ETHICS ISSUES FOR PUBLIC ATTORNEYS

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I. CONTACT WITH UNREPRESENTED PERSONS.

The general rule regarding contact with unrepresented parties is Rule 4.3, Minnesota Rules of Professional Conduct (MRPC). That rule provides:

> **RULE 4.3: DEALING WITH UNREPRESENTED PERSON**
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> In dealing on behalf of a client with a person who is not represented by counsel:
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> (a) a lawyer shall not state or imply that the lawyer is disinterested;
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> (b) a lawyer shall clearly disclose that the client's interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse;
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> (c) when a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and
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> (d) a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client.

In dealing with support actions on behalf of a public authority the public attorney is likely to encounter unrepresented persons on both sides of the equation – obligees and obligors.

Public attorneys involved in the collection of child support represent the public authority, not the individual seeking collection of the support. Minnesota Statutes §518A.47, subdivision 1, provides:

> **Subdivision 1. General.** (a) The provision of services under the child support enforcement program that includes services by an attorney or an attorney's representative employed by, under contract to, or representing the public authority does not create an attorney-client relationship with any party other than the public authority. Attorneys employed by or under contract with the public authority have an affirmative duty to inform applicants and recipients of services under the child support enforcement program that no attorney-client relationship exists between the attorney and the

applicant or recipient. This section applies to all legal services provided by the child support enforcement program.

(b) The written notice must inform the individual applicant or recipient of services that no attorney-client relationship exists between the attorney and the applicant or recipient; the rights of the individual as a subject of data under section 13.04, subdivision 2; and that the individual has a right to have an attorney represent the individual.

(c) Data disclosed by an applicant for, or recipient of, child support services to an attorney employed by, or under contract with, the public authority is private data on an individual. However, the data may be disclosed under section 13.46, subdivision 2, clauses (1) to (3) and (6) to (19), under subdivision 2, and in order to obtain, modify or enforce child support, medical support, and parentage determinations.

(d) An attorney employed by, or under contract with, the public authority may disclose additional information received from an applicant for, or recipient of, services for other purposes with the consent of the individual applicant for, or recipient of, child support services.

This statute creates an affirmative duty on the public attorney to inform applicants and recipients of services under the child support enforcement program in writing that no attorney-client relationship exists between them. In contrast, Rule 4.3, MRPC, would only require a similar specific duty of disclosure if the public lawyer knows or reasonably should know that the applicant or recipient misunderstands the public lawyer's role in the matter. Given that, absent an affirmative disclosure as required by the statute, there is a high likelihood that a support obligee relying on the public authority for collection of support is likely to misunderstand the public lawyer's role in the matter, the provisions of the statute make a great deal of sense. The statute goes further than the rule in also requiring that the notice be in writing, requiring notification as to the rights of the individual as a subject of data, and requiring the affirmative notice that the individual has the right to separate representation by an attorney in the process.

The public attorney should avoid creating the impression that he or she is a disinterested person in the support collection process. Rule 4.3(a), MRPC. While the public attorney is, in fact, disinterested in many issues that might exist between obligees and obligors, the attorney is

still charged with the duty of protecting the public authority's interests. These interests may not always be congruent with either the obligee or the obligor.

It is particularly important when dealing with obligees in the collection of support to make sure they understand the implications of the fact that you do not represent them. One of the most important implications is that of confidentiality and attorney-client privilege. Obligees dealing with a public authority's lawyer who have not been adequately advised on the nonexistence of an attorney-client relationship may assume that information conveyed to the public attorney will be held in confidence and protected by the attorney-client privilege. This may prove problematic if, for instance, the obligee reveals information that indicates the possibility of welfare fraud. Such information will not be protected from disclosure by the public attorney by either the attorney-client privilege or by Rule 1.6, MRPC, the general rule of attorney-client confidentiality. While Minn. Stat. §518A.47 does provide that data disclosed by an applicant or recipient of child support services is private data on an individual and has some protection under the Minnesota Government Data Practices Act, there are exceptions under the Act that would permit disclosure

The provisions of Rule 4.3(b), MRPC, should be kept in mind if it should develop that the interests of the obligee diverge from the interests of the public agency. In those circumstances, even after having given the statutory notice that there is no attorney-client relationship, a disclosure should be made the interests of the public authority and the obligee have become adverse.

While it may seem apparent to a public attorney seeking to collect child support that the obligor is an adverse party, room for confusion still exists. It might be assumed that, since you do not represent the obligee, you are in some fashion a disinterested person. It might even become apparent that the obligor believes that you are a source of legal advice both as to

support obligations and other matters. Clearly, Rule 4.3, MRPC, requires you to correct these misunderstandings should you know or reasonably should know that they have arisen.

Rule 4.3(d) prohibits the giving of legal advice to an unrepresented person, other than the advice to secure counsel, if you know or reasonably should know that the interest of the unrepresented person are in conflict with the interests of your client – the public authority. Clearly, in most instances, the interests of the obligor are going to be in conflict with the interests of the public authority. This does not, however, preclude the public attorney from negotiating with or explaining to the unrepresented obligor the public authority's legal theories or interpretation of the law. Comment 2 to Rule 4.3 provides:

> This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents a party whose interests are adverse and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

II. USE OF CONFIDENTIAL INFORMATION GATHERED IN ONE PROCEEDING IN A DIFFERENT PROCEEDING.

It may happen that a public attorney may come across information regarding a person in one matter that would be of some use in a different matter. Say, for instance, a public attorney in a child support matter learns that documents in a different matter have been falsified and wishes to use that information to criminally prosecute the falsifier.

First, as noted above, Rule 1.6, MRPC, the general rule on client confidentiality will not preclude disclosure of the information outside of the proceedings in which it was obtained. Assuming that the falsifier is not the client, Rule 1.6 will not apply.

Rule 4.4(a), MRPC, may preclude use of the information however. That rule prohibits lawyers from using means of obtaining evidence that violate the legal rights of a third person. Should the data or information gained in the first proceeding be considered confidential under the law – perhaps by virtue of the Data Practices Act, HIPPA, or some other statute or rule – use and disclosure of that information in a different proceeding that would run contrary to the statute or rule would then violate Rule 4.4, MRPC.

Another restriction on the use of information obtained by a public attorney in one proceeding in a different proceeding applies to attorneys who are part-time public attorneys. May a part-time public attorney use information gained while serving as a public attorney in a different proceeding where she is serving as a private attorney? Rule 1.11(c), MRPC, addresses this issue. That rule provides:

> (c) Except as the law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Thus, a part-time public attorney who has confidential government information obtained while serving as a public attorney may not undertake the representation of a private client adverse to the person to whom the information pertains if that confidential information could be used to the material disadvantage of that person. It is important to note that the disqualifying information is only that information which the government is prohibited by law from disclosing and is not otherwise available to the public. Also note that the prohibition does

not extend to the entire firm of the part-time public attorney if the disqualified lawyer is screened from participation in the private matter and is apportioned no fee from the matter.

III. EX PARTE CONTACTS WITH ADJUDICATORS.

Rule 3.5(g), MRPC, is the general rule regarding ex parte contacts with adjudicators. That rule provides,

> (g) In an adversary proceeding a lawyer shall not communicate or cause another to communicate as to the merits of the case with the judge or an official before whom a proceeding is pending except:
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> (1) in the course of official proceedings;
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> (2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if the party is not represented by a lawyer;
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> (3) orally upon adequate notice to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer; or
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> (4) as otherwise authorized by law.

As noted in the rule, there are circumstances where ex parte communication with a judge is appropriate. Contacts authorized by law are permitted. If the rules of court or statutes permit the ex parte contact, then it will not violate Rule 3.5(g).

The rule prohibits ex parte communications with a judge or other official "as to the merits of the case." This implies that there may be some communications made that do not run afoul of the rule. As noted in *The Law of Lawyering*, Hazard and Hodes, 3d Ed. §31.5, "Most authorities agree that communications about purely procedural or scheduling matters do not threaten the fairness of proceedings so long as no substantive advantage is gained." Note that discussions of procedural or scheduling matters that will result in a substantive advantage to a party – for instance asking for the scheduling of a hearing when you know the other party will be out of town – will be subject to the rule. *See* also §113, comment c, *Restatement (Third) of the Law Governing Lawyers*, "The prohibition applies to communications about a procedural matter

the resolution of which will provide the party making the communication substantial tactical or strategic advantage." Also note that ex parte communications with a judge seeking "clarification" of an order have been held to violate the rule. In *In re Jensen*, 468 N.W. 2d 541, 545 (Minn. 1991), the Minnesota Supreme Court imposed public discipline on an attorney for various violations including violation of Rule 3.5(g), noting, "Despite Jensen's claim that his letters to the court of appeals judges did not seek relief from court orders, the letters challenge the court orders, and, read most favorably to Jensen, ask the court to reconsider and clarify its orders. Because Jensen did not notify opposing counsel of these communications, the referee correctly concluded that Jensen violated Minn. R. Prof. Conduct 3.5(g)."

The Rule 3.5(g) prohibition on ex parte contact also extends beyond communications with judges and applies to other adjudicators. The *Restatement (Third) of the Law Governing Lawyers*, §113, comment d, provides, "The prohibition applies to a judge, master, hearing officer, arbitrator, or other officer authorized to rule upon evidence or argument about a disputed matter. It also applies to other officials who have decisionmaking authority in the litigation, such as a jury commissioner or a clerk with responsibility to assign cases to judges. It also applies to indirect communications, as through a judge's clerk." Arguably, since a mediator is not a person authorized to rule upon evidence or arguments, the rule does not prohibit ex parte communications with mediators.

When appearing in an ex parte proceeding, a lawyer has a special duty of candor to the tribunal. Rule 3.3(d), MRPC, provides,

> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Thus, while a lawyer is free to advocate strenuously on behalf of her client in an ex parte proceeding before a tribunal, full disclosure of all material facts must be made.

IV. RELEASE-DISMISSAL AGREEMENTS.

An agreement by a prosecutor to dismiss criminal charges in exchange for the defendant's release of any civil claims arising out of the arrest or prosecution is typically referred to as a release-dismissal agreement. Authorities seem to be split on the propriety of such agreements. In *Town of Newton v. Rumery,* 480 U.S. 386 (1987), the Supreme Court upheld the waiver of a civil rights claim in connection with release of criminal proceedings over a dissenting opinion arguing that such agreements dilute a prosecutor's obligations under Rule 3.8 to prosecute only those charges supported by probable cause. Rule 3.8(a), MRPC, prohibits prosecutors from prosecuting a charge that the prosecutor knows is not supported by probable cause.

In *Rumery*, the Court held that because release-dismissal agreements further legitimate prosecutorial and public interests, they would not hold that all such agreements are invalid per se. Instead, finding that the agreement before them was voluntary; that there was no evidence of prosecutorial misconduct; and that enforcement of the agreement would not adversely affect relevant public interests, the court upheld the agreement. *Id.* at 397-398.

There have been ethics opinions issued which hold that release-dismissal agreements may be ethically improper under certain circumstances. For instance, Connecticut Informal Ethics Opinion 00-24 held that in situations where the prosecutor either knows or should know that probable cause is absent or where the prosecutor's pursuit of the case is based primarily on his desire to seek a civil release, a prosecutor may not condition an offer to dismiss or *nolle* a criminal matter upon either (1) a defendant's stipulation or admission that probable cause existed for his or her arrest or (2) a defendant's release or agreement to release civil claims against the arresting officers or others. Indiana Ethics Opinion 2-2005, opined that release-dismissal agreements are unethical in that they violate Rule 1.7(a) (conflicts of interest), 3.8(a) (duty to refrain from prosecuting a charge not supported by probable cause, and 8.4(d) (conduct

prejudicial to the administration of justice). See also, South Carolina Bar Ethics Opinion 05-17 and California ethics opinion No. 1989-106 which contemplate (and discourage) these types of agreements.

New York specifically addressed this issue in Cowles v. Brownell, 73 N.Y.2d 382, 540 N.Y.S.2d 973, 538 N.E.2d 325 (1989) and in pertinent part said: "Insulation from civil liability is not the duty of the prosecutor. The prosecutor's obligation is to represent the people and to that end, to exercise independent judgment in deciding to prosecute or refrain from prosecution. This obligation cannot be fulfilled when the prosecutor undertakes also to represent a police officer for reasons divorced from any criminal justice concern. To enforce a release-dismissal agreement under these circumstances is simply to encourage violation of the prosecutor's obligation. "

For a contrary position in support of the use of release-dismissal agreements, note Washington State Bar Association Opinion 1135 (1987), which takes the position that nothing the Rules of Professional Conduct prohibits a prosecutor from seeking a release from civil liability from a defendant in exchange for dismissal of charges, provided that the prosecutor has a well grounded belief that the charges are supported by probable cause, that the defendant is informed of the implications of the agreement, and that the release agreement would be enforceable under the decision in Newton v. Rumery, 107 S.Ct. 1187 (1987).

V. PUBLIC CASES INVOLVING PUBLIC ATTORNEYS.

A. *In re Backstrom*, 767 N.W. 2d 453 (Minn. 2009). Public reprimand for prosecuting attorney who threatened to withdraw support for an official appointed by the county board unless the official barred her subordinates from testifying as defense experts in criminal cases, in violation of Rule 8.4(d), MRPC.

B. *In re Fink,* Supreme Court file no. A08-1534. Public reprimand for prosecuting attorney who, while prosecuting a criminal case, failed to disclose to defense counsel the existence of previously undisclosed records of scientific tests conducted on behalf of the prosecution and failed to correct a prior statement made to the court that the underlying test data had been destroyed, in violation of Rules 3.3(a)(10, 3.4(c), and 8.4(d), MRPC.

C. *In re Inquiry into the Conduct of the Honorable Harvey C. Ginsberg,* 690 N.W.2d 539 (2004). Minnesota Supreme Court removed judge from office and suspended his license to practice law for one year for misconduct including in-court impropriety and out-of-court criminal misconduct.

D. *In re Charges of Unprofessional Conduct Contained in Panel File 98-26,* 597 N.W. 2d 563 (Minn. 1999). Supreme Court, finding that race based misconduct is inherently serious, reversed a LPRB panel admonition and issued its own admonition against the involved attorney. Prosecuting attorney in criminal case filed a motion with the court seeking an order "prohibiting counsel for the defendant to have a person of color as co-counsel for the sole purpose of playing on the emotions of the jury." The court noted that, while the prosecutor had displayed "a disturbing lack of judgment regarding racial issues" respondent's remorse, remedial actions, and recognition of the nature of the misconduct required only a private admonition.

C. *State v. Erickson,* 589 N.W. 2d 481 (Minn. 1999). Supreme Court held that prosecutor's abuse of court rule allowing removal of judges was prejudicial to the administration of justice. County attorney and city attorney engaged in practice of routinely removing matters from the consideration of a judge who had issued rulings adverse to them. The court held:

A prosecutor holds a unique and powerful position in a democratic society. We have previously recognized this role and held that a prosecutor is a "minister of justice," and thus his job is to seek justice rather than convictions. *See State v. Salitros,* 499 N. W. 2d 815, 817 (Minn. 1993). "Since the prosecutor bears a large share of the responsibility for determining which cases are taken into the courts, the character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers." ABA Standards for Criminal Justice: The Prosecution Function and Defense Function, 3-1.2, cmt. (3d ed. 1993). The County Attorney's Office's excessive use of Minn. R.Crim. P. 26.03, subd. 13(4), is prejudicial to the administration of justice and contrary to the spirit of the rule.

D. *In re Fridell,* 557 N.W. 2d 208 (Minn. 1997). County Attorney's sexual relationship with adult employee of office warrants public reprimand and resignation from office.

E. *In re Hanke,* 538 N.W.2d 904 (Minn. 1995) (disbarment). United States Bankruptcy Panel Trustee for the District of Minnesota disbarred for misappropriation of client and bankruptcy funds and falsifying evidence.

F. *In re Roberts,* 476 NW2d 517 (Minn. 1991) (public reprimand). County attorney attempted to dismiss without prejudice a criminal proceeding against one of his former clients in which the client was charged with 17 counts of criminal sexual conduct. County attorney had represented the defendant, a doctor, in a civil action in which the plaintiff alleged that the doctor had improper sexual contact with her during a medical exam.

G. *In re Evans,* 461 N.W.2d 226 (Minn. 1990). County attorney was publicly reprimanded for violating a judge's gag order by making statements about two pending juvenile cases. Violated Rule 3.4(c) and 8.4(d).

H. *In re Schaefer,* 423 N.W. 2d 680 (Minn. 1988). Indefinite suspension ordered where attorney, *inter alia,* sold real property from an estate he was handling to the city for whom he served as contract counsel, thereby representing both sides

to the transaction. Attorney also ordered $1,200 worth of law books on the city's behalf but failed to forward the bills to the city for payment and failed to notify the city that it had been sued for non-payment, causing a default judgment to be entered.

I. *In re Serstock,* 432 N.W. 2d 179 (Minn. 1988). Deputy City Attorney indefinitely suspended from the practice of law with a two year minimum term of suspension for failing to file income tax returns and dismissal of traffic tickets for persons with whom he had personal and financial relationships.

J. *In re Morris,* 419 N.W. 2d 70 (Minn. 1987). County attorney publicly reprimanded for failing to disclose exculpatory information to defendants and violating order of sequestration of witnesses.

K. *In re Quello,* 338 N.W. 2d 31 (Minn. 1983). Attorney for city of Spring Lake Park failed to record more than 80 easements obtained on behalf of city and misrepresented status of easements to city officials. This, plus other misconduct in attorney's private practice, resulted in disbarment. Court specifically noted that the neglect itself was grounds for disbarment.

L. *In re Kimmel,* 322 N.W. 2d 224 (Minn. 1982). Title Examiner suspended after conviction of a felony involving sexual misconduct with a minor. Court permitted continued practice as Title Examiner during period of suspension.

M. *In re Forbes,* 257 N.W. 329 (Minn. 1934). St. Louis County Attorney disbarred for alteration of receipts for stamps from the post office that were subsequently submitted to the county for reimbursement. The Court noted that the County Attorney's Office, from January 1, 1929 to April 30, 1931 expended an average of

$25 per month for postage while the County Auditor's Office, for the same period, spent only $2 per month.

N. *In re Manahan,* 242 N.W. 548 (Minn. 1932). Misappropriation of client funds by County Attorney, including $750 from Olmsted County, warrants disbarment.

O. *In re Joyce,* 234 N.W. 9 (Minn. 1930). County attorney used criminal process to enforce collection of civil claims. Court ordered six month suspension noting:

> It is true there is no express statute against a county attorney pursuing the same person both criminally and civilly. But a moments reflection is enough to show that those who are not county attorneys are at a disadvantage if such a practice is allowable. And a county attorney who undertakes to enforce a claim of a civil nature, and at the same time institutes or instigates criminal proceedings against the party from whom the claim is due, lays himself open to the suspicion of abuse of process to say the least.