

2014 WL 6710609 (N.D.) (Appellate Brief)
Supreme Court of North Dakota.

Gregory Ian RUNGE, Petitioner,

v.

DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NORTH DAKOTA, Respondent.

No. 20140135.

July 8, 2014.

On Review from an Affirmation by the Disciplinary Board of an Admonition
Imposed by the Inquiry Committee West Complaint No. 5501-W-1304

Respondent's Brief

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STATEMENT OF THE ISSUES

1. Whether clear and convincing evidence established that Attorney Gregory Ian Runge violated [Rule 1.14, N.D.R. Prof. Conduct](#), by drafting a Revocation of a Power of Attorney and advising Norman Franz about his ability to leave the nursing home without having consulted Norman's appointed representative.

2. Whether Attorney Gregory Ian Runge's procedural due process rights were violated when the Inquiry Committee West issued an admonition to him and the North Dakota Rules for Lawyer Discipline were followed throughout the disciplinary proceedings.

STATEMENT OF THE CASE

3. On April 11, 2013, a complaint was made against Attorney Gregory Ian Runge (“Runge”). (Resp’t App. at A-3 A-22). Runge was contacted by Ida Giesinger (“Ida”), who was the lady friend of an **elderly** gentleman, Norman Franz (“Norman”). (See Resp’t App. at A-23). Ida informed Runge that Norman did not want to be in a nursing home and sought assistance from Runge to advise Norman on being legally able to leave his nursing home. *Id.* To accomplish that end, Runge drafted a Revocation of a Power of Attorney which revoked Norman's daughter, Rose Pfeifer (“Rose”), as Norman's attorney-in-fact under a Durable Unlimited Power of Attorney. *See id.* (including Revocation of Power of Attorney at A-11). Rose filed a disciplinary complaint with the Secretary of the Disciplinary Board against Runge. (Resp’t App. at A-3 A-22).

4. The complaint was assigned a number and sent to the Inquiry Committee West on

April 16, 2013, by the Secretary of the Disciplinary Board. After the Inquiry Committee Chair received the complaint, the complaint was assigned for investigation and a copy of the complaint was sent to Runge on April 30, 2013. (Resp’t App. at A-1 A-2).

5. Runge submitted his response to the complaint on May 20, 2013. (Resp't App. At A-23 A-29). Within his response, Runge denied the allegations made against him by Rose and included a banking statement with an assertion that Rose had inappropriately handled money on behalf of Norman. (*Id.* at A-26).

6. The complaint was considered by the Inquiry Committee West at its meeting on September 13, 2013. (*See* Resp't App. at A-30). After the meeting, the Inquiry Committee West sent its disposition letter to Runge on October 4, 2013. (Resp't App. at A-31). Within the disposition letter, Runge was informed, in pertinent part:

The Committee found that Attorney Gregory I. Runge violated [N.D.R. Prof. Conduct 1.14](#), regarding [a] client with limited capacity, by preparing a Revocation of Power of Attorney at the request of a third person and delivering the same to a nursing home, where it was executed by a resident/client whom Mr. Runge had never met, and failing to communicate with the client's appointed representative, a family member who had been appointed in a durable power of attorney. The Committee determined that discipline in the form of an admonition is appropriate. Therefore, Attorney Gregory I. Runge is hereby issued an ADMONITION by the Inquiry Committee West.

(Resp't App. at A-31).

7. Also within that letter, Runge was informed that he had the right to appeal the Inquiry Committee West's decision within thirty (30) days of the date of the mailing. *Id.*

8. On October 25, 2013, Runge sent a letter to the Office of Disciplinary Counsel

requesting a review of the Admonition issued by Inquiry Committee West. (Resp't App. at A-32). This letter did not make any specific requests for relief, nor did it raise any due process concerns. *Id.*

9. A confirmation letter was sent by the Office of Disciplinary Counsel on October 29, 2013, informing Runge that his appeal would be considered by the Disciplinary Board at its next meeting. (Resp't App. at A-33). On January 8, 2014, the Disciplinary Board met and considered Runge's appeal. (*See* Resp't App. at A-34).

10. The Disciplinary Board upheld the disposition of the Inquiry Committee West by affirming the admonition. (Resp't App. at A-34). The Board informed Runge about the outcome of his appeal in a letter dated February 12, 2014. *Id.*

11. After receiving the results of his appeal to the Disciplinary Board, Runge submitted a "Petition and Brief in Support of a Petition For Leave to Appeal" requesting a review of his case by the North Dakota Supreme Court. (Resp't App. at A-35 A-63). The Petition raised, for the first time, the allegation that Runge had been denied procedural due process. *See id.* The Office of Disciplinary Counsel put in its Response to Petition for Leave to Appeal. (Resp't App. at A-64 A-77). On May 14, 2014, the North Dakota Supreme Court granted leave to consider Runge's appeal. (Resp't App. at A-78).

12. The Office of Disciplinary Counsel now files its brief on behalf of the Disciplinary Board of the North Dakota Supreme Court and requests that the Court uphold the imposition of an admonition by finding that Runge violated [Rule 1.14](#), N.D.R. Lawyer Discipl., and that its own North Dakota Rules for Lawyer Discipline are constitutional, or alternatively to remand the matter for formal disciplinary proceedings.

STATEMENT OF THE FACTS

I. Norman's Powers of Attorney and Medical Status.

13. On September 17, 2009, Norman signed a Durable Unlimited Power of Attorney in which he appointed his daughter, Rose, as his attorney-in-fact. (Resp't App. at A-19 A-21). Norman listed his other daughter, Susan Ternes ("Susan"), as a successor

attorney-in-fact for the Power of Attorney. (*Id.* at A-21). Both Rose and Susan accepted their appointments. *Id.* There were two witnesses to the signing of the Power of Attorney, one of whom was Ida. (*Id.* at A-20).

14. Within the Durable Unlimited Power of Attorney (“legal power of attorney”), it stated that the Power of Attorney was to solely act as the attorney-in-fact capable of handling the finances and property of Norman. (Resp’t App. at A-19). It further stated that the attorney-in-fact had no power or authority to make health care decisions on behalf of Norman. *Id.* The document only allowed for the disclosure of information that would otherwise be protected by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). (*Id.* at A-20). The legal power of attorney was in place when Norman suffered a heart attack on September 20, 2012. (*Cf.* Resp’t App. at A-5 (second letter from Rose identifying the date of Norman’s heart attack); Resp’t App. at A-10 A-12 (revocation of legal power of attorney); Resp’t App. at A-19 A-21 (legal power of attorney)).

15. Following his heart attack, Norman was admitted to Missouri Slope Lutheran Care Center (“nursing home”) on October 30, 2012. (*See* Resp’t App. at A-3 (complaint by Rose identifying dates Norman was in the nursing home); Resp’t App. at A-14 A-18 (each identifying the date Norman was admitted to nursing home)). After being in the nursing home for a day, an Emergency Care Statement was completed (“medical power of attorney”). (Resp’t App. at A-14). On October 31, 2012, Certified Family Nurse Practitioner Mark Koivula signed an “Incapacitated Statement,” finding that Norman was incapable of making medical decisions. *Id.* Rose was designated the responsible party for Norman within that document and signed it on November 1, 2012. *Id.* The document also contained code directives for Norman’s advanced care. *Id.* Within Norman’s nursing home medical records, it was documented that this Durable Power of Attorney for Health Care had been entered on October 31, 2012. (*See* Resp’t App. at A-17).

16. Norman’s nursing home records also contained information on his health conditions. (*See* Resp’t App. at A-15 A-17). Norman was diagnosed as having several issues associated with a heart attack including: ventricular fibrillation, other specified cardiac dysrhythmias, atrial fibrillation, unspecified essential hypertension (high blood pressure), pure hypercholesterolemia (excess cholesterol in the blood), unspecified bundle branch block (heart blockage affecting the heart rhythm), and other and unspecified hyperlipidemia (high fat content in the blood). (*Id.* at A-15). In addition to these heart-related conditions, Norman suffered from problems with his bladder, problems swallowing, and also had a communication disorder (symbolic dysfunction, unspecified). *Id.*

17. The nursing home treated Norman for these conditions. (*See* Resp’t App. at A-15 A-17). Norman received medications to regulate his heart and cholesterol. (*See* Resp’t App. at A-15 A-16). He also was placed on a diet which required all fluids other than water to be the consistency of honey in order to prevent those liquids from aspirating into his lungs. (*Id.* at A-16). Several of these orders were last updated on February 14, 2013, and were standing orders for Norman’s care at the time he left the nursing home. (*See* Resp’t App. at A-15 A-17).

18. Runge alleged that he received a phone call from Ida on March 30, 2013. (*See* Resp’t App. at A-23). Ida explained to Runge that she had a friend, Norman, who was in a nursing home and did not want to be there. *Id.* Runge allegedly asked why Norman was in the nursing home and Ida explained that Norman had had a heart attack, but that she did not believe the nursing home had allowed him to properly rehabilitate. *Id.* Ida wanted Runge’s legal advice and assistance to get Norman out of the nursing home. *See id.* Ida was concerned about the Power of Attorney Rose had over Norman and how that would affect Norman’s ability to leave the facility. *See id.*; (*see also* Resp’t App. at A-19 A-21 (containing the legal power of attorney)).

19. Runge told Ida that he could provide representation. (*See* Resp’t App. at A-23 A-24). Runge told Ida they would just need to get the power of attorney revoked and told her how much he would charge for his representation. *Id.* Runge was not hired for his representation at that time. *Id.*

20. Ida called Runge again regarding representation on April 2, 2013. (*See* Resp’t App. at A-24). During that telephone call, Ida asked for Runge to draft a Revocation of the Power of Attorney for Norman, whom he had never met. *Id.* Runge allegedly

spoke with Norman for the first time during that call. *Id.* Norman allegedly told Runge his daughter was forcing him to stay in the nursing home, but that no one was forcing him to leave. *Id.*

21. Runge then drafted two original Revocations of Power of Attorney, one for the nursing home and one for Norman's records. *Id.* Runge went to meet with Norman in the nursing home that same day. *Id.* While at the nursing home, Runge met Norman for the first time and allegedly observed Norman's demeanor. (*Id.* at A-24). Runge read the Revocation aloud to Norman. (*Id.* at A-24; *see also* Resp't App. at A-3 (indicating Norman cannot read)). Runge also allegedly had a discussion with Norman about the effect of the Revocation and how no legal action could be taken to keep Norman in the nursing home after it was signed. (Resp't App. at A-24).

22. While Runge was at the nursing home on April 2, 2013, Norman signed both Revocations of the Power of Attorney. *Id.*; (*see also* Resp't App. at A-11). The Revocations indicated the Power of Attorney being revoked was dated September 17, 2009, which appointed Rose as Norman's attorney-in-fact. (Resp't App. at A-11). Norman's signature on the Revocation was witnessed by Ida. *Id.* After this document was executed, Runge sent a copy of the Revocation and a Certificate of Service to Rose along with a cover letter. (Resp't App. at A-10 A-12). The cover letter asked for personal property and financial information to be returned to Norman. (Resp't App. at A-10).

23. The following day, April 3, 2013, Norman and Ida started packing Norman's things to leave the nursing home. (Resp't App. at A-18 (progress note by social services designee)). Norman's Social Service Designee, Cindy Lovell ("Cindy"), went to check what was happening. *Id.* Cindy's account of what happened was slightly different than Runge's. (*Cf.* Resp't App. at A-18; Resp't App. at A-24 (Runge's response)). Runge stated these events occurred on April 2nd, while Cindy states they occurred on April 3rd. (*Cf.* Resp't App. at A-18; Resp't App. at A-24). According to Cindy, she attempted to call Rose after Norman had started packing but was unable to get in touch with her. (Resp't App. at A-18). Cindy then called Norman's other daughter, Susan, to let her know what was occurring. *Id.* Cindy was handed one of the Revocations of Power of Attorney and was asked to speak with Runge on a cell phone. *Id.* During the call, Runge informed Cindy that the nursing home had no basis to hold Norman and that the facility would be sued if Norman was not allowed to leave. *Id.* Cindy then asked Runge to speak with the Director of Social Services for the nursing home. *Id.*

24. The Director informed Runge that Norman had been deemed incapacitated and that the revocation likely would not be upheld in court. (Resp't App. at A-18; *see also* Resp't App. at A-14 (incapacitated statement)). Runge repeated that the facility had no basis to hold Norman and again demanded that Norman be released. *Id.* After these conversations, Norman checked himself out of the nursing home. (Resp't App. at A-13 (Release from Responsibility for Discharge)). As of April 3, 2013, several standing orders for Norman's care were still in place. (*See* Resp't App. at A-15 A-17 (standing orders)). Despite his medical conditions, Norman signed a "Release from Responsibility for Discharge" which was witnessed by Ida and Cindy. (Resp't App. at A-13).

25. In Runge's account of these events, he stated that a social worker was handed a copy of the Revocation on April 2nd after it was signed. (*See* Resp't App. at A-24). He then asserted that the social worker left the room and he left the facility. *Id.* Runge stated that the social worker called him and told him that Norman's daughter was refusing to allow Norman to leave. *Id.* Then, Runge asserted that he told the social worker that the daughter had no say in the matter because her authority had just been negated by the Revocation. *Id.* He told the social worker there was no basis to hold Norman and that if Norman continued to be held, it would be a basis for a claim of false imprisonment against the nursing home. *Id.* Runge stated that Norman left the nursing home later that afternoon. *Id.*

26. Runge claimed that Norman's daughters did not need to be concerned about Norman's health. (Resp't App. at A-25). Runge claimed Norman's health needs were being properly met, including having his catheter changed on a regular basis. *Id.* In support of his argument that Norman is in good health, Runge stated that Norman and Ida celebrated leaving the nursing home by going to Barrowed Bucks Saloon to eat pizza and drink beer. *Id.*

27. Runge asserted that Norman's decision to leave the nursing home was "his and his alone." *Id.* He also asserted the only reason the nursing home had Norman sign the form indicating that he was leaving the nursing home against medical advice was "to provide them cover for any liability." *Id.*

28. The Revocation drafted by Runge and executed by Norman revoked the legal power of attorney. (Resp't App. at A-11 (revocation of power of attorney); *see also* Resp't App. at A-19 A-21)). The Revocation had no effect on the medical power of attorney. (*See* Resp't App. at A-11). Despite Runge being told that Norman was incapacitated, Runge did not indicate within his response that he had spoken with Rose, any of the members of Norman's family, or any of Norman's diagnosticians. Because the legal power of attorney was the only power of attorney that was revoked, Rose still held the medical power of attorney even after the Revocation was signed. (*Cf.* Resp't App. at A-11 (revocation of power of attorney; Resp't App. at A-14 (medical power of attorney)). Accordingly, it was not within Norman's ability to determine whether he was capable of leaving the nursing home; rather, that authority remained vested with Rose. (*Cf.* Resp't App. at A-11 (revocation of power of attorney; Resp't App. at A-14 (medical power of attorney)).

I. The Disciplinary Complaint against Runge and its Accompanying Documents.

13. After Norman left the nursing home based upon Runge's advice, Rose filed a disciplinary complaint against Runge. Within her complaint, Rose submitted several documents in support of her assertions that Runge had engaged in ethical misconduct because Norman was incapable of making medical decisions. (Resp't App. at A-3 A-22). Rose's primary concern was that Runge did not speak with Norman's family or the medical facility to find out about Norman's health conditions. (Resp't App. at A-3). Rose was upset by the actions taken because Runge took Norman and Ida's word for it that Norman's health was fine. *Id.* It appeared to Rose that what Norman and Ida wanted took priority over Norman's medical needs. *See id.* Norman left the nursing home without proper care and arrangements being made to address Norman's medical needs. (Resp't App. at A-3 A-4).

14. The documents accompanying the complaint also included a second letter from Rose in which she acknowledged that Norman did not want to be in the nursing home, but that it was the best place for him because of the medical care Norman could be provided. (Resp't App. at A-5). Rose detailed some of the issues, including: that Norman is on oxygen, several medications and has a catheter. *Id.* Norman also does not understand that he had a heart attack. *Id.* Rose was concerned about Norman's safety outside of the nursing home and whether he would be able to receive proper care living with Ida. (Resp't App. at A-5 A-6).

15. A letter from Norman's daughter, Susan, was also included within the complaint. (Resp't App. at A-7 A-9). Susan's letter reiterated concerns about Norman's health and his ability to function on his own. *Id.* She discussed problems that the nursing home and the daughters have had with Ida in the past. *Id.* Susan was also concerned about the Revocation of the Power of Attorney and whether her dad understood what he had signed. (Resp't App. at A-7 A-8).

16. In addition to these letters, a cover letter regarding the Revocation of the Power of Attorney asking for all personal property and financial information to be returned to Norman, (Resp't App. at A-10), a certificate of service, (Resp't App. at A-12), the actual Revocation of the Power of Attorney, (Resp't App. at A-11), and the legal power of attorney, were included with the complaint, (Resp't App. at A-19 A-21). Additionally, the release against medical advice, (Resp't App. at A-13), the standing medical orders in place at the time Norman was released, (Resp't App. at A-15 A-17), the medical power of attorney and incapacitated statement, (Resp't App. at A-14) and the progress note from Social Service Designee Cindy Lovell, (Resp't App. at A-18), were also included along with the complaint. (*See* Resp't App. at A-3 A-22).

LAW AND ARGUMENT

I. Standard of Review and Burden of Proof on Appeal.

33. The North Dakota Supreme Court reviews disciplinary proceedings de novo on the record. *Disciplinary Board v. Kuhn, 2010 ND 127, ¶ 12, 785 N.W.2d 195.* "Counsel for the Disciplinary Board must prove each alleged violation by clear and convincing

evidence, which means the trier of fact must be reasonably satisfied with the facts the evidence tends to prove and thus be led to a firm belief or conviction.” *Id.*

II. Disciplinary Procedure.

34. The North Dakota Supreme Court promulgated the North Dakota Rules for Lawyer Discipline. [N.D.R. Lawyer Discipl. 1.1\(B\)](#). The North Dakota Supreme Court was given the authority to develop and administer standards of professional conduct for lawyers pursuant to [Article VI, Section 3 of the North Dakota Constitution](#). [N.D.R. Lawyer Discipl. Rule 1.1\(A\)](#); [N.D. Const. Art. VI, § 3](#). Lawyers are subject to the North Dakota Rules for Lawyer Discipline if they are admitted to practice within North Dakota. [N.D.R. Lawyer Discipl. 1.1\(C\)](#). The Rules were established to ensure the highest standards of conduct because lawyers are officers of the Court. [N.D.R. Lawyer Discipl. 1.1\(B\)](#).

35. The purpose of lawyer disciplinary proceedings is to protect the public and the administration of justice. N.D. Std. Imposing Lawyer Sanctions 1.1. Complaints against an attorney may be filed by other lawyers, judges, or lay people. After a complaint has been filed against a lawyer, if it is not summarily dismissed, it is assigned for investigation to a member of the district inquiry committee or disciplinary counsel. [N.D.R. Lawyer Discipl. 3.1\(D\)\(1\)](#). After the complaint has been assigned, the lawyer is served with a copy of the complaint. [N.D.R. Lawyer Discipl. 3.1\(D\)\(2\)](#). The lawyer is given twenty (20) days to serve the investigator with a written response to the complaint. [N.D.R. Lawyer Discipl. 3.1\(D\)\(3\)](#). The investigator is given sixty (60) days from the date of the assignment, absent an extension from the chair, to file a written report to the chair of the district inquiry committee containing a summary of the investigation and the investigator's conclusions from the investigation. [N.D.R. Lawyer Discipl. 3.1\(D\)\(5\)](#). [N.D.R. Lawyer Discipl. 3.1\(D\)\(1\)](#).

36. The district inquiry committees meet on a quarterly basis. Prior to the meeting of the inquiry committee, before any discipline may be imposed, the lawyer must also be provided notice of the opportunity to appear before the district inquiry committee. [N.D.R. Lawyer Discipl. 3.1\(D\)\(7\)](#). The requirement is only to provide notice of the opportunity to appear and does not require notice as to the specific allegations against the lawyer. *See id.* The complainant is also provided notice and given the opportunity to appear before the district inquiry committee. [N.D.R. Lawyer Discipl. 3.1\(D\)\(6\)](#).

37. Once the district inquiry committee considers the complaint, it makes a determination on the disposition of a file. [N.D.R. Lawyer Discipl. 2.4\(E\)\(3\)](#). One of the options available to an inquiry committee for the disposition of a file is to issue an admonition. *Id.*; *see also* [N.D.R. Lawyer Discipl. 1.3\(A\)\(5\)](#). Admonitions have been an available form of discipline for inquiry committees to impose since 1995. *See* [N.D.R. Lawyer Discipl. 1.3](#) (indicating the rule was adopted effective January 1, 1995);

38. After the file has been considered, the lawyer is notified by the Office of Disciplinary Counsel about the district inquiry committee's disposition and the reasons for the committee's decision. [N.D.R. Lawyer Discipl. 3.1\(D\)\(8\)](#). After receiving the notice of the disposition, the lawyer may then appeal the disposition to the Disciplinary Board by filing a written request for review within thirty (30) days of mailing the notice. [N.D.R. Lawyer Discipl. 3.1\(D\)\(8\)](#).

39. Once the lawyer sends written notice requesting an appeal, the Office of Disciplinary Counsel refers the matter to the Disciplinary Board to consider the merits of the appeal. [N.D.R. Lawyer Discipl. 3.1\(D\)\(8\)](#). The Disciplinary Board meets on a quarterly basis. Once an appeal has been referred to the Disciplinary Board, it may approve, modify or disapprove of the disposition by the district inquiry committee. [N.D.R. Lawyer Discipl. 2.1\(H\)\(1\)](#). The Disciplinary Board may also remand the case to the district inquiry committee for further proceedings. *Id.* After the Disciplinary Board has met and considered a file, minutes of the meeting are prepared which are reviewed and approved by the members before disposition letters are sent out.

40. After the appeal is considered by the Disciplinary Board, a lawyer may petition the North Dakota Supreme Court for leave to appeal the Disciplinary Board's disposition. [N.D.R. Lawyer Discipl. 3.1\(D\)\(8\)](#). If leave is granted, the case is reviewed de novo on the record. *Kuhn*, ¶12.

41. A formal petition for disciplinary proceedings is only served on a lawyer if the district inquiry committee directs the Office of Disciplinary Counsel to initiate formal proceedings against the lawyer. [N.D.R. Lawyer Discipl. 2.4\(E\)\(3\)](#); *see also* [N.D.R. Lawyer Discipl. 3.1\(E\)\(1\)](#). If a petition is served, it must contain information that is “sufficiently clear and specific to inform the lawyer of the alleged misconduct.” [N.D.R. Lawyer Discipl. 3.1\(E\)\(1\)](#). Even after formal proceedings have been initiated, a hearing only occurs if there are issues of material fact raised by the pleadings or if a request is made by the lawyer to be heard in mitigation. [N.D.R. Lawyer Discipl. 2.4\(E\)\(3\)](#).

III. Runge Violated [Rule 1.14, N.D.R. Prof. Conduct](#), by Failing to Contact Norman's Appointed Representative.

42. During his representation of Norman, Runge failed to consult with Norman's appointed representative, in violation of [Rule 1.14, N.D.R. Prof. Conduct](#). The language of [Rule 1.14\(a\)](#) states:

When a client's capacity to make adequately considered decisions *in connection with a representation is limited*, whether because of minority, [mental impairment](#), or for some *other reason*, the lawyer shall, as far as reasonably possible maintain a normal client-lawyer relationship with the client.

[N.D.R. Prof. Conduct 1.14\(a\)](#) (emphasis added).

43. Comment 1 explains, a “normal client-lawyer relationship exists in those situations where the client, when properly advised and assisted is capable of making or communicating responsible decisions concerning the client's person or affairs.” [N.D.R. Prof. Conduct, Comment 1](#).

44. In *Disciplinary Board v. Kuhn, 2010 ND 127, 785 N.W.2d 195*, a new will was prepared for a client who had been declared incompetent and who had a guardianship/conservatorship in place. Kuhn was found to have violated [N.D.R. Prof. Conduct 1.14](#) because he did not communicate with or secure decision-making authority from the guardian/conservator prior to drafting a new will for the client, despite talking to the client about the client's wishes. *Id.* ¶¶ 6, 20. In holding there was a violation of [Rule 1.14](#), the Court relied on Comment 5, which states, in pertinent part:

If the client has an appointed representative, the lawyer should ordinarily look to the representative for decisions on behalf of the client. The lawyer should be cognizant of the extent of the powers and duties conferred upon the client's appointed representative.

[N.D.R. Prof. Conduct 1.14, Comment 5](#).

45. Comment 3 to the Rule defines “appointed representatives” as including “guardians ad litem, conservators, guardians, *individuals appointed in a durable power of attorney or in an advanced health care directive*.” [N.D.R. Prof. Conduct 1.14, Comment 3](#) (emphasis added).

46. Like in *Kuhn*, Runge violated [Rule 1.14](#) in this case. In both cases, the lawyers were called by third-parties and asked to draft a legal document. *Kuhn*, ¶ 6; (Resp't App. A-23 A-24). Runge was called by a third party, Ida, and asked to draft a revocation of a power of attorney. *See Kuhn*, ¶ 6 (Kuhn was called by a caregiver and asked to draft a will). Both *Kuhn* and Runge then went and spoke directly to the person who had an appointed representative. *See id.*; (Resp't App. at A-24). In both cases, neither lawyer spoke with the appointed representative. *See Kuhn*, ¶ 6; (Resp't App at A-3 A-4).

47. While there is a distinction between the two cases based on the level of authority held by the appointed representatives, Runge still should have talked to Rose pursuant to [Rule 1.14, N.D.R Prof Conduct](#). *Kuhn* involved a guardianship/conservatorship, which limited the client's ability to make decisions for himself. *Kuhn*, ¶ 5. Norman had a durable power of attorney in place, which did not limit his decision making abilities. (*See* Resp't App. at A-19 A-21). Norman, however, was an **elderly** gentleman,

in a nursing home, whom Runge had just met for the first time that day. Pursuant to Comment 5, [N.D.R. Prof. Conduct 1.14](#), Runge had an obligation to understand the extent of the powers conferred upon Norman's appointed representative, Rose. Because Runge did not contact her, he did not understand that in addition to the legal power of attorney, Rose also was the sole authority for making medical decisions on behalf of Norman. (See Resp't App. at A-14 (medical power of attorney); Resp't App. at A-19 A-21 (legal power of attorney)).

48. In Norman's case, his ability to make decisions in connection with his representation was limited. (See Resp't App. at A-14 (incapacitated statement)); [N.D.R. Prof. Conduct 1.14\(a\)](#). Runge had been hired to assist Norman in being able to leave the nursing home. (See Resp't App. at A-23 A-25 (response by Runge)). The decision to leave the nursing home was not only a legal decision, but a medical one as well. See [N.D.R. Prof. Conduct 1.14\(a\)](#); (*but see* Resp't App. at A-14).

49. Norman had been deemed medically incapacitated because he was not able to make medical decisions affecting his care. (Resp't App. at A-14). As a result, Norman did not have the requisite ability to “make adequately considered decisions *in connection with* his representation.” See [N.D.R. Prof. Conduct 1.14\(a\)](#). Norman was a client who had limited capacity pursuant to the meaning of [Rule 1.14](#). [N.D.R. Prof. Conduct 1.14\(a\)](#). Accordingly, a normal lawyer-client relationship could not have existed between Runge and Norman, even if Norman had the legal capacity to execute the Revocation. [N.D.R. Prof. Conduct 1.14\(a\)](#); [N.D.R. Prof. Conduct](#), Comment 1.

50. Because a normal lawyer-client relationship could not exist, Runge should have looked to Norman's appointed representative for decisions on behalf of Norman. [N.D.R. Prof. Conduct 1.14](#), Comment 5. Rose continued to be Norman's appointed representative even after the legal power of attorney was revoked because she also held the medical power of attorney. (See Resp't App. at A-11 (revocation of legal power of attorney); Resp't App. at A-14 (medical power of attorney); Resp't App. at A-19 A-21 (legal power of attorney)). Accordingly, Rose should have been contacted by Runge for a decision on behalf of Norman whether Norman could medically leave the nursing home. (Resp't App. at A-14 (medical power of attorney)); *see also* [N.D.R. Prof. Conduct](#), Comment 3 (identifying individuals appointed as powers of attorney as “appointed representatives”).

51. Even though Runge failed to talk to Rose, he still should have been cognizant of the extent of the powers and duties conferred upon her. See [N.D.R. Prof. Conduct 1.14](#), Comment 5. Based off of his conversation with the Director of Social Services for the nursing home, Runge should have been aware that a medical power of attorney was in place. (See Resp't App. at A-18). The Director informed Runge that Norman had been deemed incapacitated. (See Resp't App. at A-18). Despite this information, Runge did not talk to Rose, did not speak with any other members of Norman's family, nor did he seek out a medical opinion to determine whether the medical power of attorney could be revoked; rather, Runge told the Director of Social Services that no legal basis existed to hold Norman and that the nursing home would be sued for false imprisonment if it did not allow Norman to leave. (See Resp't App. at A-18; Resp't App. at 24).

52. Like *Kuhn*, Runge violated [Rule 1.14](#), [N.D.R. Prof. Conduct](#), by clear and convincing evidence because he failed to get authority from the appointed representative. Runge violated [Rule 1.14](#) because he failed to get permission from Rose for Norman to leave the nursing home when Rose continued to hold the medical power of attorney. See [N.D.R. Prof. Conduct 1.14](#), Comment 5. Runge's violation was due to his failure to understand the full extent of authority granted to Rose. See *id.*

IV. Procedural Due Process Appropriate for an Admonition was Given to Runge.

A. Procedural Due Process Concerns were Raised by Runge for the First Time to the North Dakota Supreme Court.

53. The first time the procedural due process arguments were raised by Runge was within his Petition and Brief in Support of Petition for Leave to Appeal and now will likely be the focus of his appellate brief. (See Resp't App. at A-58 A-60). The Court has repeatedly stated that issues will not be considered for the first time on appeal. See *e.g.*, [Ericksmoen v. North Dakota Dept. Transp.](#), 2005 ND 206, ¶ 15, 706 N.W.2d 610; [Pic v. City of Grafton](#), 460 N.W.2d 706, 709 (N.D. 1990). As a result, the Office

of Disciplinary Counsel requests the Court affirm the admonition because the due process arguments were raised for the first time in Runge's filings before this Court. (*See Resp't App. At A-58 - A-60*).

54. It is also well-established that disciplinary proceedings are reviewed de novo on the record. *Disciplinary Board v. Overboe*, 2014 ND 62, ¶ 9, 844 N.W.2d 851; *Kuhn*, 1 12; *Disciplinary Board v. Ellis*, 504 N.W.2d 559, 560 (N.D. 1993). After receiving his admonition from the Inquiry Committee West, Runge only asked for a review of the disposition by the Disciplinary Board. (*Resp't App. at A-32*). Runge did not make assertions within that letter that due process had been violated. *See id.* The letter also did not ask the Disciplinary Board to send Runge's case to formal proceedings, so that further due process measures would be imposed, nor did it ask for the matter to be remanded to the Inquiry Committee West for consideration of additional evidence; rather, Runge simply asked for a review. *Id.* As a result, Runge did not put any arguments before the Disciplinary Board for its review and consideration regarding due process and did not document that argument on the record. *Id.* As a result, Runge's due process arguments were not preserved for review by the North Dakota Supreme Court despite well-established precedent that these matters are reviewed de novo on the record. *See id.*; *see also Disciplinary Board v. Overboe*, 2014 ND 62, ¶9, 844 N.W.2d 851; *Kuhn*, ¶ 12; *Disciplinary Board v. Ellis*, 504 N.W.2d 559, 560 (N.D. 1993) (each establishing that disciplinary proceedings are reviewed de novo on the record). Accordingly, the Office of Disciplinary Counsel requests the Court to affirm the imposition of an admonition because Runge failed to preserve this argument for review by the North Dakota Supreme Court.

A. Runge was Provided the Appropriate Notice and Opportunity to be Heard Given the Nature of the Case.

55. Despite Runge's failure to preserve the issue, if the Court chooses to review these matters, Runge was given the appropriate notice and opportunity to be heard by the Inquiry Committee West regarding an informal disciplinary complaint. Runge was also provided the appropriate level of procedural due process at the Disciplinary Board level. "Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pending proceeding and to afford them an opportunity to present objections." *Peplinski v. County of Richland*, 2000 ND 156, ¶ 28, 615 N.W.2d 546. In *Hartleib v. Simes*, 2009 ND 205, ¶ 12, 776 N.W.2d 217, the Court explained:

Generally, procedural due process requires fundamental fairness, which, at a minimum, necessitates notice and a meaningful opportunity for a hearing appropriate to the nature of the case. The specific requirements of due process are flexible in nature and vary depending upon the circumstances of each case. However, the very nature of procedural due process "negates the concept of inflexible procedures universally applicable to every imaginable situation; instead, the requirements imposed by due process are flexible and vary dependent upon the particular situation being examined."

Id. (internal citations omitted).

56. In *Application of Lamb*, 539 N.W.2d 865, 867 (N.D. 1995), the Court was placed in a similar situation where it was asked to review its own rules. The Court in *Lamb* stated in the context of reviewing an application to the bar, "The due process clause does not require a full dress adversary proceeding." *Id.* Similarly, private disciplinary proceedings also do not require full dress adversary proceedings. *Cf. N.D.R. Lawyer Discipl. 3.1(D); N.D.R. Lawyer Discipl. 3.1(E)*.

57. In *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222 (1968), the United States Supreme Court considered whether due process was present in Ohio's disbarment proceedings to determine whether that disbarment should affect Ruffalo's admission to practice in federal court. Ruffalo had no notice that his employment of another individual could lead to disbarment until after both he and that individual had testified at length about the employment. *Id. at 550-51*. During the course of the proceeding, the charges were amended three (3) days into the hearing, to include an additional charge related to the employment. *Id. at 546*. Ruffalo was given a continuance to respond to the new charge, but was ultimately found to have violated it. *Id. at 547*. The only evidence presented with respect to the new charge by bar counsel was the statements that had been made during the course of the hearing. The additional charge was one of two charges that led to Ruffalo's disbarment in Ohio. *Id.* The Court noted that Ruffalo was "trapped" because he was not given an opportunity to retract the earlier statements. *Id. at 551*. The Court stated that Ruffalo

had been denied due process because there was an absence of fair notice as to the charges and because no precise charges had been defined. *Id.* at 552.

58. In *Ruffalo*, the disbarment proceedings were considered quasi-criminal in nature. *Ruffalo*, 390 U.S. at 551. Under the North Dakota Rules for Lawyer Discipline, however, “disciplinary proceedings are neither civil nor criminal, but are quasi-judicial in nature.” N.D.R. Lawyer Discipl. 3.5(a).

59. The North Dakota Supreme Court looked at due process within the context of disciplinary proceedings in *Disciplinary Board v. Ellis*, 504 N.W.2d 559 (N.D. 1993). In *Ellis*, the Court cited to *Ruffalo* stating that “An attorney subjected to disbarment proceedings is ‘entitled to procedural due process, which includes fair notice of the charge.’” *Ellis*, 504 N.W.2d at 562. *Ellis* was not served with notice or a subpoena before the inquiry committee meeting. *Id.* As a result, she asserted that she had been denied her right to appear because she did not know about the inquiry committee meeting. *Id.* *Ellis* made assertions regarding what evidence could have been provided at that time, but it was unclear whether the evidence would have aided her position. *Id.* at 563. Additionally, because her case moved forward for consideration in formal disciplinary proceedings, *Ellis*'s procedural due process argument was held to be without merit. *Id.* *Ellis* was ultimately suspended for a period of six months and required to retake the Multistate Professional Responsibility Examination. *Id.* at 565.

60. Both *Ruffalo* and *Ellis* involved cases in which the lawyer's potential discipline was public information and the lawyer's right to practice would have been substantially affected. See *Ruffalo*, 390 U.S. at 545; *Ellis*, 504 N.W.2d at 560. Both of these cases are distinguishable from *Runge*'s case because they did not involve cases where private discipline had been imposed and where the lawyer's right to practice was not affected. See *Ruffalo*, 390 U.S. at 545; *Ellis*, 504 N.W.2d at 560. Accordingly, these distinctions require the Court to consider as an issue of first impression the level of procedural due process that must be afforded to a respondent lawyer in the context of an receiving an admonition under the North Dakota Rules for Lawyer Discipline.

61. The Inquiry Committee West issued *Runge* an admonition on October 4, 2013. (Resp't App. at A-31). An admonition is a “form of non-public discipline that does not limit a lawyer's right to practice.” N.D. Stds. Imposing Lawyer Sanctions 2.5. Within his Petition and Brief in Support of Petition for Leave to appeal, *Runge* asserted that his procedural due process rights were violated because his property interests were affected; however, these were inaccurate allegations based on the nature of the sanction he received. (Resp't App. at A-59 A-60); see also N.D. Stds. Imposing Lawyer Sanctions 2.5.

62. Because an admonition does not affect a lawyer's ability to practice law, *Runge* was not deprived of a property interest on that basis. See N.D. Stds. Imposing Lawyer Sanctions 2.5. Additionally, because an admonition is non-public discipline, *Runge*'s reputation also was not adversely affected by the imposition of the admonition, in and of itself. See *id.* *Runge* put his own reputation into question by directly naming himself within the petition for review. (See Resp't App. at A-35 A-63). Based upon the North Dakota Standards for Lawyer Sanctions, the sanction imposed does not deprive *Runge* of his property rights, nor do the Rules for Lawyer Discipline require him to name himself in the petition for a review. See N.D. Stds. Imposing Lawyer Sanctions 2.5; N.D.R. Lawyer Discipl. 3.1(D)(8).

63. Because *Runge* was issued private discipline, rather than disbarment or a suspension like in *Ruffalo* and *Ellis*, the level of procedural due process differs. As the Court has previously stated, “The specific requirements of due process are flexible in nature and vary depending on the circumstances of each case.” *Hartleib*, ¶ 12. Throughout the disciplinary process, *Runge* was afforded procedural due process appropriate to the circumstances of his case. See *id.*

1. Runge Received Notice at the Inquiry Committee Level.

55. *Runge* was provided sufficient notice to satisfy procedural due process requirements at the inquiry committee level. Upon receiving notice of a complaint, a lawyer “within twenty days of service of the complaint, shall serve a written response to the allegations in the complaint upon the assigned investigator.” N.D.R. Lawyer Discipl. 3.1(D)(3). “Notice of the opportunity to

appear before the district inquiry committee must be provided to the lawyer before entry of any discipline by the district inquiry committee, before diversion from discipline or before referral for formal proceedings.” [N.D.R. Lawyer Discipl. 3.1\(D\)\(7\)](#).

56. In the present case, Runge was given notice when he received a letter from the Chair of Inquiry Committee West informing him that the investigation of a complaint being made against him by Rose would occur. (Resp't App. at A-1 A-2). The letter also gave him notice of his opportunity to respond to the complaint's allegations. *Id.* Runge was sent a copy of Rose's complaint as an enclosure to this letter. (Resp't App. at A-1 A-22).

57. The complaint was drafted by a non-attorney. (*See* Resp't App. at A-3 A-22). The complaint did not contain the specific provisions of the North Dakota Rules of Professional Conduct that were alleged to have been violated, *Id.*; rather, Rose stated what had upset her about Runge's representation of Norman and explained why she thought he had been unethical. *Id.* The primary allegation within the complaint was that Runge had not contacted Rose, or any family member, to check on Norman's medical ability to leave the nursing home when Norman was medically incapacitated. (*See id.* at A-3). Rose's complaint contained a significant amount of detail due to the supporting documentation that accompanied it. (*See* Resp't App. at A-3 A-22). While there was not a formal petition with specific assertions as to the alleged violations of the Rules of Professional Conduct, Runge would have had reasonable notice that [Rule 1.14, N.D.R. Prof. Conduct](#), was implicated by Rose's complaint. (*See* Resp't App. at A-3 A-22). Within the complaint, Rose specifically asserted that Norman was incapacitated and unable to make the decision to leave the nursing home. *Id.* at A-3. [Rule 1.14](#) addresses clients with limited capacity. *See* [N.D.R. Lawyer Discipl. 1.14](#).

58. After receiving the complaint and having an opportunity to respond to its allegations, Runge received notice that he was being given the opportunity to appear before the Inquiry Committee West and that he had the opportunity to coordinate scheduling for his appearance. (Resp't App. at A-30). Runge made arrangements for an appearance in accordance with the letter providing the notice. (*See* Resp't App. at A-42).

59. Given that this complaint was being handled under the North Dakota Rules for Lawyer Discipline at the informal disciplinary level, and the flexible nature of procedural due process, adequate notice was given to Runge regarding the allegations of ethical misconduct that Rose was making against him. Runge was also notified, via letter, of his ability to appear before the Inquiry Committee West. Runge received sufficient notice under the circumstances to comply with this requirement of procedural due process.

1. Runge had an Opportunity to be Heard at the Inquiry Committee Level

55. Runge had an opportunity to be heard by the Inquiry Committee West. A lawyer must be given the opportunity to be heard by the inquiry committee before discipline may be imposed. *See* [N.D.R. Lawyer Discipl. 3.1\(D\)\(7\)](#).

56. After Runge submitted written response to the allegations within the complaint, Runge had a meaningful opportunity to be heard appropriate to the nature of the case. *See Hartleib*, ¶12. Runge appeared at the Inquiry Committee West's meeting on September 13, 2013. (*See* Resp't App. at A-42).

57. When he appeared before the Inquiry Committee West, Runge was represented by counsel, Attorney Tom Dickson. (Resp't App. at A-42). Runge was given the standard twenty-minute time frame allocated to every respondent or complainant appearing before the Committee. During that time, Runge had an opportunity to be heard by the Committee regarding his defenses to Rose's complaint. At his appearance, Runge did not ask to have any witnesses appear on his behalf, nor did he bring any additional documentation for the Committee's consideration. During that time, Runge was questioned by members of the Committee and Disciplinary Counsel regarding Norman's capacity to make decisions, regarding a possible violation of [Rule 1.14](#) and was questioned about the similarities between his role and what occurred in the Kuhn case. (*See* Resp't App. at A-42 A-43). Runge and Attorney Dickson spoke on Runge's behalf, responded to questions, and argued that *Kuhn* did not apply to Norman's situation. (*Id.* at A-43).

58. After being given an opportunity to be heard, the Inquiry Committee West determined that Runge's conduct merited an admonition. (*See* Resp't App. at A-31). Runge's opportunity to be heard was appropriate given the circumstances of his case.

1. Runge Received Notice at the Disciplinary Board Level.

55. After appealing the admonition from the Inquiry Committee West, at the Disciplinary Board level, Runge received sufficient notice to meet procedural due process requirements under the circumstances. Pursuant to [Rule 3.1\(D\)\(8\)](#), the lawyer shall be notified in writing of the disposition of the Inquiry Committee and the reasons for its decision. [N.D.R. Lawyer Discipl. 3.1\(D\)\(8\)](#). After the lawyer has been notified, an appeal from the disposition can be made by the complainant, respondent or their respective counsel. *Id.*

56. After the Inquiry Committee West made its determination, a letter was sent by the Chair of the Inquiry Committee West to Runge which issued him an admonition and informed Runge of his right to appeal its decision to the Disciplinary Board. (Resp't App. at A-31). The letter directed Runge to [Rule 3.1\(D\)\(8\)](#), [N.D.R. Lawyer Discipl.](#), and informed him of the time in which he needed to indicate his intent to appeal. *Id.*; *see also* [N.D.R. Lawyer Discipl. 3.1\(D\)\(8\)](#).

57. In response to the letter issuing an admonition, Runge informed the Office of Disciplinary Counsel of his request for a review of the Inquiry Committee West's determination by the Disciplinary Board. (Resp't App. at A-32). The Office of Disciplinary Counsel then informed Runge that his file would be considered by the Disciplinary Board as an appeal and that he could expect to hear back from the Office of Disciplinary Counsel regarding the disposition after the Disciplinary Board's next meeting. (Resp't App. at A-33). Pursuant to the [Rule 3.1\(D\)\(8\)](#), [N.D.R. Lawyer Discipl.](#), Runge was provided the notice regarding the appeal that was required under the circumstances.

1. Runge was Given the Opportunity to Present Objections at the Disciplinary Board Level.

55. Pursuant to the Rules for Lawyer Discipline, the Disciplinary Board reviews the merits of the appeal. [N.D.R. Lawyer Discipl. 3.1\(D\)\(8\)](#). After receiving an appeal from the decision of an inquiry committee, the Disciplinary Board can “approve, modify or disapprove the disposition, or remand to the district inquiry committee for further proceedings.” [N.D.R. Lawyer Discipl. 2.1\(H\)](#). The Rules for Lawyer Discipline do not require the Disciplinary Board to allow an appearance when an appeal is being considered. *Cf.* [N.D.R. Lawyer Discipl. 3.1\(D\)\(7\)](#) (providing that notice of the opportunity to appear before the inquiry committee must be provided to the lawyer before entry of any discipline); [N.D.R. Lawyer Discipl. 3.1\(D\)\(8\)](#) (providing that upon written request for review, the Office of Disciplinary Counsel “shall refer the file to the board which shall consider the merits of the appeal ***

56. After Runge was informed that his file would be considered by the Disciplinary Board, Runge did not engage in further correspondence with the Office of Disciplinary Counsel or the Disciplinary Board. At no time prior to his file being considered, did Runge submit additional evidence or arguments, make a request to appear, or ask for witnesses to be considered by the Disciplinary Board. (Resp't App. at A-32) (indicating only his intent to appeal, but making no additional requests). As a result, Runge failed to make a record regarding what an appearance, testimony of witnesses, or any additional evidence he allegedly wanted to present, would have shown. *See id.*

57. The Disciplinary Board met and considered Runge's file on January 8, 2014. (*See* Resp't App. at A-34). Its review was based on the record that was submitted. *Id.* Runge had the opportunity to present additional objections to the Inquiry Committee West's disposition, but did not take that opportunity. (Resp't App. at A-32). (indicating only his intent to appeal). After its review of Runge's file, it upheld the Inquiry Committee West's admonition and sent Runge a letter informing him of it's decision. (*See* Resp't App. at A-34). Accordingly, Runge was provided the adequate opportunity to present objections at the Disciplinary Board level to satisfy procedural due process.

A. Alternatively, Runge's File Should Be Remanded for Formal Proceedings.

55. Runge was given reasonable notice and the opportunity to be heard or present objections at both the inquiry committee and the Disciplinary Board levels. The notice and opportunity were consistent with the North Dakota Rules for Lawyer Discipline. *See generally*, [N.D.R. Lawyer Discipl. 3.1\(D\)](#). Alternatively, if the Court were to find that the notice and opportunities afforded under its Rules are not consistent with procedural due process requirements, the Office of Disciplinary Counsel would request for the case to be remanded for formal disciplinary proceedings before a Hearing Panel of the Disciplinary Board.

CONCLUSION

56. Because he failed to look to Norman's appointed representative, Runge did not understand the extent of the Powers of Attorney held by Rose. Runge only revoked the legal power of attorney, which did not give Norman the ability to make the decision to leave the nursing home as he had been advised he could by Runge. Because the medical power of attorney remained in place, Rose continued to hold decision-making authority on whether Norman could leave the nursing home. Clear and convincing evidence existed that Runge violated [Rule 1.14, N.D.R. Prof. Conduct](#).

57. Runge raised his complaints regarding procedural due process for the first time to the North Dakota Supreme Court. If the Court were to consider these issues, pursuant to the North Dakota Rules for Lawyer Discipline, Runge was afforded the notice and opportunities required for procedural due process under the circumstances of an inquiry committee issuing an admonition. Alternatively, if the Court were to find the procedural due process requirements were not met, the Office of Disciplinary Counsel requests that Runge's case be remanded for formal disciplinary proceedings.

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