Five attorneys were disbarred in 2019:

- Craighton Boates was disbarred based upon his felony bank fraud conviction in Arizona (one of the reciprocal discipline cases mentioned above);
- Boris Gorshteyn was disbarred for abandoning his practice, settling client claims without authorization, and misappropriating hundreds of thousands of dollars in client funds;
- Thomas Laughlin was disbarred for misappropriating client funds, a misappropriation that came to light during a trust account audit by the Director's office;
- Murad Mohammad was disbarred for misconduct in 11 client cases, including misappropriation of client funds, failing to return unearned fees, lack of communication and diligence in multiple client matters, and making false statements to the Director; and
- Israel Villanueva, a lawyer licensed in Mexico who was licensed in Minnesota as a foreign legal consultant—authorized to provide advice in Minnesota regarding the laws of Mexico—was disbarred from practice in Minnesota for abandoning several client matters, misappropriating client funds, and failing to cooperate with the Director's investigation.

Misappropriation is the common thread through the disbarments. Two lawyers—Gorshteyn and Mohammad—also accounted for more than 45 complaints between them, illustrating the widespread impact some lawyers have on clients.

Suspensions

Twenty-two attorneys were suspended in 2019, very similar to 2018. In reviewing the 22 cases, there is no particularly noteworthy trend. The misconduct ranged from filing frivolous claims or arguments (Wendy Nora and Lori Sklar) and failing to diligently handle client matters (Daniel Westerman) to more serious conduct, such as the two lawyers who received lengthy suspensions for criminal felony convictions involving solicitation of sex with minors (Mark Lichtenwalter and Mark Lorentzen). In contract to 2018, when an additional five cases involving misappropriation also resulted in suspensions, only one additional misappropriation case was decided in 2019 that resulted in a suspension, not disbarment (Christine Middleton). Accordingly, year over year, instances of misappropriation were down significantly.

As in 2018, we continue to see misconduct involving serious lack of candor issues. For example, Bobby Onyemeh Sea received a four-month suspension for lack of candor to the court regarding the reason for his absence at trial. Matthew McCollister received a 90-day suspension for making false statements to his client and opposing counsel regarding a settlement, in addition to additional misconduct, with evidence of mitigation.

David Izek received a lengthy suspension for misconduct that included making a false statement to a prosecutor in a matter. Daniel Miller received a lengthy suspension for misconduct that included lying to a client and the court. I know it is human nature to lie, and that it is also human nature to attempt to protect yourself when things go wrong, but it goes without saying that honesty is fundamental for lawyers, as attested by the discipline involving such misconduct.

Public reprimands

Eight attorneys received public reprimands in 2019 (four reprimands only, four reprimands and probation), down from 14 reprimands in 2018. A public reprimand is the least severe public sanction the court generally imposes. In 2018, the majority of public reprimands related to trust account errors that resulted in shortages and negligent misappropriation. I'm pleased to report that only one of the public reprimands in 2019 was for trust account books and records violations, a significant year-over-year decline. Please continue to focus on your trust account books and records if you are in private practice. You cannot just assume a trusted employee has it under control. Our website contains a lot of relevant information, including a link to a free CLE on trust accounting at the state law library's website.

Conclusion

The OLPR maintains on its website (*lprb.mncourts.gov*) a list of disbarred and currently suspended attorneys. You can also check the public disciplinary history of any Minnesota attorney by using the "Lawyer Search" function on the first page of the OLPR website. Fortunately, very few of the more than 25,000 active lawyers in Minnesota have disciplinary records.

As they say, "there but for the grace of God go I." May these public discipline cases remind you of the importance of maintaining an ethical practice, and may these cases also motivate you to take care of yourself, so that you are in the best position possible to handle our very challenging jobs; much is expected of us. Call if you need us—651-296-3952. ▲

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2019 private discipline

In 2019 the Director's Office closed 107 complaints with admonitions—a form of private discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are isolated and nonserious. This number was down from 2018, when 117 admonitions were issued. Another 14 complaints were closed with private probation, a stipulated form of private discipline approved by the Lawyers Board chair. Private probation is generally appropriate where a lawyer has a few nonserious violations in situations that suggest supervision may be of benefit. Interestingly, this number is identical to private probation dispositions in 2018 and 2017.

The rule violations that lead to private discipline run the gamut, and a table of admonition violations by rule can be found in the annual report issued each July. Generally, the most violated rules are Rule 1.3 (Diligence) and Rule 1.4 (Communication). Other frequently violated rules, particularly in the private discipline context, occur when declining or terminating representation (Rule 1.16), making fee arrangements (Rule 1.5), and safekeeping client property (Rule 1.15). Let's look at some specific rules and situations that tripped up lawyers in 2019.

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Fee-sharing

Rule 1.5(e), MRPC, sets forth the rule regarding sharing fees with a lawyer who is not in the same firm. Remember, you cannot provide anything of value to someone (lawyer or nonlawyer) for recommending your services.[1] Thus, general referral fees and finder's fees are unethical. But lawyers may divide a fee with another lawyer who is not in their firm if three conditions are met:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
(3) the total fee is reasonable.[2]

The rule is conjunctive, so each prong must be satisfied. Lawyers tell me frequently of their concerns that others are violating this rule. An attorney who has represented lawyers in proceedings with the Office for years recommended just this week that I cover this rule in this column. Most violations of this rule occur because lawyers miss the express requirements of Rule 1.5(e)(2), MRPC. Sometimes the client has no knowledge of the fee-sharing, a violation of the rule. Sometimes the client knows that a fee will be shared but does not understand the particulars, including the share each lawyer will receive—a violation of the rule. Sometimes, although the client agrees and understands the particulars, the client's agreement is not confirmed in writing—a violation of the rule.

An admonition from 2019 illustrates another variation on fee-sharing that occurs less frequently but violates the rule nonetheless. Attorney A initially agreed to represent an injured driver and injured passenger in a one-car accident. (Don't do this, by the way, because it usually involves a non-consentable conflict.) When it quickly became apparent that the injured passenger would have to sue the injured driver on the liability claim, Attorney A referred the injured passenger to Attorney B, with the injured passenger's agreement that Attorney A and B would split the 1/3 fee recovery equally if a recovery was secured. While the client agreed to the arrangement, the share each lawyer received was agreed to by the client, the agreement was confirmed in writing, and the total fee (a 1/3 contingency) was reasonable, Rule 1.5(e)(1) was nonetheless violated—because the non-consentable conflict meant that each lawyer could not assume joint responsibility for the representation. Nor was the fee split in proportion to the services performed by each. An admonition was issued to Attorney B for violation of Rule 1.5(e), MRPC.

I know that many lawyers are frustrated with the fee-sharing rules, and there are good arguments that the inability to more freely share fees among lawyers (and, probably more controversially, with nonlawyers) inhibits innovation in the profession. Irrespective of what you think the rules should be, please remember to review the ethics rules in order to avoid discipline if you are contemplating sharing fees with another.

Withdrawal from representation

One of the most common areas of inquiry on our ethics line, and a frequent source of missteps, is ethically terminating a representation. Two admonitions in 2019 illustrate this point. Attorney A was representing a client in a felony criminal matter in federal court as local counsel. After conviction, the client grew dissatisfied with Attorney B (outstate trial counsel) and planned to continue on appeal with Attorney A. While the matter was pending with the appellate court, client and Attorney A's relationship soured. Client did not fire Attorney A, but Attorney A moved to withdraw as counsel on appeal.

In support of his motion, Attorney A went into great detail in an affidavit that detailed how the attorney-client relationship had broken down by specifically describing requests the client had made to Attorney A that Attorney A believed were unreasonable, specifically describing communications with the client that Attorney A believed

to be "badgering," and disclosing specific information regarding the fee agreement. The appellate court denied the motion to withdraw, primarily because it did not address the issue of successor counsel. Attorney A then renewed his motion to withdraw, and provided additional confidential information about the client's assets (gleaned from Attorney A's representation of the client in his divorce), suggesting the client had ample funds to retain successor private counsel. An admonition was issued for violations of Rule 1.6(a), MRPC, and Rule 1.16(d), MRPC.

In another criminal case, the attorney agreed to represent a client on an initially straightforward gross misdemeanor matter for a flat fee, to include trial if applicable. As sometimes happens, though, matters were not what they initially appeared to be. Soon the attorney concluded she did not wish to continue the representation—this attorney was also planning a move out of state—and terminated the representation. Because this was a criminal matter, court rules require permission to withdraw, which the attorney did not seek. Nor did the attorney make a refund of any portion of the flat fee, even though it was undisputed that the attorney did not complete the representation. An admonition was issued for violations of Rules 1.16(c) and (d), MRPC. Rule 1.16(c) provides "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." Rule 1.16(d) provides "Upon termination of representation, a lawyer shall... refund[] any advance payment of fees or expenses that has not been earned or incurred."

Conclusion

Only about 20 percent of complaints to the OLPR result in any discipline, and private discipline is far more prevalent than public discipline. I'm sure, however, that the more than 100 attorneys who received private discipline last year do not take any comfort from these low numbers. Most attorneys care deeply about their compliance with the ethics rules but may forget that to be ethical is more than just "doing right"—there are a lot of specific requirements in the rules. If it has been a while (say, since law school), please do your practice and your peace of mind a favor and review the rules. You can even skip the comments if you like, though they are very helpful. You will find the time well spent. And, remember, we are available to answer your ethics questions—651-296-3952. ▲

Notes

[1] Rule 7.2(b), MRPC ("A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this rule; (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; (3) pay for a law practice in accordance with Rule 1.17; and (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement"); *see also* Rule 5.4(a), MRPC (A lawyer shall not share legal fees with a nonlawyer except under certain enumerated circumstances).

[2] Rule 1.5(e), MRPC.

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When may a lawyer ethically threaten criminal prosecution?

Many lawyers and members of the public look askance at lawyers who threaten criminal prosecution as part of negotiations in civil litigation. Every year we receive several complaints against lawyers who have done this, based on the complainant's belief that to do so is always unethical. Is this correct? You may be surprised to learn that, although such conduct implicates several ethics rules, it is not ethically prohibited and may be ethically permissible under certain circumstances. Let's review.

Background

Prior to 1983, most ethics rules expressly prohibited using or threatening criminal prosecution solely to gain an advantage in a civil matter. This began to change in the mid-1980s when the ABA changed its model rules to remove this express prohibition. In 1992, the ABA issued a formal opinion, based upon the revised model rules, on the circumstances under which it was ethically permissible to threaten (and relatedly refrain from pursuing) criminal prosecution to leverage a client's position in a civil matter.[1] According to that opinion, threats of criminal prosecution against an opposing party may be made in order to obtain relief in a civil matter so long as (1) the criminal matter is related to the client's underlying civil claim, (2) the lawyer has a well-founded belief that both the civil claim and criminal charges are warranted under the law and facts, and (3) the lawyer does not try to exercise or suggest improper influence over the criminal process.

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The Director has long relied on the ABA position regarding the permissibility of threats of prosecution in related civil litigation and has published articles advising the bar to this effect. *See* Patrick R. Burns, *Limits on Threats of Criminal Prosecution*, Minnesota Lawyer, October 10, 2011; Kenneth L. Jorgensen, *When Lawyers Threaten Criminal Prosecution in a Civil Case*, Minnesota Lawyer, April 24, 1998. There is more to the story, however, that is worth discussion.

Other jurisdictions

Some states carried forward the original express prohibition. For example, Rule 8.4(g) of the Illinois Rules of Professional Conduct provides that "It is professional misconduct for a lawyer to present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter." Texas Rule of Professional Conduct 4.04(b)(1) also prohibits a lawyer from presenting, participating in presenting, or threatening to present "criminal or disciplinary charges solely to gain an advantage in a civil matter." This may matter to you because, under the ethics rules choice of law provisions, the ethics rules to be applied to a matter will be the rules of the jurisdiction where a tribunal sits, if the conduct relates to a matter pending before a tribunal; where the conduct occurred; or where the predominant effects of the conduct occurred.[2] Due to the multi-jurisdictional nature of many practices, you should know the ethics rules to the extent your conduct has significant contact with other jurisdictions. And if you are considering a threat regarding criminal prosecution, you should be reviewing the applicable ethics guidance from that jurisdiction.

Criminal law

The primary rationale behind omitting the pre-1983 prohibition language was that other rules covered this conduct. For example, as noted in the ABA Opinion, "If a lawyer's conduct is extortionate or compounds a crime under the criminal law of a given jurisdiction, that conduct also violates Rule 8.4(b)."[3] Minnesota does not have an extortion statute, but does have a very broad coercion statute.[4] Criminal coercion occurs when "whoever orally or in writing makes any of the following threats and thereby causes another against the other's will to do any act or forbear doing a lawful act," including "a threat to make or cause to be made a criminal charge, whether true or false."[5] Criminal law is well beyond the purview of the Director's Office. However, provided a lawyer follows the guidance in the 1992 ABA opinion, the Director has not imposed discipline. Nor am I aware of an occasion where a lawyer was charged under the coercion statute after following the ABA guidance. But the criminal law on its face is very broad.

Recently, the Minnesota Court of Appeals struck down as unconstitutional a subdivision of the criminal coercion statute, specifically Minn. Stat. §604.27, subd. 1(4), in *State v. Jorgenson*, 934 N.W.2d 362 (Minn. Ct. App. 2019), review granted December 17, 2019. That subdivision criminalized "a threat to expose a secret or deformity... or otherwise to expose any person to disgrace or ridicule." The court of appeals determined the statute was overbroad as it proscribes and criminalized a substantial amount of protected speech. Subdivision 1(5) of Minn. Stat. §609.27 may suffer from the same constitutional problems, as it similarly proscribes a substantial amount of protected speech, including claims of right and, in some instances, other statutorily mandated speech. For example, someone collecting on a worthless check must provide a notice of dishonor that includes notification

of criminal penalties under Minn. Stat. §604.113, subdiv. 3. However, the criminal statute as presently written makes it unlawful to "threaten to make or cause to make a criminal charge, whether true or false," and you should take that into consideration when making decisions regarding your own conduct.

The ethics rules

ABA Opinion 92-363 addresses additional rules practitioners should keep in mind to guide their conduct. Rule 4.4(a), MRPC, prohibits a lawyer from using means that have "no substantial purpose other than to embarrass, delay, or burden" an opposing party. Accordingly, "A lawyer who uses even a well-founded threat of criminal charges merely to harass a third person violates Rule 4.4." Rule 4.1, MRPC, imposes a duty of truthfulness in statements to others. So, "A lawyer who threatens criminal prosecution, without an actual intent to so proceed, violations Rule 4.1." Rule 3.1, MRPC, prohibits the assertion of non-meritorious claims or contentions. Thus, "A lawyer who threatens criminal prosecution that is not well founded in fact and in law, or threatens such prosecution in furtherance of a civil claim that is not well founded, violates Rule 3.1."

Conclusion

Tread carefully when making any threat to an opposing party, particularly relating to criminal prosecution. Lawyers frequently represent clients in matters where there are both civil and criminal remedies available, and to perform your job competently, those overlapping remedies often need to be addressed. If you choose to use potential criminal prosecution as a negotiating tactic, make sure you are operating in a jurisdiction where this is permitted, and that (1) the civil and criminal claims are related, (2) you have a well-founded belief that both the civil claim and the criminal charges are warranted by the law and facts, and (3) you do not attempt to exert or suggest improper influence over the criminal process. Otherwise you almost certainly are running afoul of the ethics rules. Also, make sure your negotiation demands are reasonable. If you are demanding more than your claim is worth to forgo criminal prosecution, chances increase that you may violate a coercion or extortion statute.

We often field requests from lawyers on our ethics hotline on the topic of ethically threatening criminal prosecution in a client's civil matter. We also see several complaints on this topic annually. Most lawyers err on the side of caution when approaching this topic, but many lawyers do not. Zealous representation does not mean you can use as leverage every bad (or criminal) thing you know about the opposing party, even though your client may want you to. As always, if you have questions regarding your ethical obligations, please call us at 651-296-3952, or visit our website at *lprb.mncourts.gov* to submit an online request. ▲

Notes

[1] ABA Formal Opinion 92-363 (July 6, 1992).

[2] Rule 8.5(b), Minnesota Rules of Professional Conduct (MRPC).

[3] Rule 8.4(b), MRPC, "It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

[4] Minn. Stat. §609.27.

[5] Minn. Stat. §609.27, subd. 1(5).

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