LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING AGENDA

September 11, 2026 – 12:30 p.m. (in person and via Zoom)
Minnesota Judicial Center
Lunch provided for Board members 12:00pm

---

1. Approval of minutes of May 15, 2026, meeting minutes (attachment 1).

2. Tribute to Susan Humiston (attachments 2 (*Bench & Bar*), 3 (Doing Good Together background).

    a. Comments from Justice Moore.
    b. Comments from Board members and public.
    c. Additional optional Board contribution.

3. Supreme Court matters - Justice Moore

BREAK

4. Rules Committee report (attachments 3 (Rule 4 Memorandum), 4 (ABA Model Rule 1.14)).

    a. General report on Rules Committee activities.
    b. Rules 4.2 and 4.4, Minnesota Rules of Professional Conduct.
    c. ABA Model Rule of Professional Conduct 1.14.

5. Director's Report (attachment 5)

6. Complainant appeal statistics (attachment 6).

7. Open discussion.

8. Adjournment.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
PUBLIC MEETING

OPEN MEETING MINUTES
May 13, 2026 12:30 pm (In-person and via Zoom) – Minnesota Judicial Center

---

Board member attendance:

- Kris Fredrick
- Brigette Gay
- Tom Gorowsky
- Frank Leo
- Calista Moxey
- Melissa Manderschied
- Jill Prohofsky,
- William Pentelovitch
- Abigail Rankin
- Darrin Rosha
- Kevin Magnuson
- Amy Sweasy
- Sharon Van Leer

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:

New Chair Carrie Washington began her first meeting as Chair at 12:32pm on Friday, May 15, 2026. She began by thanking the board for their continued patience with her as she finds her way in this new role. Stating she knows she has big shoes to fill but thanked previous chair Butler, her vice-chair Amy Sweasy and admin assistant Ava Shannon. Then Washington called for any discussion on the previous meetings minutes. There were two minor changes, to add Jill Prohofsky and Bill Pentelovitch to the attendance. With that, Amy Sweasy moved to approve, with Melissa Manderschied seconding, the minutes were approved.

Personnel Updates:
Because this was the first meeting for the new board members all attending members introduced themselves. The board had three new members in attendance, Brigette Gay, Calista Moxey and Darrin Rosha.

In other personnel updates, the rules dictate the board must vote on the new Vice Chair. Amy Sweasy had been informally sitting in the role, learning alongside Washingnton. Chair Washington expressed how helpful Sweasy has been, and where Chair Washington's legal focus has been on civil, Sweasy's has been on criminal. Sweasy spoke briefly, stating having the opportunity is an honor. She has worked on the 4th Judicial District Ethics Committee for several years before the opportunity to serve the board , and because she had left public service, she wished to serve her community. Sweasy has both management experience and experience teaching professional responsibility to lawyers. Amy stated she had previous chair Kristi Paulson on speed dial and is happy to serve and do in depth work with the board.

There was brief discussion from the board where it was clarified the Vice Chair does not necessarily mean they will become Chair. Frank Leo gave his support for Sweasy from working on her committee. Melissa Manderschied motioned to vote on the matter, Jill Prohofsky seconded, the vote passed unanimously and Amy Sweasy was elected Vice-Chair of the Board.

In other membership updates, Melissa Manderschied has stepped up as the chair of rules committee. The rules committee is a lot of work and in her brief time as chair a lot of activity has already occurred. Manderschied thanked her rules committee members.

Finally, the Minnesota Bar Association will be putting forth a recommendation to fill a few spots on the board in June.

DOJ Comment Letter:

Before his departure previous chair Ben Butler authored an "us too" letter, agreeing with the large volume of comments made against Proposed Amendments to 28 C.F.R. Part 77**.** The proposed changed affects DOJ employees, which would mean their complaints would be turned over to the Department of Justice to investigate themselves in their internal framework before the state agency can. With this change the DOJ would be able to tell the OLPR or other state agencys to stand down. Many, many agencies, groups and individuals made comments, including the LPRB. Because of our position in the attorney disciplinary system it was appropriate and important, which we did by signing onto parts of the NOBC letter. Director Humiston also brought up the fact that the Minnesota Attorneys General authored another comment discussing a few of the issues the NOBC missed, she requested the board circulate this after the meeting.

Rules and Opinion Committee Update:

1) Rule 16, Minnesota Rules of Professional Conduct petition update.

Rule 16 is in process for appearance before the Supreme Court, Justice Moore was put on the spot before he had to depart the meeting early. He said while he has not definitive date he is fairly certain it will be set for hearing soon, maybe this fall.

2) Rule 4.2, Minnesota Rules of Professional Conduct

Previously the MN Supreme Court had asked the board to consider how Rule 4.2. applies to self represented lawyers. The board has discussed this in the past, but with a deadline of January 2027 so the rules committee has begun drafting their opinion, they will have something for the board in the near future.

3) Rule 1.14, Minnesota Rules of Professional Conduct.
While this was in the packet, this is not something the rules committee has looked into too much so far. With no deadline, it is on the horizon and just something for the board to be aware of.

4) Rule 3, Minnesota Rules on Lawyers Professional Responsibility.
Term limits of DEC members, some members want to serve and bring value and are terming out, began discussion that since last meeting, looking up resources and will have language for us as well

Manderschied had one addendum on the prior proposed rule change, the amendments to rule 1.8 and 3.8 to allow modest gifts for living expenses for pro bono cases have been implemented, the board thanks all its members who assisted with this.

Director's Report
Director Humiston was out of town for this meeting but joined by Zoom. She had the managing attorney Krista Barrie and Deputy Director Binh Tuong sit in, as well as a new attorney from the OLPR,

Director Humiston reminded board members of this years in-person training session which will be on October 2nd, and held at the Wilder Center, the same as last year.

The director is asking for comments on the Director's Report, the OLPR is interested in what the board wants to know from the office. The OLPR Dashboard has changed and now the office submits monthly information to show where the office is at as a form of file management. Previously the office had been uploading old *Bench and Bar* articles, for board members who do not have ABA subscriptions to view it. Whatever it is, just let the office know what would be helpful for them to report on.

Director Humiston was there for the rules committee meeting on Rule 16. The comment she put together took a different approach, suggesting the court use this as an opportunity to take a look at temporary suspension. The board settled on a narrow trigger that symbolized physical harm, Director Humiston thought her proposed change did not seem to fit the bill for the context of the rule change.

The OLPR launched three new websites since the last meeting. This includes the LPRB's website which is now separate from the OLPR's website. They are now able to track the traffic to the websites and will hopefully have some statistics concerning that at future meetings.

Previously a board work group had refined the OLPR's summary dismissal letter, the changes have not yet been implemented due to the office's focus on accessibility and getting the website launched. However, the office will be working on streamlining its template language for decisions not to investigate.

The OLPR has also been working on making reinstatement information easily accessible. Their

temporary attorney has been updating the information on the website. The office would appreciate feedback from the board on reinstatement and how to better the process.

The office is being sued again, but the suit is in the very capable hands of the attorney general. Susan briefly explained the process of someone filing a suit against the board or the office. Board members are provided immunity under RLPR Rule 21.

Despite the budget not being funded by the legislature, the office does follow their biennium. The office is funded exclusively by attorney registration fees. The Supreme Court of Minnesota sets and approves the board's budget every 2 years, always in June. The Court has made moves to increase budget this biennium. A deficit is usually the name of the game, with the office being in deficit for every year since Humiston took on the role. Any reserve the office has had is slowly dwindling.

The annual report is due soon and the office will be working with the executive team to draft it. It will be posted on the LPRB and OLPR websites.

As discussed in previous meetings the OLPR received a record number of complaints last year, so far this year numbers are staying quite high. The OLPR is drowning in complaints at the current rate. Currently the OLPR has 80 files in front of the court right now, with 3 being contested and argued in front of the Supreme Court this fall.

2026 statistics – first quarter:

For the first quarter of 2026 the board maintained a 28-day average for non-investigation and 24 days for investigations and admonitions.

Open discussion:

Melissa Manderschied brought up the recent training of the new members and wondered if there were any more on the horizon. Plans were made to upload or email out the recent training. A training committee was discussed and there is a new tab on the SharePoint where training materials are being uploaded.

Bill Pentelovitch brought up that there was a proposed rule change and it has been almost 2 years since the committee issued its report. It's been a year since the hearing, any insight from the office or the court on the timeline. Because Justice Moore had already left the meeting, Director Humiston answered, stating she knows this is weighing upon the court and is hopeful it'll move forward soon, even if we do not have a concrete timeline.

Hearing no further points of discussion, Bill Pentelovitch motioned to end the meeting, with Abigail Rankin seconding.



MORE THAN THE RULES
REMEMBERING SUSAN HUMISTON

BY KRISTI PAULSON

There are certain people in our profession whose work touches far more lawyers than they will ever know, and Susan Humiston was one of those people.

For more than a decade, Susan served as director of the Minnesota Office of Lawyers Professional Responsibility (OLPR) and the Client Security Board, occupying a position that is important, complicated, and, at times, thankless. The director is charged with protecting the public and maintaining confidence in the legal profession while administering a system that must also be fair to the lawyers whose conduct comes before it. Those responsibilities do not always point neatly in the same direction, and Susan understood the responsibility that came with navigating the space between them.

For readers of Bench & Bar of Minnesota, however, Susan was more than the director of the OLPR. She was also a familiar presence in these pages. Through her monthly professional responsibility column, Susan shared insights, observations, and experiences from her work as director, giving all of us the benefit of a perspective on the practice of law that very few lawyers will ever have. She wrote about what she was seeing, what lawyers needed to know, where problems were developing, and how changes in our profession affected our ethical responsibilities.

What I will remember most about Susan is that she never seemed to view professional responsibility simply as a system for disciplining lawyers. She understood that protecting the public and helping lawyers understand their professional responsibilities are not competing objectives; they are part of the same mission. She saw that a strong system of professional responsibility must respond when lawyers fail to meet their obligations, but it should also educate lawyers, provide guidance, and help prevent those failures in the first place.

Most lawyers hope never to receive correspondence from the Office of Lawyers Professional Responsibility, and few of us see a letter from the Director's Office in our mailbox and anticipate that it will improve our day. Susan certainly understood that, but she also understood something that can easily be lost when we talk about lawyer discipline in terms of rules, files, investigations, and decisions: Behind every matter are people whose lives and livelihoods may be profoundly affected by what happens next.

Balancing the interests at stake requires judgment, independence, patience, and a willingness to make decisions that will not always make everyone happy. Susan was willing to accept that responsibility and the criticism that can accompany it because she understood that the integrity of the system depended upon people being willing to make difficult decisions.

Susan led work that is essential to protecting the public, upholding the integrity of the legal profession, and helping Minnesota lawyers understand and meet their professional responsibilities. She approached that work with exceptional judgment, deep expertise, compassion, and an unwavering commitment to fairness. She was widely respected by her peers in professional regulation circles across the country, where her expertise, innovation, and commitment to the profession were well known.

— CHIEF JUSTICE NATALIE HUDSON, MINNESOTA SUPREME COURT

SHE SHARED WHAT SHE LEARNED

It would be easy to define Susan's career by disciplinary decisions, Supreme Court proceedings, ethics opinions, or the administration of Minnesota's professional responsibility system, but doing so would miss an important part of her contribution, because Susan was also, fundamentally, a teacher.

Anyone who regularly read her Bench & Bar columns saw that commitment. Month after month, Susan took the Rules of Professional Conduct and translated them into the situations lawyers encounter in their practices: conflicts, client communications, trust accounts, confidentiality, technology, supervision, mistakes, and the countless judgment calls lawyers make while representing clients. Her message was rarely limited to explaining what a particular rule required. She wanted lawyers to understand where problems arose, why those problems mattered, and, perhaps most importantly, how they could avoid making the same mistakes themselves.

Her columns did more than explain disciplinary rules or summarize recent decisions. Susan helped us understand how the Rules of Professional Conduct intersect with the actual practice of law and the judgment calls lawyers make every day. She wrote about the issues she was seeing, the questions lawyers were asking, developments that concerned her, and changes she believed deserved our attention. Sometimes the lesson involved a familiar ethical obligation viewed through a new set of circumstances; other times, she pointed out developments in technology, law practice, or the profession that required all of us to think about an old responsibility in a different way.

The best professional responsibility systems cannot be measured simply by how many lawyers they discipline. A strong system should prevent misconduct where it can be prevented, educate lawyers before problems become crises, protect clients when intervention is necessary, and preserve public confidence that our profession takes its responsibilities seriously.

Susan understood that education itself was a form of public protection, which is why she answered questions, wrote articles, spoke at continuing legal education programs, explained developments in professional responsibility, and made herself part of the continuing conversation about what it means to practice law ethically and professionally. We Lawyers Professional Responsibility Board (LPRB) members knew that if you needed to talk to Susan, sometimes the easiest way was to call the ethics advisory hotline—because there was a good chance she would be answering the phone and offering advisory opinions.

There is something especially fitting, and especially difficult, about remembering Susan in the pages of Bench & Bar. For years, this was one of the places where Susan spoke directly to Minnesota lawyers. Many of us opened the magazine and turned to her column because we knew we would learn something useful about our practices, our responsibilities, or an issue we might not yet have considered. We may not have realized at the time that, column by column, Susan was creating something much larger than a collection of articles. She was creating a record of her experience and a body of practical guidance about professional responsibility that will remain available long after her tenure as director. (You can find the archive at *olpr.mncourts.gov/category/articles/*.)

As significant as Susan's contributions to our profession were, the people who worked closely with her knew that her role as director of the Office of Lawyers Professional Responsibility was only one part of who she was. She was a lawyer, teacher, colleague, mentor, and public servant, but she was also a mother who was fiercely proud of her son. It is worth remembering that the people who give so much of themselves to our profession have lives, relationships, and people they love beyond the titles that appear after their names.

I will remember Susan most for her courage to engage the difficult questions and take on the difficult cases—the cases where there was no easy answer, no way to avoid criticism, and no decision that would leave everyone satisfied. As director of the Office of Lawyers Professional Responsibility, Susan understood that sometimes the right thing to do is also the hardest thing to do. She was willing to make those hard decisions, even when she knew they would bring criticism or disappointment. She did not choose the easier path simply because it was easier.

She did that at a time when women in positions of authority in the legal profession did not always receive the same benefit of the doubt as their male counterparts. Susan knew that, but she never allowed it to make her smaller or less courageous. She remained direct, principled, and willing to stand behind her decisions. The work of the office inevitably affected lawyers' careers and reputations, and Susan understood that she could not do that work without sometimes being criticized from one direction or another. She accepted those slings and arrows as part of the job. What I admired was that she never let the prospect of criticism keep her from doing what she believed was right.

— JUSTICE GORDON MOORE, MINNESOTA SUPREME COURT

Susan had the highest expectations from the people who worked with her, because she had such confidence in her team. She led by example and was never above stepping in, rolling up her sleeves, and doing whatever needed to be done. Through her leadership and example, she challenged us to do better and took the time to mentor and prepare us for the important work of the office. We will miss her energy, leadership, and love of the legal practice and attorney ethics. The OLPR and the Minnesota bar will not be the same without her.

— BINH TUONG, ACTING DIRECTOR, OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY

Susan was a deeply competent, collaborative professional who was devoted to the attorney discipline system and consequently, the public she served. Her leadership was instrumental in ensuring a productive relationship between the Board and OLPR. We will miss her professionalism, humor, and the example she set for the effective regulation of attorney discipline in Minnesota.

— CAROL WASHINGTON, CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Susan Humiston was a dedicated public servant deeply committed to the ethical practice of law. Her knowledge of attorney ethics law was encyclopedic; I learned something every time I spoke with her. More importantly, Susan was a fiercely proud mom.

— BENJAMIN BUTLER, FORMER CHAIR, LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

WHAT LAWYERS DON'T SEE

I had the privilege of serving on the Lawyers Professional Responsibility Board, including as vice chair, and that experience gave me a perspective on Susan's work that I would not otherwise have had. Before serving on the board, I understood professional responsibility primarily as most lawyers do—through the Rules, disciplinary opinions, CLE programs, and the occasional cautionary story about another lawyer's unfortunate decision. From inside the system, however, you begin to appreciate just how much more complicated the work really is.

You see how difficult some of these questions can be and how much care goes into decisions affecting a lawyer's livelihood, a client's interests, and the reputation of the profession. You learn that facts are rarely as clean as they appear in a summary, that reasonable people can disagree about the appropriate result, and that fairness requires considerably more than identifying a rule and mechanically applying it to a set of facts. Susan lived in that complexity every day, and she approached it with an appreciation for both the institutional responsibilities of her office and the very real consequences those decisions carried for the people involved.

One of the obligations of leadership is being willing to make decisions that others may criticize, particularly when the easier course would be to avoid making the decision at all. Susan did not shy away from those moments, but she listened to people who disagreed with her, engaged seriously with difficult questions, and recognized that thoughtful disagreement was not a weakness in the professional responsibility system but one of the ways the system ultimately reached better decisions. In a profession that spends an extraordinary amount of time talking, that ability to listen is an underrated form of leadership.

A LEGACY THAT CONTINUES

Some professional legacies are easy to measure. We can count cases tried, clients represented, judicial opinions written, organizations led, awards received, or years of service. Susan Humiston's legacy will be harder to count because much of it will live in decisions she will never know she influenced.

Her legacy will be found in the lawyer who remembers something Susan wrote and pauses before making a decision, in the young lawyer who seeks guidance before an uncertainty becomes a problem, and in the experienced lawyer who forwards one of Susan's columns to a colleague with a message that simply says, "You should read this." It will be found in the lawyers and staff she mentored, in LPRB members and volunteer investigators who learned from working with her, and in an office that will continue the work to which she devoted so much of herself.

Professional responsibility does not belong solely to the Office of Lawyers Professional Responsibility, the Lawyers Professional Responsibility Board, or the Minnesota Supreme Court. Susan spent years reminding us, through both her work and her writing, that it belongs to every lawyer who has been given the privilege of practicing law. We carry that responsibility in the advice we give, the choices we make, the way we treat our clients and colleagues, and the judgment we exercise when no one else is watching.

Minnesota's legal profession is better because Susan Humiston was here, and because she took the time to share what she learned with all of us. ▲



KRISTI PAULSON, the proprietor of Powerhouse Mediation, is a professional mediator and an accomplished trial lawyer. She is a former vice chair of the Lawyers Professional Responsibility Board and also served on the ADR Ethics Board.
kristi@powerhousemediation.com

vlex fastcase

Exclusive access to premier legal research is included with your MSBA membership.

Your MSBA membership provides you free access to vLex Fastcase, a premier, next-generation legal research platform. A $1,140 annual value, this benefit connects you to one of the largest law libraries in the world.

Comprehensive US and international content

Access over one billion documents, including case law, statutes, regulations, and legal journals—from one platform, reducing the need for multiple subscriptions.

Exclusive bar publications

vLex Fastcase offers a unique repository for bar publications not available elsewhere, providing a research advantage.

Cert negative citator tool

Quickly identify cases treated unfavorably in subsequent decisions for a deeper understanding of case precedents.

Word & Chrome integrations

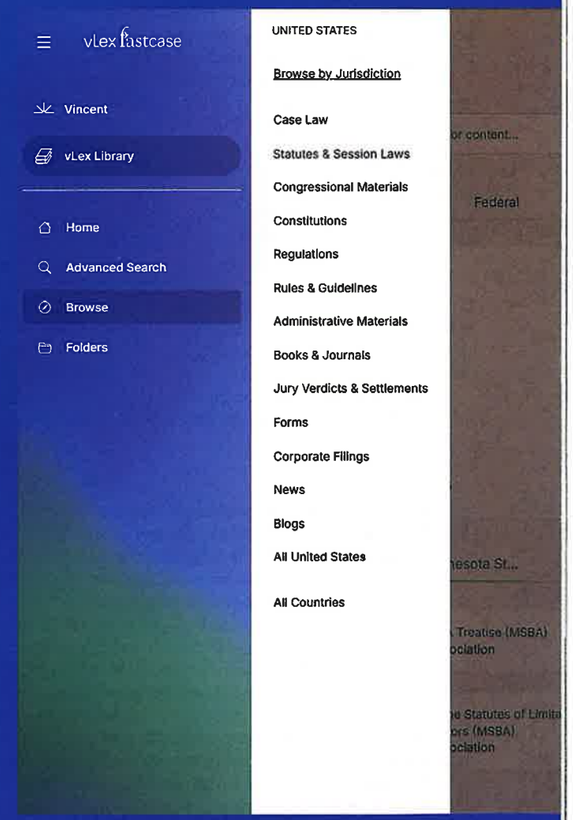
Easily access vLex Fastcase features within Microsoft Word and Google Chrome for seamless research and drafting.

Feature-rich interface

Broaden or narrow search across jurisdictions and content types using natural language, Boolean, or built-in advanced search. Documents feature linked table of contents, pincites, cited authorities, and internal document links.

AI case analysis

Access automatically generated header notes and legal issue summaries for quick insights into cases. Vincent AI subscription available to MSBA members at a discounted rate.



MSBA

As a member of the MSBA, you have free access to vLex Fastcase. Questions? Contact info@mnbars.org

MEMORANDUM

To: Rules Committee of the Lawyers Professional Responsibility Board

From: William Z. Pentelovitch

Date: August 26, 2026

Subject: Rule 4 of the Minnesota Rules of Professional Conduct (Rules 4.2 & 4.4)

The Assignment from the Supreme Court

After hearing oral argument in a disciplinary matter subsequently decided as *In Re Igbanugo,* 34 N.W. 3d 292 (Minn. 2026), the Minnesota Supreme Court entered an Order dated October 17, 2025, referring consideration of amendments to Rule 4 of the Minnesota Rules of Professional Conduct [hereafter "MRPC"] to the Lawyers Professional Responsibility Board" (hereafter "LPRB"), directing that the LPRB must file a report and any recommendation before January 29, 2027. The Chair of the LPRB referred the matter to the Rules Committee for initial consideration.

The Rules which are implicated by the court's referral are Rules 4.2 and 4.4(a), which provide respectively:

> 4.2 *In representing a client,* a lawyer shall not communicate about 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 court order.
>
> 4.4(a) *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.

(Italics added.). The italicized language in 4.2 and 4.4(a) is the subject of the court's referral to the LPRB.

For additional context, in footnote 10 to *Igbanugo* the court pointed out a discrepancy in the positions of the Director of the Office of Lawyer Professional Responsibility ("Director") regarding MRPC 4.2 and 4.4(a). The court noted that

"The public positions of the LPRB and the Director regarding Rule 4.2, regarding communications with represented parties, seems to conflict with the Director's position that Igbanugo violated Rule 4.4(a) in this case. The antecedent language in Rules 4.2 and 4.4(a) is identical – both rules begin with "(i)n representing a client."

The Positions of the ABA and the Position of the LPRB

The public position of the LPRB is set forth in LPRB Opinion 25 which was issued in 2023. In Opinion 25, the LPRB rejected American Bar Association ("ABA") Formal Op. 22-502(2022) (hereafter "ABA Op. 502") which interpreted the language "in representing a client" to include situations in which a lawyer was representing themselves *pro se*. Op. LPRB No. 25 at 2-3 (July 28, 2023). The LPRB adopted the dissent to the ABA opinion, agreeing with the dissent that the plain language of Rule 4.2 "does not apply to attorneys who represent themselves." The Director's public position was contained in an article in which the Director stated her agreement with LPRB Opinion 25. Susan Humiston, *The No-Contact Rule and the Pro Se Lawyer,* Bench and Bar of Minnesota, July 29, 2025. Yet, notwithstanding her public position, in *Ignabugo* the Director took the position that Rule 4.4(a) did apply to lawyers representing themselves pro se. However, because neither party in *Igbanugo* briefed the Rule 4.4(a) issue, the court declined to address the Rule 4.4(a) issue. *Ignabugo,* 34 N.W. 3d at 301.

In an earlier case the court had noted that several jurisdictions had interpreted the language "In representing a client" to apply to self-represented attorneys, that those decisions were in accord with ABA Formal Op. 22-502(2022), that the court had not addressed whether Rule 4.2 applied to self-represented attorneys, but that the court did not need to decide the issue at that time. *In Re Jensen,* 12 N.W. 3d 731, fn. 8 (Minn. 2024).

The dissent to ABA Op. 502 states the "the *purpose* of the rule would clearly be served by extending it to self-represented lawyers," and that "Applying Rule 4.2 to pro se lawyers is supported by compelling policy arguments." ABA Op. 502 at 6-7. The dissenters conclude by stating "The rule should be amended to achieve the result advocated for in the majority opinion." *Id.,* at 8.

The LPRB adopted "the position of the dissent in ABA Opinion 502." LPRB Op. 25 at 2. The LPRB also noted that in expanding the reach of ABA Opinion 502 to *pro se* attorneys the ABA recited the "same policy rationale underlying the original ABA Model Rule 4.2: eliminating overreach, interfering with another attorney's relationship; with his or her client, and eliciting uncounseled disclosures." The LPRB said the dissent to ABA Op. 502 "in no way disputes these important, common-sense policy prerogatives that promulgate the proper functioning of Minnesota's legal system." *Id.*

Analysis

In reviewing the available information, it appears that prior to the promulgation of ABA Op. 502 most states had adopted Model Rule 402 and that many state courts had already interpreted the words "in representing a client" in Rule 402 to include lawyers representing themselves pro se. It also appears that since ABA Op. 502 was issued, the only state which has issued an opinion rejecting the majority position of ABA Op. 502 and agreeing with the dissent is Minnesota.

There appear to be only two states that have altered Rule 402 to explicitly include *pro se* lawyers within the language of the Rule, and both of those states did so prior to the adoption of ABA Op. 502. The states in question are Oregon and New York, and they have each taken a different approach to bringing lawyers representing themselves into the explicit language of the Rule.

Oregon took the simplest approach; Oregon Rule of Professional Conduct 4.2 provides:

> In representing a client *or the lawyer's own interests,* a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer . . . unless . .

(Italics added.). Similarly, and consistently, Oregon Rule of Professional Conduct 4.4(a) begins with the words "In representing a client *or the lawyer's own interests* . . ."

New York Rule of Professional Conduct 4.2 takes a different approach. Rule 4.2(a) tracks Model Rule 4.2 by beginning with the words "In representing a client. . ." However, New York adds a Rule 4.2(c), which provides:

> A lawyer who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the Lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

The New York version is broader than the Oregon version and is broader than the interpretation of Rule 4.2 stated in ABA Op. 502. It imposes the "no contact" rule of Rule 4.2(a) not only on lawyers representing themselves, but on lawyers who are represented by other lawyers as well. But in a twist, it doesn't require permission from the opposing party's lawyer for such communication to take place, it only requires that the opposing party's lawyer either give prior consent or be given reasonable advanced noticed that the communication will take place. *See* comment 12(A) to NY Rule of Professional Conduct 4.2.[1]

LPRB Op. 25 was based on the plain language of Rule 4.2. But we also agreed with the majority and minority views expressed in ABA Op. 502 that the rationale of Rule 4.2 should extend to lawyers representing themselves. Therefore, it would be consistent with the LPRB's prior position for the Rules Committee to recommend to the full LPRB that an amendment be made to Rule 4.2 to explicitly include lawyers representing their own interests.

It is hard to understand the reasoning behind extending Rule 4.2 to lawyers represented by counsel as New York has done. It places a lawyer who is not representing themselves in a different position than a lay litigant, and it is hard to understand why situation client-to-client communication should be forbidden. The

[1] [12A] When a lawyer is proceeding *pro se* in a matter, or is being represented by his or her own counsel with respect to a matter, the lawyer's direct communications with a counterparty are subject to the no-contact rule, Rule 4.2. Unless authorized by law, the lawyer must not engage in direct communications with a party the lawyer knows to be represented by counsel without either (i) securing the prior consent of the represented party's counsel under Rule 4.2(a), or (ii) providing opposing counsel with reasonable advance notice that such communications will be taking place.

fact that no other state appears to have cast the net as broadly as New York has done suggests that Minnesota should not be an outlier like New York on this point.

Recommendation In Response to Supreme Court Order

The Oregon approach is cleaner than the New York approach and an amendment to bring MRPC 4.2 closer to the language of Oregon 4.2 is warranted. It is recommended that the LPRB propose slightly altering the language Oregon used so that a revised Minnesota Rule 4.2 would read as follows:

> 4.2 *In representing a client, acting pro se, or representing the lawyer's own direct or indirect interests,* 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 court order.

The "direct or indirect interests" language is suggested because there are a wide variety of situations in which a lawyer may be acting as counsel for an entity in which the lawyer has a material interest such that the principle underlying the rule would be vindicated by applying a no contact rule under the circumstances.

For example, a lawyer might be representing a trust of which they are a beneficiary. Or the lawyer may be representing a closely held corporation, partnership or limited liability company in which the lawyer or lawyer' spouse is a shareholder, partner or member. Similarly, the lawyer may be representing the lawyer's spouse in a child custody dispute with the other parent of the spouse's child, giving the lawyer an indirect emotional, if not financial, interest in the outcome of the matter. While any or all of these scenarios may already be adequately covered by use of the word "client," for the sake of absolute clarity it is recommended that this language should be included.

Additional Recommendations

As it considered the proposed amendment to Rule 4.2, the Rules Committee considered Rules 4.1, 4.3, and 4.4 as well. The Rules Committee feels that the same grammatical problem that exists in Rule 4.2, which has prompted the recommendation for a more precise and clear introduction to Rule 4.2, also exists

in Rules 4.1, 4.3, and 4.4 as well. There is no cogent reason not to amend those rules so that that the scope of those rules is as broad as is the scope proposed for Rule 4.2. Thus, the Rules Committee recommends the following changes so the revised rules would read as follows:

> Rule 4.1: *In representing a client, acting pro se, or representing the lawyer's own direct or indirect interests,* a lawyer shall not knowingly make a false statement of fact or law.
>
> Rule 4.3: *In dealing with a person who is not represented by counsel, a lawyer representing a client, acting pro se, or representing the lawyer's own direct or indirect interests*:
>
> (a) * * *
> (b) * * *
> (c) * * *
> (d) * * *
>
> Rule 4.4:
>
> (a) *In representing a client, acting pro se, or representing the lawyer's own direct or indirect interests,* 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.
> (b) *In representing a client, acting pro se, or representing the lawyer's own direct or indirect interests,* a lawyer who receives a document or electronically stored information relating to *such representation* and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

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.

100

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."

---

[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

---

[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

---

[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

100

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.

100

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*

100

anyone who views the House of Delegates agenda online.

Bruce A. Green, Chair
Standing Committee on Ethics and Professional Responsibility
917-331-5321
bgreen@law.fordham.edu

Sari W. Montgomery, Chair
Standing Committee on Professional Regulation
847-217-3524
smontgomery@rsmdlaw.com

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.

OLPR Dashboard for Court And Chair

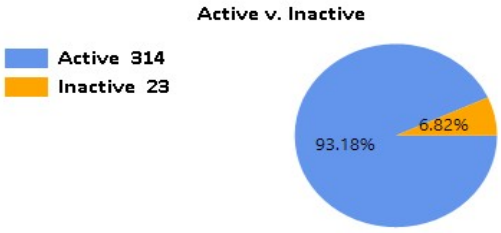
	Month Ending August 2026	Change from Previous Month	Month Ending July 2026	Month Ending August 2025
Open Files	789	13	776	676
Total Number of Lawyers	505	10	495	469
New Files YTD	1063	112	951	1045
Closed Files YTD	955	99	856	969
Closed CO12s YTD	313	43	270	260
Summary Dismissals YTD	642	65	577	612
Files Opened During August 2026	112	-3	115	132
Files Closed During August 2026	99	-29	128	106
Public Matters Pending (excluding Resignations)	40	-1	41	32
Panel Matters Pending	14	1	13	13
DEC Matters Pending	116	10	106	104
Files on Hold	20	1	19	13
Advisory Opinion Requests YTD	1179	135	1044	1180
CLE Presentations YTD	22	1	21	24
Files Over 1 Year Old	337	8	329	252
Total Number of Lawyers	197	2	195	146
Files Pending Over 1 Year Old w/o Charges	226	16	210	152
Total Number of Lawyers	154	8	146	109

	2026 YTD	2025 YTD
Lawyers Disbarred	2	5
Lawyers Suspended	4	6
Lawyers Reprimand & Probation	1	1
Lawyers Reprimand	4	2
TOTAL PUBLIC	**11**	**14**
Private Probation Files	4	0
Admonition Files	51	58
TOTAL PRIVATE	**55**	**58**

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						1			**3**
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						**4**
2023-03	2					1				**3**
2023-04	1				1					**2**
2023-05	3				1	1				**5**
2023-06	1									**1**
2023-07	2		1				8			**11**
2023-08	5				1		2			**8**
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	2			1			2			**5**
2024-03	3									**3**
2024-04	3			3						**6**
2024-05	2			2			3			**7**
2024-06	3						1			**4**
2024-07	3				1		1			**5**
2024-08	10									**10**
2024-09	5						1			**6**
2024-10	7									**7**
2024-11	3			1	1		1	1		**7**
2024-12	10			1					1	**12**
2025-01	13		1				1			**15**
2025-02	9		1				2			**12**
2025-03	15	1								**16**
2025-04	12		2		1		1			**16**
2025-05	9			2			2			**13**
2025-06	20									**20**
2025-07	23			1						**24**
2025-08	25									**25**
Total	**226**	**1**	**5**	**19**	**15**	**4**	**64**	**2**	**1**	**337**

	Total	**Sup. Ct.**
Sub-total of Cases Over One Year Old	273	22
Total Cases Under Advisement	64	64
Total Cases Over One Year Old	**337**	**86**



All Pending Files as of Month Ending August 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						1				**3**
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							**4**
2023-03				2					1					**3**
2023-04				1				1						**2**
2023-05				3				1	1					**5**
2023-06				1										**1**
2023-07				2		1				8				**11**
2023-08				5				1		2				**8**
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				2			1			2				**5**
2024-03				3										**3**
2024-04				3			3							**6**
2024-05				2			2			3				**7**
2024-06				3						1				**4**
2024-07				3				1		1				**5**
2024-08				10										**10**
2024-09				5						1				**6**
2024-10				7										**7**
2024-11				3			1	1		1	1			**7**
2024-12				10			1						1	**12**
2025-01				13		1				1				**15**
2025-02				9		1				2				**12**
2025-03				15	1									**16**
2025-04				12		2		1		1				**16**
2025-05				9			2			2				**13**
2025-06				20										**20**
2025-07				23			1							**24**
2025-08				25										**25**
2025-09				26	1		1	1						**29**
2025-10			1	24		1								**26**
2025-11				20							1		1	**22**
2025-12		1	5	34							1			**41**
2026-01		1	2	24						1	1			**29**
2026-02		2	3	25				1			1			**32**
2026-03		4	5	34				1						**44**
2026-04		8	2	21										**31**
2026-05		15	3	15										**33**
2026-06		28		38							3			**69**
2026-07		26		17										**43**
2026-08	10	30		12								1		**53**
Total	**10**	**115**	**21**	**516**	**2**	**6**	**20**	**18**	**4**	**65**	**9**	**1**	**2**	**789**

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

FILED
05-28-2026
Clerk of Circuit Court
Brown County, WI
2025CV001790

BY THE COURT:

DATE SIGNED: May 28, 2026

Electronically signed by Tammy Jo Hock
Circuit Court Judge

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

Michael B. Padden,

Plaintiff,

vs. Case Number: 25CV1790

Office of Lawyers Professional Responsibility,
a Minnesota State Agency;

and

Susan Humiston,
individually and as Director of OLPR,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

The above-entitled matter came before the court on May 26, 2026, on a hearing regarding Defendants' Motion to Dismiss, the Honorable Tammy Jo Hock presiding, and the Plaintiff, Michael Padden (hereinafter Plaintiff), having appeared by his attorney, Stephen M. Compton, and the Defendants, Office of Lawyers Professional Responsibility (OLPR) and Susan Humiston, having appeared by attorneys Robert M. Charles and Jordan M. Asch.

Per the Court's February 26, 2026, Briefing Format & Scheduling Order (Dkt. 19), Plaintiff's deadline to submit written materials opposing Defendants' motion was April 13, 2026. Plaintiff failed to do so, and to date has not made any such written submission. Instead, on April 21, 2026, counsel for Plaintiff submitted a notice of retainer (Dkt. 25), and on May 4, 2026, out-

of-state counsel for Plaintiff submitted a motion for admission pro hac vice. To date, certification of payment in support of pro hac vice admission for Plaintiff's out-of-state counsel has not been submitted despite the Court's follow-up, and the motion for admission pro hac vice was denied. On May 7, 2026, Plaintiff's counsel submitted a letter to the Court requesting additional time to file a brief opposing Defendants' motion (Dkt. 29), to which Defendants' counsel responded on May 8, 2026 (Dkt. 30).

At the May 26, 2026, hearing, Plaintiff's counsel requested additional time to file a brief in opposition to Defendants' motion. Defendants' counsel argued that professional courtesy had been reasonably extended, and the Court should grant its motion to dismiss based on its moving papers. The Court heard oral argument from Defendants' counsel in support of the motion, and counsel present for Plaintiff declined to advance oral argument.

Based upon the court record, the proceedings and documents herein, and the Court's review of Defendants' submissions supporting the motion and oral argument, the Court finds, pursuant to Wis. Stat. §§ 802.06(2)(a)1 through 3 and 6, lack of capacity to be sued, lack of jurisdiction over the subject matter, lack of jurisdiction over the persons, and failure to state a claim upon which relief can be granted.

IT IS HEREBY ORDERED THAT:

1. The Motion to Dismiss filed by Defendants, Office of Lawyers Professional Responsibility (OLPR) and Susan Humiston, is GRANTED.

2. The Amended Complaint, submitted by Plaintiff, Michael B. Padden, is hereby DISMISSED WITH PREJUDICE, pursuant to Wis. Stat. § 802.06(2)(a)1 through 3 and 6, for lack of capacity to be sued, lack of jurisdiction over the subject matter, lack of jurisdiction over the persons, and for failure to state a claim upon which relief can be granted.

STATE OF MINNESOTA | DISTRICT COURT

RAMSEY COUNTY | SECOND JUDICIAL DISTRICT

Jessica Heather Anlauf,

Petitioner,

vs.

Office of Lawyers Professional Responsibility, et al.,

Respondents.

62-CV-26-167

ORDER

This case came before the court on May 26, 2026, for a hearing on Respondents' motion to dismiss. Petitioner Jessica Heather Anlauf appeared self-represented, and Respondents, the Office of Lawyers Professional Responsibility (OLRP) and Director Susan M. Humiston, appeared through their counsel, Assistant Attorney General Christy Hall. Based on the entire record, the court now issues the following:

ORDER

Respondents' motion to dismiss is granted. This court's alternative writ of mandamus is vacated, and the petition for mandamus is dismissed without prejudice. Let judgment be entered accordingly.

Sheu, Edward (Judge)
Jun 2, 2026 1:29 PM

Edward Sheu
District Court Judge

MEMORANDUM

I. Background.

On February 13, 2024, Petitioner filed an ethics complaint with the OLRP regarding attorney Thomas H. Gunther. The OLRP acknowledged the complaint, assigned a file number to it, and stated it would be investigated under Rule 8(a) of the Rules on Lawyers Professional Responsibility.[1] On August 15, 2025, an OLRP representative told Petitioner that attorney Gunther would be publicly disciplined based on an unrelated matter but that the OLRP was still deciding whether to seek disbarment, the OLRP was still investigating Petitioner's complaint, and attorney Gunther was not responsive to the OLRP. On November 7, 2025, Petitioner requested a final determination from the OLRP on her complaint. Not having received a final determination from the OLRP on her complaint, Petitioner asked this court for a writ of mandamus on January 7, 2026. This court directed Respondents to show cause, and Respondents have now moved to dismiss.

II. Legal standards.

"The authority to issue a writ of mandamus is statutory." *State v. Wilson*, 632 N.W.2d 225, 227 (Minn. 2001). Under Minn. Stat. § 586.01, a writ of mandamus may be issued to any person to compel the performance of an act the law specifically enjoins as a duty resulting from an office. The writ must issue on the information of the party beneficially interested but

[1] Rule 8(a) provides, "At any time, with or without a complaint or a District Committee's report, and upon a reasonable belief that professional misconduct may have occurred, the Director may make such investigation as the Director deems appropriate as to the conduct of any lawyer or lawyers; provided, however, that investigations to be commenced upon the sole initiative of the Director shall not be commenced without the prior approval of the Executive Committee."

cannot issue where there is a plain, speedy, and adequate remedy in the ordinary course of law. Minn. Stat. § 586.02.

A writ of mandamus is either alternative or peremptory. Minn. Stat. § 586.03. An alternative writ must state concisely the facts showing the respondent's obligation to act, their failure to do so, and command the respondent do the required act or show cause why they have not. *Id.* A peremptory writ is the same except that the respondent does not have the opportunity to show cause. *Id.* A peremptory writ should be issued if the right to perform the act is clear and no valid excuse for nonperformance can be given. Minn. Stat. § 586.04.

The two primary uses of mandamus are (1) to compel the performance of an official duty clearly imposed by law and (2) to compel the exercise of discretion when that exercise is required by law. *See* Minn. Stat. § 586.01; *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004). A writ of mandamus does not control the particular way a duty is to be performed and does not dictate how discretion is to be exercised. *See, e.g., State v. Davis*, 592 N.W.2d 457, 459 (Minn. 1999); *State ex rel. S. St. Paul v. Hetherington*, 240 Minn. 298, 301, 61 N.W.2d 737, 740 (1953); *State ex rel. Laurisch v. Pohl*, 214 Minn. 221, 226, 8 N.W.2d 227, 231 (1943).

"Mandamus is an extraordinary remedy." *N. States Power Co.*, 684 N.W.2d at 491. A petitioner must show the respondent failed to perform an official duty the law imposes and, as a result, the petitioner suffered a public wrong specifically injurious to the petitioner. *Id.* A peremptory writ should be issued with great caution, only where the facts are unquestionable, and there is no room for doubt the right to performance of an act must be compelled. *Home Ins. Co. v. Scheffer*, 12 Minn. 382, 384 (1867). A writ should be issued

sparingly and only to compel a person to perform a duty required by law when the duty sought to be enforced is clear and indisputable. *Chanhassen Chiropractic Ctr., P.A. v. City of Chanhassen*, 663 N.W.2d 559, 561-62 (Minn. Ct. App. 2003).

A respondent may show cause to the alternative writ by "answer made in the same manner as an answer to a complaint in a civil action." Minn. Stat. § 586.06; *see also* Minn. Stat. § 586.08 (stating that the only pleadings allowed are the writ, answer, and demurrer). In lieu of immediately filing an answer, a respondent may alter the time for answering by moving to dismiss the alternative writ. *Ly v. Harpstead*, 16 N.W.3d 788, 801-03 (Minn. Ct. App. 2025).

When considering a motion to dismiss, the court must "determine whether the pleadings set forth a legally sufficient claim for relief." *Abel v. Abbott Nw. Hosp.*, 947 N.W.2d 58, 68 (Minn. 2020). A claim survives a Rule 12.02(e) motion to dismiss "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demand." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014). A complaint should not be dismissed unless it appears to a certainty that no facts that could be introduced consistent with the pleading exist that would support granting the relief demanded. *Forslund v. State*, 924 N.W.2d 25, 33 (Minn. Ct. App. 2019); *N. States Power Co. v. Franklin*, 265 Minn. 391, 394, 122 N.W.2d 26, 29 (1963). The showing a plaintiff must make to survive a Rule 12.02(e) motion is minimal. *State by Smart Growth Mpls. v. City of Mpls.*, 954 N.W.2d 584, 594 (Minn. 2021). But a pleading alleging mere labels and conclusions cannot survive a Rule 12.02(e) motion, and the court is not bound by legal conclusions or

incorrect legal statements. *Halva v. Minn. State Colls. & Univs.*, 953 N.W.2d 496, 501-02 (Minn. 2021); *Bergstrom v. McEwen*, 960 N.W.2d 556, 565 (Minn. 2021).

III. Analysis.

Petitioner argues that Respondents, state actors, have a clear duty under the Rules on Lawyers Professional Responsibility to promptly investigate and issue a determination on her ethics complaint against attorney Gunther, Respondents have now delayed issuing a determination for over 833 days, and Petitioner has no adequate legal remedy other than a writ of mandamus. Petitioner argues no circumstances warrant the delay, attorney Gunther admitted his malpractice (missing a statute of limitations and failing to communicate), the OLPR's delays are part of a system problem, the OLRP's own guidelines call for cases to be addressed within one year, and Petitioner is being harmed by Respondent's delays and deserves closure. Petitioner argues Respondents' duty to investigate and dispose of her complaint promptly, and with fairness and justice, is not discretionary, regardless of the disposition.

Respondents argue the Rules set no deadline for them to complete their investigation or dispose of ethics complaints, Respondents have discretion when investigating ethics complaints, attorney Gunther has been suspended from practicing law, and Petitioner has had an adequate legal remedy insofar as she brought a malpractice action against attorney Gunther. Respondents point to possible pending changes to the Rules, which would impose complaint-processing deadlines as Petitioner proposes here, but currently Respondents have discretion to triage complaints according to principles beyond promptness and no duty

to complete their investigation within any timeline.[2] Respondents insist they will complete their investigation, and their triage of all complaints does not mean Petitioner's case is unimportant.

In reply, Petitioner points to the OLPR's February 12, 2026, letter stating her complaint remains under investigation after more than two years and with no end in sight, attorney Gunther has since engaged in more misconduct by failing to cooperate with the OLPR, he continues to hold himself out as an active attorney, her malpractice claim has been dismissed with prejudice on procedural grounds so she has no alternative remedy but for a writ, the malpractice action was no substitute for her ethics complaint, and Respondents never cited her malpractice action as grounds for delay. Petitioner request the court issue a peremptory writ of mandamus compelling Respondents to issue a final determination on her ethics complaint within 14 days.

This court agrees Respondents have a clear legal duty to investigate and process Petitioner's complaint against attorney Gunther according to the Rules on Lawyers Professional Responsibility. Rule 6(a) provides, "All complaints of lawyers' alleged unprofessional conduct or allegations of disability shall be investigated pursuant to" the Rules. Rule 2 provides, "Such investigations and proceedings shall be conducted in accordance with these Rules." In statutory interpretation, the term "shall" means "mandatory." Minn. Stat. § 645.44, subd. 16; *In re M.O.*, 838 N.W.2d 577, 583 (Minn. Ct. App.

[2] Respondents point out that, if there was now an existing deadline for them to complete their investigation, the complaint might have to be dismissed if they had not yet determined whether to seek discipline within that time frame.

2013) (courts may apply statutory interpretation principles when interpreting court rules), *rev. denied* (Minn. Oct. 23, 2013).

It is less clear, however, that Respondents have an absolute duty to complete their investigation and issue their disposition of a matter within any timeframe. Rule 2 provides, "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, having in mind the public, the lawyer complained of and the profession as a whole, and that disability or disciplinary proceedings be commenced in those cases where investigation discloses they are warranted." Rule 8(d) provides for various dispositions including a determination no discipline is warranted, an admonition, stipulated probation, and submission to panel proceedings. Rule 8(e) allows a complainant to seek review of the director's decision by the Lawyers Board.

The Rules provide no deadline for the director to complete her investigation or dispose of an investigation, and "there is no statute of limitations in lawyer discipline proceedings." *In re Petition for Disciplinary Action Against Perez*, 688 N.W.2d 562, 568 (Minn. 2004). By contrast, Rule 7(c) requires a District Ethics Committee to complete an assigned investigation within 90 days of receiving a complaint. *See, e.g., Underwood v. State*, 25 N.W.3d 26, 38 (Minn. 2025) (omission in one part of statute is considered intentional and words of limitation or modification used in one part of statute will not be presumed elsewhere). The Rules do not specify when the Director must complete an investigation into an ethics complaint or decide on discipline.

Further, because a rule change is now being considered that would impose a complaint-disposition deadline on Respondents, that supports the fact the rules now do not impose any such requirement. *See, e.g., N. States Power Co. v. Comm'r of Rev.*, 571 N.W.2d 573, 575-76 (Minn. 1997) (when legislature changes a statute, courts presume the legislature intends a change in the law unless it appears the legislature only intended to clarify the earlier statute). The proposed rule change would clearly change the existing rule by imposing a 270-day deadline for the Director to complete an investigation where there is now no deadline at all.

The court agrees Respondents must "promptly" investigate and dispose of Petitioner's complaint, but the term "promptly" is subjective, and Rule 2 also requires Respondents to consider fairness, justice, the public, the lawyer being investigated, and the whole profession. A reasonable definition of "prompt" is something "[d]one quickly, immediately, or at the right time; performed without delay . . . ." Black's Law Dictionary (12th ed. 2024). But the appellate courts have cautioned that mandamus may be used only to compel public officers "to perform duties with respect to which they plainly have no discretion as to the precise manner of performance and where only one course of action is open." *State ex rel. Gresham v. Delaney*, 213 Minn. 217, 219, 6 N.W.2d 97, 98 (1942). Were this court to order Respondents to complete their investigation and issue a disposition on Petitioner's ethics complaint by any deadline, this court would be creating a deadline where the Rules do not provide for one and rushing Respondents' discretionary decision making, which must weigh competing policy considerations.

The court appreciates that "mandamus is inappropriate to control or interfere with the manner in which the city exercises its discretion, mandamus can be appropriate to set the exercise of that discretion into motion." *Mendota Golf LLP v. City of Mendota Heights*, 708 N.W.2d 2d 162, 172 (Minn. 2006) (cite omitted). This court believes that an order to Respondents to expedite their decision making on Petitioner's complaint, or to refer the complaint to a District Ethics Committee for a speedier investigation, would be a misuse of mandamus, since it would interfere with Respondent's investigation and decision making.

The court recognizes that Petitioner is entitled to closure on her complaint, she has a right to appeal the Director's discipline decision, a prompt investigation certainly does not mean indefinite, and, especially now that her malpractice action appears to be coming to an end, there appears no known reason for further delay. The court agrees Respondents do not have discretion to never conclude their investigation and not ever issue a disciplinary decision, and it would be appropriate for Respondents to update Petitioner on their investigation timeline. Although Petitioner's malpractice claim is different than her ethics complaint, insofar as they seek differing remedies and serve different purposes, to the extent the malpractice action was a factor in Respondents' investigation, that obstacle now appears to be cleared. Because the court does not believe mandamus is appropriate now, the petition will be dismissed without prejudice.

Filed in District Court
State of Minnesota
5/20/2026 4:22 PM

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Stephen Michael Michuda v. Tim Walz, et al.

Court File Number: 62-CV-25-6377

Order

On May 20, 2026, this matter came before the Honorable Laura Nelson, Judge of Ramsey County District Court, on Defendants Minnesota Governor Tim Walz, Lieutenant Governor Peggy Flanagan, Attorney General Keith Ellison, each member of the Minnesota House of Representatives and Minnesota Senate, the Minnesota Board of Public Defense, the Chief Administrator of Public Defense Kevin Kajer, State Public Defender William Ward, Chief Appellate Public Defender Cathryn Middlebrook, the Chief Public Defender of each Judicial District, the Lawyers Professional Responsibility Board, and the Director of the Office of Lawyers Professional Responsibility's (collectively State Defendants) Motion to Dismiss. Plaintiff Stephen Michuda appeared *pro se*. Assistant Attorney General Matthew A. McGuire appeared on behalf of State Defendants.

As addressed on the record, the Court finds Plaintiff's claims are barred by the favorable termination rule established in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994). The Court notes that while Plaintiff characterizes this suit as a class action, as a *pro se* litigant, Mr. Michuda may not bring claims on behalf of anyone other than himself. The Court having reviewed the motion papers, and based upon the files, records, and proceedings herein and for the reasons stated on the record,

IT IS HEREBY ORDERED:

1. State Defendants' motion to dismiss is **GRANTED.** This matter is hereby dismissed without prejudice.
2. Plaintiff has not properly served the County Attorney Defendants. Therefore, Plaintiff's motion to determine all Defendants have been served is **DENIED.**
3. Dismissal of Plaintiff's claims renders all other pending motions moot and they are thus **DENIED.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Laura E Nelson
Nelson, Laura (Judge)
May 20, 2026 3:20 PM

DISTRICT COURT JUDGE

Our new professional responsibility websites

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.

Interested in the public discipline history of a Minnesota attorney? Have questions regarding the management of your trust account? Curious about the difference between the Office of Professional Responsibility (OLPR) and the Lawyers Professional Responsibility Board (LPRB)? Wonder if your law firm needs to file a professional firms report? Want more information about the Client Security Fund and whether your client might have a claim against the fund for harm caused by their prior counsel? Three new and greatly expanded websites have you covered!

Office of Lawyers Professional Responsibility *(olpr.mncourts.gov/)*

This website, now featuring a new URL, contains much of the information that was located previously on a combined OLPR/LPRB site at *lprb.mncourts.gov.* Here you will find the Lawyers Search function to check for public discipline of Minnesota lawyers. This site also contains an archive of professional responsibility articles published in Bench & Bar and Minnesota Lawyer (searchable by rule and subject). There are more than 50 years of articles! And the website is finally mobile-friendly.

Complainants can file a complaint online and upload documents with the complaint form. For decades, complainants have been able to file complaints online in Minnesota (we were one of the early adopters of this functionality) but website limitations used to require complainants to mail or email supporting documents to the Office after the online complaint was filed. The complaint form now includes a more user-friendly interface, and we've added an FAQ section to answer both complainant and respondent questions related to filing complaints and the process that follows. Complaints, along with documentation, can be filed from a phone.

The website also includes several new or expanded sections. The discipline system and process in Minnesota are explained. There is a new section for the public with helpful tips for hiring a lawyer. The resources-for-the-public section has been expanded to link to government and nonprofit resources around the state to assist individuals with some of their legal issues. There is a calendar for professional responsibility events, including public hearing notices. If you have ever wanted to see a discipline or reinstatement hearing, or the related Supreme Court oral arguments, you can find those events on this calendar. And news releases will now be published on the website, something that was not done previously.

The site also contains a lot of resources to assist lawyers in their Minnesota practices, including information about the Office's advisory opinion (hotline) service, trust account information, forms for professional firm registration, and much more. And new resource sections are in the works, including new sections on reinstatements, succession planning, and trusteeships.

Finally, accessibility has been enhanced. Users can change the website language to Arabic, Hmong, Russian, Somali, or Spanish, greatly expanding language accessibility. Previously, only the complaint forms and instruction brochures were in additional languages. As the American Bar Association noted during its consultation in 2022, Minnesota is the only state that offers complaint forms in multiple languages and now much of the content of the website will also be offered in several languages. The website was designed to comply with the State of Minnesota's Accessibility Standard, which is based on Section 508 of the Rehabilitation Act (as amended) and Web Content Accessibility Guidelines 2.1 AA. (You may want to examine whether your website is accessible as well.) And there is an accessibility widget on the site that includes screen readers and other customizable navigational enhancements.

Lawyers Professional Responsibility Board *(lprb.mncourts.gov/)*

This redesigned site is now focused on the Lawyers Board, which is separate from the OLPR. It contains new content specific to the Board's role in attorney discipline and includes relevant rules, board opinions, board membership, annual reports, meeting materials, important dates, and other resources about the discipline system and process that make clear the Board's separate but very important role within the attorney discipline and regulatory system. This website also includes information for the public on hiring an attorney

and helpful links to resources to assist with finding a lawyer and navigating the courts as a self-represented litigant. It also offers news and announcements specific to the Board and directs users to the OLPR site where applicable. The creation of this website was one of the ABA recommendations from its discipline system consultation, and it will aid stakeholders in appreciating the relevant distinctions and connections between the two organizations.

Client Security Board

(csb.mncourts.gov/)

The Client Security Board administers a fund created by the Minnesota Supreme Court to reimburse victims of lawyer theft. The site has been refreshed, with two main improvements. First, claimants can submit claims online, an option not previously available. Second, a portal was created to pay the Client Security Board electronically so that lawyers who owe the fund money can make payments easily. We've also added an FAQ to explain the role of the Board, the purposes of the fund, and what is and is not payable from the fund. Since its creation in 1987, the Board has approved more than $8.8 million in compensation on claims against 211 Minnesota lawyers. The reimbursement fund is supported through previous allocations from annual registration fees, but currently no portion of your annual registration fee goes to the fund, as the Court has determined it is sufficiently funded to cover anticipated near-term claims. The Board, though not widely known, does great work considering claims where a lawyer has stolen client funds. Check out the new website to learn more.

The three sites were designed by Grossman Design Associates, a Minneapolis firm, and it was wonderful to partner with them on the work. If you have any feedback, please let me know. We want it to be easy for lawyers and legal consumers to find information about attorney discipline and ethics. We want the sites to work for all stakeholders.

Other news

You may have heard about a proposed Department of Justice rule relating to ethics complaints against DOJ attorneys. In March, the DOJ published a rule for comment proposing to give the United States Attorney General a right of "first review" of any ethics complaint against current or former DOJ attorneys; should the AG decide to investigate a complaint, requesting states would be asked to stay their own investigation in favor of the AG's process. The rule would also provide that Justice Department lawyers may be prohibited from participating in state investigations during the AG's review and authorize the AG to take necessary but undescribed actions should states decline to stay their investigations. The text of the proposed rule can be found on the Federal Register at *www.federalregister.gov*, Docket No. OAG199. You can also review the more than 1 million (!) comments submitted by numerous stakeholders during the 30-day comment period. The Lawyers Board submitted a comment, which is posted on the Lawyers Board website under news. Minnesota Attorney General Keith Ellison led a multi-state coalition in filing a comment. That letter can be found online at the AG's website.* The fact that so many individuals and entities took the time on short notice to comment highlights the importance of attorney regulation.

Conclusion

I hope you find the new websites useful. And, if you find the topic of attorney ethics and discipline interesting, remember that the district ethics committees and other parts of the lawyer regulation system are often seeking attorneys and public member volunteers. We've created a Volunteer Opportunities page on the OLPR website that provides more information—or feel free to email our volunteer coordinator at *deccordinator@courts.state.mn.us.* ▲

* *https://ag.state.mn.us/Office/Communications/2026/04/07_Federal-Attorneys.asp*





Questions?
If you have questions, do not forget you can call the OLPR every day to obtain free ethics advice at **651-296-3952**

AMENDMENTS TO THE ETHICS RULES

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.

By an order dated May 14, 2026, the Minnesota Supreme Court has amended the Minnesota Rules of Professional Conduct (MRPC). The ethics rules do not change that often, so it is important to note when changes are made to the black letter text of the rules.

Humanitarian assistance to litigation clients

Rule 1.8, MRPC, addresses specific conflicts of interest with current clients. In May, Rule 1.8(e), MRPC, was amended, effective immediately, to allow an additional instance where it is permissible to provide financial assistance to a client in connection with pending or anticipated litigation, an issue that came up a fair amount during Operation Metro Surge. The text of the new Rule 1.8(e)(4) provides:

> a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization, and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine, and other basic living expenses. The lawyer: (i) may not promise, assure, or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention; and (ii) may not seek or accept reimbursement from the client, a relative of the client, or anyone affiliated with the client.

Financial assistance to clients in connection with pending or contemplated litigation is generally prohibited except in specific, enumerated instances. The rationale is that lawyers should not be subsidizing litigation, such as making loans for living expenses, because doing so may encourage pursuit of nonmeritorious claims, and because lawyers should not have too great a financial stake in the litigation.

The enumerated exceptions, which remain in effect, include (1) advancing court costs and expenses, the repayment of which may be contingent on the outcome of the matter (Rule 1.8(e)(1); (2) paying court costs and expenses of litigation for an indigent client (Rule 1.8(e)(2); and (3) guaranteeing a loan to a client to withstand litigation delay, provided the client is liable for the loan without regard for the result of the litigation and provided no promise was made of the possibility of such a loan prior to employment of the lawyer (Rule 1.8(e)(3)). Beyond these three instances, it was unethical for a lawyer to provide financial assistance to a client in connection with litigation, such as advancing funds to the client while waiting for settlement funds to be disbursed (still unethical under the new rule) or providing funds to your litigation client to cover the costs of groceries while they are not working (now okay if your client is indigent and you are working pro bono).

New Rule 1.8(e)(4) makes it permissible—provided you are assisting an indigent client on a pro bono basis, you made no promises about gifts prior to retention, and you do not seek reimbursement—to gift modest funds for "food, rent, transportation, medicine, and other basic living expenses" without doing so being considered impermissible financial assistance. Since these are gifts for necessary living expenses, not loans, there is little room for abuse or creation of a conflict between lawyer and client, and the rule revision allows a caring lawyer to address, in a modest, humane way, the struggles their indigent client is encountering. Because these are conflict rules, they are narrow and counsel considering gifts to litigation clients should review the rules. Lawyers representing clients in transactional matters have more flexibility regarding gifts but remember that if you are entering into a financial transaction with a client (that is, one in which you obtain something in return), be sure to review and comply with the requirements of Rule 1.8(a), MRPC (business transactions with clients). You can lend your client money, but you must comply with Rule 1.8(a) to do so, whether in a transactional or litigation context.

The Lawyers Professional Responsibility Board took up this issue at the request of Hennepin County's Adult Representation Services organization. Thank you to the dedicated public interest lawyers at ARS for raising this important issue.

Duties of a prosecutor

The Court's May 2026 order also makes three changes to Rule 3.8, MRPC, entitled "Special Responsibilities of a Prosecutor," that are effective July 1, 2026. First, Rule 3.8(d) regarding disclosure requirements was amended. The new language (underlined) states:

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

The underlined text is new and did not replace any text. The intent of the addition is to underscore the fact that a prosecutor's ethical disclosure obligation (both as to timing and content) is co-extensive with their legal obligations.

The most notable changes to Rule 3.8, MRPC, include two new provisions, (g) and (h), regarding post-conviction obligations. The new text states:

> (g) when a prosecutor knows of new, credible, and material evidence creating a reasonable belief that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority; and, (2) if the conviction was obtained in the prosecutor's current jurisdiction, i. promptly disclose that evidence to the defense unless the court authorizes delay; and ii. make reasonable efforts to cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.
>
> (h) when a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's current jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

These new provisions relating to post-conviction obligations largely follow the American Bar Association's model rules adopted in 2008, which for reasons unknown to me were not adopted by Minnesota previously. Comments submitted to the Court during the comment period showed support by prosecutors within the state (and no detractors), and the Lawyers Board, which studied this rule, also sought feedback from prosecutors and defense attorneys while forming its position. Notwithstanding the support in Minnesota, it is worth noting that several states have still not added post-conviction obligations to their own Rule 3.8. The Great Northern Innocence Project requested the Lawyers Board consider adoption of Rules 3.8(g) and (h). Thank you to the Innocence Project for raising this important topic.

Other news

Recently, the American Bar Association made substantial revisions to Model Rule 1.14 (currently entitled in Minnesota, "Client with Diminished Capacity"). The Lawyers Board is reviewing those amendments this year, as are several sections of the state bar. This rule is one of guidance, so it provides information about how to competently work with clients with decision-making limitations. In August at its annual convention, the ABA is also proposing several additional changes to various model rules to incorporate key ethics opinions issued over the last decade into the text of the rules. Accordingly, we expect more discussion of rule amendments over the next year. Watch this space for updates.

Conclusion

The Minnesota Rules of Professional Conduct do not change often but they are not stagnant, and depending on when you graduated from law school, chances are very good that they have changed in some way that is likely to have an impact on your practice. For example, in 2011, Minnesota adopted Rule 1.5(b)(3), which makes it unethical to describe a fee as nonrefundable or earned upon receipt, and yet, every year, despite the passage of time, we discipline lawyers for using this precise language in their fee agreements. Please stop! You are expected to be current in your knowledge of the ethics rules, just as you are expected to know the laws and rules applicable to your practice. Thank you for reading this column and for paying attention to changes in legal ethics. If you have questions, do not forget you can call us every day to obtain free ethics advice at 651-296-3952. ▲



Restrictive covenants for lawyers

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.

Did you know that noncompetition agreements for lawyers are unethical? The ethics rules prohibit agreements that restrict the right of a lawyer to practice after termination of employment or as part of a client settlement. There are of course nuances, and a couple of exceptions. Public discipline this year provides a reminder, primarily to legal employers relating to employment agreements, of this important but perhaps little-discussed ethical prohibition.

The rules

Rule 5.6, Minnesota Rules of Professional Conduct, provides:

> A lawyer shall not participate in offering or making:
> (a) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Minnesota's rule is identical to the American Bar Association (ABA) model rule. Most states have adopted some version of the model rule prohibiting such restrictions. The rationale for the ethical prohibition is to encourage professional autonomy and client choice. "An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."[1] The public policy does allow for some restrictions.

One notable exception to the broad prohibition is if a lawyer is selling their entire law practice. In that case, Rule 1.17(f), MRPC, permits an agreement that "the selling lawyer will not engage in the practice of law for a reasonable period of time within a reasonable geographic area and will not advertise for or solicit clients within that area for that time." Similarly, Rule 5.6(a), MRPC, contains an exception that allows a restrictive covenant in an employment agreement for a retiring lawyer in exchange for retirement benefits.

In 2006, the ABA issued Formal Opinion 06-444, entitled "Permissibility of Restrictive Covenants in Lawyer Agreements Concerning Benefits Upon Retirement." This opinion holds that to be a permissible retirement benefit restriction, the benefits should be available only to a lawyer who is in fact retiring from the practice of law and cannot impose a forfeiture of income already earned by the lawyer. "Beyond that, law firms and employers have significant latitude in shaping the nature and scope of the restrictions on practice and the penalties for noncompliance." The opinion cautions agreement drafters that just calling something a retirement benefit, however, is not dispositive, and as an exception, must be construed strictly and narrowly. If you are drafting such a provision, ABA 06-444 provides guidance for how to do so consistently with the exception in Rule 5.6(a) MRPC.

Another ABA opinion from 1994 provides guidance on restrictions for corporate counsel. Formal Opinion 94-381, entitled "Restrictions on Right to Practice," opines that "[a] prohibition in a retainer or employment agreement on counsel for a corporation representing anyone against the corporation in the future is an impermissible restriction on the right to practice which may not be demanded or accepted by a lawyer without violating Model Rule 5.6(a)." This opinion is not limited to in-house counsel but would apply to outside counsel as well. Conflicts analysis might well prohibit future adverse representation; Rule 5.6(a) prevents expanding such prohibitions to unrelated representations, according to this ABA opinion.

A Minnesota Court of Appeals decision, *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354 (Minn. Ct. App. 1995), considered Rule 5.6(a), when addressing a shareholder agreement that required a 50/50 split of collected contingency fees between the departing lawyer and his former firm on cases handled by the departing lawyer while at the firm. In *Barna*, the court recognized that explicit limits on attorneys' right to practice post-employment have been struck down, as had provisions that implicitly restricted attorneys' right to practice through financial disincentives, although in *Barna*, the court concluded the fee-sharing provision in issue was not in actuality a financial disincentive.

Until recently, beyond the above, there has not been a lot of guidance for Minnesota lawyers on this topic.

Discipline cases

In 2026, the Minnesota Supreme Court publicly reprimanded two lawyers at the Fields Law Firm (the firm founder and majority owner, Steven Fields, and the firm's minority owner and president, Zachary Schmoll) for violations of Rule 5.6(a), MRPC. The cases are procedurally and substantively interesting and represent the first time that lawyers in Minnesota have received public discipline for restrictive language in employment agreements.

The Fields Law Firm handles plaintiff-side personal injury litigation, including worker's compensation, disability, and consumer rights cases, primarily on a contingency fee basis. At issue was an employment agreement used by the firm for associate attorneys drafted by outside counsel of the firm. Specifically, the agreement contained a provision, triggered at separation of employment, where the departing lawyer was obligated to pay to the firm within five days (1) all costs advanced by the firm and (2) a $1,500 marketing fee for each file the departing lawyer requests be transferred to the departing lawyer or the departing lawyer's new firm.

An associate attorney, E.S, worked at the firm for 1.5 years before departing to join another firm. E.S. asked Fields to send choice of counsel letters to a portion of his case list (about 1/3), and the firm did so. E.S. did not recall or review the terms of his employment agreement upon his departure and was surprised—to say the least—to receive a demand letter from the firm that he owed the firm, per their calculation, more than $100,000, post haste. Litigation ensued, was resolved for a much lower sum, and E.S. filed an ethics complaint against Mr. Schmoll.

The firm was represented by counsel in the ethics matter, who, apparently along with outside counsel who drafted the employment agreement, believed that Rule 5.6(a), MRPC, was not violated because the departing lawyer was allowed to compete with the firm; there were just significant financial consequences to doing so. Although this article colloquially uses the term restrictive covenants to discuss the prohibition, the prohibition in the rule is not against covenants not to compete only, but rather prohibits agreements that "restrict" the right to practice after termination. As noted in *Barna*, restrictions need not be express (thou shall not take firm clients) to violate the rule, and the Director had no problem arguing significant financial disincentives of this type restricted the post-termination lawyer's right to practice in violation of the language of the rule.

The Director chose to issue an admonition—private discipline reserved for misconduct that is isolated and nonserious. This choice for level of discipline was debatable, and the Director recognized that when made. Sometimes lawyers, however, do not. Mr. Schmoll appealed, and the matter went to an evidentiary hearing before a three-member panel of the Lawyers Professional Responsibility Board. The panel agreed with the Director that there was clear and convincing evidence of a violation of Rule 5.6(a), MRPC, but did not agree the misconduct was nonserious, and because E.S. was not the only attorney who signed the agreement, the misconduct was not isolated. Accordingly, the panel directed the Director to issue a petition for public discipline and to investigate the firm majority owner. New defense counsel was retained and Mr. Schmoll and Mr. Fields eventually stipulated to public reprimands. The Minnesota Supreme Court agreed.[2]

Post-employment restrictions are very common in nonlegal fields and experienced employment counsel retained to draft employment agreements may miss the fact that there are ethical considerations relating to lawyers that must also be considered. Law firms and corporations that employ lawyers are encouraged to review their employment agreements, including shareholder, operating, and other like agreements, with Rule 5.6(a), MRPC, in mind. While the Director understands the inclination and incentive to be creative to prevent lawyers from leaving and taking clients or going to a competitor, careful consideration is important because unethical agreements are likely unenforceable as contrary to public policy and can lead to professional discipline.

While not covered in this article, do not forget the prohibition in Rule 5.6(b), MRPC, against attempting to restrict a lawyer from bringing future claims as part of a client settlement agreement, a popular discussion topic in the 1990s and 2000s when I was practicing product liability litigation. Lawyers in Minnesota have been privately disciplined for violations of Rule 5.6(b), MRPC, albeit not recently.

Conclusion

Keep Rule 5.6 in mind when crafting or being presented with agreements that expressly or implicitly restrict a lawyer's post-relationship options. Periodically on our ethics hotline we get questions on employment terms that make it apparent no one has considered the applicable ethics rules. As always, if you have questions about your own compliance with the rules, call us at 651-296-3952 for an advisory opinion. ▲

Author's note: This column will be on hiatus until the November issue, as I will be taking a leave of absence following surgery. Remember that our website contains an archive of all prior columns on professional responsibility at *olpr.mncourts.gov/news-lawyer-resources.*

NOTES

[1] Comment [1] to Rule 5.6, MRPC.

[2] *In re Disciplinary Action Against Schmoll*, 29 N.W.3rd 727 (Minn. 2026); *In re Disciplinary Action Against Fields*, 29 N.W.3rd 726 (Minn. 2026).

ABA Formal Op. 26-523

American Bar Association Formal Ethics Opinion 26-523

American Bar Association

ENGAGEMENT AGREEMENTS ALLOWING A LAWYER TO WITHDRAW WHEN THE CLIENT FAILS SUBSTANTIALLY TO FULFILL AN OBLIGATION REGARDING THE LAWYER'S SERVICES

May 20, 2026

Rule 1.16(b)(5) of the ABA Model Rules of Professional Conduct permits a lawyer to withdraw from a representation, or to seek the tribunal's permission to do so, when "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." This provision is ordinarily invoked when a client fails to fulfill an obligation regarding payment of legal fees and expenses. The engagement agreement may memorialize additional obligations of the client, both obligations that are otherwise implicit such as the client's truthful cooperation with the representation, and further obligations insofar as they are not forbidden by the Rules, other law (including court rules), or public policy. A client's persistent failure to fulfill obligations regarding the lawyer's services, including obligations unrelated to payment of fees and expenses, may constitute a basis for withdrawal if the procedural requirements of Rule 1.16(b)(5) are met. Further, the lawyer's engagement agreement may put the client on notice of permissible grounds for withdrawal under Rule 1.16(a) and (b), including the client's failure to fulfill obligations regarding the lawyer's services. However, the engagement agreement may not expand on the grounds for withdrawal set forth in Rule 1.16 or purport to alter or amend the grounds for withdrawal or the process for withdrawal required by the Rule.

I. Introduction

Under Rule 1.16(b)(5) of the ABA Model Rules of Professional Conduct, "a lawyer may withdraw from representing a client if . . . the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." A lawyer may withdraw from a representation under this provision even if doing so will have a material adverse effect on the client, so long as the procedural requirements of Rule 1.16(b)(5) are satisfied. [FN1] The discretion provided by this provision is, however, subject to Rule 1.16(c), which requires a lawyer to "comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." [FN2] Whether to grant or deny a motion to withdraw as counsel is within the sound discretion of a trial court. [FN3]

Rule 1.16(b)(5) is most often invoked when the client fails to fulfill an obligation regarding legal fees or expenses. [FN4] However, clients may assume other obligations that may be made explicit in the engagement agreement, such as the duty to cooperate with the lawyer regarding the representation or to provide and update the client's contact information. This Opinion provides guidance regarding a lawyer's ability to include provisions in an engagement agreement for the purpose of establishing them as obligations that would form a basis for withdrawal in the event of a client's failure to abide by those obligations. This Opinion does not address, and is not intended to limit, a lawyer's ability to withdraw under any other provisions under Rule 1.16(a) or (b). [FN5]

II. Provisions in Engagement Agreements Concerning the Client's Obligations

The Model Rules of Professional Conduct offer limited guidance concerning the content of engagement or fee agreements, which may memorialize the objectives of the representation and include other understandings between lawyer and client.

 © 2026 Thomson Reuters. No claim to original U.S. Government Works.

Rule 1.5(b) requires the lawyer to explain to the client, preferably in writing, "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible" if the lawyer has not regularly represented the client. Rule 1.5(c) requires that "[a] contingent fee agreement shall be in writing" and "shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated." [FN6]

Engagement agreements may include provisions and obligations that the Model Rules do not require. [FN7] An effective engagement agreement will address not only the information required by Model Rule 1.5 but also the other material terms of the client-lawyer relationship. [FN8]

Many law firms now include in their engagement agreements a variety of clauses addressing law firm policies for handling expenses, including e-discovery charges, as well as provisions addressing, among other things, dispute resolution, choice of law, file retention, and anticipated adjustments in lawyer hourly rates on a periodic basis. In addition to serving as a risk management tool for the lawyer and law firm, engagement agreements should provide the client with a meaningful understanding of the material terms of the relationship. This Opinion focuses specifically on provisions concerning the client's obligations.

The lawyer's engagement agreement may specify obligations of the client that are otherwise implicit in the representation, such as the obligation to cooperate with the representation, including in a litigation context the duty to produce discoverable documents within the client's custody and control. Other such implicit obligations include the client's obligation to communicate with the lawyer, to provide information truthfully, and to provide or to execute documents that are necessary for the lawyer to conduct the representation as the law requires.

Within ethical limits, the engagement agreement may also set forth obligations of the client that are not otherwise implicit. [FN9] For example, a lawyer may include a provision in which the client agrees not to make an audio or a video recording of communications between the lawyer and the client, [FN10] or not to discuss the lawyer or the representation on social media during the course of the representation.

The engagement agreement, however, may not impose obligations on the client that the Rules of Professional Conduct or other law or public policy forbid. For example, the engagement agreement may not include the client's promise not to later pursue a disciplinary complaint or bar grievance against the lawyer or law firm. [FN11]

Likewise, the engagement agreement cannot be used to require the client to agree to terms that are expressly contrary to the Model Rules. For example, the engagement agreement may not obligate the client to accept a settlement recommended by the lawyer, or to reject a settlement that the lawyer disapproves. Such a provision would conflict with Model Rule 1.2(a), which provides that "A lawyer shall abide by the client's decision whether to settle a matter." [FN12] While a client is free to accept a lawyer's recommendation whether to settle a matter, a client's contractual obligation to accept the lawyer's advice would be at odds with the principle, embodied in Rule 1.2(a), that the client is the principal in the client-lawyer relationship and, therefore, has an unwaivable right to determine the objectives of the representation.

III. Withdrawal When the Client Fails Substantially to Fulfill an Obligation to the Lawyer Regarding the Lawyer's Services

Under certain circumstances, a lawyer may withdraw, or seek to withdraw, from the representation under Rule 1.16(b)(5) based on the client's failure to substantially fulfill an obligation to the lawyer set forth in the engagement agreement. [FN13] Most obviously, as noted, the lawyer may do so based on the failure to substantially meet financial obligations after the lawyer has ""given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." [FN14]

Similarly, a lawyer may withdraw based on the client's substantial failure to cooperate with the representation, regardless of whether that obligation is made explicit in the engagement agreement or left implicit, as long as the lawyer has given the requisite "reasonable warning." [FN15] For example, a lawyer may withdraw, or seek to withdraw, if, after reasonable warning, the client's continued failure to respond or communicate with the lawyer, or continued failure to provide necessary truthful

information or documents, substantially undermines the lawyer's ability to conduct the representation or to comply with the lawyer's professional obligations. A client's lack of cooperation may frustrate the lawyer's ability to conduct the representation effectively or ethically, and in adjudicative proceedings, the client's failure to cooperate may undermine the lawyer's ability to comply with court orders or with duties under the rules of professional conduct. [FN16]

Other legitimate client obligations set forth in an engagement agreement ""regarding the lawyer's services" may form a proper basis for the lawyer's withdrawal. For example, although a client may ordinarily decide whether and how to communicate publicly about a legal matter, a lawyer may hold a client to an agreement not to do so without consulting the lawyer first, because the client's public communications may frustrate effective representation or undermine the attorney-client privilege or work product protection that might attach to those communications. If the client persistently disregards an agreement to consult with the lawyer, even after being warned, the lawyer may withdraw or seek the court's permission to do so based on Rule 1.16(b)(5).

A lawyer may not withdraw based on Rule 1.16(b)(5), however, if the client fails to comply with an obligation that is not one "regarding the lawyer's services." For example, a client's obligation to pay a prior debt to the lawyer that is unrelated to the lawyer's services is not an obligation ""regarding the representation." Therefore, the client's failure to repay the prior debt would not justify the lawyer's withdrawal under Rule 1.16(b)(5).

Further, a lawyer may not withdraw under Rule 1.16(b)(5) based on a client's noncompliance with a trivial obligation or based on a client's insubstantial failure to comply with an obligation set forth in the engagement agreement. For example, if the engagement agreement obligates the client to appear at scheduled office appointments on time, tardiness probably would not alone justify terminating the representation, if the client has reasonable excuses for appearing late.

IV. Provisions in the Engagement Agreement Regarding Withdrawal from the Representation

It is fundamental that clients, at least in the civil context, may terminate an attorney-client relationship at any time for any or no reason, although the client may remain responsible to pay for the lawyer's services. [FN17] Lawyers do not have the same unfettered discretion to terminate a representation or withdraw under Rule 1.16 or, in a litigation context, to seek the court's permission to withdraw. Rule 1.16 addresses the circumstances in which a lawyer must, or may, withdraw from a representation or seek the tribunal's permission to do so. Rule 1.16(a) lists circumstances where the lawyer must withdraw or seek to do so, [FN18] while Rule 1.16(b) lists circumstances in which the lawyer is permitted to do so, including when ""withdrawal can be accomplished without material adverse effect on the interests of the client" and when "other good cause for withdrawal exists." [FN19] These provisions in Rule 1.16(a) and (b) combine to establish the exclusive grounds for terminating the representation prior to its natural conclusion.

This means that the lawyer may not expand on the grounds for withdrawal by securing the client's advanced permission to withdraw under circumstances not contemplated by Rule 1.16. Most obviously, the engagement agreement may not authorize the lawyer to withdraw if the client rejects a settlement offer or transactional agreement that the lawyer recommends, since the client has the fundamental right under Rule 1.2(a) to decide whether or not to settle a matter or close a transaction.

Nor may the agreement authorize the lawyer to withdraw for other additional reasons that do not constitute "good cause" and are not otherwise contemplated by Rule 1.16. For example, the engagement agreement may not authorize the lawyer to withdraw to undertake a more lucrative engagement without regard to whether the withdrawal would have a material adverse effect on the client's interests. [FN20]

Although the Model Rules do not require a lawyer to include information in the engagement agreement regarding the grounds on which the lawyer must, or may, withdraw from the representation, a lawyer may include such information in the engagement agreement as long as it is presented in a manner that is accurate and not misleading. [FN21] The Model Rules appropriately forbid lawyers from misleading clients and prospective clients, [FN22] including in an engagement agreement, regarding their respective rights and obligations. [FN23]

It follows that the engagement agreement may not mischaracterize the circumstances or manner in which a lawyer may withdraw from a representation under Rule 1.16. For example, in a representation that will involve a proceeding where the

applicable law requires the tribunal's permission to terminate the representation, the engagement agreement may not imply that the lawyer has the right to withdraw unilaterally, without the tribunal's permission as required by Rule 1.16(c). Nor may the engagement agreement imply that the lawyer may withdraw without "tak[ing] steps to the extent reasonably practicable to protect [the] client's interests," as required by Rule 1.16(d). [FN24]

If the engagement agreement refers to the lawyer's right to withdraw, or seek to withdraw, pursuant to Rule 1.16(b)(5) based on the client's nonpayment of legal fees or the client's failure to fulfill some other obligation to the lawyer, the engagement agreement may not state or imply that the lawyer may do so if the client's failure to fulfill an obligation is not a substantial failure, nor may the agreement dispense with the "reasonable warning" required by Rule 1.16(b)(5). Nor may the engagement agreement convey that the lawyer's termination of the representation is mandatory when, under Rule 1.16(b), the lawyer's termination of the representation is permissible, or vice versa.

The engagement agreement should not state or imply that the lawyer may withdraw from the representation in a manner not permitted by Rule 1.16. As noted, the engagement agreement may not misleadingly omit mention of the lawyer's duty to protect the client's interests upon withdrawal, or, where applicable, of the lawyer's obligation to obtain the tribunal's permission to withdraw. Likewise, the lawyer may not misleadingly imply that the lawyer's motion to withdraw may or will disclose information relating to the representation otherwise protected by Rule 1.6, given that the Model Rules generally require the lawyer to seek the tribunal's permission in a manner that preserves the confidentiality of such information. [FN25] The lawyer also may not require the client to sign a blanket stipulation irrevocably consenting to the lawyer's future withdrawal, to be executed by the lawyer later in the event the lawyer wishes to withdraw for some reason not specified and agreed to by the client.

V. Conclusion

Rule 1.16(b)(5) of the ABA Model Rules of Professional Conduct permits a lawyer to withdraw from a representation, or to seek the tribunal's permission to do so, when "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." This provision is ordinarily invoked when a client fails to fulfill an obligation regarding payment of legal fees and expenses. The engagement agreement may memorialize additional obligations of the client, both obligations that are otherwise implicit such as the client's truthful cooperation with the representation, and further obligations insofar as they are not forbidden by the Rules, other law (including court rules), or public policy. A client's persistent failure to fulfill obligations regarding the lawyer's services, including obligations unrelated to payment of fees and expenses, may constitute a basis for withdrawal if the procedural requirements of Rule 1.16(b)(5) are satisfied. Further, the lawyer's engagement agreement may put the client on notice of permissible grounds for withdrawal under Rule 1.16(a) and (b), including the clients' failure to fulfill obligations regarding the lawyer's services. However, the engagement agreement may not expand on the grounds for withdrawal set forth in Rule 1.16 or mislead the client regarding the legitimate grounds for withdrawal or the process for withdrawal.

[FN1]. The permissible withdrawal options identified in Rule 1.16(b) are in the disjunctive, meaning that any pertinent option may serve as the basis for withdrawal. Regarding lawyers' discretion to withdraw from a representation under Rule 1.16(b)(1) when "withdrawal can be accomplished without material adverse effect on the interests of the client," *see* ABA Comm. on Ethics & Pro. Resp., Formal Op. 516 (2025). A material adverse effect occurs when withdrawal significantly harms the client's ability to achieve the client's legal objectives, increases the cost of the matter, or impedes the forward progress of the representation. Opinion 516 explained that withdrawal is not likely to have a material adverse effect where (a) the representation is at an early stage; (b) the client has retained successor counsel; (c) the lawyer has completed all substantive work on the matter; or (d) no imminent legal matters are pending.

[FN2]. In ABA Formal Opinion 519 (2025), this Committee addressed whether and what a lawyer may disclose in a motion seeking to withdraw from representation, either as permitted or required by Rule 1.16.

[FN3]. *E.g.*, Koon Chun King Kee Soy & Sauce Factory, Ltd. v. Kun Fung USA Trading Co., 2009 WL 605786 (E.D.N.Y. 2009) (a breakdown in communication is sufficient grounds for permissive withdrawal); Harris v. Millington, 2008 WL 11438291 (E.D.N.Y. Sept. 18, 2008) (granting withdrawal due to client's failure to pay fees and because of material

breakdown in attorney-client relationship).

[FN4]. ABA Comm. on Ethics & Pro. Resp., Formal Op. 476 (2016) discusses what a lawyer may disclose in civil litigation to the court when seeking to withdraw for nonpayment of legal fees or expenses.

[FN5]. For example, problems with the ability of a lawyer and client to work together can amount to the representation having been "rendered unreasonably difficult by the client." Model Rule 1.16(b)(6). The types of representations and matters in which lawyers are engaged are so varied that is not possible to comprehensively identify each and every circumstance that would or would not amount to "good cause for withdrawal."

[FN6]. When a contingent fee matter is concluded, the lawyer must provide the client with a written statement confirming the outcome of the matter and, if there is a recovery, showing the amount to be paid to the client and the method of its determination.

[FN7]. Some states, such as Florida, mandate that specified language be included in contingent fee engagement agreements or impose limitations on the fees that may be charged. *See* RULES REGULATING FLA. BAR 4-1.5(f)(2).

[FN8]. *See* Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm. Op. 2025-100, The Requirements and Importance of Written Fee Agreements Under RPC 1.5, providing guidance on best practices for "clarify[ing] each party's financial obligations, manag[ing] expectations, and help[ing] prevent conflicts or misunderstandings."

[FN9]. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 17 (2000) ("A Client's Duties to a Lawyer") ("Subject to the other provisions of this Restatement, in matters covered by the representation a client must: . . . (3) fulfill any valid contractual obligations to the lawyer."). This provision also notes, in comment (d), that this duty is subject to limitations set by public policy, such as the power of the court to specify that a sanction imposed due to the lawyer's misconduct cannot be passed on to the client (citing §§ 29 & 30).

[FN10]. *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1270 (2024) ("A lawyer's engagement letter or retainer agreement may prohibit the client from making audio or video recordings of communications between the lawyer and client provided the engagement letter or retainer agreement: (a) does not mislead the client regarding circumstances under which the lawyer may seek to withdraw from the representation; and (b) does not serve as irrevocable advance consent by the client to withdrawal by the lawyer if the client violates the prohibition."); *see also* N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Op. 2025-6 (2025) (attorneys may craft retainer agreements that seek to preclude clients from using their own AI tools in conversations with attorneys and provide that any recordings will be done by the attorneys' own AI tools).

[FN11]. *See* D.C. Bar Legal Ethics Op. 260 (1995) ("under no circumstances may a lawyer seek to execute a release that would bar a lawyer's client from filing a complaint with Bar Counsel"); State of Oklahoma ex rel. Oklahoma Bar Assoc. v. Colston, 777 P.2d 920 (Okla. 1989); *In re* Wallace, 518 A.2d 740 (N.J. 1986).

[FN12]. The Rule further directs that, "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether a client will testify."

[FN13]. New York, for example, has a more limited rule that allows withdrawal if "the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees," but which does not expressly allow the lawyer to withdraw based on the client's failure to comply with other obligations. N.Y. RULES OF PROFESSIONAL CONDUCT, R. 1.16(c)(5). Additionally, New York's withdrawal rule permits a lawyer to withdraw if "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively." *Id.*, R. 1.16(c)(7).

[FN14]. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 476 (2016).

[FN15]. *See* Tex. Prof'l Ethics Comm. Op. 669 (2018) (if insured fails to communicate with a lawyer who is retained to defend the insured, then the lawyer may withdraw from the representation).

[FN16]. Such client conduct may also provide "other good cause for withdrawal" under Rule 1.16(b)(7) to withdraw in the

 © 2026 Thomson Reuters. No claim to original U.S. Government Works.

absence of any engagement agreement language referring to the client's expected cooperation.

[FN17]. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16, cmt. [4].

[FN18]. Model Rule 1.16(a) provides: "Except as stated in paragraph (c) [where ordered to continue the representation by a tribunal], a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if (1) the representation will result in violation of the Rules of Professional Conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; (3) the lawyer is discharged; or (4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud[.]"

[FN19]. Model Rule 1.16(b) provides: "Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud; (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists."

[FN20]. In Formal Opinion 516 (2025), the Committee identified the limited circumstances in which "withdrawal can be accomplished without material adverse effect on the interests of the client," under Rule 1.16(b)(1).

[FN21]. *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 719 (1999) (the engagement agreement must make "express reference to these requirements . . . in order to avoid misleadingly implying that a lawyer may terminate the representation without complying with them"). Opinion 719 involved several clauses in an engagement agreement mandating compliance by the client and permitting the lawyer to withdraw but preserving the client's ability to defend against the withdrawal. The opinion, in detail, explains how the terms may be misleading to the client as to the rights of both the client and the lawyer.

[FN22]. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."). *See also* MODEL RULES OF PROF'L CONDUCT R. 7.1(a) ("A lawyer shall not make a false or misleading communication about the lawyer's services.").

[FN23]. *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 719 (1999) (""the retainer agreement may not mislead the client with regard to the attorney's obligations, including the obligation to continue as counsel in the absence of a permissible ground for withdrawing from the representation").

[FN24]. *Id.* ("the retainer agreement may not authorize the attorney to withdraw from the representation under circumstances in which withdrawal would be impermissible"); *see also* R.I. Ethics Comm. Op. 2003-08 (2003) (lawyer may not include a provision in a retainer agreement that permits lawyer to cease work on the client's behalf, without withdrawing from the representation, if the client fails to make payments as agreed); Mo. Informal Op. 20000172 (2000) (lawyer may not include provision in retainer agreement that lawyer will cease work in client's case if client does not pay as agreed).

[FN25]. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 519 (2025): Disclosure of Information Relating to the Representation in a Motion to Withdraw From a Representation; ABA Comm. on Ethics & Pro. Resp., Formal Op. 476 (2016): Confidentiality Issues when Moving to Withdraw for Nonpayment of Fees in Civil Litigation.
ABA Formal Op. 26-523

End of Document

© 2026 Thomson Reuters. No claim to original U.S. Government Works.

ABA Formal Op. 26-524

American Bar Association Formal Ethics Opinion 26-524

American Bar Association

GOVERNMENT LAWYERS' OBLIGATIONS WHEN KNOWING OF A PUBLIC OFFICIAL'S INTENDED OR ONGOING VIOLATION OF LAW

July 22, 2026

Model Rules of Professional Conduct 1.13(b) and (c) guide lawyers employed or retained by an organization when they know of intended or ongoing violations of law or other legal obligations by representatives of the organization that, depending on the circumstances, are likely or reasonably certain to result in ""substantial injury to the organization." This Opinion addresses when these provisions may be implicated for a lawyer representing the government because the lawyer knows of a government officer's or employee's violation of a legal obligation to the government organization or their violation of law that is likely to be, or reasonably certain to be, "imputed" to the government organization and to cause "substantial injury" to the government organization. The Opinion concludes that, with respect to government lawyers under Model Rules 1.13(b) and (c), a violation of a legal obligation or of law by an officer or employee of a government organization will be "imputed" to the organization if the officer or employee is using or misusing authority that the officer or employee possesses by virtue of their employment with the government. For purposes of these provisions, any violation of a legal obligation to the government organization or violation of law that reasonably might be imputed to a government organization will cause "injury" to the organization within the meaning of Model Rules 1.13(b) and (c), given the government's obligation to support, defend, and promote the rule of law. The government lawyer should exercise reasonable judgment regarding whether that injury is "substantial" and whether that injury may therefore trigger the permissive or mandatory reporting provisions of Model Rules 1.13(b) and (c).

Introduction

Model Rules 1.13(b) and (c) address the conduct of "a lawyer for an organization [who] knows that an officer, employee or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization." If substantial injury is likely to result, the Rule ordinarily requires the lawyer initially to "refer the matter to higher authority in the organization," [FN1] and, if warranted, to the "highest authority that can act on behalf of the organization as determined by applicable law." If the highest authority "insists upon or fails to address in a timely and appropriate manner an action or refusal to act that is clearly a violation of law," and the organization's lawyer "reasonably believes that the violation is reasonably certain to result in substantial injury to the organization," the lawyer "may then reveal information relating to the representation whether or not Rule 1.6 [the confidentiality rule] permits such disclosure" to an authority outside the organizational client. That information may be revealed, however, only "to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization."

Model Rules 1.13(b) and (c) apply to a lawyer representing a government organization as well as to a lawyer representing a private organization such as a corporation. However, this Committee has not previously addressed *how* these provisions apply when the lawyer represents a *government* organization, and the answer is not self-evident. In particular, the meaning of certain terms that are not defined by the Rules may be uncertain, including (1) what it means for a government officer's or employee's violation of law to be ""imputed" to the government organization and (2) when a violation of a legal obligation to the organization or a violation of law will be said to "result in substantial injury" to a government organization.

 © 2026 Thomson Reuters. No claim to original U.S. Government Works.

This Opinion concludes that, for purposes of these provisions, a violation of a legal obligation or a violation of law by an officer, employee, or other constituent of a government organization can be "imputed" to the organization if the officer, employee, or other constituent is using or misusing authority possessed by virtue of a position with the government.

It further concludes that the injuries against which the Rule protects are not limited to financial and reputational injuries. In the case of a government organization client, virtually any violation of a legal obligation or law by a public official or other constituent that reasonably might be imputed to the government organization client may cause "injury" to the organization, given the government's obligation to support, defend, and promote the rule of law. In determining whether Rules 1.13(b) and (c) apply, the government lawyer should exercise reasonable judgment regarding whether that injury is "substantial." [FN2]

Discussion

The Model Rules, as drafted, are intended to apply to all lawyers, including lawyers for the government. [FN3] Lawyers who represent government organizations have professional obligations to their clients like those of other lawyers, such as the duty of competence, the duty of confidentiality, and the duty to avoid conflicts of interest, including under provisions specifically addressing government lawyers. *See, e.g.,* Model Rules 1.1, 1.6 & 1.11. [FN4] Further, lawyers representing the government have obligations to their government organizational clients under Rule 1.13 just as in the case of lawyers who represent private organizations. *See* Model Rule 1.13, cmt. [9] ("The duty defined in this Rule applies to governmental organizations."); Restatement (Third) of the Law Governing Lawyers § 97(2) (2000) (A lawyer representing a governmental client must proceed "as stated in §§ 96(2) and 96(3) [similar to Model Rules 1.13(b) and (c)] with respect to an act of a constituent of the governmental client that violates a legal obligation that will likely cause substantial public or private injury or that reasonably can be foreseen to be imputable to and thus likely result in substantial injury to the client."). Although government lawyers often have additional legal obligations that overlap with their obligations under the professional conduct rules, [FN5] those legal obligations rarely, if ever, preempt government lawyers' professional obligations but apply in addition to those other obligations.

Like other lawyers for an organization, lawyers employed or retained by the government may be required or permitted to make certain disclosures under Rules 1.13(b) and (c) in certain prescribed circumstances when they know that public officials or employees in their organizations are engaged or intend to engage in action that violates a legal obligation to the organization. Rule 1.13 (b) provides:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Rule 1.13(c), in turn, allows for permissive disclosure outside of the organizational client when the circumstances articulated in the Rule are present. It provides:

> Except as provided in paragraph (d), [FN6] if
> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law; and
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

These provisions may apply when a government organization's lawyer knows of a government actor's conduct that may be either (1) "a violation of a legal obligation to the organization" or (2) "a violation of law that reasonably might be imputed to the organization." This Opinion addresses the meaning and application of Rules 1.13(b) and (c) in situations in which a

lawyer for the government knows that a government officer or employee, using or misusing authority they possess by virtue of their position with the government, is engaged or plans to engage in conduct in violation of a legal obligation or of law on behalf of the government, so that the government may become, in effect, a lawbreaker. [FN7] This may include where the government representatives' actions will be violating a constitutional provision, a statutory or regulatory provision, or a court order. Among the questions presented will be whether the violation "might be imputed to the organization" and whether the violation is likely or reasonably certain "to result in substantial injury to the organization."

Two threshold questions raised by this scenario must be considered by a lawyer retained or employed by the government. First, there is the question whether the lawyer is employed in a representational capacity. As in private organizations, lawyers in government may serve in various roles, not all involving a lawyer-client relationship. A lawyer retained or employed by the government may hold a position that does not involve serving as a lawyer for the government organization as a client. To the extent the lawyer is not acting in a representative capacity, the rules governing a lawyer-client relationship, including Rule 1.6 and Rule 1.13, do not apply. Whether the lawyer serving in a nonrepresentational capacity may or must disclose information about government illegality to authorities in the government organization or to others may be dictated by internal regulations or other law, but it will not be dictated by Rules of Professional Conduct governing the lawyer-client relationship.

The second threshold question will be: "who is the client?". Where the lawyer is serving in a representative capacity as a lawyer for a government organization, then the lawyer is subject to the rules governing the lawyer-client relationship, including Rule 1.13. The client's identity may not always be obvious and is an issue beyond the scope of the Model Rules. *See* Model Rule 1.13, cmt. [9] ("Defining precisely the identity of the client . . . may be more difficult in the government context and is a matter beyond the scope of these Rules."). Government lawyers can represent a government entity as a whole (*e.g.*, the United States of America, a particular state, or a particular town or county), or a branch of government (*e.g.*, the executive branch, the legislature, or the judiciary), or one or more government agencies. [FN8]

The question is important in this context, in part, because Rule 1.6, the confidentiality rule, restricts a lawyer from disclosing "information relating to the representation of a client" to third parties without the client's informed consent, but it does not restrict the disclosure of such information to the client. On the contrary, in many situations, the lawyer has an obligation to disclose information to the client. *See* Rule 1.4; *see also* Rule 1.1 & Rule 2.1. In the case of an organizational client, the lawyer's disclosure of information relating to the representation to others *within* the organization does not necessarily implicate or run afoul of Rule 1.6. It is important therefore to identify the client in order to know whether another person is an officer or employee who can be considered a non-client constituent of the client organization.

Under the Model Rules, a lawyer representing a government organization who learns of misconduct *may* always raise the issue *within* the organization, consistent with Rule 1.4 [FN9] and Rule 2.1, [FN10] which address the lawyer's communications with, and advice to, the client. This is true even if the lawyer suspects but does not "know" of wrongdoing that falls within Rule 1.13(b). A government lawyer may (and perhaps in some cases, must) go up-the-ladder (*i.e.*, report to higher-ups within the organization), even when Rule 1.13(b) does not require it, because reporting up-the-ladder does not disclose protected information *to a third party* and therefore does not require the client's "informed consent" or implied authorization under Rule 1.6(a). [FN11] For example, if a government lawyer discloses information to the governor of the state regarding wrongdoing by a state agency, Rule 1.6 will be implicated if the client is only the state agency but not if the client is the state. *Accord* Model Rule 1.13, cmt. [9] ("[If] the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of the rule."). Rule 2.1 requires that when serving as advisors, government lawyers, like other lawyers, must provide clients their candid view of the law and facts, not the view most favorable to the client's interests. This role differs from that of an advocate who often may take positions on the law and facts that are unlikely to prevail but are not frivolous. See Rule 3.1.

When a lawyer representing the government believes that a government officer or employee may be acting on behalf of the government in violation of law, Rule 1.13 may apply. [FN12] The government lawyer's possible obligation to bring a situation to the attention of a higher authority arises under paragraph (b) where the lawyer "knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization." Likewise, paragraph (c), which authorizes an organization's lawyer, including a government lawyer, to disclose information to an authority *outside* the

organization, arises in prescribed circumstances when the lawyer knows of such misconduct by a representative of the organization. Specifically, paragraph (c) is triggered if "despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and . . . the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization."

Issues of interpretation may be raised under these provisions. One issue is whether the lawyer "knows" the information is sufficient to trigger these provisions. "Knows" is a defined term: Rule 1.0(f) explains that it "denotes actual knowledge of the fact in question. [However,] a person's knowledge may be inferred from the circumstances." Government lawyers may have greater obligations or opportunities than lawyers for private organizations to question and ascertain the legality of officers' and employees' conduct in a matter. *See* Model Rule 1.13, cmt. [9] ("[I]n a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question [...] [the] conduct [of a government official] more extensively than that of a lawyer for a private organization in similar circumstances.").

Issues of interpretation also arise because both provisions rely on two undefined terms. The first is "imputed to the organization." The concept of imputation arises in multiple areas of the law, such as when ascertaining a party's income in an action for child support or spousal maintenance, [FN13] when assigning accomplice liability in criminal law, [FN14] when bankruptcy courts impute the fraud of a non-debtor partner to a debtor, [FN15] and when assigning civil or criminal liability to an organization for the acts of its employees or officers. [FN16] The Committee's task differs from these examples, however: we must interpret the meaning of imputation in the context of Rule 1.13, which concerns a lawyer's responsibilities when representing a government organization. In that context, we construe "imputed to the organization" broadly for two reasons. First, a broad interpretation aligns with the meaning of imputation elsewhere in the Rules. For example, when one lawyer in a firm has a conflict of interest, Rule 1.10(a) imputes that conflict to all other lawyers in the same firm, subject to certain exceptions detailed in the Rule, without requiring proof that those lawyers knew or should have known of the conflict. [FN17] Second, Rule 1.13 is intended to protect the organization from substantial injury and, as explained below, "injury" should be construed broadly in the case of a government organization. It follows that imputation to a government organization should be construed broadly as well. Accordingly, for purposes of Rules 1.13(b) and (c), action or inaction by an officer, employee, or other constituent will be imputed to the organization when that person is using or misusing authority that the person possesses by virtue of a position with the government. [FN18]

The second undefined term that is central to both provisions is the term "substantial injury." Rule 1.13(b) may require a government lawyer to disclose a public official's "violation of a legal obligation or law that reasonably might be imputed to the organization" - *i.e.*, that would be, in effect, a violation of law by the government organization itself - only if the violation "is likely to result in *substantial injury* to the organization." (Emphasis added.) Rule 1.13(c) also may permit a government lawyer to disclose a violation outside the organization only if the violation "is reasonably certain to result in *substantial injury* to the organization." (Emphasis supplied.) Therefore, the application of these provisions turns on understanding when a violation causes a "substantial injury" to the organization, not just to others. A government lawyer must first assess whether there is an "injury." Then, if an injury exists, whether the injury is ""substantial."

For a government organization, as with a private organization, "injury to the organization" may include something other than direct financial injury. For example, a violation of a legal obligation or violation of law that subjects the organization to legal liability would likewise cause injury, and perhaps ""substantial injury," even if financial damages will not ensue. Similarly, a constituent's violation of a legal obligation to the organization may be considered to have resulted in substantial injury to the organization even if the direct financial damages are immaterial. Reputational harm may also constitute injury for any organization, and, if serious enough, may constitute ""substantial injury."

When assessing whether a violation may cause "injury to the organization," government lawyers are differently situated from lawyers representing private organizations because of the unique interests and obligations of the government. [FN19] In the case of a government organization, the term ""injury" should be construed broadly to include harms in addition to financial and other harms that are likely to be more relevant to private organizations. Unlike a private organization or entity, a government entity's interests are not primarily financial ones. In particular, the lawful functioning of government should be at least as significant to the government organization and to the public officials who run it or oversee it as the government organization's financial interests.

Government organizations have a significant interest in the fair administration of justice and in protecting and preserving the rule of law. The government must set an example, itself complying with the legal obligations, even seemingly minor ones, that apply to it. As Justice Brandeis put it: "If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." [FN20] Thus, in the context of representing the government, the word "injury" includes harm to the rule of law.

The credibility of government depends on its own compliance with the law. And the rule of law presupposes that no one - and no organization - is above the law. For these reasons and more, a violation of law that is imputed to the government organization - in other words, government lawbreaking or lawlessness - causes injury not only to any third parties who are victims of the violation, but also to the public's trust in government, and ultimately to the government organization itself. [FN21] Given the opportunity, public officials in authority should ordinarily be expected to address violations of legal obligations or of law that would be imputed to the government organization, even if the direct legal consequences to the organization would be insignificant. As a consequence, Rule 1.13 may impose more demanding disclosure obligations on government lawyers than on lawyers for private organizations. *Cf.* Model Rule 1.13, cmt. [9] ("[W]hen the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.").

As for the concept of what is a "substantial" injury, the Rules and accompanying Comments provide some general guidance, not specifically directed at government lawyers, that bears on the meaning of this term for purposes of Model Rule 1.13. The terminology section explains that "'[s]ubstantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance." ABA Model Rule 1.0(l). As a general matter, in deciding how to proceed under Rule 1.13, lawyers are advised to "give consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, [and] the policies of the organization concerning such matters." Model Rule 1.13, cmt. [4]. This suggests that harm must have significant consequences for the organization. Again, given the unique obligations of the government lawyer to maintain the public trust, the analysis of the meaning of "substantial" differs from that of a lawyer representing a private sector organization.

As is the case for a lawyer representing a private organization, determining whether an injury is "substantial" will require a government lawyer's exercise of reasonable professional judgment based on all the relevant facts. [FN22] For a government organization, as for a private organization, Rule 1.13(b) or (c) may be triggered if direct financial injury caused by a violation of law is "substantial." However, unlike in the private sector, in the context of representing the government, a relatively small financial loss may cause "substantial injury to the organization." "The public interest in the integrity of government may reasonably lead a lawyer to conclude, for example, that misappropriation of a small sum warrants remedial action for the government that might not be warranted for a nongovernmental client." [FN23] The term should be interpreted and applied in light of Rule 1.13's purpose, which is to require or authorize disclosures necessary to protect the organizational client from substantial injury. [FN24] "Government lawyers bear special obligations because of the responsibility to maintain public trust in government," [FN25] so the focus should be on whether the injury is significant enough that a higher authority within the organization (in the case of Rule 1.13(b)), or an authority outside the organization (in the case of Rule 1.13(c)), should reasonably want to know the information and reasonably be expected to act on it to protect the organization from being injured by the wrongdoing. [FN26]

When a lawyer representing the government knows that a government officer or employee, using or misusing authority of the officer or employee's position with the government, intends to violate or is engaged in violating a legal obligation to the organization or is violating the law, the resulting injury to the government organization may be "substantial" because of the erosion of public trust. A constitutional violation or a violation of a court order by the government should ordinarily be regarded as causing "substantial injury" to the government because of the harm to the government's credibility as an exemplar and enforcer of the law, whereas a violation of a minor procedural requirement in a statutory or regulatory provision that causes no harm to third parties and does not result in injury to the government's reputation or role in advancing the public interest may not cause substantial injury within the meaning of Rule 1.13. Violations of law that cause substantial injury to a government organization would also include violations causing substantial reputational harm to the government, creating direct or potential legal exposure to the government, or impeding a government investigation. [FN27] Additionally, we note that the federal whistleblower statute protects employees from retaliation for reporting conduct that ""violates the law,

involves mismanagement of a government agency, gross waste of funds, abuse of authority or specific danger to public health or safety." [FN28] Given the protections afforded to employees for reporting out these types of conduct, we conclude that conduct that falls in any of these areas should be evaluated by the government lawyer as potential areas of "substantial injury." [FN29]

When it is determined that there is substantial injury, government lawyers have considerable discretion under Rule 1.13(b) regarding how to proceed when the Rule is triggered, since the provision calls upon the organization's lawyer to "proceed as is reasonably necessary in the best interest of the organization." [FN30] If the lawyer cannot persuade the government representative not to violate the law, the provision presupposes that the lawyer will take the matter to a higher authority unless the lawyer reasonably believes that it is not necessary to do so in the best interest of the organization. If the violation of law still is not adequately addressed, the Rule anticipates taking the matter further up-the-ladder, even to "the highest authority that can act on" the issue, but we assume that, in a government organization, going to the highest authority sometimes will not be a reasonable or practical alternative.

Disclosures permitted, but not required, by Rule 1.13(c) outside the government organizational client should not be undertaken lightly. Like other confidentiality exceptions, Rule 1.13(c) should be invoked prudently, and information should be revealed only "to the extent the lawyer reasonably believes necessary" in light of the purposes it is intended to serve.

In the case of subordinate lawyers in a government law office, assistance in making judgments about the application of these provisions should ordinarily be sought from supervising lawyers in their offices, insofar as internal policies permit. Although all lawyers, including government lawyers, have a responsibility to abide by the professional conduct rules applicable to their own conduct, [FN31] subordinate lawyers generally benefit from their supervisors' guidance and, if the direction provided by the supervisor is "a reasonable resolution of an arguable question of professional duty," [FN32] the subordinate may defer to it even if the subordinate would decide the issue differently. However, unless the superior's direction meets that standard, following orders is no excuse and the subordinate lawyer is responsible for the lawyer's own conduct. [FN33]

Finally, it is important to emphasize that Rule 1.13 is only one potential source of a disclosure obligation for government lawyers. Government lawyers have other disclosure obligations under other provisions of the Model Rules. [FN34] They may also have contractual obligations or other employment obligations established by the organization's policies and rules and also, as noted earlier, legal obligations established by relevant regulations and statutes. We do not address obligations that government lawyers may have rooted in sources outside the professional conduct rules, but it is essential that government lawyers appropriately take account of them. For example, regardless of whether lawyers working for the government are serving in a representational capacity, they may be required by regulations or statutes in addition to Rule 1.13 to report legal or regulatory violations. [FN35] This Opinion does not address how these other confidentiality or disclosure laws may interact with the professional conduct rules. [FN36]

Conclusion

Lawyers representing the government should seek guidance found in Model Rules 1.13(b) and (c) when they know of an intended or ongoing violation of a legal obligation to their government organization client or a violation of law by representatives of the government organization client that would be ""imputed" to the organization and that is likely or reasonably certain to result in "substantial injury to the organization." A violation of law or legal obligation by an officer or employee of a government organization will be ""imputed" to the organization if that government representative is using or misusing authority they possess by virtue of their position with the government. A violation of a legal obligation or law by a government officer or employee that would be imputed to their organization will cause "injury to the organization" within the meaning of Model Rules 1.13(b) and (c), given the government's obligation to support, defend and promote the rule of law. The government lawyer should exercise reasonable judgment regarding whether that injury is "substantial."

If a lawyer representing a governmental organization knows that its officer or employee, acting on behalf of the governmental organization client, intends to violate or is violating a legal obligation to the organization or is violating the law, that violation would be imputed to the organization, and the resulting injury to the organization is likely to be "substantial," the lawyer must "proceed as is reasonably necessary in the best interest of the organization" under Rule 1.13(b). Depending on the circumstances, this will likely require the government lawyer to "refer the matter to higher authority in the organization" and,

if that fails to elicit an adequate response, to the organization's "highest authority that can act on behalf of the organization as determined with regard to applicable law." If, despite the lawyer's efforts in this situation, the higher authority fails to adequately address what is ""clearly a violation of law," the government lawyer may, under Rule 1.13(c), reveal the information to an appropriate authority outside the government organizational "but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization."

[FN1]. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) provides in pertinent part: ""Unless the lawyer *reasonably believes that it is not necessary in the best interest* of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law." (Emphasis supplied.)

[FN2]. The principles discussed in this Opinion apply to lawyers at all levels of government - federal, state, local, and tribal. Although this Opinion refers to the laws of certain jurisdictions by way of example, it is not specifically directed at lawyers for any particular government organization.

[FN3]. *See, e.g.*, N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Op. 2025-1 (2025) (a government lawyer must abide by the professional conduct rules when representing the government, even if doing so is contrary to the direction of a supervising lawyer); *In re Sponsel,* 566 P.3d 960 (Az. 2025) (sanctioning prosecutor under multiple rules of professional conduct, finding that she violated her duties to the public and the justice system, including "[b]y bringing charges without first reviewing the evidence, and by failing to review the charges as the litigation progressed").

[FN4]. Even when lawyers are not representing a client, they have obligations under the professional conduct rules that may be applicable. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.1-8.4; *see generally* ABA Comm. on Ethics & Pro. Resp., Formal Op. 518, at 1-2 (2025) (noting that Model Rules 8.1-8.4 "govern lawyers' conduct regardless of whether the lawyer is serving in a representational role"); ABA Comm. on Ethics & Pro. Resp., Formal Op. 509, at 3 (2024) (noting that ABA Model Rule 1.11(c) "applies irrespective of whether lawyers served in a representational capacity when they acquired the confidential government information").

[FN5]. As noted in recent ABA Formal Op. 509, "[l]awyers representing a public or government entity or officials have the same confidentiality obligations as lawyers for private individuals and private entities, although statutes and regulations may establish additional confidentiality obligations." ABA Comm. on Ethics & Pro. Resp., Formal Op. 509 (year) at 2; *see also In re* McCarty, 716 S.W.3d 245 (Mo. 2025).

[FN6]. MODEL RULES OF PROF'L CONDUCT R. 1.13(d) provides that paragraph (c) ""shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or constituent associated with the organization against a claim arising out of an alleged violation of law."

[FN7]. This Opinion does not address a government lawyer's professional obligations under the Model Rules when the government organization is bringing a good faith challenge to the relevant law or court order. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.1 (forbidding a lawyer from bringing or defending a proceeding or asserting or controverting an issue therein "unless there is a basis in law and fact for doing so that is not frivolous"). Nor does it address the government lawyer's responsibilities under other provisions of the Model Rules to avoid assisting in unlawful conduct. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (forbidding a lawyer from assisting a client "in conduct that the lawyer knows is criminal or fraudulent"); MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (forbidding representation that "will result in violation of the Rules of Professional Conduct or other law"). When a government representative seeks a government lawyer's assistance in conduct that may be unlawful, the lawyer should consider whether these provisions may be applicable.

[FN8]. MODEL RULES OF PROF'L CONDUCT R. 1.13, cmt. 9.

[FN9]. MODEL RULES OF PROF'L CONDUCT R. 1.4(b) includes, among other things, a duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." As we recently noted, the Rule "builds on lawyers' legal obligations as fiduciaries, which include 'the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."D' ABA Comm. on Ethics

& Pro. Resp., Formal Op. 512, at 8 (2024) (quoting *Baker v. Humphrey*, 101 U.S. 494, 500 (1879)). Like other lawyers, government lawyers owe fiduciary duties to their clients as well as duties under the professional conduct rules and other law.

[FN10]. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. [1] requires a lawyer to ""exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." This means providing "straightforward advice expressing the lawyer's honest assessment."

[FN11]. Although this Opinion focuses on Model Rule 1.13, government lawyers may have other sources of obligations to report constituents' wrongdoing to higher-ups in the organization, such as obligations established by statutes or regulations, internal policy, fiduciary duties, or other rules. Rule 1.13 simply establishes one minimal disclosure obligation. Even absent such an obligation, the Model Rules permit government lawyers to go up-the-ladder and Rule 1.6 would not be an impediment.

[FN12]. Although this Opinion focuses on interpretive questions arising under Model Rules 1.13(b) and (c), a government lawyer must take account of other potentially applicable Rules. For example, Comment [6] to ABA Model Rule 1.13 notes that this Rule "does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1." And, as suggested above, in order to render reasonable and candid advice to the government organization under ABA Model Rules 1.4 and 2.1, a government lawyer may sometimes be required to advise or communicate with an appropriate authority within the organization regarding government conduct involving actions including fraud, waste, abuse, or illegality, regardless of whether Rule 1.13(b) also applies. Further, as noted later in this Opinion, sources other than the professional conduct rules may establish a government lawyer's discretion or obligation to disclose government conduct involving actions including fraud, waste, abuse, or illegality to a public official within or outside the government organization that the lawyer represents.

[FN13]. *See, e.g.*, *In re* Dow & Dow, 169 A.3d 960, 963 (N.H. 2017) (holding that trial court erred in not imputing income as required by statute); Petrzelka v. Goodwin, 461 P.3d 1134 (affirming imputation of income).

[FN14]. *See, e.g.*, State v. Thompson, 647 S.E.2d 702, 706 (S.C. Ct. App. 2007) (affirming conviction based on acts imputed to defendant under theory of accomplice liability).

[FN15]. *See* Strang v. Bradner, 114 U.S. 555, 556-61 (1885) (holding that the fraud of a non-debtor partner may be imputed to the debtor, and the debt declared non-dischargeable, without regard to the debtor's participation in or knowledge of the wrongdoing); *see also* Casablanca Lofts LLC v. Abrham, 436 B.R. 530, 537 (N.D. Ill. Bnkr. Aug. 30, 2010) (following *Strang*).

[FN16]. *See, e.g.*, Guiga v. JLS Constr. Co., 255 A.D.2d 244, 245 (N.Y. App. Div. 1998) (holding that trial court properly imputed employee's negligence to employer based on respondeat superior principles); Schaefer v. RCP Assocs., 649 N.Y.S.2d 13, 14 (N.Y. App. Div. Oct. 24, 1996) (affirming denial of motion to set aside jury verdict imputing employee's negligence to employer).

[FN17]. As noted above, a lawyer's duty to report under Rule 1.13(b) arises only when the lawyer knows of a violation or potential violation that satisfies the Rule's criteria. That knowledge requirement, however, does not apply to the separate question whether the violation may be imputed to the government organization in the first instance.

[FN18]. We emphasize that our interpretation of imputation is limited to construing Rule 1.13 and its application to the representation of a government organization. We do not purport to address imputation in other areas of the law, such as holding employers responsible for employee misconduct or holding a corporation liable in tort for the act of an employee or officer. As explained above, those are distinct inquiries.

[FN19]. *See, e.g.*, Berger v. United States, 295 U.S. 78 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

[FN20]. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). *See also* RESTATEMENT (THIRD)

OF THE LAW GOVERNING LAWYERS § 97 (2000) cmts. (b) ("[T]he goals of a governmental client necessarily include pursuit of the public interest, as identified by law and as determined by decisions of government officials in the course of their duties.") and (f) ("A government lawyer may occasionally bear special disabilities or obligations because of responsibility to maintain public trust in government. Thus, courts and disciplinary agencies commonly apply more exacting standards of conduct for government lawyers and occasionally exercise discretion to impose harsher sanctions when a violation of such standards is found.").

[FN21]. Consequently, a violation of law by the government that harms members of the public, financially or otherwise, will also injure the government both by undermining its objective to uphold the law and by eroding the public's trust. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. j ("Unlawful acts of a governmental official may also violate the nonproprietary rights of third persons-such as depriving them of the right to vote or of the right to be free of racial or gender discrimination."); *see, e.g., In re* Sponsel, 566 P.3d at 960 (Sup. Ct. Az. 2025) (finding that prosecutor's misconduct damaged faith in the legal system, office morale, and the prosecutor's office's reputation for integrity). Comment j to Section 97 of the Restatement also notes that "[w]hen a lawyer is required to act to protect the best interests of a government client..., those interests are defined with reference to applicable constitutional, statutory, and regulatory definitions of the objectives and responsibilities of the governmental client."

[FN22]. The reasonableness of the lawyer's exercise of professional judgment will be evaluated based on relevant facts known at the time and will not be adjudged with the benefit of hindsight. The standard is an objective not subjective analysis.

[FN23]. RESTATEMENT, *supra* note 20, § 97 cmt. j.

[FN24]. If a government lawyer knows that the conduct of a government officer or employee is likely to be "a violation of a legal obligation to the organization," the question of whether any injury to the government organization would constitute "substantial" injury may be informed by the jurisdiction's whistleblower laws or other laws that require disclosure of certain misconduct directed against the government organization.

[FN25]. RESTATEMENT, *supra* note 20, § 97 cmt. f.

[FN26]. MODEL RULES OF PROF'L CONDUCT R. 1.13 assumes that, in some cases, higher authorities may not avert harm to the organization as they should. That is precisely why, in the most serious situations, a lawyer who goes up-the-ladder but fails to elicit an adequate response may be permitted to "report out" in order to protect the organizational client from substantial injury.

[FN27]. *See*, *e.g.*, *In re* Schuessler, 578 S.W.3d 762 (2019) (finding that an assistant county attorney violated the counterpart to Rule 1.13 by failing to disclose that a colleague filed false charges against a suspect to cover up a police officer's brutal assault of that suspect and among other things, lied to her supervisors about her knowledge, thereby interfering with and prolonging a federal investigation).

[FN28]. THE FEDERAL WHISTLEBLOWER PROTECTION ACT, 5 U.S.C. § 2302 provides statutory protections for government employees, including lawyers, who report misconduct by government officials. Federal agencies are prohibited from retaliating against employees who report misconduct in these categories. 5 U.S.C. § 2302 (D).

[FN29]. Lawyers should examine either the federal or state whistleblower statutes as appropriate.

[FN30]. In Rule 1.13(b), as elsewhere in the Model Rules, the reasonableness standard is an objective one, as prior opinions note. *See, e.g.*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 11-458 (2011) (the reasonableness standard under Rule 1.5(a) "is an objective standard").

[FN31]. This includes the responsibility under ABA Model Rule 2.1 to ""exercise independent professional judgment and render candid advice" to clients.

[FN32]. MODEL RULES OF PROF'L CONDUCT R. 5.2(b) ("A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.").

[FN33]. *See* MODEL RULES OF PROF'L CONDUCT R. 5.2(a) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.").

[FN34]. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3(a), 3.3(d), 3.8(d) & 4.1; MODEL RULES OF PROF'L CONDUCT R. 1.2(d), cmt. [10]; *see also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 522 (2026) (addressing the obligation under Model Rule 8.4(d) to disclose procedural and jurisdictional problems to the court, such as the possible need for judicial recusal).

[FN35]. For example, Federal Department of Justice employees must report any allegation of fraud waste, abuse, or criminal misconduct by any Department employee. Employees are also required to report any third-party investigations of any criminal misconduct. 28 CFR 45.11& 12. Government lawyers' legal obligation to report government constituents' minor violations of law, and statutory whistleblower protections for reporting such violations of law, are consistent with this Opinion's conclusion that even minor government illegality may cause "substantial injury" to the government organization. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97(4) (2000) ("A lawyer representing a governmental client must proceed in the representation as stated in § 96 [addressing the rules applicable to lawyers representing organizations other than a governmental client], except that the lawyer . . . must observe other applicable restrictions imposed by law on those similarly functioning for the governmental client.").

[FN36]. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (permitting the disclosure of information relating to the representation "to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order.").
ABA Formal Op. 26-524

End of Document

© 2026 Thomson Reuters. No claim to original U.S. Government Works.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 525 **September 2, 2026**

Client With Decision-Making Limitations

A lawyer who determines that his client has decision-making limitations is obligated under Rule 1.14 to maintain an ordinary client-lawyer relationship insofar as possible, and lawyers owe clients with decision-making limitations the same obligations as any other client, including abiding by the client's decisions regarding the objectives of the representation. In certain situations, lawyers may take protective action to prevent substantial injury to clients with decision-making limitations. In taking protective action, a lawyer may disclose protected information, but only to the extent reasonably necessary to prevent substantial injury to the client. While the recommendation of a guardianship may be an appropriate protective action in certain limited circumstances, the appointment of a guardian is a serious deprivation of the client's rights and should not be pursued if other, less drastic, solutions are available. Although a lawyer may recommend or support the appointment of someone the lawyer reasonably believes would be a fit guardian, a lawyer whose client has decision-making limitations may not represent a third-party petitioning for a guardianship over the lawyer's client. A lawyer representing a client with decision-making limitations may withdraw in accordance with Model Rule 1.16.

In February 2026, the ABA adopted a substantially revised version of ABA Model Rule 1.14.[1] The revisions replace the term "client with diminished capacity," with the more modern and accurate term "clients with decision-making limitations;" define a process called "supported decision-making" as an enhancement of a client's decision-making ability; recognize that clients with cognitive disabilities, including intellectual and mental health issues can, and should, be allowed to make decisions whenever possible; and recognize that decision-making limitations are situational in nature and can vary over time. Given the amendments to Model Rule 1.14 this opinion is a substantial revision and updating of ABA Formal Opinion 96-404, which was based on the prior version of Model Rule 1.14.[2] This opinion addresses questions such as: How does the

[1] MODEL RULES OF PROF'L CONDUCT R. 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.

[2] Prior Rule 1.14 – Client with Diminished Capacity

lawyer go about determining the extent of the client's decision-making limitations? May the lawyer consult with family members or others? May the lawyer petition the court to appoint a guardian for the client? Is the lawyer ever obligated to do so? May the lawyer represent a third-party petitioning for guardianship? May the lawyer support the appointment of a particular guardian? When may the lawyer withdraw from representing the client?

Assessing the Client's Capacity

Model Rule 1.14(a) defines "decision-making limitations" as follows: "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." The Rule uses "decision-making limitations" not as a medical diagnosis or a legal standard, but rather to assist the lawyer in determining whether the client has substantial difficulty in making and expressing informed decisions about the representation. While a medical diagnosis may be taken into account with the lawyer's judgment, the lawyer may not defer to a medical diagnosis and must make the lawyer's own evaluation of the client, which may be assisted in certain circumstances by family members or medical personnel. In some cases, a client may have serious physical or other impairments but may be perfectly capable of comprehending information about the matter and expressing the client's wishes to the lawyer. On the other hand, a client with no medical diagnosis may clearly have decision-making limitations.

The lawyer is assisted in the task of forming a judgment about the client's decision-making limitations by Comment [2]: decision-making limitations can be situational and can vary; a client with decision-making limitations often can deal with issues concerning the client's own well-being; and the client with decision-making limitations may have preferences and values that can guide the lawyer's representation.[3] In addition, Model Rule 1.14 Comment [13] offers significant guidance for the lawyer in assessing the client's decision-making limitations, advising lawyers to consider and balance such factors as: the client's ability to articulate the reasoning for and to

---

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

The Report submitted to the ABA House of Delegates in support of adopting revised Rule 1.14 stated these reasons for revising the rule:

> "(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."

This Opinion supersedes Formal Opinion 96-404, which provided guidance under the previous version of the Rule.

[3] MODEL RULES OF PROF'L CONDUCT R. cmt. [2].

understand the consequences of a decision; the client's ability to appreciate the fairness of the decision; and the consistency of a decision with the client's commitments and values.[4]

While the lawyer may be presented with a healthcare professional's evaluation, which should be considered, the lawyer should independently consider the client's decision-making limitations and the possible use of accommodations or supports.[5] In considering a healthcare professional's evaluation of the client's current abilities and limitations, the lawyer should recognize that the evaluation may have been done for a different purpose, may be based on standards that differ from the relevant legal standard, and may have been done at a time when client's abilities differed from the present.[6] A discussion of a client's condition with a healthcare professional does not violate Model Rule 1.6 (Confidentiality of Information) insofar as is reasonably necessary when taking protective action pursuant to Model Rule 1.14(b).[7]

Representing the Client with Decision-making Limitations

Representation of a client who has decision-making limitations often presents special challenges for the lawyer. Model Rule 1.14(a) states the lawyer's primary obligation: "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." An ordinary client-lawyer relationship presumes that there can be effective communication between client and lawyer,[8] and that the client, after consultation with the lawyer, can make considered decisions about the objectives of the representation and the means of achieving those objectives.[9]

When the client has decision-making limitations and the client's ability to communicate, to comprehend and assess information, and to make reasoned decisions is affected, maintaining the ordinary relationship in all respects may be difficult. Nonetheless, the rule requires lawyers to make efforts to accommodate the client's decision-making limitations in order to maintain an ordinary client-lawyer relationship. Comment [3] assists the lawyer by providing that decision-making limitations may be alleviated or eliminated by using supports or making accommodations such as "communication devices or services, assistance of appropriate third parties or supported

---

[4] MODEL RULES OF PROF'L CONDUCT R. cmt. [13].
[5] *Id*.
[6] *Id.*
[7] If a discussion with a health care professional would require disclosing information that relates to the representation of the client, the lawyer must ensure that the lawyer has first obtained the client's informed consent as required by Model Rule 1.6(a) or the lawyer is appropriately taking protective action pursuant to Model Rule 1.14(b). A lawyer seeking information about a client's condition may seek general information from a health care professional without disclosing information relating to the representation of the client.
[8] MODEL RULES OF PROF'L CONDUCT R. 1.4(a): "A lawyer shall: . . . (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; [and] (3) keep the client reasonably informed about the status of the matter; . . ."
[9] MODEL RULES OF PROF'L CONDUCT R. 1.2(a): ". . . [A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued . . ." Rule 1.14 Comment [4] provides, in part: "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."

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."[10] The lawyer may also need to do further research regarding the client's condition in order to make necessary accommodations.[11]

In considering appropriate accommodations, the lawyer must always bear in mind that the client with decision-making limitations is entitled to all the protections of the client-lawyer relationship, including abiding by the client's objectives regarding the representation as required by Rule 1.2(a). The lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to act consistent with the client's directions and decisions.[12]

The client may have given an agent authority to make decisions through an instrument such as a power of attorney. The lawyer should however take direction from and maintain communications with the client to the extent feasible unless the client has directed otherwise or is unable to give direction.[13] The lawyer may also represent a client for whom the court has appointed a guardian and in such situations the lawyer should ordinarily look to the guardian for decisions that the guardian has legal authority to make,[14] nonetheless keeping in mind that the lawyer should also continue to respect the client's reasonable objectives in carrying out the representation.[15] The lawyer may also consult directly and represent a client who wishes to challenge the conditions of a guardianship or revoke a decisions making instrument and in such situations the lawyer should look directly to the client for direction.

Maintaining Confidentiality

Paragraph (c) of the rule states that when a lawyer represents a client with decision-making limitations, all information relating to the representation is protected by Model Rule 1.6, just as with any client. A lawyer should therefore not presume extra latitude in such representations. Nonetheless the Rule does recognize that sometimes a client with decision-making limitations may request the presence or assistance of family members or others when interacting with the lawyer. When the client requests that family members or other people participate in meetings with the

[10] MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. [3].
[11] MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. [11]: "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."
[12] MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. [1] states that "[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." To the same effect was EC 7-12 of the predecessor Model Code of Professional Responsibility: "If a client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid."
[13] *See* MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. [7].
[14] *Id.*
[15] MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. [2]: "In addition, even if unable to make some or all decisions, persons with decision-making limitations . . . may have preferences and values that can guide the lawyer's representation."

lawyer, the lawyer should seek the client's informed consent.[16] The lawyer should document the role of family members or others in the representation, and the lawyer must keep the client's interests foremost.[17] Whenever possible, the lawyer should afford the client the opportunity to communicate privately with the lawyer without the presence or influence of others. Likewise, a family member or other third party may seek representation on behalf of a person with decision-making limitations.[18] In such situations the lawyer must first clarify the identity of the client and, if it is the person with decision-making limitations, make it clear to the family member or other third party that the lawyer does not represent them.[19]

Similarly, and with the caveat that the requirements of Model Rule 1.14(b) must be met, there may also be circumstances where the lawyer will wish to consult with the client's family or other interested persons who are in a position to aid in the lawyer's assessment of the client's decision-making limitations as well as in the decision by the lawyer of how to proceed. Limited disclosure of the lawyer's observations and conclusions about the client's behavior may be permitted if the client "is at risk of substantial physical, financial or other harm unless action is taken."[20] The lawyer must be careful, however, to limit disclosures to those pertinent to the assessment of the client's capacity and discussion of the appropriate protective action. This narrow exception does not permit the lawyer to generally disclose information relating to the representation without the client's informed consent.[21]

Protective Action: Taking the Least Restrictive Measures Under the Circumstances

The lawyer's primary obligation when representing a client with decision-making limitations is to maintain as much as reasonably possible under the circumstances an ordinary client-lawyer relationship. The Rule, however, recognizes there are situations in which it may be necessary to step outside that role to protect the client. Paragraph (b) of the Rule permits, but does not require, a lawyer to take protective action on behalf of a client when three conditions exist: 1) the client has decision-making limitations 2) the client is at risk of substantial physical, financial or other harm unless action is taken, and 3) the client cannot adequately act in the client's own interest to address the risk. Note that the sole purpose of this exception is to prevent substantial injury to the client – it is not for the convenience of the lawyer or others. In considering whether or not this exception applies, the lawyer should be able to articulate the harm to the client the lawyer seeks to prevent, why the protective action is necessary to prevent such harm and why the protective action is the least restrictive option under the circumstances.

If the lawyer believes the three conditions exist and chooses to take protective action, the lawyer must continue to be mindful of other obligations owed to the client. The lawyer taking protective action may believe that the client may oppose the protective action, but even so, to the extent

[16] MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. [5]. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a).
[17] MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. [5].
[18] If a family member or other third party has sought the lawyer's representation on behalf of another, the lawyer must not disclose information relating to the presentation to the nonclient unless permitted by Model Rule 1.6.
[19] Model Rule 5.4(c) prohibits the lawyer from taking direction from someone who recommends or employs the lawyers on behalf of the client. Similarly Model Rule 1.8(f) prohibits the lawyer from permitting a third-party payor to direct or control the relationship. *See also* MODEL RULES OF PROF'L CONDUCT R. 4.3.
[20] MODEL RULES OF PROF'L CONDUCT R. 1.14 (b).
[21] MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. [18].

feasible, the lawyer must communicate with the client and explain the protective action being taken and the reasons.[22] The exception set forth in Model Rule 1.14(b) envisions that often the client will be incapable of communicating with the lawyer, but if the client is capable of communication and the lawyer intends to take protective action, Model Rule 1.4 requires the lawyer to communicate that decision to the client. It may be the case that sometimes the client will agree to the protective actions and such agreement should be sought if possible.

Model Rule 1.14(b) does not authorize the lawyer to take protective action merely because the client is not acting in what the lawyer believes to be the client's best interest, but only when the client "is at risk of substantial physical, financial or other harm unless action is taken . . ." Model Rule 2.1 permits the lawyer to offer his candid assessment of the client's conduct and its possible consequences, and to suggest alternative courses,[23] but the lawyer must defer to the client's decisions concerning the objectives of the representation. Substituting the lawyer's own judgment of what is in the client's best interest robs the client of autonomy and is inconsistent with the principles of the "ordinary" relationship.

Equally important, Model Rule 1.14(b) cannot be construed to grant broad license for even the most well-intentioned lawyer to take control over every aspect of the life of a client with decision-making limitations, or to arrange to have such control vested in someone other than the client. Rather, the authority granted under Model Rule 1.14(b) to seek protective action should be exercised with caution in a limited manner consistent with the nature of the particular client-lawyer relationship, the client's needs, and, to the extent possible, carrying out the client's objectives for the representation.

Model Rule 1.14(b) permits the client-lawyer relationship to continue even in the face of the client's decision-making limitations, and thus the lawyer need not withdraw simply because the lawyer takes protective action.[24] Model Rule 1.14(b) also permits a lawyer to take protective action whether or not immediately necessary to the lawyer's effective representation of the client, if, in the matter at hand, the client "is at risk of substantial physical, financial or other harm unless action is taken . . ." Thus, a lawyer who has a longstanding existing relationship with a client, but no specific present work, is not, for lack of such assignment, barred from taking appropriate action to protect a client where Model Rule 1.14(b) applies.

Although not expressly directed by the Model Rules, the principle of respecting the client's autonomy dictates that protective action taken by a lawyer who believes a client has decision-making limitations and is at risk of substantial harm should be the action that is reasonably viewed as the least restrictive action under the circumstances. Model Rule 1.14 Comment [12] offers helpful guidance as to what constitutes "protective action," while cautioning that it should be undertaken to minimize eroding client autonomy and maximize accomplishing the client's goals,

---

[22] In certain situations, the lawyer may delay communicating information if the lawyer believes the client is likely to react imprudently. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. [4].

[23] "Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists." MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. [4].

[24] In some situations, taking protective action may give rise to circumstances that require the lawyer's withdrawal pursuant to Model Rule 1.16(a), such as when the client discharges the lawyer as a result of the protective action.

values, and interests: consulting with family members; using a reconsideration period; using voluntary surrogate decision-making tools; or consulting with persons or entities that could protect the client. Other options may include use of durable powers of attorney or revocable trusts where a client with decision-making limitations has the capacity to execute such documents.

At times, the lawyer may believe that a client's situation is so serious that the least restrictive option to protect the client is a guardianship. The appointment of a guardian is a serious deprivation of the client's rights and should not be pursued if less restrictive measures are available. Even where the appointment of a guardian is the only appropriate alternative, that course, too, has degrees of restriction. For instance, if the client-lawyer relationship is limited to a single litigation matter, the least restrictive course for the lawyer might be to seek the appointment only of a guardian ad litem, so that the lawyer will be able to continue the litigation for the client. On the other hand, a lawyer may discern that the client is at risk outside the representation and reasonably believe that a guardianship is necessary.

While there may be circumstances in which the appointment of a general guardian to assume control over every aspect of the client's life is the only reasonable course, in some, if not many, circumstances it may be sufficient for the client's protection to arrange for a guardian to manage the client's financial affairs, allowing the client to continue managing his personal affairs. Model Rule 1.14 Comment [15] notes the situation where the client with decision-making limitations has property that should be sold for the client's benefit, but completion of the transaction requires the appointment of a legal representative who can act on the client's behalf.

The Lawyer May Seek a Guardian for the Client but May Not Represent Another in Doing So

When, after consideration of less restrictive means, a lawyer has concluded that a guardian should be appointed for his client, the lawyer may file the petition for guardianship. By its terms, Model Rule 1.14(b) authorizes a lawyer to file a petition for guardianship seeking that another be appointed guardian when the lawyer has made the requisite finding that the client "is at risk of substantial physical, financial or other harm unless action is taken . . ." Conscious of the lawyer's general duty of loyalty, and the lawyer's specific obligation under Model Rule 1.14(a) to "as far as reasonably possible, maintain an ordinary client-lawyer relationship," a lawyer may feel discomfort at being the petitioner. The lawyer may also be discomfited by being in the position of taking action, regardless of how necessary and appropriate, that will take away the client's fundamental right of independence. Nevertheless, in the extraordinary circumstances in which it applies, Model Rule 1.14(b) clearly permits the lawyer to do so. In all aspects of the proceedings, the lawyer's duty of candor to the court requires disclosure of pertinent facts, including the client's wishes.

A lawyer who finds himself in this awkward position may prefer that someone else file the petition. In practice, too, it is not uncommon for the lawyer to be approached by a family member or other third party with a request that the lawyer represent family member or other third party in pursuing the petition. As discussed above, Model Rule 1.14(b) permits the lawyer to file a petition for guardianship upon concluding that the client "is at risk of substantial physical, financial or other

harm unless action is taken . . .” A lawyer with a client with decision-making limitations may not, however, represent a third party in petitioning for a guardianship over the lawyer’s client.

In permitting a lawyer to seek appointment of a guardian over the client’s objection in these limited circumstances, Model Rule 1.14(b) creates a narrow exception to the lawyer’s ordinary responsibility to defer to the client’s lawful objectives. However, Model Rule 1.14 does not otherwise derogate the lawyer’s responsibilities to the client and certainly does not abrogate the client-lawyer relationship. In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for the lawyer’s client. Such a representation is necessarily “adverse” to the client and prohibited by Rule 1.7(a), even if the lawyer sincerely and reasonably believes that such representation would be in the client’s best interests. In short, if the lawyer decides to file a guardianship petition, it must be on the lawyer’s own authority under Model Rule 1.14 and not on behalf of a third party, however well-intentioned.

This does not mean the lawyer cannot consider requests of family members and other third parties and be responsive to them, provided the lawyer has made the requisite determination that the client with decision-making limitations “is at risk of substantial physical, financial or other harm unless action is taken . . .” and a guardianship is necessary and is the least restrictive alternative. The lawyer must also have made a good faith determination that the third party with whom the lawyer is dealing is also acting in the best interests of the client. In such circumstances, the lawyer may disclose information relating to the representation to the limited extent necessary to assist the third party in filing the petition and may provide other appropriate assistance short of representation.

Seeking the appointment of a guardian for a client is to be distinguished from seeking to be the guardian. A lawyer who files a guardianship petition under Model Rule 1.14(b) should not act as or seek to have the lawyer appointed guardian except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay.[25] Even in the latter situations, a lawyer may have to act before the appointment has been actually made by the court. A lawyer whose client with decision-making limitations is about to be evicted, for instance, should be permitted to take action on behalf of the client to forestall or prevent the eviction, for example, by filing an answer to the eviction complaint. In such a case the lawyer should take appropriate steps for the appointment of a formal guardian or other legal representative, other than the lawyer, as soon as possible.[26]

Representing a Guardian

In Formal Opinion 96-404, the Committee indicated that after the court appoints a guardian for a lawyer’s client, the lawyer may represent the guardian. We caution that to do so, however, would raise heightened conflict-of-interest concerns.[27] A lawyer seeking to represent both the guardian and the ward could face a serious conflict under Model Rule 1.7(a), and the lawyer may not be able to appropriately obtain informed consent to the conflict from a client subject to a

[25] MODEL RULES OF PROF’L CONDUCT R. 1.14 cmt. [19].
[26] MODEL RULES OF PROF’L CONDUCT R. 1.14 cmt. [20].
[27] The Committee does agree, however, with the observation in Formal Opinion 96-404 that “any expectation the lawyer may have of future employment by the person he is recommending for appointment as guardian must be brought to the attention of the appointing court.”

guardianship.[28] Withdrawing from the representation of the ward, even if permissible under Model Rule 1.16, could present a former client conflict under Model Rule 1.9(a), and again, the lawyer may not be able to obtain the informed consent of the former client.[29]

Withdrawal from Representation of the Client with Decision-Making Limitations

A lawyer who represents a client with decision-making limitations may believe that, because of the client's decision-making limitations, the lawyer is unable to fulfill his or her professional obligations to the client. For example, the client may be unable to articulate the client's objectives concerning the representation or consult with the lawyer. If the lawyer reasonably believes this may result in substantial injury to the client, Model Rule 1.14(b) may permit the lawyer to address the situation through protective action.

While Model Rule 1.14(b) permits a lawyer to take protective action in certain circumstances, it does not compel the lawyer to do so, and many lawyers are uncomfortable with the prospect of having to so act. In that situation, the lawyer may believe the lawyer is obligated to withdraw by Model Rule 1.16(a)(3), which requires the lawyer to withdraw from the representation when the lawyer is discharged. Or it may be the case that the lawyer believes the lawyer has permissive grounds for withdrawal under Model Rule 1.16(b). Nothing prohibits a lawyer from seeking to withdraw from the presentation of a client with decision-making limitations in accordance with Model Rule 1.16.

While withdrawal in these circumstances solves the lawyer's dilemma, it may leave the client with decision-making limitations without help at a time when the client needs it most.[30] For instance, the client's decision-making limitations may increase in the middle of a pending matter and substitute counsel may not be able to represent the client as effectively due to the inability to discuss the matter with the client. Thus, while it cannot be stated that a lawyer representing a client with decision-making limitations may never withdraw, the better course of action, and the one most likely to be consistent with Rule 1.16(b), will often be for the lawyer to stay with the representation and seek appropriate protective action on behalf of the client.

Conclusion

A lawyer should strive to maintain an ordinary client-lawyer relationship when a client has decision-making limitations. The lawyer should employ the many resources available both to evaluate the effect of the client's decision-making limitations on the relationship and as to what measures can be taken to limit that effect. The lawyer may take reasonably necessary protective action if the client "is at risk of substantial physical, financial or other harm unless action is taken . . ." The action taken should be the least restrictive of the client's autonomy that will yet adequately protect the client.

---

[28] *See, e.g.*, *In re* Guardianship of Lillian P., 238 Wis. 2d 449, 617 N.W.2d 849 (Wis. App. 2000).

[29] A lawyer who has formerly represented the ward must be mindful of the obligation under Model Rule 1.9(c) not to disclose or use adversely any information relating to the representation of the ward without the informed consent of the ward in considering whether representation of the guardian is permissible.

[30] As pointed out in C.W. WOLFRAM, MODERN LEGAL ETHICS 162 (1986), even if withdrawal is technically permissible, it "only solves the lawyer's problem and may belittle the client's interest."

The reasonably necessary protective action could include seeking the appointment of a guardian if less restrictive actions are, or have reasonably been determined to be, ineffective. The lawyer may recommend or support the appointment of a particular person or other entity as guardian, provided the lawyer has made reasonable inquiry as to the suggested guardian's fitness. In all aspects of the proceedings, the lawyer's duty of candor to the court requires disclosure of pertinent facts, including the client's wishes. Finally, withdrawal from representation of a client with decision-making limitations is disfavored, even if ethically permissible under the circumstances.

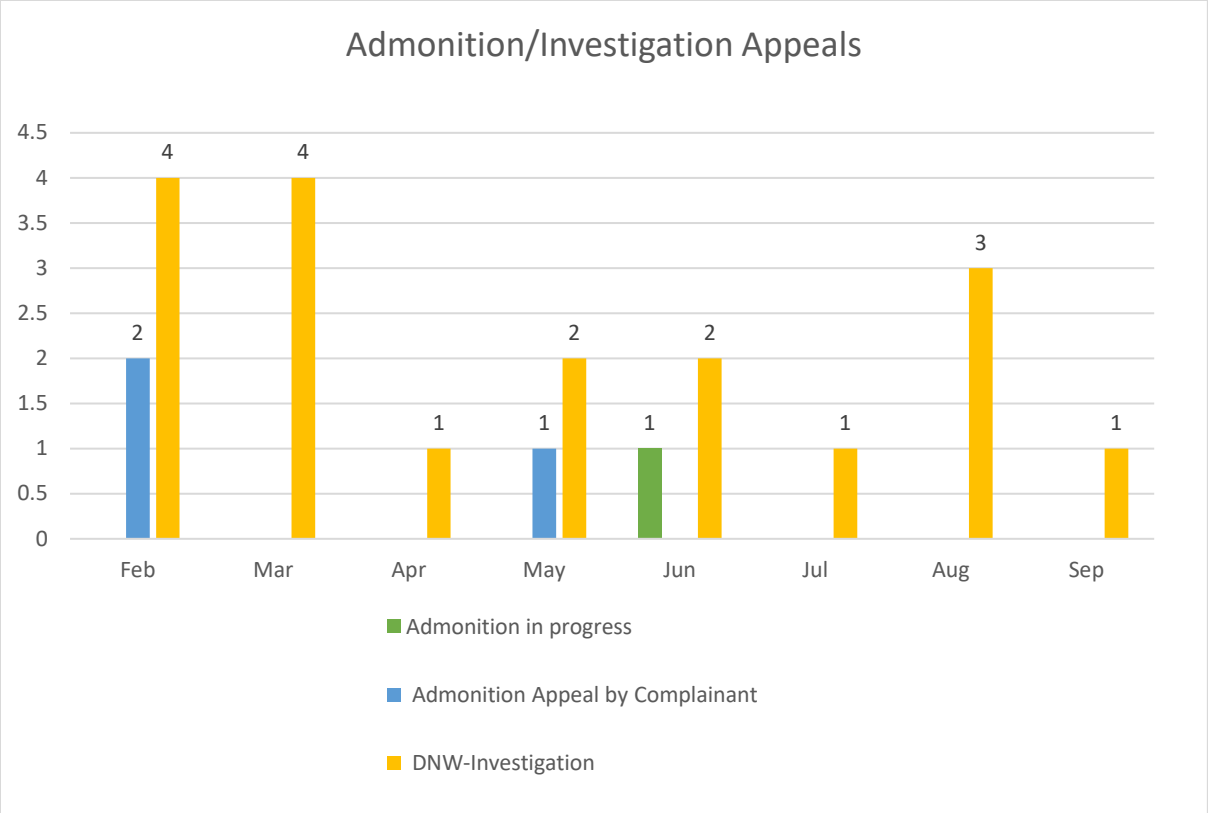
AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

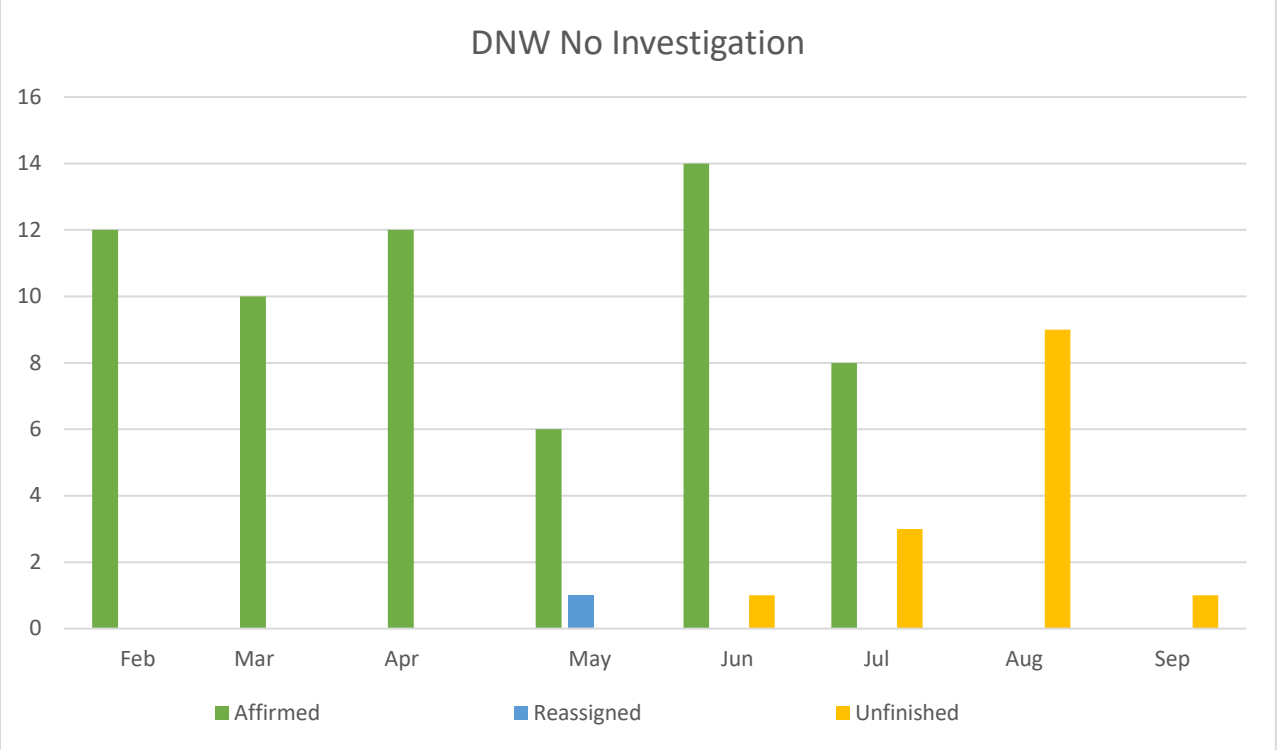
CHAIR: Bruce Green, New York, NY ■ Brian Shannon Faughnan, Memphis, TN ■ Terri Garland, Chicago, IL ■ Hilary P. Gerzhoy, Washington, D.C. ■ Veronica Root Martinez, Durham, NC ■ Tim Pierce, Madison, WI ■ Margaret Raymond, Madison, WI ■ Hon. Jennifer A. Rymell, Fort Worth, TX ■ A.J. Singleton, Lexington, KY ■ Thomas G. Wilkinson, Jr., Philadelphia, PA

CENTER FOR PROFESSIONAL RESPONSIBILITY: Joseph W. Tirrell, Lead Senior Counsel

© 2026 by the American Bar Association. All rights reserved.



Average Days to Complete: 27.93



Average Days to Complete: 27.22