

By MARTIN COLE

Summary of Private Discipline

In calendar year 2014, the Director's Office resolved 143 files with admonitions that were issued to Minnesota attorneys for isolated and nonserious violations of the Minnesota Rules of Professional Conduct (MRPC). Another 18 lawyers entered into stipulations for private probation that were approved by the Lawyers Board chair; these stipulations resolved an additional 29 complaint files (probations may involve multiple nonserious complaints against the same attorney, often in situations in which supervision may be of benefit).

The number of admonitions was almost identical to that of the previous year, which had been one of the highest totals ever. When combined with the number of files closed by private probation, 2014 was likely a record year for private discipline. To verify that statement would require reviewing old paper records by hand, so I'll leave it as being "likely" a record.

A summary of private discipline from the past year has been published in *Bench & Bar* on almost an annual basis since 1976. (It was called a summary of warnings back then.) Here, then, is a sampling of some of the misconduct that led to private discipline this past year. When reading these synopses, keep in mind that they are offered for educational purposes and that sometimes

complex facts may have been slightly simplified in order to make a particular violation clearer.

Most complaints that involve what appear initially to be allegations of isolated and nonserious misconduct are investigated by a local district ethics committee (DEC). As in past years, DEC recommendations were followed by the Director's

Office approximately 85 percent of the time. Some of the instances where the DEC recommendation is deemed not to have been followed are because the attorney has prior similar discipline, a factor the DEC is not expected to consider, rather than due to any actual disagreement with a DEC recommendation for discipline. Thus, DEC-investigated files that are part of a private probation or a public discipline petition for statistical purposes may be considered to be a recommendation that was not followed.

Neglect and Lack of Communication

As is true every year, a lack of diligence and/or communication with a client are the most common reasons for receiving a complaint, and also for receiving an admonition. What constitutes a lack of diligence or lack of communication will, of course, vary depending upon the nature of the legal matter involved and what the lawyer has agreed to do. Although there are several examples to choose from, two will suffice.

In one matter, an individual was charged with voting in an election when not eligible to do so. The attorney was able to get the charges dismissed, and then agreed to seek immediate expungement of the matter. The attorney failed to take any action on the matter for several months until a complaint was filed with the Director's Office. Thereupon, the lawyer completed the work and obtained a successful result. The DEC recommended an admonition for a violation of Rule 1.3, MRPC (diligence), and an admonition was issued.

In another matter, an attorney was hired to assist in obtaining an accounting of the client's deceased mother's estate. The attorney took some preliminary steps during the first five months after being retained. Thereafter, he took no action for the next five months. The lawyer and client met and the attorney promised to take some action. Over the next seven months, the client repeatedly attempted to contact the lawyer for a status update; the lawyer did not return

any of the calls. Finally, the client and lawyer met personally again, and again the lawyer promised action. When the lawyer again failed to return two calls from the client, the client terminated the representation. The lawyer's lack of diligence and communication violated Rules 1.3 and 1.4(a) (communication), MRPC.

Return of Files and Improper Fee Agreements

Two other recurring types of conduct that can result in the issuance of an admonition are attorneys who fail to promptly return client files upon request or who do not have a proper fee agreement with the client. Examples this past year include an attorney who handled through trial a difficult criminal matter involving a violation of an order for protection. After the trial, the client requested a complete copy of the file for a possible appeal. Although the attorney provided some documents, he admitted he did not provide the entire file as requested. This violated Rule 1.16(d), MRPC (steps upon termination of representation). The attorney then also violated Rule 1.16(g), MRPC, when he finally agreed to return the remainder of the file if the client sent payment for copying and mailing. The rule plainly states that "a lawyer shall not condition the return of client papers and property on payment of the lawyer's fees or the cost of copying the files or papers."

Several attorneys were admonished in 2014 for continuing to use a fee agreement that described their fee as "non-refundable." Use of this term (and the underlying concept) has been prohibited since 2011 in Minnesota (Rule 1.5(b)(3), MRPC). There is simply no reason for any attorney to continue to do so.

CORRECTION: Last month's column (Summary of Public Discipline) incorrectly identified an attorney who was disbarred in 2014. The correct name of the disbarred attorney is MARK DAVID HOLT. The error is the author's, not the *Bench & Bar of Minnesota*, and I am very embarrassed. Any inconvenience caused by this error is deeply regretted.



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Professional Responsibility

Other rules whose violation resulted in admonitions being issued last year included Rule 1.6 (disclosing confidential client information), Rule 3.1 (commencing a frivolous lawsuit) and Rule 4.2 (contacting a person known to be represented by counsel in a matter). Interestingly, there were very few admonitions issued in 2014 concerning conflicts of interest, which in most years is another regular source of misconduct.

Odds and Ends

In most years, there is a small handful of matters that result in admonitions that are unique in some manner. This past year was no exception. In one such case, an attorney who attended law school in Minnesota but was not licensed here (only in California and Arizona) attempted to represent a Minnesota client in a local landlord-tenant dispute. While there are now many situations in which an out-of-state attorney may practice in Minnesota on a limited basis, none of the exceptions applied in this matter. The Director's Office has jurisdiction in such instances pursuant to Rule 8.5(a), MRPC ("A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides

or offers to provide any legal services in this jurisdiction"). The lawyer's conduct violated Rule 5.5, MRPC (unauthorized practice of law).

Finally, there were two matters arising out of violations of Rule 1.12, MRPC, a conflict of interest rule covering former judges, arbitrators, mediators and judicial law clerks, a rule that rarely has been the subject of complaint. In one matter, an attorney, while a judicial law clerk, "participated personally and substantially" (in the language of the rule) on a case, and then joined the law firm representing one of the parties to that case. The attorney was assigned to work on the case at the firm, which plainly violated Rule 1.12(a). The rule imputes this conflict to all lawyers in the firm; therefore, the law firm also was disqualified from the civil lawsuit.

In the other matter, a lawyer was retained as a mediator in a marital dissolution matter. The attorney conducted the mediation and then drafted a marital termination agreement (MTA) based upon the mediation. When the parties were still not in agreement, a second mediation session was conducted and a new MTA prepared. In his cover letter to the wife, the attorney made recommendations

and advocated that the husband had made concessions and that the wife should accept the new agreement. A complaint to the Minnesota ADR Ethics Board resulted in a finding that the attorney had acted improperly by providing legal advice to one of the parties. The attorney was admonished for violating Rule 1.12(a), MRPC.

Conclusion

As is noted every year in this summary, the majority of attorneys who receive private discipline never repeat their isolated instance of misconduct. Plus, the overwhelming majority of Minnesota lawyers are never disciplined at all.

Private dispositions basically are intended to be just that, private, with few exceptions. The complainant and any DEC that investigated a matter will receive a copy of the final disposition; complainants also have the right to appeal private discipline to a reviewing Lawyers Board member. Should the attorney commit further misconduct in future, private discipline can be relevant to the determination of what level of discipline is appropriate in any subsequent proceeding and, thus, are admissible in a future disciplinary proceeding. ▲



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