Case No. _____

STATE OF MINNESOTA
IN SUPREME COURT

In re the Minnesota Rules of Professional Conduct

PETITION OF MINNESOTA STATE BAR ASSOCIATION TO AMEND RULES 1.6(b) AND 5.5 OF THE MINNESOTA RULES OF PROFESSIONAL CONDUCT

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

Petitioner Minnesota State Bar Association ("MSBA") respectfully submits this petition asking this Court to adopt the proposed amendments to Rules 1.6(b) and 5.5 4(c) of the Minnesota Rules of Professional Conduct attached hereto as Attachments 1 and 2, respectively. The proposed amendments would clarify and correct conflicting interpretations of the current Rule 1.6(b)(8) and conform the requirements for practice in Minnesota by lawyers licensed only in other jurisdictions to the needs of an increasingly nationwide practice of law.

In support of its petition, the MSBA would show the Court the following:

1. The petitioner MSBA is a not-for-profit association of lawyers admitted to practice before this Court and the lower courts of the State of Minnesota.

2. This Honorable Court has the exclusive and inherent power and duty to administer justice, to adopt rules of practice and procedure before the courts of this state,

to establish the standards for regulating the legal profession and to establish mandatory ethical standards for the conduct of lawyers and judges. This power has been expressly recognized by the Minnesota Legislature. *See* MINN. STAT. § 480.05 (2002).

3. This Court adopted the Minnesota Rules of Professional Conduct in 1985 in response to a petition of the MSBA. The Court adopted substantial revisions to the Rules in response to Petitions by the MSBA in 2005 and 2015. From time to time, the MSBA has petitioned the Court for amendments to individual rules because of changes to the ABA Model Rules of Professional Conduct, because of a perceived need to address new or changing issues in the practice of law, or to clarify or correct rules that were viewed as problematical. The Court has enacted numerous changes to the Rules since their initial adoption as a result of MSBA petitions.

4. The proposed amendments were recommended by the Rules of Professional Conduct Committee of the MSBA following a year-long study and after receiving input from MSBA sections, from the OLPR and from the LPRB. They were presented to the MSBA Assembly in December, 2017. The Assembly conducted an hour-long continuing legal education program on the proposed amendments to Rule 5.5 at its December 15, 2017 meeting. Attached to this Petition as Attachments 3 and 4 are the Reports and Recommendations of the MSBA Rules of Professional Conduct Committee on the proposed amendments. At its April 20, 2018 meeting the MSBA Assembly, the policy-making entity of the Association, adopted both Reports and Recommendations. A statement of the reasons for adopting the amendments is set forth in Attachments 3 and 4.

5. The interest of the MSBA in this matter is as follows. Key terms of Rule 1.6(b)(8), such as "establish a claim or defense" and "actual or potential controversy, are ambiguous. These ambiguities have been exacerbated by conflicting interpretations published by the Lawyers Professional Responsibility Board ("LPRB") and the Office of Lawyers Professional Responsibility ("OLPR") that make enforcement of the rule problematic. The MSBA respectfully urges amendments to Rule 1.6(b) to resolve the ambiguity and to provide clarity to Minnesota lawyers on responding to public criticism by clients and former clients. Second, the MSBA seeks to respond to the invitation of this Court, in *In re Panel File 39302,* 884 N.W.2d 661 (Minn. 2016) to amend and expand Rule 5.5 to better reflect the bar's understanding of what practice areas are "reasonably related" to a lawyer's field of practice and to amend the Rule to better reflect the realities of modern interstate practice of law. The MSBA thus asks this Court to publish the attached proposed Amendments to Rules 1.6(b) and 5.5 of the Minnesota Rules of Professional Conduct for notice comment and to adopt the Amendments after due consideration.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

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

(Signatures continued on the following page).

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

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

ATTACHMENTS

Attachment 1, Proposed amendments to Rule 1.6(b)(8),
Minnesota Rules of Professional Conduct and comments thereto……6

Attachment 2, Proposed amendments to Rule 1.6(b)(8),
Minnesota Rules of Professional Conduct and comments thereto……9

Attachment 3, Report and Recommendation regarding amendment of Rule 1.6,
Minn. R. Prof. Conduct, adopted by the Assembly of the Minnesota State Bar
Association……15

Attachment 4, Report and Recommendation regarding amendment of Rule 5.5,
Minn. R. Prof. Conduct, adopted by the Assembly of the Minnesota State Bar
Association……26

ATTACHMENT 1

Proposed amendments to Rule 1.6(b)(8),
Minnesota Rules of Professional Conduct and comments thereto.

Rule 1.6(b) A lawyer may reveal information relating to the representation of a client if:

…

(8) the lawyer reasonably believes the disclosure is necessary to respond to a client's specific and public accusation, made outside a legal proceeding, of misconduct by the lawyer, where the accusation (a) raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects and (b) includes the client's disclosure of information or purported information related to ~~establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning~~ the lawyer's representation of the client~~;~~

~~(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense in an actual or potential civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;~~

(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense by the lawyer in an actual or potential civil, criminal, or disciplinary proceeding based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

(~~9~~10) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order;

(~~10~~11) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3; or

(~~11~~12) the lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Comments to Rule 1.6.

[8] ~~Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(8) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced~~. Paragraph (b)(8) does not permit disclosure to respond to a client's petty or vague critique, or general opinion, of a lawyer, such as those that are common in online rating services. Specific allegations are those which can be factually verified or corrected. Public accusations are those made to third persons other than the lawyer and those associated with the lawyer in a firm. Paragraphs (b)(8) and (b)(9) recognize the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[9] ~~A lawyer entitled to a fee is permitted by paragraph (b)(8) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary~~. Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim or charge involving the conduct or representation of a former client. Such a claim or charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(9) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding

directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. A lawyer entitled to a fee is permitted by paragraph (b)(9) to prove the services rendered in an action to collect it.

ATTACHMENT 2

Proposed amendments to Rule 5.5,
Minnesota Rules of Professional Conduct and comments thereto.

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

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

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

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of Minnesota law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice Minnesota law ~~in this jurisdiction~~.

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

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraph (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Such reasonably-related services include services which are within the lawyer's regular field or fields of practice in a jurisdiction in which the lawyer is licensed to practice law.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in ~~this jurisdiction~~ Minnesota that ~~are services that the lawyer is authorized to provide by~~ exclusively involve federal law or the ~~other~~ law of ~~this~~ another jurisdiction in which the lawyer is licensed to practice law, provided the lawyer advises the lawyer's client that the lawyer is not licensed to practice in Minnesota..

(e) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are performed on behalf of a person who has a family, close personal, or prior professional relationship with the lawyer.

Comment

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

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

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

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the general practice of the law of this jurisdiction. Presence may be systematic and continuous even

if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] Prior versions of Rule 5.5 and prior interpretations of the Rule assumed that attorneys practice in fixed physical offices and only deal with legal issues related to the states in which their offices are located. The increased mobility of attorneys, and, in particular, the ability of attorneys to continue to communicate with and represent their clients from anywhere in the world, are circumstances that were never contemplated by the Rule. The adoption of Rules 5.5(b) and (c) in 2005 reflected the State's growing recognition that multi-jurisdictional practice is a modern reality that must be accommodated by the Rules.

The assumption that a lawyer must be licensed in Minnesota simply because he or she happens to be present in Minnesota no longer makes sense in all instances. Rather than focusing on where a lawyer is physically located, Minnesota's modifications of Rule 5.5(b)(1) and Rule 5.5(d) clarify that a lawyer who is licensed in another jurisdiction but does not practice Minnesota law need not obtain a Minnesota license to practice law solely because the lawyer is present in Minnesota.

Notwithstanding the Minnesota amendments to Rule 5.5(b)(1) and (2) and Rule 5.5(d)(2), Rule 8.5(a) still provides that a lawyer who is admitted in another jurisdiction, but not in Minnesota, "is also subject to the disciplinary authority of ... [Minnesota] if the lawyer provides or offers to provide any legal services in" Minnesota. In particular, such a lawyer will be subject to the provisions of Rules 7.1 through 7.5 regarding the disclosure of the jurisdictional limitations of the lawyer's practice. In addition, Rule 5.5(b)(2) continues to prohibit such a lawyer from holding out to the public or otherwise representing that the lawyer is admitted to practice Minnesota law.

[~~5~~6] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraph (d), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[~~6~~7] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[~~7~~8] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia, and any state, territory, or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice because, for example, the lawyer is on inactive status.

[~~8~~9] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[~~9~~10] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

[~~10~~11] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[~~11~~12] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[~~12~~13] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac

vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[~~13~~14] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraph (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14~~5~~] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients ~~in matters involving a particular body of federal, nationally uniform, foreign, or international law~~.

[16] Paragraph (e) recognizes that lawyers are often sought out by former clients, family members, personal friends, and other professional relationships for legal advice and assistance, even though the person is domiciled in a jurisdiction in which the lawyer is not licensed. The risk of harm to the public in such situations is very low and is outweighed by the value inherent in clients being able to choose lawyers they trust.

[15~~7~~] Paragraph (d) identifies a circumstance in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. Except as provided in paragraph (d), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16~~8~~] Paragraph (d) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation, or judicial precedent.

[17~~9~~] A lawyer who practices law in this jurisdiction pursuant to paragraph (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[18~~20~~] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraph (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, such notice may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b). An attorney who is not licensed in Minnesota but who limits his or her practice in Minnesota to federal law or the law of another jurisdiction in which the lawyer is licensed pursuant to Rule 5.5(d), must note the lawyer's jurisdictional limitations when identifying the lawyer on letterhead, on a website, or in other manners. See Rule 7.5(b).

[19~~21~~] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

ATTACHMENT 3

Report and Recommendation regarding amendment of Rule 1.6, Minn. R. Prof. Conduct, adopted by the Assembly of the Minnesota State Bar Association

April 20, 2018

No resolution presented herein reflects the policy of the Minnesota State Bar Association until approved by the Assembly. Informational reports, comments, and supporting data are not approved by their acceptance for filing and do not become part of the policy of the Minnesota State Bar Association unless specifically approved by the Assembly.

Report and Recommendation to the MSBA Regarding Proposed Amendments to MRPC 1.6, Confidentiality of Information

Rules of Professional Conduct Committee
November 1, 2017

RECOMMENDATION

RESOLVED, that the MSBA petition the Minnesota Supreme Court to adopt proposed amendments to Minnesota Rules of Professional Conduct 1.6(b)(8) and (9), and related comments, as set forth in this report.

Rule 1.6(b) A lawyer may reveal information relating to the representation of a client if:

> (8) the lawyer reasonably believes the disclosure is necessary to respond to a client's specific and public accusation, made outside a legal proceeding, of misconduct by the lawyer, where the accusation (a) raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects and (b) includes the client's disclosure of information or purported information related to ~~establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning~~ the lawyer's representation of the client~~;~~
>
> ~~(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense in an actual or potential civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;~~

(9) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense by the lawyer in an actual or potential civil, criminal, or disciplinary proceeding based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

(~~9~~10) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order;

(~~10~~11) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3; or

(~~11~~12) the lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Comments to Rule 1.6.

[8] ~~Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(8) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.~~ Paragraph (b)(8) does not permit disclosure to respond to a client's petty or vague critique, or general opinion, of a lawyer, such as those that are common in online rating services. Specific allegations are those which can be factually verified or corrected. Public accusations are those made to third persons other than the lawyer and those associated with the lawyer in a firm. Paragraphs (b)(8) and (b)(9) recognize the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[9] ~~A lawyer entitled to a fee is permitted by paragraph (b)(8) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.~~ Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim or charge involving the conduct or representation of a former client. Such a claim or charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example,

a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(9) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. A lawyer entitled to a fee is permitted by paragraph (b)(9) to prove the services rendered in an action to collect it.

REPORT

Committee History, Mission, Procedures.

The Rule 1.6 subcommittee was appointed on April 25, 2017, by Mike McCarthy, then Chair of the MSBA Committee on the Rules of Professional Conduct (Committee). Initial members of the subcommittee were William J. Wernz, Fred Finch, David Schultz, Tim Baland, Jr., and Patrick R. Burns. On and after September 12, 2017, Timothy Burke replaced Patrick R. Burns.

Appointment of the subcommittee was requested by William J. Wernz in a memo dated April 17, 2017. The memo stated the purposes of the subcommittee would be (a) to study and make recommendations regarding a possible petition to amend Rule 1.6(b)(8), Minn. R. Prof. Conduct; and (b) to consider how the development of electronic social media and other electronic publication modes may affect the issues addressed by Rule 1.6(b)(8). The memo also stated, "The main occasion for this request is the issuance by the Lawyers Professional Responsibility Board (LPRB) of Opinion 24, on September 30, 2016." The memo also identified what Mr. Wernz regarded as serious problems with Opinion 24.

The subcommittee's recommendations were heard and considered at the Committee meeting held on September 26, 2017. At that meeting, the Committee voted to support the recommendations of the subcommittee absent any dissenting comments received from MSBA sections. Following that meeting, the proposed changes and background information were provided to all MSBA section chairs, with notice that comments were due October 27, 2017. The only comment received came from the New Lawyers Section, indicating they had reviewed and discussed the proposed changes to Rule 1.6 and voted to support them.

This information was brought back to the Committee when they met on October 31, 2017. It was noted by representatives of the Office of Lawyers Professional Responsibility (OLPR) that the LRPB would not be formally discussing the proposed amendments until their meeting in January, 2018. As a formality, the Committee again voted to support bringing the proposed changes to the MSBA Assembly at their December meeting. The Committee felt it important that these changes, along with the changes recommended to Rule 5.5, be combined in one petition to the Court.

Sources.

Sources reviewed by the subcommittee included Lawyers Board Opinion 24, the April 17, 2017, memo of Mr. Wernz, Patrick R. Burns, *Client Confidentiality and Client Criticisms,* Bench & B. of Minn., Dec. 2016 ("OLPR article") and William J. Wernz, *Board Forbids Lawyer-Self-Defense in Public Forum – a Further Look – Board Op. 24*, Minn. Law., April 10, 2017 ("Wernz article"). The subcommittee also reviewed literature related to the advent and influence of electronic social media.

Minnesota and ABA Model Rules 1.6.

Since they were first adopted in 1985, the Minnesota Rules of Professional Conduct have followed the ABA Model Rules of Professional Conduct to a large degree. The 2005 amendments to the Minnesota Rules were generally designed to increase the overlap of the two sets of rules.

Nonetheless, Minnesota Rule 1.6 ("Confidentiality of Information") has always had many variations from Model Rule 1.6. In 1985, the Court rejected ABA Model Rule 1.6 altogether, preferring to carry forward the confidentiality provisions of the Minnesota Code of Professional Responsibility into Minnesota Rule 1.6. From the 1980s to the early part of this century Minnesota adopted amendments to Rule 1.6 which generally enhanced the discretion of lawyers to disclose confidential information when necessary to rectify or respond to client misconduct. These amendments were usually not based on the Model Rules and in some cases the ABA rejected proposals similar to those adopted in Minnesota. Sometimes the Model Rules were later amended to permit disclosures similar to those permitted in Minnesota.

In 2005, Minnesota adopted several variations from Model Rule 1.6. The variations generally permitted more disclosures than the Model Rule. For example, Minnesota Rule 1.6(b) permits eleven types of disclosures, but Model Rule 1.6(b) permits only seven. Even where the Minnesota and Model Rules address the same types of permitted disclosures, the relevant provisions sometimes differ. For example, Minnesota added the words "actual or potential" to "controversy" in Model Rule 1.6(b)(8).

Based on this history, the Committee has not found it important to try to conform to ABA Model Rule 1.6(b).

Lawyers Board Opinion No. 24 and the OLPR Article

On September 30, 2016, the LPRB issued Opinion No. 24. The Board did not follow its customary procedures of seeking comment on a draft of the opinion and including a Board explanatory comment with the opinion. Opinion 24 did not address the meaning of Minnesota's addition of "actual or potential" to "controversy." Opinion 24 did not include any explanation of

its conclusion that Rule 1.6(b)(8) does not permit disclosure of information covered by rule 1.6(a), "when responding to comments posted on the internet or other public forum. . .."

It appears that Opinion 24 takes the position that there are no circumstances in which the "actual or potential controversy" provision of Rule 1.6(b)(8) permits disclosures. Mr. Wernz reported that he inquired of the OLPR and of the LPRB whether they believed there were any such circumstances, but did not receive a reply.

The OLPR article appears to take the position that the controversy provision would apply only in public debates, especially on the internet, "that have substantial ramifications for persons other than those engaged in [the debates]." The OLPR article regards such ramifications as "unlikely" in the case of internet ratings of a lawyer. The Committee considered, however, whether such ramifications would include decisions by prospective clients as to retaining lawyers who were the subject of such ratings. A majority of the Committee has concluded that there are circumstances, outside of legal proceedings, in which a lawyer should be permitted to disclose confidential information to respond to a client's serious, specific allegations of the lawyer's misconduct.

A majority of the Committee does not regard the status quo as satisfactory. The meaning of "actual or potential controversy" is debatable. It is not evident that Opinion 24 states the "plain meaning" of Rule 1.6(b)(8). The OLPR article is not consistent with Opinion 24 as to when disclosures are allowed in public controversies – OLPR would allow some disclosures, but Opinion 24 would allow none. A majority of the Committee regards its proposed rule amendments as not expanding disclosure permissions beyond those allowed under current rules.

Electronic Social Media.

Electronic social media (ESM) has developed after 2005. ESM has become a major fact of life. ESM provides important resources for information used in making everyday decisions, including selection of providers of various services. Developments include online rating services in which customers and clients rate the services of various providers, including lawyers. The Committee has reviewed online ratings of lawyers. The Committee has the following observations and conclusions.

Most online ratings of lawyers by clients express general opinions. Where ratings include allegations of fact, they are often fairly general and do not disclose confidential client information. Most factual allegations do not involve serious misconduct, but instead involve such matters as diligence, adequacy of communications, manners and the like. However, ESM postings can involve serious accusations of misconduct by lawyers.

Opinions, Rules and Cases in Other Jurisdictions.

The Committee reviewed ethics opinions from other jurisdictions, including those that were cited in the OLPR article and were apparently relied on by the LPRB in issuing Opinion 24.

The opinions cited in the OLPR article do not address the situation where the client's accusation includes disclosure of confidential information. Three of the cited opinions expressly state that they assume the client has not disclosed confidential information and the other cited opinions expressly rely on these three opinions.[1] Opinion 24 in effect takes a position that is not taken by these opinions, viz. that Rule 1.6(b)(8) does not permit disclosure even when the client's accusation includes disclosures. Insofar as opinions in other jurisdictions take the position that lawyers may not disclose confidential information to respond to critiques outside of legal proceedings when the critiques do not themselves disclose confidential information, the Committee agrees with them.

D.C. Ethics Opinion 370, *Social Media I: Marketing and Personal Use* (Nov. 2016) was issued after LPRB Op. 24 was issued. Op. 370 includes a section, "Attorneys May, With Caution, Respond to Comments or Online Reviews From Clients." This section applies a Rule of Professional Conduct, unique to the District of Columbia, that allows disclosure or use of otherwise protected client information, "to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." D.C. Rule 1.6(e). Op. 370 states, "Attorneys may respond to negative online reviews or comments from clients. However, Rule 1.6 does not provide complete safe harbor for the disclosure of client confidences in response to a negative internet review or opinion." For further explication, Op. 370 cites Comment 25 to D.C. Rule 1.6.[2] The committee inquired of D.C. Bar Counsel's office regarding

[1] Los Angeles County Bar Ass'n Op. No. 525 addresses a situation "when the former client has not disclosed any confidential information." San Francisco Bar Ass'n Op. 2014-1 states, "This Opinion assumes the former client's posting does not disclose any confidential information and does not constitute a waiver of confidentiality or the attorney-client privilege." New York State Bar Ass'n Op. 1032 addresses response to a client statement that "did not refer to any particular communications with the law firm or any other confidential information." Texas State Bar Op. No. 662 and Pennsylvania Bar Ass'n Formal Op. 2014-200 both rely on the Los Angeles, San Francisco and New York opinions.

[2] Comment 25 to D.C. Rule 16 states, "If a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose that client's confidences and secrets in establishing a defense, without waiting for formal proceedings to be commenced. The requirement of subparagraph (e)(3) that there be "specific" charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an example of such a general criticism would be an assertion by the client that the lawyer "did a poor job" of representing the client. But in this situation, as well as in the defense of formally instituted third-party proceedings, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and

its experience with D.C. Rule 1.6(e). Bar Counsel indicated that it generally advises lawyers to avoid disclosures in responding to online reviews, but did not provide specific information on rule interpretation issues.

Several attorneys in other jurisdictions have been publicly disciplined for disclosing confidential information in response to online reviews.[3] Violations of confidentiality rules were clear in these cases. The conduct in these cases would violate both the current Minnesota Rule 1.6 and the rule as proposed for amendment.

The Committee believes it will be helpful to the bar and the public to address the situation in which the client has disclosed confidential information or purported information. Proposed Rule 1.6(b)(8) does address this situation.

Committee Comments on Drafting.

The proposed amendments bifurcate current Rule 1.6(b)(8) into proposed Rules 1.6(b)(8) and (9), to make clear when a lawyer may disclose information in legal proceedings and when disclosure may be made outside legal proceedings. Current Rules 1.6(b)(9), (10), and (11) would be re-numbered 1.6b(10), (11), and (12).

Proposed Rule 1.6(b)(8).

The proposed amendment does not retain the term "controversy," because it has proved ambiguous. The OLPR article takes the position that "public controversy" refers to issues outside legal proceedings, that is, "issues that are debated publicly and that have substantial ramifications for persons other than those engaged in it." A "debate" does not require a "proceeding" and proceedings are not normally called "debates." The OLPR article cites opinions from other jurisdictions as "consistent." However, the opinions in other jurisdictions that construe the term "controversy," conclude that "controversy" requires a legal "proceeding."[4]

---

appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable."

[3] *People v. James C. Underhill Jr.,* 2015 WL 4944102 (Colo. 2015); *In the Matter of Tsamis,* Ill. Att'y Registration and Disciplinary Comm'n, Comm'n No. 2013PR00095 (Ill. 2014); *In the Matter of Margrett A. Skinner,* 295 Ga. 217, 758 S.E.2d 788 (Ga. 2014).

[4] Texas construes the "controversy" exception to confidentiality as applying, "only in connection with formal actions, proceedings or charges." Texas Op. 662. Pennsylvania relies for its conclusion on a comment that has no Minnesota counterpart. "Comment [14] makes clear that a lawyer's disclosure of confidential information to 'establish a claim or defense' only arises in the context of a . . . proceeding." Pa. Op. 2014-200. The other opinions cited by the OLPR article do not construe the term "controversy." Another cited opinion finds that the term "accusation," as used the governing rule, "suggests that it does

The proposal uses the term "accusation," rather than "actual or potential controversy." The proposal also makes clear that an accusation "made outside a legal proceeding" is covered.[5] "Accuse" and similar terms were used for many decades before 2005. The term "accuse" was used in Rule 1.6(b)(5) from 1985 to 2005, in DR 4-101(C) of the Code of Professional Responsibility before 1985, and in Canon 37 of the ABA Canons that preceded the Code.[6]

The proposal uses the terms "specific and public" to modify "accusation." The term "specific" is borrowed from D.C. Rule 1.6(e). The proposal includes the phrase "a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." This phrase has been used for over thirty years in Minnesota and Model Rule 8.3, and has a reasonably well-understood meaning.

A client or former client who accuses a lawyer of serious misconduct in a representation will normally disclose confidential information or purported information in making the accusation. If a client made the accusation, "My lawyer stole my settlement proceeds," the proposed rule would permit the lawyer to make disclosures necessary to show that the lawyer properly distributed the settlement proceeds. In contrast, disclosure would not be permitted if the client made the accusation, "Jane Doe is a terrible lawyer."

Proposed Rule 1.6(b)(9).

The proposal associates the terms "actual or potential" with "proceeding," rather than – as in current Rule 1.6(b)(8) - with "controversy." This revision fits better with an important example of permission to disclose regarding a potential proceeding, viz. a lawyer's report to a malpractice carrier of a client "claim," which is not yet an actual lawsuit. Such claims are more accurately characterized as potential proceedings rather than potential controversies.

The proposal permits disclosure in relation to proceedings as necessary "to establish a claim or defense." Current Rule 1.6(b)(8) associates establishment of a claim with a "controversy" only, and associates establishment of a defense with both a "controversy" and a "proceeding." In

---

not apply to informal complaints, such as this website posting," but instead applies only a formal "charge." NYSBA Ethics Op. 1032.

[5] Definitions chosen from Black's Law Dictionary tend to have narrow meanings associated with legal usages. Definitions from more general dictionaries tend to have more general meanings. To avoid the issue of which dictionary to prefer, proposed Rule 1.6(b)(8) includes its own definition – a covered "accusation" is one made "outside a legal proceeding."

[6] Rule 1.6(b)(5) permitted disclosure "to defend the lawyer or employees or associates against an accusation of wrongful conduct." DR 4-101 similarly permitted disclosure of confidential information by a lawyer **"to defend himself or his employees or associates against an accusation of wrongful conduct."** Canon 37 provided, "If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation."

Kidwell v. Sybaritic, 784 N.W.2d 220 (Minn. 2010), four justices associated regarded Kidwell's disclosures to establish a claim as permitted in a proceeding that Kidwell had commenced against his former employer.[7]

Proposed Comments 8 and 9.

The proposed comments make clear that the disclosure permission of proposed Rule 1.6(b)(8) does not apply to such disclosures as a client's mere expression of opinion, vague critique, and the like. "Specific accusation" is contrasted with "petty or vague critique," and "general opinion." "Public accusation" is defined in the proposed comment in a way that is consistent with the law of defamation.

Fairness, Attorney-Client Privilege, Client Waiver by Disclosure.

Current comment 9 to Rule 1.6 recognizes, as a basis for permission to disclose in connection with a fee dispute, "the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." Because this principle extends beyond a lawyer's contested claim to a fee, proposed comment [8] relates this principle to both Rule 1.6(b)(8) and (9), as amended.

The Committee took note of another application of a principle of fairness - the fact that a client's voluntary disclosure of privileged information operates as a waiver of the attorney-client privilege. "The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication." Restatement of the Law Governing Lawyers § 79. The policy reason for finding waiver in partial disclosure is that it would be "unfair for the client to invoke the privilege thereafter." McCormick on Evidence § 93 (7th ed. 2016), citing 8 Wigmore, Evidence (McNaughton rev.) § 2327 and Imwinkelried, The New Wigmore: Evidentiary Privileges § 6.12.4 (2ed. 2010). A waiver of the privilege would occur if a client disclosed privileged information in accusing a lawyer of misconduct.

Although the law of confidentiality under the Rules of Professional Conduct overlaps with the law of privilege, the two bodies of law are in many ways distinct. Nonetheless, the Committee believes that it would be unfair for a client to disclose, or purport to disclose, confidential information to support serious accusations against a lawyer and thereafter to invoke confidentiality rules to prevent the lawyer's self-defense either in or outside a proceeding. As

[7] The remaining three justices based their opinion on employment law and did not find it necessary to reach ethics issues. *Kidwell* dealt with a whistle-blower claim.

[7] Restatement Sec. 59 cmt. d; Findings of Fact, Conclusions of Law, and Memorandum of Honorable John C. Lindstrom at 19, *In re Fuller*, 621 N.W.2d 460 (May 23, 2000).

noted above, some of the opinions of other jurisdictions on which the OLPR article and Opinion 24 rely expressly state that the opinions do not apply where the client's allegation involves a waiver of confidentiality or privilege.

Balancing Moral and Professional Issues.

Issues involving disclosure of confidential information in self-defense give rise to important moral and professional issues. A client's groundless, public accusation of serious professional misconduct, if apparently supported by disclosure of client information, may permanently damage a lawyer's reputation and income. A lawyer's unnecessary disclosure of client information may damage a client.

Electronic Court Filing.

An issue related to issues considered by the Committee arises with electronic court filings. Electronic filing has become standard in recent years in Minnesota court proceedings. Public access to court filings has been greatly enhanced. Under current Rule 1.6(b)(8) and (9), a lawyer may disclose confidential information as reasonably necessary to "establish a claim or defense." Lawyers may sue clients and other parties to establish a claim of defamation per se. If, as Opinion 24 concludes, Rule 1.6(b)(8) does not permit a lawyer to disclose information in self-defense outside a legal proceeding, the rule may create an incentive for a lawyer to defend his or her reputation against serious, false accusations by bringing a claim for defamation per se.

A lawyer may wish to call attention to filings in a defamation per se or other proceeding. The Committee has not attempted to resolve the issue of whether a lawyer Rule 1.6 permits the lawyer to make further public disclosures of information filed online in litigation. The Committee notes: (1) that such disclosure would apparently be permitted under the Restatement of the Law Governing Lawyers; (2) that a Supreme Court referee concluded that a lawyer's public disclosure of court records did not violate Rule 1.6 and OLPR did not appeal this conclusion; and (3) that OLPR does not currently take a position on when further disclosure by a lawyer of information available in court records does or does not violate Rule 1.6.[8]

The Committee believes that amending Rule 1.6(b)(8) to make clear a lawyer's permission to disclose to respond to serious accusations will reduce the lawyer's incentive to sue the client.

[8] Restatement Sec. 59 cmt. d; Findings of Fact, Conclusions of Law, and Memorandum of Honorable John C. Lindstrom at 19, *In re Fuller*, 621 N.W.2d 460 (May 23, 2000).

Conclusion.

The Committee believes that the proposed amendments will not broaden the circumstances in which a lawyer may disclose confidential information beyond those provided by current Rule 1.6(b)(8). The current permission to disclose "in an actual or potential controversy" can be interpreted in a very broad way. OLPR interprets "controversy" to include a certain type of "debate." The Committee's proposal requires, for disclosures outside a litigation "proceeding," that the client make an accusation that is specific, serious, and public, and that also discloses confidential information. These requirements will result in very few permissions to disclose. The proposed amendments are also clear enough to reduce or eliminate the uncertainty and controversy resulting from the current rule and from Lawyers Board Opinion 24[9]

ATTACHMENT 4

Report and Recommendation regarding amendment of Rule 5.5, Minn. R. Prof. Conduct, adopted by the Assembly of the Minnesota State Bar Association

April 20, 2018

No resolution presented herein reflects the policy of the Minnesota State Bar Association until approved by the Assembly. Informational reports, comments, and supporting data are not approved by their acceptance for filing and do not become part of the policy of the Minnesota State Bar Association unless specifically approved by the Assembly.

Report and Recommendation to the MSBA Regarding Proposed Amendments to MRPC 5.5, Unauthorized Practice of Law
Rules of Professional Conduct Committee
November 1, 2017

RECOMMENDATION

RESOLVED, that the MSBA petition the Minnesota Supreme Court to adopt proposed amendments to MRPC 5.5(b) and (d), 5.5(c)(4), 5.5(e), and related comments, as set forth in this report.

REPORT

Following the Court's decision in *In re Panel File 39302,* 884 N.W.2d 661 (Minn. 2016), the Rules of Professional Conduct Committee took up the question of whether Rule 5.5 of the Minnesota Rules of Professional Conduct should be amended in light of that decision and in light of changes in the practice of law since the rule was adopted in 2005. Rule 5.5 governs the unauthorized practice of law.

The Committee appointed a subcommittee in October of 2016 to review MRPC 5.5. The subcommittee's recommendations were considered by the Committee at multiple meetings. The proposed amendments were given preliminary approval in May, 2017, and forwarded to the Lawyers Professional Responsibility Board (LPRB) for their review and recommendations.

On September 9, 2017, the LPRB agreed with the proposed amendments to MPRC 5.5(b) and (d), with the addition of additional language to (d). The Board rejected the proposed amendment of Rule 5.5(c) and approved new Rule 5.5(e), but limited it to representation of persons with a family relationship with the lawyer.

On October 31, 2017, the Committee, after much discussion, voted to recommend to the Assembly the adoption of the portions of Rule 5.5 rejected by the LPRB. (The Committee accepted the additional language proposed by the LPRB in Rule 5.5(d).)

Here is an overview of the Committee proposal:

- The amendment to Rule 5.5(c)(4) is intended to respond directly to the Court's invitation in *In re Panel File 39302,* 884 N.W.2d 661 (Minn. 2016) to amend and expand that rule to better reflect the bar's understanding of the meaning of fields of practice that are "reasonably related" to a lawyer's practice in a jurisdiction in which the lawyer is licensed.
- Proposed new section 5.5(e) is intended to remove certain client relationships from the purview of Rule 5.5 –including current and former clients, family members, close friends, and other professional relationships-- to both reflect the common current practices of lawyers and allow client selection of lawyers and client trust to take priority over the geographic restrictions that may otherwise be imposed by Rule 5.5.
- The proposed amendments to Rule 5.5(b) and (d) are intended to allow lawyers to continue to practice the law of the jurisdictions in which they are licensed when they relocate to Minnesota. This proposal follows recent similar amendments in Arizona and New Hampshire.

Each of the suggested amendments is explained below, followed by a full text, redlined version of the Rule. The amendments are all offered in the context of trying to ensure that Rule 5.5 is not interpreted to proscribe conduct that would otherwise be thought of by the practicing bar as "what good lawyers do."

I. Background.

In August, the Minnesota Supreme Court decided a private admonition appeal, *In re Panel File 39302,* 884 N.W.2d 661 (Minn. 2016). The case concerned a Colorado lawyer, not admitted in Minnesota, who was contacted by his mother and father-in-law regarding efforts to collect a judgment from them. The in-laws were Minnesota residents and the opposing party, the underlying lawsuit, and the opposing party's counsel were all in Minnesota.

The Colorado lawyer agreed to help his in-laws negotiate a resolution. The Colorado lawyer, from his office in Colorado, exchanged about two dozen e-mails

with the opposing party's Minnesota lawyer over a three-month period. The Minnesota lawyer became frustrated with the process and filed an ethics complaint against him with the Minnesota Office of Lawyers Professional Responsibility (OLPR). OLPR issued the lawyer a private admonition for violating Rule 5.5 by practicing law in Minnesota. The Colorado lawyer appealed to a three-person panel of the Lawyers Professional Responsibility Board (LPRB). After a hearing, the Panel affirmed the admonition, focusing predominately on the location of the parties to the matter. Committee member Eric Cooperstein represented the Colorado lawyer in an appeal to the Minnesota Supreme Court.

Two primary issues were presented to the Court: 1) whether a lawyer practices "in" a jurisdiction by sending e-mails to a lawyer in that jurisdiction and 2) whether the Colorado lawyer's conduct was permitted under the "temporary practice" provision of Rule 5.5(c)(4), which allows a lawyer to practice temporarily in a jurisdiction if the legal services provided "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

The Court ruled, 4-3, that the Colorado lawyer had engaged in the unauthorized practice of law in Minnesota. The Court stated that a lawyer could practice in a jurisdiction solely by sending e-mail communications to someone in that jurisdiction. The Court relied heavily on dicta in a 1998 California decision, *In re Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court,* 949 P.2d 1 (Cal. 1998), a fee dispute in which both physical and virtual presence in California were at issue. Ironically, *Birbrower* inspired significant changes to Rule 5.5 of the Model Rules of Professional Conduct, which changes were mostly adopted in Minnesota in 2005.

The Court also ruled that the Colorado lawyer's conduct was not permitted by Rule 5.5(c)(4) because although the lawyer did some collections work, that work was not part of a "particular body of federal, nationally-uniform, foreign, or international law. *See* Rule 5.5, cmt. 14. Hence, the Court determined that the representation of his in-laws was not "reasonably related" to his practice in Colorado. The Court stated in a footnote, however, that "If there are concerns that these [Rule 5.5(c)] exceptions do not adequately meet client needs, the better way to address such concerns would be through filing a petition to amend Rule 5.5(c)."

II. Rationale for Seeking Amendments to Rule 5.5.

Rule 5.5, which mostly follows the ABA Model Rule, presently enforces geographic restrictions on the practice of law. In the years since the present version of the rule was adopted in 2005, lawyers and clients have become increasingly mobile. Both lawyers' practices and their clients' legal matters

routinely cross state lines. *Panel File 39302* highlights some of the unintended consequences of the present rule and draws attention to how confusing it may be for lawyers to determine whether their conduct runs afoul of the rule.

For example, although the Minnesota Supreme Court has broadly defined when a lawyer may be practicing "in" a jurisdiction under Rule 5.5(a), the provisions of 5.5(c) are intended to allow a lawyer to practice "on a temporary basis" in a jurisdiction in which the lawyer is not licensed. The present rule leaves several questions unanswered:

- A Minnesota lawyer represents a Minnesota corporate client for many years. The client moves its main operations to another state where the lawyer is not licensed. Rule 5.5(c)(4) allows the lawyer to continue to represent the client, including meeting with the client in the other state, conducting transactions for and advising client, communicating with the client by phone and e-mail, etc. The legal work is essentially the same work that the lawyer performed while the client was in Minnesota. However, the exception in 5.5(c)(4) applies only on a temporary basis. May the lawyer continue representing the lawyer indefinitely? If not, how long will the "temporary exception" apply? What interest would be protected by forcing the lawyer to cease representing the client?
- A Minnesota lawyer with an office in Minnesota purchases a home outside Minnesota, such as in Hudson, Wisconsin or Fargo, North Dakota. The lawyer finds that he or she is more productive working from home on occasion. Working at home on a temporary basis would be permitted by Rule 5.5(c)(4). How many days a week may a lawyer work from home and still fall within rule 5.5(c)(4), rather than the prohibition in Rule 5.5(b) on establishing a "systematic and continuous presence" in a jurisdiction in which the lawyer is not licensed? A similar problem confronts lawyers who want to spend winters in other jurisdictions but continue working remotely during their time away.
- A Minnesota lawyer represents several long-time Minnesota clients in a variety of matters. The lawyer's spouse obtains a "dream job" in another jurisdiction. The lawyer could easily continue all of the work for the Minnesota clients from outside the state, except for the prohibition in Rule 5.5(b) on establishing a "systematic and continuous presence" in a jurisdiction in which the lawyer is not licensed.

Note that for each of these examples, the issue could be presented in the opposite way, i.e. when a lawyer licensed in another state encounters one of these situations. The proposed amendments below would protect non-Minnesota lawyers from discipline by the OLPR; those lawyers could conceivably violate rules in their own states. Conversely, Rule 5.5(a) includes a safe harbor that states that a Minnesota lawyer does not violate the rule if his or her conduct in another jurisdiction conforms to what would be permissible for a lawyer licensed in another state who conducts business in Minnesota. Hence, these Rule amendments will protect Minnesota lawyers from Minnesota discipline, even if

another jurisdiction attempted to take disciplinary action against the Minnesota lawyer.

III. Proposed Amendments

A. Clarification of "reasonably related" in Rule 5.5(c)(4).

As noted above, Rule 5.5(c)(4) provides an exception that allows lawyers to practice in another jurisdiction temporarily, if the legal services "arise out of or are reasonably related to the lawyer's practice" in a jurisdiction in which the lawyer is licensed. In *39302*, the Minnesota Supreme Court interpreted the scope of the term "reasonably related" by relying on a portion of a comment to Rule 5.5 that limits the reach of the exception to legal services that are part of a "particular body of federal, nationally-uniform, foreign, or international law. *See* Rule 5.5, cmt. 14. As noted above, the Court invited an amendment to Rule 5.5(c).

"Reasonably" is defined in the MRPC as describing "the conduct of a reasonably prudent and competent lawyer." Rule 1.0(i), R. Prof. Conduct. The proposed amendment is intended to codify what the subcommittee believes that prudent and competent lawyers currently recognize as the scope of what is "reasonably related" to their practices: those areas that are within the lawyer's regular field or fields of practice. A lawyer's expertise in a particular area, whether it be shopping-center leases, nonprofit financing, transgender rights, restaurant franchises, etc., may attract clients regionally or nationally even where the practice area is not subject to a nationally uniform or federal body of law. Clients may seek out lawyers for this expertise and the public is well-served by allowing clients to hire lawyers with subject-matter expertise that suits the client's matter. A lawyer's expertise, gained through regular practice in a field of law provides reasonable assurance of client protection in a temporary practice context.

During the Committee's discussions, several Committee members described their experiences with prudent and competent lawyers who have been offering services in their fields of practice across state borders on a regular basis. Such conduct was noted in the practices of large firms, corporate law departments, small boutique firms, and others.

The Committee believes that people in Minnesota will be better served and protected by being able to choose among lawyers who regularly practice in a field of law, even without a Minnesota license, rather than by a lawyer who is licensed in Minnesota but has very little experience in the field of practice relevant to the client's matter. The growing complexity of law often makes field of law a better indicator of competence than local licensure. Current comment 14 to Rule 5.5 recognizes "nationally-uniform" law as "reasonably related." Many areas of law could be termed "nationally-similar," without being uniform. For example,

the ABA Model Rules of Conduct have been adopted in almost all states, but Minnesota, like many states, has variations that make the law marginally less than "uniform." A Minnesota resident with issues relating to these Rules would be well-served by retaining, for example, Geoffrey Hazzard or Ronald Rotunda, both nationally-recognized ethics experts who do not have Minnesota licenses.

The proposed amendment finds support in the *39302* dissent. The *39302* dissent, discussing the appropriate scope of Rule 5.5(c)(4), stated, "One factor provided in Rule 5.5, comment 14, relates to whether the lawyer's temporary services draw on the lawyer's 'expertise developed through the regular practice of law.'" To the extent that Rule 5.5 seeks to protect the public by ensuring competence, experience that arises from a lawyer's regular practice is more likely to accomplish that goal than a lawyer who has little experience in a federal or "nationally-uniform" area of law. Trying to determining what characteristics of a body of law make it "nationally-uniform" but still distinct from federal law would perpetuate uncertainty about when lawyers fall within the protection of Rule 5.5(c)(4).

The proposed amendment uses the term "field or fields of practice." This term has been used in Rule 7.4 for over thirty years, without any reported difficulty in definition or enforcement.

During the subcommittee meetings, Pat Burns expressed his personal reservations that the amendment was too broad in its expansion of the rule and his concerns regarding how the OLPR would determine what a lawyer's "regular" fields of practice include. Director Susan Humiston wrote a letter to then-Committee chair Michael McCarthy, expressing disagreement with several aspects of the proposed amendments. Those arguments are discussed in Section IV, below

Along with the proposed amendment, the Committee recommends amending comment 14 by deleting a phrase from the final sentence, as follows: "In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients ~~in matters involving a particular body of federal, nationally-uniform, foreign, or international law~~." Rule 5.5 cmt. 14 (cmt. 15 as renumbered below). This is intended to avoid confusion between the amended rule and the comment.

B. <u>New section 5.5(e): representation of relatives and other personal referrals</u>.

This new section is intended to directly address the *Panel 39302* decision and other potential problems related to the continuous (as opposed to temporary)

representation of current or former clients that are located in other jurisdictions. The proposal would add a new provision allowing a lawyer to perform legal services in a jurisdiction if the services:

> are performed on behalf of a person who has a family, close personal, or prior professional relationship with the lawyer**.**

This amendment accomplishes two purposes. First, it addresses the conundrum in *39302* that the present language of the rule provides no mechanism by which lawyers may provide legal services to family members and friends who happen to reside in other jurisdictions and where the subject matter of the legal issue is not within the lawyer's regular field of practice. The Committee believes that there are many situations in which family members and close friends would turn to a lawyer with whom they have a personal relationship to seek assistance in a legal matter rather than be forced to hire a stranger in their own jurisdiction. This could apply, for example, to a lawyer whose child had a dispute in another jurisdiction with a landlord or a lawyer whose aged parent had a dispute regarding the care provided by a nursing home. In these situations, there is little or no risk of harm to the public of the lawyer conducting the representation because the lawyer is well-known to the client, even if the lawyer has not previously represented that person and even if the lawyer does not have experience in that area of the law.

Second, this amendment would address the scenarios discussed above in which lawyers seek to continue work for clients who have relocated to other jurisdictions or who themselves seek to work from homes in bordering jurisdictions or take extended vacations in other jurisdictions. It is in the public interest to allow clients, including Minnesota clients, to continue working with their lawyers despite changes in the lawyers' geographic locations.

The amendment follows the Court's footnote suggestion that it might entertain a petition to expand the coverage of Rule 5.5(c). In reviewing the rules, the subcommittee determined that the clearest amendment would remove certain trusted relationships from the prohibitions of Rule 5.5(a) entirely. The language "family, close personal, or prior professional relationship" is taken from Rule 7.3, which allows direct solicitation of legal business from persons in those categories, also under the theory that there is little risk of abuse in those situations. The language of Rule 7.3 has been in place for several decades and has not presented enforcement problems for OLPR. A new comment 16 addresses the new language.

C. Amendments to Rules 5.5(b) and (d) to allow a lawyer to continue to serve existing clients from another jurisdiction.

Although not raised directly by *39302*, the issues surrounding when lawyers may practice in other jurisdictions provides an appropriate occasion for Minnesota to consider following the efforts of Arizona and New Hampshire to relax the prohibitions in Rule 5.5(b) against establishing offices in other jurisdictions where the lawyer would only practice the law of the jurisdiction in which the lawyer is licensed.

The amendments would allow a lawyer to move to another state but continue representing clients from the lawyer's licensed state. This is important, for example, when a lawyer moves to another jurisdiction because of a spouse's new job, to be closer to ailing parents, etc. The risk to the public in these situations is very small because the lawyer is simply continuing to do the exact same work that the lawyer did before, just from a different location. Much like the existing exemption in Rule 5.5(d) for lawyers who practice Federal law, such as immigration, this amendment would allow lawyers from other jurisdictions to practice only the law of that jurisdiction. Because the lawyer may not hold out as being licensed in the new jurisdiction, the lawyer therefore does not compete with the lawyers licensed in the new jurisdiction for clients with matters related to the law of that jurisdiction.

These amendments are found in Rule 5.5(b) and (d) and new comment 5 in the attached version of Rule 5.5. The amendments follow the structure of the rule in Arizona, with the exception that the amendments do not adopt Arizona's provision that the lawyer must advise "the lawyer's client that the lawyer is not admitted to practice in Arizona, and must obtain the client's informed consent to such representation." Minnesota did not adopt these provisions in the 2005 amendments, including Rule 5.5(c). It would be inconsistent to adopt these notice and consent provisions only for the amendments that are now proposed. New Hampshire adopted slightly different amendments in October 2016 that implement the same policy change.

IV. Response to OLPR Director Humiston's Substantive Concerns

In her April 24, 2017 letter to then-Committee Chair Michael McCarthy, Ms. Humiston raised several concerns that merited additional discussion by the Committee.

Regarding the proposed amendment to Rule 5.5(c)(4) (fields of practice), the Director noted that the majority opinion in *Panel File 39302* rejected the dissent's argument that a field of practice need not be nationally-uniform to qualify as "reasonably related*."* The Director suggested that the proposed amendment is a "nonstarter" for a majority of the Court. The Committee believes that the Court was interpreting the rule as written to the facts before the Court. The Court's

footnote invited amendments and the Committee believes the Court will be open-minded in considering the concerns of the practicing bar.

The Director's letter stated that the proposed amendments would benefit lawyers in other states, but expressed doubt that the amendments will benefit Minnesota lawyers while increasing risk to Minnesota consumers of legal services. The Director may have overlooked that the safe-harbor provision in Rule 5.5(a) protects Minnesota lawyers from discipline in Minnesota. The amendments, by clarifying the scope of Rule 5.5, protect Minnesota lawyers. Moreover, the amendments benefit Minnesota consumers of legal service, by increasing their range of choices of counsel without exposing them to the primary danger that unauthorized practice regulation seeks to prevent – incompetent representation. If there are harms to consumers arising from these proposed amendments the Director's letter does not identify them.

Ms. Humiston's letter state that the amendments would "enhance a conundrum that already exists in Minnesota for non-Minnesota lawyers, because Minn. Stat. § 481.02, subdiv. 1, would currently prohibit the conduct even if Rule 5.5 would allow it." The Committee does not believe there is a "conundrum." If this concern had substance, it would have weighed against the adoption of Rule 5.5(c), in 2005. The Committee is similarly unaware of any policy by the Director's Office to refuse to apply Rule 5.5(c) because of a conflict with § 481.02. The Minnesota Supreme Court has long held that it, rather than the Legislature, has the ultimate authority to define the unauthorized practice of law. *Cardinal v. Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864, 867 (Minn. 1988), *citing Cowern v. Nelson*, 207 Minn. 642, 647, 290 N.W. 795, 797 (1940). Although Minn. Stat. § 481.02 was mentioned by Justice Lillehaug in the oral argument in *39302*, the Court did not address it in their opinion.

The Director's letter stated that other states are already less permissive in multi-jurisdictional practice rules than Minnesota, citing as an example a North Carolina rule. The Committee's intent is to enhance benefits to Minnesota clients, by increasing their choices of counsel, without increasing their risk. That some other states have stricter rules does not indicate that the restrictions were adopted to benefit the public, rather than to protect local lawyers' interests.

[Text of proposed amendments to Rule 5.5 omitted. See Attachment 2].