

## Summary of Admonitions

In calendar year 2009, the Director's Office resolved 120 files with admonitions that were issued to Minnesota attorneys for isolated and nonserious misconduct.<sup>1</sup> Fifteen lawyers entered into stipulations for private probation that were approved by the Lawyers Board chair;<sup>2</sup> these stipulations resolved an additional 35 complaint files. A summary of the admonitions and private probation stipulations from the past year has been published on an annual basis. So, here again is a sampling of the types of misconduct that can lead to private discipline. As is almost always the case, lack of diligence and lack of communication with a client lead the way as the most common reason for receiving an admonition. Fifty-three of this year's admonitions involved one or the other of these shortcomings, and more likely both.

As always when reading these brief synopses, keep in mind that since these are offered primarily for educational purposes, the facts may have been simplified in order to make a particular violation clearer. In the overwhelming majority of the admonition examples described, the complaint was initially investigated by a local district ethics committee (DEC), which had recommended that the director issue an admonition. The volunteer DEC investigators, both lawyers and nonlawyers, put in many hours looking into complaints and do an outstanding job.

■ **Improper *ex parte* contact with the court.**

The attorney represented a party in a marital dissolution. The parties reached a settlement that was read into the record. The court requested that the attorney draft an order based upon the agreement. The order the attorney submitted contained some terms that

were different from those in the settlement. She did not send a copy of the proposed order to the opposing party. The judge signed the order as submitted with the incorrect terms. The opposing party then had to move for an amended order, which the court granted. The court denied a request for attorney's fees, however. The lawyer violated Rules 3.5(g) and 8.4(d), Minnesota Rules of Professional Conduct (MRPC), for the *ex parte* communication with the judge on the merits of the matter and for conduct prejudicial to the administration of justice as valuable court time was unnecessarily used.

■ **Lack of diligence and failure to provide client papers.** The attorney was hired to handle a real estate easement matter and initially worked on the matter. Then, having not heard from the lawyer for almost six months, the client began trying to contact the lawyer without success, leaving messages that he needed the documents to be completed and recorded soon. A second lawyer contacted the respondent attorney on the client's behalf, and was informed that the paperwork was almost finalized. The client then resumed trying to contact the lawyer to obtain the papers to record. After another two months the client discharged the lawyer and filed a disciplinary complaint. Only during the DEC investigation, and after another three months, did the attorney provide the documents to the client. The attorney violated Rules 1.3 and 1.4, MRPC, as to diligence and noncommunication, but also Rule 1.16(d), MRPC, for failing to provide client papers promptly upon termination of representation.

■ **Failure to clarify role to an unrepresented person.** The attorney had represented husband and wife in preparing wills several years earlier. Wife now contacted attorney about representation in possible divorce.<sup>3</sup> Husband also contacted attorney, who told husband that she had already talked with wife and that she could not represent him. She did not, however, clearly state she represented wife. Shortly thereafter, lawyer asked husband to meet with her and wife. Husband, perhaps naively, believed attorney was acting as a neutral. At the meeting, the attorney should have realized that

husband misunderstood the attorney's intended role. Instead, she discussed the merits of the matter with both parties. Only after the meeting did the attorney for the first time clearly explain that she was an advocate for wife in the matter. Husband subsequently obtained separate counsel. The attorney's failure to clarify her role and correct the husband's misunderstanding violated Rule 4.3, MRPC.

■ **Disclosure of information gained from a prospective client.** An attorney practices almost exclusively in the area of marital dissolution law. He met with a prospective client<sup>4</sup> about a divorce action. The prospective client disclosed that her estranged husband had recently sold a business to a person whose name the lawyer recognized as that of his neighbor. Not long thereafter, at a holiday gathering, the lawyer mentioned to the neighbor that the seller of the business had consulted with the lawyer. The lawyer violated Rule 1.18(b), MRPC, by revealing information learned in the prospective client consultation. Later, the neighbor, knowing that the respondent attorney practices almost exclusively in marital dissolution law, correctly guessed that the meeting concerned a divorce action and relayed this information to the business seller's spouse during a meeting. The spouse previously had been unaware that her husband had contacted the lawyer.

■ **Contacting a represented party.** The attorney represented a corporation in a collection matter against another corporation. The debtor company also was represented by counsel, who had notified the respondent attorney of this fact and requested that all future communication be with counsel. The respondent attorney sent a letter to the other lawyer using an incorrect address, while copying the letter directly to the represented party (at a correct address). Even had the attorney used a correct address for opposing counsel, copying the adverse party on a communication on the merits of the matter is improper. The attorney violated Rule 4.2, MRPC, for communicating with a person represented by counsel without the other lawyer's consent.

■ **Assisting the unauthorized practice of law and failing to supervise a non-lawyer assistant.** A lawyer employed in



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a nonlawyer capacity another lawyer whose license was suspended for nonpayment of the lawyer registration fee and who was on involuntary CLE-restricted status. The respondent lawyer knew of the restrictions on the employee's license. An unlicensed lawyer who is employed by an active attorney, say as a paralegal, is considered a nonlawyer for supervision purposes. When the active lawyer was unable to attend a motion hearing, she sent the suspended attorney to handle the matter. Neither the judge nor the opposing party nor the client was informed of the status of the person's law license. The respondent attorney violated Rules 5.3(c) and 5.5(a), MRPC, for ordering the appearance and assisting the nonlawyer in practicing law.

■ **Failure to obtain a written conflict waiver.** The attorney undertook to represent a woman and her children on a loan-repayment claim. The mother and her boyfriend had borrowed money from the children's trust fund, and then defaulted. Respondent filed suit naming mother and children as plaintiffs against the boyfriend. The boyfriend then brought a third-party indemnity claim against the mother. No separate claims were brought on the children's behalf. The lawyer orally discussed with the mother that a conflict of interest existed in his joint representation but never obtained informed consent *confirmed in writing* as required by Rule 1.7(b)(4), MRPC.<sup>5</sup>

### Probations

Stipulations for private probation are most appropriate in circumstances such as multiple instances of neglect and noncommunication, or trust account record-keeping deficiencies if no actual shortages occurred.<sup>6</sup> In such situations, the assistance of an experienced supervisor and/or the Director's Office to implement office procedures to ensure proper diligence and communication can protect the public without the need for public discipline, or ensure that absolute, trust-account-fiduciary obligations are being met. In some limited situations probation may be agreed to where an attorney commits a violation that independently might warrant only an admonition, but the attorney has prior discipline or some other factors that indicate that a period of supervised probation is justified. All of the past year's private probations fit into these categories.

Minnesota remains a "leader" in the use of private discipline as a tool to protect, yet also to educate. The value of private discipline was affirmed by the supreme court's Advisory Committee to Review the Lawyer Discipline System, which reported in 2008. It also acts as a means of deterrence; it is likely that many of the lawyers who received private discipline in the past year will never run afoul of the disciplinary system again. ▲

### Notes

<sup>1</sup> Rule 8(d)(2), Rules on Lawyers Professional Responsibility (RLPR). One of the admonitions was issued by a Lawyers Board panel pursuant to Rule 9(j)(1)(iii), RLPR.

<sup>2</sup> Rule 8(d)(3), RLPR.

<sup>3</sup> The attorney correctly determined in this unique instance that the proposed new representation was not substantially related to the prior representation and that she did not have a conflict of interest under Rule 1.9, MRPC. That is more often not true when an attorney has previously performed estate-planning work for both hus-

band and wife and now desires to represent one of the clients against the other in a divorce action.

<sup>4</sup> Rule 1.18, MRPC, defines a prospective client as "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." Even if no client-lawyer relationship ensues, the lawyer has certain confidentiality obligations as to any information obtained.

<sup>5</sup> See also Rule 1.0(b) and (f), MRPC, for definitions of "confirmed in writing" and "informed consent."

<sup>6</sup> See Rule 1.15(h), MRPC, and Appendix 1 to the MRPC.

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