

**LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
MEETING AGENDA**

Friday, September 29, 2017 – 3:00 p.m. (following Seminar)
Earle Brown Center
Minneapolis, Minnesota

1. Approval of Minutes of June 9, 2017, Lawyers Board Meeting (Attachment 1) and September 8, 2017, Special Lawyers Board Meeting (Attachment 2).
2. Welcome Bruce Williams (Attachment 3).
 - a. Updated Panel assignment (Attachment 4).
3. DEC Seminar Discussion/Feedback.
4. Committee Updates:
 - a. Rules Committee.
 - (i) LPRB Letter to MSBA Rules Committee (Attachment 5).
 - b. Opinions Committee.
 - c. DEC Committee.
5. Director's Report (Attachment 6).
6. Other Business:
 - a. Noteworthy Decisions, *In re Panel No. 41310* (Attachment 7).
 - b. Scanning of Wills (Follow-Up Request).
 - c. Panel Protocols.
 - d. Final 2018 meeting dates (Attachment 8).
 - e. Next meeting, Friday, January 26, 2018, 1:00 p.m.
7. Quarterly Board Discussion (closed session).

**MINUTES OF THE 180TH MEETING OF THE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD**

June 9, 2017

The 180th meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, June 9, 2017, at the Town & Country Club, St. Paul, Minnesota. Board members present were: Board Chair Stacy Vinberg, Jeanette Boerner, James Cullen, Roger Gilmore, Christopher Grgurich, Mary Hilfiker, Peter Ivy, Bentley Jackson, Shawn Judge, Virginia Klevorn, Cheryl Prince, Susan Rhode, Gail Stremel, Terrie Wheeler, Allan Witz, and Robin Wolpert. Present from the Director's Office were Director Susan Humiston, Deputy Director Patrick Burns, and Assistant Directors Timothy Burke, Binh Tuong, Megan Engelhardt, Cassie Hanson, and Kevin Slator. Also present were LPRB liaison Justice David Stras and a member of the public, Harvey Skow.

1. APPROVAL OF MINUTES

The minutes of the April 14, 2017, Board meeting were approved.

2. UPDATE ON APPOINTMENT OF NEW MEMBER

Susan Humiston reported on the LPRB member opening resulting from the resignation of Lisa Radzak. She noted there were several good applicants and that the Court will be making their appointment soon.

3. HARVEY SKOW PRESENTATION

Harvey Skow, a member of the public who has had complaints dismissed without investigation, desired to address the LPRB and was given the opportunity to do so. Mr. Skow discussed the procedures for determining whether to investigate complaints and referred to a *Bench & Bar* article by former Director Martin A. Cole in which Rule 8(a), Rules on Lawyers Professional Responsibility (RLPR), is discussed and the standard for determining whether to investigate a complaint. Mr. Skow stated his opinion that Rule 8(a), RLPR, does not give the Director discretion to not investigate a complaint if that complaint alleges attorney wrongdoing. In further support of his argument, he cited to an article by former Director Michael J. Hoover. He opined that Deputy Director Burns is dishonest in that he does not initiate investigations where complaints specifically allege violations of the Rules of Professional Conduct.

4. 2017 ANNUAL REPORT DRAFT

Susan Humiston discussed changes in the report format from prior years. She noted that she is continuing to try to streamline the report. She noted the addition this year of two charts – one showing the years of practice for attorneys who are disciplined, and another detailing the subject matter of advisory opinion calls. She did note that some of the biographical information for LPRB members in the report may be outdated and asked Board members to check their information and let the Office know if it needs to be updated. Virginia Klevorn asked if the Office is designing training programs around the topics of most interest in the advisory opinion calls. Ms. Humiston noted that the Office is doing a series of webinars through MNCLE on common topics of interest and will be doing FAQs for retainer agreements. Ms. Klevorn asked if these trainings would be incorporated into the training of DEC members. Ms. Humiston replied that the Office is considering substantive rule training for DEC and Board members. Justice Stras noted that the Court is planning ongoing training for referees. A motion was made and seconded to adopt the 2017 Annual Report as presented after updating of statistical information. The motion was adopted by a unanimous vote.

5. COMMITTEE UPDATES

Cheryl Prince reported on the Rules Committee. She discussed the MSBA proposed amendments to Rule 5.5, Minnesota Rules of Professional Conduct (MRPC). She noted that the LPRB Rules Committee is considering these amendments and will be getting input from the MSBA Rules Committee on the topic. She asked the Board for a consensus on how to approach the topic. She noted that the MSBA is potentially on track to present their proposal to the MSBA General Assembly in September. Timothy Burke discussed the Rules Committee process to date and discussed the nature of the proposed rule changes. He expressed concern that the MSBA's "friends and family" exception was overly broad and would create enforcement issues. He did note that concerns regarding the unauthorized practice of law (UPL) are somewhat alleviated if the client is familiar with the lawyer by virtue of a prior attorney-client relationship. He also noted that whatever changes might be made to the rule, this will not change how other jurisdictions view the application of their rules and laws pertaining to UPL.

Ms. Prince said she was seeking some guidance or consensus from the LPRB as to the proposed rule changes and opined that someone from the LPRB and OLPR should attend the MSBA General Assembly meeting where the changes will be discussed. Virginia Klevorn asked about the goal of Rule 5.5—to protect the people of the State or to protect lawyer livelihoods? Ms. Prince opined that the rules need to address changes in the practice of law and allow greater ability to practice.

Ms. Humiston discussed the overall process, noting that there would not likely be a Rules Committee position available prior to the MSBA's September General Assembly meeting. She noted that we do not necessarily need an official LPRB position prior to the Assembly. She asked for comments on how best to get LPRB input on the proposed changes. Ms. Prince reiterated that she is looking for a general sense of the LPRB on the proposed changes. Allan Witz opined that the LPRB should work with the MSBA as their proposals are being developed. Ms. Humiston noted that Patrick Burns, from the OLPR, is a member of the MSBA Rules Committee and attended and participated in their meetings where the proposed changes were discussed and developed. Mr. Witz asked what the LPRB does if there is not agreement with the MSBA on the proposed changes. Ms. Humiston noted that the Board could submit comments to the Supreme Court after the MSBA files their petition seeking amendment of the rule. Robin Wolpert asked if there is a minority report from the MSBA Rules Committee. Ms. Humiston said there is not. Ms. Wolpert opined that it would be a good idea to provide input to the MSBA Assembly when they consider the proposal and that it is important that the OLPR and LPRB attend the Assembly meeting. She suggested that it would be good to have a bullet point list of the LPRB's positions and should possibly also seek to have a minority report appended to the MSBA Rules Committee report. She suggested scheduling a special meeting of the LPRB to consider these issues before the MSBA Assembly meeting. Christopher Grgurich opined that he supported the idea of a special meeting to consider this issue after additional information is provided to the Board regarding both the OLPR and MSBA positions.

James Cullen stated it was his understanding that the OLPR would be getting additional information to the LPRB Rules Committee and that, thereafter, there would be another meeting of the Rules Committee. Ms. Prince opined that a full Board meeting on the issue rather than a Rules Committee meeting would be a better way to proceed. Mr. Cullen opined that the Rules Committee should first reconvene and then make a recommendation to the full Board. Ms. Wolpert opined that the MSBA ought to hear from the LPRB on this and asked if the Board could move quicker on it. Stacy Vinberg opined that the Rules Committee should make a recommendation to the Board before any special meeting of the full Board. Ms. Prince opined that that could be done if the special meeting is set for August. Bentley Jackson noted that the MSBA Rules Committee wants input in the LPRB's consideration of the proposed changes. Mr. Burke noted that Eric Cooperstein, a member of the MSBA Rules Committee, wants to address the LPRB Rules Committee. Ms. Prince noted that the Rules Committee could finish their deliberations and make a recommendation to the full Board after one more meeting of the Rules Committee. Mr. Cullen asked for additional input on the issue from the OLPR.

Roger Gilmore moved that a special meeting of the LPRB be set for the first Friday in August. The motion was seconded. Mr. Witz inquired as to what would be discussed at the special meeting. It was noted that the MSBA's proposal would be discussed with an eye towards developing a formal LPRB position on the proposal. Ms. Wolpert noted that submissions to the MSBA Assembly need to be submitted by mid-August in order to be considered at the September Assembly meeting. Mr. Witz asked if Board members could participate in the meeting by phone, and was told that is possible. The motion on the floor was amended to call for a special meeting on July 28. The motion was voted on and adopted by a unanimous vote. Jeanette Boerner asked if an actual meeting is necessary or whether the proposed rule changes could just be posted with the Rules Committee's comments. Ms. Prince opined that an actual meeting would be better for the purpose of formulating a position. Mary Hilfiker asked whether the meeting could be done by conference call. Ms. Vinberg opined that these are important rule changes and it is better to have a full review and discussion of the LPRB Rules Committee report and recommendation. Allan Witz expressed agreement with this.

Stacy Vinberg noted that Justice Stras may be leaving as liaison to the LPRB in that he has been nominated to fill a position on the 8th Circuit Court of Appeals. Justice Stras noted that nothing is yet finalized with respect to his nomination and thanked all involved for doing a great job improving the attorney discipline system.

Terrie Wheeler reported on behalf of the DEC Committee, summarizing the recent DEC Chairs Symposium and noting the survey results from Symposium attendees.

There was no report from the Opinions Committee.

6. DIRECTOR'S REPORT

Ms. Humiston asked the other OLPR staff members present to introduce themselves. After the introductions, Ms. Humiston discussed case statistics. She noted an overall decrease in the file inventory and the number of year old files. New filings are the same year-to-date as last year, but not on a pace to meet last year's numbers in light of the fact that last year's numbers were slightly inflated by a late-in-the-year filing of multiple complaints against various county attorneys for failure to prosecute police officers.

Ms. Humiston noted that there has been some stagnation of progress on disposing of old files and set the goal of having all cases charged or dismissed within one year by September 1. She noted that the oldest pending case dates to May 2013. She noted that Advisory Opinions are up year-over-year in 2016, but still down

somewhat from prior years. She presented the Board with a chart showing the number of complainant appeals per month for 2015 and 2016, per the prior request of Jim Cullen, and noted that Board members should generally expect one complainant appeal per month.

Ms. Humiston discussed her objectives for the Office and the strategic plan process. She noted that a team has been formed for the strategic planning committee. Justice Stras noted that it is best that the strategic planning committee have a free-flowing discussion and thinks it is better if he or his replacement as liaison not be involved until the latter part of the process.

Ms. Humiston noted that she and Chair Vinberg will be presenting the budget to the Court on June 21. She noted that merit increases for employees will be adjusted down from 3.5% to 2.5% in light of the legislature's allocation of funds to the judiciary. She also noted that she has reduced the estimate of upcoming IT costs.

Ms. Humiston noted that the Office recently completed the employee review process and noted that several employees were nominated for Spot Awards. Ms. Humiston then read from a letter received from the spouse of a deceased lawyer for whom the OLPR handled a trusteeship. The spouse expressed her praise and appreciation for the manner in which Joshua Brand and Lynda Nelson handled the trusteeship and the manner in which they interacted with her during a difficult time. She also noted receipt of a letter from a respondent complimenting Cassie Hanson and Sofia Manning on the professional manner in which they prosecuted his case. She also noted that Timothy Burke had recently done a very good job in interviewing a witness who was the victim of a crime.

Ms. Humiston then discussed the Office's collection of judgments owed to it, noting that approximately \$180,000 is owed. The Office will be reviewing these to see if more can be done to collect on these judgments.

Ms. Humiston noted that she had had discussions with Judicial IT regarding ensuring cybersecurity and the steps they are taking. Justice Stras noted that the Judicial Branch had been the victim of three or four denial of service attacks last year and steps have been taken to enhance security.

Ms. Humiston noted that amendments to the Panel Manual are still in process and hopefully will be presented to the Board for consideration at the next meeting. Mr. Cullen asked about the trusteeship report in the Annual Report and asked about trusteeship files that are eligible for expunction. He inquired whether the wills in the Director's possession in a particular trusteeship could be scanned as opposed to expunged. Ms. Humiston said she would follow-up on that.

7. **OTHER BUSINESS**

Stacy Vinberg noted the 2018 meeting dates. Susan Humiston noted that the June 18, 2018, meeting conflicts with the MSBA Annual meeting and will be rescheduled.

Ms. Humiston then discussed the issue of the submission of DEC reports as evidence in Panel proceedings. She noted that the Supreme Court, in *In re Nwaneri*, held that DEC reports and recommendations are non-binding suggestions to the Director and the Director is free to depart from them. She noted that the OLPR routinely objects to admission of the reports into evidence in that they are inadmissible hearsay and not relevant.

8. **QUARTERLY BOARD DISCUSSION**

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

Thereafter, the meeting adjourned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. Burns', is written over a horizontal line.

Patrick R. Burns
Deputy Director

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

**MINUTES OF THE SPECIAL MEETING OF THE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
TO CONSIDER PROPOSED AMENDMENTS TO RULE 5.5, MINNESOTA RULES
OF PROFESSIONAL CONDUCT**

September 8, 2017

A special meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, September 8, 2017, at the Town & Country Club, St. Paul, Minnesota. By written approval of the Board, this meeting was moved from the previously scheduled date of July 28, 2017. Board members present were: Board Chair Stacy Vinberg, Joseph Beckman (by telephone), Jeanette Boerner, James Cullen, Thomas Evenson, Roger Gilmore, Mary Hilfiker, Gary Hird, Anne Honsa, Bentley Jackson (by telephone), Virginia Klevorn, Cheryl Prince, Susan Rhode, Gail Stremel, Bruce Williams, and Robin Wolpert. Present from the Director's Office were Director Susan Humiston, Deputy Director Patrick Burns, and First Assistant Director Timothy Burke. Also present on behalf of the MSBA Rules of Professional Conduct Committee were Eric Cooperstein and Fred Finch.

1. ANNOUNCEMENTS

Susan Humiston announced the upcoming retirements of Deputy Director Patrick Burns and Senior Assistant Director Craig Klausing. She noted that the process for hiring replacements has begun. She reminded the Board of the upcoming DEC Seminar and encouraged registration for that seminar. She reported that Board member Michael Leary had health problems that limited his involvement in Board proceedings this last summer, but that he is now home and recuperating from surgery.

2. DISCUSSION OF MSBA PROPOSED AMENDMENTS TO RULE 5.5, MRPC

Tim Burke presented a summary of the MSBA Rules of Professional Conduct Committee's proposal to amend Rule 5.5, Minnesota Rules of Professional Conduct (MRPC). He noted that Rule 5.5 currently contains exceptions to the general prohibition against the unauthorized practice of law permitting temporary practice in Minnesota under specified circumstances. He then noted the recent Supreme Court Opinion in *In re Charges of Unprofessional Conduct in Panel File No. 39302* where the Court, with three dissenters, upheld a private admonition given to a Colorado attorney who engaged in the practice of law in Minnesota. The ruling in this case gave rise to concern among some members of the bar and, in response, the MSBA's Rules of Professional Conduct Committee has proposed three changes to the rule.

The first proposed change would add a new subdivision to Rule 5.5 to remove certain relationships from the scope of what would otherwise be considered the unauthorized practice of law, permitting non-Minnesota licensed lawyers to provide legal services in Minnesota to persons who have a family, close personal, or prior professional relationship with the lawyer. This is referred to as the “friends and family exception.”

The second proposed change would amend Rule 5.5(b) and (d) to allow a lawyer to continue the practice of the law of the jurisdiction in which the lawyer is licensed when the lawyer relocates to Minnesota. This is referred to as the “snowbird rule.”

The third proposed change would amend Rule 5.5(c)(4) to expand the exception permitting temporary practice in Minnesota by a non-Minnesota licensed lawyer where the services rendered arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. The proposed amendment would add the language, “Such reasonably-related services include 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.” Mr. Burke noted that the inclusion of this language would be accompanied by elimination of language currently in Comment 14 to Rule 5.5 which includes in the definition of “reasonably-related services” services that draw upon the lawyer’s recognized expertise developed through the regular practice of law “in matters involving a particular body of federal, nationally uniform, foreign, or international law.”

Cheryl Prince, Chair of the LPRB Rules Committee, proposed consideration of each of the three changes separately. She stated that the purpose of the Board’s consideration of the proposed changes was to formulate a position with respect to the proposed amendments for presentation to the MSBA General Assembly when it meets to consider the MSBA Rules of Professional Conduct Committee’s proposal.

Tom Evenson asked for clarification of how the snowbird rule would operate. Tim Burke gave further detail on this proposed change. Susan Humiston noted that Arizona and New Hampshire have adopted similar, though not identical, snowbird exceptions.

Virginia Klevorn asked how many lawyers are seeking this change and wondered about the economic impact the changes might have. Susan Humiston noted that the proposed changes would be reviewed and acted upon by the MSBA General Assembly, which presumably speaks for the bar.

Robin Wolpert asked why physical location matters regarding the practice of law. Susan Humiston said physical location is a subset of UPL noting that nationwide

there is a patchwork of regulation of the practice of law with many states taking a strict interpretation. She noted that the 1998 California *Birbrower* decision motivated the ABA to take action to make changes to Model Rule 5.5. Tim Burke noted that Rule 5.5 focuses on "practice in a jurisdiction" and, in that sense, physical location may be relevant.

Cheryl Prince discussed the "friends and family" exception noting that the LPRB Rules Committee does not oppose an exception for family members. She noted that the committee feels the term "close personal friends" is vague and that inclusion of "prior professional relationship" expands the exception too far.

Susan Humiston asked why family members ought to be excepted. Cheryl Prince relayed that the committee is not opposed to the concept of the family member exception in that family members are knowingly accepting the risk in retaining a lawyer not licensed in the jurisdiction. Gary Hird opined that prohibiting representation of family members is difficult to police. Tim Burke noted that the exceptions for family members and close personal friends are fairly narrow as opposed to the prior professional relationship exception. Jim Cullen noted that the dissent in *Panel File No. 39302* was concerned with the prohibition on representation of family members. Joe Beckman noted that, as a Panel member, while he agreed with the admonition of the Colorado lawyer, it was troubling since it involved a family member who had not complained. Virginia Klevorn noted that when her attorney brother in Chicago gives her advice he always includes caveats about how he is not licensed in Minnesota. She is concerned though that family members may not be aware of the risks they run by having a non-licensed lawyer provide legal services on their behalf and thus she is opposed to the friends and prior professional relationship exceptions.

Mary Hilfiker suggested, as to the prior professional relationship exception, that it be limited to current attorney-client relationships. She does not agree with the friends exception and believes that if family members are to be excepted, the term "family" should be defined. Susan Humiston asks whether, if the exception is to be limited to current or former clients, such representation would fall under an already existing exception. Eric Cooperstein responded that the already existing exceptions apply to temporary representations and in the transactional world, such representations may be ongoing and not considered temporary.

Eric Cooperstein stated that the idea behind these changes is to take trusted relationships out of operation of the rule and restore the decision as to whom should represent the client back to the client.

Robin Wolpert asked if corporate counsel have weighed in on these proposed changes. Eric Cooperstein responded that the proposed rule changes have not yet been

shopped around, but his experience in advising lawyers indicates that they are concerned with these issues.

Fred Finch noted that the term "prior professional relationship" is used in Rule 7.3 regarding solicitation and would be limited to prior attorney-client relationships. Pat Burns noted that there are those on the MSBA Rules Committee who believe prior professional relationships include any professional relationship, not just prior attorney-client relationships.

Virginia Klevorn asked whether it might make sense to use the phrase "attorneys serving multijurisdictional clients" instead of "prior professional relationship."

Cheryl Prince asked why the OLPR is opposed to the friends and family exception. Susan Humiston cited consumer protection concerns and noted separately that she, as former in-house counsel, took a broad view as to what might be considered "temporary" under the rule and noted the Comments to Rule 5.5 in this regard.

Eric Cooperstein said that the rule needs to be changed in order to provide clear guidance to attorneys. Virginia Klevorn noted that the words in the proposed rule are open-ended and do not provide clear guidance as to their meaning. Cheryl Prince noted that it would be difficult to provide specific, thorough guidance as to the meaning of these words in the rule. Jim Cullen expressed opposition to adding more definition.

Cheryl Prince called for a motion on the issue. Gary Hird inquired as to whether the language in the proposed MSBA amendments is final. Fred Finch replied that the language is final with respect to the MSBA Rules of Professional Conduct Committee, but others will have a chance for input before the matter goes to the MSBA General Assembly.

Mary Hilfiker moved to approve the MSBA proposal with respect to the "friends and family" exception but with elimination of the "close personal friends" exception and changing the "prior professional relationship" language to "current professional relationship." The motion was seconded.

Stacy Vinberg asked how the term "professional relationship" would be defined. Fred Finch noted that Comment 16 to Rule 5.5 addresses that issue. Cheryl Prince noted that the LPRB Rules Committee was in favor of substituting the phrase "current attorney-client relationship" for "prior professional relationship." Robin Wolpert opined that the language proposed by the MSBA ought not to be changed in that it reflects the reality of practice. Susan Humiston stated that she did not see any benefit to

Minnesota lawyers in the proposed changes. Stacy Vinberg discussed the public protection issues inherent in the rule.

Mary Hilfiker amended her motion to substitute the phrase “current attorney-client relationship” for “prior professional relationship.”

Susan Humiston expressed concern that the changes to the rule might mislead a Minnesota lawyer to believe that other jurisdictions have similar rules with the result that they could face discipline in other jurisdictions. Eric Cooperstein asked why it would matter to a lawyer if they were disciplined in a jurisdiction where they were not licensed. Jim Cullen asked why former clients would not be included in the exception. Virginia Klevorn opined that the existence of a prior working relationship is an important consideration. Robin Wolpert noted that an underlying trust between attorney and client is an important element and that the Board should recognize practice considerations unless there is a vital public protection interest. Gary Hird stated that he sees the proposed changes as a form of unilateral disarmament and noted that the only assurance of competency in Minnesota law is the law license issued by Minnesota. He sees no need to expand the current exceptions.

A vote was held on Ms. Hilfiker’s motion. The motion failed with 5 in favor and 8 opposed.

Robin Wolpert moved for approval of the MSBA’s proposed Rule 5.5(e) language. The motion was seconded and put to a vote. The motion failed with 2 in favor and 11 opposed.

Thomas Evenson moved for approval of the MSBA proposed Rule 5.5(e) but with the exception limited only to family members. The motion was seconded.

Jeanette Boerner opined that it is completely rational that a lawyer may give legal advice to a family member, but it is a different situation where that lawyer deals with others on behalf of the family member. Susan Humiston and Tim Burke noted that other court rules may restrict a non-Minnesota licensed lawyer from appearing on behalf of a family member, but otherwise, the exception would allow those lawyers to interact with others.

A vote was held on Mr. Evenson’s motion. The motion passed with 9 in favor and 4 opposed.

Tim Burke explained the “snowbird” issue noting that the proposed changes would permit a lawyer from another jurisdiction who resides in Minnesota to practice the law of their home jurisdiction on behalf of clients from their home jurisdiction while

residing in Minnesota. Eric Cooperstein noted that the term "snowbird exception" is not accurate in that the changes are meant to cover situations where the non-Minnesota licensed attorney has to permanently move to Minnesota, as opposed to a temporary visit. Gary Hird opined that he has no problem with lawyers located in Minnesota practicing the law of the jurisdiction in which they are licensed. Susan Humiston noted that her only concern is that there should be a requirement for obtaining the client's informed consent before engaging in such practice. Virginia Klevorn asked whether there is a requirement that out-of-state-licensed attorneys inform the state in which they are residing that they are present in the state and practicing the law of their home jurisdiction. It was noted there is no such requirement.

Cheryl Prince moved for approval of the MSBA Rules of Professional Conduct Committee's proposal with an addition requiring the informed consent of the client.

Robin Wolpert opined that requiring the client's informed consent could work to drive clients away from the lawyer. Jeanette Boerner asked whether disclosure is sufficient as opposed to the client's informed consent.

Gary Hird moved to amend the motion to add the language of Arizona's Rule 5.5(f) except for the last seven words of that rule. Mr. Hird's motion was seconded.

Patrick Burns asked whether the requirement of informed consent would include a requirement that the informed consent be confirmed in writing. Cheryl Prince says that it would not.

Eric Cooperstein suggested that a better motion would be to adopt the MSBA Rules of Professional Conduct Committee's proposal with the addition of language requiring disclosure but that the Board did not need to focus on wordsmithing the precise language.

Gary Hird withdrew his motion. Cheryl Prince withdrew her motion and substituted a motion to adopt the MSBA Rules of Professional Conduct Committee's proposal with the addition of language requiring disclosure. The motion was seconded and put to a vote. The motion passed with 13 in favor, none opposed, and with Bruce Williams abstaining.

Tim Burke discussed the MSBA Rules of Professional Conduct Committee's proposal regarding the changes to the "reasonably related" exception in Rule 5.5 and Comment 14 to the rule. He noted that the proposed change would eliminate the requirement that the area of law be limited to those involving a particular body of federal, nationally uniform, foreign, or international law and simply require that the

lawyer have a practice that includes the area of law in which they seek to practice in Minnesota.

Cheryl Prince noted that the LPRB Rules Committee thought the proposed change would make the exception overly-broad in that it could not ensure competency in non-uniform areas of law. Tim Burke highlighted the public protection issues in expanding the exception. Mary Hilfiker opined that the proposed change would allow any non-Minnesota licensed lawyer to practice law in Minnesota. Eric Cooperstein stated that it is not clear what constitutes a nationally uniform set of laws in that even with uniform codes there is usually some variation from state-to-state. Mary Hilfiker asked how many other states have an exception of this sort. Eric Cooperstein stated that no other states have this exception. Susan Humiston noted that the Supreme Court in *In re Panel File No. 39302* did not base their decision exclusively on the question of national uniformity, but rather looked at a number of different factors. She opined that the Court could have adopted the position of the proposed rule change, but did not.

Mary Hilfiker moved that the LPRB oppose the MSBA Rules of Professional Conduct Committee's proposal with respect to broadening the "reasonably related" exception. The motion was seconded and voted on. The motion passed with 13 in favor and 1 opposed.

Fred Finch asked that the LPRB send the MSBA Rules of Professional Conduct Committee a letter outlining its position prior to the Committee's next meeting on September 26, 2017. He discussed how the MSBA will likely proceed with respect to the proposed rule changes. Robin Wolpert suggested that someone from the LPRB attend the MSBA Judiciary Committee meeting where the MSBA Rules of Professional Conduct Committee's proposal will be considered.

Fred Finch noted that the goal of the MSBA Rules of Professional Conduct Committee is to have their proposal submitted to the MSBA General Assembly at their December meeting.

Thereafter, the meeting adjourned.

Respectfully submitted,



Patrick R. Burns
Deputy Director

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

BRUCE R. WILLIAMS

Attorney at Law
225 First Street North
Lincoln Building, Suite 2200
P.O. Box 94
Virginia, MN 55792
(218) 741-1230

EDUCATION

Hamline University School of Law, St. Paul, Minnesota

Degree: Juris Doctor, May 1990

Activities: Phi Alpha Delta

~~Elected Representative to Student Bar Association~~

Appointed member to Faculty Selection Committee

University of Minnesota, Duluth, Minnesota

Degree: Bachelor of Arts, May 1987

Major: Political Science

Minor: Sociology

Activities: Vice-Chair to University of Minnesota, Duluth,

Student Association

Bulldog Award, 1987 (Student Leadership)

Honors: Arrowhead Award, 1986 (Student Leadership)

LEGAL EMPLOYMENT

Attorney Sixth Judicial District Public Defenders Office, Virginia,
Minnesota
November 1990 to present
Defense counsel on contract with the office representing
individuals charged with felony crimes.

Attorney Sole practitioner, Virginia, Minnesota
November 1990 to present
Practices in general litigation, areas of family, criminal
defense, and property.

Attorney Federal Public Defender Conflicts Panel, United States
District Court, District of Minnesota, 1992 to present.

Law Clerk Office of Senate Counsel and Research, State Capitol,
St. Paul, Minnesota October 1989 to November 1990.

CERTIFICATIONS, POST-GRADUATE TRAINING, AND SELECTED PANELS

Criminal Trial Specialist, Certified by the National Board of Trial Advocacy – June 17, 2005; recertified, June 12, 2010.

Financial Early Neutral Evaluation (FENA) – March 18, 2011

Social Early Neutral Evaluation (SENA) – March 18, 2011

Panel of Qualified Early Neutral Evaluation for Sixth Judicial District Northeastern MN – September 23, 2011

Conflicts Panel Federal Public Defender Office United States District Court for Minnesota since 1992

COMMISSIONS

The Minnesota Supreme Court Advisory Committee to Review the Lawyer Discipline System – appointed July 25, 2007; report issued May 19, 2008

ORGANIZATIONS

Chair Fee Arbitration Committee – Twentieth District Minnesota Bar Association 2001-2011

Chair Twentieth District Minnesota Bar Association Ethics Panel 1996 to 2010 – Investigator, Chair in July 2011-2017

President Twentieth District Range Bar Association 1997 to 1998

Member Minnesota Supreme Court Board of Continuing Legal Education 1996 to 2002 (Chair 2001 to 2002)

Mentor United in Christ Lutheran Church; religious mentor for confirmation students, 2007-2010

Coach Mock Trials, Eveleth-Gilbert High School, 2005, and Virginia High School, 1997 and 1998

Coach Assistant Volunteer Varsity Football Coach, Eveleth-Gilbert School District 2010-2016

Volunteer Volunteer driver for Iron Range veterans, April 2001 to April 2003; transported disabled veterans from the Iron Range to medical appointments at the VA Hospital in Minneapolis, Minnesota.

PERSONAL

Age 53; Two boys, ages 10 and 12

Hobbies: farming, walleye fishing, pheasant hunting, no-check hockey

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 nonlawyer, and shall designate a Chair and a Vice-Chair for each Panel.

The following Panels are hereby appointed, effective July 1, 2017. Those with a single asterisk after their names are appointed Chair, and those with a double asterisk are appointed Vice-Chair.

Panel No. 1.

- * Thomas J. Evenson
- ** Peter Ivy
- Norina Jo Dove (p)

Panel No. 4.

- * James P. Cullen
- ** Gary M. Hird
- Gail Stremel (p)

Panel No. 2.

- * Joseph P. Beckman
- ** Bruce R. Williams
- Shawn Judge (p)

Panel No. 5.

- * Anne M. Honsa
- ** Jeanette Boerner
- Mary L. Hilfiker (p)

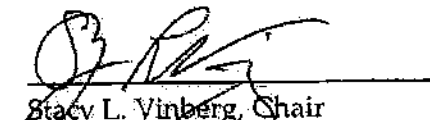
Panel No. 3.

- * Cheryl M. Prince
- ** Michael J. Leary (p)
- Allan Witz

Panel No. 6

- * Christopher Grgurich
- ** Susan C. Rhode
- Virginia Klevorn (p)

Effective July 1, 2017.


Stacy L. Vinberg, Chair
Lawyers Professional
Responsibility Board

- * Chair
- ** Vice Chair
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TELEPHONE (651) 296-3952
TOLL-FREE 1-800-657-3601
FAX (651) 297-5801

September 15, 2017

Mr. Frederick E. Finch
326 Brimhall Street
St. Paul, MN 55105

BY U.S. MAIL AND EMAIL
fredf006@earthlink.net
fredf006@comcast.net

Re: Proposed Amendments to Rule 5.5

Dear Mr. Finch:

On behalf of the Lawyers Professional Responsibility Board (LPRB), thank you for the opportunity to continue the dialogue regarding the proposed amendments to Rule 5.5, Minnesota Rules of Professional Conduct (Rule 5.5), recently recommended by the Minnesota State Bar Association Rules of Professional Conduct Committee (MSBA Rules Committee).

A. Proposed New Rule 5.5(e).

The LPRB agrees with the MSBA Rules Committee's recommendation that a new Rule 5.5(e) be added to allow a lawyer not admitted in Minnesota to perform legal services in Minnesota if the services "are performed on behalf of a person who has a family relationship with the lawyer." The LPRB does not agree that this additional exception should be further expanded to include persons with whom the lawyer has a "close personal" or "prior professional" relationship.

Members expressed multiple concerns about expanding this new exception beyond family members, and even the extension to family members was not unanimous. The terms "prior professional" and "close personal" relationship are vague and ambiguous. Moreover, these terms are potentially quite expansive and therefore appear to be overbroad.

The LPRB considered more narrowly crafted alternatives to "prior professional relationship." In the end, the LPRB could not settle on any acceptable alternative language.

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Expansion of this new exception raises consumer protection concerns. The concern is whether a family member hiring a lawyer who is not licensed in Minnesota to handle a Minnesota matter truly understands any limitations on the competency of that lawyer which may exist.

The Director and certain members of the Board are also concerned that this (and the additional proposed amendments) create the possibility that a Minnesota lawyer may be misled to believe other jurisdictions have similar rules, when in fact most jurisdictions do not. This could cause a Minnesota lawyer to unwittingly undertake conduct which results in the lawyer receiving discipline in another jurisdiction. The Director does not support the proposed Rule 5.5(e), even if limited to "a person who has a family relationship."

B. Proposed Amendments to Rule 5.5(b) and (d).

The LPRB agrees with the MSBA Rules Committee's proposed changes to 5.5(b) and (d), with the addition of a disclosure requirement in Rule 5.5(d).

The LPRB believes that this disclosure serves an important function, to ensure that a person hiring a lawyer understands the jurisdictional limitations on the lawyer's practice. Often, people assume that a lawyer physically present in a jurisdiction is licensed to practice in that jurisdiction. The proposed amendment to Rule 5.5(d) is inconsistent with this understanding. It would allow a lawyer physically present but not licensed in Minnesota to practice law in Minnesota. Ensuring clients understand that the lawyer nevertheless has limitations on the law the lawyer may practice is important. The Board considered the following language as acceptable:

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practicing in any jurisdiction, may provide legal services in Minnesota that exclusively involve federal law or the law of another 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 law in Minnesota.

It was noted, however, that this expands the disclosure request to lawyers practicing federal law.

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C. Proposed amendment to Rule 5.5(c)(4), and related amendment to the comment to Rule 5.5.

The LPRB does not support the MSBA's Rules Committee's proposed change to Rule 5.5(c)(4), MRPC, and the related proposed change to the comment to Rule 5.5.

Importantly, this proposed amendment eliminates the comment to the rule defining reasonably-related services as those "involving a particular body of federal, nationally-uniform, foreign, or international law." (Rule 5.5, Comment 14.)

The LPRB believes that maintaining the language currently in the rule and in the comment to the rule best protects the public. The LPRB is concerned that this amendment will allow lawyers to practice in an area of law in a jurisdiction in which the lawyer knows nothing about the law. For example, the lawyer may be well-versed in areas such as family law or landlord/tenant law in the lawyer's own jurisdiction. The law in these substantive areas, however, can vary widely between different jurisdictions. The fact that a lawyer knows the substantive law in one jurisdiction provides no assurance that the lawyer will know the substantive law, or identify the issues relevant in that area of law, in another jurisdiction. Although a person may know a lawyer and believe that lawyer is competent, the person will have no ability to assess the lawyer's ability to competently represent that person in that area of law in a different jurisdiction.

Additionally, in *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016), the Supreme Court declined the opportunity to adopt the position of the proposed rule change. Through that opinion the Court could have defined "reasonably related" to encompass the breadth the proposed rule change envisions. The Court did not do so. This proposed rule change appears to be an attempt to codify an interpretation of the rule that a majority of the Court expressly refused to accept:

Instead, the dissent argues, without citing any legal support for its claim, that the subject on which an attorney has expertise does not need to be nationally uniform in order for legal services provided outside the attorney's home jurisdiction to reasonably relate to the attorney's practice in his or her home jurisdiction. We disagree. Rule 5.5(c) is an exception to the general prohibition on the unauthorized practice of law. By

Mr. Frederick E. Finch

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interpreting the exception to apply to expertise in any subject matter, the dissent allows the exception to swallow the general rule.

Id. at 669 n.4. The Court appears to have already considered, and rejected, the position advanced by the committee.

Finally, this proposed amendment does not in any way assist Minnesota lawyers who may desire to practice on a temporary basis in another jurisdiction. Such practice would be governed by the rules of that jurisdiction. This proposed amendment primarily assists non-Minnesota lawyers coming into Minnesota, and the only assistance provided Minnesota lawyers is protection from reciprocal discipline once another state has already disciplined the lawyer for engaging in the unauthorized practice of law. This lack of reciprocal benefit appears inequitable and therefore troubling.

D. Conclusion.

For your information, I have also included the "Draft" minutes from the Board's September 8, 2017, meeting. These minutes are not final until approval by the Board at its next meeting. It is my understanding that at its next meeting the MSBA Rules Committee will consider the LPRB's position on, and concerns with, these proposed amendments. The LPRB and I appreciate the Committee's willingness to consider the LPRB's position.

Very truly yours,

Lawyers Professional
Responsibility Board

MAILED SEP 18 2017

By


Stacy L. Vinberg, Chair

ndh

Enclosure

cc: Nancy Mischel (w/encl. by email to nmischel@mnbar.org)
Cheryl M. Prince (w/encl. by email to cmp@hanftlaw.com)
Susan M. Humiston (w/encl. by email to Susan.Humiston@courts.state.mn.us)
Patrick R. Burns (w/encl. by email to Pat.Burns@courts.state.mn.us)
Timothy M. Burke (w/encl. by email to Tim.Burke@courts.state.mn.us)

**MINUTES OF THE SPECIAL MEETING OF THE
LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
TO CONSIDER PROPOSED AMENDMENTS TO RULE 5.5, MINNESOTA RULES
OF PROFESSIONAL CONDUCT**

September 8, 2017

A special meeting of the Lawyers Professional Responsibility Board convened at 1:00 p.m. on Friday, September 8, 2017, at the Town & Country Club, St. Paul, Minnesota. By written approval of the Board, this meeting was moved from the previously scheduled date of July 28, 2017. Board members present were: Board Chair Stacy Vinberg, Joseph Beckman (by telephone), Jeanette Boerner, James Cullen, Thomas Evenson, Roger Gilmore, Mary Hilfiker, Gary Hird, Anne Honsa, Bentley Jackson (by telephone), Virginia Klevorn, Cheryl Prince, Susan Rhode, Gail Stremel, Bruce Williams, and Robin Wolpert. Present from the Director's Office were Director Susan Humiston, Deputy Director Patrick Burns, and First Assistant Director Timothy Burke. Also present on behalf of the MSBA Rules of Professional Conduct Committee were Eric Cooperstein and Fred Finch.

1. ANNOUNCEMENTS

Susan Humiston announced the upcoming retirements of Deputy Director Patrick Burns and Senior Assistant Director Craig Klausing. She noted that the process for hiring replacements has begun. She reminded the Board of the upcoming DEC Seminar and encouraged registration for that seminar. She reported that Board member Michael Leary had health problems that limited his involvement in Board proceedings this last summer, but that he is now home and recuperating from surgery.

2. DISCUSSION OF MSBA PROPOSED AMENDMENTS TO RULE 5.5, MRPC

Tim Burke presented a summary of the MSBA Rules of Professional Conduct Committee's proposal to amend Rule 5.5, Minnesota Rules of Professional Conduct (MRPC). He noted that Rule 5.5 currently contains exceptions to the general prohibition against the unauthorized practice of law permitting temporary practice in Minnesota under specified circumstances. He then noted the recent Supreme Court Opinion in *In re Charges of Unprofessional Conduct in Panel File No. 39302* where the Court, with three dissenters, upheld a private admonition given to a Colorado attorney who engaged in the practice of law in Minnesota. The ruling in this case gave rise to concern among some members of the bar and, in response, the MSBA's Rules of Professional Conduct Committee has proposed three changes to the rule.

The first proposed change would add a new subdivision to Rule 5.5 to remove certain relationships from the scope of what would otherwise be considered the unauthorized practice of law, permitting non-Minnesota licensed lawyers to provide legal services in Minnesota to persons who have a family, close personal, or prior professional relationship with the lawyer. This is referred to as the "friends and family exception."

The second proposed change would amend Rule 5.5(b) and (d) to allow a lawyer to continue the practice of the law of the jurisdiction in which the lawyer is licensed when the lawyer relocates to Minnesota. This is referred to as the "snowbird rule."

The third proposed change would amend Rule 5.5(c)(4) to expand the exception permitting temporary practice in Minnesota by a non-Minnesota licensed lawyer where the services rendered arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The proposed amendment would add the language, "Such reasonably-related services include 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." Mr. Burke noted that the inclusion of this language would be accompanied by elimination of language currently in Comment 14 to Rule 5.5 which includes in the definition of "reasonably-related services" services that draw upon the lawyer's recognized expertise developed through the regular practice of law "in matters involving a particular body of federal, nationally uniform, foreign, or international law."

Cheryl Prince, Chair of the LPRB Rules Committee, proposed consideration of each of the three changes separately. She stated that the purpose of the Board's consideration of the proposed changes was to formulate a position with respect to the proposed amendments for presentation to the MSBA General Assembly when it meets to consider the MSBA Rules of Professional Conduct Committee's proposal.

Tom Evenson asked for clarification of how the snowbird rule would operate. Tim Burke gave further detail on this proposed change. Susan Humiston noted that Arizona and New Hampshire have adopted similar, though not identical, snowbird exceptions.

Virginia Klevorn asked how many lawyers are seeking this change and wondered about the economic impact the changes might have. Susan Humiston noted that the proposed changes would be reviewed and acted upon by the MSBA General Assembly, which presumably speaks for the bar.

Robin Wolpert asked why physical location matters regarding the practice of law. Susan Humiston said physical location is a subset of UPL noting that nationwide

there is a patchwork of regulation of the practice of law with many states taking a strict interpretation. She noted that the 1998 California *Birbrower* decision motivated the ABA to take action to make changes to Model Rule 5.5. Tim Burke noted that Rule 5.5 focuses on "practice in a jurisdiction" and, in that sense, physical location may be relevant.

Cheryl Prince discussed the "friends and family" exception noting that the LPRB Rules Committee does not oppose an exception for family members. She noted that the committee feels the term "close personal friends" is vague and that inclusion of "prior professional relationship" expands the exception too far.

Susan Humiston asked why family members ought to be excepted. Cheryl Prince relayed that the committee is not opposed to the concept of the family member exception in that family members are knowingly accepting the risk in retaining a lawyer not licensed in the jurisdiction. Gary Hird opined that prohibiting representation of family members is difficult to police. Tim Burke noted that the exceptions for family members and close personal friends are fairly narrow as opposed to the prior professional relationship exception. Jim Cullen noted that the dissent in *Panel File No. 39302* was concerned with the prohibition on representation of family members. Joe Beckman noted that, as a Panel member, while he agreed with the admonition of the Colorado lawyer, it was troubling since it involved a family member who had not complained. Virginia Klevorn noted that when her attorney brother in Chicago gives her advice he always includes caveats about how he is not licensed in Minnesota. She is concerned though that family members may not be aware of the risks they run by having a non-licensed lawyer provide legal services on their behalf and thus she is opposed to the friends and prior professional relationship exceptions.

Mary Hilfiker suggested, as to the prior professional relationship exception, that it be limited to current attorney-client relationships. She does not agree with the friends exception and believes that if family members are to be excepted, the term "family" should be defined. Susan Humiston asks whether, if the exception is to be limited to current or former clients, such representation would fall under an already existing exception. Eric Cooperstein responded that the already existing exceptions apply to temporary representations and in the transactional world, such representations may be ongoing and not considered temporary.

Eric Cooperstein stated that the idea behind these changes is to take trusted relationships out of operation of the rule and restore the decision as to whom should represent the client back to the client.

Robin Wolpert asked if corporate counsel have weighed in on these proposed changes. Eric Cooperstein responded that the proposed rule changes have not yet been

shopped around, but his experience in advising lawyers indicates that they are concerned with these issues.

Fred Finch noted that the term "prior professional relationship" is used in Rule 7.3 regarding solicitation and would be limited to prior attorney-client relationships. Pat Burns noted that there are those on the MSBA Rules Committee who believe prior professional relationships include any professional relationship, not just prior attorney-client relationships.

Virginia Klevorn asked whether it might make sense to use the phrase "attorneys serving multijurisdictional clients" instead of "prior professional relationship."

Cheryl Prince asked why the OLPR is opposed to the friends and family exception. Susan Humiston cited consumer protection concerns and noted separately that she, as former in-house counsel, took a broad view as to what might be considered "temporary" under the rule and noted the Comments to Rule 5.5 in this regard.

Eric Cooperstein said that the rule needs to be changed in order to provide clear guidance to attorneys. Virginia Klevorn noted that the words in the proposed rule are open-ended and do not provide clear guidance as to their meaning. Cheryl Prince noted that it would be difficult to provide specific, thorough guidance as to the meaning of these words in the rule. Jim Cullen expressed opposition to adding more definition.

Cheryl Prince called for a motion on the issue. Gary Hird inquired as to whether the language in the proposed MSBA amendments is final. Fred Finch replied that the language is final with respect to the MSBA Rules of Professional Conduct Committee, but others will have a chance for input before the matter goes to the MSBA General Assembly.

Mary Hilfiker moved to approve the MSBA proposal with respect to the "friends and family" exception but with elimination of the "close personal friends" exception and changing the "prior professional relationship" language to "current professional relationship." The motion was seconded.

Stacy Vinberg asked how the term "professional relationship" would be defined. Fred Finch noted that Comment 16 to Rule 5.5 addresses that issue. Cheryl Prince noted that the LPRB Rules Committee was in favor of substituting the phrase "current attorney-client relationship" for "prior professional relationship." Robin Wolpert opined that the language proposed by the MSBA ought not to be changed in that it reflects the reality of practice. Susan Humiston stated that she did not see any benefit to

Minnesota lawyers in the proposed changes. Stacy Vinberg discussed the public protection issues inherent in the rule.

Mary Hilfiker amended her motion to substitute the phrase "current attorney-client relationship" for "prior professional relationship."

Susan Humiston expressed concern that the changes to the rule might mislead a Minnesota lawyer to believe that other jurisdictions have similar rules with the result that they could face discipline in other jurisdictions. Eric Cooperstein asked why it would matter to a lawyer if they were disciplined in a jurisdiction where they were not licensed. Jim Cullen asked why former clients would not be included in the exception. Virginia Klevorn opined that the existence of a prior working relationship is an important consideration. Robin Wolpert noted that an underlying trust between attorney and client is an important element and that the Board should recognize practice considerations unless there is a vital public protection interest. Gary Hird stated that he sees the proposed changes as a form of unilateral disarmament and noted that the only assurance of competency in Minnesota law is the law license issued by Minnesota. He sees no need to expand the current exceptions.

A vote was held on Ms. Hilfiker's motion. The motion failed with 5 in favor and 8 opposed.

Robin Wolpert moved for approval of the MSBA's proposed Rule 5.5(e) language. The motion was seconded and put to a vote. The motion failed with 2 in favor and 11 opposed.

Thomas Evenson moved for approval of the MSBA proposed Rule 5.5(e) but with the exception limited only to family members. The motion was seconded.

Jeanette Boerner opined that it is completely rational that a lawyer may give legal advice to a family member, but it is a different situation where that lawyer deals with others on behalf of the family member. Susan Humiston and Tim Burke noted that other court rules may restrict a non-Minnesota licensed lawyer from appearing on behalf of a family member, but otherwise, the exception would allow those lawyers to interact with others.

A vote was held on Mr. Evenson's motion. The motion passed with 9 in favor and 4 opposed.

Tim Burke explained the "snowbird" issue noting that the proposed changes would permit a lawyer from another jurisdiction who resides in Minnesota to practice the law of their home jurisdiction on behalf of clients from their home jurisdiction while

residing in Minnesota. Eric Cooperstein noted that the term "snowbird exception" is not accurate in that the changes are meant to cover situations where the non-Minnesota licensed attorney has to permanently move to Minnesota, as opposed to a temporary visit. Gary Hird opined that he has no problem with lawyers located in Minnesota practicing the law of the jurisdiction in which they are licensed. Susan Humiston noted that her only concern is that there should be a requirement for obtaining the client's informed consent before engaging in such practice. Virginia Klevorn asked whether there is a requirement that out-of-state-licensed attorneys inform the state in which they are residing that they are present in the state and practicing the law of their home jurisdiction. It was noted there is no such requirement.

Cheryl Prince moved for approval of the MSBA Rules of Professional Conduct Committee's proposal with an addition requiring the informed consent of the client.

Robin Wolpert opined that requiring the client's informed consent could work to drive clients away from the lawyer. Jeanette Boerner asked whether disclosure is sufficient as opposed to the client's informed consent.

Gary Hird moved to amend the motion to add the language of Arizona's Rule 5.5(f) except for the last seven words of that rule. Mr. Hird's motion was seconded.

Patrick Burns asked whether the requirement of informed consent would include a requirement that the informed consent be confirmed in writing. Cheryl Prince says that it would not.

Eric Cooperstein suggested that a better motion would be to adopt the MSBA Rules of Professional Conduct Committee's proposal with the addition of language requiring disclosure but that the Board did not need to focus on wordsmithing the precise language.

Gary Hird withdrew his motion. Cheryl Prince withdrew her motion and substituted a motion to adopt the MSBA Rules of Professional Conduct Committee's proposal with the addition of language requiring disclosure. The motion was seconded and put to a vote. The motion passed with 13 in favor, none opposed, and with Bruce Williams abstaining.

Tim Burke discussed the MSBA Rules of Professional Conduct Committee's proposal regarding the changes to the "reasonably related" exception in Rule 5.5 and Comment 14 to the rule. He noted that the proposed change would eliminate the requirement that the area of law be limited to those involving a particular body of federal, nationally uniform, foreign, or international law and simply require that the

lawyer have a practice that includes the area of law in which they seek to practice in Minnesota.

Cheryl Prince noted that the LPRB Rules Committee thought the proposed change would make the exception overly-broad in that it could not ensure competency in non-uniform areas of law. Tim Burke highlighted the public protection issues in expanding the exception. Mary Hilfiker opined that the proposed change would allow any non-Minnesota licensed lawyer to practice law in Minnesota. Eric Cooperstein stated that it is not clear what constitutes a nationally uniform set of laws in that even with uniform codes there is usually some variation from state-to-state. Mary Hilfiker asked how many other states have an exception of this sort. Eric Cooperstein stated that no other states have this exception. Susan Humiston noted that the Supreme Court in *In re Panel File No. 39302* did not base their decision exclusively on the question of national uniformity, but rather looked at a number of different factors. She opined that the Court could have adopted the position of the proposed rule change, but did not.

Mary Hilfiker moved that the LPRB oppose the MSBA Rules of Professional Conduct Committee's proposal with respect to broadening the "reasonably related" exception. The motion was seconded and voted on. The motion passed with 13 in favor and 1 opposed.

Fred Finch asked that the LPRB send the MSBA Rules of Professional Conduct Committee a letter outlining its position prior to the Committee's next meeting on September 26, 2017. He discussed how the MSBA will likely proceed with respect to the proposed rule changes. Robin Wolpert suggested that someone from the LPRB attend the MSBA Judiciary Committee meeting where the MSBA Rules of Professional Conduct Committee's proposal will be considered.

Fred Finch noted that the goal of the MSBA Rules of Professional Conduct Committee is to have their proposal submitted to the MSBA General Assembly at their December meeting.

Thereafter, the meeting adjourned.

Respectfully submitted,

Patrick R. Burns
Deputy Director

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

OLPR Dashboard

9/22/2017

	Total Files	Total Lawyers	
Total Open Matters	508	386	
New Files YTD	815		
Closed Files YTD	784		
Files Opened in August 2017	116		
Files Closed in August 2017	122		
Public Matters Pending	25		
Panel Matters Pending	10		
Matters Pending with the DEC's	105		
Advisory Opinion Requests YTD	1523		
Advisory Opinion Requests Declined YTD	104		
Total Files Over 1 Year Old	120	81	
Matters Pending Over 1 Year Old w/o Charges	44	42	
Matters Pending Over 2 Years Old w/o Charges	4	2	

Discipline YTD	Total # Lawyers
Disbarred	5
Suspended	20
Reprimand & Probation	4
Reprimand	2
	Total # Files
Private Probation	13
Admonition	72

All Files Pending as of 9/22/17

Year/Month	SD	DEC	REV	OLPR	AD	ADAP	PROB	PAN	HOLD	SUP	SCUA	REIN	RESG	TRUS	Total
2014-01										1					1
2014-07										1					1
2014-08										1					1
2014-09										1					1
2014-11										1					1
2015-01									1	1	2				4
2015-03									1	1					2
2015-04										1					1
2015-05				2						2	1				5
2015-06				1						1				2	4
2015-07										1					1
2015-08				1											1
2015-09				1						1					2
2015-10								1		2					3
2015-11								1	2	1					4
2015-12				1				1						1	3
2016-02				3				2		3	2			1	11
2016-03				3				2		2					7
2016-04				2				1		1					4
2016-05				3		1			1	2				1	8
2016-06				2	1			2	2	2					9
2016-07				9		1		1		1	1				13
2016-08				12				2	4	1	1				20
2016-09				8				3		2					13
2016-10			1	13				2	2	1					19
2016-11				18				2		1					21
2016-12				20				1		2	1				24
2017-01				20				1	1	3					25
2017-02				16	1			7		1					25
2017-03				27			1	1	2						31
2017-04		5	2	17			1	1						1	27
2017-05		11	3	9	1		1		2			2		1	30
2017-06		13	1	14				1				1			30
2017-07		19		13						1				1	34
2017-08		36		21											57
2017-09	24	21		15								3	2		65
Total	24	105	7	251	3	2	3	32	18	39	8	6	2	8	508

Files Over One Year Old as of 9/22/17

Year/Month	OLPR	AD	ADAP	PAN	HOLD	SUP	SCUA	TRUS	Total
2014-01						1			1
2014-07						1			1
2014-08						1			1
2014-09						1			1
2014-11						1			1
2015-01					1	1	2		4
2015-03					1	1			2
2015-04						1			1
2015-05	2					2	1		5
2015-06	1					1		2	4
2015-07						1			1
2015-08	1								1
2015-09	1					1			2
2015-10				1		2			3
2015-11				1	2	1			4
2015-12	1			1				1	3
2016-02	3			2		3	2	1	11
2016-03	3			2		2			7
2016-04	2			1		1			4
2016-05	3		1		1	2		1	8
2016-06	2	1		2	2	2			9
2016-07	9		1	1		1	1		13
2016-08	12			2	4	1	1		20
2016-09	8			3		2			13
Total	48	1	2	16	11	30	7	5	120

	Total	Sup. Ct.
Sub-total of Cases Over One Year Old	113	35
Total Cases Under Advisement	7	7
Total Cases Over One Year Old	120	42

ALL FILES PENDING & FILES OVER 1 YR. OLD REPORTS STATUS KEY	
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

Professional Responsibility

By SUSAN HUMISTON

Who gets disciplined?

The Annual Report of the Lawyers Professional Responsibility Board (LPRB) and Office of Lawyers Professional Responsibility (OLPR) was filed with the Minnesota Supreme Court on July 3, 2017.

The report, which is posted on the LPRB website at www.lprb.mncourts.gov, covers operations of the LPRB/OLPR for the Court's fiscal year, July 1, 2016 – June 30, 2017, and details calendar year 2016 disciplinary actions. I have previously reported information regarding 2016 public and private disciplinary matters, so I won't repeat that information here.¹ What I would like to focus on this month is a bit more detail around who gets disciplined.

Risk by years of practice

Conventional wisdom seems to posit that new attorneys are at greater risk for discipline than more experienced attorneys. I have spoken with many individuals who worry about new attorneys who go into solo practice right out of law school, perhaps because they cannot find other jobs. These attorneys do not have the practical knowledge necessary to practice and may run into ethics issues—or so the argument goes. Many individuals worry about the impact of declining bar scores and crushing student loan debt, which in their view place newer attorneys in situations where they may make ill-advised choices that could in turn lead to ethics issues.

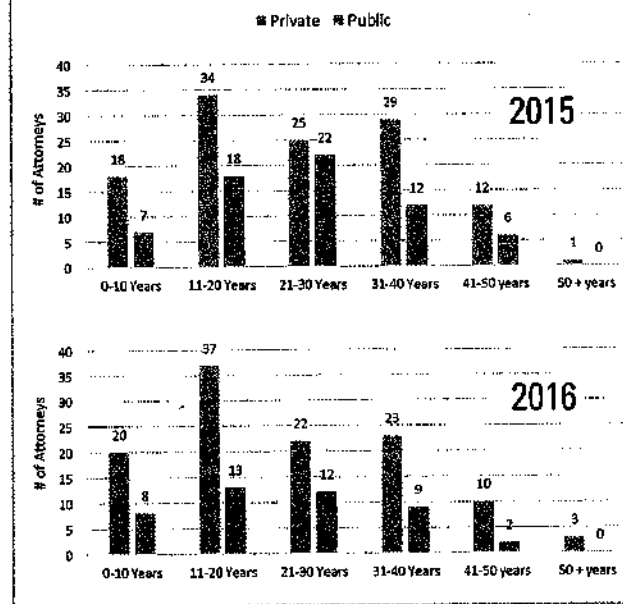
Earlier this year, a law professor from the East Coast wrote attorney regulation counsel throughout the United States asking for disciplinary information sorted by date of birth. Her premise was that millennials suffer from psychological disorders in higher numbers than the general population and she wanted to see if that translated to higher bar discipline rates. In Minnesota, we do not collect birth dates with annual registration data, so no such data is available. I have no idea whether the psychological disorder reference is accurate, but this request did prompt a lot of discussion among regulation counsel. Who generally gets disciplined?

To look into this for Minnesota, we graphed public and private discipline for 2015 and 2016 by years of practice and gender, the only demographic information available to us. Each year, generally speaking, 150-180 attorneys receive some form of discipline. (This is an extremely small percentage of the 29,000 attorneys—25,000 active—who hold Minnesota licenses.) What we found (see charts) is that attorneys with less than 10 years of practice receive fewer discipline decisions than any other 10-year practice cohort except those who have practiced more than 40 years. The attorneys at most risk? Those who have practiced between 11-20 years.



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.

Average Years of Practice for Attorneys Disciplined



As the 2016 demographic data recently reported by the Supreme Court shows, there are more attorneys within 0-10 years of practice than in any other 10-year cohort.² Thirty-two percent of all licensed lawyers have 0-10 years of experience, but they accounted for only 17 percent and 14 percent of discipline cases in 2016 and 2015, respectively. Some 24 percent of licensed attorneys are in the 11-20 years of practice cohort, but they accounted for 31 percent of discipline cases in 2016, and 28 percent in 2015. The next most at risk decade is 21-30 years of practice (my own cohort). This group, which represents 21 percent of licensed attorneys, accounted for 21 percent of discipline cases in 2016, and 26 percent in 2015. This is roughly equivalent to the percentage of the overall population. Discipline incidents jump again in the 31-40 years of practice cohort. This group constitutes 16 percent of the licensed population but accounted for 20 percent of discipline cases in 2016, and 22 percent in 2015.

No explanations, but a lesson

Why is this? I have no idea, and neither did any of my fellow regulation counsel, but anecdotal reports suggested that many other jurisdictions thought senior attorneys accounted for more discipline than newer attorneys. Lots of theories abound. Perhaps attorneys with more than 11 years of experience have more work and thus more chances to encounter issues? Perhaps newer attorneys get more supervision than senior attorneys, such that many ethical issues are caught and addressed without complaint? Perhaps newer attorneys remember professional responsibility better than those more distant in time from law school? Or maybe more senior attorneys lose focus on some of the fundamentals?

Professional Responsibility

Whatever the answer may be, this is a good reminder that ethics refreshers should be an important part of every year of practice. Just because you have been doing this a while does not mean you can afford to rest on your laurels; in fact, the data says the opposite. When was the last time you read the Minnesota Rules of Professional Conduct? Even with comments, the Minnesota rules are only 86 pages long. It is one thing to have a general idea of what the rules say; it's quite another thing to sit down, read them and think about them in the context of your everyday practice. While ethics CLEs are good opportunities to refresh your understanding of legal ethics, there is really no substitute for just reading the texts of the rules and thinking about your practice.

Gender imbalance

One other data point may be of interest: Each year, significantly more men than women are disciplined for ethics violations. In 2015, 157 men received discipline compared to 27 women. Men were the ones disciplined in 85 percent of cases, that is, though they make up approximately 55 percent of the attorney population. Women, conversely, received just 15 percent of the disciplinary actions, even as they constituted 38 percent of the attorney population. (Seven percent of the population did not respond to the gender question.) Nor is this a one-year anomaly. In 2016, 134 men were disciplined in a total pool of 159—84 percent of discipline cases. I'm not sure that women are more ethical than men, but the numbers are certainly disproportionate.

As always, remember that every business day, an attorney at the OLPR is available to answer ethics questions for Minnesota attorneys. Just call (651) 296-3952 or visit our website (www.lprb.mncourts.gov) to send a message. If you are at our website, check out the 2016 Annual Report for detailed information on the operation of Minnesota's lawyer ethics system. ▲

Notes

¹ Susan M. Humiston, "2016 Year in Review: Public Discipline," *Bench & Bar of Minnesota* 01/2017; Susan M. Humiston, "Private Discipline in 2016," *Bench & Bar of Minnesota* 02/2017.

² 2016 Minnesota Judicial Branch Report to the Community available at www.mncourts.gov/mncourtsgov/media/assets/documents/reports/2016JudicialBranchAnnualReport.

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By SUSAN HUMISTON

How do Minnesota's attorney discipline numbers compare?

Benchmarking is popular in business. I have found, however, that it is a challenge to benchmark attorney regulation systems given the differing approaches to attorney discipline and regulation among the states. Even though no two systems are identical, it is interesting to look at how different states approach attorney regulation, and to compare how many attorneys receive discipline in other jurisdictions. I picked two Midwestern states with similar attorney population sizes for purposes of this comparison, Wisconsin and Colorado. How did Minnesota compare in 2016?

The numbers

Wisconsin has approximately 25,000 active lawyers, as does Minnesota. Colorado has 26,000. In 2016, Wisconsin received 2,029 grievances. Colorado received 3,559, and Minnesota received 1,216. Why such a big difference? More lawyers behaving badly in Colorado or Wisconsin? More whiny clients in those

states? The more likely explanation is that both Wisconsin and Colorado have central intake systems, something that Minnesota does not have. This means that telephone complaints and inquiries are treated as grievances or complaints in those states. In Minnesota, we only consider written complaints. In Colorado and Wisconsin, intake also looks beyond whether or not to investigate the complaint, but may involve referring consumers to other agencies,

referrals to fee arbitration or mediation, or attempts to resolve minor disputes directly between the parties.

In 2016, Wisconsin investigated 353 complaints, and Colorado investigated 331. Minnesota investigated 608. Obviously, Colorado and Wisconsin investigated fewer cases, and used other measures to resolve client grievances short of a full investigation. Minnesota tends to investigate more. This is not to say that nothing is done with cases that are not referred for investigation in other states. Colorado, in fact, has a process whereby they can dismiss a complaint with "educational language," as well as a process of entering into diversion agreements, which may include such things as requiring attendance at an "ethics school," fee arbitration, or referral to an attorney assistance program, like Lawyers Concerned for Lawyers. Similarly, Wisconsin has an alternative-to-discipline program that may involve fee arbitration, law office management assistance, evaluation and treatment for alcohol or substance abuse, ethics school, or required CLE courses.

Interestingly, although fewer investigations were conducted in Wisconsin and Colorado, Wisconsin publicly disciplined approximately the same number of attorneys as were publicly disciplined in Minnesota; Colorado publicly disciplined more attorneys than Minnesota. In 2016 in Wisconsin, 14 lawyers were publicly reprimanded, 26 were suspended for some period of time, and one lawyer was disbarred (or revoked, in Wisconsin's nomenclature) for a total of 41 lawyers publicly disciplined. In 2016 in Colorado, 11 attorneys were publicly censured, 29 were suspended, 14 were placed on probation, and 18 were disbarred, for a total of 72 attorneys disciplined. In contrast, in 2016 in Minnesota, 44 attorneys were publicly disciplined: six reprimanded, four reprimanded and placed on probation, 28 suspended, and six disbarred. Importantly, in all three states, the attorneys receiving public discipline were a very small set of the active attorney population.

An additional difference between the three regulatory systems lies in the number of private disciplines issued. In 2016, Colorado issued nine private admonitions but entered into 46 formal diversion agreements, in addition to the 42 diversion agreements entered into as part of the intake process. Wisconsin issued 28 private reprimands, but an additional 113 lawyers entered the "alternatives to discipline" program. In contrast, Minnesota issued 115 private admonitions (reserved for rule violations that are "isolated and non-serious") and entered into 17 private probations. Because the dispositions are private in the various states, it is difficult to compare them to Minnesota's admonitions, but the numbers of private actions other than dismissal appear very similar.

A couple of other differences of note: In Wisconsin, attorneys who are disciplined must pay the litigation expenses associated with prosecuting their case, including fees, which can be several thousand dollars. In Colorado, disciplined attorneys must pay costs, assessed after entry of judgment. In Minnesota, lawyers who receive public discipline are assessed a flat cost of \$900, plus disbursements, if any.

In Wisconsin, each attorney pays \$155 to fund the Wisconsin Office of Lawyer Regulation, Wisconsin's disciplinary office; in Minnesota, the Office of Lawyers Professional Responsibility receives \$122 from each active lawyer in Minnesota licensed more than three years. Attorneys in Colorado pay \$325 annually, but that amount includes all attorney regulation costs, not just discipline, making it the equivalent of Minnesota's annual registration fee of \$248.

What does it all mean?

Different states approach attorney regulation differently, but the end result—the number of lawyers in Wisconsin, Minnesota and Colorado who engaged in serious misconduct warranting public discipline—did not vary too significantly, i.e., between 41-72 lawyers. Again, this is a very small set of



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.

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the active attorney population in each state. Minnesota attorneys also paid less to administer the state's attorney disciplinary system than Wisconsin or Colorado attorneys.

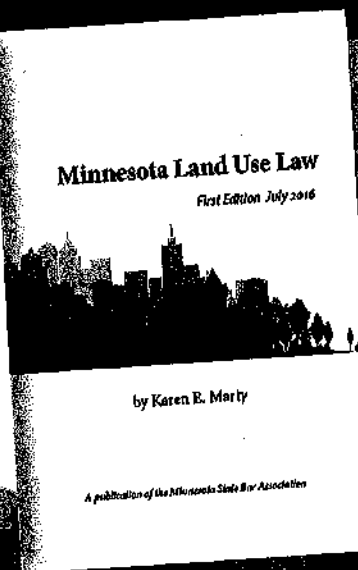
I am fascinated by the different ways in which states approach attorney regulation. While it can be difficult to truly benchmark different systems (the apples-to-oranges conundrum), there is a lot to be learned from considering how states approach the same problem—and beyond the statistics, how successful each state is in its primary regulatory objectives: maintaining public confidence in attorney self-regulation; addressing attorney misconduct; and preventing future misconduct.

Some of these issues, of course, take us beyond the discipline numbers alone. The Lawyers Professional Responsibility Board is about to commence strategic planning to ensure the Office of Lawyers Professional Responsibility is positioned to effectively meet its regulatory objectives in the years to come. Taking stock of how we compare to Midwestern states with similar attorney populations is a great starting place. ▲

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Professional Responsibility

By SUSAN HUMISTON

So you've received an ethics complaint. What now?

Receiving mail from the Office of Lawyers Professional Responsibility (OLPR) in an envelope marked "Personal and Confidential" is sure to ruin any lawyer's day. Even lawyers who serve as district ethics committee volunteer investigators hate getting mail from the OLPR, notwithstanding the fact that those envelopes are specifically marked "DEC Materials." Having been on the receiving end of the dreaded "Personal and Confidential" envelope, I know the sinking, pit-in-the-stomach feeling it evokes. On the one hand, this is good. Lawyers should have a healthy respect for the office tasked by the Minnesota Supreme Court with regulating lawyer ethics, and should take it very seriously when someone questions their ethics. On the other hand, the natural emotional reaction of dread or upset that many feel can get in the way of effectively addressing a complaint that, statistically speaking, will more likely than not result in a dismissal. The following are some tips on what to do and what not to do when a complaint is received.

Do not panic

The OLPR receives more than 1,100 complaints annually. Approximately one half of those complaints are not investigated because they do not meet the threshold for investigation.¹ Many people complain because they are unhappy with the results of the representation or do not like the amount charged. These types of complaints generally do not meet the threshold for investigation,

and the first time you receive notice of the complaint is when you receive a document entitled "Determination that Discipline is Not Warranted, Without Investigation." This means the office summarily dismissed the complaint. Open the envelope; you may be surprised to find that no action is needed.

But if you receive a notice of investigation with a copy of the complaint, do not panic. Again, statistically speaking, most cases that are investigated result in a dismissal. On average, only 20 percent of complaints result in some form of discipline, and most discipline is private. Even if your complaint is being investigated, odds are it may be dismissed. This is not because we do not take the rules seriously or tend to give lawyers a lot of breaks, but because in general attorneys take their professional obligations very seriously such that when the matter is reviewed, no rule violation is found.

If you are not surprised to see the complaint or have a feeling that you may have messed up, still do not panic. Most discipline issued is private because it is "isolated and non-serious."² While no one wants to receive any form of discipline, ethical mistakes do happen and it is not the end of the world.

Seek help

Not all, or even most, ethics complaints that are investigated require the retention of counsel. However, because of the personal and sometimes inflammatory nature of the allegations, many lawyers have a difficult time responding professionally and objectively on their own behalf. Consulting with a disinterested peer or trusted friend can bring valuable perspective to the situation and provide insight into the relevant issues. Lawyers hate asking for help but the smart move is not to handle a complaint on your own. Trust me on this one.

Some signs that you may wish to retain counsel instead of relying on a trusted peer or friend: You are too embarrassed to share the complaint with another person; you feel overwhelmed or intimidated by the process; you do not believe you can be objective in your own defense; you find yourself

procrastinating getting through the complaint or gathering the required information; or you are concerned you may have made a mistake and are unsure of the implications. Counsel who are familiar with the rules and the disciplinary process can add a lot of value in these circumstances.

Do not attack the complainant

Personal attacks against the complainant are unprofessional and never helpful. This is difficult advice for lawyers to follow, because complainants often attack the lawyer aggressively, and our naturally competitive, tit-for-tat instincts kick into gear. Do not sink to that level. You are the professional and your response should reflect that fact even if the complainant is the worst individual with whom you have ever had the misfortune to associate.

We also do not want to hear every terrible thing the client has done. While Rule 1.6(b)(8), Minnesota Rules of Professional Conduct (MRPC), allows for disclosure of confidential client information the lawyer "reasonably believes" is necessary to establish a defense in a disciplinary proceeding, this is not permission to share irrelevant client information that may be embarrassing or unflattering to the complainant just because you are upset with things they have said about you. Responding in this manner reflects poorly on you, may cause complainants to dig in their heels, and demonstrates a lack of understanding of your professional obligations.

Identify the issues

If you do not know which ethics rules are implicated by the facts in the complaint, you may want to consider retaining counsel. In making the determination to investigate your case, the duty attorney assigned to review the matter believed that, if the facts stated are true, one or more ethics rules may be implicated. I have been surprised by the number of responses that demonstrate on their face that the attorney does not have a good handle on the MRPC, and likely didn't even bother to read the rules before responding. This is never good.



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I have also been surprised at how many responses fail to apply the rules to the particular facts presented, the most basic job of any legal response. If you do not know which rules are in issue and decide not to hire counsel, you can always call the investigator assigned to the case and ask which rules they are considering, or call the OLPR attorney who signed the investigation notice. This is not a "gotcha" game. As neutral investigators, our job is to discover the facts and apply them to the rules to determine whether there is clear and convincing evidence of a rule violation. Please approach your response accordingly.

Respond, timely and completely

The notice of investigation provides 14 days to provide a written response. Timely responses are important. Not only is this part of cooperating with the investigation, which is required by rule,³ but it helps demonstrate you are taking the investigation seriously. Failure to respond will, by itself, lead to discipline. Sometimes you may need additional time to respond. A reasonable extension requested in a timely manner will likely be granted, but keep in mind that investigators are expected to keep investigations moving. We know you are busy, but you need to prioritize addressing the ethics investigation regardless of your views on its merits and what else you have going on.

Remember also that you must respond in writing, and that you should provide a copy of your response to your client if the complainant is or was a client (this is detailed in the investigation notice). You should provide supporting documentation where it exists. Do not be surprised when we ask to verify statements that you make. That is the job of an investigator. A good response understands as much, and provides supporting or corroborating information in the first instance—clearly referenced, organized, and labeled. Please also verify your facts before stating them. We will follow up. Failure to provide information or providing inaccurate information needlessly prolongs the investigation, can lead to heightened scrutiny, and makes you vulnerable to a Rule 8.1, MRPC,

violation. Finally, make sure you are fully responding to all allegations. We try to address all allegations in the determination, and in order to do so, we need you to do the same.

Be forthright

Responding to an ethics complaint is not the time to "lawyer the facts." The best response is candid and honest. Too many lawyers walk themselves into needless grief by trying to massage straightforward information, failing to acknowledge undisputed or easily proven facts, or overstating certain matters. While you can certainly put your best foot forward, an objective, well-reasoned response that acknowledges potential issues or shortcomings is always best. Lawyers sometimes also spend time explaining how great they are or all of the good things they have done. Stick to the facts and rules in issue. While context is important, matters such as where you went to law school, how successful you are, and how much pro bono work you do annually generally are not.

Conclusion

When responding to an ethics complaint, avoid panic, seek help, refrain from attacking the complainant, identify the issues, respond in a timely and thorough manner, and be forthright. These are not earth-shattering insights, but we see lawyers fail to follow this advice day in and day out. Do not let that be you.⁴ ▲

Notes

¹ Rule 8(a), Rules of Lawyers Professional Responsibility (RLPR), provides that the Director may investigate a matter if there is a "reasonable belief that professional misconduct may have occurred."

² Rule 8(d)(2), RLPR, provides for a private admonition if the misconduct is "isolated and non-serious."

³ See Rule 25, RLPR. Failure to cooperate is a separate grounds for discipline. Rule 25(b), RLPR.

⁴ Ken Jorgensen, former OLPR Director, wrote a similar article in November 2003 in *Bench & Bar*, entitled "Limiting Exposure to Complaints and Discipline." His article, re-published on the OLPR website at lrb.mncourts.gov under "Articles," is recommended reading.

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Regular Bench & Bar
columnist

Tony Zeuli is an
intellectual property
trial lawyer with
Merchant & Gould.

Prior to becoming a registered patent attorney, Tony worked in the field of nuclear physics for the University of Chicago and Department of Energy at Argonne National Laboratory. Tony is a frequent speaker and writer on patent litigation issues at national intellectual property law conferences such as those sponsored by the American Intellectual Property Law Association and the Association of Patent Law Firms, and his articles have appeared in national publications such as *The Federal Lawyer*. Tony can be reached at 612.371.5208 or at tzeuli@merchantgould.com or by visiting merchantgould.com/zeuli.

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OFFICE OF LAWYERS
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STATE OF MINNESOTA

IN SUPREME COURT

A17-0160

Original Jurisdiction

Per Curiam

In re Charges of Unprofessional Conduct in Panel
File No. 41310.

Filed: August 2, 2017
Office of Appellate Courts

William R. Sieben, James S. Ballentine, Schwebel Goetz & Sieben, P.A., Minneapolis, Minnesota; and

Charles E. Lundberg, Lundberg Legal Ethics, P.A., Roseville, Minnesota, for appellant.

Susan M. Humiston, Director, Megan Engelhardt, Senior Assistant Director, Office of Lawyers Professional Responsibility, Saint Paul, Minnesota, for respondent.

SYLLABUS

1. A panel of the Lawyers Professional Responsibility Board did not clearly err by finding that appellant violated Minn. R. Prof. Conduct 1.9(c)(2) by disclosing confidential information relating to the representation of a former client.

2. In this case, a private admonition is the appropriate disposition for an attorney who disclosed confidential information relating to the representation of a former client.

3. When an individual board member reviews a private admonition imposed on an attorney by the Director of the Office of Lawyers Professional Responsibility, the board

member adequately explains the member's decision, in compliance with Rule 8(e), Rules on Lawyers Professional Responsibility, when the decision incorporates by reference an explanation set forth in a District Ethics Committee report.

4. The Panel's statement of the facts and its conclusions complied with Rule 9, Rules on Lawyers Professional Responsibility.

Private admonition affirmed.

Considered and decided by the court without oral argument.

OPINION

PER CURIAM.

In this case, appellant, a Minnesota attorney, contests a private admonition issued by a panel of the Lawyers Professional Responsibility Board (Panel) for disclosing confidential communications with a former client, in violation of Minn. R. Prof. Conduct 1.9(c)(2). Appellant contends that he did not disclose confidential communications with a former client and that the decisions of an individual board member of the Lawyers Professional Responsibility Board and the Panel were inadequately explained, in violation of Rule 8(e), Rules on Lawyers Professional Responsibility (RLPR). We conclude that the Panel's finding that appellant disclosed confidential communications with a former client, in violation of Minn. R. Prof. Conduct 1.9(c)(2), was not clearly erroneous and that the appropriate disposition for this misconduct is a private admonition. We further conclude that the decisions of both the individual board member and the Panel were adequately explained. We therefore affirm the private admonition.

FACTS

Appellant was admitted to the practice of law in Minnesota on October 31, 2008. This attorney-discipline matter arises out of appellant's representation of a client who had been injured in a motor vehicle accident and brought a claim for damages against an insurance company. Appellant's representation was limited to seeking a settlement against the insurance company, and appellant consistently informed his client that he would not pursue litigation. On March 11, 2015, appellant sent a settlement demand to the insurance company requesting \$50,000, and in July the insurance company offered to settle the case for \$20,000.

On August 13, 2015, appellant and the client discussed the settlement offer. Appellant claims that the client accepted the offer, but the client disputes this claim. On September 4, the client asked appellant to file a lawsuit against the insurance company on his behalf. The following week, appellant told the client that the client had already accepted the \$20,000 settlement and that if he reneged on the settlement agreement, the insurance company would likely file a motion to enforce the settlement. Appellant also reminded the client that he would not pursue litigation. On September 17, the client terminated both appellant's and his firm's representation.

The next day, appellant sent an e-mail to the insurance adjuster, stating as follows:

I was notified my [sic] [client] yesterday that he is terminating my representation and that he is not accepting the settlement offer. He got upset apparently that Medicare is taking a while, as it always does, and now doesn't want the settlement. I advised him that he already accepted it, there is no rescinding his acceptance. He is picking his file up today apparently. I'm going to send a lien for our fees and costs to you. I'm assuming you will be having legal bring a motion to enforce the settlement. He's been advised of

all of this. Sorry for the inconvenience but he is a very difficult client. Let me know if you have any questions.

Appellant's client filed an ethics complaint, alleging that appellant forced him to accept the settlement offer and improperly filed an attorney's lien in the case. The matter was referred to a District Ethics Committee (DEC) for investigation, which concluded that appellant did not force the client to accept the settlement agreement or improperly file an attorney's lien. *See* Rule 6(b), RLPR (providing that a DEC may investigate certain ethics complaints). The DEC concluded, however, that appellant had violated Minn. R. Prof. Conduct 1.6 and 1.9 by disclosing confidential client communications. Based on this conclusion, the DEC recommended that the Director of the Office of Lawyers Professional Responsibility (Director) issue a private admonition. *See* Rule 7(b), RLPR (identifying the different recommendations that a DEC may make to the Director following an investigation of a complaint).

After reviewing the DEC's findings and recommendation, the Director issued a determination that discipline was not warranted. *See* Rule 8(d), RLPR (identifying the dispositions of a complaint that the Director may make following an investigation). The client appealed, and a member of the Lawyers Professional Responsibility Board reviewed the matter. *See* Rule 8(e), RLPR (stating that "[i]f the complainant is not satisfied with the Director's disposition[,] . . . the complainant may appeal the matter" and that the appeal will be assigned to a board member). The individual board member stated that he had examined the documents related to the complaint and concluded that he concurs "with the DEC's Report and believe[s that appellant] violated Rules 1.6 and 1.9 of the Minnesota

Rules of Professional Conduct.” The board member directed the Director to issue a private admonition, which occurred on August 25, 2016. *See* Rule 8(e)(3), RLPR (stating that if a DEC “recommended discipline, but the Director determined that discipline [was] not warranted, the Board member may instruct the Director to issue an admonition”).

Appellant requested that a panel review the admonition. *See* Rule 8(d)(2)(iii), RLPR (authorizing a lawyer who has been admonished to “demand that the Director so present the charges to a Panel which shall consider the matter de novo”). The Panel concluded that appellant’s statements in the September 18, 2015 e-mail violated only Minn. R. Prof. Conduct 1.9(c)(2)¹ and that appellant should be privately admonished for this misconduct. Under Rule 9(m), RLPR, appellant appealed the admonition to our court, arguing that he did not violate Minn. R. Prof. Conduct 1.9(c)(2) and that the individual board member and the Panel had failed to adequately explain their decisions.

ANALYSIS

We will uphold the findings by a Lawyers Professional Responsibility Board panel when those findings have evidentiary support in the record and are not clearly erroneous. *In re Panel File No. 39302*, 884 N.W.2d 661, 665 (Minn. 2016). Interpreting the Minnesota Rules of Professional Conduct and the Rules on Lawyers Professional

¹ Whereas Minn. R. Prof. Conduct 1.9(c)(2) addresses an attorney’s duty of confidentiality to a former client, Minn. R. Prof. Conduct 1.6 addresses an attorney’s duty of confidentiality to a current client. Similar to Rule 1.9(c)(2), Rule 1.6 prohibits a lawyer from “reveal[ing] information relating to the representation of a client” unless authorized to do so under paragraph (b) of the rule. Minn. R. Prof. Conduct 1.6(a).

Responsibility presents a question of law, which we review de novo. *In re Grigsby*, 815 N.W.2d 836, 841 (Minn. 2012); *In re Q.F.C.*, 728 N.W.2d 72, 79 (Minn. 2007).

I.

The Director argues that appellant violated Minn. R. Prof. Conduct 1.9(c)(2) through the following statement in his e-mail to the insurance adjuster: “I advised [my client] that he already accepted [the settlement offer], there is no rescinding his acceptance.” This “I advised” statement, the Director argues, violates the “very core of the attorney-client relationship.”

As an initial matter, appellant argues that the Director forfeited this argument by not raising it at the earlier stages of the proceeding. We disagree. The Director did not forfeit this theory. At each stage in the proceeding, the “I advised” statement was cited as a violation of the Rules of Professional Conduct. The Panel decision quoted this statement and concluded that it “constitutes clear and convincing evidence of a violation of Rule 1.9(c)(2).” This statement also was expressly mentioned in the Director’s admonition as a reason for discipline. The Director quoted the e-mail in full and concluded: “Based upon these facts[,] . . . [appellant’s] statements in his September 18, 2015, e-mail to the insurance adjuster violated Rule 1.9(c).” Finally, the DEC determined that appellant disclosed confidential client information because appellant’s e-mail stated that he “advised complainant the offer was ‘already accepted’ and acceptance could not be rescinded.” The theory that appellant violated the Rules of Professional Conduct by making the “I advised” statement is not being raised for the first time before us.

Having concluded that this argument is properly before us, we next turn to whether this statement violates Rule 1.9(c)(2). A lawyer who has formerly represented a client in a matter is prohibited from “reveal[ing] information relating to the representation except as these rules would permit or require with respect to a client.”² Minn. R. Prof. Conduct 1.9(c)(2). Because appellant’s client terminated the representation the day before appellant’s e-mail, appellant’s conduct is governed by Rule 1.9.

Appellant concedes that his statement in the e-mail— that he had advised his client that the settlement offer had been accepted by the client and that “there is no rescinding his acceptance”—disclosed “information relating to the representation.” He also does not dispute that it reveals details of appellant’s confidential discussions with his client. Nevertheless, appellant contends that this disclosure does not violate Rule 1.9(c)(2) because it was not “that much of a revelation” and would not have “any conceivable effect on the client’s claim.” But nothing in the language of the rule limits the prohibition to significant revelations or contains a requirement that the improper disclosure prejudices a client. *See* Minn. R. Prof. Conduct 1.9(c)(2). As we have determined, the rules protecting client confidences oblige a lawyer to “maintain *all* client confidences, significant or insignificant.” *Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 662 N.W.2d 125, 131 (Minn. 2003) (emphasis added). Accordingly, we conclude that the Panel did not clearly err by finding that appellant’s e-mail violated Minn. R. Prof. Conduct 1.9(c)(2).

² Appellant does not contend that his “I advised” statement to the insurance adjustor was authorized by any other rule of professional conduct.

II.

Next, we turn to the appropriate discipline for appellant's violation of Rule 1.9(c)(2). We have the final responsibility to determine the appropriate discipline for an attorney who violates the Rules of Professional Conduct.³ *In re Panel File 98-26*, 597 N.W.2d 563, 568 (Minn. 1999). The primary purpose of attorney discipline is “ ‘not to punish the attorney but rather to protect the public, to protect the judicial system, and to deter future misconduct by the disciplined attorney as well as by other attorneys.’ ” *In re Schulte*, 869 N.W.2d 674, 677 (Minn. 2015) (quoting *In re Rebeau*, 787 N.W.2d 168, 173 (Minn. 2010)). In determining the appropriate discipline, we consider “ ‘(1) the nature of the misconduct; (2) the cumulative weight of the disciplinary violations; (3) the harm to the public; and (4) the harm to the legal profession.’ ” *Id.* (quoting *In re Nelson*, 733 N.W.2d 458, 463 (Minn. 2007)).

Although maintaining the confidentiality of attorney-client communications is fundamental to the attorney-client relationship, *see Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (recognizing that protecting client confidences promotes the “full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice”), the nature of the

³ Appellant argues that the Director is vested with the discretion to decline to impose discipline even when there is a technical violation of the Minnesota Rules of Professional Conduct. Given this authority, appellant concludes that we should defer to the Director's initial determination that no discipline was warranted. But we have the ultimate responsibility for imposing discipline, and we are not required to give deference to the Director's determination of the appropriate discipline. *See In re Panel File 98-26*, 597 N.W.2d 563, 568 (Minn. 1999).

misconduct in this case was isolated and nonserious. Appellant stated that he had advised his client that the settlement offer was already accepted and that once accepted, the client could not rescind his acceptance. The insurance adjuster already knew that the client had accepted the offer, so the only information disclosed was that appellant made these statements to the client. The cumulative weight of the misconduct is also minimal because it involved a single e-mail. Likewise, there was minimal, if any, harm to the client in this case. Because the only new information disclosed was that appellant had discussed these issues with the client, the insurance adjuster was not able to use the disclosure to the client's disadvantage.

Nevertheless, this type of disclosure harms the legal profession because it undercuts the public's trust in attorneys. *See Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn. 1979) ("The purpose of the [attorney-client] privilege is to encourage the client to confide openly and fully in his attorney without fear that the communications will be divulged . . ."). Considering all of these factors, we conclude that the appropriate discipline is a private admonition.

III.

Appellant further contends that the individual board member reviewing the Director's determination violated Rule 8(e), RLPR, by inadequately explaining the reasons for a private admonition. The Director argues that the board member complied with Rule 8(e), RLPR, because he stated that he "concur[ed] with the DEC's Report and believe[d that appellant] violated Rules 1.6 and 1.9."

Rule 8(e), RLPR, requires that “[t]he reviewing Board member shall set forth an explanation of the Board member’s action.” When interpreting this rule, we have held that “an explanation is ‘[s]omething that explains,’ and to explain is ‘to offer reasons for or a cause of; justify.’” *Q.F.C.*, 728 N.W.2d at 80 (quoting *The American Heritage Dictionary of the English Language* 645 (3d ed. 1992)). In *Q.F.C.*, we addressed whether an individual board member violated Rule 8(e) when she said that, based on her “review of [Q.F.C.’s file], [she] direct[ed] that this matter be submitted to a Lawyer’s Board Panel to determine whether public discipline is warranted.” *Id.* at 79. We concluded that this sentence did not provide an explanation of the reasons for the board member’s actions, and therefore the board member violated Rule 8(e). *Id.* at 80. But we did not address “how thorough an explanation must be . . . or . . . what constitutes a sufficient explanation under Rule 8(e), RLPR.” *Id.* at 80 n.2.

Here, the board member’s explanation was sufficient to comply with Rule 8(e), RLPR. The board member stated, “I concur with the DEC’s Report and believe [that appellant] violated Rules 1.6 and 1.9 of the Minnesota Rules of Professional Conduct.” In turn, the DEC report described over the course of four paragraphs the reasons why the DEC thought appellant had violated Minn. R. Prof. Conduct 1.6 and 1.9. By concurring with the DEC’s report, the board member indicated that he believed that appellant committed misconduct for the same reasons as the DEC. This explanation is distinguishable from the one provided by the board member in *Q.F.C.*, who simply stated that the matter should be submitted to a panel for review. *See* 728 N.W.2d at 80. Unlike in *Q.F.C.*, the board

member's statement sufficiently sets forth an explanation for his actions, as required by Rule 8(e), RLPR. Appellant therefore is not entitled to relief on this ground.

IV.

Finally, appellant contends that the Panel failed to adequately explain the reasons underlying its conclusion that he violated Minn. R. Prof. Conduct 1.9. Although Rule 8(e), RLPR, requires the individual board member to set forth an explanation for his or her decision, Rule 9, RLPR, which governs panel proceedings, has no such requirement. Instead, Rule 9(j)(1)(iii), RLPR, states that if the panel "concludes that the attorney engaged in conduct that was unprofessional but of an isolated and nonserious nature, the Panel shall state the facts and conclusions constituting unprofessional conduct and issue an admonition." In this case, the Panel provided the facts of the situation, quoted extensively from appellant's e-mail, and explicitly concluded that he violated Minn. R. Prof. Conduct 1.9(c)(2). The Panel was under no obligation to provide further explanation.

CONCLUSION

For the foregoing reasons, we affirm the private admonition.

Private admonition affirmed.

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Lawyers Professional Responsibility Board meetings are
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<u>Date</u>	<u>Location</u>
Friday, January 26, 2018*	Town & Country Club, St. Paul, MN
Friday, April 27, 2018*	Town & Country Club, St. Paul, MN
Friday, June 29, 2018*	Town & Country Club, St. Paul, MN
Friday, September 28, 2018	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.

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