Report
to
Attorney General Lori Swanson
Office of the Attorney General
State of Minnesota

Regarding Allegations of Professional Misconduct
Raised by
Assistant Attorney General Amy Lawler

Submitted by

Thomas M. Mengler
May 27, 2008

Executive Summary

On March 23, 2008, Attorney General Swanson asked me to conduct an independent review of a handful of allegations about professional misconduct within the Office of the Minnesota Attorney General ("Office"), which Assistant Attorney General Amy Lawler had raised earlier that month. The allegations are essentially five in number. Only one of them involves alleged incidents about which Ms. Lawler has any direct and personal knowledge. The other four are hearsay allegations. Attorney General Swanson charged me with the task of investigating all these allegations, to assist her in determining whether any attorney in the Office may have violated the Minnesota Rules of Professional Conduct.

Thus, my investigation has been limited in its scope. I was not charged to investigate, and I offer no opinion on, more sweeping allegations about the Office, which Ms. Lawler has raised in a number of public forums. These more sweeping allegations, which are beyond the parameters of my investigation, deal with the management and ethical character and integrity of the Office; low morale among Office attorneys and staff; and the purported need to unionize Office attorneys.

With regard to the single allegation about which Ms. Lawler claims direct and personal knowledge – prefiling communication and activity leading up to Ms. Lawler's filing of two suits on December 6, 2007 against mortgage foreclosure assistance companies, I find no evidence of any attorney's conduct that would violate the Minnesota Rules of Professional Conduct. Ms. Lawler herself has been quoted in media as expressly admitting, "The point of the story was not that I felt we had ultimately broken any ethical rules in filing the suits...." As detailed in my report, I find no evidence of any unprofessional conduct on the part of Attorney General Swanson, Deputy Attorney General Karen Olson or any other attorney in connection with the prefiling activity and the filing of mortgage foreclosure consultant suits on December 6, 2007.

With regard to the other alleged professional misconduct reported by Ms. Lawler, in which she claims no direct and personal knowledge, I offer no opinion, make no relevant findings, and draw no conclusions about whether any attorney has violated any Minnesota Rule of Professional Conduct. Ms. Lawler says she gained awareness of these alleged events listening to other current and former Office attorneys telling stories over drinks at bars. Ms. Lawler initially disclosed these alleged events without naming anyone who was involved and without identifying the name of the cases or the nature of the matters. Ms. Lawler declined my request to provide this information, and no one has come forward with any reliable information. For this reason, I offer no opinion, make no findings, and draw no conclusions.

Finally, I have investigated whether Assistant Attorney General Amy Lawler may herself have violated any Minnesota Rule of Professional Conduct. Beginning on or about March 7, 2008 and continuing until on or about March 18, 2008, Ms. Lawler knowingly publicized information relating to the Attorney General's representation of its client, the public. That information included confidential communications among

attorneys in the Office leading up to the filing on December 6, 2007 of two mortgage foreclosure assistance company suits. In my opinion, Ms. Lawler's public disclosures of these confidential communications, as well as other disclosures about Office activities, may have diminished the ability of attorneys in the Office of Attorney General to do their jobs – namely to represent their client, the people of the State of Minnesota. For this reason, I offer the opinion that Amy Lawler has violated Rule 1.6 of the Minnesota Rules of Professional Conduct – the rule that generally prohibits an attorney from "knowingly revealing information relating to the representation of a client."

I. CHARGE

On March 24, 2008, Attorney General Lori Swanson charged me to conduct an independent review of allegations of professional misconduct, which Assistant Attorney General Amy Lawler had raised earlier that month. Specifically, the Attorney General asked me to investigate and evaluate the following allegations:

(1) Professional misconduct leading up to the filing of two lawsuits against mortgage foreclosure assistance companies;

(2) Two separate instances of pressure exerted by unnamed supervising attorneys on other unnamed attorneys to falsify information in a consumer's affidavit;

(3) Pressure exerted by an unnamed supervising attorney on a second attorney to issue a civil investigative demand against a company without reasonable cause;

(4) Pressure exerted by an unnamed supervising attorney on an unnamed second attorney to provide unsound legal advice to a state agency;

(5) Pressure exerted by an unnamed supervising attorney on an unnamed second attorney to violate a special master's order.

Attorney General Swanson asked me to review the allegations listed above for the purpose of determining whether any attorney in the Office of the Attorney General (hereafter "Office") may have violated the Minnesota Rules of Professional Conduct. General Swanson's charge, therefore, includes considering whether Ms. Lawler's own conduct with regard to the reporting of these allegations may have violated the Minnesota Rules of Professional Conduct.

I believe it important to underline the limited parameters of my charge. In her correspondence and interviews with the media, Ms. Lawler raises sweeping allegations about (1) the overall management of the Office; (2) the ethical character and integrity of the Office; (3) the need to form a union to protect the Office's attorneys; and (4) the morale among the Office's attorneys. The Attorney General has not asked me to investigate these broader allegations, and I have not done so. I make no findings and offer no opinions on these matters or on any other issues that are not within the scope of my charge as described above.

II. NATURE OF THE INVESTIGATION

Inasmuch as Attorney General Swanson asked me to conduct an independent review on her behalf, I view my role both as an independent investigator and as an agent of the Attorney General. Indeed, throughout my investigation, I have provided to

all witnesses what is called by statute a Tennessen Warning (Minnesota Statutes, section 13.04, subdivision 2). My warning apprised each witness that: (1) I was collecting information as part of an investigation into "allegations regarding ethical violations which are said to have occurred in the Office of the Attorney General;" (2) the witness was not legally required to provide some or all of the information requested, but that "Responses you give must be truthful;" (3) the witness, by not providing sufficient information in response to some or all of the questions asked, would be restricting the ability of the Office to conduct its investigation; and (4) the information provided would be accessible to staff of the Office, as well as potentially to other persons or government entities who have statutory authority to review the information, investigate specific conduct, and take appropriate legal actions.

Thus, in significant part, I have served as agent of the Attorney General. Further, I conducted my investigation without subpoena power and/or the authority to promise that the fruits of my investigation could be kept confidential. Witnesses, moreover, although told that their responses must be truthful, were not required to take an oath.

As noted later in Part IV.B of my report, the limits of my authority have restricted my ability to gather any reliable information about four of the five ethical allegations I was asked to investigate, essentially allegations (2) through (5) above.

III. STEPS IN INVESTIGATION

Since March 24, 2008, I have reviewed a large quantity of written information and interviewed 12 witnesses, some of them on more than one occasion. I list my activities below:

- March 23, 2008 – Spoke to Attorney General Swanson, who invited me to serve as independent investigator;
- March 24, 2008 – Received written charge and supporting written materials from Attorney General;
- March 25, 2008 – Met with Solicitor General Alan Gilbert and Deputy Attorney General Steven Gunn to discuss my charge and the nature of investigation;
- April 7, 2008 – Received additional written materials from Attorney General;
- April 23, 2008 – Interviewed Assistant Attorney General Amy Lawler, accompanied by her attorney Eric Cooperstein;

- April 29, 2008 – Interviewed Attorney General Swanson, Solicitor General Alan Gilbert, Deputy Attorney General Karen Olson, and Assistant Attorneys General Ben Feist and Christian Clapp;

- May 12, 2008 – Interviewed Ms. Lawler, accompanied by her attorney Eric Cooperstein;

- May 13, 2008 – Interviewed Attorney General Swanson; Solicitor General Alan Gilbert; Assistant Attorneys General Ian Dobson, James Canady, Kai Richter, and Jeff Harrington; and Investigator Don Donahugh;

- May 13, 2008 – Reviewed Amy Lawler's case files and briefing binders for State of Minnesota v. Foreclosure Assistance Solutions (filed 12/06/08 in Hennepin County District Court) and State of Minnesota v. American Housing Authority, Inc. and American Housing Financial, Inc. (hereafter "American Housing Authority")(filed 12/06/07 in Hennepin County District Court);

- May 20, 2008 – Interviewed Assistant Attorney General Nate Brennaman.

All of the Assistant Attorneys General (AAGs) whom I interviewed serve in the Complex Litigation Division, including AAG Amy Lawler.

Additionally, I have spoken to James R. Nobles, Minnesota Legislative Auditor. I have also reviewed the internet sites of MPR, MinnPost, and Minnesota Lawyer for any stories or comments relating to the allegations raised by Ms. Lawler.

IV. FINDINGS AND CONCLUSIONS

My investigation has led me to group Ms. Lawler's allegations of professional misconduct into three categories for purposes of my report:

(i) possible professional misconduct about which Ms. Lawler claims to have direct and personal knowledge. The only incidents that fall into this category are the prefiling communications and activity leading up the filing of two mortgage foreclosure fraud lawsuits;

(ii) possible professional misconduct that others have brought to Ms. Lawler's attention and about which she has no direct or personal knowledge;

(iii) possible professional misconduct undertaken by Ms. Lawler herself.

A. The Mortgage Foreclosure Assistance Company Suits

Ms. Lawler has raised ethical concerns arising out of a meeting that occurred on November 20, 2007. Attending that meeting were Attorney General Swanson, Deputy AG Karen Olson, AAGs Ben Feist, Christian Clapp, and Amy Lawler, and Investigator Don Donahugh. Ms. Lawler described the meeting in a number of forums:

- at a February 19, 2008 meeting with Solicitor General Alan Gilbert, Deputy Attorney General Karen Olson, AAG Daniel Goldberg, and retired Judge Larry Cohen;
- in a March 3, 2008 email to Ms. Olsen;
- in a series of interviews with local media reporters, including Minnesota Public Radio reporter Tim Pugmire and MinnPost reporter Eric Black;
- in Attachment A of a March 14, 2008 letter to Ms. Olson;
- in my interviews with Ms. Lawler.

Although there are some minor inconsistencies in Ms. Lawler's several accounts of the November 20 meeting, her story has generally been consistent. Ms. Lawler alleges that, at the November 20 meeting, Attorney General Swanson directed Ms. Lawler to file two or more lawsuits against two or more mortgage foreclosure consultants within one week, even though the Attorney General lacked any evidence of wrongdoing within Minnesota and had no defendants in mind.

Further, Ms. Lawler alleges that she raised ethical concerns about the timeline for filing suit and lack of evidence during the November 20 meeting. In Attachment A of her March 14 letter to Ms. Olson (hereafter "March 14 letter"), Lawler states, "I asked you and the attorney general about how a case could be built so quickly." In her interview with MinnPost reporter Eric Black, he quotes Lawler as being substantially more specific in how she expressed her ethical concerns at the November 20 meeting – that at this meeting Ms. Lawler "questioned whether it was ethical to issue a deadline for the filing of a lawsuit without knowing the facts or the parties in the case."

Ms. Lawler further contends that, at the November 20 meeting, Deputy Attorney General Karen Olson "brushed aside my concerns" by telling Ms. Lawler, "Don't worry, we'll make it survive a Rule 11." Lawler interprets Olson's alleged remarks as follows: "It seemed clear to me from your comment that you understood it might be difficult to ethically file lawsuits within the proscribed amount of time, and that it was questionable to decide to file a lawsuit before even locating a defendant, but were determined to file them nonetheless." (Attachment A of March 14 letter)

Thus, Ms. Lawler's concerns about the November 20 meeting appear to involve two individuals and two sets of comments:

- What Attorney General Swanson, at the November 20 meeting, directed Ms. Lawler to do and whether General Swanson acted ethically in so directing Ms. Lawler;

- What Deputy Attorney General Olson said to Ms. Lawler in response to ethical concerns Ms. Lawler allegedly raised at the meeting and whether Ms. Olson acted ethically.

1. Findings

The November 20, 2007 meeting took place exactly one week after Amy Lawler, a lawyer about two years out of Harvard Law School, began her position as Assistant Attorney General (AAG) in the Complex Litigation Division. At that time, the Division was somewhat thinly staffed. In addition to Ms. Lawler, there were four other AAGs – Nate Brennaman, Christian Clapp, Ian Dobson, and Ben Feist. These four and Amy Lawler reported to their direct supervisor, Deputy Attorney General Karen Olson.

The meeting on November 20 was fairly typical within the Complex Litigation Division. This Division investigates and brings suit on behalf of the State of Minnesota concerning a variety of consumer protection and fraud matters. Matters ripe for investigation and possible later litigation arise in a variety of ways. One common way for the Division to become aware of a consumer protection issue is through Minnesota consumers contacting the Attorney General's Office directly (which is staffed with personnel to accept and respond to complaints by consumers who have telephoned or written the Office). A second way is when other Minnesota law enforcement officials or other organizations bring an issue to the attention of someone within the Office.

A third way is through the formal and informal network of the Attorney Generals throughout the country (termed the National Association of Attorneys General or NAAG). In circumstances in which other states, through their Attorneys General, have filed enforcement actions against wrongdoers, the Minnesota Attorney General will always become aware of these suits and will often look to see whether these wrongdoers are also operating within Minnesota.

The meeting on November 20, 2007 involved all three ways in which the Complex Litigation Division may become aware of and decide to investigate possible wrongdoing against Minnesota consumers. At this meeting, Attorney General Swanson assigned investigations to three attorneys in the Complex Litigation Division. She assigned a consumer protection investigation of so-called lead generators to AAG Ben Feist, in which the Attorney General presented some materials to Mr. Feist and discussed the nature of the investigation he should undertake. These materials included information about suits filed by other states, as well as complaints received from Minnesota consumers relating to the same "lead generator" issue.

At the same meeting, Attorney General Swanson assigned a consumer investigation to Christian Clapp regarding unwanted merchandise that had been sent by a company, Paragon Laboratories, to the Stearns County Highway Department. The source for this investigation was the Stearns County Attorney's office, which had submitted a letter and supporting materials to the Attorney General. AAG Clapp was directed to do additional investigation, including seeing if other Minnesota consumers had been harmed by the same company. The Attorney General directed Ms. Clapp to report back quickly on what she had discovered.

Also, at the November 20 meeting, General Swanson assigned to Amy Lawler the investigation of predatory practices by mortgage foreclosure assistance consultants. The Attorney General had become aware of a certain kind of predatory practice by these types of companies. The practice – called "advance fee" billing – begins with a company offering to assist consumers with their mortgage debt; in the next step, the company demands a significant "advance fee" from a consumer in exchange for the promise of mortgage assistance; the endgame is the company accepting the fee, but failing to provide any assistance or services whatsoever.

Attorney General Swanson is a national expert in the area of predatory practices against consumers in mortgage lending, foreclosure assistance and home ownership; and she was drawing on her expertise, substantial knowledge, and network of contacts when she met with Ms. Lawler. General Swanson's expertise derives from and is evidenced by (1) her seven years as Solicitor General from 1999-2006 in which she supervised cases in the general area of mortgage fraud; (2) her appointment in 2004 by Federal Reserve Chair Alan Greenspan to the Consumer Advisory Council and as Chair of the Council in 2006 – the Council advises the Federal Reserve Board of Governors on financial consumer protection matters, including predatory mortgage lending and foreclosure practices; (3) her assistance in drafting Chapter 325N of the Minnesota Statutes, a statute on predatory practices by mortgage foreclosure assistance consultants, and in shepherding the bill through the Minnesota legislative on behalf of the Office; (4) her testimony in August 2007 on the mortgage foreclosure crisis before a Special Committee of the U.S. Congress; (5) her participation in NAAG, the network of 50 state Attorneys General, particularly as that network is a font of information about emerging consumer scams and enforcement suits undertaken in other states.

At the November 20 meeting, General Swanson drew on this expertise in explaining to Ms. Lawler the nature of the assignment she was directing Ms. Lawler to pursue, and in sharing a stack of materials on the mortgage foreclosure assistance "advanced fee" scam, which General Swanson herself had researched and compiled. (The Attorney General's handwritten notes appear on several pages of the materials she turned over to Ms. Lawler at the November 20 meeting.)

There is some dispute – but in my view not a material dispute – between Ms. Lawler and General Swanson and Deputy AG Olson about what materials General Swanson provided to Ms. Lawler at the meeting. It is clear, however, that Attorney General Swanson provided Ms. Lawler with abundant evidence that there was an

emerging problem in several states around the country. The Attorney General identified some companies that may have been operating in Minnesota, including the two whom Ms. Lawler sued 17 days later. Attorney General Swanson provided Lawler with copies of internet articles describing the mortgage "advanced fee" scam. These articles also identified two companies, Foreclosure Assistance Solutions and American Housing Authority, as companies who were involved in this type of scam and against which consumer fraud suits had been filed in other states. One of the internet articles indicated that the Better Business Bureau of Clearwater, Florida had received 236 complaints regarding mortgage foreclosure assistance companies and "advance fees," 42 of them from Texas residents.

Attorney General Swanson also provided internet press releases or other media stories to Ms. Lawler, describing the lawsuits filed by the Attorneys General in California, Illinois, Michigan, North Carolina, Ohio, and Texas against mortgage foreclosure assistance companies involved in advance fee practices. The Texas AG press release provided a website link to the complaint the Texas Attorney General had recently filed against Foreclosure Assistance Solutions. The Ohio AG press release announced the filling of suits against both Foreclosure Assistance Solutions and American Housing Authority and also provided a website link to the complaints the Ohio Attorney General had filed against these two companies.

Contemporaneous notes of the meeting taken by Deputy AG Olson corroborate Attorney General Swanson's recollection of what she discussed with Ms. Lawler on November 20. Ms. Olson's notes confirm that the Attorney General pointed out to Ms. Lawler that Ohio had already sued mortgage foreclosure assistance companies Foreclosure Assistance Solutions and American Housing Authority; that Texas had brought suit against Foreclosure Assistance Solutions and another company, JWW Services of California; and that North Carolina had sued Mortgage Assistance of the Carolinas. It is clear from Ms. Olson's notes that Attorney General Swanson called attention to and explained Chapter 325N of the Minnesota Statutes -- the statute Attorney General Swanson helped draft and the principal statute on which Ms. Lawler ultimately relied in filing her two mortgage foreclosure company suits. And the Attorney General asked Ms. Lawler to investigate and identify some Minnesota consumers who had dealt with any of the mentioned companies and to develop and receive affidavits from some of these consumers.

Finally, Attorney General Swanson assigned Investigator Don Donahugh, who has 24 years experience in the Division as an investigator, to assist Ms. Lawler in investigating whether these companies were operating in Minnesota and in identifying Minnesota consumers who had been harmed by this type of predatory practice.

It is clear, since Attorney General Swanson and Ms. Olson met with Ms. Lawler just six days later – on November 26 – that General Swanson felt some urgency to move forward quickly and had urged Ms. Lawler and Mr. Donahugh to complete their preliminary investigation as soon as possible. On this issue – of Attorney General Swanson's sense of urgency – there is controversy.

Ms. Lawler contends that the Attorney General's sense of urgency crossed over into unprofessional conduct on General Swanson's part. In her March 14 letter to Deputy Attorney General Olson, Amy Lawler contends that, at the November 20 meeting, Attorney General Swanson "told me to find some defendants and file a similar lawsuit the following week." Media stories report that Ms. Lawler made the same assertion in interviews with them – that Attorney General Swanson told her to file a lawsuit "within one week." Indeed, Eric Black of MinnPost reported on March 11 that Ms. Lawler told him that, at the November 20 meeting, General Swanson had issued "a deadline for the filing of a lawsuit without knowing the facts or the parties in the case."

Ms. Lawler's allegations, however, are exaggerated and not credible. No one else at the meeting – none of the other five participants – recall General Swanson telling Ms. Lawler to file suit within one week. Moreover, Ms. Lawler's own files undermine her credibility. In advance of the next meeting with General Swanson and Ms. Olson, scheduled for November 26, Ms. Lawler prepared two briefing binders – one focused on Foreclosure Assistance Solutions and the second on American Housing Authority, the two defendants against whom Ms. Lawler ultimately filed complaints on December 6. These briefing binders, which Ms. Lawler brought to the November 26 meeting, were entirely preliminary in their contents. They contained, among other things, (1) the stack of materials General Swanson had presented to Ms. Lawler six days earlier at the November 20 meeting; (2) copies of the lawsuits filed by the Attorneys General of Ohio and Texas against one or more of these two defendants; and (3) copies of consumer complaints of Minnesota residents who were complaining in writing that these two companies had scammed them out of an "advance fee." Ms. Lawler and Don Donahugh's investigation had discovered these complaints in the prior days, as they had been directed to do so by General Swanson.

Thus, the materials in the two briefing binders responded to the request that General Swanson contends she asked Ms. Lawler to investigate and collect on November 20. Notably, the binders do not contain drafts of lawsuits ready to be filed in a Minnesota Court "within one week." Nor is there any other evidence or testimony that Ms. Lawler, at the November 26 meeting, presented drafts of such pleadings or explained why she had not yet prepared them.

The discussions at the November 26 meeting and Ms. Lawler's briefing binders established that with respect to the predatory mortgage "advance fee" practice, there was reasonable evidence that at least two mortgage foreclosure assistance companies – Foreclosure Assistance Solutions and American Housing Authority – were operating in Minnesota; and there was tangible evidence that these companies' activities had unlawfully harmed Minnesota consumers. Thus, after a short period of time and after pursuing the leads that Attorney General Swanson had provided to Lawler on November 20 – within a week – Ms. Lawler had found two potentially culpable defendants – Foreclosure Assistance Solutions and American Housing Authority – and Minnesota consumers whom it reasonably appeared had been harmed by the predatory practices of the two companies.

Four days later, on November 30, Attorney General Swanson received draft pleadings against these two companies, prepared by Ms. Lawler. On December 6, 2007 – 17 days after the November 20 meeting – Ms. Lawler signed her name to two complaints by the State of Minnesota against Foreclosure Assistance Solutions and American Housing Authority.

Ms. Lawler also contends that, at the November 20 meeting, she raised ethical concerns about "how a case could be built so quickly" (Ms. Lawler's March 14 letter to Karen Olson). In his MinnPost column of March 11, 2008, Eric Black recounts Ms. Lawler expressing her concerns to him in this way: "Lawler said last night that when she was told to find a defendant and file a suit within a week, she questioned whether it was ethical to issue a deadline for the filing of a lawsuit without knowing the facts or the parties in the case. Her boss, Olson, told her not to worry, they would find a way to shelter the suit from any ethical complaint." In her March 14 letter to Ms. Olson, Ms. Lawler is more specific in her allegations about what Karen Olson said at the November 20 meeting:

> [Y]ou [meaning Ms. Olson] brushed aside my concerns, telling me simply, 'Don't worry, we'll make it survive a Rule 11.' Rule 11, as you know, is the rule of civil procedure allowing for sanctions against attorneys who file frivolous lawsuits. It seemed clear to me from your comment that you understood that it might be difficult to ethically file lawsuits within the proscribed amount of time, and it was questionable to decide to file a lawsuit before even locating a defendant, but were determined to file them nonetheless.

There is substantial disagreement over whether Ms. Lawler raised any ethical concerns at the November 20 meeting and whether Ms. Olson responded in the way Ms. Lawler asserts. Ms. Olson does not recall Ms. Lawler ever raising any such concerns to her between November 20 and the filing of suit on December 6. None of the participants at the November 20 meeting – General Swanson, Ms. Olson, Ms. Clapp, Mr. Donahugh, and Mr. Feist – recall a colloquy about ethical issues between Ms. Lawler and Ms. Olson. Indeed, one participant describes the meeting as light-hearted, at which both Ms. Lawler and Ms. Olson were making amusing remarks.

Mr. Donahugh, who worked closely with Ms. Lawler in the days following the November 20 meeting, recalls Ms. Lawler telling him most likely later that same day or perhaps a day or two later that Ms. Olson had mentioned Rule 11 in response to concerns Ms. Lawler expressed to Ms. Olson.

I find it impossible to have any reasonable level of confidence about what was said in this regard and when. Without question, Ms. Lawler – for a day or two after November 20 – was feeling the kind of high anxiety any new and inexperienced attorney might feel about whether she could fulfill the task which the Attorney General had set for her -- to find material evidence of wrongdoing in Minnesota within a week. It appears

that there might have been some brief exchange between Ms. Lawler and Ms. Olson on November 20 or within a day or two – about Ms. Lawler's anxiety. Ms. Olson might have responded by referencing Rule 11 of the Minnesota Rules of Civil Procedure.

Even assuming, without knowing that there was such a brief exchange, Ms. Lawler exaggerates its import because she misunderstands the terms and purposes of Rule 11. Rule 11 of the Minnesota Rules of Civil Procedure establishes and articulates the standards of factual investigation and legal grounding that every Minnesota attorney must meet before filing any type of legal document with a Minnesota court. By signing her name to a petition, written motion, or other legal paper, an attorney certifies that:

> to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (a) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (b) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (c) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (d) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Rule 11 also provides for the possibility of sanctions when Rule 11's standards have been violated. But Ms. Lawler mischaracterizes the meaning and purposes of Rule 11, when she describes it as the "rule of civil procedure allowing for sanctions against attorneys who file frivolous lawsuits." Rule 11 -- more accurately described -- is the rule of civil procedure that requires attorneys to have a reasonable and proper basis for going forward. Rule 11, as quoted above, requires that "allegations and other factual contentions have evidentiary support" and that legal claims and contentions be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Rule 11, in essence, seeks to ensure that Minnesota attorneys meet professional standards of conduct when filing lawsuits and other legal papers in Minnesota courts.

Thus, it is unreasonable to interpret a possibly brief reference to Rule 11 by Deputy AG Olson as ethically troubling. Moreover, Ms. Lawler greatly exaggerates Ms. Olson's remark's plausible meaning when Ms. Lawler asserts: "It seems clear to me from your comment that you understood that it might be difficult to ethically file lawsuits within the prescribed amount of time, and it was questionable to decide to file a lawsuit

before even locating a defendant, but were detained to file the nonetheless." No reasonable person would pack so much inflammatory content into a brief and general reference to Rule 11.

2. Conclusions

Given my findings as described above, I conclude that there is no basis for inferring any professional misconduct relating to the prefiling meetings and preparation of two suits against mortgage foreclosure assistance companies – Foreclosure Assistance Solutions and American Housing Authority. There is no reasonable basis for believing that either Attorney General Swanson or Deputy AG Olson acted unprofessionally in any way or violated any Minnesota Rule of Professional Conduct.

At the November 20 meeting, Attorney General Swanson provided substantial supporting materials, ample direction, and seasoned assistance (by assigning Mr. Donahugh as investigator) to Ms. Lawler, an inexperienced attorney who was also brand new to the Office. Within a few days, Ms. Lawler and Mr. Donahugh had identified complaints by Minnesota consumers and potential defendants. As directed by General Swanson, at a meeting on November 26, Ms. Lawler presented the fruits of her investigation, supported and documented in two briefing binders. Four days later, on November 30, Ms. Lawler had prepared draft complaints. And on December 6, 2007, Ms. Lawler signed her name to and filed two complaints, one against Foreclosure Assistance Solutions and a second against American Housing Authority.

It appears that these two suits, when filed on December 6, easily exceeded the requirements of Rule 11 of the Minnesota Rules of Civil Procedure. The Office had gathered affidavits from consumers who contended that they were charged "advance fees" by the two companies; and Chapter 325N makes it an automatic violation for a mortgage foreclosure consultant to demand or receive a fee until after the foreclosure consultant has fully performed each and every service that the foreclosure consultant contracted to perform or represented he or she could perform. Claims in the two complaints for consumer fraud, false advertising, and deceptive trade practices would also appear to exceed Rule 11's requirement.

Notably, Ms. Lawler agrees with these conclusions. She contends that she has never doubted that the two suits exceeded Rule 11's requirements. In a March 3 email to Ms. Olson, Ms. Lawler asserts "[W]e were able to ethically file the suits....The point of the story was not that I felt we had ultimately broken any ethical rules in filing the suits..."

B. Allegations About and Involving Unnamed Attorneys

In Attachment A of her March 14 letter to Deputy AG Karen Olson, Amy Lawler lists a handful of "troubling situations," which other attorneys in the Office have "faced under Lori Swanson's watch." They are described earlier in my report (page 4) as

ethical allegations (2) through (5). Ms. Lawler also submitted a copy of her March 14 letter to MinnPost reporter Eric Black, who described the allegations in a March 18 blog.

When I spoke to Ms. Lawler at our initial interview on April 23, I asked her to provide me with the names of the attorneys or staff members involved. She declined. I also asked her how she had come to learn about allegations (2) through (5). Ms. Lawler told me that she had heard other attorneys narrate these alleged incidents after work hours at bars over drinks.

Finally, I asked Ms. Lawler to speak to these individuals and urge them to contact me. In a subsequent interview on May 12, Ms. Lawler indicated that she had passed on my request to the "organizing committee."

No one has called or contacted me with information about these alleged incidents. Because I have received no reliable information of any kind, I form no opinions and draw no conclusions whatsoever about whether these incidents occurred or, if so, whether they would constitute violations of any Minnesota Rule of Professional Conduct.

C. Amy Lawler's Conduct

Attorney General Swanson has asked me to review whether any attorney in the AG's office may have violated the Minnesota Rules of Professional Conduct in connection with the five allegations of professional misconduct listed on page 4 of my report. As part of my investigation, therefore, I have considered whether Amy Lawler's own conduct is violative of any rule of professional conduct.

1. Findings

Ms. Lawler has made several disclosures of information pertaining to the activities of the Office of the Attorney General, information that she obtained during the performance of her duties for the Office. They include the following:

(a) On or about March 7, 2008, Ms. Lawler conducted an interview with MPR Reporter Tim Pugmire, in which Ms. Lawler states, "there are a lot of things that are really wrong with the office right now that are a real disservice to the public...And as a result, we're losing the best talent, the brightest minds. People don't feel like there's anything they can do to improve the office, so they just leave, or get fired."

(b) On or about March 7, 2008, Ms. Lawler conducted an interview with MinnPost report Eric Black. Ms. Lawler is quoted as saying, "she has been put in situations that made her uncomfortable where she had to weight her own ethical standards against pressure to help Swanson get favorable media coverage and portray herself as the

friend of the downtrodden." Ms. Lawler further made public, "[Soon] after she joined the office in November, Lawler recalls, she was called to a meeting and told by Swanson she wanted a case to get the AG's office into a particular consumer-protection issue...Lawler – who said she couldn't disclose the precise issue for ethical reasons – said Swanson told her to find someone to sue, draft a complaint, and file suit within a week. Lawler considered that an ethically questionable way to begin a lawsuit."

(c) On or about March 10, 2008, Ms. Lawler released to MinnPost reporter Eric Black a redacted portion of a March 10 letter from Deputy AG Olson to Ms. Lawler. The letter places Ms. Lawler on administrative leave.

(d) On or about March 11, 2008, Ms. Lawler provided interviews with MPR reporter Pugmire and MinnPost reporter Black. In these interviews, Ms. Lawler identified the mortgage foreclosure consultant suits as those that raised ethical issues in Ms. Lawler's mind. Further, Ms. Lawler is quoted by Mr. Pugmire as stating, "And that was kind of the case across the board... [Attorney General Swanson would] just have an idea about a lawsuit, and she'd want it filed as quickly as possible." To Mr. Black of MinnPost, Ms. Lawler expressed her worries "not just about her ethical concerns but about the dysfunctional environment" of the Attorney General's Office.

(e) On or about March 18, 2008, Ms. Lawler submitted to MinnPost a copy of the March 14 letter she sent to Deputy AG Olson. The letter, which is two pages long, contains seven attachments, identified as Attachments A through G. Attachment A is an eleven page memorandum, written in Ms. Lawler's voice. It describes several conversations involving Office personnel, including Ms. Lawler's version of the November 20 meeting involving General Swanson, Deputy AG Olson, Ms. Lawler, AAGs Clapp and Feist, and Investigator Donahugh. It also describes a number of other activities of the Office. And it concludes, in a section titled, "Ongoing Areas of Concerns in the Office," by listing what Ms. Lawler terms eight "troubling situations," including the allegations of professional misconduct described on page 4 of my report. Attachment B is a March 3, 2008 email from Ms. Lawler to Ms. Olson titled "Case Reassignment." Attachment D is a February 19, 2008 email from General Swanson to all staff of the Office regarding an internal matter. Attachment E contains a February 20, 2008 message from General Swanson to all Office staff concerning an internal matter.

(f) On or about March 18, 2008, Ms. Lawler submitted the same March 14 letter with attachments to MPR reporter Tim Pugmire, and she spoke to him again about ethical issues in the Office faced by other attorneys.

Ms. Lawler disclosed the array of information mentioned above without obtaining the consent of Attorney General Swanson, Deputy AG Karen Olson, or anyone else in a supervisory position at the Office.

2. Conclusions

Rule 1.6 of the Minnesota Rules of Professional Conduct, titled "Confidentiality of Information," governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client." (Comment 1 to Rule 1.6). Rule 1.6 itself provides in pertinent part:

> (a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.
>
> (b) a lawyer may reveal information relating to the representation of a client if:
>
> (1) the client gives informed consent;
>
> (2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client...
>
> ....
>
> (10) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

The Comments to Rule 1.6 make clear that the general prohibition in 1.6(a) against disclosing information relating to the representation of a client "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." (Comment 3 to Rule 1.6).

Rule 1.6, of course, applies to government, as well as, to private attorneys. In the case of the Attorney General, because of the distinctive nature of her office, the attorney-client relationship is not an ordinary one. Although frequently the Attorney General represents and acts on behalf of a state agency, the AG's client is not the agency or office, but rather the public at large. Minnesota law has consistently affirmed that "the attorney-client relationship is subtly different for the government attorney. He or she has for a client the public, a client that includes the general populace even though this client assumes its immediate identity through its various governmental agencies." See, e.g., State v. McLaren, 402 N.W. 2d 535, 543 (Minn. 1987). Thus, the Minnesota Attorney General is obligated to act on behalf of the people, and the Attorney General's client is the public.

The Attorney General, as an elected constitutional officer, is Minnesota's chief legal officer. Minn. Const. art. 5, sec. 1. The Attorney General is accountable to the electorate and has important and broad legal policymaking duties. The Attorney General has broad discretion to set the policies and priorities she believes are necessary to further the interests of the public. The Attorney General, in effect, is the people's lawyer.

In operational terms, because the Minnesota Attorney General's client is the Minnesota public – society in general – the activities of the Office of the Attorney General in legally representing the public are also, therefore, those activities that fall under the protection of Rule 1.6(a). More specifically, information that an attorney working in the Office of the Attorney General is professionally bound to keep confidential under Rule 1.6 would certainly include any and all confidential conversations and communications involving Office attorneys and staff concerning the representation of the State of Minnesota in an investigation, possible suit, or pending suit. These types of activities are privileged communications under the attorney-client privilege and protected attorney work product. They, therefore, clearly fall within the ambit of Minnesota Rule of Professional Conduct 1.6(a).

Moreover, information about other activities of the Office of the Attorney General – which might not be protected from disclosure under an evidentiary privilege or attorney work product – may nevertheless be within the scope of Rule 1.6. As Comment 3 explains, Rule 1.6 "applies not only to matters communicated in confidence by a client but also to all information relating to the representation, whatever its source." Thus, public disclosure of information about the internal activities of the Office of the Attorney General in legally representing the State of Minnesota could run afoul of Rule 1.6, particularly when the disclosure could be "likely detrimental to the client." [Rule 1.6(b)(2)]. If, in effect, public disclosure by an Office attorney of Office activities would be likely to diminish the ability of the Office to represent the public, that attorney may have violated Rule 1.6 – unless one of the exceptions under 1.6(b) would apply.

Beginning on March 7 until March 18, Amy Lawler knowingly revealed information relating to the Attorney General's representation of the public. In particular, Ms. Lawler's disclosure of the prefiling activity leading up to the filing of two suits

against mortgage foreclosure consultants, including her account of the communications on or about November 20, amounted to a disclosure of confidential information under Rule 1.6(a). Neither Attorney General Swanson, as the State's chief legal officer, nor Ms. Lawler's supervising attorney, Deputy Attorney General Karen Olson, consented to Ms. Lawler's public disclosures of confidential communications. Disclosures concerning the November 20 meeting, as well as other disclosures about Office activities and other "troubling situations" in the Office, have likely diminished the ability of attorneys in the Office of the Attorney General to do their jobs – namely, to represent the people of the State of Minnesota in Minnesota courts.

In my opinion, by going public with a great deal of information about the internal activities of the Office of the Attorney General, particularly including confidential privileged communications at a November 20 meeting, Amy Lawler has violated Rule 1.6 of the Minnesota Rules of Professional Conduct.

Ms. Lawler's more appropriate recourse, if she had harbored legitimate and well-supported concerns about the professional conduct of any attorney in the Office, should have been to report her concerns to supervising attorneys within the Office of the Attorney General or, as contemplated by Minnesota Rule of Professional Conduct 1.6(b)(10), to the Minnesota Office of Lawyers Professional Responsibility.