Private discipline in 2017

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In 2017, 90 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.Ftn1 This number is down markedly from the 115 admonitions issued in 2016 and, coincidentally, 2015. Additionally, 14 files were closed with a private probation. 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.

Having now worked at the OLPR for two years, I've seen obvious trends in the conduct that result in private discipline. This sampling is offered to highlight common issues to avoid.

Fee arrangements

Every year attorneys are disciplined for improper fee agreements. Since 2011, it has been unethical to describe an advance fee as "nonrefundable."Ftn2 Notwithstanding this fact, attorneys continue to receive discipline for describing their fee as nonrefundable or "earned upon receipt," though this number went down last year, so perhaps this column has helped spread the word to practitioners. 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 the rules.

The single most common mistake we see regarding fee agreements involves flat fees. The ethics rules *require* that in order for a flat fee to be considered an attorney's property upon payment (rather than placed in trust until earned), a written fee agreement meeting the requirements of Rule 1.5(b)(1) must be in place.Ftn3 While most attorneys who received discipline had some form of written fee agreement for their flat fees, the agreements often failed to include all five notice provisions required by the rule, and accordingly, admonitions were issued. Perhaps more common is the problem of accepting flat fees for services without any retainer agreement at all. You can do this, but remember, all fees received in advance of being earned must be placed into trust.Ftn4 You do not fully earn a flat fee until you have completed the representation—so unless you have a compliant fee agreement in place, flat fees must go into trust until earned.

"Availability" fees can also lead to discipline. The ethics rules allow an attorney to charge "a fee to ensure the lawyer's availability to the client during a specified period or on a specified matter in addition to and apart from any compensation for legal services performed."Ftn5 Instead of treating the availability fee as separate from legal services, attorneys will sometimes try to designate a portion of their flat fee services for "availability." The OLPR

views this as an impermissible attempt to charge a nonrefundable fee, and disciplined attorneys accordingly in 2017. You must also remember that once you have been hired, you have ethically agreed to be available for that representation, and should not be charging a separate availability fee absent specific and justifiable circumstances. Availability fees are typically and correctly used to secure counsel when you do not know if counsel will be needed but want to ensure your counsel of choice is available on demand in the event you need to call upon them.

Confidentiality

An important ethics obligation is the duty of confidentiality. It is not just attorney advice that must be kept confidential: The rules prohibit an attorney from knowingly revealing any "information relating to the representation of a client" unless disclosure is permitted by a specific ethics exception.Ftn6 Each year, attorneys are disciplined for disclosing information related to a representation that does not fall within a permitted exception. In 2017, for example, an attorney was privately disciplined for sharing sensitive pictures of personal injury clients with a third party not involved in the litigation. While an attorney can discuss generic issues relating to a representation with a third party, they can only do so as "long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."Ftn7

Further, one attorney was disciplined for disclosing confidential information about a former client to an insurance adjuster after the attorney was terminated. The attorney appealed his admonition to the Minnesota Supreme Court, which upheld it.Ftn8 The details of the case are a good reminder about the ways we must take care in discussing our clients with others. Separately, an attorney was disciplined for disclosing non-public data that was subject to a protective order in a case in a second but related matter. Violating a protective order may present an issue for the court but it also implicates the ethics rules, namely the prohibition against knowingly disobeying an obligation under the rules of a tribunal or interfering with the administration of justice.Ftn9

Recently, the ABA issued Opinion 479, relating to the "generally known" exception for former-client confidentiality.Ftn10 A lawyer's duty of confidentiality extends to former clients, and a lawyer may not use information related to the representation of a former client to the former client's disadvantage without informed consent, as permitted by Rule 1.6(b), or unless the information has become "generally known." This opinion states the ABA position that "Information is not 'generally known' simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information." This is a cautionary tale for lawyers who think that because a former client's information is in a "public record" somewhere, they are free to use that information, and likewise a good reminder about the importance of keeping confidential all information relating to your representation unless a specific exception allows you to disclose such information.

Conclusion

Private discipline is just that—private.Ftn11 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 have no further disciplinary issues. If an attorney does engage in further misconduct, please note that prior private discipline may be relevant to the determination of appropriate discipline for subsequent conduct, and may be disclosed if future complaints result in public proceedings.Ftn12 I'm pleased to report the number of admonitions in 2017 was down substantially year over year, accounting for only 8 percent of closed files, and I am also pleased to report that the number of advisory opinions given by our office rose substantially in 2017, to more than 2000 opinions. As always, if you are unsure of your ethical obligations in a particular situation, call and ask us at 651-296-3952, or get in touch through our website at *www.lprb.mncourts.gov*.

Notes

1. Rule 8(d)(2), Rules of Lawyers Professional Responsibility (RLPR).
2 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.").
3 Rule 1.5(b)(1) requires that written fee agreements notify the client: (i) of the nature and scope of the services to be provided; (ii) of the total amount of the fee and the terms of payment; (iii) that the fee will not be held in a trust account until earned; (iv) that the client has the right to terminate the client-lawyer relationship; and (v) that the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided. Rule 1.5(b)(1)(i)-(v), MRPC. The OLPR recommends attorneys use the language of the rule without modification to ensure their flat fee agreement is compliant.
4 Rule 1.15(c)(5), MRPC, provides that, except as specified in Rule 1.5(b)(1) and (2), a lawyer shall "deposit all fees received in advance of the legal services being performed into a trust account and withdraw the fees as earned."
5 Rule 1.5(b)(2), MRPC.
6 Rule 1.6(a), MRPC.
7 Rule 1.6, Cmt. 4, MRPC.
8 *In re Charges of Unprofessional Conduct in Panel No. 41310*, 899 N.W.2d 821 (Minn. 2017).
9 Rule 3.4(c), MRPC; Rule 8.4(d), MRPC.
10 ABA Formal Opinion 479 (12/15/2017), located at *https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_479.authcheckdam.pdf*.
11 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.
12 Rule 19(b)(4), RLPR.