

## Private discipline in 2016

In 2016, 115 files were closed by the Office of Lawyers Professional Responsibility (OLPR) with the issuance of an admonition, a form of private discipline issued for professional misconduct that is isolated and non-serious.<sup>1</sup> This number, coincidentally, is the same as the number of admonitions issued in 2015. Additionally, 17 lawyers were placed on private probation for rule violations, as compared to 12 lawyers in 2015. Private probations, which must be approved by the board chair, are generally appropriate for attorneys with multiple non-serious violations, who may benefit from supervision.

The following sampling of admonitions is offered to highlight common issues that lead to private discipline.

### Neglect and non-communication

As in prior years, the most common rules violated are Rule 1.3 (diligence) and Rule 1.4 (communication).<sup>2</sup> The required diligence and communication involved in each representation will depend upon the nature and scope of the representation.



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One example of conduct that violated both rules occurred in a real estate matter. Following a closing, the attorney was responsible for recording the real estate transaction with the county recorder's office. Counsel failed to do so for more than a year. When the client learned of this fact, he called counsel, who promised to take corrective action within the week. Notwithstanding this promise, counsel failed to record the transaction for

an additional four months, and did not keep the client apprised of the further delay. The attorney received an admonition for violating Rule 1.3, MRPC ("A lawyer shall act with reasonable diligence and promptness in representing a client"), and Rule 1.4(a)(3), MRPC (which requires counsel to "keep the client reasonably informed about the status of the matter").

An additional example of neglect that gave rise to an admonition occurred when an attorney failed to file a required pre-trial statement at least five days prior to a court-ordered settlement conference. Counsel did not file the required statement, and the court cancelled the settlement conference and set the matter down for hearing. Counsel was issued an admonition for violation of Rule 1.3, MRPC.

### Fee arrangements

Every year attorneys are disciplined for improper fee agreements. Since 2011, it has been unethical to describe an advance fee as "nonrefundable."<sup>3</sup> Notwithstanding this fact, several attorneys received discipline for describing their fee as nonrefundable. Variations on this claim also subject attorneys to discipline. For example, claiming "All flat fees will be nonrefundable once substantial services have been performed" also violates Rule 1.5(b)(3).

The ethics rules also require that in order for a flat fee to be considered an attorney's property upon payment (and not required to be placed in trust until earned), a written fee agreement meeting the requirements of Rule 1.5(b)(1) must be in place. Several attorneys violated this rule in 2016. While most had some form of written fee agreement, the agreements failed to include all five notice provisions as required by the rule, and accordingly, admonitions were issued.

Improper fee agreements really frustrate me, because fee agreements are so important (they form the basis for the attorney-client relationship) and because improper agreements can be easily avoided with careful attention to the rules. Due to the number of rule

violations on this subject, in 2017 I'm committed to providing additional resources for attorneys concerning retainer agreements—through additional materials posted on the OLPR website, and an on-demand CLE webcast through Minnesota CLE. When in doubt, you can also call the Office for an advisory opinion regarding fee agreements.

Another issue somewhat related to fees that I was surprised to see come up was financial assistance to clients in the form of advances against lawsuit proceeds. Rule 1.8(e) prohibits an attorney from providing financial assistance to a client in connection with pending or contemplated litigation unless the assistance falls within three specifically enumerated exceptions. For example, in one case, an attorney handling a medical malpractice matter provided modest cash advances in the several months before the case was resolved to assist the client with basic living expenses. Advances against future settlements for living expenses do not fall within the exceptions in the rule, and an admonition was issued.

### Return of client files and property

Upon termination, an attorney is obligated to surrender papers and property belonging to the client and must refund any advance fees or expenses not earned or incurred.<sup>4</sup> In one case, a client met with counsel to determine whether there was a basis to contest the client's deceased father's will. The client paid an advance retainer, which the attorney placed in trust. The attorney performed some work, and invoiced that work against the advance fee. The client thereafter declined to move forward with the representation as it would likely be cost-prohibitive. At the time of termination, one half of the advance retainer remained in trust. Thereafter, the client contacted counsel over a several month period requesting a refund and a copy of the file, and finally threatened to file an ethics complaint if the file and remaining fees were not returned. It was not until after the threat of a complaint was made that the file and unearned fees were returned.

### Professional debt

An attorney's failure to pay a debt related to the practice of law is prejudicial to the administration of justice and a violation of Rule 8.4(d), MRPC. In some instances, public discipline can result from such a failure. This past year, an attorney received an admonition for failing to pay an outstanding debt arising from an appraisal the attorney hired for a matter.<sup>5</sup>

### Conclusion

Private discipline is just that—private.<sup>6</sup> Only the complainant and respondent attorney will know of the disposition. Unless an attorney provides written authorization, the Office does not disclose private discipline to third parties. Fortunately, most attorneys who receive admonitions often have no further disciplinary issues. However, if an attorney engages in further misconduct, please note that prior private discipline may be relevant to the appropriate level of discipline for subsequent conduct, and may be disclosed if future proceedings result in public proceedings.<sup>7</sup> ▲

### Notes

<sup>1</sup> Rule 8(d)(2), Rules of Lawyers Professional Responsibility (RLPR).

<sup>2</sup> Minnesota Rules of Professional Conduct (MRPC).

<sup>3</sup> Rule 1.5(b)(3), MRPC ("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.").

<sup>4</sup> Rule 1.16(d), MRPC; *see also* Rule 1.15(c)(4).

<sup>5</sup> The OLPR does not want to serve as a collection agency for creditors, so Office policy is to generally defer consideration of professional debt complaints until a judgment has been obtained; however, discipline has been imposed for instances of failure to pay an undisputed law-related debt.

<sup>6</sup> Rule 20(a), RLPR. Note, Rule 20 addresses in detail the circumstances under which the OLPR may disclose information to third parties and others involved in the lawyer regulation system.

<sup>7</sup> Rule 19(b)(4), RLPR.