

# District Ethics Committee Workshop

Susan Humiston, Director

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# Agenda

- Description of how an investigation is initiated
- Discussion about investigation strategy
- Best practices for the report
- DEC breakout session

We would like the next 30 minutes to be a collaborative session. Please jump in and share your thoughts and experience.

# An investigation is initiated

- Notice of Investigation sent to:
  - Respondent
  - Complainant
  - DEC- Chairperson or Investigator
- Case specific Notices
  - Fee Disputes- referred to fee arbitration
  - Focused Investigation

Parties as listed-  
complainant first,  
then respondent

**\*\*Conflicts Check\*\***

Notice is sent to  
Complaint, Respondent  
and DEC  
Chair/Investigator

In the Matter of the Complaint of  
SALLY JONES  
1213 Riverview Lane  
Castletown, MN 12345  
against CHAD SMITH  
Law Offices of Chad Smith  
123 Main Street  
Castletown, MN 12345,  
a Minnesota Attorney,  
Registration No. 0987654.

**NOTICE OF INVESTIGATION  
PURSUANT TO RULE 8(a), RULES  
ON LAWYERS PROFESSIONAL  
RESPONSIBILITY (RLPR)**

**TO: SALLY JONES:**

Your complaint has been received. It will be investigated, as provided by Rule 8(a), RLPR. You will be contacted if further information is required. You will receive written notice of the final decision.

In accordance with Rule 6(b), RLPR, your complaint is being forwarded to the Hennepin County Bar Association Ethics Committee for investigation. The name, address and telephone number of the committee investigator is as follows:

Bob Anderson  
999 Second Street  
Castletown, MN 12345  
(123) 444-4444

Until you are otherwise notified, please direct any questions or information about this complaint only to the district ethics committee (DEC) or the DEC's investigator.

This Office and the DEC can only investigate complaints of unethical conduct and take appropriate action. Neither this Office nor the DEC can represent you in any legal matter or give you legal advice. You must retain your own attorney if you need legal advice or representation.

A portion of your complaint appears to involve a **dispute concerning legal fees**. Most fee disputes do not involve unethical conduct, and this aspect of your complaint may not be investigated. However, the Minnesota State Bar Association has established fee arbitration committees around the state to help resolve disputes between attorneys and clients concerning legal fees. Fee arbitration procedures are often quicker, cheaper, and less formal than court proceedings. The cases are usually heard by a panel consisting of one attorney and two non-lawyers. Not every fee dispute can be submitted to the fee arbitration boards. To determine whether your case can be submitted to fee arbitration, and for further information about fee arbitration procedures, you should contact:

X District Fee Arbitrator

If your attorney has retained as fees money which you believe your attorney should have returned to you, and if your attorney will not agree to submit the matter to fee arbitration, you have the right to bring a civil action against your attorney to collect the amount in dispute.

**(15<sup>th</sup> only)**

A portion of your complaint may also involve a dispute about legal fees. A Supreme Court Advisory Committee recommended that this Office not be used to review fee disputes. Most fee disputes do not involve conduct which violates the Rules of Professional Conduct. Most fee disputes are better resolved through court action or through discussion and negotiation between attorney and client—remedies which you are free to pursue. However, for the foregoing reasons, the Director has determined this matter will not be investigated.

General fee dispute  
language referring the  
complaint to fee  
arbitration

Specific fee dispute  
language for the 15<sup>th</sup> DEC

Instructions to  
respondent

Language limiting  
investigation. Can the  
Investigator ask about  
other issues?

Another type of notice  
where respondent is  
given additional  
instructions

If complainant is the  
client, then a copy of  
the complaint goes to  
complainant

**TO: THE ABOVE-NAMED RESPONDENT ATTORNEY:**

Enclosed is a copy of the complaint identified above. It is being assigned to the above-named DEC for investigation.

Pursuant to Rule 25, RLPR, and Rule 8.1(b), Minnesota Rules of Professional Conduct, please **respond completely to the complaint in a writing mailed to the DEC investigator within 14 days of this notice.** The DEC chairperson will promptly notify you of the name, address and telephone number of the DEC investigator who will be investigating this complaint. You need not send a copy of your response to this Office, as the DEC will forward its file to us after its investigation is concluded.

You are directed to respond initially only to the portion of the complaint concerning the alleged failure to respond to Complainant's requests for information from January 1, 2018 through September 1, 2018. The investigator will advise you if a response is later needed to other portions of the complaint.

**OR**

In addition to your response to Complainant's allegations in the complaint, please also provide as part of your response a copy of the flat fee agreement and state where you deposited the advance fee. If you deposited the advance fee in your trust account, please include in your response the trust account books and records evidencing the deposit of complainant's advance fee into your trust account.

Please send a copy of your response(s) to complainant, if complainant is or was your client. *See* Rule 20(a)(5), RLPR. Please note that the filing of an ethics complaint does not in itself terminate an attorney-client relationship.

Thank you in advance for your cooperation.

# First things first- Conflicts Check

- What is a conflict for the purpose of the investigation?
  - Relationship with Respondent?
  - Relationship with Complainant?
  - Involvement in the underlying legal case?

# Investigation Strategy

- Investigation Strategy:
  - For example: you are investigating a complaint regarding diligence and communication. How would you tackle this investigation?
  - Brainstorming questions:
    - What information are you looking for?
    - Who has that information?
    - Are there documents you know of that will contain the information?
    - Who has those documents?
    - Publically accessible information
    - Any witnesses?
    - Anyone else with information?

# Interviewing Witnesses

- Preparation for interview
  - What information are you seeking?
  - Do you need corroborating evidence?
  - Identify the purpose of the interview.
- Conducting the interview
  - Have an open mind.
  - Ask open ended questions.
  - Ask key questions in multiple ways.
  - Recap what was said to ensure accuracy.
- Post interview
  - Follow up for any documents identified in the interview.
  - Document impressions/credibility while fresh in your mind.

# Investigation Hurdles

- Investigation Road Blocks
  - Non cooperation
    - Respondent is required to cooperate with investigation
    - Complainant is not required to cooperate, but noncooperation will affect evidence
  - The ever expanding complaint
  - Identification of new issues
    - This might be more of a detour than a roadblock
    - Investigation may identify additional issues
      - These issues may not have been included as complainant didn't know they were against the MRPC
  - Respondent asserting privilege
  - Stuck? Call/email your DEC chair or your OLPR liaison

# Privileged Information in Response to Complaint

- Rule 20(a)(5), RLPR – Response to complaint that “involves information as to which another client has a privilege” may be deleted from the response prior to providing complainant with a copy.
- Similarly, when providing a complainant with a copy of respondent’s response pursuant to Rule 6(d), RLPR, investigators will be sensitive to issues of privilege, but only if they are aware.

# Privileged or Confidential Information

- Confidential information
  - What is this?
    - Any information subject to a protective order.
    - Any information that is restricted by court order.
  - Don't take possession of this type of information.
  - Oops, you have it- what next?
    - Call your DEC Chair/OLPR Liaison
- Respondent Attorney claims privilege in response to an inquiry
  - What is the basis for the attorney's privilege claim?
  - What is the purpose of requesting the information?
  - Questions or need to talk through this? Call your DEC Chair/OLPR Liaison

# The report

- Burden of Proof
  - Clear and convincing evidence
    - This standard is met when “the truth of the facts asserted is highly probable.” *In re Dedefo*, 752 N.W.2d 523, 529 (Minn. 2008).
    - Clear and convincing evidence is established by more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978).
  - Facts and Analysis
  - Explanation of recommendation
    - Why did you make the decision you did?
    - Credibility calls? Why did you believe one person over another? Can a he said/she said meet clear and convincing evidence?
  - Public vs. Private Discipline?

# Private Discipline- Admonition

“In any matter with or without a complaint, if the Director concludes that a lawyer’s conduct was unprofessional but of an **isolated and non-serious** nature, the Director may issue an admonition.”

- Rule 8(d)(2), RLPR

What is Isolated and Non-Serious?

# Other Investigation Issues

- I volunteered, but I don't have time right now for an investigation
- This investigation is going to take longer than 90 days.
- This is a close call and I'm not sure if the Rules were violated.
- I think there needs to be additional investigation of an issue.

Call your DEC chair or your OLPR Liaison- we are here to help!

OLPR phone number: 651-296-3952

OLPR email addresses: first name.last name@courts.state.mn.us

# DEC Breakout Session

- What is going well in your DEC?
- What challenges are you as an investigator facing?
- How can the OLPR assist you?
- What resources would help you perform your investigative duties?