

A YEAR IN REVIEW: 2021

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Outline

- Office statistics
- Discipline cases of note from 2021
- ABA opinions from 2021
- Potential proposed rule changes
- Miscellaneous



2021 OLPR Statistics



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Office Statistics

- 2021 Complaints - 946; 2020 complaints – 930
- Active lawyers in MN – 26,323 (30,396 licensed) (steady)
- 2021 Public Discipline— 28 lawyers
 - 4 disbarred
 - 17 suspended
 - 4 publicly reprimanded/probation
 - 3 reprimanded
- Private Discipline:
 - 8 private probations (9 files)
 - 88 admonitions (84 lawyers) - (up from 82 in 2020)
 - 1 lawyer transferred to disability status in lieu of discipline



Office Statistics (cont'd)

- Dismissals:
- 429 summarily dismissed (determination that discipline is not warranted without investigation)
- 205 determinations that discipline is not warranted (after investigation)
- Who filed complaints?
 - Clients (368)
 - Adverse parties (225)
 - Other lay person (93)
 - Opposing counsel (32)
 - Director initiated (7)—primarily through trust account overdraft program
 - Judges, other interested parties (remainder)



Office Statistics (cont'd)

- Most Frequent Areas of Law Involved
 - Criminal (220)
 - Family law (160)
 - General litigation (112) (number down from 2020)
 - Probate (81) (real estate not far behind)
- Most Frequent Areas of Violations
 - Rule 1.3—lack of diligence
 - Rule 1.4 - failure to communicate



Public Discipline Cases



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Public Discipline Cases

Four lawyers were disbarred:

- **Blomquist**—Trustee who misappropriated and converted trust assets; failed to comply with court orders; failed to cooperate with Director.
- **Kleyman**—Used trust account to funnel money as part of fraudulent escrow schemes; misappropriated client funds; made false statements to the Director; failed to cooperate.
- **Schutz**—Engaged in the practice of law while on disciplinary suspension (stip.).
- **Sutor**—Felony conviction for conspiracy to commit healthcare fraud (stip.).



Public Discipline Cases

Suspensions: 17 – range from 10* days to 4 years

– Criminal Conduct

- Butler: 4 years – two felony convictions for failing to file personal income tax returns, as well as misuse of the trust account, failing to cooperate, and holding himself out as an attorney while on disciplinary suspension.
- Kootz: 30 days + 5 years probation – Disbarred in FL after 2019 DWI conviction; OLPR declined reciprocal because FL’s discipline (disbarment) was inconsistent with what MN would impose (stip.).
- Thompson: 3 years – Felony assault conviction; failure to cooperate.



Public Discipline Cases Suspensions (Cont'd)

Misappropriation

- Essien: 18 months – failed to deposit filing fee in trust; misappropriated filing fee; mitigating factors (stip.).
- Gunther: 18 months – misappropriation and failure to deposit client funds in trust; mitigating factors (stip.).
- Ruffenach: 1 year – communication, failure to safeguard client funds, failure to take prompt action to resolve fee dispute; mitigating factors.
- Lohse: 2 years – misappropriated \$900, neglect, communication, and failure to return unearned funds; mitigating factors (stip.).



Public Discipline Cases Suspensions (Cont'd)

Suspensions – Other Notables

- Frank: 10* days – making a statement to the court without a reasonable basis in fact, and failing to correct the statement once he learned of the falsity (stip.).
- Kennard: 30 days – Texas attorney not admitted in MN engaged in UPL here.
- MacDonald: 4 months – false statements about a judge during a radio interview; raised First Amendment defense.
- Swanson: 6 months – Engaged in the practice of law while suspended and settled a client's malpractice claim against him in exchange for the client agreeing not to file ethics complaint, among other things.



Public Discipline Cases

Reprimands

- Lo: Reprimand/Probation.
- Biersdorf: Public Reprimand – Civ. Pro. Rule 5.04 and prior disciplinary history.

Interesting Reinstatement Decision (and dissent) - Tigue

- Lengthy disciplinary history; most recently suspended in 2017 for two years for misappropriation, and permanently prohibited Tigue from being an authorized signer on a trust account. Tigue petitioned for reinstatement in 2019.
- Attorney's burden to prove by clear and convincing evidence requisite moral change and, among other things, recognizing the wrongfulness of their prior misconduct.
- Court denied reinstatement but J. Thissen's dissent called into question the long-held standard of "requisite moral change."



Private Discipline Matters



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Private Discipline

- Admonitions: 88 in 2021
 - Rule 1.3 (diligence) – 23 files
 - Rule 1.16(d) (obligations upon termination of representation) – 20 files
 - Rule 1.15(c)(5) – 19 files
 - Rule 1.4(a)(3) (communication) – 15
 - Note: communication as a total may be more since we count by the subdivision.



Private Discipline

In Re Charges of Unprofessional Conduct in Panel File No. 43372

- Admonition for violations of Rule 7.3(a) and (c), Minnesota Rules of Professional Conduct (MRPC).
- Appealed it and had evidentiary hearing before a panel.
- Panel affirmed Director's admonition (found clear and convincing evidence of rule violations).



In Re Charges of Unprofessional Conduct in Panel File No. 43372 (cont.)

FACTS

- Lawyer was at an open house and neighbors of complainant expressed concerns.
- Stopped at complainant's house claiming to do a wellness check.
- Stopped by the next day and dropped off: 1) business card, 2) page of webpage, 3) register of action for case involving complainant, 4) property tax info relating to complainant, and 5) hand-written note that says, "Please call and I will be able to assist you."



In Re Charges of Unprofessional Conduct in Panel File No. 43372 (cont.)

FACTS, cont.

- The packet of documents did not indicate “advertising material.”
- When complainant didn’t call lawyer, lawyer returned the next day.
- At that time, complainant said don’t come back and lawyer did not return.



In Re Charges of Unprofessional Conduct in Panel File No. 43372 (cont.)

- Lawyer argued he was not soliciting business but wanted to help complainant
 - Claimed it was for wellness check;
 - Claimed concerned because complainant had crumbled steps and overgrown trees;
 - Claimed the offer of help on the note was to refer complainant to legal aid; and
 - Claimed complainant asked him to come back with business card.



2021 ABA Opinions



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ABA Opinions

- Formal Opinion 496 (January 13, 2021)
 - Responding to online criticism.
- Formal Opinion 497 (February 10, 2021)
 - Conflicts involving materially adverse interests.
- Formal Opinion 498 (March 10, 2021)
 - Virtual practice.



ABA Opinions, cont.

Formal Opinion 496 (January 13, 2021)

(Responding to online criticism.)

- Rule 1.6(a), MRPC “a lawyer shall not knowingly reveal information relating to the representation of a client.”
- No exception for responding to online review.
- Clarifies that online review is not a “proceeding” and responding online is not to establish a defense against criminal or civil claims. *See*, Rule 1.6(b)(8), MRPC.



ABA Opinions, cont.

Formal Opinion 497 (February 10, 2021)

(Conflicts involving materially adverse interests.)

- Rules 1.9 and 1.18, MRPC.
- Clarifies what “materially adverse” means under Rules 1.9(a) and 1.18(c), MRPC.
 - Suing or negotiating against a former client;
 - Attacking lawyer’s own prior work;
 - Examining a former client; and
 - “may exist when the former client is not a party or a witness in the current matter if the former client can identify some specific material legal, financial, or other identifiable concrete detriment that would be caused by the current representation.”



ABA Opinions, cont.

Formal Opinion 498 (March 10, 2021)
(Virtual practice.)

- Rules 1.1, 1.3, 1.4, 1.6, 5.2 and 5.3, MRPC.
- Guidance on ethical obligations when engaging in virtual practice.
- Good reminder that Rules of Professional Conduct *still apply* even during a pandemic.



Potential Rule Changes



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Potential Rule Changes Advertising Series

- ABA recommended expansive changes to Model Rules 7.1-7.5 — which MN generally follows;
- Petition filed; court received public comment; held hearing and is under advisement; and
- There will be several changes **if adopted by the court.**



Potential Rule Changes

Advertising Series

- Main rule stays same—no false or misleading communications about the lawyer or lawyer's services.
- Can provide nominal referral as thank you (less than \$100)—finder or referral fees still prohibited
- Can use qualified referral service—**not just non-profit referral service— but needs to be ABA certified**
- Open questions about use of specialist or certified as a specialist—Rule 7.4(c)—current difference of opinion among MSBA, LPRB and BLC. When can a lawyer use expert?



Rule 7.3, MRPC

- Solicitation rules remain basically the same;
- Except, solicitation defined and focus is on live person to person contact;
- No need to label written materials with “advertising materials”; and
- Current Rule 7.4 and Rule 7.5 would be withdrawn — content moved to comments under Rule 7.1 — not false or misleading.



Rule 7.2, MRPC

- Referral or finder's fees (still unethical)
- May share fees with a lawyer not in your law firm if you comply with the requirements of Rule 1.5(e), MRPC.
 - Division of fees is in proportion to services or joint representation;
 - Client agrees to the share of each lawyer and the agreement is confirmed in writing; and
 - Total fee is reasonable.



Rule 20, RLPR

- Disciplinary procedural rules.
- Covers confidentiality of discipline files and other files of the Director's Office.
- OLPR (like court records) exempt from Data Practices Act—Court concerned with Public Access Rules.
- Reorganized:
 - Allow one way sharing of info to LCL; and
 - Certain other exceptions.



Miscellaneous



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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; and
 - Duty of competence—to include lawyer well-being (Rule 1.1)—action for regulators.



Context

- During 2021: 80 open disciplinary probations — 18 cases included a disability related condition, either mental health (14) and/or substance use (8) (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 (A/O) Service

- Available to licensed MN attorneys.
- OLPR attorneys will provide at no cost verbal opinions on application of specific facts to the 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 2021, the OLPR provided 2,004 opinions.
- Options: Submit a written request online (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>



Miscellaneous Information

- Consider volunteering!
- **DEC volunteer**
 - 1 or 2 investigations a year (attend screening meetings).
 - Learn the rules.
 - Receive training and provide an important service to the profession.
- **Probation Supervisor**
- **Recruit** public members as DEC volunteers
 - 20% requirement.
- **Consider** becoming a LPRB member.



Professional Firms First & Annual Reports

- A legal entity organized for pecuniary profit may not engage in the practice of law unless it is organized under the MN Professional Firms Act (Chapter 319B).
- After registering with the MN Secretary of State, the firm must file a First Report with the Office of Lawyers Professional Responsibility.
- Reports are available by calling the office or on the website:
<http://lprb.mncourts.gov/LawyerResources/Pages/ProfessionalFirms>.
- Reports must be completed and returned with the firm's organizational documents filed with the Secretary of State and a \$100 filing fee.
- Each year the firm is active with the Secretary of State an Annual Report is required regardless of whether or not the firm provided legal services during the reporting year.
- Reports are mailed out each year at the end of November.
- Reports must be completed and returned with any amendments filed that year and a \$25 filing fee.
- Check your firm's status. If you have questions please call the OLPR at 651-296-3952. *See also* Bench & Bar Article (November 2017).



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 the 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 firms 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 approved for payment over \$8.6 million over life of the fund (33 years) relating to 695 claims against 194 lawyers.
- Currently fully-funded and no part of registration fee goes to fund.
- www.csb.mncourts.gov.



Closing

- Feedback—how can the OLPR help you in your practice?
- Questions?
- Thank You!



Thank you



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