

# Complaint investigation and prosecution

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Individuals who file ethics complaints and lawyers who receive them often have questions about complaint investigation and prosecution of misconduct. Maybe you're curious, too.

The Minnesota Supreme Court has adopted a set of procedural rules called the Rules on Lawyers Professional Responsibility (RLPR) that address how complaints are investigated and discipline proceedings are conducted. This article is not about these rules (although they govern what is covered) but rather is aimed at explaining generally how attorney ethics complaints are handled, and the various options available when rule violations are discovered.

## The starting point

Before I jump into the process, a bit about the players involved. One of the confusing aspects of our discipline system is the role of various entities in the process. Many states have a mandatory bar association, to which all licensed lawyers must belong, that is both a trade association and a regulatory entity. In fact, most state bars function this way. Thus, individuals with complaints against lawyers are encouraged to file complaints with the "bar association." That is not the case in Minnesota. The MSBA serves many roles, but it does not have a regulatory role, with one exception that I'll discuss. Rather, attorney regulation is handled by several boards and offices created by the Minnesota Supreme Court.

For purposes of attorney discipline, there are two relevant entities—the Lawyers Professional Responsibility Board (LPRB) and the Office of Lawyers Professional Responsibility (OLPR). These entities are often collectively referred to as the "Lawyers Board," but the two have distinct roles in the discipline system. The LPRB is a volunteer body of lawyers and public members that assists the Court in rule- and policy-making in attorney ethics and discipline and performs other important decision-making roles within the process. The LPRB does not investigate complaints.

The OLPR, also sometimes referred to as the Director's Office—led by me—is the professionally staffed office created by the Court to investigate complaints and prosecute ethics violations. The OLPR is assisted in its investigation work by several district ethics committees (DECs) throughout the state that consist of volunteers—again, both lawyers and non-lawyers—established by the MSBA for this purpose. Consequently, although Minnesota is not a mandatory bar state, the bar association and its members play an important role in attorney discipline.

Another important fact is that no public moneys are spent to fund the Minnesota discipline system. The Minnesota Supreme Court assesses licensed Minnesota lawyers an annual fee that is used to cover the costs of attorney regulation, including but not limited to attorney discipline. The legal profession is often referred to as a self-regulated profession, and part of that process is that attorneys fund the regulatory function. If you are a member of the MSBA, similarly, no part of your annual membership fee goes to the attorney discipline system, except as necessary to support the district ethics committees within the MSBA.

## Complaints

Anyone can file a complaint, and complaints can be filed by mail to the OLPR or online through our website ([lprb.mncourts.gov](http://lprb.mncourts.gov)). We usually receive 1100-1200 complaints each year (although we are on track to exceed those numbers this year). We do not investigate every complaint we receive. But every complaint is carefully reviewed by an attorney in the OLPR to determine whether its allegations provide a basis to investigate.

If we decide not to investigate, a determination is drafted that explains the decision. And there is a process for complainants to appeal the decision not to investigate. These appeals go to a reviewing LPRB member, who can direct the Office to investigate or affirm the decision not to investigate; this determination is final.

If we decide to investigate, or are directed to investigate by an LPRB member, the next question is, to whom the matter should be assigned? In many cases, a DEC will initially investigate the complaint allegations. However, some cases are investigated in-house by OLPR personnel. And there are several circumstances in which the Director's Office can investigate without the filing of a complaint, although most of our matters are initiated by a complaint. The Notice of Investigation will tell both the complainant and respondent attorney the individual or committee who has been assigned to investigate the matter (committees then make further investigator assignments), and sometimes the notice will narrow the investigation to particular rules or issues.

If a matter is investigated by a DEC investigator, that investigator will report the results to a committee, and the committee will vote on its recommendation. But it's important to note that the resulting recommendation of the committee is only a recommendation and is not binding on the OLPR. This is commonly misunderstood by both complainants and

respondent attorneys. All DEC investigation recommendations are reviewed by senior attorneys in the OLPR for thoroughness and consistency, and our DEC's do excellent work. While we follow the recommendations of the DEC's approximately 80 percent of the time, there are occasions where we depart, often after further investigation. And, as noted, some cases are not investigated by DEC's at all.

Investigation timelines vary depending on several factors, such as the nature of the allegations, how cooperative witnesses may be, how promptly individuals respond to requests for information, and whether additional issues are discovered during the investigation that require additional followup, to name a few factors. Most DEC investigations take four to seven months, and in-house investigations can take longer. We aim to address dismissals or private discipline, whether DEC investigations or in-house, within one year. And many cases are dismissed sooner than that, with an average of seven months from complaint filing to dismissal for many of the cases we handle.

### Determinations

At the conclusion of an investigation, there are several options. Dismissal is warranted if the investigation does not show facts demonstrating a rule violation that can be proven by clear and convincing evidence (the applicable standard of proof). Both the complainant and respondent attorney will receive a copy of the written dismissal, which can be appealed by the complainant to a reviewing LPRB member. Dismissal decisions are expunged from an attorney's record after three years.

If there is evidence of a rule violation that can be proven by clear and convincing evidence, the next issue is whether public or private discipline is warranted. The Director may issue a private admonition, which is a form of private discipline reserved for rule violations that are both isolated and non-serious. Or the Director may agree with a respondent attorney to place that attorney on private probation, if the respondent attorney has more than one matter with non-serious misconduct where probation might be appropriate. Private probation decisions must be approved by the chair of the LPRB. Complainants receive copies of admonitions and private probation decisions and may appeal the Director's decisions in those matters to a reviewing LPRB member. Thus, while private discipline is private in Minnesota, it is not secret; the complainant will receive a copy of the decision. Private discipline is not disclosed by the Director, except under certain circumstances, and is never expunged.

Respondent attorneys may appeal admonitions issued by the Director to the LPRB, and those appeals are heard by three-member panels (typically two lawyers and a public member) of the LPRB. There is currently a rule change pending before

the Court to adopt a diversion program, which would create an option to enter into diversion agreements in lieu of discipline in some instances. This change, if adopted, may have a material impact on private discipline. Currently between 80-120 private discipline decisions are issued each year.

### Public discipline

If an investigation discloses rule violations that are serious (as compared to isolated and non-serious), then the Director will pursue public discipline. The Director cannot just file a petition for public discipline, however. With limited exceptions, before filing a petition for public discipline, the Director presents charges to a panel of the LPRB for a probable cause determination. A panel of the LPRB (again, two lawyers and a public member) may dismiss the charges, determine there has been a rule violation but that an admonition is more appropriate, or approve the filing of the charges in whole or in part. This decision is generally based upon written filings with the panel.

If the panel finds probable cause, a petition is filed with the Minnesota Supreme Court. After probable cause is found, discipline proceedings are public. The case is assigned to a referee appointed by the Minnesota Supreme Court (usually a senior district court judge) to hold an evidentiary hearing and to make findings of fact, conclusions of law, and a recommendation for discipline. The Minnesota Supreme Court makes all final public discipline decisions, and may accept, modify, or reject the referee's recommendations after further briefing and oral argument. Similarly, the Director and respondent attorney may stipulate to a discipline recommendation, before or after an evidentiary hearing, which recommendation the Court may approve, disapprove, or modify as they see fit.

Public discipline options include dismissal, a public reprimand, public probation, suspension for a period from 30 days to five years, or disbarment, as well as other conditions the Court considers warranted by the facts. Public discipline remains public and is also not expunged. Approximately 30-40 attorneys are publicly disciplined by the Court each year.

### Conclusion

The RLPR provide more details, but this is the general process. Minnesota has a robust attorney discipline system with lots of checks and balances and due process for both complainants and respondent attorneys. It can be confusing, and it is often slower than most would prefer, but for more than 50 years, the OLPR (along with the LPRB and the DEC's) have carefully considered thousands of complaints, with discipline pursued where warranted, with the goal to protect the public, protect the legal profession, and deter misconduct. ▲