

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING AGENDA**

January 26, 2024 – 12:30pm (in person and via Zoom) – Minnesota Judicial Center

Lunch provided for Board members 12:00pm

Members of the public wishing to attend via Zoom are invited to contact Board Chair Benjamin Butler for information: Ben.Butler@pubdef.state.mn.us

1. Approval of minutes of October 27, 2023, meeting (attachment 1).
2. Introduction to liaison Justice Margaret Chutich.
3. Tributes to departing members Andrew Rhoads, Mark Lantermann, and vice-chair Susan Rhode.

Action Items

4. Motions for appointment of Board Vice-Chair.
5. Rule 3.8 Working Group – Proposed amendment to Rule 3.8(d) (attachment 2).
6. Rules committee:
 - a. Proposed amendment to Rule 1.8(e) (attachment 3);
 - b. Proposed Board opinion regarding jurisdiction over lawyers appointed pro hac vice in the United States District Court for the District of Minnesota (attachment 4).
7. Break – 10 minutes.

Discussion Items

8. Request from the Minnesota District Judges Association to form working group with MDJA and Board of Judicial Standards on ethical rules regarding judicial elections (attachment 5).
9. Our year in review: 2023 numbers (attachment 6).
10. Participation by respondents in complainant appeals (attachment 7).
11. Director's report.
12. Open discussion.
13. Adjournment.

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING**

OPEN MEETING MINUTES

October 27, 2023, 12:30 pm (In-person and via Zoom) – Minnesota Judicial Center

The following members were present either in-person or via Zoom:

- Ben Butler, Chair
- Landon Ascheman
- Dan Cragg
- Michael Friedman
- Jordan Hart
- Katherine Brown Holman
- Tommy Krause
- Mark Lanterman
- Paul Lehman
- Frank Leo
- Kevin Magnuson
- Melissa Manderschied
- William Pentelovitch
- Matthew Ralston
- Susan Rhode, Vice-Chair
- Carol Washington
- Antoinette Watkins, Executive Committee Member
- Bruce Williams

The following members were unable to attend:

- Kristi Paulson
- Andrew Rhoades
- Wendy Sturm

Other attendees:

- Susan Humiston, Director of the Office of Lawyers Professional Responsibility
- Members of the OLPR staff
- Members of the public

Note: Minnesota Supreme Court liaison Justice Margaret Chutich was unable to attend.

Minutes:

The Chair and a member moved to amend the minutes from the July 27, 2023, meeting as follows:

Page 5: Only one organization has provided comments – the state public defenders. ~~Michael~~ The committee met with ~~them~~ him to develop ~~their~~ his positions on rule changes.

Page 8: In Minnesota, fees are ~~\$378~~ \$263, of which \$78 ~~does~~ goes for Civil Legal Aid.

The Board unanimously approved both changes and approved the minutes as amended.

Introduction of new member Jill Prohofsky

The Chair introduced Magistrate Jill Prohofsky to the Board. Magistrate Prohofsky said she was excited to be a part of the group. The Chair thanked Magistrate Prohofsky for her service.

Rule 3.8 Committee

All members of the Rule 3.8 committee were in attendance for all operative parts of the meeting. The chair, Michael Friedman, presented the committee's report and recommendations concerning potential amendments to Rule 3.8. Committee members – Frank Leo, Melissa Manderschied, and Landon Ashman – thanked Mr. Friedman for his hard work leading the group.

The Board considered the committee's recommendations rule-by-rule.

Rules 3.8(a), (b), (c)

The committee recommended no changes. The Board agreed. A member moved to have the Board recommend adding an introductory line as suggested by the OLPR: The duty of a public prosecutor is to seek justice, not merely to convict. Concern was raised that "justice" was a vague goal. The OLPR Director clarified that OLPR suggested the line for consideration but was not necessarily recommending its adoption. The motion was seconded but was defeated on a divided vote.

Rule 3.8(d)

The committee recommended that the rule be amended to connect the prosecutor's duty to disclose exculpatory material to plea bargaining and plea offers. The committee was

divided on what language should be used and presented the Board with three options. A lengthy discussion followed concerning the pros and cons of each option and of amending the rule at all. The Chair determined that the Board should vote on whether to recommend a change; if a majority agreed a change was desirable, then the Board could consider language options. A motion to that effect was made and seconded. On a divided vote, the Board agreed that an amendment to Rule 3.8(d) should be recommended.

Discussion then turned to the merits of the committee's recommended options. Each committee member explained their preferred option. For some members, the key difference between options 1 and 2, on one hand, and option 3, on the other, is that option 3 requires prosecutors to make inquiries to investigating agencies and disclose any information received, whereas options 1 and 2 did not specifically require an affirmative inquiry. Attention was paid to the fact that the vast majority of criminal cases are resolved via guilty pleas and expressly linking the prosecutor's ethical duties regarding disclosure of exculpatory evidence to such procedural postures would be very beneficial.

Those in favor of a change also thought that a more specific disclosure requirement would be helpful to prosecutors and defense counsel so that each knows the obligation. The committee reported that the State Public Defender had provided examples of vastly different interpretations of disclosure-timing obligations by prosecutors around the state. The OLPR Director confirmed that she had seen or been told of the same thing.

Some Board members expressed concern that an ethics rule was unnecessary in light of Minn. R. Crim. P. 9, which requires prosecutors to disclose evidence at various points during the case. Members expressed concern that the supreme court would reject any proposed amendment of Rule 3.8 as improperly layering on top of Rule 9 obligations. Members opined that any changes should be suggested to the Advisory Committee on the Rules of Criminal Procedure if the concern was that the provisions of Rule 9 were not specific enough to coordinate disclosure of exculpatory evidence. In sum, several members thought prosecutorial compliance with Rule 9 should be sufficient and that violations of Rule 9 might amount to an ethical issue.

The OLPR Director opined that members of the defense bar do not ordinarily report alleged Rule 9 violations as ethics issues for several reasons, including that Rule 9 is thought to be not specific enough to support such allegations and the need for defense attorneys and prosecutors to work together on a regular basis.

A point of order was raised suggesting reconsideration of the need to amend Rule 3.8(d). The Chair determined that the Board's vote was proper and would stand. A member suggested that, given the discussion, the Board refer the matter back to the committee to consider the feedback and revise the options for presentation at the next Board meeting. A motion to that effect was made and seconded, and the Board approved the motion.

Accordingly, the Board will recommend a change to Rule 3.8(d). The committee is requested to re-consider the potential language of such an amendment and re-present the matter to the Board at the next meeting. The Chair and Board members thanked the committee for its hard and important work on this matter.

Rule 3.8(e)

The committee recommended no changes. No motion to the contrary was made.

Rule 3.8(f) and comment

The Chair deferred consideration of the committee's recommended change to the comment until the next Board meeting.

Potential Rule 3.8(g)

Committee members discussed the rationale, as reflected in the report, for recommending that the Board recommend that the supreme court adopt the rule. A member questioned why the committee recommended a "probable cause" standard and noted that the Court had ordered the Advisory Committee on the Rules of Lawyers Professional Responsibility to replace that standard with one of "reasonable cause." The OLPR Director noted that the rules already define terms such as "know," "reasonable," and "reasonably believes," and suggested that the Board consider using defined terms. A friendly amendment suggesting that the rule read "...creating a reasonable belief..." was proposed, seconded, and passed unanimously.

Committee members discussed their recommended addition of the word "current" to describe the prosecutor's jurisdiction. Members essentially thought the word made explicit what was already implicit in the model rule. Committee members explained that if a prosecutor learned of information creating a reasonable belief that a person in the prosecutor's former jurisdiction was wrongfully convicted, the prosecutor would be obliged under 3.8(g)(1) to disclose that information to an appropriate "authority," meaning the county attorney's office in the prosecutor's former jurisdiction. Prosecutors in that office would then be obliged to comply with 3.8(g)(1) and (2) and any other applicable rules.

Members discussed whether the committee's suggested change of "knows" to "is provided with" strengthens or weakens the knowledge requirement. Upon review of the definition of "knows" in Minn. R. Prof. Conduct 1.0(g), the committee offered a friendly amendment to return to the ABA Model rule language of "knows." That motion was seconded and passed unanimously.

The OLPR Director expressed her support for the adoption of Rule 3.8(g). The Director suggested that the Board use the language of the ABA model rule whenever possible.

A motion was made to have the Board recommend that the Court adopt the following rule:

Rule 3.8(g)

When a prosecutor knows of new, credible, and material evidence creating a reasonable belief that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority; and
- (2) if the conviction was obtained in the prosecutor's current jurisdiction,
 - i. promptly disclose that evidence to the defense unless the court authorizes delay, and
 - ii. make reasonable efforts to cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.

That motion was seconded and passed unanimously.

Potential Rule 3.8(h)

The committee discussed its rationale, as reflected in its report, for recommending that the Board recommend that the Court adopt ABA model rule 3.8(h) with a few edits. Similar to Rule 3.8(g), a friendly amendment was made, seconded, and adopted to replace the recommended "is provided with" language with "knows." A second friendly amendment was made proposing striking the proposed rule in its entirety and replacing it with a rewritten rule imposing more affirmative obligations on prosecutors who know of evidence of wrongful convictions in current or former jurisdictions. That motion was seconded and was defeated on a divided vote.

A motion was made to have the Board recommend the following language:

Rule 3.8(h)

When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's current jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

That motion was seconded and passed unanimously.

Potential Rule 3.8(i) or Comment with Same Language

The committee discussed its recommendation regarding language not contained in the ABA model rules but used in some jurisdictions providing essentially a “good faith” defense to prosecutors regarding alleged violations of rules 3.8(g) and (h). Initial discussion focused on whether any such language should be a rule or a comment. The OLPR Director explained the difference between the two, noting that the supreme court did not approve comments but that the OLPR used comments to guide its decisions on whether and how to allege rules violations. Essentially, comments could be used to explain which factual situations were not violations of the rule. Members opined that the language if adopted seemed more appropriate for a rule because the good-faith defense appeared to be a substantive defense for a lawyer not a guide to what might not be a violation.

Members expressed concern with the scope of the defense, with some contending that the exception would swallow the rule. Other members questioned when the language would be applicable. The OLPR Director answered a question by stating that no other Rule of Professional Conduct has a “good faith” defense, and that including a subjective “good faith” standard in either a rule or a comment would be inconsistent with the generally objective nature of the rules. The Director also allowed that an attorney’s “good faith” could be considered when deciding what if any discipline to impose for a violation.

The language as considered in the votes discussed below was as follows:

A prosecutor’s judgment, made in good faith, that evidence does not ride to the standards stated in paragraphs (g) or (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

The Chair determined that the Board should first vote on whether to adopt that language as a comment. A motion to that effect was made and seconded, but was defeated on a divided vote.

A motion to adopt that language as Rule 3.8(i) was then made and seconded. That motion was also defeated on a divided vote.

Later in the meeting, the Chair recognized that there may have been members who voted “no” on making the language a comment but, now knowing that it would not be a recommended rule, might vote differently. Accordingly, the Chair, calling a point of order on himself, called for any new motion to make the language a comment. Such a motion was made and seconded, but was defeated on a divided vote.

Update on Advisory Committee on Rules of Lawyers Prof. Resp.

The Chair updated the Board on the advisory committee's work. Committee members include Chair Butler, Board member William Pentelovitch, and OLPR Director Susan Humiston. The Chair discussed the supreme court's limited charge to the committee, which included consideration of the Board's 2023 petition.

Director's Report

In the interest of time, Director Humiston limited her report to two things. First, the Director described her outreach to immigrant communities in the Twin Cities metro area. She wished to make known her office's availability to help underserved communities navigate the attorney/client relationship. Partially as a result of that outreach, the OLPR will be revising its complaint form to make it simpler and more user-friendly.

Second, the Director requested that the Board consider the ABA's recent recommended amendment to model rule 1.16, regarding the use of the lawyer's services to perpetrate a crime or fraud. Rules Committee Chair Daniel Cragg informed the Director and the Board that the Rules Committee was considering the issue.

A member asked if the OLPR was fully staffed. The Director responded that the office had a couple of open positions and was recruiting and collecting applications. The Director also reported that a number of staff, including attorneys, are expected to retire in the next two years, and that the Director is planning for the impact of the same.

Executive Committee Succession Planning

The Chair reported that five members' terms are up January 31, 2024. Three members are eligible for reappointment and were encouraged to contact the Chair if they did not want to be reappointed; the Chair expressed hope that all eligible members would want to be reappointed. Two members – vice-chair Susan Rhode and public member Mark Lanterman – are not eligible for reappointment. The Chair encouraged members to let him know if they wished to be considered to succeed vice-chair Rhode on the Board's Executive Committee.

Open Discussion

A member asked whether Board members were applying consistent standards of review in deciding complainant appeals. Attention was drawn to Executive Committee Policy & Procedure #1, which sets forth the applicable standards of review.

Adjournment

The Chair thanked the members, and members thanked each other, for civil and informed discussion and debate over a number of hours. A motion to adjourn was made and seconded, and the motion passed unanimously.

Report to the LPRB: Consideration of Changes to Rule 3.8 - (1/26/24)

Background

At its 10/27/23 meeting, the LPRB approved recommending certain changes to MRPC 3.8. In regard to 3.8(d), the LPRB agreed that the Working Group would discuss it further internally in light of the comments that had been received at the meeting in order to refine, or possibly withdraw, its recommendation to change this section.

The LPRB also postponed discussion about one potential proposed change to Comment 5 of that rule, for which our Working Group had been divided in regard to a recommendation.

Prior to the 10/27/23 LPRB meeting, the 3.8 Working Group had not yet collectively reviewed all of the Comments to MRPC 3.8 to see if we might recommend any changes; we believed doing so would be premature in the absence of knowing LPRB interest in recommending any changes to the Rule.

Recommendations

- 1) Propose a change to 3.8(d) which is different than any of the options discussed in October.
- 2) Withdraw consideration for changing Comment 5 to 3.8.
- 3) Do not propose any other changes to the Comments to 3.8.

Proposed Change to 3.8(d)

The Working Group (which after October expanded to include Kevin Magnuson) is in general agreement about recommending the following:

[a prosecutor shall...]

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that a prosecutor is required to disclose under applicable law and procedural rules which, a prosecutor knows or reasonably should know, tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

At the LPRB's January meeting we can answer any questions about why we removed from consideration concepts or language previously proposed. Our general principle, that we all agreed with, is that the ethics rule should not use language which seemingly creates new requirements that are best developed by the Criminal Rules Committee. However, the new language adds the element of "reasonably should know", a term defined in MRPC 1.0(k), and which essentially imposes an element of competence for properly understanding disclosure requirements. We also added a specific reference to "applicable law and procedural rules" as the guiding element, without which the same might be inferred but could come across as ambiguous or too open to interpretation. Overall, the Working Group recognizes that this recommended change would not be significant enough to petition the Supreme Court about if this was our only proposal. But as we will be going to the Supreme Court for the 3.8 language changes approved in

October, it seemed appropriate to include this helpful, albeit less significant, change at the same time.

Comment 5 to 3.8

In our report prepared for the LPRB's October meeting, we put forward this possible revision:

Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused or any group within the community. Nothing in this comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

Former supporters of the change within the Working Group have reconsidered. Without anyone on the Working Group in favor of making this change, we do not offer it for discussion as part of the January agenda.

Comments to 3.8 (overall)

All of the members of the Working Group reviewed the existing Comments. No one proposed any changes for further discussion.

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

.....

(e)

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client.

(4) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

OPINION NO. XX

Minnesota Jurisdiction Over Non-Minnesota Attorneys

It is the opinion of the Lawyers Professional Responsibility Board ("LPRB") that neither the Director of the Office of Lawyer Responsibility ("Director") or the LPRB have jurisdiction over complaints against lawyers who are (a) not licensed to practice law in the State of Minnesota, and (b) are admitted to practice *pro hac vice* in a federal court within the State of Minnesota, if (c) the complaint against the lawyer arises out of the conduct of the lawyer in the federal court case which the lawyer was admitted *pro hac vice*.

The conduct of lawyers admitted *pro hac vice* in federal court proceedings is governed by the rules of federal, not state courts. Federal courts may adopt state or ABA rules as their ethical standards, but whether and how these rules are to be applied are questions of federal law. *In re Am. Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992). Accordingly, a state does not have authority, under the guise of regulating the bar, to prohibit the conduct of a person from performing functions that are within the scope of federal authority. *See Sperry v. Florida*, 373 U.S. 379 (1963) (holding that when the Patent Office permits non-lawyers to practice before it, the Supremacy Clause prohibits Florida from enjoining such conduct as "unauthorized practice").

It is the opinion of the LPRB that the Director should dismiss such complaints, without investigation, for lack of jurisdiction and notify the complainant that the complainant may have the right to file a complaint with the federal court which admitted the lawyer *pro hac vice*.

The foregoing opinion does not apply to lawyers for the United States government who are within the scope of 28 U.S.C. § 530B. With respect to lawyers for the United States government who are within the scope of 28 U.S.C. § 530B it is the opinion of the LPRB that the Director should in most cases abstain and defer to the disciplinary processes of the federal court in which the conduct occurred.

MINNESOTA DISTRICT
JUDGES ASSOCIATION
MDJA

January 19, 2024

Benjamin Butler
Chair, Minnesota Lawyers Professional Responsibility Board
445 Minnesota Street
Suite 2400
St. Paul, MN 55101

RE: Request for Collaboration

Dear Mr. Butler:

The Minnesota District Judges Association (“MDJA”) is exploring issues surrounding judicial elections. As you know, both the Lawyers Professional Responsibility Board (“LPRB”) and the Board on Judicial Standards (“BJS”) enforce the judicial canons related to elections.

The MDJA has concerns about uniform application and enforcement of the Code of Judicial Conduct by two wholly separate governing bodies. These concerns surround the potential for inconsistent application and different consequences for similar actions, depending on which body reviews the conduct. MDJA believes this disciplinary scheme should be reviewed and updated to address these concerns. We have had initial conversations with BJS. Recognizing that this is your jurisdiction, we would like to collaborate with you. Also, BJS supports the creation of this Work Group. Here’s a tentative outline for the group:

March 2024	Identify Scope of Concerns
June 2024	Identify Possible Solutions
Sept. 2024	Make Joint Recommendations

As a preview, we anticipate that part of what the work group will discuss is whether the Code of Judicial Conduct and the applicable rules governing it should be amended concerning jurisdiction over judicial candidates.

Currently, Rule 2(b) and (c) of the Rules of Board on Judicial Standards state:

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MINNESOTA DISTRICT  
JUDGES ASSOCIATION  
MDJA

(b) Jurisdiction over Judges. The Board shall have jurisdiction over allegations of misconduct and disability for all judges.

(c) Conduct Prior to Assuming Judicial Office. The Board's jurisdiction shall include conduct that occurred prior to a judge assuming judicial office. The Office of Lawyers Professional Responsibility shall have jurisdiction to consider whether discipline as a lawyer is warranted in matters involving conduct of any judge occurring prior to the assumption of judicial office.

Likewise, the Minnesota Rules of Professional Conduct state:

(b) A Lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

The Rules cited above make clear that judicial candidates that are lawyers and sitting judges must comply with the Code of Judicial Conduct. However, the rules require the LBPR have sole jurisdiction over candidates for judicial office who are not current judges. Similarly, BJS has sole jurisdiction over incumbent judicial officer candidates. Therefore, separate bodies can have jurisdiction over judicial candidates who are running against each other in the same election.

MDJA is hoping that LBPR will be willing to send one or two representatives to our Judicial Election Work Group to work collaboratively on this issue. It would be helpful if those representatives were appointed by March 1, 2024.

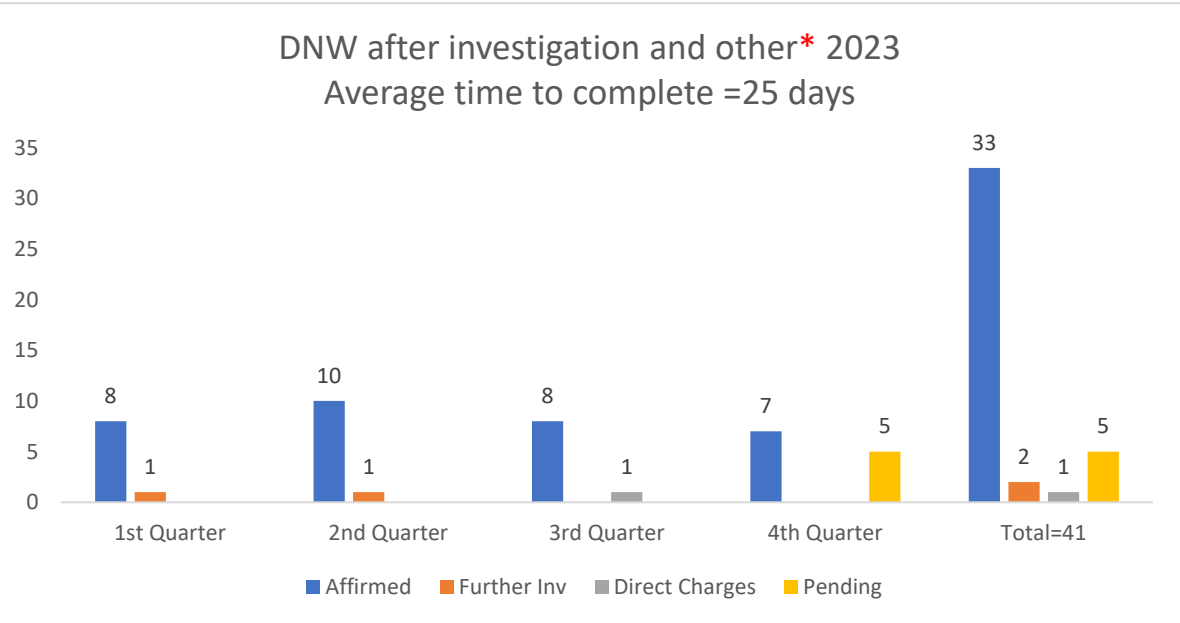
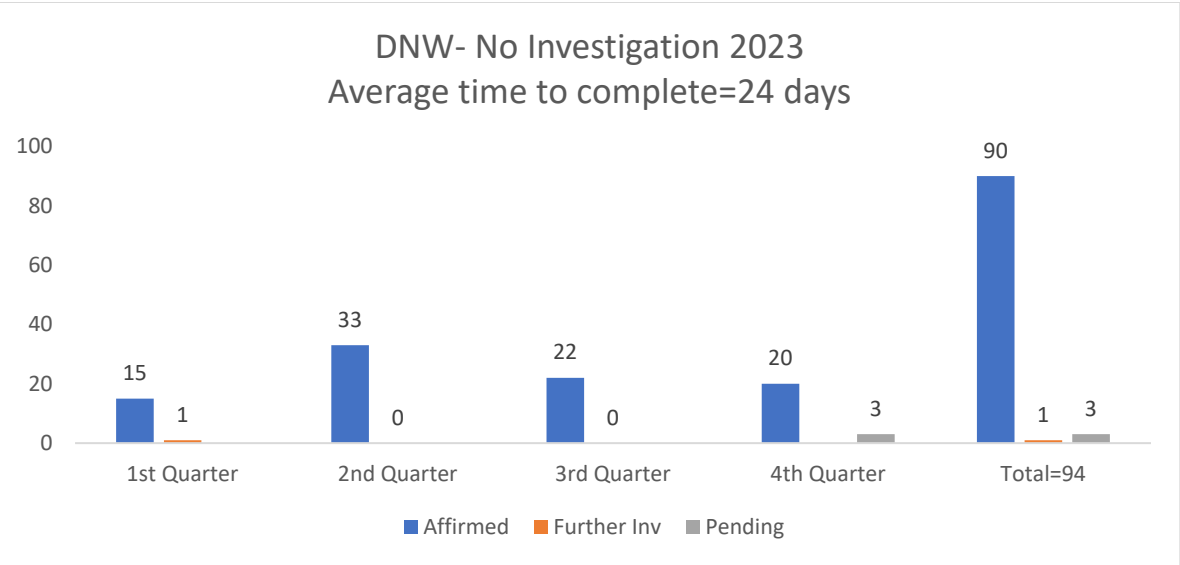
You may have several questions and I welcome discussing this further by phone if that is helpful. We would be happy to attend any of your meetings to answer questions that you may have about our work group. Please let me know if you would like additional information.

Thank you for your consideration.

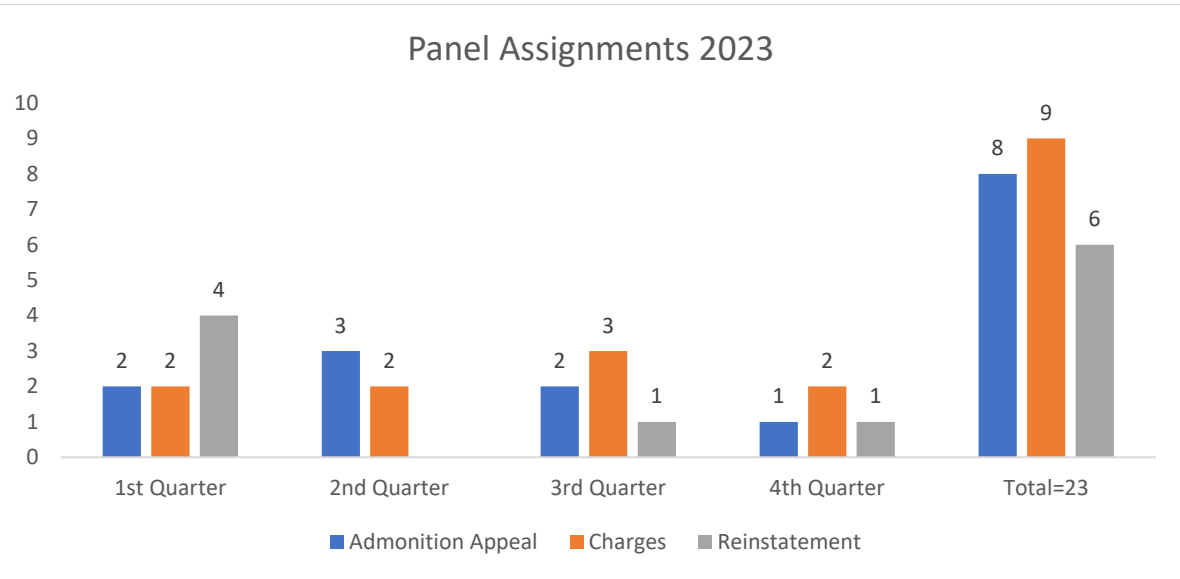
/s Judge Millenacker

Judge Robyn Millenacker, Chair, MDJA Committee on Board of Judicial Standards

Cc: Susan Humiston  
Executive Director, Office of Lawyers Professional Responsibility



\*Other: Private probation (1) and Complainant Admonition Appeals (4)



**From:** [Hanson, Cassie](#)  
**To:** [Butler, Benjamin](#); [Humiston, Susan](#)  
**Cc:** [Nancy K. Mischel](#); [etc@ethicsmaven.com](mailto:etc@ethicsmaven.com); [nmr@ethicsmaven.com](mailto:nmr@ethicsmaven.com)  
**Subject:** RE: Invitation to speak at January 22nd MSBA Professional Regulation Committee Meeting re Rule 8(e), RLPR  
**Date:** Wednesday, January 24, 2024 11:38:41 AM  
**Attachments:** [image001.png](#)

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Mr. Butler-

Thank you for clarifying current LPRB standards for accepting comments at the quarterly meetings. In my prior time at the OLPR, the Board previously granted requests from various members of the MSBA Professional Regulation Committee to speak on topics related to the MRPC/RLPR. I will inform Committee members that comments should be submitted in writing and in person requests to speak are generally not accepted.

Per your request the MSBA Professional Regulation Committee is submitting written comments and observations from our January 23, 2024, meeting regarding Rule 8 (e), RLPR.

Our meeting focused on the following:

As relevant background, the MSBA Committee has taken over responsibility for updating the MSBA's eBook "Dealing With & Defending Ethics Complaints" and this is a valuable resource for the bar. We currently have a subcommittee working on a draft update and the subcommittee chair has requested guidance on the current process for appeals, which was one of the reasons this agenda item was taken up by the MSBA Committee. We want to be accurate and up to date in our description of the appeals process in the eBook. Second, the Committee was also concerned by statements from a Committee member who was representing a Respondent lawyer was notified that Respondents are not authorized to participate in the Complainant Appeal Process. He reported that materials forwarded to OLPR for transmission to the assigned Board Member were not transmitted to the Board Member. This was after contacting the OLPR lawyer who handles the Complainant Appeal Process and being told the procedure was to forward the materials to OLPR so they could be uploaded to SharePoint for the assigned Board Member.

The Committee discussion of this issue included the following:

- For decades, lawyers have been permitted to respond to Complainant Appeals. Both former and current Board Members, former Directors, and former OLPR Assistant Directors on the Committee acknowledged this procedure, including a former OLPR Assistant Director who managed the appeal process before her departure within the past year.
- Both former and current Board Members on the Committee, who consider[ed] Complainant Appeals, stated that although responses from Respondent Lawyers were infrequent, they had received and considered appeal responses from lawyers or their counsel.
- Respondents' Counsel on the Committee indicated they had submitted appeal responses on several occasions and sometimes sent the response directly to the assigned Board Member, which indicates an inconsistent application of the appeals process.

- Neither the current Board Member or the OLPR representative (Deputy Director) who are also MSBA Committee members, were aware of what appears to be a change in position or policy that Rule 8(e) does not authorize or permit Respondent Lawyers to participate in the appeal process.
- The letter that OLPR uses to notify respondents of a complainant's appeal is inconsistent with the position that respondents are not authorized to participate in the appeals process since it directs that a respondent is "not required to respond", which implies that responses are permitted under Rule 8(e).
- Rule 8(e) on its face does not prohibit respondents from submitting materials to the reviewing board member.

The Committee expressed concern that preventing Respondents from appeal participation is substantively unfair and contradictory to basic tenants of due process. If a matter has been investigated or the appeal involves an admonition, the assigned Board Member has the authority to direct the issuance of Charges of Unprofessional Conduct for Public Discipline. The ability of a Complainant to lodge new or different allegations in the appeal, without any ability of the lawyer to respond, when there potential for public discipline is substantively unfair. Even directing further investigation is unfair if the lawyer has conclusive evidence (e.g., court order, settlement agreement, prior dismissal or other documentation) clearly refuting the new allegations. For example, if the respondent lawyer is renewing a malpractice policy or applying for admission to a new jurisdiction, he/she would have to report the pending complaint. Permitting, but not encouraging, Respondent Lawyer participation in appeals may also conserve OLPR resources and reduce delay by foregoing unnecessary further investigation or unwarranted panel proceedings.

The Committee understands the LPRB intends to discuss this issue at its January 26<sup>th</sup> meeting and encourages the LPRB to reconsider its position that Respondent Lawyers are not authorized to participate in Complainant Appeals. It is my understanding that Committee members Eric Cooperstein and/or Nic Ryan will be attending the LPRB meeting on Friday, and they can answer any questions that the LPRB may have regarding the Committee's discussion at our January 22, 2024, meeting.

Thank you for your consideration.

**Cassie Hanson** (she/her)  
Conflicts and Ethics Counsel  
[chanson@fredlaw.com](mailto:chanson@fredlaw.com)

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Fredrikson & Byron, P.A. / 60 South Sixth Street / Suite 1500 / Minneapolis, MN 55402-4400  
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**From:** Butler, Benjamin <Ben.Butler@pubdef.state.mn.us>

**Sent:** Tuesday, January 23, 2024 9:01 PM

**To:** Hanson, Cassie <CHanson@fredlaw.com>; Susan.Humiston@courts.state.mn.us

**Cc:** Nancy K. Mischel <nmischel@mnbars.org>; etc@ethicsmaven.com; nmr@ethicsmaven.com

**Subject:** RE: Invitation to speak at January 22nd MSBA Professional Regulation Committee Meeting re Rule 8(e), RLPR

**CAUTION: EXTERNAL E-MAIL**

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Hi all –

Thanks much for your interest in this matter. The Board does not generally accept oral statements or presentations at our public meetings. If the Committee wishes to submit something in writing, it does not have to be formal – an email summarizing the comments or something similar would be just fine. I will certainly pass along anything I receive to Board members.

- Ben

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**From:** Hanson, Cassie <[CHanson@fredlaw.com](mailto:CHanson@fredlaw.com)>

**Sent:** Tuesday, January 23, 2024 1:10 PM

**To:** Butler, Benjamin <[Ben.Butler@pubdef.state.mn.us](mailto:Ben.Butler@pubdef.state.mn.us)>; [Susan.Humiston@courts.state.mn.us](mailto:Susan.Humiston@courts.state.mn.us)

**Cc:** Nancy K. Mischel <[nmischel@mnbars.org](mailto:nmischel@mnbars.org)>; [etc@ethicsmaven.com](mailto:etc@ethicsmaven.com); [nmr@ethicsmaven.com](mailto:nmr@ethicsmaven.com)

**Subject:** RE: Invitation to speak at January 22nd MSBA Professional Regulation Committee Meeting re Rule 8(e), RLPR

You don't often get email from [chanson@fredlaw.com](mailto:chanson@fredlaw.com). [Learn why this is important](#)

Mr. Butler-

The Committee met today, and members had a lot of comments. Given the short turn around time for submitting written comments, the Committee requested if a member could have 5 minutes during Friday's meeting to summarize the Committee's concerns. Eric Cooperstein and/or Nic Ryan are willing to do so and are copied here. Please advise if this is possible.

**Cassie Hanson** (she/her)  
Conflicts and Ethics Counsel  
[chanson@fredlaw.com](mailto:chanson@fredlaw.com)

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Fredrikson & Byron, P.A. / 60 South Sixth Street / Suite 1500 / Minneapolis, MN 55402-4400  
**main** 612-492-7000 **direct** 612-492-7041



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**From:** Butler, Benjamin <[Ben.Butler@pubdef.state.mn.us](mailto:Ben.Butler@pubdef.state.mn.us)>  
**Sent:** Tuesday, January 23, 2024 10:17 AM  
**To:** Hanson, Cassie <[CHanson@fredlaw.com](mailto:CHanson@fredlaw.com)>; [Susan.Humiston@courts.state.mn.us](mailto:Susan.Humiston@courts.state.mn.us)  
**Cc:** Nancy K. Mischel <[nmischel@mnbars.org](mailto:nmischel@mnbars.org)>  
**Subject:** RE: Invitation to speak at January 22nd MSBA Professional Regulation Committee Meeting re Rule 8(e), RLPR

**CAUTION: EXTERNAL E-MAIL**

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Hi Cassie –

The tentative agenda for Friday’s meeting includes a discussion item on respondent participation in complainant appeals. There are no outside materials for the Board related to that item. If your group has a perspective that can be submitted in writing, even in an email, the Board would welcome receiving them.

I hope that helps. Thanks.

- Ben

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**From:** Hanson, Cassie <[CHanson@fredlaw.com](mailto:CHanson@fredlaw.com)>  
**Sent:** Tuesday, January 23, 2024 10:10 AM  
**To:** Butler, Benjamin <[Ben.Butler@pubdef.state.mn.us](mailto:Ben.Butler@pubdef.state.mn.us)>; [Susan.Humiston@courts.state.mn.us](mailto:Susan.Humiston@courts.state.mn.us)  
**Cc:** Nancy K. Mischel <[nmischel@mnbars.org](mailto:nmischel@mnbars.org)>  
**Subject:** RE: Invitation to speak at January 22nd MSBA Professional Regulation Committee Meeting re Rule 8(e), RLPR

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Hello Ben-

The MSBA Rules Committee is set to meet at noon today to discuss the issue of Rule 8(e), RLPR. Your prior email had mentioned the Board’s meeting materials would be published today. I did not see them available on the OLPR website yet. Given the tight turn around for the Committee to submit any comments to you, it would be very helpful if these could be published prior to our meeting. You had mentioned you would accept comments from the Committee through tomorrow. However, without seeing the Board agenda, it will be difficult for the Committee to work within that already tight timeframe.

Thanks in advance.

**Cassie Hanson** (she/her)

Conflicts and Ethics Counsel  
[chanson@fredlaw.com](mailto:chanson@fredlaw.com)

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**From:** Butler, Benjamin <[Ben.Butler@pubdef.state.mn.us](mailto:Ben.Butler@pubdef.state.mn.us)>  
**Sent:** Friday, December 1, 2023 7:52 AM  
**To:** Hanson, Cassie <[CHanson@fredlaw.com](mailto:CHanson@fredlaw.com)>; [Susan.Humiston@courts.state.mn.us](mailto:Susan.Humiston@courts.state.mn.us)  
**Cc:** Nancy K. Mischel <[nmischel@mnbars.org](mailto:nmischel@mnbars.org)>  
**Subject:** RE: Invitation to speak at January 22nd MSBA Professional Regulation Committee Meeting re Rule 8(e), RLPR

**CAUTION: EXTERNAL E-MAIL**

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Ms. Hanson –

Thank you for your invitation. Unfortunately, I am not available to participate in the Jan. 22 meeting.

The Lawyers Professional Responsibility Board intends to discuss this issue at our Jan. 26, 2024, public meeting. I do not know what if any action the Board might take or how, if it all, it might proceed. If the Professional Regulation Committee wishes to submit something on the matter for Board consideration, feel free to submit things to me. We like to have materials for members distributed by the Tuesday before our meetings, but I understand that may be a time crunch given the day of your meeting. Accordingly, I can accept any request for Board consideration by the end of the business day Wednesday, Jan. 24.

Thanks much.

- Ben

Ben Butler  
Chair, Lawyers Professional Responsibility Board

---

**From:** Hanson, Cassie <[CHanson@fredlaw.com](mailto:CHanson@fredlaw.com)>  
**Sent:** Thursday, November 30, 2023 9:46 AM  
**To:** [Susan.Humiston@courts.state.mn.us](mailto:Susan.Humiston@courts.state.mn.us); Butler, Benjamin <[Ben.Butler@pubdef.state.mn.us](mailto:Ben.Butler@pubdef.state.mn.us)>  
**Cc:** Nancy K. Mischel <[nmischel@mnbars.org](mailto:nmischel@mnbars.org)>  
**Subject:** Invitation to speak at January 22nd MSBA Professional Regulation Committee Meeting re Rule 8(e), RLPR

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**External message alert:** This message originated from outside the Board of Public Defense email system. **Use caution** when clicking hyperlinks, downloading pictures or opening attachments.

Good morning:

Several members of the MSBA Professional Regulation Committee have requested that an agenda item be added to the January 22, 2024, meeting date. The topic relates to a recent LPRB decision prohibiting respondent lawyers and their counsel from participating in complainant appeals. The committee would like to invite both of you to speak on this topic. Some committee members noted this appears to be a recent departure from prior OLPR and LPRB practice where the OLPR would forward materials from respondents and their counsel to the board member assigned to an appeal. This was basically a due process concern. There was also a question of whether some respondent attorneys individually or their counsel were submitting materials directly to reviewing board members, which indicated an uneven process. Additionally, the MSBA Regulation Committee has taken on the task of updating the MSBA ebook "Dealing with and Defending Ethics Complaints" and we have a working subcommittee on this with an upcoming deadline for spring 2024. The chair of that subcommittee has identified the appeals process to be an area that was missing from the ebook and the subcommittee wants to ensure that the advice provided regarding the Rule 8(e) process is consistent with current interpretations. I would be happy to put together some specific questions to assist you if you available to speak with the committee at the January 22<sup>nd</sup> date. I look forward to hearing from you and feel free to reach out to me at my number below with any questions.

**Cassie Hanson** (she/her)  
Conflicts and Ethics Counsel  
[chanson@fredlaw.com](mailto:chanson@fredlaw.com)

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**main** [612-492-7000](tel:612-492-7000) **direct** [612-492-7041](tel:612-492-7041)

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### OLPR Dashboard for Court And Chair

|                                                        | Month Ending<br>December 2023 | Change from<br>Previous Month | Month Ending<br>November 2023 | Month Ending<br>December 2022 |
|--------------------------------------------------------|-------------------------------|-------------------------------|-------------------------------|-------------------------------|
| <b>Open Files</b>                                      | 551                           | -35                           | 586                           | 472                           |
| <b>Total Number of Lawyers</b>                         | 370                           | -31                           | 401                           | 327                           |
| <b>New Files YTD</b>                                   | 1151                          | 76                            | 1075                          | 1019                          |
| <b>Closed Files YTD</b>                                | 1072                          | 111                           | 961                           | 1028                          |
| <b>Closed CO12s YTD</b>                                | 227                           | 12                            | 215                           | 163                           |
| <b>Summary Dismissals YTD</b>                          | 532                           | 49                            | 483                           | 513                           |
| <b>Files Opened During December 2023</b>               | 76                            | -8                            | 84                            | 87                            |
| <b>Files Closed During December 2023</b>               | 111                           | 22                            | 89                            | 113                           |
| <b>Public Matters Pending (excluding Resignations)</b> | 23                            | 0                             | 23                            | 38                            |
| <b>Panel Matters Pending</b>                           | 8                             | -1                            | 9                             | 18                            |
| <b>DEC Matters Pending</b>                             | 93                            | -6                            | 99                            | 81                            |
| <b>Files on Hold</b>                                   | 12                            | 0                             | 12                            | 10                            |
| <b>Advisory Opinion Requests YTD</b>                   | 1792                          | 113                           | 1679                          | 1688                          |
| <b>CLE Presentations YTD</b>                           | 45                            | 2                             | 43                            | 44                            |
| <b>Files Over 1 Year Old</b>                           |                               |                               |                               |                               |
| <b>Total Number of Lawyers</b>                         | 158                           | -5                            | 163                           | 157                           |
| <b>Files Pending Over 1 Year Old w/o Charges</b>       | 103                           | 1                             | 102                           | 87                            |
| <b>Total Number of Lawyers</b>                         | 104                           | -3                            | 107                           | 72                            |
| <b>Total Number of Lawyers</b>                         | 77                            | -2                            | 79                            | 49                            |

|                                          | 2023 YTD  | 2022 YTD  |
|------------------------------------------|-----------|-----------|
| <b>Lawyers Disbarred</b>                 | 3         | 5         |
| <b>Lawyers Suspended</b>                 | 24        | 21        |
| <b>Lawyers Reprimand &amp; Probation</b> | 1         | 6         |
| <b>Lawyers Reprimand</b>                 | 0         | 4         |
| <b>TOTAL PUBLIC</b>                      | <b>28</b> | <b>36</b> |
| <b>Private Probation Files</b>           | 9         | 6         |
| <b>Admonition Files</b>                  | 68        | 81        |
| <b>TOTAL PRIVATE</b>                     | <b>77</b> | <b>87</b> |

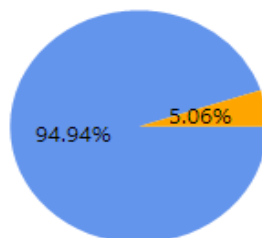
# FILES OVER 1 YEAR OLD

| Year/Month   | OLPR       | AD       | PAN      | HOLD     | SUP       | SCUA      | TRUS     | Total      |
|--------------|------------|----------|----------|----------|-----------|-----------|----------|------------|
| 2018-10      | 2          |          |          |          |           |           |          | 2          |
| 2018-12      | 1          |          |          |          |           |           |          | 1          |
| 2019-04      | 1          |          |          |          |           |           |          | 1          |
| 2019-06      |            |          |          | 1        |           |           |          | 1          |
| 2019-07      | 1          |          |          |          |           |           |          | 1          |
| 2019-08      | 1          |          |          |          |           |           |          | 1          |
| 2019-11      |            |          |          |          |           | 1         |          | 1          |
| 2020-01      | 1          |          |          |          | 3         |           |          | 4          |
| 2020-02      | 1          |          |          |          | 1         |           |          | 2          |
| 2020-05      | 1          |          |          |          |           |           |          | 1          |
| 2020-06      |            |          |          |          |           | 1         |          | 1          |
| 2020-08      | 1          |          |          |          |           |           |          | 1          |
| 2020-09      | 1          |          |          |          |           |           |          | 1          |
| 2020-10      |            |          |          |          | 1         |           |          | 1          |
| 2021-01      | 1          |          |          |          | 1         | 1         |          | 3          |
| 2021-02      |            |          |          |          |           | 1         |          | 1          |
| 2021-03      | 1          |          |          | 1        | 1         | 1         |          | 4          |
| 2021-04      | 2          |          |          |          |           | 1         |          | 3          |
| 2021-05      | 5          |          |          |          |           | 1         |          | 6          |
| 2021-06      | 3          |          | 1        |          | 2         |           |          | 6          |
| 2021-07      | 1          |          | 1        |          | 1         |           |          | 3          |
| 2021-08      | 4          |          | 1        |          |           | 2         |          | 7          |
| 2021-09      | 3          |          |          |          |           | 1         |          | 4          |
| 2021-10      | 3          |          |          |          | 1         | 2         |          | 6          |
| 2021-11      | 6          |          |          |          |           |           |          | 6          |
| 2021-12      | 2          |          |          |          | 2         |           |          | 4          |
| 2022-01      | 1          |          |          |          |           |           |          | 1          |
| 2022-02      |            |          |          | 1        | 1         |           |          | 2          |
| 2022-03      | 2          |          | 1        |          |           | 2         |          | 5          |
| 2022-04      | 4          | 2        |          |          |           |           |          | 6          |
| 2022-05      | 6          |          | 1        | 1        |           | 1         |          | 9          |
| 2022-06      |            |          |          |          |           |           | 1        | 1          |
| 2022-07      | 7          |          |          |          |           |           |          | 7          |
| 2022-08      | 11         |          |          | 1        | 1         |           |          | 13         |
| 2022-09      | 10         |          |          |          | 2         | 1         |          | 13         |
| 2022-10      | 4          | 1        |          | 3        |           | 1         |          | 9          |
| 2022-11      | 7          |          |          |          | 2         |           |          | 9          |
| 2022-12      | 10         |          |          |          |           | 1         |          | 11         |
| <b>Total</b> | <b>104</b> | <b>3</b> | <b>5</b> | <b>8</b> | <b>19</b> | <b>18</b> | <b>1</b> | <b>158</b> |

|                                      | Total      | Sup. Ct.  |
|--------------------------------------|------------|-----------|
| Sub-total of Cases Over One Year Old | 140        | 20        |
| Total Cases Under Advisement         | 18         | 18        |
| <b>Total Cases Over One Year Old</b> | <b>158</b> | <b>38</b> |

Active v. Inactive

■ Active 150  
■ Inactive 8



## All Pending Files as of Month Ending December 2023

| Year/Month   | SD       | DEC       | REV       | OLPR       | AD       | PAN      | HOLD      | SUP       | SCUA      | REIN     | RESG     | TRUS     | Total      |
|--------------|----------|-----------|-----------|------------|----------|----------|-----------|-----------|-----------|----------|----------|----------|------------|
| 2018-10      |          |           |           | 2          |          |          |           |           |           |          |          |          | 2          |
| 2018-12      |          |           |           | 1          |          |          |           |           |           |          |          |          | 1          |
| 2019-04      |          |           |           | 1          |          |          |           |           |           |          |          |          | 1          |
| 2019-06      |          |           |           |            |          |          | 1         |           |           |          |          |          | 1          |
| 2019-07      |          |           |           | 1          |          |          |           |           |           |          |          |          | 1          |
| 2019-08      |          |           |           | 1          |          |          |           |           |           |          |          |          | 1          |
| 2019-11      |          |           |           |            |          |          |           |           | 1         |          |          |          | 1          |
| 2020-01      |          |           |           | 1          |          |          |           | 3         |           |          |          |          | 4          |
| 2020-02      |          |           |           | 1          |          |          |           | 1         |           |          |          |          | 2          |
| 2020-05      |          |           |           | 1          |          |          |           |           |           |          |          |          | 1          |
| 2020-06      |          |           |           |            |          |          |           |           | 1         |          |          |          | 1          |
| 2020-08      |          |           |           | 1          |          |          |           |           |           |          |          |          | 1          |
| 2020-09      |          |           |           | 1          |          |          |           |           |           |          |          |          | 1          |
| 2020-10      |          |           |           |            |          |          |           | 1         |           |          |          |          | 1          |
| 2021-01      |          |           |           | 1          |          |          |           | 1         | 1         |          |          |          | 3          |
| 2021-02      |          |           |           |            |          |          |           |           | 1         |          |          |          | 1          |
| 2021-03      |          |           |           | 1          |          |          | 1         | 1         | 1         |          |          |          | 4          |
| 2021-04      |          |           |           | 2          |          |          |           |           | 1         |          |          |          | 3          |
| 2021-05      |          |           |           | 5          |          |          |           |           | 1         |          |          |          | 6          |
| 2021-06      |          |           |           | 3          |          | 1        |           | 2         |           |          |          |          | 6          |
| 2021-07      |          |           |           | 1          |          | 1        |           | 1         |           |          |          |          | 3          |
| 2021-08      |          |           |           | 4          |          | 1        |           |           | 2         |          |          |          | 7          |
| 2021-09      |          |           |           | 3          |          |          |           |           | 1         |          |          |          | 4          |
| 2021-10      |          |           |           | 3          |          |          |           | 1         | 2         |          |          |          | 6          |
| 2021-11      |          |           |           | 6          |          |          |           |           |           |          |          |          | 6          |
| 2021-12      |          |           |           | 2          |          |          |           | 2         |           |          |          |          | 4          |
| 2022-01      |          |           |           | 1          |          |          |           |           |           |          |          |          | 1          |
| 2022-02      |          |           |           |            |          |          | 1         | 1         |           |          |          |          | 2          |
| 2022-03      |          |           |           | 2          |          | 1        |           |           | 2         |          |          |          | 5          |
| 2022-04      |          |           |           | 4          | 2        |          |           |           |           |          |          |          | 6          |
| 2022-05      |          |           |           | 6          |          | 1        | 1         |           | 1         |          |          |          | 9          |
| 2022-06      |          |           |           |            |          |          |           |           |           |          |          | 1        | 1          |
| 2022-07      |          |           |           | 7          |          |          |           |           |           |          |          |          | 7          |
| 2022-08      |          |           |           | 11         |          |          | 1         | 1         |           |          |          |          | 13         |
| 2022-09      |          |           |           | 10         |          |          |           | 2         | 1         |          |          |          | 13         |
| 2022-10      |          |           |           | 4          | 1        |          | 3         |           | 1         |          |          |          | 9          |
| 2022-11      |          |           |           | 7          |          |          |           | 2         |           |          |          |          | 9          |
| 2022-12      |          |           |           | 10         |          |          |           |           | 1         |          |          |          | 11         |
| 2023-01      |          |           |           | 11         |          |          |           |           | 1         | 1        |          |          | 13         |
| 2023-02      |          |           |           | 25         | 1        |          | 3         |           |           | 1        |          |          | 30         |
| 2023-03      |          |           |           | 27         |          |          |           | 2         | 1         |          |          |          | 30         |
| 2023-04      |          |           |           | 23         | 1        |          |           |           | 2         |          |          |          | 26         |
| 2023-05      |          | 1         | 3         | 20         | 1        |          | 1         | 3         |           |          |          |          | 29         |
| 2023-06      |          | 1         | 1         | 19         |          |          |           |           |           |          |          |          | 21         |
| 2023-07      |          | 2         | 5         | 22         |          |          |           |           | 1         |          |          |          | 30         |
| 2023-08      |          | 14        | 2         | 33         |          |          |           |           |           |          |          |          | 49         |
| 2023-09      |          | 17        | 1         | 41         |          |          |           |           |           | 1        |          |          | 60         |
| 2023-10      |          | 24        | 1         | 15         |          |          |           |           |           | 1        |          | 1        | 42         |
| 2023-11      |          | 18        | 1         | 15         |          |          |           |           |           |          |          |          | 34         |
| 2023-12      | 1        | 16        |           | 9          |          |          |           |           |           |          | 3        |          | 29         |
| <b>Total</b> | <b>1</b> | <b>93</b> | <b>14</b> | <b>364</b> | <b>6</b> | <b>5</b> | <b>12</b> | <b>24</b> | <b>23</b> | <b>4</b> | <b>3</b> | <b>2</b> | <b>551</b> |

**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                                               |

January 18, 2024

**OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY**

2023 Year in Review Numbers—Year over (Year)

|                             |         |          |
|-----------------------------|---------|----------|
| New Complaints:             | 1151    | (1019)   |
| Closings:                   | 1072    | (1028)   |
| Advisory Opinions:          | 1792    | (1688)   |
| Public Discipline:          | 28      | (36)     |
| Disbarred:                  | 3       | (5)      |
| Suspended:                  | 24      | (21)     |
| Reprimand/Prob:             | 1       | (6)      |
| Reprimand:                  | 0       | (4)      |
| Private Discipline (files): | 77      | (87)     |
| Probation:                  | 6       | (6)      |
| Admonitions:                | 68      | (81)     |
| Open Files:                 | 551     | (472)    |
| Lawyers:                    | 370     | (327)    |
| Year Old:                   | 158     | (157)    |
| With Office:                | 104     | (72)     |
| With Others                 | 54      | (84)     |
| Lawyers:                    | 103     | (87)     |
| Oldest File:                | 10/2018 | (6/2018) |

# Drawing the line on ethical witness preparation

BY SUSAN M. HUMISTON ✉ [susan.humiston@courts.state.mn.us](mailto:susan.humiston@courts.state.mn.us)



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

**E**arlier this year, a former Fox News employee filed an employment lawsuit against Fox.<sup>1</sup> I was interested in this lawsuit due to its allegations regarding improper witness coaching before a deposition. In fact, the alleged actions of counsel had their own section of the complaint with this heading: To Thrust Exposure for Its Wrongdoing Away from Fox Corp and onto Others, Fox News’s Legal Team Coerces Ms. Grossberg to Distort the Truth and Shade Her Deposition Testimony Against Her Personal and Professional Best Interest in the *Dominion* Litigation.<sup>2</sup> What was alleged against both in-house and outside counsel?

The complaint alleged, among other things, that Ms. Grossberg (1) was discouraged from mentioning understaffing or workplace stress and how it interfered with her ability to stay current on tasks; (2) understood she was to respond with “I do not recall” whenever she had the opportunity; and (3) counsel “scowled” or shook their head “no” when she answered hypothetical questions in ways that were truthful but implicated others or put information in context.

My first thought was, who hasn’t made a face on occasion when prepping a witness? Sometimes you cannot help cringing when you listen to a witness, not because you want the witness to testify untruthfully but because you know how the witness’s words would be misconstrued. My second thought was, telling a witness to truthfully answer “I don’t know” is not problematic, but I also found it fascinating what the complainant heard the lawyers to be communicating based upon the allegations. Effectively preparing witnesses to provide testimony is an essential litigation skill. To do so competently and ethically requires a lot of work and forethought, because you must not only understand where the ethical lines lie but also keep in mind how the nonlawyer witness is hearing what you are saying.

With this backdrop, I was pleased to see a recent ethics opinion by the ABA.<sup>3</sup>

## Permissible witness preparation

The opinion provides a helpful list of preparatory conduct that is ethical. That list includes:

- reminding the witness that they are under oath;
- emphasizing the importance of telling the truth;
- explaining that telling the truth can include a truthful answer of “I do not recall;”
- explaining case strategy and procedures, including the nature of the testimonial process or the purpose of the deposition;
- suggesting proper attire and appropriate demeanor and decorum;
- providing context for the witness’s testimony;
- inquiring into the witness’s probable testimony and recollection;
- identifying other testimony that is expected to be presented and exploring the witness’s version of events in light of that testimony;
- reviewing documents or physical evidence with the witness, including the use of documents to refresh a witness’s recollection of the facts;
- identifying lines of questioning and potential cross-examination;
- suggesting choice of words that might be employed to make the witness’s meaning clear;
- telling the witness not to answer a question until it has been completely asked;
- emphasizing the importance of remaining calm and not arguing with the questioning lawyer;
- telling the witness to testify only about what they know and remember and not to guess or speculate; and
- familiarizing the witness with the idea of focusing on answering the question, i.e., not volunteering information.

This list not only delineates ethical witness preparation but also provides a good roadmap for how to competently prepare a witness to be deposed or to testify. Diligence and competent representation of your client generally requires that you approach witness preparation by covering the above topics and doing so in the manner described.

### Impermissible witness preparation

The opinion also outlines unethical efforts to improperly influence witness testimony (described in the opinion by various phrases such as coaching, horseshedding, woodshedding, or sandpapering). This list includes:

- counseling a witness to give false testimony;
- assisting a witness in offering false testimony;
- advising a client or witness to disobey a court order regulating discovery or trial process;
- offering an unlawful inducement to a witness; or
- procuring a witness's absence from a proceeding.

Obvious, right? But what about gray areas?

The opinion provides the following guidance regarding “I don’t recall.” It is appropriate to tell a witness that “I don’t recall,” when true, is an acceptable answer. The opinion contrasts this with impermissibly telling a witness, “The less you recall, the better.” The former is permissible, while the latter encourages a witness to lie under oath about what is remembered.<sup>4</sup> Turning to the allegation in the Fox lawsuit, encouraging a witness to respond “I don’t recall” when true is permissible; it may cross the line if the guidance is to respond that way even if it’s not true or to respond that way categorically to certain types of questions, regardless of the truth. A nuance to keep in mind here is thinking about your guidance from the perspective of the witness. Are you being clear in your guidance by reiterating that “I don’t recall” is acceptable only if true, without suggesting that is a preferable answer notwithstanding its accuracy? Judicial proceedings (which include deposition testimony) are truth-seeking exercises, and it is generally true that the facts are the facts, as they say. Similarly, take care in suggesting word choice. Is your focus on making the witness’s testimony clear, or are you assisting a witness in providing false or misleading testimony? The former is permissible, the latter is not. Are you clear with your witness on the distinction?

The ABA opinion discusses examples in which lawyers are implicitly and impermissibly encouraging false testimony, such as telling a witness to “downplay” the number of times prep sessions occurred, encouraging a client to misrepresent the location of a slip-and-fall accident to have a viable claim, or “programming a witness’s testimony.”

The opinion is somewhat equivocal on scripting testimony.<sup>5</sup> The opinion calls “programming” witness testimony unacceptable but suggests question-and-answer scripts may be permissible, and provides an analogy to drafting witness affidavits. The Restatement has long taken the position that witness preparation can include rehearsal of testimony.<sup>6</sup> The key is that the testimony must be truthful. I’ve never known anyone to script questions and answers (and it seems like a bad idea and extremely difficult to do), but I have seen witnesses perform poorly because they try to testify the way they think the lawyer wants them to answer questions instead of speaking clearly about how they recall and understand the facts. Again, the bullet-point list of permissible witness preparation actions not only provides good guidance for staying on the right side of

the ethical line but also shows the best way to assist the witness in authentically and accurately sharing the information they possess.

### Remote proceedings

An important focus of the recent opinion is impermissible coaching during testimony, particularly given the prevalence of remote proceedings, where it is possible to attempt to influence testimony mid-deposition or trial. The opinion starts with the obvious prohibitions—winking at a witness during trial testimony, kicking a deponent under the table, passing notes or whispering to the witness mid-testimony—and then progresses to other forms of signaling that are often impermissible, such as spoken objections that suggest the answer. Basically the opinion provides that what doesn’t fly in person does not fly remotely, just because it is easier to do and harder to prevent. And there is very little tolerance for such coaching even if the “coached” testimony is true, given how often it runs afoul of procedural rules and the myriad ways it undermines the credibility of the witness and the proceedings.

The opinion does note one caveat relating to deposition testimony, namely, “openly asking a witness to correct an inadvertent misstatement when the witness obviously misunderstood a question or simply misspoke.” The opinion notes this is not impermissible coaching, and in some instances, may be an appropriate remedial measure to correct false testimony.<sup>7</sup> The best way to handle this is in real time, or through limited re-direct at the end of the deposition.

### Conclusion

Effectively preparing a witness to offer testimony is a required litigation skill and I hope that newer lawyers are getting the training they need to do so competently and ethically. Becoming proficient is more challenging than it may appear. Actions that interfere with the opposing party’s ability to gather information relating to the matter are generally not consistent with the ethics rules and add to the stress of an already stressful situation and practice. I hear from so many that lawyers are losing the ability to be adversarial in a professional manner, and I see that in the complaints that we receive. Further, more courts are sanctioning such conduct, which is often in violation of the court’s procedural rules but can also run afoul of several ethics rules. No matter your level of experience, a review of the recent ABA opinion is a helpful reminder of the ethics of witness preparation. ▲

### NOTES

<sup>1</sup> Complaint, *Grossberg v. Fox Corp. et. al.*, No. 1:23-cv-02368 (SDNY 3/20/2023), ECF No. 1.

<sup>2</sup> Para. 132-171, at 31-39.

<sup>3</sup> ABA Formal Opinion 508, “The Ethics of Witness Preparation” dated 8/5/2023.

<sup>4</sup> *Id.*, fn. 10.

<sup>5</sup> *Id.*, fn. 19.

<sup>6</sup> The Restatement (Third) of the Law Governing Lawyers, §116 (2000).

<sup>7</sup> Opinion 508, fn. 29.

# Conducting a trust account self-assessment

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**S**afekeeping client or third-party funds relating to a representation is one of the most important legal and ethical duties lawyers have. Safekeeping is not only an important ethical obligation with potentially serious licensure consequences; it's a fiduciary duty owed to our clients or others whose money we hold. This column has covered common trust account errors as well as examples of serious discipline imposed when the rules are not followed. This month I want to discuss ways that you can proactively conduct a self-assessment of your trust account practices. Whether you handle your own trust account or supervise others who do all the heavy lifting, ensuring that this important task is completed consistently and correctly is always worth your time. As the year ends and 2024 begins, I hope you are inspired to give yourself the gift of peace of mind relating to your trust account responsibilities.

## California's new annual self-assessment rule

My inspiration for this topic comes from California. Effective earlier this year, California created a Client Trust Account Protection Program to aid in the detection and deterrence of trust account misconduct.<sup>1</sup> There are several components to this program but one in particular stood out to me—a required annual self-assessment that attorneys must complete as part of their annual license registration. This assessment, the first of its kind in the nation, is just a series of questions that requires the lawyer to affirm in detail compliance with the reporting and recordkeeping ethics rules. It includes provisions that have long been part of the requirements in Minnesota: annual disclosure of account information and certification of compliance with the rules.

Minnesota requires lawyers to confirm annually that they keep compliant books and records for their trust account, and to disclose annually the bank and accounting information for their account(s). If you have a trust account, when you complete Step 2 on your annual registration, you are certifying that “I or my law firm maintains books and records as required by Rule 1.15, MRPC and Appendix 1 to the MRPC.”<sup>2</sup> Completing an annual self-assessment helps to ensure that this certification is accurate.

## Self-assessment content

California's self-assessment is done online.<sup>3</sup> Although it references the California rules, generally the same inquiries apply for a review of your trust account. Let's walk through some related questions you should ask yourself regarding your Minnesota trust account:

1. Is your trust account with a bank approved by this Office and have you reported its existence through your annual registration? Have you disclosed all trust accounts that you maintain?
2. Do you maintain all funds that should be in trust (client advance attorney's fees, advances for expenses, settlement funds, and third-party funds you have been provided) in a designated trust account separate from any personal or business accounts? How do you know this is true? Do you have a written policy? Have you talked with staff about this requirement?
3. Do you know what the required books and records are for your trust account? Appendix 1 to the Minnesota Rules of Professional Conduct describes the required books and records. Too many people misunderstand this question and think it just means their bank statements. Nope.
4. Do you have for each trust account: a check register; a subsidiary ledger for each client with funds in trust; a separate subsidiary ledger for nominal attorney funds held in the account (not to exceed \$200); an interest subsidiary ledger; a trial balance report of the subsidiary ledgers, updated monthly; a completed reconciliation report, prepared monthly; bank statements; cancelled checks (if provided); deposit slips; and memoranda documenting wire or electronic account transfers? All these documents are required to be kept.
5. Do you have a record of the monthly reconciliation of the check register balance, the subsidiary ledger trial balance total, and the adjusted bank statement balance? Three-way reconciliation of the account is the hallmark of trust accounting recordkeeping and is something bookkeepers and accountants are not used to performing unless they have been instructed on the required records. Have you given your team Appendix 1 and made sure

they understand its requirements? Do you periodically review Appendix 1 to make sure you understand its requirements?

6. Do you have a process to ensure that timely notice is made to clients or others of transactions involving deposits and withdrawals related to their money? You should be accounting to clients and third parties no less than monthly any activity relating to their funds.
7. Do you have a process to ensure that attorney’s fees are withdrawn timely when earned? You should not be holding earned fees in your trust account as a “cushion” or to avoid overdrafts. Doing so is commingling of attorney and client funds and is ethically prohibited.
8. Do you have more than \$200 of your funds or firm funds in your account? You can and should keep nominal sums (up to \$200) in the account to cover bank charges and service fees that may arise so that client funds are not used to cover trust account service charges.
9. Do you have a process to ensure that if a dispute arises regarding funds transferred from trust, those funds are returned to trust and not withdrawn until the dispute is resolved?
10. If you have delegated to others the maintenance of your trust account, do you have policies and procedures sufficient to ensure the account is maintained in compliance with Minnesota’s ethics rules? Do you make sure that periodic training takes place so that personnel understand the policies and procedures?
11. If not performed by you, do you review on a monthly basis the monthly three-way reconciliation referenced above to ensure that it balances and any open questions are answered? A family member who is in private practice has a policy that he reviews his trust account records on a monthly basis the same day he gets them from his bookkeeper and does not do anything else except work on his trust account if the reconciliation does not match to the penny or if his review shows something out of line. In my view, this is the right approach to such an important fiduciary and ethical obligation. Do you have the same or a similar approach? It really is that important.
12. Do you have procedures in place to ensure that any payments in cash are documented by a receipt signed by both the recipient and the payor, and that copies of such receipts are maintained?
13. Is someone other than a lawyer a signatory on the trust account? If so, does a lawyer also sign every check? Checks must be signed by lawyers. Also, a lawyer must direct every electronic transfer or withdrawal from the trust account and a written record of that direction must be kept. Do you have those records?
14. Do you hold client funds on closed client matters? Have you investigated why this is the case? You have an obligation to timely return unearned and unused client funds upon termination of the representation. You must address those funds to ensure stale checks are accounted for and that former clients are located and their funds returned to them.
15. Do you have a process for periodic review of your policies and procedures and compliance with those procedures to ensure your trust account is being maintained in a manner consistent with the rules?

16. Do you ensure that your trust account and business account records are maintained for six years following the business/tax year to which they apply?
17. Having reviewed these questions, how do you feel about your trust account maintenance?

If you reviewed these questions, and they made sense to you, that is wonderful, and I hope that gives you some peace of mind. If a review of these questions raised questions in your mind, don’t panic—but please do turn your attention to your trust account. Note also that this list of questions does not cover every single issue that might occur with a trust account but rather is intended to ensure you understand the main obligations relating to your account. Nothing is a substitute for sitting down with Rule 1.15 and Appendix 1.

**Resources**

We have a lot of resources on our website, including sample forms that can assist you with your compliance. We are also in the process of creating a trust account school that we hope to launch in 2024 that you and your staff can attend to ensure you have the knowledge you need to comfortably manage your trust account. The state law library has an on-demand free basics training for trust accounting.<sup>4</sup> We are available every day to answer your trust account questions at 651-296-3952. Trust account recordkeeping may seem mysterious and daunting; it is not, and we are here to help. ▲

**NOTES**

<sup>1</sup> Rule 9.8.5, California Rules of Court.  
<sup>2</sup> Blank Minnesota Annual Registration Statement, available at <https://www.lro.mn.gov/for-lawyers/annual-lawyer-registration-fees>.  
<sup>3</sup> California’s Trust Account Protection Program, including a draft of the self-assessment, is available at <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Client-Trust-Accounting-IOLTA/Client-Trust-Account-Protection-Program>.  
<sup>4</sup> Visit the State Law Library website at <https://mn.gov/law-library/services/index/on-demand-cle-videos.jsp>.



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