

Director's role in conducting disciplinary investigations
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The director's office receives approximately 1,400 complaints against lawyers per year. Rule 8(a), Rules on Lawyers Professional Responsibility (RLPR), states that if a complaint gives rise to a "reasonable belief that professional misconduct may have occurred," then the director may "make such investigation as the director deems appropriate" in accordance with procedures established in the RLPR.

May the director investigate a lawyer's conduct and take disciplinary action without a complaint? Yes. Under Rule 8(a), RLPR, the director may conduct an investigation "at any time, with or without a complaint," as long as the director has the requisite reasonable belief that professional misconduct may have occurred. Investigations that are "to be commenced upon the sole initiative of the director," however, i.e., without a complaint, usually require approval of the Lawyers Professional Responsibility Board (LPRB) Executive Committee.

Are there limits on the scope of a director's investigation? What checks or controls are in place to insure that the director does not go on a proverbial "fishing expedition"? Basic requirements of due process, certainly apply. Although the Court has said lawyer discipline proceedings are "sui generis" and "not encumbered by technical rules and formal requirements," – *In re Rerat*, 224 Minn. 124, 28 N.W.2d 168, 172 (1947) – lawyers responding to allegations of professional misconduct are clearly entitled to due process rights. *In re Gherity*, 673 N.W.2d 474, 478 (2004), citing *In re Gillard*, 271 N.W.2d 785, 808 (Minn. 1978). Lawyers have unsuccessfully made due process challenges in two dozen or so disciplinary cases over the last 25 years.

Occasionally during lawyer discipline investigations, alleged misconduct is uncovered that relates to a matter in which a client has filed a complaint but was not contained in the complaint. May the director investigate and take disciplinary action based on these allegations? Complainants don't always know precisely about what they should complain ("My lawyer won't return my phone calls." Why? Turns out the lawyer stole the client's money. Should the disciplinary system be limited to the four corners of the original complaint?). Inquiry into such clearly connected matters would be "deemed appropriate."

A more difficult question can arise when alleged misconduct by a lawyer emerges during an investigation that either (1) involves clients (or others) who have not filed complaints, or (2) concerns misconduct that is unrelated to a legal representation, such as financial fraud by the lawyer.

The Minnesota Supreme Court recently addressed this scenario in *In re Nathanson*, 2012 WL 638014, __ N.W.2d __ (Minn., Feb. 29, 2012). There was only a complaint filed against Mr. Nathanson by his client, "D.C." D.C.'s allegations included incompetence, failure to communicate a settlement offer, and mishandling of an appeal by Nathanson. The director's Office investigated Nathanson's handling of several other appeals that did not involve D.C. Because similar misconduct by Nathanson was uncovered in all of the other appellate matters, the Director included them along with D.C.'s case in a petition for disciplinary action against Nathanson.

Nathanson argued the director violated Rule 8(a), RLPR, by investigating matters beyond the scope of D.C.'s complaint without first obtaining approval of the LPRB's Executive Committee. The Court rejected Nathanson's argument, noting the director's investigation in fact was initiated based upon a complaint, and not upon the director's sole initiative. The Court held that, because the investigation showed Nathanson had mishandled D.C.'s appeal, the director had a reasonable belief that Nathanson may have committed similar misconduct in other appeals, and therefore had a reasonable basis to investigate the other cases.

The Court also provided some guidance in *In re Nathanson* on the director's authority under Rule 8(a), RLPR, to conduct what may be called ancillary investigations beyond the four corners of a complaint or in the absence of a complaint. Significantly, the Court stated that the rule "does . . . place some limitations on the director's authority to conduct an investigation beyond the allegations of the complaint." The director must always have "reasonable belief that [additional] professional misconduct may have occurred." The Court also observed that "the director may not unduly expand the scope of an investigation to explore matters not reasonably related to the original complaint." Stated another way, the director cannot engage in "fishing expeditions." *Id.*