

Mythbusters: Lawyer discipline edition

by

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This year marks the 50th anniversary of the creation of the Office of Lawyers Professional Responsibility. In 1971, the Minnesota Supreme Court appointed the first Administrative Director of the Office, R.B. Reavill, having created the Lawyers Professional Responsibility Board the prior year. Since 1971, OLPR directors have written columns for *Bench & Bar*, advising the bar on ethics topics of interest. To ensure as broad a reach as possible, *Bench & Bar* allows us to republish these articles on our website, where you can find all of those articles archived today. On two occasions—in 1984 and again in 2013—Directors have written columns devoted to busting myths about the Office and the discipline system. In this anniversary year, let's see if I can demystify some beliefs about the Office, presented in no particular order.

Belief #1: Only clients can file complaints.

This is not true. In Minnesota, as in many states, there is no standing requirement to file a complaint. Who is making the complaint may figure in determining whether there is a reasonable basis to believe misconduct may have occurred—the standard we use to determine if we should investigate. But opposing parties, opposing counsel, members of the public, family members, etc., may file a complaint, and we will give it the same consideration we give a client complaint. There is also no statute of limitations to file a discipline complaint. The passage of time may necessarily impact our ability to investigate misconduct, but it has long been a core part of the process to disfavor any barriers to alleging misconduct.

Belief #2: Anonymous complaints are not investigated.

Mostly true, but there are exceptions. If the Office receives a complaint from an anonymous source, the Office will consider a number of factors, including whether the alleged misconduct is serious, the level of detail provided, whether an investigation can effectively occur without an identified complainant, and whether the conduct alleged involves personal rather than professional misconduct. The Office does not want to be used to advance personal agendas, but also understands that fear of retaliation may

affect a person's willingness to come forward, even when there is an ethical duty to report misconduct. The discipline imposed in the *Pertler* matter in 2020 (former county attorney disbarred for withholding information regarding a police officer) started with an anonymous complaint.

Belief #3: The Director can initiate an investigation without a complaint.

True, but there are good checks in place. Rule 8(a), Rules on Lawyers Professional Responsibility, provides that "with or without a complaint," the Director—upon a reasonable belief that professional misconduct has occurred—may conduct such investigation as is appropriate. But the rule also provides that investigations on the sole initiative of the Director need the approval of the Executive Committee of the Lawyers Professional Responsibility Board. The two most common reasons to seek approval, as noted in the 2013 mythbusters article, remain news reports of a lawyer's felony criminal arrest or conviction, or court of appeals decisions involving attorney misconduct.

There are other areas in which a Director's file might be initiated without a complaint and without Executive Committee approval (because the investigation is not on the sole initiative of the Director), including trust account misconduct discovered after an overdraft notice is received on a lawyer's IOLTA account, misconduct of another lawyer (such as a lawyer's supervisor) discovered while investigating a complaint against a subordinate lawyer, or report of discipline from another disciplinary agency against a Minnesota lawyer. Director-initiated complaints account for very few investigations annually, but help to ensure that misconduct is not ignored for lack of a complaining party.

Belief #4: The Director may have an open investigation against me without my knowledge.

Not true. The Director's office always provides notices of investigations to attorneys. I have heard from some lawyers under the impression that our summary dismissal notices mean that we reviewed a matter without their input, because the document is entitled "Determination that Discipline is Not Warranted Without Investigation." I'm not sure where that language came from, but I agree it looks like we make a discipline determination without input from you—though it's actually how we explain to the complainant that we are not investigating their complaint.

This is often the first notice a lawyer gets that a complaint has been filed, but it also indicates that no investigation will be conducted for the reasons stated. If we or a

district ethics committee are investigating a complaint against you, you will receive a document entitled "Notice of Investigation." If you do not keep your address up-to-date with the Lawyer Registration Office (*lro.mn.gov*), however, you might not receive that notice in a timely fashion. We do spend a surprising amount of time chasing down lawyers.

Belief #5: Only lawyers investigate lawyers.

Not true. Public members play a very important role in Minnesota's discipline system. District ethics committees, by rule, are composed of at least 20 percent public members. These individuals do not just advise on discipline recommendations by the committee, but conduct investigations themselves. While this can be disconcerting for lawyers, it is by design. Public members make up a large share (40 percent) of the Lawyers Professional Responsibility Board as well. Board members (including public members) review decisions by the Director not to investigate a complaint, or to dismiss a complaint after investigation, if a complainant appeals that determination. This information is provided to complainants in the notice regarding their appeal rights. I hear from a lot of complainants that this is very meaningful to them: They like to know that their concerns may be heard by a non-lawyer. Public members also sit on panels of the Board to review charges of public discipline for probable cause (ensuring that the public perspective is represented) and also sit on panels that hear appeals by lawyers to private admonitions. While we will likely never convince some members of the general public that a self-regulated system is more than the fox guarding the henhouse, public member participation in discipline decisions go a long way toward countering that belief.

Belief #6: Lawyers involved in discipline do not know what it is like to practice law.

Not true. Staff attorneys in the Office, including myself, have practiced in a wide variety of practice areas and settings before joining the Office. We have experience in large firms, small firms, solo practice, in-house counsel positions, and government agencies, including in the area of criminal law, both prosecution and defense. Further, most cases are initially investigated at the district ethics committee, which is composed of practicing attorneys in your local community. Attorney board members come from a variety of practices as well, and include MSBA members and non-MSBA members. Our discipline investigations and reviews of discipline determinations greatly benefit from this diversity of legal experience.

Belief #7: Lawyer well-being does not matter in discipline.

Not true, although it can certainly feel this way to affected attorneys. Lawyer discipline is not punishment, but rather is about protecting the public and the profession and deterring future misconduct by that lawyer and other lawyers. Because discipline is largely about objective factors, the subjective, personal aspects of the situation may have less impact than a lawyer would like. But those factors are taken into consideration if raised by a lawyer in mitigation. We work very hard to understand why something occurred as well as what occurred, but we recognize that it can be difficult for lawyers to raise sensitive issues, particularly in public matters. We frequently refer lawyers to lawyer assistance programs like Minnesota Lawyers Concerned for Lawyers (*mlcl.org*), and use private probation where appropriate to help lawyers get back on track. We see firsthand the impact of untreated substance use and mental health issues, and want nothing more than to see lawyers get the help they need to maintain an ethical practice.

Belief #8: OLPR only focuses on discipline.

Investigating and prosecuting violations of the ethics rules is the majority of our work. But we also present at CLEs; run an ethics hotline that provides free ethics advice to thousands of attorneys a year; serve as a trustee for disabled or deceased lawyers who do not have a succession plan in place; provide staff support to the Client Security Board and administer the Client Security Fund; staff a large probation department; provide support to Lawyers Board committees on proposed rule changes and the issuance of ethics opinions; train and mentor district ethics committee volunteers; administer an overdraft notification program aimed at trust account compliance; handle the annual registration of thousands of professional firms under the Professional Firms Act; provide written disclosures of discipline history upon authorization of counsel; maintain a website with a wealth of ethics information; and handle reinstatements to and resignations from the bar. Whew! When I was hired, I was surprised at the breadth of the OLPR's work, and remain very proud of all that we do.

There may well be other misconceptions about the work of the Office, but I hope this article has dispelled some myths. If you have questions about what we do and how we do it, please let me know. And, remember, we are available to answer your ethics questions: 651-296-3952.