

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
MEETING AGENDA**

Friday, April 26, 2019 – 1:00 p.m.
Town & Country Club
300 Mississippi River Boulevard North
St. Paul, Minnesota

1. Approval of Minutes of January 31, 2019, Lawyers Board Meeting (Attachment 1).
2. Panel and Committee Assignments (Attachment 2).
3. Panel Discussion
 - a. Panel Assignments (Attachment 3).
 - b. Panel and Reviewing Member Authority.
4. Committee Updates:
 - a. Rules Committee.
 - (i) Proposed ABA rules changes to advertising rules (Attachment 4).
 - (ii) Proposed changes to Rules on Lawyers Professional Responsibility (Attachment 5).
 - a. Opinion Committee
 - (i) Proposed changes to Opinion No. 21 (Attachment 6).
 - b. DEC Committee
 - (i) May 17, 2019, DEC Chairs Symposium (Attachment 7).
 - (ii) September 27, 2019, Professional Responsibility Seminar.
5. Director's Report (Attachment 8).
6. Other Business:
 - a. BLE ad hoc committee.
 - b. "Success" ad hoc committee.
7. Justice Lillehaug Update
8. Quarterly Board Discussion (closed session).

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

If you have a disability and anticipate needing an accommodation, please contact Susan Humiston at 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 186TH MEETING OF LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD JANUARY 31, 2019**

The 186th meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Thursday, January 31, 2019, at the Town and Country Club, St. Paul, Minnesota. Present were: Board Chair Robin Wolpert, and Board Members Joseph P. Beckman, Jeanette M. Boerner, James P. Cullen, Thomas J. Evenson, Roger Gilmore, Christopher A. Grgurich (by phone), Mary L. Hilfiker, Gary M. Hird, Anne M. Honsa, Cheryl M. Prince, Susan C. Rhode, Brent Routman, Gail Stremel, Bruce R. Williams and Allan Witz (by phone). Present from the Director's Office were: Director Susan M. Humiston, Deputy Director Timothy M. Burke, Senior Assistant Directors Binh T. Tuong and Jennifer S. Bovitz, and Assistant Directors Amy M. Halloran and Nicole S. Frank. Also present were Minnesota Supreme Court Associate Justice David L. Lillehaug, and Landon J. Ascheman, who will join the Board effective February 1, 2019.

1. **APPROVAL OF MINUTES.**

The minutes of the September 28, 2018, Board meeting were unanimously approved.

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

Robin Wolpert reiterated her remarks during the luncheon which preceded the Board meeting about how much she enjoyed working with, and appreciated the service and contributions of, retiring Board members Norina Jo Dove, Anne M. Honsa, Michael J. Leary, Cheryl M. Prince and Brent Routman. Ms. Wolpert also acknowledged the kind and generous remarks Justice David L. Lillehaug made about those members during the luncheon.

3. **UPDATED PANEL AND COMMITTEE ASSIGNMENTS.**

Ms. Wolpert informed the Board that on January 28, 2019, the Supreme Court issued its order appointing Board members effective February 1, 2019. Based on the composition of the Board, Ms. Wolpert had made the following assignments.

- **Executive Committee:** The membership will remain the same, with the exception that Christopher Grgurich will replace Cheryl Prince as Vice-Chair and member of the Executive Committee.
- **Rules Committee:** Membership will be James Cullen (Chair), Jeanette Boerner, Christopher Grgurich, Gary Hird, Virginia Klevorn and Gail Stremel.

- Opinions Committee: Membership will be Gary Hird (Chair), Joseph Beckman, Mark Lanterman, and Susan Rhode.
- DEC Committee: Membership will be Peter Ivy (Chair), Thomas Evenson, Roger Gilmore, Mary Hilfiker, Bruce Williams and Allan Witz.
- Panels: Panels will be constituted as follows:
 1. Thomas Evenson (Chair), Katherine Brown Holmen, and Mark Lanterman.
 2. Susan Rhode (Chair), Bruce Williams, and Shawn Judge.
 3. James Cullen (Chair), Jeanette Boerner, and Susan Stahl Slieter.
 4. Gary Hird (Chair), Landon Ascheman, and Gail Stremel.
 5. Allan Witz (Chair), Kyle Loven, and Mary Hilfiker.
 6. Peter Ivy (Chair), Virginia Klevorn, and a member to be determined.

Ms. Wolpert informed the Board that there were two vacancies effective February 1, 2019, for public members but only one application was received. Because of this, Ms. Wolpert would ask public Board members to substitute on Panel 6 as necessary. Ms. Wolpert anticipates that the posting for the public member Board position will be posted soon.

Ms. Wolpert asked Board members to vigorously recruit qualified potential public members and for ideas on how to spread the word. Joseph Beckman stated that he was considering asking neighbors who could make the required time commitments. Mary Hilfiker inquired whether a person had to have served on a district ethics committee (DEC) in order to serve on the Board. Ms. Wolpert replied that service is not required but is preferred.

Roger Gilmore inquired whether a push for public members had been made through the DEC's. Susan Humiston replied it had.

Bruce Williams stated that he would reach out to former DEC public members. Ms. Wolpert stated her appreciation and stressed the importance of geographic and other diversity. Ms. Wolpert also stated her belief that personal phone calls work best for recruitment. She also suggested Board members consider civic organizations and, for those in law firms, non-lawyer assistants.

Ms. Humiston stated that she has asked the Clerk of Appellate Courts to post the opening and hoped it would be done soon.

Jeanette Boerner stated that she believed it would be helpful to have a writing to share with people interested in the position. Ms. Humiston stated that she would create a writing with information beyond what is in the posting the Supreme Court makes through the Clerk of Appellate Courts. She would include information such as what Board members do, when the Board meets, etc. Ms. Boerner thought that including why Board service is important would be beneficial as well.

Ms. Humiston reminded the Board members that the new Panel memberships are effective February 1, 2019, but that if a Panel has a hearing scheduled or is otherwise in the midst of a probable cause proceeding, then the matter will be heard by the Panel as constituted when the matter was initiated.

Ms. Wolpert reminded Board members that Panel Chairs should act as mentors to new Board members for any questions or concerns. Ms. Wolpert will inform new members of this, as well. Although Board members are free to talk with any other Board member regarding any issues, Ms. Wolpert believes that it is good to have a mentor assigned when a new member joins.

4. COMMITTEE UPDATES.

A. Rules Committee.

i. MSBA Petition and LPRB Response.

Christopher Grgurich noted that the past year has been very busy for the Rules Committee.

Mr. Grgurich summarized the petition pending before the Supreme Court from the Minnesota State Bar Association (MSBA) to amend Rules 1.6(b) and 5.5, Minnesota Rules of Professional Conduct, and the responses the Board and the Director had filed. Oral presentations to the Court were made on January 15, 2019. Ms. Wolpert, who presented on January 15, stated her belief that the debate before the Supreme Court was robust, with the Court asking good questions. Ms. Humiston informed the Board that the argument is available to view through the Minnesota Judicial Branch website.

ii. RLPR Proposed Changes.

Mr. Grgurich stated that a number of proposed changes to the Rules on Lawyers Professional Responsibility (RLPR) designed to facilitate the process had emanated from the Director's Office, the changes were reviewed and approved by the Rules Committee, and a subcommittee of the MSBA Rules of Professional Conduct Committee had no strong objections to any of the proposals.

Ms. Humiston reported that the MSBA subcommittee established to consider adding rules regarding succession planning had, by split decision, recommended no rule amendments be proposed at this time, and that the conversation continues. Mr. Williams stated that Ms. Humiston's article regarding succession planning had been very helpful and thanked her for it. Ms. Humiston noted that she has received many comments about that article.

iii. Proposed ABA Advertising Rule Changes.

Mr. Grgurich reported that in 2018 the ABA amended Model Rule 7 regarding advertising and solicitation. The MSBA Rules of Professional Conduct Committee established a subcommittee, which included Mr. Grgurich and Timothy Burke, to consider whether any or all of the changes should be adopted in Minnesota. Mr. Grgurich summarized what he viewed as the two most substantial changes. These involve use of the word "specialist," and the definition of "solicitation." The MSBA subcommittee voted to adopt the ABA changes in whole. Mr. Grgurich reported that the MSBA will move this issue through its process, and that separately the Board's Rules Committee will consider the issue for presentation to the Board in April 2019.

B. Opinions Committee.

Anne Honsa reported that the Opinions Committee is considering whether the Board should modify LPRB Board Opinion No. 21 in light of ABA Opinion No. 481. The Opinions Committee is in the process of gathering information regarding what other states are doing, and will continue its consideration of the matter.

Ms. Humiston stated that she has referred to the Opinions Committee the issue of whether to follow ABA Formal Opinion 11-461 on advising a client about direct party-to-party contact with a represented party.

C. DEC Committee.

Ms. Humiston reported on the excellent agenda for the upcoming DEC Chairs Symposium. Ms. Humiston complimented Peter Ivy for his extensive efforts in planning and preparation, which included speaking with many DEC Chairs for their input and suggestions. Unfortunately, Justice Lillehaug is unable to attend, and Justice Paul C. Thissen will attend in his place. The agenda includes a well-being session tied to implicit bias, and a substantial portion of the Symposium will contain practical advice for DEC Chairs. Mr. Williams stated that he had requested Mr. Ivy include on the agenda the issue of a criminal defense lawyers being required to provide the file to the client when that file may contain private or sensitive information about the victim.

5. DIRECTOR'S REPORT.

Ms. Humiston thanked Mark Lanterman for speaking at the National Organization of Bar Counsel conference in January 2019 in Las Vegas on cybersecurity. Ms. Humiston stated that the audience greatly appreciated that presentation.

There are several personnel updates. Ms. Humiston extended congratulations to Binh Tuong on her promotion to Senior Assistant Director, and Cassie Hanson on her promotion to Managing Attorney. Josh Brand has been out since early October with a chronic health issue, with no return to duty date set. Mr. Brand and Siama Brand just had a daughter born, and Ms. Brand is on a six-month parenting leave.

Patrick R. Burns has returned to the Office on a part-time basis. Ms. Humiston stated that he has been a big help to the Office. Rebecca Huting took a job with a law firm and departed. The Office has completed its hiring process, identified a candidate, and hopes to finalize the hiring process in the immediate future.

The paralegal position remains open. The Office previously posted for hiring, the pool of applicants was not as hoped, there was one finalist, but she did not accept the position. The position has been reposted, and more than 80 applications were received.

Ms. Humiston informed the Board that the Office will be hiring a financial analyst to help with audits, which are primarily done by paralegals. Currently, there are 14 audits pending, and help is needed. Ms. Humiston also stated that the Office will

have a paralegal intern who will be working with the Office as part of her class work. Finally, Ms. Humiston has been considering, and will communicate with Justice Lillehaug and Ms. Wolpert about, whether the Office should hire a temporary attorney.

Ms. Humiston reported that Amy Halloran had received compliments for her work in improving the operations of the professional firms department. The Office is in charge of administering the Professional Firms Act, and there are about 8,000 professional firms who register through the Office each year. Ms. Halloran is in charge of that department, substantially streamlined the processes, and developed an FAQ and a tutorial. Ms. Halloran is working to make more improvements, such as developing the ability to file and pay registration fees online.

Ms. Humiston gladly reported that Jennifer Bovitz had a case with a very appreciative complainant, who noted the importance, impact and quality of the work Ms. Bovitz had done on the matter.

Ms. Humiston reported to the Board that Bentley Jackson, as the Board's personnel liaison to the Office, meets quarterly with staff to hear concerns and to thank people on behalf of the Board. Staff greatly appreciates the opportunity to have this conversation, and these quarterly conversations will continue.

Ms. Humiston briefly discussed the year just concluded. She noted that there were more public disciplines, more disbarments and more private disciplines. Of particular note is that there were six matters in which a lawyer was transferred to disability-inactive status. This is a significant departure, as in most years only one or two lawyers are transferred to disability-inactive status. Ms. Hilfiker inquired whether there was a certain type of disability which was prevalent in these matters. Ms. Humiston replied that there was not. Ms. Hilfiker also inquired as to whether the lawyers involved typically were in the same age range. Ms. Humiston stated that the age range varied, which highlighted the importance of lawyer well-being.

Ms. Humiston stated that a lot of progress had been made toward eliminating the Office's backlog and acknowledged the importance of eliminating the backlog. She stated the Office has a plan and teams devoted to complete in February the oldest files which remain under investigation.

Ms. Humiston noted that there is one matter involving one lawyer which has 22 separate complaint files. In this matter, the lawyer has been suspended pursuant to Rule 12(c), RLPR. The Director's brief will be due in February, and then the matter will be on the way toward adjudication and closure.

Ms. Humiston noted that Mr. Gilmore has encouraged the Office to think of data in a graphic way, which is why the Office has been presenting more year-over-year comparisons. Also included in the Board materials is a graph which shows from 1985 to date the year-end number of complaints received, open files in the system, and number of files over one year old. Also included is a chart of public discipline during that time frame. Ms. Humiston found the large variations in public discipline between years to be surprising.

Ms. Humiston reported that Mr. Gilmore and the Executive Committee have tasked the Office with how the Office could continue to put greater context into the statistics presented to the Board, and the Office continuously strives to do so. Mr. Beckman stated that he found the graphs included in the materials to be exactly what the Board wants.

Cheryl Prince inquired about the total file, and files over one year old, statistics in the 1980s. Ms. Humiston reported that Mr. Burns, who worked for the Office at that time, said that many dispositional documents, particularly dismissals, were much briefer. Ms. Prince thought that leads to an interesting question for the Board, which is whether the Office is expending an appropriate, or too much, time investigating its files; Ms. Prince believes the time spent on investigations is appropriate. Ms. Boerner asked if the reports could also include the percentage of older files relative to the total number of open files and stated her belief that this may tell a good story.

James Cullen inquired about the trusteeships currently being handled by the Office. Ms. Humiston reported that these trusteeships are newer. Mr. Cullen asked if these trusteeships involve wills. Ms. Humiston replied that at least one of them does. This trusteeship consists of more than 100 boxes. Mr. Cullen asked if the Office had received inquiries from people looking for their wills. Ms. Humiston replied that the Office has not. Ms. Humiston reminded the Board that when the Office destroys files pursuant to the Supreme Court's order appointing the Office as trustee, the Office removes all valuable original documents such as titles, wills, and abstracts.

Justice Lillehaug inquired as to the status of the proceeding identified as a proceeding under Rule 12(c), RLPR. Ms. Humiston stated that the matter is in briefing and gave an overview of the process pursuant to Rule 12(c), RLPR.

Ms. Humiston noted that there are three lawyers who account for significant numbers of open files. In one matter, the lawyer and the Director have filed a stipulation for disbarment with the Supreme Court, which remains pending. The Office has ten more files which are not included in the pending public proceeding. Another matter involves the lawyer with 22 files proceeding pursuant to Rule 12(c), RLPR. In

another matter, there is a pending petition, other files are being investigated, and this totals 15 files.

Mr. Gilmore inquired about the one year period a lawyer has to appear under Rule 12(c), RLPR, and asked if other states had a similar one year period. Ms. Humiston stated she was not familiar with that. Ms. Humiston noted that this does tap into a larger issue of revisiting the RLPR, to revise and update these rules.

Mr. Grgurich asked if the cases on hold are included in the file numbers. Ms. Humiston replied they were. Mr. Grgurich opined that perhaps they ought not to be as the Office is unable to take any action on these matters. Ms. Humiston believes it is appropriate to include these files because they are open files in the Office.

Mr. Williams asked about a file which is on hold and received in 2015. There was then a discussion about whether the Director should be taking further action regarding this matter.

6. OTHER BUSINESS.

Ms. Wolpert reported that she had recently attended the National Council of Bar Presidents meeting. This included a session for bar leaders on lawyer well-being. Minnesota and Pennsylvania gave a detailed presentation of the work these states are doing. This was an opportunity to showcase the work of the Board, the Office, the Bar and the Supreme Court.

Ms. Wolpert noted the well-being summit the Supreme Court will host on February 28, 2019. Justice Lillehaug stressed the Court's commitment to disseminating the August 2017 task force study to all Minnesota lawyers and to focus on the importance of lawyer well-being. The Call to Action Summit will be at the University of St. Thomas. The Court has invited a broad array of attendees from all constituencies, including large firms, solo and small firm practitioners, corporate attorneys, and public attorneys. One goal is to try to persuade employers such as large firms to implement well-being programs in their firms. National experts will give addresses to the audience, and there will be breakout sessions tailored to each particular group. The entire Supreme Court is invested in lawyer well-being and will attend. Chief Justice Lori S. Gildea will present welcoming remarks, and Justice Lillehaug will close the seminar. Justice Lillehaug extended the Court's thanks to the Court's partners, including the Board, the Office, Lawyers Concerned for Lawyers (LCL), and others, in planning the Call to Action. Ms. Hilfiker expressed her pleasure that the Court is hosting this event and asked about conveying the message and material regarding lawyer well-being to small and rural firms. Justice Lillehaug acknowledged the

importance of doing that, noted the challenges, and hopes that the Call to Action will be a foundation for expanding the important message of lawyer well-being. Along these lines, Ms. Humiston noted that Ms. Wolpert, Joan Bibelhausen of LCL, and others have tried very hard to invite leaders who can spread the word.

Ms. Wolpert stated that on her own personal agenda is to talk in 2019 to every district bar association to receive feedback on how to get the message on well-being to them. Ms. Wolpert believes that individual DEC members can be part of this process, too. She noted and appreciated the fact that the Supreme Court is working to normalizing well-being, changing the culture, and changing the dialogue and expectations.

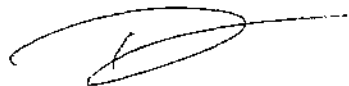
Mr. Routman inquired about outreach on this topic to the law schools. Justice Lillehaug stated that University of St. Thomas law school has been leaders in collecting data on this topic and that all three law school deans have been invited to the Call to Action.

7. QUARTERLY BOARD DISCUSSION.

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

Thereafter the meeting adjourned.

Respectfully Submitted,



Timothy M. Burke
Deputy Director

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

Attachment 2

EXECUTIVE COMMITTEE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Rule 4(d), Rules on Lawyers Professional Responsibility, provides:

The Executive Committee, consisting of the Chair, and two lawyers
and two non-lawyers designated annually by the Chair.

The following members of the Lawyers Professional Responsibility Board are appointed to the Executive Committee for the period February 1, 2019, through January 31, 2020.

Robin Wolpert, Chair
Chris Grgurich, Vice-Chair
Joe Beckman
Roger Gilmore
Bentley Jackson

Chris Grgurich, Vice Chair, shall receive reports from the Director's Office of tardy complainant appeals on behalf of the Chair in accord with Executive Committee Policy & Procedure No. 10; shall be responsible for reviewing dispositions by the Director that vary from the recommendations of a District Ethics Committee; and, shall be responsible for review of complaints against LPRB and Client Security Board members, the Director, members of the Director's staff or DEC members based solely upon their participation in the resolution of a complaint, pursuant to Section 4, Executive Committee Policy & Procedure No. 5.

Bentley Jackson shall act as personnel liaison in accord with Executive Committee Policy & Procedure No. 12.

Roger Gilmore will oversee the Executive Committee process for reviewing file statistics and the aging of disciplinary files.

Joe Beckman will consider former employee disqualification matters in accord with Executive Committee Policy & Procedure No. 3.

Robin Wolpert, in addition to the Chair's responsibility for oversight of the Board and OLPR as provided by the RLPR, will handle Panel Assignment matters in accord with

Rule 4(f) and Executive Committee Policy & Procedure No. 2, and complaints against the Director or staff members in accord with Executive Committee Policy & Procedure No. 5.

Effective February 1, 2019.

Romi M. Wolpert

Robin M. Wolpert, Chair

Lawyers Professional Responsibility Board

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 February 1, 2019, through January 31, 2020, are:

LANDON ASCHEMAN

JEANETTE BOERNER

KATHERINE BROWN HOLMEN

JAMES CULLEN

THOMAS EVENSON

MARY HILFIKER

GARY HIRD

PETER IVY

SHAWN JUDGE

VIRGINIA KLEVORN

MARK LANTERMAN

KYLE LOVEN

SUSAN RHODE

SUSAN STAHL SLIETER

GAIL STREMEL

BRUCE WILLIAMS

ALLAN WITZ

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 February 1, 2019.

Robin M. Wolpert

Robin M. Wolpert, Chair
Lawyers Professional
Responsibility Board

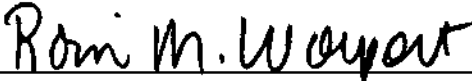
RULES COMMITTEE

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:

Jim Cullen, Chair
Jeanette Boerner
Chris Grgurich
Gary Hird
Virginia Klevorn
Gail Stremel

Effective February 1, 2019.



Robin 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:

Gary Hird, Chair
Joe Beckman
Mark Lanterman
Susan Rhode

Effective February 1, 2019.

Robin M. Wolpert

Robin M. Wolpert, Chair
Lawyers Professional
Responsibility Board

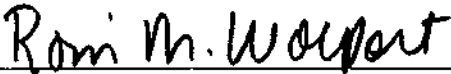
DEC COMMITTEE

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 and to assist the DEC's in recruitment and training of volunteers, shall be constituted with the following members:

Peter Ivy, Chair
Tom Evenson
Roger Gilmore
Mary Hilfiker
Bruce Williams
Allan Witz

Effective February 1, 2019.



Robin M. Wolpert, Chair
Lawyers Professional
Responsibility Board

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 effective February 1, 2019. Those with a single asterisk after their names are appointed Chair, and those with a double asterisk are appointed Vice-Chair.

Panel No. 1.

- * Tom Evenson
- ** Katherine Brown Holmen
- Mark Lanterman (p)

Panel No. 4.

- * Gary Hird
- ** Landon Ascheman
- Gail Stremel (p)

Panel No. 2.

- * Susan Rhode
- ** Bruce Williams
- Shawn Judge (p)

Panel No. 5.

- * Allan Witz
- ** Kyle Loven
- Mary Hilfiker (p)

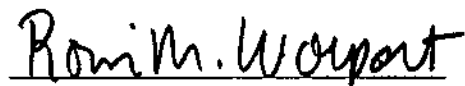
Panel No. 3.

- * Jim Cullen
- ** Jeanette Boerner
- Susan Stahl Slieter (p)

Panel No. 6.

- * Peter Ivy
- ** Virginia Klevorn (p)
- TBD (p)

Effective February 1, 2019.



Robin M. Wolpert, Chair
Lawyers Professional
Responsibility Board

- * Chair
- ** Vice Chair
- (p) Public member

Attachment 3

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 2

RE: Panel Assignment Procedures.

PANEL ASSIGNMENTS

Rule 4(f), RLPR, provides in part, "The Director shall assign matters to Panels in rotation." To enhance the appearance of fairness and avoid any perception that the Director's Office could manipulate Panel assignments, the task of assigning Panel matters to Lawyers Board Panels is implemented by use of a blind rotation system, which is the responsibility of the Board Chair or an Executive Committee member designated by the Board Chair.

The procedure followed is outlined as follows:

1. A rotation chart is prepared by the Board Chair or the Board Chair's designee. The chart designates Panel rotations from one through six, picked arbitrarily for at least 50 cases. The designee provides the Board Chair with a copy of the rotation schedule. See Exhibit A.
2. In the Director's Office, the following are immediately forwarded to the Panel clerk for Panel assignment: charges when signed, admonition appeals when the Director decides to present them to a Panel; expunction petitions and reinstatement petitions when received.
3. The Panel clerk promptly contacts the designee's staff member. The Panel clerk informs the staff member of the name of the respondent and type of proceeding. The staff member gives the Panel clerk the name of the Panel Chair and number of the next Panel on the rotation chart.

If the Chair of the next Panel on the rotation chart has a conflict in a matter, the staff member instead gives the Panel clerk the name of the Panel Chair and number of the next Panel on the rotation chart. The staff member then assigns the skipped Panel to the next matter.

If the Panel clerk is unable to reach the staff member within 24 hours, the clerk attempts to contact the Board Chair or Board Chair's designee. If the clerk is unable to contact either the staff member or the designee, the clerk contacts the Board Chair or Vice-Chair who shall choose a Panel randomly.

SUBSTITUTIONS

Rule 4(e), RLPR, provides in part, "The Board's Chair or the Vice-Chair may designate substitute Panel members . . ." It is impractical for such substitutions to be made personally by the Chair or Vice-Chair, or by the Board Chair's designee. Therefore, this function is delegated to the Panel clerk in the Director's Office. The procedures to be followed by the clerk are as follows.

If a Board member has a conflict in a matter or cannot serve on a Panel for some other reason, a substitute Panel member must be obtained. The Panel clerk finds a substitute Panel member using a rotation schedule. This rotation schedule is separate from the Panel rotation schedule. The Panel clerk must, however, take into consideration the following:

1. Panel Chairs are not called to substitute unless there is an emergency or no non-chairs are available.
2. Panels must include at least one lawyer and one public member.

The Panel clerk notes on the clerk's rotation chart the reason why each Board member could not serve as a substitute. The basis for a conflict need not be specified.

BOARD MEMBER EXPERTISE AND WORKLOADS; DISTRICT COMMITTEE AND FORMER BOARD MEMBER PANEL SUBSTITUTIONS

Rule 4(e) and (f), RLPR, provides in part,

(e) . . . The Board's Chair or the Vice-Chair may designate substitute Panel members from current or former Board members or current or former District Committee members for the particular matter, provided that any panel with other than current Board members must include at least one current lawyer Board member. . . .

(f) . . . The Executive Committee may, however, redistribute case assignments to balance workloads among the Panels, appoint substitute panel members to utilize Board member or District Committee member expertise

EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 2
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A. Expertise.

A Panel Chair, a respondent or the Director may request that there be a substitution on a particular Panel to utilize the expertise of a Board member or a District Committee member. The request should be addressed to the Board Chair, in writing, with copies to appropriate parties, and to the Board Vice-Chair. The request shall be made at or before the time of the pre-hearing meeting and shall state the particular expertise needed. The Board Chair (or by delegation from the Chair, the Vice-Chair) decides whether expertise is needed, and if so, substitute an expert Board member or District Committee member. The Director's Office maintains a directory of Board members, showing expertise, and a list of District Committee chairpersons.

The substitution must harmonize with the requirements that each Panel include a current Board member and a public member. The substitution should not be for the Panel Chair. The Board Chair or Vice-Chair choose the person substituted for by the above criteria and, secondarily, by seniority.

B. Workload Balancing.

Either on the Executive Committee's own initiative or at the request of a Panel Chair, the Board Chair or Board Chair's designee may redistribute case assignments among Panels or among Board members in such a way as in the designee's discretion balances workloads in a reasonable fashion.

C. Substitution of District Committee Members.

Normally, reasonable efforts should be made to utilize current Board members on Panels. However, when an expert is desirable, or Board members generally have excessive workloads in view of their volunteer status or when some other particular exigency requires, the Board Chair or Board Chair's designee may on the Chair or designee's initiative or after receiving a written request from any interested party, substitute current or former District Committee members.

D. Assignment of Admonition Appeals.

The Executive Committee is mindful that, particularly for outstate Board members, the burden of hearing an admonition appeal may contribute to excessive workload. To

balance workloads in connection with admonition appeals, the Board Chair or Board Chair's designee for case assignments shall re-assign admonition appeals when appropriate so that as many admonition appeals as practical may be heard before a single Panel in a single day. It is hoped that through this procedure each Panel may have no more than one admonition appeal hearing day per year. To implement this policy, whenever it appears appropriate to re-assign an admonition appeal to a Panel that already has an admonition appeal pending, the Director shall request the Board Chair or Board Chair's designee in writing to make such re-assignment, pursuant to this policy.

CHOOSING "THE PANEL CHAIR" UNDER RULE 10(d)

Rule 10(d), RLPR, provides,

Other Serious Matters. In matters in which there are an attorney's admissions, civil findings, or apparently clear and convincing documentary evidence of an offense of a type for which the Court has suspended or disbarred lawyers in the past, such as misappropriation of funds, repeated non-filing of personal income tax returns, flagrant non-cooperation including failure to submit an answer or failure to attend a pre-hearing meeting as required by Rule 9, fraud and the like, the Director may either submit the matter to a Panel or upon a motion made with notice to the attorney and approved by the Panel Chair, file the petition under Rule 12.

When the Director makes a motion under Rule 10(d) to a Panel Chair, the Panel Chair shall be chosen, together with a Panel, in the same manner employed for Panel assignments generally, as stated above.

CHOOSING "THE PANEL CHAIR" UNDER RULE 10(e)

Rule 10(e), RLPR, provides,

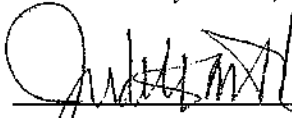
Additional Charges. If a petition under Rule 12 is pending before this Court, the Director must present the matter to the Panel Chair, or if the matter was not heard by a Panel or the Panel Chair is unavailable, to the Board Chair, or Vice-Chair, for approval before amending the petition to

EXECUTIVE COMMITTEE
POLICY AND PROCEDURE NO. 2
Page 5

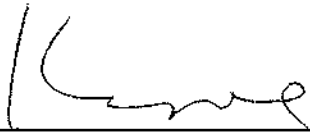
include additional charges based upon conduct committed before or after the petition was filed.

In order to eliminate any difficulties in identifying "the Panel Chair" for purposes of this rule, the following procedures are to be implemented. If charges were made against the respondent and assigned to a Panel, the Chair of that Panel shall approve (or decline to approve) supplemental petitions based on additional charges. If the matter against the respondent was never assigned to a Panel (e.g., the respondent waived the Panel before charges were filed), the supplementary petition is sent to the Board Chair for approval and signature.

Approval: The above policy was approved by the Lawyers Professional Responsibility Board at its June 26, 2015, meeting.



JUDITH M. RUSH
CHAIR, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD



KENNETH S. ENGEL
VICE-CHAIR, LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

EXHIBIT A

PANEL ROTATION CHART

File #	OLPR Case #	Panel #	Panel Chair	Respondent	Type of Matter
14-01		4			
14-02		1			
14-03		6			
14-04		2			
14-05		5			
14-06		4			
14-07		2			
14-08		6			
14-09		4			
14-10		1			
14-11		2			
14-12		3			
14-13		6			
14-14		3			
14-15		2			
14-16		2			

Attachment 4

OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY
MEMORANDUM

TO: Lawyers Professional Responsibility Board Rules Committee

CC: Robin M. Wolpert, Lawyers Professional Responsibility Board Chair
Susan D. Humiston, Director, Office of Lawyers Professional Responsibility

FROM: Timothy M. Burke, Deputy Director

DATE: March 25, 2019

RE: March 21, 2019, Meeting

I am writing to briefly summarize and follow up the March 21, 2019, telephone conference call meeting of the Board's Rules Committee. Present for the meeting were Committee members James P. Cullen (Chair), Christopher A. Grgurich, Gary M. Hird, Virginia Klevorn and Gail Stremel. Also present were Board Chair Robin M. Wolpert, and Timothy M. Burke of the Director's Office.

The Committee considered whether to make a recommendation about the position the Board should take regarding amending the Minnesota Rules of Professional Conduct (MRPC) in light of the recent amendments to the ABA Model Rules of Professional Conduct regarding Rules 7.1-7.5.

The MSBA formed a subcommittee to make recommendations about whether the ABA amendments should be adopted in Minnesota. The subcommittee recommends that all of the ABA amendments be adopted in Minnesota. That recommendation is making its way through the MSBA process, which will culminate with a final decision from the MSBA General Assembly in the future about whether to recommend the Supreme Court adopt any or all of these ABA Model Rules.

As they have done historically, the LPRB and MSBA are communicating openly to see if a consensus can be reached on these issues.

The ABA Model Rules have substantially reworked the ordering of the rules, and the comments have also been changed. The ABA Model Rules have eliminated Rules 7.4 and 7.5. The provisions from those rules which are retained are incorporated in the

remaining ABA Model Rules 7.1 through 7.3. Here are some of the differences between the new ABA Model rules and the current MRPC.

The ABA Model Rules allow a lawyer to provide a nominal thank you gift for a referral, as long as the gift is not intended or expected to be compensation for the referral. The MRPC do not allow this. *Compare* ABA Model Rule 7.2(b)(5) with Rule 7.2(b), MRPC. This amendment to the ABA Model Rules would allow what the Minnesota rules now prohibit.

The ABA Model Rules allow a lawyer to (1) call herself a "specialist" as long as that statement is not false or misleading, and (2) allow a lawyer to call herself a "certified specialist" only if the lawyer is certified by an appropriate authority of the state or an organization accredited by the ABA. *See* ABA Model Rule 7.2(c). Comment 9 to this rule states that certification is not required for a lawyer to call herself a "specialist" or words to that effect; the lawyer's experience, specialized training, or education can be sufficient. By contrast, Rule 7.4(d), MRPC, prohibits a lawyer from stating the lawyer is a "specialist" unless the lawyer is a certified specialist. Rule 7.4(d), MRPC, also provides that if the certifying organization is not accredited by the Minnesota Board of Legal Certification (MBLC), the lawyer also says this in the same sentence of the communication. This amendment to the ABA Model Rules would allow a lawyer to call herself a specialist without the need to become certified. This would expand the circumstances from the current Minnesota rules in which a lawyer could call herself a "specialist." MBLC opposes adopting ABA Model Rule 7.2(c) and wants to keep the present Rule 7.4(d), MRPC.

The rules have traditionally distinguished between in-person solicitation, understood to mean in-person or by phone, and other forms of solicitations, such as letters and emails. ABA Model Rule 7.3, comment 2, adds a definition designed to reflect modern communication methods. "Live person-to-person contact" is defined to include in-person, telephone, or other real time audio or visual communication. This type of contact does not include chat rooms, text messages or other communications which may be real time but are written. This definition is not in the Minnesota rules.

The ABA Model Rules allow live in-person contact of people who routinely use the type of offered legal services for business purposes. The Minnesota rules do not. *Compare*

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March 25, 2019
Page 3

ABA Model Rule 7.3(b)(3) with Rule 7.3(b), MRPC. This amendment to the ABA Model Rules would allow what the Minnesota rules now prohibit.

ABA Model Rule 7.3(a) adds a definition of "solicitation." Rule 7.3(a), MRPC, limits a lawyer's solicitation through live in-person contact to lawyers and persons with whom the lawyer has a family, prior professional, or close personal relationship. The effect of the ABA definition of "solicitation" is to add another category, persons the lawyer does not know that needs specific legal services in a given matter. For example, under the ABA definition of solicitation, a lawyer can cold call residents in a certain geographic area urging them to hire the lawyer, or conduct a seminar for residents of a senior residence urging them to hire the lawyer, because the lawyer does not know that any particular person in the target audience needs the services the lawyer is offering. Thus, this amendment to the ABA Model Rules would allow what the Minnesota rules now prohibit. On the other hand, under the ABA Model Rule, a lawyer who received a DUI arrest list would remain prohibited from calling the persons on that list for representation in the DUI matter, because the lawyer knows those persons need that type of legal service. Under this amendment to the ABA Model Rules, this prohibition in the Minnesota rules would continue.

The new definition of solicitation in ABA Model Rule 7.3(a) could allow for an inherent possibility of abuse, overreaching, etc. Lawyers will be able to contact persons, including potentially vulnerable persons such as the elderly or English language learners, directly in an effort to attempt to secure legal services. ABA Model Rule removes the prophylactic barrier which prohibits this live in-person contact.

The ABA Model Rules eliminate the requirement in Minnesota Rule 7.3(c) that direct mail or similar solicitations state "Advertising Materials." Going forward, under the ABA Model Rules, no notice or disclaimer is required when a lawyer sends a written solicitation, even if directed to a person the lawyer knows needs legal services in a particular matter.

After discussion, a motion was made and seconded that the Rules Committee recommend the Board support amending Rules 7.1-7.5, MRPC, to be consistent with the newly-amended ABA Model Rules 7.1-7.3. The motion was seconded and passed unanimously.

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March 25, 2019
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By way of information, Mr. Burke reminded the Rules Committee that in August 2018 the Committee had considered various amendments to the rules and had recommended the Board support the amendments set forth in Mr. Burke's August 16, 2018, memorandum to the Rules Committee.

Mr. Burke reminded the Rules Committee that the following rule change proposals will be presented to the Board for consideration at its April 2019 meeting:

1. Possible amendment of Rules 7.1-7.5, MRPC, in light of the new ABA Model Rules.
2. Amendment of Rule 20, RLPR, along the lines identified in Mr. Burke's August 16 memorandum.
3. Amendment of Rule 1.15(h), MRPC, regarding the frequency with which banks must remit interest on IOLTA accounts and the legal services advisory committee.

The meeting thereafter adjourned.

jmc



April 4, 2019

Robin Wolpert, Esq., Chair
Lawyers Professional Responsibility Board
345 St. Peter Street # 1500
St. Paul, MN 55102

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Treasurer
Dyan J. Ebert
St. Cloud

Secretary
Jennifer A. Thompson
Edina

Cheryl Dalby
Chief Executive Officer

Susie Brown
Chief Operating Officer

Dear Robin:

I am attaching a Report and Recommendation of the MSBA Standing Committee on the Rules of Professional Conduct. The Report and Recommendation calls for a petition to the Minnesota Supreme Court to amend Rule 7 of the Minnesota Rules of Professional Conduct to conform to August, 2018 amendments to Rule 7 of the American Bar Association's Model Rules of Professional Conduct.

This Report and Recommendation has been provisionally approved by the Committee and is being circulated to MSBA sections and committees for comment. After reviewing and considering comments, the Committee intends vote on submission of the Report and Recommendation to the MSBA Assembly for action at its June meeting.

As you know, representatives of the LPRB and the Director's office participated in the development of the Committee Report and Recommendation and we are hopeful that our efforts will result in a joint petition to the Supreme Court for adoption of the amendments to Rule 7, M. R. Prof. C.

If you have questions about any aspect of the Report and Recommendation, please contact me.

Sincerely,

Frederick E. Finch, Chair
Committee on Rules of Professional Conduct

Enc.

cc: Susan Hummiston Esq. (*with enc.*)
Paul Godfrey, Esq. (*with enc.*)

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

**MSBA Rules of Professional Conduct Committee
March __, 2019**

**REPORT AND RECOMMENDATION PROPOSING AMENDMENTS
TO RULE 7, MINNESOTA RULES OF PROFESSIONAL CONDUCT**

Recommendation

The Minnesota State Bar Association should petition the Minnesota Supreme Court to adopt the amendments to Rule 7, Minnesota Rules of Professional Conduct, attached hereto. The amendments conform the Minnesota rules to amendments to the ABA Model Rules of Professional Conduct adopted in August, 2018.

Report

At its Annual Meeting in August, 2018, the American Bar Association adopted amendments to Rule 7 of the ABA Model Rules of Professional Conduct dealing with lawyer advertising and solicitation of clients. The Minnesota Rules of Professional Conduct are based upon the ABA Model Rules. Historically, whenever the ABA adopts amendments to the ABA Model Rules, the MSBA Rules of Professional Conduct Committee has examined the ABA amendments with a view to determining whether and in what form the Association should petition the Minnesota Supreme to amend the Minnesota rules to incorporate the ABA changes.

Following the ABA's action in August, 2018, the Rules of Professional Conduct Committee appointed a subcommittee to study the ABA amendments to Model Rule 7. The subcommittee invited the Rules Committee of the Lawyers Board of Professional Responsibility and the Office of Lawyers Professional Responsibility to participate and each organization had representation on the subcommittee. The Rule 7 Subcommittee met four times to study and evaluate the ABA amendments to Rule 7. Conforming Minnesota's Rule 7 will affect how attorneys communicate with clients, advertise, and hold themselves out to the public as specialists. After study and deliberation, the Rules of Professional Committee recommends that the Assembly petition the Supreme Court to adopt the ABA Model Rule 7 amendments in their entirety.

Attached to this Report and Recommendation are copies of the text of the proposed amended rule and a redlined copy of the rule showing the changes to the present Minnesota Rule 7: Amending the rule would change the following parts of Rule 7: (7.1) Communications Concerning a Lawyer's Services; (7.2) Communications Concerning a Lawyer's Services: Specific Rules; (7.3) Solicitation of Clients; (7.4) Communication of Fields of Practice and Certification; and (7.5) Firm Names and Letterheads. The amendment deletes Rules (7.4) Communication of Fields of Practice and Certification; and (7.5) Firm Names and Letterheads because they are incorporated into the comments to other rules.

The text of Rule 7.1 is unchanged by the amendments. It still sets out the basic rule that a lawyer cannot make false or misleading statements about the lawyer's services. The amendments do, however change the comments to Rule 7.1, including outlining when truthful information may be misleading if consumers are led to believe that they must act when, in fact, no action is required. The amendments also include merging 7.5, dealing with firm names, into Rule 7.1's comments section in comments five through eight. Adopting the same reasoning as the ABA, the subcommittee believes that the new format better addresses the issues.

The amendments to Rule 7.2(a) change the language of the rule from "advertising" to "communication." Adopting those changes will create conformity with the ABA Model Rule and replaces the identification of specific methods of communication with broader language that using any media constitutes communication. Rule 7.2(b) maintains the existing prohibition against giving "anything of value" to someone recommending an attorney but excludes nominal gifts as an expression of appreciations. Rule 7.2(c) merges the current Rule 7.4 into its text and comments. Proposed Rule 7.2(c) prohibits a lawyer from stating or implying that he or she is *certified* as a specialist, unless so certified by an approved accreditation agency, but would permit an attorney to state that he or she is a specialist in a given practice area, so long as the lawyer does not claim to be a certified specialist. Stating that one is a specialist is prohibited by current Rule 7.4, unless one is also certified. The Board on Legal Certification has indicated it opposes this change.

Finally, proposed Model Rule 7.3 for the first time provides a definition of "solicitation." It generally still prohibits direct, in person, solicitation of a potential client when the lawyer knows or should know that the potential client needs legal services in a particular matter. New exceptions to this prohibition have been added for potential clients who have an existing business relationship with the lawyer or law firm, and for potential clients who "routinely" use for business purposes the type of legal services offered by the lawyer.

The subcommittee questioned whether the definition of solicitation loosens some existing restrictions on communications with a potential client. One example discussed was a lawyer giving a presentation on estate planning at a nursing home and then soliciting the attendees to prepare wills or estate plans. The proposed rule would allow this because the lawyer would not *know* whether anyone in the audience needs a will. On the other extreme, a lawyer cannot solicit work from a sophisticated business owner whose company is being sued unless the company "routinely" is sued for the type of claim at issue. Despite this incongruity, the subcommittee voted in favor of conformity because the changes on the whole are beneficial. Moreover, the subcommittee believes the interest in achieving a degree of national uniformity among jurisdictions counsels acquiescing in this change.

We are providing a link to the web site of the ABA Standing Committee on Ethics and Professional Responsibility which contains the text of the proposed amendments, prior drafts of the amendments, comments received by the Standing Committee on the proposed amendments, and other background information on the proposal:

https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/

ATTACHMENT A – NEW RULE 7

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

**RULE 7.2: COMMUNICATIONS CONCERNING
A LAWYER'S SERVICES: SPECIFIC RULES**

(a) A lawyer may communicate information regarding the lawyer's services through any media.

(b) A lawyer shall not compensate, give or promise 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 or qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17;

(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;
and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

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

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer

referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

RULE 7.3: SOLICITATION OF CLIENTS

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to

a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such

entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

ATTACHMENT B

~~INFORMATION ABOUT LEGAL SERVICES~~

~~RULE~~ MODEL RULE 7.1: COMMUNICATIONS CONCERNING COMMUNICATIONS CONCERNING A LAWYER'S SERVICES ~~LAWYER'S SERVICES~~

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] ~~This rule~~ This Rule governs ~~all~~ communications ~~about~~ a lawyer's ~~lawyer's~~ services, including advertising ~~permitted by Rule 7.2.~~ Whatever means are used to make known a lawyer's ~~services~~ services, statements about them must be truthful.

[2] ~~Truthful~~ Misleading truthful statements ~~that are misleading~~ are also prohibited ~~by this rule~~ Rule. A truthful ~~statement~~ is misleading ~~if it omits a fact necessary to make the lawyer's~~ communication ~~considered~~ as a whole not materially misleading. A truthful statement is also misleading if ~~there is~~ a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's ~~services~~ services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] ~~An advertisement~~ A communication that truthfully reports a lawyer's ~~achievements~~ achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without ~~reference to the specific factual and legal circumstances of each client's~~ client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's ~~services or fees~~ services or fees, or an unsubstantiated comparison ~~of the lawyer's lawyer's or law firm's services or fees with the services or fees~~ those of other lawyers or law firms, may be misleading if presented ~~with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated~~. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

RULE [5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer

not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

RULE 7.2: ADVERTISING COMMUNICATIONS CONCERNING

~~(a) Subject to the requirements of~~ A LAWYER'S SERVICES: SPECIFIC RULES 7.1 and 7.3, a

~~(a) A lawyer may advertise~~ communicate information regarding the lawyer's services through written, recorded, or electronic communications, including public ~~any~~ media.

~~(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's~~ lawyer's services except that a lawyer may:

~~(1) pay the reasonable costs of advertisements or communications permitted by this rule~~ Rule;

~~(2) pay the usual charges of a legal service plan or a not-for-profit~~ or qualified 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~~ 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; and~~

~~(e) (5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.~~

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

~~(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and~~

~~(2) the name of the certifying organization is clearly identified in the communication.~~

~~(d) Any communication made pursuant to~~ under this rule shall ~~Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.~~

Comment

~~_____ [1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. _____ This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.~~

~~[2] This rule~~Rule permits public dissemination of information concerning a lawyer's name~~lawyer's or firm~~law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's~~lawyer's~~ fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's~~lawyer's~~ foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

~~[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.~~

~~[4] Neither this rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.~~

Paying Others to Recommend a Lawyer

~~[5]. [2] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule~~

~~7.3, lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."~~

~~_____ [3] Paragraph (b)(3), however, 1) allows a lawyer to pay for advertising and communications permitted by this ruleRule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers. Moreover,~~

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such Qualified referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a not-for-profit lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person or telephonic contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer

professional, so long as the reciprocal ~~referral agreement~~ is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements ~~should not~~ be of indefinite duration and should ~~be~~ reviewed periodically ~~to~~ determine whether ~~they~~ comply ~~with~~ these Rules. This ~~rule~~Rule does not restrict referrals or divisions of revenues or net income among lawyers within ~~a firm~~firms comprised of multiple entities.

RULE 7.3. SOLICITATION OF CLIENTS

(Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a) lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer shall not by in is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

MODEL RULE 7.3: SOLICITATION OF CLIENTS

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person or the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live telephone person-to-person contact solicit professional employment from anyone when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the person contacted; contact is with a:

_____ (1) is a lawyer; or

_____ (2) person who has a family, close personal, or prior business or professional relationship with the lawyer, or law firm; or

(b)

_____ (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment by written, recorded, or electronic communication or by in person or telephone contact even when not otherwise prohibited by paragraph (a), if:

_____ (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

_____ (2) the solicitation involves coercion, duress, or harassment.

(c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall clearly and conspicuously include the words "Advertising Material" on the outside envelope, if any, and within any written, recorded, or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in paragraph (a), this Rule, a lawyer may participate with a prepaid- or group legal service plan operated by an organization not owned or directed by the lawyer that uses in person or telephone contact to solicit memberships live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

~~or subscriptions~~ [1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the ~~plan from~~ persons who are not known to need legal services in a particular matter covered by lawyer's doing so is the ~~plan~~.

Comment

[1] ~~lawyer's or the law firm's pecuniary gain. A solicitation is a targeted lawyer's communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute~~not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to ~~Internet~~electronic searches.

[2] ~~There~~ "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for ~~abuse~~overreaching exists when a solicitation involves direct in-person or live telephone contact by a lawyer with someone, seeking pecuniary gain, solicits a person known to be in need of legal services. ~~These forms~~This form of contact subjects subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's lawyer's presence and insistence upon being retained immediately. ~~an immediate response.~~ The situation is fraught with the possibility of undue influence, intimidation, and ~~over-reaching~~overreaching.

[3] ~~This~~The potential for ~~abuse~~overreaching inherent in direct in-person or live telephone ~~solicitation~~ person-to-person contact justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

without subjecting the public to direct in person or telephone persuasion that may overwhelm a person's judgment.

~~_____ [4]. The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in person or live telephone of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~

~~_____ [5]. There is far less likelihood that a lawyer would engage in abusive practices overreaching against a former client, or a person with whom the lawyer has a close personal or, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's lawyer's pecuniary gain. Nor is there a serious potential for abuse overreaching when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(e) are not applicable in those situations. Also, paragraph (a) is not intended or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.~~

~~_____ [6]. But even permitted forms of _____ A solicitation can be abused. Thus, any solicitation which that contains information which is false or misleading information within the meaning of Rule 7.1, which that involves coercion, duress or harassment within the meaning of Rule 7.3(b)(c)(2), or which that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(c)(1) is prohibited. Moreover, if after sending a letter Live, person-to-person contact of individuals who may be especially vulnerable to coercion or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).~~

~~[7] This rule duress is ordinarily not appropriate, for example, the elderly, those whose first language is not intended to English, or the disabled.~~

~~_____ [7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the~~

lawyer. Under these circumstances, the activity -which -the -lawyer -undertakes in -communicating with -such -representatives and -the -type -of information transmitted to the -individual are functionally -similar -to and -serve -the -same -purpose -as advertising permitted- under Rule 7.2.

~~[8] The requirement in Rule 7.3(e) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.~~

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

~~[9] Paragraph (d) of this rule permits a lawyer to participate with an organization which uses personal contact to solicit enroll members for its group or prepaid legal service plan, provided that the personal~~

~~contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a)(c).~~

~~RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND CERTIFICATION~~

~~(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.~~

~~(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.~~

~~(c) A lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation.~~

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

~~(1) the communication shall clearly identify the name of the certifying organization, if any, in the communication; and~~

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

Comment

[1] Paragraph (a) of this rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

~~[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

~~[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization that has been accredited by the Board of Legal Certification. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~

~~[4] Lawyers may also be certified as specialists by organizations that either have not yet been accredited to grant such certification or have been disapproved. In such instances, the consumer may be misled as to the significance of the lawyer's status as a certified specialist. The rule therefore requires that a lawyer who chooses to communicate recognition by such an organization also clearly state the absence or denial of the organization's authority to grant such certification. Because lawyer advertising through public media and written or recorded communications invites the greatest danger of misleading consumers, the absence or denial of the organization's authority to grant certification must be clearly stated in such advertising in the same sentence that communicates the certification.~~

~~RULE 7.5: FIRM NAMES AND LETTERHEADS~~

~~(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.~~

~~(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~

~~(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~

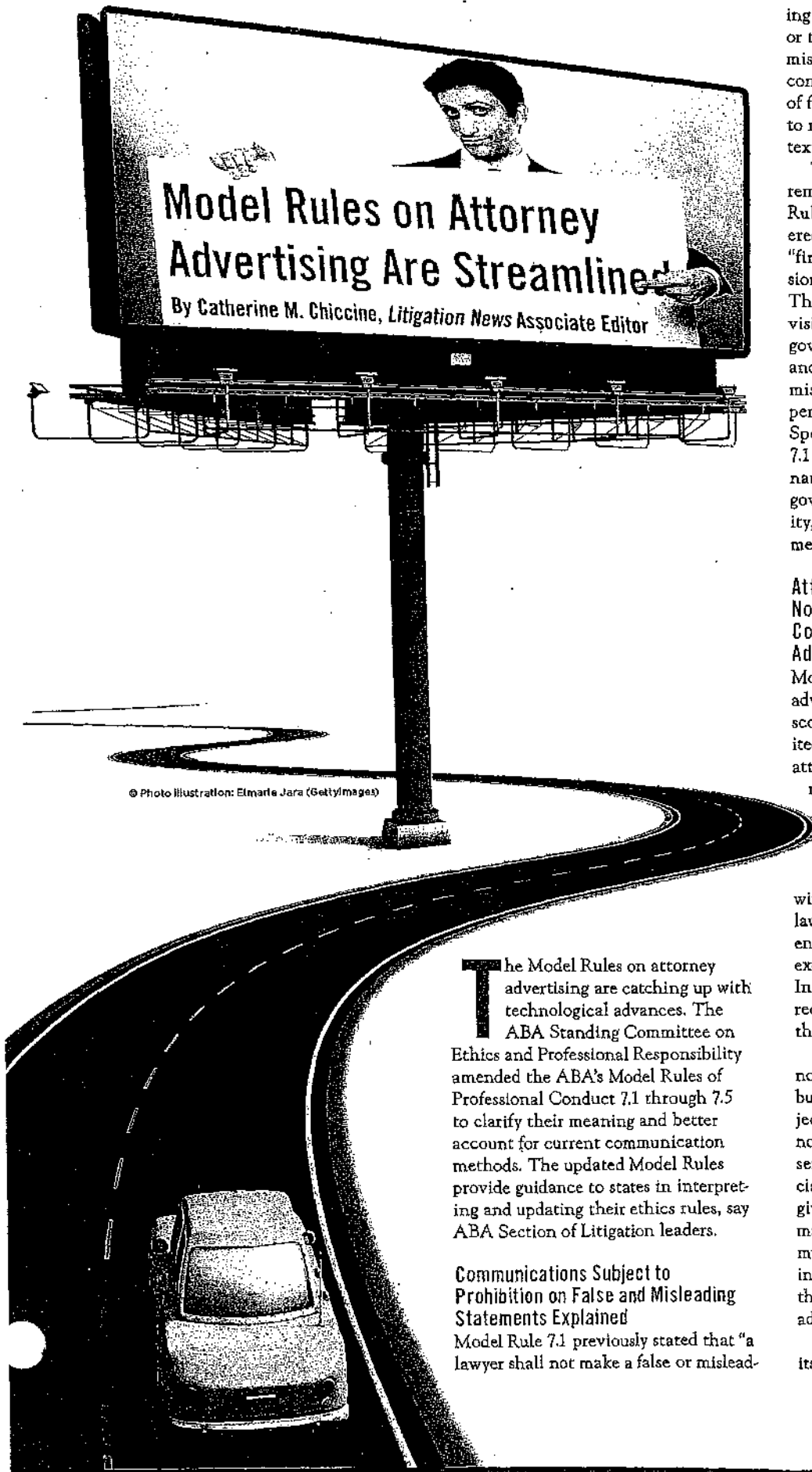
~~(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.~~

~~Comment~~

~~[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation~~

~~may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.~~

~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.~~



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Model Rules on Attorney Advertising Are Streamlined

By Catherine M. Chiccine, *Litigation News Associate Editor*

The Model Rules on attorney advertising are catching up with technological advances. The ABA Standing Committee on Ethics and Professional Responsibility amended the ABA's Model Rules of Professional Conduct 7.1 through 7.5 to clarify their meaning and better account for current communication methods. The updated Model Rules provide guidance to states in interpreting and updating their ethics rules, say ABA Section of Litigation leaders.

Communications Subject to Prohibition on False and Misleading Statements Explained

Model Rule 7.1 previously stated that "a lawyer shall not make a false or mislead-

ing communication about the lawyer or the lawyer's services." A "false or misleading" communication is one that contains a "material misrepresentation of fact or law" or omits a fact necessary to make the statement accurate. This text remains unchanged.

Though the term "communication" remains undefined, the comments to Rule 7.1 now provide examples of covered communications, which include "firm names, letterhead and professional designations," and advertising. These comments also subsume the provisions of the former Rule 7.5, which governed circumstances where names and designations could be considered misleading, and which is no longer permitted following the amendments. Specifically, comments 5 to 8 of Rule 7.1 (formerly Rule 7.5) hold that firm names implying a connection with a government agency, non-lawyer, charity, or an attorney who is not a firm member are impermissible.

Attorney Advertising Rules Now Apply to All Attorney Communications, Not Just Advertising

Model Rule 7.2, regulating attorney advertising, has been expanded in scope. The former Rule 7.2 was limited to advertisements and permitted attorney advertising through "written, recorded or electronic communication, including public media," subject to the restrictions of Rules 7.1 and 7.3. It also prohibited lawyers from paying for referrals, with exceptions for paying a qualified lawyer referral service, or referring clients to another lawyer through a non-exclusive reciprocal referral agreement. In addition, the old Model Rule 7.2 required communications to include the lawyer's office address.

By contrast, the new Rule 7.2 covers not just advertising communications but all attorney communications subject to Rule 7.1. However, lawyers may now give token gifts for recommending services if these gifts reflect appreciation, such as holiday gifts or those given for social hospitality. Another major change is that communications must contain the sender's "contact information," which is broader than the previous requirement of an office address.

The amended Rule 7.2 also prohibits attorneys from representing they

are specialists in an area, unless they are certified and the communication includes the name of the certifying organization. This addition to Rule 7.2 essentially incorporates former Rule 7.4 on attorney specialization, which was deleted.

Attorney Solicitation Rule Is Relaxed

Amendments to Model Rule 7.3 dial back some limitations on attorney solicitations. Previously, the rule prohibited a lawyer from soliciting employment unless the person contacted was another lawyer, the lawyer's relative, a person with a prior professional relationship with the lawyer, or a person who "is known by the lawyer to be an experienced user of the type of legal services involved for business matters." The old Rule 7.3 also required inclusion of the words "Advertising Material" on every solicitation. It did not, however, define what constituted a solicitation.

The revised Rule 7.3 still prohibits most attorney solicitations but clarifies what is and is not permitted. Rule 7.3 now defines a solicitation as "a communication initiated by or on behalf of a law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter." While the amendment eliminates the "experienced user" exception, a new exception allows solicitation of those who "routinely use for business purposes the type of legal services offered by the lawyer." Thus, according to comment 5 to the Model Rule, persons who may be solicited include in-house counsel who frequently hire outside counsel, entrepreneurs who regularly hire business lawyers, and business owners who routinely hire lawyers for lease or contract issues. Finally, the committee eliminated the "Advertising Material" requirement.

New Methods of Communications and Prohibitions on Solicitations and Gifts Clarified

Section of Litigation leaders agree that the changes were overdue. "The rules had not been updated substantively since 1985," comments Lynda C. Shely, Scottsdale, AZ, member of the ABA Standing Committee on Ethics and Professional Responsibility. "We have had technology changes since then, so

we had to make the rules more flexible in order to deal with new technologies and enable lawyers to use alternative methods of communications that hadn't been contemplated 30 years ago, while still putting forth truthful information," she explains. Thus, "Model Rule 7.2 recognizes that lawyers have all kinds of communications and the word 'advertising' may not account for all types of lawyer communications," explains John M. Barkett, Miami, FL, cochair of the Section's Ethics & Professionalism Committee and a member of the ABA Standing Committee on Ethics and Professional Responsibility. For example, "If I hand out a pen with my law firm's name on it, it is unclear whether it is advertising, but it definitely falls under the term 'communication,'" says Shely.

The changes also address "confusion about who attorneys can or can't solicit," Shely observes. "The definition of 'solicitation' in Model Rule 7.3 establishes the generally understood concept that direct solicitation is regulated by the Model Rule if a lawyer knows or should know that the person he or she wants to communicate with about possibly hiring the lawyer needs legal services for a specific matter," she says. "For instance, a lawyer is not prohibited from talking to a group of senior citizens about estate planning or a group at a community center about family law matters, if it's a general gathering. But if the lawyer wants to target someone who probably needs legal services for a specific matter, such as a personal injury incident reported in the paper, dog bite report, or a police log of individuals charged with DUIs, then the Model Rule is triggered," she concludes.

Similarly, the addition of the nominal gifts exception to Model Rule 7.2 "is meant to insulate what is a common courtesy that happens between lawyers all the time," comments Barkett. "As a

dinner guest, bringing a bottle of wine to someone's house is fairly routine," he notes.

Revamped Rules Provide Guidance

"While the Model Rules technically do not bind anyone, they are models that the states absolutely will look to for guidance, just like ABA ethics opinions, which are not binding precedent but provide guidance in interpreting similar provisions in states," says Shely. The Model Rules "may play a role in court proceedings where advertising rules are in issue, as has been the case in some First Amendment challenges to state advertising rules," adds Barkett.

These changes may induce changes to the states' ethics rules as well. "Generally speaking, when the Model Rules are amended, that prompts the states to consider equivalent changes to state rules of professional conduct," notes Barkett. "If the states follow the ABA's lead, then there is hope for a consistent set of rules applicable to lawyers throughout the

United States. That is especially valuable for lawyers who engage in multi-jurisdictional practices and law firms that have offices in multiple jurisdictions," he says. ☐

The new Rule 7.2 covers not just advertising communications, but all attorney communications subject to Rule 7.1. However, lawyers may now give token gifts for recommending services if these gifts reflect appreciation.

RESOURCES

- American Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, *Report to the House of Delegates* (Aug. 2018).
- Transcript of American Bar Ass'n Pub. Hearing, Vancouver, B.C., Canada (Feb. 2, 2018).
- Ass'n of Prof'l Responsibility Lawyers, *2015 Report of the Regulation of Lawyer Advertising Committee* (June 22, 2015).
- Ass'n of Prof'l Responsibility Lawyers, *Regulation of Lawyer Advertising Committee, Supp. Report* (Apr. 26, 2016).

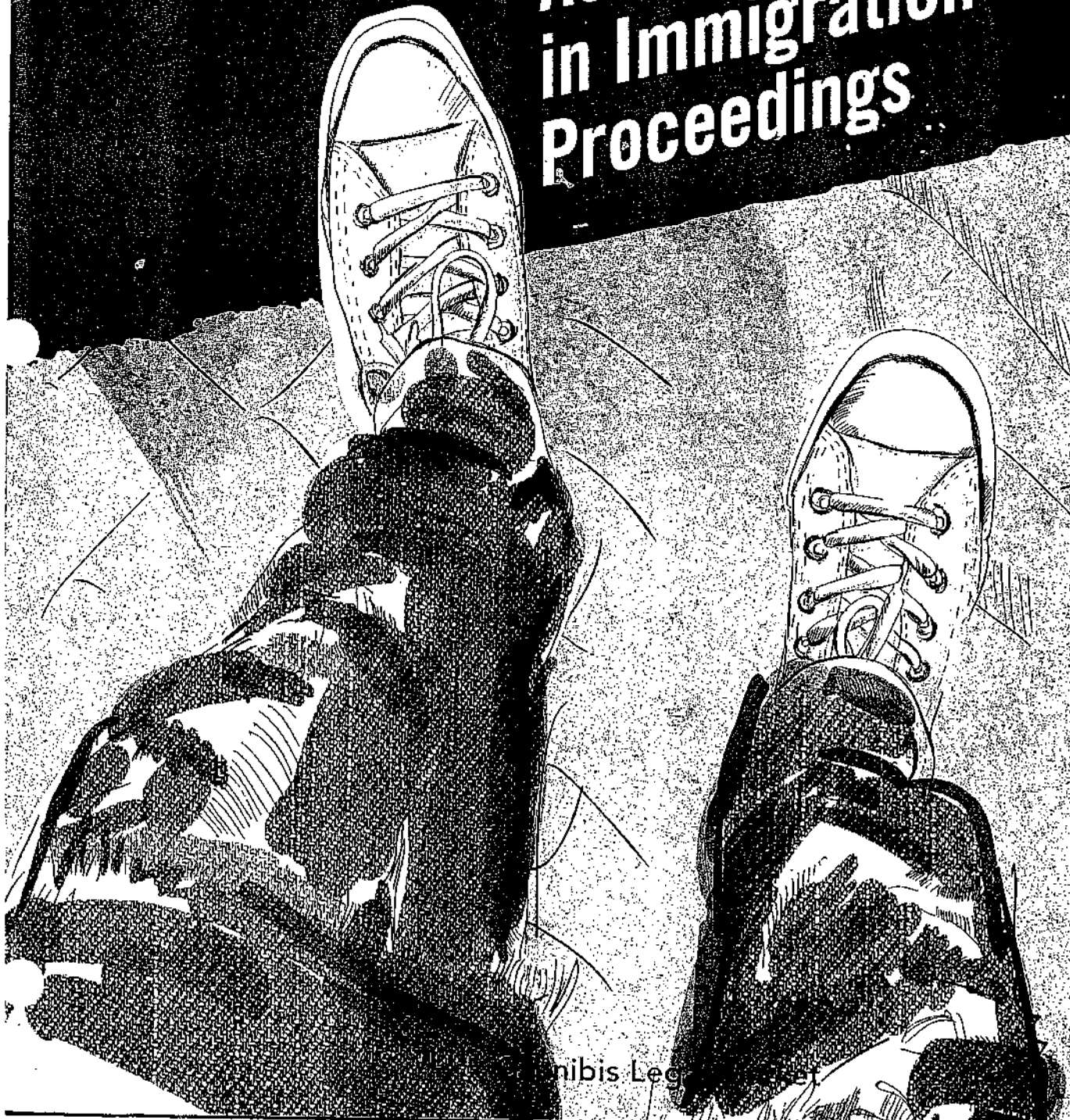


SECTION OF LITIGATION

VOLUME 44 NUMBER 2 WINTER 2019

LITIGATION NEWS

Access to Counsel in Immigration Proceedings



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Attachment 5

OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY
MEMORANDUM

TO: Lawyers Professional Responsibility Board

CC: Susan D. Humiston, Director, Office of Lawyers Professional Responsibility

FROM: Timothy M. Burke, Deputy Director

DATE: March 29, 2019

RE: Potential Rule Amendments

This memorandum will address proposed rule changes for the Board's consideration at its April 2019 meeting. There are four amendments to Rule 20, Rules on Lawyers Professional Responsibility (RLPR), and an amendment to Rule 1.15(o), Minnesota Rules of Professional Conduct (MRPC).

The Rules Committee has discussed various proposed rule changes and approved unanimously that the Board recommend to the Supreme Court the proposed Rule changes set forth in this memorandum. These proposals which the Rules Committee recommends are presented to the Board for consideration at its April 2019 meeting.

A. Rule 20, RLPR.

There are four proposed changes to this Rule:

1. Add a new Rule 20(b)(8), RLPR. This will clarify the ability of the Office to communicate with the Supreme Court-approved lawyer assistance program, which currently is Lawyers Concerned for Lawyers (LCL). The reason for this change is that, on occasion, the Office believes it is important to communicate with LCL regarding a lawyer who may be in crisis. Presently, the RLPR do not expressly allow such communication in connection with private matters pending before the Office. The proposed change is to clarify that the OLPR may have these one-way communications with LCL. LCL has greater confidentiality requirements than the Director's Office, which reduces the likelihood of any adverse consequences caused by disclosure by the Director's Office to LCL.

2. Add a new Rule 20(g), RLPR. This will exempt certain portions of the Office's public files from disclosure. These portions include medical records and other documents containing sensitive personal information such as social security numbers, birthdates, bank account numbers, and medical diagnoses or other information. Currently, Rule 20(a)(2), RLPR, provides that once probable cause is found, the Director's entire file, except for the Director's own work product, is non-confidential. The file, however, may contain information which public policy considerations dictate should remain confidential. This will also allow the Office to more easily file documents with such information as confidential. A proposed new Rule 20(h), RLPR, has been added to confirm the confidentiality of all other files not specifically referenced.
3. Add a new Rule 20(f)(3), RLPR. This will further define which other portions of the Office's files are or are not public (for example, affidavits and attachments received pursuant to Rule 26, RLPR, and letters or other communications sent or received in connection with collection efforts). Rule 20 is premised on the notion that all Office files arise out of a disciplinary investigation and/or litigation. Before probable cause is established, those files are confidential; after probable cause is established, those files are not confidential. The Director's Office, however, maintains files on many other types of matters. Some of these (advisory opinions, overdraft notification program and probation files) are already addressed in Rule 20(f), RLPR. The Director's Office maintains additional types of files as well. The issue arises as to whether such files should or should not be confidential. There appears to be no need to hold Rule 26, RLPR, and collection correspondence confidential.
4. Add a new Rule 20(a)(12), RLPR. This will permit the disclosure of letters received pursuant to Rule 5.8, MRPC, from employers of suspended or disbarred lawyers. The basis of this change is that on occasion the Director receives letters from lawyers pursuant to Rule 5.8, MRPC, which these lawyers are required to provide when they hire a suspended or disbarred lawyer (or when such employment terminates). On occasion,

the Director will receive a request about this information. There does not appear to be a need to keep such information confidential.

The redlined version of the pertinent subsections of the proposed rule reads as follows:

RULE 20. CONFIDENTIALITY; EXPUNCTION

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

* * *

(12) Correspondence received by the Director pursuant to Rule 5.8, Minnesota Rules of Professional Conduct.

(b) Special Matters. The following may be disclosed by the Director:

* * *

(8) Information related to concerns about a lawyer's mental, emotional, or physical well-being to the Supreme Court approved lawyer assistance program in a situation in which such notification appears to the Director to be necessary or appropriate.

* * *

(f) Advisory Opinions, Overdraft Notification Program Files, and Probation Files and Other Files of the Director. The files, notes, and records maintained by the Director relating to advisory opinions, trust account overdraft notification, and monitoring of lawyers on probation shall be deemed confidential and shall not be disclosed except:

* * *

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

(g) Notwithstanding any of the foregoing provisions of this Rule, including but not limited to Rule 20(a)(2), medical records and other documents containing sensitive personal information, including but not limited to social security numbers, birthdates, bank account numbers and medical information shall remain confidential in the files of the Director. The Director shall have the sole discretion to disclose such information in the course of a lawyer discipline investigation or proceeding under these Rules or as the Director otherwise deems appropriate.

(h) All other files, notes and records not specifically mentioned and maintained by the Director shall not be disclosed.

B. Rule 1.15(o), MRPC.

This proposal comes from Bridget Gernander, the legal services grant manager of the Legal Services Advisory Committee (LSAC). Currently, the definition of "IOLTA account" in this Rule provides the bank must remit interest in an IOLTA account monthly. According to Ms. Gernander, LSAC allows banks to remit annually if they have a very small number of accounts and remit a very small amount of interest (less than \$25) on the annual remittance. LSAC works with the bank to find a schedule that makes sense based on the bank's situation. For example, LSAC would prefer in a given year to receive only one \$0.20 check instead of four \$0.05 checks. Ms. Gernander would be in favor of a Rule change that would allow for maximum flexibility in this regard.

The redlined version of the proposed Rule is as follows:

RULE 1.15: SAFEKEEPING PROPERTY

(o) Definitions.

"Trust account" is an account denominated as such in which a lawyer or law firm holds funds on behalf of a client or third person(s) and is: 1) an interest-bearing checking account; 2) a money market account with or tied to check-writing; 3) a sweep account which is a money market fund or daily overnight financial institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities; or 4) an open-end money market fund solely invested in or fully collateralized by U.S. Government Securities. An open-end money market fund must hold itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Act of 1940, and, at the time of the investment, have total assets of at least \$250,000,000. "U.S. Government Securities" refers to U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof. A daily overnight financial institution repurchase agreement may be established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

"IOLTA account" is a pooled trust account in an eligible financial institution that has agreed to:

(1) remit the earnings accruing on this account, net of any allowable reasonable fees, monthly to the IOLTA program as established-approved by the Minnesota ~~Supreme Court~~ IOLTA program unless an alternative schedule is approved by the IOLTA program;

OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY
MEMORANDUM

TO: LPRB Rules Committee

FROM: Timothy M. Burke
Deputy Director

DATE: April 9, 2019

RE: Draft Proposed Rule Change
Addition to Rule 20, RLPR

By email recently, the Committee considered the proposed addition of Rule 20(b)(13), RLPR, to read as follows:

(13) As between the Director and/or District Committee and witnesses, the Director or District Committee may reveal such information as is necessary to advance the Director's or District Committee's handling of the matter to a person who may have knowledge relevant to the matter or to a consulting or testifying expert regarding the matter.

The purpose of this amendment is to codify the Director's ability during an investigation or Panel proceedings to provide information as necessary to persons who can assist in the investigation. For example, it may be necessary to provide information or documents about a matter to a fact witness as part of gathering information or documents about the matter from the witness. Similarly, it may be appropriate to provide information or documents about a matter to an expert to further the Director's understanding. Presently, the Director does make such disclosures as appropriate.

By email vote, five Committee members voted to recommend the Board support amending Rule 20, RLPR, to add this proposed Rule 20(b)(13). One Committee member did not vote. I am therefore forwarding this proposed amendment for inclusion on the Agenda for the Board's April 2018 meeting.

Attachment 6

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

OPINION NO. 2125

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

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

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

¹ -Rule 1.7(a)(2), MRPC.

² -Rule 1.7(a), MRPC.

³ -Rule 1.7(b)(1) and (2), MRPC.

⁴ -Rule 1.7(b)(4), MRPC.

⁵ -Rule 1.4(a)(1), MRPC.

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

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

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

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

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

⁶ Rule 1.0(f).

⁷ Rule 1.4 (a)(3).

⁸ Rule 1.4 (b).

⁹ Rule 1.4 (a)(2).

¹⁰ See ABA Opinion 481 (April 7, 2018).

Comment

The issue of when and what to say to a client; when a lawyer ~~knows that the lawyer's conduct described in Opinion 21 could reasonably be expected to be the basis for a malpractice claim~~ determines a material error has been committed is difficult and may create inherent conflicts. The Board is issuing ~~Opinion No. 21~~ this opinion to apprise the Bar of the Board's position on the matter and to provide guidance to lawyers who may confront the issue. The American Bar Association (ABA) and other jurisdictions have opined that lawyers owe current clients similar duties to disclose. See, e.g., ABA Formal Opinion 481 (April 7, 2018) (lawyer must inform current client of a material error; which is defined as "(a) reasonably likely to harm or prejudice a client; or (b) of such nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice"); Louisiana Public Opinion 16-RPCC-20 (2016) (lawyer who commits a significant mistake or error that may materially affect the client's case, must disclose that fact to the client under Rule 1.4, LRPC); North Carolina Ethics Op. 4 (2015) (applying Rule 1.4 to "material errors that prejudice the client's rights or interests as well as errors that clearly give rise to malpractice); Cal. Ethics Op. 2009-178 (2009) ("A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation Where the lawyer believes that he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'" (Citation omitted.)); Colo. B. Ass'n Ethics Comm., Formal Op. 113 (2005) ("When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client."); Wis. St. B. Prof'l Ethics Comm., Formal Op. E-82-12 ("[A]n attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission."); N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 734 (2000), 2000 WL 33347720 (Generally, an attorney "has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim."); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 684 ("The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney's own interest.").

~~In consulting with the current client about the possible malpractice claim, the lawyer should bear in mind Comment 5 to Rule 1.4, which provides that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information~~

consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."

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

In re SRC Holding Corp., 352 B.R. 103 (Bankr. D. Minn. 2006), *aff'd in part and rev'd in part In re SRC Holding Corp.*, 364 B.R. 1 (D. Minn. 2007), reversed *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir. 2009) discuss certain matters addressed in Opinion 21. In *Leonard*, the Eighth Circuit held that the bankruptcy court had relied too heavily on ethics rules in determining whether the law firm had violated a legal duty to consult with its client about the law firm's possible malpractice. The Eighth Circuit said "[d]emonstrating that an ethics rule has been violated, by itself, does not give rise to a cause of action against the lawyer and does not give rise to a presumption that a legal duty has been breached." 553 F.3d 628. In predicting how the Minnesota Supreme Court would rule on an attorney's legal duty to consult with a client about the law firm's possible malpractice, the Eighth Circuit did not opine on a law firm's ethical duties to consult about such a claim. Recognizing the distinction, this Opinion does not opine on a law firm's legal duties to consult about such a claim.

A lawyer's obligation to report a possible malpractice claim to the lawyer's client also is discussed in a local article written by Charles E. Lundberg, entitled *Self Reporting Malpractice or Ethics Problems*, 60 Bench & B. of Minn. 8, Sept. 2003, and more recently and extensively in Benjamin P. Cooper's article, *The Lawyer's Duty to Inform His Client of*

~~*His Own Malpractice*, 61 Baylor L. Rev. 174 (2009) and Brian Pollock's article, *Surviving a Screwup*, 34 ABA Litig. Mag. 2, Winter 2008.~~

~~Adopted: October 2, 2009.~~

~~Amended/Adopted : _____, 2019.~~

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

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

OPINION NO. 25

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

A lawyer who commits an error that materially affects a current client's interests has one or more duties to act under the Minnesota Rules of Professional Conduct. The requirements of Rules 1.4 and 1.7, Minnesota Rules of Professional Conduct (MRPC), are implicated in such a circumstance and the lawyer must determine what actions may be required under the Rules. The lawyer must inform a current client of the material error. An error is considered material if a neutral lawyer would find that it is (a) reasonably likely to harm or prejudice a client; or (b) could reasonably cause a client to consider terminating the lawyer.

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

¹ Rule 1.7(a)(2), MRPC.

² Rule 1.7(a), MRPC.

³ Rule 1.7(b)(1) and (2), MRPC.

⁴ Rule 1.7(b)(4), MRPC.

⁵ Rule 1.4(a)(1), MRPC.

⁶ Rule 1.0(f).

Regardless of whether a material error creates a conflict of interest under Rule 1.7, MRPC, the lawyer also has duties of communication with a current client under Rule 1.4, MRPC, that may apply. When the lawyer has committed an error that materially affects a current client's interests, the lawyer shall inform the client about that conduct to the extent necessary to achieve each of the following objectives:

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

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

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

Comment

The issue of when and what to say to a client; when a lawyer determines a material error has been committed is difficult and may create inherent conflicts. The Board is issuing this opinion to apprise the Bar of the Board's position on the matter and to provide guidance to lawyers who may confront the issue. The American Bar Association (ABA) and other jurisdictions have opined that lawyer owe current clients similar duties to disclose. *See, e.g.,* ABA Formal Opinion 481 (April 7, 2018) (lawyer

⁷ Rule 1.4 (a)(3).

⁸ Rule 1.4 (b).

⁹ Rule 1.4 (a)(2).

¹⁰ *See* ABA Opinion 481 (April 7, 2018).

must inform current client of a material error; which is defined as “(a) reasonably likely to harm or prejudice a client; or (b) of such nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice”); Louisiana Public Opinion 16-RPCC-20 (2016) (lawyer who commits a significant mistake or error that may materially affect the client’s case, must disclose that fact to the client under Rule 1.4, LRPC); North Carolina Ethics Op. 4 (2015) (applying Rule 1.4 to “material errors that prejudice the client’s rights or interests as well as errors that clearly give rise to malpractice); Cal. Ethics Op. 2009-178 (2009) (“A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation Where the lawyer believes that he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client’s potential malpractice claim against the lawyer to the client, because it is a ‘significant development.’” (Citation omitted.)); Colo. B. Ass’n Ethics Comm., Formal Op. 113 (2005) (“When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client’s right or claim, the lawyer must promptly disclose the error to the client.”); Wis. St. B. Prof’l Ethics Comm., Formal Op. E-82-12 (“[A]n attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission.”); N.Y. St. B. Ass’n Comm. on Prof’l Ethics, Op. 734 (2000), 2000 WL 33347720 (Generally, an attorney “has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim.”); N.J. Sup. Ct. Advisory Comm. on Prof’l Ethics, Op. 684 (“The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney’s own interest.”).

Adopted: _____, 2019.

Robin M. Wolpert, Chair
Lawyers Professional Responsibility Board

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 481

April 17, 2018

A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error

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

Introduction

Even the best lawyers may err in the course of clients' representations. If a lawyer errs and the error is material, the lawyer must inform a current client of the error.¹ Recognizing that errors

¹ A lawyer's duty to inform a current client of a material error has been variously explained or grounded. For malpractice and breach of fiduciary decisions, *see, e.g.*, *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 629 (8th Cir. 2009) (predicting Minnesota law and concluding that "the lawyer must know that there is a non-frivolous malpractice claim against him such that there is a substantial risk that [his] representation of the client would be materially and adversely affected by his own interest in avoiding malpractice liability" (internal quotation marks omitted)); *Beal Bank, SSB v. Arter & Hadden, LLP*, 167 P.3d 666, 673 (Cal. 2007) (stating that "attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice"); *RFF Family P'ship, LP v. Burns & Levinson, LP*, 991 N.E.2d 1066, 1076 (Mass. 2013) (discussing the fiduciary exception to the attorney-client privilege and stating that "a client is entitled to full and fair disclosure of facts that are relevant to the representation, including any bad news"); *In re Tallon*, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.").

For disciplinary decisions, *see, e.g.*, *Fla. Bar v. Morse*, 587 So. 2d 1120, 1120–21 (Fla. 1991) (suspending a lawyer who conspired with his partner to conceal the partner's malpractice from the client); *In re Hoffman*, 700 N.E.2d 1138, 1139 (Ind. 1998) (applying Rule 1.4(b)). *See also* *Ill. State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., P.C.*, 980 N.E.2d 1120, 1129 (Ill. App. Ct. 2012) (finding that a voluntary payments provision in a professional liability insurance policy was "against public policy, since it may operate to limit an attorney's disclosure [of his potential malpractice] to his clients").

For ethics opinions, *see, e.g.*, *Cal. State Bar Comm. on Prof'l Responsibility & Conduct Op. 2009-178*, 2009 WL 3270875, at *4 (2009) [hereinafter *Cal. Eth. Op. 2009-178*] ("A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation. . . . Where the lawyer believes that he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'" (citation omitted)); *Colo. Bar Ass'n, Ethics Comm., Formal Op. 113*, at 3 (2005) [hereinafter *Colo. Op. 113*] ("Whether a particular error gives rise to an ethical duty to disclose [under Rule 1.4] depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error."); *Minn. Lawyers Prof'l Responsibility Bd. Op. 21*, 2009 WL 8396588, at *1 (2009) (imposing a duty to disclose under Rule 1.4 where "the lawyer knows the lawyer's conduct may reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client's

occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

If a material error relates to a former client's representation and the lawyer does not discover the error until after the representation has been terminated, the lawyer has no obligation under the Model Rules to inform the former client of the error. To illustrate, assume that a lawyer prepared a contract for a client in 2015. The matter is concluded, the representation has ended, and the person for whom the contract was prepared is not a client of the lawyer or law firm in any other matter. In 2018, while using that agreement as a template to prepare an agreement for a different client, the lawyer discovers a material error in the agreement. On those facts, the Model Rules do not require the lawyer to inform the former client of the error. Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules.

The Duty to Inform a Current Client of a Material Error

A lawyer's responsibility to communicate with a client is governed by Model Rule 1.4.² Several parts of Model Rule 1.4(a) potentially apply where a lawyer may have erred in the course of a current client's representation. For example, Model Rule 1.4(a)(1) requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent may be required. Model Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Model Rule 1.4(a)(3) obligates a lawyer to "keep a client reasonably informed about the status of a matter." Model Rule 1.4(a)(4), which obliges a lawyer to promptly comply with reasonable requests for information, may be implicated if the client asks about the lawyer's conduct or performance of the representation. In addition, Model Rule 1.4(b) requires a lawyer to "explain a

interests"); 2015 N.C. State Bar Formal Op. 4, 2015 WL 5927498, at *2 (2015) [hereinafter 2015 N.C. Eth. Op. 4] (applying Rule 1.4 to "material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim"; N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 684, 1998 WL 35985928, at *1 (1998) [hereinafter N.J. Eth. Op. 684] (discussing Rules 1.4 and 1.7(b) and requiring disclosure "when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Eth. Op. 734, 2000 WL 33347720, at *3 (2000) [hereinafter N.Y. Eth. Op. 734] (discussing the prior Code of Professional Responsibility and concluding that the inquirer had a duty to tell the client that it made "a significant error or omission that may give rise to a possible malpractice claim"); Sup. Ct. of Prof'l Ethics Comm. Op. 593, 2010 WL 1026287, at *1 (2010) [Tex. Eth. Op. 593] (opining that the lawyer must also terminate the representation and applying Texas Rules 1.15(d), 2.01, and 8.04(a)(3)). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (requiring disclosure where the conduct "gives the client a substantial malpractice claim against the lawyer").

² MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018) ("Communication") [hereinafter MODEL RULES].

matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” More broadly, the “guiding principle” undergirding Model Rule 1.4 is that “the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.”³ A lawyer may not withhold information from a client to serve the lawyer’s own interests or convenience.⁴

Determining whether and when a lawyer must inform a client of an error can sometimes be difficult because errors exist along a continuum. An error may be sufficiently serious that it creates a conflict of interest between the lawyer and the client. Model Rule 1.7(a)(2) provides that a concurrent conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.” Where a lawyer’s error creates a Rule 1.7(a)(2) conflict, the client needs to know this fact to make informed decisions regarding the representation, including whether to discharge the lawyer or to consent to the conflict of interest. At the other extreme, an error may be minor or easily correctable with no risk of harm or prejudice to the client.

Several state bars have addressed lawyers’ duty to disclose errors to clients.⁵ For example, in discussing the spectrum of errors that may arise in clients’ representations, the North Carolina State Bar observed that “material errors that prejudice the client’s rights or claims are at one end. These include errors that effectively undermine the achievement of the client’s primary objective for the representation, such as failing to file the complaint before the statute of limitations runs.”⁶ At the other end of the spectrum are “nonsubstantive typographical errors” or “missing a deadline that causes nothing more than delay.”⁷ “Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client’s interests.”⁸ With respect to the middle ground:

Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client’s objectives for the representation, or material disadvantage to the client’s legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing, or direction of the representation, the lawyer may not withhold information about the error.⁹

³ *Id.* cmt. 5.

⁴ *Id.* cmt. 7.

⁵ See *supra* note 1 (listing authorities).

⁶ 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Another example is contained in the Colorado Bar Association's Ethics Committee in Formal Opinion 113, which discusses the spectrum of errors that may implicate a lawyer's duty of disclosure. In doing so, it identified errors ranging from those plainly requiring disclosure (a missed statute of limitations or a failure to file a timely appeal) to those "that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice."¹⁰ Errors by lawyers between these two extremes must be analyzed individually. For example, disclosure is not required where the law on an issue is unsettled and a lawyer makes a tactical decision among "equally viable alternatives."¹¹ On the other hand, "potential errors that may give rise to an ethical duty to disclose include the failure to request a jury in a pleading (or pay the jury fee), the failure to include an acceleration provision in a promissory note, and the failure to give timely notice under a contract or statute."¹² Ultimately, the Colorado Bar concluded that whether a particular error gives rise to an ethical obligation to disclose depends on whether the error is "material," which further "depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim."¹³

These opinions provide helpful guidance to lawyers, but they do not—just as we do not—purport to precisely define the scope of a lawyer's disclosure obligations. Still, the Committee believes that lawyers deserve more specific guidance in evaluating their duty to disclose errors to current clients than has previously been available.

In attempting to define the boundaries of this obligation under Model Rule 1.4, it is unreasonable to conclude that a lawyer must inform a current client of an error only if that error may support a colorable legal malpractice claim, because a lawyer's error may impair a client's representation even if the client will never be able to prove all of the elements of malpractice. At the same time, a lawyer should not necessarily be able to avoid disclosure of an error absent apparent harm to the client because the lawyer's error may be of such a nature that it would cause a reasonable client to lose confidence in the lawyer's ability to perform the representation competently, diligently, or loyally despite the absence of clear harm. Finally, client protection and the purposes of legal representation dictate that the standard for imposing an obligation to disclose must be objective.

With these considerations in mind, the Committee concludes that a lawyer must inform a current client of a material error committed by the lawyer in the representation. An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

¹⁰ Colo. Op. 113, *supra* note 1, at 3.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1, 3.

A lawyer must notify a current client of a material error promptly under the circumstances.¹⁴ Whether notification is prompt will be a case- and fact-specific inquiry. Greater urgency is required where the client could be harmed by any delay in notification. The lawyer may consult with his or her law firm's general counsel, another lawyer, or the lawyer's professional liability insurer before informing the client of the material error.¹⁵ Such consultation should also be prompt. When it is reasonable to do so, the lawyer may attempt to correct the error before informing the client. Whether it is reasonable for the lawyer to attempt to correct the error before informing the client will depend on the facts and should take into account the time needed to correct the error and the lawyer's obligation to keep the client reasonably informed about the status of the matter.

When a Current Client Becomes a Former Client

As indicated earlier, whether a lawyer must reveal a material error depends on whether the affected person or entity is a current or former client. Substantive law, rather than rules of professional conduct, controls whether an attorney-client relationship exists, or once established, whether it is ongoing or has been concluded.¹⁶ Generally speaking, a current client becomes a former client (a) at the time specified by the lawyer for the conclusion of the representation, and acknowledged by the client, such as where the lawyer's engagement letter states that the representation will conclude upon the lawyer sending a final invoice, or the lawyer sends a disengagement letter upon the completion of the matter (and thereafter acts consistently with the letter);¹⁷ (b) when the lawyer withdraws from the representation pursuant to Model Rule of Professional Conduct 1.16; (c) when the client terminates the representation;¹⁸ or (d) when overt acts inconsistent with the continuation of the attorney-client relationship indicate that the

¹⁴ See N.J. Eth. Op. 684, *supra* note 1, 1998 WL 35985928, at *1 ("Clearly, RPC 1.4 requires prompt disclosure in the interest of allowing the client to make informed decisions. Disclosure should therefore occur when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted."); 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *4 ("The error should be disclosed to the client as soon as possible after the lawyer determines that disclosure of the error to the client is required."); Tex. Eth. Op. 593, *supra* note 1, 2010 WL 1026287, at *1 (requiring disclosure "as promptly as reasonably possible").

¹⁵ See MODEL RULES R. 1.6(b)(4) (2018) (permitting a lawyer to reveal information related to a client's representation "to secure legal advice about the lawyer's compliance with these Rules").

¹⁶ *United States v. Williams*, 720 F.3d 674, 686 (8th Cir. 2013); *Rozmus v. West*, 13 Vet. App. 386, 387 (U.S. App. Vet. Cl. 2000); see also MODEL RULES Scope cmt. 17 (2018) (explaining that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists").

¹⁷ See *Artromick Int'l, Inc. v. Drustar Inc.*, 134 F.R.D. 226, 229 (S.D. Ohio 1991) (observing that "the simplest way for either the attorney or client to end the relationship is by expressly saying so"); see also, e.g., *Rusk v. Harstad*, 393 P.3d 341, 344 (Utah Ct. App. 2017) (concluding that a would-be client could not have reasonably believed that the law firm represented him where the lawyer had clearly stated in multiple e-mails that the law firm would not represent him).

¹⁸ A client may discharge a lawyer at any time for any reason, or for no reason. *White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc.*, 647 F.3d 684, 689 (7th Cir. 2011); *Nabi v. Sells*, 892 N.Y.S.2d 41, 43 (App. Div. 2009); MODEL RULES R. 1.16 cmt. 4; see also STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 77 (11th ed. 2018) ("Clients, it is said, may fire their lawyers for any reason or no reason.") (citations omitted).

relationship has ended.¹⁹ If a lawyer represents a client in more than one matter, the client is a current client if any of those matters is active or open; in other words, the termination of representation in one or more matters does not transform a client into a former client if the lawyer still represents the client in other matters.

Absent express statements or overt acts by either party, an attorney-client relationship also may be terminated when it would be objectively unreasonable to continue to bind the parties to each other.²⁰ In such cases, the parties' reasonable expectations often hinge on the scope of the lawyer's representation.²¹ In that regard, the court in *National Medical Care, Inc. v. Home Medical of America, Inc.*,²² suggested that the scope of a lawyer's representation loosely falls into one of three categories: (1) the lawyer is retained as general counsel to handle all of the client's legal matters; (2) the lawyer is retained for all matters in a specific practice area; or (3) the lawyer is retained to represent the client in a discrete matter.²³

For all three categories identified by the *National Medical Care* court, unless the client or lawyer terminates the representation, the attorney-client relationship continues as long as the lawyer is responsible for a pending matter.²⁴ With respect to categories one and two above, an attorney-client relationship continues even when the lawyer has no pending matter for the client because the parties reasonably expect that the lawyer will handle all matters for the client in the future as they arise.²⁵ In the third category, where a lawyer agrees to undertake a specific matter, the attorney-client relationship ends once the matter is concluded.²⁶

Although not identified by the *National Medical Care* court, another type of client is what might be called an episodic client, meaning a client who engages the lawyer whenever the client requires legal representation, but whose legal needs are not constant or continuous. In many such

¹⁹ See, e.g., *Artromick Int'l, Inc.*, 134 F.R.D. at 230–31 (determining that a man was a former client because he refused to pay the lawyer's bill and then retained other lawyers to replace the first lawyer); *Waterbury Garment Corp. v. Strata Prods.*, 554 F. Supp. 63, 66 (S.D.N.Y. 1982) (concluding that a person was a former client because the law firm represented him only in discrete transactions that had concluded and the person had subsequently retained different counsel).

²⁰ *Artromick Int'l, Inc.*, 134 F.R.D. at 229.

²¹ *Id.* at 229–30.

²² No. 00-1225, 2002 WL 31068413 (Mass. Super. Ct. Sept. 12, 2002).

²³ *Id.* at *4.

²⁴ *Id.*; see also MODEL RULES R. 1.3 cmt. 4 (2018) (stating that unless the relationship is terminated under Model Rule 1.16, the lawyer "should carry through to conclusion all matters undertaken for a client").

²⁵ See *Berry v. McFarland*, 278 P.3d 407, 411 (Idaho 2012) (explaining that "[i]f the attorney agrees to handle any matters the client may have, the relationship continues until the attorney or client terminates the relationship"); see also MODEL RULES R. 1.3 cmt. 4 (2018) (advising that "[i]f a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal").

²⁶ *Simpson v. James*, 903 F.2d 372, 376 (5th Cir. 1990); *Berry*, 278 P.3d at 411; see also *Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.*, 687 F. Supp. 2d 381, 389–90 (S.D.N.Y. 2010) (noting that an attorney-client relationship is ordinarily terminated by the accomplishment of the purpose for which it was formed); *Thayer v. Fuller & Henry Ltd.*, 503 F. Supp. 2d 887, 892 (N.D. Ohio 2007) (observing that an attorney-client relationship may terminate when the underlying action has concluded or when the attorney has exhausted all remedies and declined to provide additional legal services); MODEL RULES R. 1.16 cmt. 1 ("Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded.").

instances, the client reasonably expects that the professional relationship will span any intervals and that the lawyer will be available when the client next needs representation.²⁷ If so, the client should be considered a current client. In other instances, it is possible that the attorney-client relationship ended when the most recent matter concluded.²⁸ Whether an episodic client is a current or former client will thus depend on the facts of the case.

The Former Client Analysis Under the Model Rules

As explained above, a lawyer must inform a current client of a material error under Model Rule 1.4. Rule 1.4 imposes no similar duty to former clients.

Four of the five subparts in Model Rule 1.4(a) expressly refer to “the client” and the one that does not—Model Rule 1.4(a), governing lawyers’ duty to respond to reasonable requests for information—is aimed at responding to requests from a current client. Model Rule 1.4(b) refers to “the client” when describing a lawyer’s obligations. Nowhere does Model Rule 1.4 impose on lawyers a duty to communicate with former clients. The comments to Model Rule 1.4 are likewise focused on current clients and are silent with respect to communications with former clients. There is nothing in the legislative history of Model Rule 1.4 to suggest that the drafters meant the duties expressed there to apply to former clients.²⁹ Had the drafters of the Model Rules intended Rule 1.4 to apply to former clients, they presumably would have referred to former clients in the language of the rule or in the comments to the rule. They did neither despite knowing how to distinguish duties owed to current clients from duties owed to former clients when appropriate, as reflected in the Model Rules regulating conflicts of interest.³⁰

²⁷ See, e.g., *Parallel Iron, LLC v. Adobe Sys. Inc.*, C.A. No. 12-874-RGA, 2013 WL 789207, at *2–3 (D. Del. Mar. 4, 2013) (concluding that Adobe was a current client in July 2012 when the law firm was doing no work for it; the firm had served as patent counsel to Adobe intermittently between 2006 and February 2012, and had not made clear to Adobe that its representation was terminated); *Jones v. Rabanco, Ltd.*, No. C03-3195P, 2006 WL 2237708, at *3 (W.D. Wash. Aug. 3, 2006) (reasoning that the law firm’s inclusion as a contact under a contract, the law firm’s work for the client after the contract was finalized, and the fact that the client matter was still open in the law firm’s files all indicated an existing attorney-client relationship); STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 78-79 (11th ed. 2018) (“Lawyers might believe that a client is no longer a client if they are doing no work for it at the moment and haven’t for a while. . . . [A] firm may have done work for a client two or three times a year for the past five years, creating a reasonable client expectation that the professional relationship continues during the intervals and that the lawyer will be available the next time the client needs her.”).

²⁸ See, e.g., *Calamar Enters., Inc. v. Blue Forest Land Grp., Inc.*, 222 F. Supp. 3d 257, 264–65 (W.D.N.Y. 2016) (rejecting the client’s claim of an attorney-client relationship where the relationship between the law firm and the client had been dormant for three years; despite the fact that the attorney-client relationship had not been formally terminated, it ended when the purpose of the parties’ retainer agreement had been completed).

²⁹ AM. BAR ASS’N CTR. FOR PROF’L RESPONSIBILITY, *A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013*, 71–78 (Arthur H. Garwin ed., 2013).

³⁰ Compare MODEL RULES R. 1.7 (2018) (addressing current client conflicts of interest), with MODEL RULES R. 1.9 (2018) (governing former client conflicts of interest).

Because Model Rule 1.4 does not impose on lawyers a duty to communicate with former clients,³¹ it is no basis for requiring lawyers to disclose material errors to former clients.

The California State Bar's Committee on Professional Responsibility and Conduct reached a similar conclusion with respect to California Rule of Professional Conduct 3-500, which states that "[a] member [of the State Bar of California] shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." In concluding that a lawyer had no duty to keep a former client informed of significant developments in the representation, and specifically the former client's possible malpractice claim against the lawyer, the Committee focused on the fact that the lawyer and the former client had "terminated their attorney-client relationship" and on Rule 3-500's reference to a "client," meaning a current client.³²

Finally, in terms of possible sources of an obligation to disclose material errors to former clients, Model Rule 1.16(d) provides in pertinent part that, upon termination of a representation, "a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee[s] or expense[s] that has not been earned or incurred." This provision does not create a duty to inform former clients of material errors for at least two reasons. First, the wording of the rule demonstrates that the error would have to be discovered while the client was a current client, thereby pushing any duty to disclose back into the current client communication regime. Second, Model Rule 1.16(d) is by its terms limited to actions that may be taken upon termination of the representation or soon thereafter; it cannot reasonably be construed to apply to material errors discovered months or years after termination of the representation.

Conclusion

The Model Rules require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The lawyer

³¹ See Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline Adv. Op. 2010-2, 2010 WL 1541844, at *2 (2010) (explaining that Rule 1.4 "applies to ethical duties regarding communication *during a representation*" (emphasis added)); Va. State Bar Comm. on Legal Ethics Eth. Op. 1789, 2004 WL 436386, at *1 (2004) (stating that "[d]uring the course of the representation, an attorney's duty to provide information to his client is governed by Rule 1.4(a)") (emphasis added)).

³² Cal. Eth. Op. 2009-178, *supra* note 1, 2009 WL 3270875, at *6.

must so inform the client promptly under the circumstances. Whether notification is prompt is a case- and fact-specific inquiry.

No similar duty of disclosure exists under the Model Rules where the lawyer discovers after the termination of the attorney-client relationship that the lawyer made a material error in the former client's representation.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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Attachment 7

DEC Chairs Symposium Agenda

May 17, 2019

Earle Brown Heritage Center
6155 Earle Brown Drive, Brooklyn Center, MN 55430

- 8:00-8:45AM:** Check-in and breakfast
- 8:45-9:30AM:** Opening Remarks and Roundtable Discussion on Recruiting (Robin Wolpert and Susan Humiston)
- 9:30-10:30AM:** Essential Legal Constructs in the Attorney Discipline Process (Jennifer Bovitz and Peter Ivy)
This presentation will focus on answering the following questions: What are the differences, if any, between mistakes, malpractice and actual MRPC rules violations? How does the LPRB serve as a check or balance on the OLPR? What different evidentiary standards of review are used at different stages of the attorney discipline process? How is “isolated and non-serious” defined and why does it matter? What are complainant appeals and how are they handled?
- 10:30-10:45AM:** *Break*
- 10:45-11:45AM:** Exploring the Connections Between Implicit Bias, Incivility, and Toxicity in the Legal Profession (Nicole Frank and Joan Bibelhausen)
The focus for the first part of this program is to understand and demonstrate how implicit bias discussions in the legal profession must include mental health (including substance use) and stress issues. This program will begin with a general understanding of the concept of implicit bias and discuss how implicit bias stands in the way of lawyers seeking the help they need for mental health and stress issues. While it’s hard for anyone to ask for help, there is a double stigma for those already in underrepresented groups. This program will address the challenge for lawyers, judges and law students to ask for help for mental health issues, the relationship between mental health issues and diversity and inclusion and a discussion of current challenges and strategies to address them. The

second part of this program will explore these issues from an attorney regulation standpoint. The discussion will review examples of misconduct that involve incivility and consider the connection between implicit bias and incivility or toxicity.

11:45-12:30PM: *Lunch*

12:30-1:30PM: **Supreme Court Review (Justice Thissen)**

As the newest Supreme Court Justice, Justice Thissen will share his perspective on recent ethics decisions and issues handled by the Court, and will highlight significant decisions and activities of the Court during the past year.

1:30-2:30PM: **Investigation Tips and Best Practices for DEC Chairs (Susan Humiston, Aaron Sampsel, and Tracy Podpeskar)**

This presentation will offer investigation tips and other best practices to assist DEC Chairs in answering questions from investigators and in reviewing DEC reports. This session will use real case examples to highlight such topics as: (1) what to do when a lawyer fails to provide requested information, including non-cooperation, confidentiality and work product objections; (2) cautions regarding the use and possession of documents considered confidential/private data and how to identify such documents; (3) how to handle rude/disparaging responses from a respondent or complainant and what information to convey to the other side; (4) how to handle “technical violations” of the MRPC; and (5) “best practice tips” for Chairs when reviewing a DEC report.

2:30-2:45PM: **Closing Remarks (Peter Ivy)**

Presenter Biographies:

Associate Justice Paul Thissen:

Associate Justice Paul Thissen was appointed to the Minnesota Supreme Court by Governor Mark Dayton in April 2018. Born and raised in Bloomington, Minnesota, Justice Thissen graduated from Harvard University and the University of Chicago Law School. After graduation, he clerked for the Honorable James Loken at the United States Court of Appeals for the Eighth Circuit. He did complex civil litigation at Briggs and Morgan for nearly twenty years and advised health care providers including long-term care facilities in transactional and regulatory matters at Lindquist & Vennum (now Ballard Spahr). He also worked as an appellate lawyer for the State Public Defender's Office and actively participated in pro bono cases throughout his career. Justice Thissen served in the Minnesota House of Representatives from 2003 until 2018 including two years as Speaker of the Minnesota House. He and his wife Karen live in Minneapolis and have three children.

Robin Wolpert:

Robin Wolpert is a business litigation and white collar criminal defense attorney at Sapientia Law Group. Her practice focuses on business fraud and misrepresentation, real estate, data privacy, and business compliance. Robin is Chair of the Lawyers Professional Responsibility Board and the Immediate Past President of the Minnesota State Bar Association. Robin is a former prosecutor and Senior Counsel of Compliance & Business Conduct at 3M.

Peter Ivy:

Peter Ivy is the Chair of the Lawyers Professional Responsibility Board DEC Committee. He currently serves as Chief Deputy Carver County Attorney. Mr. Ivy carries a felony caseload and provides legal advice to all Carver County officials and divisions. He also serves as Co-Chair of the Minnesota County Attorneys Association Ethics Committee.

Susan Humiston:

Susan Humiston is the director of the Office of Lawyers Professional Responsibility and Client Security Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan was Vice-President and Assistant General Counsel for Alliant Techsystems Inc. and its public company spin-off, Vista Outdoor Inc., and was a litigation partner at Leonard, Street and Deinard, now Stinson Leonard Street. She clerked for U.S. District Court Judge

David S. Doty, is an honors graduate of the University of Iowa College of Law, and received her B.A. with honors from the University of Nebraska-Lincoln.

Jennifer Bovitz:

Jennifer Bovitz joined the Office of Lawyer's Professional Responsibility in 2017 as a Senior Assistant Director. Jennifer earned her J.D. from William Mitchell College of Law in 2001, and served as a felony prosecutor until joining the OLPR. Jennifer's trial experience includes a wide range of criminal cases, and extends to appellate practice at both the Minnesota Court of Appeals and the Minnesota Supreme Court. Jennifer serves as adjunct faculty at Mitchell Hamline College of Law, served on the Washington County Community Corrections Advisory Board, and is a past board president of Friends in Need Food Shelf.

Nicole Frank:

Nicole Frank is an Assistant Director at the Office of Lawyers Professional Responsibility. Prior to joining the OLPR, Ms. Frank practiced business litigation at Robins Kaplan LLP for eight years. Before private practice, Ms. Frank clerked for Judge Larkin on the Minnesota Court of Appeals. Law is Ms. Frank's second career; she began her professional work as a high school language arts teacher. Ms. Frank enjoys being active in the local arts community and serves on the Executive Board for the French-American Chamber of Commerce, Minneapolis-St. Paul.

Aaron Sampsel:

Aaron D. Sampsel is an attorney and Assistant Director at the Office of Lawyers Professional Responsibility. Aaron investigates and prosecutes allegations of attorney misconduct and acts as an assistant liaison to the Fourth District Ethics Committee. Before joining the OLPR, Aaron was in private practice in Minneapolis where he practiced in the areas of trademark litigation, business litigation, and real estate. Aaron is a 2016 graduate of William Mitchell College of Law. Prior to law school, he worked in the financial services industry in Chicago.

Joan Bibelhausen:

Joan Bibelhausen has served as Executive Director of Lawyers Concerned for Lawyers since 2005. She is an attorney and is nationally recognized for her work in the lawyer assistance and diversity and inclusion realms. Joan has significant additional training in the areas of counseling, mental health and addiction, diversity, employment issues and management. She has spent more than two decades working with lawyers, judges and law students who are at a crossroads because of mental illness and addiction concerns as well as well-being, stress and related issues.

Tracy Podpeskar:

Tracy Podpeskar currently serves as the Chair of the 20th District Ethics Committee. Prior to that, she was an investigator for the committee for 6 years. Tracy is a partner at the Trenti Law Firm in Virginia, Minnesota, and practices exclusively in the area of family law. She received her Bachelor's Degree from the University of Minnesota and her J.D. from William Mitchell. Tracy is a Qualified Neutral under Rule 114 and is an Early Neutral Evaluator for the Sixth Judicial District.

Attachment 8

OLPR Dashboard for Court and Chair

	Month Ending March 2019	Change From Previous Month	Month Ending March 2018	
Open Matters	506	0/506	508	
New Files YTD	238	+74/164	258	
Closed Files YTD	240	+74/166	267	
Closed C012s YTD	66	+15/51	89	
Summary Dismissals YTD	101	+31/70	119	
Files Opened During March 2019	74	-18/92	90	
Files Closed During March 2019	74	-22/96	106	
Public Matters Pending (excluding Resignations)	41	0/41	27	
Panel Matters Pending	15	0/15	7	
DEC Matters Pending	85	-1/86	72	
Files On Hold	22	+1/21	20	
Advisory Opinion Requests YTD	526	+179/347	503	
CLE Presentations YTD	16	+5/11	12	
Total Files Over 1 Year Old	136	-7/143	151	
Matters Pending Over 1 Year Old w/o Charges	41	-1/42	71	

	2019 YTD	2018 YTD
Lawyers Disbarred	2	4
Lawyers Suspended	5	7
Lawyers Reprimand & Probation	0	0
Lawyers Reprimand	1	2
TOTAL PUBLIC	8	13
Private Probation Files	1	5
Admonition Files	25	22
TOTAL PRIVATE	26	27

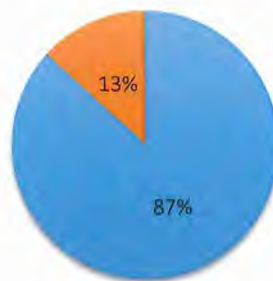
Files Over 1 Year Old as of Month Ending March 2019

Year/Month	OLPR	AD	PROB	PAN	HOLD	SUP	S12C	SCUA	REIN	TRUS	Total
2015-01								1			1
2015-03					1						1
2015-05						2					2
2015-11					2						2
2015-12					1	1					2
2016-02				1		1					2
2016-03						1					1
2016-05					1						1
2016-06					2	1					3
2016-07	1					1					2
2016-08					3	3					6
2016-09						3					3
2016-10					1	3					4
2016-11								1			1
2016-12	1					2					3
2017-01						1		1			2
2017-02						8					8
2017-03	2				1	2					5
2017-04	1					1		1			3
2017-05						1				1	2
2017-06			1			2		1			4
2017-07	1			1	1	1		2		1	7
2017-08	1		1			6					8
2017-09	4					5					9
2017-10	5				1	2					8
2017-11	4	1		1	1			1			8
2017-12	6			1		2					9
2018-01	5		1	3		1					10
2018-02	5				1	4					10
2018-03	5				1	1	1		1		9
Total	41	1	3	7	17	55	1	8	1	2	136

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	128	59
Total Cases Under Advisement	8	8
Total Cases Over One Year Old	136	67

Active	118
Inactive	18

Active v. Inactive



■ Active ■ Inactive

All Files Pending as of Month Ending March 2019

Year/Month	SD	DEC	REV	OLPR	AD	PROB	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	Total
2015-01											1				1
2015-03								1							1
2015-05									2						2
2015-11								2							2
2015-12								1	1						2
2016-02							1		1						2
2016-03									1						1
2016-05								1							1
2016-06								2	1						3
2016-07				1					1						2
2016-08								3	3						6
2016-09									3						3
2016-10								1	3						4
2016-11											1				1
2016-12				1					2						3
2017-01									1		1				2
2017-02									8						8
2017-03				2				1	2						5
2017-04				1					1		1				3
2017-05									1					1	2
2017-06						1			2		1				4
2017-07				1			1	1	1		2			1	7
2017-08				1		1			6						8
2017-09				4					5						9
2017-10				5				1	2						8
2017-11				4	1		1	1			1				8
2017-12				6			1		2						9
2018-01				5		1	3		1						10
2018-02				5				1	4						10
2018-03				5				1	1	1		1			9
2018-04				15	1				7		1				24
2018-05				16		1		1	1					1	20
2018-06				15				1	2	1					19
2018-07				18					1			1			20
2018-08		3	1	27		1		2	4			1			39
2018-09			1	11					2						14
2018-10		4	1	32					3			2			42
2018-11		8	1	14					2			1			26
2018-12		10	3	22				1	1					1	38
2019-01		21	1	16											38
2019-02		21		23								1			45
2019-03	6	18		16								2	3		45
Total	6	85	8	266	2	5	7	22	78	2	9	9	3	4	506

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

**FY20/21 Budget Request
MN Board of Lawyers Professional Responsibility**

DRAFT 4/18/2019

Appropriation: J650LPR

Account	FY16 Actual	FY17 Actual	FY18 Actual	FY19 Budget	FY19 Projected	FY20 Projected	FY21 Projected
	a	b	c	d	e	f	g
Reserve Balance In	3,445,582	3,386,942	2,910,119	2,344,762	2,344,762	1,939,388	781,732
Revenue:*							
Law Prof Resp Attrny Judgmnts	512416 57,757	26,422	24,001	25,300	23,214	23,910	24,628
Other Agency Deposits	514213 22,355	26,785	26,899	28,900	23,605	25,019	25,770
Law Prof Resp Misc	553093 57,462	61,239	49,880	57,000	52,915	54,503	56,138
Attorney's Registration	634112 3,163,603	3,201,155	3,150,783	3,137,000	3,238,215	3,214,297	3,241,253
Law Prof Resp Bd Prof Corp	634113 89,800	74,851	72,425	87,300	71,319	73,459	75,663
Subtotal Revenue	3,390,977	3,390,452	3,323,988	3,335,500	3,409,269	3,391,188	3,423,451
Expenditures:	3,449,618	3,867,274	3,889,345	3,969,600	3,814,643	4,548,845	4,510,031
Reserve Balance Out (Ending Cash Balance)	3,386,942	2,910,119	2,344,762	1,710,662	1,939,388	781,732	(304,848)

Notes:

* Revenue assumptions FY20/21 3% over FY19 projected amounts (excluding Atty. Reg. (634112)).

Atty. Reg. Assumptions: FY20 29,567 (23,062 @ \$122; 3,844 @ \$83; 2,661 @ \$26; 833 @ \$15)

FY21 29,815 (23,256 @ \$122; 3,876 @ \$83; 2,683 @ \$26; 833 @ \$15)

FY20/21 Budget Request

MN Board of Lawyers Professional Responsibility

DRAFT

DRAFT 4/18/2019

Appropriation: J650LPR
Findept. ID: J653500B

Account	FY16 Actual Expenditures	FY17 Actual Expenditures	FY18 Actual Expenditures	FY19 Budget Expenditures	FY19 Projected Expenditures	FY20 Projected Expenditures	FY21 Projected Expenditures	
	a	b	c	d	e	f	g	
Full Time	41000	2,636,719	2,758,682	2,815,371	2,800,000	2,824,069	3,351,569	3,573,612
PT, Seasonal, Labor Svc	41030	199,065	233,218	200,379	249,000	215,182	121,346	124,866
OT Pay	41050	2,851	532	3,022	1,000	2,825	3,000	3,000
Other Benefits	41070	44,334	15,475	66,139	50,000	34,506	13,000	30,000
PERSONNEL		2,882,969	3,007,907	3,084,910	3,100,000	3,076,582	3,488,915	3,731,478
Space Rental, Maint., Utility	41100	323,882	336,891	344,225	346,000	353,104	374,142	367,361
Printing, Advertising	41110	17,401	8,778	9,896	12,300	13,065	13,849	14,680
Prof/Tech Services Out Ven	41130	28,516	38,327	27,957	51,600	27,821	85,130	31,160
IT Prof/Tech Services	41145	26,748	266,943	165,964	180,000	44,061	282,000	64,500
Computer & System Svc	41150	6,161	4,679	38,835	2,500	50,352	53,373	56,576
Communications	41155	19,176	23,308	22,556	29,900	25,503	27,033	28,655
Travel, Subsistence In-St	41160	14,624	9,704	13,630	13,500	7,997	14,310	15,169
Travel, Subsistence Out-St	41170	10,270	15,044	18,998	26,400	33,772	37,149	40,864
Employee Dev't	41180	13,027	14,860	20,002	14,500	9,888	10,877	11,964
Agency Prov. Prof/Tech Svc	41190	-	100					
Supplies	41300	57,597	66,502	60,435	91,200	56,475	62,123	68,335
Equipment Rental	41400	2,714	3,029	3,035	3,000	3,990	4,000	4,000
Repairs, Alterations, Maint	41500	8,052	7,074	6,921	10,600	8,086	33,460	9,056
Other Operating Costs	43000	29,925	40,512	69,636	43,100	55,447	58,774	62,300
Payment to Individ. Med/Rehab Client	44100		365					
Equipment Capital	47060	-	1,131	1,386	35,000	45,000		
Equipment-Non Capital	47160	8,556	22,119	960	10,000	3,500	3,710	3,933
OPERATING		566,649	859,367	804,435	869,600	738,061	1,059,930	778,553
TOTAL		3,449,618	3,867,274	3,889,345	3,969,600	3,814,643	4,548,845	4,510,031

Notes:

- FY16 - Increased by 11%, including 4% Merit and 7% for insurance. One additional paralegal position.
- FY17 - Increased 9.8%, including 3.5% Merit and 6.3% for insurance. No staff increases anticipated.
- FY18 - Salaries increased by 2.5% for merit. Insurance increased by 8.8%. Anticipated retirement payout for one professional staff. No staff increases anticipated.
- FY19 - Salaries increased by 2.5% for merit. Insurance increased 6.55%. Anticipated retirement payout for one professional staff. No staff increases anticipated.
- FY20 - Increased by 9.13%, including 3.0% for merit and 5.63% for insurance. A 0.80 FTE Office Assistant II position changed to a 1.0 FTE Office Assistant III position at a savings of \$1,459 (based on individual insurance coverage), a 0.50 FTE Paralegal position was changed to a 1.0 FTE Investigator position at a cost of \$47,158 (based on individual insurance coverage), and added a one-year temporary attorney position at \$95,679, inclusive of benefits. Anticipated retirement payout for one staff of \$13,000.
- FY21 - Increased by 9.12%, including 3.0% for merit and 5.62% for insurance. Added a 1.0 FTE Investigator position at a cost of \$109,995 (based on individual insurance coverage). Anticipated retirement payout for two staff of \$30,000. Move temporary attorney to permanent position.

Space Rental & Utilities - Includes office space rent, document storage, parking and meeting and conference space rental.

Landmark lease expires 7/31/20. Building is in foreclosure. State Real Estate believes we will be able to negotiate a new lease; approved 3% year over year assumption. MJC lease expires 6/30/19.

- FY16 - 7/15 - \$21.42 sq. ft @ 11,158 sq. ft + \$18.65 sq. ft @ 1057 sq. ft for 12th floor office and storage + \$259.52 garage storage + 11 mos. - \$21.85 sq. ft @ 11,158 sq. ft + \$18.65 sq. ft @ 1057 sq. ft for 12th floor office and storage + \$2,855 for garage storage + \$43,588 parking + \$20,956 for courtroom.
- FY17 - 7/16 - \$21.42 sq. ft @ 11,158 sq. ft + \$18.65 sq. ft @ 1057 sq. ft for 12th floor office and storage + \$259.52 garage storage + 11 mos. - \$22.29 sq. ft @ 11,158 sq. ft + \$18.65 sq. ft @ 1057 sq. ft for 12th floor office and storage + \$2,855 for garage storage + \$45,719 parking + \$22,008 for courtroom.
- FY18 - 7/17 - \$22.29 sq. ft @ 11,158 sq. ft + \$18.65 sq. ft @ 1057 sq. ft for 12th floor office and storage + 11 mos. - \$22.73 sq. ft @ 11,158 sq. ft + \$18.65 sq. ft @ 1057 sq. ft for 12th floor office and storage + \$42,120 parking + \$20,000 for courtroom. End basement storage.
- FY19 - 7/18 - \$22.73 sq. ft @ 11,158 sq. ft + \$18.65 sq. ft @ 1057 sq. ft for 12th floor office and storage + 11 mos. - \$23.19 sq. ft @ 11,158 sq. ft + \$18.65 sq. ft @ 1057 sq. ft for 12th floor office and storage + \$42,120 parking + \$20,000 for courtroom.
- FY20 - 7/19 - \$23.19 sq. ft @ 11,158 sq. ft + \$18.65 sq. ft @ 1057 sq. ft for 12th floor office and storage + 11 mos. - \$23.65 sq. ft @ 11,158 sq. ft + \$18.65 sq. ft @ 1057 sq. ft for 12th floor office and storage + \$50,470 parking + \$28,500 for courtroom + \$2,000 offsite file storage + \$10,000 meeting/conference space rental.
- FY21 - 7/20 - \$23.65 sq. ft @ 11,158 sq. ft + \$18.65 sq. ft @ 1057 sq. ft for 12th floor office and storage + 11 mos. - \$24.36 sq. ft @ 11,158 sq. ft + \$50,470 parking + \$32,000 for courtroom + \$2,100 offsite file storage + \$10,000 meeting/conference space rental.

Printing & Advertising - Includes copies of medical records, printing and advertising.

- FY16 - based on 4 year average plus 6%.
- FY17 - 6% increase over FY16.
- FY18 - based on 4 year average plus 6%.
- FY19 - 6% increase over FY18.
- FY20/21 - 6% increase over previous FY projected.

Prof. & Tech. Services Outside Vendor- Includes court reporting, transcripts, witness fees, Board reimbursements and temporary help.

- FY16 - based on 4 year average plus 6%.
- FY17 - 6% increase over FY16.
- FY18 - 15% of projected FY17.
- FY19 - 15% increase over FY18.
- FY20 - Includes \$20,000 for ABA audit, \$34,640 for Courtroom technology improvements (AV upgrade, video cart, Skype connectivity, ClickShare).
- FY21 - 12% increase over FY19 projected.

IT Prof/Tech Services Outside Vendor - includes IT development and maintenance, West Publishing (Clear)

FY16 - includes funds for Westlaw, CLEAR and rebuilding ADRS and ongoing maintenance and projects.

FY17 - includes funds for new internal database project (LDMS), Westlaw, CLEAR and ADRS necessary maintenance.

FY18 - includes funds for LDMS database project (\$200,000), Judicial ITD service fees (\$100,000), Westlaw CLEAR and any ADRS necessary maintenance.

FY19 - includes funds for LDMS maintenance (\$30,000), Judicial ITD service fees (\$100,000), re-building of LPRB public website (\$50,000), Westlaw and CLEAR.

FY20 - includes funds for LDMS (\$99,600 - final Contract payment, \$5,400 - final Change Order #1 payment, \$3,000 - estimate of final Change Order #2 payment, \$120,000 - first year maintenance), rebuilding of LPRB public website (\$50,000), West Publishing (\$4,000).

FY21 - includes funds for LDMS maintenance (\$60,000), West Publishing (\$4,500).

Computer & System Services - includes software, software maintenance, subscriptions

FY16 - includes funds for SharePoint enhancements, Dictaphone services.

FY17 - includes funds for SharePoint enhancements, Dictaphone services.

FY18 & FY19 - includes funds for software licenses, PACER, WestLaw, BNA, dictation software maintenance agreement.

FY20/21 - 6% increase over previous FY projected.

Communications - Includes mailing services, freight, courier, voice and WAN services.

FY16 - based on 4 year average plus 6%.

FY17 - 6% increase over FY16.

FY18 - based on 4 year average plus 3%.

FY19 - 3% increase over FY18.

FY20/21 - 6% increase over previous FY projected.

Travel In-State - Reimbursement of employee travel expenses, MetroPass subsidy

FY16 & FY17 increased 6% each year.

FY18 & FY19 increased 6% each year.

FY20/21 6% increase over previous FY budget.

Travel Out-Of-State - Includes airfare, hotel, facility rental.

FY16 & FY17 - 10% increase each year to allow for witness travel. Allows for 2 employees to attend 3 conf. and 1 misc. trip.

FY18 & FY19 - 10% increase each year to allow for witness travel. Allows for 2 employees to attend 3 conf. and 1 misc. trip.

FY20/21 - 10% increase over previous FY projected. Allows for 3 employees to attend 3 conferences.

Employee Development - Includes memberships, registration fees for seminars and tuition.

FY16 - based on 4 year average plus 6%.

FY17 - 6% increase over FY16.

FY18 - based on 4 year average plus 10%.

FY19 - 10% increase over FY16.

FY20/21 - 10% increase over previous FY projected.

Supplies - General office supplies, paper subscriptions, furniture under \$2,000, postage, food.

FY16 is 6% increase.

FY15 & FY16 These FYs high due to Finance accounting error. Various items should have been debited against Computer Services and Furniture and Equipment totaling approximately \$10,000 (FY15) and \$12,000 (FY16).

FY17 is adjusted amount.

FY18 is 10% of projected FY17.

FY19 is 10% of FY18 amount.

FY20/21 10% increase over previous FY projected.

Equipment Rental

FY16 & FY17 includes funds for mail machine lease

FY18 & FY19 includes funds for mail machine lease

FY20/21 includes funds for mail machine lease

Repairs - Misc. equipment repairs and maintenance contracts

FY16 - based on 4 year average plus 6%.

FY17 - 6% increase over FY16.

FY18 - based on 4 year average.

FY19 - 6% increase over FY18.

FY20 - \$24,860 for Courtroom technology improvements ((AV upgrade, video cart, Skype connectivity, ClickShare) installation and maintenance.

FY21 - 12% increase over FY19 projected.

Other Operating Costs - Includes interpreter services, installation charges, catering, AV services, document destruction, insurance,

FY16 - based on 4 year average plus 6%.

FY17 - 6% increase over FY16.

FY18 - 6% of projected FY17. Also includes one time costs to (a) upgrade OLPR security (\$10,000) and (b) Audio upgrades to Judicial courtroom (\$20,000).

FY19 - 6% of FY18 base projected amount (\$40,700).

FY20/21 - 6% increase over previous FY projected.

Equipment Capital

FY19 includes estimated funds for purchase of three (3) new commercial copiers.

Equipment Non-Capital

FY16 & FY17 includes funds for new furniture and printers/scanners.

FY18 includes funds for new furniture, printers and 10 personal scanners for use in conjunction with LDMS. Each scanner is approx. \$2,400.

FY19 includes funds for new furniture, printers and scanners.

FY20/21 - 6% increase over previous FY projected.

2018 year in review: Public discipline

Public discipline in professional responsibility cases is imposed not to punish the attorney, but to protect the public, the profession, and the judicial system, and to deter future misconduct by the attorney and others. In 2018, 45 attorneys were publicly disciplined, up slightly from the 2017 number (40 attorneys) but commensurate with the 2016 number (44 attorneys). Two particular statistics jumped out at me when I was reviewing 2018 public discipline statistics: the number of disbarments, and the number of transfers to disability inactive status.

Disability inactive status is not discipline, and transfers to disability inactive status are not included within the numbers referenced above, but these transfers play an important role in public disciplinary proceedings. When a lawyer asserts a disability in defense or mitigation of a disciplinary proceeding—and is unable to participate in the defense of the proceeding because of this disability—the professional responsibility rules allow attorneys, upon court approval, to transfer to disability status and have disciplinary proceedings stayed.¹ In 2018, six attorneys were transferred to disability inactive status. Over the past 10 years, one or two attorneys have typically transferred to disability inactive status annually (though four attorneys transferred in 2010). I do not know what accounted for the sharp uptick in 2018. The reasons for transfers varied from mental health to substance use disorders to serious physical disabilities, or some combination of the foregoing; no one set of circumstances emerged as a pattern.² Hopefully this is a one-year spike, but I worry in light of the increasing evidence of serious well-being issues among lawyers.



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Disbarments

Eight attorneys were disbarred in 2018. This number is up from 2017 (when five attorneys were disbarred), and more than is typical. The attorneys disbarred were:

- Joseph Capistrant, who was disbarred for misappropriating filing fees and costs, failing to place client funds in trust, failing to file an action as promised, abandoning a client file, and failing to cooperate in the disciplinary proceeding;
- Roy Henlin, who was disbarred for misappropriating significant funds from a trust while acting as trustee, and other client misconduct. The beneficiaries of the trust were teenage children at the time the trust was formed, and the trust had been funded by the children's mother before her death. As of the writing of this column, Mr. Henlin is a defendant in a felony theft by swindle criminal case pending in Hennepin County;

- George Hulstrand, who was disbarred for misappropriating \$685 in client funds, but also engaged in multiple acts of misconduct across multiple matters, and had prior similar public and private discipline involving incompetency and client neglect;
- Ian Scot Laurie, who was disbarred following his conviction in federal court for distribution of child pornography;
- Jeffrey Olson, who was disbarred for fraudulent use of his trust account during a suspension from the practice of law for similar misconduct. Mr. Olson also pleaded guilty to aiding and abetting felony mail fraud for some of the misconduct that had led to the prior suspension;
- Amoun Sayaovong, who was disbarred for conduct in Wisconsin and Minnesota, including misappropriation of third-party funds he had garnished, and other misconduct across several files;
- Barry VanSickle, who was disbarred as a matter of reciprocal discipline due to misconduct in California in four separate disciplinary proceedings; and
- Richard Virnig, who was disbarred for misappropriating funds from two clients, and other client misconduct.

The common thread once again this year is misappropriation of funds—which, absent significant mitigating circumstances, generally leads to disbarment. Also notable this year is the incidence of felony-level misconduct by several attorneys.

Suspension

Twenty-three attorneys were suspended for periods of 30 days to four years. This figure continues the trend of rising suspension numbers. A few things struck me when reviewing suspensions as a whole for 2018. Misappropriations of client funds was a basis for discipline in five additional cases. But unlike the disbarment cases, the suspension cases contained evidence of mitigating circumstances such that the court imposed less than disbarment. Combined with the number of disbarment cases involving misappropriations of client or third-party funds, though, 2018 was a big year for misappropriations.

Two cases also involved significant misconduct through lies. One case, that of Mark Novak, involved a pervasive pattern of lies to clients in multiple matters, including falsifying documents. Mr. Novak was suspended for four years, and in fact, had previous misconduct for not telling a client the truth. The case of Bradley Mann also involved a pattern of lies to clients, opposing counsel, and the courts, as well as settling claims without client consent, including one claim for almost six figures.

Perhaps also notable is the fact that two lawyers this year were administratively suspended for failing to pay child support or maintenance. The professional rules contain an administrative suspension provision that allows the court to suspend attorneys who fail to remain current with payment plans.

There are procedural protections in the rule, and at first I thought it counterproductive to take away someone's ability to earn money because they are not paying money when due, but it really is a very effective way to get the attention of the most recalcitrant lawyer non-payers.

Public reprimands

Fourteen attorneys received public reprimands (six reprimands only, eight reprimands and probation), compared to nine reprimands last year. A public reprimand is the least severe public sanction the court generally imposes. Reprimands are appropriate for rule violations that are more than "isolated and non-serious" (conduct that would warrant a private admonition) but not so serious that suspension is needed to protect the public and deter future misconduct.

The most common misconduct leading to a public reprimand was trust account errors that resulted in shortages and negligent misappropriation of client funds. Eight attorneys were reprimanded for trust account books and records misconduct. As I discussed in my October 2018 column, the State Law Library noted this trend and sponsored a free on-demand 1.5-hour trust account CLE entitled "Everything you need to know about trust accounts." You can access it from our website and the state law library's website, where it will be available for the next two years.

Also receiving public reprimands in 2018 were Pamela Larson, for prosecutorial misconduct that led to a new trial in a malicious punishment of a child case, and Joshua Williams, for physical contact with opposing counsel during a deposition.

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. I have now been in my position for almost three years, and I continue to be surprised by the serious misconduct of attorneys. I am glad to note, however, that the 45 attorneys disciplined in 2018 represent a *de minimus* portion of the 25,000 active lawyers practicing in Minnesota.

Notes

¹ Rule 28(c), Rules on Lawyers Professional Responsibility (RLPR).

² Please note that disability inactive status under Rule 28, RLPR, is different from Inactive Status—Permanent Disability, under Rule 2(C)(6), Rules of the Supreme Court on Lawyer Registration.

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Private discipline in 2018

In 2018, 117 files were closed by the Office of Lawyers Professional Responsibility (OLPR) with the issuance of an admonition, a form of private discipline reserved for professional misconduct that is isolated and non-serious.¹ This number is up from private discipline in 2017 (90 admonitions), but on par with 2016 and 2015. Additionally, 14 files were closed with private probation, the same number as in 2017. Private probation, which must be approved by the board chair, is generally appropriate for attorneys with more than one non-serious violation who may benefit from supervision.

This sampling of admonitions is offered to highlight issues that lead to private discipline.

The no-contact rule

Rule 4.2 provides that:

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.²

Periodically, lawyers are disciplined for violating this rule. In 2018, the Minnesota Supreme Court affirmed an admonition where an attorney communicated with a represented co-

defendant immediately following one party's settlement of the case.³ The Court's opinion is illuminating because it walks through the elements of the rule violation (ongoing representation, merits of the matter, and knowledge of representation), and rejects respondent's attempts to narrowly interpret the rule. The case also illustrates the extensive remedies available in Minnesota to respondents subject to private discipline—the right to appeal to a panel of the Lawyers Board and to the Minnesota Supreme Court itself—and it reminds us that technical violations of the rule are still rule violations warranting discipline.

Lesson: Always clarify with counsel—not the represented party—the scope of the representation so you do not violate the no-contact rule.

Confidentiality

All information relating to your representation of a client is confidential under the ethics rules.⁴ Because it is confidential, information relating to the representation should not be disclosed

unless it falls within one of several specifically enumerated exceptions to the confidentiality rule.⁵ One of the exceptions is to prove that services were rendered in an action to collect a fee.⁶ In sharing confidential information, it's important to bear in mind that you should only be sharing information necessary to establish your claim. An attorney was recently admonished when his response to LawPay went beyond proof of services rendered, delving into confidential communications relating to the representation that had little to do with the fee dispute. Specifically, the response to LawPay—and a third party who had referred the client to the attorney—quoted and enclosed unredacted attorney-client communications relating to the merits of the claim the attorney was handling. In the lawyer's view, the information demonstrated the unrealistic expectations of the client. LawPay, in contrast, was basically looking for a copy of the signed fee agreement and proof of services rendered, such as invoices, which respondent did not provide.

Lesson: Tread carefully when disclosing information relating to your representation to third parties, making sure there is an exception that will cover your disclosure—and only disclose the information necessary to address the issue at hand.

Misuse of "evidence"

Rule 4.4(a) provides:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.⁷

In a harassment restraining order proceeding, an attorney met with the opposing *pro se* party and advised the party that the lawyer intended to admit into evidence at the upcoming hearing a police report involving the *pro se* party's boyfriend (who was not the subject of the HRO). The report disclosed confidential medical information about the boyfriend unrelated to any issue in dispute in the HRO proceeding. The *pro se* party agreed to dismiss her HRO because she did not want the medical information, which was embarrassing, to be part of the court record.

During the ethics investigation, the attorney was unable to present credible arguments as to why the information was potentially admissible or relevant, leading to the conclusion that its use in negotiations had no substantial purpose other than to embarrass the *pro se* party sufficient to prompt the dismissal of the HRO. This matter also presented a close question as to whether the rule violation was isolated and non-serious, given that the attorney's action led directly to the dismissal of a pending proceeding.

Lesson: Make sure you have a meritorious, good faith basis for the means you are using to accomplish your client's goals.



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Conclusion

Private discipline is just that—private.⁸ With few exceptions, unless an attorney provides written authorization, the Office does not disclose private discipline to third parties. Fortunately, most attorneys who receive admonitions often have no further disciplinary issues. However, if an attorney engages in further misconduct, prior private discipline may be relevant in determining the appropriate level of discipline for subsequent conduct, and may be disclosed if future actions result in public proceedings.⁹ ▲

Notes

¹ Rule 8(d)(2), Rules of Lawyers Professional Responsibility (RLPR).

² Rule 4.2, Minnesota Rules of Professional Conduct (MRPC).

³ *In re Charges of Unprofessional Conduct in Panel File No. 41755*, 912 N.W.2d 224 (Minn. 2018).

⁴ Rule 1.6(a), MRPC, provides “a lawyer shall not knowingly reveal information relating to the representation of a client.”

⁵ Rule 1.6(b), MRPC, lists 11 exceptions authorizing disclosure of confidential information.

⁶ Rule 1.6(b)(8), MRPC, comment [9].

⁷ Rule 4.4(a), MRPC.

⁸ Rule 20(a), RLPR. Note, Rule 20 addresses in detail the circumstances under which the OLPR may disclose information to third parties and others involved in the lawyer regulation system.

⁹ Rule 19(b)(4), RLPR.

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