

## SUMMARY DISMISSAL GUIDELINES

By

William J. Wernz, Director

Minnesota Office of Lawyers Professional Responsibility

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“Summary Dismissals” are determinations by the Director’s Office that an ethics complaint against a lawyer is dismissed without any investigation at all. The Lawyers Board has adopted guidelines, implemented by the Director’s Office, for issuing summary dismissals in several recurring types of cases. The “guidelines” are not intended to be applied as rigid rules in each and every case, but rather to state expectations of how the great majority of summary dismissals will be handled.

**General Standard.** If a complaint makes allegations which, if true, would not state a violation of the Minnesota Rules of Professional Conduct, the complaint will ordinarily be summarily dismissed. However, most complainants are not lawyers, and do not know the rules; therefore the guideline is broadly applied. In some situations, rather than dismissing or investigating, the director may ask the complainant for clarification or additional facts, particularly if there is any suggestion that serious misconduct may have occurred.

**Fee Disputes.** Routine fee disputes are referred to the MSBA arbitration committees in each area of the state. Most fee disputes involving matters subject to court jurisdiction – *e.g.*, probate, bankruptcy – are deferred for court consideration. Examples of fee complaints which are investigated and have resulted in discipline include an admonition for charging percentage fees in probate matters and suspensions for charging illegal fees in workers compensation matters.

**Malpractice Complaints.** The Supreme Court advisory committee recommended summary dismissal of complaints involving “only possible malpractice”. At about the same time, the Court adopted a new rule of professional conduct, Rule 1.1, providing, “a lawyer shall provide competent representation to a client”. Which allegations of poor quality representation should be investigated? The answer is far from clear. A great deal of discretion is used in applying this guideline, but complaints that principally involve an isolated allegation of malpractice are often summarily dismissed, without prejudice. Somewhat similar standards are applied to claims of bad faith litigation and pleadings, failure to obey court orders, and the like. Thus, if the court whose order has allegedly been violated makes a finding of improper conduct by the attorney, the ethics file will be reopened.

**Nonpayment of Professionally Incurred Indebtedness.** Routine claims that attorneys have not paid debts are usually summarily dismissed, whether the complainant is a professional (such as a court reporter) or private creditor. Lawyers Board Opinion No. 7 (stating that nonpayment of professional debts may be subject to discipline) was repealed in 1983. However, if it appears that there may have been a direct misrepresentation, an unsatisfied judgment or other aggravating circumstances, an investigation may be undertaken.

**Advertising and Written Solicitation.** Complaints against attorney advertising or written solicitation are routinely dismissed, unless there is an allegation of a false or misleading statement. Constitutional interpretation and changes in applicable rules have removed almost all such communications from the purview of the disciplinary office.

**Personal Behavior Outside the Practice of Law.** The Director's Office clearly has jurisdiction to consider allegations of attorney misconduct whether or not the actions were in the practice of law. *Matter of Scallen*, 269 N.W.2d 834, 841 (Minn. 1970). In general, however, discretion has been exercised using the limited resources of the office to investigate allegations of attorney misconduct in nonattorney situations only when the allegations, if true, would indicate a lack of fitness to practice law.

**The Criminal Process: Postconviction Claims of Ineffective Assistance; Prosecutorial Discretion.** Complaints alleging that a prosecutor improperly charged, or failed to charge, a particular person are normally summarily dismissed. The prosecutor's discretion in such matters is, as a matter of law, normally too broad for review. Postconviction claims of inadequate assistance of counsel and the like are seldom investigated by this office, because of the availability of postconviction review and appeal procedures, and because review of criminal proceedings is often a difficult and burdensome undertaking.

**Statistics.** The percentage of complaints summarily dismissed has greatly increased in the last two years. From 1982 through 1984, the summary dismissal rate averaged about 20 percent of all files closed. In the last two years, the summary dismissal rate has increased to over 30 percent. However, the overall dismissal rate (that is summary dismissals plus dismissals after investigation), remains at just over 80 percent, as it has for many years. This suggests that the complaints dismissed summarily would generally have been dismissed had there been investigations.

**Appeal Rights.** The increased summary dismissal rate may cause the concern that complainants will perceive the system to be unfair. Under Rule 8(a), Rules on Lawyers Professional Responsibility, "the Director may make such investigation as he deems appropriate. . . ." However, as one of the checks on this discretion, Rule 8(d), as amended, now provides that upon appeal of the director's determination by complainant, a Lawyers Board member may "direct that further investigation be undertaken". This amendment gives the board more of a voice in implementing summary dismissal policy, and lessens the risk that meritorious complaints will be dismissed without any investigation.

As the numbers of lawyers and complaints increase each year, the adoption of summary dismissal guidelines should enhance the fairness, consistency and efficiency of the professional responsibility system. At the same time, including an element of discretion in applying the guidelines should enhance the possibilities of doing justice to individual aspects of complaints. Finally, the increased summary dismissal rate lessens the burden on the volunteer district ethics committee members.