

OLPR Use of DEC Recommendations

**When We Depart and Other
Enforcement Positions of the OLPR to
Aid In Your Investigations**

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DEC OPTIONS



DEC Options

1. Discipline Not Warranted (DNW)
 - Insufficient clear and convincing evidence of a rule violation.



DEC Options

2. Private Admonition

- Rule violation has been established by clear and convincing evidence but the violation is “isolated and non-serious.”



DEC Options

3. Public Discipline (Referral to Board Panel a/k/a Charges)

- Rule violation has been established by clear and convincing evidence and it cannot be said that the violation was isolated and non-serious.



DEC Options

4. Investigate the Matter Further

- Committee is split on determination; cooperation of one or more parties has been less than complete; matter complained about does not show a violation but another issue has arisen that should be looked at, etc.



How often does it happen?

I ♥
STATS

Departure Stats, Jan-July 2021

- 112 files closed
- 95 recommendations adopted
- 17 files departed
- 15% departure rate



Departure Stats

Out of 17 departures, 9 were upward:

- 6 DNWs → admonitions
- 2 admonitions → public
- 1 DNW → public



Departure Stats

Out of 17 departures, 6 were downward:

- 4 admonitions → DNWs
- 1 public → DNW
- 1 public → admonition



Departure Stats

- 2 files were closed due to the death of respondent attorney

Departure Stats

51 of 114 reports received in 2021 are still under investigation.



Sometimes We Depart Because...

- ✓ DEC report incomplete
 - ✓ All potential violations alleged in complaint not addressed or investigated
 - ✓ Additional issues not addressed (e.g. fee agreement)
 - ✓ Attorney did not respond
 - ✓ Complainant had no opportunity to respond to attorney's response

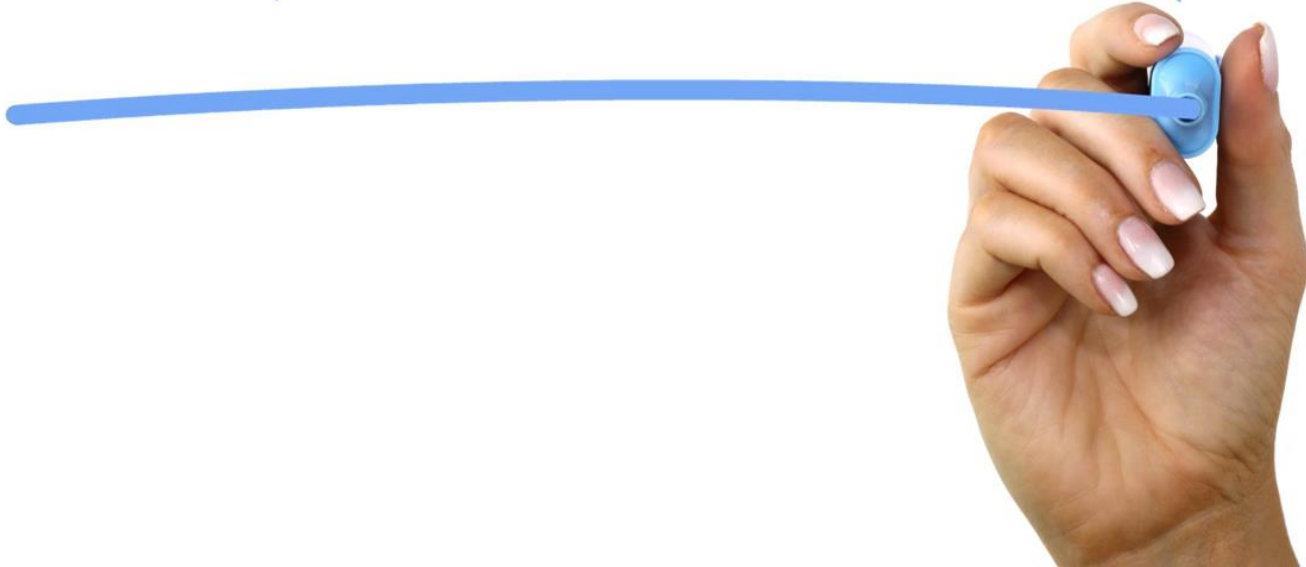


We May Also Depart...

- ✓ To apply rules consistently
- ✓ To take into account other factors
 - ✓ Past disciplinary history
 - ✓ Additional complaints
 - ✓ New evidence or information
 - ✓ Complainant stops cooperating (or respondent starts cooperating)
 - ✓ Credibility determinations



CASE STUDY



Case Studies

- The following cases will illustrate:
 - Reasons OLPR may depart.
 - “Technical” violation discussions.
 - When violations cross the line into public discipline (or vice versa).



Case Study 1: Are You My Client?

C was a member of a pre-paid legal services plan. C contacted the plan about an employment discrimination claim against a former employer.

The plan contacted R to see if R would speak with C “about potential representation” on the matter.

All events occurred in 2020 and 2021.



Case Study 1

R agreed to speak with C.

The plan referred C to R via email that stated that, if R was unable to assist C, C should contact the plan for further help.

Case Study 1

C and R spoke for about 37 minutes. C told R she had filed a claim with the EEOC. R asked C to send documentation related to the claim so that R could evaluate whether C had a valid claim.

A few days later, C sent R a 190-page personnel file from her former employer.



Case Study 1

A couple of months later, C and R spoke for about 17 minutes. R asked C to provide additional evidence supporting her claim.

The next day, C went to R's office and a staff member helped her copy and fax another 100 pages to R.



Case Study 1

R reviewed the additional documents, then misplaced them.

R did not contact C for the next 4 months.



Case Study 1

At the end of 4 months, C called R twice and faxed a copy of the EEOC's dismissal letter and notice of rights.

R called C the same day and left a voicemail requesting a call back.

C did not respond.



Case Study 1

Two months later, C left a voicemail for R asking if R intended to go ahead with her case or not, and noted that the filing deadline was approaching.



Case Study 1

R returned the call the same day.

R disclosed she had misplaced the earlier documents.

R told C that R could not undertake the representation.

R advised C to contact the plan for another referral, and reminded C of the filing deadline.



Case Study 1

C contacted the plan and got referred to another lawyer. That lawyer declined the case.

Less than 2 weeks before the filing deadline, the plan informed C that no lawyers within its network would undertake her matter.



Case Study 1

Four days before the filing deadline, R contacted C to find out whether C had found other counsel. C had not.

R offered to represent C for the limited scope of filing C's complaint to preserve C's rights, provided C paid the \$400 court filing fee.

C did not respond.



Case Study 1

Three days before the filing deadline, R texted C offering to drive to C's home to pick up document to file the case.

C replied that she was waiting to hear from another lawyer and did not want to pay the filing fee.

The next day R made the same offer and got the same response.



Case Study 1

The day before the filing deadline, R contacted C offering to pick up the documents, file the complaint and advance the \$400 court filing fee.

The next day, C called R saying she was still waiting on another lawyer and did not want R to file a complaint if R was not going to continue the representation.



Case Study 1

Due to the Covid-19 pandemic, C received a 60 day extension to file her case.

About halfway through that period, C filed a complaint about R with OLPR.

When C could not find another attorney to represent her, C filed a *pro se* complaint.



Case Study 1

C complaint alleged:

- C called R several times for an update on her case but received no response
- C sent the EEOC letter to R but received no response for 2 months
- R told C she had deleted the documents C had provided and was too busy to take C's case



Case Study 1

DEC investigator also learned:

- R inadvertently failed to save the 100-page document after briefly reviewing it
- C and R never got to the point of signing or even discussing a fee agreement
- R contended she never gave C legal advice and therefore C was not a client



Case Study 1

DEC investigator considered whether C was R's client, and concluded

- C and R had entered into a limited-scope agreement to evaluate C's case
- *Togstad* (tort) doctrine



Case Study 1

DEC investigator considered:

- 1.3 diligence
- 1.4(a)(3) keep client reasonably informed about the status



Case Study 1

DEC investigator recommended private admonition:

- Violation of 1.3
 - R failed to thoroughly review C's 100-page document
 - R failed to review C's claim in a timely manner
- Violation of 1.4(a)(3)
 - Failure to advise C whether she had a viable claim



Case Study 1

At the committee meeting

- Committee found violations of Rules 1.3 and 1.4(a)(3)
 - 13 in favor, 2 opposed
- Committee recommended admonition
 - 14 in favor, 1 opposed



Case Study 1

OLPR followed up and concluded that discipline was not warranted.



Case Study 1

- Why did we depart from admonition to DNW?
 - C was never R's client
 - Nonetheless, R made efforts to help C file complaint which C rejected
 - Without an attorney-client relationship, no duty of diligence or communication, therefore no violations of Rules 1.3 or 1.4(a)(3)



Case Study 1

- We did note that C was “understandably frustrated” with R’s actions prior to declining the representation
- R’s conduct did “not meet best practice standards or evidence good business practices when it comes to prospective client retention.”



Case Study 1

Lessons Learned

- C and R may not agree on the existence of an attorney-client relationship
- So too DEC and OLPR
- Fact-intensive analysis based on surrounding facts and circumstances



Case Study 1

QUESTIONS about Case Study 1 before we move on?



Case Study 2

Things Not To Say In An Email

R and R's associate represented mother in a dissolution matter. Mother lived in MN and father lived in FL.

Mother and father had an agreement that the children would travel from MN to FL once a month to visit father.



Case Study 2

In 2020, father suggested to mother that father's partner, C, escort the children to FL because C was already planning to fly from MN to FL at the same time.



Case Study 2

R and R's associate exchanged emails with father's counsel about father's proposal.

R had to run an errand so asked R's associate to send an email to father's counsel from R's email address.



Case Study 2

R's associate's email stated in relevant part:

“[W]hen you volunteer to send your own children to stay in a hotel with and be accompanied to Florida on a plane with a soft core porn star that they barely know, then I will take your client's request seriously.”

The email was signed by R's associate.



Case Study 2

Later that same day, R sent father's counsel an email regarding C, stating,

“Have you seen this woman's for want of better words, seductive pictures on the internet? Ewww- I would not send my daughters with her on a cross country flight.”



Case Study 2

Father's counsel shared the emails with father.

Father shared them with C.

C, who is not a soft-core porn star, shared them with OLPR.



Case Study 2

C complaints alleged:

- R and R's associate repeatedly defamed C including in the 2 emails previously mentioned
- C sought counseling

OLPR limited scope of investigations to Rule 4.4(a)



Case Study 2

DEC investigator learned:

- Children were ages 7 and 11
- R's client was genuinely concerned about father's request to allow C to travel interstate and overnight with the children
- Emails made father reluctant to attend mediation with mother



Case Study 2

DEC investigator considered that parties in family court proceedings might reasonably object to having “an unfamiliar proxy without legal standing” accompany minor children.



Case Study 2

DEC investigator communicated only with C and R's counsel and did not interview R or R's associate, nor father's lawyer.

Case Study 2

DEC investigator considered:

- 4.4(a)

Because DEC investigator found that the communications served the substantial purpose of advocating for the genuine concerns of a client, DEC investigator decided no discipline was warranted.



Case Study 2

OLPR followed up and concluded that an admonition was appropriate...

...for a violation of Rule 5.1(c)(1).



Case Study 2

OLPR concluded that an email to opposing counsel referring to a third party as a “soft core porn star” violated Rule 4.4(a).

Such language “was neither appropriate nor necessary.”

R’s associate was admonished for violating Rule 4.4(a).



Case Study 2

OLPR concluded that R violated Rule 5.1(c)(1) by

- failing to address the associate's inappropriate language either with associate or with father's counsel;
- ratifying the associate's conduct by using own inappropriate language



Case Study 2

Lessons Learned

- Further investigation can add helpful context. Interviews with R and R's associate indicated that both regretted their conduct and understood it had been wrong.
- When we limit the scope, we may end up departing



Case Study 2, Cont.

QUESTIONS about Case Study 2 before we move on?



Case Study 3

The Once And Future Admonition

C wanted to divorce her husband and also start deportation proceedings against him for fraudulently inducing marriage.

C first went to SMRLS.

When SMRLS said it could not help with immigration, C hired R.

Representation occurred 2019-2020.



Case Study 3

C and R had written fee agreement

- Flat fee of \$1,500 for divorce & immigration
 - States “non-refundable” and “earned upon receipt”
 - States “client may not receive a refund” if client terminates representation
- Scope of immigration: writing a letter to immigration authorities requesting that opposing party be deported



Case Study 3

C paid R in cash

– R's receipt not countersigned by C

R placed fee into operating account



Case Study 3

R determined that immigration authorities would not deport C's ex-husband and therefore a letter would be unproductive.

R did not tell C this.

R failed to take any action concerning the immigration portion of the engagement.



Case Study 3

At ICMC, C and husband reached a settlement.

C agreed to waive \$10,000 claim.

R agreed to prepare stipulated findings, conclusions, judgment and decree (J&D) and submit to court within 3 weeks.

Respondent did not file the documents.



Case Study 3

Two weeks later, C texted R asking for her file.

R said he would send a copy “ASAP.”

R failed to do so.



Case Study 3

One month later, C texted R:

“I no longer need your services please email my file to me.”

R did not respond.

R did not send the file.

R did not terminate his representation.



Case Study 3

C called and texted R several more times with no response.

Then C filed her complaint with OLPR.

Case Study 3

After C's OLPR complaint, R filed the proposed J&D with the court.

Before filing, R did not give C a copy of the J&D or go over it with her.



Case Study 3

The next day, C wrote to the court saying she wanted to “stop the divorce” and represent herself.

R did not respond or communicate with C.
The court did not respond.



Case Study 3

About 2 weeks later, the court signed and issued the J&D.

Two days later, R sent C a closing letter and copy of her file including the signed J&D.



Case Study 3

C complaint alleged:

- R did not communicate w C before family court date
- R talked privately to C's ex-husband at court and did not explain why
- R did not submit the immigration petition
- R did not give C case file



Case Study 3

DEC investigator also learned:

- R did not notify C that R intended to waive monetary demand from ex-husband as part of marital dissolution
- R filed proposed J&D without notifying C or going over document with her
- R did not comply with C's request to stop dissolution and withdraw



Case Study 3

DEC investigator considered:

- 1.2(a) abide by client decisions
- 1.3 diligence
- 1.4 communication
- 1.5 flat fee
- 3.2 expediting litigation



Case Study 3

DEC investigator recommended private admonition:

- Violation of 1.3
 - Failure to complete immigration work
- Violation of 1.4
 - Failure to communicate about immigration
 - Failure to communicate about J&D
 - Failure to respond to requests for information
 - Failure to respond to request for file



Case Study 3

DEC investigator recommended private admonition:

- Violation of Rule 1.5(b)(1)(i) and (v)
 - Flat fee retainer agreement is vague and does not contain the required refund language
- Violation of 3.2
 - Failure to timely file J&D



Case Study 3

At the committee meeting

- Committee unanimously found violations of Rules 1.2(a), 1.3, 1.4, 1.5, and 3.2
- Committee discussed public vs private
- Investigator revised her recommendation to public
- Committee unanimously recommended public



Case Study 3: OLPR reshuffles the DEC

DEC violations

- 1.2(a)
- 1.3
- 1.4
- 1.5
- 3.2

OLPR violations

- 1.2(a)
- 1.3
- 1.4(a)(2) x 2
- 1.4(a)(3)
- 1.4(a)(4)
- 1.4(b) x 2
- 1.5(b)(3)
- 1.15(c)(4)
- 1.15(c)(5)
- 1.15(h) & Appx I
- 1.16(a)(3)
- 1.16(d)
- 3.2



Case Study 3

OLPR followed up and concluded an admonition was appropriate after all.



Case Study 3

- Why did we depart from public to admonition?
 - One matter
 - Relatively short time
 - No misappropriation of client \$
 - No false statements or dishonesty
 - R's misconduct did not affect outcome of either dissolution or immigration



Case Study 3

Lessons Learned

- Communications breaks down (into subparts)
- Fees are tricky (Rule 1.5 and 1.15)
- Cash issue was not considered (Rule 1.15)
- Withdrawal issue was not considered (Rule 1.16)



Case Study 3

Lessons Learned on Fees

- “Nonrefundable” is 1.5(b)(3) → admonition
- Noncompliant flat fee + funds into operating account = 1.15(c)(5), failure to safekeep



Case Study 3

Lessons Learned on Omitted Issues

- Remember **Appendix I** to Rule 1.15 offers details on handling **Other People's Money**
 - Cash deposits need a countersigned receipt
- Remember **withdrawal** triggers special obligations under Rule 1.16



Takeaways

Even when we depart, we rely on DEC's "leg work"

- Learning factual and legal context
- Assessing witness credibility
- Spotting issues for further inquiry

These are tough issues, so feel free to contact your DEC liaison with questions!



Thank you DEC investigators for
your outstanding work!



QUESTIONS?

