Lessons from private discipline in 2023

BY SUSAN HUMISTON ✉ *susan.humiston@courts.state.mn.us*

SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

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.

Contact with a represented party

Every year lawyers are disciplined for contacting represented parties in violation of Rule 4.2, MRPC. Rule 4.2 is generally referred to as the no-contact rule; it states:

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

Last year, Zoom hearings brought a new twist to this age-old rule.

Courts often have large court calendars, and use online breakout rooms for parties to discuss matters before the court or, particularly in calendars involving lots of unrepresented parties with ancillary issues, such as in housing court, financial assistance or other services might be available.

In one matter, a tenant was represented by a legal services provider in a housing matter. It's clear the lawyer for the landlord knew of this representation, because the parties had been attempting to negotiate a resolution of the dispute. At one point, the client chose to attend the financial assistance breakout room, while her attorney assisted another client in a matter before the court. The lawyer for the landlord, however, chose to join the financial assistance breakout room and proceeded to ask the tenant substantive questions to gather information without the tenant's lawyer being present. The tenant's lawyer returned to the breakout room to join her client to find opposing counsel speaking with her client on matters relating to the dispute. This is a straightforward violation of Rule 4.2, MRPC, and the lawyer received an admonition.

The lesson is to be mindful of the different ways in which court hearings are taking place and the different ways in which you might encounter a represented party unaccompanied by their lawyer. Saying hello to a represented party is not prohibited, nor is asking that individual where their lawyer may be or if they will be joining soon, or discussing the weather if you cannot handle silence, but communicating about the subject of the representation—even if you don't think the communication is material—is off-limits.

In another Rule 4.2 admonition, co-defendants in a criminal matter (a burglary) were separately represented by defense counsel. Although the state had made a motion to try the cases together, the court denied the joinder, and the cases proceeded to trial separately. One day, one co-defendant called counsel for his co-defendant to discuss the upcoming trial of the co-defendant. Counsel discussed the facts and circumstances surrounding the alleged crime for which both individuals had been charged, and determined she wanted to call the co-defendant in the upcoming trial of her client. Counsel reached out to counsel for the co-defendant and acknowledged the prior contact. Opposing counsel brought a complaint and a Rule 4.2 admonition was issued.

Counsel appealed the admonition, arguing that the co-defendant reached out to her, and she was not talking about the co-defendant's matter but rather her client's matter. After an evidentiary hearing, a panel of the Lawyers Professional Responsibility Board affirmed the admonition. Because the representations arose out of the same facts and circumstances, the fact that they resulted in two separate court files was not dispositive. Because of the interrelated nature of the facts, you cannot discuss one matter without discussing the other. And whether the opposing party reaches out or you do is not material to the rule violation; the main inquiry is whether there is communication regarding the subject of the representation.

The lesson here is that if someone is represented in the same or related proceedings, just work through counsel and don't take the represented party's calls. Trying to parse "matters" might make sense to you, but it often results in your thinking too narrowly about the subject matter of the opposing party's representation (the key part of the rule), and forgetting that the point of the rule is protecting the opposing lawyer-client relationship and preventing the uncounseled disclosure of information.

Conflicts

Each year a few lawyers receive admonitions for conflicts that were nonconsentable, or in which no informed consent was obtained.

Rule 1.8(c) is not a rule that most lawyers run into frequently, but it is an important rule to remember. It is one of a series of rules that address transactions with clients. Rule 1.8(c) prohibits a lawyer to "prepare an instrument giving the lawyer... any substantial gift from a client, including a testamentary gift, except where the lawyer is related to the donee." Rule 1.8(k) provides that "[w]hile lawyers are associated in a firm," the prohibition of Rule 1.8(c) "that applies to any one of them shall apply to all of them."

At his client's request, a lawyer asked an associate in his firm to draft a will for a long-time firm client that left 25 percent of the remainder of the client's estate after taxes, expenses, and payment of debts to the lawyer. Among other defenses the lawyer raised, one was that although he was familiar with Rule 1.8(c), he thought having another attorney represent the client and staying out of the matter was sufficient to address the conflict concerns raised. Unfortunately, the lawyer had not read the entirety of Rule 1.8 when making this decision, because the associate in his firm was also prohibited. In many instances, lawyers have been publicly disciplined for this rule violation. In this matter, private discipline was imposed because the lawyer repudiated the gift and had attempted to convince his client to do something different over the years on numerous occasions, indicating a lack of self-interest and harm. The lesson here is obvious: If a client wishes to give you a substantial gift, whether testamentary or otherwise, neither you nor anyone in your firm should represent the client in that transaction.

Rule 1.7, MRPC, defines 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). Both kinds of conflicts can be consented to under most circumstances unless the requirements of Rule 1.7(b) cannot be met. The key, however, when there is a concurrent conflict that is consentable, is 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, this is an important part of advising clients, and it can be overlooked when things are going well. Several lawyers received admonitions in 2023 for failing to get informed consent in circumstances where informed consent was required.

In one matter, for example, a lawyer who had represented several family members in various estate planning and real estate transactions over the course of a decade agreed to represent siblings in the sale of property from one to the other. The lawyer represented both parties in the transaction, giving both tax and corporate structure advice. Although it is tempting to think of oneself as a scrivener in these types of largely amicable transactions, that is rarely the case, as lawyers ultimately end up providing advice to both parties regarding transaction details. This conflict was consentable, although the lawyer did not obtain informed consent from each party in writing. Sibling relationships being what they are, adversity did arise between the siblings regarding their parents' trust, and a complaint was filed, resulting in an admonition for lack of informed consent confirmed in writing.

The lesson is to remember that if you are representing multiple parties in a matter, you must analyze for conflicts and whether consent can be obtained, and then obtain that informed consent confirmed in writing. A corollary to this lesson is to make sure you have properly identified who is and who is not your client, and that this is clear to the individuals you are interacting with on the matter. And remember, clients never consent to an actual conflict—that is, where you put the interest of one party before the other; rather, they consent to the risk that a conflict might arise and the lawyer-client relationship might fail.

Other common mistakes

The most common reasons for private admonitions year over year are lack of diligence (Rule 1.3) and lack of communication (Rule 1.4). Every year, several lawyers are also admonished for errors in withdrawing under Rule 1.16(d). The mistakes that lead to discipline when withdrawing include failure to refund unearned fees promptly, failing to provide reasonable notice or to take steps necessary to protect the client's interest, or failing to promptly provide the client's file upon request.

Collecting fees or subsequently suing your client can lead to discipline. In one case, a lawyer sought a harassment restraining order against a former client for conduct that occurred after the representation concluded. The lawyer was perfectly within his rights to do so, and the motion was warranted by the client's harassing post-termination conduct. But when providing evidence in support of the harassment motion, the lawyer disclosed significant confidential information relating to the representation that was not relevant to the motion the lawyer was making. Rule 1.6(b) includes exceptions to the confidentiality rule, including one that allows a lawyer to disclose information the lawyer reasonably believes is necessary to establish the claim in issue, with one of the key words being *necessary*.

Conclusion

Most attorneys care deeply about compliance with the ethics rules. 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. ▲