

When We Depart: Case Scenarios

Susan M. Humiston

Director, Office of Lawyers Professional Responsibility

Susan.humiston@courts.state.mn.us; 651-297-2963

Background Information

- ▶ Many cases are initially investigated by DEC's.
- ▶ In 2017: 278 cases were investigated by the DEC's. This was down significantly (14%) from 2016: 323 cases.
- ▶ A sign of more serious misconduct on initial review or more follow on cases. Summary dismissals increased YOY by 2% in 2017 to 50% of cases. Since 2011, SDs have been between 45% and 50% of case dispositions.
- ▶ 2018 Year to Date: 171 reports received with 80 investigations currently at the DEC's.
- ▶ Duty Attorneys make the initial determination as to whether the case is best initially investigated at a DEC or in-house.

DEC Numbers (2017)

2017 DEC INVESTIGATIONS COMPLETED BY DEC AND RECOMMENDATION						
DEC #	DNW	AD	CHG	FURTHER INVESTIGATION	WITHDRAWN	TOTALS
1	9	3	1		1	14
2	31	3		2	2	38
3	4	3				7
4	73	32	1	5	18	129
5	4	1				5
6	8					8
7	13	5	1	1	2	22
8	5	3				8
11	3					3
12	2					2
13	2					2
14	4	1				5
15	3			1		4
17	1					1
18	4	3				7
19	5	4		1	1	11
20	1			1		2
21	8	1		1		10
Totals	180	59	3	12	24	278

DEC Numbers (2018)

2018 DEC INVESTIGATIONS COMPLETED BY DEC AND RECOMMENDATION						
DEC #	DNW	AD	CHG	FURTHER INVESTIGATION	WITHDRAWN	TOTALS
1	2	1	2	1		6
2	22	6	1	1	4	34
3	6					6
4	39	25	3		4	71
5	2	2				4
6	3	1			1	5
7	1	3	1			5
8	5	2		1		8
10		1	1			2
11	4	1				5
12	1					1
13	1					1
15	4	2				6
18	1	1				2
19	5	2			1	8
20	4	1				5
21	1	1				2
Totals	101	49	8	3	10	171

Departures (Calendar 2017)

DEC REPORTS RECEIVED IN 2017						
Recommendation (Followed)	212					
Recommendation (Departed)	38					
With OLPR	28					
Total	278					
		Pending at OLPR		Final Determinations		
		Under	Charges			
Recommendation Made by DEC	Totals	Investigation	Pending	DNW	Admonition	Probation
Admonitions	59	9	2	14	33	1
Charges	3	0	1	1	1	0
DNW	180	5	3	151	20	1
Further Investigation	12	1	2	7	2	0
Withdrawn from DEC	24	2	3	16	3	0
Totals	278	17	11	189	59	2

Departures YTD (2018)

DEC REPORTS RECEIVED IN 2018				
Recommendation (Followed)	74			
Recommendation (Departed)	10			
With OLPR	87			
Total	171			
		Pending at OLPR	Final Determinations	
Recommendation Made by DEC	Totals	Under Investigation	DNW	Admonition
Admonitions	49	40	5	4
Charges	8	8		
DNW	101	27	69	5
Further Investigation	3	3		
Withdrawn from DEC	10	9	1	
Totals	171	87	75	9

Departures

- ▶ Typically follow DEC recommendations in 80-90% of cases.
- ▶ 2017—85%
- ▶ 2018 YTD—88% (87 cases with OLPR).

Reasons for Departures

- ▶ Application of rules – want consistent application.
- ▶ Issue spotting of additional rule violations.
- ▶ Disciplinary history of respondent that Director is aware of that investigators are not.
- ▶ New information emerges that changes disposition.
- ▶ Other complaints come in, so combined, the discipline might change.
- ▶ Proof of violation not available (complainant stops cooperating or wants to withdraw complaint).
- ▶ Respondent or complainant provide new arguments and information.

Basis for Departure

- ▶ We review DEC recommendations *de novo*, but consider the recommendations carefully because:
 - ▶ The DEC had direct contact with both complainant and respondent.
 - ▶ DECs give us perspective from those “in the trenches.”
 - ▶ DEC input includes (hopefully) input from lay members, giving us that additional perspective.
- ▶ Language used if departing:
- ▶ The district ethics committee (DEC), pursuant to Rule 7(b)(1), RLPR, recommended the Director determine that discipline is not warranted. The Director, upon receipt of the DEC recommendation, may accept, reject or modify it. Rule 8, RLPR. Modification of DEC recommendations is occasionally necessary to ensure that lawyer disciplinary standards are applied uniformly statewide.

Scenario #1

- ▶ **DEC recommended Admonition that became a DNW.**
- ▶ Facts: Respondent was opposing counsel in a conciliation court matter brought by complainant.
- ▶ Complainant defaulted, and respondent's client was awarded nominal costs that was reduced to a judgment.
- ▶ Parties ultimately settled for a modest sum. Complainant paid the settlement. Respondent did not provide or file a satisfaction of judgment for several months.
- ▶ DEC voted 5 – 2 in favor of an admonition for Rule 1.3, MRPC.

Scenario #1

- ▶ Director issued a DNW.
- ▶ Respondent credibly asserted that the failure to file a satisfaction was a mistake. Although complainant claimed that he called respondent three times, respondent had no record of any calls and complainant was unable to provide any specificity about the calls.
- ▶ Rule 1.3 is generally invoked by clients, to whom the duty is owed, not opposing parties.
- ▶ While there is a statute that requires satisfaction of judgments to be filed within 30 days, not connected to an ethics rule such that Rule 3.4(c) or Rule 8.4(d) implicated.
- ▶ DEC troubled by statute and fact that respondent handles judgments routinely.

Scenario #2

- ▶ **DEC recommended DNW that became an Admonition**
- ▶ Advertising Issue
- ▶ Solicitation directed to an individual regarding his criminal matter.
- ▶ Did not have “Advertising Material” on outside of envelope—said, “This is an advertisement.” Inside was labeled correctly, though one could argue not clearly and conspicuously.
- ▶ Investigator found a violation of Rule 7.3(c), MRPC, though technical.
- ▶ DEC voted 8-6 against a violation.
- ▶ Director issued an Admonition.
- ▶ In *In re M.D.K.*, 534 N.W.2d 271 (Minn. 1995), the lawyer sent a solicitation letter which enclosed a copy of the lawyer’s yellow pages advertisement. Below the signature block appeared the text, “Enclosure: Ad.” The court affirmed an admonition issued to the lawyer for violation of Rule 7.2(f), MRPC (the predecessor to Rule 7.3(c), MRPC).

Scenario #3

- ▶ **DEC recommended DNW that became an Admonition**
- ▶ Complainant was client, complaining of lack of communication, competence and lack of diligence. No merit to those claims as investigated by DEC.
- ▶ Investigator correctly noted that flat fee agreement was not compliant with Rule 1.5(b) for flat fee agreements.
- ▶ Ignored this fact because that was not what complainant was concerned about, rather, the complaint was focused on the quality of services provided.
- ▶ OLPR attorney flagged to see if funds placed in trust or business account.
- ▶ Issued Admonition for Rule 1.15(c)(5), MRPC.
- ▶ Rule 8(a), RLPR—At any time, with or without a complaint, or a DEC report, and upon reasonable belief that professional misconduct may have occurred,

Scenario #4

- ▶ **DEC recommended DNW became an Admonition**
- ▶ Respondent represented a client who was a defendant in an HRO proceeding.
- ▶ Respondent met with opposing party, ex-girlfriend with whom Respondent's client shared a child, before the HRO hearing. Opposing party was unrepresented.
- ▶ During the pre-hearing meeting, Respondent showed opposing party an exhibit she planned to introduce, which was a police report filed by opposing party against her new boyfriend — individual unrelated to the HRO — where opposing party told police her boyfriend did not disclose a medical status prior to having sex with her. The police report also included other sensitive medical information about the parties. Respondent claimed this information would become “public” if she proceeded with the HRO.
- ▶ Complainant was a domestic abuse advocate who heard the conversation and thought respondent was attempting to improperly intimidate the victim of harassment.

Scenario #4 (cont'd)

- ▶ Investigator correctly identified potential rule violation, Rule 4.4(a), and considered whether the use of the police report had “no substantial purpose other than to embarrass, delay, or burden a third person.”
- ▶ The investigator found persuasive respondent’s reasons for planning to introduce the report, and did not feel there was evidence of a rule violation.
- ▶ Flagged for further review by OLPR attorney because investigator had not asked for the police report.
- ▶ Upon receipt of the police report, and analysis of respondent’s arguments, it was clear that police report did not demonstrate what Respondent claimed it would. Found there was no other purpose but to embarrass the victim into dropping the HRO complaint, which she did.
- ▶ Particularly troubling, respondent had represented her client in 2013 and 2014 criminal proceedings, where the opposing party was the victim, and the HRO was being sought while respondent’s client was on probation for misdemeanor domestic assault violations.

Scenario #5

- ▶ **DEC recommended DNW that became Charges**
- ▶ Complaint alleged respondent was hired to represent complainant in a collection action for medical expenses. Complainant paid respondent cash but did not receive a receipt that accurately reflected how much paid. Complainant said respondent would only accept cash. Complainant also alleged the matter dragged on way too long.
- ▶ The DEC reviewed Rule 1.5 fees, and Rule 5.1, because respondent was the supervising attorney of the individual handling complainant's matter. DEC found fee reasonable for what was done, got copies of the receipts and did not see a supervision issue, but mentioned the attorney handling the case was not in the same firm as respondent.
- ▶ Reviewing OLPR attorney flagged for further review. Cash receipts were not countersigned as required by Rule 1.15(h), and Appendix 1 (6), MRPC, no fee agreement so there was a question of whether the advance fees (which included a filing fee) were placed into trust as required by Rule 1.15(a), and the issue of a potential fee-split needed to be reviewed.

Scenario #5

- ▶ OLPR attorney followed up on these points. Discovered that respondent did not have a trust account at all. Accordingly, no funds had been placed into trust, including the advance filing fee and unearned fees.
- ▶ When started to review bank records and actions in case, learned that on multiple occasions, respondent had been depositing settlement funds in her business account, and was disbursing client funds from her business account.
- ▶ Also learned that filing fee was never incurred and never refunded, although respondent had understood that it had been incurred. Potential issue of misappropriation of a filing fee.
- ▶ Awful time for respondent. Husband dying; she was in process of moving and discontinuing her practice.
- ▶ Stipulated to six month suspension for failing to deposit unearned fees into trust (Rule 1.15(a), failing to timely refund unearned fees and costs (Rule 1.16(d)), failing to obtain countersigned cash receipts (Rule 1.15(h) and Appendix 1), failing to safe keep client settlement funds by depositing them into her trust account on multiple occasions (Rule 1.15(a)).

Strategic Plan (Effective July 2018)

- ▶ **Tagline:** Protecting the Public, Strengthening the Profession.
- ▶ **Mission:** Protecting the public and serving the legal profession through the fair and efficient enforcement of the Minnesota Rules of Professional Conduct, and effective educational resources.
- ▶ **Vision:** Through effective, efficient and accountable regulation, the Office of Lawyers Professional Responsibility promotes the public interest and inspires confidence in the legal profession.

Strategic Plan (cont'd)

▶ Regulatory Objectives:

- ▶ 1. Enhance client protection and promote public confidence;
- ▶ 2. Ensure compliance with the rules of professional conduct in a manner that is fair, efficient, transparent, effective, targeted and proportionate;
- ▶ 3. Proactively assist lawyers in maintaining competence, well-being and professionalism;
- ▶ 4. Promote access to justice and public choice in the availability and affordability of competent legal services;
- ▶ 5. Safeguard the rule of law and ensure judicial and attorney independence sufficient to allow for a robust system of justice;
- ▶ 6. Promote diversity, inclusion, equality and freedom from discrimination in the delivery of legal services and the administration of justice; and
- ▶ 7. Protect confidential client and other legally-protected information.

Strategic Plan (cont'd)

▶ **OLPR Strategic Priorities**

- ▶ Partner with the Board and legal community to provide proactive, educational resources designed to promote competence, ethical practices, professionalism, and well-being in the legal profession.
- ▶ Maintain operational excellence to ensure ability to execute mission of the Office.
- ▶ Strengthen awareness of and confidence in the attorney regulation system.
- ▶ Strengthen organizational competence and efficiency by ensuring OLPR staff and DEC volunteers have the skills and support necessary to tackle forthcoming challenges within the legal profession.

Advisory Opinion Service

- ▶ Available to licensed MN attorneys
- ▶ OLPR attorneys will provide no cost verbal opinion on application of specific facts to rules; every day an attorney is assigned to A/O tasks and spends much of the day returning calls; will receive answer the same day or next day
- ▶ Confidential; non-binding on third parties
- ▶ No opinion will be offered on (1) conduct of third parties, (2) where conduct has already occurred, and (3) OLPR does not approve lawyer advertising, but will advise rules relating to same
- ▶ In 2017, the OLPR provided 2051 opinions.
- ▶ Options: Submit a written request on line (preferred where facts are complicated or detailed); call 651-296-3952 or toll-free 1-800-657-3601 and ask for the A/O attorney
- ▶ Website: <http://lprb.mncourts.gov>

Additional Resources

- ▶ Wealth of Resources on Website, <http://lprb.mncourts.gov>
- ▶ Index and text of Bench and Bar articles and MN Lawyer ethics columns by Office, sorted by Rule, Subject and Year (no precedential value but useful guidance)
- ▶ Current Rules (MRPC and RLPR) and Board Opinions
- ▶ Suspended and Disbarred Lawyer List
- ▶ Attorney Search containing all public discipline, with links to Court opinions and petitions for discipline
- ▶ Trust Account Information and Resources, including FAQs
- ▶ Professional Firm Filing Requirements
- ▶ Cross Border (Multijurisdictional Practice) Information
- ▶ Annual Reports of OLPR, including historical reports
- ▶ Announcements and News
- ▶ Board and Office Directory
- ▶ Complaint forms in English, Hmong, Russian, Somali, and Spanish

Client Security Fund

- ▶ Available to compensate clients who have been victims of dishonest conduct by an attorney that results in a direct loss.
- ▶ Loss must arise from an attorney-client relationship
- ▶ Must be caused by dishonest conduct of the attorney
- ▶ Direct loss is compensable; consequential damages are not
- ▶ Has paid out \$8.3 million over life of the fund (30 years) relating to 660 claims against 182 lawyers
- ▶ Funded by \$6 from annual registration
- ▶ www.csb.mncourts.gov

Closing

- ▶ Feedback—Thank you for all you do for the disciplinary system! How can we help you?
- ▶ Questions?
- ▶ Thank You!