ETHICS QUESTIONS
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Lessons from private discipline in 2024

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Private discipline is nonpublic discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are isolated and nonserious. Several lessons can be learned from reviewing the mistakes and situations that led to private discipline last year.

Fee disputes with clients

No one likes fee disputes. Your focus will be on getting paid, but remember there may be ethical obligations you need to follow as well. Last year a few attorneys received private discipline for failing to follow the ethics rules when fee disputes occurred.

For example, Rule 1.15(b), MRPC, requires that lawyers must withdraw earned fees from trust within a reasonable time of the fees being earned. This is not only the rule, but it is good practice, as it can minimize the amount that you need to place back into trust if the client timely disputes your entitlement to fees. In one private discipline case, a lawyer learned this lesson the hard way.

The lawyer received a fee advance and placed those funds into trust as they were required to do. Along the way, the client paid additional advance funds for expert costs and a trial retainer. Instead of withdrawing funds against the advance fee retainer as the matter progressed (and sending timely invoices that would account for those withdrawals), the lawyer waited to bill the client.

Prior to trial, the lawyer was discharged, and it was then that a bill was sent. The client promptly disputed the fees charged, which triggered an ethical obligation to return the disputed fees to trust. Rule 1.15(b), MRPC, provides "[i]f the right of the lawyer or law firm to receive funds from the [trust] account is disputed within a reasonable time after the funds have been withdrawn, the disputed portion must be restored to the account until the dispute is resolved." The lawyer did not return any portion of the fees to trust, primarily because the lawyer did not think much of the client's basis for disputing the fees.

This representation had lasted for about a year, and if the lawyer had promptly withdrawn fees as they were earned and promptly accounted to the client for those withdrawals, he would have minimized the amount of funds that needed to be placed back into trust when the relationship disintegrated and the client disputed the fees earned. In this case, the lawyer violated Rule 1.15(b), MRPC, by failing to withdraw fees within a reasonable time of those fees being earned and then failing to place disputed fees back into trust when the dispute arose.

Lawyers must also remember that when funds are withdrawn from a trust account, whether it's to pay the lawyer or third parties, it is mandatory under Rule 1.15(b), MRPC, to provide written notice to the client (or other third party whose funds they are) of: (1) the time, amount, and purpose of the withdrawal and (2) an accounting of the remaining funds in trust. You should make sure your invoicing software provides this level of detail to clients (and there is a process to follow to account to third parties if you are holding nonclient funds in a trust account as part of a representation). We have seen instances in which solo, small, and midsize law firms fail to include the needed detail on invoicing. These are ethics issues that we notice, even if a complaining client does not.

Remember also that if you have a flat fee arrangement with your client and the client disputes the amount of fee that has been earned, you must, under Rule 1.5(b)(3), MRPC, "take reasonable and prompt action to resolve the dispute." Just ignoring your client is inconsistent with the ethics rules (and a good way to draw an ethics complaint). You cannot simply wait for the client to ask for a refund of unearned flat fees. If the lawyer-client relationship ends before the entire scope of work is completed and the flat fee fully earned, it is mandatory that the unearned portion be refunded.

There are several ethics rules that may be implicated when a fee dispute arises. Although we tend to try to stay away from fee disputes since they are such a strain on our resources, we will investigate these types of collateral issues when we see them, and we often see such issues when we are investigating some other portion of a complaint.

Conflicts

Last year in this column I wrote about conflicts of interest. We continue to see a lot of complaints alleging conflict issues and more complaints than we would like are ultimately substantiated. Most cases arise from failing to obtain informed consent to joint representations where there is a high probability that adversity will arise and cannot be reconciled between co-clients.

Rule 1.7, MRPC, addresses concurrent conflicts of interest. There are two kinds of concurrent conflicts: direct adversity under Rule 1.7(a)(1), and substantial-risk conflicts under Rule 1.7(a)(2). Direct adversity under Rule 1.7(a)(1) occurs when the representation of one client will be directly adverse to another client. Rule 1.7(a)(2) defines a conflict as "a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person, or by a personal interest of the lawyer."

Both kinds of conflicts can be consented to under many circumstances unless the requirements of Rule 1.7(b) cannot be met. When there is a concurrent conflict that is consentable, you need to ensure that "each affected client gives informed consent, confirmed in writing." As many lawyers who simultaneously represent corporations and individuals as well as generations of family members know, identifying conflicts and obtaining informed consent where available is an important part of onboarding clients, and it can be overlooked when things are going well. The key, particularly as it relates to joint representations, is to think about whether there is a future risk of material limitation.

In one case, for example, a lawyer took on the representation of co-personal representatives. Each personal representative owes a fiduciary duty to the beneficiaries of the estate, and it is foreseeable that they may disagree on how to jointly carry out their duties, a classic example of a circumstance in which informed consent to the significant-risk conflict is needed. Here, disputes arose quickly, mostly small ones—but as the matter progressed, disagreements continued to arise between the co-personal representatives, with the lawyer taking the side of one client over the other. In this matter, not only did the lawyer fail to see the conflict situation at the time of retention and fail to get his clients' informed consent, but also failed to see that choosing sides between co-clients is not how you manage a conflict when actual adversity arises, even if one client is being unreasonable.

Comments [29] – [33] to Rule 1.7 set out several special considerations in common representation, and these comments provide a good framework of issues to consider and discuss with potential clients for lawyers considering common representations. Many joint or common representations involve conflicts that are consentable, but it is important to remember how conflicts are defined, and that they are consentable only if and for as long as you can provide competent and diligent representation to each party.

If you are representing multiple parties in a matter, you must analyze for conflicts and whether consent should be obtained, and then, if needed, obtain confirmation of that informed consent in writing.

Supervision of paraprofessionals

In 2024, the Minnesota Supreme Court converted the paraprofessional pilot project to a standing committee and continues to explore expansion of the program. These paraprofessionals are practicing under a lawyer's law license through the Rules of Supervised Practice. This means lawyers may be subject to discipline for misconduct engaged in by the paraprofessionals.

In 2024, one lawyer was disciplined for failing to adequately supervise the work of a paraprofessional approved as part of the project. In that matter, the lawyer failed to adequately review documents the paraprofessional was e-filing, and in fact allowed the paraprofessional to e-file and e-serve documents with the lawyer's signature that had not been reviewed and approved by the lawyer before filing. Additionally, the paraprofessional was not complying with court rules—a fact that opposing counsel brought to the supervising lawyer's attention, to no avail. It was only when the opposing side filed a motion for conduct-based attorney's fees that the supervising lawyer stepped in and took corrective action.

This discipline matter happened to arise in the context of the paraprofessional program, but it is a good reminder that if you supervise lawyers or nonlawyers, you must make reasonable efforts to ensure that there are effective measures in place giving reasonable assurance of compliance with the ethics rules. You can be directly responsible for the misconduct of those you supervise if you ratify, direct, or know about the misconduct with time to correct, but you can also fail to satisfy your ethical supervisory responsibilities if you have inadequate measures in place and those you supervise violate the rules.

Conclusion

Most attorneys care deeply about compliance with the ethics rules, and no one wants professional discipline, even if it is private. Please take some time each year to reread 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. ▲