

By MARTIN COLE

Summary of Private Discipline

In calendar year 2013, the Director's Office resolved 144 files with admonitions that were issued to Minnesota attorneys for isolated and nonserious violations of the Minnesota Rules of Professional Conduct (MRPC). Another 13 lawyers entered into stipulations for private probation that were approved by the Lawyers Board chair; these stipulations resolved an additional 18 complaint files (probations may involve multiple nonserious complaints against the same attorney, often in situations in which supervision may be of benefit). As was true with cases of public discipline, reported in last month's column, the number of admonitions issued in 2013 was one of the highest totals recorded. You would have to go back to 1996 to find a year with as many private disciplinary determinations.

A summary of private discipline from the past year has been published on an annual basis.¹ Here then is this year's sampling of the misconduct that led to private discipline this past year. When reading these synopses, keep in mind that they are offered for educational purposes and that sometimes complex facts may have been slightly simplified in order to make a particular violation clearer (facts are not changed, but some admonitions may involve more than one rule violation; facts concerning the second violation may have been omitted).



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Most complaints that involve what appear initially to be allegations of isolated and nonserious misconduct are investigated by a local district ethics committee (DEC). Most lawyer and nonlawyer volunteer DEC investigators who investigate such complaints do an outstanding job of determining the facts and making a preliminary recommendation.

As in past years, DEC recommendations were followed by the Director's Office approximately 90 percent of the time this year (and note that some of the instances where the recommendation technically is considered not to have been followed involved attorneys who had prior similar discipline, a factor the DEC is not expected to consider, rather than demonstrating any actual disagreement with a DEC recommendation).

Admonitions in 2013

Neglect, noncommunication. As has been true every year, lack of diligence and/or lack of communication with a client are the most common reasons for receiving a complaint, and also for receiving an admonition. The comments to Rule 1.3 (Diligence), for example, rightly note that "[p]erhaps no professional shortcoming is more widely resented than procrastination." What constitutes a lack of diligence or lack of communication may vary depending upon the nature of the legal matter involved and what the lawyer has agreed to do.

In one matter, an attorney represented a client in a workers' compensation matter. The matter was mediated and the attorney believed the employer's offer was reasonable. The client disagreed. Perhaps feeling frustrated, the attorney took no further action on the matter; several months later the employer made a motion to dismiss. Only then did the attorney communicate with his client and submit an objection to the motion. Shortly thereafter, the lawyer withdrew. The DEC recommended finding a violation of Rule 1.3, MRPC, and the attorney received an admonition.

In another matter, the attorney represented a beneficiary of a trust in seeking an increase in his monthly distribution. The lawyer petitioned the district court for such an increase and a hearing was held. The attorney told the client that the court likely would rule on the petition within 60 days. After the 60 days passed, the client began contacting the attorney to determine the status of the petition. In fact, the court had not yet ruled, but the lawyer failed to respond to any of the client's numerous requests for information. Shortly thereafter, the court denied the petition; the attorney

did not inform the client of the result for several more months, until after a complaint was filed. Because the DEC determined that the harm to the client was not substantial, it recommended finding nonserious violations of Rule 1.4(a) (3) and (4), MRPC (keeping client reasonably informed about the status of a matter, and promptly complying with reasonable requests for information). The attorney received an admonition.

Professional indebtedness. Attorneys continue to be disciplined for failing to pay debts incurred professionally, despite having been on notice for many years that such a failing may be considered conduct prejudicial to the administration of justice (Rule 8.4(d), MRPC) and can result in discipline in some instances.² In one matter this past year, the attorney hired a court reporter for a deposition and ordered a transcript, which was prepared. The court reporter dutifully sent the attorney an invoice for \$486. The attorney ignored the billing and did not pay. After two more billing notices were ignored, the court reporter filed a claim in conciliation court. The attorney did not appear at the hearing and a default judgment was entered; the attorney did not remove the matter to district court. Having not received payment, the court reporter filed a complaint six weeks later. Only then did the lawyer pay for the transcript.

In defense to the complaint, the lawyer asserted that his client had not paid him for the transcript. At that point, whether the lawyer had any potential defense was immaterial the issue then was the failure to pay a valid, law-related *judgment*, for which the DEC recommended an admonition. The Director's Office routinely will summarily dismiss such complaints prior to the creditor obtaining a judgment; but afterwards, investigation and possible discipline will result.

Improper fee agreements. Another area of recurring problems concerned attorneys continuing to use fee agreements that contain language providing that an advance fee is "nonrefundable." Since 2011, Rule 1.5(b)(3), MRPC, has clearly stated that "[f]ee agreements may not describe any fee as nonrefundable or earned upon receipt" Yet lawyers continue

to use this now prohibited phrase and continue to place advance fees directly into their business operating accounts without complying with the written fee agreement requirements of Rules 1.5(b) and 1.15(c)(5), MRPC. In one marital dissolution matter for which the DEC recommended an admonition, the attorney presented the client with a fee agreement containing the "nonrefundable" language and placed the advance fee directly into his business account. The client never signed the agreement and discharged the lawyer after a short time. Even though the lawyer in fact provided a partial refund, an admonition was recommended and issued.

Withdrawal from representation.

Lawyers are permitted to withdraw from representation in many situations, including for nonpayment of fees by a client. Nevertheless, several issues potentially can result in discipline, such as whether adequate warning of withdrawal for nonpayment was provided. The timing of any withdrawal is often important in determining whether the withdrawal was "accomplished without adverse effect on the interests of the client" (Rule 1.16(b)(1), MRPC). And the timely return of client files upon request is important for the same reason. Each of these problems resulted in admonitions in 2013, including one matter in which the attorney represented an individual with tax matters before the IRS and the Minnesota Department of Revenue. Again, the DEC that investigated the matter recommended an admonition, for a violation of Rule 1.16(d), MRPC.

Conflicts of interest. Several attorneys received admonitions in 2013 for representing individuals despite having a conflict of interest prohibited by the MRPC. For example, an attorney represented a client in a credit card dispute. The local bank then hired the attorney to collect on an unrelated debt against the client. Recognizing the conflict, the attorney sought and obtained a purported waiver of the conflict from the client, but did not advise the client of the risks of such conflicted representation or alternatives to agreeing to the waiver³ and required the client to sign an acknowledgment of the debt as part of the waiver. After obtaining a default judgment against his client, the attorney withdrew. The DEC recommended an admonition for a violation of Rule 1.7(a)(1), MRPC, which was issued.

In another matter, an attorney drafted a will for a client that left a substantial bequest to the lawyer's father, who was a close friend of the client. The DEC recommended and the lawyer

received an admonition for violating Rule 1.8(c), MRPC, which prohibits a lawyer from drafting an instrument giving the lawyer or certain close relatives (including parents) a substantial gift, including a testamentary gift, unless the client is related to the donee.⁴ In instances where the attorney personally has received a substantial financial gain through a violation of this rule, public discipline has been imposed.

Conclusion

Although in 2013 more admonitions were issued than on average, this fact should not necessarily be read to indicate that lawyer misconduct is increasing. In fact, the majority of attorneys who receive private discipline never repeat their isolated instance of misconduct. And the overwhelming majority of Minnesota lawyers are never subject to discipline.

Private dispositions basically are just that, although the complainant and the DEC that investigated a matter will receive a copy of the final disposition. Complainants also have the right to appeal private discipline to a reviewing Lawyers Board member. Should the attorney commit further misconduct in future, however, private discipline can be relevant to the determination of what level of discipline is appropriate in any subsequent proceeding and thus admissible in a future disciplinary proceeding.⁵ ▲

Notes

¹ This year we changed the title of this annual column from "Summary of Admonitions" to "Summary of Private Discipline," which more accurately includes private probations, and thus is more complete. So naturally, during the year no unique private probations occurred, and so none are included.

² See, *In re Pokorny*, 453 N.W.2d 345, 348 (Minn. 1990).

³ Rule 1.0(f), MRPC (Terminology), defines informed consent to include providing "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

⁴ The ABA Model Rule also exempts individuals with whom the lawyer or the client maintains a "close familial relationship." Minnesota's version of the rule expressly eliminated this language.

⁵ Rule 19(b)(4), Rules on Lawyers Professional Responsibility; *In re Winter*, 770 N.W.2d 463, 468 (Minn. 2009).



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