LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING AGENDA

May 15, 2026 – 12:30 p.m. (in person and via Zoom) –
Minnesota Judicial Center
Lunch provided for Board members 12:00pm

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1. Approval of minutes of January 23, 2026, meeting (Attachment 1).

2. Membership updates and introductions.

    a. Welcome to new board members.
    b. Approval of nomination of Vice Chair nomination.
    c. Other membership updates.
        i. Executive committee appointments.
        ii. Rules committee chair and member appointments/reappointments.
        iii. MSBA member update.

3. DOJ Comment Letter (Attachment 2).

BREAK

4. Rules committee report (Attachments 3-5).

    a. Rule 16, Minnesota Rules of Professional Conduct petition update.
    b. Rule 4.2, Minnesota Rules of Professional Conduct.
    c. Rule 1.14, Minnesota Rules of Professional Conduct.
    d. Rule 3, Minnesota Rules on Lawyers Professional Responsibility.

5. Director's Report (Attachment 6)

6. Complainant appeal statistics (Attachment 7).

7. Open discussion.

8. Adjournment.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING

OPEN MEETING MINUTES

January 23, 2026, 12:30 pm (In-person and via Zoom) – Minnesota Judicial Center

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Board member attendance:

- Ben Butler, Chair
- Daniel Cragg
- Kris Fredrick
- Elizabeth Henderson
- Paul Lehman
- Frank Leo
- Melissa Manderschied
- Kevin Magnuson
- Kristi Paulson
- Matthew Ralston
- Abigail Rankin
- Amy Sweasy
- Carol Washington

Other attendees:

- Minnesota Supreme Court liaison Justice Gordon Moore
- Susan Humiston, Director of the Office of Lawyers Professional Responsibility
- Members of the OLPR staff
- Members of the public

Approval of prior meeting minutes:
The first LPRB meeting of 2026 began at 12:33 on Friday, January 23rd. It was held via Zoom due to weather. First on the agenda was the approval of the last meetings minutes, Daniel Cragg wanted to correct the Rules Committee section to accurately reflect the rule number (ADA opinion 519) and where we would be sending it (the Federal Practice Committee). Hearing no other discussion Kristi Paulsen motioned to approve with William Pentelovitch seconding. The motion passed unanimously.

Membership Updates and Tributes to Departing Members:
This was the last meeting for several members including vice chair Kristi Paulsen. Paulsen said it had been a true honor to serve the board for the last 6 years. Her term had originally been extended another 2 and a half years but she had decided to step away and resign from the board. Vice-chair Paulsen stated she was very confident in the place the board is in and will miss it's

members. Chair Butler spoke up to say Kristi has been a member since February 2020 and has been an invaluable as his vice chair. Stating "anything he did right was because Kristi told me to do it. In conjunction with the end of Butler's term, Paulsen will term off on April 30th.

Wendy Sturm was not at the meeting, but she will be finishing her term on February 1st. Sturm prefromed her duties with grace, care and dedication, without incident or issue. Chair Butler said knowing her in her day job, this does not come as a surprise as everyday as a defense attorney, Wendy stands up for her clients against a much stronger foe. Her service will be missed.

Paul Lehman has been a board member since April 2020 with the intention of "helping a bunch of lawyers as the world falls apart". He is a father and a grandfather who brought humor and common sense to everything, especially the board. William Pentelovitch complained that he was being abandoned by his friend, but the board couldn't have asked for a better member.

Michael Friedman did a commendable work for the legal rights center that helps poor people defend themselves. He brought a well-informed and feisty spirit. He led and worked with the board's DEI committee.

Last but not least, Daniel Cragg, whose contribution to the board cannot be overstated. Cragg is proactive, he rewrote prodecdural rules while Dan and the board though ABA opinions and was always first to contact us with potential conflicts for the board and new rules. Cragg is a person of strongly held opinions but only after research and looking at his options.

Justice Moore made a final statement, stating the stability and steadfastness of the board has been a blessing.

The board is still looking to replace Cragg as Panel Chair 1, interested members should email the executive committee.

Rules committee report: Potential amendments to Rule 16, Rules on Lawyers Professional Responsibility (attachment 2)

Daniel Cragg spoke for the rules committee, reminding the board of their charge with this amendment, to figure out if an interim suspension would work for Minnesota's system. Right now, it is hard for the director to come up with facts justifying an interim suspension.

What the rules committee decided was to have just one "trigger" for interim suspension. The trigger is a lawyer being charged with a crime and a judge finding probable cause. There are other subject components such as severity of the crime being so great that the lawyers authority to practice law prior to public petition could cause harm to the public. The burden of proof has been placed on the respondent or their attorney, which does cause some potential due process issues merely on probable cause.

This is the lowest evidentiary threshold, which once the director clears this bar, then the court issues the start to proceedings. This would be akin to a summons or an alternate writ of

mandamus. Respondent attorneys can make an argument, but any fact issues would be referred to a referee to decide.
Director Humiston also drafted a way to end/vacate this process as it can drag on for some time. This would also allow the respondent to move to vacate. This is a very particular remedy which would have to fall under Rule 16a.

One final "drive-by" change from 20 to 21 days. It is in line with what the court currently and was a late suggestion from the board, including to restrict involvement with trust accounting for those accused of serious fraud.

Daniel Cragg moved to recommend to the court the new amended rules, Kristi Paulson seconded and the motion passed unanimously. Chair Butler thanked the rules committee for their hard work and said he would draft a memo summarizing the changes and run it by the vice chair and Dan Cragg.

Directors Report
The director was having Zoom difficulties at the time of her report, she could not hear the audience but we could hear her, questions and comments were put into the Zoom chat. Director Humiston addressed the caseload of last year, describing it as crazy, the highest number of complaints ever with a 24% increase. In the first few days of 2026 so far that does not appear to be changing. Public Discipline is down from the average of 30, with 17 cases in 2025. There are still a number of files under consideration with the court.

The Director also wanted to make the board aware of a lawsuit against the office by Michael Padden through the Wisconsin courts system. Humiston told the board this was well in hand.

The OLPR had great applications for their new additions, they have found some temporary help which has brought a lot of synergy into the office. Erin Lacker, former CHIPs and GAL attorney is now working part time for the office.

The board's feedback on the summary dismissal alnaguage and considering if there was a way to incorporate the discretionary nature to the director's decision to investigation, the board's opinion has been heard and the director understands and is open to additional feedback.

Finally the LPRB and OLPR websites are almost ready to go live, Director Humiston intends to send out the draft to the board before it is published so watch out for that.

Open Discussion
Open discussion began with Chair Butler saying this will be his last meeting with all of the LPRB, as Carrie Washington will be taking over as chair starting in May. He stated his time with the board has been a pleasure and an honor, Vice Chair Paulsen spoke up to thank Butler on behalf of the board. Butler commented to say how sad he is to leave, but how happy he is at the state the board is in currently. His final parting wisdom were to ask board members not to call it the attorney discipline system as this is only one of the outcomes, and in Butler's opinion should not be the

goal of the system. The aim instead should be to lawyers follow rules, regulate themselves and act ethically.

Hearing no more points of discussion, Daniel Cragg called for adjournment, with Kristi Paulsen seconding.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
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April 3, 2026

Comment of the Minnesota Lawyers Professional Responsibility Board

Submitted through: https://www.regulations.gov

RE: Department Of Justice – Office of Attorney General
Docket No. OAG199

Comment to Proposed Rulemaking Review of State Bar Complaints and Allegations against Department of Justice Attorneys

The Minnesota Lawyers Professional Responsibility Board is part of the Judicial Branch of the government of the State of Minnesota. The Board's members are appointed by and accountable to the Minnesota Supreme Court. The Board is responsible for administering the Minnesota Rules on Lawyers Professional Responsibility, "for establishing the policies that govern the lawyer discipline and disability system, and for providing recommendations and guidance to the Director [of the Office of Lawyers Professional Responsibility] regarding the operations of the Office of Lawyers Professional Responsibility." Rule 4(a), Minn. R. Lawyers Prof. Resp. As part of those duties, the Board can issue opinions on the attorney-regulation system and lawyers' professional conduct. Rule 4(c), RLPR. It is with that background that the Board provides the following comment on the proposed rulemaking.

For many of the reasons explained in the March 25, 2026, comment of the National Organization of Bar Counsel, the Board opposes the proposed amendments to 28 C.F.R. Part 77. The Board agrees with the NOBC that "the rule proposal unlawfully and unconstitutionally intrudes on state authority to enforce state discipline rules" and that the proposed amendments "would materially interfere with the public protection function of state disciplinary authorities." NOBC Comment at 1-10 (citation amended). The Board takes no position on NOBC's rationales III and IV.

The Board felt this comment was necessary given the scope of Minnesota's attorney-regulation system. Lawyers licensed in Minnesota are subject to the Minnesota Supreme Court's regulatory authority regardless of where the lawyer's conduct occurs. Minn. R. Prof. Cond. 8.5(a). "A lawyer not admitted in [Minnesota] is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." *Id.* The proposed amendments would substantially and unconstitutionally interfere with that authority.

The Minnesota Lawyers Professional Responsibility Board opposes the proposed amendments to 28 C.F.R. Part 77. This comment expresses the position of the Board and not necessarily that of any of its individual members.

Respectfully submitted,

Minnesota Lawyers Professional Responsibility Board

APPENDIX

1. Comment of National Organization of Bar Counsel, Mar. 25, 2026

NOBC
NATIONAL ORGANIZATION OF BAR COUNSEL
Promoting Professionalism – Protecting the Public

March 25, 2026

NOBC Headquarters
1300 Piccard Drive, Suite LL 14
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Phone: (240) 844-3612
E-mail: info@nobc.org

Comment of the National Organization of Bar Counsel

Submitted through: https://www.regulations.gov

RE: Department Of Justice – Office of Attorney General
Docket No. OAG199
Comment to Proposed Rulemaking Review of State Bar Complaints and Allegations against Department of Justice Attorneys

The National Organization of Bar Counsel (NOBC) was formed in 1965 to enhance the professionalism and effectiveness of attorney disciplinary counsel throughout the United States. NOBC is a nonprofit organization, formally established in the District of Columbia, whose members work in the regulation of the practice of law, including lawyer and judicial discipline, legal and judicial ethics and education, and the promotion of professionalism. Since 1965, NOBC membership has grown to include attorney discipline and ethics counsel from over 60 state, local, and federal attorney regulatory agencies in the United States.

NOBC submits the following comment on the proposed rulemaking by the United States Department of Justice (DOJ) regarding review of State Bar complaints and allegations against DOJ attorneys.[1] The proposed amendments to 28 C.F.R. Part 77 are unprecedented, unnecessary, inappropriate, and lack both Congressional and Constitutional authority. They do nothing to support the public protection mission of regulating and, when necessary, disciplining licensed attorneys. To the contrary, they will detract from the public trust in attorney regulation. As described in detail below, NOBC opposes the proposed rulemaking.

I. The Rule Proposal Unlawfully and Unconstitutionally Intrudes on State[2] Authority to Enforce State Discipline Rules

A. The Proposed Amendments to 28 C.F.R. Part 77 Would Violate Federal Law, Which Mandates That DOJ Attorneys Remain Subject to State Disciplinary Rules to the Same Extent and in the Same Manner as All Other Attorneys

Under 28 U.S.C. §530C(c)(1), DOJ attorneys must be "duly licensed and authorized to practice as an attorney under the law of a State, a territory of the United States, or the District of Columbia." To ensure accountability for unethical conduct of attorneys employed by DOJ, Congress enacted 28 U.S.C. §530B ("Section 530B"), which was signed into law on October 21,

[1] This comment expresses the opinion of the NOBC and not necessarily that of any of its individual members.
[2] This comment uses the term "state" to refer, inclusively, to the states, U.S. territories, and other jurisdictions such as the District of Columbia that, like states, have full licensure and enforcement authority.

1998, and became effective on April 19, 1999. Its mandate is straightforward:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

28 U.S.C. §530B(a). Section 530B(b) directed the Attorney General to "make and amend rules of the Department of Justice to assure compliance with this section."

Acting under this authority, the Attorney General issued regulations in 1999 that, consistent with the text and purpose of Section 530B, did not change "the enforcement authority of the Department of Justice's Office of Professional Responsibility [OPR], state authorities, or the federal courts." Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19273, 19274 (Apr. 20, 1999). Since that time, for some 27 years, consistent with the system of enforcement that predated the 1999 regulations, these different entities have worked under rules that recognize their differing enforcement authorities:

(1) State attorney disciplinary authorities—generally through authority conferred by the state supreme courts—receive complaints about attorneys licensed or otherwise authorized to practice in their jurisdictions, including DOJ attorneys. Many mid- to larger-sized jurisdictions receive thousands of complaints each year. Using criteria applied consistently across matters, disciplinary authorities review all complaints to determine whether they have sufficient merit to justify further investigation or should be dismissed because they do not implicate rules of professional conduct or because further investigation is unlikely to yield sufficient evidence to prove a violation of the rules. Under these criteria, the great majority of complaints are dismissed without proceeding to investigation. More complaints are dismissed after investigation, with relatively few resulting in disciplinary charges or sanctions imposed when attorneys are found to have engaged in violation of state professional conduct rules.

(2) Federal courts investigate and impose disciplinary sanctions against attorneys appearing in those courts, including DOJ attorneys, when they are found to have committed professional misconduct under the rules of those courts using standards set out in those rules and applicable case law. While federal courts maintain their own disciplinary authority, they may not have the level of investigative and prosecutorial resources available to state disciplinary authorities and therefore may, and often do, refer matters to state disciplinary authorities. Federal courts also enforce licensure decisions made by state authorities as to attorneys appearing in federal court.

(3) Using the DOJ Office of Professional Responsibility (OPR) and the more recently established Professional Misconduct Review Unit (PMRU), the Attorney General as employer of DOJ attorneys investigates and imposes employment sanctions on DOJ attorneys who have engaged in professional misconduct, including but not limited to violations of state professional conduct rules, but only if there is a finding "that the attorney

has violated a clear and unambiguous standard either intentionally or recklessly." Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10781 (proposed Mar. 5, 2026). In addition, if PMRU "concludes that a State rule of professional conduct is implicated by the Department attorney's conduct, it will authorize OPR to refer the matter to the appropriate bar disciplinary authorities." *Id*. Importantly, these internal DOJ entities may impose consequences that have personnel implications, but they cannot unilaterally affect the underlying law license held by each DOJ attorney.

The proposed amendments to Rule 77.5(a) would give the Attorney Geneal a right of first review, attempting to mandate that, before state disciplinary authorities "undertake any investigative steps that seek information or otherwise require participation from an attorney for the government in response to allegations that a current or former attorney for the government violated a rule of ethical conduct while engaging in that attorney's duties for the Department, the Attorney General shall have the right to review the allegations in the first instance." *Id.* at 10787. It would also provide that if the Attorney General, in her sole discretion, chooses to exercise "her right to review," the Attorney General or her designee "shall request that the bar disciplinary authorities suspend any parallel investigations or disciplinary proceedings until the completion of the review," and, if "the relevant bar disciplinary authorities refuse the Attorney General's request," the proposed rule threatens unspecified "appropriate action" to "prevent the bar disciplinary authorities from interfering with the Attorney General's review." *Id.*

This attempt by the Attorney General to direct and limit state authorities in their conduct of state attorney disciplinary investigations is illegal because it both is inconsistent with Section 530B and improperly intrudes on the long-recognized inherent power of the states to discipline attorneys.

1. Background of Section 530B

The decades-long recognition that DOJ attorneys must be held accountable for violating the rules of professional conduct "to the same extent and in the same manner as other attorneys in that State," as set forth in Section 530B, did not materialize from thin air. Prior to the enactment of Section 530B, DOJ had repeatedly attempted to exempt its attorneys from portions of the state regulatory system, including by issuing the non-binding Thornburgh Memorandum in 1989, and then promulgating regulations that were invalidated as exceeding the Attorney General's authority in *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp*., 132 F.3d 1252, 1257 (8th Cir. 1998).[3]

Section 530B, also known as "the McDade Amendment," was enacted after members of Congress debated DOJ's position at that time—that DOJ should handle all disciplinary issues for

[3] DOJ's attempts to exempt its attorneys from oversight not only eventually faced strong Congressional opposition, but they were also rebuffed and strongly criticized by the courts. *See In the Matter of Doe*, 801 F. Supp. 478, 486 (D.N.M. 1992) ("The idea of placing the discretion for a rule's interpretation and enforcement solely in the hands of those governed by it not only renders the rule meaningless, but the notion of such an idea coming from the country's highest law enforcement official displays an arrogant disregard for and irresponsibly undermines ethics in the legal profession."). The Eighth Circuit held the DOJ rule issued as Communications with Represented People, 59 Fed. Reg. 94-4510 (Mar. 3, 1994) (previously codified at 28 C.F.R. pt. 77), was an "invalid promulgation[.]" *McDonnell Douglas*, 132 F.3d at 1257.

its own lawyers—and rejected it.[4] As detailed by Charles Doyle, Congressional appropriations historically required DOJ attorneys to be duly licensed and authorized to practice under the laws of a state, territory or the District of Columbia—such that compliance with underlying ethics rules was also mandatory. CHARLES DOYLE, CONG. RSCH. SERV., RL30060, MCDADE-MURTHA AMENDMENT: ETHICAL STANDARDS FOR JUSTICE DEPARTMENT ATTORNEYS 2 n.3 (2001) (citing 93 Stat. 1044 (1979); *see also United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993), *aff'd on other grounds*, 54 F.3d 825 (D.C. Cir. 1995)).

As Congress considered whether to codify this long-standing principle despite DOJ's opposition to it, hearing testimony and legislator comments reinforced that Congress deemed the state regulatory system to be the ultimate source of accountability for DOJ attorneys' required compliance with state ethics rules. A leading proponent of ensuring that this system continued was Representative Joseph M. McDade:

> I introduced this bill because I believe that they [Federal prosecutors] should be accountable, as all other lawyer[s] in this country are, to charges of misconduct and to ethical standards. The legislation, quite simply, Mr. Chairman and members of the committee, says that an attorney for the Government shall be subject to the same rules, the same laws, and local Federal court rules governing attorneys in each State to the same extent and in the same manner as other attorneys in that State.
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> ***
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> **Department of Justice prosecutors, as you have pointed out, Mr. Chairman, have always been monitored for ethics compliance by independent outside observers: the State or the Federal court. That is the way it ought to be, and we would be unwise to abandon this longstanding arrangement in favor of some kind of self-regulation internally by DOJ.[5]**

Ethical Standards for Federal Prosecutors Act of 1996: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong. 7-8 (1996) (emphasis added).[6]

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[4] At the time, NOBC expressed its support of the McDade Amendment. The Effect of State Ethics Rules on Federal Law Enforcement: Hearing on Section 530B of Title 28 Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary, 106th Congress, Appendix 103(1999)(Letter Submitted to Senator Hatch from Michael J. Oths, president, National Organization of Bar Counsel, Inc., dated Mar. 10, 1999).

[5] The rulemaking notice claims that Section 530B "preserves" the authority of the Attorney General to enforce substantive state rules because "Congress did not expressly confer to the States enforcement authority." Fed. Reg., Vol. 91 at 10783. However, it is clear through both the U.S. Supreme Court authorities discussed below as well as this legislative history that Congress knew that states already had enforcement authority through the Tenth Amendment powers reserved to the states. There is no federal power under the U.S. Constitution to "confer" to states authority that they already have.

[6] Representative McDade was not alone in his concerns. *See id.,* at 1, Representative Carlos J. Moorhead ("Historically, States have had the exclusive authority to determine the membership of its bars and to regulate the conduct of its members. . . . One of the fundamental requirements to maintain the benefits of membership to a State bar is adherence to the bar's rules of ethics. . . The highest court of each jurisdiction has the authority to investigate and discipline the members of its bar who fail to comply with these rules of ethics and ultimately to disbar one of its members."); *id.* at 93, Roger Pilon, Ph.D., J.D., Senior Fellow and Director, Center for Constitutional Studies, Cato Institute (noting that "the Attorney General's authority to regulate the Department's attorneys . . . is delegated by Congress, to be sure, but it is not a plenary authority. . . . [T]he courts . . . are the proper authority because they are a

2. The Proposed Rulemaking Is Antithetical to Both the Text and History of Section 530B

The proposed rulemaking ignores Section 530B's actual text, as well as its history, and argues that its lack of any explicit provision about enforcement leaves a mystery as to what Congress intended. To the contrary, Congress spoke to the ongoing debate about how DOJ attorneys should be regulated through simple provisions that include DOJ involvement, but ultimately must be effectuated through state disciplinary authorities, who alone have the ability to take action affecting attorney licenses, and in doing so necessarily rely on state procedural rules regarding investigations, hearings, and decisions. Otherwise, "to the same extent" and "in the same manner" in subsection (a) mean nothing.

The proposed right of first review applicable only to DOJ attorneys is inconsistent with the requirement in Section 530B(b) that the Attorney General make and amend rules "to assure compliance with this section." By categorically requiring a right of first review and reserving to herself the authority to seek to compel state disciplinary authorities to suspend their disciplinary investigations in favor of an OPR investigation, the Attorney General seeks to carve out differential treatment for selected DOJ attorneys (as determined by the Attorney General). This is directly contrary to Section 530B, which requires that DOJ attorneys be subject to state laws and rules "to the same extent and in the same manner as other attorneys in that State," and that any DOJ implementing regulations be designed to "assure compliance" with that mandate.

The Attorney General's proposed rulemaking points to Section 530B's language, which does not explicitly address enforcement authority, to suggest that she is now trying to fill some sort of void. It is no accident, however, that Section 530B commands that DOJ attorneys be subject to state regulation to both "the same extent" and "same manner" as other attorneys. "Extent" ensures that DOJ cannot pick and choose the state ethical rules to which it will be subject, as it had attempted to do in the years preceding Section 530B's passage. "Manner" ensures that DOJ cannot push state disciplinary authorities to the side, requiring instead that DOJ attorneys remain accountable to those same state authorities, in accordance with existing procedures and the concerns voiced by the legislation's primary sponsor. This is consistent with the absence from the statute of any language explicitly altering the existing balance of enforcement authority.[7]

Both the text and history of the legislation make clear that Congress chose to leave in place and not change the respective and different enforcement authority of OPR, state authorities, or the federal courts. At the time Section 530B was enacted, states could enforce rules of professional conduct without any procedural or substantive limitations imposed by the Attorney General. Section 530B intentionally left this enforcement authority in place.

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neutral as between the opposing parties. The Department is a party-in-interest. It is hardly in a position, strictly speaking, to set rules. It is the court's business to set the rules for parties that appear before it or for business that is related to litigation, which is, of course, what we're talking about here."); *id.* at 94, Pilon, *see supra* ("The Department's argument comes down in the end to a very simple and very old proposition: 'Trust us; we can police ourselves.' We should resist that proposition. . . . The founders understood what Lord Acton later said, that power corrupts; absolute power corrupts absolutely.").

[7] As the Attorney General's 1999 rulemaking notice recognized, Section 530B was "silent on enforcement methods" and "for this reason" did "not change the enforcement authority of the Department of Justice's Office of Professional Responsibility [OPR], state authorities, or the federal courts." *See* Fed. Reg., Vol. 64 at 19275 (Apr. 20, 1999).

The voice of Congress on this issue was consistent with the Supreme Court's recognition of state primacy in the context of attorney discipline:

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.

Leis v. Flynt, 439 U.S. 438, 442 (1979). Indeed, as the Supreme Court also has recognized, state interests in enforcing their own state attorney discipline rules are so important that they may override federal interests, including any asserted interest in having federal courts resolve federal constitutional claims that can be raised in a state proceeding. *See Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 425, 435 (1982) (as to "whether a federal court should abstain from considering a challenge to the constitutionality of disciplinary rules that are the subject of pending state disciplinary proceedings" the Court found that the "importance of the state interest in the pending state judicial proceedings and in the federal case calls *Younger* abstention into play.").

One cannot infer a Congressional intent to federally preempt state regulatory enforcement. DOJ now presumes an intent to preempt from Section 530B(b), which states that DOJ must promulgate regulations "to assure compliance with this Section." When analyzing whether there is Congressional intent to preempt, the Supreme Court applies a presumption against preemption, particularly as to "the historic police powers of the States." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). As *Leis v. Flynt* makes clear, and as further discussed below, attorney licensure and discipline incontrovertibly are a historic state police power. And far from indicating any Congressional intent to preempt state disciplinary authority, the plain language of Section 530B does exactly the opposite, recognizing state authority to discipline government attorneys "to the same extent and in the same manner as other attorneys in that State."

Section 530B's text and history are both consistent with Congressional recognition that DOJ attorneys would be admitted to the bar by states, required to comply with state rules to maintain licensure, and subject to state enforcement of the state rules applicable to practicing law under those licenses. DOJ's 1999 regulations correctly recognized that Congress left in place the enforcement authority of state regulators, without any improper and unjustified requirement that they defer to OPR investigations. Nothing has changed that provides any new legal basis for the Attorney General to upend the existing rules and instead attempt to mandate limitations on the enforcement authority of state regulators.

B. The Proposed Amendments to 28 C.F.R. Part 77 Would Violate the Constitution

The proposed rulemaking runs afoul of not only the Attorney General's statutory authority but also the Constitution. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Tenth Amendment to the Constitution underscores both that the Attorney General lacks constitutional authority to direct the activity of state disciplinary authorities and that she cannot rely on "silence" as proof of preemptive intent when it comes to state regulation of the legal profession, a traditional state police power reserved to the states.

The work of state attorney disciplinary authorities is a long-recognized traditional state police power of the kind reserved to the states. *See Leis v. Flynt*, 439 U.S. at 442 ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. at 434-35 (Supreme Court recognition of the "importance of the state interest" in enforcing state attorney disciplinary rules); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("'The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"); *Cohen v. Hurley*, 366 U.S. 117, 123-124 (1961) ("History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied."), *overruled on other grounds by Spevack v. Klein*, 385 U.S. 511 (1967).

The proposed rule would not survive a constitutional challenge. It matters not if DOJ contends that the proposed rule seeks to prohibit state action rather than compel it. The anti-commandeering doctrine of the Tenth Amendment applies when federal law prohibits states from pursuing a regulatory scheme not otherwise preempted. The Supreme Court addressed that scenario in *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 470-475 (2018), concerning a federal law that, generally speaking, prohibited states from legalizing sports gambling. Proponents of the law contended that the anti-commandeering doctrine of the Tenth Amendment was not applicable, since the law did not compel states to do anything in particular. In holding the law unconstitutional, the Court rejected the proponents' position and held the anti-commandeering doctrine applied to an attempt by Congress to prohibit a state action that was not subject to federal preemption: "It was a matter of happenstance that the laws challenged in *New York* [*v. United States*, 505 U.S. 144 (1992)] and *Printz* [*v. United States,* 521 U.S. 898 (1997)] commanded 'affirmative' action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." *Murphy*, 584 U.S. at 475.

Here, the text of the Attorney General's proposed rule expressly reserves to the Attorney General, in the exercise of her sole discretion, the right to somehow force a state to defer, potentially indefinitely,[8] the state's own investigation by taking undefined "appropriate action" to "prevent the bar disciplinary authorities from interfering with the Attorney General's review of the allegations." 91 Fed. Reg. at 10787 (Proposed 28 C.F.R 77.5(b)). In so doing, the rulemaking broadly sweeps the entire state bar complaint process into the concept of "interference," effectuating the type of improper prohibition of state action that offends the Tenth Amendment.[9]

[8] The proposed rule sets no time limits either for the conduct of the Attorney General's investigation or for notification to state disciplinary authorities of the results of the investigation, posing the risk that indefinite delay may result in effective preclusion of any meaningful state enforcement action.

[9] We recognize the Attorney General's authority to seek to limit or protect the disclosure by DOJ attorneys and former attorneys of confidential information contained in DOJ files or acquired by the attorney as part of the performance of that attorney's official duties. Such regulation, however, must be directed at DOJ attorneys, not at state disciplinary authorities that the Attorney General lacks any ability to regulate. Moreover, these concerns are already addressed by DOJ's existing *Touhy* regulations. *See* U.S. Dep't of Just., Just. Manual §§ 1-6.100 to -6.640 (2026); *see also* 28 C.F.R.

Nothing identified in the rulemaking comes even close to justifying such an unbridled, unconstitutional usurpation of state authority. Indeed, there is no actual evidentiary basis presented in the proposed rulemaking. Instead, the proposal rests on a series of unsupported assertions that: (1) there has been an increase, undocumented and unquantified, in complaints submitted by individuals or groups that the Attorney General asserts, without any specifics or supporting evidence, are "political activists"; (2) states have decided to "give credence to" and investigate some subset of these complaints, again without providing any specifics or explaining why any such state decision was improper or unsupported; (3) this has resulted in what the Attorney General characterizes, again without quantification or specifics, as an "unprecedented weaponization" of the state bar complaint process; (4) this "risks" chilling zealous advocacy by DOJ attorneys, without any specific explanation of legal arguments or positions that the attorneys can no longer assert solely because of the "credence" being given to complaints; (5) due to all of the above, there is some sort of interference "with the broad statutory authority of the Attorney General to manage and supervise Department attorneys." 91 Fed. Reg. at 10782.

On the basis of these unsupported assertions, the Attorney General proposes a solution that would usurp the authority of state regulators. This solution fails to acknowledge the scope of the Attorney General's statutory duty to comply with section 530B's broad command that DOJ attorneys be subject to state disciplinary rules "to the same extent *and* in the same manner as other attorneys." (emphasis added). And the unbridled discretion the Attorney General seeks, to enjoin a state-based attorney discipline investigation or proceeding, falls squarely within the prohibition of commandeering enshrined in the Tenth Amendment.

II. The Proposed Amendment to 28 C.F.R. Part 77 Would Materially Interfere with the Public Protection Function of State Disciplinary Authorities

The proposed regulatory amendments are illegal and unenforceable. But were they to have effect, they would severely hinder state disciplinary authorities' ability to pursue state disciplinary investigations, undermining the public protection mission that undergirds the state attorney regulatory system.

As an initial matter, while the proposed rules would give the Attorney General discretion to review a complaint in the first instance, they impose no time limits either for the completion of the Attorney General's review or for notification to state disciplinary authorities of the results of that review. Indefinite delay would cause numerous states to face constraints imposed by statutes of limitation. Most states have them to promote both fairness and diligence in investigating and prosecuting attorney regulatory matters. *See, e.g.,* Ohio Gov. Bar R. V(9)(D); Texas R. Disc. P. 17.06; R. Disc. Miss. State Bar 4(d). Even where a statute of limitation does not pose a likely legal barrier, state disciplinary matters could face challenges or fail as witness memories fade, witnesses become unavailable, documentary evidence is lost, and other evidentiary problems mount. The

§ 16.1 *et seq*. Notably, these regulations specify that, "[a]s a general policy, the Department favors cooperation in state and federal cases in which the testimony of one of its employees is sought or in which information obtained by the Department is sought. Authorization in one form or another is usually granted if it is appropriate under the rules of procedure governing the case or matter in which the demand arose and if it is appropriate under the relevant substantive law concerning privilege, unless one of the factors set forth in 28 C.F.R. 16.26(b) is present." U.S. Dep't of Just., Just. Manual §§ 1-6.240. In contrast to the proposed rule amendments, this approach is consistent with Section 530B's command that government attorneys remain "subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."

proposed rule does nothing to address the inevitable and potentially indefinite delay created by the Attorney General's review of a complaint. Such indefinite delay poses significant risks of undermining states' ability to pursue their public protection mission and effectively precluding any meaningful state disciplinary action.

The proposal also raises the specter of attempting to require substantive—not just sequential—deference to the Attorney General's review. The rulemaking notes that the "proposed rule does not require State bar disciplinary authorities to defer to OPR's findings that a Department attorney violated an ethics rule." 91 Fed. Reg. at 10784. While the rulemaking thus calls out the possibility that a state disciplinary authority may reach a result more favorable to the DOJ attorney, it is conspicuously silent about the scenario in which OPR finds that a DOJ attorney did not violate an ethics rule, but a state disciplinary authority concludes otherwise.

To be abundantly clear: the Attorney General has no statutory or constitutional authority to require such deference. Indeed, such deference would be inappropriate given that OPR, in making determinations relevant to potential personnel actions, employs standards different than those applied by many state disciplinary authorities. Nonetheless, the silence is concerning. The rulemaking—if not abandoned for its multiple infirmities—should make clear that such deference to OPR's findings is not required in any context. For example, if a state disciplinary authority voluntarily delays its investigation pending OPR review, its subsequent ability to obtain information from DOJ relevant to its investigation should not be conditioned on any agreement with OPR's conclusion. And of course, DOJ has no legal authority to require a state disciplinary authority to adopt the same position as OPR or the Attorney General. Accordingly, if the proposed rulemaking is finalized, it should affirmatively state that no substantive deference is required, period.[10]

The Attorney General's "right to review" state bar allegations in the first instance also is patently designed to pressure state disciplinary authorities to (1) disclose the allegations they are investigating to the Attorney General, and then (2) defer their own regulatory investigations, or risk significant litigation. Effectively forcing disclosure and deferral, rather than leaving it up to state disciplinary authorities, raises numerous problems that are inherent in prematurely disclosing an investigation of an employee to that person's employer, and then stepping aside in favor of the employer's investigation. There are various ways an employer's decision to investigate the employee first, before cooperating with outside authorities, may hinder state disciplinary authorities' ability to meaningfully complete their own subsequent investigation and take appropriate regulatory action, undermining states' ability to pursue their public protection mission.[11] For example, even if the Attorney General fires a DOJ attorney for unethical conduct, in the absence of state discipline, the DOJ attorney will retain their state license and may return to

[10] The rulemaking notes that "the proposed rule permits the State bar disciplinary authorities to impose additional sanctions beyond those already imposed by the Department, including suspension or permanent disbarment." 91 Fed. Reg. at 10784. This is nothing more than a necessary recognition that, as discussed above, the regulatory remedies pursued by the states as part of their public protection mission are different than the personnel actions to which OPR and PMRU are limited.

[11] Conditioning the ability to complete an investigation on disclosure of a complaint's allegations also may pose significant issues for states in which confidentiality rules limit the ability of state disciplinary authorities to disclose a disciplinary complaint or its allegations to an attorney's employer, including the Attorney General, or may vest in state disciplinary authorities limited discretion to make disclosures to particular individuals or entities. *See, e.g.*, Cal. Bus. & Prof. Code § 6086.1(b); Calif. R. of Proc. of the State Bar 2302(e); Md. Rules 19-707(b)-(c), (f).

practice, posing a risk to the public in the very state whose disciplinary investigation was hindered or foreclosed by the Attorney General's "right of review."

We have no doubt that the Attorney General would strenuously oppose any new legislative requirement that she defer to and await the completion of an internal investigation by a private or public employer—putting a DOJ criminal or civil investigation on hold while awaiting the results. The reasons are obvious. An employer's motivations and methods in investigating its own employees may lead to an investigation that diverges significantly from what would be done by a truly independent, outside regulator. Moreover, the employer's investigation, no matter how well meaning, may make any subsequent investigation by outside regulators more difficult. Even friendly witnesses may be reluctant to agree to additional interviews, and adverse witnesses will be aware of and have a chance to prepare, to evade, or to obfuscate in response to likely questions. There are also significantly increased risks of evidence spoliation by witnesses now more fully aware of the nature of the investigation.

States' policy interests in protecting their own investigative rules and discretionary decisions are no less important than DOJ's interest in its investigative procedures. That state disciplinary authorities cannot, or choose not to, immediately notify and coordinate with OPR on a particular disciplinary investigation reflects nothing more than a determination that this is the best way for the state disciplinary authorities to get to the bottom of the relevant facts.

Overall, the proposed rule would significantly increase—by years in many cases—the time that complaints about DOJ attorneys must sit in abeyance with state disciplinary authorities, with a corresponding degradation to the quantity or quality of information available to support the state investigation and the resulting risk that the delay will effectively preclude state regulatory action. The public at large, including other licensed attorneys, judges, court staff, and lay people, sometimes view prolonged investigations, dismissed complaints, or failed prosecutions as proof that the attorney disciplinary system cannot be trusted. The proposed rule would amplify this lack of trust as to DOJ attorneys.

III. The Notice of Rulemaking Fails to Establish that State Enforcement of State Discipline Rules Would Meaningfully Interfere with the Attorney General's Authority to Manage and Supervise DOJ Attorneys

As noted above, the rulemaking asserts that the proposed amendments are necessary to prevent state disciplinary investigations from interfering with "the broad statutory authority of the Attorney General to manage and supervise Department attorneys." 91 Fed. Reg. at 10782. The rulemaking supports this claim with vague references to the filing of "bar complaints against senior Department officials" by alleged "political activists," the "willingness of some State bar disciplinary authorities to give credence to such complaints," and that "certain State bar disciplinary authorities have undertaken investigations of Department attorneys without notifying and coordinating with OPR." This, the rule making notice claims, "risks chilling the zealous advocacy by Department attorneys on behalf of the United States, its agencies, and its officers," and the "chilling effect, in turn, would interfere with the broad statutory authority of the Attorney General . . . ." *Id.* These vague assertions provide no valid basis for the proposed rule changes for several reasons.

First, that complaints are filed by so-called "political activists" does not render those complaints invalid. State disciplinary authorities generally have an obligation to review and assess

the merits of every complaint submitted to them. *See, e.g.,* Ind. Admis. and Disc. R. 23, (10)(a); Iowa Court Rule 35.1; Minn. R. Lawyers Prof. Resp. 6(a). State disciplinary authorities routinely filter through the large number of complaints submitted and determine which have sufficient merit to warrant investigation and, potentially, the pursuit of disciplinary charges. That state disciplinary authorities may have given sufficient credence to some of the complaints referenced in the rulemaking to move them forward to investigation reflects nothing more than a determination by those disciplinary authorities, exercising judgment and discretion developed through years of experience, that the facts underlying the complaint warrant investigation. It does not mean that a state disciplinary authority has simply accepted the entirety of a complainant's allegations as true.

Second, as discussed above, similar to DOJ attorneys conducting investigations of criminal or civil violations, state disciplinary authorities have broad discretion to determine how best to proceed with their investigations of violations of ethics rules, including when to notify and coordinate with the employer of the attorney being investigated. The fact that state disciplinary authorities may exercise this broad discretion to proceed without notifying and coordinating with OPR does not indicate any improper motive.

Finally, requiring state disciplinary authorities to defer their investigations pending OPR review would not negate the purported "chilling effect" cited in the rulemaking notice. As discussed above, even if it were to take effect, the proposed rule would leave state disciplinary authorities free to pursue disciplinary investigations and seek regulatory remedies (including suspension and disbarment) after OPR review is complete and after DOJ has imposed any personnel remedies. Assuming that the purpose of the rule is not to use indefinite delay as a means of forestalling states from pursuing regulatory remedies, regardless of any coordination and resulting deferral of the state investigation, DOJ attorneys will continue to face potential state disciplinary charges and sanctions. That possibility would pose the very "chilling effect" the rulemaking notice claims must be eliminated. This is entirely consistent with Section 530B, which Congress passed over objections from DOJ precisely to ensure that DOJ attorneys, like other attorneys, understand that they must comply with state disciplinary rules or face the consequences for their state licenses. To the extent the existence of state disciplinary authority deters unethical conduct, that is a good thing and serves to protect the public.

In a similar vein, the rulemaking suggests that state disciplinary investigations conducted without notice to and coordination with OPR may interfere with the Attorney General's statutory authority to assign and authorize staff to perform DOJ functions. This is incorrect. If unaware of a state disciplinary investigation, the Attorney General of course could not be affected by it in making staffing decisions. Awareness of a state disciplinary investigation also does nothing to alter the Attorney General's ability to make staffing decisions. The Attorney General may discount the investigation, or factor knowledge of the investigation into her staffing decisions. This remains the Attorney General's choice, which must be made even if OPR is notified of and coordinating with a state disciplinary investigation.

Further, the proposed regulation's coverage of **former** DOJ attorneys has no connection to any legitimate regulation of DOJ attorneys. The OPR and PMRU review process would have no impact on licensure or continued employment. Further, as the proposed rulemaking acknowledges, OPR has no authority to compel the participation of attorneys who have left the employment of DOJ—in stark contrast to state disciplinary authorities' ability to compel such participation. 91 Fed. Reg. at 10785. So, reserving to the Attorney General the ability to preempt state disciplinary proceedings to allow DOJ to first investigate a former DOJ attorney serves no purpose other than

unwarranted delay: it depends on the attorney voluntarily submitting to the investigation and, if it concludes the attorney engaged in misconduct, there is no sanction that DOJ can impose.

DOJ cannot justify stalling a state investigation under such circumstances. If, for example, a complaint concerns allegations of prosecutorial misconduct by a former DOJ attorney that were later affirmed on appeal, DOJ has no reason (at least no reason relating to upholding attorney ethics) to prevent a state disciplinary authority from commencing an investigation. Indeed, it is **only** a state disciplinary authority that can effectively act, as that former DOJ attorney is still a member of the bar of the state in which the attorney was licensed.

IV. The Notice of Rulemaking Contains Other Infirmities and Should Be Abandoned in Light of the Continuing Legitimacy of the 1999 Regulations

The rulemaking seems to suggest that the 1999 regulations have less force or are otherwise inconsequential because they were promulgated as an interim final rule. The rulemaking goes on to recite various regulatory certifications (Section III) that imply the current public comment process is unnecessary. The unusual framing of the past regulatory process and current effort should be rejected.

First, the 1999 regulations have remained in place and have been followed for over two decades, and any question about that rulemaking process is a distraction from the present effort to upend a settled framework governing DOJ attorneys. The 1999 regulations were accompanied by a public comment period, which ended on June 21, 1999. 91 Fed. Reg. at 10786. But by its terms, the interim final rule became effective April 19, 1999, and it was never rescinded, remaining in place through the present.

Second, and more importantly, the 1999 regulations are addressed to DOJ's internal process, appropriately recognizing the backdrop of state disciplinary authorities and Section 530B's mandate that DOJ attorneys "shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." That backdrop includes state laws and rules that impose specific professional obligations relating to state regulatory investigations on attorneys. For example, Rule 8.1(b) of the ABA Model Rules of Professional Conduct, adopted in many states, provides that a lawyer, in connection with a disciplinary matter, shall not "knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority; except that this rule does not require disclosure of information otherwise protected by Rule 1.6." *See also, e.g.*, Ohio R. Prof'l Conduct 8.1(b); Wyo. R. Prof'l Conduct 8.1(b);Wash. R. Prof'l Conduct 8.4(l) ("It is professional misconduct for a lawyer to . . . violate a duty or sanction imposed by or under the Rules for Enforcement of Lawyer Conduct in connection with a disciplinary matter, including but not limited to, the duties catalogued at ELC 1.5" which includes duties to respond to inquiries about matters under investigation, comply with a subpoena, and answer a formal complaint); Cal. Bus. & Prof. Code § 6068(i) ("duty of attorney" to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself").[12] In other words, a component of compliance with state ethics rules is compliance with rules relating to regulatory enforcement, and the substance of state ethics obligations is inextricably intertwined with state enforcement mechanisms.

[12] As another example, many states have rules requiring attorneys to report known misconduct by other attorneys and/or to self-report to state disciplinary authorities certain events that may trigger a state disciplinary investigation. *See, e.g*., Pa. R. Prof'l Conduct 8.3(a);; Colo. R. Civ. Proc. 242.11; W.Va. R. Lawyer Disciplinary Proc. 3.18-3.19.

The 1999 regulations did not change the enforcement authority of OPR, state authorities, or the federal courts. The 1999 regulations did not exempt DOJ attorneys from their duties to report misconduct or to cooperate with disciplinary investigations. As the current rulemaking recognizes, in some instances, based on practical concerns, "State bars refrain from taking further action until OPR is able to complete the investigation so that the bar has a full account, through OPR's report of investigation, of the evidence and OPR's analysis, as well as the PMRU's conclusions." *Id*. at 10782. But both Section 530B and the 1999 regulations leave this to the discretion of state disciplinary authorities and do not in any way mandate such a deferral of state action. This approach has worked well for more than 27 years, reflects the differing roles of the Attorney General (employer) and state disciplinary authorities (regulators), and is consistent with Section 530B in that it ensures that DOJ attorneys are subject to state laws and rules regulating attorney conduct "to the same extent and in the same manner as other attorneys in that State."

The current notice of proposed rulemaking fails to advance the public protection mission that is foundational to state attorney regulation and disciplinary processes. Instead, the proposed rules would hinder this mission by imposing unwarranted burdens on state regulators.

Additionally, Section III, Regulatory Certifications, contains several misstatements leading to incorrect legal conclusions. For example:

- Section III.A. "Administrative Procedure Act" states: "This proposed rule relates to a matter of agency management or personnel and is a rule of agency organization, procedure, or practice." *Id.* at 10786. As noted above, the proposed rule goes well beyond these limits and attempts to compel state regulatory authorities to handle investigations in a certain way; as such the proposed rule should not be exempt from the usual requirements of the APA.

- Section III.I. "Congressional Review Act" states that because the proposed action "pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties," "it is not a 'rule' as that term is used in the Congressional Review Act, 5 U.S.C. 804(3)(B), (C), and the reporting requirements of 5 U.S.C. 801 do not apply." *Id.* For the same reasons noted above, this is incorrect.

- Section III.E, "Executive Order 13132—Federalism" states: "This proposed rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. It does not dictate the substance of the ethical standards a State may adopt. The proposed rule would merely better reflect the existing balance of responsibilities between State bar authorities and the Department, whereby the State bar authority should wait for OPR to conduct its review of the allegations and reach a conclusion before deciding whether to pursue its own disciplinary investigation." *Id.* As noted above, the proposed rule indeed would have a substantial direct effect on the federal relationship with states. Indeed, the very content of the

> federalism statement insists that state authorities cannot even decide whether to move forward until a federal decision has been made, a substantial change from the existing balance of responsibilities among DOJ and state disciplinary authorities. Indeed, the very purpose of the proposed rule is to alter the existing balance of responsibilities established by Section 530B and the 1999 regulations.

The notice and proposed rulemaking are procedurally as well as substantively deficient. Fortunately, there is an existing regulatory framework, consistent with Section 530B and the constitution, that adequately addresses the balance of responsibilities among DOJ and state disciplinary authorities in addressing allegations of state ethics rules violations by DOJ attorneys, and there is no void to address. This new rulemaking effort should be abandoned.

NOBC opposes the proposed amendments to 28 C.F.R. Part 77.

Respectfully submitted,

The National Organization of Bar Counsel

RULE 16. TEMPORARY SUSPENSION PENDING DISCIPLINARY PROCEEDINGS

(a) Petition for Temporary Suspension. In any case where the Director files or has filed a petition under Rule 12, if it appears that a continuation of the lawyer's authority to practice law pending final determination of the disciplinary proceeding poses a substantial threat of serious harm to the public, the Director may file with this Court a petition for suspension of the lawyer pending final determination of the disciplinary proceeding, with proof of service. The petition shall set forth facts as may constitute grounds for the suspension and may be supported by a transcript of evidence taken by a Panel, court records, documents or affidavits.

(b) Service. The Director shall cause the petition to be served upon the lawyer in the same manner as a petition for disciplinary action.

(c) Answer. Within 20 days after service of the petition or such shorter time as this Court may order, the lawyer shall file in this Court an answer to the petition for temporary suspension, with proof of service. If the lawyer fails to do so within that time or any extension of time this Court may grant, the petition's allegations shall be deemed admitted and this Court may enter an order suspending the lawyer pending final determination of disciplinary proceedings. The answer may be supported by a transcript of any evidence taken by the Panel, court records, documents, or affidavits.

(d) Hearing; Disposition. If this Court after hearing finds a continuation of the lawyer's authority to practice law poses a substantial threat of serious harm to the public, it may enter an order suspending the lawyer pending final determination of disciplinary proceedings.

(e) Interim Suspension. Upon a referee disbarment recommendation, the lawyer's authority to practice law shall be suspended pending final determination of the disciplinary proceeding, unless the referee directs otherwise or the Court orders otherwise

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8005

IN RE PROPOSED AMENDMENTS TO MINNESOTA RULES OF PROFESSIONAL CONDUCT

O R D E R

Rule 4 of the Minnesota Rules of Professional Conduct governs transactions with persons other than clients. Rule 4.2 specifically concerns communication with a person represented by counsel and provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." As we have identified, several jurisdictions, along with a 2022 advisory opinion from the American Bar Association, have interpreted this language to mean that the non-contact rule applies to self-represented attorneys. *In re Jensen*, 12 N.W.3d 731, 741 n.8 (Minn. 2024) (compiling citations). We have also noted, however, that "[w]e have not addressed whether the no-contact rule applies to *self-represented* attorneys." *Id.*

This court will benefit from consideration by the Lawyers Professional Responsibility Board as to whether Rule 4.2 in particular, and Rule 4 more generally, should be amended to clearly allow or clearly prohibit a self-represented lawyer to communicate directly with other represented parties.

Based on all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. Consideration of amendments to Rule 4 of the Minnesota Rules of Professional Conduct is referred to the Lawyers Professional Responsibility Board.

2. The board must file its report and any amendment recommendations on or before January 29, 2027.

Dated: October 17, 2025

BY THE COURT:

Natalie E. Hudson

Natalie E. Hudson
Chief Justice

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 9, 2026

RESOLUTION

RESOLVED, That the American Bar Association adopts American Bar Association Model Rule of Professional Conduct 1.14, dated February 2026, to supplant all earlier versions of that Model Rule.

100

RULE 1.14: CLIENT WITH DECISION-MAKING LIMITATIONS

(a) A lawyer shall, as far as reasonably possible, maintain an ordinary client-lawyer relationship with a client with decision-making limitations, including when the client's decision-making limitations impact the client's ability to provide direction to the lawyer or make reasoned, informed choices. A person has decision-making limitations if the person has substantial difficulty receiving and understanding information, evaluating information, or making or communicating decisions even with appropriate supports or accommodations.

(b) When the lawyer reasonably believes that the client: (1) has decision-making limitations, (2) is at risk of substantial physical, financial or other harm unless action is taken, and (3) cannot adequately act in the client's own interest to address the risk, the lawyer may take reasonably necessary protective action to address the risk.

(c) Information relating to the representation of a client with decision-making limitations is protected by Rule 1.6. However, when taking protective action pursuant to paragraph (b), the lawyer may reveal information related to the representation to the extent the lawyer reasonably believes necessary to protect the client's interests.

Comment

Client Abilities and Limitations

[1] A client's decision-making limitations do not diminish the lawyer's obligations under the Rules or the importance of treating the client with attention and respect. Except as provided in this Rule, a client with decision-making limitations is owed all the protections under the Rules ordinarily afforded by the client-lawyer relationship.

[2] Decision-making limitations can be situational in nature and can vary in degree and over time. A client may have decision-making limitations with regard to certain issues and not others. A client with decision-making limitations often can understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, some adults with substantial decision-making limitations, including those due to intellectual, developmental or cognitive disabilities, mental health conditions or substance abuse disorder, can make legal decisions. In addition, even if unable to make some or all decisions, persons with decision-making limitations, including even very young minors, may have preferences and values that can guide the lawyer's representation.

[3] A client's decision-making limitations may be affected by multiple factors. Sometimes decision-making limitations can be alleviated or eliminated by using supports or making accommodations to enhance the client's decision-making abilities, and such use can assist the lawyer in maintaining an ordinary client-lawyer relationship. Examples of supports and accommodations include communication devices or services, assistance of appropriate third parties or supported decision-making, environmental

changes (e.g., conducting client meetings in a familiar setting), and using plain language or otherwise modifying the lawyer's communication and counseling techniques for the client.

Ordinary Client-Lawyer Relationship

[4] Lawyers are required to maintain, as far as reasonably possible, an ordinary client-lawyer relationship with clients with decision-making limitations. An ordinary client-lawyer relationship requires, among other things, abiding by a client's decisions concerning the objectives of the representation; keeping a client informed about the status of the matter and explaining matters to the extent reasonably necessary for a client to make informed decisions regarding the representation; and rendering candid advice to a client. See Rules 1.2, 1.4, and 2.1. An ordinary client-lawyer relationship is based, in part, on the assumption that the client, when properly advised and assisted, can make and communicate reasoned, informed decisions about important matters. When the client has decision-making limitations, however, maintaining an ordinary client-lawyer relationship may not be possible in all respects. In particular, a client with decision-making limitations may have limited ability to make or communicate legally binding decisions.

[5] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer should seek the client's informed consent to the presence of such persons. See Rule 1.6(a). If the presence of such persons assists in the representation, the lawyer should document that role when such documentation could help avoid a waiver of the attorney-client evidentiary privilege.

Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members or other persons, to make decisions on the client's behalf. Whenever possible, the lawyer should afford the client the opportunity to communicate privately with the lawyer without the presence or influence of others.

[6] When a family member or another seeks a lawyer's services on behalf of an individual who may have decision-making limitations, the lawyer should identify who the client is and seek to establish an ordinary lawyer-client relationship with that client. When a family member or another seeks the lawyer's assistance in drafting a legal document to be executed by an individual who may have decision-making limitations, the lawyer should be alert to the possibility of undue influence or fraud.

[7] When the client has granted an agent authority to make decisions, including an agent acting under a power of attorney, the lawyer nevertheless should take direction from the client and maintain communication with the client to the extent feasible unless the client has otherwise directed or is unable to provide direction. In addition, a lawyer may consult with and represent a person who seeks to challenge the actions of an agent or terminate or modify the agent's appointment. When representing a client in such situations, the lawyer must take direction from the client and advocate for the client's objectives.

When a court has appointed a guardian, conservator or other appointee who is not a guardian ad litem to act on behalf of a lawyer's client or prospective client, a lawyer should ordinarily look to the court appointee for those decisions on behalf of the client or prospective client over which the appointee has authority.

However, a lawyer may consult with and represent a person subject to guardianship or conservatorship who seeks representation to challenge or modify the terms of that arrangement, or who seeks representation with regard to any other matter over which the person retains decision-making authority. When representing a client in such situations, the lawyer must take direction from the client and advocate for the client's objectives.

If a lawyer represents the guardian, conservator, or agent of a person with decision-making limitations, and is aware that the guardian, conservator or agent is acting adversely to the person's interest, the lawyer may have an obligation to prevent or rectify the misconduct.

[8] When a client in a criminal matter appears to have decision-making limitations, the lawyer's ethical duty to render competent representation and to protect the client's constitutional rights may require the lawyer to seek a competency evaluation or other mental health evaluation to determine whether the client is capable of deciding whether to testify or to plead guilty or to determine whether the client can meaningfully participate in preparation for trial, sentencing or another adjudicatory process. Because a client's liberty may be at stake, these questions are uniquely difficult. Judicial decisions vary regarding whether, without the client's informed consent, a lawyer for the accused may or must raise doubts with the court about the competency of the accused. In such situations, lawyers should inform themselves of relevant judicial decisions and other authority in the jurisdiction and are encouraged to seek guidance from other organizations and resources, such as the ABA Defense Function Standard on Establishing and Maintaining an Effective Client Relationship and the ABA Criminal Justice Standards on Mental Health.

[9] A lawyer representing a minor should be mindful that the minor may have decision-making limitations due to age and stage of development. As with adult clients with decision-making limitations, the lawyer for a minor with decision-making limitations should, as far as reasonably possible maintain an ordinary client-lawyer relationship. Accordingly, a lawyer for a minor capable of providing direction ordinarily should advocate for the minor's objectives of the representation. See Rule 1.2(a). In assessing the minor's decision-making limitations, including with regard to providing direction on a legal matter, a lawyer should consider a variety of factors such as the minor's developmental stage, cognitive ability, emotional development, ability to communicate, ability to understand consequences, and consistency of decisions, the informed opinions of professionals and others with knowledge of the child's abilities and limitations, and the factors identified in Comment [13].

[10] A lawyer acting as guardian ad litem for a person is often tasked with advocating for the best interest of that person. Because the lawyer's assessment of what is in the best interest of that person may diverge from that person's objectives, lawyers who simultaneously act as a guardian ad litem for a person and provide direct legal representation of that person may find themselves in an ethically untenable position and should consider the need to withdraw as counsel or request to be relieved of the guardian ad litem appointment.

[11] A lawyer representing a client with decision-making limitations can employ a variety of techniques to ensure that the lawyer's representation is competent. For example, the lawyer can use developmentally appropriate interviewing and counseling

skills when representing a minor, employ or invite the client to use supports and accommodations that make it easier for the client to understand and communicate information, or meet with the client at a place and time where the client is likely to have less difficulty providing direction. To identify and learn such techniques, lawyers can seek guidance from resources developed by professional associations and others with expertise in working with individuals with decision-making limitations.

Taking Protective Action

[12] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that an ordinary client-lawyer relationship cannot be maintained as provided in paragraph (a), paragraph (b) permits the lawyer to take protective measures the lawyer deems necessary. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; using voluntary surrogate decision-making tools such as durable powers of attorney; or consulting with support groups, healthcare professionals, other professional services, adult-protective agencies, or other persons or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of minimizing intrusion into the client's decision-making autonomy, maximizing client capacities and respecting the client's family and social connections. In litigation involving the capacity of the client, such as a guardianship or conservatorship proceeding, the lawyer should advocate for the client's expressed position regarding what, if any, protective action should be taken.

[13] In determining the extent of the client's decision-making limitations, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to understand consequences of a decision; appreciation of the substantive fairness of a decision; the consistency of a decision with the known long-term commitments and values of the client; and whether supports or accommodations could alleviate factors contributing to decision-making limitations. A lawyer's reasonable belief that the client cannot make and communicate reasoned, informed decisions may be based on the lawyer's own observations. In forming a reasonable belief, a lawyer should ordinarily not rely exclusively on a medical diagnosis, but rather should consider the client's functional abilities and whether the limitations in the client's abilities could be alleviated by the use of accommodations or supports. In forming a reasonable belief, a lawyer who is aware of a healthcare professional's evaluation of the client's current abilities and limitations should take such evaluation into consideration. However, the lawyer should recognize that the evaluation may have been done for a different purpose, and that the evaluator may have evaluated the client based on standards that differ from the relevant legal standard and at a time when client's abilities differed from the present.

[14] A determination that a client has decision-making limitations need not have been made by a healthcare professional or court for a lawyer to form a reasonable belief that a client has such limitations. Nevertheless, in appropriate circumstances, the lawyer may seek guidance from a healthcare professional with relevant expertise or with knowledge of the client's abilities or limitations. If obtaining such guidance requires

revealing confidential information about the client and the client does not or cannot give informed consent, it is permissible only if it is a reasonably necessary protective action under paragraph (b).

[15] If a lawyer reasonably believes that the client meets the criteria set forth in paragraph (b) of this Rule, the lawyer may consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. For example, if the client has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a guardian or conservator, which may be temporary or limited in nature, or a court order in lieu of such an appointment. In addition, rules of procedure in litigation sometimes provide that minors or persons with decision-making limitations must have their interests represented by a guardian ad litem or next friend if they do not have a general guardian. In many circumstances, however, appointment of such a legal representative may be more intrusive, expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should generally advocate the least restrictive action on behalf of the client, and be aware of any law that so requires. The lawyer should also communicate with the client regarding such protective action to the extent feasible unless doing so is not necessary for the client to make informed choices about the representation and would be detrimental to the client or the lawyer's ability to protect the client's interests. See Rule 1.4.

[16] If another person has petitioned a court for an appointment of a conservator or a guardian or another restriction on the client's legal capacity, the lawyer may not advocate for such an appointment or restriction if the client opposes it. If the lawyer represents a client who is a respondent in a proceeding for guardianship or conservatorship, the lawyer must advocate for the client's objectives if known or ascertainable.

[17] Taking protective action under paragraph (b) of this Rule does not, without more, require the lawyer to terminate the representation. However, the lawyer must inform the client of the protective action and should consider whether withdrawing from the representation has become necessary under Rule 1.16(a). For example, the lawyer may have a conflict of interest necessitating withdrawal in light of the particular protective action, the subject of the representation, the nature of the client-lawyer relationship, and other relevant considerations. See, e.g., Rule 1.7.

Disclosure of Information When Taking Protective Action

[18] Disclosure of the client's decision-making limitations could adversely affect the client's interests, including constitutional or other legal rights. For example, raising the question of decision-making limitations could, in some circumstances, lead to proceedings for involuntary civil commitment. Information relating to the representation is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer may reveal information about the representation without the client's informed consent, but only to the extent reasonably necessary to protect the client's interests. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other persons or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely

that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client.

Emergency Legal Assistance

[19] In an emergency where a substantial health, safety or financial interest of a person with decision-making limitations is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or communicate reasoned, informed judgments about the matter. Such action may be taken when the person has consulted with the lawyer or when another acting in good faith on that person's behalf has consulted with the lawyer.

Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person with decision-making limitations has no other lawyer, agent or other representative available to act. The lawyer should take legal action on behalf of the person with decision-making limitations only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person with decision-making limitations in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[20] A lawyer who in an emergency acts on behalf of a person with decision-making limitations who is unable to establish a client-lawyer relationship should keep the confidences of the person with decision-making limitations as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of the lawyer's relationship with the person with decision-making limitations. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Ordinarily, a lawyer would not seek compensation for such emergency actions taken.

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REPORT

I. INTRODUCTION

This Resolution proposes to amend the ABA Model Rules of Professional Conduct by replacing Model Rule of Professional Conduct 1.14 (hereinafter MRPC 1.14 or Model Rule 1.14) and its accompanying Comments, which provide guidance to lawyers working with people who have limitations that affect their ability to make decisions, including decisions related to a representation. The Rule underwent significant changes at the recommendation of the ABA's Ethics 2000 Commission but has remained essentially unchanged since 2002.

Over the past two decades, experience with MRPC 1.14, and changes in the law and understanding of the rights and abilities of people with decision-making limitations have revealed a need for amendments to the Rule. Ambiguities in MRPC 1.14, as well as seemingly inconsistent guidance, have created confusion for lawyers. In addition, it appears language in MRPC 1.14 has unintentionally encouraged and normalized the use of guardianship and conservatorship when less restrictive protective actions could meet client needs.

In recognition of these concerns, in 2023, the Supreme Court of Maryland adopted revisions to Maryland RPC 1.14 after a three-year process. Inspired in part by Maryland's changes, which became effective in July 2023, a working group of eight ABA entities[1] recommended that the Center for Professional Responsibility consider revisions to MRPC 1.14. Subsequently, representatives from the Standing Committee on Professional Regulation, the Standing Committee on Ethics and Professional Responsibility, and several other ABA entities worked together as a drafting committee to study MRPC 1.14 and whether and how it might be best amended.[2]

The drafting committee circulated an initial discussion draft with explanatory memo on April 1, 2025. In June, the drafting committee reviewed the comments received and prepared a revised discussion draft which was distributed on July 21, 2025. The drafting committee reviewed the comments from the second round in September 2025, and along with the two Standing Committees, agreed upon final revisions that are reflected in the revised amendments herein.

[1] ABA Section of Civil Rights and Social Justice; Commission on Disability Rights; Commission on Law and Aging; Judicial Division; National Conference of State Trial Judges; Real Property, Trust and Estate Law; Senior Lawyers Division; Section of Family Law.

[2] Entities that have had representatives engaged in this work include the Section on Civil Rights and Social Justice (led by Section's Elder Affairs Committee); Commission on Disability Rights; Commission on Law and Aging; Judicial Division; National Conference of State Trial Judges; Real Property, Trust and Estate Law Section; Senior Law Division; the Section of Family Law; Solo, Small Firm and general Practice Division; Standing Committee on Ethics and Professional Responsibility; and Standing Committee on Professional Regulation.

This Report summarizes the key changes set forth in the updated Model Rule 1.14 proposed in this Resolution and the rationale behind them. Because the proposed changes to current Model Rule 1.14 and the Comments are extensive, this Resolution proposes replacing, instead of amending, the current Rule. Given the extent of the proposed changes, the Standing Committee on Ethics and Professional Responsibility and Standing Committee on Professional Regulation include as an Appendix a legislative version of the proposed changes (additions underlined and deletions struck through).

II. THE NEED FOR AMENDMENT

There exist important reasons for the ABA to update MRPC 1.14. These include: (1) it unintentionally has the effect of encouraging many lawyers to pursue guardianship or conservatorship over clients; (2) it has been read to offer conflicting guidance to lawyers representing people with surrogate decision-makers; (3) its terminology is inconsistent with changes in the law and the modern understanding of the rights and abilities of people with disabilities; and (4) it does not provide sufficient guidance to lawyers in several major areas implicated by the Rule.

A. MRPC 1.14 has the unintentional effect of encouraging lawyers to pursue guardianship or conservatorship of their clients.

MRPC 1.14's existing wording has unintentionally led some lawyers to treat guardianship or conservatorship[3] as a standard response—perhaps even a default response—when a client has decision-making limitations, rather than the last resort that experts widely agree that either should be. Specifically, paragraph (b) indicates that lawyers have enormous discretion when taking "reasonably necessary protective action," and then identifies "seeking the appointment of a guardian ad litem, conservator or guardian" as one of three permissible protective actions if the criteria for protective action set forth in 1.14(b) are met. The other protective action identified is "consulting with individuals or entities that have the ability to take action to protect the client."

Attorneys who frequently deal with the situations contemplated by the Rule have raised concerns that the express inclusion of guardianship or conservatorship as a protective action in the black letter of MRPC 1.14 suggests that these actions have priority and legitimacy over other possible, less intrusive, actions suggested in current Comment 5. This implicit prioritization based on the current construction of the Rule is problematic not only because guardianship and conservatorship are extraordinarily high-impact interventions into a person's life, but because this response poses the most direct conflict of interest for lawyers, compared to any other protective action. That is because a guardianship or conservatorship proceeding is, at heart, adversarial

[3] Hereafter, this Report may use the term "guardianship" to refer to both "guardianship" and "conservatorship," although states vary in their terminology.

litigation. Today, the ABA[4] and advocates for older adults and people with disabilities urge lawyers to prioritize a broad array of alternatives to guardianship and conservatorship, such as supported decision-making.[5] MRPC 1.14 should be amended to align with these efforts.[6]

B. MPRC 1.14 offers conflicting guidance to lawyers representing people with surrogate decision-makers and fails to distinguish materially different kinds of surrogates.

MRPC 1.14 has been read over time as providing internally inconsistent guidance to lawyers who represent a person who either has appointed an agent (e.g., through a power of attorney) or for whom a guardian, conservator, or other agent (such as a representative payee) has been appointed. Clarification of the Rule would address this confusion.

Currently, Comment 4 provides: "If a legal representative has already been appointed for a client, the lawyer should ordinarily look to the representative for decisions on behalf of the client." In so doing, Comment 4 seems at odds with the black letter of MRPC 1.14. As explained in a 2016 law review article:

> By advising attorneys to "ordinarily" look to the appointed representative to make decisions, Comment 4 undermines the main text of Rule 1.14. The primary guidance provided by the rule itself is that attorneys should default to a normal model of representation when working with individuals with diminished capacity and only veer from that model if the person with diminished capacity faces significant risk otherwise and such deviation is reasonably necessary. By stating that the ordinary approach should be to accord the representative with decision-making authority, Comment 4 reverses this default. This reversal is particularly strange given that most persons with appointed representatives have never been adjudicated incapacitated; rather, they appointed the representative through a document such as a power of attorney, the validity of which depended on the individual having at least some decision-making capacity when executing it.[7]

Current Comment 4 is also at odds with the unequivocal statement in current Comment 2 that a lawyer should "as far as possible" accord a person with a legal representative "the status of a client."

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[4] *See, e.g.,* ABA Policy 22M602 (Feb. 2022), adopting the recommendations of the 4th National Guardianship Summit.

[5] *See, e.g.*, Nina Kohn & David English, *Protective Orders and Limited Guardianships: Legal Tools for Sidelining Plenary Guardianship*, 72 SYRACUSE L. REV. 225, 236-238 (2022); Alison Hirschel & Lori Smetanka, *The Use and Misuse of Guardianship by Hospitals and Nursing Homes*, 72 SYRACUSE L. REV. 255 (2022).

[6] The revised Rule avoids such apparent prioritization by amending the Blackletter as discussed in Section III(C) and providing additional guidance to lawyers in revised Comments 12 and 13.

[7] Nina A. Kohn & Cathryn R. Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 616 (2016) (footnote omitted).

Comment 4 reverses what many have interpreted as the default approach set forth in Comment 2, making deviation from the normal client-lawyer relationship the ordinary approach. This has the effect of weakening the individual's agency and access to legal assistance. The lack of clarity has also resulted in inconsistent state ethics opinions.[8]

In addition, the current Comments fail to recognize the tremendous difference between a situation in which the client cannot directly make a legal decision (e.g., because a court stripped the client of that right when appointing a guardian) and a situation in which the client retains the right to make a legal decision (e.g., the client has executed an immediately effective power of attorney for finances and continues to have financial capacity).[9]

The Comment revisions resolve these issues by providing needed and consistent guidance as to how to proceed in the very common situation in which an agent or guardian seeks the lawyer's assistance, at least purportedly, on behalf of the client.[10]

C. MRPC 1.14's terminology is problematic in two respects.

1. "Diminished capacity" is inconsistent with the current understanding of decision-making abilities and impairments.

MRPC 1.14 uses the term "client with diminished capacity." There are many problems with this term. First, it is undefined in the Model Rules. The absence of definition or adequate guidance results in disparate and often inconsistent ethical responses to clients with decision-making limitations. Second, it is inherently confusing as it suggests that there is always some baseline from which to compare a client's current level of functioning. Many people with decision-making limitations did not previously have greater capacity. Third, the term suggests that capacity is static and does not vary based on type of decision, neither of which are accurate. This is one reason why the use of the term is increasingly rejected in other contexts, such as the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act. Finally, MRPC 1.14 reads to some as if it only applies to decisions made within the scope of representation of an existing client (where the lawyer may have some base line) and thus may provide insufficient guidance regarding new or prospective clients. As discussed in Section IIIA of this Report, the Proposed Rule and Comments address this issue by using the term "person with decision-making limitations."

[8] *Id.* at 635.
[9] *See* revised Comment 7.
[10] *Id*.

*2. **The term "normal client-lawyer relationship" suggests that clients who need accommodations and/or protective actions because of decision-making limitations have an abnormal client-lawyer relationship.***

Many disability advocates and others who work with clients with decision-making limitations have flagged the term "normal client-lawyer relationship" as inappropriate because of the implied negative image of abnormality of clients who have cognitive or other limitations. The Maryland Supreme Court, in rejecting the term, acknowledged that the term may be unnecessarily stigmatizing of people with disabilities and older adults when used in this context.

D. MRPC 1.14 offers insufficient guidance on a variety of ethical challenges lawyers face when working with clients with decision-making limitations.

1. Insufficient guidance for lawyers for respondents in guardianship or conservatorship proceedings or lawyers for people subject to guardianship or conservatorship.

Individuals for whom a guardianship is being sought, or who seek to challenge the terms and conditions of their guardianship, have a due process right to counsel to advocate for their objectives. Unfortunately, some lawyers—and even some judges—fail to appreciate this right and are more focused on protectionism. Individuals in these adversarial proceedings may find that their lawyer is urging actions that are inconsistent with their wishes or revealing otherwise confidential information as a purported protective action. The current Rule contributes to this confusion when it states in Comment 4 that: "If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."[11]

2. Insufficient guidance on the presence of third parties.

Comment 3 to MRPC 1.14 recognizes that clients may wish to involve family members or others in discussions with a lawyer. The Comment reminds lawyers that, except for authorized protective actions, the lawyer "must look to the client, and not family members, to make decisions on the client's behalf." However, the Comment lacks helpful guidance on what the lawyer should do to accomplish this goal.

As the ABA Commission on Law and Aging has long urged, and the National Academy of Elder Law Attorneys has recognized in its aspirational standards, lawyers should provide clients with the opportunity to communicate privately with the lawyer. This approach is important to help avoid undue influence over, or even outright coercion of, the client by a third party who is present alongside the client.[12] These

[11] The revised Rule addresses these issues in Comment 7 and 16.
[12] The revised Rule addresses this issue in Comment 5.

groups and others have also stressed the importance of clearly identifying the client and letting affected parties know who the lawyer actually represents.[13]

3. Insufficient guidance for lawyers working with defendants in criminal proceedings.

MRPC 1.14 does not provide any specific guidance for lawyers representing defendants in criminal proceedings even though issues of cognitive incapacity often arise in such proceedings.[14]

4. Insufficient guidance for lawyers representing minors.

MRPC 1.14 provides only very minimal guidance for lawyers representing minors. For example, there is no guidance on how to determine whether a minor has decision-making limitations and what factors should be considered, such as developmental stage. Similarly, there is no specific guidance on how the lawyer can support or enhance the minor's decision-making abilities.[15]

III. PROPOSED AMENDMENTS TO BLACKLETTER MRPC 1.14

This section outlines substantive changes to MRPC 1.14 set forth in the Resolution.

A. Replaces the term "diminished capacity" with "client with decision-making limitations" in 1.14(a) and throughout the Rule and Comments and adds a definition of the new term.

The term "capacity" can be broadly applied across every physical, mental, or emotional function, and with that breadth comes many different conceptual perspectives and approaches, and too often, confusion. The use of the term "decision-making limitations" focuses directly and in plain language on the area of capacity relevant to legal representation—decision-making—which is key to being able to direct and assist in representation.

The definition added in MRPC 1.14(a) reduces the confusion caused by the imprecision of "diminished capacity" by clearly explaining the type of individuals

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[13] *See* NATIONAL ACADEMY OF ELDER LAW ATTORNEYS, *ASPIRATIONAL STANDARDS FOR THE PRACTICE OF ELDER LAW AND SPECIAL NEEDS LAW WITH COMMENTARIES* (Second Edition, April 24, 2017). The third standard under *Part B. Client Identification* states that the Elder Law Attorney "Meets with the prospective client in private at the earliest practicable time to help the attorney identify the client and assess the prospective client's capacity and wishes as well as the presence of any undue influence." *See also* ABA Commission on Law and Aging, *Why Am I Left in the Waiting Room? Understanding the Four Cs of Elder Law Ethics (2020)*, https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-elderlaw-ethics-brochure.pdf.

[14] The revised Rule addresses this issue in Comment 8.

[15] *See* Bruce Boyer, *Representing Child-Clients with "Diminished Capacity": Navigating an Ethical Minefiel*d, 24 THE PROFESSIONAL LAWYER 1 (2016).

contemplated by the Rule, specifically a person who "has substantial difficulty receiving and understanding information, evaluating information, or making or communicating decisions even with appropriate support or accommodations." It is intended to do so in a way that helps focus lawyers' attention on their clients' functional abilities and limitations, rather than on categorizing their clients. The definition is also consistent with related criteria in §301 of the Uniform Guardianship and Conservatorship and Other Protective Arrangements Act (2017) and §3 of the Uniform Health-Care Decisions Act (2023).

B. Replaces the term "normal client-lawyer relationship" with "ordinary client-lawyer" relationship.

As the Maryland Supreme Court implicitly recognized in rejecting the term "normal," MRPC 1.14's reference to "a normal client-lawyer relationship" implies representing people with cognitive disabilities creates an "abnormal" relationship, which may be unnecessarily stigmatizing of people with disabilities and older adults when used in this context.[16] The suggested amendments change the modifier "normal" to "ordinary." Notably, "ordinary" is already used in current Comment 1 to describe the relationship. The term appears in the revised Rule 1.14(a) as well as in Comments 3, 4, 6, 9, and 13.[17]

C. Enumerates the requirements that must be met for a lawyer to take protective action and eliminates language singling out certain types of protective action (e.g., guardianship).

The revised Rule, in paragraph (b), eliminates problematic language that has inadvertently encouraged lawyers to pursue guardianship or conservatorship over clients when less restrictive protective action would be reasonable instead by eliminating reference to specific examples of protective action, including guardianship.[18] The revision to paragraph (b) would also make the Rule easier to read by adding enumeration.

D. Rewords the final paragraph of Rule 1.14 to provide clarity as to when disclosures are permitted.

This revised Rule would resolve ambiguity by clearly stating that it is the lawyer's reasonable belief that determines whether revealing information relating to the representation is permissible to the extent necessary to protect the client's interests. Currently, the Rule states that information may be revealed where "reasonably necessary" but does not specify how this is to be determined. The revision also

[16] See, Supreme Court of Maryland, Rules Order (Apr. 21, 2023), *available at* https://www.mdcourts.gov/sites/default/files/rules/order/ro214.pdf.

[17] The option of using the modifier "customary" was considered but rejected because the term risks confusion with case law and disciplinary decisions that consider customary practices in connection with fees or other legal conduct.

[18] The range of protective actions is discussed in Comment 12. In addition, revised Comments 3, 11, and 13 recommend the use of decision supports and accommodations.

eliminates the suggestion—and legal fiction—that the reason a lawyer may reveal information when taking protective action is because such disclosure is "impliedly authorized" under Model Rule 1.6. Rather, the only basis for disclosure is the lawyer's reasonable belief both that the criteria for protection action are met, and disclosure is necessary to protect the client's interests.

IV. PROPOSED AMENDMENTS TO COMMENTS

A. Overview

As a general matter, there are three types of proposed substantive amendments to the Comments to MRPC 1.14. First, are changes designed to align the Comments with the suggested amendments to the Blackletter and to otherwise increase clarity. Second, are changes to provide more substantial and useful guidance for lawyers on what decision-making limitations are and the steps that lawyers can take to assess and support a client's decision-making abilities. Third, are changes to provide guidance to lawyers in specific situations that lawyers often find difficult and that have led to conflicting advice. These include situations in which the lawyer represents a person: (1) with a surrogate decision-maker (e.g., an agent under a power-of-attorney or a guardian); (2) who is a respondent in a guardianship proceeding; (3) who is involved in a criminal matter where the person's competency or mental health may be an issue; and (4) who is a minor. In all, the number of Comments doubles from 10 to 20.

The two terminology changes of using "decision-making limitations" in place of "diminished capacity" and "ordinary" in place of "normal" to describe the client relationship is applied throughout and is not repeated in the description of each revised Comment below. Any current Comment carried over unchanged into these revised Comments, but for this terminology, are described as substantially identical.

B. Comment by Comment Analysis

This section describes the revised and new amendments to the Comments, with a focus on how they vary from the current Comments to MRPC 1.14.

The header prior to Comments 1 to 3 is new and labeled **Client Abilities and Limitations**.

Proposed Comment 1 restates the foundational principle from current Comment 2 of always treating the client with attention and respect and adds (for clarity) that a client with decision-making limitations is owed all the protections under the Rules ordinarily afforded by the client-lawyer relationship.

Proposed Comment 2 articulates dimensions of the definition of decision-making limitations in paragraph (a) of the Rule that are essential for lawyers to understand, including its variability over time, task specificity, and the endurance of many abilities despite one's diagnosis. This is partly addressed in current Comment 1

but expanded in revised Comment 2, which also recognizes the role of client preferences and values in guiding the lawyer's representation even when decision-making ability is limited.

Proposed Comment 3 is a new Comment and addresses the importance of supports and accommodations as a factor in enhancing the client's decision-making abilities. The Comment also offers several examples of supports and accommodations lawyers may use.

A header before Comments 4 to11 is new and labeled **Ordinary Client-Lawyer Relationship**.

Proposed Comment 4 draws from current Comment 1 to address the mandate to maintain the ordinary client-lawyer relationship. It adds references to other select Rules that flesh out the meaning of that relationship and recognizes that the relationship is based, in part, on the assumptions that the client, when properly advised and assisted, can make and communicate reasoned, informed decisions about important matters.

Proposed Comment 5 revises current Comment 3 on representing clients who wish to have third parties participate in client-lawyer discussions. The revised Comment recognizes the need to obtain the client's informed consent to the presence of others and reiterates the duty to look to the client and not family members or other persons in decision-making. The Comment also adds that if the presence of another is to assist in representation, that role should be documented to avoid a waiver of the attorney-client evidentiary privilege. The revised Comment also mentions a valuable best practice, specifically to afford the client the opportunity to communicate privately with the lawyer without the presence or influence of others. Such a practice helps to lessen the risk of undue influence and enables the lawyer to observe the client's decision-making abilities more objectively.

Proposed Comment 6 is new and acknowledges the ethical complexity that commonly arises when a family member or another seeks a lawyer's services on behalf of an individual who may have decision-making limitations. The Comment highlights the importance of clearly identifying who is the client and being alert to the possibility of undue influence or fraud.

Proposed Comment 7 expands significantly the guidance in current Comment 4 which addresses clients with surrogate decision-makers. When a client has a surrogate decision-maker, two key questions arise: from whom should the lawyer take direction and with whom should the lawyer communicate? The revised guidance on these issues recognizes that the answer depends on the type of surrogate at issue.

When a principal authorizes an agent to act, the principal typically retains the authority to do so. Moreover, in many cases, clients execute a power of attorney giving an agent authority to act but do not expect the agent to act unless the client cannot, or

the client asks for help. Thus, the revised Comment advises that a lawyer for a client who has appointed an agent should take direction from the client and maintain communication with the client to the extent feasible unless the client has otherwise directed or is unable to provide direction.

By contrast, when a court appoints an agent (e.g., a guardian or conservator), the court is removing certain authority from the principal. Accordingly, the suggested Comment provides that in such situations the lawyer should ordinarily look to the court appointee to make decisions over which the appointee has authority. The Comment explains, however, that a lawyer may consult with and represent a person subject to guardianship who seeks representation to challenge or modify the terms of that arrangement or seeks representation about any other matter over which the person retains decision-making authority. It further explains that when representing a client in such situations, the lawyer must take direction from the client and advocate for the client's objectives. In this way the Comment seeks to clear the confusion within the bar and judiciary over the role of a lawyer for a person subject to guardianship.

The Comment ends with a restatement from current Comment 4 that when the lawyer represents the court-appointed agent of a person with decision-making limitations and is aware that such agent is acting adversely to the person's interest, the lawyer may have an obligation to prevent or rectify the misconduct.

Proposed Comment 8 is a new Comment acknowledging the uniquely difficult decisions lawyers must make to competently represent a client in a criminal matter, including decisions about seeking a mental examination of the client or taking other protective measures that aid in the client's defense. It highlights the importance of knowing the jurisdiction's underlying law and encourages lawyers to seek guidance from other organizations and resources.

Proposed Comment 9 focuses on representing minors. It is new and fills a gap in the current Comments, which briefly mention minors in Comments 1, 4, and 7. The Comment recognizes that the representation of minors with decision-making limitations involves obligations both similar to and distinct from that of adults, and that minors may have decision-making limitations due to age and stage of development. Yet, it explains that lawyers should, as far as reasonably possible, maintain an ordinary client-lawyer relationship with a minor client. Thus, if the minor client is capable of providing direction, the lawyer should ordinarily advocate for the minor's objectives of the representation. It notes the need for lawyers of minors to consider the cognitive, emotional, and developmental dimensions relevant to the child and to consider the opinions of professionals and others with knowledge of the child's abilities and limitations.

Proposed Comment 10 is new and addresses the potential conflict in roles that arises when a lawyer attempts to simultaneously serve as guardian ad litem for a person and that same person's personal lawyer. The Comment warns that it can be ethically untenable for the lawyer to serve in both roles at the same time, and advises

the lawyer to consider the need to withdraw as counsel or request to be relieved of the guardian ad litem appointment.[19]

Proposed Comment 11 is new and offers several suggestions of techniques a lawyer can employ to ensure competent representation of clients with decision-making limitations. It further urges lawyers to seek guidance from resources developed by professional associations with expertise in working with individuals with decision-making limitations.

The header before Comments 12 to 17 remains the same as the header before current Comments 5 to 7, **Taking Protective Action**.

Proposed Comment 12 regarding taking protective action is largely identical to current Comment 5 in providing examples of protective actions but adds, in a sentence at the end, guidance for when there is litigation involving the decision-making ability of the client, such as a guardianship proceeding. In such situations, lawyers for clients with decision-making limitations sometimes fail to advocate for the client's expressed position regarding what, if any, action should be taken. The Comment makes clear that protective actions that may be proper outside of a dispute or proceeding at which the client's decision-making ability is in question do not apply in such litigation.

Proposed Comment 13 incorporates core guidance from current Comment 6 regarding factors to consider in determining the extent of a client's decision-making limitations. It makes two substantive changes to the prior guidance. First, instead of instructing the lawyer to consider the "substantive fairness of the decision" it advises the lawyer to consider "[the client's] appreciation of the substantive fairness of the decision". Second, it advises the lawyer to consider supports or accommodations that could alleviate factors contributing to decision-making limitations. Both changes focus on supporting the client's agency. The final sentence of the current comment which permits seeking guidance from an appropriate diagnostician is moved to a separate comment (Comment 14) and replaced with more detailed guidance for weighing medical input alongside the use of accommodations or supports. The proposed Comment cautions against over-reliance on diagnosis, emphasizes the importance of accommodations and supports, and recognizes the responsibility of the lawyer to make a decision based on the lawyer's reasonable belief.

Proposed Comment 14 recognizes that while a lawyer is not dependent on a healthcare professional for determinations of client decision-making abilities, the lawyer may seek guidance from a healthcare professional (not simply a "diagnostician," the term used in the current Comment). The revised Comment guides lawyers to look for healthcare professionals with knowledge and experience in the kind of limitations specific to the client's situation. It also explains that unless such

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[19] *See* Colo.Bar Ass'n, Formal Op. 131 (2017), *available at* https://www.cobar.org/Portals/COBAR/Repository/ethicsOpinions/FormalEthicsOpinion_131.pdf (explaining the conflict between the two roles).

consultation is permitted as a reasonably necessary protective action, it will require the client's informed consent if the lawyer will reveal confidential information about the client. Consultations that can be accomplished without such revelation may be done without client consent even if grounds for taking protective action are not satisfied.

Proposed Comment 15 substantially restates the guidance in current Comment 7 regarding when to consider appointment of a substitute decision-maker for a client but clarifies that the conditions of paragraph (b) must be met. The Comment also directs the lawyer to advocate for the least restrictive action on behalf of the client and to be aware of any law that so requires. Finally, the Comment highlights the importance of communication with the client about any such protective action to the extent feasible unless certain exceptions apply, cross-referencing Model Rule 1.4.

Proposed Comment 16 addresses an aspect of guardianship and conservatorship not addressed in proposed Comment 7. Proposed Comment 7 addresses the lawyer's ability to accept as a client a person already under guardianship or conservatorship. Comment 16 addresses the lawyer's duties in the representation of a client when another person has petitioned a court for appointment of a conservator or guardian. The revised Comment 16 clarifies that, in such circumstances, the lawyer may not advocate for the appointment or restriction if the client opposes it. This applies even if the lawyer believes the appointment or restriction is justifiable as a protective action because the lawyer's advocacy role in that situation is to be the voice of the client. In such proceedings, the lawyer must advocate for the client's objectives if known or ascertainable.

The header for Comment 18 rephrases the header to current Comment 8 to refer to **Disclosure of Information When Taking Protective Action** rather than **Disclosure of the Client's Condition**, because confidential information about the client may encompass more than the client's condition.

Proposed Comment 17 remains substantially similar to current Comment 8 but reflects the revised language in the paragraph (c) that eliminates "implied" authorization and links disclosure of information about representation to the criteria for protective action and limits it only to the extent reasonably necessary to protect the client's interests. The revised Comment also eliminates the last sentence of the current Comment as unnecessary since it provides no guidance.[20]

The header to revised Comments 19 and 20 remains the same as the header for current Comment 9 and 10, **Emergency Legal Assistance**.

Proposed Comment 19 is substantially identical to current Comment 9 with one change: the modifier "a substantial" is added before "health, safety or a financial interest" in the first sentence to clarify that the threat of imminent and irreparable harm must be considerable. This Comment provides the lawyer the ability to represent a

[20] The last sentence in current Comment 8 reads, "The lawyer's position in such cases is an unavoidably difficult one."

person who is unable to form a client-lawyer relationship under the emergency circumstances described for the immediate purpose of preserving the status quo or otherwise avoid imminent and irreparable harm.

Proposed Comment 20 is substantially identical to current Comment 10 which explicates the duties of the lawyer acting to provide emergency legal assistance.

V. CONCLUSION

Model Rule 1.14 exists to provide guidance to lawyers working with people who have limitations that affect their ability to make decisions, including decisions related to a representation. Practice experience since the Rule's last major changes in 2000 has shown the Rule to be insufficient in providing guidance in several major areas implicated by the Rule. In addition, it appears language in Model Rule 1.14 has unintentionally encouraged and normalized the use of guardianship and conservatorship when less restrictive protective actions could meet client needs. Overall, the current Rule has fallen behind modern understandings of the rights and abilities of people with disabilities and how to work effectively with them as clients.

The proposed revisions to Model Rule 1.14 and the accompanying Comments are the product of several years of review by representatives of multiple ABA entities, with additional input provided by many other entities and individuals with a range of relevant expertise, responding to two earlier drafts. The principal proposed revisions of substance are targeted to: (1) update terminology to be consistent with changes in the law and modern understandings of the rights and abilities of people with disabilities; (2) encourage wider use of accommodations and supports that can be effective to support the decision-making abilities of clients and avoid the need for protective action; (3) reduce the use of guardianships and conservatorships when less restrictive protective actions could meet client needs; (4) eliminate conflicting guidance to lawyers representing or considering representing people with surrogate decision-makers in such a way as to strengthen access to justice for these individuals and distinguishing voluntarily appointed surrogates such as agents under powers of attorney versus guardians and conservators; (5) provide additional guidance to attorneys when clients are accompanied by family members or friends or supporters; and (6) provide additional guidance to lawyers representing minors and clients in criminal matters.

The ABA Standing Committees on Ethics and Professional Responsibility and Professional Regulation respectfully request that the House of Delegates approve this Resolution to amend the Black Letter of Model Rule 1.14 and its Comments.

Respectfully submitted,

Bruce A. Green, Chair
Standing Committee on Ethics and Professional Responsibility

Sari W. Montgomery, Chair
Standing Committee on Professional Regulation

February 2026

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APPENDIX – Redline of Current Model Rule 1.14

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2025121-resolution-100-2026-midyear-appendix-redline-current-rule-1-14.pdf

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Ethics and Professional Responsibility and Standing Committee on Professional Regulation

Submitted By: Bruce A. Green, Chair of the Standing Committee on Ethics and Professional Responsibility (Ethics Committee) and Sari W. Montgomery, Chair of the Standing Committee on Professional Regulation (Regulation Committee)

1. Summary of the Resolution(s).

The Resolution proposes to replace current ABA Model Rule of Professional Conduct 1.14 (Client With Diminished Capacity) with significantly updated new Model Rule 1.14 (Client With Decision-Making Limitations). There exist important reasons for the ABA to replace current Model Rule 1.14, including that it: (1) is misaligned with current law and modern understanding of the rights and abilities of people with decision-making limitations; (2) contains ambiguities which have resulted in the Rule being read to offer conflicting guidance to lawyers representing people with surrogate decision-makers; and (3) does not provide sufficient guidance to lawyers in several major areas implicated by the Rule.

New proposed Model Rule 1.14, as set forth in this Resolution, addresses these matters and, if adopted, will provide needed updated guidance to lawyers as to how to meet their ethical obligations in these situations. For example, by replacing the confusing term “client with diminished capacity” with “client with decision-making limitations,” and then defining the new term, the new proposed Model Rule 1.14 will help lawyers better understand when the Rule applies. It also eliminates other ambiguities that resulted in confusion as to how the Rule should be applied, including in situations relating to representing minors and clients with surrogate decision-makers. Further, the new Model Rule 1.14 addresses concerns that the current Rule has the unintentional effect of encouraging lawyers to pursue guardianship and conservatorship of their clients as a standard response to handling the needs of clients with decision-making limitations. The proposed new Rule instead encourages lawyers to first provide supports and accommodations, and then to prioritize less restrictive alternatives when taking protective action.

The Ethics and Regulation Committees undertook this initiative to update Model Rule 1.14 at the request of the ABA Section of Civil Rights and Social Justice; Commission on Disability Rights; Commission on Law and Aging; Judicial Division; National Conference of State Trial Judges; Real Property, Trust and Estate Law; Senior Lawyers Division; and Section of Family Law, a number of which had representatives that participated in the Resolution’s development.

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2. Indicate which of the ABA's four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this. (*Include the number of the goal(s) in the response*

   This Resolution seeks to advance Goals I and II by providing ABA members and members of the profession, including lawyer regulators, with clear and current guidance on how lawyers can meet their ethical obligations when representing clients with decision-making limitations.

3. Approval by Submitting Entity (*List the date of approval and name of the governing entity that provided approval (for primary sponsor(s) only)*).

   The Standing Committee on Ethics and Professional Responsibility approved the Resolution at its meeting on September 25, 2025, and the Standing Committee on Professional Regulation approved the Resolution at its meeting on October 10, 2025.

4. Has this or a similar resolution been submitted to the House or Board previously?

   No.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? Policies should be listed in proper format (i.e. 2 digit year, A for Annual or M for Midyear) and resolution number; i.e. 97M601)

   The ABA Model Rules of Professional Conduct are implicated by this Resolution and if adopted, this Resolution would see the replacement of current Model Rule 1.14 with a new, significantly updated Model Rule 1.14.

   Additionally, if this Resolution is adopted, the Ethics Committee will review ABA Formal Opinion 96-404 (Client Under a Disability) to determine whether and how it requires updating, or whether a new Formal Opinion should be issued and Formal Opinion 96-404 should be withdrawn.

6. If this is a late report, what urgency exists which requires action at this meeting of the House? (if not a late report, enter "N/A")

   N/A.

7. Status of Legislation. (If not applicable, enter "N/A")

   N/A.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

   If adopted, consistent with Ethics and Regulation Committee practices, the Committees will seek implementation of the Resolution by: (1) providing state supreme court chief justices with new Model Rule 1.14, urging its adoption by their courts, and offering the Committees' assistance; (2) copying the president and executive director of each state bar association, and each chief lawyer discipline counsel on the communication with their respective chief justice; and (3) conducting educational webinars about new Model Rule 1.14. The Committees will monitor implementation efforts in the jurisdictions.

9. Cost to the Association. (Both direct and indirect costs-If no cost, enter "None."

   None.

10. Disclosure of Interest. (If there are no interests to disclose, enter "None".)

    N/A.

11. Referrals. (List proper names of ABA entities as reflected here. *Note: This list should reflect entities to whom the Resolution has already been sent. Use list format and proper names for each entity.)*

    Prior to filing this Resolution, the Standing Committees released for comment to all ABA Sections, Divisions, Forums, Standing Committees, Task Forces, Commissions, and Centers, as well as to state and local bar associations, two discussion drafts of possible proposed changes to Model Rule 1.14, seeking their comments and suggestions. The Association of Professional Responsibility Lawyers, Conference of Chief Justices, and National Organization of Bar Counsel also received the discussion drafts, and their input was sought, as was the input of an array of other relevant stakeholders. The Ethics and Regulation Committees posted the discussion drafts on the Center for Professional Responsibility website and on the Committees' webpages.

12. Name and Contact Information (Prior to the Meeting. Please include **name, telephone number and e-mail address only)**. *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.)

    Ellyn S. Rosen, ABA Regulation and Global Initiatives Counsel
    312/929-6456
    ellyn.rosen@americanbar.org

13. Name and Contact Information. (Onsite at the meeting.) Please include best contact information to use when on-site at the meeting. Please include **name, telephone number and e-mail address only** *Be aware that this information will be available to*

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anyone who views the House of Delegates agenda online.

Bruce A. Green, Chair
Standing Committee on Ethics and Professional Responsibility
917-331-5321
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Sari W. Montgomery, Chair
Standing Committee on Professional Regulation
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EXECUTIVE SUMMARY

1. Summary of the Resolution.

The Resolution proposes to replace current ABA Model Rule of Professional Conduct 1.14 (Client With Diminished Capacity) with significantly updated new Model Rule 1.14 (Client With Decision-Making Limitations). There exist important reasons for the ABA to replace current Model Rule 1.14, including that it: (1) is misaligned with current law and modern understanding of the rights and abilities of people with decision-making limitations; (2) contains ambiguities which have resulted in the Rule being read to offer conflicting guidance to lawyers representing people with surrogate decision-makers; and (3) does not provide sufficient guidance to lawyers in several major areas implicated by the Rule.

New proposed Model Rule 1.14, as set forth in this Resolution, addresses these matters and, if adopted, will provide needed updated guidance to lawyers as to how to meet their ethical obligations in these situations. For example, by replacing the confusing term "client with diminished capacity" with "client with decision-making limitations," and then defining the new term, the new proposed Model Rule 1.14 will help lawyers better understand when the Rule applies. It also eliminates other ambiguities that resulted in confusion as to how the Rule should be applied, including in situations relating to representing minors and clients with surrogate decision-makers. Further, the new Model Rule 1.14 addresses concerns that the current Rule has the unintentional effect of encouraging lawyers to pursue guardianship and conservatorship of their clients as a standard response to handling the needs of clients with decision-making limitations. The proposed new Rule instead encourages lawyers to first provide supports and accommodations, and then to prioritize less restrictive alternatives when taking protective action.

The Ethics and Regulation Committees undertook this initiative to update Model Rule 1.14 at the request of the ABA Section of Civil Rights and Social Justice; Commission on Disability Rights; Commission on Law and Aging; Judicial Division; National Conference of State Trial Judges; Real Property, Trust and Estate Law; Senior Lawyers Division; and Section of Family Law, a number of which had representatives that participated in the Resolution's development.

2. Summary of the issue that the resolution addresses.

The Resolution addresses numerous correct concerns expressed to the Ethics and Regulation Committees that current Model Rule 1.14 was dated and required updating to provide necessary ethical guidance to the profession that aligns with changes in the law, science, and modern understanding of rights and abilities of people with decision-making limitations.

3. Please explain how the proposed policy position will address the issue.

New Model Rule 1.14, proposed in this Resolution, makes the necessary updates responsive to the valid concerns expressed including updates to terminology, such as replacing “client with diminished capacity” with “client with decision-making limitations” and providing a definition of the term. The new proposed Model Rule eliminates other ambiguities that resulted in confusion as to how the Rule should be applied, including in situations relating to representing clients with surrogate decision-makers and minors. Further, the new Model Rule 1.14 addresses concerns that the current Rule has the unintentional effect of encouraging lawyers, as a standard response to handling clients with decision-making limitations, to pursue guardianship and conservatorship of their clients, instead of first providing supports and accommodations and then considering and pursuing less restrictive protective actions.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None.

RULE 3. DISTRICT ETHICS COMMITTEE

(a) Composition. Each District Committee shall consist of:

(1) A Chair appointed by this Court for such time as it designates and serving at the pleasure of this Court but not more than six years as Chair; and

(2) Four or more persons whom the District Bar Association (or, upon failure thereof, this Court) may appoint to three-year terms except that shorter terms shall be used where necessary to assure that approximately one-third of all terms expire annually. No person may serve more than two consecutive three-year terms, nor more than a total of four three-year terms, in addition to any additional shorter term for which the person was originally appointed and any period served as District Chair. At least 20 percent of each District Committee's members shall be nonlawyers. Every effort shall be made to appoint lawyer members from the various areas of practice. The Board shall monitor District Committee compliance with this objective and the District Committee shall include information on compliance in its annual report to the Court.

(b) Duties. The District Committee shall investigate complaints of lawyers' alleged unprofessional conduct and make reports and recommendations thereon as provided in these Rules in a format prescribed by the Executive Committee. It shall meet at least annually and from time to time as required. The District Chair shall prepare and submit an annual report to the Board and this Court in a format specified by the Executive Committee and make such other reports as the Executive Committee may require

OLPR Dashboard for Court And Chair

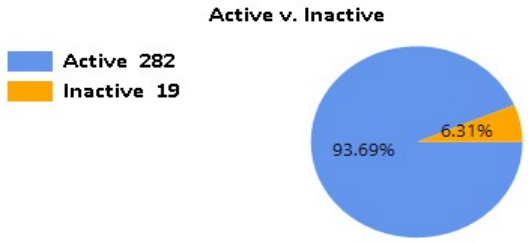
	Month Ending April 2026	Change from Previous Month	Month Ending March 2026	Month Ending April 2025
Open Files	768	25	743	651
Total Number of Lawyers	510	22	488	427
New Files YTD	566	139	427	524
Closed Files YTD	479	114	365	473
Closed CO12s YTD	145	35	110	138
Summary Dismissals YTD	324	59	265	298
Files Opened During April 2026	139	-20	159	127
Files Closed During April 2026	114	-39	153	107
Public Matters Pending (excluding Resignations)	38	-1	39	34
Panel Matters Pending	14	-1	15	10
DEC Matters Pending	116	-3	119	118
Files on Hold	20	-1	21	13
Advisory Opinion Requests YTD	585	156	429	577
CLE Presentations YTD	9	5	4	8
Files Over 1 Year Old	301	5	296	234
Total Number of Lawyers	177	0	177	129
Files Pending Over 1 Year Old w/o Charges	189	10	179	127
Total Number of Lawyers	133	2	131	88

	2026 YTD	2025 YTD
Lawyers Disbarred	1	4
Lawyers Suspended	2	3
Lawyers Reprimand & Probation	1	1
Lawyers Reprimand	2	0
TOTAL PUBLIC	**6**	**8**
Private Probation Files	2	0
Admonition Files	21	35
TOTAL PRIVATE	**23**	**35**

FILES OVER 1 YEAR OLD

Year/Month	OLPR	AD	PAN	HOLD	SUP	S12C	SCUA	REIN	TRUS	Total
2018-12	1									**1**
2019-04							1			**1**
2019-07	1									**1**
2019-08	1									**1**
2020-01	1									**1**
2020-02							1			**1**
2020-09	1									**1**
2021-03	1			1						**2**
2021-05	3									**3**
2021-06	1				1					**2**
2021-07	1									**1**
2021-08							1			**1**
2021-10							1			**1**
2021-11	2						2			**4**
2022-01	1									**1**
2022-03	1									**1**
2022-04	2						1			**3**
2022-05	1		1							**2**
2022-08	1				1		1			**3**
2022-09	1						1			**2**
2022-10	1			3		1				**5**
2022-11	1				1		1			**3**
2022-12	1									**1**
2023-01	1				2	1				**4**
2023-02	1			3			3			**7**
2023-03	2		1			1				**4**
2023-04	1				1		1			**3**
2023-05	3		1			1				**5**
2023-06	1									**1**
2023-07	2		1				9			**12**
2023-08	5		1		1		2			**9**
2023-09	1				2		25			**28**
2023-10	2			1	1		4	1		**9**
2023-11	3						1			**4**
2023-12	2									**2**
2024-01	2									**2**
2024-02	3			1			2			**6**
2024-03	3									**3**
2024-04	3			3						**6**
2024-05	3		1	2			2			**8**
2024-06	3		1							**4**
2024-07	3				1		2			**6**
2024-08	13									**13**
2024-09	7						1			**8**
2024-10	9									**9**
2024-11	9			1	1		2	1		**14**
2024-12	15								1	**16**
2025-01	17	1					2			**20**
2025-02	12				1					**13**
2025-03	23									**23**
2025-04	17	2			1					**20**
Total	**189**	**3**	**7**	**15**	**14**	**4**	**66**	**2**	**1**	**301**

	Total	**Sup. Ct.**
Sub-total of Cases Over One Year Old	235	21
Total Cases Under Advisement	66	66
Total Cases Over One Year Old	**301**	**87**



All Pending Files as of Month Ending April 2026

Year/Month	SD	DEC	REV	OLPR	AD	PAN	HOLD	SUP	S12C	SCUA	REIN	RESG	TRUS	**Total**
2018-12				1										**1**
2019-04										1				**1**
2019-07				1										**1**
2019-08				1										**1**
2020-01				1										**1**
2020-02										1				**1**
2020-09				1										**1**
2021-03				1			1							**2**
2021-05				3										**3**
2021-06				1				1						**2**
2021-07				1										**1**
2021-08										1				**1**
2021-10										1				**1**
2021-11				2						2				**4**
2022-01				1										**1**
2022-03				1										**1**
2022-04				2						1				**3**
2022-05				1		1								**2**
2022-08				1				1		1				**3**
2022-09				1						1				**2**
2022-10				1			3		1					**5**
2022-11				1				1		1				**3**
2022-12				1										**1**
2023-01				1				2	1					**4**
2023-02				1			3			3				**7**
2023-03				2		1			1					**4**
2023-04				1				1		1				**3**
2023-05				3		1			1					**5**
2023-06				1										**1**
2023-07				2		1				9				**12**
2023-08				5		1		1		2				**9**
2023-09				1				2		25				**28**
2023-10				2			1	1		4	1			**9**
2023-11				3						1				**4**
2023-12				2										**2**
2024-01				2										**2**
2024-02				3			1			2				**6**
2024-03				3										**3**
2024-04				3			3							**6**
2024-05				3		1	2			2				**8**
2024-06				3		1								**4**
2024-07				3				1		2				**6**
2024-08				13										**13**
2024-09				7						1				**8**
2024-10				9										**9**
2024-11				9			1	1		2	1			**14**
2024-12				15									1	**16**
2025-01				17	1					2				**20**
2025-02				12				1						**13**
2025-03				23										**23**
2025-04				17	2			1						**20**
2025-05				16			2	1		1				**20**
2025-06				22										**22**
2025-07		1		27			1							**29**
2025-08				31			1				1			**33**
2025-09		1		31			1							**33**
2025-10		6		26										**32**
2025-11		5	1	22							1		1	**30**
2025-12		14		30							1			**45**
2026-01		20	1	14							1			**36**
2026-02		23		21							1			**45**
2026-03	1	25		24				1				2		**53**
2026-04	45	21		15								8		**89**
Total	**46**	**116**	**2**	**468**	**3**	**7**	**20**	**16**	**4**	**67**	**7**	**10**	**2**	**768**

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

FILE NO. ADM10-8043

STATE OF MINNESOTA

IN SUPREME COURT

COMMENT OF THE DIRECTOR ON PROPOSED TEMPORARY SUSPENSION RULE CHANGE

INTRODUCTION

Pursuant to the Court's order dated March 6, 2026, the Director of the Office of Lawyers Professional Responsibility (OLPR) submits this comment on the Report of the Lawyers Professional Responsibility Board (LPRB) Regarding Rule 16, Rules on Lawyers Professional Responsibility (RLPR), dated January 30, 2026. The Director recommends a different approach to provide the Court with more flexibility in the appropriate case.

Specifically, the Director recommends the rule be modified to expand temporary suspension or license restriction availability pre-petition under a broader set of circumstances (not just criminal charges of a severe crime as proposed by the Board) and further recommends a new category of interim suspension upon a lawyer's conviction of a serious crime, where the serious crime is defined as a felony, the presumptive discipline sanction for which is disbarment or a suspension longer than one year based upon the Court's

on-point or analogous case law. These changes would bring Minnesota's rule more in line with the approach of most jurisdictions and the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement.

The LPRB's proposal is an improvement over the current Rule 16, RLPR. However, it only allows a pre-petition temporary suspension application upon a charge of a "crime of such severity that the lawyer's authority to practice law prior to the filing of a petition under Rule 12 poses a substantial threat of serious harm to the public." This is a narrow triggering event, and as is more fully discussed below, given how the Court has approached temporary suspensions using similar language to date, would likely only apply to criminal charges that, on their face, lead to disbarment.

Further, no provision is made for consistency with Rule 20, RLPR, which requires that all discipline matters before the Director are confidential except in limited circumstances, such as after a panel finds probable cause. Thus, although the criminal charges may be public, the discipline rules prohibit the Director from disclosing information relating to any discipline proceedings. Additionally, the proposed rule is inefficient to the extent it requires the Director and the Court to redo the entire process upon filing of a Rule 12 petition. Because the Director

has concerns regarding the proposed revisions, and does not believe it fully addresses the intent of the Court's inquiry in the first instance, the Director recommends further consideration of any proposed changes to Rule 16, RLPR, with further direction from the Court.

DISCUSSION

A. Current Rule and Application.

Before considering potential revisions, it is helpful to consider the current rule and how it has been applied over the years. Rule 16, RLPR, authorizes the Director to move for the temporary suspension of a lawyer while discipline proceedings are pending only in a limited set of circumstances. First, a petition for public discipline must already be pending under Rule 12. *See* Rule 16(a), RLPR. To submit a petition for public discipline under Rule 12, the Director must have approval of the Board following the procedures set forth in Rule 9 (probable cause process), or under circumstances set forth in Rule 10, such as the agreement of the parties or a felony conviction, the latter of which petition still requires Board Chair approval. This procedure presupposes the Director has completed an investigation and has been able to gather clear and convincing

evidence of one or more rule violations that warrant public discipline (and convinced others of that fact), or a felony criminal conviction has been entered.

Second, the standard is specific to circumstances that present a "substantial threat of serious harm to the public," a phrase the Court has never defined. Rule 16(a), RLPR. As discussed below, in the most recent case where the Court has considered this standard in a contested, post-petition context, the Court declined to impose a temporary suspension but imposed measures necessary to "adequately protect the public" without addressing whether there was a "substantial threat of serious harm to the public." In fact, with limited exceptions, the Court has only ordered temporary suspension under Rule 16(a), RLPR, where a lawyer (1) has stipulated to the temporary suspension, or (2) has not opposed the petition for temporary suspension or is otherwise not participating in the proceeding, and disbarment is the likely outcome of the proceedings.

Separately, Rule 16(e), RLPR, provides for interim suspension upon a referee's recommendation of disbarment, a standard the Court has uniformly applied. Although the Court has not generally articulated the rationale for this rule, where a judicial officer has found clear and convincing evidence of

misconduct that warrants disbarment, the continued practice of the lawyer is arguably on its face a substantial threat of serious harm to the public.

The most recent petition for temporary suspension under Rule 16(a), RLPR, considered by this Court where the matter was contested occurred in *In re Oliver*, A15-1285. *See* Ex. C, Order dated November 12, 2015.[1] In that order, the Court declined without explanation to temporarily suspend a lawyer who had pleaded guilty to felony wire fraud relating to his fraud in securing $500,000 from a non-client and lied to cover up the fraud. Although Oliver had pleaded guilty in September 2014, the entry of his conviction on the guilty plea and sentencing were significantly delayed and by August 2015, when the Director petitioned for temporary suspension, he had still not been sentenced and the referee hearing for related discipline was on hold. Instead of temporarily suspending Oliver, the Court prohibited Oliver from handling client funds, required him to provide notice to his clients that he had pleaded guilty to a federal felony and that the Director was seeking suspension or disbarment of his law license, and placed Oliver on supervised probation. In issuing its order, the

[1] Not all discipline orders of the Court can be found on Westlaw. Accordingly, where a Westlaw cite is not available, the Director has included a copy of the Court's order as an exhibit to this motion.

Court denied the requested relief of temporary suspension but determined that some measures were necessary prior to the referee hearing to "adequately protect the public."

The most common situation where the Court has temporarily suspended lawyers under Rule 16(a), RLPR, occurs upon stipulation of the parties. *See In re McNeilly*, A22-0574, Ex. E, Order dated September 9, 2022) (stipulation for temporary suspension and to stay discipline proceedings pending exhaustion of criminal appeals relating to felony criminal conduct related to the practice of law); *In re Green*, A15-0682 (Ex. F, Order dated September 16, 2015) (petition pending for misappropriation of client funds; respondent also under federal investigation for related misconduct; respondent stipulated to temporary suspension and discipline proceedings were placed on hold pending federal investigation); *In re Mayne*, 764 N.W.2d 815 (Mem.) (Minn. 2009) (stipulation for temporary suspension; respondent had pleaded guilty to the crime of financial exploitation of a vulnerable adult); *In re Light*, 741 N.W.2d 607 (Mem.) (Minn. 2007) (stipulation for temporary suspension; respondent had been temporarily suspended in North Dakota and had entered a guilty plea to a felony charge of terrorizing another, among other misconduct); *In re Schmitt*, 681 N.W.2d 352

(Mem.) (Minn. 2004) (stipulation for temporary suspension; petition pending for misappropriation of client funds); *In re Oberhauser*, 664 N.W.2d 847 (Mem.) (Minn. 2003) (stipulation for temporary suspension after initially opposing the motion; petition pending for federal money laundering convictions).

The Court has also ordered temporary suspensions under Rule 16(a), RLPR, where the lawyer provided no response or did not oppose the motion. *See In re Lundeen*, 807 N.W.2d 168 (Mem.) (Minn. 2011) (no response to the motion for temporary suspension and petition for disciplinary action alleging misappropriation, where misappropriation was deemed admitted due to respondent's failure to answer the discipline petition); *In re Mulvahill*, 696 N.W.2d 349 (Mem.) (Minn. 2005) (court *sua sponte* requested briefing on whether respondent should be temporarily suspended after the Court questioned an indefinite suspension versus more severe discipline such as disbarment; respondent did not respond); *In re Jellinger*, 632 N.W.2d 640 (Mem.) (Minn. 2001) (respondent failed to respond to petition for temporary suspension, and the Director had filed a petition for revocation of probation due to respondent's failure to respond to new complaints or cooperate with implementing probation). Accordingly, although the Court has imposed temporary

suspensions in several cases, there is no case law expressly explaining what conduct might give rise to a "substantial threat of serious harm."

The Director did find a couple of older cases where the lawyer may have opposed the motion, but the motion was nonetheless granted. In doing so, however, the Court did not elaborate on the "substantial threat of serious harm" language. In *In re Plowman*, the Court ordered temporary suspension pending the completion of disciplinary proceedings, where the respondent had admitted misappropriation, made partial restitution, cooperated with the Director's investigation, and provided letters of support from clients and friends attesting to respondent's good character. In temporarily suspending the lawyer, the Court stated, "it would be inappropriate, pending final determination of disciplinary proceedings, to hold out the respondent as an attorney who poses no risk of injury to the public and who is entitled to the unquestioned trust and confidence of clients, judges, and lawyers." *Plowman*, 463 N.W.497 (Mem.) (Minn. 1990) (citing *In re Okerman*, 298 N.W.2d 28, 29 (Minn. 1980)). Similarly, in *In re Anderley*, the Court temporarily suspended Anderley prior to a referee hearing where Anderley had admitted misappropriation and forgery during the investigation, but was undergoing treatment for alcohol use disorder and was

planning to present mitigation. *In re Anderley*, 471 N.W.2d 104 (Mem.) (Minn. 1991). In its order, the Court reiterated its statement from *Okerman*.

Importantly, in every decision the Director found where the Court ordered a temporary suspension pursuant to Rule 16(a), RLPR, except one, the lawyers were ultimately disbarred. *See e.g., In re McNeilly*, 18 N.W.2d 774 (Minn. 2025), *In re Green*, 888 N.W.2d 451 (Mem.) (Minn. 2016), *In re Oliver*, Ex. D, Order dated March 2016); *In re Lundeen*, 811 N.W.2d 602 (Minn. 2012); *In re Mayne*, 783 N.W.2d 153 (Mem.) (Minn. 2010; *In re Light*, 769 N.W.2d 768 (Mem.) (Minn. 2009); *In re Schmitt*, 712 N.W.2d 179 (Mem.) (Minn. 2006); *In re Mulvahill*, 697 N.W.2d 194 (Men.) (Minn. 2005); *In re Oberhauser*, 679 N.W.2d 153 (Minn. 2004) ; In re Anderley, 481 N.W.2d 366 (Mem.) (Minn. 1992); *In re Plowman*, 465 N.W.2d 921 (Mem.) (Minn. 1991).

The exception occurred in *In re Jellinger*. (Ex. G, Opinion dated December 26, 2002.) In *Jellinger*, after being temporarily suspended for failing to comply with probation terms, respondent ultimately received a stayed disbarment, and a two-year suspension for conduct that included misappropriation of client funds, and failure to cooperate while on probation, with mitigation including untreated depression. (*Id.*)

Thus, to date, the Court has only ever imposed temporary suspension prior to a referee recommendation of disbarment, where there was an admission of misconduct and the likely discipline was disbarment or there was a stipulation or non-opposition to temporary suspension and the likely discipline was disbarment. It is with this background in mind that the Director considers how best a "fast track" temporary suspension might be crafted.

B. **Survey of Other Jurisdictions**.

Minnesota is one of only a couple jurisdictions that does not have a mechanism for seeking temporary suspension or other restrictions of an attorney's license prior to filing a petition for discipline. On this topic, most jurisdictions have adopted some variation of the America Bar Association's Model Rules for Lawyer Disciplinary Enforcement, which provide for immediate interim suspension for threat of harm (Rule 20) and a separate rule for interim suspension where a lawyer has been found guilty of a serious crime (Rule 19). A chart describing generally the temporary suspension rules in all states and the District of Columbia (and the ABA model rules) is attached as Exhibit A.

Model Rule 20 provides for an expedited process where there is sufficient evidence that a lawyer has committed a rule violation and poses a substantial

threat of serious harm to the public. The rule does not define sufficient evidence or substantial threat to the public and can be made at any time. The rule contemplates a motion upon reasonable notice to the lawyer, with supporting evidence and quick entry of immediate suspension. A motion for dissolution may be made by the lawyer, which motion shall be heard and determined as expeditiously as the ends of justice require. The comment to Rule 20 explains the rationale:

> Certain misconduct poses such an immediate threat to the public and the administration of justice that the lawyer should be suspended from the practice of law immediately pending a final determination of the ultimate discipline to be imposed. Interim suspension is also appropriate when the lawyer's continuing conduct is causing or is likely to cause serious injury to a client or the public, as for example, where a lawyer abandons the practice of law or is engaged in an ongoing conversion of trust funds.

Rule 20, Model Rules of Lawyer Disciplinary Enforcement.

Most states have adopted some form of the model rule. Variations include whether the triggering event is "substantial threat of serious harm to the public" or some variation on that language, usually drawn from the comment to the model rule. For example, some states add administration of justice to the language. *See e.g.*, Rule 61, Arizona Rules of the Supreme Court; Rule 16, Delaware Lawyers' Rules of Disciplinary Procedures. Some states add

"irreparable" to the language. *See* Connecticut Practice Book Section 2-42; Rule 774, Illinois Rules on Admission and Discipline of Attorneys; Rule 5.24, Rules Governing the Missouri Bar and the Judiciary. New Hampshire is the only state to define "substantial threat of serious harm" in the text of its rule:

> The term "substantial threat of serious harm" encompasses any non-serious crime, conduct, or course of conduct that substantially impairs the attorney's ability to continue to practice in conformity with the Rules of Professional Conduct and Rule 50, or creates a substantial risk of harm to the public if the attorney is not suspended on an interim basis.

N.H. R. S. Ct. Rule 37 (9-A) (b).

Separately, Rule 19 of the ABA Model Rules for Lawyer Disciplinary Enforcement provides for an expedited process upon a lawyer's conviction of a "serious crime." A "serious crime" is defined as:

> [A]ny felony or any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, or any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy or solicitation of another to commit a "serious crime."

Model Rule 19(C). Upon disciplinary counsel's determination that the conviction involves a "serious crime," discipline counsel shall file formal charges for discipline and seek interim suspension, which interim suspension the Court shall impose upon proof the lawyer has been found guilty of a serious crime regardless of the pendency of any appeal. Upon reversal of a finding of guilt or conviction, the interim suspension shall be vacated but disciplinary proceedings are not otherwise terminated. Typically, formal proceedings on discipline should not be conducted until all appeals from the conviction have been exhausted, unless the respondent lawyer requests that the hearing not be deferred.

The comment to Model Rule 19 makes clear the basis for such a rule:

> Interim suspension is necessary both to protect members of the public and to maintain public confidence in the legal profession. The interim suspension not only removes any danger to clients and the public which the respondent may pose, but also serves to protect the profession and the administration of justice from the specter created where an individual found guilty of a "serious crime" continues to serve as an officer of the court in good standing.

Most states adopt the definition of "serious crime" found in the model rule. Three states include as a triggering event a *charge* of a serious crime, not just conviction. *See* Rule 16, Delaware Lawyers' Rules of Disciplinary Procedures;

Rule 3-5.3, Rules Regulating the Florida Bar; Rule 413-17, South Carolina Rules for Lawyer for Lawyer Disciplinary Enforcement.

C. Director's Proposed Amendments to Rule 16, RLPR.

By Order dated July 9, 2025, the Court asked the LPRB to consider whether Rule 16, RLPR, "should be amended to allow for an alternative 'fast track' temporary suspension process in certain circumstances." The Director appreciates the work of the LPRB and its careful consideration of this request. However, the Director recommends that this Court take this opportunity to bring Rule 16, RLPR, more in line with the ABA Model Rules and the rules of many states, including considering temporary and interim suspensions in situations short of when the ultimate discipline will be disbarment. A proposed redline of recommended changes is attached as Exhibit. B.

First, the Director recommends that Rule 16(a), RLPR, be modified to apply both pre-Rule 12 petition and post-Rule 12 petition. The Director agrees that suspension before the Director has fully investigated and demonstrated misconduct should be disfavored and is unlikely in the overwhelming number of cases. However, license restrictions short of temporary suspension should be more available for the protection of the public and the profession. Because the

Court has the inherent authority to regulate the practice of law, including plenary authority over a lawyer's license, there should be a confidential method for the Director to move the Court to impose conditions that protect the lawyer's clients and the public's perception of lawyers in certain circumstances. The majority of jurisdictions have such a process, and the ABA model rules provide such a process.

Second, the Director recommends that in addition to conduct that poses a "substantial threat of serious harm," the Court expand that language to include harm to the public, clients and the administration of justice. To date, the Court has only found substantial threat of serious harm upon an undisputed showing of misconduct that leads to disbarment. If the Court wishes to change that high threshold to allow some action in less clear or definitive situations, the triggering event must be changed, or the Court must differently define "substantial threat of serious harm." The Director does not recommend limiting the triggering event to only the situation where a lawyer has been charged with a "severe crime," because that leaves unaddressed situations where lawyers are causing havoc through a pattern of failing to attend hearings or abandoning client representations (more common than lawyer criminal conduct), or

misappropriating client funds and continuing to take on new clients and obtaining new client funds, or has been charged with a serious crime such as solicitation of sex with a minor (a crime that does not lead to disbarment) while engaging in representations that involve minors, as examples.

The Director understands the discomfort that comes from a broader triggering event particularly where misconduct has not been proven, but as the comment to Model Rule 20 provides, the procedure is similar to a civil temporary restraining order. Courts routinely weigh the harm caused by the proposed restraint with the harm likely to occur by the continuation of the status quo to enter temporary orders, and the Director should have a confidential avenue to bring to the Court situations where restrictions on a lawyer's license may be warranted. Whether the Court will order such restrictions, including temporary suspension, would be left to the sound discretion of the Court upon its determination that sufficient evidence is present and sufficient harm likely that some action should be taken.

Third, the Director recommends, consistent with the LPRB, that Rule 16, RLPR, expressly provide for other restrictions on the lawyer's license less than temporary suspension. The Court has always had this authority, as it exercised

in *In re Oliver*, but this change makes the authority express, and as it relates to pre-petition matters, it acknowledges the more likely consequence of any motion.

Fourth, the Director recommends any motions be filed under seal unless there is a public discipline proceeding already in process. This is consistent with the limited circumstances where the Director may comment on private matters under Rule 20, RLPR, and should the Court deny the requested relief, maintains the confidentiality of the Director's investigation. Otherwise, the Director agrees suspensions or license limitations should be public.

Fifth, the Director recommends changing service from personal service currently required to mail service to the address on file with Lawyer Registration. This change is consistent with the model rule, which contemplates an *ex parte* entry of an order "following reasonable efforts to notify the lawyer." *See* Model Rule 20, comment.

Sixth, the Director recommends a new interim suspension category for criminal convictions for "serious crimes" in line with Model Rule 19. Most jurisdictions follow the model rule definition of a serious crime, which is any felony, or lessor crime with specific elements relevant to a lawyer's fitness to practice. The Director does not believe this definition is workable for Minnesota

given the Court's precedent where many felony convictions lead to less than disbarment and some, such as impaired driving, lead to only a short suspension. Thus, the Director proposes defining "serious crime" as one that likely leads to disbarment or a lengthy suspension based upon the Court's precedent. The idea is that lawyers convicted of such serious crimes should not be able to continue to practice while discipline proceeds absent extraordinary circumstances but also protects against a temporary suspension often being longer than any ultimate suspension. Such a rule may also have the benefit of prompt resolution of such matters since the only issue is appropriate discipline.

Seventh, similar to a "threat of harm" motion, this motion would initially be confidential unless the Director has filed a Rule 12 petition.

Eighth, the Director proposed a process for dissolution of the temporary or interim solution, similar to that set forth in the model rules and lastly, specified, that any suspension requires the lawyer to comply with the notice provisions in Rule 26.

The Director recognizes these changes are substantial and understands why the LPRB chose to narrow the task at hand to one particular circumstance.

However, the Director's proposed changes are in line with the model rules and how the majority of jurisdictions approach similar circumstances.

D. Director's Specific Concerns Regarding the LPRB Proposed Changes.

The LPRB commenced its review to address only the situation where the lawyer presents a "substantial threat of serious *physical* harm." (Report at 4., emphasis supplied.) The Director disagrees with this limited starting point. Where a lawyer presents a threat of serious physical harm to others, the Director believes the criminal or civil courts are well equipped to address the physical safety of the public to the extent anyone is able to do so through harassment restraining order on the civil side and confinement to jail or conditions of release, on the criminal side. Second, the Director notes that she has not sought temporary suspension under Rule 16(a), RLPR, during her tenure, except one time by agreement (*McNeilly*), not because she has not seen harm that should be addressed but because the rule applies to such a narrow set of circumstances.

In its review of Minnesota's discipline system, the ABA recommended the Court review Rule 16 to streamline its temporary suspension process. (ABA Report, Recommendation 20 at 75.) Specifically, the ABA recommended the Court eliminate the requirement that a petition for discipline be filed. The ABA further recommended the Court revise its rule to generally conform with ABA Model Rules for Lawyer Disciplinary Enforcement R. 20, which the Director has done in her proposal. (ABA Report at 76.) In its Order dated August 23, 2023, the Court rejected Recommendation 20 regarding Rule 16 because the record before the Court at that time did not present compelling reasons to amend Rule 16, RLPR. (August 23, 2023, Order at 33.) By its July 2025 request to the LPRB, however, the Court suggests that a "fast track," pre-petition process might be beneficial. The Director agrees and encourages the Court to take up at this time the recommendations made by the ABA, as proposed by the Director.

Additionally, the LPRB assumed that pre-petition suspension proceedings should be rare. (LPRB Report at 5.) The Director concurs but believes that, while pre-petition suspension should be rare or even nonexistent, situations that warrant pre-petition license restrictions should be limited but not so rare as to be a unicorn. The Court will ultimately determine, as part of its plenary authority

over an attorney's license, whether to and to what extent a temporary suspension should be granted, or licensing restrictions be imposed. The Director should have a mechanism to seek such relief on a confidential basis.

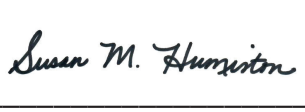
Finally, the Director sees no reason that any temporary suspension or restriction process should be repeated after it is ordered, where there is a mechanism available to the impacted lawyer to make changes upon changed circumstances, just because the Director has filed a petition for disciplinary action. Such a process is inefficient for both the Court and Director.

CONCLUSION

The Director recommends the Court create a mechanism for the Director to confidentially seek temporary suspension or licensing restrictions at any time where there is a substantial threat of harm to clients, the public, or the administration of justice. Separately, but relatedly, the Director recommends that an interim suspension process be created to address lawyers convicted of serious crimes that warrant disbarment or suspension of more than one year. A proposed redline to Rule 16, RLPR, is attached to provide information as to the specific recommendations of the Director. The Director recommends further

consideration with direction from the Court before any changes to Rule 16, RLPR, are made.

Respectfully submitted,



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Survey of Temporary or Interim Suspension Rules

Jurisdiction	Pre-Charges temp suspension (Y or N)	When?	Process	Rule
Alabama	Y	Conviction of serious crime (defined); Conduct causing or likely to cause immediate and serious injury to a client or the public	Petition by discipline counsel w off; Process for prompt hearing (for other than criminal conviction); Process for lawyer to dissolve	Rule 20, Alabama Rules of Discipline Procedures; Rule 8 (serious crime defined)
Alaska	Y	Conviction of serious crime (defined); Substantial threat of irreparable harm to client or public or conduct causing great harm by continuing course of conduct	Petition by discipline counsel w aff; 7 day response; 7 day opposition to objection; Court determines; Separate process for conviction of crim related to alcohol or drug use.	Rule 26, Rules of the Bar Association; Rule 26(b) (serious crime defined)
Arizona	Y	Conviction of misdemeanor involving serious crime or felony; engage in conduct that has caused or is likely to cause immediate and substantial harm to clients, the public or the administration of justice	Automatic on conviction felony; petition process for misdemeanor or other; handled by presiding discipline judge (may involve hrg); option for SCT review.	Rule 61, Arizona Rules of the Supreme Court
California	Y	Conviction of crime involving moral turpitude; lead to summary disbarment; involuntary enrollment upon various showings including causing substantial harm to clients or public and likely to prevail on charges that will warrant disbarment; sentenced to 90 days or more on a conviction for period of incarceration.	Depends on nature of involuntary inactive enrollment	Rule 5.342, Rules of Procedures of the State Bar of California; Section 6102 Cal. Business & Professional Code; Sec. 6007 (involuntary inactive enrollment)
Colorado	Y	Causing or has caused substantial public or private harm and any of the following: (1) been convicted of a serious crime; (2) knowingly converted property or funds; (3) abandoned a client; or (4) engaged in conduct that poses a substantial threat to the administration of justice	Petition to presiding discipline judge; order to show cause; hearing if ordered; recommendation to SCT; petition must be filed expeditiously and proceedings subject to acceleration; reasonable cause showing	Rule 242.22, Rules Governing Lawyer Disciplinary Proceedings (Rule addresses confidentiality)
Connecticut	Y	Substantial threat of irreparable harm to his or her clients or prospective clients	Petition filed; Hrg; good cause shown; may suspend or make such other interim action as deemed appropriate	Practice Book Sec. 2-42.

Delaware	Y	Charged or convicted of felony; charged or convicted of other criminal conduct which demonstrates threat of substantial harm to public or the orderly administration of justice; or has engaged in misconduct that demonstrates significant threat of substantial harm to the public or to the orderly administration of justice.	Petition filed; Hrg before referee; C&C burden; confidential proceedings; order public if suspends or restricts practice; otherwise confidential; reinstatement if charges dismissed or conviction vacated.	Rule 16, Deleware Lawyers' Rules of Disciplinary Procedures
D.C.	Y	Substantial threat of serious harm to the public or failed to respond to an order of the Board in a matter where investigation involves allegations of serious misconduct. Serious misconduct defined.	Petition filed; special master appointed; report to court; dissolved if respondent responds and suspension is for nonresponse; Panel of Board can recommend dissolution of substantial threat suspensions.	Section 3(c), Rules Governing the District of Columbia Bar
Florida	Y	Suspension (great public harm); automatic suspension upon felony conviction unless modified by court; new rule regarding interim suspension for felony charges that reflect adversely on the lawyer's fitness to practice law (not yet defined).	Emergency Suspension for Great Public Harm; C&C evidence of harm; Interim suspension process (new) for any felony charge "that reflects adversely on the lawyer's fitness to pratice law"; process for dissolution on great harm only; briefing process for interim suspension on criminal charges.	Rule 3-5.1, Rules Regulating the Florida Bar (Emergency Suspension and Interim Probation); Rule 3-4.4 (Criminal Misconduct); Rule 3-5.3 (Interim suspension)
Georgia	Y	Substantial threat of harm to his clients or the public	Petition filed with approval of Chair of Board; Special Master appointed; Hearing and Rec to Court with expedited decision timeline	Rule 4-108, Georgia State Bar Rules and Regulations
Hawaii	Y	Substantial threat of serious harm to the public or failed to respond to an order of the Board in a matter where investigation involves allegations of serious misconduct. Serious misconduct defined.	Petition to court; rebuttal opportunity; SCT decides; lawyer may move to dissolve or modify, which motion shall be heard on an expedited basis.	Rule 2.23, Hawai'i Discipline Rules (administrative suspension unless otherwise ordered)
Idaho	Y	Conviction of Serious Crime; Substantial threat of serious harm to public and alleged conduct	Petition to SCT; briefing and potential for referral for hearing; procedures for dissolution.	Rule 510, Idaho Rules for Review of Professional Conduct

Illinois	Y	Lawyer charged with crime of moral turpitude or that reflects adversely upon fitness to practice or complaint approved by Inquiry Board and misconduct involves fraud, moral turpitude or threatens irreparable injury to the public, clients or orderly administration of justice.	Petition; Order to Show Cause; Hearing not contemplated.	Rule 774, Illinois Rules on Admission and Discipline of Attorneys
Indiana	Y	Noncooperation; Conviction of any felony; Emergency Interim Suspension for substantial threat of harm to the public, clients, potential clients or the administration of justice, and if true, would violate an ethics rule.	Vote of 2/3 of Discipline Commission to Petition; 15 days to answer; enter order or order hearing. Dissolution motion (good cause); 60 days to file petition for discipline	Rule 10.1(c), Indiana Rules for Admission to the Bar and the Discipline of Attorneys (noncooperation); Rule 11.1(b) (Emergency)
Iowa	Y	Conviction of crime that would be grounds for license suspension or revocation or substantial threat of serious harm to the public.	Petition to SCT, convincing preponderance of the evidence of substantial threat; may be reinstated if crime reversed or set aside	Rule 34.14 (substantial threat), 34.15 (criminal conviction), Iowa General Disciplinary Rules of Grievance Commission and Attorney Discipline Board
Kansas	Y	Failing to answer formal complaint; substantial threat of harm to clients, the public or the administration of justice	Motion to SCT showing good cause; response within 14 days, decided by full court or single justice	Rule 213, Kansas Rules Relating to Discipline of Attorneys
Kentucky	Y	Felony conviction; probable cause misappropriated funds; probable cause attorney's conduct poses a substantial threat of harm to his clients or the public; or felony conviction or Class A misdemeanor and conduct relating to convicting grave issue of whether fit to continue to practice.	Petition to court; 20-day response period; oral argument. Motions for dissolution or amendment referred to Special Commissioner for report and recommendation.	Rule 3.165 Kentucky Rules of the Supreme Court for the Practice of Law
Louisiana	Y	Conviction of Serious Crime; Substantial threat of serious harm to the public.	Notice of conviction; response from respondent; Upon substantial threat application, show cause order; potential hearing before panel	Rule 19 (C), Louisiana Rules for Lawyer Disciplinary Enforcement (serious crime conviction); Rule 19.2 (threat of harm)

Maine	Y	Threat of imminent injury to a client, to the public or to the administration of justice; conviction of serious crime warranting immediate interim suspension.	Motion to SCT; interim suspension or such order as sees fit; motion for dissolution to be heard on expedited basis; no suspension upon showing of extraordinary circumstances by lawyer.	Rule 23, Maine Bar Rules (criminal conviction); Rule 24 (imminent injury suspension)
Maryland	N	Expedited process for conviction of serious crime (similar to MN)	Petition with request for immediate suspension pending sentencing; order to show cause; Hrg if disposition would be other than disbarment.	Rule 19-738, Maryland Rules for Discipline, Inactive Status, Resignation.
Massachusetts	Y	Conviction of serious crime; threat of harm to clients or lawyer's whereabouts are unknown	Petition; opportunity to be heard; motion for dissolution interim suspension terminated in the interests of justice	Section 12, Massachusetts Rules of Bar Discipline and Clients' Security Protection
Michigan	N	Expedited process for conviction of serious crime (similar to MN); Commission authority to interim suspend upon failure to follow commission orders	Automatic suspension upon felony conviction unless set aside by Commission; simultaneous discipline determination	Rule 9.120, Michigan Court Rules, Attorney Grievance Commission; Rule 9.127 (interim suspension)
Minnesota	N	Post petition motion; substantial threat of serious harm to the public; presumptive on referee recommendation for disbarment	Petition; personal service; 20-day answer; hearing required.	Rule 16, Minnesota Rules on Lawyers Professional Responsibility
Mississippi	N	Expedited process for criminal conviction felony	Petition with copy of conviction; presumptive disbarment	Rule 6, Mississippi State Bar Rules of Discipline
Missouri	Y	Substantial threat of irreparable harm (probable cause); abbreviated discipline process for criminal convictions (similar to reciprocal); interim suspension available without further notice	Petition, response; no hearing; motion for dissolution with 10-day response time and ability of lawyer to request expedited discipline determination	Rule 5.24, Rules Governing the Missouri Bar and the Judiciary

Montana	Y	Conviction of crime that "affects the lawyer's ability to practice law."	Lawyer required to notify court; court determines if interim suspension warranted; discipline determination deferred until all appeals exhausted or lawyer requests matter not be deferred	Rule 23, Montana Rules for Lawyer Disciplinary Enforcement
Nebraska	Y	Serious damage to the public or bar membership unless suspended or conviction of a serious crime	Petition showing temporary suspension "necessary and proper"; proceedings not specified but consistent with "fundamental fairness and due process"	Section 3-312, Nebraska Discipline Procedures for Lawyers
Nevada	Y	Evidence of misappropriation can limit access to trust account; upon recommendation of disbarment; and upon showing of substantial threat of serious harm to the public; conviction of serious crime (automatic suspension)	Petition to court; affidavit upon personal knowledge; motion to dissolve is heard by hearing panel with recommendation to court	Rule 102, Nevada Rules on the Government of the Legal Profession
New Hampshire	Y	Substantial threat of serious harm (defined); The term “substantial threat of serious harm” encompasses any non-serious crime, conduct, or course of conduct that substantially impairs the attorney’s ability to continue to practice in conformity with the Rules of Professional Conduct and Rule 50, or creates a substantial risk of harm to the public if the attorney is not suspended on an interim basis. Also summary suspension upon noncooperation or "serious misconduct"	Petition; personal service not required; 20-day response; if contested hearing before referee or panel as ordered by court; expedited hearing (within 30 days); recommendation to court	Rule 37, New Hampshire Attorney Discipline System Rules
New Jersey	Y	Substantial threat of serious harm	Petition, response, court order; lawyer may move for reinstatement which motion shall be considered expeditiously	Rule 1:20, New Jersey Rules for Discipline of Members
New Mexico	Y	Conviction of felony or serious crime; substantial probability of harm, loss, or damage to the public and attorney is under investigation, formal charges are pending or criminal charges filed; administrative suspension for failure to cooperate	Petition, order to show cause; motion for administrative suspension	Rule 17-207, New Mexico Rules Governing Discipline

New York	Y	Conduct immediately threatening the public interest	Petition that demonstrates five specific circumstances (1) default; (2) admission under oath of misconduct; (3) noncooperation; (4) willful failure or refusal to pay money owed, where debt is clear; or (5) other uncontroverted evidence of professional misconduct.	Section 1240.9, New York Rules for Attorney Discipline Matters
North Carolina	Y	Necessity warrants restraint or enjoinment of conduct	Bar must follow regular injunction rules	Section 84-28(f), North Carolina Rules and Regulations of the State Bar
North Dakota	Y	Substantial threat of irreparable harm to the public	Motion; Sufficient Evidence	Rule 3.4, North Dakota Rules for Lawyer Discipline
Ohio	Y	Substantial threat of serious harm to the public	Petition for interim remedial suspension; opposing memo and rebuttal evidence; motion for dissolution or modification process; 180 days to file formal petition for discipline	Section 19, Ohio Discipline Procedures
Oklahoma	Y	Immediate threat of substantial and irreparable public harm	Petition, 10-day order to show cause; potential for hearing; lawyer can request accelerated disposition of discipline matters which shall be completed "without appreciable delay."	Section 6.2A, Oklahoma Rules Governing Disciplinary Proceedings
Oregon	Y	Probable cause for misconduct and reasonable belief client or others will suffer immediate and irreparable harm by continued practice	Petition to Discipline Board, 14-day answer; if contested, then hearing within 30-60 days. Accelerated proceedings following interim suspension; lawyer can seek SCT review.	Rule 3.1, State Bar Rules of Procedures

Pennsylvania	Y	Immediate and substantial public or private harm because of misappropriation, other egregious conduct in manifest violation of rules; noncooperation with Board; expedited process for criminal conviction	Petition with concurrence of a reviewing Board member; 10-day show cause order; dissolution or amendment process; hearing before a member of the Board; process for accelerated disposition upon request.	Section 91.151, Pennsylvania Disciplinary Board Rules
Rhode Island	Y	Conviction of felony	Petition, 10-day response, single justice to consider	Rule 24, Discipline Procedures for Attorneys
South Carolina	Y	Charged with or convicted of serious crime defined as any felony; any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; or, any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, willful failure to file income tax returns, or an attempt, conspiracy or solicitation of another to commit a serious crime. Also "substantial threat to the public or to the administration of justice"	Disciplinary counsel "may" seek interim suspension upon charging, "shall" seek interim suspension upon conviction	Rule 413--17, South Carolina Rules for Lawyer Disciplinary Enforcement; Rule 2(bb), Serious Crime defined.
South Dakota	Y	Attorney poses a risk or danger to clients, client's property, or the public, or where substantial likelihood of discipline and discipline would be suspension or disbarment.	Petition by certified mail; 10-day response; oral argument or referee hearing on an expedited basis.	Section 16-19-35.1, South Dakota Laws for the Discipline of Attorneys
Tennessee	Y	Misappropriation of funds, noncooperation, noncooperation with Lawyer Assistance Program, or lawyer poses a threat of substantial public harm to the public	Petition supported by affidavits upon personal knowledge; notice to lawyer. Good cause request for dissolution, set for hearing of a panel of the Board, report to SCT	Rule 12.3, Tennessee Rules of Discipline Enforcement

Texas	Y	Substantial threat of irreparable harm to clients or prospective clients	Petition with approval of Commission; 10-day hearing in district court; burden--preponderance of the evidence of serious crime, three or more rule violations, other acts "will probably cause harm"	Rule 2.14, Texas Rules of Disciplinary Procedures; Part 14.01 Interim suspension; Part 14.02 Burden of Proof and Evidentiary Standard
Utah	Y	Threat of serious harm to the public	Petition in district court; hearing; discipline counsel can skip screening panel process to file a discipline action; motion to dissolve process	Rule 11-563, Utah SCT Rules of Professional Practice
Vermont	Y	Conviction of Serious Crime; substantial threat of serious harm to the public	Petition by bar counsel; opportunity to respond; automatic on conviction and immediate petition for discipline to be filed; motion for dissolution.	Rule 21(D), Vermont Administrative Order No. 9 Regarding the Establishment and Operation of the Professional Responsibility Program; Rule 22 (threat of harm)
Virginia	Y	Conviction of Specified Crimes; May request expedited consideration after petition filed if risk of harm present	Immediate suspension upon notice and opportunity to be heard for why not further suspension; hearing to occur within 30 days	Paragraph 13-22, Rules of the Virginia Supreme Court on the Procedures for Disciplining, Suspending and Disbarring Attorneys
Washington	Y	Conviction of Felony; substantial threat of serious harm to the public and a review committee recommends interim suspension; recommendation for disbarment; failure to cooperate.	Discipline petition to be filed with request for interim suspension (automatic, Court must enter); Petition to terminate allowed	Rule 7.1, Washington Rules for Enforcement of Lawyer Conduct (criminal conviction); Rule 7.2 (other reasons)
West Virginia	Y	Substantial threat of irreparable harm to the public	Petition filed, SCT reviews for good cause, provides notice to lawyer for expedited hearing	Rule 3.27, West Virginia Rules of Lawyer Disciplinary Procedures
Wisconsin	Y	Threat to the interests of the public and the administration of justice	Petition; order to show cause. 4 months to file discipline complaint	Rule 22.21, Wisconsin Procedures for the Lawyer Regulation System

Wyoming	Y	Immediate and substantial public or private harm and the attorney has converted funds, abandoned clients, or has engaged in conduct that poses an immediate threat to the effective administration of justice; convicted of a serious crime; or noncooperation.	Petition supported by an affidavit showing sufficient facts to give rise to reasonable cause that the alleged conduct occurred; 15-day response period; clear and convincing evidence of imminent threat; petition for dissolution process but burden on petitioner of no imminent threat	Rule 17, Wyoming Rules of Disciplinary Procedures
ABA	Y	Conviction of Serious Crime; Substantial threat of serious harm to the public	Petition filed; personal service not required; opportunity to respond; court enters order; procedure for dissolution motion	Rule 19, ABA Model Rules for Lawyer Disciplinary Enforcement (criminal conviction); Rule 20 (threat)

End of worksheet

Rule 16, Rules on Lawyers Professional Responsibility--Temporary Suspension Pending Disciplinary Proceedings.

(a) Motion ~~Petition~~ for Temporary Suspension. In any case where ~~the Director files or has filed a petition under Rule 12, if~~ it appears that a continuation of the lawyer's unrestricted authority to practice law pending final determination of the disciplinary proceeding poses a substantial threat of serious harm to clients, the public or the administration of justice, the Director may file with this Court a motion ~~petition~~ for suspension of the lawyer pending final determination of any~~the~~ disciplinary proceeding, or such other restriction on the lawyer's right to practice as may be warranted, with proof of service. The motion~~petition~~ shall set forth facts as may constitute grounds for the suspension or requested restriction and~~-~~ shall be supported by affidavits based upon personal knowledge and other evidence.~~may be supported by a transcript of evidence taken by a Panel, court records, documents or affidavits.~~ Unless the Director has filed a petition under Rule 12, this motion shall be confidential and shall be filed under seal.

(b) Service. The Director shall serve~~cause~~ the motion ~~petition to be served~~ upon the lawyer~~-~~ by U.S. Mail at the address on file with Lawyer Registration~~in the same manner as a petition for disciplinary action~~.

(c) Response~~Answer~~. Within 20 days after service of the motion ~~petition~~ or such shorter time as this Court may order, the lawyer shall file in this Court a response to the motion ~~an answer to the petition~~ for temporary suspension or license restriction, with proof of service. If the lawyer fails to do so within that time or any extension of time this Court may grant, the motion's ~~petition's~~ allegations shall be deemed uncontested ~~admitted~~ and this Court may enter an order suspending the lawyer pending final determination of disciplinary proceedings or imposing such other terms and conditions on the lawyer's license to practice as may be warranted. ~~The answer may be supported by a transcript of any evidence taken by the Panel, court records, documents, or affidavits.~~

(d) ~~Hearing;~~ Disposition. If this Court ~~after hearing~~ finds~~-~~ that a ~~a~~ continuation of the lawyer's authority to practice law poses a substantial threat of serious harm to clients, the public, or the administration of justice~~the public~~, it may enter an order suspending the lawyer pending final determination of disciplinary proceedings, or imposing such other terms and conditions on the lawyer's license to practice as may be warranted. If the Court finds an additional factual record is necessary to consider the motion, it may refer the matter to a referee for a hearing and a recommendation on the motion, which hearing and recommendation shall occur as expeditiously as possible under the circumstances. If the Court temporarily suspends

or orders any restrictions on the lawyer's license pursuant to this paragraph (d), the Court's order and the court record leading to the order shall be public. If the motion is denied, the matter shall remain confidential. If the lawyer is temporarily suspended under this paragraph (d), the lawyer may request accelerated disposition of any disciplinary proceeding by providing notice to the Director and Court of that request, and thereafter the matter shall proceed without appreciable delay.

(e) Interim Suspension, Disbarment Recommendation. Upon a referee disbarment recommendation, the lawyer's authority to practice law shall be suspended pending final determination of the disciplinary proceeding, unless the referee directs otherwise or the Court orders otherwise.

(f) **Interim Suspension, Serious Crime Conviction**. Upon notice that a lawyer has been convicted of a serious crime, the Director shall determine whether the crime constitutes a "serious crime." A "serious crime" is any felony where the Director determines the likely discipline for the conviction would be disbarment or a suspension of a year or more based upon the Court's on-point or analogous case law. Upon such a determination, the Director shall move for interim suspension by filing and serving by U.S. mail a motion for interim suspension. The motion shall contain evidence of the conviction and analysis supporting a "serious crime" determination. Within 20 days or such other time as the Court may specify, the lawyer may respond by filing and serving by U.S. Mail evidence that establishes the interim suspension should not be ordered, such as the crime does not constitute a "serious crime" or that no conviction has been entered. Unless the Director has filed a petition under Rule 12, this motion shall be confidential and shall be filed under seal.

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The lawyer's authority to practice law shall be suspended pending final determination of the discipline proceeding relating to the lawyer's conviction of a serious crime, unless the Court finds extraordinary circumstances exist that interim suspension is not warranted. A lawyer may be placed on interim suspension regardless of the pendency of any appeals. Discipline proceedings will not ordinarily be conducted until all appeals from the conviction have been exhausted, unless the lawyer requests that the discipline proceedings not be deferred. If the Court suspends the lawyer or orders any restrictions on the lawyer's license pursuant to this rule, the Court's order and the court record leading to the order shall be public. If the motion is denied, the matter shall remain confidential.

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(g) **Dissolution Motion**. A lawyer who has been temporarily suspended or has restrictions imposed by the Court pursuant to paragraph (d) may move the Court

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for relief upon a showing of substantially changed circumstances. The lawyer must serve the Director with the motion for relief by U.S. Mail and the Director's response shall be due within 20 days after service or such shorter time as this Court may order. If a lawyer suspended on an interim basis pursuant to paragraph (f) demonstrates by motion filed and served upon the Director that the conviction has been reversed or vacated, the order for interim suspension shall be promptly vacated and the lawyer placed on active status. The vacation of the interim suspension will not automatically terminate any discipline proceeding then pending against the lawyer, the disposition of which shall proceed in the ordinary course.

(h) **Notice**. Any lawyer suspended pursuant to any part of this rule shall comply with Rule 26.

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STATE OF MINNESOTA

IN SUPREME COURT

A15-1285

In re Petition for Disciplinary Action against
Timothy J. Oliver, a Minnesota Attorney,
Registration No. 0121393.

ORDER

The Director of the Office of Lawyers Professional Responsibility has filed a petition for disciplinary action alleging that respondent Timothy J. Oliver pleaded guilty to wire fraud, in violation of 18 U.S.C. § 1343 (2012). The Director has also filed a petition, pursuant to Rule 16, Rules on Lawyers Professional Responsibility (RLPR), seeking an order temporarily suspending respondent from the practice of law pending the final determination of the disciplinary proceedings. Respondent opposes the petition for temporary suspension.

In his answer to the petition for disciplinary action, respondent admitted that he pleaded guilty to wire fraud and is awaiting acceptance of his guilty plea and sentencing in federal court. At his guilty-plea hearing, respondent admitted that his fraudulent conduct involved $500,000 that he obtained in 2009 on behalf of a company he controlled in order to secure a letter of credit. Within weeks of receipt, respondent had personally spent the funds and then made misrepresentations intended to lull the provider of the funds into believing that the funds had been used to secure a letter of credit when, in fact, respondent knew that there was no letter of credit.

Given the specific facts and circumstances of this case, restrictions must be placed on respondent's authority to practice law pending final resolution of the disciplinary proceedings in order to adequately protect the public.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. The petition for temporary suspension is granted to the extent that the restrictions in paragraphs (2) – (5) below on respondent's authority to practice law are imposed pending final resolution of the disciplinary proceedings. The petition to temporarily suspend respondent is otherwise denied.

2. Respondent is prohibited from handling client funds, effective as of the date of the filing of this order.

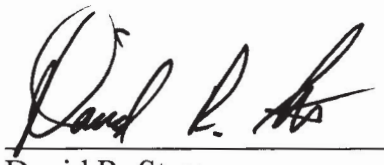
3. Within 10 days of the date of the filing of this order, respondent shall provide written notice to his existing clients of his criminal proceedings and of the disciplinary proceedings pending against him. Such notice shall state that respondent has pleaded guilty to wire fraud, in violation of 18 U.S.C. § 1343; that respondent may not handle client funds; that the Director of the Office of Lawyers Professional Responsibility has filed a petition for disciplinary action against respondent; and that the Director seeks respondent's suspension or disbarment from the practice of law. Respondent may state that he is cooperating with the Director's investigation but that he is contesting the discipline proposed in the petition for disciplinary action. Respondent shall also provide the same notice to clients who retain respondent on or after the date of this order.

4. Within 14 days of the date of the filing of this order, respondent shall file with the Director an affidavit showing that respondent has fully complied with the court's order, including attaching copies of the notice he sent to clients. Respondent shall also explain the actions taken to ensure that he does not handle client funds.

5. Pending final resolution of the disciplinary proceedings against him, respondent shall be supervised by a licensed Minnesota attorney, appointed by the Director. Within 5 days of the date of this order, respondent shall provide to the Director the name of an attorney who has agreed to be nominated as respondent's supervisor. If the attorney who has agreed to be nominated as respondent's supervisor is not acceptable to the Director, the Director shall appoint a supervisor. Respondent shall cooperate fully with the supervisor in his or her efforts to monitor compliance with this probation. Respondent shall contact the supervisor and schedule a minimum of one in-person meeting per calendar quarter. Respondent shall submit to the supervisor an inventory of all active client files by the first day of each month during the probation. With respect to each active file, the inventory shall disclose the client name, type of representation, date opened, most recent activity, next anticipated action, and anticipated closing date. Respondent's supervisor shall file written reports with the Director at least quarterly, or at such more frequent intervals as may reasonably be requested by the Director.

Dated: November 12, 2015

BY THE COURT:



David R. Stras
Associate Justice

STRAS, J., who joins in the court's decision to place restrictions on respondent's authority to practice law, would have granted the petition in full and temporarily suspended respondent pending final resolution of the disciplinary proceedings.

LILLEHAUG, J., took no part in the consideration or decision of this case.

View Petition

View Referee Findings

View Stipulation

FILED

March 1, 2016

OFFICE OF APPELLATE COURTS

STATE OF MINNESOTA

IN SUPREME COURT

A15-1285

In re Petition for Disciplinary Action against
Timothy J. Oliver, a Minnesota Attorney,
Registration No. 0121393.

ORDER

The Director of the Office of Lawyers Professional Responsibility filed a petition for disciplinary action alleging that respondent Timothy J. Oliver committed professional misconduct warranting public discipline. We referred the matter to a referee, who issued findings of fact, conclusions of law, and a recommendation for discipline. The referee found that respondent violated Minn. R. Prof. Conduct 8.4(b) and 8.4(c) by defrauding a Mexican company and later pleaded guilty to one count of federal wire fraud, 18 U.S.C. 1343 (2012). The referee recommended that respondent be disbarred.

The respondent and the Director have entered into a stipulation for discipline, in which they stipulate that the referee's findings and conclusions are conclusive and waive their rights under Rule 14, Rules on Lawyers Professional Responsibility (RLPR), to briefing and oral argument before this court. The parties jointly recommend that the appropriate discipline is disbarment.

This court has independently reviewed the file and approves the jointly recommended disposition.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

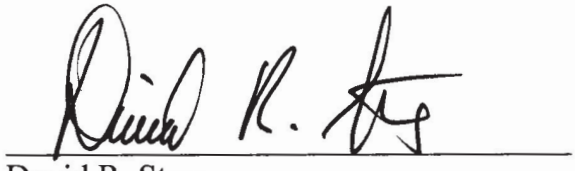
1. Respondent Timothy J. Oliver is disbarred, effective as of the date of this order;

2. Respondent shall comply with Rule 26, RLPR (requiring notice of disbarment to clients, opposing counsel, and tribunals); and

3. Respondent shall pay $900 in costs pursuant to Rule 24, RLPR.

Dated: March 1, 2016

BY THE COURT:



David R. Stras
Associate Justice

LILLEHAUG, J., took no part in the consideration or decision of this case.

STATE OF MINNESOTA

IN SUPREME COURT

A22-0574

In re Petition for Disciplinary Action against
Kristi D. McNeilly, a Minnesota Attorney,
Registration No. 0341265.

O R D E R

The Director of the Office of Lawyers Professional Responsibility has filed a petition for disciplinary action alleging that respondent Kristi D. McNeilly has committed professional misconduct warranting public discipline, namely, being convicted of felony theft-by-swindle in Court File No. 27-CR-19-13419, in violation of Minn. R. Prof. Conduct 8.4(b) and (c). Respondent's appeal of her conviction is pending before the Minnesota Court of Appeals in Court File No. A22-0468. The disciplinary hearing on the petition is scheduled for September 26, 2022.

This matter is before the court on the parties' stipulation (1) to place this matter on hold pending the decision of the court of appeals in respondent's felony conviction appeal, and (2) for respondent's voluntary interim temporary suspension during that same time period.

This court has independently reviewed the file and approves the recommended stay and interim temporary suspension.

Based upon all the files, records, and proceedings herein,

Exhibit E

IT IS HEREBY ORDERED THAT:

1. Respondent's license to practice law is temporarily suspended pursuant to Rule 16, Rules on Lawyers Professional Responsibility (RLPR), effective on the date of this order. If the court of appeals affirms respondent's criminal conviction, respondent's license shall remain suspended until the disciplinary proceedings are concluded. If the court of appeals vacates the conviction and remands for a new trial, respondent's license shall be reinstated pending the outcome of the criminal case and subsequent disciplinary proceedings. Absent further agreement of the parties, the disciplinary proceedings will recommence upon the issuance of the court of appeals' decision or upon voluntary dismissal of the appeal;

2. Respondent shall comply with Rule 26, RLPR; and

3. Nothing in this order shall preclude the Director or respondent from seeking, upon written motion to this court and for good cause shown, to recommence the disciplinary proceedings and to lift the temporary suspension before a decision of the court of appeals is issued.

Dated: September 9, 2022

BY THE COURT:

Natalie E. Hudson

Natalie E. Hudson
Associate Justice

STATE OF MINNESOTA

IN SUPREME COURT

A15-0682

In re Petition for Disciplinary Action against
Pamela L. Green, a Minnesota Attorney,
Registration No. 0037369.

ORDER

The Director of the Office of Lawyers Professional Responsibility filed a petition for disciplinary action alleging that respondent Pamela L. Green committed professional misconduct warranting public discipline. The petition alleges that respondent misappropriated approximately $160,000 in client funds from a vulnerable client who was suffering from dementia and engaged in fraudulent billing practices related to the client funds she wrongfully paid herself, in violation of Minn. R. Prof. Conduct 8.4(c). The petition also alleges that respondent engaged in fraudulent conduct with respect to a life insurance policy of the same vulnerable client, including changing the ownership of the policy to herself without the client's consent, taking out a $226,000 loan against the life insurance policy, and misappropriating client funds to repay the loan and the life insurance policy premiums, in violation of Minn. R. Prof. Conduct 1.7(a)(2), 1.7(b)(4), 1.8(a), and 8.4(c).

The Director filed a petition for temporary suspension, alleging that the continuation of respondent's authority to practice law poses a substantial threat of serious

harm to the public. *See* Rule 16, Rules on Lawyers Professional Responsibility (RLPR). Respondent has entered into a stipulation with the Director in which they jointly recommend that respondent be temporarily suspended pending final determination of this disciplinary matter. Respondent waives her right to oral argument before this court on the question of her temporary suspension. The stipulation also indicates that respondent is currently the subject of a criminal investigation and that the misconduct alleged in the petition for disciplinary action is substantially the same conduct that is the subject of the pending criminal investigation. The parties further recommend that this disciplinary matter be stayed pending a resolution of respondent's criminal proceedings.

This court has independently reviewed the file and approves the jointly recommended disposition.

Based upon all the files, records, and proceedings therein,

IT IS HEREBY ORDERED that:

1. Respondent Pamela L. Green is temporarily suspended from the practice of law as of the date of the filing of this order pending final resolution of the disciplinary proceedings in this matter;

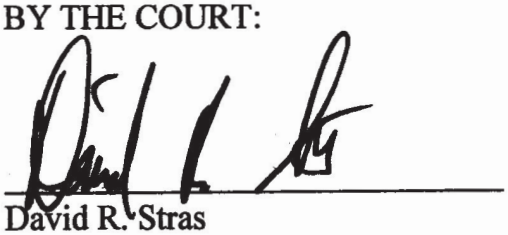
2. The disciplinary proceedings in this matter shall be stayed until: (1) respondent is charged with a criminal offense related to the allegations in the petition for disciplinary action and is then convicted of such an offense, a finding of not guilty is entered, or the charges are dismissed; (2) the statute of limitations for criminal conduct

related to the allegations in the petition for disciplinary action expires; or (3) further order of the court, whichever occurs first; and

3. Respondent shall comply with Rule 26, RLPR (requiring notice of suspension to clients, opposing counsel, and tribunals).

Dated: September 16, 2015

BY THE COURT:



David R. Stras
Associate Justice

View Petition

View Supp. Petition

View Temporary Suspension Order

STATE OF MINNESOTA

IN SUPREME COURT

C3-00-1681

Supreme Court

PerCuriam

In re Petition for Disciplinary Action against
Richard T. Jellinger, an Attorney at Law
of the State of Minnesota.

Filed: December 26, 2002
Office of Appellate Courts

S Y L L A B U S

1. An attorney who claimed mitigation based on untreated depression failed to prove that the depression was causally related to his misappropriations of client funds or to his misrepresentations to clients and to the Director.

2. Evidence that the attorney was making progress after two months of treatment for his depression was insufficient to prove that he had made a recovery sufficient to arrest the misconduct or that the misconduct was not apt to recur.

3. The appropriate disciplinary action on this record is disbarment, stayed subject to indefinite suspension, with the opportunity to apply for reinstatement not sooner than two years and supervised probation for two years after successfully petitioning for reinstatement.

Heard, considered and decided by the court en banc.

Exhibit G

O P I N I O N

PER CURIAM.

In this attorney-discipline proceeding, we review the referee's conclusion that although Respondent Richard T. Jellinger violated the Rules of Lawyers Professional Responsibility (RLPR), he proved by clear and convincing evidence that his depression provided mitigation. We hold that Jellinger's claim of mitigation was not fully supported by the evidence. We also review the referee's recommendation that we suspend Jellinger for one year, retroactive to August 17, 2001, and place him on conditional probation for three years. We conclude that a more severe discipline is appropriate.

Jellinger was admitted to practice law in Minnesota in 1982. He was in private practice from 1982 to about 1989 and from 1994 to 2001, ultimately operating as a sole practitioner specializing in family law, criminal defense, and estate planning and administration. He is currently suspended from the practice of law pending the outcome of this proceeding.

On May 3, 2001, we publicly reprimanded Jellinger and placed him on conditional probation for two years after an investigation by the Director of the Office of Lawyers Professional Responsibility (Director) revealed that he misused a trust account, neglected clients, and failed to cooperate with the investigation that led to the charges against him. *In re Jellinger*, 625 N.W.2d 143, 145 (Minn. 2001). In the ensuing months, Jellinger ignored requests from the Director's office for information concerning the conditions of his probation. As a result, the Director petitioned for further disciplinary action and we temporarily suspended Jellinger from the practice of law on August 17, 2001.

The current disciplinary proceeding arises from a supplementary petition filed by the Director against Jellinger. The supplementary petition charged Jellinger with misappropriating client funds, failing to act with reasonable diligence, failing to communicate with clients, making false statements, exceeding the scope of representation, failing to expedite litigation, continuing noncooperation with the Director's investigation and other assorted acts of misconduct. Jellinger's answer alleged as mitigation that he suffered from depression during his period of misconduct.

The matter was assigned to a referee, who held a disciplinary hearing on the supplementary petition. The evidence showed that Jellinger's operating account for his law practice had been closed by the bank in December 2000 for chronic overdrafts and that he thereafter used his client trust account to pay his operating and personal expenses. For example, the referee found that Jellinger, acting as the personal representative of an estate,

misappropriated $5,200 of estate funds to his client trust account and then disbursed them for his personal benefit; told the heirs and the Director that he had paid $5,280 in federal fiduciary taxes on behalf of the estate, when he had paid nothing; misappropriated $10,000 from the estate account to his client trust account and disbursed the funds to himself or to personal and business creditors; and misappropriated $4,050 from the estate account to his client trust account and disbursed the funds for personal and business expenses.

The referee also found that Jellinger failed to communicate with his clients in an adoption matter, neglected two marital dissolution matters, made false statements to clients and failed to cooperate with the Director's investigation.

Jellinger testified on his own behalf and he called his treating psychologist, Dr. Sheldon Pinsky, as a witness. Dr. Pinsky had seen Jellinger on five occasions over a period of approximately two months, beginning in January 2002. Dr. Pinsky testified that he conducted a series of diagnostic interviews and psychological tests on Jellinger, including the Beck's Inventory Test and the Minnesota Multiphasic Personality Inventory ("MMPI"). Dr. Pinsky opined that Jellinger had a major depressive disorder; that he had been depressed for over two years; and that his professional misconduct was in large part a result of his depressive disorder, because he did not have the skills or the awareness to appreciate what was happening around him. Dr. Pinsky further opined that if Jellinger adheres to a regimen of antidepressant medication and bi-weekly cognitive therapy, over a period of two to three years, his depression is not likely to reappear.

On cross-examination, Dr. Pinsky acknowledged that the results of the Beck's Inventory Test indicated that Jellinger had only moderate depression. The Director did not call an opposing expert witness.

The referee concluded that Jellinger failed to comply with the terms of his probation, failed to communicate with clients, made false statements to clients, neglected clients, failed to expedite litigation, failed to cooperate with the Director's investigations, misappropriated client funds, and made misrepresentations of fact to the Director. In regard to Jellinger's depression, the referee found that Dr. Pinsky's opinions must be accepted because they were uncontested and they proved mitigation by clear and convincing evidence. He found that Jellinger's "misconduct was largely the byproduct of inadequate treatment of his depression." While the Director sought disbarment, the referee found that disbarment would be "unduly harsh" and, based on the finding of mitigation, recommended a one-year suspension, retroactive to August 17, 2001, and conditional probation for three years. The Director sought review.

I.

The Director ordered the hearing transcript and notified this court within the ten-day time period allotted by Rule 14(e), RLPR. The referee's findings, therefore, are not conclusive and are subject to review. *In re Jensen*, 468 N.W.2d 541, 543 (Minn. 1991). In attorney-discipline cases, we will uphold the referee's findings of fact and conclusions of law if they are supported by the evidence. *In re Bergstrom*, 562 N.W.2d 674, 677 (Minn. 1997) (quoting *In re Copeland*, 505 N.W.2d 606, 608 (Minn. 1993)).

The Director agrees with the referee's findings and conclusions regarding Jellinger's misconduct but disputes the referee's conclusion that Jellinger proved his claim of mitigation by clear and convincing evidence. When an attorney raises a psychological disability as a mitigating factor in an attorney-discipline case, he or she has the burden to prove by clear and convincing evidence that: (1) the attorney has a severe psychological problem; (2) the psychological problem caused the misconduct; (3) the attorney is undergoing treatment and is making progress to recover from the psychological problem which caused or contributed to the misconduct; (4) recovery has arrested the misconduct; and (5) the misconduct is not apt to recur. *In re Weyhrich*, 339 N.W.2d 274, 279 (Minn. 1983).

We conclude that the evidence fell short on at least three *Weyhrich* factors: causation, recovery sufficient to arrest the misconduct and the misconduct is not apt to recur. As to the latter two, we determine that Jellinger's treatment by Dr. Pinsky, for only two months and during a period when Jellinger was suspended and not practicing, was too short to provide clear and convincing evidence that Jellinger's recovery was sufficient to arrest his misconduct or that the misconduct is not apt to recur. Dr. Pinsky himself prescribed a course of treatment that would take from two to three years to complete.

As to causation, we addressed the evidentiary standard for proof of depression as mitigation in *In re Pyles*, 421 N.W.2d 321 (Minn. 1988). The attorney in *Pyles* was charged with misrepresentation and misappropriation of client funds and claimed mitigation based on depression. *Id*. at 322-23. Two psychologists testified that the attorney suffered from a "psychological adjustment disorder" but agreed that this disorder did not prevent the attorney from knowing that his conduct was morally and ethically wrong. *Id*. at 326. We affirmed the referee's rejection of the mitigating evidence, concluding that the attorney's mental illness was "not a severe problem on a recognized psychological diagnostic scale and did not result in impairment of respondent's cognitive functions, his ability to direct his actions, or to know right from wrong." *Id*. at 325 (internal quotations omitted). Jellinger similarly failed to meet this standard by clear and convincing evidence.

While Dr. Pinsky's testimony may have been sufficient to prove some causal connection between Jellinger's depression and his passive misconduct (failing to act with reasonable diligence, expedite litigation, communicate with clients and cooperate with the Director's investigation), we are not persuaded that Dr. Pinsky's testimony proves that a causal relationship exists between Jellinger's depression and his affirmative acts of dishonesty (misappropriating funds from client accounts, making false statements to clients and making false statements to the Director's office). It is obvious that Jellinger possessed enough cognitive ability to understand that he needed to restore the funds that he repeatedly withdrew from the client trust account and the estate account. Jellinger's active manipulation of various accounts, in an attempt to avoid detection of his misappropriations, and his misrepresentations to the heirs and the Director's office, demonstrate that the depression had not impaired Jellinger's ability to direct his actions and that he continued to recognize that his actions were wrong.

On this record, we conclude that Jellinger failed to prove by clear and convincing evidence that he satisfied all of the *Weyhrich* factors.

II.

We now turn to the appropriate discipline in this case. We look not to punish, "but rather to guard the administration of justice and to protect the courts, the legal profession and the public." *In re Dovolis*, 572 N.W.2d 734, 736 (Minn. 1998) (citations and internal quotations omitted). We consider: (1) the nature of the misconduct, (2) the cumulative weight of the rule violations, (3) the harm to the public and (4) the harm to the legal profession. *In re Hoedeman*, 620 N.W.2d. 714, 717 (Minn. 2001). We give weight to the referee's recommendation, but the ultimate responsibility for determining the appropriate sanction rests with this court. *Pyles*, 421 N.W.2d at 325.

The Director argues that the circumstances of this case, coupled with the fact that this is Jellinger's second public disciplinary proceeding within two years, warrant disbarment. Indeed, ample precedent supports the sanction of disbarment in cases involving misappropriation of client funds. *See In re Samborski*, 644 N.W.2d 402, 407 (Minn. 2002) (disbarment is the appropriate discipline for an attorney who misappropriated client funds and who made false statements to conceal misappropriation and client neglect); *In re Graham*, 609 N.W.2d 894, 897 (Minn. 2000) (disbarment is appropriate where the attorney misappropriated client funds while on probation); *In re Weems*, 540 N.W.2d 305, 308 (Minn. 1995) (attorney's misappropriation of client funds,

neglect of client matters, violation of the terms of his second public probation, and failure to cooperate with the disciplinary investigation warrant disbarment). At the same time, we give some weight to the referee's recommendation that disbarment would be too harsh. We also recognize that Jellinger's depression was shown to have some causative relationship to his passive misconduct, that he is currently receiving professional treatment for his depression and that his former clients did not ultimately suffer any pecuniary loss as a result of his misconduct.

After considering all of these factors, we order:

1. Respondent Richard T. Jellinger is hereby disbarred pursuant to Rule 15, RLPR. Respondent's disbarment shall be stayed subject to the following conditions:

   a. Respondent's current suspension from the practice of law in the State of Minnesota shall continue indefinitely;

   b. Respondent may petition the Director for reinstatement not sooner than two years from the date of this order;

   c. Respondent is required to make periodic reports to the Director, in such form and with such frequency as the Director requires, regarding the progress of his treatment for depression, including regular reports from Dr. Pinsky;

   d. Respondent shall pay the Director the sum of $900 in costs and disbursements pursuant to Rule 24, RLPR; and

   e. Respondent's failure to comply with the conditions of this stay shall result in immediate disbarment.

2. If and when respondent petitions for reinstatement:

   a. There shall be a hearing on respondent's petition for reinstatement pursuant to Rule 18(d), RLPR;

   b. Respondent must show that he has successfully completed the Multistate Professional Responsibility Examination pursuant to Rule 18(e)(2), RLPR (respondent is exempt from the reinstatement requirement found in Rule 18(e)(1), RLPR); and

   c. Respondent must demonstrate, by clear and convincing evidence, that he has successfully completed treatment for his depression, that his mental condition will not adversely affect his ability to practice law and that his misconduct is not apt to recur.

3. Upon reinstatement, respondent shall be on supervised probation for a period of two years under the conditions set forth in this court's order of May 3, 2001.

4. Respondent shall fully cooperate with the Director's efforts to monitor his compliance with the provisions of this order.

So ordered.

MINNESOTA JUDICIAL BRANCH

FY2026/27 BUDGET UPDATE
Lawyers Prof. Responsibility Board (LPRB)
Office of Lawyers Prof. Responsibility (OLPR)

AT A GLANCE

- FY26 revenue is generally in line with projections excluding the planned CSB transfer with minor deficits in judgment and payment collections offset by registration receipts favorable to budget. Planned $500,000 transfer from CSB deferred.
- FY26 expenses are favorable to budget by approximately $700k, due to salary savings ($410,000), moving savings ($100k), and $190k in IT and professional service projects, the latter of will be transferred to FY27.
- The OLPR and Board are currently budgeted for 14 attorneys (including the Director), 7 paralegals, one investigator, one office administrator, nine staff, one law clerk, one part-time Board staff, and one part-time referee law clerk. One attorney and one paralegal position are open.
- Primary stakeholders are the Supreme Court, the LPRB, licensed Minnesota attorneys and the public who hire lawyers.

Background:

The LPRB and OLPR serve approximately 30,000 licensed lawyers (26,000 active) and the Minnesota public who consume legal services. In calendar 2025, the OLPR received 1571 complaints, a record. Complaints have been trending upward in the last several years. 17 lawyers were publicly disciplined, down from 27 the previous year. Complaints year to date in 2026 continue to outpace last year's record.

In addition to its disciplinary functions, the OLPR performs several administrative functions, such as staffing an ethics hotline utilized nearly 2,000 times annually, running a large probation department supervising approximately 100 lawyers annually, administering an overdraft trust account program, as well as handling attorney resignations, judgment and collections for sanctioned attorneys, administration of the Professional Firms Act, acting as trustee for disabled or deceased attorneys when others are not available to transition practices, and staff serves as frequent speakers at CLEs throughout the State.

FY2026/27 Revenue Update:

The Court has addressed the Board's historic deficit issues through reallocation of money from the CSB and increases in lawyer registration for purposes of this biennium. $750,000 was projected to be transferred but the FY26 transfer of $500,000 has been delayed due to FY26 expense savings. This is the first year in a long time that revenue from lawyer registration fees covered actual (though not budgeted) expenses.

FY2026/27 Expenditures Update:

Expenses are projected to be favorable to budget by $700k. This is mainly due to salary savings. We have not attempted to hire a budgeted attorney and paralegal due to focusing on backfilling and training for open positions. We have been using temp assistance instead, with part-time assistance from a BLE attorney, part-time auditor assistance and a full-time additional summer law clerk. Additionally, $190k in IT and professional services for planned projects have been delayed to FY27. This includes the professional firms online project, additional enhancements to LDMS for reporting and case management purposes and spending relating to diversion program creation.

Conclusion:
The OLPR move to MJC not only resulted in significant expense savings but has been very positive overall. The volume of new complaints and additional investigations has negatively impacted our ability to effectively execute on the additional allocated resources approved by the Court in this budget, but we have been extremely fortunate in our recent hires and are doing what we can with the available bandwidth.

FY2026/27 Budget Update
MN Lawyers Professional Responsibililty Board

Appropriation: J650LPR

	Account	FY22 Actual	FY23 Actual	FY24 Actual	FY25 Actual	FY26 Budget	FY26 Projected	FY27 Budget
		a	b	c	d	e	f	g
Balance In		1,168,882	681,413	214,002	378,626	643,419	643,419	1,028,335
Revenue:								
Law Prof Resp Attrny Judgmnts	512416	17,271	42,277	31,949	13,825	15,000	10,701	15,000
Other Agency Deposits	514213	26,531	26,375	25,055	24,919	-	3,237	-
Law Prof Resp Misc	553093	13,806	26,874	33,446	3,627	15,000	7,388	15,000
Attorney's Registration	634112	3,452,475	3,682,970	3,919,134	4,449,167	4,609,945	4,711,860	4,623,711
Law Prof Resp Bd Prof Corp	634113	62,375	59,750	55,300	54,275	55,000	56,200	55,000
Proposed Transfer from the Client Security Board				500,000	250,000	500,000		250,000
Subtotal Revenue		3,572,457	3,838,246	4,564,884	4,795,813	5,194,945	4,789,386	4,958,711
Expenditures:		4,059,927	4,305,657	4,400,260	4,531,019	5,153,950	4,404,470	5,066,153
Balance Out (Ending Cash Balance)		**681,413**	**214,002**	**378,626**	**643,419**	**684,414**	**1,028,335**	**920,892**
FY27 Adjustment								-
Final FY27 Reserve Balance								**920,892**

Notes:

FY2026/27 Budget Update
MN Lawyers Professional Responsibililty Board

Appropriation: J650LPR
Findept. ID: J653500B

	Account	FY22 Actual Expenditures	FY23 Actual Expenditures	FY24 Actual Expenditures	FY25 Actual Expenditures	FY26 Budget Expenditures	FY26 Projected Expenditures	FY27 Budget Expenditures
		a	b	c	d	e	f	g
Full Time	41000	3,060,270	3,374,349	3,473,051	3,699,936	4,134,993	3,718,977	4,266,080
PT, Seasonal, Labor Svc	41030	212,378	180,799	128,183	136,148	201,262	206,127	228,108
OT Pay	41050	4,033	1,755	1,589	783	3,000	626	3,000
Other Benefits	41070	99,521	38,481	75,493	5,946	42,418	44,128	15,000
PERSONNEL		**3,376,202**	**3,595,384**	**3,678,317**	**3,842,812**	**4,381,673**	**3,969,859**	**4,512,188**
Space Rental, Maint., Utility	41100	370,961	380,405	385,944	390,584	260,748	151,541	162,246
Printing, Advertising	41110	8,408	7,134	8,416	1,345	10,100	10,843	5,000
Prof/Tech Services Out Ven	41130	82,150	58,405	14,402	24,003	91,325	35,145	82,825
IT Prof/Tech Services	41145	49,417	54,999	101,230	69,845	205,500	76,797	100,500
Computer & System Svc	41150	49,102	86,733	66,011	67,907	50,580	59,935	52,971
Communications	41155	20,187	13,749	14,301	16,970	27,900	16,669	23,800
Travel, Subsistence In-St	41160	1,923	3,040	3,308	4,324	2,500	1,833	2,500
Travel, Subsistence Out-St	41170	1,602	15,475	9,646	15,018	20,000	12,844	20,000
Employee Dev't	41180	8,043	15,139	10,439	13,972	18,000	13,731	18,000
Agency Prov. Prof/Tech Svc	41190							
Claims Paid to Claimants	41200							
Supplies	41300	27,145	14,722	24,967	8,089	23,200	8,709	23,200
Equipment Rental	41400	2,166	2,166	6,006	2,206	6,024	4,449	6,024
Repairs, Alterations, Maint	41500	11,592	10,383	6,007	3,927	6,100	6,355	6,100
State Agency Reimb.	42030						(11,390)	
Other Operating Costs	43000	35,803	46,347	27,599	57,767	47,300	46,834	47,800
Equipment Capital	47060							
Equipment-Non Capital	47160	15,227	1,576	43,667	12,812	3,000	318	3,000
Construction	47230							
Reverse 1099 Expenditure	49890				(563)			
OPERATING		**683,725**	**710,273**	**721,943**	**688,207**	**772,277**	**434,612**	**553,965**
TOTAL		**4,059,927**	**4,305,657**	**4,400,260**	**4,531,019**	**5,153,950**	**4,404,470**	**5,066,153**

Notes:

State of Minnesota
Ramsey County

District Court
Second Judicial District
Court File Number: 62-CV-26-167
Case Type: Civil Other/Misc.

Notice of Case Filing and Assignment

Office of Lawyers Professional Responsibility
Suite 105, 25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul MN 55155

Jessica Heather Anlauf vs Susan Humiston, Office of Lawyers Professional Responsibility

Date Case Filed: **January 07, 2026**

Court file number **62-CV-26-167** has been assigned to this matter. All future correspondence must include this file number, the attorney identification number, and must otherwise conform to format requirements or they WILL BE RETURNED. Correspondence and communication on this matter should be directed to the following court address:

Ramsey Court Administration
15 West Kellogg Boulevard Room 170
St Paul MN 55102

Assigned to: **Judge Edward Sheu**

If ADR applies, a list of neutrals is available at www.mncourts.gov (go to Alternative Dispute Resolution) or at any court facility. Please direct all scheduling inquiries on this matter to Assignment at 651-266-8309.

Dated: February 11, 2026

cc: Jessica Heather Anlauf; Susan Humiston; Office of Lawyers Professional Responsibility

DISTRICT COURT
Civil Division
170 Courthouse
15 W. Kellogg Boulevard
St. Paul, MN 55102-1618

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OFFICE OF LAWYERS
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55155-160225

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State of Minnesota
1/7/2026 12:53 PM

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
Case Type: Legal Malpractice

Jessica Anlauf,

Petitioner,

vs.

Office of Lawyers Professional Responsibility, Susan M. Humiston, in her official capacity as Director,

Respondents.

Court File No.

PETITION FOR WRIT OF MANDAMUS

Petitioner Jessica H. Anlauf, pro se, respectfully petitions this Court for a writ of mandamus directing Respondents to issue a final determination on Petitioner's ethics complaint against attorney Thomas H. Gunther (File No. 47780), pursuant to Minn. Stat. §§ 586.01 et seq. In support of this petition, Petitioner states as follows:

I. Parties

1. Petitioner Jessica H. Anlauf is a resident of Kanabec County, Minnesota, with an address at 3273 421st Ave NE, Braham, MN 55006. Petitioner has worked as a senior paralegal, filed the underlying ethics complaint as a complainant, and serves as a volunteer investigator for the Fourth District Ethics Committee.
2. Respondent Office of Lawyers Professional Responsibility (OLPR) is an agency of the Minnesota Supreme Court responsible for investigating and disposing of ethics complaints against attorneys licensed in Minnesota, located at Minnesota Judicial Center, Suite 105, 25 Rev. Dr. Martin Luther King Jr. Blvd, St. Paul, MN 55155.

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3. Respondent Susan M. Humiston is the Director of OLPR and is sued in her official capacity.

II. Jurisdiction and Venue

4. This Court has jurisdiction under Minn. Stat. § 586.01, which authorizes district courts to issue writs of mandamus to compel the performance of a duty clearly imposed by law.
5. Venue is proper in Ramsey County under Minn. Stat. § 586.12, as Respondents are located in St. Paul, Ramsey County, and the acts or omissions giving rise to this petition occurred there.

III. Statement of Facts

6. On February 13, 2024, Petitioner filed an ethics complaint with OLPR against attorney Thomas H. Gunther (Registration No. 0219678), alleging unethical conduct including failure to communicate, false statements about work performed, allowing the statute of limitations to expire on Petitioner's claim without notice, and improper termination of representation. OLPR assigned File No. 47780 to the complaint. A copy of the complaint submission email is attached as Exhibit E.
7. Shortly after receipt, OLPR issued a Notice of Investigation Pursuant to Rule 8(a), Rules on Lawyers Professional Responsibility (RLPR), acknowledging receipt and stating that the complaint would be investigated promptly as required by Rule 8(a), RLPR. A copy of this notice is attached as Exhibit A.
8. Rule 8(a), RLPR, requires OLPR to conduct a prompt investigation of complaints. Rule 2, RLPR, emphasizes that prompt investigation and disposition of complaints is of "primary importance" to the public and the bar.

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9. Despite these requirements, OLPR has failed to issue a final determination for **685 days** (as of December 29, 2025).
10. On August 15, 2025, at approximately 1:25 PM, OLPR Assistant Director Jennifer Novak called Petitioner. The call lasted 6 minutes. Ms. Novak informed Petitioner that OLPR intended to publicly discipline Gunther but was still deciding whether to seek disbarment. Ms. Novak also stated that Gunther was not responding to OLPR's communications. A screenshot of the phone log is attached as Exhibit B.
11. Gunther's failure to respond constitutes an independent violation of Rule 8.1(b), Minnesota Rules of Professional Conduct, and Rule 25, RLPR, which require attorneys to cooperate with disciplinary investigations. This non-cooperation does not excuse OLPR's delay but exacerbates it, as OLPR has authority to proceed despite non-response.
12. On November 7, 2025, Petitioner emailed Ms. Novak formally requesting a final determination within 10 days, noting that 617 days had passed since OLPR Director Humiston's initial response acknowledging the investigation, and stating that the prolonged delay was hindering Petitioner's healing from emotional trauma caused by the underlying events. Petitioner indicated that without a prompt determination, a writ of mandamus would be sought. A copy of this email exchange, including OLPR's response stating no timeframe could be provided, is attached as Exhibit C.
13. OLPR's delays are part of a systemic issue, as documented in a February 6, 2025, article by William Wernz, a recognized expert in Minnesota legal ethics and former OLPR Director, published in the Minnesota State Bar Association's Legal Ethics Community blog. The article highlights OLPR's failure to meet its benchmark of no more than 100 files over one year old, with 218 such files as of December 31, 2024—an increase of 61

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files in one year. It notes that OLPR's average time to close private admonition files has increased compared to historical baselines, and criticizes OLPR for "endless investigations" in violation of its duty under Rule 2, RLPR. A copy of the article is attached as Exhibit D.

14. Petitioner serves as a volunteer investigator for the Fourth District Ethics Committee (DEC), which assists OLPR in investigating ethics complaints pursuant to Rule 8(b), RLPR. On November 3, 2025, the DEC Coordinator emailed Petitioner regarding an assigned investigation, stating that investigations should be completed within 90 days. A copy of this email is attached as Exhibit F. This 90-day standard, applied to investigations delegated by OLPR, underscores the unreasonableness of the 685-day delay in processing Petitioner's complaint directly handled by OLPR.
15. Petitioner has no adequate remedy at law. The RLPR provide no mechanism for complainants to appeal or compel action on delays, and further waiting would perpetuate irreparable harm, including ongoing emotional distress and inability to achieve closure.
16. OLPR has a clear legal duty to promptly investigate and dispose of the complaint under Rules 2, 8(a), and 25, RLPR. The delay is unreasonable, arbitrary, and contrary to law.

IV. Legal Argument

17. A writ of mandamus shall issue to compel performance of a duty clearly required by law where there is no other adequate remedy. Minn. Stat. § 586.01; State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cnty. Bd. of Cnty. Comm'rs, 799 N.W.2d 619, 623 (Minn. Ct. App. 2011).
18. OLPR has a nondiscretionary duty to promptly process complaints. Rule 2, RLPR ("It is of primary importance... that cases... be promptly investigated and disposed of"); Rule

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8(a), RLPR (requiring prompt investigation). The Minnesota Supreme Court has repeatedly emphasized promptness in the disciplinary system. See In re Charges of Unprofessional Conduct, 597 N.W.2d 563, 568 (Minn. 1999).

19. The 685-day delay far exceeds reasonable timelines. Historical OLPR benchmarks aim for resolution within one year, and admonitions (for minor misconduct) historically averaged 8-10 months. Here, OLPR has acknowledged misconduct warranting public discipline, yet delays persist without justification.
20. Gunther's non-response does not justify delay; it is itself misconduct under Rule 8.1(b), MRPC, and OLPR may impose discipline for non-cooperation alone. Rule 25, RLPR.
21. Systemic delays documented by Wernz demonstrate OLPR's pattern of violating its duties, supporting mandamus to enforce compliance in this case.
22. The 90-day guideline for DEC investigations, as evidenced by the email to Petitioner in her volunteer capacity, further illustrates that OLPR's delay is unreasonable and inconsistent with the standards it imposes on its own delegated investigators.
23. Petitioner will suffer irreparable harm without relief, as the delay stifles healing from trauma related to Gunther's alleged conduct.

V. Prayer for Relief

WHEREFORE, Petitioner respectfully requests that this Court:

a. Issue an alternative writ of mandamus directing Respondents to issue a final determination on File No. 47780 within 14 days or show cause why they have not done so;

b. After hearing, issue a peremptory writ of mandamus compelling Respondents to immediately issue the determination;

c. Award the Court reimbursement of costs and disbursements; and

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d. Grant such other relief as the Court deems just and equitable.

Dated: December 29, 2025

/s/ Jessica H. Anlauf
Jessica H. Anlauf, *Pro Se*
3273 421st Ave NE
Braham, MN 55006
Phone: (320) 436-5115
Email: j_anlauf@hotmail.com

Verification

I, Jessica H. Anlauf, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: December 29, 2025

/s/ Jessica H. Anlauf

In the Matter of the Complaint of
JESSICA ANLAUF
3273 - 421st Avenue NE
Braham, MN 55006
against THOMAS H. GUNTHER
10 South Fifth Street, Suite 1010
Minneapolis, MN 55402,
a Minnesota Attorney,
Registration No. 0219678.

NOTICE OF INVESTIGATION PURSUANT TO RULE 8(a), RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY (RLPR)

Our File No. 47780

To: Jessica Anlauf:

Your complaint has been received. It will be investigated, as provided by Rule 8(a), RLPR. You will be contacted if further information is required. You will receive written notice of the final decision.

In accordance with Rule 6(b), RLPR, your complaint will be investigated by an attorney in this Office. If you have any questions or further information, please contact the attorney named below.

This Office can only investigate complaints of unethical conduct and take appropriate action. We cannot represent you in any legal matter or give you legal advice. You must retain your own attorney if you need legal advice or representation.

To: The Above-Named Respondent Attorney:

Enclosed is a copy of the complaint identified above, which is being investigated without referral to a district ethics committee.

Pursuant to Rule 25, RLPR, and Rule 8.1(b), Minnesota Rules of Professional Conduct, please respond completely to the complaint in a writing mailed or emailed to the undersigned within 14 days of this notice.

Please send a copy of your response(s) to complainant, if complainant is or was your client. *See* Rule 20(a)(5), RLPR. Please note that the filing of an ethics complaint does not in itself terminate an attorney-client relationship.

Thank you in advance for your cooperation.

SUSAN M. HUMISTON
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY
445 Minnesota Street, Suite 2400
St. Paul, MN 55101-2139
(651) 296-3952

Jennifer M. Novak

By Jennifer M. Novak
Feb 29 2024 9:01 AM
Jennifer M. Novak
Assistant Director
Jennifer.Novak@courts.state.mn.us

EXHIBIT A

Filed in District Court
State of Minnesota
1/7/2026 12:53 PM

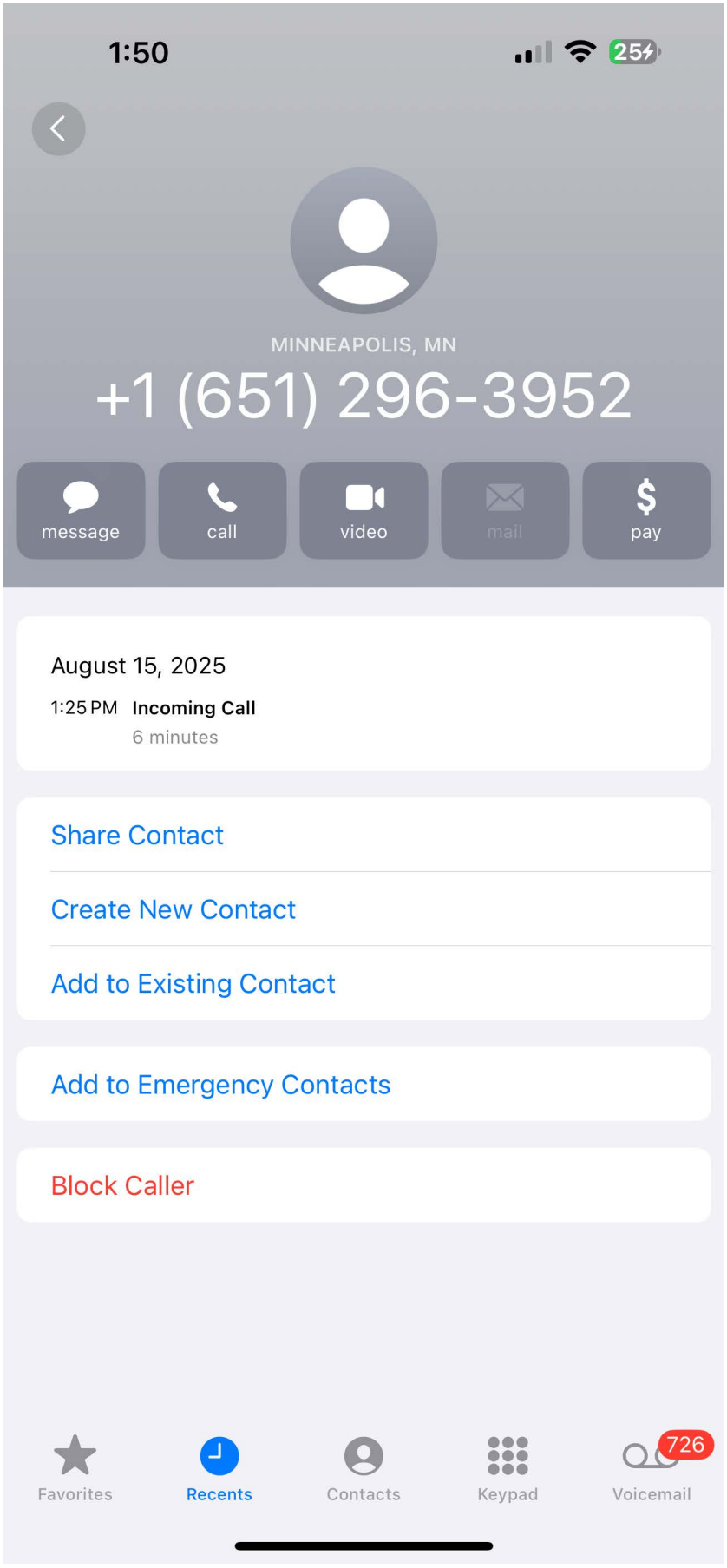

EXHIBIT B

Outlook

RE: [EXTERNAL] Gunther Complaint Determination Request

From Novak, Jennifer <Jennifer.Novak@courts.state.mn.us>
Date Fri 11/7/2025 1:16 PM
To jessica anlauf <j_anlauf@hotmail.com>

Dear Ms. Anlauf,

This matter is still under consideration and being investigated by our Office. While I understand your wish to move on and to have this matter resolved, we are unfortunately unable to provide a timeframe for when there will be a final determination.

Yours truly,

Jennifer Novak | Assistant Director
Office of Lawyers Professional Responsibility
Minnesota Judicial Center, Suite 105
25 Rev. Dr. Martin Luther King Jr. Blvd
St. Paul, MN 55155
Phone: 651-296-3952 | Fax: 651-297-5801
Jennifer.Novak@courts.state.mn.us

Protecting the Public, Strengthening the Profession

WE HAVE MOVED! Please note our new address, above.
Telephone, fax and email contact information remain the same.

From: jessica anlauf <j_anlauf@hotmail.com>
Sent: Friday, November 7, 2025 1:17 AM
To: Novak, Jennifer <Jennifer.Novak@courts.state.mn.us>
Subject: [EXTERNAL] Gunther Complaint Determination Request

Hello Ms. Novak,

I am writing to formally request a final determination of my complaint I filed against Mr. Thomas Gunther in February of 2024. File: 47780

It has now been 617 days since Director Humiston, responded stating that she was investigating the complaint.

I understand that I did provide additional information and evidence over some of that time period, however, it has now been several months since my last submission and the reasonableness of the timeline for this investigation is in question and the prolonged waiting period has stifled the progress of my healing from the events outlined in the complaint (and the underlying case), which have caused severe emotional trauma.

EXHIBIT C

Therefore, I would like to formally and respectfully request, a final determination be made within the next 10 days. It is my understanding that I may otherwise seek a writ of mandamus, directing a final determination, however, I am hopeful that you will understand the urgency and need behind this request and be able to make a final determination as requested so I need not seek a writ.

I truly wish to move on with my life and put all of this behind me. Thank you for your time and attention to this matter.

Sincerely,

Jessica H. Anlauf
Senior Paralegal - Remote
3273 421st Ave NE
Braham, MN 55006

Filed in District Court
State of Minnesota
1/7/2026 12:53 PM

OLPR Is Again Missing Its Priority Goal of Prompt Complaint Dispositions by a Mile

Posted by: William Wernz on Feb 6, 2025

Introduction

EXHIBIT D

For the second time in a decade, the Office of Lawyers Professional Responsibility (OLPR) has failed to fulfill its primary responsibility under law - to process complaint files "promptly."

The text below was published in the February 4, 2025 online *Minnesota Lawyer*. This blog adds an introduction and graphs. This blog supplements and amplifies Lawyers Board comments, filed with the Minnesota Supreme Court in connection with a rule-making proceeding, that address "the indisputable fact that OLPR decisions routinely take, by any measure, too long."

For forty years, the Lawyers Board and OLPR have recognized a benchmark for determining promptness – no more than 100 open files that are at least a year old. At the end of 2024, there were 218 old files. Ten years ago, when a comparable old file problem arose, the Minnesota Supreme Court directed a prompt, material reduction of old files and appointed a new OLPR Director, who wrote that reducing old files to benchmark levels would be her "number one priority."

The primary cause of OLPR's failure is its low productivity in recent years. The best measure of productivity is the number of files closed annually. For the period 1985 – 2015, OLPR's annual files closed averaged 1,280. For the period 2017-2024 (the period of the current Director's administration), OLPR's annual files closed averaged only 1,053.

The Lawyers Board comments focused on OLPR's "endless investigations." Corroborating this characterization is the annual average number of months for OLPR to close files with a private admonition (for "isolated and nonserious" misconduct). From 2017 - 2023 that number was 14. The baseline number, from 1985 – 2015, is 10.

Adding to the concerns voiced by the Lawyers Board is OLPR's failure to address the file-aging problem as it has developed. As explained below, OLPR regularly and optimistically commented on file-aging issues in 2016-21, when statistics were reasonably good, but OLPR's published reports have ignored the problems developing in 2022-2024.

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State of Minnesota
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Article

For the second time in a decade, the Office of Lawyers Professional Responsibility (OLPR) is in substantial violation of its legal duty to process ethics complaints promptly. A recent Lawyers Board filing in the Supreme Court stated, "The Board's concern lies. . .in the indisputable fact that OLPR decisions routinely take, by any measure, too long."[i] OLPR's Director was appointed nine years ago to rectify a similar problem, but – after initially identifying OLPR's file-aging problem as the "number one priority" – the Director's writings now generally ignore the problem and claim, implausibly, that the problem is insoluble or requires substantial staff additions to solve.

Although a Lawyers Board benchmark of no more than 100 files at least a year old had been (and remains today) in effect since the 1980s, on December 31, 2024, the number of old files was 218 - an increase of 61 in a single year. Since 2021, the old file total has increased by 97 files. The Lawyers Board recently reported to the Supreme Court, the number of year-old files under investigation leapt by an astonishing 40% from October 2023 to October 2024![ii]

Another indicator of OLPR's "endless investigations" (as the Lawyers Board put it) is the number of months on average a file that resulted in a private admonition was open. In 2023, the average number was 17 months. In 1998-2004 and 1986-1992, respectively, the average numbers of months were 9.4 and 8.[iii] OLPR is taking approximately twice as long to close admonitions as OLPR took in two prior periods.

In 2015 there were 221 old files. In 2015, three ethics lawyers wrote a letter to the justices of the Minnesota Supreme Court, reporting their "grave concern" about the file-aging problem. The Court responded promptly, directing OLPR to reduce the file number. The OLPR Director retired soon after.

This article addresses four subjects related to the old file problem:

- Why file-aging is important.
- How file-aging problems were addressed in the 1980s and in 2015-16.
- How OLPR's recent annual reports do not even acknowledge, let alone address, the current problem.

- What the Minnesota Supreme Court should do to address the problem.

Why File-Aging is Important. As a matter of law, "It is of primary importance to the public and to the members of the Bar that cases of lawyers' alleged disability or unprofessional conduct be promptly investigated and disposed of with fairness and justice, ..."[iv] Promptness is not merely a desired goal - it is required by rule of those responsible for the attorney discipline system.

Promptness is "primary" for several reasons. Lawyers who have engaged in serious misconduct should not be held out to an unsuspecting public as trustworthy. Lawyers who have erred in minor ways need correction. The public should have its complaints addressed promptly. File-aging and file-closing statistics are important indicators of OLPR's efficiency and productivity.

The recent Lawyers Board filing reported the injustices done to lawyers by delays in handling complaints: "An attorney under investigation ordinarily must report the same to potential employers, to the government when applying for a judgeship, to errors-and-omissions insurance providers, and to other jurisdictions when applying for an attorney license outside Minnesota or seeing pro hac vice status. The Board is aware of numerous situations where the status of being "under investigation" has hindered lawyers' professional plans in this regard."[v]

Responses to File-Aging Problems in the 1980s and in 2015. The ethics lawyers' 2015 letter reported that an earlier file-aging problem– 241 year-old cases at the end of 1984 - was resolved by appointing a new Director, adding staff, and streamlining rules. With these correctives in place, from 1985 through 1992 old files averaged about 50. From 1990-2005, old files were below 100 in five years and in other years not far above 100. In 2008, however, a Supreme Court committee reported that the total of old files was a problematic 152 [vi] After 2008, the old-file total increased, notwithstanding the committee report.

The 2015 letter reported the consequences of OLPR delays. Complainants called OLPR frequently about file status. Respondent's counsel pointed out that the moral authority to impose discipline depends on authorities' own compliance with Rule 2, by "promptly"

disposing of discipline matters. Hearing panels sometimes dismissed complaints when OLPR's delay exceeded respondent's alleged delay.

The Court responded to the lawyers' 2015 letter, by directing OLPR to reduce old files. OLPR decreased old files from 221 to below 150 by March 2016, when a new Director took office. The new Director wrote, "[T]he Lawyers Professional Responsibility Board and the Supreme Court, as well as various members of the bar, have raised concerns regarding whether the office is, in fact, promptly addressing claims given the number of matters pending more than a year, and the length of time it has taken in certain instances to bring a matter to conclusion. The concern is well taken, and *addressing it is the number one priority of the office*. All parties, including the office, have an interest in ensuring the prompt resolution of complaints."[vii]

For several years, OLPR prioritized prompt file management. At year-ends in 2016, 2019, 2020, and 2021, old files totaled 115, 119, 125, and 122. OLPR's Annual Reports predicted full compliance.

In 2022 and 2023, however, old files increased to 156 and 158. By April 2024, the total jumped to 176. OLPR's Annual Reports went silent regarding file-aging, claiming performance was "stable," even when year-old file totals increased rapidly. By December 31, 2024, the total had jumped to 218.

OLPR's Productivity has Greatly Decreased Even When New File Openings Substantially Declined. The main cause of OLPR's failure to meet old file goals is OLPR's very low productivity in recent years. File closing numbers are the best indicator of productivity. In 2017 – 2013, file closings averaged 1,019. In 2022 – 2024, when old files were increasing from 122 to 218, annual file closings averaged 1,110. In contrast, the years 2000-2015, annual file closings exceeded 1,300 three times and in eight additional years exceeded 1,200.[viii]

OLPR's extraordinarily low file-closing statistics are especially hard to justify or even understand because the numbers of new files in recent years before 2024 have been far below historical norms. In 1986-1992, new files annually averaged 1,309.[ix] In 2000 to

2015, new files averaged 1,292. In 2017-2023, however, new files averaged only 1,038. With a 20 percent reduction in new files, and an increasing staff, OLPR's new administration would be expected to greatly reduce the number of old files. Astonishingly, however, under the current administration old files have increased by 50 percent!

The Board was alarmed by the Director's report in November 2024 "that OLPR had 151 open files pending for over one year without charges," representing "a nearly *40% increase*" in one year.[x] The broader measure of all files at least a year old is the main subject of analysis here, but the Board has chosen another revealing measure, viz. the skyrocketing number of old files remaining under investigation. By any measure, the file aging numbers are out of control.

OLPR'S Inconsistent and Implausible Positions. In Annual Reports, the OLPR Strategic Plan, and recent Comments filed with the Supreme Court, OLPR has either ignored its increasing old file problem or stated inconsistent and implausible positions.

OLPR's Annual Reports from 2016-2024 address old files when statistics come close to benchmarks and are silent when statistics are problematic. The 2016-2021 Annual Reports foresaw "an attainable goal," of closing or charging almost all cases within a year. The 2021 Report states, "The OLPR is very close to obtaining compliance with the Board and Court's case processing goals in a sustainable way and saw significant progress toward that goal in FY21."[xi]

In contrast, the July 1, 2024 Report does not explain why old files increased from 119 in 2019, to 158 in December 2023, to 176 in April 2024. Instead, the Report assures the Court and the public, "Fiscal year 2024 was another stable and solid year for the Board and the OLPR."[xii]

In 2018, OLPR adopted a five-year Strategic Plan. The Plan's "Vision" stated, "Through effective, efficient, and accountable regulation, the OLPR promotes the public interest and inspires confidence in the legal profession." The Plan's "Process" stated, "Case management processes are clearly defined and regularly measured against performance

metrics."[xiii] The Plan's Strategy was to "Remain focused on active case management strategies to ensure timely processing of complaints in accordance with Board-established targets."[xiv]

On December 2, 2024, OLPR filed Comments regarding amendments to procedural rules proposed by a Supreme Court Committee. OLPR's Comments take positions on old file goals that contradict both prior OLPR positions and historical facts. The OLPR Comments state, "For decades, the OLPR has had a goal. . . to have no more than 100 cases more than one year old. The Office has rarely if ever met these goals since their adoption."[xv]

Historical facts contradict OLPR's representation. in 1986-1992, the average old-file total was 50 and the lowest total was 39.[xvi] In 1995-2004, the old file average was about 117 and in two years was below 100.[xvii]

How can OLPR take an agnostic "if ever" position in a filing with the Supreme Court, when its own Annual Reports show that OLPR bested the 100 old file benchmark nine times?! OLPR's own institutional knowledge includes that there is no "if" about OLPR's repeatedly having met and indeed performed much better than goals for old files. "Rarely if ever" gives the Court to understand the goals are in never-never land, rather than in actual OLPR history.

The current problem is not marginally failing to meet goals, but missing standards by a mile. The OLPR Comments claim that because "cases in general continue to grow more complex and challenging to address," OLPR cannot meet time deadlines.[xviii] The 2021 OLPR Annual Report prediction of "sustainable . . . compliance with the Board and Court's case processing goals" was credible – after all, in several then-recent years, the goal had been nearly attained. Purported increasing complexity does not explain the year-end totals nearly doubling from 2021 to 2024. Instead, chronic low productivity is the clear primary explanation.[xix] Nor does purported complexity explain the delays in issuing admonitions, the great majority of which are far from complex.

OLPR's Comments claim that "significant increases in personnel" are needed to meet "timelines that the OLPR has for decades been unable to meet . . .."[xx] If the current administration for four years was able to average about 120 year-old files, why would

significant additional personnel be needed to close 20 files? From 1985 through 1992 the professional staff was only about three-fifths as large as today's staff, old files averaged 50, and annual file closings exceeded annual file closings in 2017-2024 by about thirty percent. The 2024 Annual Report states, "The Director's Office employs 13 attorneys including the Director, five paralegals, an investigator, an auditor, an office administrator, nine support staff and a law clerk."[xxi] Surely this staff is sufficient.

Supreme Court Actions. In 2022, the Court requested an ABA Standing Committee to review certain aspects of Minnesota's professional responsibility system. In August 2023, the Court issued an order accepting some ABA recommendations, rejecting others, and appointing an Advisory Committee on the Rules on Lawyers Professional Responsibility. The Advisory Committee's June 28, 2024, Report responded to the Court's request for recommendations to "enhance efficiency" in OLPR investigations by proposing a 270-day deadline (with certain exceptions) for investigations. Based on OLPR's increasing backlog of incomplete investigations, the Lawyers Board supported the proposal. OLPR opposes the proposal.

The proposal should be unnecessary. If OLPR were to close files in the number that OLPR had achieved for over three decades before 2017, or if OLPR were to meet established standards for annual file closings, or even if OLPR again achieved old file statistics similar to those it achieved in 2017, 2019, 2020, and 2021 (above), the merits of deadlines would not have to be debated.

Conclusion. Minnesota's professional responsibility system has, for the most part, thrived for many reasons. First among them has been publicly recognizing and dealing with problems. Another hallmark has been clearly prioritizing duties – prompt dispositions are "of primary importance" and effectively dealing with file-aging is OLPR's proclaimed high priority.

For the second time in a mere ten years, the Supreme Court's rules-enforcement agency is operating in material violation of a rule requiring it to "promptly" process ethics complaints. The Court often cites harm to the public's confidence in the legal profession as a factor warranting lawyer discipline. And OLPR recently acknowledged, "delays negatively impact public trust and confidence.[xxii]

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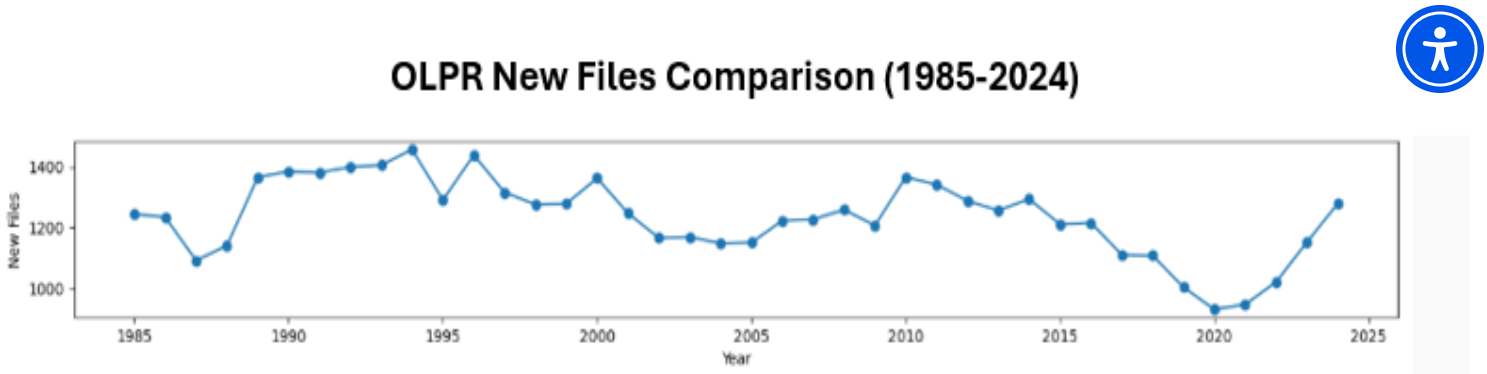
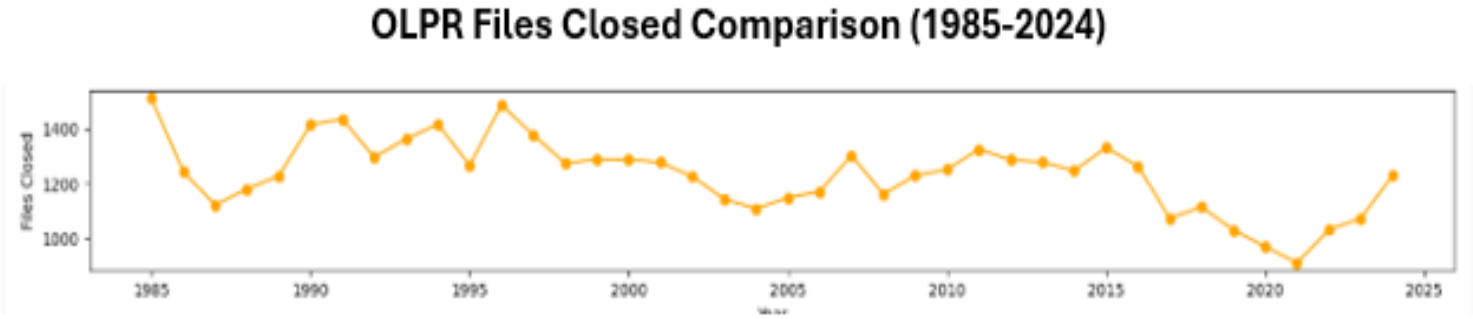
The 2024 OLPR Annual Report states, "The Board and the Office have long appreciated the active engagement of the Court and its commitment to optimizing the fairness, effectiveness, transparency, accountability, and efficiency of Minnesota's professional responsibility and discipline system."[xxiii] If the system is in fact to become once again fair, effective, transparent, accountable, and efficient, then indeed the Court will have to fully engage in a grave situation and commit to making major changes needed to deal with the current severe file aging and low productivity problems.

The Court will soon deal with recommendations from the ABA, OLPR, the Lawyers Board, and others, for procedural rule amendments. The Court should consider how the system can improve its recognition and response to the rapidly worsening failure by OLPR to come close to achieving what it once called its "number one priority." Just as the Court responded promptly and strongly in 2015 to ethics lawyers' concerns, the Court should heed the alarm sounded by the Lawyers Board and amplified in this article.





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OLPR Files Over 1-Yr Comparison (1985-2024)

[i] Comments of the Lawyers Professional Responsibility Board Regarding the Proposed Amendments to the Rules on Lawyers Professional Responsibility Lawyers Board Comments, (Minn. Nos. ADM10-8042, ADM10-8043 Dec. 2, 2024) ("Lawyers Board Comments") at 11 n.6.

[ii] *Id.* at 11-12.

[iii] 2005 Annual Report.pdf at A.7. 1991-06-18-LPRB-Annual-Rpt.pdf at 9, 1993-06-22-LPRB-Annual-Rpt.pdf at 6.

[iv] Rule 2, Rules on Lawyers Professional Responsibility.

[v] Lawyers Board Comments, at 10.

[vi] Supreme Court Advisory Commitee Report.pdf at 16.

[vii] Susan Humiston,"*That's a Terrible Job" How this Lawyer Ended up Director of the OLPR*," Bench & B. of Minn. (April 2016) (emphasis added).

[viii] 2024 Annual Report.pdf A.3.

[ix] 1993 Annual Report. at 5.

[x] Lawyers Board Comments, at 12.

[xi] Annual Reports are available at Pages - Annual Reports. 2021 Report at 22.

[xii] 2024 Annual Report.pdf at 1.

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[xiii] Strategic Plan at 3, 6.

[xiv] Strategic Plan at 8-9.

[xv] Comments of the Office on Lawyers Professional Responsibility on the Report and Proposed Amendments to the Rules on Lawyers Professional Responsibility. (Minn. Nos. ADM10-8042, ADM10-8043 Dec. 2, 2024) ("OLPR Comments") at 8.

[xvi] 1993-06-22-LPRB-Annual-Rpt.pdf at 4.

[xvii] 2005 Annual Report.pdf

[xviii] OLPR Comments. at 8-9.

[xix] Some decades ago, events beyond OLPR's control caused staff shortages and affected file statistics, e.g. a state hiring freeze and a requirement to pay attorney fees in litigation that OLPR did its best to avoid.

[xx] *Id.* OLPR Comments. at 5.

[xxi] 2024 Annual Report.pdf at 10.

[xxii] OLPR Comments, at 7.

[xxiii] 2024 Annual Report.pdf at 22-3.

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Outlook

New Online Complaint

From NO_REPLY_SharePoint@courts.state.mn.us <NO_REPLY_SharePoint@courts.state.mn.us>
Date Tue 2/13/2024 10:41 AM
To LPRB.Receptionist@courts.state.mn.us <LPRB.Receptionist@courts.state.mn.us>; j_anlauf@hotmail.com <j_anlauf@hotmail.com>

Do not reply to this email.

MINNESOTA
OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY
COMPLAINT FORM

Complainant Name, Address and Phone Numbers

Complainant 1:
Ms. Jessica Anlauf
3273 421st Ave NE
Braham, MN 55006

Email: j_anlauf@hotmail.com

Cell Phone: (320) 436-5115

Respondent Name, Address and Phone Number

Thomas Gunther
10 S 5th St UNIT 1010
Minneapolis, MN 55402

Phone: (612) 305-4450

Additional Information

Relationship to Lawyer: Client

If you are a client or former client, give the approximate date you hired the lawyer, and the nature of your legal case.
10/15/25, hired Attorney Thomas Gunther for a malicious prosecution/abuse of process/civil rights violation case.
I contaced Attorney Gunther, repeatedly for updates. He would say that he will call me within a certain time and then have the case put together in a certain time, and time would go by and I'd ask for an update again and he would say he would have it put together within a short period of time again and give me a copy of it etc., But he actually didn't do any of that work at all.

On 7/11/2018 Attorney Gunther sent me an email stating he was no longer taking these types of cases so he was sending my retainer back and would no longer represent me.

I eventually contacted another attorney who informed me that Attorney Gunther had let the statute of limitations pass without my knowledge and therefore that attorney could not take the case, despite her wanting to.

I sent an email to Attorney Gunther informing him of his allowing the statute of limitations to pass and then on 1/27/2020 he sent me this email:

"Hello Jessica,

Sorry for the delay, but I wanted to review your file before response. It appears that I made a mistake in calculating the statute of limitation period. I believed that the limitation period was six years. Upon review, the statute was a two-year statute of limitations which I did miss. I apologize and have contacted my malpractice carrier. You should consult with an attorney regarding the potential malpractice claim that you have against my firm.

Sincerely,

Thomas H. Gunther

Attorney at Law"

Complaint:
He failed to stay in contact, claimed he was going to do things and send me things and he never did, and then dropped me for no reason, after he had let the statute of limitations pass.

I have copies of all of the emails if you need them.

Are you submitting documents with this complaint? No

Documents submitted by mail must be received within 7 days to be considered part of the complaint. If this Office does not receive accompanying documents, your complaint may be considered based solely on the information contained in this complaint form.

Dated: 2/13/2024

Additional information and documents must be mailed to:

Office of Lawyers Professional Responsibility
1500 Landmark Towers
345 St. Peter Street
St. Paul, MN 55102
651-296-3952
1-800-657-3601

Outlook

Personal & Confidential File No. [redacted]

From DECCoordinator <DECCoordinator@courts.state.mn.us>
Date Mon 11/3/2025 4:26 PM
To j_anlauf@hotmail.com <j_anlauf@hotmail.com>
Cc Ivanca, Corinne <corinne.ivanca@allina.com>

Hi Jessica,

Our records show that you are handling the investigation referenced above. I wanted to check in to see how things are progressing. Please let us know if there is anything we can assist you with.

As a reminder, we would like the investigation to be completed within 90 days, with the report due on **11/28**. If any challenges arise that will prevent you from meeting this deadline, please notify us as soon as possible so that we can determine whether an extension is appropriate.

Thank you for your attention to this matter, and please don't hesitate to reach out if you need assistance.

Best Regards,
Mara Medved |Office Assistant III | DEC Coordinator
Office of Lawyers Professional Responsibility
Minnesota Judicial Center, Suite 105
25 Rev. Dr. Martin Luther King Jr. Blvd
St. Paul, MN 55155
(651) 296-3952 | (651) 297-5801
DEC contacts: DECCoordinator@courts.state.mn.us
Internal contacts: Mara.Medved@courts.state.mn.us
Upload DEC File to Box (secured link): Click Here
Protecting the Public, Strengthening the Profession

EXHIBIT F

MORE QUESTIONS?
If you have more questions please call the LPRB office and ask to speak with the professional firms staff at
651-296-3952

Your professional firm questions

BY SUSAN M. HUMISTON ✉ *susan.humiston@courts.state.mn.us*

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

It is professional firm reporting season! If you practice law through a corporate legal entity in Minnesota, you should be familiar with the requirements of the Minnesota Professional Firms Act (Minn. Stat. §319B.11), including its annual reporting requirement. In November 2017, we published a primer on the Act, and that is a good place to start if you are unfamiliar with the law's requirements.* For this column, I'm going to look at questions we frequently receive this time of year as law firms submit their required annual report. Annual reports covering the previous year are due January 1, but we continue to receive reports throughout the month of January.

FREQUENTLY ASKED QUESTIONS

I'M A LAWYER LICENSED IN MINNESOTA. DO I HAVE TO PRACTICE LAW AS A FIRM?
No. If you have a valid law license, you can practice as a sole proprietor, which is not a corporate entity. But if you provide legal services through a corporate entity such as a corporation, limited liability company, or limited liability partnership, that entity must be a professional firm that complies with the Minnesota Professional Firms Act. (Interestingly, professional firms can't use the suffix "Inc." The law specifies which suffixes are permitted.)

CAN I RESCIND MY ELECTION TO HAVE MY LAW FIRM NOT BE A PROFESSIONAL FIRM AND STILL HAVE THE FIRM PRACTICE LAW IN MINNESOTA? "ELECTION" MAKES IT SOUND LIKE IT'S VOLUNTARY, AFTER ALL.
No. If you have a firm, and the firm provides legal services, the firm must elect to practice under the Professional Firms Act. Don't let the word "election" create confusion—it's mandatory, not voluntary.

WE'RE A LAW FIRM ORGANIZED AS A NONPROFIT. DOES THE PROFESSIONAL FIRMS ACT APPLY TO US?
Yes. If a nonprofit firm provides legal services in Minnesota, it must operate under the Professional Firms Act. Although the unauthorized-practice-of-law statute refers to "pecuniary profit," the Professional Firms Act applies to all professional firms no matter their tax status.

OUR FIRM IS BASED IN CALIFORNIA, BUT WE NOW WANT TO PROVIDE SOME LEGAL SERVICES IN MINNESOTA. DO WE HAVE TO HAVE A MINNESOTA-LICENSED LAWYER WHO HAS GOVERNING AUTHORITY? DOES THAT LAWYER NEED TO LIVE IN MINNESOTA?
All the owners and persons with governing authority need to be lawyers licensed in some jurisdiction—not necessarily Minnesota. But all lawyers providing legal services in Minnesota must be Minnesota-licensed (or providing legal services in Minnesota pursuant to an authorized exception under Rule 5.5(c), MRPC).

WHEN DOES MY FIRM HAVE TO FILE A REPORT?
At conception and every year thereafter, if the firm is active with the Minnesota Secretary of State. Remember, the firm's annual renewal with the Secretary of State is not the same thing as an annual report under the Minnesota Professional Firms Act. They are two separate reports.

I JUST LEARNED THAT OUR FIRM HASN'T FILED AN ANNUAL REPORT IN FIVE YEARS. CAN WE FILE THE REPORTS RETROACTIVELY?
No. The Director's Office interprets the statute to require an annual report to be made each year for the year that is ending. Each December, as a courtesy, the Office sends a letter and a report form to each firm in our database to make it easier for the firm to return the report to our office. The report form covers the preceding year. But the obligation to report exists regardless of whether the firm gets a mailing from the Director's Office. Even if you have been delinquent, you should act promptly to bring your firm into current compliance.

MY FIRM HAS CLOSED. DO I STILL HAVE TO FILE AN ANNUAL REPORT?
It depends on whether the "closed" firm is active with the Minnesota Secretary of State. If so, then an annual report is required.

MY FIRM ISN'T CLOSED BUT HASN'T PROVIDED LEGAL SERVICES FOR TWO YEARS. DO I STILL HAVE TO FILE AN ANNUAL REPORT?
Yes. If the firm is active with the Minnesota Secretary of State, it's required to report annually.

I THOUGHT MY FIRM WAS CLOSED BUT I SEE IT'S STILL ACTIVE WITH THE MINNESOTA SECRETARY OF STATE. HOW DO I GET MORE INFORMATION ON CLOSING MY FIRM?
The Secretary of State can provide more information on closing your firm; typically, a firm is required to file a notice of intent to dissolve, followed by a notice of termination. The firm will usually remain active with the Secretary of State until the notice of termination is filed. Alternatively, if the firm fails to file its annual renewal, it will be inactivated automatically.

WHERE CAN I GET THE MOST CURRENT REPORT FORMS?
The 2025 forms are available for download on the OLPR website (*www.lprb.mncourts.gov*).

CAN I COMPLETE THE ANNUAL REPORT BEFORE DECEMBER?
The annual report forms are typically uploaded in December, and the content of the form may change. If you are closing your firm mid-year and want to talk this through, please call.

CAN A NONLAWYER EMPLOYEE OF THE FIRM COMPLETE THE REPORT FORM?
Nonlawyer employees may assist in compiling the necessary information, but the form contains a declaration that must be completed by an owner or employee who is licensed to practice law.

I SEE THE FORM REQUIRES THE TITLES OR POSITIONS FOR THE LAWYERS WITH GOVERNANCE AUTHORITY. WHAT DOES THIS MEAN?
The "title or position" language comes from the statute. Within the firm, what is the lawyer's position? Answers, for example, might include owner, managing attorney, partner, shareholder, and so on.

ONE OF OUR OWNERS HAS JUST BEEN SUSPENDED FROM PRACTICING LAW. IS THERE ANYTHING WE NEED TO DO TO BE SURE OUR FIRM IS IN COMPLIANCE?
If the suspension is for more than 90 days, then the owner may need to relinquish their ownership interest in the firm. A nonlawyer (which includes a lawyer without a valid, active license) cannot own or hold a position of governance authority in a professional firm.

IF I'M OUT OF COMPLIANCE WITH THE PROFESSIONAL FIRMS ACT, WILL THAT BECOME THE SUBJECT OF A DISCIPLINARY INVESTIGATION?
No. While lawyers are expected to comply with all laws relating to their practice, the Office does not generally investigate compliance with the Professional Firms Act. Statements made to the Office on the annual report form are made under oath, so care should be taken to provide accurate information, and knowingly false statements might raise an ethics issue.

IS THERE A WAY TO SUBMIT MY REPORT AND PAY MY FEE ONLINE?
Not yet but we are exploring that option in 2026. Thanks for your patience!

CONCLUSION

Only duly organized corporate entities compliant with the Professional Firms Act may provide legal services in Minnesota, except for sole proprietorships or partnerships. Ownership of professional firms is limited to lawyers, as is governance authority. If you have not completed your annual report, or if this is the first you are learning of this requirement, visit the Professional Firms section of our website at *www.lprb.mncourts.gov* for additional information, and, of course, review the statute. If you still have questions after reviewing this information, please call our Office and ask to speak with a member of the professional firms staff at 651-296-3952. ▲

CORRECTION: My November article on conflicts mistakenly noted in reference to a hypothetical that Rule 1.7(b)(3), MRPC, is not applicable if law firm clients were adverse in unrelated matters (lease dispute and products liability matter). Rule 1.7(b)(3), MRPC, applies to situations where clients are adverse in the same litigation before a tribunal (not consentable) but does not prevent lawyers from seeking consent to representation where firm clients have adverse matters in general. All parts of Rule 1.7(b), MRPC, must be satisfied for a lawyer to obtain consent to a direct-adversity or significant-risk conflict.

* Susan M. Humiston, "Is your firm complying with the Minnesota Professional Firms Act?", Bench & Bar of Minnesota (Nov. 2017), located at *www.lprb.mncourts.gov*, under the Articles tab.

Public discipline in 2025

BY SUSAN M. HUMISTON susan.humiston@courts.state.mn.us

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

Annually this column recaps the prior year's public discipline matters. As the Minnesota Supreme Court often notes, the purpose of public discipline is not to punish the lawyer but rather to protect the public and the judicial system, and to deter future misconduct, both individually by the impacted lawyer and generally among the profession. The Court considers several factors when determining the appropriate discipline to be imposed, namely, (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. The Court also considers aggravating and mitigating factors specific to the matter and seeks to impose discipline consistent with similar cases.

Although this formula is straightforward, its application in particular cases is not always easy, and opinions may vary as to the adequacy of the discipline imposed. Most lawyers are unlikely to see themselves in these cases, but there are often lessons to be learned by stepping back and reviewing some of the cases from the prior year.

The numbers

The Court issued 34 decisions in public matters in 2025, down from 42 decisions in 2024. Six lawyers were disbarred, seven attorneys were suspended, one lawyer was reprimanded and placed on probation, and three lawyers received public reprimands. Additionally, one judge was reprimanded as a lawyer at the time he received judicial discipline and then was subsequently suspended as a lawyer upon his retirement from the bench, five lawyers were placed on disability inactive status in lieu of discipline, two reinstatement petitions were denied, and 10 lawyers were reinstated to the practice of law.

The 2025 numbers are lower than previous years. At the end of the year, though, the Court had under advisement approximately 17 additional public discipline matters covering 68 files, which serves to illustrate the volume of public matters moving through the discipline system. Some additional numbers stood out as well. First is the serious nature of the misconduct we are seeing. Six lawyers were disbarred in 2025; a typical year involves three to five disbarments. Although this variance is small, among the cases under advisement with the Court at year end were other cases where disbarment was recommended. These numbers show the serious nature of the misconduct that is occurring.

We also continue to see cases involving transfers to disability status in lieu of discipline. (This is a disciplinary status that is distinct from the "disability status" a lawyer may elect under the lawyer registration rules.) Court rules provide that if a lawyer is not competent to practice law and their disability causes them to be unable to assist in the defense or investigation of complaints, the lawyer may raise disability, and where substantiated, be transferred to disability inactive status. This causes discipline investigations or proceedings to be placed on hold until such time as the lawyer is no longer disabled. Five lawyers were transferred to disability inactive status in 2025 in lieu of discipline, up from three the prior year. This number alone is not notable; what is notable is that those five lawyers had a combined 37 complaints, including one lawyer with 18 complaints. Lawyers whose disability impacts their ability to competently practice can cause a lot of havoc before we can suspend their practicing privilege—something I believe the rules should be amended to address.

Disbarment

Six lawyers were disbarred in 2025: Stephen J. Baird, Samuel A. McCloud, Kristi D. McNeilly, Anders L. Odegaard, Ana L. Pena, and Jay A. Rosenberg. Typically, the most common reason for disbarment is misappropriation of client funds. In 2025, none of the disbarred lawyers misappropriated client funds, although two engaged in financial misconduct related to the practice of law. The 2025 disbarments featured an unusual variety of misconduct.

Kristi McNeilly was disbarred following her conviction for felony theft by swindle. As established in the criminal proceedings, Ms. McNeilly swindled $15,000 from a client by telling the client that the money was needed to bribe government officials to dismiss pending drug charges. Through lengthy proceedings in the criminal matter, Ms. McNeilly challenged her conviction and matters related to the criminal investigation, such as law enforcement's search of her law office pursuant to a search warrant. After more than five years of proceedings in both the criminal matter and discipline proceedings, Ms. McNeilly was disbarred for violating Rule 8.4(b),

Minnesota Rules of Professional Conduct (MRPC). Rule 8.4(b), MRPC, provides, "It is professional misconduct for a lawyer to... commit a crime that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

Ana Pena was disbarred for misappropriating more than $94,000 from her employer. This occurred, shockingly, while she was suspended from the practice of law for having previously misappropriated client funds. While misappropriation of client funds is the most common reason for disbarment, not all misappropriation cases result in disbarment. Under the Court's case law, certain mitigating circumstances can lead to a lengthy suspension rather than disbarment in some misappropriation cases. In 2020, Ms. Pena was suspended for misconduct that included misappropriation of client funds. The law firm where she worked in Texas chose to keep Ms. Pena on in a nonlawyer capacity while she was suspended from the practice of law, believing that her misconduct was unlikely to recur. The firm, in fact, allowed Ms. Pena to manage the firm's payroll. She abused that position in several ways. They included failing to adjust her pay schedule, which led to salary overpayments; secretly increasing her own compensation; taking pay advances she did not intend to repay; and borrowing money from one of the partners with no intent to repay the money. The seriousness of the new misconduct, coupled with Ms. Pena's prior misconduct for similar behavior, led to her disbarment.

Anders Odegaard was disbarred following his conviction for second-degree felony murder—murdering his ex-wife in front of their minor child. Mr. Odegaard is the fourth lawyer disbarred for murder in Minnesota, though it had been more than 50 years since it last happened.

The remaining disbarment cases from 2025 are also unusual. Stephen J. Baird was disbarred on reciprocal discipline from North Dakota, where Mr. Baird was disbarred three times and suspended for six months for a variety of client-related misconduct, including lack of diligence, communication, failing to refund unearned fees and to return client files, failing to supervise staff, providing misinformation to clients regarding their matters, and failing to take steps to protect client interests upon withdrawal in a number of cases. Here, the Court considered Mr. Baird's cumulative misconduct in North Dakota and agreed that disbarment in Minnesota was the appropriate reciprocal discipline. Jay Rosenberg's disbarment was another reciprocal discipline matter. Mr. Rosenberg's willful eight-year unauthorized practice of law in Virginia in thousands of matters led to his disbarment in several jurisdictions, including Minnesota.

Sam McCloud's disbarment is also unique and worth discussing. Prior to his disbarment, Mr. McCloud had a long (almost 50-year) career representing clients in criminal matters, primarily DWI cases. Along the way he had also accumulated a lengthy discipline history. He has been privately disciplined eight times, and had been publicly disciplined four times, including one public reprimand and three suspensions. The matter that led to Mr. McCloud's disbarment included his neglect, lack of communication, misrepresentations, and failure to make a refund in one client matter where he was representing an elderly individual in a DWI matter. The referee recommended and the Director concurred that Mr. McCloud's additional misconduct warranted at least another 90-day suspension. (Mr. McCloud was already suspended for prior misconduct and needed to petition for reinstatement before he could be readmitted to the practice of law.) The Court, however, decided that enough was enough! Considering Mr. McCloud's substantial experience in the law, prior discipline—including prior discipline for similar misconduct—and lack of remorse, more severe discipline was warranted, causing the Court to depart significantly from the referee's recommendation (which is accorded great deference) to impose disbarment. For most readers, this may seem obvious, but previous cases had generally not placed such significant weight on aggravating factors. Mr. McCloud's case is without doubt unique to the aggravating factors present, but it also is a reminder that deterrence is an important aspect of attorney discipline, and McCloud's is a cautionary tale for lawyers with significant prior discipline who find themselves before the Court again.

Other cases

Wisconsin attorney John Ryan was publicly reprimanded for his unauthorized practice of law in Minnesota. Mr. Ryan was general counsel for a Minnesota corporation headquartered in Minnesota with extensive healthcare facilities in Minnesota. But Mr. Ryan never became licensed to practice law in Minnesota, even though he lived and worked in Minnesota for years. Lee Hacklander was publicly reprimanded for signing opposing counsel's name to a document without approval. Mr. Hacklander's misconduct normally would have resulted in a suspension, but he had mitigating factors. We continue to see cases where lawyers sign other people's names to documents without permission and file them with the Court. Even if the content of the document is accurate, you are making a knowing false statement to the Court by that act of signing without approval, which is serious misconduct.

Conclusion

Thankfully, public discipline is rare given the high number of complaints that we receive, but serves an important function. Thanks to the thousands of lawyers in Minnesota who engage in law practice without incident. If you need assistance in understanding your ethical obligations, please do not hesitate to call our Office. Every day a lawyer is available free of charge to answer your ethics questions. ▲

If you need assistance in understanding your ethical obligations, please do not hesitate to call the Office of Lawyers Professional Responsibility.
651-296-3952

Lessons from recent private discipline

BY SUSAN M. HUMISTON ✉ *susan.humiston@courts.state.mn.us*

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Private discipline is issued when a lawyer has violated an ethics rule, but the conduct is "isolated and nonserious." Rule 8(d), Rules on Lawyers Professional Responsibility (RLPR), states: "In any matter, with or without a complaint, if the Director concludes that a lawyer's conduct was unprofessional but of an isolated and non-serious nature, the Director may issue an admonition." Each year for decades, the Director has issued 80-120 admonitions. In 2025, 91 admonitions were issued. Most of these decisions are accepted by both complainants and respondents. In 2025, complainants appealed seven admonition determinations—all of which were affirmed. Respondent lawyers challenged four admonitions. One resulted in public discipline, one appeal was withdrawn, one admonition was affirmed, and one admonition was reversed. What lessons can be gleaned from a review of private discipline?

Lesson 1: Nonrefundable fees are still unethical

Every year lawyers are disciplined for failing to follow Rule 1.5, Minnesota Rules of Professional Conduct (MRPC), relating to fee agreements. For example, since 2011, it has been unethical in Minnesota to describe a fee as nonrefundable. Rule 1.5(b)(3), MRPC, states: "Fee agreements may not describe any fee as nonrefundable or earned upon receipt but may describe the advance payment as the lawyer's property subject to refund." The latter phrase applies to flat fees paid in advance of legal services being performed, not all advance payments made by clients. For the handling of those advance payments, please review Rule 1.15, MRPC.

Every year, we see lawyers include impermissible language in their fee agreement and they are always disciplined. Usually, it is more senior lawyers who perhaps remember a time when nonrefundable fees were not expressly prohibited, but last year we also saw newer lawyers receiving discipline for this violation. If you charge clients for your services and you have not recently reviewed Rule 1.5, MRPC, in its entirety (it is very different from the model rule), you are doing yourself a disservice.

Lesson 2: Ethics complaints are not leverage or bargaining tools

On our ethics hotline, we often provide advice to lawyers on whether they have a duty under Rule 8.3, MRPC, to report what they believe to be the ethical misconduct of other lawyers. We also discuss with lawyers how to handle this situation consistent with the ethics rules. Sometimes lawyers are disciplined because they try to use the threat of an ethics complaint as leverage. In 2025, a lawyer was disciplined under Rule 4.4(a), MRPC, for misconduct related to threatening to file an ethics complaint against opposing counsel for not providing information the lawyer wanted and believed opposing counsel should provide. Rule 4.4(a), MRPC, provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." In this matter, the lawyer threatened before others in unrelated proceedings on more than one occasion to file an ethics complaint against opposing counsel. Opposing counsel maintained the information sought was confidential under Rule 1.6(a), MRPC, and not something that could be disclosed. Instead of simply filing a complaint because he believed he had a basis to do so, or using available civil procedure remedies to obtain discoverable information, respondent argued that he had a substantial purpose in his actions, namely, leverage to attempt to compel disclosure. The Director disagreed.

Lawyers need to take care in these situations. Lawyers have been disciplined, usually under Rule 8.4(d), MRPC, for seeking to settle ethics complaints by asking former clients to withdraw an ethics complaint that has been filed in exchange for some resolution in a dispute between the lawyer and complainant. Lawyers have been disciplined for bargaining away criminal referrals in attempts to gain leverage in a civil proceeding. Lawyers are free to share their view that opposing counsel's conduct is inconsistent with the ethics rules. Lawyers are free to share their view that they have a duty to report or will be reporting opposing counsel for conduct they believe to be an ethics violation. Lawyers are free to state their

opinion that conduct may raise criminal as well as civil liability. But when you start bargaining about whether a complaint will be made, or taking coercive actions related to those claims, you run the risk of moving from permissible conduct to impermissible conduct.

Lesson 3: Discovery violations can lead to ethics violations

We are seeing more violations of Rule 3.4(d), MRPC. This rule provides that a lawyer shall not, "in pretrial procedures, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party." Both civil and criminal attorneys have been receiving discipline for violations of this rule, including, as one example, a county attorney who did not make reasonably diligent efforts to disclose the notes taken by a victim witness coordinator taken during meetings with witnesses. In that case, the attorney notes of the meetings were produced, but the witness coordinator's notes were not produced, and those notes were more detailed. I was a civil litigator for years and know that discovery is no fun. But Rule 3.4, MRPC, contains several subparts focused on "fairness to opposing party and counsel" that have implications for discovery, and can be violated even if sanctions (the typical penalty imposed for discovery violations) are not awarded by the courts.

Lesson 4: Understand your confidentiality obligations to former clients

Lawyers can be adverse to former clients' interests in unrelated matters under Rule 1.9(a), MRPC, without the former client's informed consent. But Rule 1.9(c), MRPC, can cause issues if lawyers fail to appreciate the breadth of their confidentiality obligation to that former client. Rule 1.9(c), MRPC, provides: "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these rules would permit or require with respect to a client."

Lawyers sometimes mistakenly read this as focused on covering or limiting use of only secret or attorney-client privileged information. The rule is much broader, because your confidentiality obligation under Rule 1.6(a), MRPC, prohibits disclosure of "information relating to the representation of the client" unless it falls within an enumerated exception under Rule 1.6(b), MRPC. And the ABA has issued a formal opinion, which this office follows, regarding the "generally known" exception referenced in Rule 1.9(c)(1), MRPC. Specifically, ABA Formal Opinion 479, issued December 15, 2017, holds that the "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) "only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade." The opinion specifically provides that "[i]nformation is not 'generally known' simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information." Similarly, the exceptions in Rule 1.6(b), MRPC, do not include an exception for information that has been publicly disclosed in court or is available in court records.

In addition to limiting what can be used or revealed regarding former clients (a violation of which can lead to discipline under Rule 1.9(c)), your duty to your former client to keep information relating to the representation confidential can create a current conflict in an unrelated representation if your obligation to keep that confidence limits a current representation. Rule 1.7(a)(2), MRPC, defines a concurrent conflict of interest to include "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer." The combination of these rules has led to discipline in several cases—including, in 2025, discipline for four public defenders for conflicted representation without informed consent and for disclosing confidential information relating to a prior representation.

Conclusion

Historically, approximately 20 percent of complaints result in discipline, and most of that discipline is private discipline. The Court also has under advisement a diversion rule, which would allow the office to resolve matters through a diversion program when there has been a rule violation, an option not currently available. Periodically reviewing the Rules of Professional Conduct is great advice to avoid rule violations. And remember, we are here to help you proactively. If you need assistance in understanding your ethical obligations, please do not hesitate to call our Office. Every day a lawyer is available free of charge to answer your ethics questions. We much prefer providing guidance in advance to disciplining lawyers later. ▲

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 520 **January 21, 2026**

A Lawyer's Obligation to Convey Information to a Former Client or Successor Counsel

Model Rule 1.16(d) requires a lawyer to respond to requests for information from former clients or successor counsel in certain limited circumstances when doing so is necessary to protect client interests and reasonably practicable. Ordinarily, such a request will require a response when the requested information was acquired by the lawyer during the course of the representation, is unavailable from other sources, and is important to the client's interests in the matter in which the lawyer formerly represented the client. Rule 1.16(d) does not require a lawyer to take steps to acquire new information, generate written responses, or provide further legal services to the client in response to a request for information.

Introduction

Rule 1.16(d) of the ABA Model Rules of Professional Conduct requires, in part, that: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests." This Opinion concludes that, at times, reasonably practicable steps required by Rule 1.16(d) include complying with a request by a former client or by a former client's successor counsel for certain information that is not already memorialized in the client's file. This is a limited duty, however. In many circumstances, prompt compliance with a former client's request for the client's file will provide all the material information available because the file is well maintained and complete in accordance with the law of the jurisdiction.[1]

Discussion

Rule 1.16(d) of the ABA Model Rules of Professional Conduct requires lawyers "[u]pon termination of representation" to "take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." This duty arises "[e]ven if the lawyer has been unfairly discharged by the client."[2] As the Committee recently explained in ABA Formal Opinion 516 (2025), the particular interests that Rule 1.16 protects are those relating to the matter in which the lawyer represents the client.

[1] Through case law on property rights or agency law and ethics opinions, many jurisdictions have examined the question of what constitutes the "file" for the purposes of Rule 1.16(d) and determined which papers and property a lawyer must return, reproduce, or provide to a client. Nothing in this Opinion is intended to supersede those authorities.

[2] MODEL RULES OF PROF'L CONDUCT R. 1.16, cmt. [9] (2025) ("Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.").

In ABA Formal Opinion 471 (2015), the Committee addressed one step that Rule 1.16(d) specifically identifies, namely, the lawyer's obligation, upon request, to surrender "papers and property to which the client is entitled" to the former client or successor counsel. The steps listed by Rule 1.16(d) are not exclusive but are instead illustrative. In Opinion 471, the Committee reaffirmed that under the Model Rules, a lawyer must provide the client with "end product – the certificates or other evidence of registration of the trademark, searches conducted and paid for, significant correspondence, applications and materials filed in aid thereof, receipts, documents received from third parties, significant documents filed in the administrative and court proceedings, finished briefs whether filed or not if they pertain to the right of the client to the use or registration of the mark in question."[3] At the same time, Opinion 471 recognized that a lawyer terminating the representation will sometimes be required to provide written information that is not ordinarily included in the client's file, although Rule 1.16(d) does not expressly so state. Specifically, the Opinion noted "that when a lawyer has been representing a client on a matter that is not completed, . . . the former client may be entitled to the release of some materials the lawyer generated for internal law office use primarily for the lawyer's own purpose in working on a client's matter."[4]

The question considered by this Opinion is whether the lawyer may also have an obligation to provide certain unrecorded information acquired in the course of the terminated representation. Specifically, we address whether the former lawyer has any obligation under Rule 1.16(d) to respond to a request for information that is not memorialized in file materials, including information explaining or elaborating on the materials contained in a previously surrendered file. Neither the text nor the comment to Rule 1.16 explicitly addresses this question.

Before the representation ends, a lawyer has an obligation under Rule 1.4(a) to "promptly comply with [the client's] reasonable requests for information," but the Committee recognized in Formal Opinion 481 (2018) that this Rule does not apply after the representation ends.[5] Therefore, a lawyer has no obligation under Rule 1.4(a) to inform a former client of a material error made during the course of the representation but discovered after the representation ended. The Opinion further concluded that Rule 1.16(d) does not require a lawyer to volunteer this newly discovered information to a former client.[6]

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[3] ABA Comm. on Ethics & Pro. Resp., Formal Op. 471, at 4 (2015).

[4] Unlike ABA Formal Opinion 471, which adopted the narrower "end product" approach to determining which papers and property must be returned to the client, opinions in some other jurisdictions have adopted the more expansive "entire file" approach to that issue. *See, e.g.*, Wis. Formal Op. EF-16-03 (2016); Cal. Formal Op. 1992-127 (1992) (applying prior version of California rules). Although this Opinion cites authorities from jurisdictions that follow the "entire file" approach, this Committee does not intend to suggest that it no longer adheres to the "end product" approach adopted in Opinion 471.

[5] The Opinion states: "Nowhere does Model Rule 1.4 impose on lawyers a duty to communicate with former clients. The comments to Model Rule 1.4 are likewise focused on current clients and are silent with respect to communications with former clients. There is nothing in the legislative history of Model Rule 1.4 to suggest that the drafters meant the duties expressed there to apply to former clients. Had the drafters of the Model Rules intended Rule 1.4 to apply to former clients, they presumably would have referred to former clients in the language of the rule or in the comments to the rule. They did neither despite knowing how to distinguish duties owed to current clients from duties owed to former clients when appropriate, as reflected in the Model Rules regulating conflicts of interest."

[6] The Opinion stated: "This provision does not create a duty to inform former clients of material errors for at least two reasons. First, the wording of the rule demonstrates that the error would have to be discovered while the client

In certain areas of practice, however, lawyers who terminate a representation are expected to provide non-memorialized information to the client or successor counsel, although not necessarily as a matter of obligation under the rules of professional conduct. For example, the ABA's Criminal Justice Standards for the Defense Function and various other writings recognize an expectation that criminal defense lawyers will respond to requests for information from former clients or their new counsel. Standard 4-9.2(a) (4th ed. 2017) of the Defense Function Standards reads: "Appellate defense counsel should seek the cooperation of the client's trial counsel in the evaluation of potential appellate issues. A client's trial counsel should provide such assistance as is possible, including promptly providing the file of the case to appellate counsel." This identifies an explicit and affirmative professional norm in criminal defense practice to assist successor counsel, insofar as reasonably possible, in evaluating the client's matter in a criminal representation.

Section 33(c) of the Restatement (Third) of the Law Governing Lawyers identifies another limited responsibility to convey information to a former client, arising out of the lawyer's former role as the client's agent. Section 33 provides that lawyers must "take reasonable steps to convey to the former client any material communication the lawyer receives relating to the matter involved in the representation." For example, the lawyer may receive correspondence, or a phone call, containing information that has not also been transmitted to the client or successor counsel. In certain situations, agency law appears to impose a broader duty. The Restatement of Agency says that "if the agency terminates without the fault of the principal, the agent is under a duty thereafter to give the principal relevant information received by the agent when acting as such."[7] Neither provision limits the disclosure obligation to written information.

Wisconsin courts have found a post-termination obligation to respond to requests for information from former clients or successor counsel. In *Disciplinary Proceedings against Winkel*, 217 Wis. 2d 339 (1998), a lawyer was disciplined for violating Wisconsin's Supreme Court Rule 20:1.4[8] by failing to respond to requests, shortly after the end of the representation, from successor counsel for information necessary to conclude the matter. Subsequently, in *Disciplinary Proceedings against Baehr*, 250 Wis. 2d 541 (2002), a lawyer was found to have violated Wisconsin's Supreme Court Rule 20:1.4 by failing to respond to requests for information from a former client after the lawyer had been disciplinarily suspended. These cases suggest some obligation to respond to certain requests for information from former clients.

Similarly, State Bar of California Formal Opinion 1992-127 concluded that trial counsel has an obligation to cooperate with appellate counsel's request for information that was not recorded. The Committee stated:

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was a current client, thereby pushing any duty to disclose back into the current client communication regime. Second, Model Rule 1.16(d) is by its terms limited to actions that may be taken upon termination of the representation or soon thereafter; it cannot reasonably be construed to apply to material errors discovered months or years after termination of the representation."

[7] RESTATEMENT (SECOND) OF AGENCY § 381, cmt. f.

[8] Wisconsin's rule at the time was substantively identical to Model Rule 1.4. As explained in Formal Opinion 481, this Committee does not believe that Model Rule 1.4 imposes an obligation to communicate with former clients, and the discussion of these Wisconsin cases is not meant to suggest otherwise. Rather, these cases are discussed for the more general proposition that a lawyer may, in some circumstances, have an obligation to convey information to a former client.

> "It is the opinion of the Committee that the attorney's obligation to cooperate with successor counsel is grounded in rule 3-700, and that the original attorney is obligated to assist her former client by providing him or her with all materials generated as a result of the representation. Where the need arises for successor counsel to learn matters that have not been reduced to writing, the original attorney should provide this information to the client and to successor counsel, and if such assistance would require extensive effort from former counsel, the attorney may properly seek compensation for such effort."[9]

Taken together, these authorities implicitly recognize that "to protect a client's interests" it is sometimes necessary for a lawyer who terminated, or is terminating, a representation to convey information that was not recorded and maintained in the client's file. Ordinarily, if the importance of the information is evident, the lawyer should convey the information before or promptly upon terminating the representation, whether by putting the information in writing, transmitting it in a conversation with successor counsel, or communicating it in some other manner. But nothing in Rule 1.16(d) suggests that a lawyer's failure to memorialize information during the representation or to convey it promptly after terminating the representation entirely obviates the lawyer's responsibility. When a request makes it evident that unrecorded information is necessary to protect the former client's interests in the matter, the former counsel must convey such information if it is reasonably practicable to do so. Such a necessity may arise, for example, when the requested information will assist successor counsel in completing the representation. Of course, a lawyer's memory may fade over time. But, if the lawyer recalls the information, and the unrecorded information is needed to protect the client's interests in the matter, the lawyer must take reasonably practicable steps to provide it, whether it is requested contemporaneously with the termination of the representation or later.[10]

This duty is limited, however, by the provision that complying with the request actually be necessary "to protect the client's interests" in the matter undertaken by the lawyer and that compliance be "reasonably practicable." Rule 1.16(d) does not require a lawyer to comply with the former client's or successor counsel's request if the requested information is not necessary to protect the client's interests in the matter (although the lawyer certainly may comply voluntarily out of concern for the former client or as a matter of professionalism). An example of a legitimate need is when the requested information is material to the successor counsel's representation in the matter previously conducted by the lawyer,[11] such as when the information is important to a full understanding of the ongoing legal matter at the time the information is requested. In transactional representations, information may be needed to successfully complete negotiations or to understand the former client's obligations or those of its counterparty under a contract. The usefulness of requested information may change over time.

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[9] California Rule of Professional Conduct 3-700 governed withdrawal and was in force when California Formal Opinion 1992-127 was issued. In 2018, it was replaced by California Rule of Professional Conduct 1.16, which is similar but not identical to ABA Model Rule 1.16.

[10] This obligation as an analogue of the obligation to surrender the file to a former client or successor counsel because both are requests for relevant information about the matter. It is undisputed that the obligation to surrender the file is not time-limited to immediately upon termination or shortly thereafter.

[11] There is no definition of "material" in the Model Rules. Model Rule 4.1(a) prohibits lawyers from knowingly making false statements of "material" fact to third parties and in *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435 (Md. 2002), the court held that a fact was material in the context of that rule "if it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the settlement." *Id.* at 449.

The request must also be for information already acquired in the context of work already performed for the former client. If necessary to protect the client's interests relevant to the representation, this may include, for example: (a) factual information that could have been, and perhaps should have been, memorialized, regarding, for example, an interview with a client or material witness or what happened off the record in court or in settlement negotiations with opposing counsel; (b) the original lawyer's strategic or tactical reasons for actions taken in the course of representing the client; (c) that lawyer's impression of a witness's credibility; or (d) the lawyer's un-memorialized communications with the client.[12] In other words, the obligation is a counterpart to the obligation to surrender file materials. It applies to material information previously acquired by the lawyer regarding work conducted in the course of the lawyer's representation of the client.

Lawyers do not have an obligation under Rule 1.16(d) to provide information that is readily accessible elsewhere or by other means. For example, if the lawyer has surrendered the file according to the law of the jurisdiction, and the former client is asking for information readily available from the court system's website, the lawyer would have no obligation to provide the information. If the lawyer provided the file and other evidently important information at the time the representation ended, that lawyer can ordinarily assume in the absence of a request that any additional unrecorded information is not necessary to protect the former client's relevant interests. Therefore, the lawyer generally does not have an obligation to provide additional information unless requested.

Lawyers also do not have an obligation to provide information when the request concerns a different matter from the one in which the lawyer represented the former client.[13] For example, a lawyer who withdraws from the representation before a litigation or transaction is completed may have an obligation under Rule 1.16(d) to comply with requests for needed information even if the lawyer's own role in the litigation or transaction was limited in scope and the lawyer completed the work in the matter for which the lawyer was retained. However, a lawyer who represented a client in a completed business transaction would not have an obligation under Rule 1.16(d) to comply with a request for information to be used in a subsequent lawsuit between the parties to the transaction, because that would be a new matter, even though it grew out of the transaction in which the lawyer provided legal services.

Additionally, lawyers are not required to generate further work product such as producing affidavits or memos, because that would normally exceed the "reasonably practicable" limitation. There also is no requirement that the lawyer make any attempt to retrieve information not already in the lawyer's possession or otherwise known to the lawyer. If the lawyer does not recall the answer to a request, there is no obligation to perform further work, such as reviewing a court file, to refresh the lawyer's recollection. Lawyers are also not obligated to respond to repetitive or

[12] This list is illustrative rather than exhaustive.

[13] Model Rule 1.11(e) defines a matter as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties." As noted in that rule, the definition is specific to Model Rule 1.11. Nonetheless, it provides useful guidance here.

excessively time-consuming requests,[14] nor are they required to educate former clients or successor counsel on the law.

Finally, once a representation is over, a lawyer obviously has no obligation to respond to a request for information by performing further legal services, such as providing legal advice to the former client, in the absence of an explicit agreement to do so. When the request is coming from an unrepresented former client, the lawyer should be careful to explain that the lawyer no longer represents the former client and is not providing further legal representation. Of course, a lawyer may voluntarily agree to provide further assistance to a former client, but the lawyer is not obligated to do so under MR 1.16(d).

If the request is coming from successor counsel representing the former client, the lawyer should confirm that the former client has given consent for the disclosure as required by Rule 1.9(c). Further, the requesting lawyer should disclose the reason for the request so the responding lawyer may properly evaluate and understand the request. In doing so, the requesting lawyer must be mindful of the lawyer's obligation under Model Rule 4.1 to refrain from making any false statements of material fact or law.

Illustrations

To illustrate the principles set out above, we offer the following examples of how they would generally apply. Of course, in actual practice, the relevant facts may be more complex or nuanced.

First, suppose that a lawyer represented a defendant in a state criminal matter at the trial level. After the defendant's conviction is affirmed on appeal, post-conviction counsel is retained. Post-conviction counsel requests the trial file from the trial lawyer, who promptly complies with the request. After reviewing the file, post-conviction counsel is considering arguing for a new trial based on ineffective assistance of counsel but needs to ask the trial lawyer about strategy decisions not documented in the files. After consulting with and obtaining the informed consent of the client, post-conviction counsel reaches out to the lawyer and asks to schedule a brief phone call to ask questions to determine whether an ineffective-assistance-of-counsel claim may have merit. Post-conviction counsel informs trial counsel that the client has given informed consent for the conversation. The lawyer in this situation may not refuse post-conviction counsel's request for a few minutes of time for a phone call to discuss the strategic decisions made in the case. Although the post-conviction proceedings may be nominally civil proceedings, they are the same matter as the criminal trial and appeal for purposes of Rule 1.16(d) because they are a later stage in litigation between the state and an individual regarding whether that individual should be punished for alleged criminal conduct.[15] Further, the reasons for trial counsel's decisions are necessary to protect

[14] What constitutes an excessively time-consuming request of course is in some sense subjective, but as with many matters, the request should be viewed through the lens of reasonableness.

[15] We recognize that different arms of the state may be nominally involved in the different proceedings – for example, the "state," "people," or "commonwealth" at the trial stage and, in some situations, the warden of the prison where the individual is confined at the post-conviction stage. Further, the question of whether trial counsel rendered ineffective assistance of counsel will likely be a new legal issue, not one raised at the trial stage. Nonetheless, the post-conviction proceedings challenging the fairness of a criminal trial will build on the record at the trial stage together with any additional evidence adduced in later proceedings and, like an appeal, are a

the former client's interests, *i.e.*, to determine whether legal and factual grounds exist for a claim of ineffective assistance of counsel. The information is also directly related to the matter in which trial counsel represented the client and it is available to trial counsel. Trial counsel, however, would not be obligated to produce written answers to questions, submit a sworn statement, or agree that the conversation be recorded or transcribed. Trial counsel would also be free to refuse a request that trial counsel take extra time to review written materials before discussing the matter.

Second, suppose that a lawyer represented a client in the sale of a business. After negotiations began, the client became dissatisfied with the lawyer's services and obtained successor counsel, who then requested the file from the lawyer. When reviewing the file, successor counsel could not determine why a specific term had been omitted from the most recent draft of the proposed terms of sale, and the client cannot recall any discussion with the lawyer about it. The lawyer must answer successor counsel's questions about the omission of the term, to the extent that the lawyer is able to do so, because the information requested is important to a full understanding of the status of the ongoing transactional matter and it is reasonably practicable for the lawyer to provide the information.

Third, suppose a lawyer represented a client in negotiating and agreeing to a contract for a commercial transaction. After the transaction was over, the former client became dissatisfied with the lawyer's work and believed that the lawyer's deficient representation caused economic harm. Upon the former client's request, the lawyer conveys the client's complete file. The former client then retains the services of a litigator, who contacts the lawyer and asks the lawyer to answer some questions about why certain actions were taken. When the former lawyer asks whether that information will be used to evaluate a potential malpractice action against that lawyer, the litigator admits that it could be. The initial lawyer is not obligated to answer the questions, because a malpractice action against the lawyer would constitute a different, albeit related, matter from the transaction in which the lawyer provided legal services.

Conclusion

Lawyers often completely fulfill their obligations under Model Rule 1.16(d) to protect client interests upon termination of the representation by surrendering the file upon request and refunding unearned advanced fees and unexpended costs. There are limited situations, however, where a lawyer must comply with requests for information from successor counsel or a former client. Ordinarily, such a request will require a response when the requested information was acquired by the lawyer during the course of the representation, is unavailable from other sources, and is important to the client's interests in the matter in which the lawyer formerly represented the client. Rule 1.16(d) does not require a lawyer to take steps to acquire information, research and generate written responses, or provide further legal services to the client in response to a request for information.

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reasonably foreseeable stage of continued litigation between the individual and the state. We therefore regard such proceedings as part and parcel of the state's prosecution of a criminal defendant, meaning that the obligations under Rule 1.16(d) continue. In contrast, a post-conviction proceeding where the convicted defendant challenges prison conditions will not be the same matter as the criminal trial for purposes of Rule 1.16(d).

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 521 **February 18, 2026**

The Judicial Canons of Ethics Applicability to the Administrative and Supervisory Role of a Judge

This opinion examines the ethical obligations of judges under the ABA Model Code of Judicial Conduct when exercising administrative, employment, and supervisory authority. The Canons and Rules governing impartiality, integrity, and independence - particularly Canons 1 and 2 and associated rules require judges to administer chambers and court staff with the same fairness and neutrality that guide adjudication. The opinion explains that ethical duties extend beyond the courtroom to include merit-based appointments, the prevention of bias and harassment, and the avoidance of favoritism or the appearance of impropriety in all administrative decisions. Judges fulfill these obligations by ensuring that their use of administrative authority promotes public confidence in the judiciary's independence and integrity.

I. Introduction

Due to the nature of their work and the need for the public to have confidence in their impartiality, judges have ethical obligations that extend well beyond their conduct on the bench. Canon 1 of the *ABA Model Code of Judicial Conduct* requires judges to uphold and promote the independence, integrity, and impartiality of the judiciary, and to avoid both impropriety and the appearance of impropriety. Rule 1.2 further provides that a judge must "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." These principles apply not only to a judge's adjudicative functions but also to their administrative and supervisory responsibilities.

Public perception of whether a judge is impartial can be shaped by the judge's actions and decisions outside the cases before the court. Accordingly, the Model Code makes clear that ethical obligations extend to a judge's exercise of employment, supervisory, and administrative authority, which are also "duties of judicial office" within the meaning of Canon 2. Under Rule 2.3(A), judges must perform all duties, including administrative ones, "without bias or prejudice." Rule 2.3(B) prohibits judges from engaging in or permitting harassment or discrimination by court staff, and Rule 2.12 imposes supervisory duties to ensure that others subject to the judge's direction and control also act "in a manner consistent with the judge's obligations" under the Model Code. Likewise, Rule 2.13 requires judges to make administrative appointments impartially and on the basis of merit, avoiding favoritism, nepotism, or the appearance of political influence.

These obligations apply to all individuals under a judge's authority, including law clerks, courtroom deputies, administrative assistants, interns, externs, security personnel, and other members of chambers or court staff. The ethical responsibility to administer chambers fairly and without bias is essential to maintaining public confidence in the judiciary's independence and integrity.

This opinion explains, elaborates on, and illustrates judges' ethical responsibilities in their administrative and supervisory roles. This opinion, however, does not address the substance of judicial rulings or adjudicative bias, which are governed by the recusal and disqualification provisions of Rule 2.11 and related doctrines.

II. Public Confidence in Judicial Integrity and Independence

Canon 1 of the ABA Model Code of Judicial Conduct provides that a judge "shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Rule 1.2 elaborates that a judge "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Rule 2.4 likewise forbids judges from allowing family, social, political, or other relationships to influence their judicial conduct or judgment, reinforcing the expectation of independence in all professional roles. Together, these provisions make clear that a judge's ethical obligations are not confined to the courtroom; they extend to every aspect of judicial service, including administrative, supervisory, and employment-related functions. Comment [1] to Rule 1.2 explains that public confidence "is eroded by improper conduct and conduct that creates the appearance of impropriety." The test for such an appearance is whether the conduct "would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."[1]

Because administrative conduct can affect perceptions of impartiality as much as adjudicative behavior, judges must ensure that all employment and supervisory decisions reflect the same commitment to neutrality and fairness required on the bench. Rule 1.2 recognizes that confidence in the judiciary depends not only on the absence of actual bias but also on the appearance that decisions are made free from favoritism or ideological influence. The Code therefore expects judges to maintain independence in their administrative functions by avoiding conduct that could reasonably be perceived as reflecting personal, political, or social bias. Comment [2] to Rule 1.2 observes that judges must "accept the restrictions imposed by the Code" and "expect to be the subject of public scrutiny" greater than that faced by ordinary citizens.

Judges also may not use the prestige of judicial office to advance personal economic interests. Rule 1.3 prohibits such misuse, emphasizing that judicial authority must be exercised to serve the public interest rather than personal preference. Employment or supervisory decisions influenced by personal relationships, political affiliations, or institutional loyalties may create an appearance of favoritism inconsistent with Canon 1's requirement of impartiality. This prohibition ensures that judges administer their chambers and court offices in a manner that reflects the judiciary's institutional integrity rather than the judge's individual predilections.

Ultimately, ethical administration of chambers and staff is essential to maintaining public trust in the judiciary as an institution. The public's confidence in the courts depends on the belief that all judicial actions—whether in rulings or in managing personnel—are guided by principles of fairness, independence, and neutrality. When judges apply these same standards to their supervisory and administrative duties, they reinforce the perception that the judicial process is impartial in both outcome and operation. By contrast, administrative decisions that appear

[1] MODEL RULES OF PROF'L CONDUCT R. 1.2, cmt. [5] (2025).

arbitrary, biased, or politically motivated risk undermining the very foundation of judicial legitimacy that Canons 1 and 2 are designed to protect.

Illustration 1: Application Processes and Perceived Bias

A judge participates in a courthouse summer pipeline program designed to expand access to judicial internships. Over several years, however, the judge consistently invites applications only from students who attended the judge's alma mater, declining to consider equally qualified applicants.

Although the judge's intent in limiting participation to students from her alma mater may be to ensure that the judge supports graduates of her alma mater, the Model Code of Judicial Conduct makes clear that public perception, not private motive, is the measure of ethical propriety. Canon 1 directs judges to uphold and promote the independence, integrity, and impartiality of the judiciary and to avoid impropriety and its appearance. Rule 1.2 reinforces this obligation by requiring that a judge act in ways that promote public confidence in the judiciary's independence and integrity. Applying the appearance-of-impropriety test, a reasonable observer could conclude that the judge's consistent exclusion of students from other educational institutions suggests a bias or institutional preference inconsistent with the judiciary's obligation of neutrality.

Even where no discriminatory motive exists, the appearance that judicial opportunities are reserved for those from particular educational institutions may undermine the public confidence in the judiciary's openness and impartiality. Public trust depends not only on actual fairness but on the perception that judges exercise administrative discretion free from favoritism, elitism, or social bias. Rule 2.3(A) extends this principle beyond adjudication by requiring judges to perform "administrative duties without bias or prejudice," and Rule 2.3(B) prohibits conduct that could reasonably be understood as manifesting prejudice. A pattern of exclusion based on institutional affiliation may therefore raise concerns that the judge's administrative actions reflect social or ideological preferences rather than merit-based criteria, contravening the spirit of impartial administration required by Canons 1 and 2.

Moreover, because the judge's participation in a publicly sponsored educational program involves the exercise of judicial prestige, Rule 1.3's restriction also applies. That rule forbids using "the prestige of judicial office to advance the personal or economic interests of the judge or others." By consistently favoring applicants from the judge's alma mater, a judge may unintentionally convey that the judiciary endorses or privileges certain institutions, thereby using judicial status to advance private or institutional interests. Even absent intent, this creates a risk that the public perceives the judge's administrative authority as being exercised in a manner inconsistent with judicial independence and neutrality. Though a judge is not precluded from selecting multiple individuals from the same school to serve with the judge simply because they have that common background, the judge is required to consider whether that creates an appearance of impropriety and, if so, select another qualified candidate.

Additionally, there is an obligation inherent in the position to fairly fill opportunities with the court, whether in the form of a summer program, clerkships, or otherwise. Judges are government employees and, in so doing, are allocating positions that do not belong to the judges personally.

Rather, they are tied to limited public resources. Accordingly, there is a responsibility owed to the public to use the judgment for what best serves the court, rather than personal preferences.[2]

Taken together, Canons 1 and 2 and Rules 1.2, 1.3, and 2.3 establish that judges must not only act impartially but also avoid conduct that reasonably appears partial or exclusive. This hypothetical illustrates how seemingly benign administrative choices—when viewed through the lens of public perception—can erode confidence in the judiciary's fairness. Upholding the integrity of the judiciary therefore requires judges to ensure that opportunities for participation in educational or professional programs under judicial supervision are administered on objective, merit-based, and inclusive criteria consistent with the Code's overarching commitment to public trust and equal access to justice.

Illustration 2: Use of Judicial Influence

A state supreme court justice becomes aware that her neighbor is the subject of a criminal investigation for alleged misuse of public funds. Believing the investigation is unfair, the justice privately contacts senior executive officials and urges them to halt or redirect the inquiry.[3]

Even if motivated by loyalty, compassion, or a belief that the investigation is unjust, the judge's actions would violate the core ethical principles that preserve judicial independence. Canon 1 and Rule 1.2 require judges to uphold and promote public confidence in the independence, integrity, and impartiality of the judiciary and to avoid both impropriety and its appearance. When a judge uses or appears to use the prestige of judicial office to influence an executive or law-enforcement process, a reasonable observer could conclude that the judge has subordinated the impartial exercise of judicial responsibilities to personal relationships. Such conduct undermines the public's expectation that judicial authority will be exercised solely in the service of justice and the rule of law.

Rule 2.4(B) expressly prohibits judges from permitting "family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." Comment [1] cautions that confidence in the judiciary "is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." This rule reflects the understanding that judicial independence is not merely the absence of actual bias but also the maintenance of public confidence that decisions are made free from the influence of personal loyalty or external pressure. When a judge intervenes in a governmental investigation for a neighbor, particularly one with whom the judge holds a close relationship, the act signals to the public that personal and institutional boundaries have been blurred—that judicial prestige may be used to obtain special consideration or protection. Even if the judge does not succeed in influencing the outcome, the mere attempt creates an appearance that the judiciary's independence can be compromised for private ends.

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[2] *See* PRINCIPLES OF THE LAW, GOVERNMENT ETHICS § 101 TD No 4 (2023) ("At the core of government ethics is the principle that public office is a public trust. Individuals who hold public office have a fiduciary duty to use their office to serve the public interest, not their private interest.")

[3] *See e.g.*, Manny Marotta, *State Supreme Court Justices and Ethics Investigations*, STATE COURT REPORT (Jun. 11, 2025), https://statecourtreport.org/our-work/analysis-opinion/state-supreme-court-justices-and-ethics-investigations.

The use of judicial position to advance or shield personal interests also implicates Rule 1.3, which forbids using "the prestige of judicial office to advance the personal or economic interests of the judge or others." The integrity of the judicial office depends on strict adherence to this principle: judges must not leverage their title, reputation, or institutional influence to affect matters outside their adjudicative or administrative responsibilities. The public's perception that a judge may deploy judicial authority to benefit a family member, neighbor, or other associate undermines the judiciary's credibility as an impartial arbiter. Maintaining that credibility requires judges to avoid both the reality and the perception that judicial authority is exercised for private advantage.

In combination, Canons 1 and 2 and Rules 1.2, 1.3, and 2.4 underscore that judicial ethics demand restraint and neutrality not only in deciding cases but in every use of judicial influence. The appearance that a judge has sought to influence another branch of government on behalf of a neighbor or family member—or has otherwise invoked judicial authority for private benefit—compromises the perception that judges are guided by law and principle rather than by personal loyalty or interest. Upholding public confidence in the judiciary therefore requires judges to avoid any action that could reasonably be understood as exploiting the prestige of office or conveying favoritism, bias, or undue influence. The legitimacy of judicial authority rests as much on perception as on performance; it depends on the consistent demonstration, in both adjudicative and administrative contexts, that judges exercise power with impartiality, integrity, and restraint. When a judge's personal relationships or external pressures appear to shape the exercise of official power, both the reality and the appearance of judicial integrity are imperiled.

III. Merit-Based and Impartial Decision-Making in Appointments

Rule 2.13(A)(1) of the ABA Model Code of Judicial Conduct provides that a judge "shall exercise the power of appointment impartially and on the basis of merit." Rule 2.13(A)(2) further instructs that judges "shall avoid nepotism, favoritism, and unnecessary appointments." These provisions articulate an affirmative ethical duty: judges must ensure that administrative and employment decisions—including the hiring of law clerks, courtroom deputies, administrative assistants, interns, and other staff—are grounded in objective, merit-based criteria relevant to competence and performance. The comments to Rules 2.13 and 2.12 make clear that these obligations apply not only to formal judicial appointments, such as special masters or receivers, but also to the selection of all personnel "subject to the judge's direction or control."

Merit-based decision-making protects both the actuality and the perception of judicial impartiality. When judges base hiring or supervisory decisions on considerations unrelated to merits such as school affiliation, political affiliation, social ideology, or personal loyalty, they risk creating an appearance that the judiciary is influenced by external or partisan interests. Such perceptions undermine public confidence in judicial independence, which Canon 1 and Rule 1.2 identify as foundational to the legitimacy of the judicial system. The expectation that judges will select staff and appointees based on professional qualifications rather than political or ideological alignment ensures that judicial administration reflects the same neutrality and fairness that must characterize adjudicative decision-making.

Rule 2.4 reinforces this expectation by prohibiting judges from permitting "family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."

Although Rule 2.4 is often applied in adjudicative contexts, its principle extends to administrative functions as well. Administrative choices that appear to favor those with personal or ideological proximity to the judge convey the impression that external influences shape judicial decision-making. The comment to Rule 2.4 warns that "confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." This admonition applies equally to the staffing, appointments, and management of a judge's chambers.

In short, Rule 2.13's command that appointments be made impartially and on the basis of merit, when read together with Canon 1 and Rule 2.4, creates a clear ethical mandate for objective and neutral administration. The judge's obligation is not merely to avoid actual favoritism or bias but also to prevent reasonable perceptions that non-merit factors influence hiring or supervisory decisions. Compliance with these provisions ensures that judicial administration exemplifies the same integrity and independence that the public expects from judicial rulings, thereby reinforcing confidence in the judiciary as an impartial and principled institution.

Illustration 3

Without any competitive process, a judge presiding in a county trial court appoints his son, a newly licensed attorney, to represent indigent defendants on the court's public-defender appointment list. The judge explains that his son is "qualified" and that the appointments will help the court manage a heavy caseload.[4]

Even if the son is competent to serve, the appointment is ethically impermissible because it creates the appearance of impropriety and favoritism—an appearance that erodes the public's trust in the judiciary's neutrality. Rule 2.13(A)(1) requires that judges make administrative appointments "impartially and on the basis of merit," while Rule 2.13(A)(2) directs judges to "avoid nepotism, favoritism, and unnecessary appointments." These provisions impose an affirmative obligation not merely to avoid actual favoritism, but to prevent circumstances that would lead reasonable observers to question whether personal relationships have influenced judicial decisions. The judge's decision to appoint a family member, even one fully qualified, fails to meet that standard because it reasonably appears that judicial power has been used to confer personal benefit.

The prohibition of nepotism serves a broader purpose than protecting against inefficiency or poor performance. It safeguards the judiciary's reputation for independence and integrity—values enshrined in Canon 1, which requires judges to "uphold and promote the independence, integrity, and impartiality of the judiciary" and to "avoid impropriety and the appearance of impropriety." When a judge's appointment decision favors a family member, the public's perception is that judicial authority can be used to secure private advantage. This appearance undermines the judiciary's institutional integrity by blurring the line between impartial public service and personal interest. Even if the appointment does not alter the outcome of any case, the public may lose confidence in the fairness of judicial administration because of the appearance that family ties, rather than objective qualifications, influence judicial appointments.

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[4] *See In re* Hon. Gina A. Tviet, No. 11462-F-216 (Wash. Nov. 19, 2015), *available at* https://www.cjc.state.wa.us/materials/activity/public_actions/2025/11462StipFINAL.pdf (Washington Commission on Judicial Conduct reprimanded a judge for allowing her adult children to be hired for court positions, creating an appearance of nepotism).

Rule 2.4(B) prohibits judges from allowing "family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment," and Comment [1] warns that "confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." This principle applies not only to adjudicative acts but also to administrative and supervisory decisions. A reasonable observer learning that a judge appointed their own child to a professional position outside of a competitive process would likely conclude that familial loyalty influenced the decision, and that perception alone—regardless of competence or intent—undermines the impartiality that Rule 2.13 protects. The duty to avoid nepotism embodies the judiciary's broader responsibility to model integrity in all aspects of governance: judicial offices and appointments are public trusts, not personal entitlements. To preserve confidence in judicial independence, judges must avoid both actual favoritism and the appearance of it, ensuring that all appointments and administrative decisions under Canons 1 and 2 and Rules 2.13 and 2.4 are grounded in merit, transparency, and fairness.

Illustration 4: Appointment Practices and Appearance of Favoritism

A trial court judge is responsible for appointing attorneys from an approved list to represent indigent defendants. Several of the qualified lawyers on the list are affiliated with advocacy organizations that engage in public policy work on criminal justice reform. The judge declines to appoint those attorneys, stating that their "political views" might influence how they represent clients or interact with the court.

Even if motivated by a desire to maintain neutrality in the courtroom, a judge who excludes qualified attorneys based on their political or advocacy affiliations violates the fundamental principle that judicial appointments must be made on the basis of merit, not ideology. Rule 2.13(A)(1) requires judges to "exercise the power of appointment impartially and on the basis of merit," and Rule 2.13(A)(2) directs them to "avoid nepotism, favoritism, and unnecessary appointments." These provisions impose an affirmative obligation to select appointees based on objective professional criteria—such as competence, diligence, and ethical fitness—rather than personal, ideological, or political considerations. When a judge disqualifies attorneys solely because of their association with advocacy organizations, the decision substitutes subjective political judgment for the neutral, merit-based evaluation that the Model Code requires. This transforms an administrative process designed to ensure equal access and fairness into one that appears to reward or punish attorneys for their affiliations or viewpoints.

Rule 2.4(B) further prohibits judges from allowing "family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." While this provision is often discussed in adjudicative contexts, its scope includes administrative functions as well. The rule embodies a foundational precept of judicial ethics: judges must separate their personal or ideological perspectives from their official decision-making. When a judge's administrative appointments reflect aversion to certain political beliefs or organizational affiliations, the conduct suggests that judicial authority is being used to enforce ideological conformity within the legal profession. Comment [1] to Rule 2.4 warns that "confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." A reasonable member of the public, observing such selective appointments, could conclude that the judiciary disfavors lawyers associated with particular causes or viewpoints. That

perception undermines the judiciary's role as an impartial arbiter and erodes confidence in the fairness of the justice system as a whole.

Canon 1 reinforces this principle by directing judges to "uphold and promote the independence, integrity, and impartiality of the judiciary" and to "avoid impropriety and the appearance of impropriety." Even if the judge sincerely believes the decision promotes neutrality, the appearance of bias is sufficient to constitute an ethical violation under the Canon. By excluding attorneys affiliated with advocacy organizations, the judge appears to be making appointments based on political alignment rather than objective merit. The result is a perception that judicial administration is influenced by ideological preference—precisely the kind of appearance of partiality that Canon 1 and Rule 1.2 forbid. Such conduct suggests that access to judicial appointments depends on conformity with the judge's personal beliefs rather than on professional competence, thereby compromising both the appearance and the reality of fairness.

Ultimately, the ethical framework of Rules 2.13 and 2.4 and Canon 1 establishes that judicial appointments must be insulated from politics and personal ideology. The judiciary's legitimacy rests on the assurance that every lawyer, regardless of affiliation or viewpoint, will be evaluated on ability, experience, and integrity alone. When judges make appointment decisions that reflect political or ideological preference, they undermine the judiciary's claim to independence and its essential promise of impartial justice. Maintaining public confidence in the courts therefore requires judges to apply objective, merit-based standards in all appointments, ensuring that no reasonable observer could perceive judicial power as being used to reward allies, punish critics, or enforce ideological uniformity.

The duty to make judicial appointments impartially and on the basis of merit is part of a broader obligation to ensure that all aspects of judicial administration are conducted with fairness, independence, and integrity. Rule 2.13 protects against the intrusion of favoritism, ideology, or personal interest into the appointment process, but these same principles extend beyond selection decisions to the ongoing supervision of those who serve under a judge's authority. Once appointed, court staff and officials remain subject to the judge's ethical direction and control. Rule 2.12 makes clear that judges have an affirmative obligation to require court personnel to act in accordance with the judge's own ethical duties, while Rule 2.3 prohibits bias, prejudice, and harassment by anyone under the judge's supervision. The next section addresses these supervisory responsibilities and the corresponding duty to maintain an environment of impartiality, respect, and professionalism within the court.

IV. Supervisory and Oversight Responsibilities

The Model Code of Judicial Conduct makes clear that a judge's ethical obligations encompass not only the judge's own conduct but also the conduct of those who serve under the judge's supervision. Rule 2.12(A) provides that a judge "shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code." This rule imposes an affirmative supervisory duty: judges must take reasonable steps to ensure that those who work in chambers or in the court's administrative structure uphold the same standards of impartiality, integrity, and fairness that govern the judge's own behavior. Judicial leadership carries with it the responsibility for setting the ethical tone of

the workplace and for intervening when conduct under the judge's authority undermines these values.

Rule 2.3 reinforces and specifies this obligation. Paragraph (A) mandates that a judge "shall perform the duties of judicial office, including administrative duties, without bias or prejudice." Paragraphs (B) and (C) prohibit judges from engaging in or permitting bias, prejudice, or harassment by court staff, court officials, or others subject to the judge's direction and control. The accompanying comment clarifies that even subtle behaviors—such as "demeaning nicknames," "attempted humor based on stereotypes," or "facial expressions and body language"—can convey bias and thus impair fairness and public confidence in the judiciary. The rule therefore extends beyond the judge's own behavior to the broader culture of the chambers or courthouse: judges have an ethical duty to prevent and, when necessary, correct discriminatory or harassing conduct by those they supervise.

This supervisory duty is active, not passive. A judge who becomes aware of biased or unethical practices within the court's operations—whether in hiring, assignments, or workplace interactions—must take appropriate action to address them. Failure to do so constitutes more than poor management; it may amount to a violation of Canon 2, which requires a judge to "perform the duties of judicial office impartially, competently, and diligently." Inaction in the face of known discrimination, harassment, or unethical conduct erodes confidence in judicial impartiality and violates the fundamental principle that justice must not only be done, but must be seen to be done.

By enforcing ethical standards within their own administrative sphere, judges protect both the individuals who work within the judiciary and the public's perception of judicial integrity. The court environment should exemplify fairness, respect, and professionalism—the same qualities the public expects in judicial proceedings. Through active supervision and timely intervention, judges fulfill their obligation under the Code to ensure that their administrative authority strengthens, rather than undermines, confidence in the judiciary's independence and impartiality.

Illustration 5: Retaliation and Workforce Fairness

A courtroom deputy requests a reasonable accommodation[5] after developing a physical disability that limits the ability to lift heavy boxes and stand for extended periods. The judge expresses frustration with the request and begins assigning the deputy an increased number of time-consuming or undesirable tasks, such as lengthy trial coverage or clerical duties typically rotated among staff. Other deputies notice the pattern and begin to view the assignments as a warning against raising workplace concerns.

Even if the judge believes the reassignment of duties is justified by management needs, the Model Code of Judicial Conduct makes clear that a judge's supervisory authority must be exercised

[5] It is important to remember that while the federal judiciary is exempt from many of the standard federal antidiscrimination statutes, those statutes have helped to create a foundation of what is and is not expected within employment settings. Judges act as employers and should keep in mind best practices when engaged in their administrative and supervisory roles. If judges fail to do this, the general public, which may not understand that federal antidiscrimination statutes are technically not applicable for courthouse and chambers' staff, may conclude that judges are "above the law" and not required to adhere to generally understood expectations in the employment setting.

without bias or the appearance of retaliation. Rule 2.12(A) imposes an affirmative duty on judges to ensure that staff and officials under their supervision "act in a manner consistent with the judge's obligations under this Code." A judge who engages in or allows retaliatory treatment toward an employee for requesting an accommodation violates this duty because such conduct communicates that equal treatment depends on avoiding disfavor, rather than on professional merit or lawful rights. The judge's behavior therefore compromises the fairness and integrity that Canons 1 and 2 identify as essential to maintaining public confidence in the judiciary.

Rule 2.3(A) further requires that judges perform all duties of office, including administrative responsibilities, "without bias or prejudice." Retaliating against or singling out an employee who requests an accommodation constitutes a form of bias because it penalizes the individual for asserting a lawful right and discourages others from seeking equal treatment. Rule 2.3(B) prohibits harassment and discriminatory conduct by judges or by others under their supervision. When a judge assigns disproportionate burdens or undesirable work to an employee because of a disability—or in retaliation for asserting rights associated with that disability—the conduct would reasonably be perceived as discriminatory and harassing. By allowing personal frustration or bias to shape administrative decisions, the judge signals to both staff and the public that judicial power may be exercised arbitrarily or punitively, rather than according to principles of fairness.

The duty to supervise ethically under Rule 2.12 requires active intervention to prevent injustice within the judicial workplace, just as judges are expected to prevent it in adjudication. Inaction in the face of known or reasonably apparent discrimination conveys indifference to the values of fairness and equality and thus diminishes confidence in judicial impartiality. Retaliation or bias within a judge's staff is not merely an internal personnel issue; it is a breach of the judiciary's public trust. Upholding these supervisory duties reinforces the judiciary's integrity and demonstrates that the same principles of fairness that govern the courtroom also guide the internal operations of the courts.

Illustration 6: Workplace Bias

During weekly staff meetings, a judicial assistant routinely refers to one of the courtroom clerks and several interns with gendered or racialized nicknames in front of the judge. The judicial assistant occasionally makes "jokes" about how certain employees are "too sensitive" or "not tough enough for court," and once commented that a female clerk should "smile more for the attorneys." Although the judicial assistant insists the comments are made in jest and not intended to offend, several staff members feel demeaned and uncomfortable and have complained to the judge, who insists the judicial assistant means no harm. The behavior has created tension and lowered morale in the chambers.

This conduct directly violates Rule 2.3(B), which prohibits judges or by others under their supervision from engaging in harassment or manifesting bias or prejudice through words or conduct. The accompanying comment explains that bias may be conveyed "through epithets, slurs, demeaning nicknames, attempted humor based upon stereotypes, or facial expressions and body language," and that even such subtle expressions "impairs the fairness of the proceeding and brings the judiciary into disrepute."[6] A judge who tolerates their staff's use of racially or gendered

[6] MODEL RULES OF PROF'L CONDUCT R. 2.3, cmt. [1] (2025).

language in the workplace, even under the guise of humor, therefore engages in conduct that erodes confidence in the judiciary's impartiality and professionalism.

The judicial assistant's intent—or lack of malice—is not a defense. The Model Code focuses on the effect of the conduct and the perception it creates, not on the subjective motive. Under Canons 1 and 2, judges must act in ways that promote public confidence in the judiciary's independence, integrity, and impartiality. A reasonable observer who learns that a judge allows his judicial assistant to speak to staff in a demeaning or biased manner could conclude that the judge lacks the temperament, impartiality, or fairness expected of judicial office. Even when the comments are made privately or without the intention to harm, they signal tolerance of discriminatory attitudes and undermine the respect that judicial leadership should command.

Moreover, Rule 2.12(A) imposes an affirmative supervisory duty requiring judges to ensure that "court staff, court officials, and others subject to the judge's direction and control act in a manner consistent with the judge's obligations under this Code." When a judge fails to address inappropriate behavior occurring in chambers, it conveys to others that such behavior is acceptable, effectively nullifying the judge's ability to enforce ethical standards in others.

Finally, Rule 2.3(A) requires that judges perform all duties "without bias or prejudice," including administrative and supervisory duties. A judge who habitually uses language reflecting bias or stereotype, or who tolerates such behavior in their subordinates, cannot credibly claim to administer justice impartially. Even informal remarks that demean staff based on protected characteristics convey the impression that the judge's decisions—both administrative and judicial—may be influenced by personal prejudice or lack of respect for equality. The appearance of discriminatory attitudes compromises public confidence in judicial neutrality and diminishes the dignity of the judicial office.

By engaging in or tolerating biased language, a judge undermines both the integrity of the court's workplace and the public's perception of judicial fairness. The ethical duty under Rules 2.3 and 2.12 requires judges to foster an environment that exemplifies impartiality, respect, and professionalism. Upholding these obligations ensures that judicial authority is exercised consistently with the values of equality and dignity that the public expects of the courts.

Taken together, Rules 2.12 and 2.3 reflect the principle that ethical judicial administration requires both personal integrity and institutional accountability. The judge's obligation is not limited to avoiding individual misconduct but extends to cultivating a professional environment in which impartiality, respect, and fairness are modeled and expected at every level of court operations. Supervisory ethics therefore serve as a critical bridge between personal responsibility and institutional legitimacy: when judges enforce ethical standards within their chambers, they ensure that the judiciary as a whole reflects the same commitment to justice that it demands of others. A courthouse culture that tolerates retaliation, bias, or harassment—whether through action or silence—inevitably undermines public confidence in the judiciary's independence and impartiality.

These concepts regarding administration also translate to roles within the courthouse beyond the individual courtrooms. For example, the presiding judge in a courthouse would have similar

considerations regarding the avoidance of discrimination or harassment when interacting with and making staffing decisions for assignments involving the other judges and courthouse employees.

While Rules 2.12 and 2.3 address specific supervisory responsibilities, Canons 1 and 2 impose a comprehensive duty to administer justice fairly in every professional context. Judges must not only correct bias or misconduct when it arises but must also structure the administrative functions of their offices to reflect fairness and equality in practice and perception. This broader ethical mandate—administrative fairness—ensures that the judiciary's integrity is evident not only in its rulings but in the daily conduct, decisions, and values of those who serve within it.

VI. Conclusion

Judges occupy a unique public trust: they must decide controversies impartially and must also administer the courts in a manner that sustains the public's confidence in the independence, integrity, and impartiality of the judiciary. The Model Code of Judicial Conduct makes plain that those obligations reach beyond adjudication to embrace the full scope of judicial administration. Canon 1 and Rule 1.2 require judges to avoid impropriety and the appearance of impropriety; Canon 2 and Rule 2.3 require that judges perform all duties of office—adjudicative, administrative, and supervisory—without bias or prejudice; Rule 2.12 imposes affirmative supervisory duties; and Rule 2.13 requires that appointments be made impartially and on the basis of merit. Together, these provisions create an affirmative, institutionally focused ethical mandate: judges must ensure that both their own conduct and the conduct of those they supervise preserve the fairness and legitimacy of the courts.

Applied here, that mandate means (1) avoiding administrative actions that convey favoritism, partiality, or the use of judicial prestige for private ends; (2) making hiring, appointment, and personnel decisions on objective, merit-based criteria; and (3) actively supervising and correcting discriminatory, harassing, or retaliatory conduct within chambers. The illustrations in this opinion demonstrate how apparently discrete administrative acts (or the failure to act)—when motivated by nepotism, ideology, or personal loyalty—can produce precisely the appearance of partiality that the Code forbids, and how patterns of such conduct can erode institutional integrity even where no single act violates a particular rule.

To give effect to the ethical principles discussed above, courts and judges may find it useful to adopt or strengthen internal practices that promote administrative fairness—such as clear, merit-based selection criteria for appointments; transparent processes for recurring discretionary decisions; education and training for judges and staff on supervisory obligations and workplace fairness; and prompt, impartial procedures for addressing allegations of staff misconduct. These are institutional measures meant to assist judges in meeting their ethical duties under the Code; they should be tailored to the resources, structure, and traditions of each court and implemented in a manner that respects judicial independence and the separation of powers.

Finally, this opinion affirms that preserving public confidence in the judiciary requires attention to both substance and perception: judicial fairness must be real, and it must be seen to be real. When judges administer their chambers with impartiality, competence, and diligence, they not only fulfill individual ethical obligations but also strengthen the judiciary's collective standing as an

institution worthy of public trust.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 522 **April 8, 2026**

Lawyer's Obligation to Disclose Information About Grounds for a Judge's Disqualification

ABA Model Rule of Professional Conduct 8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice. When a lawyer in a proceeding possesses information that the lawyer knows is reasonably likely to give rise to a judicial disqualification obligation, Rule 8.4(d) requires the lawyer, as an officer of the court, to disclose that information to the tribunal. When the lawyer possesses the information only because it is "information relating to the representation of a client," then the lawyer's disclosure obligation is subject to the lawyer's duty of confidentiality under Model Rule of Professional Conduct 1.6.

I. Introduction

ABA Model Code of Judicial Conduct ("MCJC") Rule 2.11 outlines circumstances that require judges to recuse themselves from proceedings. Rule 2.11(a) begins by setting forth the general recusal standard: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." It then provides a nonexclusive list of circumstances in which judges must be recused, subject in certain circumstances to the parties' waiver of disqualification.[1] Among the kinds of circumstances that may call for a judge's recusal are familial and significant personal relationships with parties or lawyers in an action, economic interests implicated by the action, and extrajudicial knowledge of or involvement in the events underlying the action.[2]

Judges are expected to raise recusal questions themselves, as they best know the relevant information. Comment [5] to Rule 2.11 instructs judges to "disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." Comment [2] explains that "[a] judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed."

This Opinion addresses lawyers' obligations under the ABA Model Rules of Professional Conduct ("Model Rules") when the lawyer represents a client in a matter before the tribunal and a judge fails to raise the possibility of recusal, but the lawyer knows information establishing that the judge

[1] MODEL CODE OF JUDICIAL CONDUCT 2.11(A)(1)-(6). Comment [1] to Model Code of Judicial Conduct Rule 2.11 explains: "Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply. In many jurisdictions, the term 'recusal' is used interchangeably with the term 'disqualification.'"

[2] Although the rule itself does not contain expansive guidance on the types of relationships that may be perceived to compromise a judge's impartiality, judicial decisions and ethics opinions collectively give considerable guidance to lawyers who learn information that may be relevant to a judge's analysis on issues related to recusal and disqualification. For example, ABA Formal Opinion 488 examines three categories of relationships between judges and lawyers or parties: (1) acquaintances, (2) friendships, and (3) close personal relationships.

must consider recusal because of the possibility that the judge's impartiality might reasonably be questioned.[3] This Opinion is limited to lawyers' ethical obligations under the Model Rules of Professional Conduct and does not address substantive recusal law or standards governing judges' disqualification obligations under the Model Code of Judicial Conduct.

II. Subject to the duty of confidentiality, Model Rule 8.4(d) requires a lawyer who knows information that is reasonably likely to give rise to a judicial recusal obligation to disclose that information to the tribunal.

Outside of ex parte proceedings, lawyers have no duty under the Model Rules to inform the tribunal of all material facts necessary to make informed judicial decisions.[4] However, in certain circumstances lawyers in judicial proceedings have a limited duty to disclose procedural or jurisdictional information, as distinct from evidentiary information. Although the obligation originates in judicial decisions, a failure to comply with the obligation may be the basis for professional discipline under Model Rule 8.4(d).

A. The Lawyer's Role as an Officer of the Court

Judicial decisions recognize that, as officers of the court, lawyers have an "overarching duty of candor to the Court,"[5] which requires certain disclosures of important procedural or jurisdictional information, even though no rule or law expressly requires such disclosure.[6] For example, in *Tiverton Board of License Commissioners v. Pastore*, 469 U.S. 238 (1985), the United States Supreme Court found that a party's lawyer was obligated to disclose that the party had gone out of business because that information made the case moot. The Court stated: "It is appropriate to remind counsel that they have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation." *Id.* at 240.

Other judicial decisions have similarly recognized that lawyers must disclose circumstances and events with important procedural significance. These circumstances have included procedural deficiencies that, if unaddressed, could result in the denial of a fair trial and the reversal of a conviction.[7] These also include filings and decisions in other jurisdictions that may strip the court of jurisdiction, make further work by the court unnecessary, or be important to the scheduling of a

[3] The Model Rules define knowledge as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." MODEL RULES OF PROF'L CONDUCT R. 1.0(f). Knowledge in the Model Rules means more than a mere possibility or suspicion.

[4] In an ex parte proceeding, Model Rule 3.3(d) requires a lawyer to "inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." That is because in an ex parte proceeding "there is no balance of presentation by opposing advocates"; therefore, to enable the court to achieve "a substantially just result," which is the object of the proceeding, "[t]he lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision." MODEL RULES OF PROF'L CONDUCT R. 3.3, cmt. [14].

[5] Eagan by Keith v. Jackson, 855 F. Supp. 765, 790 (E.D. Pa. 1994).

[6] The Committee recognizes that there are variations among jurisdictions on how disclosure would occur. Nothing in this opinion is intended to supersede jurisdiction-specific authorities on that issue.

[7] *See, e.g.*, Holloway v. Arkansas, 435 U.S. 475, 485-86 (1978) ("[Criminal] defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem.").

case.[8]

In some circumstances, knowing nondisclosure will be prejudicial to the administration of justice because, for example, the judge is unaware that the court lacks jurisdiction to continue the proceedings, the court would be committing a procedural error that jeopardizes the fairness of the proceedings, or the proceedings are procedurally deficient in some other legal respect.

For example, in ABA Formal Op. 280 (1949), which predates the ABA's adoption of the Model Code of Professional Responsibility, this Committee determined that, "An attorney should advise the court of decisions adverse to his case which opposing counsel has not raised if the decision is one which the court should clearly consider in deciding the case, if the judge might consider himself misled by the attorney's silence, or if a reasonable judge would consider an attorney who advanced a proposition contrary to the undisclosed opinion lacking in candor and fairness to him." This determination arose out of lawyers' duty, as officers of the court, "to aid the court in the due administration of justice" and their duties of "candor and fairness."[9]

To give another example, ABA Informal Op. 1169 (1970) concluded that it would be impermissibly deceptive and prejudicial to the administration of justice for the civil defendant's lawyer to fail to disclose the defendant's death. The Committee reaffirmed that conclusion in Formal Op. 95-397 (1995).[10] The Committee's 1995 opinion relied on *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507 (E.D. Mich. 1983), which found that the plaintiff's lawyer in a personal injury action had a duty to disclose the client's death to opposing counsel and the court. The ethics opinion quoted the District Court's opinion extensively and with approval, including the court's observation that, "Although each lawyer has a duty to contend, with zeal, for the rights of his client, he also owes an affirmative duty of candor and frankness to the Court and to opposing counsel when such a major event as the death of the plaintiff has taken place." *Virzi*, *supra*, 571 F. Supp. at 512.

In other contexts, this Committee has long reached conclusions that accord with the judicial decisions on lawyers' duty of candor to the tribunal. Although the Committee's opinions offer

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[8] *See, e.g.*, Cleveland Hair Clinic, Inc. v. Puig, 200 F.3d 1063, 1067-68 (7th Cir. 2000) (plaintiff's counsel had an obligation to disclose a parallel state lawsuit, because its "goal . . . was to cut off the federal court at the pass, a development that surely could have affected the outcome of the litigation pending in federal court"); *In re* Jones, 231 B.R. 110 (Bankr. Ct., N.D. Ga. 1999) (failure to disclose parallel bankruptcy filing was impermissibly deceitful and prejudicial to the administration of justice).

[9] This obligation was later codified in Disciplinary Rule 7-106(B)(1) of the Model Code of Professional Responsibility, and it is currently codified in Model Rule 3.3(a)(2), which provides that: "A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Model Rule 3.3(a)(2) can be understood as a reminder that the role of an advocate is not purely partisan but also carries a responsibility to protect the integrity of the judicial process itself. Much like a referee in a game depends on players to play by the rules in order for the match to be fair, courts depend on lawyers to surface controlling adverse legal authority—even when it undermines their client's position—so the court can make a fully informed decision. The lawyer's ethical responsibility under Rule 3.3(a)(2) is not merely about avoiding falsehoods but is about actively ensuring the fairness, accuracy, and legitimacy of proceedings, even at the expense of short-term client advantage.

[10] The Committee relied on Model Rule 3.3(a)(1), which addresses the duty to avoid knowingly making false statements to the tribunal and omissions that are the equivalent. The Committee's 1995 Opinion did not call into question the earlier conclusion that failing to disclose the party's death is prejudicial to the administration of justice.

various explanations and cite various rules, the unifying theme is that lawyers must be forthcoming with procedural information that the tribunal needs to ensure that the proceedings are fair.[11]

In contrast, there is ordinarily no such disclosure duty under the Model Rules when the procedural information in question does not call the court's jurisdiction into question and is not otherwise important to the fair administration of justice. ABA Formal Op. 94-387 (1994) concluded that a plaintiff's lawyer has no obligation to disclose that the statute of limitations has run on the plaintiff's claim. The opinion explained: "The running of the period provided for enforcement of a civil claim creates an affirmative defense which must be asserted by the opposing party, and is not a bar to a court's jurisdiction over the matter. A time-barred claim may still be enforced by a court, and it will be if the opposing party raises no objection."[12]

B. The Source of the Lawyer's Knowledge

Lawyers may obtain actual knowledge about a judge's need to consider recusal from a range of sources. Some of these sources may include "information relating to the representation of the client," but there could be other sources of the lawyer's knowledge.

Illustration 1: Prior Employment Connection

A prosecutor is assigned to represent the state in post-conviction proceedings. The assigned judge previously served as a supervisor in the prosecutor's office. The prosecutor learns from the file that, while working in the prosecutor's office, the judge supervised the trial prosecutor in the case. The defendant's lawyer is evidently unaware of the judge's supervisory responsibility for an earlier stage of the case, and the judge may not recall it.

Illustration 2: Campaign Contribution

A lawyer representing a party in a civil case learns from the client that the client was a major financial supporter of the presiding judge's recent judicial election campaign. The client acknowledges having made a significant contribution to a political action committee earmarked for the judge's campaign, but there is no public record of the contribution, and it is uncertain whether the judge knows of it.

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[11] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 96-404 (1996) (a lawyer seeking appointment of a guardian for a client must disclose the lawyer's expectation of being retained by the guardian to provide future legal services); ABA Comm. on Ethics & Pro. Resp., Informal Op. 1386 (1977) (a lawyer must disclose to opposing counsel and the court that the client has entered into a "Mary Carter Agreement," under which the amount of the defendant's liability will decrease as another defendant's liability increases); ABA Comm. on Pro. Ethics & Grievances, Formal Op. 17 (1930) (if a party's lawyer moves for substitution of counsel without notice to the party's prior counsel, it would violate the duty of candor to the court to fail to disclose that notice was not given).

[12] *See also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 07-446 (2007) (a lawyer need not disclose the provision of assistance to a pro se litigant, because the court is unlikely to be misled or to provide unfair assistance). *But see* Duran v. Caris, 238 F.3d 1268 (10th Cir. 2001) (lawyer's failure to disclose the provision of substantial assistance in drafting a pro se litigant's brief is impermissible deceit and conduct prejudicial to the administration of justice).

Illustration 3: Spouse's Law Firm Involvement

A lawyer learns that co-counsel for another party in a consolidated civil action has engaged the judge's spouse's law firm for related consulting work on discovery strategy. The lawyer knows of this fact because an associate from the spouse's firm copied the lawyer on an email exchange related to scheduling depositions.

Illustration 4: Counsel's Business Relationship with Judge's Family Member

A lawyer for a party in a civil action recently became a minority shareholder in a local business. The lawyer knows that the judge's adult child is an executive and major investor in the business.

In each of these illustrations, the lawyer possesses actual knowledge of facts that may reasonably require the judge to consider recusal. Whether Model Rule 8.4(d) requires the lawyer to make a disclosure depends on whether (a) the information is reasonably likely to require recusal and (b) the disclosure can be made without violating the lawyer's confidentiality obligations under Model Rule 1.6 or Model Rule 1.9.

C. Limits on the Lawyer's Obligation to Disclose

Candor to the tribunal imposes obligations beyond what the Model Rules alone enumerate. As discussed above, courts may—and often do—require lawyers to disclose jurisdictional or procedural information essential to just adjudication. While the Model Rules codify some specific disclosure requirements, they deliberately leave room for courts to define others, and failure to meet those judicially recognized duties can amount to conduct prejudicial to justice. Information that is reasonably likely to give rise to a judicial recusal obligation, if not raised by the judge, is the sort of information that a lawyer must disclose to ensure procedural fairness.[13] The failure to make this disclosure constitutes conduct prejudicial to the administration of justice under Model Rule 8.4(d).[14] Unlike information relevant to an affirmative defense based on the statute of limitations, information that is reasonably likely to require a judge's recusal is important for the judge to consider, and, unless the judge recuses, to share with the parties. Otherwise, the judge's failure to recuse may deny the parties a fair trial and constitute the kind of procedural error that necessitates overturning the result of the proceeding.

As in the situation addressed by Model Rule 3.3(a)(2)—which requires a lawyer to disclose to the tribunal legal authority in the controlling jurisdiction that is both directly adverse to the lawyer's client and not disclosed by opposing counsel—the underlying concern is about the structural integrity of the proceedings. If the lawyer knows there is a procedural flaw in the proceedings that goes to their fairness and integrity—in this case, the judge's failure to consider the recusal obligation—the lawyer must rectify that procedural deficiency.

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[13] *See In re* Bernard v. Coyne, 31 F.3d 842, 847 (9th Cir. 1994) ("Counsel for a party who believes a judge's impartiality is reasonably subject to question has not only a professional duty to his client to raise the matter, but an independent responsibility as an officer of the court.").

[14] *Cf.* State Bar of Michigan, Opinions JI-79 (1994) and J-6 (1996) (concluding, based on Michigan's Rule of Professional Conduct 8.4, that when a judge fails to disclose facts that would require the judge's recusal, a party's lawyer who knows the facts must disclose them).

This is not the kind of evidentiary information relating to the court's rulings that one may leave to the opposing party to uncover; nor may a party fairly exploit the opposing party's lack of diligence in failing to uncover this sort of information. Parties have no reason to investigate the judge's financial and familial relationships and other circumstances in search of facts that may call for a judge's recusal. As noted, that is principally the judge's responsibility. But when the judge fails to make the requisite disclosure and that failure could result in a serious procedural deficiency that jeopardizes the justness of the proceedings, the judge's nondisclosure must be corrected by a lawyer who knows the relevant information.

The obligation to disclose information requiring a judge's recusal should take account of a lawyer's duty of confidentiality. Model Rule 8.3, which requires lawyers to report certain serious judicial misconduct as well as certain serious misconduct by lawyers, provides that these reporting obligations are limited by the duty of confidentiality under Model Rule 1.6.[15] Although clients should generally be encouraged to give informed consent to their lawyer's reporting judicial misconduct pursuant to Model Rule 8.3(c), a lawyer may not disclose information relating to the representation without the client's informed consent unless there is an applicable exception to the confidentiality obligation. We conclude that the lawyer's duty to disclose a judge's possible recusal obligation is subject to the same limitation.

As this Committee recently discussed in ABA Formal Opinion 519 (2025), which addressed lawyers' disclosures in motions to withdraw from a representation, various provisions of the Model Rules may require or permit lawyers to disclose information relating to the representation to the court. When a lawyer knows information that is reasonably likely to give rise to a judicial disqualification obligation, either of two provisions may apply.

First, Model Rule 1.6(b)(6) permits a lawyer to "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with other law." As discussed above, judicial decisions recognize that, in some circumstances, lawyers' duty of candor to the court requires lawyers in judicial proceedings to disclose jurisdictional or procedural information relating to the representation. Insofar as the judicial decisions of the relevant jurisdiction extend this disclosure obligation to information regarding judicial recusal, Model Rule 1.6(b)(6) would permit disclosure to comply with other law.

Second, Model Rule 3.3(b) provides: "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." In some situations, such as when a client has an undisclosed personal, professional, or business relationship with the judge that is likely to require judicial recusal, the client's intent to exploit—rather than disclose—the relationship may amount to "fraudulent conduct related to the proceeding."[16] When the lawyer knows that the client plans to proceed without disclosure in order to secure an improper advantage, withdrawal alone will often be insufficient as a remedial measure. In those circumstances, the lawyer may be required to

[15] Model Rule 8.3(c) provides that the reporting obligation "does not require disclosure of information otherwise protected by Rule 1.6." Comment [2] to Rule 8.3 further clarifies: "A report about misconduct is not required where it would involve violation of Rule 1.6."

[16] MODEL RULES OF PROF'L CONDUCT R. 3.3(b) & R. 3.3, cmt. [12].

disclose the grounds for recusal or take other reasonably available steps necessary to prevent or rectify the client's fraudulent conduct. Needless to say, the lawyer may not assist in a client's fraudulent conduct. *See* Model Rule 1.2(d) & 1.16(a)(4).

Absent the client's informed consent or an applicable exception to the duty of confidentiality, however, we conclude that the duty to disclose information reasonably likely to require recusal is subject to the duty of confidentiality under Model Rule 1.6(a) when that information is "relating to the representation of a client."

III. Where Should the Lawyer Disclose the Information?

The lawyer should disclose information that is reasonably likely to require recusal to an authority capable of addressing that issue. In most instances, the lawyer may appropriately begin by disclosing the information directly to the judge, with notice to opposing counsel.[17] In other cases, disclosure to the chief judge or other designated administrative authority may be warranted, depending on the nature of the potential conflict.

It is important to remember that for many potential disqualification concerns, the judge would ordinarily be aware of sufficient information to recognize the need to engage in a disqualification analysis. Yet recent years have seen numerous reported instances in which judges failed to recuse when the circumstances warranted it. Lawyers, as officers of the court, should not only disclose information reasonably likely to require recusal that a judge may not be aware of, but also should not remain silent and allow a judge to knowingly refuse to acknowledge circumstances requiring recusal. Regardless of whether judges fail to meet their own ethical obligations, lawyers' obligations as officers of the court also require lawyers to do what they can to remedy the situation.

There can also be circumstances where a judge may not recognize the basis for disqualification as a result of procedural error or misunderstanding rather than volitional disregard of ethical duties. Judges are not infallible, and the disqualification provisions of MCJC Rule 2.11 can be complex in their application. For example, a judge might know that she owns stock in Alpha Corporation but not realize that Alpha is the parent company of Beta Corporation, a named party in the case, and thus fail to consider disqualification. If that information is reasonably likely to require the judge's recusal, the lawyer should alert the judge to the issue so that the judge can determine whether recusal or disclosure is warranted. In this way, the lawyer helps to safeguard the fairness and integrity of the proceeding, ensuring that inadvertent judicial oversights do not compromise public confidence in the impartial administration of justice.

As noted above, ABA Model Rule of Professional Conduct 8.3(b) specifically addresses lawyers' obligation to disclose judicial misconduct in certain circumstances and requires the lawyer to "inform the appropriate authority."[18] Model Rule 8.3(b) will rarely require a lawyer to report a

[17] The opposing party should be notified to avoid the risk of an improper ex parte communication between a lawyer and the judge.

[18] Model Rule 8.3(b) provides that: "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority." Comment [3] explains: "The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."

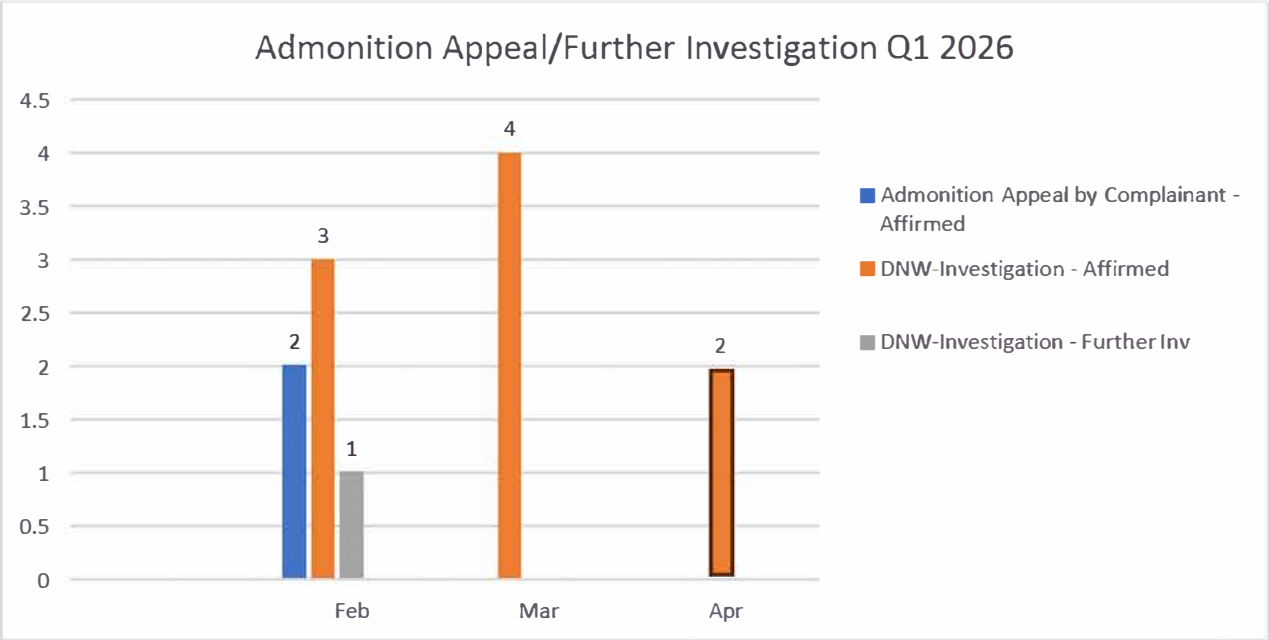
judge's failure to recuse as required by MCJC 2.11. The lawyer must disclose only if the lawyer personally *knows* (not merely suspects) each of three things: (1) that the judge had a recusal obligation under the MCJC Rule 2.11; (2) that the judge failed to comply with that obligation; and (3) that the judge's failure to recuse raises a substantial question as to the judge's fitness for office.[19] Ordinarily, a judge's failure to recuse will not raise a substantial question about the judge's fitness for office unless the obligation to recuse is obvious and the judge is utterly indifferent to the obligation, so that the judge's recusal violation seriously erodes public confidence in the judge's fairness and commitment to ethical compliance in general, not just in the particular case.[20] A judge's failure to consider recusal in circumstances where the obligation to recuse is uncertain would not implicate Model Rule 8.3(b), because the failure to consider recusal in such circumstances would not "raise[] a substantial question as to the judge's fitness for office." Consequently, a reporting obligation will likely arise only if the facts necessitating the judge's recusal were called to the judge's attention during the case or it is otherwise obvious that the judge was aware of the relevant facts and deliberately disregarded their significance.

IV. Conclusion

When a lawyer in a proceeding possesses information that the lawyer knows is reasonably likely to give rise to a judicial disqualification obligation, Model Rule 8.4(d) requires the lawyer, as an officer of the court, to disclose that information to the tribunal. When the lawyer possesses the information only because it is "information relating to the representation of a client" then the lawyer's disclosure obligation is subject to the duty of confidentiality under Model Rule 1.6.

[19] *See* note 3, *supra*; *see also* Hon. Deborah L. Thorne et al., *Protecting the Integrity of the Profession*, 43-JUN AM. BANKR. INST. J. 24, 24 n.5 (2024) (citing Mont. Merch. Inc. v. Dave's Killer Bread Inc., No. CV-17-26-GF-BMM, 2017 WL 4246899, at *5 (D. Mont. Sep. 25, 2017)); S.C. Bar Ethics Advisory Committee, Advisory Op. 05-04 (2005) ("Rule 8.3 requires actual knowledge of, or believing clearly that there has been a violation, which implies more than a suspicion of misconduct."). In ascertaining whether a lawyer has the requisite knowledge, the information of other lawyers in the lawyer's firm or of co-counsel is not "imputed" to the lawyer in question if they have not shared the information, and likewise, a lawyer's information is not "imputed" to other lawyers or to the lawyer's firm if the lawyer has not shared the information.

[20] *Cf.* Me. Board of Overseers of the Bar Op. 227, *Required Reporting M.R. Prof. Conduct 8.3* (2025) (explaining that lawyers must report if they know (or reasonably infer) that another attorney engaged in misconduct violating the Rules, creating a "substantial question" about that attorney's honesty, trustworthiness, or fitness to practice).



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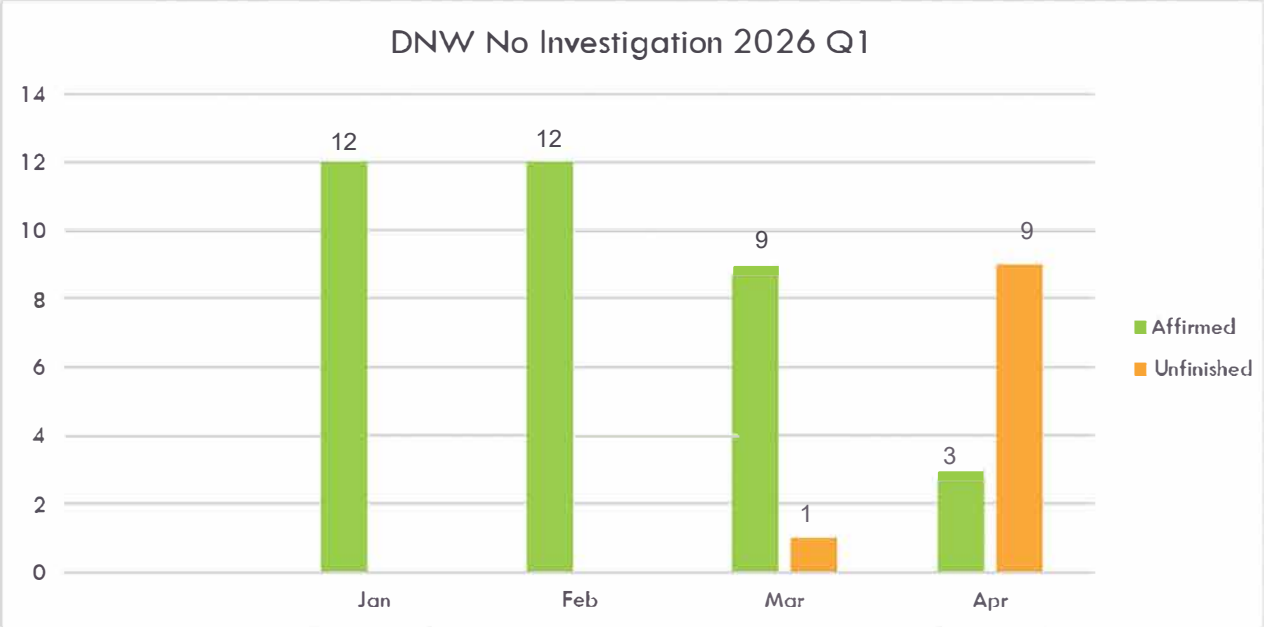

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