

PRIVATE DISCIPLINE *in 2021*

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In 2021 the Director’s Office closed 88 complaints with admonitions—a form of private discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are viewed as isolated and nonserious. This number was comparable to, but slightly higher than, the prior year (82).

The rule violations that lead to private discipline run the gamut, and a table of admonition violations by rule can be found in the annual report issued each July (which is available on our website). It is always true that a significant number of admonitions are due to lack of diligence (Rule 1.3) and lack of communication (Rule 1.4). Last year was no exception. In fact, there were 43 communication violations contained in the 88 admonitions. (I should mention that this doesn’t mean that half of the admonitions were for communications violations, as some admonitions contain multiple rule violations—but it nonetheless shows the scope of communication failures.) Although it’s easier said than done, the single best advice I can offer to avoid complaints is to work on your files and communicate with your clients. Much will be forgiven by clients if they feel you are paying attention to their matter, and you keep them up to date on what is happening. This is not only good customer service but an effective risk management tool.

Like last year, a high number of admonitions arose out of termination of representation (there were 19 citations to Rule 1.16(d) in 2021 admonitions) and numerous errors (also 19) related to failing to handle unearned fees correctly—mostly in flat fee arrangements (Rule 1.15(c)(5)). A high number of admonitions (13) contained violations of Rule 1.5(b)(3)—impermissibly calling a fee nonrefundable or earned upon receipt.

Let’s look at a few specific rules and situations that tripped up lawyers in 2021.

Nonrefundable fees and other retainer agreement errors

Please, please take this opportunity to pull out your standard retainer agreement and review it against the ethics rules. Two areas frequently lead to private discipline—describing a fee as nonrefundable and failing to follow the rules related to compliant flat fee agreements.

Since 2011, Rule 1.5(b)(3), MRPC, has stated, “Fee agreements may not describe any fee as nonrefundable or earned upon receipt but may describe the advance fee payment as the lawyer’s

property subject to refund.” If your agreement uses the term *nonrefundable* to describe your fee or calls an advance flat fee payment earned upon receipt, delete that language! You will receive an admonition if we see this impermissible language in a fee agreement, even if the client does not raise the issue or your fee is not in dispute in a complaint. Fifteen percent of admonitions in 2021 stemmed from this rule violation. You are expected to be familiar with the ethics rules applicable to your practice.

Flat or fixed fee arrangements are very common and are ethically permissible. If you use this type of fee arrangement, review Rule 1.5(b), MRPC, and its subparts in detail. There are several requirements, none of them onerous, that need to be met to satisfy the rules if you wish to treat the advance flat fee payment as your property subject to refund (and thus place it into your business account rather than your trust account). Make sure you know what the rules are and comply with them. Many admonitions annually are issued for these failures.

Ethically withdrawing from representation

In 2021, an unusually high number of admonitions (19) involved violations of Rule 1.16(d), MRPC, which provides:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has not been earned or incurred.

One common failure to act led to several admonitions in 2021—namely, failing to provide notification to the court that an attorney withdrew. In civil matters, unlike criminal ones, permission from the court to withdraw is not needed, but take care: Because of efilings and eservice, if you fail to provide notice to the court that you have withdrawn (and no substitution of counsel or certificate of representation is filed by successor counsel), you and not your client will receive case notifications. This is an example of a step you should take to protect your client’s interest upon termination of the representation—your client needs to get notices from the court. While opposing counsel might serve your client if they receive notice of your withdrawal, failing to notify the court runs the risk of leaving your client without

information necessary to handle their case on their own (in this instance, timely receipt of court notices).

Several admonitions were also issued due to unreasonable delays in providing the client a copy of their file upon request after termination. I'm not sure why this happens, but happen it does. Please make sure you or your staff attend to this task when requested, because it can prejudice the client and is clearly required by the rules. Note too that although Rule 1.16(d) does not contain the word *prompt*, Rule 1.15(c)(4) does. Providing a copy of the client's file upon request and doing so promptly is a practical—and required—step you can take to protect the client's interest in their legal matter when you withdraw.

Some admonitions were issued for failing to refund unearned fees on a flat fee representation, even though the services were not completed at the time of withdrawal. If you do not complete the representation, some amount of refund is due, because by definition you have not earned the full fee—the fee is fixed for specified services. Note also that Rule 1.5(b)(3), MRPC, requires that “[i]f a client disputes the amount of the fee earned, the lawyer shall take reasonable and prompt action to resolve the dispute.” This is slightly different than if the fees were originally in trust—as Rule 1.15(b), MRPC, requires the disputed portion of the fees to be returned to trust until the dispute is resolved. Your obligation to timely resolve the dispute is the same whether it involves a flat fee or withdrawal of an advance fee retainer, and failure to do so can result in discipline.

Finally, the timing of the notice of your withdrawal can

lead to discipline. While you may have a right or obligation to withdraw under Rule 1.16(a) and (b), MRPC, the rule requires you to give reasonable notice to the client of that withdrawal. While what is reasonable will depend upon the circumstances, providing no notice usually is problematic, as is doing so sufficiently close to key events when work is left incomplete and no extension has been secured.

Withdrawing from representation sometimes occurs in high-conflict circumstances. When that happens, take time to review Rule 1.16 in its entirety to make sure you have your bases covered. There are also several articles on our website on the topic of withdrawing from representation, which can be found at lprb.mncourts.gov/articles, and withdrawal is a frequent topic for our ethics hotline.

Conclusion

Only about 20 percent of complaints to the OLPR result in any discipline, and private discipline is far more prevalent than public discipline. Most attorneys care deeply about compliance with the ethics rules, but it is important to remember that ethical conduct involves more than refraining from lying or stealing; the rules contain specific requirements. You cannot go wrong by taking a few minutes each year to re-read the Minnesota Rules of Professional Conduct. They can be found on our website and in the Minnesota Rules of Court. You will find the time well spent. And remember, we are available to answer your ethics questions: 651-296-3952. ▲