

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
MEETING AGENDA**

Friday, June 21, 2019 – 1:00 p.m.
Town & Country Club
300 Mississippi River Boulevard North
St. Paul, Minnesota

1. Approval of Minutes of April 26, 2019, Lawyers Board Meeting (Attachment 1).
2. Updated Panel and Committee Assignments (Attachment 2).
3. Committee Updates:
 - a. Rules Committee.
 - (i) May 3, 2019, Order on MSBA Petition (Attachment 3);
 - (ii) June 14, 2019, Response to Court on Comments (Attachment 4);
 - (iii) Draft Petition on Rule 1.15(o), MRPC, & Rule 20, RLPR (Attachment 5).
 - a. Opinion Committee
 - (i) Update Opinion No. 21.
 - b. DEC Committee
 - (i) Feedback on Chairs Symposium (Attachment 6).
 - (ii) September 27, 2019, Professional Responsibility Seminar.
4. Director's Report (Attachment 7).
5. June Budget Submission to Court (Attachment 8).
6. Draft Annual Report (Attachment 9).
7. Other Business:
 - a. Panel Assignments Update;
 - b. Proposed 2020 meeting dates (Attachment 10).
8. Quarterly Board Discussion (closed session).
9. Next meeting, September 27, 2019, following the Annual Seminar.

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 lhprada@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 187TH MEETING OF LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD APRIL 26, 2019**

The 187th meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, April 26, 2019, at the Town and Country Club, St. Paul, Minnesota. Present were: Board Chair Robin Wolpert, and Board Members Landon J. Ascherman, Joseph P. Beckman, Jeanette M. Boerner, James P. Cullen, Thomas J. Evenson, Roger Gilmore, Christopher A. Grgurich, Katherine A. Brown Holmen, Peter Ivy, Bentley R. Jackson, Tommy A. Krause, Mark Lanterman, Kyle A. Loven, Susan C. Rhode, 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 Director Keshini M. Ratnayake, Assistant Directors Aaron D. Sampsel, Alicia J. Smith, and Bryce D. Wang. Also present were Minnesota Supreme Court Associate Justice David L. Lillehaug, Daniel Cragg representing the Minnesota State Bar Association, and Nicholas Ryan.

1. APPROVAL OF MINUTES.

Robin Wolpert began the meeting by welcoming four Board members who joined since the January 31, 2019, meeting: Katherine Brown Holmen, Tommy Krause, Kyle Loven, and Susan Stahl Slieter (who was unable to attend). Mr. Krause, Ms. Brown Holmen and Mr. Loven briefly introduced themselves. Ms. Wolpert then asked Susan Humiston to introduce the staff attorneys present at the meeting. Ms. Humiston presented Keshini Ratnayake, Aaron Sampsel, Alicia Smith and Bryce Wang and noted that Ms. Smith and Mr. Wang had joined the Office since the January 31, 2019, Board meeting. Ms. Smith and Mr. Wang introduced themselves to the Board.

The minutes of the January 31, 2019, Board meeting were unanimously approved.

2. PANEL AND COMMITTEE ASSIGNMENTS.

Ms. Wolpert reported that Committee and Panel assignments were made as of February 1, 2019, and this information was in the meeting packet. With the recent appointment of Mr. Krause to the Board, assignments will be modified to at least some degree. Ms. Wolpert requested all those who joined the Board in 2019 to call Ms. Wolpert to discuss what interests each has as Ms. Wolpert considers new Committee and Panel assignments. Ms. Wolpert noted that every January she calls each Board member to ascertain each member's interests before making that year's assignments.

3. PANEL DISCUSSION.

A. Panel Assignments.

Ms. Wolpert referenced a question James Cullen raised at the January 31 Board meeting which Ms. Wolpert had subsequently discussed with the Executive Committee. During that January 31 meeting, Mr. Cullen, a Panel Chair, expressed concern that the Panel workload was not evenly distributed. After that meeting, Ms. Wolpert looked into the issue and noted that Mr. Cullen was correct. In 2018, Panel 4 was assigned eight cases, Panels 2 and 6 were assigned seven cases, Panel 5 was assigned five cases, and Panel 3 was assigned three cases.

Ms. Wolpert noted that the reason for this distribution of workload was the random system used to assign Panels, pursuant to Executive Committee policy. Under this policy, the Board Chair works to create a random assignment sheet, randomly generating numbers 1-6 fifty times. When a Panel needs to be assigned to a matter, the Panel clerk in the Director's Office contacts the Board Chair's designee, who at this time is Ms. Wolpert's administrative assistant. The designee provides to the Panel clerk the number of the Panel assigned to the matter from the list of numbers previously generated randomly.

In 2018, the random number generator created results such that Panel 3 received fewer matters than other Panels. In 2019, Ms. Wolpert again worked to generate a completely random list of 50 numbers. Again, the distribution will not be equal among the Panels.

In a February 20, 2019, memorandum to the Executive Committee, Ms. Wolpert stated that she did not intend to change the process by which Panels are assigned unless the Executive Committee believed the change was desirable. Ms. Wolpert reported that no Executive Committee member did, and the sense of the Executive Committee was there was no reason to revisit the policy.

Ms. Wolpert also noted that the policy allows the Board Chair to look at Panel workloads to balance when appropriate. Ms. Wolpert has not exercised that authority during her time as Board Chair. Ms. Wolpert reported that the reason for the Executive Committee policy is to avoid the perception or the reality that the Director's Office has any input or visibility into the selection of Panels.

Ms. Wolpert posed two questions: First, should uneven workload be a factor in Panel assignments and, second, should the Board Chair act to balance Panel workloads? Ms. Wolpert solicited direction from the Board on these questions. She stated her

opinion that unevenness in Panel workloads may be necessary to ensure that a blind Panel assignment system exists.

Ms. Wolpert then invited Mr. Cullen to address this issue. Mr. Cullen stated that Ms. Wolpert had reported Mr. Cullen's concerns accurately. This issue had come to Mr. Cullen's attention in the fall of 2018, when he saw a disparity in Panel assignments. Mr. Cullen did not raise this as an issue until the January 2019 Board Meeting, when he saw the reports from the Office which indicated the imbalance in Panel workloads continued. Ms. Humiston reminded the Board that the Office, pursuant to Executive Committee policy, has nothing to do with Panel assignments. Mr. Cullen noted that the Panel he chairs is the only one which has not received an assignment in 2019. He believes that the current results are not fair. In light of the current Panel assignments, Mr. Cullen stated that he could bring a motion that the next two matters assigned to a Board Panel be assigned to Mr. Cullen's Panel. He also inquired whether Ms. Wolpert could tell the Panel clerk in the Director's Office to give the next two Panel assignments to Panel 3. Mr. Cullen noted that in his first five years on the Board, he had not noticed this as an issue until the end of 2018, and he did not know what triggered this situation in 2018. Mr. Cullen believes that Panel workloads were balanced before then.

Ms. Wolpert hoped that in 2019, the situation would correct itself, even though Panel assignments in 2019 would not be equal. Ms. Wolpert reported that pursuant to Executive Committee policy, random numbers are generated. As such, it is possible that a number may not come up often, and at times a number may come up multiple times in a row. Ms. Wolpert believes that this process is important to preserve the perception and reality of the impartiality of the Panel assignment process.

Ms. Boerner, a member of Panel 3, stated that she understands Ms. Wolpert's point about impartiality and believes the fairest process is a random number-generating system. She wondered, however, if one could exist in a way which balanced Panel workloads better.

Ms. Humiston concurred that the perception and reality of fairness were the fundamental concern.

Ms. Wolpert stated that the goal of the Executive Committee policy is that over a long term, the end result would be equal distribution of workload. This did not necessarily mean equal distribution in any year, or that distribution this year would be the same as last year. Ms. Wolpert also noted that this Executive Committee policy is long-standing.

Ms. Wolpert asked if it was the sense of the Board that this is such a concern that Ms. Wolpert would disregard the random distribution and make different Panel assignments to balance workload.

Mr. Beckman inquired about the time-stamping of charges so that the Office could not determine Panel assignments. Ms. Humiston reported that when she signs charges, she also dates and records the time she signed. Matters are presented through the Panel Clerk for assignment in the order in which they are dated and timed. Ms. Humiston noted that were the Board to adopt a system whereby Panel numbers would be generated in random 1-6 and after the sixth assignment the process would be repeated, then by the time of the sixth assignment the Director's Office would know which Panel would be assigned to the next matter. Ms. Humiston reiterated the important need to protect the system and ensure impartiality in Panel assignments.

Mr. Beckman reported that the Executive Committee had considered numerous alternatives, and suggested that if the Board wanted to discuss this issue further, an ad hoc committee be appointed to study the issue and report, with the goal to achieve better balance in Panel assignments.

Ms. Wolpert asked how many Board members were concerned about uneven Panel workloads in 2018 and 19. Some Board members acknowledged this concern. Ms. Wolpert stated that options included changing the process, or Ms. Wolpert monitoring the situation during 2019 and pursuant to the Executive Committee rebalancing Panel assignments if that seemed best. Some Board members liked this latter approach.

Mr. Jackson stated that it was his understanding of the Executive Committee policy there were two ways to adjust Panel assignments. Either Ms. Wolpert could reassign matters between Panels, or a Panel Chair could request reassignment because of unusually heavy workload on that Panel. Ms. Wolpert stated that this was correct. Mr. Jackson stated that he preferred to work within the current policy, and noted the importance of randomness in Panel assignments. Ms. Wolpert stated that she has not heard from any Panel Chair that any Panel is overwhelmed with work. She stated she could work within the current policy.

Ms. Wolpert asked Mr. Cullen if he wanted his concern to be treated as a request of a Panel Chair for rebalancing of Panel workloads. Mr. Cullen stated that he did. Ms. Wolpert stated that she would consider Mr. Cullen's request, and decide if in a given timeframe redistribution is appropriate. Ms. Wolpert asked if that was sufficient, or if the Board believed that an ad hoc committee was appropriate.

Mr. Lanterman stated that a random number generator, with weighted probability, exists, and he was willing to write such a program that would generate random numbers while also factoring historical experience. Ms. Wolpert stated that in January 2019 she and her assistant had created a purely random generated list of 50 numbers, and stated that she would like to learn more about the weighted random number generator.

Mr. Witz suggested that going forward, Ms. Wolpert continue the random Panel assignments, and also that the assignments be compared with what the results would be under a random weighted number generator, and the results could be reported back to the Board after six months.

Ms. Wolpert summarized the outstanding proposals. She could assign matters to Panel 3; an ad hoc committee could be established to study the question; the current system could be retained and Ms. Wolpert would adjust Panel assignments as necessary; and a trial period comparing the results of a weighted random number generator against a random number generator could be conducted.

Mr. Ascheman stated that he believed Mr. Lanterman's idea of a weighted random number generator was excellent, and also believed that a period of comparison was a good idea. After that, the Board could consider whether to adjust the Executive Committee policy.

Mr. Grgurich expressed his appreciation to Mr. Cullen for raising this issue, and expressed his opinion that it was important that Panel assignments be purely random.

Ms. Boerner inquired whether consideration of Mr. Cullen's concern would mean more matters would be assigned to Panel 3, and also asked whether there were other imbalances. Ms. Wolpert noted that there were other differences, as not all Panels had the same number of matters assigned.

Ms. Wolpert inquired whether any Board Member wanted a motion on the issue, or whether it was sufficient that Ms. Wolpert is looking at the issue within the existing Executive Committee policy. Mr. Cullen stated that he believed Mr. Bentley had the right idea, to act within the current policy, for Ms. Wolpert to make decisions about reassignment based on facts as they develop, and to study Mr. Lanterman's idea. Mr. Cullen believes that it would be appropriate for Ms. Wolpert to make reassignments at this time.

Mr. Williams stated that he liked Mr. Witz' idea to continue the current policy, while comparing those results to the results under a weighted random number

generator for a period of time. Ms. Wolpert stated that she would work with Messrs. Lanterman and Ascherman and the Executive Committee to continue the current policy while comparing those results to those which would be achieved under a random weighted number generator and would report to the Board at its September meeting.

B. Panel and Reviewing Member Authority.

Ms. Wolpert reported that she had received an email from William Wernz, Kenneth Jorgensen and Eric Cooperstein. The stated purpose of the email was to alert the Board about a Panel case and express concern about fair notice and due process.

The email stated that Charles Lundberg had represented the respondent in a case before a Panel in 2018. In that matter, the Director had issued an admonition for violation of Rule 1.3, Minnesota Rules of Professional Conduct (MRPC). The lawyer appealed. The Director's brief to the Panel extensively discussed the violation of Rule 1.3, MRPC, and alternatively argued that if the Panel did not find a violation of Rule 1.3, MRPC, it could find a violation of Rule 1.1, MRPC, even though that rule was not charged in the admonition. The Panel said it could consider the matter de novo, review the case, and decide if the lawyer had violated any rule.

The authors' concern was that uncharged conduct could violate a Rule of Professional Conduct. The authors opined that the Rules on Lawyers Professional Responsibility did not give a Panel the authority to impose discipline for a rule which was not charged by the Director's Office. The authors focused on Rule 9, Rules on Lawyers Professionals Responsibility (RLPR), which the authors stated allowed a Panel to affirm an admonition, reverse the admonition, or instruct the Director to file a petition for disciplinary action. The authors argued that Rule 9, RLPR, does not authorize a Panel to decide what conduct violated an uncharged rule. The authors also stated that the phrase "de novo" is not in Rule 9, RLPR. In support of their contentions, the authors cited Minnesota Supreme Court case law regarding due process.

Ms. Wolpert reported that this issue likely has been put to rest by a March 2019 Minnesota Supreme Court lawyer discipline decision. That matter was also an admonition appeal. According to the Court's opinion, the admonitions alleged a violation of Rule 3.4, MRPC, and the Director's Office had also offered an alternative argument that the lawyer had violated a different rule, Rule 1.2, MRPC. The Supreme Court rejected what it saw as an effort to

discipline under an uncharged rule. The Court stated that charges must be sufficiently clear and specific so that the attorney can prepare a defense. In this matter, the lawyer did not have notice that the lawyer could be subject to discipline for violation of Rule 1.2, MRPC, so violation of that rule was not an alternative basis for discipline.

Ms. Humiston agreed with the importance of due process considerations in lawyer discipline proceedings. Ms. Humiston stated that the case discussed by Messrs. Wernz, Jorgensen and Cooperstein was unfortunate because when the draft admonition was presented to Ms. Humiston, the draft admonition identified the rule violation as Rule 1.1, MRPC. Ms. Humiston, recognizing that lawyers particularly do not like to be disciplined for violations of Rule 1.1, MRPC, changed the violation to the also applicable Rule 1.3, MRPC. Ms. Humiston agreed that as part of the process, lawyers should have specificity in the allegations against them, and that she is happy to plead in the alternative. Ms. Humiston noted that she disagrees with the email on several items that were raised. Ms. Humiston also reported that in a recent decision, the Kansas Supreme Court stated that the only notice and opportunity to be heard requirement is as to the specific facts that give rise to any basis, and any rule violation, for discipline.

Ms. Humiston does not believe there is any concern that Board Panels need to act differently going forward.

Ms. Wolpert stated that she brought this to the attention of the Board because this may come up again as an issue before a Panel. Ms. Wolpert informed Board members that if a Panel believes that a rule violation other than the one charged is appropriate, the Panel should look at whether the Panel has authority to do so. Ms. Wolpert stated that further discussion on this could be conducted during the Board's closed session.

Mr. Ivy inquired of Ms. Humiston whether this topic would change her charging decisions, noting that the effect may well lead to charging more rule violations. Ms. Humiston agreed that this is an unfortunate effect.

5. DIRECTOR'S REPORT.

The Director's Report was considered at this time so it could be presented before Justice Lillehaug needed to leave the meeting.

Ms. Humiston reported that March was a very good month for the Office, and that significant progress was made. The matter which had been on hold pursuant to Rule 12(c), RLPR, is now under advisement with the Supreme Court. Ms. Humiston stated that she is very pleased with the progress the Office has made, and specifically thanked Mr. Wang who has joined the Office as a temporary attorney, leaving a non-temporary position, and provided great assistance to senior attorneys in getting the investigation and charging on large matters completed.

Ms. Humiston stated that making progress on improving the Office statistics is important to the Supreme Court, which wants to see a path forward toward eliminating or substantially reducing older matters under investigation without charges. This issue was true when Ms. Humiston was hired slightly over three years ago. Ms. Humiston noted that the Office had success early in her tenure, but that the pace of success has slackened. Ms. Humiston reminded the Board that the Office has had many staffing challenges during the past three years, and that as part of the budget process she is making proposals to address these issues.

Ms. Humiston reported that Patrick R. Burns has gone back to retirement, and was most helpful during his part-time duty with the Office this past winter. Siama C. Brand has returned from leave, working half-time from home until the end of June. Ms. Brand is doing advisory opinions and other work which is helping to free the time of senior attorneys to focus more on their litigation calendars.

Ms. Humiston reported that in April she was out of the Office extensively due to a family medical situation. This will have an impact on the statistics for April. This also reminded her in a very meaningful way of the impact on the Office the extended absence of any person can have.

Ms. Humiston reported that she is strongly focused to make substantial progress in May to show the Supreme Court what the Office can do and ascertain what additional resources are needed.

Ms. Humiston reported that the paralegal position has been open, but the Office did not have good success with candidates. Therefore, she has requested and Minnesota Judicial Branch Human Resources has approved reclassifying that position to an investigator position. Ms. Humiston wants the paralegals to be able to focus on the good work that they do, and wants an investigator who can work in the field to look for missing respondents, interview witnesses, etc.

The proposed 2020 budget will reclassify this paralegal position to an investigator position. Also, the proposed 2020 budget will make Mr. Wang's temporary

one year position into a permanent position. Additionally, Ms. Humiston would like to add a second investigator position. She has in mind hiring a forensic auditor, as a large bottleneck in bigger cases is going through and sorting documents, and preparing audits.

Mr. Williams inquired whether the Office currently employs any investigators, and Ms. Humiston replied that although almost all other states do, the Director's Office does not.

Ms. Humiston reminded the Board that on a quarterly basis, Mr. Jackson comes to the Director's Office to meet with staff. Mr. Jackson's visits are very well received by the staff. Mr. Jackson stated that he has productive and open discussions with the staff, who have good ideas and which shows that people are moving in the right direction. Mr. Jackson particularly noted the tremendous camaraderie in the Office.

Ms. Humiston informed the Board that the Office had done a needs assessment as part of its well-being process. She thought very good data had been received, showing areas in which the Office is strong and areas for improvement.

Ms. Humiston referenced the draft budget included in the Board materials. Ms. Humiston noted that although MJB Finance has seen the budget, it has not vetted or approved it.

Because attorney registration fees are declining, the Office is spending into its reserves. At projected rates of income and expenditure, the Office's reserves will be expended before the end of the next biennium. Even without staffing changes, attorney registration fees do not cover office salaries, benefits, etc. Ms. Humiston will be talking with the Supreme Court about whether the portion of the attorney registration fee currently assigned to the Client Security Board should be assigned to the Director's Office and what the Court believes the Office's reserve balance should be.

The only major changes to the budget are the new investigator and permanent attorney positions. One unknown in the budget is rent. The Office's lease in its current space expires on June 30, 2020. Ms. Humiston is working to estimate pricing. She hopes that, given the high vacancy rate in the building in which the Director's Office is located, there will be no or little rent increase. The budget will be presented to the Supreme Court in June before the Board's June 2019 meeting.

Ms. Humiston reported that in January 2019 Mr. Lanterman made a very popular presentation to the National Organization of Bar Counsel on a panel which included Ms. Humiston. Mr. Lanterman and Ms. Humiston have been invited back to present

again; Mr. Lanterman to do a presentation on the dark web and internet of things, and Ms. Humiston to talk about how bar counsel can teach technology competency.

7. JUSTICE LILLEHAUG UPDATE.

Justice Lillehaug thanked Ms. Wolpert for the opportunity to address the Board.

Justice Lillehaug noted that he has been liaison justice for about 1 ½ years and thought the Board members would like an idea of what he and the Court do on a day-to-day basis in the area of lawyer discipline. Justice Lillehaug reported that on a monthly basis he reviews the Director's dashboard, comparing it to the prior month and year. Every three months, Justice Lillehaug has an informal conversation with the other members of the Supreme Court about what the Board and Office are doing. Other conversations may occur from time to time when issues arise in connection with cases the Court is considering. Also, in June 2019, Ms. Wolpert and Ms. Humiston will meet with the Court regarding the proposed budget, which will allow for a question and answer session.

Justice Lillehaug stated that from time to time people ask him why he and the Court are so concerned with numbers, that numbers are just numbers. Justice Lillehaug emphatically disagrees. Real people are victimized by attorney misconduct, real attorneys may pose a risk to the public, and considerations of due process apply. Therefore, the system should move at a reasonable pace.

When Ms. Humiston was hired, there were too many cases which had been in the Director's Office for too long. It is true that some of these matters are complex. However, too many cases were over one year while still being investigated.

Justice Lillehaug noted the Court's efforts to move matters along once they are under advisement. When a matter is presented to the Court by stipulation, the Commissioner's office prepares a bench memorandum which is forwarded to Justice Lillehaug. He prepares a cover note and distributes the note and bench memorandum to the other justices, who are to vote quickly and electronically.

Justice Lillehaug expressed his confidence in Ms. Wolpert's leadership and Ms. Humiston's management. He is, however, continually pressing to move cases along expeditiously. That does not mean in a poor manner. Cases should be well worked up with quality. This is important to public trust and confidence.

The ultimate goal is to see more files closed than opened. This is important to the public, for due process, and for fairness. Justice Lillehaug will therefore continue to press to improve the Office's statistics.

Justice Lillehaug then invited questions. Mr. Williams asked about discussion among members of the Court. Justice Lillehaug stated that in a stipulated matter, usually the attorney has admitted all the facts and the parties have joined in a recommendation. If, however, any Justice wanted to conference the case, the Court would. In a matter which has gone to an evidentiary hearing before a Referee or Board Panel, then the usual process of briefing and oral argument occurs. After oral argument, it may take the Court 60-120 days to issue a decision, particularly if there is a dissent. Mr. Cullen inquired why some decisions are issued per curiam, and others are signed by Justice Lillehaug. Justice Lillehaug reported that contested cases result in per curiam opinions, and stipulated matters result in orders signed by Justice Lillehaug. The reason for per curiam opinions is to convey that the decision is speaking the voice of the entire Court.

5. DIRECTOR'S REPORT (CONTINUED).

Ms. Wolpert asked if there were any questions for Ms. Humiston. Mr. Williams asked how collections were coming along. Ms. Humiston reported that no substantial additional efforts have been made. Collections are a small percentage of the Office's budget, and many judgments are uncollectable. She noted the Office has made a greater effort to submit collection matters to revenue recapture. She stated that more could always be done, and analogized this situation to that encountered by the Client Security Board in attempting to collect on subrogation claims.

Ms. Wolpert summarized that the budget would be presented to the Supreme Court on or about June 13, 2019, and she would report to the Board on that discussion.

Ms. Wolpert stated that the Court may find the request for an additional investigator and attorney interesting, and the basis of the request was positive impact on Office performance. Ms. Humiston stated that Justice Lillehaug had encouraged Ms. Humiston to request this additional staffing. Ms. Humiston had been reluctant to do so until the Office was fully staffed and trained. Unfortunately, that situation has not occurred during her tenure as Director. From a management perspective, Ms. Humiston recognized that she should have spoken up sooner. As a consequence, substantial burden has been placed on the Office to make up for short staffing.

The request for additional staffing is particularly important given the strategic plan and the additional effort the Office wishes to undertake regarding advisory opinions, continuing legal education, District Ethics Committee training, and other efforts. Additionally, litigation is a more complex and time consuming process than it was previously. Therefore, another attorney is appropriate. She believes that productivity will be assisted by shifting to an investigator model over time.

4. COMMITTEE UPDATES.

a. Rules Committee.

(i) Proposed ABA Changes to Advertising Rules.

Ms. Wolpert invited Mr. Cullen to discuss the changes to the ABA Model Rules regarding advertising and solicitation. Mr. Cullen reported that Mr. Grgurich and Timothy Burke had been on a Minnesota State Bar Association subcommittee, and their participation had been very helpful to the Rules Committee.

Mr. Cullen identified the issue before the Board as whether to amend Rules 7.1 to 7.5, MRPC, to conform to the Model Rules of Professional Conduct. Last year, the ABA considered streamlining and amending these rules. The ABA Model Rules have eliminated Rules 7.4 and 7.5, incorporating comments to address issues from those rules. For example, the language of Rule 7.5 has been incorporated into the comments to Rule 7.1.

Mr. Cullen reported the MSBA established a subcommittee which, as well as the MSBA Rules of Professional Conduct Committee, have recommended that the ABA Model Rules be adopted in Minnesota.

Mr. Cullen also reported that the Board's Rules Committee agrees with this position. On March 21, 2019, the Rules Committee met by telephone, with Ms. Wolpert and Mr. Burke present. The committee voted unanimously that the ABA Model Rules should be adopted in Minnesota, implying perhaps a co-petition with the MSBA to amend these rules. As to the substance, although different people may have different concerns with different parts of the rule, the ABA Model Rules bring these rules up to date. Mr. Cullen summarized some of the proposed changes:

- ABA Model Rule 7.1 reiterates that truthful statements can be misleading, so a lawyer must be clear and non-misleading in communications about the lawyer's services.
- ABA Model Rule 7.2 provides that a lawyer may say the lawyer is a specialist if that is true, without further disclaimer, and that a lawyer may not say the lawyer is a certified specialist if not. Additionally, historically, nominal

gifts for referrals were barred. Presently, there are many attorney and non-attorney cross-referral organizations.

- The ABA Model Rules allow nominal gifts for referrals if done without the expectation of compensation for a referral.
- ABA Model Rule 7.3 deletes the requirement that the phrase "Advertising Materials" be on solicitation materials. Additionally, person-to-person exceptions on solicitation are expanded. Mr. Cullen opined that the ABA recognizes that such activity occurs now and not much abuse is seen.

Ms. Wolpert invited Daniel Cragg to speak. Mr. Cragg stated that Mr. Cullen accurately summarized proposed changes. Mr. Cragg opined that the MSBA subcommittee and MSBA Rules of Professional Conduct Committee were largely unanimous that Minnesota rules should be brought into conformity with the Model rules. He noticed that the subcommittee had a lot of conversation, especially as to Rule 7.3. Nevertheless, people generally saw a lot of value in coming into conformity. He concurred with Mr. Cullen that any or all of the proposed changes could be picked at. The Model Rules, however, are a great attempt to modernize the rules, including as to technology. For example, Mr. Cragg believes that one reason eliminating Rule 7.5 makes sense is letterhead is not used as much these days. Mr. Ascherman asked if any consideration had been given in ABA Model Rule 7.3(b)(3) to someone whose regular business activity is an illegal activity, such as drug sales. Mr. Cragg reported this was not discussed, but he believes the underlying assumption is that the language applies to legitimate businesses.

Ms. Humiston stated that the Minnesota Board of Continuing Legal Education wants the specialist rule to remain as is. Mr. Cragg stated that he believes the current rule on specialization is subject to successful First Amendment challenge, and the new rule allows Minnesota to prevent any such challenge, although he understands the BCLE position. Ms. Wolpert reported that certain areas of law where people do practice extensively and have substantial experience nevertheless do not have certification, so that a lawyer could not state that the lawyer is a specialist.

Ms. Humiston stated that she did not have objection to any of the proposed amendments. She believes uniformity across the states is important. She did want the Board to recognize and understand that

there is a material change allowing an expansion of permissible in-person solicitation. Additionally, of note from the disciplinary office perspective is the elimination of the "Advertising Materials" requirement. Although Ms. Humiston is not a fan of this current rule, she noted that the Office has seen that communications without that label but look official may be harder to deal with under a "misleading" standard. Although Ms. Humiston does not know if a majority of states will adopt all of the ABA Model Rules, as a number of states are very restrictive in their advertising and solicitation rules, she nevertheless believes uniformity in these rules is good.

Mr. Williams noted that for people who have already gone through the time and expense of becoming and remaining a certified specialist, it does not seem fair that non-certified specialists may nevertheless call themselves specialists. Mr. Cullen recognized that Mr. Williams raised a legitimate point, but noted that a certified specialist could state that he or she is certified and why that is better.

A motion was made and seconded to co-petition with the MSBA that the Supreme Court amend Rules 7.1 to 7.5, MRPC, to conform to Rules 7.1 to 7.3 of the ABA Model Rules. The motion passed with one against (Mr. Williams).

(ii) Other Proposed Changes.

Mr. Burke gave an overview to the proposed changes to Rule 20, RLPR, and Rule 1.15(o), MRPC. Mr. Burke noted that the Rules Committee has recommended the Board request the Court to adopt these amendments. Ms. Wolpert asked if the Rules Committee's recommendation was unanimous, and Mr. Cullen stated in the affirmative. Mr. Cullen also stated that regarding the particular amendment regarding experts, as a Panel Chair Mr. Cullen has allowed expert testimony so the Director's Office ought to be able to communicate with experts to bring the rule in line with current practice.

A motion was made that the Board petition the Supreme Court to approve all of the proposed amendments to Rule 20, RLPR, in Exhibit 5 to the Board materials. The motion was seconded and passed unanimously.

A motion was made that the Board petition the Supreme Court to approve the proposed amendment to Rule 1.15(o), MRPC, in Exhibit 5 to

the Board materials. The motion and was seconded and passed unanimously.

b. Opinions Committee.

Mr. Beckman reported that approximately one year ago, the ABA had issued Formal Opinion 481. This opinion provides that an attorney who is aware of a claim of malpractice or error against the lawyer must tell a current client. LPRB Opinion No. 21 also touched on this topic. The outstanding issue, however, is whether a duty to report should exist toward a former client.

Procedurally, the question was whether to amend LPRB Opinion No. 21, or withdraw existing LPRB Opinion No. 21 and issue a new opinion. The Opinions Committee saw this as an issue of semantics which, if it needs to be resolved, is that the opinion is being withdrawn and a new opinion reissued.

Ms. Wolpert summarized that the Opinions Committee had reviewed ABA Opinion 481 and believes that LPRB Opinion No. 21 should be conformed to ABA Formal Opinion 481. Mr. Beckman summarized this to mean that an attorney must inform a current client of a material error, a term which is defined in ABA Formal Opinion 481.

Ms. Wolpert inquired whether there were any questions on the substance of the proposed change to LPRB Opinion No. 21. There were none.

Ms. Wolpert asked Mr. Beckman why, if an ABA opinion exists on the topic, the Board would want to have a conforming opinion, as well. Mr. Beckman stated that he believed clear guidance was important. The ABA opinion is very thorough. A client needs information to make informed decisions. After consideration, the ABA limited the duty in Formal Opinion 481 to current clients, and the Opinions Committee agrees. Too many open issues remain if the duty is attempted to be extended to former clients, including what if the law changes, the duty to find former clients who are missing, etc.

Ms. Humiston noted that, currently, LPRB Opinion No. 21 is narrower than ABA Formal Opinion 481, which can lead to ambiguity for lawyers researching this issue, and she believes the ABA approach is correct.

Ms. Humiston noted that LPRB Opinion 21 deals with malpractice, but ABA Formal Opinion 481 involves material error, which is a broader standard because it does not take harm into consideration, as a malpractice standard does.

Any material error raises issues under the conflict of interest and duty to communicate rules.

Ms. Wolpert opined about the mental state required to trigger the duty to report. After discussion, Ms. Humiston stated that she believes that language addressing this issue could be included from ABA Formal Opinion 481 into LPRB Opinion No. 21 to give guidance.

Ms. Wolpert noted that the Board does not have a written policy for what process to follow with a recommendation from the Rules or Opinions Committees regarding stakeholder input. Ms. Wolpert was not looking to create a policy at this time, but sought direction on how to proceed. Ms. Wolpert reported that the sense of the Executive Committee was that the proposed opinion is for the Board's information, that appropriate stakeholders should be informed, input should be received, and the Board should vote in the future. Ms. Wolpert requested input on which stakeholders should be notified, and how. Ms. Wolpert identified stakeholders to be identified to include the MSBA, the Federal Bar Association, various sections of the bar, in-house counsel, and the public. She suggested that additionally, the proposed opinion could be the subject of an article by the Director in *Minnesota Lawyer*. Mr. Ivy stated that the proposed opinion should be published on the Office's website, long enough for people to find and comment on it. Mr. Ivy inquired whether the Office has a social media presence. Ms. Humiston noted that this is part of the Office's strategic plan. Mr. Williams suggested that Ms. Humiston could do a *Bench & Bar* article on the topic. Ms. Humiston reported that she has asked staff to poll other jurisdictions for their policies and procedures on this topic, to work toward a draft policy. In the meantime, the Office can post the draft opinion on the website. Ms. Humiston stated that she believed any sort of written policy should establish a minimum baseline for all proposed rule and amendment changes, which could be modified on a case-by-case basis.

Ms. Boerner stated that she believed the Minnesota Association of Criminal Defense Lawyers would appreciate receiving notice and the opportunity to comment on this proposed amendment. The sense of the Board was that this matter will be on the Board's agenda as an action item at its September 2019 meeting.

c. DEC Committee.

Mr. Ivy reminded the Board that the DEC Chairs' symposium will be on May 17, 2019, at the Earle Brown Heritage Center. Mr. Ivy is working diligently

to ensure attendance of each Chair or designee. Mr. Ivy invited Board Members to attend, stating that their presence will be beneficial to the symposium. The agenda is designed to be as substantive and practical as possible.

Ms. Humiston asked Board Members for any suggestions they may have for content for the DEC seminar in September. Ms. Wolpert has requested the opportunity to present on the topic of the critical nature of sleep to well-being. Ms. Humiston also reported that Ms. Wolpert has been appointed to the ABA National Task Force on Well-Being, and that the work of this task force may be a topic at the DEC seminar.

6. **OTHER BUSINESS.**

a. **BLE Ad Hoc Committee.**

Ms. Wolpert reported that the Supreme Court recently denied an MSBA petition to allow the bar examination to be taken early by final year law students and directed the Board of Law Examiners to establish a committee to study the issue further. Ms. Wolpert and Mr. Ascherman are members of the committee. Ms. Wolpert asked for any comments on the topic, about which she and Mr. Ascherman are passionate.

b. **Ad Hoc "Success" Committee.**

Ms. Wolpert reminded the Board of the substantial discussion and inquiry during the January 2019 Board meeting about the Office's targets and that during the closed session, the idea of a success committee was discussed. The purpose of the committee would be to look at what constitutes success for the Office, the Office's challenges to meeting its targets, what can be managed with existing resources, what if any rule changes may be required, and what can the Board do to help the Office be successful. Ms. Wolpert reported that the Success Committee has had a great set of meetings, as the members of the Success Committee are people who know how to manage organizations. During the first meeting, the Success Committee explored issues of identifying needed information, how cases are processed, identifying bottlenecks, and identifying information the Office collects. The Success Committee then met with Ms. Humiston, Chris Wengronowitz and Cindy Peerman of the Office to understand the data the Office collects and further study the process of cases through the system.

The Success Committee is in the process of obtaining information to make the case for Ms. Humiston's request for additional resources for the Office and to get ideas for Ms. Humiston to improve the Office's performance. Ms. Wolpert hopes the Success Committee will be able to make a report to the Board in September of the results of its time-intensive process.

Ms. Humiston noted that the Supreme Court has created a committee to study limited licensed legal technicians. These are non-lawyers who would be licensed to provide certain limited legal services to help with access to justice. Chief Justice Gildea has asked Ms. Humiston and Emily Eschweiler of the Board of Law Examiners to provide support to the committee from a regulatory perspective. Justice Thissen is the Co-Chair of the committee. Ms. Humiston will keep the Board informed.

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

BOARD MEMBERS REVIEWING COMPLAINANT APPEALS

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

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

The reviewing Board members appointed for the period April 22, 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

TOMMY KRAUSE

MARK LANTERMAN

KYLE LOVEN

SUSAN RHODE

SUSAN STAHL SLIETER

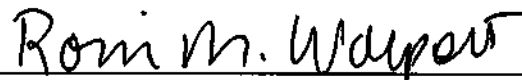
GAIL STREMEL

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 April 22, 2019.

Handwritten signature of Robin M. Wolpert in black ink, written over a horizontal line.

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. 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)

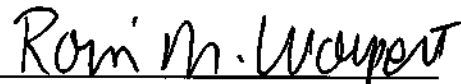
Panel No. 3.

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

Panel No. 6.

- * Peter Ivy
- ** Virginia Klevorn (p)
- Tommy A. Krause (p)

Effective April 22, 2019.



Robin M. Wolpert, Chair
Lawyers Professional
Responsibility Board

* Chair

** Vice Chair

(p) Public member

Attachment 3

STATE OF MINNESOTA
IN SUPREME COURT
ADM10-8005

FILED

May 3, 2019

**OFFICE OF
APPELLATE COURTS**

**ORDER REGARDING PROPOSED AMENDMENTS
TO THE MINNESOTA RULES OF PROFESSIONAL CONDUCT**

The Minnesota State Bar Association (MSBA) filed a petition proposing amendments to Rules 1.6 and 5.5 of the Minnesota Rules of Professional Conduct and the comments to those rules. We opened a public comment period and held a public hearing on the proposed amendments on January 15, 2019.

After thorough consideration of the proposed amendments and the public comments, and for the reasons explained below, we grant the petition in part and deny the petition in part. Specifically, we agree that limited amendments to Rule 5.5 are appropriate to ensure that Minnesota lawyers are not disadvantaged in the practice of law; we therefore grant the petition to the extent that it requests amendments to certain provisions of that rule. We also make additional amendments to Rule 5.5 that were not proposed in the MSBA's petition. We deny the petition with respect to the proposed amendments to Rule 1.6, and with respect to any other proposed amendments to Rule 5.5.

Because we have adopted only some of the proposed changes and made other amendments to Rule 5.5 that were not reflected in the petition, the MSBA's proposed amendments to the comments to the rules do not reflect the changes to the rules made in this order. Those proposed comments are therefore not part of this order. If the MSBA or the Lawyers Professional Responsibility Board believe that the comments to Rule 5.5

should be amended in light of the amendments we have adopted, they may jointly submit such proposed comments on or before June 14, 2019. As with other rule amendments, comments are included with the rules for convenience and will not reflect court approval or adoption.

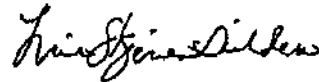
IT IS HEREBY ORDERED THAT:

1. The petition of the Minnesota State Bar Association to amend Rules 1.6 and 5.5 of the Minnesota Rules of Professional Conduct is granted in part and denied in part. The rules are amended effective as of July 1, 2019.

2. By June 14, 2019, the Minnesota State Bar Association and the Lawyers Professional Responsibility Board may jointly file with the Clerk of the Appellate Courts proposed comments to the rules as amended by this order.

Dated: May 3, 2019

BY THE COURT:



Lorie S. Gildea
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8005

MEMORANDUM

PER CURIAM.

The Minnesota State Bar Association (MSBA) filed a petition proposing amendments to Rules 1.6(b) and 5.5 of the Minnesota Rules of Professional Conduct. The MSBA's petition asks that we amend Rule 1.6(b) to clarify when lawyers may respond to public accusations of alleged wrongdoing made by a client or former client by revealing confidential client information. With respect to Rule 5.5, the MSBA's petition asks us to expand the rule to better reflect the practice areas that are "reasonably related" to a lawyer's field of practice and the current realities of the interstate practice of law.

We opened a public comment period on the MSBA's proposed amendments. Several comments were received, and representatives of the MSBA, the Office of Lawyers Professional Responsibility, and the Lawyers Professional Responsibility Board spoke at the public hearing on the MSBA's petition. After careful consideration of the proposed amendments and the public comments, we decline to make any amendments to Rule 1.6 of the Minnesota Rules of Professional Conduct. With respect to Rule 5.5, we adopt some, though not all, of the proposed amendments, and adopt additional amendments not proposed in the MSBA's petition. We take these steps for the following reasons.

First, Rule 1.6 prohibits a lawyer from "knowingly reveal[ing] information relating to the representation of a client" other than in the circumstances defined in the Rule. Minn.

R. Prof. Conduct 1.6(a). Rule 1.6(b) identifies those circumstances. As relevant here, the rule permits a lawyer to disclose information relating to the client “to establish [the lawyer’s] claim or defense . . . in an actual or potential controversy between the lawyer and the client,” in a “civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved,” or “to respond in any proceeding to allegations by the client concerning the lawyer’s representation of the client.” Minn. R. Prof. Conduct 1.6(b)(8). The MSBA’s proposed amendment would expand these circumstances by authorizing a lawyer to disclose confidential client information in response to a client’s specific, serious allegation of the lawyer’s misconduct made *outside* of a legal proceeding. The proposed amendment, the MSBA explains, will clarify existing ambiguity in the rule regarding when an “actual or potential controversy” between the lawyer and a client might arise that would allow the lawyer to disclose confidential client information. The MSBA asserts that these changes are needed because of the prevalence of online rating services for lawyers and social media comments by former clients.

The Lawyers Professional Responsibility Board (LPRB)¹ agrees that eliminating the phrase “actual or potential controversy” would clarify that the fundamental principle of confidentiality in the lawyer-client relationship limits authorized disclosures to two possibilities: actual or potential litigation, and disciplinary proceedings. Apart from this clarification opportunity, however, the LPRB opposes the proposed amendment, asserting that the disclosure that would be permitted is overly broad and unnecessary.

¹ The LPRB’s comments were submitted jointly with the Director of the Office of Lawyers Professional Responsibility.

We recognize that a “controversy” could be read broadly to encompass any sort of dispute. But, recognizing that confidentiality is a fundamental tenet of the lawyer-client relationship, we have recognized that the disclosure of client confidences is appropriate in only “narrow circumstances.” *See, e.g., Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 232–33 (Minn. 2010) (Magnuson, C.J., concurring) (describing the “relationship of trust and confidence” between a lawyer and client). As it stands now, Rule 1.6(b) authorizes a lawyer’s disclosure of client confidences in the context of certain controversies or proceedings. We are sympathetic to the possibility that underlies this proposed amendment: a lawyer may need to defend the lawyer’s professional reputation from false accusations, made on social media, of serious misconduct. But based on the information available to us, we do not see a need at this time to expand Rule 1.6(b)(8), at least in the form of the amendments the MSBA proposes.

The MSBA’s petition does not establish that additional clarity in the rule is needed because lawyers are routinely, or wrongly, disclosing confidential client information in response to a client’s public comments about the lawyer; or that lawyers are unable to fully or fairly respond to a client’s public comments because the current language of the rule unduly constrains those responses. Further, the MSBA acknowledges that, even if its proposed amendments were adopted, lawyers would not be authorized to disclose confidential client information in all circumstances as a response to a client’s public comments about the lawyer. Finally, the proposed amendment would introduce an additional exception to the otherwise general rule of client confidentiality, which could have unforeseen impacts on the relationship between a lawyer and client. Thus, we see no

substantial benefit to the proposed amendments to Rule 1.6(b), and we therefore decline to amend the rule.

Next, we consider the proposed amendments to Rule 5.5 of the Minnesota Rules of Professional Conduct, which addresses the unauthorized practice of law and the authorized, multijurisdictional, practice of law. Rule 5.5 prohibits a lawyer from “practic[ing] law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.” Minn. R. Prof. Conduct 5.5(a). But, a lawyer who is “admitted to practice in Minnesota does not violate this rule” by practicing law in another jurisdiction if a lawyer who is *not* admitted to practice law in Minnesota is allowed to engage in that practice under Rule 5.5(c)–(d). *See* Minn. R. Prof. Conduct 5.5(a). Rule 5.5 also imposes two restrictions on non-Minnesota lawyers²: they cannot open an office or have a “systematic and continuous presence” in Minnesota, except as permitted by “these rules or other law,” and cannot “represent that they are admitted to practice law in this jurisdiction.” Minn. R. Prof. Conduct 5.5(b). Several exceptions, however, allow non-Minnesota lawyers to practice in Minnesota “on a temporary basis,” including in a transactional matter that is “reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice,” Minn. R. Prof. Conduct 5.5(c)(4); or continuously, if federal or Minnesota law authorizes the lawyer to do so. Minn. R. Prof. Conduct 5.5(d).

The MSBA proposes amendments to Rule 5.5(c)(4) to better define the areas of practice that might be “reasonably related” to a lawyer’s existing practice of law and, therefore, fall within the scope of authorized temporary practice in this jurisdiction. In

² A non-Minnesota lawyer is a lawyer admitted to practice in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction.

addition, the MSBA proposes amendments to expand the category of matters under Rule 5.5(d) in which a non-Minnesota lawyer could continuously provide legal services in Minnesota, as well as a new provision, Rule 5.5(e), to “better reflect the realities of modern interstate practice of law.”

The LPRB asserts that Rule 5.5, in its current form, works well because it provides lawyers with the necessary degree of flexibility to engage in the practice of law on behalf of clients. The LPRB agrees, however, that some limited amendments to the rule would be appropriate, to allow lawyers to represent family members in Minnesota, and to allow a non-Minnesota lawyer to provide legal services in Minnesota that exclusively involve the law of another jurisdiction in which the lawyer is licensed to practice law. Apart from these limited changes, the LPRB opposes the MSBA’s proposed amendments.

Turning first to Rule 5.5(d), the MSBA proposes new language that will allow non-Minnesota lawyers to continue to practice the law of the lawyer’s home jurisdiction when the lawyer has physically re-located to Minnesota, if the lawyer discloses to the client “that the lawyer is not licensed to practice in Minnesota.”³ The LPRB supports these amendments because they include a client-disclosure requirement.

The MSBA’s proposed amendments are consistent with the current exemption in Rule 5.5(d), which allows a non-Minnesota lawyer to continuously practice law here in limited areas (i.e., federal law). We agree with the MSBA and the LPRB that this extension of the scope of authorized practice in Minnesota poses little risk to the public because the

³ The MSBA proposed additional amendments to Rule 5.5(b) to reflect these changes in Rule 5.5(d).

lawyer has already demonstrated the competence required to practice the law of the other jurisdiction by reason of that jurisdiction's decision to admit the lawyer to the practice of law.⁴ We also agree that the proposed notice requirement is an important component of this extension, because it ensures that clients are aware of or understand the jurisdictional limits on the lawyer's authority to practice law. Finally, to ensure completeness in the scope of the authorized exemption in Rule 5.5(d), we include "tribal law" within this amendment.

We turn next to the proposed amendment to Rule 5.5(c)(4). This rule authorizes the temporary, as opposed to continuous, practice of law in Minnesota without being admitted to the Minnesota bar if the services provided are "reasonably related to the lawyer's practice" in another jurisdiction. The MSBA proposes an amendment to clarify the meaning of "reasonably related" services, by defining that phrase as including "services which are within the lawyer's regular field or fields of practice in a jurisdiction in which the lawyer is licensed to practice law."

⁴ Arizona, New Hampshire, and North Carolina have adopted similar rules. *See* Ariz. R. Prof. Conduct 5.5(d) (stating that a non-Arizona lawyer "may provide legal services in Arizona that exclusively involve federal law, the law of another jurisdiction, or tribal law"); N.H. R. Prof. Conduct 5.5(d) (stating that a non-New Hampshire lawyer "may provide legal services" in New Hampshire "that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction or . . . relate solely to the law of a jurisdiction in which the lawyer is admitted"); N.C. R. Prof. Conduct 5.5(d)(2) (stating that a non-North Carolina attorney may provide "services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice, or . . . services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction").

The LPRB opposes this proposed amendment, primarily out of concern that the exception would effectively swallow the rule that prohibits the unauthorized practice of law.

The MSBA's proposed amendment responds to the invitation we extended in *In re Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016). There, we held that a Colorado lawyer engaged in the unauthorized practice of law in Minnesota by representing relatives on a matter in Minnesota that we concluded was unrelated to the lawyer's Colorado practice. *Id.* at 668–69. We declined to read the “reasonably related” exception in Rule 5.5(c)(4) in a way that would erase the “general prohibition on the unauthorized practice of law.” *Id.* at 669 n.4. We suggested, however, that different language in the rule may be needed if our reading of that language unnecessarily restricted the ability of lawyers to meet client needs. *Id.* at 666 n.1.

We cannot conclude, however, that a “regular field” of practice is any more specific than determining whether a matter is “reasonably related” to the lawyer's practice. Nothing in the term “field” tells us, or practitioners, whether the lawyer's practice is broad, such as real estate law, or a narrow subset of a broad area of law, such as landlord-tenant disputes or retail-lease negotiations. In other words, we can no better define the “field” than we can the “regular” areas of practice. In this respect, the LPRB's concerns are justified: the proposed amendment could effectively erase the prohibition on the unauthorized practice of law.

On the other hand, we believe that our central concern—public confidence in lawyer competency, *see* Minn. R. Prof. Conduct 5.5 cmt. 2 (noting that limits on a lawyer's authorized practice of law “protect[] the public against rendition of legal services by

unqualified persons”)—can be met with language that clarifies the scope of “reasonably related” legal services through slightly narrower language. *Id.*, cmt. 5 (noting that a lawyer “may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts”). As the comment to Rule 5.5 acknowledges, a number of factors may be relevant to determining whether the offered legal services are “reasonably related” to the lawyer’s practice in a jurisdiction in which the lawyer is admitted. *See id.*, cmt. 14. For purposes of the temporary practice of law in Minnesota, and bearing in mind our concern for competency, we conclude that “reasonably related” legal services encompass “services that are within the lawyer’s recognized expertise in an area of law” that the lawyer has developed through the “regular practice of law.” We therefore adopt this language as the amendment to Rule 5.5(c)(4).

Finally, we consider the MSBA’s proposed amendment to add a new provision, Rule 5.5(e), to authorize the continuous practice of law in Minnesota by a non-Minnesota lawyer acting on behalf of a person with whom the lawyer has “a family, close personal, or prior professional relationship.” The MSBA urges us to adopt this amendment because it will allow family and client relationships, existing or former, to take priority over geographic restrictions on a lawyer’s practice.

The LPRB agrees that lawyers should be allowed to represent family members on a temporary basis, but asserts that the other categories of representation—those with a “close personal” relationship to the lawyer or a “prior professional relationship”—are both broad and ambiguous.

Apart from family relationships, we conclude that the proposed amendment introduces unnecessary confusion in determining the boundaries of the authorized practice of law. At the outset, we note that no other state has adopted a rule that authorizes the continuous practice of law in a jurisdiction based purely on the existence of any relationship between the lawyer and client, and unrelated to the area of practice at issue. Next, the ambiguities in the proposed "relationship" language pose problems. Nothing in the language of the MSBA's proposed amendment tells us (or lawyers) when a "close" relationship arises, how to distinguish between a relationship that is "close" and one that is not, and whether a prior "professional" relationship must have involved an attorney-client relationship or merely any professional relationship.

We also do not see a need for an amendment of this breadth, given that a non-Minnesota lawyer who has a need to practice law in Minnesota has other routes to this authority. For example, the lawyer may practice law in Minnesota temporarily by associating with a Minnesota lawyer. *See* Minn. R. Prof. Conduct 5.5(c)(1). Or, a lawyer could be admitted to the practice in Minnesota without taking a bar exam. *See, e.g.*, Rules 6E, 6J, Rules for Admission to the Bar (allowing a lawyer to be admitted to the Minnesota bar based on a passing score on a Uniform Bar Exam); Rule 7A, Rules for Admission to the Bar (allowing admission to the bar based on years of practice).

Thus, with the exception of an amendment in Rule 5.5(c)(4) to permit the temporary practice of law in Minnesota on behalf of a non-Minnesota lawyer's family members, we decline to adopt this amendment.

AMENDMENTS TO THE MINNESOTA RULES OF PROFESSIONAL CONDUCT

In the following amendments, deletions are indicated by a line drawn through the words and additions by a line drawn under the words.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so, except that a lawyer admitted to practice in Minnesota does not violate this rule by conduct in another jurisdiction that is permitted in Minnesota under Rule 5.5 (c) and (d) for lawyers not admitted to practice in Minnesota.

(b) A lawyer who is not admitted to practice in ~~this jurisdiction~~ Minnesota shall not:

- (1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of Minnesota law; or
- (2) hold out to the public or otherwise represent that the lawyer is admitted to practice Minnesota law ~~in this jurisdiction~~.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction which:

- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
- (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized;
- (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
- (4) are not within paragraphs (c)(2) or (c)(3) and involve the representation of a family member or arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Such reasonably related services include services that are within the lawyer's recognized expertise in an area of law, developed through the regular practice of law in that area in a jurisdiction in which the lawyer is licensed to practice law.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in ~~this jurisdiction~~ Minnesota

that are services that the lawyer is authorized to provide by exclusively involve federal law, tribal law or the other law of another this jurisdiction in which the lawyer is licensed to practice law, provided the lawyer advises the lawyer's client that the lawyer is not licensed to practice in Minnesota.

Attachment 4

Case No. ADM 10-8005

STATE OF MINNESOTA
IN SUPREME COURT

In re the Minnesota Rules of Professional Conduct

**SUBMISSION OF THE MINNESOTA STATE BAR ASSOCIATION
REGARDING COMMENTS TO RULE 5.5 OF THE
MINNESOTA RULES OF PROFESSIONAL CONDUCT**

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

In its Order of May 3, 2019 in this matter, the Court permitted the Minnesota State Bar Association and the Lawyers Professional Responsibility Board to file jointly, on or before June 14, 2019, proposed amendments to the comments to Rule 5.5 of the Minnesota Rules of Professional Conduct as amended by the Order.

Because the Lawyers Professional Responsibility Board meets only quarterly and does not meet prior to June 14, 2019, it cannot timely participate in the preparation or filing of proposed amendments as requested. The Court's invitation to the MSBA was taken up by its Standing Committee on the Rules of Professional Conduct, which prepared and approved the proposed amended comments to Rule 5.5, attached hereto, on June 7, 2019. The Council of the MSBA, acting between meetings of its Assembly, as permitted in its Bylaws, approved the attached proposed comments to Rule 5.5 on June

14, 2019. The MSBA therefore hereby responds to the invitation in the Court's order of May 3, 2019 by recommending to the Court the substitution of the attached proposed comments to Rule 5.5 for the current comments to that Rule.

The MSBA, through its Rules of Professional Conduct Committee has worked with the Director of the Office of Lawyers Professional Responsibility and the Chair of the LPRB in the development of these proposed comments. The Chair of the Lawyers Board has advised that at its meeting on June 21, 2019, she will recommend that the LPRB agree to these proposed comments and report to the Court.

June 14, 2019

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By /s/Paul W. Godfrey
Paul W. Godfrey (Attorney #0158689)
Its President
600 Nicollet Mall #380
Minneapolis, MN 55402
612-333-1183

Minnesota State Bar Association
Standing Committee on the
Rules of Professional Conduct

By /s/Frederick E. Finch
Frederick E. Finch (Attorney #29191)
326 Brimhall Street
St. Paul, MN 55105
612-875-8001

ATTACHMENT

Proposed Amended Comments to Rule 5.5, Minnesota Rules of Professional Conduct

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction. The exception is intended to permit a Minnesota lawyer, without violating this rule, to engage in practice in another jurisdiction as Rule 5.5 (c) and (d) permit a lawyer admitted to practice in another jurisdiction to engage in practice in Minnesota. A lawyer who does so in another jurisdiction in violation of its law or rules may be subject to discipline or other sanctions in that jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts.

Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraph (d), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia, and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection

with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services either involve the representation of a family member or arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise in an area of law, developed through the regular practice of law on behalf of clients in a jurisdiction in which the lawyer is licensed in matters involving a particular body of federal, nationally uniform, foreign, or international law. For purposes of paragraph (c)(4) of this rule, "family member" means

a person related to the lawyer by blood or marriage as parent, child, sibling, spouse, grandparent or grandchild.

[15] Paragraph (d) identifies ~~a-circumstances~~ in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. Except as provided in paragraph (d), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d) recognizes that a lawyer who is not licensed in Minnesota may provide legal services in ~~a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation, or judicial precedent~~ Minnesota if the services exclusively involve federal law, tribal law, or the law of another jurisdiction in which the lawyer is licensed to practice, provided the lawyer specifically advises the client that the lawyer is not licensed to practice law in Minnesota.

[17] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[18] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) ~~or (d)~~ may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, such notice may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[19] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

Attachment 5

DRAFT

FILE NO. ADM10-8005

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition to Amend the
Minnesota Rules of Professional Conduct
and the Rules on Lawyers Professional
Responsibility.

**PETITION OF THE LAWYERS
PROFESSIONAL RESPONSIBILITY
BOARD TO AMEND RULE 1.15,
MINNESOTA RULES OF
PROFESSIONAL CONDUCT, AND
RULE 20, RULES ON LAWYERS
PROFESSIONAL RESPONSIBILITY**

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

Petitioner, Lawyers Professional Responsibility Board (LPRB), respectfully
requests this Court to amend Rule 1.15(o), Minnesota Rules of Professional Conduct
(MRPC), and Rule 20, Rules on Lawyers Professional Responsibility (RLPR), as set forth
in Attachment A.

In support of this petition, the LPRB states the following:

Introduction.

1. Petitioner LPRB is a Board established by this Court to oversee the lawyer discipline system.
2. This Court has the exclusive and inherent power and duty to administer justice and adopt rules of practice and procedure before the courts of this state and to establish standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05.

3. The Court has adopted the MRPC to establish standards of conduct for lawyers licensed to practice law in the State of Minnesota. This Court has adopted the RLPR to govern the procedures for enforcing and administering the MRPC. This Court has amended the MRPC and the RLPR from time-to-time for good cause shown.

4. At its April 26, 2019, meeting, the LPRB voted to approve and recommend to this Court the proposed amendments to Rule 1.15(o), MRPC, and Rule 20, RLPR, as described below.

Summary of Proposed Amendments.

A. Rule 1.15(o), MRPC.

This proposal comes from 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 the legal services grant manager of LSAC, LSAC allows banks to remit annually if they have a very small number of accounts and remit small amounts 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. LSAC requests a rule change that would allow the program to approve an alternate remittance schedule.

B. Rule 20, RLPR.

There are five proposed changes to this rule. The focus of Rule 20 is confidentiality of Office of Lawyers Professional Responsibility and LPRB records.

1. 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's Office 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's Office will receive a request from a third party about this information. There does not appear to be a need to keep such information confidential.

2. Add a new Rule 20(b)(8), RLPR. This will clarify the ability of the Office of Lawyers Professional Responsibility (Director's Office) to communicate with the Court-approved lawyer assistance program, which currently is Lawyers Concerned for Lawyers (LCL). The reason for this change is that, on occasion, the Director's Office believes it is important to communicate with LCL regarding a lawyer who may need assistance. Presently, the RLPR do not allow such communication in connection with private matters pending before the Director's Office. The proposed change is to clarify that the Director's Office 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.

3. Add a new Rule 20(b)(13), RLPR. This will codify the ability of the Director's Office during an investigation or LPRB Panel proceeding to provide information as necessary to persons who can assist in an 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 a consulting or testifying expert to further the Director's understanding of a matter. Presently, the Director's Office does make such disclosures as appropriate.

4. 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 Director's 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.

5. Add a new Rule 20(g) and (h), RLPR. This will exempt certain portions of the Director's 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 similar 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 proposed change will also allow the Director's Office to more easily electronically file confidential documents as such without the need to obtain a protective order or file a separate motion to seal. Finally, a proposed new Rule 20(h), RLPR, has been added to confirm the confidentiality of all other files not specifically referenced.

CONCLUSION

Based upon the foregoing, petitioner Lawyers Professional Responsibility Board respectfully recommends and requests this Honorable Court to amend Rule 1.15(o), MRPC, and Rule 20, RLPR, as set forth in Attachment A.

Dated: _____, 2019. Respectfully submitted,

LAWYERS PROFESSIONAL
RESPONSIBILITY BOARD

By _____

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ATTACHMENT A

RULE 1.15: SAFEKEEPING PROPERTY

(o) Definitions.

"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;

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.

* * *

(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.

(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.

Attachment 6

2019 DEC Chairs Symposium Survey Results

Q1

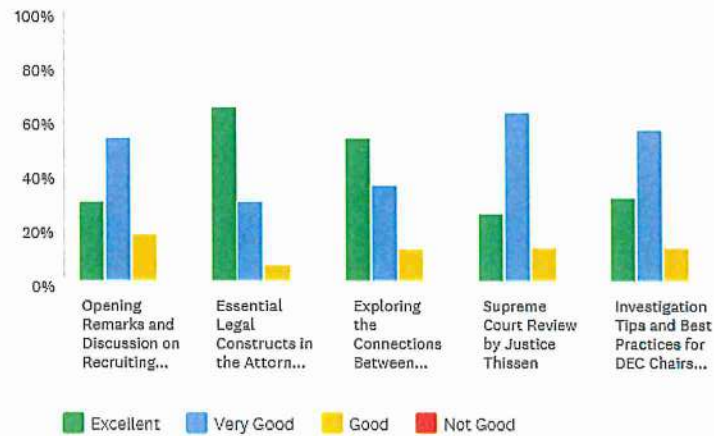


Customize

Save as ▼

Please rate the following presentations:

Answered: 17 Skipped: 0



Q2

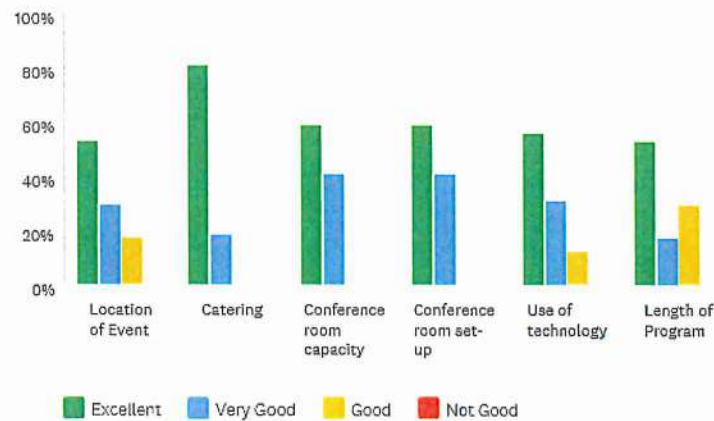


Customize

Save as ▼

Please rate your satisfaction level with:

Answered: 17 Skipped: 0



2019 DEC Chairs Symposium Survey Results

Q3

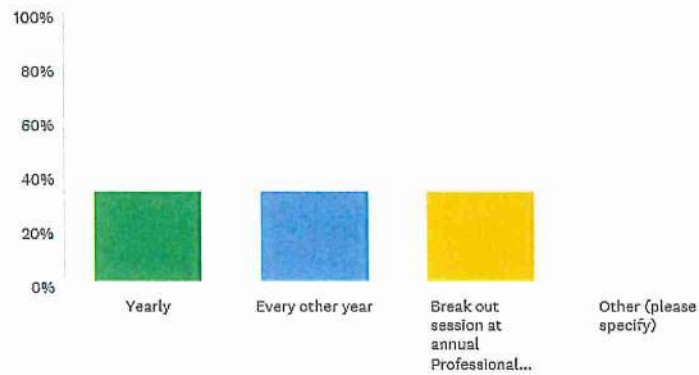


Customize

Save as

Should we hold this event:

Answered: 15 Skipped: 2



Q4



Save as

What topics would you suggest for the next symposium?

Answered: 5 Skipped: 12

RESPONSES (5) WORD CLOUD TAGS (0)

Sentiments: OFF

Search responses

Showing 5 responses

- More discussion about fact patterns and open discussion about how each DEC addresses them.

5/24/2019 1:17 PM [View respondent's answers](#) Add tags
- A Justice always presenting.

5/22/2019 6:59 PM [View respondent's answers](#) Add tags
- Recruiting, training new members (beyond assigning a mentor), Supreme Court review



5/22/2019 3:05 PM [View respondent's answers](#) Add tags
- maybe dealing with difficult investigators

5/22/2019 2:02 PM [View respondent's answers](#) Add tags
- Addressing investigation of ethical violation without an in depth knowledge of that area of practice or knowledge of whether this conduct is appropriate under the circumstances

5/22/2019 1:56 PM [View respondent's answers](#) Add tags

2019 DEC Chairs Symposium Survey Results


Q5

 Save as 



Please let us know how we can improve the next year's DEC Symposium

Answered: 6 Skipped: 11

RESPONSES (6) WORD CLOUD TAGS (0)

 Sentiments: OFF

 Filter by tags

Search responses  

Showing 6 responses

- Combine with annual seminar in the fall.

5/23/2019 8:04 AM [View respondent's answers](#) [Add tags](#)
- Push for a rep from each DEC more. Have someone come, even if not chair.

5/22/2019 6:59 PM [View respondent's answers](#) [Add tags](#)
- 1/2 day plus lunch

5/22/2019 3:05 PM [View respondent's answers](#) [Add tags](#)
- Despite active solicitation, many DEC chairs did not attend, nor did they send a designee. That is disappointing as so much advance notice was given. It makes some sense to have this as a break out event at the annual PR seminar. And with the money saved, perhaps the seminar could be followed with dinner, recognition of DEC volunteers and general social networking.

5/22/2019 2:28 PM [View respondent's answers](#) [Add tags](#)
- It was awesome and so helpful

5/22/2019 2:02 PM [View respondent's answers](#) [Add tags](#)
- Better dessert - snacks on table

5/22/2019 1:56 PM [View respondent's answers](#) [Add tags](#)

2019 DEC Chairs Symposium Survey Results


Q6



 Save as ▼

Other comments about the event:

Answered: 3 Skipped: 14

RESPONSES (3) WORD CLOUD TAGS (0)

 Sentiments: OFF

Search responses  

Showing 3 responses


- The training is valuable, I believe resources could best be allocated the event were held every other year or combined with the Professional Responsibility Seminar

5/24/2019 9:26 AM [View respondent's answers](#) [Add tags](#)
- Staff was very helpful

5/22/2019 6:59 PM [View respondent's answers](#) [Add tags](#)
- yearly, but attendance more limited to DEC Chairs, the Board Chair and DEC Committee Chair, the Director, and the Office staff presenting. This would facilitate more of a dialogue, especially between and among the DEC Chairs

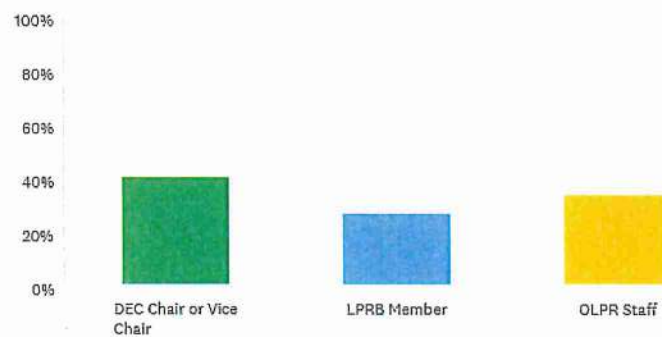
5/22/2019 3:05 PM [View respondent's answers](#) [Add tags](#)

Q7

 Customize [Save as ▼](#)

Please select the category that describes you:

Answered: 15 Skipped: 2



Attachment 7

OLPR Dashboard for Court and Chair

| | Month Ending May 2019 | Change From Previous Month | Month Ending May 2018 | |
|---|--------------------------|-------------------------------|--------------------------|--|
| Open Matters | 505 | -4/509 | 519 | |
| New Files YTD | 419 | +83/336 | 468 | |
| Closed Files YTD | 422 | +87/335 | 466 | |
| Closed C012s YTD | 114 | +20/94 | 153 | |
| Summary Dismissals YTD | 184 | +36/148 | 236 | |
| Files Opened During May 2019 | 83 | -15/98 | 100 | |
| Files Closed During May 2019 | 87 | -8/95 | 95 | |
| Public Matters Pending (excluding Resignations) | 41 | 0/41 | 24 | |
| Panel Matters Pending | 16 | +3/13 | 7 | |
| DEC Matters Pending | 85 | -6/91 | 87 | |
| Files On Hold | 12 | -8/20 | 21 | |
| Advisory Opinion Requests YTD | 858 | +166/692 | 857 | |
| CLE Presentations YTD | 32 | +9/23 | 49 | |
| | | | | |
| Total Files Over 1 Year Old | 136 | -5/141 | 144 | |
| Matters Pending Over 1 Year Old w/o Charges | 47 | +2/45 | 73 | |
| | | | | |

| | 2019 YTD | 2018 YTD |
|-------------------------------|-----------|-----------|
| Lawyers Disbarred | 3 | 5 |
| Lawyers Suspended | 11 | 8 |
| Lawyers Reprimand & Probation | 2 | 1 |
| Lawyers Reprimand | 1 | 2 |
| TOTAL PUBLIC | 17 | 16 |
| Private Probation Files | 5 | 8 |
| Admonition Files | 49 | 38 |
| TOTAL PRIVATE | 54 | 46 |

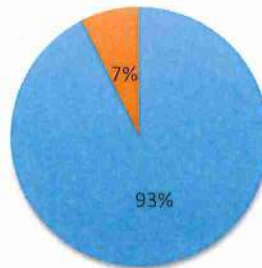
All Files Pending as of Month Ending May 2019

| Year/Month | OLPR | AD | ADAP | PROB | PAN | HOLD | SUP | S12C | SCUA | REIN | TRUS | Total |
|--------------|-----------|----------|----------|----------|----------|----------|-----------|----------|-----------|----------|----------|------------|
| 2015-03 | | | | | | 1 | | | | | | 1 |
| 2015-05 | | | | | | | 2 | | | | | 2 |
| 2015-11 | 2 | | | | | | | | | | | 2 |
| 2015-12 | 1 | | | | | | | | 1 | | | 2 |
| 2016-02 | | | | | | | 2 | | | | | 2 |
| 2016-03 | | | | | | | | | 1 | | | 1 |
| 2016-05 | 1 | | | | | | | | | | | 1 |
| 2016-06 | 1 | | | | | 1 | | | 1 | | | 3 |
| 2016-07 | 1 | | | | | | 1 | | | | | 2 |
| 2016-08 | | | | | | 3 | 1 | | 2 | | | 6 |
| 2016-09 | | | | | | | 1 | | 2 | | | 3 |
| 2016-10 | 1 | | | | | | 1 | | 2 | | | 4 |
| 2016-12 | 1 | | | | | | 1 | | 1 | | | 3 |
| 2017-01 | | | | | | | 1 | | | | | 1 |
| 2017-02 | | | | | | | 2 | | 6 | | | 8 |
| 2017-03 | 2 | | | | | 1 | 1 | | 1 | | | 5 |
| 2017-04 | 1 | | | | | | 1 | | | | | 2 |
| 2017-05 | | | | | | | | | 1 | | 1 | 2 |
| 2017-06 | | | | | | | 2 | | | | | 2 |
| 2017-07 | 1 | | | | 1 | | 2 | | | | 1 | 5 |
| 2017-08 | 1 | | | 1 | | | 4 | | 2 | | | 8 |
| 2017-09 | 3 | | | | 1 | | 5 | | | | | 9 |
| 2017-10 | 3 | 1 | | | 1 | | 2 | | 1 | | | 8 |
| 2017-11 | 2 | | | | | 1 | | | 1 | | | 4 |
| 2017-12 | 5 | | | | | | 2 | | | | | 7 |
| 2018-01 | 2 | | | | 1 | | 1 | | | | | 4 |
| 2018-02 | 2 | | | | | 1 | 4 | | | | | 7 |
| 2018-03 | 4 | | | | | 1 | 1 | 1 | | 1 | | 8 |
| 2018-04 | 7 | | | | | | 7 | | | | | 14 |
| 2018-05 | 6 | | 1 | | | | 2 | | | | 1 | 10 |
| Total | 47 | 1 | 1 | 1 | 4 | 9 | 46 | 1 | 22 | 1 | 3 | 136 |

| | Total | Sup. Ct. |
|--------------------------------------|-------|----------|
| Sub-total of Cases Over One Year Old | 114 | 51 |
| Total Cases Under Advisement | 22 | 22 |
| Total Cases Over One Year Old | 136 | 73 |

| | |
|----------|-----|
| Active | 126 |
| Inactive | 10 |

Active v. Inactive



■ Active ■ Inactive

All Files Pending as of Month Ending May 2019

| Year/Month | SD | DEC | REV | OLPR | AD | ADAP | PROB | PAN | HOLD | SUP | S12C | SCUA | REIN | RESG | TRUS | Total |
|--------------|-----------|-----------|-----------|------------|----------|----------|----------|----------|-----------|-----------|----------|-----------|-----------|----------|----------|------------|
| 2015-03 | | | | | | | | | 1 | | | | | | | 1 |
| 2015-05 | | | | | | | | | | 2 | | | | | | 2 |
| 2015-11 | | | | 2 | | | | | | | | | | | | 2 |
| 2015-12 | | | | 1 | | | | | | | | 1 | | | | 2 |
| 2016-02 | | | | | | | | | | 2 | | | | | | 2 |
| 2016-03 | | | | | | | | | | | | 1 | | | | 1 |
| 2016-05 | | | | 1 | | | | | | | | | | | | 1 |
| 2016-06 | | | | 1 | | | | | 1 | | | 1 | | | | 3 |
| 2016-07 | | | | 1 | | | | | | 1 | | | | | | 2 |
| 2016-08 | | | | | | | | | 3 | 1 | | 2 | | | | 6 |
| 2016-09 | | | | | | | | | | 1 | | 2 | | | | 3 |
| 2016-10 | | | | 1 | | | | | | 1 | | 2 | | | | 4 |
| 2016-12 | | | | 1 | | | | | | 1 | | 1 | | | | 3 |
| 2017-01 | | | | | | | | | | 1 | | | | | | 1 |
| 2017-02 | | | | | | | | | | 2 | | 6 | | | | 8 |
| 2017-03 | | | | 2 | | | | | 1 | 1 | | 1 | | | | 5 |
| 2017-04 | | | | 1 | | | | | | 1 | | | | | | 2 |
| 2017-05 | | | | | | | | | | | | 1 | | | 1 | 2 |
| 2017-06 | | | | | | | | | | 2 | | | | | | 2 |
| 2017-07 | | | | 1 | | | | 1 | | 2 | | | | | 1 | 5 |
| 2017-08 | | | | 1 | | | 1 | | | 4 | | 2 | | | | 8 |
| 2017-09 | | | | 3 | | | | 1 | | 5 | | | | | | 9 |
| 2017-10 | | | | 3 | 1 | | | 1 | | 2 | | 1 | | | | 8 |
| 2017-11 | | | | 2 | | | | | 1 | | | 1 | | | | 4 |
| 2017-12 | | | | 5 | | | | | | 2 | | | | | | 7 |
| 2018-01 | | | | 2 | | | | 1 | | 1 | | | | | | 4 |
| 2018-02 | | | | 2 | | | | | 1 | 4 | | | | | | 7 |
| 2018-03 | | | | 4 | | | | | 1 | 1 | 1 | | 1 | | | 8 |
| 2018-04 | | | | 7 | | | | | | 7 | | | | | | 14 |
| 2018-05 | | | | 6 | | 1 | | | | 2 | | | | | 1 | 10 |
| 2018-06 | | | | 9 | | | | | 1 | 2 | 1 | | | | | 13 |
| 2018-07 | | | | 11 | | | | | | | | 1 | 1 | | | 13 |
| 2018-08 | | | | 25 | 1 | | | 2 | 1 | 5 | | 1 | 1 | | | 36 |
| 2018-09 | | | | 6 | | | | | | 1 | | 1 | | | | 8 |
| 2018-10 | | 1 | 1 | 31 | | | | | | 2 | | | 2 | | | 37 |
| 2018-11 | | | 4 | 15 | | | | | | 2 | | | 1 | | | 22 |
| 2018-12 | | 3 | 3 | 19 | | | | | 1 | 1 | | | | | 1 | 28 |
| 2019-01 | | 12 | 3 | 19 | 1 | | | | | | | | | | | 35 |
| 2019-02 | | 12 | 1 | 28 | | | | | | | | | 1 | | | 42 |
| 2019-03 | | 15 | 2 | 16 | | | | 1 | | | | | 2 | 1 | | 37 |
| 2019-04 | | 25 | | 17 | | | | | | | | | | | | 42 |
| 2019-05 | 16 | 17 | | 15 | | | | | | | | | 1 | 6 | 1 | 56 |
| Total | 16 | 85 | 14 | 258 | 3 | 1 | 1 | 7 | 12 | 59 | 2 | 25 | 10 | 7 | 5 | 505 |

ALL FILES PENDING & FILES OVER 1 YR. OLD

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

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 486

May 9, 2019

Obligations of Prosecutors in Negotiating Plea Bargains for Misdemeanor Offenses

Model Rules 1.1, 1.3, 3.8(a), (b), and (c), 4.1, 4.3, 5.1, 5.3, and 8.4(a), (c) and (d) impose obligations on prosecutors when entering into plea bargains with persons accused of misdemeanors. These obligations include the duty to ensure that each charge incident to a plea has an adequate foundation in fact and law, to ensure that the accused is informed of the right to counsel and the procedure for securing counsel, to avoid plea negotiations that jeopardize the accused's ability to secure counsel, and, irrespective of whether an unrepresented accused has invoked the right to counsel, to avoid offering pleas on terms that knowingly misrepresent the consequences of acceptance or otherwise pressure or improperly induce acceptance on the part of the accused.¹

I. Introduction

This opinion addresses a prosecutor's obligations under Model Rules 1.1, 1.3, 3.8(a), (b), and (c), 4.1, 4.3, 5.1, 5.3, and 8.4(a), (c), and (d) when negotiating with an unrepresented individual who is or may be entitled to counsel at the time the prosecutor initiates the plea bargaining process for a misdemeanor charge. The opinion also addresses a prosecutor's duties when plea bargaining with an unrepresented accused on a misdemeanor charge irrespective of whether the accused has invoked the right to counsel. These ethical obligations exist independently of any constitutional or statutory obligations prosecutors may have to an accused.

Part I emphasizes the unique role that prosecutors play in the administration of justice and highlights (i) the expansion of misdemeanor criminal enforcement and (ii) the displacement of trial by plea bargaining. Part II identifies evidence of practices that have developed in some jurisdictions to manage misdemeanor pleas. Part III turns to Model Rule 3.8, addressing first the need for guidance and then examining the text and scope of Rules 3.8(a)-(c) and related rules as they apply to misdemeanor plea bargaining. Part IV identifies the specific obligations of a prosecutor under Rules 3.8(b) and (c) with respect to the accused's right to counsel. Part V interprets Rules 4.1, 4.3, and 8.4 as they apply to negotiation and entry of plea bargains.

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

A. The Special Role of Prosecutors

The professional integrity of prosecutors is essential to the administration of criminal justice.² Their special role is reflected in a distinctive standard of professional responsibility. Under the Model Rules, a prosecutor “has the responsibility of a minister of justice and not simply that of an advocate.”³ Canon 5 of the 1908 American Bar Association Canons of Professional Ethics stated that “[t]he primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.”⁴ The ABA Model Code of Professional Responsibility also emphasized a categorical difference between the responsibility of a public prosecutor and “that of the usual advocate.”⁵ A prosecutor’s duty

is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he may also make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.⁶

As this Committee has emphasized in prior opinions, there are “many excellent prosecutors who scrupulously follow or exceed the mandates of the Rules of Professional Conduct.”⁷ This opinion focuses on the distinctive challenges and obligations of prosecutors when negotiating pleas in misdemeanor cases.

² See JOHN JAY DOUGLASS, NATIONAL COLLEGE OF DISTRICT ATTORNEYS, *ETHICAL ISSUES IN PROSECUTION* 36 (1988) (“The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor.”) (quoting former prosecutor Carol Corrigan, Commentary, *Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 537 (1986)).

³ MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [1]. See also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 454 at 3 n.10 (2009) (a prosecutor’s interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done”) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 467 at 1 (2014) (same).

⁴ Specific references to the American prosecutor as a minister of justice date to the nineteenth century. See, e.g., *People v. Davis*, 18 N.W. 362, 363 (Mich. 1884) (the prosecutor is a “sworn minister of justice, whose duty it was, while endeavoring to bring the guilty to punishment, to take care that the innocent should be protected”); *Hurd v. People*, 25 Mich. 405, 416 (1872) (“The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success.”), *superseded on other grounds by statute*, 1986 Mich. Pub. Acts 114, as stated in *People v. Koonce*, 648 N.W.2d 153, 155-56 (Mich. 2002).

⁵ MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1980).

⁶ *Id.*

⁷ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 14-467 at 6 (2014) (on the supervisory and managerial responsibilities of prosecutors); *id.* at 1 (“We believe that most prosecutors know and follow the rules of professional conduct. Indeed, the laudable efforts of such prosecutors have provided good examples” for this and other opinions of the Committee.).

B. Background on Misdemeanor Enforcement

Misdemeanors make up approximately 80 percent of state criminal dockets.⁸ The number of misdemeanor prosecutions is estimated to have doubled since 1972.⁹ The expansion has had a “concentrated impact on communities of color.”¹⁰ Most misdemeanor arrests result in charges – declination rates are low in many states, sometimes as low as 3 or 4 percent.¹¹ And “the vast majority of defendants plead guilty” at their initial appearance.¹² The result is a significant increase in the pre-trial dockets of state and local courts, and daunting legal and administrative burdens for both judges and prosecutors.¹³ Collateral consequences for

⁸ See Ben Kempinen, *The Ethics of Prosecutor Contact with the Unrepresented Defendant*, 19 GEO. J. LEGAL ETHICS 1147, 1148 n.3 (2006) (citing Wisconsin data showing that in 2002, 79 percent of criminal cases filed in the state were for “criminal traffic or misdemeanor” offenses); ROBERT C. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010) (listing data from study of 11 state dockets). A more recent study estimates that “there are three times as many misdemeanor cases as felony cases filed nationally each year.” Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 764 (2017).

Although there is variation in the exact classification of low-level offenses across state and federal jurisdictions, in this opinion we use the term “misdemeanor” in its generic sense to refer to any criminal offense less serious than a felony according to the law of the relevant jurisdiction.

⁹ See ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 11 (2009) (“Most people who go to court in the United States go to misdemeanor courts,” describing growth of misdemeanor prosecutions since 1972); Alexandra Natapoff, *Misdemeanors*, in 1 REFORMING CRIMINAL JUSTICE 71 (Erik Luna, ed. 2017) (“Most criminal convictions in this country are misdemeanors, and most Americans experience criminal justice through the petty offense process.”). *But see* Stevenson & Mayson, *supra* note 8, at 747, 764 (estimating a seventeen percent decline in state misdemeanor filings over the last decade while reporting that the total number of misdemeanor cases remains substantial: 13.2 million in 2016).

¹⁰ See ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 51 & fig.1.10 (2018) (an empirical study of New York City courts, describing data showing that “the dramatic expansion of misdemeanor arrests has been hyperconcentrated on ... black, and ... Latino individuals”); Stevenson & Mayson, *supra* note 8, at 737 (finding a “profound ... remarkably constant” racial disparity in the misdemeanor arrest rate over the last thirty-seven years); CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 55-56 (2016) (reporting data showing that while African Americans make up 63 percent of the population of Baltimore, for “misdemeanor street offense[s], unconnected to a more serious charge” between 2010 and 2015, they comprised 91 percent of trespassing charges, 91 percent of failure to obey charges, 88 percent of hindering charges, 84 percent of disorderly conduct charges, and 90 percent of people charged with resisting arrest where no other charge supported the resisting charge); Sean Webby, *Policing in San Jose: Strict Enforcement of “Conduct Crimes,” Are Latinos Targeted?*, THE MERCURY NEWS (Apr. 4, 2009), <https://www.mercurynews.com/2009/04/04/policing-in-san-jose-strict-enforcement-of-conduct-crimes-are-latinos-targeted/> (reporting that 70 percent of arrests for disturbing the peace, 57 percent of charges for resisting arrest, and 57 percent of arrests for public drunkenness were of Latinos, even though this group comprises less than a third of San Jose residents).

¹¹ See Natapoff, *supra* note 9, at 78.

¹² *Id.*; see also BORUCHOWITZ ET AL., *supra* note 9, at 8 (“In New York City in 2000, almost 70 percent of misdemeanor cases were disposed of at the first appearance – most through a guilty plea.”); *Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) [hereinafter *Hearing*] (statement of Prof. Erica J. Hashimoto at 3), <https://www.judiciary.senate.gov/imo/media/doc/05-13-15%20Hashimoto%20Testimony.pdf>.

¹³ Hearing times in some jurisdictions run as short as three minutes. See ALISA SMITH ET AL., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, RUSH TO JUDGMENT: HOW SOUTH CAROLINA’S SUMMARY COURTS FAIL TO PROTECT CONSTITUTIONAL RIGHTS 19 (2017) (reporting that in South Carolina courts the hearings for misdemeanors and other minor crimes average 3.29 minutes and just two minutes long if a few outlier cases are excluded); ALISA

misdemeanor convictions have also expanded.¹⁴ A misdemeanor conviction can lead to denial of employment, expulsion from school, deportation, denial of a professional license, and loss of eligibility for a wide range of public services including food assistance, public housing, health care, and federal student loans.¹⁵

To realize the legitimate law enforcement objectives of plea bargaining, a practice that has become “an essential component of the administration of justice,”¹⁶ there must be “fairness in securing agreement between an accused and a prosecutor.”¹⁷ This is particularly so in the misdemeanor setting where, as the Supreme Court has warned, “the volume of . . . cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.”¹⁸ Observance of the special obligations of prosecutors under the Rules of Professional Conduct is critical to achieving fair guilty pleas.

II. Evidence of Plea Bargaining Practices in Misdemeanor Cases

Notwithstanding the commitment of most prosecutors to high professional standards, there is evidence that in misdemeanor cases where the accused is or may be legally entitled to counsel, methods of negotiating plea bargains have been used in some jurisdictions that are inconsistent with the duties set forth in the Rules of Professional Conduct. As the report of a comprehensive five-year study chaired by a distinguished group of former prosecutors and judges summarized, “[w]hether because of a desire to move cases through the court system, a desire to keep indigent defense costs down, or ignorance, pervasive and serious problems exist in misdemeanor courts across the country because counsel is oftentimes either not provided, or provided late, to those who are lawfully eligible to be represented.”¹⁹ Methods of negotiating pleas documented in this report and other studies include:

SMITH & SEAN MADDAN, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS 14-15 (2011); BORUCHOWITZ ET AL., *supra* note 9, at 32.

¹⁴ See *National Inventory of the Collateral Consequences of Conviction*, JUSTICE CENTER, COUNCIL OF STATE GOVERNMENTS; JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 225-300 (2015); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 489-94 (2010); BORUCHOWITZ ET AL., *supra* note 9, at 12-13 (listing collateral consequences); *People v. Suazo*, 118 N.E.3d 168, 178 (N.Y. 2018) (requiring a jury trial where a misdemeanor conviction carries the potential penalty of deportation; “even if deportation is technically collateral, it is undoubtedly a severe statutory penalty that flows from the federal government as the result of a state criminal conviction”). A misdemeanor conviction can also result in sentence enhancements should the person reoffend. See *Nichols v. United States*, 511 U.S. 738, 746-48 (1994) (upholding use of misdemeanor DUI conviction to add 25 months to a subsequent felony drug sentence).

¹⁵ See sources gathered *supra* note 14.

¹⁶ *Santobello v. New York*, 404 U.S. 257, 260 (1971); see also *id.* at 261 (the plea bargain “leads to prompt and largely final disposition of most criminal cases[,] . . . and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty”). Counting both misdemeanors and felonies, “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” *Missouri v. Frye*, 566 U.S. 134, 143 (2012); see also *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”).

¹⁷ *Santobello*, 404 U.S. at 261.

¹⁸ *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972) (citation omitted).

¹⁹ NAT’L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 85 (2009) [hereinafter JUSTICE DENIED]. The Committee added that “when counsel is not provided, all too often, the defendant’s waiver of legal representation is inadequate under Supreme Court precedents. As a result, there is a shocking disconnect between the system of justice envisioned by

- (i) requiring or encouraging plea negotiation with a prosecutor before the right to counsel has been raised;²⁰
- (ii) using delay or the prospect of a harsher sentence to dissuade the accused from invoking the right to counsel;²¹
- (iii) gathering arrestees into court *en masse* and instructing them, prior to any advice regarding the right to counsel or other rights, that they must tell the clerk of the court how they intend to plead;²²
- (iv) using forms to obtain waivers of the right to counsel and other rights either as a condition of negotiating a plea or following a negotiation absent proper

the Supreme Court's right-to-counsel decisions and what actually occurs in many of this nation's courts." *Id.* (citation omitted). The Committee's co-chairs included a former director of the Federal Bureau of Investigations, a former state attorney general, a former district attorney and chair of the National District Attorney's Association, two former United States Attorneys, and a former state district and state supreme court judge.

²⁰ See Thomas B. Harvey et al., *Right to Counsel in Misdemeanor Prosecutions After Alabama v. Shelton*, 29 CRIM. JUST. POL'Y REV. 688, 699 (2018) (reporting from court observations in St. Louis, Missouri "that mention of a defendant's right to counsel occurred after the defendant, prosecutor, and judge have discussed sentencing and have decided that the defendant will enter a formal guilty plea. . . . [P]roceedings usually lasted only a few minutes."); STEPHEN F. HANLON ET AL., SECTION ON CIVIL RIGHTS AND SOCIAL JUSTICE, AMERICAN BAR ASS'N, DENIAL OF THE RIGHT TO COUNSEL IN MISDEMEANOR CASES: COURT WATCHING IN NASHVILLE, TENNESSEE 8-9 (2017); SIXTH AMENDMENT CTR., ACTUAL DENIAL OF COUNSEL IN MISDEMEANOR COURTS 6 (2015) [hereinafter ACTUAL DENIAL]; SIXTH AMENDMENT CTR., THE CRUCIBLE OF ADVERSARIAL TESTING: ACCESS TO COUNSEL IN DELAWARE'S CRIMINAL COURTS 29-33 (2014); JUSTICE DENIED, *supra* note 19, at 89 ("In several courts, the Committee's investigators found that defendants were encouraged to negotiate with prosecutors without the assistance of counsel, and in one court they were required to do so."); see also BORUCHOWITZ ET AL., *supra* note 9, at 9, 16-17.

This opinion addresses only the ethical obligations of prosecutors, including obligations under Rules 5.1, 5.3, and 8.4(a) toward lawyers and non-lawyers directed or supervised by the prosecutor. The opinion does not address the obligations of courts and court staff. While the Committee recognizes that courts and court staff are involved in some of the practices discussed in this opinion, prosecutors have independent and specific obligations in these circumstances, as discussed in this opinion.

²¹ See STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 25 (2004) [hereinafter *GIDEON'S BROKEN PROMISE*] (describing Rhode Island judge who "told the defendant that by requesting a lawyer, the defendant likely would receive three years of jail time instead" of six months, and California judges who told defendants "If you plead guilty today, you'll go home. If you want an attorney, you'll stay in jail for two more days" and noting that the judicial encouragement of waivers of fundamental rights is "especially acute" with regard to juvenile defendants); see also JUSTICE DENIED, *supra* note 19, at 85-86, 87 (noting that in Mississippi "[m]onths may pass before counsel is appointed, causing many people charged with non-violent offenses to serve more time in pretrial custody than warranted for the offenses themselves") (citations omitted); see also *id.* at 85-86, 89; BORUCHOWITZ ET AL., *supra* note 9, at 18-19.

²² See SMITH ET AL., *supra* note 13, at 8 (reporting from court observation in Richland County that defendants in a "packed courtroom" were told in an address that took less than two minutes that "everyone needed to form a line and come to the front of the room to tell the clerk how they intended to handle their case today. . . . No mention was made of the right to counsel. . . . Over the next hour or so, the defendants formed a line and the clerk worked through the [cases]. This process, though technically in open court, was a secret to observers who were present – whatever conversations the clerk had with those facing charges were not on the record and were inaudible to those in the seating area.").

- confirmation that the defendant understands the forms and the rights being waived;²³
- (v) permitting police officers involved in the investigation of a crime or arrest to act as prosecutors and negotiate pleas;²⁴
 - (vi) advising defendants of the right to counsel but failing to provide any procedure for asserting or validly waiving that right before requiring plea negotiation with a prosecutor;²⁵ and
 - (vii) failing to inform indigent defendants of the procedure for requesting a waiver of court application fees associated with assignment of a state subsidized defense lawyer.²⁶

²³ See *Harvey et al.*, *supra* note 20, at 700 (describing process of signing waivers after judge accepted uncounseled guilty plea); *BORUCHOWITZ ET AL.*, *supra* note 9, at 16 (describing forms presented with instructions simply to sign); *GIDEON'S BROKEN PROMISE*, *supra* note 21, at 25 (reporting witness testimony that "in many Georgia courts, the clerk provides defendants with a complicated form that, if signed, serves as a waiver of counsel and guilty plea. Defendants are told that their case will not be called unless they sign the form.").

Forms are sometimes used after displaying a video describing the right to counsel and other important rights. See *ACTUAL DENIAL*, *supra* note 20, at 15-16 n.17 (describing use of video recordings to advise defendants of rights); *SMITH & MADDAN*, *supra* note 13, at 15, 23 tbl.8 (describing use of video advisements and written forms). However, in some jurisdictions no effort is made to ensure that all the defendants gathered in the screening area have seen the full video or understand its contents (e.g., a video may begin before some defendants arrive or end after others have been called to appear or have to step out of court). See *ACTUAL DENIAL*, *supra* note 20, at 15-16 n.17; *SMITH ET AL.*, *supra* note 13, at 8.

²⁴ *SMITH ET AL.*, *supra* note 13, at 19 (In South Carolina's minor crimes courts, police officers "were the majority of prosecutors in all counties, and nearly the sole prosecutor of defendants in [four]. . . . [T]hey negotiated directly with the defendants who they accused of violating the law. . . . Defendants were almost three times more likely to enter a plea of guilty or no contest when confronted by a police-officer-prosecutor . . ."). See also *State ex rel McLeod v. Seaborn*, 244 S.E.2d 317, 319 (S.C. 1978) (holding that practice of arresting officers acting as prosecutors in certain misdemeanor cases does not constitute unauthorized practice of law); *State v. Messervy*, 187 S.E.2d 524, 525 (S.C. 1972) (noting that this practice in the state's magistrates courts has "been followed under a ruling of the attorney general since 1958"). For evidence of the practice in another jurisdiction, see *State v. Aberizk*, 345 A.2d 407 (N.H. 1975) (dismissing challenge of misdemeanor defendant to arresting officer serving as both prosecutor and witness). Cf. N.J. Supreme Court Advisory Comm. on Prof'l Ethics, Op. 672 *Conflict of Interest: Municipal Police Officer Serving as Municipal Prosecutor*, (1993), 1993 WL 137686, at *1 ("[T]he specter of an appearance of impropriety so permeates this situation as to preclude the dual service."); Ohio Bd. of Comm'rs on Grievances and Discipline, Advisory Op. No. 89-23 (1989), 1989 WL 535028, at *1-2 (advising that an impermissible conflict of interest arises from county prosecutor serving simultaneously as city police officer within same county if "one position is a check on, or subordinate to the other," if the officer acting as a prosecutor is "aware of the possibility of being called as a witness in the same case," or if there would otherwise be an "appearance of impropriety").

²⁵ See *GIDEON'S BROKEN PROMISE*, *supra* note 21, at 24-25 (describing observation of Georgia court "mass arraignment of defendants charged with jailable misdemeanors during which the judge informed defendants of their rights and then left the bench. Afterwards, three prosecutors told defendants to line up and follow them one by one into a private room. When the judge reentered the courtroom, each defendant approached with the prosecutor, who informed the judge that the defendant intended to waive counsel and plead guilty to the charges.") (citations omitted).

²⁶ See *ACTUAL DENIAL*, *supra* note 20, at 6 (noting that a county in Michigan charges \$240 for all misdemeanor representation, a practice that contributes to 95% of defendants waiving counsel and 50% "pleading guilty at first appearance"); *BORUCHOWITZ ET AL.*, *supra* note 9, at 19 (describing pressure to waive right to counsel arising from the amount of application fees in New Jersey, South Carolina, and Washington).

A prosecutor's use or endorsement of practices such as these would violate the Model Rules of Professional Conduct, as discussed in Parts III through V below.

III. The Prosecutor's Responsibilities Under Model Rule 3.8 and Related Rules

A. The Need for Guidance

Model Rules 3.8(a), (b), and (c) provide the foundation for analysis. Yet more than thirty years after their adoption by the American Bar Association there is still relatively little interpretive authority.²⁷ We address each of these sections of Rule 3.8 and its relationship to other provisions of the Rules of Professional Conduct below. At the outset, however, we note that faithful interpretation of the special responsibilities of a prosecutor under the Model Rules demands sensitivity to the higher calling of the role.²⁸ In some respects a prosecutor's duties exceed the requirements of statutory and constitutional law.²⁹

²⁷ Rule 3.8(d) is discussed in detail in an earlier opinion of this Committee, *see* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454 (2009). However, as the Illinois State Bar Association has summarized, "[t]here is a dearth of legal opinions, not only in Illinois but in other states, on prosecutors seeking to obtain a waiver of an important pretrial right from a pro se defendant." Ill. State Bar Ass'n, Advisory Op. 14-02, 2014 WL 2434672, at *2 (2014); *see id.* at *3 (concluding nonetheless that "a prosecutor may convey a plea offer to a pro se defendant prior to a court proceeding, regardless of who initiates the contact" as long as the prosecutor does "not recommend the plea or otherwise force, threaten or coerce the person to waive any important pretrial right," and the prosecutor "clearly identif[ies] that he or she is not disinterested, clarif[ies] any misconception the person may have about the prosecutor's role and advise[s] the person about the right to secure counsel."). *See also* Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2014-500, 2014 WL 10383870, at *7 (2014) (concluding that prosecutor may not condition guilty plea and eligibility for favorable deferred adjudication program on defendant's waiver of right to discovery because practice violates Rule 3.8(d), constitutes a "coercive practice" in violation of Rules 8.4(a) and (d) and "abdicat[es] his responsibility as a minister of justice by not according the defendant procedural justice"; explaining that "[a] pro se defendant would have little or no understanding of the importance of his procedural right of discovery; and even if he had some understanding, the prosecution threat of facing increased penalties, including incarceration, if he does not accept [the program] and its conditions, negates any voluntary waiver of such procedural rights"); *see also* Va. State Bar Legal Ethics Advisory Op. 1876, 2015 WL 4977834, at *4-6 (2015) (identifying duty of prosecutor who knows defendant is a noncitizen to include reference to immigration consequences in the plea or request the court to include such consequences in the plea colloquy under the state version of Rule 3.8(b), which prohibits "knowingly tak[ing] advantage of an unrepresented defendant"; prohibiting a prosecutor from offering legal advice under Rule 4.3 to an unrepresented non-citizen defendant). Wisconsin amended its rules for prosecutors in the wake of *United States v. Acosta*, 111 F.Supp. 2d 1082, 1092-97 (E.D. Wis. 2000), *aff'd sub nom. United States v. Olson*, 450 F.3d 655, 681-82 (7th Cir. 2006). *See* WIS. SUP. CT. R. 20:3.8 (creating, inter alia, affirmative duty to inform an unrepresented person of the prosecutor's "role and interest in the matter" and of the person's right to counsel; specifying terms upon which prosecutor may negotiate a plea bargain with an unrepresented person); *see also* Wis. Bar Ass'n, Formal Op. E-09-02, slip op. at 3-4 (2009).

²⁸ *See In re Swarts*, 30 P.3d 1011, 1031 (Kan. 2001) ("A prosecutor is a servant of the law and a representative of the people of Kansas. When one undertakes the responsibility of prosecution we must view his or her conduct by an enhanced standard.") (internal quotation marks and citation omitted).

²⁹ *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454 at 4 (2009) ("Courts as well as commentators have recognized that the ethical obligation [of a prosecutor under Rule 3.8(d)] is more demanding than the constitutional obligation."); *see also* ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT, *Prosecutors* 61:601 (ABA/BNA 2019) ("Model Rule 3.8 goes beyond what constitutional guarantees require of prosecutors on the subject of pretrial responsibilities to the unrepresented accused.").

B. Model Rule 3.8(a) and the Duty to Ascertain the Existence of Probable Cause to Charge

Rule 3.8(a) prohibits the prosecution of “a charge that the prosecutor knows is not supported by probable cause.” The provision avoids undue interference with the exercise of prosecutorial discretion.³⁰ As Comment [1] emphasizes, however, the prosecutor has a “specific obligation [] to see that the defendant is accorded procedural justice [and] that guilt is decided upon the basis of sufficient evidence.”³¹ Read together with the duty of competence under Rule 1.1, the duty of diligence under Rule 1.3, and the prohibition on conduct “prejudicial to the administration of justice” in Rule 8.4(d), it is axiomatic that a prosecutor must actually exercise informed discretion with respect to the selection and prosecution of each charge. Thus, a prosecutor may not negotiate pleas without first making an independent assessment of the relevant facts and law for each charge.³² While it is common for prosecutors to make a careful assessment of evidence compiled incident to a decision to offer a plea, in some jurisdictions the volume of misdemeanor cases and their relatively lower stakes may dispose a prosecutor to rely uncritically on a police report or citation and a criminal background check.³³ Unless the prosecutor has reasonable confidence in the thoroughness of the fact finding and the evenhandedness of the judgment of other law enforcement officers who prepare the supporting documents and investigation, reliance on them is likely to be misplaced and the very discretion the Rule is designed to protect may be abused.

If a prosecutor’s workload is too heavy to permit the independent assessment of each charge as required by Rule 3.8(a) and the supervision of other state actors and their work product relevant to each case as required by Rules 5.1(b) and (c) and 5.3(b) and (c), the prosecutor may not be able to provide the competent representation required by Rule 1.1, nor act with the diligence required by Rule 1.3. A supervising prosecutor is responsible, under Rules 5.1(a), 5.3(a), and 8.4(a), for establishing policies, practices, and methods of monitoring prosecutors and non-lawyers that give “reasonable assurance” of compliance with prosecutors’ ethical obligations, including the obligation to be diligent and perform competent work.³⁴ In the words of Comment [2] to Rule 1.3, a lawyer’s workload “must be controlled so that each matter can be handled competently.”

³⁰ See also MODEL CODE OF PROF’L RESPONSIBILITY DR 7-103(A) (1980).

³¹ MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [1].

³² See MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. [5] (“Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”). See also CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-5.6(c) (AM. BAR ASS’N 2015) (“The prosecutor should not enter into a disposition agreement before having information sufficient to assess the defendant’s actual culpability.”); *id.* at 3-5.6(g) (“A prosecutor should not agree to a guilty plea if the prosecutor reasonably believes that sufficient admissible evidence to support conviction beyond reasonable doubt would be lacking if the matter went to trial.”).

³³ See *State v. Young*, 863 N.W.2d 249, 253 (Iowa 2015) (“Given the pressures of docket management, there is a risk that the ability of the system to function efficiently and at low cost, rather than the reliability of fact-finding, will shape judicial outcomes. . . . [T]he risk of an inaccurate verdict in uncounseled misdemeanor cases is higher than in most felony prosecutions.”); see also KOHLER-HAUSMANN, *supra* note 10, at 131 (noting from lengthy New York City court observations and interviews with district attorneys, judges, and public defenders that “arraignment plea offers are based largely on prosecutorial practice and policy, and only minimally on factual or legal investigation”); *id.* at 125, 133, 138 (same). Evidence that misdemeanor convictions are not always tied to factual guilt can be found in studies going back to the 1950s. See *id.* at 62. On increases in misdemeanor dockets over the last three decades, see *id.* at 110, 111 fig. 3.1, 119.

³⁴ On the prosecutor’s managerial and supervisory responsibilities, see ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 467 (2014). See also MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [6] (“Like other

In Formal Opinion 441, the Committee addressed the ethical obligations of lawyers representing indigent criminal defendants when caseloads interfere with competent and diligent representation.³⁵ The same analysis applies to prosecutors. If workloads interfere with competent and diligent representation, appropriate remedial steps must be taken by the prosecutor and/or the supervising attorney to whom the prosecutor reports by, for example, reassigning cases or limiting other duties.³⁶

C. Model Rule 3.8(b) and the Right to Counsel

Rule 3.8(b) requires the prosecutor to “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.” This opinion does not address constitutional issues, but our analysis of a prosecutor’s responsibilities under Rule 3.8(b) is aided by identifying circumstances in which the right to counsel applies. In a series of cases beginning with *Argersinger v. Hamlin*, the Supreme Court has held that the Sixth Amendment right to state subsidized counsel applies to misdemeanors if the punishment includes either actual imprisonment or a suspended sentence that may result in imprisonment.³⁷ Federal courts are divided over the test to determine when the Sixth Amendment right to state subsidized counsel attaches,³⁸ but there is no doubt that it can attach as early as an initial appearance,³⁹ that plea bargaining is a “critical

lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer’s office.”); N.Y. State Bar Ass’n Comm. on Prof’l Ethics Op. No. 2, 2018 WL 3019993, at *2 (discussing prosecutor’s post-conviction duties regarding potential wrongful conviction, “[t]he Rules apply not only to individual prosecutors but also to their offices.”); *id.* at *2 n.3 (referencing both state analogue to Model Rule 3.8 cmt. [6] and Rule 5.1(a)); Or. State Bar Ass’n Bd. of Governors, *Trial Publicity*, Formal Op. 2007-179, 2007 WL 7261223, at *8 (2007) (a prosecutor’s level of responsibility under state analogues to Model Rule 5.1 and 5.3 “depends on the level of the prosecutor’s authority over the investigator” with whom she works); *id.* *8 n.8 (describing circumstances under state analogue to Model Rule 5.1 in which a supervising prosecutor would be responsible for impermissible pre-trial publicity). *See also* MODEL RULES OF PROF’L CONDUCT R. 8.4(a) & R. 8.4 cmt. [1] (2019) (“Lawyers are subject to discipline when they ... knowingly assist or induce another to [violate or attempt to violate the Rules of Professional Conduct] or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf.”).

³⁵ *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 441 at 1, 7 (2006) (“[L]awyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers”; possible ameliorative measures might include, for example, reassigning cases to others, refusing new cases, or reassigning non-representational work to others).

³⁶ *Id.* at 1, 7.

³⁷ *See* *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (extending right to counsel to misdemeanors and petty offenses involving imprisonment); *see also* *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (“a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution of the crime charged”) (quoting *Argersinger*, 407 U.S. at 40); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (clarifying that the Sixth Amendment right to counsel does not apply where state law provides both for fines and imprisonment, and a defendant is sentenced only to a fine).

³⁸ Compare *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018) (en banc) (holding that Sixth Amendment right to counsel attaches “only at or after the time that adversary judicial proceedings have been initiated” and therefore does not extend to pre-indictment plea negotiations) (quoting *United States v. Gouveia*, 467 U.S. 180, 187 (1984)), with *United States v. Larkin*, 978 F.2d 964 (7th Cir. 1992) (holding that although Sixth Amendment right presumptively attaches only at or after the initiation of adversary judicial criminal proceedings [a] defendant may rebut this presumption by demonstrating that ... the government had crossed the constitutionally significant divide from fact-finder to adversary” at an earlier stage) (internal quotations and citations omitted).

³⁹ *See* *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

phase” of the representation during which the assistance of counsel is important to ensure fair and accurate outcomes,⁴⁰ and that the Sixth Amendment protects against interference with the right to counsel whether counsel is subsidized by the state, appointed, or independently retained.⁴¹ As importantly, a right to state subsidized counsel in misdemeanor cases may exist in circumstances not covered by the U.S. Constitution.⁴² An accused person also has a constitutional right to proceed *without* the assistance of counsel, but the waiver of such assistance must be knowing, voluntary, and intelligent.⁴³

The first draft of the Model Rules addressed the accused’s right to counsel, enjoining a prosecutor to “advise the defendant of the right to counsel and provide assistance in obtaining counsel.”⁴⁴ The language of the current rule is more precise in several respects. First, rather than simply enjoin the prosecutor to “provide assistance,” it specifies that the lynchpin to assistance is ensuring (i) that the accused is advised of the procedure for obtaining counsel and (ii) that the nature and timing of prosecution does not interfere with this procedure. Second, it replaces the restrictive term of art “defendant” with the more flexible term “accused,” thus clarifying that the assistance obligations of the Rule apply before the filing of an indictment. Third, the shift to passive voice makes the prosecutor responsible for ensuring that the accused is aware of the state’s procedure for obtaining counsel and has adequate time and access to the necessary administrative

⁴⁰ See *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (“[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel”); *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012). The right may attach even before a prosecutor decides formally to proceed with charges. See *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 207-08 (2008) (rejecting claim that the Sixth Amendment right to counsel attaches only after a prosecutor has formally decided to prosecute; the government’s commitment is “sufficiently concrete” once an accusation is “filed with a judicial officer” by the police incident to arrest and incarceration, triggering an initial appearance). The key for attachment of the Sixth Amendment right is initiation of “adversary judicial proceedings.” *Gouveia*, 467 U.S. at 187.

⁴¹ See *Johnson v. Zerbst*, 304 U.S. 458, 460, 469 (1938) (holding right to counsel violated where defendant allegedly invoked right in discussion with prosecutor and jailer but was not permitted by either to contact a lawyer and was tried and convicted); *Powell v. Alabama*, 287 U.S. 45, 58 (1932) (gathering state cases finding violation of right to counsel where accelerated pre-trial and trial process compromised appointed counsel’s preparation of defense); *In re Motz*, 136 N.E.2d 430, 433 (Ohio Ct. App. 1955) (right to counsel violated where court refused a continuance to permit counsel retained by defendant to prepare, counsel withdrew, court refused to appoint new counsel, and defendant forced to trial pro se). Although we do not address how Rule 3.8 applies to the right to counsel in custodial interrogations, we note that the Fifth Amendment right to counsel can apply to misdemeanor defendants. See *Miranda v. Arizona*, 384 U.S. 436, 469-70 (1966); cf. *infra* notes 45 & 47.

⁴² State law frequently guarantees a right to subsidized counsel in circumstances in which the federal constitution does not. See *State v. Young*, 863 N.W.2d 249, 272 (Iowa 2015) (citing 2009 study showing that a majority of states provide a right to subsidized counsel broader than the Sixth Amendment “actual imprisonment” standard); *DeWolfe v. Richmond*, 76 A.3d 1019, 1031 (Md. 2013) (state constitutional right to due process requires right to state subsidized counsel at initial appearance). See also *Pretrial Right to Counsel*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-right-to-counsel.aspx> (offering 50 state survey of state constitutional and statutory provisions establishing right to counsel) (last visited Apr. 30, 2019).

⁴³ See *Faretta v. California*, 422 U.S. 806, 835 (1975); see also *Godinez v. Moran*, 509 U.S. 389, 390 (1993) (“[W]hen a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted.”). “[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.” *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (emphasis in original). Whether a waiver is knowing, intelligent and voluntary is a question of law on which we do not opine.

⁴⁴ MODEL RULES OF PROF’L CONDUCT R. 3.10(b) (Discussion Draft 1980).

assistance to invoke it, irrespective of whether another state actor (e.g., the judge, the court clerk, the public defender office) is legally charged with providing counsel, making indigence determinations, or soliciting and recording waivers of the right. Fourth, the modifier “reasonable” in “reasonable efforts” clarifies that a prosecutor is not required to suffer undue delay or otherwise compromise legitimate law enforcement objectives in order to meet the obligations of the Rule. The prosecutor is therefore charged with specific responsibilities to ensure that those who are or may be entitled to counsel are afforded the information and reasonable time necessary to retain a lawyer.⁴⁵

D. Model Rule 3.8(c) and the Duty Not to Seek Waivers of Important Pretrial Rights

Rule 3.8(c) provides that a prosecutor “shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.” As with Rule 3.8(b), there is no direct analogue to this provision in the 1908 Canons or the 1969 Code. The first draft of the Model Rules provided that a prosecutor “shall not induce an unrepresented defendant to surrender important procedural rights, such as the right to a preliminary hearing.”⁴⁶ The Rule as adopted is broader for several reasons. First, it prohibits seeking a waiver from an unrepresented “accused” and is therefore not limited to someone who is formally a “defendant.” Second, “inducement” implies efforts to persuade, whereas “seek to obtain” reaches even a bare request. Finally, the replacement of “procedural rights” with “pretrial rights” broadens the scope of the Rule by extending its application to all “important” rights (whether classified as substantive or procedural) and by explicitly targeting the pretrial stage – a particularly delicate phase of prosecution where judges exercise minimal or only intermittent supervision, the leverage of a prosecutor is extraordinary, and the risks and consequences of improper waiver by an unrepresented accused person are correspondingly acute.⁴⁷ As the Comment makes clear, the Rule does not apply to individuals who have elected to proceed pro se “with the approval of the

⁴⁵ Although the Rule applies broadly to the right to counsel, this opinion is limited to its application in the context of misdemeanor plea bargaining. For guidance on the right to counsel under the Fifth Amendment in custodial interrogation, see ABA/BNA LAWYER’S MANUAL ON PROF’L CONDUCT, *Prosecutors* 61:616 (ABA/BNA 2019) (citing CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-2.7, 3-3.2, 3-3.6 (AM. BAR ASS’N 1992)).

⁴⁶ MODEL RULES OF PROF’L CONDUCT R. 3.10(c) (Discussion Draft 1980).

⁴⁷ The example of a preliminary hearing indicates, as the Comment notes, that in jurisdictions where waiver can lead to the loss of a chance to challenge probable cause or use the preliminary hearing to ascertain relevant facts about the prosecution’s case, prosecutors should not seek to deprive defendants of those opportunities. See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [2]. The contemporaneous ABA Standards of Criminal Justice, Prosecution Function, noted these features of the preliminary hearing in some jurisdictions. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION, Standard 3-5.1 (AM. BAR ASS’N 1980). But in its general reference to “important pretrial rights” the Rule as adopted plainly sweeps beyond that illustration. See ABA/BNA LAWYER’S MANUAL ON PROF’L CONDUCT 61:617 (“the phrase is broad enough to cover pretrial rights grounded on federal or state constitutions, statutes, or case law”). As the Comment emphasizes, “prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons.” MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [2] (emphasis added). See also ABA/BNA LAWYER’S MANUAL ON PROF’L CONDUCT 61:617 (ABA/BNA 2019) (“Rule 3.8(c) precludes prosecutors from seeking a waiver of important pretrial rights from an unrepresented accused, even when this conduct maybe permissible as a matter of constitutional law.”). The Rule’s reference to other “important pretrial rights” is particularly relevant to misdemeanor plea bargaining because there is often no requirement of a preliminary hearing or grand jury to provide an external check on prosecutors in misdemeanor cases and there are many important pretrial rights (among them not only the right to counsel but the right to disclosure of exculpatory evidence, the right to inspect evidence, and other discovery rights). This opinion addresses the right to counsel.

tribunal,” or to “the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.”⁴⁸

IV. Duties Arising from the Accused’s Right to Counsel

As discussed in Parts III.C through III.D above, Model Rules 3.8(b) and (c) provide that the “prosecutor in a criminal case shall:

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.”⁴⁹

Rule 3.8(b) and (c) are of central importance to misdemeanor prosecutions because many people accused of misdemeanors are issued citations and notices to appear rather than arrested and brought in for questioning. Alternatively, they may be questioned in the field by police, arrested, and, particularly for the indigent, held if they cannot make bail. In these circumstances, they functionally become “unrepresented accused” persons either upon receipt of a citation and notice to appear, or as a consequence of an arrest. And yet, this early in the proceedings they may not be aware of their right to state subsidized counsel, the process for exercising it, or the fact that they have the right to retain a lawyer not paid for by the state. As importantly, a prosecutor may control whether the right to state subsidized counsel attaches because the Sixth Amendment right to counsel may hinge on the classification of the underlying offense and the prosecutor’s decision about what kind of plea to offer.⁵⁰ Under these circumstances, a prosecutor must scrupulously conform to Rules 3.8(b) and (c), as well as Rule 4.3, which prohibits giving legal advice to an unrepresented person whose interests in defending herself may conflict with the prosecutor’s interest in securing a conviction.⁵¹ A prosecutor must also take steps to be reasonably sure that the conduct of her subordinates and agents is “compatible with the professional obligations of the [prosecutor].”⁵²

Accordingly, if the charge associated with a plea offer triggers the right to counsel under *Argersinger* or where the circumstances of the offense, arrest, or initial appearance otherwise indicate that the accused has or may have a right to counsel under state or federal law, the prosecutor may not make a plea offer or seek a waiver of the right to counsel before complying with Rule 3.8(b). The prosecutor must make reasonable efforts to assure that the accused has been advised of the right to counsel and the procedure for obtaining counsel, and has been given a

⁴⁸ MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [2].

⁴⁹ MODEL RULES OF PROF’L CONDUCT R. 3.8 (b) & (c).

⁵⁰ A plea offer of release for time served, for instance, triggers *Argersinger* because it is a sentence of actual imprisonment. Of course, state law, federal statutes, and the requirements of due process may create a legal right to subsidized counsel even though the Sixth Amendment does not. See note 42 *supra*. And the unrepresented accused has a core Sixth Amendment right to retain counsel at her own expense unless she elects to proceed pro se on terms approved by the court or by the laws and rules of the jurisdiction.

⁵¹ For a prosecutor’s duties under Rule 4.3 when negotiating pleas in misdemeanor cases, see Part V *infra*.

⁵² ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 467 at 3 (2014) (quoting Rule 5.3(b)).

reasonable opportunity to exercise that right and obtain counsel. If the prosecutor delegates authority to or otherwise relies upon police officers or other state actors to discuss waivers of rights in misdemeanor cases, pursuant to Rules 5.1(b) and (c), 5.3(b) and (c), and 8.4(a), the prosecutor is responsible for ensuring that Rules 3.8 and 4.3 are not violated during those discussions. As noted earlier in this opinion, under Rules 5.1(a) and 5.3(a) a supervising prosecutor is responsible for establishing policies, practices, and methods of monitoring that give “reasonable assurance” of compliance with prosecutors’ ethical obligations.

Moreover, under Rule 3.8(b) and (c), a prosecutor may not pressure, advise, or induce acceptance of a plea or waiver of the right to counsel after an unrepresented accused has been informed of the right to counsel and is deciding whether to invoke or has initiated the process to invoke that right.⁵³ Even asking an unrepresented accused if she wishes to waive the right to counsel or accept a plea is improper if it is clear from the circumstances that the accused does not understand the consequences of acceding to the request. This is so because legal advice may be necessary to clarify any such misunderstanding, and, consistent with Rules 3.8(b), 3.8(c), and as required by Rule 4.3, a prosecutor is precluded from offering legal advice other than to seek counsel.

On the other hand, if the accused has independently elected to proceed pro se on terms approved by the court or by the laws and rules of the jurisdiction, the prosecutor may negotiate a plea, but any negotiations must comply with the Rules discussed in Part V below.

V. Duties When Plea Bargaining with an Unrepresented Accused

Irrespective of whether an unrepresented accused has invoked the right to counsel, Model Rules 4.1, 4.3 and 8.4(c) constrain a prosecutor’s conduct when negotiating a plea bargain with, e.g., (i) persons who are ineligible under state and federal law for state subsidized defense counsel and cannot afford or otherwise cannot secure private counsel, (ii) those who elect to proceed pro se even though they are eligible for subsidized counsel or could retain private counsel, and (iii) those who have invoked the right to counsel but are still in the process of securing counsel or deciding whether to do so.

Rule 4.1 prohibits a lawyer from knowingly making “a false statement of material fact or law to a third person.” The rule “was intended to incorporate the law of misrepresentation by recognizing that the failure to disclose can amount to a misrepresentation in some circumstances”⁵⁴ Comment [1] emphasizes that misrepresentations can “occur by partially true but misleading statements or omissions that are the equivalent of false statements.”⁵⁵ Rule 4.3 states that “[i]n dealing on behalf of a client with a person who is not represented by counsel” a lawyer “shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if

⁵³ This is so whether the unrepresented accused intends to pursue counsel subsidized by the state or retain counsel at the accused’s expense.

⁵⁴ CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, A LEGISLATIVE HISTORY OF THE DEVELOPMENT OF THE ABA MODEL RULES, 1982-2005, at 522 (2006) [hereinafter LEGISLATIVE HISTORY] (discussion at February 1983 Midyear Meeting). Rules 4.1 and 8.4(c) also apply when the accused has retained counsel, as does Rule 4.2.

⁵⁵ The comment was amended in 2002 according to the recommendations of the Ethics 2000 Commission. The amendment explicitly expanded emphasis on misrepresentation by omission, substituting the current language for the prior, more vague, reference to misrepresentation by “failure to act.” See *id.* at 527-28.

the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”⁵⁶ Finally, Rule 8.4(c) prohibits a lawyer from engaging “in conduct involving dishonesty, fraud, deceit or misrepresentation.”⁵⁷

In the context of plea negotiations, these rules circumscribe the terms on which a prosecutor may deal with an unrepresented accused. An unrepresented accused, particularly one who lacks experience with the intricacies of the criminal justice system, is in an acutely vulnerable position.⁵⁸ The accused faces the vast array of resources at the prosecutor’s disposal as well as the prosecutor’s legal expertise at a moment in which, even in misdemeanor cases, substantial liberty interests and financial security are in jeopardy.⁵⁹ Moreover, once a prosecutor has committed to pursue a misdemeanor charge in plea negotiations, the interests of the prosecutor and the unrepresented accused are adverse, so the prosecutor must take particular care to avoid giving the impression that she is “disinterested” and to correct any misunderstanding regarding the prosecutor’s role in the matter. From the moment of arrest there is already, within the meaning of Rule 4.3, “a reasonable possibility of ... conflict with the interests of” the unrepresented accused. Accordingly, a prosecutor is prohibited by Rule 4.3 from offering legal advice regarding the substance of the plea, the process of its negotiation and entry, or the consequences incident to conviction.⁶⁰ As discussed below, however, a prosecutor can and sometimes must disclose material information regarding the substance of the plea, the process of its negotiation and entry, and known consequences of a conviction to an unrepresented person.

Comment [2] to Rule 4.3 states that a lawyer is not generally prohibited from “settling a dispute with an unrepresented person,” but a plea bargain is no ordinary arms-length transaction or settlement agreement. The stakes are often significantly higher than in civil matters and the terms must meet specific constitutional standards designed to ensure that the accused’s acceptance is “voluntary, knowing, and intelligent.”⁶¹ Thus while a prosecutor may negotiate a plea bargain with a pro se litigant, the prosecutor’s duties under Rules 4.1 and 8.4(c) are heightened in this setting. Assertions regarding the terms of a plea violate these rules if the prosecutor knows they are materially underinclusive. For example, statements regarding the value of a plea offer, particularly those which omit known collateral consequences of accepting a plea or the legal relevance of a plea to enhancement of a sentence in any subsequent case, can constitute prohibited

⁵⁶ Amendments approved in 2002 on the recommendation of the Ethics 2000 Commission elevated the prohibition on giving advice from the comments to the rule in response to reports that “in negotiations between lawyers and unrepresented parties, the giving of legal advice (often misleading or overreaching) is not uncommon.” *Id.* at 550. The Commission recognized that “although the line may be difficult to draw, it is important to discourage lawyers from overreaching in their negotiations with unrepresented persons.” *Id.* at 549-50. On the law of misrepresentation by omission, see RESTATEMENT (SECOND) OF TORTS § 551 (AM. LAW INST. 1977).

⁵⁷ Comment [1] to Rule 4.1 states that for “dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.”

⁵⁸ Comment [2] to Rule 4.3 emphasizes that “[w]hether a lawyer is giving impermissible advice may depend on the experience and the sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.”

⁵⁹ See Part IB *supra*.

⁶⁰ See Ill. State Bar Ass’n, Advisory Op. No. 02, 2014 WL 2434672, at *3 (“It would be a violation of Rule 4.3 ... should the communication [with a person who has elected to proceed pro se] give value to the plea offer or in any way advise the pro se defendant (‘It is a good offer’ or ‘Take the deal.’).”)

⁶¹ See Part IIIB *supra*.

misrepresentations under Rule 4.1 or deceptive conduct under Rule 8.4(c).⁶² Thus, where a prosecutor knows from the charge selected, the accused's record, or any other information that certain collateral consequences or sentence enhancements apply to a plea on that charge, statements like the following would constitute prohibited misrepresentations:

"Take this plea for time served and you are done, you can go home now."

"This is a suspended sentence, so as long as you comply with its terms, you avoid jail time with this plea."

"You only serve three months on this plea, that's the sentence."

A prosecutor will rarely know all of the potentially relevant collateral consequences of accepting a plea or the exact nature of any subsequent sentence enhancement. However, if the prosecutor knows the consequences of a plea – either generic consequences or consequences that are particular to the accused – the prosecutor must disclose them during the plea negotiation.⁶³

Finally, a prosecutor's duties under these rules do not end once a plea has been accepted. If a prosecutor learns during the plea colloquy with the court or other interactions that the unrepresented accused's acceptance of a plea or waiver of the right to counsel is not in fact voluntary, knowing, and intelligent, or if the plea colloquy conducted by the court is inadequate to ascertain whether the plea or waiver of the right to counsel is in fact voluntary, knowing, and intelligent, the prosecutor is obliged to intervene. The prosecutor cannot, consistent with her role as a minister of justice under Rule 3.8 and the duty to avoid conduct prejudicial to the administration of justice under Rule 8.4(d), knowingly permit an unconstitutional plea to be entered by an unrepresented accused.⁶⁴

VI. Conclusion

Under Model Rules 1.1, 1.3, 3.8(a), and 8.4(a) and (d), prosecutors have a duty to ensure that charges underlying a plea offer in misdemeanor cases have sufficient evidentiary and legal foundation. Under Model Rules 1.1, 5.1, 5.3, and 8.4(a) prosecutors must take appropriate steps to make reasonably sure that the work of their subordinates and agents is compatible with their professional obligations. Under Model Rule 3.8(b) prosecutors must make reasonable efforts to assure that unrepresented accused persons are informed of the right to counsel and the process for securing counsel, and must avoid conduct that interferes with that process. After an unrepresented accused has been informed of the right to counsel and is deciding whether to invoke that right or is in the process of attempting to secure counsel, a prosecutor may not, under Model Rules 3.8(b)

⁶² Furthermore, in the context of plea negotiations, violation of either rule is conduct prejudicial to the administration of justice under Rule 8.4(d).

⁶³ Given the delicacy of balancing the need to disclose material information to avoid either misrepresentation or deception, on the one hand, and the prohibition on legal advice, on the other, the best practice is to carefully record and preserve plea negotiations with an unrepresented accused. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-5.6(b) (AM. BAR ASS'N 2015) (encouraging record keeping where defendant waives right to counsel and proceeds pro se). Additional guidance is provided in the NAT'L PROSECUTION STANDARDS §§ 2-7.2, 2-7.4 and 2-7.5 (3d ed. 2009).

⁶⁴ *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454 (2009).

and (c), pressure, advise, or induce acceptance of a plea or waiver of the right to counsel. Finally, irrespective of whether an unrepresented accused has invoked the right to counsel, a prosecutor must, under Model Rules 4.1, 4.3 and 8.4(c) and (d), avoid offering, negotiating, and entering pleas on terms that knowingly misrepresent the consequences of acceptance, or otherwise improperly pressure, advise, or induce acceptance on the part of the unrepresented accused.

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CENTER FOR PROFESSIONAL RESPONSIBILITY

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Ethical “of counsel” associations

Based on several recent calls to our ethics hotline, it appears that many Minnesota attorneys are interested in understanding the ethics rules involved when “associating” with another lawyer or law firm as a means to grow a practice or expand the legal services available to clients. Some use the term “of counsel” to describe this association; others consider the term old-fashioned and prefer variants like special counsel, associated counsel, or affiliated counsel. The term can refer either to an individual with whom you associate or to a law firm. While the term can refer to an employee relationship, I will focus on the use of the term to describe non-employee relationships.

The starting point

Minnesota’s ethics rules do not define, or specifically mention, the term “of counsel” or its variants. The American Bar Association addressed the term “of counsel” and the types of relationships it’s meant to cover in ABA Opinion 90-357. Pursuant to this opinion, the term is a professional designation denoting a



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

“close, regular, and personal” relationship that is more than just a referral relationship, more than an occasional consulting relationship, and more than an association for one case. If you have such a close, regular, and personal relationship with another firm or attorney, you may ethically use the designation “of counsel” or similar variants.

Conversely, though, if your association is less than close, regular and personal, your use of the designation “of counsel” or its variants may be

false or misleading. As everyone knows, the cardinal rule of lawyer advertising is to ensure that all communications about yourself and your legal services are not false or misleading.¹ The ABA opinion provides that this type of relationship may be between individuals or law firms, and you can have associations with more than one lawyer or law firm simultaneously.

Fee-sharing

Rule 1.5(e) regulates the division of fees between lawyers who are not in the same firm. When you have the close, regular, and personal association described above, are you in the same firm for purposes of this rule? I think so, and so do many ethics opinions that have addressed this subject.² This position is consistent with the definition of law firm or firm in the rules: “a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or *other association* authorized to practice law,” and “if [lawyers] present themselves to the public in a way that suggests they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules.”³

While you may choose to disclose to clients the division of fees with the “of counsel” firm or lawyer, you are not required to do so under Rule 1.5(e), but you would be if you do not have a close, regular, or personal relationship with the entity or individual with whom you are sharing fees. Remember, “of counsel” relationships should not be used to disguise a referral relationship to avoid—or because you cannot meet—the division of fee requirements of Rule 1.5(e). Finally, if you are sharing fees with an associated non-Minnesota lawyer or law firm, you should check the rules of the jurisdiction where that lawyer is located, as those ethics rules may differ.

Conflicts

Perhaps the most significant ethical consequence of this type of association is the imputation of conflicts for purposes of disqualification. Because you are being treated for purpose of the ethics rules as a “firm,” Rule 1.10(a) provides that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent

a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”⁴

Please keep this in mind when you are forming an association with another lawyer or law firm—your conflicts are imputed to them, and their conflicts are imputed to you. As part of forming this relationship, you must think through how you are going to detect and address potential conflicts. Note also that blanket screens and broad advance waivers generally do not solve this problem, because some conflicts cannot be consented to, and you usually cannot provide sufficient generic information in advance to obtain the informed consent needed to consent to specific conflicts.

Other considerations

If you are associating with law firms or lawyers not licensed in Minnesota, you should be sure to include jurisdictional limitations when communicating about the association or services being provided.⁵ Similarly, some states, like Iowa, do not allow you to form “of counsel” relationships with attorneys not admitted in Iowa.⁶ Obviously, you should also not suggest an “of counsel” or closer association if that is not in fact true (“Lawyers may state or imply that they practice in a partnership or other organization only when that is in fact true”).

If you only associate occasionally, using terms that suggest a closer relationship is false and potentially misleading, and, as noted, should not be used to avoid fee-sharing disclosure requirements. Beyond the scope of this article, you should also think about how to minimize your potential vicarious liability for those with whom you are associated, as well as the implications of the association for your malpractice insurance; both are good questions for your malpractice carrier. Finally, if you are associating with a non-Minnesota law firm, you should look at the Professional Firms Act regarding the requirements for that foreign entity to register in Minnesota.⁸



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Conclusion

I've enjoyed discussing with several lawyers the various ways in which they are looking to associate with others to grow their practice or expand the services they provide to clients. I also applaud the fact that calling for ethics advice was one of the first things they did! ▲

Notes

¹ Rule 7.1, Minnesota Rules of Professional Conduct (MRPC).
² See, e.g., Illinois State Bar Association Opinion No. 16-04 (October 2016); State Bar of Arizona Ethics Opinion 16-01 (April 2016); *But see* Professional Ethics of the Florida Bar Opinion 00-1 (April 20, 2000) (concluding that only if the "of counsel" attorney practices exclusively through the firm is the relationship exempt from the division of fees rules).
³ Rule 1.0(d), MRPC; Rule 1.0, Cmt. [2].
⁴ Rule 1.10(a), MRPC.
⁵ Rule 7.5(b), MRPC.
⁶ Iowa Ethics Opinion 13-01 (July 2013).
⁷ Rule 7.5(d), MRPC.
⁸ Minn. Stat. §319B.04 (2018).



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Business transactions with clients

Lawyers frequently have an opportunity to do business with clients beyond the straightforward monetary payment for legal services rendered. Sometimes clients wish to offer their lawyer an ownership interest in a start-up business as payment for some or all of the legal services provided, or lawyers wish to acquire an interest in property owned by the client to secure payment for future legal fees. Sometimes a client would like to partner with their lawyer to pursue a new business opportunity, or sometimes a client simply cannot pay a bill and wishes to trade property the client owns or barter professional services for payment. Each of these situations is permissible, but all present a potential concurrent conflict of interest with a client. How to ethically navigate these conflicts is specifically regulated by professional responsibility rules.



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The rules

Rule 1.8, Minnesota Rules of Professional Conduct, is helpfully entitled “Conflicts of Interest: Current Clients: Specific Rules.” There are 11 main subparts to Rule 1.8 that cover a gamut of situations from business transactions with clients to financial assistance to clients to sex with clients (expressly prohibited unless that relationship predated the lawyer-client relationship). Let’s start with the main rule on business transactions: Rule 1.8(a):

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a document signed by the client separate from the transaction documents, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.¹

As written, the rule is expansive in its application, and applies to everything except standard commercial transactions with clients of the kind and on the same terms as the client markets to the public, and ordinary fee arrangements between a client and lawyer, including applying whenever a “lawyer accepts an interest in the client’s business or other nonmonetary property as payment for all or a part of a fee.”²

The requirements of the rule are strictly enforced from a disciplinary perspective but more importantly, lawyers should view them as important risk management tools. Because of the trust and confidence that clients place in counsel, business transactions with clients can be easy targets for claims of overreaching and breach of fiduciary duty. Taking pains to comply with the requirements of the rule provides an effective counter to such claims.

What does compliance look like?

First, remember Rule 1.8(a) is conjunctive—all three prongs must be satisfied. Second, note that each prong contains additional requirements. Specifically, Rule 1.8(a)(1) requires that the terms of the transaction be (i) “fair and reasonable,” *and* (ii) requires that the terms be disclosed in writing *and* (iii) disclosed in a manner that can be reasonably understood by the client. Accordingly, depending on the sophistication level of your client, the written agreement effectuating the transaction may need to be separately summarized in an understandable manner. You should also spend time establishing for yourself how the terms are “fair and reasonable” to the client. What factors are available to show the current value of the transaction? If the transaction is in lieu of payment of fees, how is the value “reasonable” in light of Rule 1.5(a), which requires that lawyers charge fees that are reasonable under the circumstances? As with much in the law, what these elements look like will depend on the particular facts and circumstances presented.

The second prong, Rule 1.8(a)(2), contains two requirements: The client is advised in writing of the desirability of seeking counsel *and* the client is given a reasonable opportunity to obtain such advice. Again, what is reasonable will depend on the particular facts and circumstances. Requiring the client to execute the documents on the same day they are given to the client, or shortly thereafter, is likely unreasonable. Providing the client with several weeks to seek separate counsel and to consult with same is likely reasonable.

The third prong, Rule 1.8(a)(3), incorporates one of the most important aspects of conflict law—informed consent. Rule 1.0(f) defines “informed consent” as an “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternative to the proposed course of conduct.”³

In addition, the informed consent must be in a document separate from the transaction, must be signed by the client, must discuss the essential terms of the transaction, and must disclose the lawyer's role in the transaction *vis-à-vis* the client.

Remember, it is generally insufficient just to use the words "informed consent." Rather, as the definition states, you must give your client information about the material risks and alternatives available in order for the consent to the transaction to actually be informed. Think about this from your client's perspective—if someone asks them, "What were the risks of the transaction," what do you think they will say? What about, "What were the alternatives available to you?" Having a written document that sets forth this information, signed by the client, demonstrates compliance with the rule and is a good risk management strategy.

Other things to keep in mind

In addition to the black-letter law required to do business with clients, Rule 1.8 contains a lot of other rules on specific client conflicts, such as specific restrictions that usually cannot be papered over, including that a "lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent."⁴ This rule generally prohibits lawyers from usurping client opportunities. Lawyers cannot draft an instrument that gives the lawyer or a member of the lawyer's family a substantial gift unless the lawyer is related to the donee.⁵

This rule would, for example, prohibit a lawyer from drafting sale documents for a below-market transaction with a client meant as a gift to the lawyer for exceptional services. While a lawyer can accept a gift from a client, neither the lawyer, nor the lawyer's law firm, can draft the transaction documents.⁶ Lawyers cannot provide financial assistance to clients in connection with pending or contemplated litigation except in limited, specified circumstances.⁷ This prohibition applies to loan advances against settlement proceeds. Further, lawyers cannot acquire a proprietary interest in the cause of action or subject matter of the litigation, except by statutory lien or reasonable contingency fee agreement.⁸ Accordingly, for example, while you can

have a contingency fee agreement on damages arising from a patent infringement case, you cannot acquire an ownership interest in the patent that is the subject of the infringement case.

Conclusion

Clients often look to us as trusted business advisors in addition to legal advisors, and it may make perfect sense to do business with clients. Before engaging in business with a client (beyond standard commercial transactions with your client of the kind your client markets to the general public),⁹ however, please review the rules so that you are familiar with the conflicts of interest that such transactions create, the specific steps needed to address those conflicts, and times when there is a *per se* prohibition on the type of transaction you are contemplating. As always, you can call our ethics hotline for advice on how to

ethically do business with your client, 651-296-2963 or 1-800-657-3601. ▲

Notes

¹ Rule 1.8(a), MRPC.

² Rule 1.8, MRPC, Comment [1].

³ Rule 1.0(f), MRPC.

⁴ Rule 1.8(b), MRPC.

⁵ Rule 1.8(c), MRPC.

⁶ Rule 1.8(k), MRPC, "While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them."

⁷ Rule 1.8(e), MRPC.

⁸ Rule 1.8(i), MRPC.

⁹ See Rule 1.8, MRPC, Comment [1], excluding from Rule 1.8(a) "standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services."

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Attachment 8

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TO: The Honorable Lorie Skjerven Gildea, Chief Justice
The Honorable G. Barry Anderson, Associate Justice
The Honorable David L. Lillehaug, Associate Justice
The Honorable Natalie E. Hudson, Associate Justice
The Honorable Margaret H. Chutich, Associate Justice
The Honorable Anne K. McKeig, Associate Justice
The Honorable Paul C. Thissen, Associate Justice

FROM: Susan M. Humiston *SMH*
Director

CC: Dan Ostdiek, Finance Director
Robin Wolpert, LPRB Chair
Robert Bauer, CSB Chair

SUBJECT: Budgets on behalf of The Lawyers Professional Responsibility
Board/Office of Lawyers Professional Responsibility and the Minnesota
Client Security Board

Enclosed for the Court's review and approval are biennium budgets for fiscal years 2020 and 2021 on behalf of the Lawyers Professional Responsibility Board/Office of Lawyers Professional Responsibility and the Minnesota Client Security Board.

The Board Chairs, Robin Wolpert (LPRB) and Robert Bauer (CSB), and myself look forward to discussing these proposed budgets with the Court on June 13, 2019.

Thank you.

cmw



MINNESOTA JUDICIAL BRANCH

FY2020-21 BUDGET NARRATIVE Lawyers Prof. Responsibility Board (LPRB) Office of Lawyers Prof. Responsibility (OLPR)

AT A GLANCE

- FY19 revenue is projected to be slightly favorable to budget based on additional registration receipts.
- FY19 expenses are projected to be favorable to budget by approximately \$155,000.
- Expense savings were primarily due to timing of external IT expenses relating to the new database project, which will go on line in FY20.
- The OLPR is currently budgeted for 12 attorneys (including the Director), 6.5 paralegals, one Office Administrator, ten staff and one law clerk.
- Primary stakeholders are the Supreme Court, the LPRB, licensed Minnesota attorneys and the public who hire lawyers.

Background:

The OLPR and LPRB serve approximately 29,500 licensed lawyers and the Minnesota public who consume legal services. In 2018, the OLPR received 1,107 complaints, very similar to the number of complaints received the prior year. In 2018, 45 lawyers were publically disciplined, up from the previous year of 40. Private discipline in 2018 was up modestly as well. Complaints year to date in 2019 are trending flat to prior years. Public discipline and private discipline for 2019 are comparable to prior years.

In addition to disciplinary functions, the OLPR performs several administrative functions, such as staffing an ethics hotline utilized more than 2000 times annually, running a large probation department supervising approximately 100 lawyers annually, administering an overdraft trust account

program, as well as handling attorney resignations, judgment and collections for sanctioned attorneys, administration of the Professional Firms Act, acting as trustee for disabled or deceased attorneys when others are not available to transition practices, and serves as frequent speakers at CLEs throughout the State.

Revenue:

Revenue is driven by attorney registration fees. The LPRB/OLPR receives \$122 for attorneys licensed to practice for more than three years, and smaller assessments for all other licensed attorneys. This number has remained consistent for at least 15 years. Based on estimates from BLE, only modest increases in registration revenue are projected over the biennium.

Expenditures:

Expenditures for FY19 are projected to be modestly favorable to budget by \$155k primarily due to timings of IT payments for the new database. The OLPR expects to complete its new database project in FY20, at which time approximately ½ of our files will become paperless. The primary expense for the Office is personnel. Personnel costs have remained flat for the last several years despite increasing merit and health insurance costs due to timing of hires and other savings on salaries. Current projections anticipate being fully staffed over the entire biennium, and adding the equivalent of 2.7 FTEs, broken down as follows: one part-time

paralegal position changed to a full-time investigator, one .8 staff moved to full time and adding one attorney and one additional investigator. This investment is necessary to meet the Court's case processing goals of only 500 open cases and 100 year old cases, and to increase the proactive assistance the Office provides to Minnesota attorneys and the public in line with the OLPR/LPRB strategic plan.

Conclusion:

The Office has moved into deficit spending primarily driven by increasing salary costs and essentially flat revenues, and will exhaust its reserves over the next biennium, even without additional personnel. Because of healthy reserves, one option available to the Court is to reallocate Client Security Funds to the OLPR/LPRB to ensure a reserve is on hand while determining the appropriate amount for any attorney registration assessment, or alternatively, to being incremental increases to meet the regulation requirements where attorney numbers are essentially flat.

FY20/21 Budget Request

MN Lawyers Professional Responsibility Board

6/6/2019

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 | 1,977,142 | |
| Revenue:* | | | | | | | | |
| Law Prof Resp Attny 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 | 3,218,131 | 3,245,142 |
| Reallocation of Attorney Registration Fees from the Minnesota Client Security Board | | | | | | | 177,402 | 178,890 |
| Transfer from Minnesota Client Security Board | | | | | | 1,000,000 | | |
| 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 | 4,572,424 | 3,606,230 | |
| Expenditures: | 3,449,618 | 3,867,274 | 3,889,345 | 3,969,600 | 3,814,643 | 4,534,671 | 4,479,932 | |
| Reserve Balance Out (Ending Cash Balance) | 3,386,942 | 2,910,119 | 2,344,762 | 1,710,662 | 1,939,388 | 1,977,142 | 1,103,440 | |

Notes:

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

Atty. Reg. Assumptions: FY20 29,567 (23,275 @ \$122; 3,924 @ \$83; 1,579 @ \$26; 789 @ \$15)

FY21 29,815 (23,471 @ \$122; 3,956 @ \$83; 1,592 @ \$26; 796 @ \$15)

FY20/21 Budget Request

MN Lawyers Professional Responsibility Board

6/6/2019

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 | 3,337,798 | 3,544,341 |
| PT, Seasonal, Labor Svc | 41030 | 199,065 | 233,218 | 200,379 | 249,000 | 215,182 | 120,943 | 124,038 |
| 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 | 3,474,741 | 3,701,379 |
| 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 Indiv. 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 | 4,534,671 | 4,479,932 |

Notes:

- FY16 - Salaries increased by 4% for merit. Insurance increased by 7%. One additional paralegal position.
- FY17 - Salaries increased by 3.5% for merit. Insurance increased by 6.3%. 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 - Salaries increased by 2.5% for merit. Insurance increased by 5.63%. 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 - Salaries increased by 2.5% for merit. Insurance increased by 5.62%. 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.

**Attachment 9
(forthcoming)**

Attachment 10

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

ROBIN M. WOLPERT
CHAIR
LONDON J. ASCHEMAN
JOSEPH P. BECKMAN
JEANETTE M. BOERNER
JAMES P. CULLEN
THOMAS J. EVENSON
ROGER GILMORE
CHRISTOPHER A. GRGURICH
MARY L. HILFIKER
GARY M. HRD
KATHERINE A. BROWN HOLMEN
PETER IVY
BENTLEY R. JACKSON
SHAWN JUDGE
VIRGINIA KLEVORN
TOMMY A. KRAUSE
MARK LANTERMAN
KYLE A. LOVEN
SUSAN C. RHODE
SUSAN STAHL SUIETER
GAIL STREMEL
BRUCE R. WILLIAMS
ALLAN WITZ

1500 LANDMARK TOWERS
345 ST. PETER STREET
ST. PAUL, MINNESOTA 55102-1218

TELEPHONE (651) 296-3952
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FAX (651) 297-5801

MEETINGS OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD 2020

Lawyers Professional Responsibility Board meetings are
scheduled for the following dates and locations:

| <u>Date</u> | <u>Location</u> |
|----------------------------|--|
| Friday, January 31, 2020* | Town & Country Club, St. Paul, MN |
| Friday, April 24, 2020* | Town & Country Club, St. Paul, MN |
| Friday, June 19, 2020* | Town & Country Club, St. Paul, MN |
| Friday, September 25, 2020 | Earle Brown Center, Brooklyn Center, MN (following seminar) |

*Lunch is served for Board members at 12:00 noon. The public meeting starts at approximately 1:00 p.m.

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.