Private discipline in 2020

by

Susan M. Humiston
Office of Lawyers Professional Responsibility

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In 2020 the Director's Office closed 82 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 substantially from 2019, when 107 admonitions were issued. Overall, approximately 8 percent of file closings in 2020 were due to the issuance of an admonition. Another 20 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. More files resulted in private probation dispositions in 2020 than in 2019, when 14 files closed with private probation. Notably, the pandemic was generally not a material factor in admonitions from 2020.

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), with communication violations being more frequent in 2020 than diligence. Other frequently violated rules, particularly in the private discipline context, involve declining or terminating representation (Rule 1.16), making fee arrangements (Rule 1.5), and safekeeping client property (Rule 1.15), although 2020 also saw a higher number than usual of the no-contact rule violations (Rule 4.2) and confidentiality violations (Rule 1.6). Let's look at a few specific rules and situations that tripped up lawyers in 2020.

Safekeeping client property

As I wrote in my December 2020 column, safekeeping client property is an important obligation, and it is particularly important that fees paid in advance of being earned and filing fees be held in trust. (Rule 1.15(a), MRPC; Rule 1.15(c)(5), MRPC.) Clients will frequently pay advance fee retainers and expense deposits by credit card. If you have not already done so, make sure you are using a credit card service provider that allows you to deposit advance fees and filing fees directly into your trust account, while separately withdrawing any service fees or disputed fees from your operating

account. LawPay comes to mind, but there are numerous other solutions, many of which integrate with other client management software solutions you might use already.

If you do not use such a service, you can deposit credit card advances in your operating account and then transfer then over to trust—*see* Rule 1.15(h), Appendix 1(I)(10)—but you then need to have good internal processes to make sure that happens "immediately" as referenced in the appendix. If you don't have a good process, you can inadvertently leave money that belongs in trust in your operating account. This is what happened to one attorney who received an admonition in 2020. While on vacation, the attorney accepted a new engagement, and the client paid an advance retainer by credit card. Because she was on vacation, however, the attorney did not transfer that advance fee into her trust account though it remained unearned, and through a continued oversight, the advance fee remained in her business account for a fair amount of time. Because the funds were not in trust, the lawyer failed to safekeep client funds and received an admonition for Rule 1.15(a), MRPC.

No-contact rule

In 2020, four attorneys received admonitions for violating Rule 4.2, MRPC. Rule 4.2 is seemingly straightforward:

> 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.

As one would expect, the circumstances surrounding the Rule 4.2 admonitions in 2020 were distinct. One involved a father-in-law repeatedly contacting a represented soon-to-be ex-daughter-in-law regarding a dissolution, as he assisted his son, on and off, with the divorce. When one is personally involved, it is easier than you might think to fail to remember rules that you would ordinarily never disregard. Other Rule 4.2 cases involved lawyers attempting to narrowly define the matter in issue in order to contact the opposing party, when they know full well that counsel is involved. This is an area that really bothers both opposing counsel and opposing parties, so it frequently draws complaints. Sometimes Rule 4.2 violations occur when civil proceedings arise out of facts that also give rise to criminal actions. Four in one year is a lot of admonitions for Rule 4.2, MRPC. Please take note.

Prejudicial conduct

Rule 8.4(d), MRPC, makes it professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. This is a broad rule with various applications. One action that the Office has consistently found to fall within this provision is a prosecutor's failure to comply with victim-notification statutes. Minnesota law places special obligations on prosecutors, particularly in domestic abuse cases.

For example, Minn. Stat. §611A.0315, subd. 1(a), provides that prosecutors shall make every reasonable effort to notify victims in domestic assault cases of a decision not to file charges or to dismiss pending charges. In 2020, a prosecutor received an admonition under this rule, affirmed by a panel of the Board, for failing to notify the victim—a minor child and her custodial parent—of dismissal of misdemeanor assault charges against the non-custodial parent. In prior years, there has been a push from various stakeholders to amend Rule 3.8, MRPC, to include reference to prosecutors' victim-notification obligations due to a concern about uneven compliance. The response has historically been that Rule 8.4(d), MRPC, covers such conduct and that a more specific rule is not needed. For new prosecutors or those who are unaware, please note.

Conclusion

Only about 20 percent of complaints to the OLPR result in any discipline, and private discipline is far more prevalent than public discipline. As I noted in my column on this same subject last year, 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. 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 are 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.