PRIVATE DISCIPLINE *in 2022*

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Private discipline is non-public discipline issued for violations of the Minnesota Rules of Professional Conduct (MRPC) that are viewed as isolated and nonserious. In 2022, 80 admonitions were issued, one panel admonition was issued (in lieu of charges for public discipline), and six lawyers were placed on private probation. These numbers are generally comparable to the numbers in recent years.

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 (available on our website). It is always true that a significant number of admonitions are due to lack of diligence (Rule 1.3) and lack of communication (Rule 1.4); hence my perennial advice that the best thing you can do to avoid complaints is to work on your files and communicate with your clients. This is of course easier said than done, as we all have those files that are challenging to work on for a variety of reasons, and once time has elapsed it is harder than ever to pick up the file. Just do it, as the saying goes. You will feel better, and you owe it to your client.

Every year a significant number of admonitions are issued for violations of Rule 1.16(d)—relating to ethical withdrawals. Last year was no exception. Fifteen admonitions were issued for failing to take reasonable steps upon withdrawal to protect the client's interest, such as providing notice, surrendering the file, and refunding unearned fees. This is also one of the most frequently asked about areas on our ethics hotline. If you have questions, just ask. I would love to see this number reduced substantially. Although compliance is pretty straightforward, it often comes when there is a breakdown in the relationship. Don't let your annoyance with the client or the souring of the relationship interfere with the discharge of your ethical duties at the time of termination.

Also remember that you have an affirmative ethical duty to refund unearned fees and expenses that have not been incurred. Don't wait for the client to complain or ask for the refund. The rule is mandatory; a lawyer "shall" refund "any advance payment of fees or expenses that has not been earned or incurred." And you must do so "promptly," upon request under Rule 1.15(c)(4). When a representation ends, prioritize settling the account with the client and make sure the client has what they need to avoid rule violations.

Let's look at a few additional rules and situations that tripped up lawyers in 2022.

Contact with a represented party

Every year lawyers are disciplined for contacting represented parties in violation of Rule 4.2, MRPC. Three lawyers were admonished for this violation in 2022; of note, two of the three lawyers admonished for this rule violation had 20-plus years of experience as lawyers and the third had more than a dozen years of experience, so an overall refresher is in order for even seasoned attorneys.

Rule 4.2 is generally referred to as the no-contact rule and 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."

Sometimes a lawyer inadvertently contacts a represented party directly by serving documents in a case because they failed to note in the lawyer's file management system that the opposing party is represented by counsel. Mistakes happen (I've done this) and such a mistake rarely leads to discipline. In most instances, the opposing counsel calls the mistake to counsel's attention by reiterating the representation, the error is acknowledged, and the parties move forward.

In one case, a lawyer continued to directly contact a represented party by e-serving documents on that party, even though they had specifically been advised previously that the party was still represented. This is a situation that more typically gives rise to a violation; the first contact is not at issue because there was some question as to the lawyer's continuing representation. Or a mistake was made. Here, the lawyer contacted the opposing party directly after being advised of the representation on two additional occasions, because the lawyer was moving for default and wanted to make sure the client was receiving information, having heard little from opposing counsel.

While the intentions were good *(i.e.,* wanting to avoid the opposing party's default), the requirements of the rule are clear. There may be any

number of reasons why an opposing party and their counsel would choose to proceed as they are, and there is no exception to the no-contact rule to make sure that opposing counsel is effectively communicating with the opposing party. It is not our job to make sure someone else is doing their job, but it is our job to comply with the rules. This question arises fairly frequently on the ethics hotline and we advise, as the rule requires, to serve counsel and let the consequences fall where they may.

In another case, the lawyer violated Rule 4.2 when he interviewed a 12-year-old witness that he knew had been appointed counsel in a CHIPS proceeding; counsel knew the 12-year-old had counsel because he was present in court when the appointment was confirmed. Often lawyers will claim that the "matter" is not the same, attempting to draw fine distinctions to unilaterally narrow the scope of the opposing counsel's representation, an argument that is usually unpersuasive when the opposing counsel's representation arises from the same operative facts and circumstances such that the questioning infringes on the subject of the opposing counsel's representation. If you know that a party is represented by counsel, your best course of action always is to reach out to opposing counsel to understand the scope of the representation, and to proceed with caution. Opposing counsel and opposing parties take this rule seriously and direct contact often prompts ethics complaints. The Minnesota Supreme Court has a helpful opinion on Rule 4.2 that you may wish to review, *In re Panel No. 41755*, 912 N.W.2d 224 (Minn. 2018).

Business transactions with clients

Four lawyers were privately disciplined for failing to comply with Rule 1.8(a), MRPC, when entering into a business transaction with a client or acquiring an ownership interest adverse to the client. Rule 1.8(a) does not prohibit such arrangements, but rather sets forth specific compliance requirements due to the conflict of interest that the arrangements introduce into the relationship. These violations often arise when lawyers acquire a financial interest in a client's property to secure or satisfy their fee, such as acquiring title to a vehicle or other personal property that later can be sold to satisfy a fee balance. Three such admonitions arose out of criminal cases, and one from a family law case. To ethically enter into such transactions, make sure:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
(3) the client gives informed consent, in a document signed by the client separate from the transaction documents, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Failure to comply with all requirements will likely lead to discipline given the conjunctive nature of the requirements. Taking a moment to ensure compliance with this very straightforward rule when you enter into a business transaction or acquire a security or ownership interest adverse to your client will pay off in avoiding discipline, as this too is a frequent source of complaints by former clients.

Conclusion

Only about 20 percent of complaints to the OLPR result in any discipline, and private discipline is far more prevalent than public discipline. Most attorneys care deeply about compliance with the ethics rules, but it is important to remember that ethical conduct involves more than refraining from lying or stealing; the rules contain specific requirements. You cannot go wrong by taking a few minutes each year to re-read 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. ▲