

SUMMARY OF ADMONITIONS

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In 1989, 120 admonitions were issued to Minnesota attorneys. Admonitions each year account for about 10 percent of all dispositions. Admonitions are issued for "isolated and nonserious misconduct."

Nearly half of all admonitions are issued for neglect or failure to communicate. Other common subjects of admonitions include: failure to return a client file on request; failure to cooperate with the professional responsibility investigation; illegal interest charges on unpaid fees; and conflict of interest. Although admonitions are retained as permanent files, and may be used in subsequent discipline proceedings, most admonished attorneys are never disciplined again.

Some admonitions are issued to practitioners who would not knowingly do anything unethical, but have failed to learn all their responsibilities under the Rules of Professional Conduct. Some admonition offenses have nothing to do with ethics in the general sense, but are more in the nature of regulatory infractions.

Every year or so a summary of recent admonitions has been published in this column for the instruction of the practicing bar. This year's summary follows, with references to the Rules of Professional Conduct.

The Scrivener-Beneficiary. An attorney drafted a will for a friend which provided a \$5,000 devise to the attorney. The estate had a value of \$500,000. Rule 1.8(c) forbids drafting an instrument which provides "any substantial gift from a client." The district committee concluded that the gift was not substantial in relation to the size of the estate. Even though the Director's Office defers to district committees, here it concluded that the gift was substantial. It was also noted that public discipline has resulted from similar misconduct involving larger devises.

Prosecutor's Contact With Represented Defendant. A represented defendant sent messages to the prosecutor to meet with him in jail. The prosecutor arranged the meeting and had certain minimal communications. Before the meeting he determined that the defendant's Sixth Amendment rights would not be affected by the meeting, but did not consider the restrictions of Rule 4.2, forbidding contact with a represented party. Violation of Rule 4.2 does not depend on who initiated the contact.

Opening Adverse Party's Mail. An attorney represented the wife in a marriage dissolution. The husband's mail continued to arrive at the wife's residence. The attorney advised the wife to open envelopes addressed to the husband containing a bank statement and a letter from his lawyer. The contents were then exhibited with affidavits in support of motions against the husband. An admonition was issued for violations of Rule 4.4 (violating the legal rights of a third person), Rules 8.4(c) (conduct involving

dishonesty) and Rule 8.4(d) (conduct prejudicial to the administration of justice). A New York Ethics Committee opinion also suggests that opening mail from an adverse party's lawyer to the adverse party may involve criminal conduct. Because the conduct of the attorney in this case was apparently spontaneous and because the district committee recommended dismissal, only an admonition was issued.

Client Loan. An attorney retained in a personal injury matter was asked to advance funds because of a client's financial difficulties. The attorney guaranteed bank loans to the client and directly loaned money to the client. Rule 1.8(e) permits loan guarantees but forbids direct loans. Although a recent Virginia case imposed a public reprimand for a direct client loan of \$6,000, several mitigating circumstances in this case resulted in admonition.

Conflict in Subsequent Representation. Complainant consulted an attorney about her mother's financial affairs after the mother became comatose. The attorney advised against a guardianship and recommended that complainant handle her mother's finances informally. The complainant then transferred to herself a substantial portion of her mother's assets. After the mother's death, other relatives retained the attorney to insure they received their portions of the mother's estate. The attorney contested complainant's appointment as personal representative and made negative allegations about complainant. The attorney violated Rule 1.9, prohibiting representation of a second client in a matter substantially related and adverse to representation of the first client.

Malpractice Release. An attorney represented an extremely difficult, mentally ill party in a marriage dissolution. After attempting to withdraw from representation, at the client's urging the attorney continued in the matter. However, the attorney drafted, and the client signed, as a condition of continuing representation, an agreement which included the provision, "[client] releases Attorney . . . from any and all claims of negligence and/or malpractice in the handling of [client's] case." The lawyer was admonished for violating Rule 1.8(h), which prohibits a lawyer from prospectively limiting liability for malpractice.

Improper Fee Agreement. Complainant retained an attorney in a postjudgment dissolution matter, to seek an increase in maintenance and to collect a small maintenance arrearage. An oral contingent fee agreement was made. Several provisions of Rule 1.5 were violated, by having an oral contingent fee agreement, by having a contingent fee agreement in a proceeding to determine the amount of maintenance, and for double billing of hourly and contingent fees.

Disclosure of Confidential Information. In one situation an attorney retained by a debtor called a creditor in the debtor's presence, and discussed both the debtor's matter and another client's matter. The debtor was able to identify the other client and learn of his or her affairs, even though the attorney did not use the second client's name. In another situation, a daughter consulted an attorney about various matters relating to the onset of Alzheimer's disease in her mother. The daughter told the attorney that a doctor advised against telling the mother of the diagnosis. On the attorney's invoice, sent to the mother, was a statement of services rendered "re: Alzheimer's planning." Although neither attorney intended to disclose confidential information, Rule 1.6 requires that "reasonable care" be used to prevent even inadvertent disclosures.

Client's Right to Settle. An attorney was retained for a contingent fee of over 40 percent in a wrongful termination matter. The attorney made very large settlement demands, and the client instructed him to make a smaller demand. The attorney stated that he would not "settle this case for peanuts" and referred to the matter as "his" case. After the settlement was reached, the attorney received about \$38,000 in

fees, but demanded that \$11,000 be escrowed for his claim for additional fees. An admonition was issued for respondent's failure to make settlement demands as instructed and for demanding an unreasonable fee. A fee arbitration committee was the complainant.

Business Conflict. An attorney represented a couple in purchasing a business. He loaned them \$10,000, and in return received various security interests and a promise of payment of \$1,000 monthly for the life of the business and any successor in interest. The attorney was admonished for entering into a business transaction with a client without following the requirements of Rule 1.8. The attorney received back only \$6,000 of his original loan.

Admonition vs. Discipline. The distinction between misconduct which is "isolated and nonserious," and thus subject to admonition, and that which warrants public discipline is sometimes difficult to define or discern. Occasionally a district committee will recommend admonition, but the director will seek public discipline. Here is the most recent example.

An attorney for a plaintiff became aware that medical records existed which had not been produced pursuant to defendant's demand. When defendant moved to exclude plaintiff's medical testimony for failure to produce records, plaintiff's counsel represented to the court that all records had been produced. After trial, the existence of other medical records was inadvertently disclosed. A verdict which had been entered in plaintiff's favor was very substantially reduced. Although the Court did not specifically sanction plaintiff's counsel, his dishonesty warranted public discipline.