

By MARTIN COLE

OLPR Investigation Procedures

Anot infrequent underlying cause of lawyer complaints and misconduct is when the lawyer attempts to handle a matter in an area of law with which she is not familiar. The criminal defense lawyer who tries to represent a personal injury plaintiff; the real estate lawyer handling a relative's contested marital dissolution; the corporate lawyer helping a business client with an employee's immigration case—these well-intentioned scenarios can all lead to possible legal disasters.¹ So too can lawyers attempting to navigate the lawyer discipline system, either in representing a lawyer or as a *pro se* respondent, run afoul of procedures with which they are not familiar.

The Minnesota Rules on Lawyers Professional Responsibility (RLPR) are the procedural rules by which complaints are investigated and disciplinary proceedings are conducted. These rules rarely generate significant discussion by the bar or the public; this is perhaps not surprising—the rules have worked well over the years and provide a fair and efficient method by which the disciplinary system can operate.

A downside of longstanding effective rules, however, is that even experienced practitioners may take the rules for granted and overlook portions of them. Usually this causes little or no mischief, but

on occasion can lead to confusion or unhappiness over what the Director's Office, a Lawyers Board panel, the respondent, or the complainant can or cannot do during a disciplinary investigation. Some of the rules for which a reminder (or if an initial lesson so be it) may be appropriate include the following.



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Start at the Beginning

Rule 8(a), RLPR, establishes the threshold for initiating an investigation into an attorney's alleged misconduct, authorizing an investigation if there is a "reasonable belief that professional misconduct may have occurred." This is somewhat akin to the civil litigation standard that a complaint must state a claim upon which relief can be granted; that is, if the allegations in the complaint are true, do they constitute a violation of one of the Minnesota Rules of Professional Conduct? Even if the Director's Office considers it unlikely that the allegations in fact will be proven true, if the allegations sufficiently allege attorney misconduct that would violate the Rules of Professional Conduct—such as neglect or a conflict of interest, for example—the complaint should be investigated. This is a source of frequent misunderstandings.

For many complaints, the Director's Office determines that the above standard has not been met and so determines discipline is not warranted without pursuing an investigation. Rule 8(a) also has built into it the requirement that before the director may commence an investigation on his sole initiative (*i.e.*, without a complaint), such as upon reading a news report of a criminal indictment or a Minnesota Court of Appeals decision citing lawyer misconduct, the Lawyers Board executive committee must approve that investigation.

A volunteer with the local District Ethics Committee² (DEC) usually takes responsibility for investigation of a complaint when an investigation is deemed necessary. The respondent lawyer is asked to submit an initial response to the DEC investigator within 14 days,³ but reasonable and timely requests for extensions may be granted. Additional written information, personal meetings with the investigator—or, occasionally in Hennepin County, attendance at a committee review meeting—may be required. Rule 25, RLPR, requires the subject attorney to cooperate in the investigation. After completing its investigation, the DEC will make a recommendation to the Director's Office which usually, in the overwhelm-

ing number of matters, will be followed. Occasionally the Director's Office conducts additional investigation and sometimes must disagree with the local committee recommendation, perhaps because there are additional complaints against or prior discipline of the lawyer to be considered. Many complaints are determined to not warrant discipline after the initial investigation.

During an investigation, the complainant has certain rights to information. The Director's Office has a general requirement to keep complainants advised as to the status of their complaint. If the complainant is or was a client of the lawyer at the time of the actions complained about, then the lawyer must provide a copy of her response to the complainant as well as to the investigator.⁴ If not a client, the complainant still must be afforded an opportunity to respond to the attorney's response—which may require the investigator to describe the lawyer's response.⁵

Imposing Discipline

If discipline is sought, there are private and public discipline options. Private admonitions are issued for "isolated and non-serious" violations of the MRPC.⁶ The attorney has the right to demand an evidentiary hearing before a Lawyers Board panel and to appeal to the Minnesota Supreme Court before an admonition is final.⁷ The Lawyers Board panel will usually handle charges of unprofessional conduct, seeking probable cause for public discipline, based on written submissions rather than a live hearing, since if probable cause is found, the lawyer will still be entitled to an evidentiary hearing before a supreme court-appointed referee.⁸

The director may need to add additional charges against an attorney during the litigation process. Additional complaints may have been received against an attorney (this is particularly true after a matter becomes public and there may have been publicity about the attorney) that warrant additional charges. If possible,⁹ board panels and the court prefer that allegations against an attorney not be handled serially, but rather be considered as a whole so that the proper overall level of discipline

can be assessed. The panel hearing a matter will, when necessary, be assigned any supplemental charges; similarly, the referee already assigned to the case will be assigned any supplemental public petition.

Public discipline proceedings are conducted pursuant to the Rules of Civil Procedure and the Rules of Evidence. Thus, either side may conduct discovery, including depositions, and ultimately there may be an evidentiary hearing. The referee, when appointed, is assigned a due date to file findings of fact, conclusions of law, and a recommendation as to discipline with the supreme court. Matters do not necessarily end there, however. Either party may challenge the referee report, although to challenge findings of fact or conclusions of law a transcript must be prepared.¹⁰ Briefing to the supreme court, followed by oral argument, can follow. A fully contested public discipline matter frequently may take a year to complete even after a finding of probable cause. Of course, the parties may and often do stipulate to a recommended level of discipline at any point during the proceedings.

Some Surprises?

Assorted aspects of the RLPR deserve special brief mention. Although this list is not exhaustive, examples include:

- Rule 6(c), RLPR, allows the respondent attorney to obtain a copy of any report from the DEC about an investigation;
- Under Rule 8(e), RLPR, complainants are allowed to appeal all private determinations (determinations that discipline is not warranted and those that impose private discipline);¹¹
- Rule 20(e), RLPR, requires that disciplinary files on matters that result in a determination that discipline is not warranted shall be expunged after three years, and that not even a docket record of the complaint may be retained;¹²
- Rule 21, RLPR, provides that statements made in a disciplinary complaint are privileged and may not form the basis of civil liability.

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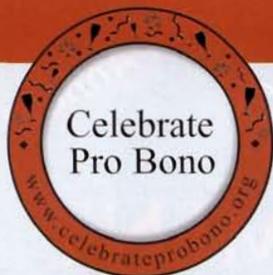
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The Rules on Lawyers Professional Responsibility try to strike a reasonable balance between the courts, the bar, the respondent attorney and the public, attempting to create fair and just lawyer discipline investigation procedures.¹³ On balance, they do just that. ▲

Notes

¹ This is not to imply that lawyers should never or can never take on a matter in an area in which they do not routinely practice. Comment [4] to Rule 1.1, Minnesota Rules of Professional Conduct (MRPC) (Competence) states in part that, “[a] lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.”

² Rule 3(b), RLPR.

³ Rule 7(c), RLPR, requires the DEC to complete its investigation within 90 days unless good cause exists.

⁴ Rule 20(a)(5), RLPR. Insofar as a response does not relate to the client’s complaint or involves information as to which another client has a privilege, portions may be deleted.

⁵ Rule 6(d), RLPR.

⁶ Rule 8(d)(2), RLPR.

⁷ Rules 8(d)(2)(iii) and 9(m), RLPR.

⁸ Rule 14(a) – (d), RLPR.

⁹ Timing sometimes makes serial charges impossible to avoid, since it is also important that matters be handled as promptly as reasonably possible, especially if an attorney is a current risk to the public.

¹⁰ Rule 14(e), RLPR.

¹¹ See also, Cole, “Complainant Appeals,” *Bench & Bar of Minnesota*, November 2010.

¹² As a result, attorneys who are the subject of a dismissed complaint should retain a copy of the determination on the possibility of a duplicate complaint being filed more than three years later.

¹³ See Rule 2, RLPR (Purpose).