# Comments of the Office of the

# Attorney General on the

# Minnesota Rules of Professional Conduct

## with Appendix Containing Office Policies Addressing Specific Ethical Issues

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# INTRODUCTION TO THE COMMENTS OF THE OFFICE OF THE ATTORNEY GENERAL ON THE MINNESOTA RULES OF PROFESSIONAL CONDUCT

In 1985, the Minnesota Supreme Court promulgated the Minnesota Rules of Professional Conduct (Rules) to guide attorneys in their professional conduct. At the same time, the Attorney General appointed an office ethics committee to aid staff attorneys in identifying and fulfilling their obligations under the Rules. The Attorney General took this action in recognition of the duty placed on "partners" by Rule 5.1(a) to "ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." The mission statement of the ethics committee directly follows this introduction.

One of the first projects undertaken by the ethics committee was to draft comments on each rule. The ethics committee's goal was to highlight any unique or special application of the rule to attorneys serving in the Office of the Attorney General. The reason this task was undertaken is explained more fully below.

## Application of the Rules to the Office of the Attorney General

The Rules apply generally to all attorneys regardless of the context in which they practice. Accordingly, the Attorney General requires staff attorneys to comply with the Minnesota Rules of Professional Conduct. To this end, staff attorneys must read and become familiar with the Rules and these Office Comments. Office Manual § XVII.F., reprinted in Appendix at A-10.

There are instances in which government attorneys are required or authorized to conduct themselves in a manner different than attorneys in private practice. In several instances the Rules themselves (see, e.g., Rule 1.11) or the Comments (see Comment to Rule 1.13) specifically recognize a different standard or special application to government attorneys. For the most part, however, the unique status of government attorneys and the effect of that status on the application of the Rules to them are not specifically addressed in either the Rules or the Comments. This situation is explicitly recognized in the Scope portion of the Preamble to the Rules as follows:

> Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and prosecutors in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in

> circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

The Office Comments were drafted for the purpose of identifying authorities that control or otherwise impact the Office's practice of law and explaining the extent to which they authorize variations from the conduct prescribed in the Rules. The Office Comments address the unique ethical issues that public lawyers face and provide guidance for resolving them. Accordingly, staff attorneys should use the comments in applying the Rules to their public law practice.

The basis of the different application of the Rules to staff attorneys is that staff attorneys work for the Attorney General, who, "as elected chief legal officer of the state, represents and is accountable to the public as provided by Article V of the Minnesota Constitution." Office Comment to Rule 1.2. See Minn. Stat. ch. 8 (1996); Slezak v. Ousdigian, 260 Minn. 303, 110 N.W.2d 1 (1961); and State ex rel. Peterson v. City of Fraser, 191 Minn. 427, 254 N.W. 776 (1934). Notwithstanding the possibility of a different application of the Rules in certain situations, staff attorneys should comply with both the letter and spirit of the Rules, except where different conduct is authorized or required by independent authority. In such situations staff lawyers are to respond in a way that is fair to all concerned and that exemplifies the highest ethical conduct whether or not mandated by the Rules or some other authority. Staff attorneys must also realize that the courts and the Lawyers Professional Responsibility Board may well expect a higher standard of ethical conduct from government lawyers.

> Decisions abound in which an action by a government lawyer has been criticized because, although it would have been acceptable for a lawyer for a private-practice client to take the step in question, a government lawyer is said to owe a higher standard of discretionary fairness than do private lawyers. . . .
>
> What "fairness" requires of a government lawyer that is different from what is required of a lawyer representing a nongovernmental client is, of course, a large and, in part, debatable question. . . .

Charles W. Wolfram, Modern Legal Ethics § 13.9.2 at 757 (West 1986).

In any event, staff lawyers should remember that their ultimate client is the public and that the public is best served by individuals who deal in an open, honest, fair, and forthright manner. It is in this spirit that the following comments are presented to the staff.

## The Office Comments, the Ethics Committee, and Other Information Pertaining to Public Lawyer Professional Responsibility

In drafting the Office Comments, the ethics committee has referred to other applicable Rules, statutes, case law, and relevant authority. However, one should not assume, when referring to the Office Comments for guidance on a specific issue, that every pertinent authority has been cited. In addition, words and phrases in the Office Comments have the same meaning given them in the Terminology section which precedes the Rules. To those definitions, two more must be included. First, the word "Comment" refers to one of the Comments which are printed

with the Rules. Second, "supervising attorney" or "supervisor" means not only deputies and division managers but also includes attorneys who supervise other members of the staff.

Staff attorneys must also be familiar with the formal opinions on professional conduct issued by the Lawyers Professional Responsibility Board. The Board repealed one of the eighteen opinions it issued, leaving seventeen currently in effect. Appendix B contains a list of these opinions as well as the texts of untitled opinions and of opinions which may be applicable to the public practice of law.

When the Rules of Professional Conduct were adopted by the Minnesota Supreme Court, they were accompanied by Comments which were used as an aid in interpreting and applying the Rules. It was assumed that the Minnesota Supreme Court had adopted or, at a minimum, given official sanction to the Comments. However, when the Minnesota State Bar Association petitioned to amend the Comment to one of the Rules, the Court, in denying the petition, stated that "unless specifically adopted by this court, any comments to the rules are those of the committee or organization submitting them. . . ." Order of the Minnesota Supreme Court, In re the Petition of the Minnesota State Bar Association, a Corporation, with Regard to the Minnesota Code of Professional Responsibility, January 29, 1988. In a subsequent order, the Court stated that the comments are "included for convenience" and that the Court did not "necessarily approve the content of the comments." Order of the Minnesota Supreme Court, In re Petition to Amend the Minnesota Rules of Professional Conduct, December 27, 1989. Notwithstanding these statements by the Supreme Court, prudence dictates that the Comments still be referred to for guidance and that clear directives in them not be ignored simply because the Court has chosen not to officially adopt them.

Ethical issues identified by staff attorneys in the course of their work should be researched and discussed with their supervisors. To aid staff attorneys in this regard, Appendix J contains a list of resources for legal ethics research. Attorneys also are encouraged to discuss ethical questions with individual members of the ethics committee. Appendix K contains the Office Ethics Committee Membership List which includes each member's office location and telephone number. However, questions which the staff attorney cannot easily resolve by reference to the Rules, Comments and Office Comments in consultation with supervisors, or questions which raise special implications for the Office, must be submitted in writing to the ethics committee. Before doing so, the staff attorney should first discuss the matter with the chair of the ethics committee.

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## The Mission of the Attorney General's Office Ethics Committee is:

*To assure that the practice of law within the Attorney General's Office fully complies with the Rules of Professional Conduct and also meets the highest ethical standards for attorneys engaged in the public practice of law, through*

### Advice to Staff

*~~immediate availability of resources to include Office Comments on the Minnesota Rules of Professional Conduct and personal consultation to provide advice to staff attorneys and other staff, which will help guide and influence their present and future conduct in a manner consistent with ethical mandates;*

### Education

*~~education of attorneys and others within the office regarding the Rules of Professional Conduct and their application to attorneys engaged in the public practice of law;*

### Policy Development

*~~identification of current or potential officewide issues relating to the application of the Rules of Professional Conduct to the practice of law within the Attorney General's Office and development of policy recommendations for resolution of such issues;*

### Assistance to Staff

*~~provision of legal assistance to staff attorneys when a complaint has been filed against them with the Lawyers Professional Responsibility Board so that staff attorneys may be free to vigorously represent their public clients notwithstanding threats of ethical complaints; and*

### Participation in Rules of Professional Conduct

*~~participation, including recommendations, in the development of the Rules of Professional Conduct and related interpretations so that the standards of professional conduct reflect the unique duties and authority of the Attorney General.*

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## COMMENTS OF THE OFFICE OF THE

## ATTORNEY GENERAL ON THE

## MINNESOTA RULES OF PROFESSIONAL CONDUCT

### RULE 1.1 COMPETENCE

Rule 1.1 requires lawyers to represent clients competently. Competent representation under the Rule means that the lawyer has the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

A major portion of the legal work performed by the Attorney General's Office, as in private practice, can be competently performed with a reasonable amount of preparation by the lawyer. It is reasonable to assume that staff lawyers who have graduated from accredited law schools and have been admitted to the Minnesota Bar possess the basic skills to represent the State in most matters. All lawyers must exercise some common sense regarding specific areas that require special expertise and experience.

Supervisory lawyers must exercise good judgment in making assignments to staff lawyers. The supervisory lawyer should be assured that the lawyer assigned to a matter possesses the legal knowledge and skill required to represent the State or governmental agency adequately. In matters in which experience is important, e.g., litigation, the supervisory lawyer should provide opportunities for the inexperienced lawyer to assist an experienced lawyer in a trial or contested case proceeding. (See Rule 5.1 regarding responsibilities of supervisory lawyer.)

Overall, the Attorney General's Office should identify any additional legal knowledge and skills it expects its lawyers to possess. The Office training program should give staff lawyers an opportunity to attain and maintain these skills. The Office must recognize that some divisions of the Office may require knowledge and skills that differ from other divisions or are peculiar to them. The Office training program should also address these needs. The Office should make available reasonable opportunities for additional training in specific areas of legal representation through continuing legal education (CLE), subject to budgetary restraints.

In very specialized areas, e.g., bankruptcy and bond matters, the Office should identify lawyers in the Office who can assist other staff lawyers or take over matters requiring highly specialized legal knowledge and skills. If the Office does not have lawyers with these specialized skills currently on the staff, the Office should seek outside counsel with the required expertise or provide an opportunity to staff lawyers to attain the necessary knowledge and skills through study.

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## RULE 1.2 SCOPE OF REPRESENTATION

Rule 1.2, Scope of Representation, establishes a framework for dealing with one of the basic concepts underlying the attorney-client relationship, the division of authority and responsibility between the two. The client has the authority to determine the "objectives of representation," subject to certain limits, and the responsibility to make the ultimate decision whether to accept an offer of settlement of a matter. The Rule suggests that the attorney shoulders the main burden for determining the appropriate means to reach the goal desired by the client. Although this system may be analytically sound, the Comment notes that in practice the boundaries of these roles may shift and overlap to some degree. The carefully drafted Comment further cautions that other law and the lawyer's professional obligations may limit the rule's application.

One of the situations where modification of the Rule is necessary because of other law is in the relationship between Attorney General's staff lawyers and their clients, which include the people of the State of Minnesota and such entities as state agencies, officers, and employees. See Humphrey v. McLaren, 402 N.W.2d 535, 543 (Minn. 1987). This situation is specifically acknowledged in the Preamble to the Rules, Scope at paragraph 4, which states:

> Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and prosecutors in state government. . . .

Minnesota Rules of Professional Conduct, Preamble, Scope (emphasis added.)

In Minnesota, the Attorney General, as elected chief legal officer of the State, represents and is accountable to the public as provided by Article V of the Minnesota Constitution. The Attorney General's duties are prescribed pursuant to Article V, Section 4, in statutory provisions including Minnesota Statutes chapter 8.

The statutory duties of the Attorney General include an area of potential difficulty in the division of authority and responsibility between the attorney and client. Minn. Stat. § 8.01 (1996) requires the Attorney General to "appear for the state in all causes . . . whenever, in the attorney general's opinion, the interests of the state require it." Minn. Stat. § 8.06 (1996) requires the Attorney General to act as the attorney for all state officers, boards or commissions in all matters pertaining to their official duties.

Attorney General staff lawyers should proceed in their client relationship as if it were the conventional attorney-client relationship contemplated by Rule 1.2. Occasionally, however, circumstances may arise where the opinions of the Attorney General and the client may diverge even though they both firmly believe that the public interest requires the administration or enforcement of a law based on their interpretation. In such a case, the common law resolution of this conflict establishes the authority of the Attorney General to decide, based upon the public

interest, issues such as the commencement of litigation, the conduct of litigation, the pursuit of an appeal and the settlement of a matter. The Minnesota Supreme Court has confirmed the common law view. In Slezak v. Ousdigian, 260 Minn. 303, 110 N.W.2d 1 (1961), the Minnesota Supreme Court stated:

> The attorney general is the chief law officer of the state. His powers are not limited to those granted by statute but include extensive common-law powers inherent in his office. He may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. He is the legal adviser to the executive officers of the state, and the courts will not control the discretionary power of the attorney general in conducting litigation for the state. He has the authority to institute in a district court a civil suit in the name of the state whenever the interests of the state so require.

Id. at 308, 110 N.W.2d at 5 (emphasis added) (citation omitted).

That statement is consistent with other holdings of the Minnesota Supreme Court on the authority of the Attorney General. Head v. Special School District No. 1, 288 Minn. 496, 182 N.W.2d 887 (1970); State ex rel. Peterson v. City of Fraser, 191 Minn. 427, 254 N.W. 776 (1934); State ex rel. Schmidt v. Youngquist, 178 Minn. 442, 227 N.W. 891 (1929); and State ex rel. Young v. Village of Kent, 96 Minn. 255, 104 N.W. 948 (1905). Indeed, the court in City of Fraser, made the following explicit comment:

> [I]nasmuch as the attorney general in his discretion decided that he should proceed, there is nothing for any court to pass upon as to the necessity for or policy of proceeding. In that field the discretion of the attorney general is plenary. He is a constitutional officer . . . and as such the head of the state's legal department. His discretion as to what litigation shall or shall not be instituted by him is beyond the control of any other office or department of the state.

Id. at 432, 254 N.W. at 778-79 (emphasis added) (citations omitted).

Thus, unlike the attorney-client relationship in the private sector, the staff attorney relationship with the client is modified by the decision-making power of the Attorney General and the Attorney General's duty to represent the public interest. On rare occasions the Attorney General and a client will disagree as to what course of action is necessary to protect the public interest. The responsibility for making judgments concerning the State's legal work is in the hands of the Attorney General who must consider the finite nature of the State's legal resources, sometimes compelling selective enforcement. The Attorney General may decide that litigation is ill-advised for any number of reasons including little likelihood of success or diversion of legal resources from other legal matters of greater significance to the State. A decision of this type does not violate Rule 1.2. If and when a staff attorney believes that a client is requesting representation contrary to the public interest, the attorney should promptly contact his or her

immediate supervisor. Significant disagreements between a staff attorney and a client with regard to representation issues should be brought to the attention of the Attorney General or the Chief Deputy or both.

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## RULE 1.3 DILIGENCE

Rule 1.3 of the Rules of Professional Conduct states: "A lawyer shall act with reasonable diligence and promptness in representing a client." While the Comment to the Rule addresses a number of points, the warning against procrastination and the admonition to control workload so that each matter can be handled adequately are of special note.

The Rule requires that each matter be moved along as quickly as possible and should be read in conjunction with Rule 3.2 which places an affirmative responsibility on lawyers to expedite litigation. Office policy is consistent with these requirements to expedite the projects for which staff attorneys are responsible. While staff attorneys must work at least 40 hours a week, that is a minimum requirement. Staff attorneys should expect that in many instances they will have to work a substantial number of additional hours to complete assignments in a timely and professional manner. Office Manual § III.D., reprinted in Appendix at A-7.

Experience indicates, however, that workload often increases beyond what an individual staff attorney can reasonably be expected to handle even though the attorney works many additional hours. The reference in the Rule's Comment to the effect that an attorney should control the attorney's workload so as to avoid delay must be based upon the supposition that an attorney is in a position to control the workload. Staff attorneys generally do not have the luxury of controlling their workloads. For the Attorney General's Office, workload is governed by agency referrals, the number of complaints submitted by the public, laws passed by the legislature, and many other external factors over which the Office has no control. At the same time the Office does not have the freedom to quickly hire additional attorneys and other staff to respond to increases in workload. Increasing staff usually takes an extended period of time and sometimes requires legislative action.

Notwithstanding this lack of control over the Office's workload, the Office can do much to shift work among attorneys and divisions to avoid the creation of unreasonably-sized backlogs and to ensure that all work is done in a timely and professional manner. Procedures must always be in place to monitor the progress of work and to assure that deadlines are met. This responsibility must be fulfilled by the staff attorney, supervising attorney, division manager, deputy and by those having office-wide responsibility such as the Solicitor General's Division which receives and distributes summons and complaints to appropriate divisions. The Office itself need not prescribe a common set of procedures to meet this obligation. Individual attorneys and supervising attorneys should be free to monitor work and deadlines in a manner that meets their particular situation.

As they become aware of growing workloads, staff attorneys should inform their supervising attorneys of the problem. Client agencies should be informed and made aware of the difficulties. Managers should consider adjusting workloads of attorneys within their respective divisions. If necessary, the division manager should inform the deputy to determine if workloads or attorneys can be shifted within section offices. The deputy should inform the Chief Deputy. Occasionally, attorney positions may be shifted from one division to another to balance workloads within the office. In addition to informing supervising attorneys of the problem, the division can set priorities in coordination with the client and the deputy. The divisions should determine what matters can be deferred or dropped with the least likelihood of significant harm

or exposure to liability. Depending upon the nature of the problem and the reason for the increased workload, the Office must decide whether to seek a new position through the next budgetary process and, if appropriate, pursue that effort.

In summary, both staff attorneys and supervising attorneys are responsible for identifying areas in which it is not possible to proceed with diligence and promptness and taking action to rectify the matter. As long as attempts are made to deal with the problem, even if the Office cannot eliminate the delays because of the nature of the system in which the Office operates, the relevant staff and supervising attorneys should not be in violation of Rule 1.3.

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## RULE 1.4 COMMUNICATION

Rule 1.4 requires that a lawyer communicate with the client to keep the client reasonably informed of a matter and to permit the client to make informed decisions regarding the representation. As pointed out in the Office Comment to Rule 1.2, in all legal matters in the State of Minnesota, the Attorney General has a public purpose role regardless of any position taken by a state agency. As a result, it may be the Attorney General, as chief legal officer of the State, rather than a state agency, who makes the decisions regarding a legal matter. In this respect, attorneys in this Office, unlike attorneys in private practice, do not have a client with absolute authority to make decisions concerning a legal matter. Consequently, our obligation to a state agency, person, or entity (hereinafter "state agency") for which we provide legal services differs somewhat from that of our counterparts in private practice.

However, as a practical matter, and particularly for purposes of this rule, attorneys assigned to state agencies must treat them as clients. State agency personnel regularly bring their legal questions and problems to the staff attorney assigned to represent them. Indeed, the staff attorney appears on behalf of and represents the agency in court proceedings and normally responds to the agency's decisions regarding the representation. Only on rare occasions will representatives of the Attorney General find it necessary to assert the Office's independent responsibility. Because the normal relationship with the agency is as attorney and client, the usual obligation is to communicate with the agency and keep it reasonably informed about the status of a matter. This duty ordinarily should not be affected by the separate authority of the Attorney General.

The obligation to communicate exists even if the Attorney General is directing the litigation and making decisions independent of the state agency. In such a situation, the responsibility of the attorney is to keep the agency reasonably informed and to advise the agency of the Attorney General's role.

The Comment to the Rule recognizes that in some circumstances a lawyer may delay communicating certain information to the client. Similarly, staff attorneys in this Office should also be able to delay if the situation warrants it. In light of the Attorney General's role as chief legal officer of the State, the delay may, in limited circumstances, permit the withholding of information if there is reason to do so. See introductory Comments to the Rules (Scope at paragraph 4) and Comment to Rule 1.13, which recognize the sometimes differing role of the government attorney in the client-lawyer relationship.

Although the specific requirements of Rule 1.5 regarding fees do not apply to this Office, Rule 1.5 raises issues which are appropriate subjects of communication with state agency clients.

These subjects include responding to an agency's request for an estimate of the cost of a project before the project is commenced. The project's cost would include items such as legal services costs of our Office, filing fees, witness and expert witness fees and costs of discovery. It would also mean that "[w]hen developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client." Rule 1.5 Fees, Comment. These are appropriate matters of communication inasmuch as these

costs may have an impact on the agency's appropriation and budget. See, e.g., Minn. Stat. §§ 8.15 and 214.04 (1996).

The subject of the fees and costs associated with pursuing litigation, contested cases or other legal matters may also raise the question of the control of the Attorney General over the State's legal affairs. An agency may wish not to pursue a matter or may wish to settle a matter because of the adverse impact the fees and costs will have on the agency's budget/appropriation. The Attorney General's Office may, however, feel it necessary to pursue the matter notwithstanding the impact on the agency's budget/appropriation. An example is where an agency does not support a legislative enactment which the agency is charged with implementing. If the constitutionality of that enactment is challenged, the agency may wish to limit the expenditure of funds defending the legislation hoping the enactment would be struck down. Such an action by the agency would conflict with the role of the Attorney General's Office in defending state law against challenges alleging unconstitutionality.

Where a staff attorney's communication with the agency does not result in the agency's commitment (including financial commitment) to the case, the attorney should immediately bring the problem to the attention of supervising attorneys.

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## RULE 1.5 FEES

Rule 1.5 establishes the factors to be considered in determining the reasonableness of a lawyer's fee. Inasmuch as the legislature, and not the Attorney General, establishes the fees for the legal services performed by the Office (see, e.g., Minn. Stat. § 8.15 (1996)), the specific requirements of Rule 1.5 should not apply to the Attorney General's Office.

However, Rule 1.5 and its Comment raise matters which relate to the requirements of Rule 1.4 concerning communication with the client.

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## RULE 1.6 CONFIDENTIALITY OF INFORMATION

Rule 1.6 prohibits lawyers from knowingly revealing, except in specified circumstances, or otherwise misusing the confidences or secrets of a client. The scope of protection is broader than the attorney-client evidentiary privilege (see Minn. Stat. § 595.02, subd. 1(b) (1996)), or attorneys' statutory duties (see Minn. Stat. § 481.06(5) (1996)). The Rule also requires that an attorney take affirmative steps to keep protected information from being disclosed.

As a general rule for staff attorneys, a client's confidences and secrets should not be disclosed. This is a matter of legal responsibility, professionalism and, as the Comment states, social amenities. Rule 1.6(b) recognizes that confidential information may be released by the attorney under certain circumstances. Staff attorneys in this Office may be required to reveal information under Rule 1.6(b) more frequently than private attorneys. See, e.g., the Government Data Practices Act (Minn. Stat. ch. 13), the Open Meeting Law (Minn. Stat. § 471.705 (1996 and Supp. 1997)), and case law (e.g., Minneapolis Star and Tribune Co. v. HRA, 310 Minn. 313, 251 N.W.2d 620 (1976); Star Tribune v. Special School District No. 1, 507 N.W.2d 869 (Minn. Ct. App. 1993.)) However, because confidential information once divulged never again can be made confidential, when doubt exists it is advisable to err on the side of protecting the information. If the issue of disclosing client information arises, the staff attorney must consult with supervising attorneys prior to deciding how to proceed.[1]

Because of the Attorney General's independent responsibilities to the public interest, the Attorney General occasionally may need to explain publicly a legal position taken by the Office. While it is possible that such a position may involve the same subject as advice given to a client agency, the Office will reconcile its responsibilities to the public with its obligation to protect confidential information. Staff attorneys must discuss such matters with the Chief Deputy Attorney General. The Attorney General of Nebraska has written an opinion concluding that the Attorney General has independent authority to determine what confidential information should be disclosed. See Opinion of Attorney General Don Stenberg (August 26, 1992). But see Lawyer Disciplinary Board v. McGraw, 461 S.E.2d 850 (W. Va. 1995) (Attorney General lacked authority to disclose confidential information).

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[1] When addressing whether the attorney-client privilege applies to written communications with clients, staff attorneys must consider Kobluk v. University of Minnesota, 556 N.W.2d 573 (Minn. Ct. App. 1996). The decision was the subject of a memorandum to all staff attorneys dated April 7, 1997. Consult your division manager or an ethics committee member for a copy of the memorandum. The Minnesota Supreme Court has the Court of Appeals decision under review and heard oral argument in September 1997. The Office will amend this Comment when the Supreme Court issues its decision.

decided in 1/98: held that attorney-client privilege applies to draft communications

**Joint Representation**

Special ethical concerns are raised when a suit against the State names an individual employee as a separate defendant. Typically, a single staff attorney will represent both the State and the named employee(s). This joint representation raises ethical concerns in two areas: (1) potential conflict of interest;[2] and (2) confidential communications between the staff lawyer and the co-clients. See AGO Policy on Requests by State Employees to State of Minnesota for Legal Defense and the forms for state employees and elected officials to request legal defense and indemnification, reprinted in Appendix G.

Although case authority is conflicting, substantial authority exists that permits an attorney to share information obtained from one client with a co-client. See Restatement (Third) of Law Governing Lawyers § 125 (Proposed Final Draft 1996); Charles W. Wolfram, Modern Legal Ethics § 6.4.8 (1986); Longo v. American Policyholders' Insurance Co., 436 A.2d 577 (N.J. Super. 1981). Such sharing is not considered a violation of the attorney-client privilege and, therefore, does not violate Rule 1.6. See Moritz v. Medical Protective Co., 428 F.Supp. 865 (W.D. Wis. 1977). An attorney, however, should inform all co-clients at the time the representation begins that information may be shared. See, e.g., Los Angeles Cty. Bar Ass'n, Formal Op. 471 (1992). Note that other authority prohibits sharing adverse information with co-clients. See ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 1476 (1981) and 1441 (1979); New York State, Ethics Op. 555 (1984).

Therefore, in cases of joint representation, attorneys must inform the employee that information relevant to the lawsuit will be shared with the agency, even if the information is adverse to the employee's interests. The State's position is that the employee has no right to object to the sharing of the information if the employee is seeking defense and indemnification from the State. See Minn. Stat. § 3.736, subd. 9 (1996) (duty to cooperate and provide complete disclosure). In fact, under this law, relevant information may be shared with the employee's agency even if the agency is not a party to the litigation.

Information not relevant to the litigation does not fall within the exception to Rule 1.6 and, therefore, should not be communicated to the employing agency. Relevance may be difficult to determine, except on a case-by-case basis. Questions regarding relevance should be discussed with your supervisor or a member of the Office Ethics Committee. There may be circumstances, however, where the information concerning the employee may make continued representation inadvisable or improper under Rule 1.7.

**Notice of Confidentiality**

There may be instances in which an agency employee misperceives or is unaware of the protections afforded by Rule 1.6. To protect the agency's interests, as discussed in the Comment to Rule 1.13, the attorney should take steps to inform the agency employee of the attorney-client privilege and, if necessary, discuss the matter with the employee's supervisor. Some agency

[2] The general standards under Rule 1.7 govern issues of conflict of interest in cases of potential joint representation of clients.

heads have designated agency employees who may waive the privilege. The attorney may wish to emphasize the protected nature of a communication by including a notice to that effect on the face of memoranda or documents. An example of such a notice is:

> THIS MEMORANDUM IS SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE AND PROTECTED FROM DISCLOSURE. THE [AGENCY] MAY WAIVE THE PRIVILEGE, BUT NO WAIVER SHOULD OCCUR WITHOUT THE EXPRESS WRITTEN PERMISSION OF THE COMMISSIONER OR THE DEPUTY COMMISSIONER [OR OTHER DESIGNATED STAFF]. TO PREVENT UNINTENTIONAL WAIVER OF THE PRIVILEGE, COPIES SHOULD BE DISTRIBUTED ONLY TO AGENCY EMPLOYEES WHOSE INPUT IS NECESSARY TO RESOLVE THE ISSUES.

If used, the notice should suit the policies and procedures of the particular client agency. Confidential communications sent electronically via E-Mail should be treated similarly. See also discussion below, Portable Telephones and Electronic Mail, regarding E-Mail outside the state hub.

**Inadvertent Disclosure**

Ethical considerations also apply to the subject of the inadvertent disclosure of privileged or confidential documents. This topic is particularly pertinent in light of the use of newer forms of technology which can lead to increased inadvertent disclosure.

The law is not clear regarding a lawyer's ethical responsibilities upon receipt of inadvertently disclosed privileged or confidential documents.[3] Accordingly, if a staff attorney

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[3] The American Bar Association issued an opinion concluding that a lawyer receiving privileged or confidential documents when the lawyer was clearly not the intended recipient should refrain from reviewing the materials, notify opposing counsel of the inadvertent disclosure if they remain unaware of it, and abide by opposing counsel's instructions as to how to treat disposition of the materials. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368 (1992), Inadvertent Disclosures of Confidential Materials, reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:155. The Opinion indicates that a clearly privileged document should be returned if it is accidentally faxed and the recipient has not reviewed or copied it. The Minnesota Office of Lawyers Professional Responsibility ("OLPR") has not followed this ABA Opinion. The OLPR views inadvertent disclosure of privileged documents as primarily a legal, evidentiary issue rather than an ethics issue because, in its view, no Rule of Professional Conduct directly requires that inadvertently disclosed information must be returned to the sender. The OLPR generally advises attorneys who have received privileged documents where there is evidence that the documents were inadvertently provided to obtain a ruling on the admissibility of the document from the court and proceed accordingly.

The applicable law is unclear regarding whether an inadvertent disclosure of privileged or confidential documents waives the privileged or confidential nature of the materials. No published Minnesota state court case has yet addressed the issue. The Eighth Circuit, applying

(Footnote Continued On Next Page.)

becomes aware that he or she has (1) inadvertently received privileged or confidential documents,[4] or (2) inadvertently sent privileged or confidential documents to another, the staff member should consult with the Chair or Vice-Chair of the Office Ethics Committee.

Additionally, to guard against the inadvertent disclosure by the Office of privileged or confidential documents, and to expeditiously rectify any such error if it should occur, staff members should utilize the following precautions and measures:

1. Clearly label privileged or confidential documents as such.

2. Use extra caution in the faxing of documents because fax transmissions present increased danger of inadvertent disclosure of privileged or confidential material. In addition, when sending any privileged or confidential materials, the fax should include a cover sheet that includes the following legend:

> The information contained in this fax is attorney-client or work product PRIVILEGED or CONFIDENTIAL information, or both. It is intended only for the use of the individual or entity named above. If the reader of this fax is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. Furthermore, you should (a) refrain from examining the materials, (b) immediately notify the sending person of the mistake, and (c) abide by the sending person's instructions regarding the return of the document(s).

**This legend should not be used if the materials or message being faxed are neither privileged nor confidential.** Use facsimile cover sheets containing the following legend when sending materials which are **not privileged or confidential**:

> The information contained in this fax is intended only for the use of the individual or entity named above. If the reader of this fax is not the

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Missouri law, has used a balancing test which considers the reasonableness of the precautions taken to prevent the inadvertent disclosure to determine whether waiver occurred and, if so, the scope of the waiver. See Gray v. Bicknell, 86 F.3d 1472, 1482-1484 (8th Cir. 1996). See also Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993) (whether waiver occurs depends on particular circumstances); In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989) (privilege waived by inadvertent disclosure); United States v. Zolin, 809 F. 2d 1411 (9th Cir. 1987) (no waiver); Floyd v. Coors Brewing Co., No. 96CA1059, 1997 WL 411731 (Colo. Ct. App. July 24, 1997), modified and reh'g denied (Oct. 2, 1997) (adopting five-part test to determine whether privilege waived).

[4] Such documents include confidences or secrets within the meaning of Rule 1.6(d), work-product privileged documents, and data made not public under the Minnesota Government Data Practices Act or other applicable state or federal law.

intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are requested to: (a) refrain from examining the materials, (b) immediately notify the sending person of the mistake, and (c) abide by any instructions of the sending person regarding the return of the document(s).

The Office has developed appropriate cover sheets with these alternative legends for facsimile transmission.

3. Refrain, if possible, from sending privileged or confidential documents or messages by use of less secure methods of communication (e.g., E-Mail via the Internet, outside the state hub system). For more specific guidance, see Portable Telephones and Electronic Mail, below, and AGO Policy on Use of Portable Telephones or Electronic Mail when Communicating Privileged or Confidential Information, reprinted in Appendix H.

4. In the event of an inadvertent disclosure of privileged or confidential documents, the staff attorney should, as soon as possible, notify the recipient of the mistake, and immediately direct the recipient to: (a) refrain from examining the materials and (b) return to the staff attorney the materials and any copies of the materials the recipient may have made.

5. Exercise extreme caution when exchanging computer disks with people outside the Office.[5] When providing information on a disk to persons outside the Office, use a new disk never previously used or, if re-using a disk, consult with AGO systems staff, if needed, to obtain instructions on formatting a disk such that all existing data on the disk is permanently destroyed before entry of the information intended to be provided.

**Portable Telephones and Electronic Mail**

Cordless and cellular telephone communications (collectively, "portable telephones") can fairly easily be intercepted by others. Electronic mail ("E-Mail") via the Internet, without use of the state hub system, is also susceptible to interception. In contrast, the Office's internal E-Mail system and messages sent on the state hub system are considered to be secure methods of communication. Due to the relative lack of security of portable telephones and E-Mail via the Internet, outside the state hub system, the ethical duty to protect confidential information is implicated when these forms of communication are used.

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[5] A commonly misunderstood function in computer technology is the "delete", as opposed to the "erase" function. In most business computers, when a user instructs the computer to "delete" a document, it is interpreted as an instruction that the space used by the file is no longer needed. The information, however, remains and will not disappear until the file is overwritten with new information. Therefore, while information may have been "deleted" from a computer disk, it may still be present on the disk. Such information can be retrieved with little effort.

Federal and state laws prohibit the intentional, unauthorized interception of portable telephone or E-Mail communications. See 18 U.S.C. § 2511(1) (1996); Minn. Stat. § 626A.02, subd. 1 (1996). These laws also preserve the attorney-client privilege when such a communication is deliberately intercepted, whether it is intercepted illegally or with authorization for law enforcement purposes. See 18 U.S.C. § 2517(4) (1996); Minn. Stat. § 626A.09, subd. 4 (1996). However, it is not yet clear whether these laws protect the privilege when a portable telephone or E-Mail communication is unintentionally intercepted.

Accordingly, staff members should take precautions to assure that confidentiality is maintained and the privilege is not lost. Staff attorneys should refrain, if possible, from engaging in privileged or confidential conversations while using portable telephones or E-Mail via the Internet, outside the state hub system. If these forms of communications are used to communicate confidential information, the staff attorney should first explain to the client that any communication conducted in this manner could be intercepted by others, and make sure the client agrees to assume the risk of interception, and the possible loss of the attorney-client privilege for inadvertently intercepted communications. See AGO Policy on Use of Portable Telephones or Electronic Mail when Communicating Privileged or Confidential Information, reprinted in Appendix H.

**Confidentiality Within The Office**

Office attorneys generally may be regarded as associates, thus allowing them to consult with one another about particular client issues. However, specific circumstances may require that a staff attorney not divulge client information to another division, or even to attorneys within the division. Examples include litigation involving agencies on opposing sides, or an attorney advising an agency decisionmaker in a contested case which has been handled for the agency by another division attorney.

Attorneys also must exercise reasonable care to prevent unauthorized disclosure by others whose services are used by the attorney. Secretaries, legal assistants, paralegals and investigators with whom the attorney works must be informed of the necessity for confidentiality. The Office ensures office-wide compliance with the Rule by having non-lawyer staff members sign an oath of confidentiality.

In addition, the Office and its attorneys should take reasonable precautions to safeguard information within the Office. Depending on the nature of the information, this may require:

- securing office areas through restricted access, locked entrance or office doors, or locked file cabinets

- avoiding casual conversation in public or semi-public areas (such as elevators, cafeterias, and hallways) which might be overheard by unauthorized persons

- destroying discarded papers containing sensitive information

- taking other protective measures as appropriate.

In considering the requirements of Rule 1.6, staff attorneys also must recognize that as government attorneys they are functioning under a process made open by laws such as the Government Data Practices Act and the Open Meeting law. The foregoing discussion should not be construed to place limitations on those laws but rather to assist the attorney in finding the proper balance between competing public policies.

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## RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

Rule 1.7 sets forth principles regarding conflicts of interests. The Rule generally prohibits a single lawyer from representing a client if (1) that representation would be directly adverse to another client of the attorney (Rule 1.7(a)); or (2) that representation may be restricted in a material way as a result of the lawyer's responsibilities to another client, or a third person, or the lawyer's own interest (Rule 1.7(b)). These ethical standards are primarily based upon the concept of loyalty which "is an essential element in the lawyer's relationship with a client." Rule 1.7, Comment.

Consistent with the mandate of Rule 1.7, an individual lawyer on the Attorney General's staff should not represent clients in matters in which the clients have directly adverse interests or a client when the staff lawyer's representation in a particular matter could be significantly impaired due to obligations owed to others or by the lawyer's own interests.

When a staff attorney believes that a conflict might exist, the attorney should promptly notify the immediate supervisor. If appropriate, arrangements can be made to represent the affected client or clients. Such arrangements could include, but are not necessarily limited to, the assignment of separate staff attorneys to represent each of the involved agencies (see Rule 1.10); substitution of one staff attorney for another in representing a client; refusal to represent an individual (see Minn. Stat. § 3.736 (1996); or, in rare cases, retention of private counsel to represent a state agency (see Minn. Stat. § 8.06 (1996)). See, Minneapolis Police Officers Federation v. City of Minneapolis, 488 N.W.2d 817 (Minn. Ct. App. 1992), rev. denied, (Minn. Sept. 15, 1992).

If separate staff lawyers are assigned to represent clients with adverse interests, those lawyers should not, as to that particular matter, consult with the same supervising attorney. Thus, if the attorneys share the same supervisor, the supervisor should consult on the matter with only one of the attorneys. The other attorneys involved in the matter should be assigned a separate supervisor or consulting attorney if they require assistance on the matter. As with the attorneys directly handling the matter, there should be no exchange of information on the matter between the consulting attorneys, except as necessary to promote their respective clients' interests.

The potential for a conflict of interest is heightened where an attorney represents a state agency and an employee of the agency who has been individually sued. Generally, our office assigns one attorney to represent both the agency and the employee, unless a conflict is immediately apparent. See In re Opinion 552 of Advisory Committee on Professional Ethics, 507 A.2d 233, 238 (N.J. 1986) ("[J]oint representation of clients with potentially differing interests [by an individual government attorney] is permissible provided there is a substantial identity of interests between them in terms of defending the claims that have been brought against all defendants.") (emphasis added). A conflict requiring separate representation may be apparent initially, for example, where there is a question whether the employee acted outside the

scope of employment.[6] A conflict may also arise because the staff attorney, during the course of litigation, acquires information that reveals adverse interests between the employee and the state. See In re Opinion 552, 507 A.2d at 238-39 (government attorneys are under a continuing obligation to ascertain whether there exist actual or impermissible potential conflicts of interest among the defendants so that steps can be taken to promptly terminate joint representation if such a conflict exists). For a more complete discussion, see AGO Policy on Requests by State Employees to State of Minnesota for Legal Defense, reprinted in Appendix at G-1 to G-3.

**Consent to Conflict of Interest**

Rule 1.7 provides that, even though a conflict may exist under the Rule, a client may nevertheless consent to representation. However, an individual lawyer on the staff should generally avoid representing a client in a situation where a Rule 1.7 conflict exists. As the Comment to the Rule states, even with a client's consent, a lawyer should not represent the client in a conflict situation if "a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances." See Rule 1.7, Comment; see also Rule 1.7(a) (1) and (b) (1).

There is a question whether a government entity can ever consent to joint representation where a conflict exists. Some courts have held that, because of the "special concerns over the appearance of impropriety in the public sector," a government client cannot consent to multiple representation by an individual lawyer where a conflict exists. In re Opinion 552, 507 A.2d at 238-39 (in the case of an *actual* conflict involving multiple representation of government clients by a government lawyer, consent of the parties will not satisfy the requirements of Rule 1.7) (emphasis added). See State ex rel. Morgan Stanley & Co. v. MacQueen, 416 S.E.2d 55, 60 (W.Va. 1992) ("the state is incapable of granting its consent [to dual representation]" required under Rule 1.7 where the dual representation involves such adversity of interests as to raise the appearance of impropriety). But see Miller v. Norfolk & Western Ry., 538 N.E.2d 1293, 1296 (Ill. App. Ct. 1989) ("[W]e hold there is no per se rule prohibiting a public entity from waiving conflicts of interest under [the Illinois ethical rule equivalent of Rule 1.7]"). Different considerations apply when the State hires a private law firm which represents a client with interests adverse to the State in a separate matter. When the State retains a private law firm, any conflict of interest issues, and the possibility of consent, must be discussed with the Chief Deputy.

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[6] Moreover, if the employee acted outside the scope of employment, our office will not represent the employee, because the right to defense and indemnification depends on the employee having acted within the scope of employment. See Minn. Stat. § 3.736, subd. 9 (1996).

## RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

Rule 1.8 restricts certain business and other transactions by lawyers. Paragraphs (a), (f), (g), (i), and (k) merit brief comment.

Paragraph (a) prohibits a lawyer from entering into a business transaction unless certain conditions are met. However, the Comment to Rule 1.8 states that the restrictions of paragraph (a) do not "apply to standard commercial transactions between the lawyer and the client."

Staff attorneys who advise licensing agencies that exercise a high degree of discretion in reviewing license applications should be aware of potential conflicts under this rule. Thus, for example, a staff attorney advising an agency that licenses a business activity should not apply for such a license without first consulting a supervisor or the office ethics committee about potential conflicts of interest. Lawyers advising agencies with more routine and standardized licensing responsibilities, such as issuing driver's licenses, are not generally likely to encounter conflicts of interest.

Some transactions, if not prohibited by this Rule, may be barred by Rule 1.7(b), which restricts representation when such representation may be materially limited by the staff attorney's own interests or responsibilities to another client or to a third person. For example, a license application by a staff attorney's spouse may restrict the staff attorney's representation of the licensing agency. In addition, staff attorneys should be aware of these other conflict of interest provisions: Minn. Stat. §§ 10A.07 (conflicts of interest) and 43A.38-43A.39 (1996 & Supp. 1997) (code of ethics for executive branch employees), and the Office Manual §§ I.A. (ethics and conduct) and I.D.1 (investments) (Office Manual §§ I.A. and I.D.1, reprinted in Appendix at A-2 to A-3 and A-5).

Paragraph (f) prohibits compensation for representation from one other than the client unless certain conditions are satisfied. However, compensation arrangements for staff attorneys are regulated by law rather than by this paragraph. See Minn. Stat. § 43A.18, subd. 4 (1996).

Paragraph (g) prohibits aggregate settlements for or against more than one client without client consent and certain disclosures to each client. This paragraph is generally applicable to the Attorney General's Office. However, there may be extraordinary situations, such as when the client is one of numerous nominal parties who are not in fact affected by the settlement, where application of this paragraph serves no purpose and may unduly delay settlement.

Paragraph (i) restricts representation in cases in which closely-related lawyers represent directly adverse parties. Although the Rule permits closely-related lawyers to represent directly adverse clients after client consultation and consent, such representation may nevertheless violate Rule 1.7(b) and generally should be avoided whenever possible. A staff attorney representing a client whose interests are directly adverse to a party represented by a close relative of the staff attorney should consult with a supervisor as soon as the situation arises. For the benefit of staff lawyers with attorney spouses, it should be noted that this paragraph does not impute disqualification to members of the spouse's law firm (nor to other attorneys in this Office). The situation may arise in which a staff attorney, though not specifically assigned to the matter, works in a division representing a client with interests directly adverse to a party represented by a

close relative of the staff attorney. Measures to screen that staff attorney from even casual involvement in the matter are appropriate. Rule 1.7(b) may apply in these situations.

Paragraph (k) prohibits a lawyer from having sexual relations with a client, unless a consensual sexual relationship pre-dated the attorney-client relationship. In the case of an organizational client, the person who oversees the relationship and gives instructions to the lawyer is considered the client. The Rule does not, however, prohibit sexual relations with a client of the office, provided that the lawyer has no involvement in performing legal work for the client.

Lawyers Professional Responsibility Board Opinion No. 17, adopted June 18, 1993, prohibits a lawyer from accepting a gratuity, beyond nominal gifts such as pens and mugs, from a court reporting service or other service for which a client will pay unless the client consents after consultation. See LPRB Op. 17 (1993) reprinted in Appendix at B-5.

Eff. 1/98

## RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

Rule 1.9 provides that a lawyer who has formerly represented a client in a matter may not represent another client in the same or a related matter or disclose information to the disadvantage of the former client relating to the client except as provided in the Rule. Thus, Rule 1.9 may limit the clients a staff attorney may represent when that staff attorney has changed assignments within the staff or joined the Office after representing clients in other government employment or in private practice. While Rule 1.9(a) applies generally to limitations on representation after termination of a lawyer-client relationship, Rule 1.11 more specifically addresses ethical responsibilities when a lawyer moves in or out of government service. Temporary restrictions on client representation after employment with the Attorney General's Office are encouraged by office policy. See Office Manual § I.A.7 (appearances before state agencies previously represented by attorney general lawyer), reprinted in Appendix at A-3.

Eff. 7/91

## RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

Rule 1.10 states general principles for the imputed or vicarious disqualification of a law firm from representing particular clients.

Rule 1.10(a) vicariously disqualifies a law firm from representing a client if any single lawyer then associated with the firm would be prohibited by Rules 1.7 (conflict of interest-generally), 1.8(c) (specific conflict relating to preparation of certain legal instruments), 1.9 (conflicts relating to former clients) or 2.2 (intermediaries) from representing the client.

Rule 1.10(b) and (c) deal with the vicarious disqualification of a firm from representing certain persons where an attorney moves between firms (either when a lawyer joins a firm or when a lawyer has terminated his or her association with the firm).

Rule 1.10(d) acknowledges that a firm's disqualification otherwise required by Rule 1.10 may be waived by the affected client in accordance with the conditions specified in Rule 1.7.

Rule 1.10 does not apply to the Attorney General's Office because our Office is not a "firm" within the meaning of the Rule. Humphrey v. McLaren, 402 N.W.2d 535 (Minn. 1987). Nonetheless, our Office should take reasonable precautions to promote independence of judgment and client loyalty of individual attorneys. For example, where different staff attorneys are representing clients with adverse interests, those lawyers should avoid any communication regarding the matter, unless necessary as part of the representation of their respective clients, and should not consult with, or obtain assistance from, the same supervising attorney. See Office Comments on Rules 1.2 and 1.7. Similarly, staff lawyers disqualified from representing a client "should be screened from any direct or indirect participation in the matter. . . ." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 at 11 (1975), reprinted in 62 A.B.A.J. 517 at 522 (1976).

In addition to his or her ethical obligations, a staff attorney should be aware of due process requirements pertaining to the representation of state agencies. See, e.g., Richview Nursing Home v. Minn. Dept. of Public Welfare, 354 N.W.2d 445, 460 (Minn. Ct. App. 1984) (separate representation of staff advocacy and agency decision-making functions required); Schmidt v. Independent School District No. 1, 349 N.W.2d 563 (Minn. Ct. App. 1984) (separate representation of staff advocacy and decision-making functions required in teacher terminations). Although due process and ethical principles are certainly related, due process may require conflict-avoidance measures by the Attorney General's Office not specifically mandated by the Rules of Professional Conduct.

Eff. 7/91

## RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

Rule 1.11 relates to attorneys moving to and from government and private practice, as well as from one government law office to another.

Paragraph (a) prohibits a lawyer from representing a private client in a matter in which the lawyer participated both personally and substantially as a public officer or employee, unless the involved government agency consents after consultation. Further, no attorney in the firm with which the disqualified lawyer is associated may undertake or continue representation of a client in the same matter unless: (1) the disqualified lawyer is screened from the matter and apportioned no part of the fee earned by the firm in the matter; and (2) written notice is promptly given to the appropriate government agency so it can determine whether the firm has complied with the Rule.

Paragraph (b) provides that a lawyer who while acting as a public officer or employee obtained confidential government information about a person, may not represent a private client (or a different government entity) whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of the person. Nor may the firm with which the disqualified lawyer is associated undertake or continue representation in the matter unless the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee earned by the firm.

Paragraph (c)(1) generally prohibits a lawyer serving as a public officer or employee from participating in a matter in which the lawyer had participated personally and substantially in private practice or non-governmental employment. Paragraph (c)(2) precludes an attorney serving as a public officer or employee from negotiating for private employment with any person who is a party or an attorney for a party in a matter in which the government lawyer is participating personally and substantially.

Any staff attorneys who are unable to undertake or continue a representation due to the mandate of Rule 1.11 should promptly notify their supervising attorney so that appropriate arrangements can be made for substitute representation. In addition, although not expressly required of governmental law offices by Rule 1.11, the disqualified lawyer should be screened from any participation in the matter.

The Office has implemented a procedure by which new employees (attorneys as well as non-attorneys) will notify the Office of any legal matters in which the employee has a prior involvement relating to the State of Minnesota. Based on this information the Office will be able to determine, consistent with Rule 1.11(c)(1), whether that employee should be screened from participating in a particular matter on behalf of the State. If screening is appropriate, the supervising attorney will be responsible for implementing it. See sample memorandum in Appendix C.

The supervising attorney should remind a lawyer leaving employment with the Attorney General's Office of the requirements of Rule 1.11 as they relate to the lawyer as well as any future firm with whom the lawyer may become associated. By so advising a departing lawyer, a supervising attorney not only takes reasonable measures to assure compliance with Rule 1.11,

see Rule 5.1 (responsibilities of a partner or supervising lawyer), but also enhances the client's interests by reducing the risk of a Rule 1.11 violation which could work to the detriment of the client.

As to paragraph (c)(2), although the provision does not define the term "negotiate," the word should be construed to include any serious inquiry or discussion regarding possible employment. The submission of a resume in and of itself constitutes negotiation as contemplated by the rule. Moreover, paragraph (c)(2) should be read to prohibit a staff attorney from negotiating not just with a specific lawyer representing a party in a matter, but also the law firm with which the lawyer is associated. See also Rule 1.7.

If a staff attorney desires to pursue employment opportunities with a party, lawyer, or firm which is involved in a matter as contemplated by paragraph (c)(2), the staff lawyer should advise the supervising attorney so that substitute representation can be arranged. Supervising attorneys should be as helpful as possible in providing for substitute representation to allow staff lawyers to pursue other employment opportunities. However, it must be recognized that in some extraordinary situations when substitute representation would severely prejudice the client's interests or is otherwise incompatible with office staffing needs, substitute representation may not be permitted and pursuit of that particular employment opportunity should be deferred.

In the event a staff attorney submits a resume pursuant to an advertisement which does not reveal the name of the prospective employer, the Rule is not violated if the prospective employer turns out to be a party, attorney, or law firm in a matter in which the staff lawyer is personally and substantially involved. However, once the staff lawyer in such a case is aware of the prospective employer's identity and based on that knowledge wishes to pursue the employment opportunity, the Rule applies at that time and the attorney must notify the attorney's supervisor so that substitute representation can be arranged, if possible.

If a staff lawyer submits a resume to a prospective employer at a time when the attorney is not personally and substantially involved in a matter with the prospective employer, and the prospective employer indicates that it has no present interest in pursuing the employment solicitation, but is maintaining the resume on file for possible consideration in the future (e.g., when vacancies arise), the Rule is not violated in the event the staff lawyer subsequently becomes personally and substantially involved in a matter with the prospective employer. Only when pursuit of the employment opportunity is renewed by the attorney, either on the attorney's initiative or pursuant to the solicitation of the prospective employer, would the Rule apply.

Finally, in addition to the ethical obligations imposed by Rule 1.11, staff lawyers should be aware of the "post employment" policy set forth in Office Manual § I.A.7., reprinted in Appendix at A-3.

Eff. 7/91

## RULE 1.12 FORMER JUDGE, ARBITRATOR, OR LAW CLERK

Rule 1.12 concerns the movement of judges, other adjudicative officers, arbitrators or their law clerks to other areas of employment. As the Comment notes, this Rule generally parallels Rule 1.11.

In accordance with Rule 1.12(a), a staff attorney who was a judge, other adjudicative officer, arbitrator or law clerk to such a person shall not represent a client of the Attorney General in a matter in which the staff attorney participated personally and substantially in the former position, unless all parties to the matter consent after disclosure. Rule 1.12(c) imputes the disqualification of any lawyer under Rule 1.12(a) to the lawyer's firm, thus precluding all lawyers in the firm from representing a client in the matter, unless the disqualified lawyer is appropriately screened from participation in the matter and written notice is given to the tribunal to enable it to ascertain compliance.

The Minnesota Supreme Court has decided that the Office is not a firm for imputing conflict-of-interest disqualifications. Humphrey v. McLaren, 402 N.W.2d 535, 543 (Minn. 1987); see also Minneapolis Police Officers Federation v. City of Minneapolis, 488 N.W.2d 817, 821 (Minn. Ct. App. 1992) (definition of law firm used in imputed conflict does not include attorney general). Thus, it appears the Court would not consider the Office a firm for purposes of Rule 1.12(c). Nevertheless, the Office will comply with the spirit of the rule by screening new employees and notifying the appropriate tribunal.

The Office has implemented a procedure by which new employees will notify the Office of any legal matters in which the employee has a prior involvement relating to the State of Minnesota. Based on this information the Office will be able to determine, consistent with this Rule and Rule 1.11(c)(l), whether that employee should be screened from participating in a particular matter on behalf of the State. If screening is appropriate, the supervising attorney will be responsible for implementing the screening and ensuring that the appropriate tribunal is given prompt notice of the screening by letter. See sample memorandum in Appendix C and sample letter in Appendix D.

Eff. 5/93

## RULE 1.13 ORGANIZATION AS CLIENT

Rule 1.13 addresses the attorney-client relationship in which lawyers are employed or retained by organizations. An organizational client is a legal entity that cannot act except through its duly authorized constituents. The Rule addresses ethical problems raised when an attorney represents a client by working with officers, directors, employees, etc., who are not themselves the client.

Paragraph 1.13(a) states the basic proposition that a lawyer for an organization represents the organization, which acts through its duly authorized constituents.

Paragraph 1.13(b) addresses the situation where an organization may be substantially injured by a constituent's acts, intended actions, or refusals to act that are in violation of law or a legal obligation to the organization. The Rule requires that a lawyer knowing of such a situation must proceed "as is reasonably necessary in the best interests of the organization."

The Rule lists certain factors to which the lawyer must give due consideration in determining how to proceed. Those factors include the seriousness and consequences of the violation, the nature of the representation, the position and motivation of the actor(s), and the organization's policies on such matters.

The Rule states that any measures the lawyer takes must minimize disruption of the organization and the risk of revealing confidential information to persons outside the organization. Suggested measures include asking the constituent to reconsider the matter, advising that a separate legal opinion be sought, and referring the matter to higher authority in the organization, up to the highest, as the seriousness of the matter warrants.

If, despite those efforts, a violation of law appears likely, paragraph 1.13(c) provides that the lawyer may resign as provided in Rule 1.16 and, in cases of fraud or criminality, may reveal the violation.

The organization's interests may be or become adverse to those of the constituents with whom the lawyer is dealing. In the situation of adverse or conflicting interests, Rule 1.13(d) requires the lawyer to explain to those constituents that the lawyer's client is the organization. The Comment goes even further by stating that the lawyer should advise the constituents that the lawyer cannot represent the constituents who appear to have interests adverse to the organization and that the constituents may wish to obtain independent representation.

Rule 1.13(e) acknowledges that a lawyer for an organization may represent constituents with interests conflicting with those of the organization, provided that the lawyer observes the constraints of Rule 1.7. That is, the lawyer must reasonably believe the attorney-client relationship will not be adversely affected and the client must consent after consultation.

Rule 1.13 applies to all government attorneys, but it is especially important for staff attorneys who represent client agencies. The staff attorney's clients are the agencies, but the agencies can act only through their constituents, i.e., officers and employees. Staff attorneys representing such organizations must represent the organizations, not the constituents. See

Humphrey v. McLaren, 402 N.W.2d 535, 540 (Minn. 1987) (assistant attorney general represented PERA, not PERA director).

The Comment acknowledges that government lawyers have a different relationship with their organization clients than do private lawyers representing organization clients. The differences in the relationship involve, inter alia, the authority of the government lawyer in certain legal matters to make client-like decisions such as deciding upon a settlement or an appeal, the right to represent more than one governmental agency in a controversy, greater authority to question an individual official's or employee's conduct, and the right and obligation to represent the public interest. See Preamble to Rules, Scope; Office Comment to Rule 1.2, Scope of Representation; Minn. Stat. §§ 8.01 and 8.06 (1996); and the Comment to Rule 1.13. The last of those acknowledges that "defining precisely the identity of the client and prescribing the resulting obligations of . . . lawyers may be more difficult in the government context."

Paragraph 1.13(b) specifies the duty the staff attorney owes to the client organization when an officer, employee, or other associated person is proposing to act, acting, or refusing to act in a manner that is a violation of a legal obligation to the organization or a violation of law. The duty is to "proceed as is reasonably necessary in the best interest of the organization." The Rule lists the factors the staff attorney must consider in determining how to proceed. They include the seriousness and consequences of the violation, the staff attorney's role in the matter, the position and motivation of the officer or employee, and the relevant policies of the agency. In addition, because of the role of this Office, the public interest must be considered. Staff attorneys must bear in mind that, since the conduct at issue is that of government officials and employees, the Attorney General has the authority and obligation to question their conduct and raise public interest considerations more extensively than the attorney for a private organization. For assistance in assessing these factors, the staff attorney should consult statutory and common law authorities of the Attorney General and of the client agency and should confer with supervising attorneys. See, e.g., Minn. Stat. § 43A.39 (1996).

The Rule provides that any measures taken by the attorney must be designed to minimize disruption of the client organization and the risk of revealing information about the attorney-client relationship to those outside the organization. The Comment points out that when the client is a government organization, a different balance may be appropriate between maintaining confidentiality and assuring that a wrongful act is prevented or rectified. Accordingly, a heavier emphasis should be placed on preventing or rectifying the wrongful act because public business is involved.

The Rule suggests three measures a lawyer may take to deal with the errant conduct. A staff attorney can follow the spirit, if not the letter, of each suggested measure. First and simplest, the staff attorney should ask the constituent officer or employee to reconsider the matter.

The second suggested measure is to advise the client to seek a separate legal opinion to present to the proper decision maker. This alternative is not available to the staff attorney because it is the Attorney General who acts as the attorney for all state officers, boards, and commissions and, except in unusual circumstances, no board, commission or officer may employ any other attorney. Minn. Stat. § 8.06 (1996). However, the staff attorney can achieve the same

results by consulting a supervisor and other attorneys in the office and communicating the fact of that consultation to the client. The staff attorney may consider suggesting that the constituent's supervisor(s) also be consulted.

A third measure the staff attorney should consider is referring the matter directly to higher authority in the organization, including the ultimate decision maker, as appropriate. Experience with state agencies varies greatly regarding access, and the utility of access, to the agency head. The Comment states that clear justification should exist for seeking review over the head of the constituent normally responsible for the matter. A staff attorney should be sensitive to the protocol of the agency. With some clients such referrals are routine and appropriate; with others referral to the highest authority will be successful only if a standardized referral procedure is established before the need to use it arises. Supervisors should consider whether to encourage agencies to formulate an express referral policy.

Paragraph (c) provides that if, notwithstanding the lawyer's efforts, a violation of law appears likely, then the lawyer may resign and, if the violation is criminal or fraudulent, reveal the violation. A staff attorney generally would not resign as attorney for the client based on a constituent's actions, as the Rule suggests, but the Attorney General's independent authority can be exercised to refuse to represent the client and to reveal the officer's or employee's violation to the proper authority. These steps should be taken only after consultation with a supervisor. Further, the Attorney General, as well as all other state employees, may be required to report a substantial violation of Minnesota Statutes chapter 43A to the legislative auditor. Minn. Stat. § 43A.39, subd. 2 (1996).

Whenever it appears that the agency's interests are or may be adverse to those of the officers or employees with whom the staff attorney is dealing, i.e., whenever there appears to be an actual conflict of interest, the attorney must bear in mind the caution set out in paragraph (d): the officers or employees must be advised that the staff attorney's client is the agency. The constituent officers or employees also must be advised that the staff attorney cannot represent the constituents and that the individuals may wish to seek independent representation.

A staff attorney can represent officers and employees when their interests are not adverse to, or in conflict with, the client agency's interests. The staff attorney should refer to Rule 1.7 for assistance in determining whether the staff attorney may also represent the officers or employees. See also AGO Policy on Requests by State Employees to the State of Minnesota for Legal Defense and the forms for state employees and elected officials to request legal defense and indemnification, reprinted in Appendix G.

Eff. 1/98

## RULE 1.14 CLIENT UNDER A DISABILITY

This Rule applies to a client's ability to adequately comprehend decisions regarding legal representation. It has limited application to the Attorney General's Office. Generally, if a person cannot comprehend or does not have the ability to make adequately considered decisions in regard to legal representation, the person cannot perform in an official capacity. Most agency or department heads serve at the pleasure of the Governor and in those situations it can be reasonably assumed that the Governor would take action to replace that person either temporarily or permanently as the circumstances warrant. The Attorney General's Office is obligated to represent clients in their official governmental capacities, but the Attorney General maintains the ultimate authority to decide questions of law and manner of representation in the best interests of the State and public. See Office Comment on Rule 1.2.

Eff. 7/91

## RULE 1.15 SAFEKEEPING PROPERTY

This Rule concerns the proper handling of client's funds or other property. It has limited application to the Attorney General's Office because the Attorney General does not have the authority to hold property or set up separate accounts for funds belonging to the State. However, staff attorneys will occasionally receive checks or money orders resulting from settlements or judgments. In these instances, the staff attorney has the obligation to deliver any receipts to the state agency or the State Treasurer as soon as practicable or otherwise promptly transmit payments to properly designated persons. In particular, a staff attorney should take special note of Rule 1.15(b). The Office recommends that a staff attorney use transmittal letters or memoranda as the Office's record of how the lawyer handled receipt or payment of monies. Staff attorneys also should be aware that under Minn. Stat. § 16A.275 (1996) an agency is required to deposit receipts totaling $250 or more with the State Treasurer daily. Staff attorneys should consult the Office's Director of Administration regarding the handling of receipts from settlements or judgments.

Staff attorneys should also be aware that the Office receives funds on behalf of the citizens of the state, usually under the Attorney General's parens patriae authority, Minn. Stat. § 8.31, subd. 2c (1996). When the Attorney General exercises parens authority the Attorney General is acting to protect the interests of citizens.[7] Although equitable principles and Minn. Stat. § 8.31 allow the Attorney General to seek payment for victims, these victims are not "clients." Such victims do not have settlement authority, or any other authority to dictate litigation decisions which exist in the relationship between a private attorney and his or her client. To avoid any issue as to whether Rule 1.15 applies to parens funds, particularly as to whether interest from pooled accounts must be paid to the Lawyers Trust Account Board under Rule 1.15(d), the staff attorney should include language specifically addressing the disposition of any accrued interest in any proposed court order settling the matter.

Eff. 1/98

[7] See, e.g., Minnesota v. Standard Oil Co., 568 F. Supp. 556 (D. Minn. 1983); State v. Ri-Mel, Inc., 417 N.W.2d 102 (Minn. Ct. App. 1987).

## RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

Rule 1.16 describes the circumstances in which an attorney either must withdraw or may withdraw or terminate legal representation. The Rule also describes the procedures for withdrawing legal representation which are intended to protect the client's interests.

Declining or terminating legal representation of a state governmental client by the Attorney General's Office is a matter primarily governed by legal authority outside the scope of Rule 1.16. Minn. Stat. ch. 8 charges the Attorney General with control of all legal representation of the State and its officers, boards, or commissions. Consequently, the Attorney General may decline or terminate legal representation of state governmental clients. See Office Comment on Rule 1.2.

Staff attorneys should check for applicable statutory provisions that may affect legal representation. For example, Minn. Stat. § 3.736, subd. 9 (1996) of the Torts Claims Act requires the State to defend and indemnify state employees against tort claims "if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee was acting within the scope of employment."

Staff attorneys should be aware of circumstances that require or allow the individual or the Office to terminate or refuse further representation. If any of the circumstances described in Rule 1.16 or other legal authority arises, the staff attorney must immediately inform supervising attorneys. The Attorney General will make any decision regarding withdrawal of legal representation by the Office.

Eff. 7/91

## RULE 2.1 ADVISOR

This Rule presents two main principles in describing an attorney's role as legal advisor. The first principle is that the attorney is to "exercise independent professional judgment and render candid advice." The second principle is that the attorney is not limited solely to the law in providing advice to a client, but may also address other considerations relevant to a client's situation. Examples of other considerations include moral, economic, social and political factors as well as public interest considerations.

As the Comment indicates, the first principle expressed by the Rule recognizes that an attorney may not always be able to give the advice the client wants to hear. Good legal advice "often involves unpleasant facts and alternatives that a client may be disinclined to confront." Comment to Rule 2.1. While an attorney may strive to sustain the client's morale and maintain a good working relationship with the client, good legal advice should not be sacrificed solely because it will be unpalatable to the client.

The second principle expressed by the Rule recognizes that purely technical legal advice in a vacuum may be of little value to the client. Other considerations, such as those listed in the Rule, may have a significant role in resolving an issue presented by a client. For example, a client agency may seek a legal interpretation of a statute in an attempt to expand its authority. If agency representatives attended a legislative committee meeting which led to the passage of the statute, and understand that the legislature intended to grant only limited authority to the agency, the agency may appropriately be reminded that it will again be facing the same committee in an upcoming legislative session. Such advice will recognize the political factors which should be considered by the client in deciding upon its ultimate action.

The Comment suggests a third distinct principle which is not necessarily evident from the Rule itself. The Comment acknowledges that a lawyer is generally not expected to give advice until asked to do so by the client. The Comment recognizes, however, that there may be circumstances in which a lawyer should appropriately provide legal advice in the absence of a specific request. Such circumstances may arise when the lawyer knows "that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client." Comment to Rule 2.1. As members of the Attorney General's Office, an independent state agency, staff attorneys may also properly give legal advice to a client to protect or promote the public interest. See Office Comment on Rule 1.2. For example, it may be appropriate to offer legal advice to a state client when a staff attorney learns of a potential legal problem from a citizen's complaint about the state agency client. Similarly, changes in law which significantly affect a client should be communicated to the client.

Eff. 7/91

## RULE 2.2 INTERMEDIARY

The scope of this rule is broader than its title suggests. It is not limited to the relatively rare situation in which a lawyer attempts to help two clients reach an accommodation. The Rule also governs the situation in which a lawyer represents two or more clients with potentially conflicting interests. It is thus closely related to Rule 1.7 (conflict of interest). On the other hand, the Rule does not apply to most situations in which a lawyer is acting as mediator, since the lawyer-mediator typically does not represent either party.

Paragraph (a) of the Rule sets out the conditions which must be met before a lawyer may act as an intermediary between or among clients. A staff attorney who may act as an intermediary should consult the detailed list of conditions set out in the Rule. Very generally, the conditions are that (1) the lawyer must apprise the clients of the implications of the common representation; (2) the lawyer must reasonably believe that the matter can be resolved on terms compatible with all of the clients' best interests; and (3) the lawyer must reasonably believe that the common representation can be undertaken impartially.

Paragraph (b) of the Rule requires that a lawyer who acts as an intermediary consult with each client concerning the decision to be made and the considerations relevant in making them.

Paragraph (c) requires that a lawyer withdraw as an intermediary if any of the clients requests or if the conditions of paragraph (a) are no longer satisfied. The lawyer who acted as intermediary is precluded from continuing to represent any of the clients in the matter.

If the interests of multiple clients appear diverse or there is potential antagonism between or among the clients at the outset, a staff attorney should not attempt the role of intermediary, but should consult with a supervising attorney to assure separate representation of the diverse interests.

If the staff attorney's role in acting as intermediary between or among clients is no longer appropriate because, for example, an antagonism develops among the clients represented, it may become necessary to remove the staff attorney from the matter and assign other staff attorneys to represent the different clients.

Finally, there may be negative consequences affecting the attorney-client privilege if the role of intermediary, once undertaken, fails. As the Comment notes, "the prevailing rule is that as between commonly represented clients the [attorney-client] privilege does not attach."

If the staff attorney is considering representing more than one client in litigation, the attorney should consult the AGO Policy on Requests by State Employees to the State of Minnesota for Legal Defense, reprinted in the Appendix at G-1 to G-3.

Eff. 1/98

## RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

This Rule addresses the circumstances in which a lawyer may be called upon to undertake an evaluation of a matter affecting a client for the use of someone other than the client.

Paragraph (a) sets forth the conditions which must exist before a lawyer may undertake such an evaluation. Generally, the lawyer must believe that making such an evaluation is compatible with other aspects of the lawyer's relationship with the client. Another condition is that the client must either consent after consultation to such an evaluation or the evaluation must be impliedly authorized by the nature of the representation of the client.

Paragraph (b) provides that information relating to the evaluation is confidential under Rule 1.6 except to the extent that disclosure is required in connection with a report of the evaluation.

The Comment to the Rule notes that "[w]hen the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise," but specifically states that the Rule is not intended to resolve that issue. In any event, preparation of such an evaluation is certainly a different role than the ongoing attorney-client relationship. For example, as the Rule indicates, information contained in the report, which might otherwise be confidential under Rule 1.6, loses its confidentiality. In recognition of the different role played by the lawyer in undertaking such an evaluation, "the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings." Comment to Rule 2.3.

The Comment acknowledges that confidential legal advice given to state clients is clearly not an evaluation within the meaning of the Rule. Nor is an investigation by a government lawyer or a lawyer retained on behalf of the government considered to be such an evaluation.

While staff attorneys are not generally requested by state clients to undertake an evaluation of a matter for the use of someone other than the State, there are circumstances in which staff attorneys are requested to perform such a role. Examples include Opinions of the Attorney General issued to state clients, attorney opinions on bonds (e.g., general obligation and revenue bonds issued by state agencies) and debentures before their sale, and evaluations for financial auditors auditing state accounts.

Opinions of the Attorney General issued pursuant to Minn. Stat. ch. 8 which are made public constitute an evaluation as contemplated by the Rule. See Comment to Rule 2.3. As a consequence, before rendering such an opinion, a staff lawyer should ensure that the provisions of Rule 2.3 are satisfied as to such an evaluation and that the client understands that the opinion will be made public.

Bond opinions are addressed to the state agency which intends to issue the bonds, but with the knowledge that the bond opinion will be given to, and relied upon by, underwriters and bond counsel. Bond opinions indicate generally that the bonds are issued pursuant to proper authority, that they are properly executed and that they meet all statutory and legal requirements.

Similar opinions are issued prior to the sale of debentures to enable a state agency, for example, to use the funds from the sale to make loans to small businesses.

As another example, financial auditors who are auditing a state agency's accounts may ask the agency to have its attorney provide the auditors with information relating to, among other things, liabilities and potential liabilities concerning possible and pending claims and litigation, all in accordance with Financial Accounting Standards No. 5. The Comment to Rule 2.3 indicates that if the lawyer responds to such a request, it should be in accordance with the procedure set forth in the American Bar Association Statement of Policy Regarding Lawyer's Responses to Auditor's Requests for Information (1975), reprinted in 31 Bus. Law. 1709 (1976).

Eff. 7/91

## RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

Rule 3.1 essentially prohibits a lawyer from bringing or defending a proceeding or asserting or controverting an issue unless a good faith legal basis exists for doing so. However, with respect to a proceeding which could result in the incarceration of the lawyer's client, the lawyer may defend so as to require that every element of the case is established.

The Rule states a basic, foundational principle of our legal system and applies with equal force to lawyers in the Attorney General's Office and in private practice. The Rule is also consistent with longstanding statutory law which directs that every attorney shall "[c]ounsel or maintain such causes only as appear to the attorney legal and just" and shall "[e]mploy . . . such means only as are consistent with truth." Minn. Stat. § 481.06(3), (4) (1996). A corollary provision is also noted in the Office Comment on Rule 1.2 which explains that the Attorney General has the duty to protect the public interest.

The Comment to Rule 3.1 points out that it is not a violation of the Rule to file an action, defense, or similar action without first fully substantiating the facts. Discovery may be used to develop vital evidence. (Prosecutors should take note of Rule 3.8(a) which prohibits prosecuting a charge without first establishing that it is supported by probable cause.) Notwithstanding this caveat with respect to the use of discovery, staff attorneys, before signing any pleading, motion, or other paper as part of a court proceeding, should be aware of Rule 11 of the Minnesota Rules of Civil Procedure. Rule 11 provides that:

> The signature of an attorney or party constitutes a certification that the pleading, motion or other paper has been read; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

Rule 26.07 has a similar provision with respect to signing discovery requests, responses, and objections.

Minn. Stat. § 549.211 (Supp. 1997) imposes upon attorneys in civil actions the obligation to attach to pleadings, written motions, and papers served on the opposite party or parties a signed acknowledgment that sanctions may be imposed under the statute. The statute expands upon the language in Rule 11 prohibiting frivolous pleadings.

Eff. 1/98

## RULE 3.2 EXPEDITING LITIGATION

Rule 3.2 directs lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client." It appears to be a specific counterpart to Rule 1.3 which places the duty upon lawyers to act "with reasonable diligence and promptness in representing a client."

While Rule 3.2 itself places an affirmative duty on lawyers to expedite litigation, the tone of the Comment is that of proscribing courses of action taken merely for the purpose of delaying the proceeding. However, especially when Rule 3.2 is read in conjunction with Rule 1.3, it is clear that attorneys are obligated not only to avoid intentional delaying tactics, but also to take the actions necessary to advance the cause of the client. If a staff attorney, for whatever reason, is unable to proceed at a reasonable pace, then the lawyer's supervisor should be informed and assistance sought. See Office Comment on Rule 1.3.

Eff. 7/91

## RULE 3.3 CANDOR TOWARD THE TRIBUNAL

Rule 3.3 governs a lawyer's relationship with a tribunal, which includes "all courts and all other adjudicatory bodies." See Terminology section of Preamble to the Rules. Rule 3.3(a) places three responsibilities on the lawyer. First, it prohibits a lawyer from making false statements of fact or from offering evidence the lawyer knows to be false. Second, the Rule requires disclosure of a fact when it is necessary to avoid assisting a criminal or fraudulent act by the client or the taking of remedial measures if the lawyer learns that material evidence already offered is false. Third, with respect to legal authority, the Rule requires the disclosure to the tribunal of directly adverse authority in the controlling jurisdiction when not presented by the opposing counsel. As discussed below, a court's expectations under the third part of this Rule may be broader than the Rule language itself.

These responsibilities existed under the old Code of Professional Responsibility and in long-standing statutory provisions which prohibit attorneys from misleading "judges by an artifice or false statement of fact or law." Minn. Stat. § 481.06(4) (1996). However, paragraphs (b), (c), and (d) of Rule 3.3, which find no counterparts in the Code, enhance the basic concepts expressed in paragraph (a). Perhaps most noteworthy is the statement that the duties of paragraph (a) apply even if it requires disclosure of information that is made confidential by Rule 1.6. In addition, to prevent a tribunal from being misled because of the lack of facts, a lawyer is obligated to disclose all known material facts, whether or not adverse, in an ex parte proceeding.

Paragraph (a)(3) requires special attention. The language itself, regarding the disclosure of directly adverse "legal authority in the controlling jurisdiction" if not noted by opposing counsel, appears clear and limited in scope. However, the predecessor to the Rule, DR 7-106(B)(1), which contains virtually the same language, has been interpreted more broadly.

The leading American Bar Association opinions indicate that the emphasis of this provision is on the disclosure of adverse authority whether or not such authority is technically "controlling" in the jurisdiction. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1505 (1984); ABA Comm. on Professional Ethics and Grievances, Formal Op. 280 (1949). The 1949 opinion stated:

> We would not confine the opinion to "controlling authorities" -- i.e., those decisive of the pending case -- but . . . would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.

The 1949 opinion outlined a somewhat ambiguous test to guide attorneys. The ABA Committee mandated disclosure when there is any possibility that a judge might be misled by an implied representation that the lawyer knew of no adverse authority. It also noted that any doubt should be resolved by disclosure. The duty to disclose is further heightened when the issue before the tribunal is a new or novel one and on which there is "a dearth of authority." Disclosure, however, may always be accompanied with a challenge to the soundness of the adverse authority.

In keeping with these guidelines, the Minnesota Lawyers Board of Professional Responsibility has informally advised that it would be prudent to disclose in district court adverse decisions on the issue in question made by another district court. The same guidance applies at the administrative level. The Lawyers Board recognizes, however, that whether the failure to disclose in these circumstances constitutes a violation of the Rule depends on many factors. It also notes that maintaining one's integrity with the bench is as much a part of the decision on whether to disclose as is compliance with the Rule.

It is important to note that while the Rule requires disclosure of legal authority which is directly adverse to the position of the attorney's client only when the authority has not been cited by opposing counsel, it may also be prudent to address the adverse authority even when cited by opposing counsel. Failure to cite and discuss adverse authority may also violate Rule 3.1. Rule 3.1 prohibits a lawyer from pursuing an issue unless there is a nonfrivolous basis for doing so which may include a good faith argument to extend, modify, or reverse existing law. Thus, while opposing counsel's citation of adverse, controlling authority may remove a potential violation of Rule 3.3(a)(3), the failure to address that authority could constitute violation of Rule 3.1.

The provisions of Rule 3.3 apply equally to government and nongovernment attorneys. There does not appear to be any unique application of the Rule or special considerations applicable to lawyers of the Attorney General's Office.

Eff. 4/89

## RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

The basic thrust of Rule 3.4 is to prohibit a lawyer from unlawfully hindering or preventing the opposing party or counsel from obtaining all discoverable information, documents, evidence, or other material which may bear upon the matter in dispute. The reason behind the Rule, as noted in the Comment, is to secure fair competition in the adversary system by "prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."

There does not appear to be any unique application of the Rule or special considerations applicable to lawyers of the Attorney General's Office. However, staff attorneys should review the Office Comment on Rule 3.1 with respect to the lawyer's obligations prior to signing a pleading; motion; discovery request, response, or objection; or other paper as part of a court proceeding.

Eff. 4/90

## RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

This Rule sets out precise limitations upon a lawyer's communications with jurors and prospective jurors in connection with the trial of a case, and upon communications about the merits of a case with the judge or other official before whom an adversary proceeding is pending. The Rule also prohibits a lawyer from engaging in "conduct intended to disrupt a tribunal," and should be read in conjunction with Rule 3.4(c) and (e). See also Minn. Gen. R. Practice Dist. Cts., Rule 2; Code of Judicial Conduct, Canon 3.A(2) and (3). "Tribunal" includes all courts and other adjudicatory bodies. See Terminology section of Preamble to Rules.

Paragraphs (c) and (f) of the Rule directly affect the conduct of a lawyer who seeks to impeach a jury verdict. Specific procedures have been established for impeaching a verdict based upon misconduct by or affecting a jury. See Schwartz v. Minneapolis Suburban Bus Co., 258 Minn. 325, 104 N.W.2d 301 (1960); Minn. R. Crim. P. 26.03, subd. 19(6). The Minnesota Supreme Court has held that neither the lawyer nor the lawyer's agent should initiate questioning of jurors either for the purpose of harassment or for the purpose of gathering evidence of possible juror misconduct. Zimmerman v. Witte Transp. Co., 259 N.W.2d 260 (Minn. 1977); Olberg v. Minneapolis Gas Co., 291 Minn. 334, 191 N.W.2d 418 (1971). It is not improper, however, for a lawyer to question jurors who take the initiative by reporting possible misconduct to the lawyer. Id at 263.

Certain egregious types of improper influence upon a juror, judge or hearing officer are proscribed by the criminal code. See Minn. Stat. §§ 609.27 (coercion); 609.42, subd. 1(1) (bribery); 609.515(2) (inducing judicial or hearing officer to engage in certain misconduct) (1996).

Paragraph (g) of the Rule, which prohibits ex parte communications about the merits of a case with the decision-maker, applies to communications with the judge or with "an official before whom a proceeding is pending." By virtue of this broad language, the ethical prohibition extends to communications with commissioners or other agency officials acting in a decision-making role in contested case proceedings. Such communications also have due process implications. See Richview Nursing Home v. Minn. Dept. of Public Welfare, 354 N.W.2d 445, 460 (Minn. Ct. App. 1984) (review of commissioner's draft order as to form by staff attorney who prosecuted contested case proceeding).

Judges and administrative law judges are subject to restrictions on ex parte communications similar to those imposed upon lawyers by paragraph (g) of the Rule. Canon 3.A(4) of the Code of Judicial Conduct provides that except as authorized by law, a judge should neither initiate nor consider ex parte communications concerning a pending or impending proceeding. The Code applies to any officer in the judicial system performing judicial functions, including referees, special masters and court commissioners. Similarly, an administrative law judge is prohibited from communicating ex parte with any person or party, including the administrative agency, concerning any issue of fact or law in a pending case. Minn. R. 1400.7700 (1995); see also id., pts. 1400.8606, subp. 2 (Revenue Recapture Act hearings); 1415.2900, subp. 9.A (litigation procedures). The administrative hearing rules also require explicitly that any party sending a letter, exhibit, brief, memorandum or other document to an

administrative law judge must transmit a copy to all other parties. Id. pts. 1400.7100, subp. 4; 1400.8604, subp. 3 (Revenue Recapture Act hearings).

The Minnesota Supreme Court has cautioned that ex parte communications in contravention of a standard of professional conduct may, under appropriate circumstances, rise to the level of a constitutional due process violation. In Crosby-Ironton Federation of Teachers, Local 1325 v. Independent School District No. 182, 285 N.W.2d 667, 670 (Minn. 1979), the Court declared that in arbitration cases, the existence of ex parte contacts in regard to issues under dispute raises a "strong presumption" that the ultimate award was procured by corruption, fraud or other undue means.

Eff. 4/90

## RULE 3.6 TRIAL PUBLICITY

This Rule is limited in application to extrajudicial statements affecting a pending criminal jury trial. The Rule prohibits a lawyer from making such a statement when two conditions are present: (1) a reasonable person would expect the statement to be disseminated by means of public communication, and (2) the lawyer knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing a pending criminal jury trial. As to the second condition, "knows" denotes actual knowledge, which may be inferred from the circumstances; "reasonably should know" denotes that a lawyer of reasonable prudence and competence would ascertain that the statement will have a substantial likelihood of materially prejudicing the trial. See Preamble to Rules, Terminology. The likelihood of prejudice is "substantial" when the statement concerns a material matter of clear and weighty importance. Id.

Ordinarily, extra-judicial statements for public dissemination in pending criminal cases should be limited to factual information which is already a matter of public record (e.g., allegations in the complaint and proceedings in the case to date). Opinions as to the strength of the evidence, the credibility of witnesses, and the likelihood of successful prosecution should be avoided. Fair Trial and Free Press Standards promulgated by the American Bar Association prescribe in detail matters which properly may and may not be publicly divulged by a lawyer concerning a pending criminal case. See A.B.A. Standards for Criminal Justice, Fair Trial and Free Press, Standard 8-1.1(b), (c) (3d ed. 1992).

Special caution should be exercised in publicly disseminating information about evidence which is or may be the subject of a suppression motion. Public dissemination of suppressed evidence can very clearly prejudice a defendant's constitutional right to an impartial jury. Id. and Commentary. Additionally, staff attorneys should be aware that investigative information concerning a pending criminal case is in large measure restrictively classified under the Data Practices Act. See Minn. Stat. §§ 13.30, 13.80-13.83, 13.86, 13.87 (1996 & Supp. 1997).

Rule 3.8(e) places upon a prosecutor the additional obligation to exercise reasonable care to prevent employees and others assisting or associated with the prosecutor over whom the prosecutor has direct control from making an extra-judicial statement that the prosecutor would be prohibited from making under Rule 3.6.

As noted in the Comment to Rule 3.6, Rule 3.4(c) requires compliance with special rules of confidentiality governing juvenile, domestic relations and mental disability proceedings. Public dissemination of juvenile court matters, which are ordinarily criminal in nature, is governed by Minn. Stat. § 260.161 (1996 & Supp. 1997) and Minn. R. Juv. Ct. 34 and 64.

Finally, Attorney General staff must also be guided by Section V of the Office Manual (reprinted in Appendix at A-7 to A-9) in regard to contacts with the news media.

Eff. 4/90

## RULE 3.7 LAWYER AS WITNESS

Rule 3.7 governs the propriety of a lawyer acting as an advocate at a trial in which either the lawyer or a member of the lawyer's firm is likely to be a witness.

Paragraph (a) generally prohibits a lawyer from combining the roles of advocate and witness where the lawyer is likely to be a necessary witness. To be disqualified, the advocate's testimony must be "necessary"; the opposing party cannot force an attorney's removal from a case simply by asserting the intention to call the attorney as a witness. Humphrey v. McLaren, 402 N.W.2d 535, 541 (Minn. 1987); State v. Fratzke, 325 N.W.2d 10 (Minn. 1982).

Paragraph (a) clearly prohibits an individual staff attorney from being both an advocate and witness at trial, unless one of the stated exceptions applies. Only in the rarest of cases would disqualification of an individual attorney on the Attorney General's staff qualify as working a "substantial hardship" on the client under the exception set out in paragraph (a)(3) of the Rule. Under this exception, the principle of imputed disqualification set out in Rule 1.10 has no application. See Comment to Rule 3.7.

Rule 3.7 was substantially amended in 1987. As the Rule originally read, the "advocate-witness" prohibition (paragraph (a) of the current Rule) also applied where a member of the lawyer's firm was likely to be a necessary witness. In 1987 that language was deleted and paragraph (b) was added. The Rule now permits the advocate-lawyer to litigate the case where a member of the firm is likely to be a witness (whether necessary or not), unless precluded from doing so due to a conflict of interest. As stated in the 1987 Comment, if a lawyer who is a member of a firm may not act as both advocate and witness by reason of such a conflict, then Rule 1.10 disqualifies the firm as well.

It appears that the Attorney General's Office is not a "firm" within the meaning of paragraph (b) of the current Rule, and that its imputed disqualification provisions do not apply. In Humphrey v. McLaren, supra at 543, the Supreme Court held that as the Rule read prior to adoption of the 1987 amendment, there was a presumption that the Attorney General's staff was a "firm" for purposes of Rule 3.7, and that this presumption could be rebutted by evidence of organizational structure and personnel practices of the office showing that less than the entire staff should be considered a "firm." At the same time, the Court considered a number of factors which distinguish public from private practice, and concluded that a government legal department is not a "firm" for purposes of Rule 1.10 (imputed disqualification of firm due to conflict of interest). Id. Because Rule 3.7 was later amended to disqualify a "firm" solely where the combination of roles creates a conflict of interest, the McLaren rationale in relation to Rule 1.10 should now apply to Rule 3.7(b) as well. This interpretation is supported by the above-noted references to Rule 1.10 in the Comment, which were added in 1987 following the McLaren decision.

When a staff attorney believes that he or she is likely to be a witness in a case involving representation by the Attorney General's Office, the attorney should immediately notify his or her supervisor. Where the attorney is disqualified from acting as an advocate under this Rule, the attorney assigned to handle the case should exercise independent judgment in litigation decisions and should not rely on the advice of the disqualified attorney as to direction and strategy of the

litigation. The advocate-attorney may discuss any aspect of the case with the disqualified attorney, as with any other witness. Under no circumstances, however, may a staff attorney who is disqualified under this Rule assume the role of advocate, either directly or indirectly. See Rule 8.4(a).

Eff. 4/90

## RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

Several of the special obligations imposed upon a prosecutor by Rule 3.8 also appear in A.B.A Standards for Criminal Justice, Prosecution Function and Defense Function, ch. 3 (3d ed. 1993). Relevant parallel provisions may be found in Standards 3-3.9(a) (prosecution must be supported by probable cause), 3-3.10(c) (waiver of preliminary hearing by unrepresented accused), 3-3.11(a) (disclosure of evidence tending to negate guilt or reduce punishment of accused), and 3-6.2 (disclosure of information relevant to sentencing).

Under paragraph (a) of Rule 3.8, a prosecutor in a criminal case, unlike a plaintiff's attorney in a civil action, may not proceed with a charge that the prosecutor knows does not meet the threshold standard of probable cause. Compare Rule 3.1.

The prosecutor's obligation to take steps to assure an accused the right to counsel, as set out in paragraph (b), is new. The relevant A.B.A. standards do not specifically place special responsibilities upon the prosecutor in this regard. See A.B.A. Standards for Criminal Justice, Providing Defense Services, Standards 5-5.1 and 5-8.1 (3d ed. 1992). Numerous statutory provisions and rules of court ensure that a criminal defendant is timely advised of both the right to counsel and the procedure for obtaining counsel, and is given reasonable opportunity to obtain counsel. See Minn. Stat. §§ 611.14-611.19, 611.262 (1996); Minn. R. Crim. P. 5.01, 5.02, 13.02 and 19.04, subd. 3. The right to counsel attaches at all "critical stages" of the proceedings, commencing with the institution of formal charges. Kirby v. Illinois, 406 U.S. 682 (1972).

As noted in the Comment to the Rule, the prohibition in paragraph (c) against seeking a waiver of important pretrial rights from an unrepresented accused does not apply in two situations: (1) when the accused appears pro se with the approval of the court, and (2) during the lawful pretrial questioning of a suspect who has knowingly waived the rights to counsel and silence. A criminal defendant has a constitutional right to proceed pro se. Faretta v. California, 422 U.S. 806 (1975). The applicability and waiver of the rights of counsel and silence in connection with pretrial questioning is governed by Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny.

The obligation to disclose evidence that tends to negate the guilt of the accused under paragraph (d) is constitutionally mandated. Brady v. Maryland, 373 U.S 83 (1963). This obligation also appears in Minn. R. Crim. P. 9.01, subd. 1(6). Procedures are in place for a prosecutor to defer disclosure of information which could result in harm to an individual witness and to obtain a protective court order. Minn. R. Crim. P. 9.01, subd. 3(2); 9.03, subds. 5, 6.

Eff. 1/98

## RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

This Rule prescribes standards of conduct for a lawyer who represents a client before a legislative or administrative body in a nonadjudicative proceeding. As noted in the Comment, Rules 4.1 through 4.4 rather than this Rule govern representation of a client in a negotiation or other bilateral transaction with a governmental agency.

When appearing as an advocate in a nonadjudicative proceeding, the lawyer is required to (1) disclose that the appearance is in a representative capacity; (2) exercise candor toward the decision-making body as to the facts, law and evidence, as set out in Rule 3.3(a)-(c); and (3) conform to the prohibitions in Rule 3.4(a)-(c) concerning evidence, testimony of witnesses, and adherence to the rules of the decision-making body. As stated in the Comment, a legislative or administrative body, like a court, should be able to rely on the submissions made to it by a lawyer.

A staff attorney who is requested to testify before a legislative committee on behalf of a client is subject to additional limitations under section XXIII.B.4 of the Office Manual (reprinted in Appendix at A-11). The attorney must obtain the approval of the Chief Deputy before acceding to the request. In addition, the attorney's testimony generally must be limited to legal issues.

Eff. 4/90

## RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

Rule 4.1 prohibits a lawyer from knowingly making a false statement of fact or law. The prohibition extends to a lawyer who has actual knowledge of the falsity, although the lawyer's knowledge may be inferred from circumstances. See Preamble to Rules, Terminology; see also Minn. Stat. § 481.06 (1996); State v. Casby, 348 N.W.2d 736 (Minn. 1984).

Unlike Rule 3.3 relating to a lawyer's candor towards a tribunal, Rule 4.1 applies to any statement made by a lawyer in the course of representing a client. See In re Jagiela, 517 N.W.2d 333 (Minn. 1994); In re Schmidt, 402 N.W.2d 544 (Minn. 1987).

Eff. 5/93

## RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

The first sentence of Rule 4.2 generally prohibits a lawyer from communicating about "the subject of the representation" with a "party" whom the lawyer "knows" is represented by another lawyer. Issues related to the meaning of the words "subject of the representation," "party," and "knows" are discussed below. The first sentence of the Rule specifies two situations in which an attorney may communicate with a represented party: when the communication is authorized by law and when the lawyer for the represented party has given consent. Both of these exceptions are discussed below.

Generally, parties to a controversy may speak with each other, whether or not they are represented. See Comment to Rule 4.2. The Minnesota Supreme Court added the second sentence of Rule 4.2 effective January 1, 1995, to address the situation in which a lawyer is a party. This sentence allows a lawyer who is a party to communicate directly with a represented party, unless expressly instructed by the lawyer for the other party to avoid communication, or unless the other party manifests a desire to communicate only through counsel. Because staff attorneys rarely represent themselves in connection with their employment, all further references to Rule 4.2 in this comment address only the first sentence of Rule 4.2.

In 1995, the American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility issued a formal opinion on many issues concerning the interpretation of Model Rule 4.2. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (hereinafter "ABA Formal Op. 95-396"), reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) 1001:290.[8] This opinion constitutes the leading commentary on questions of interpretation of the ABA's Model Rule 4.2. Rule 4.2 was based on Model Rule 4.2.

Staff attorneys should pay particular attention to the ethical ramifications of contacts with represented parties by Attorney General investigators and legal assistants. Rule 5.3(c)[9] makes an attorney with direct supervisory authority over a nonlawyer responsible for the conduct of that person if the attorney orders or, with knowledge of the specific conduct, ratifies conduct which would constitute a violation of the Rules if engaged in by the attorney. See also Rule 5.3(b). In addition, it is professional misconduct under Rule 8.4(a) for an attorney to violate or attempt to violate the Rules through the acts of another. For a general discussion of the

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[8] Because the ABA/BNA service is readily available to staff attorneys, citations to ethics opinions in this comment will cite only the page numbers in the ABA/BNA service.

[9] Rule 4.2, read in conjunction with Rule 5.3(c), creates a potential anomaly with respect to investigators employed by a government law office. By virtue of the attorney's supervisory authority, a government attorney can be subject to ethical sanctions for impermissible contacts by an investigator employed in the same office. Yet where such contacts are made by an investigator employed by an agency where lawyers do not supervise investigators (e.g., a police department), Rule 5.3(c) does not apply.

relationship among Rules 4.2, 5.3, and 8.4(a), see ABA Formal Op. 95-396, reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:303 to 1001:304.

Violations of Rule 4.2 can have not only disciplinary consequences[10] but also other serious consequences. Evidence obtained in violation of Rule 4.2 has been subject to exclusion in criminal cases, although exclusion is not required. See State v. Willis, 559 N.W.2d 693 (Minn. 1997); State v. Ford, 539 N.W.2d 214, 224-25 (Minn. 1995); State v. Lefthand, 488 N.W.2d 799, 801 n.6, 801-02 (Minn. 1992). In determining whether to exclude evidence where a criminal prosecutor has violated Rule 4.2, Minnesota courts will consider "the egregiousness of the government's action in total." State v. Ford, 539 N.W.2d at 224-25. It is unclear whether this exclusionary rule would apply in a civil context. The Minnesota Court of Appeals had previously held in civil cases that the Minnesota Code of Professional Responsibility (the predecessor of the Minnesota Rules of Professional Conduct) has no bearing on the admissibility of evidence. See Kantorowicz v. VFW Post No. 230, 349 N.W.2d 597, 600 (Minn. Ct. App. 1984) (regarding predecessor of Rule 4.2). See also In re Estate of Arend, 373 N.W.2d 338, 343 (Minn. Ct. App. 1985). Courts may sometimes impose other sanctions for violations of Rule 4.2, including protective orders, the assessment of fees and costs, fines, and even disqualification of the attorney or law firm which initiated the impermissible contact. See Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996) (law firm disqualified and testimony stricken).

**"Party."**

Although Rule 4.2 uses the word "party," the rule applies whenever any person is represented by counsel in the matter in question, regardless of whether any formal proceeding, contract, or negotiation is involved. See Comment to Rule 4.2; ABA Formal Op. 95-396, reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:294 - 1001:296.[11]

**The "Subject" Or "Matter" Of Representation.**

Rule 4.2 prohibits only communications concerning the subject of a representation . In determining whether the contact concerns a subject of representation for purposes of Rule 4.2, it is not always easy to decide where one "matter" ends and another begins. The notion of a "matter" involves some controversy surrounding a core of facts. See, e.g., Black's Law Dictionary 978 (6th ed. 1990); see also Rule 1.11(d). While the term "matter" cannot be precisely defined, communication is clearly permissible if unrelated to the particular subject of the representation. For example, if a criminal defendant is charged with one crime and is

[10] See, e.g., In re Coleman, 463 N.W.2d 718 (Minn. 1990) (public reprimand for violation of rules 3.1, 4.2 and 8.4(d)).

[11] Because the word "party" has been consistently interpreted to mean "person," the ABA has now amended Model Rule 4.2 to replace the word "party" with "person." ABA Center for Professional Responsibility, Annotated Model Rules of Professional Conduct 391-92 (3d ed. 1996) (hereinafter "Annotated Model Rules").

represented by counsel in connection with that crime, the prosecutor or the prosecutor's agents may still communicate directly with the individual regarding a different, unrelated crime. See State v. Willis, 559 N.W.2d 693, 698 (Minn. 1997); ABA Formal Op. 95-396, reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:299. If there are questions regarding whether a proposed communication relates to the subject matter of the representation, a staff attorney should discuss this issue with the supervising attorney.[12]

Rule 4.2 prohibits communication only if the subject matter of the representation is specifically focused. For example, if a career criminal retains "house counsel" and advises the prosecutor that the "house counsel" represents the career criminal in connection with all matters, this is insufficient to trigger the Rule 4.2 prohibition. Similarly, a law firm or government lawyer cannot preclude communication with a corporation or government agency by stating that the firm or government lawyer routinely represents the corporation or agency in all legal matters. The Rule 4.2 prohibition is triggered only when there is a specific subject of representation. See United States v. Hammad, 846 F.2d 854, 859-60, revised 858 F.2d 834, 836 (2d Cir. 1988); United States v. Masullo, 489 F.2d 217, 223-24 (2d Cir. 1973); Jorgensen v. Taco Bell Corp., 58 Cal. Rptr.2d 178 (Cal. Ct. App. 1996); ABA Formal Op. 95-396, reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:299 - 1001:300.

**Knowledge Of Representation.**

Rule 4.2 requires actual knowledge that a party is represented by counsel in the matter in question. See Preamble to Rules, Terminology. In the context of law enforcement investigations (discussed more fully at pp. 61-63, infra), Rule 4.2 is triggered only when the government lawyer has actual knowledge that the person being investigated is represented in conjunction with the particular subject matter of the investigation. See, e.g., United States v. Hammad, 846 F.2d 854, 859-60, revised 858 F.2d 834, 836 (2d Cir. 1988); United States v. Chestman, 704 F. Supp. 451, 454 n. 2 (S.D.N.Y. 1989); Note, 67 Wash. U.L.Q. 613, 621-22 (1989).

Actual knowledge may be inferred from the circumstances. See Preamble to Rules, Terminology. See also ABA Formal Op. 95-396, reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:299; Annotated Model Rules, supra note 11, at 392.

If representation is terminated, communication with the person is not prohibited by Rule 4.2. This raises the issue whether a staff attorney should rely on a person's statement to the staff

[12] Staff attorneys sometimes receive citizen calls from represented parties in matters which do not involve the state, where the citizens are dissatisfied with their counsel or desire disinterested legal advice. Although staff attorneys cannot provide citizens with legal advice in such matters, they clearly may advise the citizens to contact their attorneys, contact attorney referral services for the purpose of finding new counsel, or contact the Minnesota Office of Lawyers Professional Responsibility. Staff attorneys also may refer citizens to relevant statutes or other authorities when the State has no involvement in the matter. Rule 4.2 does not apply in this situation because the staff attorney is not representing a client in the matter.

attorney that the representation has been terminated. The staff attorney ordinarily should confirm that the representation has been terminated before communicating with the person. If the staff attorney has reason to believe that the person is unreliable or incompetent, the staff attorney should definitely confirm that the lawyer has been discharged before communicating with the person. If the lawyer has been appointed by the court or is otherwise counsel of record in a formal proceeding, the staff attorney should not communicate with the person until the staff attorney has reasonable assurance that the lawyer is no longer counsel of record. See ABA Formal Op. 95-396, reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:302 to 1001:303. See also Annotated Model Rules, supra note 11, at 400.

**Communications With Organizations Represented By Counsel.**

In the case of represented organizations such as corporations or government agencies, the Comment to the Rule specifies three classes of persons with whom contact is prohibited absent consent or legal authorization.

First, it is impermissible to talk to any person having managerial responsibility on behalf of the organization.

Second, contact is prohibited with any other person whose acts or omissions may be imputed to the organization for purposes of liability. For example, it would be impermissible to talk to a janitor who dumped hazardous waste in a lake at the direction of the company president, because the janitor's act might result in liability to the corporation. Similarly, a truck driver involved in an accident while driving a company vehicle may have committed an act for which the company will have to answer in respondeat superior.

Third, contact is prohibited with any other person whose statement could constitute an admission on the part of the organization. A statement by a person who is authorized by an organizational party to make a statement concerning the matter, as well as a statement by an agent or employee concerning a matter within the scope of employment which is made during the existence of the relationship, constitute admissions by the organization. See Minn. R. Evid. 801(d)(2)(C), (D).

The classes of persons described above should be distinguished from other, nonmanagerial employees or agents who were mere witnesses to an act which might result in organizational liability. See Wright by Wright v. Group Health Hospital, 691 P.2d 564 (1984); ABA Formal Op. 95-396, reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:300 to 1001:301; William J. Wernz & Wendy Willson Legge, Contacting Represented Parties: Ethical Considerations, 16 Minn. Trial Lawyer 10 (Summer 1991) (hereinafter "Wernz & Legge"). Thus, in the hazardous waste example above, another maintenance employee who witnessed the dumping but played no part in that act does not fall within the prohibition against contact.

Where separate counsel represent an organization and an individual employee in a matter, the consent of the employee's counsel is sufficient to permit a contact. See Comment to Rule 4.2; Wernz & Legge, supra, at 11.

**Former Employees.**

A question sometimes arises whether Rule 4.2 permits contact with a former employee of an organizational party when the rule would otherwise prohibit the contact if the employee were still employed by the organization. A formal opinion of the ABA Standing Committee on Ethics and Professional Responsibility concludes that Rule 4.2 is not applicable to any former employees. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-359 (1991), reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:101.[13] Although the Minnesota Lawyers Professional Responsibility Board has not issued an opinion on this, the Minnesota Office of Lawyers Professional Responsibility ("OLPR")[14] follows the ABA Opinion. See Wernz & Legge, supra, at 11.

In communicating with a former employee, staff attorneys need to be careful not to seek information about confidential attorney-client communications.[15] Since a former employee would not have the authority to waive a corporation's attorney-client privilege, seeking such communications might constitute a method of obtaining evidence which violates the legal rights of the corporation in violation of Rule 4.4. See Wernz & Legge, supra, at 11. A staff lawyer who contacts an unrepresented former employee should tell the person not to divulge privileged communications with corporate counsel. Id. See also text accompanying note 19 infra.[16]

Staff lawyers should also remember the requirements of Rule 4.3 when directly contacting former employees. As stated in the 1991 ABA opinion, under Rule 4.3 "the lawyer contacting a former employee of an opposing corporate party [must] make clear the nature of the lawyer's role in the matter giving occasion for the contact, including the identity of the lawyer's client and the fact that the witness's former employer is an adverse party." ABA Comm. on

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[13] The 1995 ABA opinion follows this 1991 opinion with respect to former employees. See ABA Formal Op. 95-396, reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:301 n.47.

[14] The OLPR is the staff office for the Lawyers Professional Responsibility Board. See Rule 5, Rules on Lawyers Professional Responsibility.

[15]The ABA opinion implies that, when an individual is no longer an employee of an organization, further communications between the former employee and the attorney for the organization are not privileged (unless the attorney is representing both the organization and the individual). A staff attorney dealing with an unrepresented former agency employee should make sure that the former employee understands the lawyer's role, and understands that communications are not privileged. See Rule 4.3.

[16]Some courts may find a violation of Rule 4.2 if confidential communications were obtained from a former employee. See Camden v. Maryland, 910 F. Supp. 1115, 1122-23 (D. Md. 1996) (court found violation of Rule 4.2 where former employee had been extensively exposed to confidential information and law firm obtained attorney-client privileged information). See also Annotated Model Rules, supra note 11, at 398-99.

Ethics and Professional Responsibility, Formal Op. 91-359 (1991) (citation omitted), reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:104 to 1001:105; see also Office Comment to Rule 4.3. Also, if the attorney believes that the former employee may become an adverse party, the Minnesota Office of Lawyers Professional Responsibility interprets Rule 4.3 to require the attorney to inform the former employee that the State may initiate legal proceedings against that person. In the context of undercover investigations, these requirements would not apply.

**Consent Exception.**

A lawyer may communicate with a represented party about the subject matter of the representation if the lawyer has the consent of the other lawyer. There is an issue whether a staff attorney should rely on a statement by the represented party that the party's attorney has told the party to call the staff attorney, or has otherwise given consent. Ordinarily, staff attorneys should not communicate with the person until the staff attorney confirms with the person's lawyer that consent has been granted. The staff attorney should definitely not rely on the person's statement if the circumstances make it unreasonable to believe that the lawyer would have granted consent. See In re Searer, 950 F. Supp. 811, 814 - 15 (W.D. Mich. 1996).

**Contacts Authorized By Law.**

Rule 4.2 permits communication with a represented party about the subject matter of the representation if the communication is "authorized by law." If there is a specific statute, rule, court order, case or other source of law which allows a particular contact with a represented party that would otherwise be prohibited by the Rule, then the Rule permits that direct communication with the party . See ABA Formal Op. 95-396, reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:305; Wernz & Legge, supra, at 11; Appendix E, Admonition Issued by Director of OLPR (hereinafter "Admonition"). Issues arise as to whether the "authorized by law" exception permits investigations or permits opposing counsel to contact a government agency directly under the Data Practices Act or under the First Amendment right to petition the government. These issues are discussed below.

**Issues Arising In Government Law Practice.**

**A. Contacts with State Agencies by Attorneys Representing Private Parties.**

**1. Contacts prior to representation by the Attorney General.**

Attorneys may contact state agencies prior to the Attorney General's representation of the agency on the subject of the contact. As a general rule, once a staff attorney becomes involved in the representation of an agency in a particular matter, the staff attorney should communicate the fact of representation to the other party's lawyer. Staff attorneys should have an understanding with the agencies they represent concerning communications with outside attorneys. See Rule 3.4(f) (permitting a lawyer to advise employees of a client to refrain from giving information to another party).

## 2. Contacts during representation by the Attorney General.

A recurring issue concerns the propriety of opposing counsel contacting agency personnel after representation by the Attorney General in a matter has commenced. The OLPR treats government agencies like any other organizational parties. See Wernz & Legge, supra, at 11; Appendix E, Admonition. Accordingly, opposing counsel may contact lower level agency employees without managerial responsibility, whose statements could not constitute an admission on the part of the agency, and whose acts or admissions would not be imputed to the agency for purposes of liability. Opposing counsel may also contact former agency employees. See also Brown v. Oregon Dept. of Corrections, 173 F.R.D. 265, 268-69 (D. Ore. 1997) (holding that a state employee who transferred from the Oregon Department of Corrections to another Oregon state agency was a former employee of the Department of Corrections).

There is an issue whether opposing counsel can contact managerial employees of the agency as an exercise of the constitutional right to petition the government. The Comment to Rule 4.2 includes the following sentence: "Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter."

The OLPR does not interpret this comment as allowing contact with all employees of a government agency. Instead, the OLPR interprets the Comment as meaning that direct contact with government agency employees is permissible if allowed by a specific source of law. Wernz & Legge, supra, at 11.

Staff attorneys should be aware, however, that a 1997 ABA opinion interprets the same comment to Model Rule 4.2 as allowing a lawyer who represents a private party in a controversy with a government agency to contact managerial employees of the agency directly, provided: (1) the lawyer gives advance notice to government counsel; and (2) "the sole purpose of the communication is to address a policy issue, including settling the controversy." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-408 (1997), reprinted in [Manual] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1101:139, 1101:145 - 1101:146. See also Camden v. Maryland, 910 F. Supp. 1115, 1118 n.8 (D. Md. 1996); Annotated Model Rules, supra note 11, at 402-03.

This ABA interpretation contradicts the interpretation by the OLPR. Also, this ABA interpretation assumes that requiring an individual to petition the government through the government's attorneys is a denial of the First Amendment right to petition. The Attorney General's Office disagrees with this assumption. The position of the Attorney General's Office is that individuals can petition the government through the government's attorneys. Moreover, under certain circumstances, such as when there is a pending contested case under the Minnesota Administrative Procedure Act, a direct petition to the decision-maker could expose the decision-maker to information which is not part of the contested case record, and could constitute an improper ex parte contact.

For all of these reasons, the Attorney General's Office will follow the interpretation of the OLPR, and not ABA Formal Op. 97-408. It is the position of the Attorney General's Office that, unless specifically authorized by statute, rule, or other law, opposing counsel may not

contact agency employees who, by reason of managerial responsibility or otherwise, are considered to be part of the organizational party for purposes of the Rule.

In certain situations opposing counsel are authorized by statute to make some types of direct contact with agency personnel concerning a matter in which the Attorney General represents the agency. For example, Minn. Stat. §§ 14.63 and 14.64 (1996) require petitions for judicial review of contested case decisions to be served personally upon the agency. However, a statute such as Minn. Stat. § 117.055 (1996), which merely provides that during the pendency of legal proceedings certain documents in the agency's possession shall be made available to the opposing party, does not authorize that party's attorney to bypass the Attorney General's Office in obtaining the documents. See Wernz & Legge, supra, at 11, 32; Appendix E, Admonition.

Another question frequently raised is whether counsel may properly contact agency employees for the purpose of obtaining public documents relevant to the subject of the representation. The Attorney General's Office position is that once a staff attorney represents an agency in a matter, requests for information must be made through opposing counsel to the staff attorney, unless opposing counsel consents to direct contact between the staff attorney and the opposing party. See Nieszner v. Minn. Dept. of Jobs & Training, No. C9-94-2422 (Minn. Ct. App. July 3, 1995) (unpublished). But see Minn. Dept. of Admin., Advisory Op. 96-038 (Aug. 14, 1996). After litigation has commenced, discovery procedures must be employed by opposing counsel to obtain relevant agency documents regardless of their classification under the Data Practices Act. The Data Practices Act does not allow opposing counsel to bypass the Attorney General's Office because, like Minn. Stat. § 117.055 discussed above, the Data Practices Act does not expressly allow communication to occur in the absence of counsel. But see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-408 (1997), reprinted in [Manual] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1101:141 n.5.

A principal reason for requiring opposing counsel to direct information requests to the staff lawyer is to ensure that the staff lawyer knows exactly which documents opposing counsel has requested and obtained. The classification system and discovery provisions of the Data Practices Act suggest that the attorney for the state exercises control over the dissemination of state data to opposing counsel when a legal action is pending. See, e.g., Minn. Stat. §§ 13.03, subd. 4; 13.30; 13.39; 13.82, subd. 5 (1996). Rule 3.4(d) of the Rules of Professional Conduct is the ethical standard governing compliance with discovery demands.

If a represented person makes a data practices request directly to the agency and the request concerns the matter which is the subject of the representation, the staff attorney may not communicate directly with the represented person regarding the request (Rule 4.2) and may not specifically direct the agency how to respond to the represented person (Rule 8.4(a)).[17] The staff

[17]If there is any question whether the request concerns the matter which is the subject of the representation, the staff attorney, after consultation with the client agency, should contact the requester's attorney to ask whether the data practices request relates to the subject of the representation. If the attorney says "yes," then the staff attorney should deal only with opposing counsel with respect to the data practices request. If opposing counsel says "no," then the staff

(Footnote Continued On Next Page.)

attorney should advise the client agency that under such circumstances it is the State's position that the request should be made through the requester's attorney to the client agency's lawyer. The staff attorney should then contact the requester's attorney and tell the attorney that the request has been made by the attorney's client and that instead the request should be made by the attorney to the staff lawyer. If the opposing counsel insists that the request be made by the represented person directly to the agency, then the staff lawyer should respond to the request (in consultation with the client agency) through opposing counsel.

### B. Contacts with Represented Parties in State Investigations.

#### 1. Prior to commencement of legal proceedings.

Contact with represented parties is permissible when authorized by law. Such authorization may be inferred from law enforcement investigation authority. Legal authority for a government lawyer to conduct investigations is sufficient to satisfy this exception to the Rule consistent with the considerations stated below. See United States v. Hammad, 858 F.2d 834 (2d Cir. 1988); State v. Porter, 210 N.J. Super. 383, 510 A.2d 49 (1986); ABA Formal Op. 95-396, reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct (ABA/BNA) at 1001:298; see also United States v. Ryans, 903 F.2d 731 (10th Cir. 1990); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.), cert. denied, 464 U.S. 852 (1983).[18]

Government prosecutors are recognized by case law as having the authority to perform investigative duties, and this authority satisfies the "authorized by law" exception. United States v. Hammad, 858 F.2d 834 (2d Cir. 1988); see also ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 3-3.1(a) (3d ed. 1993 ) ("prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies"). In addition to the general authority of government prosecutors to perform investigative duties, the authority of the Attorney General to conduct criminal investigations is recognized in a variety of statutes. See, e.g., Minn. Stat. §§ 8.16, subd. 1; 8.31, subd. 2; 270.064; 325D.59, 609.912 (1996).

By statute, the Attorney General is granted specific investigative authority in a variety of noncriminal areas. This authorization principally appears in Minn. Stat. § 8.31, subds. 1 and 2 (1996), which broadly direct the Attorney General to investigate violations of certain state laws

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attorney may deal with the requester directly or may instruct the agency what to tell the requester.

[18]Although case authority for this proposition has arisen in the criminal context, the public policy considerations underlying the principle apply as well to civil or administrative cases. In 1995, the ABA amended its comment to Model Rule 4.2 to recognize that both civil and criminal law enforcement investigations are permissible under the rule, "prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable." Annotated Model Rules, supra note 11, at 391.

relating to unfair, discriminatory or unlawful practices in business, commerce or trade. Other statutes grant the Attorney General very specific investigatory powers which necessarily encompass the authority to communicate with a represented party. Examples include administrative subpoenas and precomplaint civil investigative demands.

In a few areas the Attorney General is authorized by statute simply to "enforce" specific laws, without also providing for investigative authority. Staff attorneys should exercise caution in determining whether such a statute necessarily implies the authority to investigate violations and hence to directly communicate with a represented party. Where, for example, investigations of violations are conducted by agency personnel, the Attorney General's authority to enforce the statute is very likely limited to compelling compliance by initiating legal proceedings. By contrast, if as a practical matter such a statute cannot be enforced without Attorney General staff performing investigations, the statute could be interpreted as granting the authority to communicate with a represented party. Past practices and any relevant legal authority should be examined. As in all cases, there must be a good faith basis for concluding that a particular source of law authorizes a communication that is otherwise prohibited by the Rule. See Appendix E, Admonition.

Notwithstanding the "authorized by law" exception for investigations, a staff attorney should exercise discretion in communicating with represented persons as part of an investigation. Government lawyers' authority is not unlimited in regard to such investigative communications with represented parties. Indeed, one commentator, in discussing Rule 4.2, states that "[a] possible area of uncertainty has to do with the exception for contact where authorized by law - a provision which could overgenerously be construed to permit direct contact in any official investigation." Charles W. Wolfram, Modern Legal Ethics § 11.6.2 at 615 (1986); see United States v. Hammad, 858 F.2d 834 (2d Cir. 1988) (in which the court found the use by a prosecutor of a sham grand jury subpoena to be improper). While public policy mandates that government attorneys be able to conduct investigations by communicating directly with represented people, investigative communications with a represented person must not exceed that which is reasonable under the circumstances. If any questions arise as to the reasonableness of a particular investigative communication with a represented person, the staff attorney should consult with the supervising attorney.

In addition, the authorized by law exception only extends to investigative communications, and would not, for example, allow a staff lawyer to communicate directly with a represented party regarding settlement. Likewise, the exception does not generally apply to matters in which the state's position is no different than that of a private litigant.

Even where communication with a party or its present or former employees is permitted, it is nevertheless impermissible to seek the content of communications with counsel that are protected by the attorney-client privilege. See Minn. Stat. § 595.02, subd. 1(b) (1996). In the context of organizational parties, it is important to recognize that the scope of the attorney-client privilege not only includes top management, but can also include middle and low-level employees. Upjohn Co. v. United States, 449 U.S. 383 (1981). Tests applied by the Minnesota Supreme Court for determining the scope of the privilege in this context are set out in Leer v. Chicago, M., St. P. & P. Ry., 308 N.W.2d 305 (Minn. 1981), cert. denied, 455 U.S. 939 (1982).

If attorney-client privileged information comes into the possession of a staff attorney, investigator or legal assistant, the chair or vice-chair of the Ethics Committee should be consulted as soon as possible regarding what should be done with the information. If possible, the staff attorney, investigator or legal assistant should refrain from reading attorney-client privileged documents before consultation with the chair or vice-chair of the Ethics Committee.[19]

When the Attorney General is authorized by law to conduct an investigation, the authority to contact a represented party continues until formal legal proceedings are initiated. Accordingly, except as limited by constitutional constraints relating to custodial interrogation of a criminal suspect, during the precomplaint stage Rule 4.2 allows direct interviews with a represented party as well as the use of government informants and other legitimate undercover methods to obtain information from that party.

**2. Subsequent to commencement of legal proceedings.**

After a charge, lawsuit or administrative action is filed, further contact with a represented party about the matter is generally restricted to discovery methods authorized by the applicable rules of procedure. There are some circumstances where direct contact with a represented party is "authorized by law" even after formal legal proceedings have been commenced. For example, it may be necessary in a consumer fraud case or other enforcement action to have an undercover investigator, posing as a consumer, contact a represented party to determine whether the party is violating the terms of an injunction or otherwise continuing to violate the law after the action has been commenced. Staff members should consult their supervising attorneys in determining whether a contact with the represented party after formal legal proceedings have begun is "authorized by law."

Eff. 1/98

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[19] See Office Comment to Rule 1.6 regarding inadvertent disclosure. See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-382 (1994), reprinted in [Ethics Opinions 1991-1995] Lwyrs. Man. on Prof. Conduct at 1001:221, 1001:224 (lawyer who receives unsolicited privileged or confidential materials from a person not authorized to disclose them "satisfies her professional responsibilities by (a) refraining from reviewing materials which are probably privileged or confidential, any further than is necessary to determine how appropriately to proceed, (b) notifying the adverse party or the party's lawyer that the receiving lawyer possesses such documents, (c) following the instructions of the adverse party's lawyer; or (d), in the case of a dispute, refraining from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court").

## RULE 4.3 DEALING WITH UNREPRESENTED PERSON

Rule 4.3 governs communications between a lawyer who is dealing on behalf of a client and a person who is not represented by counsel. Paragraph (a) of the Rule requires that the lawyer disclose whether the client's interests are adverse to the other person's interests. It also prohibits the lawyer from stating that he or she is disinterested. Further, if the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, paragraph (b) requires the lawyer to make a reasonable effort to correct this misunderstanding. Finally, paragraph (c) prohibits a lawyer from giving advice on those issues in which the person's interests are or have a reasonable possibility of being in conflict with the interests of the client (except the advice to secure separate counsel).

This Rule is particularly important for staff attorneys' communications with the public. Many of these communications fall outside the Rule since they involve requests for general information or assistance. Other communications, however, involve a complaint against state officers, boards, or commissions and their employees or agents. In these communications, staff attorneys must give the disclosures required by paragraph (a) of this rule. In addition, unless the citizen clearly demonstrates otherwise, staff attorneys should assume that the Attorney General's role with respect to the public is not clearly understood. Consequently, a reasonable effort should be made to correct the citizen's potential understanding and explain the staff attorney's role.

Finally, in those communications which fall within the scope of this rule, staff attorneys should refrain from giving advice. Office policy also requires that attorneys advise the public that the Attorney General is not authorized to act as a private attorney for individual citizens. See Office Manual, § VII.C.2.a., reprinted in Appendix at A-10. A staff attorney may, however, give the person general information, such as citations to or copies of relevant rules or statutes, so long as this assistance cannot reasonably be construed as constituting advice. In some cases, it may be appropriate for a staff attorney to contact the state official involved in the problem. See Office Comment on Rule 2.1. While this contact may resolve the problem, the staff attorney must be sure that the citizen does not misinterpret the attorney's actions.

State law mandates that the Attorney General give legal opinions, when requested, to city or county attorneys, school districts and the Commissioner of Education on matters of public importance. See Minn. Stat. § 8.07 (1996). Occasionally, these opinions relate to the Attorney General's representation of a state officer, board or commission. Because section 8.07 requires that the opinion be issued, the disclosures and prohibition mandated by this Rule are not applicable. See Preamble to Rules, Scope.

Since legal assistants and investigators have frequent contact with the public, staff attorneys should be aware of Rule 5.3 which generally requires that lawyers having supervisory authority over nonlawyers must make reasonable efforts to assure that the person's conduct is compatible with the professional obligations of the lawyer. See Office Comment on Rule 5.3.

Eff. 4/90

## RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

This Rule prohibits a lawyer, in representing a client, from using means "that have no substantial purpose other than to embarrass, delay, or burden a third person, or [using] methods of obtaining evidence that violate the legal rights of such a person." While the Comment to the Rule recognizes that a lawyer subordinates the interests of others to a client, it does not allow the lawyer to disregard a third person's rights.

The Rule is applicable to staff attorneys as well as others. Because the Attorney General's duty is to protect the public interest, staff attorneys should be sensitive to the legal rights of all persons with whom they come in contact. For example, reference should be made to the applicable discovery and disclosure provisions of the rules of civil and criminal procedure and of the Minnesota Government Data Practices Act.

Eff. 4/90

## RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

Rule 5.1 sets out specific ethical responsibilities of partners, supervisory lawyers and lawyers working with other lawyers. Although the Attorney General's Office does not have "partners," it does have lawyers with supervisory authority over the professional work of the office. Consequently, the office must adhere to the mandate of Rule 5.1(a) and (b).

The Attorney General's Office is committed to ensuring through reasonable efforts that all attorney staff members conform to applicable Rules of Professional Conduct. The Office represents the public interest and, therefore, has a special obligation to maintain an ethical atmosphere that adheres to the highest professional standards. Consistent with Rule 5.1(a), the Office has undertaken the following measures:

a. Office policy mandates all attorneys to read and become familiar with the Rules of Professional Conduct and the Office Comments which summarize the Rules and detail ethical concerns which are special or unique to the Attorney General's Office. See Office Manual § XVII.F, reprinted in Appendix at A-10;

b. The Office has formed a professional ethics committee to be available to consult with staff attorneys regarding ethical questions, to review and update office policies as they relate to the Rules of Professional Conduct, and to decide any ethical questions which cannot be easily resolved by reference to the Rules, Office Comments, and supervisors or which raise special implications for the Office; and

c. The Office is committed to provide educational opportunities regarding ethical practices.

Under Rule 5.1(b), supervisory lawyers are required to make reasonable efforts to ensure that lawyers working under their direct authority conform to the Rules of Professional Conduct. Supervisory attorneys must encourage and facilitate open communication and discussion of ethical issues among attorneys under their supervision. "Supervisory lawyer" includes not only the division managers and deputies but also an attorney who has any supervisory responsibility over another lawyer.

Under Rule 5.1(c) a lawyer, whether or not a supervisory lawyer, working with another lawyer can become responsible for that person's violation of the Rules of Professional Conduct under certain circumstances. This responsibility arises when a lawyer involved with another has knowledge of conduct in violation of the Rules. In addition, a supervisory lawyer with knowledge of a violation has responsibility, when there is an opportunity, to avoid or mitigate the consequences of the violation. The supervisory lawyer's failure to take remedial action in that circumstance is a violation of Rule 5.1(c).

All lawyers in the Attorney General's Office are encouraged to raise ethical issues with other staff lawyers. Reasonable assurance of Office compliance with the Rules of Professional Conduct is fundamentally dependent on staff lawyers willingly assisting each other in conforming to the Rules.

Eff. 4/90

## RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

Rule 5.2 affirms that a lawyer's actions must conform with the Rules of Professional Conduct notwithstanding that he or she was acting at the direction of a supervisory lawyer or any other person. To assist staff attorneys in resolving ethical questions, the Office has established an ethics committee and adopted the Office Comments to the Rules. Besides reviewing ethical matters with supervisors, which should always be done, the staff attorney may also discuss the issues with individual members of the committee.

Two exceptions exist to the general proposition expressed in Rule 5.2. The Comment to Rule 5.2 indicates a possible exception if the lawyer carries out a task without having the necessary underlying factual knowledge that the conduct is a violation of the Rules, e.g., serving a complaint for another not knowing it to be frivolous. Second, under Rule 5.2(b), another exception to the general rule arises when a supervisory lawyer has resolved for the staff attorney an arguable question of professional conduct. By deciding an arguable question the supervisory lawyer assumes responsibility for the decision. Arguable questions of professional conduct, i.e., those issues which cannot be easily resolved by reference to the Rules, Office Comments, and in consultation with supervisors, or which raise special implications for the Office must be submitted in writing to the Office's ethics committee for resolution.

Eff. 4/90

## RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

Rule 5.3 covers professional conduct responsibilities for the activities of nonlawyer assistants. Nonlawyer assistants in the Attorney General's Office include legal and administrative assistants, investigators, and secretaries.

For reasons stated in the Office Comment on Rule 5.1, the Attorney General's Office will put in effect measures giving reasonable assurance that the conduct of all nonlawyer staff is compatible with the professional obligations of staff attorneys. These measures include dissemination of appropriate information concerning the Rules of Professional Conduct for all nonlawyer staff members. See, e.g., Office Manual § I.A.4, reprinted in Appendix at A-3, regarding confidentiality of information.

The Office also has implemented a procedure for identifying conflicts of interest which exist on the part of new nonlawyer staff. Based on this information the Office will be able to determine, consistent with this Rule and Rule 1.11(c)(1), whether the employee should be screened from participating in a particular matter on behalf of the State. If screening is appropriate, the supervising attorney will be responsible for implementing it. See sample memorandum in Appendix C.

Rule 5.3(b) requires attorneys who have direct supervisory authority over nonlawyer assistants to ensure that the person's conduct is compatible with the professional obligations of the attorney. Thus, an attorney who is directing a nonlawyer regarding a specific project or case must reasonably assure that the activities of the nonlawyer are consistent with the attorney's professional obligations.

Rule 5.3(c) makes a staff attorney responsible for a nonlawyer's conduct if the attorney orders or, with knowledge of the specific conduct, ratifies the conduct which, if taken by the staff attorney, would be a violation of the Rules of Professional Conduct. An attorney who has direct authority over the nonlawyer is responsible if the attorney has knowledge of a Rule violation and fails to take action when the consequences of the conduct could be mitigated or avoided.

Staff attorneys directing nonlawyers should provide them appropriate instruction and supervision regarding ethical obligations. For example, nonlawyers should be made aware of the obligation of not disclosing information that is protected by the attorney-client relationship. Finally, nonlawyers on the staff should be encouraged to ask questions to clear up any misunderstandings regarding ethical obligations.

Eff. 4/90

## RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

Rule 5.4 describes traditional limitations on fee sharing arrangements between attorneys and financial arrangements between attorneys and non-attorneys. These limitations are intended to preserve the attorney's freedom to exercise professional judgment unencumbered by extraneous pressures and obligations. This rule is not intended to prohibit organizational structures in which attorneys obtain advice from supervisors. See Rule 5.2(b) and Office Comment.

Although Rule 5.4 has no direct application to our Office in which the employment structure is governed by statutory provisions, staff attorneys are expected to exercise their independent professional judgment. See Office Comments on Rule 1.2 and 1.8(f).

Eff. 4/90

## RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

Rule 5.5 prohibits practicing law in a jurisdiction in contravention of the requirements to practice law in that jurisdiction. It also prohibits assisting a non-lawyer in any activity which constitutes the unauthorized practice of law. Minn. Stat. § 481.02 (1996) regulates the unauthorized practice of law in Minnesota and should be read in conjunction with this Rule.

Rule 5.5 and the accompanying Comment exclude the proper delegation of work to paralegals or other non-attorney support staff from the concept of aiding in the unauthorized practice of law. Also excluded is providing legal advice to state agency personnel whose work requires knowledge of law.

Based on Rule 5.5 and Minn. Stat. § 481.02 (1996), staff attorneys who have not yet been licensed in Minnesota cannot offer legal advice or sign pleadings until they have been admitted to practice. (See Office Manual § I.F., reprinted in Appendix at A-6.) With regard to the prohibition against aiding in the unauthorized practice of law, supervision of work delegated to paralegals or other non-attorney support staff is addressed in Rule 5.3.

Eff. 4/90

## RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

Rule 5.6 severely limits the use of agreements restricting a lawyer's right to practice law. Because of perceptions of fairness and impartiality, staff attorneys who leave the Office are "encouraged not to appear before any State agency which they represented in the previous year." Office Manual § I.A.7., reprinted in Appendix at A-3; see also Rule 1.11 and Office Comment.

Eff. 4/90

## RULES 6.1 THROUGH 6.4 PUBLIC SERVICE

Under a public service rubric, Rules 6.1 to 6.4 make more specific a lawyer's responsibilities as a public citizen. They address pro bono publico service (Rule 6.1), accepting appointments by tribunals to represent people (6.2), membership in legal services organizations (Rule 6.3), and participation in law reform activities affecting client interests (Rule 6.4). The Comment notes that the Rule is not intended to be enforced through disciplinary process and that the basic responsibility for providing legal services for those unable to pay rests upon the individual lawyer.

The Preamble to the Minnesota Rules of Professional Conduct begins with a statement of the three roles a lawyer plays -- representative of clients, officer of the legal system, and public citizen having special responsibility for the quality of justice. The Preamble discusses the public citizen role as follows:

> As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

This Office is committed to legal service in the public interest. It seeks to hire and retain attorneys who share that commitment. It is the express policy of the Office to encourage individual staff attorneys to fulfill the ethical obligations expressed in Rule 6 by supplying legal assistance personally or by participating in organizations which serve the public interest. Outside work, without compensation, for civic and charitable concerns is normally permitted and encouraged.

The Supreme Court substantially amended Rule 6.1 in 1995, effective January 1, 1996, to include a suggestion that lawyers render at least 50 hours of pro bono services per year. The Office has determined that the provision of pro bono services, including a limited use of state resources, is consistent with and furthers the state's interests.

The Office is publicly funded and represents state government, however, and as a result, certain limitations are placed on staff attorney's volunteer assistance. Also, the Office has articulated certain concerns which individual staff attorneys should consider prior to participation. The limitations and concerns serve to avoid potential conflicts arising from representing state agencies as well as members of the public and the expending of state funds to represent private individuals. The concerns and limitations are set out in the Office Pro Bono policy, reprinted in Appendix I. A staff attorney must seek and receive the Division Manager's advance approval of the staff attorney's participation in pro bono activities.

Eff. 1/98

## RULES 7.1 THROUGH 7.5
## INFORMATION ABOUT LEGAL SERVICES

These rules govern how and what information about a lawyer's services can be disseminated. The rules prohibit a lawyer from making false or misleading communications about the lawyer's services (Rule 7.1); regulate advertising by lawyers (Rule 7.2); generally prohibit direct in-person or telephone solicitation of new clients (Rule 7.3); control the communication of a lawyer's specialties (Rule 7.4); and establish limitations on what can be used as firm names or included in letterheads (Rule 7.5).

The purpose of these rules generally is to ensure that individuals seeking a lawyer's services are not misled as to what services the lawyer can provide. As the Preamble states, "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living." These five rules are designed to ensure that the lawyer's interests in attracting business are not allowed to interfere with the consumer's ability to retain counsel based on objective information.

While the substance of these rules is largely inapplicable to the Attorney General's Office, the admonition of Rule 7.1 still applies. Staff attorneys should ensure when dealing with a client's constituent (as described in Rule 1.13 and Comment) that the constituent understands the scope of the attorney's representation. See, e.g., Rules 1.13 and 4.1, and Comments.

Eff. 4/90

## RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

This Rule prohibits an applicant for bar admission from engaging in fraudulent practices. The Rule further prohibits a lawyer from engaging in fraudulent conduct in connection with either a bar admission application or a disciplinary matter.

The specific practices proscribed by the Rule are knowingly making a false statement; failing to disclose a fact necessary to correct a misapprehension known by the bar applicant or lawyer to have arisen in the bar admissions or disciplinary process; and knowingly failing to respond to an admissions or disciplinary authority's lawful demand for information. A good faith challenge to the demand does not constitute a failure to respond. Rule 8.1(b) acknowledges that Rule 8.1 is not intended to require the disclosure of information which is otherwise protected from disclosure under Rule 1.6 (relating to confidences and secrets of clients).

Rule 8.1 does not present any considerations which are unique to the Attorney General's Office.

Eff. 4/90

## RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

This Rule prohibits a lawyer from making a statement regarding the qualifications or integrity of judicial or legal officials, or candidates for such offices, if the statement is false or knowingly made with reckless disregard as to its truth or falsity. Also, Rule 8.2(b) requires a lawyer who is a candidate for judicial office to comply with the Code of Judicial Conduct. The Comment to Rule 8.2 further states that "lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized."

In addition to the mandate of Rule 8.2, staff attorneys should be familiar with office policies regarding political activities (see Office Manual § I.C, reprinted in Appendix at A-4 to A-5) and removal of judges (see Office Manual § XVII.H, reprinted in Appendix at A-10 to A-11).

Eff. 4/90

## RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

Rule 8.3(a) requires a lawyer who has knowledge of a violation of the Rules of Professional Conduct by another lawyer, which violation raises a substantial question as to the offending lawyer's honesty, trustworthiness or fitness as a lawyer, to inform the Office of Lawyers Professional Responsibility of the violation. Under Rule 8.3(b) a lawyer is similarly required to report a judge's violation of applicable rules of judicial conduct to the Board on Judicial Standards. Rule 8.3(c) provides that a lawyer is not required to disclose a violation of the Rules of Professional Conduct or the applicable judicial code if such information is protected from disclosure pursuant to Rule 1.6 (relating to confidences and secrets of clients). However, the Comment to Rule 8.3 states that "a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests."

Accusing a lawyer or judge of impropriety can have a serious impact on the person accused and potentially the Attorney General's Office and its clients. Therefore, staff attorneys must consult with their supervisor and the chief deputy before communicating with the appropriate authority. In addition, the matter may be referred to the Office's ethics committee for advice and consultation. When the Office has completed its review, the final decision to report an alleged violation rests with the staff attorney. A copy of any report filed must be provided to the staff attorney's supervisor, the chief deputy, and the chair of the Office's ethics committee.

Eff. 5/93

## RULE 8.4 MISCONDUCT

Rule 8.4 defines professional misconduct of a lawyer to be:

(a) violating or attempting to violate the Rules of Professional Conduct by himself or herself or through the acts of another or knowingly assisting or inducing another to violate the Rules;

(b) committing a criminal act that reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engaging in conduct that is prejudicial to the administration of justice;

(e) stating or implying an ability to influence improperly a government agency or official;

(f) knowingly assisting a judicial officer in conduct that constitutes a violation of the applicable judicial code or other law;

(g) harassing a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities; or

(h) committing a legally-prohibited discriminatory act that reflects adversely on the lawyer's fitness as a lawyer, considering (1) the seriousness of the act, (2) whether the lawyer knew it was prohibited, (3) whether the act was part of a pattern of prohibited conduct, and (4) whether the act was committed in connection with the lawyer's professional activities.

It should be noted that the Comment on Rule 8.4 recognizes that "[l]awyers holding public office assume legal responsibilities going beyond those of other citizens." Thus, as acknowledged by the Comment, an official's breach of public duties may adversely reflect on his or her fitness as a lawyer.

The Comment to Rule 8.4(h), added effective June 1, 1992, notes that a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on the lawyer's fitness as a lawyer "even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities."

Since our last revision of these Comments in May 1993, the Lawyers Professional Responsibility Board has adopted two new formal opinions. Effective June 18, 1993, the Lawyers Professional Responsibility Board adopted Opinion No. 17, entitled "Accepting Gratuities from Court Reporting Services and Other Similar Services." Effective September 20, 1996, the Board adopted Opinion No. 18, entitled "Secret Recordings of Conversations." The office policy on recording by office staff is set forth in Appendix F to these Comments.

Opinions 17 and 18 are reprinted in Appendix B along with a list of all of the board opinions currently in effect, the texts of untitled opinions, and the texts of other prior opinions which may have any applicability to the public practice of law; the texts of opinions which by their terms or applicability are limited to the private practice of law are not set out in the Appendix. The Court Rules volume of Minnesota Statutes includes all opinions, except the most recent. You may also find the opinions by using the Netscape Navigator function on the personal computer network of the Office.

Failure to comply with any Lawyers Professional Responsibility Board opinion may subject the lawyer to discipline. See In re Pearson, 352 N.W.2d 415 (Minn. 1984); Lawyers Professional Responsibility Board Opinion No. 1, reprinted in Appendix B at B-1.

Eff. 1/98

## RULE 8.5 JURISDICTION

This Rule provides that a lawyer admitted to practice in Minnesota may be subjected to the disciplinary authority of this State even though the alleged misconduct took place in another state.

The Rule does not raise any concerns which are unique to the Attorney General's Office.

Eff. 4/90

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**APPENDIX A**

# POLICIES SET OUT IN OFFICE MANUAL REFERRED TO IN OFFICE COMMENTS ON RULES OF PROFESSIONAL CONDUCT

Office Manual Sections:

# I. GENERAL OFFICE POLICIES

These office policies pertain to all staff members of the Attorney General's Office and were written to allow for reasonable flexibility in their application. If you have any questions regarding the interpretation or application of these policies, you should consult with your supervisor.

## A. ETHICS AND CONDUCT

Staff members must obey the law, observe standards of conduct which build respect for the Office of the Attorney General and avoid any appearance of impropriety. Staff members should not use their public office for any private gain or to resolve personal disputes. Staff members are expected to comply with three specific sets of restrictions: (1) Minn. Stat. §§ 43A.38, the Code of Ethics for Employees in the Executive Branch, which sets forth the statutory limits governing acceptance of gifts and favors by state employees; (2) the Lawyers Rules of Professional Conduct, which govern the conduct of lawyers admitted to practice in Minnesota, including lawyers in the Attorney General's Office; and (3) these office policies, which place additional limits on conduct of staff members of the Attorney General's office.

### 1. Acceptance of Gifts; Favors

You should not accept anything worth more than $5.00, including food and refreshments, from adversaries in matters in which you are participating personally and substantially or from individuals or organizations regulated by you or regulated by an agency you represent. For purposes of this paragraph and paragraph 2 below, an "adversary" means an opposing party in a pending civil, criminal, or administrative proceeding, the subject of a pending investigation and a lawyer or law firm representing any such person. This does not prohibit:

a. Acceptance of unsolicited advertising or promotional material distributed to the general public, such as pens, pencils, note pads, calendars, and other items of nominal value.

b. Receipt of bona fide reimbursement from, or payment on behalf of staff members by, persons other than the State for actual expenses for travel and such other necessary subsistence incurred for activities receiving prior approval of the Attorney General or Chief Deputy (e.g., actual expenses for consumer attorney speech to Consumer Trade Association on Consumer Law). However, a staff member may not be reimbursed, and payment may not be made on a staff member's behalf, for excessive personal expenses.

c. Designation of charitable or educational organizations or government agencies as recipients of honoraria in accordance with the office policy on honoraria set forth in paragraph 5 below.

### 2. Loans and Other Financial Transactions

You should not accept loans from or engage in other financial transactions with adversaries in matters in which you are participating personally and substantially or

individuals or organizations regulated by you or regulated by an agency you represent. This does not prohibit transactions with financial institutions such as banks, securities broker-dealers, mortgage companies and insurance companies if the transactions are on the same terms and conditions as are available to other members of the general public.

3. Microcomputer Use

The use of microcomputers for non-work related activities is prohibited by law. See Minn. Stat. §§ 609.89.

4. Confidential Information

No staff member shall disclose to any unauthorized person confidential information gained by reason of official position, nor shall the information be otherwise used for personal gain or benefit.

Staff attorneys shall abide by the Rules of Professional Conduct and statutory and case law in determining whether information is not confidential or secret. Other staff members shall regard as confidential all information received and shall not disclose or disseminate any information except with the consent of or at the direction of the handling attorney.

5. Honoraria

Staff members are encouraged to lecture at Continuing Legal Education courses and other appropriate forums where the person's expertise might be useful. If honoraria are offered, you may not accept them but you may suggest that the honoraria be given to a charitable or educational organization such as a law school scholarship or a building fund or a government agency, but not in your name. When these lectures require out-of-pocket expenses, for example, travel, meals or lodging, these costs may be paid by the sponsoring organization. Consistent with the office policy on acceptance of gifts and favors set forth in paragraph 1.b. above, staff members may not be reimbursed, and payment may not be made on a staff member's behalf, for excessive personal expenses.

6. Use of State Property

State law requires that the use of state time, supplies or state owned or leased property and equipment be limited to the interest of the state. Minn. Stat. §§ 43A.38, subd. 4.

7. Post Employment

For the first year after leaving the staff, staff members are encouraged not to appear before any State agency which they represented in the previous year. After that year, it is also inappropriate to represent a client before any agency on any matter the staff member dealt with while employed in this office.

. . . .

## C. POLITICAL ACTIVITIES

No staff member shall be a candidate for or accept an elected or appointive public office, whether or not compensation is provided for the office, without prior approval of the Attorney General or Chief Deputy. A candidate for purposes of this provision is a person who has done, or permitted to be done, any of the following:

1. Informally or formally announced his/her candidacy;

2. Activities and efforts by other persons on behalf of his/her candidacy;

3. Filed a campaign committee registration with the Ethical Practices Board;

4. Sought or received support or endorsement of any political unit, e.g., precinct, district or party organization; or

5. Filed or applied for office.

The Attorney General may request that the staff member resign, or may grant a leave of absence.

All political activities that involve significant time, responsibility, or visibility, must be approved by the Attorney General or the Chief Deputy. Routine political activities are permitted, such as distributing literature, contributing your personal funds, putting up lawn signs, attending caucuses, serving as a party convention delegate, and telephone bank activities which do not involve fund raising.

Staff members may engage in political activity as long as that activity does not conflict or appear to conflict with official duties, and does not result in criticism of the office. When participating in a political activity, staff members should not identify themselves as members of the Attorney General's staff. These limitations on political activity are not intended to force the surrender of personal convictions. Good judgment is what is expected. When a staff member is in doubt about contemplated political activity, he or she should contact his or her supervisor or the Chief Deputy.

Familiarize yourself with and abide by Minn. Stat. §§ 43A.32. It prohibits certain political activities by public employees. Needless to say, you should not carry on any political activity during office hours nor should you ever solicit funds in the name of the Attorney General.

You may not engage in any lobbying activities, except in connection with the duties of your office, and then only after prior approval of the Chief Deputy (see Section XXIII, Legislation).

The restrictions on lobbying activities made under Section 1C of the Office Manual refer to lobbying done in the name of or on the behalf of the Attorney General's Office. It is not intended to limit your opportunities to speak to your elected officials on your own behalf or as a representative for other organizations.

D. STATEMENT OF ECONOMIC INTEREST

1. Investments

Financial activities should be restricted to areas which do not pose any potential conflicts of interest. For instance, passive ownership of stocks, bonds and mutual funds are acceptable, provided they create no conflict of interest. Notice of proposed or actual ownership of commercial (non-residential) real estate, or businesses should be given to the Attorney General or the Chief Deputy.

. . . .

E. OUTSIDE WORK

Employment with the Attorney General's Office must be given priority before all other employment.

1. Employment Not Involving Legal Representation

With prior written consent of the Attorney General or the Chief Deputy, attorneys may have other (legal or non-legal) employment. Legal assistants and secretarial staff members should obtain prior written consent from the Administrative Manager for other legal employment. If they engage in other non-legal employment, they should notify the Administrative Manager, but need not obtain prior written consent.

2. Legal Representation

Except as provided in Section 3 below, staff attorneys are allowed to perform private legal work only for members of the attorney's immediate family. This legal work should generally be restricted to matters such as the drafting or revising of wills, leases and contracts, and no fee may be accepted. Other legal representation of family members may be permitted with the prior written consent of the Chief Deputy.

With the approval of the Chief Deputy, staff attorneys may also volunteer their time to organizations that provide legal assistance to the indigent. Individual approval need not be obtained for already approved programs such as the SMRLS/LAC/AG telephone project.

3. Civic or Charitable Work

Outside work by attorneys, without compensation, for civic or charitable concerns, such as a church's governing board, is normally permitted. However, discussion of

these activities in advance with staff supervisors or the Chief Deputy is advisable to avoid awkward situations later. Moreover, staff members should be sensitive to the following concerns:

a. The potential for a conflict of interest caused by the Attorney General's regulatory responsibilities over charitable organizations (see Minn. Stat., ch. 309 (1996));

b. The fact that some activities of civic and charitable organizations present the immediate potential for a conflict of interest because of their subject matter (e.g., committees to recommend school closings);

c. The fact that some activities of civic and charitable organizations present either:

1. The potential for a conflict of interest at some time in the future; or

2. The potential for unnecessary involvement of the Attorney General's Office in a public policy issue because of the public profile or controversial nature of the subject matter; and

d. The fact that attorneys serving on organization boards are often asked legal questions and asked to draft legal documents. When providing informal assistance in this way, staff members should make clear that the opinions expressed are their own and not that of the Attorney General. Attorneys may not represent such organizations in litigation.

Before becoming involved with a particular charitable organization, staff members should ordinarily check the organization's status with the office's Charities Division.

F. TITLE FOR ATTORNEYS NOT ADMITTED TO THE MINNESOTA BAR

1. Recent law school graduates hired by the office with the expectation that they will pass the bar examination and be sworn in after the date of their initial employment are classified as "Legal Assistants;"

2. Attorneys who are admitted in other states who have joined or staff but who are not yet members of the Minnesota bar are classified as:

a. "Assistant Attorney General" for compensation plan purposes;

b. "Legal Assistant" for purposes relating to the provision of legal advice such as providing legal memoranda to clients; and

c. "Assistant Attorney General" for purposes of signing responses to citizen mail wherein they would not be giving legal advice.

III. COMPENSATION AND BENEFITS

D. ALTERNATE WORK SCHEDULES AND EQUIVALENT TIME FOR UNCLASSIFIED STAFF MEMBERS

Each lawyer and legal assistant is expected to handle his or her assignments with the highest quality of performance and to work as many hours as are needed. A work day is ordinarily a minimum of eight hours. The minimum number of full-time hours worked per pay period is 80. However, workloads and deadlines frequently require additional work hours. When staff members devote a substantial number of work hours in excess of the minimum 80 hours during a pay period (or periods), alternate work schedules are allowed.

Eff. 9/92

V. MEDIA POLICY

A. GENERAL POLICY

Media contacts are a very important part of our office's service to the public. The office should be both timely and accurate in its response to media inquiries and in its issuance of news releases.

In order to maximize coordination of media contacts within the office, whenever possible, a staff member should contact the Communications Director before the staff member has direct contact with the media. Generally, the Communications Director will ask the attorney handling the particular matter in question also to handle the media contact. However, it is important that the Communications Director be notified in advance.

In making decisions under this policy, the Communications Director will consult with either the Attorney General or Chief Deputy, as appropriate.

B. TELEPHONE CALLS FROM REPORTERS

Telephone calls from news reporters received at office location, but not directed to a particular attorney, should be routed to the Communications Director. Depending on the information needed, the Communications Director will ask the appropriate staff person to return the call and provide the requested information.

If a staff member receives a telephone message from a reporter, he or she should call the Communications Director before contacting the reporter.

If a reporter calls a staff member directly, he or she should find out who the reporter is; the news organization the reporter works for; what it is the reporter wants to know; and the reporter's deadline. The staff member may also provide basic, factual information about a case or project (hearing dates, times, case cites, etc.). If the reporter wants to know more, the staff member should tell the reporter that he or she will call them back after obtaining more information. The staff member should then contact the Communications Director to determine

how to proceed. Staff members should not feel pressured to continue a conversation with a reporter immediately. Questions from reporters asking for analysis, commentary, interpretation, or policy positions of the Attorney General may require more time and input for response, and these questions should always be referred to the Communications Director. In some circumstances, it may also be appropriate for a staff member to call the Communications Director after a media contact in order to apprise her of additional information relating to the matter discussed.

No staff member should initiate a letter to the editor or directly call a reporter or news organization to discuss an office matter, including correcting an inaccuracy or mistake in an article. Instead, he or she should alert the Communications Director who will then determine the appropriate course of action.

## C. OTHER MEDIA CONTACTS

All requests for formal, in-person interviews should be referred to the Communications Director. No interviews with newspapers, radio stations or television news stations should be arranged by a staff member.

In the event of a request for an immediate, "on the courthouse steps" interview, the attorney should provide any factual or other information that is proper to disclose at that time. The staff member should then notify the Communications Director of such contacts as soon as possible.

## D. PREPARING NEWS RELEASES

News releases are our office's most important way of telling the public about what we do. Releases must be timely and accurate in order to assist reporters in informing the public about our office's activities.

The general policy of this office is to prepare a news release when a significant case or investigation leading to administrative or court proceedings is completed. The significance of a case or an investigation should be determined in consultation with the staff member's division manager and deputy. The decision whether to issue a news release regarding a particular matter will be made by the Communications Director. If a staff member has a question about an event's newsworthiness, he or she should contact the Communications Director.

News releases should be drafted in advance of court proceedings or announcements and given to the Communications Director along with the anticipated date of the action. Staff members should notify the Communications Director of planned actions as far in advance as possible. Staff should then call the Communications Director immediately when an action has taken place so that the media can be notified. In the event of late-breaking news, the Communications Director should be contacted at home if necessary. The Communications Director will handle the distribution of all news releases.

In settling cases, news releases are not negotiable with the other party. In addition, no promises should be made that any news organization will receive a "scoop" on any investigations or cases that the office is involved in.

E. MISCELLANEOUS SUGGESTIONS

What may not seem important to you, may be of considerable importance to a small town in another part of the state. Always consider the ramifications in another part of the state. Always consider the ramifications in a particular community. Always consider your audience.

Be simple, not too technical, in speaking with reporters and in drafting news releases.

Always assume that everything you say will be seen in print or heard on tape. Do not go "off the record," provide "background," or request anonymity.

If there is a reason we cannot discuss a situation with a reporter, for example, an on-going investigation or because state laws regarding confidentiality prohibit, explaining why is much better than saying that we have "no comment."

Eff. 4/88

FOR FURTHER INFORMATION, CONTACT:

| | WORK | HOME |
|---|---|---|
| LEE E. SHEEHY<br>Chief Deputy<br>Attorney General | 296-2351 | 377-0779 |
| ERIC JOHNSON<br>Executive Assistant<br>to the Attorney General | 296-2643 | 377-1783 |

Eff. 1/98

VII.C.2. CITIZEN PHONE CALLS

a. Requests for Information

Try to comply with reasonable requests for general information on legal questions particularly if the information is readily available in a statute or prior opinion of the Attorney General. However, the caller should be informed that the office is not authorized to act as a private attorney for individual citizens. In order to preserve all his or her legal rights, advise the caller to contact a private attorney if there is a chance his or her rights may be in jeopardy. If the caller persists, requesting further information, inform the caller that official opinions of this office are only rendered to certain public officials and attorneys representing counties and municipalities.

Eff. 1/86

XVII. LEGAL POLICIES AND PROCEDURES

A. VOLUNTEER ATTORNEY PARTICIPATION

This office is committed to a legal service in the public interest. It seeks to hire and retain attorneys who share that commitment. The office recognizes that, while employed by state government, individual attorneys often desire to fulfill their ethical obligations to make legal assistance broadly available by supplying legal assistance to the disadvantaged without charge. It is the policy of this office to encourage such activity.

. . . .

F. MINNESOTA RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS

As of September 1, 1985, the Minnesota Code of Professional Responsibility was replaced by the Rules of Professional Conduct. The new Rules represent some important changes in the ethical standards by which Minnesota attorneys are to abide. It is mandatory for all attorneys in this office to read and become familiar with these rules as soon as possible. Particular attention should be given to Rule 1.11 (obligations of government attorneys) and Rules 5.1, 5.2 and 5.3 (responsibilities of supervising attorneys, staff attorneys and legal assistants). Copies of these Rules are available in every office division. Contact the librarian if you are unable to locate any.

The office has also established a special committee to coordinate the training of staff under the Rules and to help resolve questions regarding their application. staff members with such questions should schedule a meeting with that committee.

. . . .

H. POLICY ON REMOVAL OF JUDGES

Under Minn. Stat. § 542.16 and Minn. R. Civ. P. 63.03 there are mechanisms by which parties or attorneys can obtain the removal of a judge from presiding over a given court

proceeding. Our office has a rather strict policy against petitioning for the removal of a judge because of our unique relationship with the judiciary and our role as the chief law enforcement office of the State of Minnesota. Only under very exceptional circumstances would we do so on behalf of client agencies or on behalf of the State itself.

Eff. 1/86

## XXIII. LEGISLATION

### B. BILL DRAFTING FOR STATE AGENCIES

#### 4. Testifying before Legislative Committees

in the event your client requests that you testify on one of its proposals, you must first obtain the approval of the Chief Deputy or the Assistant for Legislation and Policy. Testimony on behalf of clients will generally be limited to legal issues.

Eff. 1/86

AG:104469 v1

# LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
# OPINIONS

Rule 4(c) of the Rules on Lawyers Professional Responsibility authorizes the Lawyers Professional Responsibility Board to "issue opinions on questions of professional conduct." Since 1972, the board has issued eighteen opinions. Seventeen of those opinions remain in effect. The Board repealed Opinion No. 7 in January 1983. The Board has amended several of the opinions.

All of the board opinions currently in effect are listed below. The texts of untitled opinions and the opinions which may have any applicability to the public practice of law are set forth below; the texts of opinions which by their terms or applicability are limited to the private practice of law are not set out. You can find the full text of all opinions in the Court Rules volume of Minnesota Statutes and on Netscape at:

http://www.courts.state.mn.us/lprb/opinions.html

## OPINION NO. 1
The Legal Force and Effect of Opinions Issued by the State Board of Professional Responsibility.

It is the policy of the State Board of Professional Responsibility to issue, from time to time, advisory opinions as to the professional conduct of lawyers, whether as a result of a specific request or its own initiative, on matters deemed important by the board.

The board considers these opinions to be guidelines for the conduct of lawyers in the state of Minnesota. Failure to comply with the standards set forth in these opinions may subject the lawyer to discipline. See, e.g., In re Pearson, 352 N.W.2d 415 (Minn. 1984).

Opinions issued by the board will be subject to change from time to time as deemed necessary by the board, or as required by decisions of the Minnesota Supreme Court.

Adopted: October 27, 1972
Amended: December 4, 1987

## OPINION NO. 2
Defense of Criminal Cases by a County Attorney

It is improper for a county attorney of one county to accept the defense of a criminal case in another county of the state. Nevertheless, this rule would be outweighed in any case where the accused would be deprived of competent counsel or put to an unreasonable burden of expense by the application of this rule. In this event, the county attorney to be retained, as soon as practicable after he is asked to represent the accused, shall petition a judge of the court before which the matter is to be tried for permission to represent the accused. Upon a proper showing of good cause, the judge may issue an order approving defense of the case by the petitioner. If the court decides that the facts of the situation do not justify granting this exception, the attorney involved shall then withdraw from the case. In any event, defense counsel who is also a county

attorney shall scrupulously refrain from any reference to his position as a county attorney in the course of all proceedings.

Adopted: October 27, 1992

OPINION NO. 3

It is improper for a part-time judge, or his partners or associates, to practice law in the court on which the part-time judge serves, or in any court of record subject to the appellate jurisdiction of the court on which the part-time judge serves.

Adopted: November 20, 1972

OPINION NO. 4

It is professional misconduct for a lawyer, having accepted a fee to represent a client, to refuse to proceed with the client's matter until any remaining fee is paid in full unless the client has failed to honor an agreement or obligation to the lawyer as to expenses or fees. If the attorney raises the client's failure to honor a fee agreement as a defense for his failure to proceed, the agreement must be established by clear and convincing evidence or be in writing, signed by the attorney and the client.

It is professional misconduct for a lawyer to withdraw from representation in a proceeding before any tribunal without first giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and obtaining permission to withdraw from the tribunal where required. See Rule 1.16, Minnesota Rules of Professional Conduct, concerning a lawyer's obligations upon the termination of representation.

Adopted: October 12, 1973
Amended: December 4, 1987

OPINION NO. 5

It is professional misconduct for an attorney who has signed an agreement to arbitrate a fee dispute to refuse to honor and carry out the final decision reached in such proceedings. See In Re Pearson, 352 N.W.2d 415 (Minn. 1984).

Adopted: April 19, 1974
Amended: December 4, 1987

OPINION NO. 6
Defense of Criminal Cases by Municipal Attorneys

It is improper for a city or municipal attorney to accept the defense of a criminal case arising within the limits of the city or municipality which he serves. It is not improper for a city or municipal attorney to accept the defense of criminal cases in other areas provided he is not required to challenge the validity of a state statute which he would otherwise be required to

support while acting in his capacity as a prosecutor, and provided there is no other actual conflict of interest. If such a challenge or conflict arises, he should withdraw from the case.

In any event, defense counsel who is also a city or municipal attorney shall scrupulously refrain from any reference to his position as a city or municipal attorney in the course of all proceedings.

Adopted: June 26, 1974

OPINION NO. 7
Repealed: January 7, 1983

OPINION NO. 8
Attorneys' Guidelines for Law Office Services by Nonlawyers

Except to the extent permitted by the Supreme Court of the state of Minnesota (e.g., Student Practice Rules) neither law students nor any other person not duly admitted to the practice of law shall be named on pleadings under any identification.

Legal assistants, or other paralegal employees, may be listed on professional cards, professional announcement cards, office signs, letterheads, telephone director listings, law lists, legal director listings, or similar professional notices or devices, so long as the paralegals are clearly identified as such, and so long as no false, fraudulent, misleading, or deceptive statements or claims are made concerning said paralegals, their legal status and authority, or their relationships to the firms by which they are employed. Paralegals may use business cards so identifying themselves, which cards carry the law firm's name and address.

Such a paralegal, so identified, may sign correspondence on behalf of the law firm, provided he or she does so by direction of an attorney-employer.

Nonlawyers must be supervised by an attorney who is responsible for their work. If the attorney-supervisor permits violations of these guidelines, he shall be guilty of professional misconduct. See also Rule 5.3 and comment, Minnesota Rules of Professional Conduct.

Adopted: June 26, 1974
Amended: June 18, 1980 and December 4, 1987

OPINION NO. 9
Maintenance of Books and Records

[Text not reproduced here because application of opinion is limited by its terms to attorneys "engaged in the private practice of law, or partnerships or professional corporations of which the attorney is a member, associate or employee."]

OPINION NO. 10
Debt Collection Procedures

[Except for paragraphs 7 and 9, text not reproduced here because application of remainder of opinion is limited by its terms to attorneys engaged both in the practice of law and in the debt collection agency business, or representing or performing legal work for a debt collection agency, or employed by a debt collection agency as in-house counsel, or who represent, or perform legal work for, a debt collection agency.]

To prevent the possibility of (a) misleading the public, or (b) abusing debtors, violations of the following guidelines by attorneys in connection with debt collection work may constitute grounds for discipline

. . . .

7. Except for purposes of effecting service of legal process according to law, no attorney shall permit any correspondence, pleadings, garnishment summonses, executions, releases, or other documents which bear his or her signature (or a facsimile thereof) to be used, or mailed, by persons who are not in the exclusive employ of the attorney's law office.

. . . .

9. An attorney shall not aid, abet or assist any debt collection agency in the violation of the provisions of Minnesota Statutes § 332.37, prescribing prohibited practices of debt collection agencies. Similarly, an attorney shall not aid, abet or assist a debt collection agency in the violation of any other state or federal laws, rules or regulations governing debt collection agency practices.

Adopted: June 22, 1977
Amended: December 4, 1987

OPINION NO. 11
Attorneys' Liens

[Text not set out here because opinion applies only to liens based on unpaid attorneys' fees.]

OPINION NO. 12
Trust Account Signatories

[Text not set out here because application of opinion is limited by its terms to lawyers "engaged in the private practice of law."]

OPINION NO. 13
Copying Costs of Client Files, Papers and Property

[Text not set out here because opinion does not apply to government data and property in the possession of lawyers in the public practice of law.]

OPINION NO. 14
Attorney Liens on Client Homesteads

[Text not set out here because opinion applies only to liens based on unpaid attorneys' fees.]

OPINION NO. 15
Advance Fee Payments and Availability of Non-Refundable Retainers

[Text not set out here because opinion applies only to attorneys' fees paid by private clients.]

OPINION NO. 16
Interest and Late Charges on Attorneys Fees

[Text not set out here because opinion applies only to attorneys' fees paid by private clients.]

OPINION NO. 17
Accepting Gratuities from Court Reporting Services and Other Similar Services

It is improper for a lawyer to accept, or to permit any nonlawyer employee to accept, a gratuity offered by a court reporting service or other service for which a client is expected to pay unless the client consents after consultation. However, a lawyer may accept nominal gifts, such as pens, coffee mugs, and other similar advertising-type gifts without consent of the client. See Rules 1.4, 1.5(a), 1.8(f)(1) and 5.3, Minnesota Rules of Professional Conduct (MRPC). See also definition of "consultation" in the MRPC terminology section.

Adopted: June 18, 1993

OPINION NO. 18
Secret Recordings of Conversations

It is professional misconduct for a lawyer, in connection with the lawyer's professional activities, to record any conversation without the knowledge of all parties to the conversation, provided as follows:

1. This opinion does not prohibit a lawyer from recording a threat to engage in criminal conduct;

2. This opinion does not prohibit a lawyer engaged in the prosecution or defense of a criminal matter from recording a conversation without the knowledge of all parties to the conversation;

3. This opinion does not prohibit a government lawyer charged with civil law enforcement authority from making or directing others to make a recording of a conversation without the knowledge of all parties to the conversation;

4. This opinion does not prohibit a lawyer from giving legal advice about the legality of recording a conversation.

Adopted: September 20, 1996

Committee Comment

It has been the position of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility for over a decade that surreptitious recording of conversations by a lawyer constitutes unprofessional conduct. This position is consistent with that announced by the ABA Committee on Ethics and Professional Responsibility in Formal Opinion 337 (August 10, 1974). It is also the position held by the majority of state ethics authorities who have addressed the issue. The ABA and other state ethics authorities recognize that although secret recording is not illegal (provided one of the parties to the conversation consents to the recording), such conduct is inherently deceitful and violates the profession's standards prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4 (c), Rules of Professional Conduct and DR 1-102(A)(4), Code of Professional Responsibility. The committee agrees that in most instances secret recording violates these standards.

The exceptions provided for in this opinion recognize that in certain limited circumstances, the interests served by surreptitious recordings outweigh the interests protected by prohibiting such conduct through professional standards. For example, a lawyer who is the subject of a criminal threat ought not be subject to discipline for secretly recording the threat. The "in connection with the lawyer's professional activities" language is intended to limit application of the opinion to those situations where a lawyer is representing a client or is representing him or herself in a legal matter.

Another exception is secret recording in the criminal prosecution area where such conduct has become a recognized law enforcement tool provided it is done within constitutional requirements. See e.g., ABA Formal Opinion 337 at page 3. The committee determined, however, that such an exception should also be recognized for lawyers engaged in the defense of a criminal matter. See also, Arizona Opinion No. 90-02; Tennessee Ethics Opinion 86-F-14 (a), July 18,1986); and Kentucky Opinion E-279 (Jan. 1984). Creating an exception only for prosecutors could create an imbalance raising potential constitutional problems. See e.g., Kirk v. State, 526 So.2d 223, 227 (La. 1988) (court found disparity between permitting prosecutors to secretly record and prohibiting defense lawyers was impermissible denial of equal protection).

The exception provided to government lawyers engaged in civil law enforcement similarly recognizes that to effectively protect the public, surreptitious recording is a necessary law enforcement tool. In certain areas such as consumer fraud, false advertising, deceptive trade practices and charitable solicitation, there may be few, if any, alternatives to surreptitious recording for effective enforcement. The exception also recognizes that during the investigative stage, a government lawyer may not be able to determine with certainty whether the violations are civil, criminal or both.

Finally, because surreptitious recording with the consent of one of the parties is not illegal, the committee determined that a lawyer should not be prohibited from advising a client about the

legality or admissibility of such a recording. This exception is not intended, however, to permit non-lawyer employees or agents of the lawyer to record conversations in violation of this opinion. See Rule 5.3, Minnesota Rules of Professional Conduct.

Related Authorities and other Resources: Minnesota Bench & Bar, Nov/Dec 1996 at p.19.

AG:99169 v1

STATE OF MINNESOTA

# Office of the Attorney General

TO: ALL DIVISION STAFF DATE: January 12, 1998

FROM: MANNY JEER PHONE: 296-6666
Assistant Attorney General

SUBJECT: Pollution, Impairment & Destruction, Inc.
v. Minnesota Pollution Control Agency; J. D. Barrister Screening

This Division currently represents the Minnesota Pollution Control Agency in its defense of Pollution, Impairment & Destruction, Inc. v. MPCA. Tetra, Chloro, Ethylene, Ltd. (TCE Ltd.) represents the plaintiff.

Attorney J. D. Barrister, who recently joined this Division, worked on the case as an associate at TCE Ltd.

In accordance with Rule 1.11(c) of the Minnesota Rules of Professional Conduct, we must take several measures to ensure that J.D. does not participate in any way in our handling of this matter:

1. I have instructed J.D. that she shall not participate in any way in our handling of this matter and shall not have access to the file, including the computer file;

2. I have instructed and required J.D. not to convey any information about this matter to any persons employed by the Minnesota Attorney General's Office;

3. All attorneys, legal assistants, interns, and support staff who have knowledge of this matter shall not discuss it with or in the presence of J.D. and shall not in any other way convey information about the matter to J.D.

MJ:vpd
Distributed to:
J.D. Barrister; [AAG 2]; [Legal Ass't]; [et al.]
[Deputy A.G.]; [...]; [Intern];
[AAG 1]; [AAG 8]; [Sec'y];

AG:99267 v1

Eff. 5/93

# STATE OF MINNESOTA

**APPENDIX D**

**OFFICE OF THE ATTORNEY GENERAL**

(Date)

PUBLIC AND HUMAN RESOURCES
SUITE 900
445 MINNESOTA STREET
ST. PAUL, MN 55101-2127
TELEPHONE: (612) 297-1075

**HUBERT H. HUMPHREY III**
ATTORNEY GENERAL

Judge LeRoi Solomon
Court of Appeals for the
D. C. Circuit
Federal Courthouse
Washington, D.C. 20002

Re: State of Minnesota, et al. vs. Scrooge

Dear Judge Solomon:

Minnesota is one of the forty-nine plaintiff states in the above-referenced case and the lead plaintiff. This office represents the State in the case. We recently hired Joanie Caucus as an Assistant Attorney General in the Human Rights Division of our office. While clerking for you during the past term of the Court, she was personally and substantially involved in the case. Thus, in accordance with Minnesota Rule of Professional Conduct 1.12(a), Ms. Caucus is disqualified from participation in the case unless all parties consent. We are not seeking consent.

We believe this office is not a "firm" to which Ms. Caucus's disqualification is imputed. Humphrey v. McLaren, 402 N.W.2d 535 (Minn. 1987). Nevertheless, Ms. Caucus is being screened from any participation in the matter consistent with the spirit of Minn. Rule Prof. Conduct 1.12(c).

Very truly yours,

ZONKER T. M. HARRIS
Assistant Attorney General

cc: G. B. Trudeau, Esq.
Co-Plaintiffs' Counsel

C. Dickens, Esq.
Defense Counsel

AG:99274 v1

Eff. 1/98



Facsimile: (612) 297-4139 • TTY: (612) 296-1410 • Toll Free Lines: (800) 657-3787 (Voice), (800) 366-4812 (TTY)

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In the Matter of the Complaint
of _____,
Office of the Attorney General
515 Transportation Building
St. Paul, MN 55155, Complainant,
Against _____,
an Attorney at Law of the
State of Minnesota.

---

ADMONITION AND NOTICE
PURSUANT TO RULE 8(d)(2),
RULES ON LAWYERS
PROFESSIONAL RESPONSIBILITY

## ADMONITION

This matter was initiated by a written complaint filed with the Director by the complainant. Thereafter, it was assigned for investigation to the Second District Ethics Committee which referred the matter to the Office of Lawyers Professional Responsibility "for an advisory opinion or appropriate action based on the technical nature of the legal matters involved and the lack of concrete guidelines on the specific disciplinary issues." Based upon the entire file the Director hereby makes the following findings of fact:

1. The above-named attorney, hereinafter respondent, is, and has been since September 23, 1952, admitted to practice law in Minnesota. Respondent is current in paying the registration fee required by the Minnesota Supreme Court. Respondent currently practices law in St. Paul, Minnesota.

2. In 1988 and 1989, respondent represented various landowners in condemnation proceedings brought by the State of Minnesota because of planned highway construction. Respondent's previous practice in such cases, which he continued in 1988 and 1989, was to informally obtain information directly from the Minnesota Department of Transportation (MDOT) regarding the proposed highway construction, even after the commencement of a condemnation proceeding in which the Attorney General represented the State.

3. By letter dated August 24, 1988, a copy of which is attached hereto as Exhibit A, Special Assistant Attorney General _____ asked respondent to cease direct contact of state employees in connection with such condemnation matters in litigation. _____ also stated in her letter her belief that respondent had violated Rule 4.2 of the Minnesota Rules of Professional Conduct (MRPC).

4. By letter to _____ dated August 25, 1988, a copy of which is attached hereto as Exhibit B, respondent stated: "I believe that the Rules of Professional Conduct do not prohibit counsel in a condemnation action from communicating directing with the engineering staff concerning the physical facts about the highway." Respondent stated that he disagreed with the Attorney General's interpretation of Rule 4.2, and cited a statute concerning condemnation petitions which states: "Any plans or profiles which the petitioner has shall be made available to the owner for inspection." Minn. Stat. § 117.055.

5. By letter dated August 31, 1988, a copy of which is attached hereto as Exhibit C, _____ again advised respondent to make future requests for data and information through the Attorney General's office.

6. After this exchange of letters, respondent continued to contact MDOT employees directly regarding highway construction plans. Respondent set up meeting with MDOT engineers, and at least two meetings between respondent and an MDOT engineer occurred without the knowledge or consent of the Attorney General's office.

7. On June 6, 1989, respondent appeared at a pre-trial conference on behalf of the landowner in the condemnation matter State v._____. _____ represented the State at the hearing. She stated to the court that _____ of the MDOT had a conflict and therefore could not be present. _____ is the Director of the MDOT Office of _____ and has final settlement authority for the MDOT in all condemnation matters.

8. Immediately after the pre-trial conference, respondent telephoned _____ from the courthouse lobby. The following telephone conversation occurred:

* * * * * *

RESPONDENT: _____, good morning. This is _____.

_____: I know.

RESPONDENT: Where were you this morning?

_____: What do you mean? I have been right here in my office all morning.

RESPONDENT: I asked you that because _____ told a Judge this morning that you had an appointment somewhere else and could not be in court, is that true?

_____: What are you talking about? I have been right here in my office and I do not know anything about a Judge.

RESPONDENT: Well, last April Judge Borg issued an order setting June 6, 1989 at 8:30 a.m. as a time for a settlement conference. The Order required you to be present. He asked where you were and _____ told him that you had a conflicting appointment and could not be present. The Judge was going to issue sanctions, but we told him that was not necessary.

_____: I don't know anything about any court hearing today. No one ever told me anything about it. If I had known I would have been there.

RESPONDENT: Well, forget it. We are interested in settling the _____ case. I think there are many facts that you ought to be aware of. Why don't you talk to the Attorney General's office and see if we can set up a meeting.

_____: I will do that and I will get back to you.

* * * * * *

In fact, _____ had the pre-trial conference on his calendar and had instructed the Attorney General's office that he would be available by telephone only.

Based upon the foregoing facts, the Director hereby makes the following conclusion:

1. Respondent's conduct in telephoning _____ after the pre-trial conference violated Rule 4.2, Minnesota Rules of Professional Conduct (MRPC).

2. Respondent's unprofessional conduct warrants the issuance of an admonition.

WHEREFORE, this admonition is issued pursuant to Rule 8(d)(2), Rules on Lawyers Professional Responsibility (RLPR). The attached memorandum is made a part hereof.

Date: _____

_____

WILLIAM J. WERNZ
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY
520 Lafayette Road, 1st Floor
St. Paul, MN 55155-4196
(612) 296-3952

NOTICE

To Respondent:

You are hereby notified that the Director has, pursuant to Rule 8(d)(2), RLPR, issued the foregoing admonition.

You are further notified that the issuance of this admonition is in lieu of the Director's presenting charges of unprofessional conduct to a Lawyers Professional Responsibility Board Panel. You have the right to demand that the Director so present the charges to a panel which shall consider the matter de novo or instruct the Director to file a petition for disciplinary action in the Minnesota Supreme Court.

To demand the presentation of charges to a panel, you must notify the Director in writing within 14 days of the date of this notice. If you demand a hearing, you are hereby requested, pursuant to Rule 25, RLPR, to enclose a reply to the facts and conclusions contained in the admonition. Your reply should set forth with specificity, those facts and conclusions which you admit, those which you deny, and any qualifications, explanations, defenses, or additional information you deem relevant.

If you do not demand the presentation of charges within 14 days of the date of this notice, the Director's file will be closed with the issuance of this admonition. Your reply should set forth with specificity, those facts and conclusions which you admit, those which you deny, and any qualifications, explanations, defenses, or additional information you deem relevant.

Dated: _____, 1990

WILLIAM J. WERNZ
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY

By: WENDY WILLSON LEGGE
SENIOR ASSISTANT DIRECTOR

**MEMORANDUM**

Rule 4.2, MRPC, states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so." thus, an attorney may contact a represented party directly only if (1) the opposing counsel has granted permission, or (2) the direct contact is authorized by law.

Respondent says that it is the longstanding practice for attorneys representing landowners in condemnation proceedings to contact the highway department directly for information on highway construction. If this is the case, then the Attorney General's office might have implicitly given permission for such a practice to continue by not objecting to it before August 1988. Any such implicit permission to respondent was revoked, however, by _____ in her letters of August 24 and 31, 1988.

Although respondent no longer had any permission to contact certain MDOT employees directly after August 24, 1988, no opposing counsel can prohibit direct contact with all employees of an organizational client such as a government department). See Kentucky Bar Association Ethics Committee, Opinion E-332, September 1988 (digested at [1988] 4 Lawyers' Manual on Professional Conduct (ABA/BNA) 377). Opposing counsel can only prohibit contacts

> with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

Comment to Rule 4.2, MRPC (hereinafter referred to as the "organizational comment to Rule 4.2"). See Wernz, "Communication with Represented Parties," Bench & Bar of Minnesota, 11, 12 (Dec. 1987). Moreover, no opposing counsel can prohibit direct contact which is authorized by law. There are thus several issues: (1) what the words "authorized by law" mean in Rule 4.2; (2) whether respondent's contacts with the MDOT after August 24 were "authorized by law"; and (3) whether the MDOT employees contacted were the types of employees described in the organizational comment to Rule 4.2

The comment to Rule 4.2 includes the following statement about the "authorized by law" exception: "Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter" (hereinafter referred to as the "authorized by law comment to Rule 4.2"). Although the comments to the Rules of Professional Conduct have never been adopted by the Minnesota Supreme Court, the Director's Office considers the comments helpful in interpreting the rules. This Office has taken the position that the authorized by law comment should be interpreted to mean that, if there is a specific statute, rule, case, or other source of law that allows contact with represented parties which would otherwise be prohibited by Rule 4.2, then such contact is permitted. This is true in any context, including for example the context of a controversy with a government agency.

Respondent cites Minn. Stat. § 117.055, and argues that this is a specific statute which allows attorneys for landowners to contact state employees after condemnation proceedings have been commenced. The Director disagrees with this interpretation. The statute merely says that certain documents shall be made available, and does not authorize the landowner's attorney to bypass the Attorney General's office in obtaining the documents. By contrast, an example of a court rule which authorizes direct contact with an adverse party is Rule 8.01 of the Minnesota Rules of Family Court Procedures. This requires orders to show cause and moving papers to be served upon the opposing party personally. Thus, even if the opposing party is represented by counsel, the rule authorizes personal service.

Pursuant to the Director's interpretation of the "authorized by law" exception to Rule 4.2, all of respondent's contacts with MDOT engineers after August 24, 1988, may have violated Rule 4.2. There is no specific statute or rule which permitted respondent's direct contact. The Attorney General's office had revoked any prior permission for direct contact. The MDOT engineers could apparently make statements which would constitute admissions on the part of MDOT, and were therefore the type of employee described in the organizational comment to Rule 4.2

The Director has determined, however, that no discipline of respondent is warranted for his contacts with the MDOT regarding the physical facts about the highway. When respondent contacted the MDOT about the highway, he was acting on his good faith interpretation of the authorized by law comment to Rule 4.2. This comment could, in good faith, be read as authorizing direct contact with the MDOT about the physical facts concerning the highway, since such information would be generally available to the public. Moreover, the Director's position on the meaning of the authorized by law comment has not been well publicized.

Although no discipline is warranted for respondent's contacts with the MDOT about the physical facts of the highway, respondent must be admonished for his telephone call to _____ after the pretrial conference. This contact had nothing to do with the physical facts of the highway, and therefore went well beyond any good faith interpretation of the authorized by law comment to Rule 4.2. In fact, respondent's telephone call to _____ went well beyond respondent's stated intentions in his letter of August 25, 1988: "I intend, as I have in the past, to go directly to the Highway Department offices to review drawings and to obtain copies of such drawings. I also intend to ask the Highway Department engineers to explain the drawings."

Respondent's call to _____ was not authorized by law or by the Attorney General's office. Also, as the Director of the MDOT Office of _____ and as the person at the MDOT with final settlement authority in all _____ matters, _____ had managerial authority and his statements could constitute admissions on the part of the MDOT. Respondent therefore violated Rule 4.2 when he telephoned _____.

Respondent claims that his telephone call to _____ was justified since he thought at the time that _____ had made a misrepresentation to the court about _____ availability. Such suspicions do not justify direct contact. See Florida Bar Professional Ethics Committee, Opinion 88-4 (May 1988) (digested at [1988] 4 Lawyers' Manual on Professional Conduct (ABA/BNA) 202) (suspicions that opposing counsel, who failed to appear at oral argument, had neglected his client's legal matter and also billed the client for an appearance do not justify direct contact with opposing party to investigate these suspicions). See also ABA Committee on Ethics and Professional Responsibility, Informal Opinions, No. 1348 (1975) (suspicions that opposing

counsel is not communicating settlement offers do not justify copying the adverse party on settlement correspondence).

Admonitions are appropriate for unprofessional conduct which is isolated and non-serious. Rule 8(d)(2), Rules on Lawyers Professional Responsibility. Respondent's telephone call to _____ was isolated since it only occurred once, and was non-serious since there is no clear and convincing evidence that it resulted in any actual harm to the State's position.

Although the Director has determined that no discipline is warranted with respect to respondent's other direct contacts with the MDOT, respondent is now on notice of the Director's interpretation of Rule 4.2. Any future direct contacts with the MDOT after condemnation proceedings have been commenced may subject respondent to discipline if: (1) the employee contacted is the type of employee described in the organizational comment to Rule 4.2; (2) respondent has not first obtained permission from the Attorney General's office; and (3) the direct contact is not authorized by law. Note that contact with a clerical employee for the sole purpose of obtaining copies of documents generally available to the public would ordinarily not violate Rule 4.2.

W.J.W.

EXHIBIT A

August 24, 1988

_____

Re: S.P. _____
County_____
Parcel _____
State v. _____
Court File No. _____

Dear _____:

On August 17, 1986, I was contacted by _____, Minnesota Department of Transportation. _____ informed me that he had been contacted by both you and _____, a law clerk in your office, requesting information concerning highway construction plans to which you claimed entitlement a public information for use in the above-captioned condemnation action. _____ advised both you and your law clerk that this matter was in litigation and that MnDOT was represented by the Minnesota Attorney General's Office. _____ further advised you that all requests for information must be submitted through the Attorney General's Office. Despite _____'s response and a similar response to you by _____, and also _____, you or your clerk continued to contact _____ and _____ and demand that the information be produced in less than 43 hours. It was only after you implied to _____ that you had been in contact with this office that the data was released to you. In fact, at no time did you contact me or any other attorney in this office concerning this matter. After reviewing this matter with _____, _____ and _____, it is apparent that your continued contacts and verbal harassment of MnDOT's _____ personnel constitutes an attempt to bypass proper discovery procedures.

Your conduct in this regard is improper and a violation of Rule 4.2 "Communication with Person Represented by Counsel" of the Minnesota Rules of Professional Conduct. As counsel for an adverse party in litigation, you must comply with the discovery procedures set forth in the Minnesota Rules of Civil Procedure. Even if this information is to be provided to you pursuant to the Minnesota Data Practices Act, it is improper that your request bypass MnDOT's counsel.

I trust that you will inform me immediately whether any similar requests for information about matters in litigation with MnDOT have been made by you to any other State of Minnesota employee and whether any information had been provided to you in response to said requests. I also expect that this practice will not occur in the future.

Very truly yours,

_____

Special Assistant
Attorney General
Telephone: (612) _____

EXHIBIT B

August 25, 1988

_____
Special Assistant Attorney General
_____
St. Paul, MN 55155

Re: S.P. _____
State of Minnesota v. _____
Condemnation No. _____
State of Minnesota v. _____
Condemnation No. _____
Our File Nos. _____

Dear _____:

The facts are accurately stated in a copy of my file memorandum enclosed herewith.

The accusation contained in the last sentence of the first paragraph of your letter of August 24, 1988 is unwarranted. It is not true that I "implied" to _____ that I had been in contact with your office or that your office had agreed to release the data to me. On the contrary, I told _____ and _____ that I would not contact you and that it was my view that my client and I were entitled to the information requested. I do not recall any discussion with _____.

You apparently have some concern about requests made to the Highway Department to furnish copies of the highway plans. I would be pleased to discuss this matter with you. You and I have talked on the telephone two or three time during the last few days and you did not mention this matter to me.

I believe that the Rules of Professional Conduct do not prohibit counsel in a condemnation action from communicating directly with the engineering staff concerning the physical facts about the highway. Moreover, I believe Minn. Stat. 117.055 requires the state to make the highway plans and drawings available to the owner for inspection. I intend, as I have in the past, to go directly to the Highway Department offices to review drawings and to obtain copies of such drawings. I also intend to ask the Highway Department engineers to explain the drawings. I believe this to be a uniform, proper and long accepted practice.

If the Attorney General now interprets Rule 4.2 of the Rules of Professional Conduct to mean that lawyers representing a named respondent in a condemnation petition cannot contact the engineering staff at the Highway Department for information concerning the construction of a highway, I respectfully advise that I disagree with the Attorney General's interpretation of the rule. I believe that I have acted properly and fairly. I believe that direct contact with the Highway Department is permissible and proper so long as counsel acts fairly and within the scope of Rule 3.4 of the Rules of Professional Conduct. Therefore, I intend to continue to make

such contacts in the course of my representation of respondents, or prospective respondents, in condemnation matters. However, I do not want to create controversy. The purpose of direct contact with the Highway Department engineering staff is to expedite the obtaining of information. Controversy about this practice can only be counter-productive and a waste of time of counsel, as well as the Highway Department staff. I believe any issue that exists about this practice can and should be resolved by good faith discussion. I am confident that it is not the intention of the Attorney General to impede or make it more difficult for respondents or their lawyers in condemnation actions to obtain information. There must be some other reason that the Attorney General wishes to restrict direct contact with the department. I believe that upon disclosure of the Attorney General's reasoning, we can meet the issue and resolve it.

Please get in touch with me with respect to this matter.

Very truly yours,

_____

Enc.

EXHIBIT C

August 31, 1988

_____

Re: S.P. _____
State of Minnesota v. _____
Court File No. _____
_____ County

Dear _____:

I am in receipt of your letter dated August 25, 1988. Please be advised that my client has been instructed not to release any data, drawings, or plans to provide any explanations thereof involving matters which are in litigation to any attorney or their representatives or clients until expressly instructed to do so by this office. Further controversy on this matter can certainly be avoided if all further requests for data and related information are made to the attorney assigned to the matter when the information requested pertains in any way to pending litigation.

Very truly yours,

_____
Special Assistant
Attorney General

Telephone:

bcc:

AG:3522 v1

**STATE OF MINNESOTA**
**Office of the Attorney General**

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# AGO POLICY
**on**
**Recording by Attorney General's Staff**

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## I.
## APPLICABLE LAW

Effective September 20, 1996, the Lawyers Professional Responsibility Board adopted Opinion No. 18, entitled *"Secret Recordings of Conversations."* A copy of the full Opinion is attached to this Office Policy. The Opinion prohibits a lawyer from recording, in connection with the lawyer's professional activities, any conversation without the knowledge of all parties to the conversation, with the following exceptions: (1) recording a threat to engage in criminal conduct; (2) recordings by a lawyer engaged in the prosecution or defense of a criminal matter; and (3) recordings by or at the direction of a lawyer charged with civil law enforcement authority. The Opinion also specifies that lawyers may give legal advice about the legality of recording a conversation. The legal basis for Opinion No. 18 is Minnesota Rule of Professional Conduct 8.4(c) which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation.

Failure to comply with Opinion No. 18 may subject a lawyer to discipline. See Lawyers Professional Responsibility Board Opinion No. 1; In Re Pearson, 352 N.W.2d 415 (Minn. 1984).

## II.
## OFFICE POLICY APPLIES TO RECORDING WITHOUT KNOWLEDGE

This Policy applies to circumstances in which a staff attorney, or someone else at the staff attorney's direction, is either: (a) recording a telephone conversation in which they are a participant without the knowledge of the other party or parties; or (b) recording a face-to-face conversation in which they are a participant without the knowledge of the other party or parties. The person acting at the staff attorney's direction may be, for example, another staff member, an employee of another State agency, or a member of the public (e.g., a person who has filed a consumer complaint against a company which is being investigated for possible consumer fraud).

The recording of public presentations does not appear to be covered by Opinion No. 18 or by Minnesota Rule of Professional Conduct 8.4(c), because such recording is not deceitful. This Policy therefore does not apply to the recording of public presentations. However, before secretly recording a public presentation or directing another person to do so, a staff attorney should first obtain the approval of the applicable Division Manager.

## III.
## PERMITTED RECORDING

The Lawyers Professional Responsibility Board Opinion No. 18 sets forth the circumstances in which attorneys may ethically make recordings without the knowledge of all parties to the conversation. Any decision by a staff attorney to record without the knowledge of all parties to the conversation must meet the following conditions:

1. The recording must not violate Opinion No. 18.

2. The staff attorney must reasonably believe that the recording will be an effective means of gathering evidence.

3. The recording must conform to applicable constitutional, statutory, and decisional requirements.

4. Except in the case of recording a threat to engage in criminal conduct, the recording must be approved by the respective Division Manager. Such approval may be, for example, on a case-by-case basis or in the form of pre-approved categories in instances in which recording is permissible. Staff attorneys or staff members under an attorney's direction are encouraged to seek approval by the respective Division Manager where possible before recording a threat to engage in criminal conduct. Staff attorneys or staff members who have recorded or directed the recording of a threat to engage in criminal conduct must notify the Division Manager immediately after the recording has been made.

5. The contact with the person being recorded must not violate Minnesota Rule of Professional Conduct 4.2 or any other Minnesota Rule of Professional Conduct.

6. Except in the case of recording a threat to engage in criminal conduct, the State's interest in the subject matter of the recording must be law enforcement related. The State's interest cannot be analogous to a private party's interest, for example, enforcement or defense of contracts to which the State is a party, defending tort actions, or litigation involving construction or real estate.

## IV.
## DECISION TO RECORD

Although staff attorneys may make and direct recordings consistent with this Policy, this Policy does not require a staff attorney to record or direct or approve recording by others.

Recording permitted under this Policy is not precluded merely because litigation has been commenced.

(Distributed Aug. 14, 1997)

AG:32897 v

# AGO Policy on Requests by State Employees to State of Minnesota for Legal Defense

When a state employee is sued because of something that happened during the course of employment, the state or the state agency and additional employees are often also named as parties.[1] An employee or elected official who desires state representation must submit the appropriate form to obtain representation. Samples of the appropriate forms for state employees and elected officials ("Request") follow this document. Staff attorneys should obtain the current version of the Request from their Office Manager. Generally, our office assigns one attorney who represents both the state and the employee or employees named. Joint representation raises two ethical concerns for lawyers: (1) issues about conflicts of interest, and (2) issues about communications between lawyers and the co-clients. The Request lays out for the employee important information about both of these issues. By signing the Request, the employee agrees to have certain communications shared with others.[2]

## CONFLICTS

A potential for a conflict of interest always exists when multiple state defendants are named in a lawsuit. Conflicts may be apparent at the outset or they may arise during the course of litigation. A conflict may be apparent initially, for example, because the state contends that the employee was acting outside the scope of employment. In that event, the Office will not represent the employee, since the employee's right to defense and indemnification depend on the employee's having acted within the scope of employment. See Minn. Stat. § 3.736, subd. 9 (1996).

Conflicts may also arise because the attorney, during the course of litigation, acquires information that reveals adverse interests between the employee and the state or between employee defendants. The information could be adverse to the employee in the course of litigation or it could be adverse in the context of matters unrelated to the lawsuit. In a tort action, for example, the attorney may learn of employee actions unrelated to the lawsuit that could subject the employee to disciplinary action by the agency.

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[1] The term "employee" in this document includes all state employees whether elected, appointed or engaged.

[2] Lawsuits against elected officials present special communications issues, depending on the official sued. The attorney may have communications with the state court administrator or the Supreme Court if a judge is sued, for example, whereas communications in a suit against a constitutional officer would be dealt with differently. Because suits against elected officials involve distinct circumstances, the attorney may need to tailor the Elected Official Request to fit the situation. The attorney should do this in consultation with the Assistant Solicitor General.

Rule 1.7 of the Minnesota Rules of Professional Conduct describes the circumstances under which an attorney must not represent co-clients. Under the rule, an attorney generally should not undertake representation of co-clients if a conflict exists. See Rule 1.7, Comment. As a consequence, the attorney should, at the outset, inquire of the state employee whether the person knows of any conflicts or potential conflicts. Once it becomes clear that the Office will not be representing an employee, the attorney should take care to comply with Rules 4.2 and 4.3, dealing with represented or unrepresented persons.

The Request is intended to inform state employees about the potential for conflict, to advise them of what may happen if a conflict arises, and to explain the need to bring any conflicts to the attorney's attention.

## ATTORNEY-CLIENT COMMUNICATION

Rule 1.6 restricts an attorney's communication of a client's confidences and secrets. The fiduciary relationship between attorney and client requires this. In addition, the rule recognizes the need for the free flow of information between attorney and client to assist in fully developing facts. The assurance of confidentiality furthers the sharing of information. See Rule 1.6, Comment. Under Rule 1.6(b)(1), information received from a client and certain other information gained by the attorney during the representation may be communicated to another if the client has consented after consultation.

There is substantial authority indicating that sharing with one co-client information obtained from another is permitted as an exception to the attorney-client privilege, see Restatement, the Law Governing Lawyers § 125, and therefore to the ethical rule governing confidentiality. See Rule 1.6(b)(1). Indeed, such communication may be required. See Rule 2.2, Comment. According to some authority, however, permission to share communications among co-clients should not be inferred from the fact of joint representation. See New York State Ethics Op. 555 (1984). As a consequence, the employee must be informed that information relevant to the lawsuit will be shared with the employing agency, as discussed below. It is the office's position that the employee cannot object to the provision of the Request about sharing information because a state employee must cooperate fully in the defense and provide complete disclosure, see Minn. Stat. § 3.736, subd. 9 (1996), even when information provided may be detrimental to the employee.

The Request advises the state employee about two types of communications: those related to the lawsuit and those unrelated to it.

### Communications Relevant to the Lawsuit

The Request adopts the approach that communication of information relevant to the lawsuit may be freely shared among co-clients and informs the employee that information will be shared even if it might have an adverse impact on the employee. The Request further advises the employee that information relevant to the lawsuit may be shared with the employee's state agency even when the agency is not a party to the litigation. This approach is taken because the agency, as a decision maker in the litigation, must have all relevant information to help it decide matters like settlement. The agency needs this information whether it is a party or not; hence the provision in the Request informing the employee that the agency will receive all relevant

information, regardless of its status as a party. This approach is consistent with the employee's duty to cooperate. The employee's right to representation and indemnification is premised on the employee's making complete disclosure and cooperating fully. See Minn. Stat. § 3.736, subd. 9.

**Communication Not Relevant to the Lawsuit**

At any time during a lawsuit, the attorney may acquire information about the state employee that is not relevant to the lawsuit. The Request informs the employee that this information will not be communicated to the state agency. Although this method of dealing with nonrelevant communications seems clear enough, two issues may arise.

First, the attorney is responsible for determining whether the information is relevant to the lawsuit. Often this decision will be straightforward. Material that surfaces during discovery, however, may be difficult to categorize. The attorney should discuss any relevance issues with the attorney's manager or a member of the Office Ethics Committee. Second, the information concerning an employee may make it inadvisable for the attorney to continue representing the employee. Generally, another attorney will be appointed under these circumstances.

## ADDITIONAL ADVICE TO CLIENTS

Any time an attorney undertakes representation, the attorney should apprise the client of the facts alleged, their significance and the foreseeable adverse consequences that may follow from them. Claim for punitive damages may present difficult issues. Before advising a client about punitive damages, the staff attorney may wish to confer with colleagues in the Solicitor General Section. In addition, the attorney should inform the state employee that:

- -- the state may discontinue representation if it is determined later that the employee's actions were not within the scope of employment
- -- if the employee wishes to assert claims against a co-defendant, private counsel will be necessary
- -- unrestricted disclosure of relevant communications to the agency means the agency may use information gained by the attorney to take a position adverse to the employee in the context of the lawsuit
- -- unrestricted disclosure of relevant communications to the agency also means the agency may use information gained by the attorney to take adverse action against the employee outside the context of the lawsuit
- -- the employee's obligation to cooperate in the defense includes an obligation not to share information about a co-client with persons outside the lawsuit
- -- before signing the Request, the employee is free to consult with a private attorney at his or her own expense

If you have questions about the foregoing, please contact the Assistant Solicitor General.

AG:95541 v1

**STATE EMPLOYEE**
**REQUEST TO STATE OF MINNESOTA**
**FOR LEGAL DEFENSE AND INDEMNIFICATION**

RE:

Court File No. _____

Name of Person Requesting Representation:

## CONDITIONS OF REPRESENTATION

You must sign and return this form to request legal representation by the State of Minnesota, Office of the Attorney General. Your representation will be governed by Minn. Stat. §§ 3.732 and 3.736 (1996). Minn. Stat. § 3.736, subd. 9, which specifically addresses representation and indemnification of state employees, is reproduced at the end of this form for your convenience.

The following summarizes the major features of the extent and nature of legal representation that the Attorney General can provide to you. Your signature indicates your understanding of and agreement to such representation. Before you sign this form, you are free to consult with an Assistant Attorney General or, if you prefer, with a private attorney at your own expense. If you do not sign this form, the Attorney General will not represent you. Instead of signing this form, you may hire your own counsel at your own expense.

### (1) Certification by Appointing Authority

Representation is provided under the statute upon a determination that the conduct alleged in the complaint was within the scope of your employment as an employee of the State of Minnesota. After you have signed and returned this request, your appointing authority will be asked to certify that you were acting within the scope of your employment. The Attorney General will review the certification and will not represent you if, in the opinion of the Attorney General, the conduct alleged did not occur within the scope of your employment. If this happens, you must arrange for your own defense. Also, if your conduct involves malfeasance in office, willful or wanton conduct, or neglect of duty within the meaning of section 3.736, subdivision 9, the State will not defend you. Under these circumstances, you must arrange for your own defense of the lawsuit. If the Attorney General determines you are entitled to defense by the State, a lawyer from the Attorney General's Office will be assigned to represent you. The remainder of this form refers to this lawyer as "your attorney."

**(2) Disclosure and Cooperation**

The State's agreement to defend and indemnify you is conditioned on your complete disclosure to your attorney of all information known or learned by you concerning the events or matters at issue in the lawsuit and your full cooperation in the defense of the lawsuit.

**(3) Representation of Co-Defendants**

There may be additional defendants named in the complaint. If these co-defendants are the State of Minnesota itself, a State agency, officer or employee, they may be represented by the same lawyer from the Attorney General's Office who is representing you. Your attorney will advise you if there are co-defendants and if there will be joint representation of the co-defendants by the same attorney.

Joint representation of co-defendants normally is not permitted if there are conflicts of interest, whether factual or legal, between you and any of your co-defendants. If there is a conflict of interest between you and any of your co-defendants, your attorney will advise you of this and discuss available options. Correspondingly, should you ever become aware of such conflicts, you should immediately bring them to the attention of your attorney.

**(4) Attorney-Client Communications**

All written or oral communications between you and your attorney will be protected by the attorney-client privilege, which means that the attorney normally will not share the communications with persons other than co-defendants. Information relevant to the lawsuit, however, may be required by law to be disclosed to the opposing party. In addition, communications may be shared with your employer agency or others, as explained below.

**a. Information relevant to the lawsuit.**

If your attorney represents co-defendants in this case, information relevant to the lawsuit provided to your attorney by any co-defendant can be shared with any other co-defendant. Information relevant to the lawsuit can be shared with co-defendants even if it could have some adverse effect on you outside of the lawsuit.

The concept of relevance is broad. For example, the agency may need the information to assess the strengths and weaknesses of the case. If you have questions concerning relevance, you should discuss them with your attorney.

Information relevant to the lawsuit that you provide to your attorney can be communicated to the State agency that employs you, even if the agency is not a named co-defendant and even if it could have some adverse effect on your employment relationship. If the information indicates that a conflict of interest exists between you and a co-defendant or your employer agency, whether in the context of the lawsuit or otherwise, your attorney may have to withdraw from representing you, the co-defendant or the agency.

**b. Information not relevant to the lawsuit.**

Information you provide to your attorney that the attorney determines is not relevant to the lawsuit will not be communicated to any of your co-defendants or your employer agency. However, if the information indicates that a conflict of interest exists between you and a co-defendant or your employer agency, the attorney may have to withdraw from representing you, the co-defendant or the agency.

Generally, in the event the attorney withdraws from representing you as described in (4) a. or b., other arrangements will be made for your representation in the lawsuit.

**(5) Affirmative Claims**

As a general policy, your attorney can only defend you. He or she will not assert an affirmative claim on your behalf against the plaintiff or anyone else. If you believe that such a claim should be asserted, your normal recourse is to hire a private attorney at your personal expense to press that claim. In the rare instance when an affirmative claim would further the interests of the State of Minnesota in addition to yours, the Attorney General's Office will consider bringing the claim.

**(6) Paying Adverse Judgments**

Indemnification means that, if an adverse money judgment for compensatory damages and/or attorneys fees is entered against you in this matter, the State will pay the judgment on your behalf, provided you were acting within the scope of your employment and you did not engage in malfeasance, willful or wanton conduct or neglect of duty. If a claim for punitive damages is made against you, your attorney will discuss with you the significance and potential consequences of such a claim.

**REQUEST FOR LEGAL DEFENSE AND INDEMNIFICATION**

On _____ __, 199__, I received a copy of the Summons and Complaint in the above-referenced matter in which I am named as a defendant. Pursuant to Minn. Stat. § 3.736, subd. 9 (1996), I hereby request legal representation in this matter by the Attorney General and indemnification by the State of Minnesota. The allegations against me in this suit pertain wholly to activities within the scope of my employment. I promise to provide to the Office of the Attorney General complete disclosure of all facts known to me or learned by me, and I further promise to cooperate fully with the Attorney General's Office in the defense of this lawsuit. I have read and understand and agree to the foregoing conditions of representation by the Attorney General's Office.

Dated: _____ _____

**Minn. Stat. § 3.736, subd. 9 (1996):**

The state shall defend, save harmless, and indemnify any employee of the state against expenses, attorneys' fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the employee in connection with any tort, civil, or equitable claim or demand, or expenses, attorneys' fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the employee in connection with any claim or demand arising from the issuance and sale of securities by the state, whether groundless or otherwise, arising out of an alleged act or omission occurring during the period of employment if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee was acting within the scope of employment. Except for elected employees, an employee is conclusively presumed to have been acting within the scope of employment if the employee's appointing authority issues a certificate to that effect. This determination may be overruled by the attorney general. The determination of whether an employee was acting within the scope of employment is a question of fact to be determined by the trier of fact based upon the circumstances of each case:

(i) in the absence of a certification,

(ii) if a certification is overruled by the attorney general,

(iii) if an unfavorable certification is made, or

(iv) with respect to an elected official.

The absence of the certification or an unfavorable certification is not evidence relevant to a determination by the trier of fact. It is the express intent of this provision to defend, save harmless, and indemnify any employee of the state against the full amount of any final judgment rendered by a court of competent jurisdiction arising from a claim or demand described herein, regardless of whether the limitations on liability specified in subdivision 4 or 4a are, for any reason, found to be inapplicable. This subdivision does not apply in case of malfeasance in office or willful or wanton actions or neglect of duty, nor does it apply to expenses, attorneys' fees, judgments, fines, and amounts paid in settlement of claims for proceedings brought by or before responsibility or ethics boards or committees.

AG:77635 v1

# ELECTED OFFICIAL
# REQUEST TO STATE OF MINNESOTA
# FOR LEGAL DEFENSE AND INDEMNIFICATION

Re:

Court File No.

Name of Person Requesting Representation:

## CONDITIONS OF REPRESENTATION

You must sign this form to request legal representation by the State of Minnesota, Office of the Attorney General. Your representation will be governed by Minn. Stat. §§ 3.732 and 3.736 (1996). Minn. Stat. § 3.736, subd. 9, which specifically addresses representation and indemnification of state employees, including elected officials, is reproduced at the end of this form for your convenience.

The following summarizes the major features of the extent and nature of legal representation that the Attorney General can provide to you. Your signature indicates your understanding of and agreement to such representation. Before you sign this form, you are free to consult with an Assistant Attorney General or, if you prefer, with a private attorney at your own expense. If you do not sign this form, the Attorney General will not represent you. Instead of signing this form, you may hire your own counsel at your own expense.

**(1) Determination Regarding Scope of Employment**

Representation and indemnification are provided under the statute for employees who were acting within the scope of their employment as an employee of the State of Minnesota. The determination of whether an elected official was acting within the scope of employment is a question to be determined by the trier of fact. If your conduct involves malfeasance in office, willful or wanton conduct, or neglect of duty within the meaning of section 3.736, subdivision 9, the State will not defend you. Under these circumstances, you must arrange for your own defense of the lawsuit. If the State will defend you, a lawyer from the Attorney General's Office will be assigned to represent you. The remainder of this form refers to this lawyer as "your attorney."

**(2) Disclosure and Cooperation**

The State's agreement to defend and indemnify you is conditioned on your complete disclosure to your attorney of all information known or learned by you concerning the events or matters at issue in the lawsuit and your full cooperation in the defense of the lawsuit.

**(3) Representation of Co-Defendants**

There may be additional defendants named in the complaint. If these co-defendants are the State of Minnesota itself, a State agency, officer or employee, they may be represented by the same lawyer from the Attorney General's Office who is representing you. Your attorney will advise you if there are co-defendants and if there will be joint representation of the co-defendants by the same attorney.

Joint representation of co-defendants normally is not permitted if there are conflicts of interest, whether factual or legal, between you and any of your co-defendants. If there is a conflict of interest between you and any of your co-defendants, your attorney will advise you of this and discuss available options. Correspondingly, should you ever become aware of such conflicts, you should immediately bring them to the attention of your attorney.

**(4) Attorney-Client Communications**

All written or oral communications between you and your attorney will be protected by the attorney-client privilege, which means that the attorney normally will not share the communications with persons other than co-defendants. Information relevant to the lawsuit, however, may be required by law to be disclosed to the opposing party. In addition, communications may be shared with others, when necessary or appropriate, as described below.

**a. Information relevant to the lawsuit.**

If your attorney represents co-defendants in this case, information relevant to the lawsuit provided to your attorney by any co-defendant can be shared with any other co-defendant. Information relevant to the lawsuit can be shared with co-defendants even if it could have some adverse effect on you outside of the lawsuit.

The concept of relevance is broad. For example, the agency may need the information to assess the strengths and weaknesses of the case. If you have questions concerning relevance, you should discuss them with your attorney.

Information relevant to the lawsuit that you provide to your attorney may be communicated to responsible officials in your branch of government even if neither those officials nor the State is a named co-defendant, and even if it could have some adverse effect on you. Your attorney will discuss with you the circumstances under which this might occur and which state officials may receive information related to the lawsuit. If the information indicates that a conflict of interest exists between you and a co-defendant, whether in the context of the lawsuit or otherwise, your attorney may have to withdraw from representing you or the co-defendant.

**b. Information not relevant to the lawsuit.**

Information you provide to your attorney that the attorney determines is not relevant to the lawsuit will not be communicated to any of your co-defendants or other state employees. However, if the information indicates that a conflict of interest exists between you and a co-defendant, the attorney may have to withdraw from representing you or the co-defendant.

Generally, in the event the attorney withdraws from representing you as described in (4) a. or b., other arrangements will be made for your representation in the lawsuit.

**(5) Affirmative Claims**

As a general policy, your attorney can only defend you. He or she will not assert an affirmative claim on your behalf against the plaintiff or anyone else. If you believe that such a claim should be asserted, your normal recourse is to hire a private attorney at your personal expense to press that claim. In the rare instance when an affirmative claim would further the interests of the State of Minnesota in addition to yours, the Attorney General's Office will consider bringing the claim.

**(6) Paying Adverse Judgments**

Indemnification means that, if an adverse money judgment for compensatory damages and/or attorneys fees is entered against you in this matter, the State will pay the judgment on your behalf, provided you were acting within the scope of your employment and you did not engage in malfeasance, willful or wanton conduct or neglect of duty. If a claim for punitive damages is made against you, your attorney will discuss with you the significance and potential consequences of such a claim.

**REQUEST FOR LEGAL DEFENSE AND INDEMNIFICATION**

On _____ ___, 199__, I received a copy of the Summons and Complaint in the above-referenced matter in which I am named as a defendant. Pursuant to Minn. Stat. § 3.736, subd. 9 (1996), I hereby request legal representation in this matter by the Attorney General and indemnification by the State of Minnesota. The allegations against me in this suit pertain wholly to activities within the scope of my employment. I understand that, as an elected official, the final determination of whether I was acting in the scope of my employment relative to the allegations in the complaint is to be made by the trier of fact. I promise to provide to the Office of the Attorney General complete disclosure of all facts known to me or learned by me, and I further promise to cooperate fully with the Attorney General's Office in the defense of this lawsuit. I have read and understand and agree to the foregoing conditions of representation by the Attorney General's Office.

Dated: _____, 199__ _____

**Minn. Stat. § 3.736, subd. 9 (1996):**

The state shall defend, save harmless, and indemnify any employee of the state against expenses, attorneys' fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the employee in connection with any tort, civil, or equitable claim or demand, or expenses, attorneys' fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by the employee in connection with any claim or demand arising from the issuance and sale of securities by the state, whether groundless or otherwise, arising out of an alleged act or omission occurring during the period of employment if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee was acting within the scope of employment. Except for elected employees, an employee is conclusively presumed to have been acting within the scope of employment if the employee's appointing authority issues a certificate to that effect. This determination may be overruled by the attorney general. The determination of whether an employee was acting within the scope of employment is a question of fact to be determined by the trier of fact based upon the circumstances of each case:

(i) in the absence of a certification,

(ii) if a certification is overruled by the attorney general,

(iii) if an unfavorable certification is made, or

(iv) with respect to an elected official.

The absence of the certification or an unfavorable certification is not evidence relevant to a determination by the trier of fact. It is the express intent of this provision to defend, save harmless, and indemnify any employee of the state against the full amount of any final judgment rendered by a court of competent jurisdiction arising from a claim or demand described herein, regardless of whether the limitations on liability specified in subdivision 4 or 4a are, for any reason, found to be inapplicable. This subdivision does not apply in case of malfeasance in office or willful or wanton actions or neglect of duty, nor does it apply to expenses, attorneys' fees, judgments, fines, and amounts paid in settlement of claims for proceedings brought by or before responsibility or ethics boards or committees.

AG:79716 v1

# AGO POLICY ON USE OF PORTABLE TELEPHONES[3] OR ELECTRONIC MAIL WHEN COMMUNICATING PRIVILEGED OR CONFIDENTIAL INFORMATION

## I. INTRODUCTION

Communications via cordless and analog cellular telephones can fairly easily be intercepted by others.[4] Electronic Mail ("E-Mail") via the Internet, outside the state hub system,[5] is also susceptible to interception. In contrast, cellular telephone communications in which digital technology and service are used, as explained below, are considered to be a secure method for communicating confidential information. Likewise, our office's internal E-Mail communication system, and messages sent via the Internet on the state hub system, are considered to be secure methods for communicating confidential information.[6]

Digital cellular telephones are a recent technological development. While only a small portion of cellular telephone communications now use digital technology, use of digital cellular telephones, and the service areas within which digital technology is available[7], are expanding

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[3] The term "portable telephones" is used to refer collectively to cordless and cellular phones.

[4] A cordless telephone receives and transmits signals from the telephone base to the hand-held unit. An analog cellular telephone receives and transmits signals from the cellular phone to other telephones through several radio frequencies that move through cell stations in varying locations. While analog cellular and cordless telephones are similar in that they both receive and transmit signals, the stationary nature of a cordless telephone eliminates the constant frequency changes associated with cellular telephones and therefore makes the cordless telephone more susceptible to interception.

[5] The state hub system was recently developed to provide a secure system for communicating on the Internet between state agencies. Although the Attorney General's Office is connected to the state hub system, not all state agencies currently are on the system. To enjoy the security afforded by the state hub system, both the sending and receiving agency must be connected to the state hub. If you are not sure whether the agency with which you are communicating is on the state hub system, contact the office's system staff.

[6] At the time of this writing, the AGO is contemplating the purchase and implementation of E-Mail software which is capable of encryption for use by some or all staff attorneys. Such software may only be used with a recipient who has compatible software capable of un-encrypting the E-mail transmission. Many other state agencies already have or plan to purchase software capable of un-encryption. Use of encryption technology would be considered secure for purposes of communicating confidential or privileged information with a client. See, e.g., Illinois Advisory Op. 96-10 (1997).

[7] At the time of this writing, digital technology service in Minnesota is available only in the Twin Cities metropolitan area. When a digital cellular telephone is used outside the service area within

(Footnote Continued On Next Page.)

dramatically. Digital cellular technology is exceptionally difficult to intercept.[8] Use of a digital cellular telephone in a digital service area when the other party to the call is using a digital or landline phone (hereinafter, "digital cellular telephone call") should therefore be considered a secure method of communication. Since digital technology will likely displace analog technology in the foreseeable future, the precautions contained in this policy for relatively unsecure methods of communication presumably will not pertain to most cellular telephone communications in the future.

## II. POLICY.

In view of the potential for interception of portable telephone calls, other than digital cellular telephone calls, and E-Mail messages via the Internet, outside the state hub system, staff members should refrain, if possible, from engaging in privileged or confidential conversations while using such modes of communication.[9]

## III. STATEMENT OF SUPPORT.

### A. Statutory Protection of Portable Telephone Communications Does Not Guarantee Privacy Of Conversation.

The unauthorized interception of portable telephone conversations is generally prohibited by the Electronic Communications and Privacy Act ("ECPA"). See 18 U.S.C. § 2511(1) (1996). See also Minn. Stat. § 626A.02, subd.1 (1996) (Minnesota Privacy of Communications Act prohibits same). Moreover, if there is an intentional interception of a communication containing privileged attorney-client information, whether done with authorization for law enforcement purposes[10] or done illegally, the attorney-client privilege is not lost because "[n]o otherwise privileged wire, oral, or electronic communications intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." See 18 U.S.C. §

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which digital technology is available, the phone is usually programmed to switch automatically to use of analog cellular technology.

[8] Unlike other portable telephone communications in which frequencies over the airwaves transmit the communication at least in part, digital cellular technology uses a digital format which cannot be understood without a digital analyzer. Further, the digital code used in digital cellular technology changes repeatedly and rapidly as the person with the digital phone moves through varying locations, making it exceptionally difficult, even with a digital analyzer, to intercept the communication.

[9] If a staff member is using a method of communication other than those addressed herein which presents similar security concerns, this policy should be used as guidance. If the staff member has any questions regarding the application of this policy to a particular form of communication, a member of the Office Ethics Committee should be consulted.

[10] Both the ECPA and the Minnesota Privacy of Communications Act authorize interception pursuant to a lawfully executed court order for specific law enforcement purposes when appropriate criteria are met. See 18 U.S.C. § 2516 (1996); Minn. Stat. § 626A.09 (1996).

2517(4) (1996); Minn.Stat. § 626A.09, subd.4 (1996). Furthermore, the ECPA provides that illegally intercepted communications may not be introduced as evidence in any trial or hearing. See 18 U.S.C. § 2515 (1996). See also Minn. Stat. § 626A.04 (1996).

Inadvertent interception is arguably neither in accordance with, nor in violation of, the provisions of the ECPA and the Minnesota Privacy of Communications Act. See 1986 U.S. Code Cong. & Admin. News at 3577 (noting that under the ECPA, the state of mind requirement for a violation has been heightened to underscore that inadvertent interceptions are not crimes); Minn. Stat. § 626A.02, subd.1 (same state of mind requirement as that in the ECPA). The statutory preservation of the privilege and evidentiary exclusion therefore may not apply when a communication is inadvertently intercepted by a third party. This possible gap in the law has not yet been addressed by a published judicial or ethics opinion.

While the ECPA does prohibit the intentional, unauthorized interception of portable telephone communications, it does not guarantee privacy while using a portable telephone. Privileged portable telephone communications, other than digital cellular telephone calls, may still be readily intercepted, whether done illegally or unintentionally.

B. State Bar Association Opinions Regarding Portable Telephone Conversations.

Although the ethical implications of communicating while using portable telephone technology have not been specifically addressed by a published judicial opinion, state bar associations have discussed these issues. Illinois State Bar Ass'n. Op. 90-7 (1990) and Iowa State Bar Ethics Op. 9 (1991) state that cordless and analog[11] cellular communications are not secure for maintaining confidential conversations. Nevertheless, the opinions reason that an attorney has no obligation, when communicating with a client, to inquire whether the client is using a portable telephone. The two opinions also conclude that if an attorney is aware that a cordless or analog cellular telephone is being used, the client should be informed:

1. regarding the lack of security of cordless and analog cellular telephones for maintaining confidential conversations, i.e., that phone conversations in which either party is using such technology are susceptible to interception by others; and

2. regarding waiver of the attorney-client privilege.

North Carolina Bar Ass'n. Op. RPC 215 (1995) similarly reasons that "a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication via a[n analog] cellular or cordless phone." See id. at 1-2. The opinion further states that when an attorney knows or has reason to know that a cordless or analog cellular phone is being used, the attorney must apprise the other parties to the communication of the possibility of interception and lost confidentiality. See also Arizona Ethics Op. 95-11 (1995) (cautioning lawyers against discussing sensitive information via analog cellular or cordless phones despite illegality of interception); Massachusetts Ethics Op. 94-5 (1994) (lawyer should not discuss confidential

[11] Since the opinions cited in this section pre-date the general availability of digital cellular phone technology and do not mention this new and far more secure technology, the opinions are presumed to refer to analog cellular phones when they refer to cellular phones.

information with client on analog cellular telephone without client's informed consent); New York City Ethics Op. 1994-11 (1994) (lawyers should use caution when discussing client matters on an analog cellular or cordless phone and should consider taking steps such as encryption which are sufficient to ensure security of such conversations); New Hampshire Ethics Op. 1991-92/6 (1991) (lawyer should not discuss client information on analog cellular or cordless telephones unless the client consents after the lawyer has disclosed that this method of communication may be unsecure and confidentiality may be invaded).

Significantly, none of these opinions addresses the applicability of the ECPA provision which preserves the privilege for portable telephone communications that have been intercepted illegally or with authorization for law enforcement purposes.[12] Possibly, these opinions intentionally refrain from reliance on the ECPA's preservation of the privilege due to its possible gap with respect to unintentional interceptions. Given the absence of any reference to the provision at all, it appears more likely that the provision is being routinely overlooked in the analysis of issues related to waiver of the privilege and the duty of confidentiality.

C. Statutory Protection of E-Mail Does Not Guarantee Privacy of E-Mail Sent via the Internet, Outside the State Hub System.

As indicated above, use of the E-Mail via the Internet, outside the state hub system, presents security concerns. However, such communications do have statutory protection. The ECPA and its Minnesota counterpart prohibit the intentional, unauthorized interception of E-Mail, except when the E-Mail is configured so that it is accessible to the general public.[13] See 18 U.S.C. § 2511(1) (1996); Minn.Stat. § 626A.02, subd.2(e)(1) (1996). As previously noted for portable telephones, the intentional interception of E-Mail containing privileged attorney-client information, whether done illegally or with authorization for law enforcement purposes, does not result in the loss of the privilege.[14] See 18 U.S.C. § 2517 (4) (1996); Minn. Stat. § 626A.09, subd. 4 (1996).

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[12] This provision had been added to the ECPA and had applicability to cellular telephone communications prior to the release of these opinions. Its applicability was expanded in 1994 to include cordless telephone communications, prior to the release of several of these opinions. See 1994 Pub. L. 103-414, § 202(a)(1) and (2).

[13] An example of an E-mail communication which is accessible to the general public is an E-mail message sent to a public electronic bulletin board.

[14] The ECPA and its preservation of the privilege pertain only to E-mail messages while being transmitted, and not to stored E-mail messages. Nevertheless, it is illegal to obtain stored data without proper authority (see 18 U.S.C. 2701(a)) and it is generally more difficult to obtain a stored message in a secure computer than it is to intercept a message while in transmission. One commentator has therefore concluded that "[t]here is no similar [privilege] provision (and none is needed) for electronically stored data . . . because there is no waiver of privilege when a thief steals a document out of a file cabinet any more than there is a waiver when the file is in digital form and the break-in occurs through the phone line." Albert Gidari, Privilege and Confidentiality in Cyberspace (visited Aug. 15, 1997) <http://www.perkinscoie. com>. While there is no universal rule that a criminal act causing disclosure of privileged information will not result in a finding of implied waiver, the level of criminal sophistication needed to evade a

(Footnote Continued On Next Page.)

Like portable telephone communications, these statutory protections do not guarantee privacy for E-Mail. Issues related to the attorney-client privilege and the ethical duty of confidentiality must therefore be considered with respect to the use of E-Mail.

Several state bar association opinions address whether a lawyer's use of E-Mail to communicate confidential information to a client violates the ethics rules. Early opinions held that a lawyer's use of E-Mail to communicate confidential information to a client would violate the ethical duty to maintain client confidences, unless the lawyer had first obtained an express waiver of the attorney-client privilege or had encrypted the message. See South Carolina Bar Advisory Op. 94-27 (Jan. 1995); Iowa Supreme Court Board of Professional Ethics and Conduct, Formal Op. 96-01 (1996). More recent opinions reflect what appears to be a growing trend recognizing that, absent unusually sensitive information, unencrypted E-Mail should generally be considered sufficiently secure for lawyers to communicate with clients, despite the possibility of interception. Many of these opinions contain caveats, as explained below.

The Arizona State Bar Committee on Rules of Professional Conduct recently concluded in Opinion 97-04 (April 7, 1997) that a lawyer's use of unencrypted E-Mail to communicate with a client does not violate the ethics rules. The Committee further indicated, though, that lawyers who do so should use caution and include a statement indicating that the transmission is confidential, and even suggested that a lawyer may want to err on the side of caution and use encryption. Other recent opinions similarly conclude that a lawyer's use of unencrypted E-Mail to communicate with a client generally does not violate the ethics rules, absent unusual circumstances or the presence of "sensitive information" requiring enhanced security measures. See Illinois Advisory Op. 96-10 (1997) (lawyer does not violate duty of confidentiality by communicating with a client using unencrypted E-Mail on the Internet without client consent, absent unusual circumstances involving "an extraordinarily sensitive matter" that might require enhanced security measures); Vermont Bar Ass'n. Advisory Ethics Op. 97-05 (1997) (concurring with Illinois opinion and adopting its reasoning and sources); South Carolina Bar Advisory Op. 97-08 (June 1997) (use of unencrypted E-Mail without an express waiver does not violate the ethics rules); North Dakota Bar Ass'n. Ethics Op. 97-09 (1997) (unless unusual circumstances require enhanced security measures, lawyers may communicate with clients using unencrypted E-Mail); Iowa Supreme Court Board of Professional Ethics and Conduct, Formal Op. 97-01 (1997) (lawyer must first obtain a written acknowledgment of risk and consent from client before transmitting "sensitive material" via unencrypted e-mail on Internet, but is not required to do so for "pure exchange of information or legal communication with client"). Notably, in so finding, the South Carolina Bar reversed an earlier opinion, and the Iowa Bar substantially amended a prior opinion.

In short, recent state bar association opinions seem to reflect growing acceptance of lawyers' use of E-Mail to communicate with clients, though not without caveats. As noted, the

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computer security system and access stored electronic data would likely militate against such a finding. See also United States v. Maxwell, 42 M.J. 568, 575 (1995) (under Fourth Amendment analysis, accused had a reasonable expectation of privacy in stored E-mail messages transmitted electronically to other America Online subscribers who had individually assigned passwords needed to retrieve messages).

opinions contain cautionary language suggesting that some information is of such a confidential nature that a prudent attorney would be reluctant to use E-Mail, or should do so only if encryption is used. See note 6 supra. Further, as with portable telephone communications, it is not clear whether the ECPA's statutory protection of the privilege applies to E-Mail communications that are inadvertently intercepted. See analysis supra III.A. See also Joan C. Rogers, Ethics, Malpractice Concerns Cloud E-Mail, On-Line Advice, 12 Law. Man. Prof. Conduct 59 (1996); William P. Matthews, Comment, Encoded Confidences: Electronic Mail, The Internet, And The Attorney-Client Privilege, 45 U. Kan. L. Rev. 273 (1996).

## IV. PRECAUTIONS.

In accordance with the office policy of refraining when possible from the use of relatively unsecure methods of communication for privileged or otherwise confidential conversations, the following precautions should be taken by a staff member who is aware that he or she may be communicating privileged or confidential information with a person by the use of such devices. Relatively unsecure methods of communication include portable telephones, other than digital cellular telephones used in a digital service area with another party who is on a landline or digital phone, or E-Mail via the Internet, outside the state hub system. If a staff member is using such an unsecure method of communication, or if a staff member is aware that the person with whom he or she is communicating is using one of these unsecure forms of communication, the staff member should[15]:

A. inform the person of the use of the unsecure form of communication and that any communication conducted in this manner could be intercepted by others;

B. inform the person of the consequences of interception, including the possible loss of attorney-client privilege with respect to the communication. Explain that laws generally protect the privilege when a communication is intentionally intercepted, but that it is unclear whether the privilege would be preserved if a communication were to be inadvertently intercepted.[16] (See analysis in III, supra). If you are

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[15] Remember also that, as with all written communications to clients that contain confidential information, staff attorneys should consider using with an E-Mail containing confidential information a notice emphasizing the protected nature of the communication. This is true for E-Mails sent via the state hub system and E-Mails sent outside the state hub system. See Office Comment 1.6.

[16] If the staff member has previously informed the person with whom he or she is communicating of the possibility of interception and loss of the attorney-client privilege, and the staff member knows that the person with whom he or she is communicating is aware of that risk, then it may not be necessary to repeat this warning during each subsequent communication. In this regard, a staff member should use his or her discretion in deciding whether it is necessary to repeat the warning to ensure that the person is aware of the consequences of using this form of communication.

communicating with a client, make sure the client agrees to assume the risk of interception and the possible loss of the attorney-client privilege[17];

C. consider using a more secure method of communication which, under the circumstances, would reasonably facilitate the exchange of information (e.g., conventional telephone, fax or mail). If a more secure form of communication is, under the circumstances, a viable alternative, then such form of communication should be used.

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[17] Staff members should be cautious about whether an attorney-client privilege exists and which employees of a client agency may waive the attorney-client privilege. Generally, a privilege exists where: (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his/her superior; (3) the superior made the request so that the organization could secure legal advice; (4) the subject matter of the communication is not disseminated beyond those persons who, because of the organizational structure, need to know its contents. Lee v. Chicago M. St. P. & P. Ry., 308 N.W.2d 305, 309 (Minn. 1981). If the foregoing criteria are met, the staff member and the client agency must clearly identify the agency's "duly authorized constituents," which are typically employees who have authority to make decisions on a particular matter on behalf of the agency. See Rule 1.13. Only these individuals generally have the authority to waive the attorney-client privilege.

AG:87357 v1

STATE OF MINNESOTA

# Office of the Attorney General

TO : **ALL STAFF** DATE : December 30, 1997

FROM : **RICHARD L. FINCH**
Information Systems Manager
PHONE : 297-1142 (Voice)
296-7438 (Fax)
296-1410 (TTY)

Richard L. Finch

SUBJECT : **Security of E-Mail**

There are a number of methods used to send E-Mail. The following is a brief summary of whether or not each is secure.

## INTERNAL E-MAIL

We are currently running on two different E-Mail platforms within our office, Mass-11 and Microsoft. Mass-11 users sending E-Mail to other Mass-11 users is **secure**. Microsoft users sending E-Mail to other Microsoft users is also **secure**. When Mass-11 users communicate with Microsoft users, in either direction, the E-Mail message travels to the statewide E-Mail hub first and then to the user. This is slightly less secure, but should not be a concern.

We are in the process of replacing both of these E-Mail systems with a third system. This new E-Mail system will provide a better messaging foundation which will be more scalable, reliable, and even more secure. Some of the security features which will likely be available are encryption and digitally-signed signatures, which would make our internal E-Mail sytem (as well as E-Mail with clients having compatible software) **very secure.**

## E-MAIL TO STATE AGENCIES/BOARDS ON THE STATEWIDE E-MAIL HUB

Agencies are joining the statewide E-Mail hub constantly and it is intended that all state agencies and boards will ultimately be on the hub.[1] The agencies currently on the state hub system are:

Administrative Hearings
Administration Materials Management
Division
Administration InterTech
Administration MAD
Agriculture
Architecture
Attorney General
Campaign Finance

[1] The next agencies to be added to statewide E-Mail hub are DNR and Health.

Ethical Practices Board
Commerce
EMC2/TAO - various agencies, 1200+ users
Department of Employee Relations
Governors Office
Housing Finance Agency
Department of Labor and Industry
Mental Health and Retardation
Nursing Board
Public Employee Retirement Assoc.
Revenue
Teachers Retirement
Treasurer
Children Families and Learning
Economic Security
Emergency Medical Services Board
Finance
Higher Education Services Office
Department of Human Services
Legislative Auditor
MN State Retirement
Pollution Control Agency
Department of Public Safety
Secratary of State State Auditor
Trade and Economic Development
MN Zoo

Sending E-Mail to agencies that are on the state hub should be considered **secure.** The hub adds security which is not present when messages are sent on the Internet outside the state hub system. [2]

**E-MAIL TO STATE AGENCIES/BOARDS NOT ON THE STATE WIDE E-MAIL HUB**

Sending E-Mail to agencies that are not attached to the statewide E-Mail hub should be considered **not secure**. The State of Minnesota has its own network called MNet, which is a subset of the internet. This is slightly more secure because messages sent to other state agencies and boards do not leave MNet. However, there are 55,000 state employees that have access to MNet including educational institutions.

**E-MAIL TO THE REST OF THE WORLD**

E-Mail sent via the internet should be considered **not secure**. The rule of thumb is, do not send a message on the internet that you would not want to see published in the newspaper.

AG:103836 v1

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[2] While the state hub system should generally be considered secure, this does not mean that it is impossible to intercept messages transmitted via the state hub system. A knowledgeable computer hacker could probably deliberately intercept a message transmitted via the state hub system, although the likelihood of such interception is very remote. The same would not be true of the Office's current internal E-Mail system, which is protected by a "firewall" and therefore cannot be breached.

# STATE OF MINNESOTA

## Office of the Attorney General

## PRO BONO POLICY

I. POLICY.

This office is committed to legal service in the public interest. It seeks to hire and retain staff members who share that commitment. The office recognizes that, in addition to the significant public interest work performed by staff as part of their employment with the state, individual staff members may also desire to provide legal assistance to the disadvantaged without charge. It is the policy of this office to allow and support such activity.

There is a serious unmet need for legal services for persons of limited means as documented in numerous studies in Minnesota and across the nation. The shortage in such services prompted the Minnesota State Bar Association several years ago to adopt an aspirational standard which encourages attorneys to provide pro bono legal services of 50 hours per year with at least 25 hours devoted to direct legal services to low income persons. The American Bar Association has adopted a similar standard. Given the unmet need and the Minnesota State Bar Association's aspirational standard, the office has determined that the provision of pro bono services, including a limited use of state resources as outlined below, is consistent with and furthers the state's interests. Each attorney must make his or her own decision about participation in pro bono activities, depending on other professional and personal commitments. Nevertheless, the Office encourages each staff member to consider ways to engage in pro bono activities.

II. PRO BONO SERVICES.

A. Pro bono services include both the pro bono representation of clients and non-litigation volunteer activities. As used in this policy, "pro bono services" means:

1. Providing legal services without remuneration to:

a. Persons of limited means; or

b. Charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

2. Providing additional law related services without remuneration through:

   a. The delivery of legal services to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would otherwise be inappropriate; or

   b. Participation in activities for improving the law, the legal system or the legal profession.[18]

B. Examples of pro bono activities which may be approved include, but are not limited to:

1. Representation of individual clients;

2. Serving as a guardian ad litem;

3. Providing representation to nonprofit organizations;

4. Providing advice as part of a Legal Services Corporation program:

   a. In landlord/tenant or consumer matters;

   b. On wills, powers of attorney, and private guardianship;

5. Performing research for or rendering expert advice to providers of legal services to the low income and disadvantaged;

6. Participating on the board of a legal services organization;

7. Providing training or preparing materials for seminars or other educational activities involving poverty law issues;

8. Participating on Bar committees and projects relating to the delivery of legal services and pro bono legal services.

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[18] This policy is not intended to affect any other policies of the Attorney General's Office regarding participation in Bar activities.

III. PROCEDURES.

A. Approval.

Participation in pro bono activities must be approved in advance by the Division Manager. In order to identify pro bono opportunities generally available to staff, the Pro Bono Committee will review major referring programs identified by staff or others, and upon approval by the Chief Deputy, will notify staff of programs which meet office criteria.

The following criteria will be used by the division manager when approving a staff member's participation in a particular activity, and by the Pro Bono Committee when reviewing programs for general approval:

1. Whether the request is consistent with the terms and purpose of this policy.

2. Whether a conflict of interest exists under the Rules of Professional Responsibility.[19]

3. Whether malpractice coverage exists.

4. Whether the high profile or controversial nature of the subject matter may lead to an unacceptable public perception that the Attorney General's office is participating in the activity. Participation in a pro bono activity opposing a State agency is discouraged and must be approved by the Chief Deputy.

5. Whether the amount of time necessary to perform the activity would adversely affect the staff member's ability to discharge his or her office responsibilities.

6. Whether the case would require establishment of a trust account by the staff member. Staff will not be permitted to handle such cases. Trust accounts, where necessary, must be established and maintained by referring programs.

7. In matters involving legal representation of a nonprofit organization, whether the representation may involve issues subject to regulation by the Attorney General pursuant to chapters 309, 317A and 501B of Minnesota Statutes. Staff should not provide legal representation concerning such issues as governance disputes, formation or dissolution of an organization, IRS matters, accounting practices, charitable solicitations, conflicts of interest or the use or proposed use of assets held for charitable purposes. To the extent that staff members who are directors of nonprofit organizations become involved in such issues, they should clarify

[19] The *Comments of the Office of the Attorney General on the Minnesota Rules of Professional Conduct* should be consulted in determining whether a conflict of interest exists.

they are doing so as directors of the organization, not as lawyers for the organization.[20]

B. Staff members should obtain approval from the Division Manager for each new pro bono client, should continue to comply with these criteria, and should consult with the Division Manager or Committee if he or she has questions.

C. Continuing participation.

If, after approval for a pro bono project, the circumstances related to the representation change in a manner that significantly impacts one or more of the factors referenced in Section III.A. above, the staff member must consult with the Division Manager to discuss the change in circumstances and continued participation of the staff member in the activity.

Similarly, the staff member's manager must be contacted if it appears that the matter will be more time consuming or complex than originally contemplated.

D. Representation of pro bono clients.

1. The potential client must be informed that a conflicts check must be made before acceptance of the case. No discussion with the prospective client should take place if it is immediately apparent that a conflict exists. After the first meeting with the client, the staff member is responsible for determining whether any potential conflicts exist. The Pro Bono Committee shall develop a check list to assist in this determination. The division manager must maintain a list of pro bono activities in which division members are engaged in order to assist with the evaluation of possible conflicts.

2. Before agreeing to accept a pro bono client the attorney should determine whether the referring program or organization has a malpractice insurance policy which covers volunteer attorneys. This office does not provide malpractice coverage for pro bono work. A staff member's pro bono work is not within the scope of his or her employment with the State; the State does not assume any liability for this work.

3. Accepting a pro bono case.

   a. Following approval of pro bono activity, a retainer letter, specifically confirming the scope of the representation, and outlining the client's obligations and responsibilities, should be sent to the client. (The Pro Bono Committee will make available a model letter.) A copy must be maintained in

[20] The office policy permits staff members to serve as directors of nonprofit organizations. However, staff members who become directors of nonprofits must notify the Chief Deputy and the manager of the Charities Division.

the attorney's file. The staff member is responsible for making it clear to the client, any opposing parties, or others involved in a pro bono case or activity, that the staff member is acting in his or her individual capacity as a volunteer, and is not acting as a representative of, or on behalf of, the office.

b. The client should be informed how, when and where to contact the attorney by telephone or letter.

4. Case file responsibility.

An attorney participating in a pro bono project or matter is personally responsible for his or her pro bono files.

## IV. IDENTIFICATION WITH THE OFFICE.

Staff members who participate in pro bono activities or in providing pro bono services may not indicate or represent in any way that they are acting on behalf of the office or in their official capacity. If a staff member has any reason to believe that those receiving service, opposing counsel, or the courts mistakenly believe that a staff member is acting in an official role, staff must make a clear disclaimer that they are not acting on behalf of the officer or in their official capacity. For example, if a staff member is known to opposing counsel or the court as a member of the Attorney General's staff, a disclaimer must be made.

A. The staff member may not use office business cards or otherwise identify himself or herself as a government attorney in any communication, correspondence or pleading connected with pro bono activities. It is preferred that correspondence be handled through the coordinating legal services organization or received at the staff member's home address. However, if this would present an undue hardship, the office address may be used if the address does not include the office name or indicate the nature of the office.

B. The general office telephone number may not be used for pro bono activities. Phone calls may be received either on the staff member's individual line, through the referring program or organization, or at the staff member's home.

C. The office may not be used for meetings with clients or opposing counsel in a pro bono case.

## V. USE OF OFFICE RESOURCES.

A. Hours of work.

When performance of pro bono work is required during regular work hours, the staff member may request that his or her manager approve a flexible work schedule, in accordance with section III of the Office Manual, to accommodate the time needed for pro bono work or vacation leave may be used. In unusual circumstances, and with prior approval, the staff member may take leave without pay.

B. Telephone calls.

Local telephone calls may be made from the staff member's individual line. Long distance telephone calls may not be charged to the office.

C. Offices/Library.

Staff members may use their individual offices to do research and to draft pleadings, briefs, letters or other written materials. The library may also be used for doing research related to pro bono projects. Such work must be done in a manner which does not interfere with the performance of the office's or staff member's regular functions or duties and responsibilities. Office computer research facilities (e.g., Lexis or Westlaw) may not be used to do pro bono research.

D. Clerical support.

Clerical services should be obtained from the coordinating agency when available. This office will explore the possibility of making clerical support available, consistent with state law and union work rules.

E. Supplies and equipment.

1. Staff members may use word processing and dictation equipment so long as such use does not interfere with the performance of the office's or the staff member's regular functions or duties and responsibilities.

2. A limited amount of office supplies (not including stamps), photocopying, and non-long distance fax use is available to staff members performing pro bono work consistent with other provisions of this policy. Multi-paged memoranda and briefs should be copied at referring agencies.

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# Resources for Legal Ethics Research

**Common Research Strategy**

1. Identify legal ethical issues.

2. Read Minnesota Rules of Professional Conduct and the Office Comments on the Rules.

3. Consult relevant court rules if litigation is involved.

4. Talk to other knowledgeable lawyers, supervisors, and ethics committee members.

5. Refine legal issues and identify key phrases.

6. Use electronic databases or published digests to identify cases and other relevant resource materials. Consult the AGO Library staff to help locate resource material you have identified.

**Good Background Sources** (All listed sources are available in the Office law library or one or more of the local law libraries. See one of the Office law librarians to locate.)

Geoffrey C. Hazard, Jr., Susan P. Koniak, & Roger C. Cramton, The Law and Ethics of Lawyering (Foundation Press, 2d ed. 1994).

Geoffrey C. Hazard, Jr., W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (Prentice Hall Law and Business, 2d ed. 1990).

ABA/BNA Lawyers' Manual on Professional Conduct (Chicago, Illinois, American Bar Association; Washington, D.C., Bureau of National Affairs, 1984- ).

Charles W. Wolfram, Modern Legal Ethics (West 1986).

Restatement of the Law Governing Lawyers (Proposed Final Draft 1996).

Restatement of the Law Governing Lawyers (Tentative Draft No. 8, March 21, 1997).

Annotated Model Rules of Professional Conduct (ABA, 3d ed., 1996).

**Legal Periodicals, Journals and Law Reviews that Regularly Publish Articles on Legal Ethics** (You can find all listed sources in the Office law library or one or more of the local law libraries. See one of the Office law librarians.)

ABA Journal

Georgetown Journal of Legal Ethics

Professional Liability Reporter (Shepard's/McGraw-Hill)

## WESTLAW Research, Legal Ethics and Professional Responsibility

Every legal issue in cases published by West Publishing is identified, summarized and assigned a topic and key number. West topic and key numbers allow you to focus your research and retrieve relevant cases that might not include your exact search terms. For example: Topic 45 covers "Attorney and Client" and key number 32 covers "Regulation of Professional Conduct". You choose the database: i.e., "MNETH-CS" for Minnesota cases or "METH-CS" for Multi-State Ethics cases.

Key 32 is divided as follows:

1. In general
2. Standards, canons, or codes of conduct
3. Power and duty to control
4. Attorney's conduct and position in general
5. Persons subject to regulations
6. Limitations on duty to client, in general
7. Miscellaneous particular acts or omissions
8. Dignity, decorum, and courtesy; criticism of courts
9. Advertising or soliciting
10. Duty to accept or decline representation
11. Frivolous, vexatious, or meritless claims
12. Relations, dealing or communications with witness, juror, judge, or opponent
13. Client's confidences, in general
14. Candor, and disclosure to opponent or court
15. Extrajudicial comments

For example, to find cases which address whether paralegals or legal assistants are subject to ethical regulations, you could use 45K32(5).

## WESTLAW Tips for Electronic Research

Database: **(ABA-BNA)** = ABA/BNA Lawyers' Manual on Professional Conduct. **FIND LMPC 91:4101** will access the Government Lawyer Practice Guide. **pr(current)** preceding a term will limit the search to the "Current Reports" section.

**(ABA-AMRPC)** = Annotated Model rules of Professional Conduct. Use a citation field to narrow your search. **ci(4.2)** will retrieve Model Rule 4.2 and related comments.

**(REST-LGOVL)** = Restatement of the Law Governing Lawyers. Includes 1996 Proposed Final Draft text. Basic word searches work best here.

**(ETH-TP)** = Ethics articles and substantive documents from newsletters, magazines and periodicals. Key terms in legal ethics are frequently used in articles. Limit your search to title fields or specific RPC titles.

WESTLAW has many more legal ethics and professional responsibility databases under the following general categories: federal and state case law; federal and state statutes, legislative history and ethics opinions; federal and state administrative law; directories and lists; and news, information and practice guides. See the Office law librarians for database names, database identifiers, and dates of coverage.

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# Minnesota Attorney General's Office
# Ethics Committee

*Chair:* Dick Wexler, Health Division
525 Park, Ste. 500
297-5934

*Vice Chair:* Al Gilbert, Solicitor General
1100 NCL
296-7519

## ***Members***

### ***Solicitor General Section***

| Name | Telephone No. | Division | Location |
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| Joe Lally | 297-4393 | Employment Law | 1100 NCL |
| Beth Richter | 282-5710 | Construction Lit. | 1100 NCL |

### ***Public Resources/Human Resources Section***

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| Gail Olson | 296-6216 | Education | 1200 NCL |
| Dwight Wagenius | 296-7345 | Environmental Protection | 900 NCL |

### ***Health & Licensing Section***

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| Wendy Legge | 297-8834 | Health | 525 Park, Ste. 500 |
| Tom Vasaly | 297-5950 | Licensing | 525 Park, Ste. 500 |
| Margaret Swanson | 297-1176 | Licensing | 525 Park, Ste. 500 |

### ***Law Enforcement Section***

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| Cece Morrow | 296-9539 | Charities | 1200 NCL |
| Bob Stanich | 296-6598 | Criminal | 1400 NCL |

### ***Government Services***

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| Frank Ling | 296-0691 | Labor Law | 525 Park, Ste. 200 |
| Ken Raschke | 297-1141 | Public Finance/ Opinions | 525 Park, Ste. 200 |

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