

SUMMARY OF ADMONITIONS 1994

By

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On an annual basis, the Director has published in this column a short digest of some of the admonitions issued in the prior year, in an effort to educate lawyers about rule violations that may lead to minor discipline. As in each year since the Office of Lawyers Professional Responsibility was created in 1971, the majority of admonitions issued in 1994 were for neglect and failure to adequately communicate with clients. The following summarizes less common situations which resulted in attorney discipline.

EX PARTE CONTACT WITH THE COURT. A lawyer represented an out-of-state client in a matter being arbitrated in Minnesota. Four days before a scheduled arbitration hearing, the lawyer's client notified him that he could not come to Minnesota for the hearing or for a deposition scheduled for the following day. The lawyer then contacted the court's arbitration office to determine whether his client could appear at the arbitration hearing via telephone. Upon being advised he needed to speak with the assigned judge's clerk, the lawyer called and left a message for the clerk. The lawyer also drafted a proposed order providing for the client's appearance via telephone. The lawyer did not contact the adverse counsel concerning his request or his contact with the judge's clerk. The next day, the clerk advised that the lawyer should provide a proposed order. The lawyer's secretary sent the proposed order to the judge, who signed it. The arbitration hearing took place without the live appearance of the lawyer's client. The lawyer's conduct in failing to advise adverse counsel of the *ex parte* contact with the judge violated Rule 3.5(g), Minnesota Rules of Professional Conduct (MRPC),

CONTACT WITH REPRESENTED PARTY. A lawyer represented a client against whom a temporary Order for Protection had been entered. The hearing on making the Order for Protection permanent was continued several times due to scheduling conflicts. The lawyer was aware that the adverse party was represented by counsel. The lawyer's client advised him that he and the adverse party had "worked things out," but needed to sign something setting out their agreement. The lawyer agreed to draft the agreement, and met with both parties, without contacting adverse counsel. When adverse counsel arrived at his office the next morning, the date scheduled for the hearing on the permanent order, he had a fax waiting for him which purported to cancel the hearing based on the parties' agreement. Eventually, the hearing on the merits was held. The lawyer's conduct in meeting with an adverse party whom he knew to be represented by counsel without first obtaining consent of adverse counsel violated Rule 4.2, MRPC.

THREATS OF CRIMINAL PROSECUTION. A lawyer represented clients in obtaining a commercial lease for a daycare business. After successfully negotiating the lease, the lawyer sent the clients his bill. The clients disputed the amount of the bill and, after being provided explanations, paid only 60 percent of the bill by check. The check was returned to the lawyer by the bank for insufficient funds. The lawyer then filed

suit on the fees in conciliation court. After filing suit, the lawyer called the clients demanding payment and told them that unless they paid the bill, the lawyer would report them to their prospective landlord, the police, and various city and state licensing agencies for nonpayment of fees, "bouncing a check," and "general dishonesty." The lawyer's conduct in threatening criminal prosecution to gain an advantage in a civil matter violated Rule 8.4(d), MRPC.^{Ftn 1}

IMPERMISSIBLE FEE SPLITTING. A law firm was retained to represent a client in a medical malpractice claim and paid a \$2,500 nonrefundable retainer, as well as a \$1,000 advance against costs. The law firm "assigned" the case to a lawyer who was not a partner or associate, but who regularly worked with the firm on an independent contractor basis. The firm paid the lawyer a portion of the retainer fee. The lawyer worked on the client's case but did not disclose to the client that he was not a member of the firm or that the firm had paid him a portion of the retainer. The lawyer's conduct in failing to advise the client of the share that each lawyer was to receive pursuant to a division of the fee between lawyers not in the same firm violated Rule 1.5(e), MRPC.

IMPROPER WITHDRAWAL. A lawyer represented a landlord on various unlawful detainer matters which brought him into contact with one of the building managers. The building manager retained the lawyer on personal matters involving post-decree visitation issues. The lawyer filed a motion and scheduled a hearing on the manager's case. Thereafter, the landlord and the building manager had a dispute which resulted in the manager being evicted and his employment terminated. Another lawyer handled the eviction. The manager filed for unemployment benefits and a hearing was scheduled. The lawyer wrote to the court administrator in the visitation matter and withdrew as counsel for the building manager, and sent the manager a letter terminating representation. The lawyer then appeared at the unemployment compensation hearing as counsel for the landlord. The lawyer's conduct in terminating representation of the building manager without just cause, in order to represent the adverse party in another matter violated Rules 1.16, MRPC, and Lawyers Professional Responsibility Board Opinion No. 4.

IMPROPER ASSERTION OF ATTORNEY'S LIEN. A lawyer represented a client in various legal matters, including child support and post-decree visitation matters and mortgage foreclosures. The lawyer billed the client at the end of the year on all matters. The client paid a small amount on the bill and stated that full payment would be made when the house he owned in joint tenancy with his ex-wife was sold. The lawyer then filed an attorney's lien against the house, although none of the fees were incurred in connection with the house. The lawyer then called and wrote to two prospective purchasers several times about the house, including sending them notice of his purported attorney's lien. The lawyer also filed a lien against his client's workers compensation claim, although the fees were unrelated to the claim. The lawyer was paid on both liens. The lawyer's conduct in filing liens against the house and the workers compensation claim for work unrelated to the lien property violated Rule 8.4(d), MRPC, and his repeated contact of third parties concerning his lien on the house violated Rule 4.4, MRPC.

FRIVOLOUS CLAIM. A lawyer pursuing a workers compensation case served a claim petition naming the employer and the Special Compensation Fund. After obtaining a verification of coverage from the State Workers' Compensation Division, the lawyer amended the petition to name a specific insurer, although the verification indicated that insurer's coverage did not begin until several weeks after the injury. The insurer's attorney requested dismissal of the petition because the insurer was not a proper party to the action. The lawyer then received a second verification which indicated the employer was uninsured on the date of the injury. The lawyer did not respond to several requests for dismissal until after the insurer brought a formal motion to dismiss. The lawyer's failure to dismiss the petition against the insurer for five months, after

receiving uncontroverted evidence that the insurer was not a proper party, violated Rules 3.1 and 3.2, MRPC.

FAILURE TO RESPOND TO DISCIPLINE INVESTIGATION. A lawyer was sent a notice of investigation by the Director's Office and requested to respond within 14 days. Within a week of the notice of investigation, the lawyer terminated her employment with the law firm where she had worked. When the lawyer did not respond to the notice, the district ethics committee investigator attempted to contact her by phone and mail. The lawyer did not send a response to the complaint until eight weeks after the notice had first been sent out. The lawyer did not, at any time, attempt to contact the investigator as to the reasons for the delay in responding or to request an extension. The lawyer's conduct in failing to timely respond to the complaint violated Rule 8.1(a)(3), MRPC, and Rule 25, Rules on Lawyers Professional Responsibility (RLPR).

A NOTE ABOUT ADMONITIONS. The Director's Office issues private admonitions to attorneys for "isolated and nonserious misconduct," Rule 8(d)(2), RLPR. Admonitions are the lowest level of discipline and account for between nine and ten percent of all dispositions in the Director's Office. In 1993, 147 admonitions were issued to Minnesota attorneys. In 1994, 148 files were closed with admonitions.

A large percentage of all admonitions are issued for neglect or failure to communicate with a client, usually in a single matter. Attorneys also commonly receive admonitions for failing to promptly return a client's file, failing to have a written retainer agreement for an earned-upon-receipt or "flat fee" case, or practicing for a short time period while suspended for nonpayment of the attorney registration fee.

Admonitions, while private, are permanently retained and may be used in subsequent proceedings as disciplinary history and may be disclosed with permission of the lawyer. Many lawyers who receive admonitions, however, are never disciplined again.

Lawyers are reminded that they may call the Director's Office for a telephone advisory opinion concerning a particular situation which poses an ethical dilemma. The metro number is 296-3952. Outstate callers may call 1-(800)-657-3601.

NOTES

1 The MRPC, in effect since September 1, 1985, does not have an exact counterpart to DR 7-105(A) of the Code of Professional Responsibility, which specifically prohibited threats "to present criminal charges solely to obtain an advantage in a civil matter." Nevertheless, the Director's Office continues to view the threat of criminal prosecution as misconduct in certain circumstances. See W. Wernz, "Threatening to Present Criminal Charges," Bench & Bar of Minnesota, November 1987.