

1996 ADMONITIONS

by
Marcia A. Johnson, Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (March 1997)

In 1996, the Director's Office issued 152 admonitions to Minnesota lawyers. Admonitions are issued for misconduct which is "isolated and non-serious," Rule 8(d)(2), Rules on Lawyers Professional Responsibility (RLPR). As in prior years, more admonitions were issued for neglect and failure to adequately communicate with the client than for any other type of rule violation. Other misconduct for which admonitions were issued include: inappropriate handling of retainers, noncooperation with the disciplinary process, *ex parte* contacts with the court, improper advertising, and inappropriate communication with unrepresented or represented parties. Summaries of several representative admonitions issued in 1996 follow.

Failure to Attend Court Hearings. A lawyer was retained by a client in a paternity case. The client subsequently was charged with a violation of an order of protection. The court set a hearing and notified the lawyer. The lawyer had a conflict on the hearing date and attempted unsuccessfully to have other lawyers in his office handle the matter. The client ultimately appeared at the hearing *pro se* and was sentenced to a short jail term for contempt. The mother then brought a motion requesting that she be allowed to move out of state with the minor child. The lawyer wrote to the court on the issue of the contemplated move, but did not attend the hearing as he was out of town on vacation. The lawyer's failure to appear at two scheduled hearings violated Rule 1.3, MRPC.

Failure to File Informational Statement. A lawyer was retained to represent a couple in two separate lawsuits. The lawyer served and filed a summons and complaint in each matter. In case 1, an informational statement was ordered filed within 60 days. When no statement was filed, the court wrote to the lawyer warning that the case would be dismissed if the informational statement were not filed within eight days. The lawyer then wrote to the clients, advising of his withdrawal as counsel in both cases. The lawyer failed to give the clients necessary information, namely that the court had set a deadline for filing the information statement, that the statement had not been filed, and that the deadline had passed. Case 1 subsequently was dismissed without prejudice. The lawyer's conduct in failing to timely file the informational statement and withdrawal from representation without adequately informing the client of relevant information violated Rules 1.3, 1.4, and 1.16(d), MRPC.

Professional Independence. A lawyer represented an elderly widow in drafting a revocable trust agreement which placed her home in trust. The widow was cotrustee of the trust with her daughter. Two years later, the daughter contacted the lawyer to draft a deed conveying the homestead to the daughter individually. The lawyer drafted the deed and had the widow sign it as trustee, although he had not advised or consulted with her individually about the transfer. The daughter paid for the lawyer's services. The lawyer violated Rules 2.1 and 5.4(c) by preparing the deed based on the daughter's instructions alone and in direct conflict with the earlier trust he had drafted for the widow.

Fee Splitting and Return of Client File. A personal injury claimant met with a law firm, which referred him to a second firm. A lawyer in the second firm investigated the claim and determined not to take the case. The lawyer sent the client a letter declining to handle the case and advising that the file had been returned to the first firm. Upon inquiry by the client, the first firm could not locate the file. During

investigation, the lawyer who reviewed the case stated that he had an informal (unwritten) agreement with the first firm to pay them one-third of the fee in the event of a recovery. The client was not aware of the agreement. The lawyer's conduct in returning the file to the first firm instead of the client and failing to disclose to the client the fee arrangement with that firm violated Rules 1.16(d) and 1.5(e), MRPC.

Handling Retainers. A criminal defendant retained a lawyer to defend him. As a fee, the defendant assigned to the lawyer his interest in certain real property and agreed to pay \$2,000 in cash. The lawyer took the \$2,000 check and deposited it into his general office account rather than a client trust account. The lawyer claimed the funds were a nonrefundable retainer, while the client claimed the funds were for litigation expenses. No retainer agreement was signed. Depositing the retainer into the general business account without a signed retainer agreement with appropriate disclosures violated Rule 1.15(a), MRPC, and Opinion No. 15, Lawyers Professional Responsibility Board (LPRB).

Noncooperation in Trust Account Overdraft Investigation. The Director received notice of an overdraft on a lawyer's trust account and wrote to the lawyer requesting information. When the lawyer did not respond to three letters from the Director over the course of two months, the Director opened a disciplinary investigation file and for the fourth time requested information from the lawyer. The lawyer did not respond until after an additional (fifth) request from the Director. The Director then received a second overdraft notice, and requested a response from the lawyer. After receiving no response to three requests for information, the Director opened another disciplinary investigation file, notified the lawyer and requested trust account information. After repeatedly failing to respond to the requests for information, the lawyer finally responded. The trust account records were all in order and the overdrafts were not the result of lawyer error. The Director's Office issued the lawyer an admonition for repeated failure to cooperate in a timely manner with the overdraft investigation which violated Rule 8.1(a)(3), MRPC, and Rule 25, RLPR.

Improper Use of Collection Agency Address. A collection agency sought to collect a debt. Outside counsel for the agency sent a summons and complaint by certified mail to the debtor. The complaint and certified mail receipt indicated the lawyer's address was that of the collection agency. The debtor responded, sending it to the collection agency address. The agency did not forward the letter to the lawyer. The lawyer eventually filed the summons and complaint and obtained a default judgment. Use of the collection agency's address was misleading and violated Lawyers Professional Responsibility Board Opinion No. 10.

Ex parte Contacts With the Court. A lawyer represented the family of an auto accident victim and applied to the court for an order of distribution of funds received from the driver's no-fault insurer (the decedent did not own a car and had no insurance). The lawyer did not provide notice to the driver's attorney before obtaining the order and included in the order a provision that the no-fault benefits did not constitute a set-off in the wrongful death lawsuit, contrary to the driver's attorney's understanding. A few months later, in the wrongful death lawsuit, the lawyer was directed by the court to prepare an order on a motion to compel. The lawyer did not provide a copy of the proposed order to the driver's attorney and included in the order a requirement that the deponent produce financial statements at his deposition, which had not been mentioned in the motion to compel the deponent's appearance. After another hearing, the judge ruled that the deponent did not have to bring the financial statements with him to the deposition. The lawyer's conduct in communicating with the court on two separate occasions without providing copies to opposing counsel violated Rules 3.5(g) and 8.4(d), MRPC.

Free Initial Consultation. A lawyer advertised in the telephone book that he provided a "free initial consultation." A client met with the lawyer about a default judgment entered against the client and

thereafter retained the lawyer to conduct a detailed investigation to determine whether to reopen the judgment. The client paid a \$1,500 advance fee, but no fee agreement was signed and the lawyer did not discuss whether or how he would charge for the initial meeting. After investigation, the lawyer recommended taking no action, sent the client a bill, and refunded the unearned portion of the retainer. The bill reflected a \$100 charge for the initial meeting. After the client complained to the lawyer, the lawyer refunded the \$100, although he stated during the ethics investigation that his policy since opening his practice was to bill for the initial consultation if he was hired by the client and he had never had a complaint before this. The lawyer's failure to discuss with the client whether and how he intended to charge for the initial consultation violated Rules 1.5(b) and 7.1(a), MRPC.

Communication with an Unrepresented Party. A lawyer represented a minor injured in an altercation with several other minors. The lawyer wrote to one of the other minors, a potential defendant, who was not represented by counsel and requested that he contact the lawyer to discuss the altercation. The minor's parents were not home at the time and the lawyer did not advise the minor that the interests of the minor and the lawyer's client were adverse. This conduct violated Rule 4.3(a), MRPC.

Contact with Represented Party. In a marriage dissolution action, both husband and wife were represented by lawyers. In a related criminal proceeding against the husband, the court entered a no-contact order prohibiting the husband from contacting the wife or the children. One of the children was hospitalized for observation and the husband called his lawyer to arrange for him to visit the child in the hospital, despite the no-contact order. The lawyer called the wife directly at the hospital to discuss the issue, although he knew she was represented by counsel. The lawyer's conduct violated Rule 4.2, MRPC.