

Professional Responsibility
Year in Review
MCAA—Child Support Professionals
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Susan Humiston
Director, Office of Lawyers Professional Responsibility
Susan.Humiston@courts.state.mn.us; 651-297-2963

Outline of Presentation

- ▶ 2017 Office Statistics
- ▶ Case Process
- ▶ Year in Review—Cases of Note (Public & Private)
- ▶ Rule and Opinion updates
- ▶ Services and Resources of the OLPR
- ▶ Lawyer Assistance Programs and the OLPR
- ▶ Client Security Board

Minnesota Discipline System

- ▶ Minnesota Supreme Court
- ▶ Authority over all aspects of attorney regulation, including admittance to the bar, Rules of Professional Conduct (MRPC), and discipline for rule violations—original jurisdiction
- ▶ Justice Lillehaug, Liaison Justice to LPRB and OLPR

Minnesota Discipline System (cont'd)

- ▶ Lawyers Professional Responsibility Board (LPRB)
- ▶ Established by the Court in the Rules on Lawyers Professional Responsibility (RLPR)
- ▶ 23 volunteer members; 14 lawyers and 9 non-lawyers
- ▶ Duties include general supervision of OLPR, probable cause determinations for public discipline, and review of non-public dispositions of OLPR
- ▶ Chair, Robin Wolpert (October 2017)
- ▶ Peter Ivy, Chief Deputy Carver County Attorney
- ▶ Jeannette Boerner, First Assistant Public Defender (Hennepin County)
- ▶ Bentley Jackson, Public Member, Retired Burnsville Police Officer

Minnesota Discipline System (cont'd)

- ▶ Office of Lawyers Professional Responsibility (OLPR)
- ▶ Agency of Court established to investigate cases of lawyers' alleged disability or unprofessional conduct (Rule 2, RLPR)
- ▶ Also serves an educational and outreach role to public and bar regarding professional responsibility
- ▶ Funded by portion of annual license fees paid by attorneys (\$122 per attorney > 3 years), as well as professional firm fees and costs imposed on disciplined attorneys
- ▶ Director, Susan Humiston, serves at pleasure of Court, accountable to LPRB and through Board to Court; appointed to a second, two-year term March 7, 2018
- ▶ 12 attorneys (including Director), 7 paralegals and 12 staff
- ▶ Annual budget of approximately \$4 million
- ▶ Handles between 1100-1200 complaints annually
- ▶ 21 District Ethics Committees—volunteer investigators (270) assist with complaint investigation and make recommendations

Office Statistics

- ▶ 2017 Complaints—1110; Down from 2016—1216
- ▶ Active lawyers in MN—25,241 (29,000 licensed)
- ▶ 2017 Public Discipline (41):
 - ▶ 5 Disbarred
 - ▶ 26 Suspended
 - ▶ 6 Publicly Reprimanded/Probation
 - ▶ 4 Reprimanded
- ▶ Private Discipline:
 - ▶ 14 Private Probations
 - ▶ 90 Admonitions (down from 115 in 2016)
- ▶ Open cases as of June 5, 2018: 532; 145 more than 1 year old
- ▶ 2015 record year: 65 attorneys publically disciplined.

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

Complaint Handling & Public Discipline

- ▶ Who investigates initially and why?
- ▶ If investigated by DEC, what happens with recommendation?
- ▶ If OLPR investigates, what is process?
- ▶ What is private and what is public?
- ▶ If public, what happens and what is the difference between charges and petition?
- ▶ Who makes probable cause determinations?
- ▶ What happens after a petition is filed?
- ▶ How does the matter get to the Supreme Court?
- ▶ *Bench and Bar* Article, September 2017.

Year in Review – Public Cases

- ▶ 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;

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Year in Review – Public Cases

- ▶ 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

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Year in Review – Suspension Cases

- ▶ 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 in criminal matter.
- ▶ 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).

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In re Mollin, 906 N.W.2d 260 (Minn. 2018)

- ▶ County Attorney in Clearwater County
- ▶ Misconduct occurred in prosecution of two drug cases
- ▶ In one cases, failed to identify criminal history of CRI—instead misrepresented it as none—on probation for a felony conviction and second violation pending when agreed to be CRI; Mollin had prosecuted the felony for which CRI was currently on probation
- ▶ When finally disclosed criminal history, left out history for most recent 4 years—delayed the case for more than a year with number defense motions for discovery
- ▶ In second case, failed to disclose arrangement for cooperation; stated CRI never worked with police before, but that was not true, told court discovery was complete at a hearing when still had not disclosed known information about CRI

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Rule Violations--*Mollin*

- ▶ Rule 1.1, MRPC—competence;
- ▶ Rule 3.4(d)—frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- ▶ Rule 3.8(d)—special responsibilities of a prosecutor—make timely disclosure of known info that tends to negate the guilt of the accused or mitigates the offense;
- ▶ Rule 4.1—no knowing false statements of law or fact;
- ▶ Rule 8.4(c)—conduct involving dishonesty, fraud, deceit or misrepresentation;
- ▶ Rule 8.4(d)—conduct that is prejudicial to the administration of justice.
- ▶ Second day of trial stipulated to 60-day suspension, then tried to withdraw stipulation. Court said no.

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Year in Review—Misc. Topic

- ▶ Rule 3.8(d)—broader than *Brady* or *Giglio*?
- ▶ No Minnesota case
- ▶ *In re Kline*, 2015 WL 1638151 (D.C. April 9, 2015) (fascinating case involving an AUSA) (disclose regardless of materiality)
- ▶ *In re Feland*, 820 N.W.2d 672 (N.D. 2012) (broader)
- ▶ *In re Riek*, 834 N.W.2d 384 (Wis. 2013) (coextensive)
- ▶ ABA Opinion 09-454 (July 8, 2009) (broader)

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Private Discipline (examples)

- ▶ Very few cases involving prosecutors result in private discipline (reserved for cases that are isolated and non-serious)
- ▶ Rule 4.2 (admonition)
- ▶ An Assistant County Attorney communicated directly with witness in criminal matter after being informed that the witness was represented by counsel “in all matters relating to the [incident giving rise to the prosecution].”

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Private Discipline

- ▶ County Attorney and assistant county attorney made statements to the press to the effect that criminal charges would not be brought if county attorney didn't think that the defendant was guilty, and that jurors ought not to budge from their positions in deliberations because a hung jury is preferable to an acquittal.
- ▶ Rule 3.6(a), 3.8(f), and 8.4(d), MRPC.
- ▶ Failure to comply with Minn. Stat. § 611A obligations (e.g., failing to notify a domestic assault victim of dismissal or failing to disclose final plea to victim, or notify court that victim did not agree to the plea, or afford opportunity to submit victim impact statement)—Rule 8.4(d), MRPC. (Two recent admonitions and several current complaints).

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Additional Issues

- ▶ Rule 3.4(e), during cross of criminal defendant, asked questions highlighting defendant's opportunities prior to trial to explain his actions but failed to do so, questions resulted in mistrial—2013 admonition.
- ▶ Conflicts—Rule 1.7 conflict if prosecuting child support issues of child support personnel or other related persons?
- ▶ Cannot represent if concurrent conflict of interest exists.
- ▶ A concurrent conflict of interest exists if:
 - ▶ (1) the representation of one client will be directly adverse to another client; or
 - ▶ (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client, or a third person or by a personal interest of the lawyer.

Rule 1.7(b) requirements must be met including informed consent by all affected parties, confirmed in writing.

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Additional Issues

- ▶ Rule 4.3—Dealing with Unrepresented Person
- ▶ In dealing on behalf of a client with a person who is not represented by counsel:
 - ▶ (a) a lawyer shall not state or imply that the lawyer is disinterested;
 - ▶ (b) a lawyer shall clearly disclose that the client's interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse;
 - ▶ (c) when a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and
 - ▶ (d) a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.3, MRPC

- ▶ What does this look like? Mostly from Ramsey County materials
 - ▶ Make sure not represented — Rule 4.2 would then apply (need to "know"); Recent S. Ct. admonition affirmation.
 - ▶ Be clear about your role and the county's role; State that interests are adverse;
 - ▶ Ask if they understand and agree to talk to you;
 - ▶ Advise of rights in process; advise only legal advice can give is the advice to seek counsel. May state what law provides, but what I am stating is my position, not providing legal advice;
 - ▶ Do not seek a waiver of important rights if you do not believe they understand what they are waiving;
 - ▶ Explain the process — what will happen in the pre-hearing and hearing;
 - ▶ Do not speak "legalese" or "child support-ese";
 - ▶ Leave bias (intentional or unintentional) at the door;
 - ▶ Ensure active listening — repeat, rephrase, question;
 - ▶ New information comes along; does it change approach;
 - ▶ Seek justice; not a win.

Social Media

- ▶ Direct contact with potential jurors or jurors prohibited including through social media.
- ▶ Can search publically available information, but cannot "friend" or "follow" — take care with sites that disclose search presence. ("passive contact" ABA Formal Opinion 466 (April 24, 2014))
- ▶ Cannot use another to do what you cannot do.
- ▶ Also remember Rule 4.2 (No contact rule). OLPR admonition when an attorney asked a paralegal to send a friend request to opposing party who was represented by counsel.

Duty to Report (Rule 8.3(a))

- ▶ "A lawyer who 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."
- ▶ Actual knowledge
- ▶ Rule violation is the kind that generally warrants public discipline.

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Attorney Ethics and #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).

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Rule Amendments (2015)

- ▶ New Comments to Rule 5.3
- ▶ Addresses Responsibility for Non-lawyer assistance outside of office
- ▶ Permissible and includes retention of an investigative or paraprofessional service, hiring a document management company, sending documents to a third party for scanning or printing, using an internet-based service to store client information
- ▶ Must make "reasonable efforts" to ensure services are provided in a manner compatible with the lawyer's professional obligations
- ▶ Specific obligation required will depend upon multiple facts

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ABA Opinion 467 (September 8, 2014)

- ▶ Entitled *Managerial and Supervisory Obligations of Prosecutors under Rules 5.1 and 5.3*
- ▶ Opinion specifies that prosecutors have additional duties (defines 'reasonable efforts') under Rule 5.1 and 5.3 to supervise and manage attorneys in their offices. (Can be disciplined for conduct of subordinate if order, ratify or fail to correct/remediate violation.)
- ▶ The Opinion provides detail regarding establishing office-wide policies and training for all prosecutors, regardless of years of experience, and provides advice on how to create a "culture of compliance."
- ▶ Supervisory prosecutors should train incoming lawyers, regardless of experience, on matters such as disclosure of exculpatory evidence, public statements, what must be revealed to a tribunal, how to deal with represented and unrepresented persons, how to conduct closing arguments and what conduct by other prosecutors must be reported and to whom—up the ladder reporting. Non-lawyer training is also addressed regarding Rule 3.8 and preservation of evidence.

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) **Competency Issue**
- ▶ 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

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 has 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

Additional Resources

- ▶ During 2017: 103 open disciplinary probations—23 included a disability related condition, either mental health (18) and/or chemical dependency (10) (some with both)
- ▶ A recent 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.
- ▶ **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

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
- ▶ *Resnik* prosecution—Hennepin County

Closing

- ▶ Feedback—how can the OLPR help you maintain an ethical practice?
- ▶ Questions?
- ▶ Thank You!

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