

MSBA Rules of Professional Conduct (RPC) Committee Meeting Summary

November 25, 2019

12:00 noon

MSBA/HCBA Offices, Glacial Lakes Room

Members Present: Dan Cragg –Chair on behalf of Fred Finch, Tim Baland, Eric Cooperstein, Jim Cullen, Nick Ryan, Binh Tuong, Bill Wernz, Nancy Mischel-MSBA staff. Guests Kevin Hofman (Chair, MN Board of CLE) and Rebecca Kutty (DPS). **By telephone:** Mark Berhow, Rachel Brygger, Kari Dahlin, Karen England, Roy Ginsburg, April King, Lisa Peralta, Ted Landwehr, Daniel Reiff and guest Liz Vanderbeek.

Proposed comments to the Court regarding unlimited CLE on-demand Petition: Mr. Hofman reported that on demand courses have steadily grown since first approved by the court. The current petition is very similar to the prior petition filed with the court in 2014. The Board of Continuing Legal Education has not yet taken a position on the matter, but will do so soon.

Mr. Cooperstein, chair of the MN CLE Board, indicated they have a large library of on demand courses. MN CLE has been tracking how many questions they receive after live programs, and there are quite a few. This indicates the important educational value of conversations that take place later. In the last five years that MN CLE has offered on-demand courses, only 10 questions total have been asked. Live events may assist in attorney wellness by fostering attorneys getting together in person. They may also assist in business development by providing networking opportunities. There are hundreds of on-demand courses available across the country at low prices and package rates. This could result in lost revenue for bar associations in terms of attendance at their own programs.

The MN CLE board is meeting the first week of December. Mr. Cooperstein anticipates they will approve comments opposing the petition. While it is convenient to have on-demand CLE, there are reasons the court required some CLE be live. MN CLE sees higher attendance for webcasts scheduled at a specific time (where participants can ask questions in real time and hear responses) vs. on-demand. MN CLE has sold 26,000 hours of on-demand programming.

Mr. Wernz asked what the RPC Committee's position was on the similar petition filed in 2012. Ms. Mischel responded that the RPC did not take a position at that time.

Mr. Ginsburg commented it is very difficult if you are in greater Minnesota to find live CLE and/or relevant CLE in close proximity. Replays are not good. The MSBA needs to consider the convenience and cost-savings for bar members that on-demand CLE offers. There is a misperception that attorneys are more engaged at live programs. Most people in live programs are on their cell phones or laptops, and not paying much or any attention.

Mr. Cragg mentioned there is a gulf between bar membership, many of whom are in greater Minnesota, and bar leadership, who are mainly downtown Minneapolis. In person CLEs may be better in some ways, but not everyone works downtown. The bars have been facing declining

membership for some years, and it's important to think of what the membership as a whole wants, not what leaders think is best. Leadership should take its cues from the members.

Mr. Baland moved that the RPC Committee oppose the petition. The motion failed for lack of a second. Mr. Ginsburg moved that the RPC Committee support the petition. The motion was seconded and passed on a 7-4 vote, with Mr. Cooperstein abstaining.

Consideration of request to amend MRPC Rule 3.8: Ms. Kutty, a crime victim rights compliance investigator, presented a proposal to amend MRPC 3.8 to explicitly include the obligation of prosecutors to honor the statutory rights of crime victims.

Mr. Kutty works every day with crime victims. Her office provides statewide information and a referral helpline for victims, providing them with information about their rights and the criminal justice process, trainings for criminal justice professionals, program reviews, and investigation of complaints (other than judges) from victims' that their rights were violated or they were mistreated in the process. It is important to remind prosecutors of their important responsibility and Rule 3.8 is mute on the issue of crime victims' rights. Her proposed amendment will make this obligation more explicit in the rules. She distributed an article written by Tim Burke of the OLPR article on this issue in 2008. The only way crime victims can have their voices heard is via prosecutors, otherwise their rights only exist on paper. There is no recourse for victims if prosecutors fail to honor those rights.

The proposed amendment provides balance, including provisions for protecting the rights of the accused. Ms. Kutty noted it is surprising the rule does not say anything about crime victim rights since they are the only "parties in the process that have no ability to respond without the help of prosecutors. Minnesota would be breaking new ground if they adopted the proposed amendment. No other state has anything similar.

Mr. Cooperstein asked whether this a common problem, and if Ms. Kutty is aware of anywhere the rule is not being followed by prosecutors. Ms. Kutty responded that new prosecutors are always coming into the system, along with contract prosecutors, so they may not always know. Her office receives several dozen complaints from crime victims; but she does not have exact numbers. Victims complain they do not know their case is being prosecuted, and some are upset they have lost a chance to give their crime victim statement.

Committee members thanked Ms. Kutty for presenting her proposal and commenced discussion after she left.

Mr. Cullen mentioned that when the Rules Committee of the LPRB discussed this issue, they did not have Ms. Kutty's specific amendment language in front of them. Mr. Cullen will share this information with the LPRB's Rules Committee to see if they wish to further discuss the matter. However, the proposed amendment is coming at a time when there does not seem to be a real problem in Minnesota.

Committee members noted it has been more than 10 years since an OLPR column has been written on this issue. It may be time for another article addressing the topic in a broader way.

Minnesota breaking new ground is not a reason to support the proposed amendment. In fact, the RPC Committee tries to follow the ABA model rules unless there is a good reason not to. There should be a good reason to break new ground.

Mr. Wernz pointed out that part of statute is not well written and suffers from vagueness. It may be more of a legislative problem, perhaps solved by having an executive agency branch such as DPS bringing forward changes. The statute already provides a remedy.

Ms. Tuong indicated that the OLPR views it as a Rule 8.4(d) violation if a prosecutor fails to comply with the statutory obligation, so there is no need to add anything additional to the MRPC.

Members did not express a desire to pursue amending Rule 3.8, mainly because it does not seem necessary.

OLPR Update: Ms. Tuong indicated that the Client Security Board filed a petition with the court on November 15 to amend Rule 1.09, clarifying confidentiality and what information is public. The RPC Committee discussed the proposed changes at a prior meeting and voted to support them.

The Court asked the LPRB and OLPR to explore mandatory malpractice insurance, including soliciting input from a broad cross section of the bar. The OLPR is just beginning to gather information from stakeholders. Mr. Cooperstein indicated he believes the court should form a Task Force on the issue. The OLPR's area of expertise is not malpractice claims but ethical issues. OLPR is unaware of pending malpractice claims and the outcome. Where is data and knowledge going to come from? Statistics on discipline itself isn't enough. OLPR needs to work with MLM to obtain aggregate data. MLM may not track correlation between discipline and mandatory malpractice insurance. Washington state has undergone this process and may be helpful in identifying who should be included in the discussion.

Mandatory reporting of malpractice is required now, and it came as a result of an MSBA recommendation. Ms. Humiston wrote an article about this, which Ms. Mischel will send to the Committee.

The meeting adjourned at 1:00 p.m.