

COMPLAINANT APPEALS

By
Martin A. Cole, Director
Minnesota Office of Lawyers Professional Responsibility

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A unique and often misunderstood aspect of the lawyer discipline system is the right of a complainant to appeal a private disposition of their complaint.^{Ftn 1} If a complaint is dismissed without investigation (usually referred to as summarily dismissed), dismissed after investigation, results in the issuance of an admonition, or results in a stipulation for private probation the complainant is provided notice of the disposition and of their right to appeal.

The review is conducted by a member of the Lawyers Professional Responsibility Board assigned in rotation. The five board members who serve on the board's executive committee, who are charged with overseeing the operation of the Director's Office, do not handle complainant appeals. Just as is true in all phases of the lawyer discipline system in Minnesota, nonlawyers play a vital and equal role in handling complainant appeals. In most years, approximately 20-25 percent of private dispositions are appealed.

Board Member Options

The reviewing board member has several options of how to rule on the appeal. First, the board member may affirm the director's determination to dismiss, to issue an admonition, or to stipulate to probation. Second, the board member may instead direct that further investigation be undertaken. Particularly in instances where the complaint was dismissed without investigation, the directive to investigate simply places the complaint into the normal complaint process, very often with the complaint being referred to a local district ethics committee (DEC) to investigate, just as if it had been directed there to begin with. The overwhelming percentage of complainant appeals, well over 90 percent, results in one of these two choices.

Third, the reviewing board members have a limited option to impose discipline in matters in which a DEC, after investigation, recommends that the Director's Office

issue an admonition to the attorney,Ftn 2 but where the director determined that discipline is not warranted. In that situation, the reviewing board member may instruct the director to issue an admonition. The attorney then has the right to “appeal” the admonition and demand an evidentiary hearing before a Lawyers Board panel (other than the panel on which the reviewing board member sits) to consider the matter *de novo*.Ftn 3

The fourth and final option available to a reviewing board member, if the board member concludes that public discipline is warranted, is to instruct the Director’s Office to issue charges of unprofessional conduct and submit the matter to a panel (again other than the panel on which the reviewing board member is a member) for a probable cause determination pursuant to Rule 9, Rules on Lawyers Professional Responsibility (RLPR). As indicated, these two final options are only rarely employed.

One group of complainants is not permitted any avenue to appeal. Rule 8(b), RLPR, states that no investigation is permitted of a complaint made by or on behalf of a party represented by court-appointed counsel in a pending matter, insofar as the complaint alleges incompetent representation. Such complaints must be summarily dismissed. Almost exclusively this applies to complaints filed by criminal defendants who are represented by public defenders and are alleging ineffective assistance of counsel. The summary dismissal of such a complaint is not appealable under Rule 8(e).

How It Works

Considerable misunderstanding exists, both among complainants and respondent attorneys, regarding the process by which appeals are handled. Complainants are notified simultaneously with the attorney that a complaint has been summarily dismissed or dismissed after investigation with a determination that discipline is not warranted. All dismissals contain an explanation of why the matter is being dismissed. The complainant is given 14 days to appeal the disposition if they are not satisfied. Not surprisingly, a higher percentage of complaints are appealed by those whose complaints were dismissed without investigation than by those whose matter was investigated before a decision was reached. Complainants are notified of the right to appeal an admonition only after the attorney has accepted the admonition. Notification of a stipulated probation occurs after the board chair has approved the agreement.

There is no “magic” form that must be used by a complainant in order to appeal a disposition. Any timely letter that clearly states the desire to appeal will suffice. A basic statement of why the complainant believes the disposition is incorrect certainly is beneficial, as is pointing out any particular statements with which the complainant

disagrees and the information already provided that supports the appeal. This last point is important for complainants to understand, since the reviewing board member will make their determination based solely on the same information that was available to the DEC and the director; in other words, on the record as it existed at the time of the disposition. The entire file is of course available to the reviewing board member. The reviewing board member does not conduct additional investigation or initiate or invite direct contact with complainants or respondent attorneys.

If a complainant submits new information as part of the appeal, the board member can determine it makes no difference or return the matter to the Director's Office for further investigation.Ftn 4 The respondent attorney is not expected to reply to any new information during the appeal process. If further investigation is ordered, then the attorney will have an opportunity to respond.

Upon completion of their review, board members will issue a letter to the complainant and the attorney, stating their disposition and an explanation of their action.Ftn 5 There is no further review of a board member's affirmation of the director's disposition.

Fairness

Not all jurisdictions allow complainants the right to appeal private disciplinary dispositions. After all, a complainant is not a party to a disciplinary investigation any more than a victim of a crime is a party to a criminal prosecution. Crime victims have the right to certain information and to make an impact statement, but they do not get to appeal the prosecutor's charging or settlement/plea decisions.Ftn 6

Complainants in the lawyer discipline process might have their rights similarly limited—to being informed of the lawyer's response to their complaint, being provided an opportunity to respond, and being provided a copy of the disposition and notice of the right to petition to the Minnesota Supreme Court for review of a private disposition, all of which they have in Minnesota's system.Ftn 7 Minnesota goes beyond these rights, however, to provide the right to an appeal since it is important that complainants know that their allegations and concerns have been taken seriously and fully considered, even when the ultimate result is not what they hoped.

Procedural fairness requires balancing the due process rights of the subject attorney against the complainant's rights to a fair investigation and disposition. In Minnesota, an important part of that process is allowing complainants to appeal private dispositions.

Notes

1 Rule 8(e), Rules on Lawyers Professional Responsibility (RLPR), <http://lprb.mncourts.gov/rules/Pages/RLPR.aspx>. A fascinating historical tidbit is that until 1981, the OLPR and the Minnesota Attorney General had overlapping authority to investigate lawyer misconduct. Thus a dissatisfied OLPR complainant could effectively appeal to the Attorney General's Office. This was eliminated based in part upon separation of powers concerns, and Rule 8(e) was created.

2 Admonitions are issued for isolated and nonserious violations of the Minnesota Rules of Professional Conduct (MRPC). Rule 8(d)(2), RLPR.

3 Rule 8(d)(2)(iii), RLPR.

4 The board member could affirm the disposition of the issues in the original complaint and instruct investigation only of the new issues or, if there exists a reasonable basis to believe that the new/additional information could have altered the original disposition, direct further investigation of all issues in light of the additional information.

5 The supreme court has been strict in its interpretation and application of this requirement. See, *In re Q.F.C.*, 728 N.W.2d 72 (Minn. 2007), in which the court negated a board member's directive of a matter to a panel for failing to include the requisite explanation.

6 Minn. Stat. §611A.

7 Rules 6(d), 7(e), 8(d) and 9(l), RLPR.