

2019 private discipline

In 2019 the Director's Office closed 107 complaints with admonitions—a form of private discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are isolated and nonserious. This number was down from 2018, when 117 admonitions were issued. Another 14 complaints were closed with private probation, a stipulated form of private discipline approved by the Lawyers Board chair. Private probation is generally appropriate where a lawyer has a few nonserious violations in situations that suggest supervision may be of benefit. Interestingly, this number is identical to private probation dispositions in 2018 and 2017.

The rule violations that lead to private discipline run the gamut, and a table of admonition violations by rule can be found in the annual report issued each July. Generally, the most violated rules are Rule 1.3 (Diligence) and Rule 1.4 (Communication). Other frequently violated rules, particularly in the private discipline context, occur when declining

or terminating representation (Rule 1.16), making fee arrangements (Rule 1.5), and safekeeping client property (Rule 1.15). Let's look at some specific rules and situations that tripped up lawyers in 2019.

Fee-sharing

Rule 1.5(e), MRPC, sets forth the rule regarding sharing fees with a lawyer who is not in the same firm. Remember, you cannot provide anything of value to someone

(lawyer or nonlawyer) for recommending your services.¹ Thus, general referral fees and finder's fees are unethical. But lawyers may divide a fee with another lawyer who is not in their firm if three conditions are met:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.²

The rule is conjunctive, so each prong must be satisfied. Lawyers tell me frequently of their concerns that others are violating this rule. An attorney who has represented lawyers in proceedings with the Office for years recommended just this week that I cover this rule in this column. Most violations of this rule occur because lawyers miss the express requirements of Rule 1.5(e) (2), MRPC. Sometimes the client has no knowledge of the fee-sharing, a violation of the rule. Sometimes the client knows that a fee will be shared but does not understand the particulars, including the share each lawyer will receive—a violation of the rule. Sometimes, although the client agrees and understands the particulars, the client's agreement is not confirmed in writing—a violation of the rule.

An admonition from 2019 illustrates another variation on fee-sharing that occurs less frequently but violates the rule nonetheless. Attorney A initially agreed to represent an injured driver and injured passenger in a one-car accident. (Don't do this, by the way, because it usually involves a non-consentable conflict.) When it quickly became apparent that the injured passenger would have to sue the injured driver on the liability claim, Attorney A referred the injured passenger to Attorney B, with the injured passenger's agreement that Attorney A and B would split the 1/3 fee recovery

equally if a recovery was secured. While the client agreed to the arrangement, the share each lawyer received was agreed to by the client, the agreement was confirmed in writing, and the total fee (a 1/3 contingency) was reasonable, Rule 1.5(e) (1) was nonetheless violated—because the non-consentable conflict meant that each lawyer could not assume joint responsibility for the representation. Nor was the fee split in proportion to the services performed by each. An admonition was issued to Attorney B for violation of Rule 1.5(e), MRPC.

I know that many lawyers are frustrated with the fee-sharing rules, and there are good arguments that the inability to more freely share fees among lawyers (and, probably more controversially, with nonlawyers) inhibits innovation in the profession. Irrespective of what you think the rules should be, please remember to review the ethics rules in order to avoid discipline if you are contemplating sharing fees with another.

Withdrawal from representation

One of the most common areas of inquiry on our ethics line, and a frequent source of missteps, is ethically terminating a representation. Two admonitions in 2019 illustrate this point. Attorney A was representing a client in a felony criminal matter in federal court as local counsel. After conviction, the client grew dissatisfied with Attorney B (outstate trial counsel) and planned to continue on appeal with Attorney A. While the matter was pending with the appellate court, client and Attorney A's relationship soured. Client did not fire Attorney A, but Attorney A moved to withdraw as counsel on appeal.

In support of his motion, Attorney A went into great detail in an affidavit that detailed how the attorney-client relationship had broken down by specifically describing requests the client had made to Attorney A that Attorney A believed were unreasonable, specifically describing communications with the client that Attorney A believed



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to be “badgering,” and disclosing specific information regarding the fee agreement. The appellate court denied the motion to withdraw, primarily because it did not address the issue of successor counsel. Attorney A then renewed his motion to withdraw, and provided additional confidential information about the client’s assets (gleaned from Attorney A’s representation of the client in his divorce), suggesting the client had ample funds to retain successor private counsel. An admonition was issued for violations of Rule 1.6(a), MRPC, and Rule 1.16(d), MRPC.

In another criminal case, the attorney agreed to represent a client on an initially straightforward gross misdemeanor matter for a flat fee, to include trial if applicable. As sometimes happens, though, matters were not what they initially appeared to be. Soon the attorney concluded she did not wish to continue the representation—this attorney was also planning a move out of state—and terminated the representation. Because this was a criminal matter, court rules require permission to withdraw, which

the attorney did not seek. Nor did the attorney make a refund of any portion of the flat fee, even though it was undisputed that the attorney did not complete the representation. An admonition was issued for violations of Rules 1.16(c) and (d), MRPC. Rule 1.16(c) provides “A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.” Rule 1.16(d) provides “Upon termination of representation, a lawyer shall... refund[] any advance payment of fees or expenses that has not been earned or incurred.”

Conclusion

Only about 20 percent of complaints to the OLPR result in any discipline, and private discipline is far more prevalent than public discipline. I’m sure, however, that the more than 100 attorneys who received private discipline last year do not take any comfort from these low numbers. Most attorneys care deeply about their compliance with the ethics rules but may forget that to be ethical is more than just “doing right”—there are a lot of specific requirements in the rules.

If it has been a while (say, since law school), please do your practice and your peace of mind a favor and review the rules. You can even skip the comments if you like, though they are very helpful. You will find the time well spent. And, remember, we are available to answer your ethics questions—651-296-3952. ▲

Notes

¹ Rule 7.2(b), MRPC (“A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this rule; (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; (3) pay for a law practice in accordance with Rule 1.17; and (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement”); see also Rule 5.4(a), MRPC (A lawyer shall not share legal fees with a nonlawyer except under certain enumerated circumstances).

² Rule 1.5(e), MRPC.