

## SUMMARY OF ADMONITIONS

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The Rules on Lawyers Professional Responsibility provide for two types of nonpublic, or private, discipline: admonitions and stipulated probation.[Ftn 1](#) A summary of admonitions has been published on an annual basis in this column for many years, and so in a bow to tradition, the title above remains the same again this year. In fact, a summary of private discipline may be a more accurate description of what will be discussed.

In calendar year 2007, the Director's Office issued 120 admonitions to Minnesota attorneys for what the rules consider isolated and nonserious misconduct. Another 20 lawyers entered into stipulations for private probation that were approved by the Lawyers Board chair; these stipulations resolved 32 complaint files. A sampling of the types of misconduct that can lead to private discipline is set out below.

As always, a word of caution is appropriate in reading the brief descriptions: since these are offered for educational purposes, the facts may have been slightly simplified in order to make the violations clearer (real-life fact patterns sometimes are complicated). It is also worth noting that in each of the examples of admonition described, the complaint was initially investigated by the local District Ethics Committee (DEC), which had recommended that the Director issue an admonition. The Director's Office follows the DEC recommendation in well over 90 percent of the complaints investigated. In general, the volunteer investigators, both lawyers and nonlawyers who perform these investigations, do an outstanding job of determining the facts and applying the Rules of Professional Conduct.

### **Admonitions**

**Failure to Screen a Conflicted Lawyer.** An attorney had consulted with a woman about a potential dissolution of her marriage. The potential client provided confidential information to the lawyer during the meeting. The potential client did not retain the attorney. Later, the husband of this potential client sought to retain a lawyer in the attorney's firm for the same dissolution matter. The wife provided a valid waiver of any conflict of interest only upon the express agreement of the attorney that he would be fully screened from any participation in the matter. Thereafter, the lawyer had discussions with the other lawyer in his firm who was representing the husband, and also performed some limited services on the husband's

matter. The attorney violated Rules 1.9(a) and 1.10(a), Minnesota Rules of Professional Conduct (MRPC), concerning conflicts of interest with former clients and the imputation of conflicts of interest within a law firm. [Ftn 2](#)

**Suing Client for Statements Made in Disciplinary Complaint.** A client made a complaint to the Director's Office against the attorney. After investigation by the DEC, it was determined that discipline was not warranted and the complaint was dismissed. Thereafter, the attorney initiated a civil action against the client in part for defamation, based upon the statements made in the disciplinary complaint process. Rule 21(a), RLPR, grants immunity from civil liability for statements made in a disciplinary proceeding. By suing the client based upon statements made in the disciplinary process in violation of Rule 21(a), the attorney violated Rule 3.4(c), MRPC (knowingly disobeying an obligation under the rules of a tribunal). Note that the RLPR provide immunity protection only to statements made in the disciplinary proceeding, not to statements made elsewhere.

**Improper Fee-Sharing Agreement.** A client retained the attorney to handle a criminal matter and a family law matter. The written fee agreement provided that the attorney may hire cocounsel to assist in the representation, with the client's consent. The agreement did not, however, set out what portion of the fees would be paid to cocounsel, nor did it obtain client's consent to the fee-sharing arrangement. The client learned the details of the fee-sharing only when he sought a partial refund of his retainer. The attorney violated Rule 1.5(e), MRPC, which requires all fee-sharing arrangements to be agreed to by the client, including the share each lawyer will receive, and be confirmed in writing.

**Contacting a Represented Person.** The attorney represented the husband in a marital dissolution proceeding. The attorney knew that the wife was represented by counsel in the matter. The wife then initiated an Order for Protection (OFP) matter *pro se*. The attorney wrote directly to the wife, discussing property issues that were part of the dissolution and not at issue in the OFP proceeding. The letter specifically invited the wife to contact the lawyer "with reference to the divorce matter." The attorney violated Rule 4.2, which prohibits communication with a person known to be represented by counsel in a matter.

**Improper Withdrawal from Representation.** Attorneys in two separate court matters were admonished for failure to properly withdraw from representation, even though the attorneys had sufficient grounds to withdraw. The attorneys both violated Rule 1.16(c), MRPC. Withdrawal from state court civil actions must be done pursuant to Rule 105 of the General Rules of Practice for the District Courts, which requires that a notice of withdrawal be sent to all parties and be filed with the court. Court approval is not required. Court approval for withdrawal of counsel is required in state court criminal matters, pursuant to Rule 703, General Rules of Practice, and in all federal court matters, pursuant to Rule 83.7 of the Local Rules for the U.S. District Court for the District of Minnesota. Other issues related to the termination of representation, such as the return of the client's file or property or the refund of any unearned advance fee payments, also resulted in admonitions this past year.

**Lack of Diligence and Communication.** As is true almost every year, violations of Rules 1.3 (Diligence) and 1.4 (Communication) were the most common occasions for private discipline in 2007.[Ftn 3](#) This past year, admonitions were issued for failing to serve and file a complaint in a discrimination matter within the prescribed time period following the issuance of an EEOC Notice of Right to Sue; for failing to take any meaningful action or communicate with the client for many months in a personal injury matter; for submitting a proposed QDRO in a dissolution matter several months after the court's deadline; and for failing to take timely action in an immigration matter concerning an H-1B visa. Immigration law matters increasingly are a source of complaints and discipline in recent years concerning diligence and communication issues, but also as to issues of basic legal competence. Like most areas of the law today, immigration law is not an area in which it is safe to "dabble" without proper training or experience. Substantial harm to a client can be caused by even "minor" instances of lack of competence or diligence.

### **Probations**

One response to recurring issues of competence, diligence and/or communication by an attorney is for the attorney and the Director to enter into a stipulation for probation, usually supervised by a volunteer attorney. For example, in the past year, one attorney agreed to probation for neglecting three client matters: failing to communicate with the client in two of them, and billing the client for work performed after the client had discharged the attorney in the third. Another attorney neglected two client matters and had two prior admonitions (eight and 12 years ago) for similar misconduct. Probations also are appropriate in some instances in which an attorney fails to maintain proper trust account books and records, although in other instances public discipline may be more appropriate. This year, for example, an attorney agreed to such probation, to be monitored by the Director's Office, following the receipt of a trust account overdraft notice and the determination that the attorney was failing to keep complete records. In this particular matter, taking into account that the attorney had practiced for 40 years without any discipline and that no client harm occurred, the Board chair agreed that public discipline was not necessary.

The Supreme Court Advisory Committee to Review the Lawyer Discipline System, whose report to the Supreme Court will be issued later this year, is attempting to study data to determine the how effective private discipline is in preventing recidivism by an attorney. While there are certainly attorneys who commit further misconduct after being privately disciplined, in many, and likely more instances, private discipline serves as a sufficient "wake up call" to the attorney to renew a commitment to an ethical practice.

### **Notes**

**1** See Rule 8(d) (2) and (3), Rules on Lawyers Professional Responsibility (RLPR).

**2** The initial meeting in this example took place before October 2005, when current Rule 1.18, MRPC, was adopted specifically addressing representation adverse to a former potential client. Thus, this matter was analyzed under Rules 1.9 and 1.10 (former clients and imputed conflicts of interest). The result would not have been different under the current rule.

**3** In August 2007, this column was exclusively devoted to the issues of diligence and communication. Some

additional admonitions were briefly described.