



Current Issues in Professional Responsibility April 2018

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Office Statistics

- ▶ 2017 Complaints—1110; Down from 2016--1216
- ▶ Active lawyers in MN—25,241 (29,000 licensed)
- ▶ 2017 Public Discipline:
 - ▶ 5 Disbarred
 - ▶ 26 Suspended
 - ▶ 5 Publically Reprimanded/Probation
 - ▶ 4 Reprimanded
 - ▶ Private Discipline:
 - 14 Private Probations
 - 90 Admonitions (down from 115 in 2016)
- ▶ Open cases as of March 30, 2018: 528; 151 more than 1 year old

Office Statistics (cont'd)

- ▶ 2017 Dismissals
- ▶ 531 Summarily Dismissed (Determination that Discipline is Not Warranted Without Investigation)
- ▶ 260 Determination that Discipline is Not Warranted (after investigation)
- ▶ Who filed Complaints?
 - ▶ Clients (520)
 - ▶ Adverse Parties (233)
 - ▶ Opposing Counsel (33)
 - ▶ Director Initiated (48)—primarily through trust account overdraft program
 - ▶ Judges, other interested parties (remainder)

Office Statistics (cont'd)

- ▶ Most Frequent Areas of Law Involved
 - ▶ Criminal (265)
 - ▶ Family Law (170)
 - ▶ General Litigation (152)
 - ▶ Probate (85)

- ▶ Most Frequent Areas of Violations
 - ▶ Rule 1.4—Failure to Communicate
 - ▶ Rule 1.3—Diligence

Public Discipline of Note

- ▶ 5 lawyers disbarred; Average number of disbarments (3 of 5 admitted less than 10 years).
- ▶ Terri Lynn Fahrenholtz, who was disbarred in Minnesota following her disbarment in North Dakota for misappropriation of a modest client retainer in a bankruptcy case and abandoning at least eight open client matters;
- ▶ Diane Lynn Kroupa, who pleaded guilty to one count of felony conspiracy to defraud the United States, and was sentenced to 32 months in prison and ordered to pay restitution in the amount of \$532,000. Ms. Kroupa was a United States Tax Court judge;
- ▶ Jesse David Matson, who misappropriated a \$550 filing fee, made false statements to clients, fabricated a document, neglected and abandoned numerous client files, failed to return unearned fees, used improper fee agreements, failed to cooperate with the disciplinary investigation, and also committed misconduct in North Dakota, where he was subsequently disbarred as well;

Public Discipline of Note

- ▶ Steven Michael O'Brien, who misappropriated more than \$300,000 from a trust for which he was appointed the trustee; the Order of St. Benedict at St. John's Abbey was the trust beneficiary; and
- ▶ Geoffrey R. Saltzstein, who misappropriated approximately \$68,000 from two clients, made false statements to clients, failed to diligently pursue client matters or communicate with his clients, used improper fee agreements and failed to cooperate with the disciplinary investigation.

Public Discipline of Note

- ▶ 26 lawyers suspended—30 days to five years.
- ▶ William Bulmer—3 years (sex with witnesses and clients).
- ▶ Shawn Patrick Siders—soliciting a minor for sex (2 years)—stayed adjudication.
- ▶ John Bonner—felony theft by swindle (9 months)
- ▶ Patrick Nwaneri—false statement in an affidavit of service (30 days)
- ▶ Public reprimands: false notary (Kelly Sater)
- ▶ Negligently misappropriating client funds; failure to keep required trust account books and records; commingling client and personal funds. (5 attorneys).
- ▶ 2018—Prosecutorial Misconduct—Mollin—former Clearwater County Attorney (60 days)

Private Discipline

- ▶ Rule 3.1 violations— with or without sanctions by court.
- ▶ Rule 4.2— contact with a represented party.
- ▶ Rule 1.5 & Rule 1.15(c)(5)— improper fee agreements (most common reason for admonitions). Nonrefundable fees; availability fees; non-compliance flat fee agreements.
- ▶ Rule 1.6— disclosure of confidential information to opposing party upon termination of representation.
- ▶ Criminal conduct by disbarred attorney— Resnik, several counts theft by swindle. Hennepin County; not pursuing unauthorized practice of law; just a misdemeanor under Minn. Stat. 481.02.

Duty to Report

- ▶ Frequent area of inquiry on advisory opinion line
- ▶ No duty to self-report.
- ▶ Rule 8.3(a), MRPC, “A lawyer knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” Same knowledge about judge. Rule 8.3(b), MRPC.
- ▶ Rule 8.3(c), MRPC, Rule 1.6 exception if retained because professional conduct is in issue. & LCL
- ▶ Remember, Rule 5.1 and Rule 5.3, MRPC.

New ABA Opinions

- ▶ ABA Opinion 479 (December 15, 2017)
- ▶ The “Generally Known” Exception to Former-Client Confidentiality
- ▶ A lawyer’s duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client’s disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become “generally known.”
- ▶ The “generally known” exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client’s industry, profession, or trade. Information is not “generally known” simply because it has been discussed in open court, or is available in court records,¹⁰ in libraries, or in other public repositories of information.

ABA Opinions

- ▶ ABA Opinion 480 (March 6, 2018). Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.
- ▶ Rule 1.6, MRPC, broader than attorney-client privilege. Cannot discuss information whatever its source and without regard to the fact that others are aware of or have access to the information, unless a specific exception is found in Rule 1.6(b).

Proposed Rule Changes

- ▶ MSBA is considering petitioning the Court for changes to Rule 1.6 and Rule 5.5.
- ▶ Rule 1.6—to allow lawyers to respond to online or public criticism by clients with confidential information—Opinion No. 24.
- ▶ Rule 5.5—expand what non-Minnesota licensed lawyers can do in Minnesota.
 - ▶ Practicing law of another jurisdiction in Minnesota.
 - ▶ Family, close personal or prior professional relationships.
 - ▶ Temporary practice—reasonably related include services which are within the lawyer’s regular field or fields of practice in a jurisdiction in which the lawyer is licensed to practice law.

Sexual Harassment & Ethics #metoo

- ▶ It is professional misconduct for a lawyer to:
- ▶ harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer's professional activities. Rule 8.4(g), MRPC.
- ▶ It is professional misconduct for a lawyer to:
- ▶ commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer. Rule 8.4(h), MRPC. (Applies irrespective of whether in connection with a lawyer's professional activities).

Harassment & Discrimination

- ▶ Comment [6] “Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession.”
- ▶ Rule 5.1 & Rule 5.3, MRPC. Responsibility of Partner or Supervisory Lawyer; Responsibilities Regarding Nonlawyer Assistants. You have an obligation to ensure conduct of others is compatible with the ethics rules. Applies to government lawyers too.
- ▶ Rule 1.8(j), MRPC—sex with clients prohibited.
- ▶ Rule 4.4(a), MRPC—lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person.

Lawyer Well-Being & Ethics

- ▶ New report—National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being, Practical Recommendations for Positive Change* (August 2017)
- ▶ Specific recommendations for legal employers
 - ▶ Form a Lawyer Well-being Committee or appoint a well-being advocate
 - ▶ Assess Lawyers' Well-being (including stressors such as secondary trauma and workload)
 - ▶ Establish policies and practices to support well-being including confidential reporting procedures
 - ▶ Monitor for signs of work addiction and poor self-care
 - ▶ Actively combat social isolation and encourage interconnectivity
 - ▶ Provide training and education on well-being including during new lawyer orientation
 - ▶ Emphasize service-centered mission versus competition
 - ▶ Create standards, align incentives and give feedback on wellness efforts.
 - ▶ Duty of Competence—to include lawyer well-being (Rule 1.1)—action for regulators

Lawyer Well-Being & Regulation

- ▶ Specific recommendations for regulators – December 2017 Bench & Bar article
- ▶ Adopt regulatory objectives that prioritize lawyer well-being
- ▶ Modify rules of professional conduct to endorse well-being as part of a lawyer's duty of competence
- ▶ Expand continuing education requirements to include well-being topics
- ▶ Require law schools to create well-being education for students as an accreditation requirement
- ▶ Reevaluate bar application inquiries about mental health histories
- ▶ Adopt essential eligibility admission requirements
- ▶ Adopt a rule for conditional admission
- ▶ Publish data revealing the rate of denied admissions due to mental health disorders and substance use disorders
- ▶ Implement proactive management-based programs that include well-being components

Lawyer Well-Being and Regulation

- ▶ Adopt a centralized grievance intake system to promptly identify well-being concerns
- ▶ Modify confidentiality rules to allow one-way sharing of lawyer well-being related information from regulators to lawyer assistance programs
- ▶ Adopt diversion programs and other alternatives to discipline that have proven successful in promoting well-being (“Discipline does not make a sick lawyer well.”)
- ▶ Add well-being related questions to the MPRE

Context

- ▶ During 2017: 103 open disciplinary probations—23 cases included a disability related condition, either mental health (18) and/or substance use (10) (some with both)
- ▶ The ABA/Hazelden study indicates that one-fifth of U.S. attorneys may suffer from some level of problematic drinking, and a significant percentage of study participants reported mental health concerns.
- ▶ Study participants advised that barriers to seeking treatment included (1) not wanting others to find out they needed help; and (2) concerns regarding confidentiality or privacy (and relatedly, their license).
- ▶ **Lawyer assistance programs like Lawyers Concerned for Lawyers are not required to report misconduct disclosed to them by an attorney seeking assistance. Rule 8.3(c), MRPC.**
- ▶ Please do not let concerns for your license interfere with seeking help from a lawyer assistance program.
- ▶ Lawyers Concerned for Lawyers: 651-646-5590 or help@mnlcl.org
- ▶ 24-hr crisis line: 612-332-4805

Advisory Opinion Service

- ▶ Available to licensed MN attorneys
- ▶ OLPR attorneys will provide no cost verbal opinion on application of specific facts to rules; every day an attorney is assigned to A/O tasks and spends much of the day returning calls; will receive answer the same day or next day
- ▶ Confidential; non-binding on third parties
- ▶ No opinion will be offered on (1) conduct of third parties, (2) where conduct has already occurred, and (3) OLPR does not approve lawyer advertising, but will advise rules relating to same
- ▶ In 2017, the OLPR provided 2051 opinions.
- ▶ Options: Submit a written request on line (preferred where facts are complicated or detailed); call 651-296-3952 or toll-free 1-800-657-3601 and ask for the A/O attorney
- ▶ Website: **<http://lprb.mncourts.gov>**

Additional Resources

- ▶ Wealth of Resources on Website, <http://lprb.mncourts.gov>
- ▶ Index and text of Bench and Bar articles and MN Lawyer ethics columns by Office, sorted by Rule, Subject and Year (no precedential value but useful guidance)
- ▶ Current Rules (MRPC and RLPR) and Board Opinions
- ▶ Suspended and Disbarred Lawyer List
- ▶ Attorney Search containing all public discipline, with links to Court opinions and petitions for discipline
- ▶ Trust Account Information and Resources, including FAQs
- ▶ Professional Firm Filing Requirements
- ▶ Cross Border (Multijurisdictional Practice) Information
- ▶ Annual Reports of OLPR, including historical reports
- ▶ Announcements and News
- ▶ Board and Office Directory
- ▶ Complaint forms in English, Hmong, Russian, Somali, and Spanish

Client Security Fund

- ▶ Available to compensate clients who have been victims of dishonest conduct by an attorney that results in a direct loss.
- ▶ Loss must arise from an attorney-client relationship
- ▶ Must be caused by dishonest conduct of attorney
- ▶ Direct loss is compensable; consequential damages are not
- ▶ Has paid out \$8.3 million over life of the fund (30 years) relating to 660 claims against 182 lawyers
- ▶ Funded by \$6 from annual registration
- ▶ www.csb.mncourts.gov

Closing

- ▶ Feedback—how can the OLPR help you in your practice?
- ▶ Questions?

- ▶ Thank You!