

When We Depart

Examining When the OLPR Departs From DEC Recommendations

*Presenter: Binh Tuong,
Deputy Director, OLPR*



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DEC OPTIONS



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DEC Options

- Discipline Not Warranted (DNW)
 - Insufficient clear and convincing evidence of a rule violation.
- Private Admonition
 - Rule violation has been established by clear and convincing evidence, but the violation is “isolated and non-serious.”



DEC Options, Cont.

- Public Discipline (Referral to Board Panel a/k/a Charges)
 - Rule violation has been established by clear and convincing evidence, and it cannot be said that the violation was isolated and non-serious.



DEC Options, Cont.

- Investigate the Matter Further
 - Committee is split on determination; cooperation of one or more parties has been less than complete; matter complained about does not show a violation, but another issue has arisen that should be looked at, etc.



Departure Stats.

I ♥
STATS



Departure Stats.

- For Reports received from August 2024 to August 2025.
 - In that period 260 files closed.
 - Total: 34 files that departed.
 - We adopted 226 of the recommendations.
Departure rate of 13%.



Departure Stats Cont.,

Out of the 34 departures:

- 18 were recommended for admonitions
 - 16 of those ended in DNWs.
 - 2 of those ended in more severe discipline.
- 14 were recommended for DNWs
 - 14 of those ended in admonitions.
 - No DNWs ended in more severe discipline



Departure Stats Cont.,

Out of 34 departures:

- 2 were recommended for charges
 - Both of those ended in admonition.
 - Zero files recommended charges that ended in DNWs.



Departure Stats Cont.,

NOTE: 76 of 302 reports received August 2024 to August 2025 are still under investigation.



Reasons for Departure Include:

- ✓ Some possible violations missed (spotting issues, e.g., retainer agreement language clear violation but not part of complaint).
- ✓ Complainant never had a chance to respond to the lawyer's response (or was never contacted).
- ✓ Assistant Director does not agree with the analysis.



Reasons for Departure Include:

- ✓ All allegations of violations have not been addressed or investigated.
- ✓ **Application of rules – want consistent application.**
- ✓ **Disciplinary history of respondent that Director was aware of, but investigators are not.**

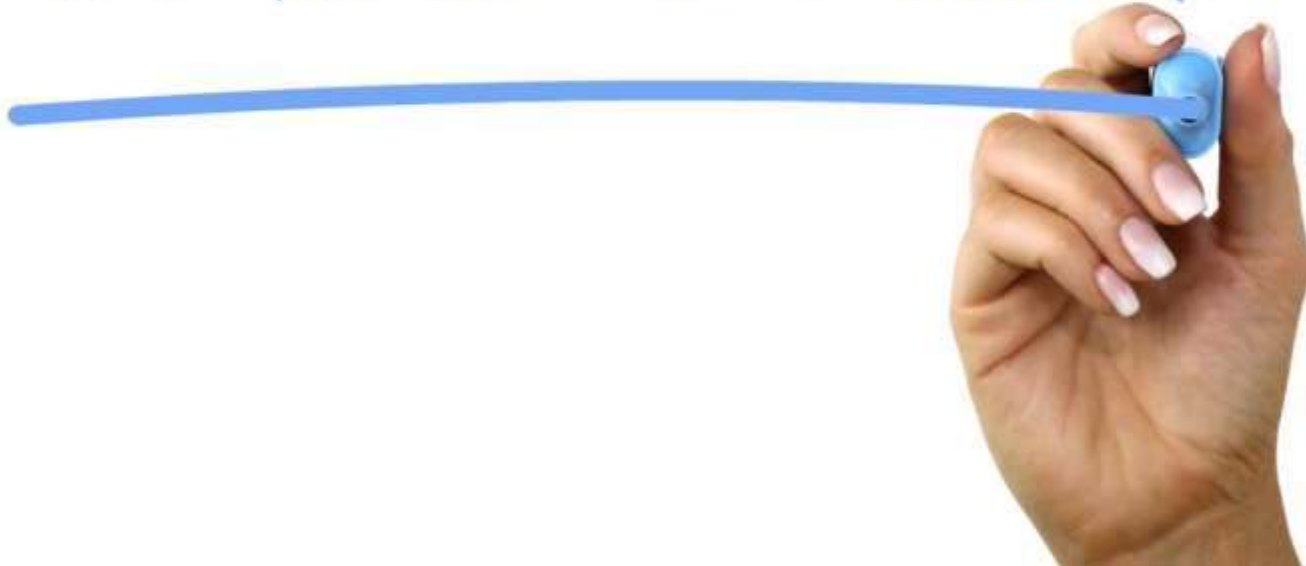


Reasons for Departure Include:

- ✓ New information emerges that changes the disposition.
- ✓ Proof of violation not available (complainant stops cooperating or wants to withdraw complaint).
- ✓ Other complaints come in, so combined, the discipline might change.



CASE STUDY



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Case Study 1: From Admonition to Dismissal

The Case of Reply All

- Attorney represented a party in dissolution matter.
- Opposing counsel sent attorney an email discussing the case, cc'ing her client on the email.
- Attorney “replied all” to the email and responded to opposing counsel’s email, this included represented party.
- In doing so, respondent directly contacted a party he knew was represented by counsel.



Case Study 1, Cont.

The Case or Reply All:

- Opposing counsel reached out and told attorney not to contact client anymore. Attorney stopped.
- **DEC recommendation:** admonition for violation of Rule 4.2, which provides, “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”



Case Study 1, Cont.

Director departed because:

- DEC did not consider ABA Formal Opinion 503
- When an attorney sends the opposing attorney an email that includes the client, the attorney has impliedly consented to the client receiving a “reply all” communication.
- If the sending attorney does not want the receiving attorney to include their client in a “reply all” email, the attorney should refrain from copying their client on the electronic communication or should separately and expressly inform the receiving attorney that they do not consent to the “reply all” communication.



Case Study 1, Cont.

Director departed because:

- If attorney kept on “replying all” the while knowing the opposing lawyer was not consenting to the contact, would be different. But he stopped when told.
- The attorney was not nicest to the opposing side in communications so could be a factor.
- It USED to be that “reply all” was a violation of 4.2, but with new ABA opinion addressing the changes in how we communicate, it’s flipped the other way.



Case Study 1, Cont.

QUESTIONS about Case Study
1 before we move on?



Case Study 2: DNW to ADM

The Case of Sympathetic Lawyer:

- Complaint: Self-report (because court told him to).
- Client retained lawyer to represent him in a bankruptcy matter.
- Client had filed 3 other bankruptcies, and lawyer was hired to file another one in June.
- In July, lawyer suffered a fall that resulted in hospital stay.



Case Study 2

- *The Case of Sympathetic Lawyer:*
 - In August, the bankruptcy trustee files a motion to dismiss and requested the client to be banned from filing any bankruptcies for two years.
 - In October, the court granted the order.
 - Lawyer did not read the order.



Case Study 2

- *The Case of Sympathetic Lawyer:*
 - Months later (in Jan.), client calls lawyer and asks him for advice on an impending foreclosure.
 - A miscommunication occurred during this phone call. Client came away from the conversation believing that he could file a new case, despite being banned from doing so.



Case Study 2

- *The Case of Sympathetic Lawyer:*
 - Lawyer next filed the pleadings to open a new bankruptcy case, despite the court's ban. Did this without looking at the file so he did not see the order.
 - Because client was banned from filing any new cases for two years, the bankruptcy court dismissed the case and issued an order to show cause why lawyer and client should not be subject to sanctions.



Case Study 2

- The DEC recommended a DNW.
 - The DEC analyzed the misconduct under Rule 1.3, MRPC, which is the rule related to diligence but did not think lawyer's lack of diligence was the problem, but because of injury and hospital stay.
 - Was sympathetic because lawyer had a fall that caused the head injury and hospitalization.



Case Study 2

- The Director departed because:
 - The Director acknowledged that lawyer had a fall and was hospitalized, and that might excuse him if the order came around the time of the fall.
 - The Director excused him of the failure to provide a copy of the trustee's motion to dismiss and ban to the client and explain it was because he was hospitalized at the time.



Case Study 2

- The Director departed because:

BUT...

- His fall occurred in July and the Order banning client came months later in October. Lawyer was well enough to return to work by then.
- He did not think to review his file and the court order before he filed the last pleading.



Case Study 2

- Lessons learned:
 - We acknowledged the accident, but asked about what he did afterwards:
 - Did he have a process to ensure client matters handled while he was out?
 - Why didn't he review the file when advising client when so much time had elapsed, and he knew he had an event that would cause him to not remember the case?
 - Why didn't he review file before filing the last motion to reopen?



Case Study 2

- Lessons learned:
 - Analyzed the Rule under 1.1 (competence) vs. 1.3 (diligence)
 - 1.1, MRPC, provides, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
 - 1.3, MRPC, provides, “A lawyer shall act with reasonable diligence and promptness in representing a client.”



Case Study 2

- Lessons learned:
 - Why 1.1 vs. 1.3?
 - 1.1 and 1.3 are very often confused.
 - It was not that he was not timely, prompt or missed any deadlines, or was too busy to do something or didn't give himself enough time.
 - He lacked thoroughness and preparedness in the representation to allow himself the requisite skill and knowledge to get it right. Thoroughness required him to review the file and read the order to ensure he was permitted to file to re-open the bankruptcy.



Case Study 2

- Lessons learned:
 - Lawyers do not like to be told their representation was not competent.
 - But if you look at the rule, it's not about being smart or capable but about doing the things to make you competent for the representation.
 - He needed to read the file to properly represent his client, and he didn't.
 - Sometimes doing what is necessary to provide competent representation means research, reviewing obvious things, staying up to date on the law in your practice.



Case Study 2

- Lessons learned:
 - Rule 1.1, MRPC
 - Ask: If the lawyer just did the basic steps that a reasonable attorney would do, would they have gotten it right? Law is clear if you just looked it up.
 - Is the knowledge and skill required so fundamental that we expect an attorney to know it? Litigation attorneys knowing proper service.
 - Issue so widely known that expected to know. AI is hot topic now.



Case Study 2

- Lessons learned: Rule 1.1, MRPC
 - Difference between competence and judgment.
 - Some legal issues are very fundamental and well settled. Some are not, so look at that to help you.
 - If there are various ways to get to legal conclusion? Getting it wrong is not lack of competence.
 - I do ask – what did you do to get to that legal conclusion.
 - If they did a lot of research and came to the wrong conclusion it's not really lack of competence.



Case Study 2

- Lessons learned: Rule 1.3, MRPC
 - Lawyer had the knowledge, but missed deadlines that could have been prevented if lawyer was diligent.
 - Overworked, procrastinated, or time was of the essence and didn't get to it.
 - Not the time it took the lawyer to do things that is determinative. It's what was reasonable under the circumstances. One week can be too long to do something that was due tomorrow, while six months may not be too long if six years of the statute of limitations is left.



Case Study 2

- Lessons learned: Rule 1.3, MRPC
 - Lack of Diligence vs. Mistake
 - Is missing a deadline always 1.3?
 - No. Depends on the REASON.
 - Missed it because I did not give myself enough time.
 - Missed it because I calculated it wrong
 - Missed it because I overbooked
 - Missed it because I forgot to put in in my calendar
 - Missed it because I did not read the order
 - Missed a deadline because I was hospitalized



Case Study 2

- Lessons learned: Reasonable minds can disagree about what is reasonable. Example A.
 - DEC DNW that became an ADM. Lawyer represented client in a dispute with insurance company over damage to home. Here, the DEC looked at all the right rules and properly DNW'd everything except Rule 1.16(d).
 - Lawyer took 6 months to return client's file, which DEC thought was reasonable given the volume and complexity of the file; Director disagreed.
 - Lawyer did not return file upon termination but then took 6 months after request so it was a whole year from termination of representation that client got file.
 - Admonition



Case Study 2

- Lessons learned: Reasonable minds can disagree about what is reasonable. Example 2.
 - DEC ADM that became a DNW. Lawyer was hired to pursue a claim against client's ex-girlfriend.
 - DEC investigator found violations of Rule 1.4(a)(3), 1.4(a)(4), and 1.5(b) because lawyer did not have written fee agreement.
 - No requirement fee agreement is in writing under 1.5(b).
 - Lawyer responded to a series of emails and calls the following week; DEC felt that was not prompt, Director disagreed.

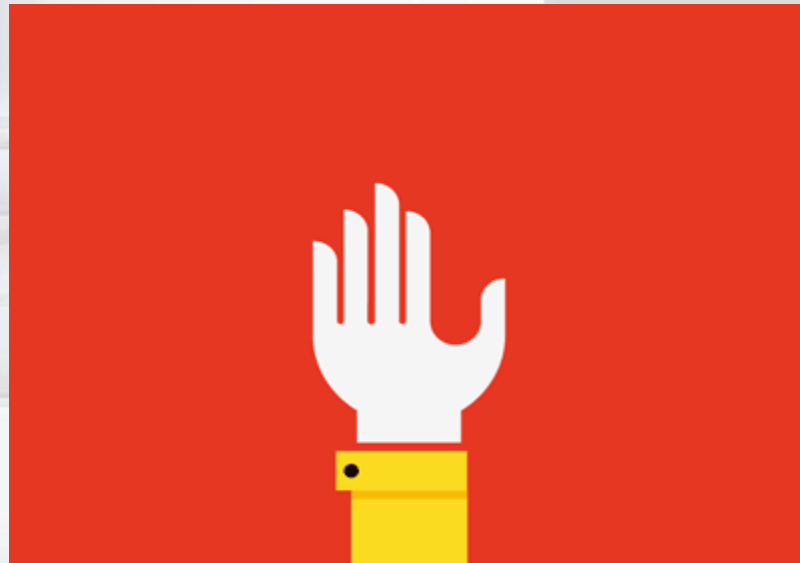


Case Study 2

- Lessons learned: Reasonable minds can disagree about what is reasonable.
 - As for 1.4(a)(3), there was nothing to update the client on.
 - As for 1.4(a)(4), there were requests for information but due to a combination of personal and professional circumstances, was unable to respond as promptly as he would have liked.
 - Sometimes there is no need for immediate call.
 - Sometimes other factors come into play, vacation, holidays, illness etc.
 - We can look at all of those factors to figure out reasonableness.



QUESTIONS about Case Study
2 before we move on?



Case Study 3: ADM to Public

- *The Case of the Confusing Lawyer:*
Complaint: Client hired lawyer on a family law matter and order for protection (OFP) matter. Had really strange fee agreements that apparently was limited scope but not clear. Client provided advanced fees totaling \$11,700 to lawyer but got poor accounting. Client also alleged that she was not informed of the next hearing date in OFP case, and it was dismissed. Lawyer also withdrew without protecting client's interests.



Case Study 3: ADM to Public

- *The Case of the Confusing Lawyer:*
DEC recommended: Admonition
 - 1.4(a)(3), for not advising about the OFP hearing.
 - 1.5(a) for charging unreasonable fees based on the invoices not making sense.
 - 1.16(d) for terminating rep 48 hours before a hearing.



Case Study 3: ADM to Public

- *The Case of the Confusing Lawyer:*
 - DEC also expressed concerns about the lawyer based on the answers that were provided and how difficult it was to understand her billing.
 - Lots of confusing aspects about the case which the DEC could not sort through.
 - Recommended the Director do additional investigation.



Case Study 3: ADM to Public

- *The Case of the Confusing Lawyer*
 - The Director departed (but not really)
 - Did additional investigation and found additional misconduct related to an unreasonable limited scope arrangement
 - Additional communication issues – not only failed to inform client of OFP hearing but failed to advise client of other hearings and to advise client to allow client to make informed decisions.



Case Study 3: ADM to Public

- *The Case of the Confusing Lawyer:*
 - The Director departed (not really):
 - Found lawyer failed to do proper accounting under 1.15(b), but also failed to deposit advanced fees into trust, and failing to restore disputed amount back into trust
 - Failed to give reasonable notice of withdrawal and return of unearned fees.



Case Study 3: ADM to Public

- *The Case of the Confusing Lawyer:*
 - The Director departed because:
 - What made this a departure was that the Director had another complaint and looked at disciplinary history where attorney engaged in similar misconduct.
 - Cannot be viewed as isolated and non-serious.



Case Study 3: ADM to Public

- *The Case of the Confusing Lawyer:*
 - Lessons learned
 - Sometimes need to meet with lawyer to get straight answers, assess issues, etc.
 - Lawyer's fee agreements WERE confusing. They were advanced fees, but called it "pay as you go." Confused the client.
 - Called it "pay as you go" because she wanted to limit the scope without complying with 1.2(c), MRPC.



Case Study 3: ADM to Public

- *The Case of the Confusing Lawyer:*
 - Lessons learned
 - Because she considered the fee arrangement limited scope, she would not talk to the client about next steps, etc. because she felt it was part of a separate representation.
 - Sometimes we have to figure what this really is because the lawyer will frame it in a way that does not make sense.



Case Study 3: ADM to Public

- *The Case of the Confusing Lawyer:*
 - Lessons learned
 - Lawyer's fee arrangement was such that she told the client, unless you agree to next steps, I won't even look at you email until you agree to next steps.
 - But the email was disputing fees charged. We had a failure to return disputed funds back into trust because you can't ignore that obligation by refusing to read emails that dispute the fees, until the client agrees to next stage in representation.

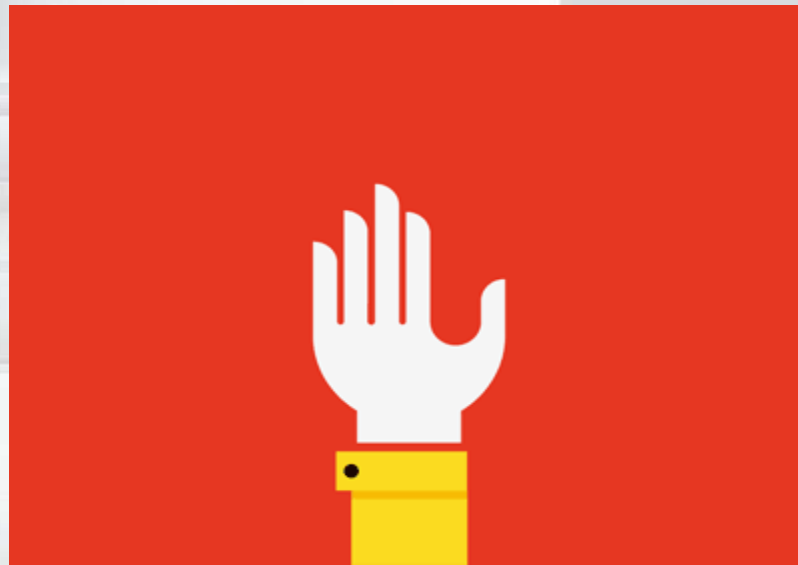


Case Study 3: ADM to Public

- *The Case of the Confusing Lawyer:*
 - Lessons learned
 - Fee arrangements are a very common area of complaints.
 - Remember:
 - 1.2(c) – limited scope (informed consent).
 - Failure to safekeep 1.15(c)(5) vs 1.5(b)(1) violation.
 - 1.5(a) reasonableness.
 - 1.5(b) communicate the scope of rep and basis of fees.
 - 1.5(b)(3) – nonrefundable.
 - Accounting, flat fees vs. 1.15(b).



QUESTIONS about Case Study
3 before we move on?

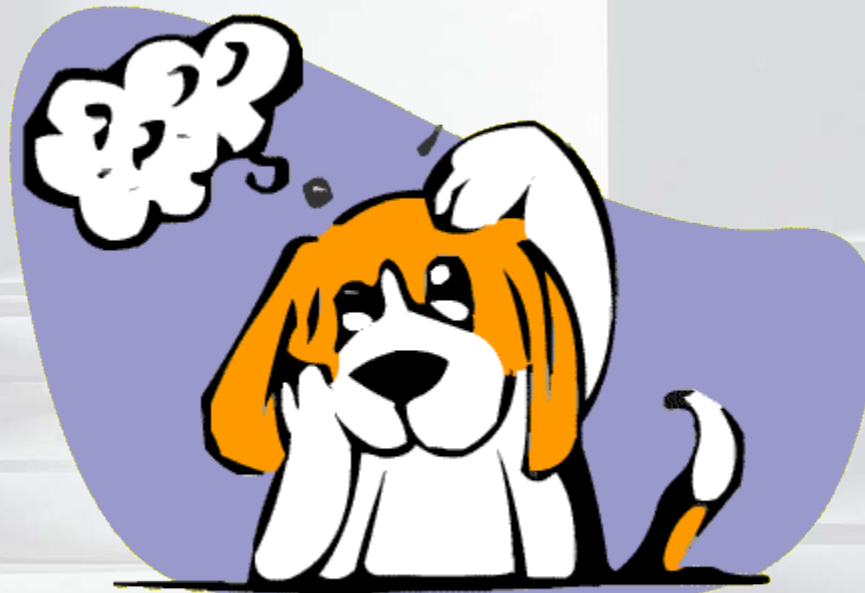


CLOSING COMMENTS

- Lessons learned:
 - Thanks to all DEC investigators for your hard work.
 - These are tough issues, so feel free to ask questions – your DEC liaison will be happy to answer them.



QUESTIONS?



Question



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Thank You



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