

## SUMMARY OF ADMONITIONS

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For the past 23 years my predecessors periodically have used the opportunity of this column to provide a summary of some of the private admonitions issued by the Director's Office. Such summaries, although often cursory in their statement of the facts of a particular matter, help educate practitioners about some of the nonserious violations that can occur even in an otherwise ethical practice, and perhaps deter others from similar actions.

The standard for an admonition is a violation of the Rules of Professional Conduct of an isolated and nonserious nature. Rules 8(d)(2) and 9(j)(1)(iii), Rules on Lawyers Professional Responsibility (RLPR). Most admonitions are issued after a preliminary investigation by a district ethics committee and upon their recommendation for discipline. The admonitions summarized below were among the 83 admonitions issued by the Director's Office in 2006.

As in most years, the majority of admonitions last year involved a lack of diligence and/or communication by the attorney. Others involved what may seem to be rather outrageous, albeit comparatively nonserious conduct, such as in some of the admonitions summarized in this article. Note that some of the factual recitations have been simplified to highlight the applicable misconduct.

**Expediting Litigation.** The attorney represented an individual in a workers-compensation matter. The client desired that the matter be handled as promptly as possible and the attorney specifically agreed to do so. Although there were four months from the time he was hired until the scheduled hearing on the matter, the attorney did not start obtaining medical reports until less than two months before the hearing. The last report was not provided to the employer's counsel until ten days before the hearing. The employer's counsel requested a continuance based upon information contained in the belatedly provided report. The workers-compensation judge granted the request and the client complained. The attorney violated Rule 3.2, which requires an attorney to "make reasonable efforts to expedite litigation consistent with the interests of the client."

**Failing to Deposit and Refund Advance Fees.** The attorney agreed to represent the wife in a marital dissolution proceeding. The client paid the attorney a \$2,000 advance fee. There was no written fee

agreement prepared or signed. The attorney immediately deposited the money into her business account, rather than into her trust account.

Before the attorney had earned the entire advance fee, she took a job that did not permit her to maintain a private law practice. Although she properly withdrew from the representation, she did not refund any portion of the advance fee until after a complaint was filed. The attorney violated Rules 1.5(b) and 1.15(c)(5), which require a written fee agreement if a fee is to be considered nonrefundable and deposited into a business account upon receipt. She also violated Rule 1.16(d), which requires an attorney to refund unearned advance fees upon termination of representation.

**Communication with a Represented Party.** The attorney represented the plaintiff in a litigated contract dispute. The attorney received an email from another attorney stating that he represented the defendant and that all future communications should be directed to counsel. Thereafter the attorney continued to attempt to contact the party directly, including serving motion papers on the individual that should have been served on counsel (Rule 5.02, Minnesota Rules of Civil Procedure). The attorney's conduct violated Rule 4.2, MRPC.

The attorney argued that until a formal certificate of representation was filed by opposing counsel with the court, that direct contact with the client was still permitted. Rule 4.2 requires only that an attorney know that a person is represented by counsel and contains no such requirement in litigation matters.

**Threatening Action Unrelated to the Matter.** The attorney represented a defendant in a discrimination lawsuit. The pro se plaintiff was a foreign citizen who was in compliance with all immigration requirements. In response to a settlement offer from the plaintiff, the attorney threatened to seek to have the plaintiff deported if she did not voluntarily dismiss the matter. The attorney's threat was unrelated to the litigation and had no purpose except to burden the plaintiff in violation of Rule 4.4, MRPC. This matter was analyzed as being similar to threatening criminal prosecution in a civil matter, which is permissible only if there is a good faith belief that the claim is valid and there exists a nexus between the threat and the pending matter.

**Return of File and Unnecessary Disclosure of Client Confidential Information.** An attorney represented the wife in dissolution proceedings. After approximately one year, the client discharged the lawyer and requested the return of her file. The fee agreement signed by the client authorized the attorney to charge for copying the client's file upon termination of the representation. The attorney would not release the file, however, until the copying costs were paid. The attorney even contacted the Director's Office for an advisory opinion and was advised that while he could charge the client pursuant to the agreement, he could not condition return of the file upon receipt of payment. Despite the advisory opinion, the attorney refused to release the file for an additional two months. The conduct violated Rule 1.16(g), MRPC.

The same attorney also filed an attorney's lien for unpaid fees. In support of the lien, the attorney

attached unredacted copies of billing statements and an affidavit in which the attorney disclosed confidential information about the client and the attorney's assessment of her mental health. This information went beyond what was necessary to collect the attorney's fees and violated Rule 1.6(b)(8), MRPC, which allows disclosure of confidential information only to the extent reasonably necessary to establish a claim in a controversy between the lawyer and a client (*see* Comment [12] to Rule 1.6).

**Improper Claim of Specialization.** The complainant was injured in a car accident. He received several direct mail solicitation letters offering legal services; these are permitted under Rule 7.3, MRPC, if the words "Advertising Material" appear clearly and conspicuously on the envelope. The attorney properly sent such a letter. The attorney's letter also stated in boldface letters, all capitalized, that the reader should hire the attorney because the client needed to "hire an attorney who specializes in personal injury law."

Rule 7.4(d), MRPC, prohibits an attorney in a communication from stating or implying that he is a specialist unless 1) the name of the certifying organization is clearly identified, or 2) if the individual is not certified, then a statement to that effect must appear in the same sentence in which specialization was stated or implied. The attorney in this instance was not a certified specialist and the letter did not contain the required disclaimer.

**Litigation in Response to Ethics Complaint.** The attorney represented the husband in a marital dissolution proceeding. After the wife filed an ethics complaint against the attorney (that was dismissed), the attorney sued the wife/complainant for abuse of process. The wife answered in part that Rule 21(a), RLPR, provides immunity from civil liability based upon a disciplinary complaint. The attorney then filed an amended civil complaint for contempt. The district court dismissed the attorney's claims with prejudice. The attorney's actions constituted nonmeritorious litigation in violation of Rules 3.1 and 8.4(d), MRPC.

**Failing to Supervise a Disbarred Attorney.** An attorney hired a disbarred lawyer to work in a paralegal capacity. As required by Rule 5.8, MRPC, the lawyer provided written notice to the Director's Office that she was employing the disbarred attorney. Rule 5.8 sets out the tasks that a suspended or disbarred lawyer may or may not perform.

The disbarred lawyer sent a letter to an insurance company on behalf of a client making a settlement demand, setting out a detailed legal analysis as to liability, and requesting the insurer to contact either the attorney or the disbarred lawyer to further discuss the matter. Rule 5.8(b)(4) restricts a lawyer from allowing a suspended or disbarred lawyer from negotiating on behalf of a client with third parties. The attorney had failed to properly supervise the disbarred attorney by allowing the attempted negotiation.

In a separate matter, an attorney who employed a suspended attorney without notifying the Director's Office as required by Rule 5.8 also was issued an admonition.

**Naming Self as Beneficiary in Will.** Finally, a correction is appropriate concerning a matter

discussed in last month's column that also resulted in an admonition, albeit one issued by a Lawyers Board panel rather than the Director's Office. A lawyer drafted a will providing a \$10,000 bequest to the lawyer in violation of Rule 1.8(c), MRPC. The Director filed charges of unprofessional conduct, asking the panel to find probable cause for public discipline. The previous column intimated that the lawyer challenged whether his conduct violated the rule at all based upon a "family-like" relationship that existed between the lawyer and the decedent. In fact, the lawyer admitted his conduct violated the rule, but argued that an admonition was the appropriate discipline. The panel agreed with the lawyer.

## **Conclusion**

The standard for issuing admonitions includes that they be isolated. Attorneys who commit a second or third nonserious violation, especially if related as to the nature of the misconduct or related in time (multiple instances of neglect or lack of communication, for example) may agree to a private probation in lieu of charges of unprofessional conduct, in the hopes of correcting their behavior without public discipline. Admonitions are admissible in public discipline matters, and can serve to aggravate the level of discipline imposed by the Supreme Court.

The majority of lawyers who receive an admonition, however, never repeat their misconduct; indeed many never commit any further violations whatsoever. In those instances the admonition has clearly served its educational and deterrent purposes.