

By SUSAN HUMISTON

## Demystifying the handling of lawyer complaints

**N**o one likes to receive communications from the Office of Lawyers Professional Responsibility, particularly in envelopes marked "Personal and Confidential." Your heart may miss a beat, or a pit may form in your stomach, and your first thought may be, "What have I done?" I know I felt that way when, as a young lawyer, I received a letter from the OLPR. After gathering my courage to open the letter, it was a bit anticlimactic (thankfully) to see that a complaint had been made but dismissed without investigation. Back then, I did not even know that was possible.

How does the Director's Office handle complaints? Which ones are investigated and by whom? If the complaint is not investigated, why not? What does the director do with recommendations from District Ethics Committees (DECs)? Is there a particular standard of review or burden of proof? How can adverse determinations be appealed and to whom? What does the Lawyers Professional Responsibility Board (LPRB) do that is

different from the Director's Office? Even experienced volunteer ethics investigators can get confused about the complaint handling process, so periodic refreshers are in order.

In Minnesota, we have a detailed, methodical process prescribed by Court rules, augmented by detailed office procedures, and designed to ensure fair and consistent handling of complaints, with several built in reviews and appeal options for both complainants and respon-

dent lawyers. While I trust everyone has read the Minnesota Rules of Professional Conduct (MRPC), I am pretty sure very few of you, even those who volunteer with the local DEC's, have read the accompanying and confusingly named Rules on Lawyers Professional Responsibility (RLPR). They are worth your time.

### Initial Review of Complaints

In 2015, the Director's Office received 1,210 new complaints. Every day, a duty attorney (a lawyer in the Director's Office) is assigned to review new complaints to make a determination whether to investigate the complaint or whether summary dismissal (a/k/a Determination That Discipline is Not Warranted, Without Investigation) is more appropriate. Rule 8(a), RLPR, provides, in part, that the director "may make such investigation as the Director deems appropriate" where a complaint presents "a reasonable belief that professional misconduct may have occurred." Because of limited resources and given the volume of complaints, it is not possible to investigate all allegations. Sometimes, the duty attorney may request more information from the complainant to assist in the initial determination. Although not set forth in Rule 8, the duty attorney typically asks herself, if all of the factual allegations are true, would they give rise to a violation of the MRPC?

Because the determination of whether to investigate is inherently discretionary, office procedures require a second attorney to independently review a summary dismissal, a task performed by the first assistant director. The decision whether to investigate is generally made promptly, usually no later than two weeks from the receipt of the complaint. Further, Rule 8(e), RLPR, allows a complainant who is dissatisfied with the Director's Office's summary dismissal the opportunity to appeal to the Lawyers Board. The appeal is assigned by rotation to a LPRB member, who may either approve the director's disposition or direct that further investigation be undertaken. In 2015, the Director's Office summarily dismissed 610 complaints, or 46 percent. Complainants appealed 115

summary dismissals; 110 were affirmed and 5 were returned for investigation.

### Investigation

If the Director's Office decides to investigate, the duty attorney next determines if the complaint should be investigated by a DEC or by the Director's Office. Many complaints are initially investigated by DEC's pursuant to Rule 7, RLPR. We are fortunate to have a volunteer pool of over 300 public and attorney members trained to serve as investigators. The Director's Office tends to investigate matters involving trust accounts, serious misconduct that on its face may lead to public discipline, cases requiring an interpreter, and complaints against attorneys with multiple complaints pending, although this is a non-exhaustive list. In 2015, DEC's investigated 374 complaints. The remainder were investigated by the Director's Office.

### Dispositions

After their investigation, DEC's make a recommendation to the Director's Office. The DEC options are: (1) Discipline Not Warranted (DNW); (2) private discipline (what is known as an admonition); (3) charges of public discipline (public reprimand, probation, suspension or disbarment); or (4) further investigation. Rule 7(b), RLPR. The type of DEC recommendation guides further handling of the complaint by the Director's Office.

If the DEC recommends a DNW, the file is assigned by rotation to a senior attorney in the Director's Office for review. Although the Director's Office relies on work completed by the DEC, the attorney is reviewing the file independently to determine if, in fact, a thorough investigation was completed and the rule(s) analysis is correct. If the senior attorney agrees with the DEC recommendation of no discipline, a DNW is issued, which explains the determination. If the senior attorney does not agree, the file comes to me for assignment in-house. This does not mean the DEC necessarily got it wrong; usually it means we may not agree with the rule analysis or may



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## Professional Responsibility

believe additional information is needed.

If the DEC recommends an admonition, charges of public discipline, or further investigation, those files also come to me for assignment in-house for further review. Last year, the DEC recommended 247 dismissals, 81 admonitions, 17 charges and further review in the remainder. In 2015, the Director's Office followed the DEC recommendations in 279 files, departed in 48, and is considering further 47 files.

As with summary dismissals, complainants may appeal dismissals after investigation to LPRB members pursuant to Rule 8(e). Last year, the Director's Office issued 335 dismissals after investigation, whether investigated by the DEC or the Director's Office. Of those dismissals, 69 were appealed. On appeal, all but four were upheld. Of the four, one resulted in an admonition, one was referred to a panel for consideration of charges, and two were returned for further investigation.

While complainants may be troubled by the high numbers of dismissals annually, one thing to keep in mind is the standard of proof established by the Supreme Court for determinations of unprofessional conduct: "[a]llegations of

professional misconduct must be proven by full, clear and convincing evidence." *In re Ruhland*, 442 N.W.2d 783, 785 (Minn. 1989).

An admonition is a private form of discipline that is issued upon the finding of a rule violation but where the Director's Office determines the unprofessional conduct was "of an isolated and non-serious nature." Rule 8(d)(2), RLPR. Pursuant to office procedures, all discipline recommendations, including private discipline, are reviewed and approved by me, except a subset of admonitions involving Rule 1.3 (diligence) and Rule 1.4 (communication) violations, which are reviewed and approved by the first assistant director. Unlike dismissals, with or without investigations, which are completely expunged after three years (not even a record entry is maintained), records of admonitions are not expunged but remain confidential except as set forth in Rule 20, RLPR. In 2015, the Director's Office issued 111 admonitions, the most common form of discipline. Pursuant to Rule 8, these determinations can also be appealed by complainants or respondents to LPRB members. Of the 111 admonitions issued, eight were appealed, and all were affirmed.

Every year, a number of matters also result in public discipline, a detailed discussion of which is beyond the scope of this article. In 2015, six lawyers were disbarred, 47 were suspended, eight received a public reprimand and probation, and four received a public reprimand.

### Conclusion

Because lawyers in Minnesota take their ethical obligations seriously, it will likely always feel terrible to receive communications from the Director's Office. No one likes to have their ethics questioned, even if the allegation can be defended. However, due to the good work of my predecessors and comprehensive rules established by the Supreme Court, we have a fair system that keeps the rights of both complainants and respondent lawyers at the forefront, with numerous checks and balances and appeal options. I have only been behind the scenes at the OLPR for two months, but so far, I can say that the complaint handling process is working well to ensure that allegations of unprofessional conduct are "disposed of with fairness and justice, having in mind the public, the lawyer complained of and the profession as a whole." Rule 2, RLPR. ▲



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