

SUMMARY OF ADMONITIONS

By

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This month's article is the annual summary of admonitions issued to Minnesota lawyers over the past year. Admonitions are issued for isolated and nonserious violations of the Rules of Professional Conduct. Of the 1,150 complaints received in 2005, 107 resulted in private admonitions. Some of the facts in the following summaries have been simplified for ease of understanding and others have been changed to maintain anonymity.

Admonitions, though private, serve several important functions. They assist in maintaining the profession's integrity by demonstrating to the public that even minor violations of ethics standards are important to the bar. Admonitions can be a valuable educational tool for lawyers and law students. Very few lawyers who receive admonitions are "bad or unethical" lawyers. Most often they are culpable of no more than an isolated instance of substandard lawyering. It is important, however, to keep in mind that a pattern of otherwise "isolated and nonserious conduct" can lead to other dispositions, including private probation and in some instances public discipline. Small ethical transgressions have a way of becoming large problems if not taken seriously. Learning from other people's mistakes is a good idea. Getting an advisory opinion about one's future conduct can be even better by helping to avoid complaints, especially valid complaints.

Rule 4.4 -- Rude Harassing Words. An attorney representing clients facing a termination of parental rights trial received a large stack of documents from a witness who indicated she would be testifying about the substance of those documents. The attorney, irritated with the amount of information being presented to him right before trial, made a rude comment to the witness. A paralegal for adverse counsel commented to the attorney that he was being rude to that witness. Whereupon the attorney launched into a tirade against the paralegal that lasted several moments in front of other individuals in the courtroom. The tirade included profanity. It was a demeaning, unprofessional, hostile attack which frightened those who witnessed it. The attorney's conduct violated Rule 4.4, Minnesota Rules of Professional Conduct, which provides in pertinent part, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass ... a third person" Fortunately, the court was not actually in session at that time and neither the judge nor the jury was present during the attorney's outburst. The attorney's

remorse, coupled with the absence of any indication that the behavior might be repeated, eliminated the need to seek more serious discipline.

Rule 1.7(b) -- Pushing a Client to Settle. The attorney's client, who was the citizen of another country, had to return to that country while his case was pending. As a result, discovery went unanswered for an extended period of time and opposing counsel brought a motion to compel, resulting in an order of the court directing responses from the attorney and his client. Eventually the attorney provided some discovery responses, but did not translate the responses into English. On the date the trial was to begin, the parties had detailed discussions about a possible settlement. The attorney's client did not want to settle on the terms the adverse party was proposing. When the attorney and opposing counsel met with the court to discuss final pretrial matters, opposing counsel brought a motion *in limine* regarding the attorney's incomplete and non-English responses to discovery requests. Opposing counsel requested sanctions in the form of attorney's fees, which the court took under advisement. The attorney then asked to speak with his client in the hallway where he told the client he needed to settle the client's case so that he, the attorney, would not run the risk of being made to pay attorney's fees for the client's failure to comply with discovery requests. An interpreter was present for the conversation. The attorney and client returned to the courtroom where the client allowed the settlement to be read into the record and indicated, in response to the court's questioning, that he understood and accepted the settlement. When client later refused to sign the written settlement memorializing the oral agreement as set forth in court, opposing counsel brought a motion to enforce the settlement. The court denied the motion because the client had felt coerced into settling the case, did not understand the terms of the agreement, and felt obligated to settle because the attorney feared the prospect of sanctions in the form of attorney's fees and did not have the funds to pay such fees.

Rule 1.7(b), MRPC, provides "A lawyer shall not represent a client if the representation of that client may be materially limited by ... the lawyer's own interests, unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the lawyer consents after consultation." In this case, the attorney's professional judgment appears to have been influenced by his concern that he might be sanctioned for his failure to respond to written discovery in the matter. Although the reason for the many problems with the discovery process is not entirely clear, the fact that the attorney allowed his own interests to interfere with representing and advising his client is clear. The interpreter who witnessed the conversation between the attorney and his client confirmed that the attorney cajoled his client into settling because the attorney was concerned about the possible sanctions and even asked the interpreter to assist him in convincing the client to settle.

Rule 1.8(a) -- Obtaining a Security Interest for Fees. When the client received a \$13,000 bill following her marriage dissolution and failed to make payment on the overdue bill, the attorney called the client and told her that they needed to discuss the bill and devise a payment plan. The client's exhusband owed the client about \$8,000. The attorney asked the client to assign this payment to him and also asked for assurances that the remainder of his bill would be paid. To that end, the attorney had the client sign a

document entitled “Promissory Note and Agreement and Attorney Lien.” The document provided that client was (1) acknowledging the amount owed, (2) assigning the \$8,000 payment due from her exhusband to the attorney, (3) agreeing to pay \$2,000 immediately and (4) promising to make payment of the remaining \$2,000 within 30 days. The document also stated that if payments were not made as indicated, the attorney could obtain a judgment against the client without a hearing for the unpaid amount by simply filing an affidavit with the court. The document also included a pledge of the client’s automobile and four-wheeler as collateral securing the payment and extending an existing attorney’s lien to the collateral. The attorney did not advise the client in writing that she might want to consult with another attorney before signing the document. The attorney failed to provide the client with an opportunity to consult with another attorney as required by Rule 1.8(a)(1), MRPC, and did not obtain the client’s written consent in a separate document as required by Rule 1.8(a)(3). By signing the document at the attorney’s request, the client surrendered legal rights and the attorney acquired a security interest in the client’s personal property greater than what is typically granted by law to lawyers. *See* Minn. Stat. §481.13. By failing to give the client written notification that she should consider consulting independent counsel before signing the document at issue, the attorney violated Rule 1.8(a)(1) and (3).

Rule 1.16(d) -- Withdrawal from Representation. The attorney’s clients remained steadfast in their position not to settle their matter for less than \$5,000 and refused several settlement offers. The attorney never indicated to the clients her unwillingness to proceed to trial if the clients refused to accept a lower settlement offer. One week before the deadline for filing exhibits and two weeks before the date of the trial, the attorney withdrew from representation and did not timely forward the file materials to clients so that they could obtain new counsel in time for trial. Rule 1.16(d) provides that an attorney who withdraws from representation should take reasonable steps to protect the interest of the clients. Such steps include giving the client reasonable notice that withdrawal is imminent, timing the withdrawal so as not to prejudice the client’s case, and promptly surrendering all client files and property. While the attorney’s conduct in this matter was isolated, the Director’s Office seriously questioned whether the attorney’s conduct was truly nonserious. Her failure to promptly provide the client file critically impacted the clients’ ability to proceed with their case. Had the clients’ new counsel not indicated that he was unsure whether the clients would have received a different outcome had they proceeded to trial, the Director’s Office might have considered other more serious discipline for this conduct.

Rule 1.16(d) -- Return of File. The attorney represented the client in a replevin action. While the replevin action was pending, the client was charged with fraud in federal court. After learning of the federal fraud charge, the attorney in the replevin action no longer believed the client’s claim regarding that matter. Without consulting the client, the attorney reached an agreement with the opposing party to dismiss the replevin action without prejudice and signed a stipulation to that effect. The attorney withdrew and informed the client that he could refile his civil action should he be acquitted on the federal fraud charge. The attorney refused to give the client the file, contending that the client might misuse the attorney’s research to pursue a frivolous or fraudulent claim. Once the attorney came to a good faith belief

that the client's claim was based on fraud, she had a right to withdraw her representation and may have even had a duty to withdraw her representation. The attorney, however, did not have the right to refuse to provide the client with the research materials for which the client had already paid as part of the attorney's representation up to that point. The research, which consisted of how-to forms and outlines the attorney had compiled, cannot be said to constitute aiding the client's "commission of a crime." If the client were to proceed with his claim, the court proceeding over that claim can assess the validity of the claim and direct appropriate sanctions and/or notify the criminal authorities as warranted. An attorney cannot refuse to surrender the file based upon her belief as to what the client might do with the file materials and based on the attorney's unilateral conclusion as to what such possible conduct would or would not constitute. The attorney's repeated refusal to surrender the file materials to the client for almost a year after the client's unequivocal written demand for the file violated Rule 1.16(d).

Rule 1.4(b) -- Making Sure the Client Can Understand. The attorney's client in a workers compensation proceeding spoke very little English. During the settlement negotiation, an interpreter was present. Several weeks later, the attorney called the client into his office to sign the final version of the settlement documents. The attorney did not explain the documents to the client. He simply had the client sign the various documents. The attorney did not have the documents translated or an interpreter present to read the documents to the client. Rule 1.4(b) requires an attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Having a client who speaks limited English sign legal documents written in English without the assistance of a translation or interpreter violates Rule 1.4. It is the attorney's responsibility to take the steps necessary to allow the client to make an informed decision. Because of the language barrier, the attorney failed to explain the meaning and purpose of the legal documents the client was signing. The client could not make an informed decision about signing the documents because they were not presented to her in a manner she could understand.

Rule 4.2 -- Communicating with a Party Represented by Counsel. A collection attorney who knew that the debtor was represented by counsel nevertheless sent a letter directly to the debtor. In responding to the complaint, the attorney stated that the letter was sent by mistake and provided information tending to demonstrate that the letter was sent due to a glitch in his computer system. The Director's Office and the district ethics committee investigating the matter might have concluded that this technical violation of Rule 4.2 did not rise to the level mandating discipline, but for the fact that four months later a second letter was sent directly to the same debtor in violation of Rule 4.2. The second letter having been sent after the attorney had been placed on notice about the problems with his computer-generated mail resulted in an admonition.

Rule 3.1 -- Frivolous Motion. The attorney represented a party in a contentious contract dispute. During the course of the litigation, the court ordered the parties to mediate. The attorney failed to respond to opposing counsel's efforts to set up mediation and then filed a motion to compel mediation. After hearing the matter, the trial court sanctioned the attorney and the attorney's client. The attorney failed to

comply with the court's order and took little action with regard to the matter until the trial court judge issued a bench warrant for the attorney's arrest. Rule 3.1 provides that an attorney should not bring or defend a frivolous claim. The attorney's motion to compel mediation was frivolous. Opposing counsel sent the attorney letters regarding the court-ordered mediation and the attorney either refused or did not respond to the request. The trial court, after hearing the attorney's motion to compel mediation, found that the motion was frivolous because it was the attorney's own conduct which caused the lack of mediation. As a result, the trial court sanctioned the attorney and his client for bringing the motion.

Rule 5.1(a) -- Covering for an Absent Partner. The client retained the attorney's firm to represent him in 2003. The attorney's partner was primarily responsible for the client's case. In October 2003 the attorney's partner, who was responsible for the case, was deployed to Kosovo with the Minnesota National Guard. From October 2003 until July 2004 the client's many letters to the law firm went unanswered. During that time period, the client received no information from the firm regarding his case. Even after the initiation of the investigation of the client's complaint, little information was provided to the client. Between October 2003 and July 2004 little, if any, work was done on the client's case. Rule 5.1(a) requires a partner in a law firm to have reasonable measures in place to ensure compliance with the Rules of Professional Conduct. The attorney failed to have proper measures in place and failed to have any system to deal with her partner's cases once the partner was deployed. There was no system to ensure that the partner's cases were reviewed, correspondence handled, and to ensure that communication with the partner's clients occurred. The attorney's failure to have systems in place to guarantee her partner's cases would be handled in accordance with the Rules of Professional Conduct violated Rule 5.1(a).

Rule 1.5 -- Return of Client Funds. The attorney represented the client in a number of different matters. In one matter the attorney obtained a \$2,500 payment for the client. The client told the attorney to take his fees out of that amount and forward the remainder to him. The attorney transferred the \$2,500 balance from his trust account into his general business account in preparation for paying himself the attorneys fees owed and to return the balance to the client. Because the client had other open matters with the law firm, the attorney's bookkeeper placed the money due to be returned to the client as a credit balance on those open accounts. It was not until almost two years later, when the client complained to the Director's Office, that the attorney finally forwarded the balance due to the client. The evidence is clear that a portion of the \$2,500 belonged to the client. Accordingly, the attorney should have disbursed from his trust account only the funds owed to him as fees, not the entire amount. The remainder should have been sent directly to the client from the trust account as opposed to being allowed as a "credit balance" on the client's unrelated matters. By moving the client's money from the trust account to the business account, the attorney violated Rule 1.15(a).

Rule 1.15 -- Third Party Funds. The attorney represented a client in a marriage dissolution. The pro se opposing party gave the attorney \$15,000 to place in her trust account to be held until the final disposition of the case. Pursuant to Rule 1.15, the attorney had a duty to keep the pro se adverse party's money in a safe and secure manner and to seek that person's consent prior to distributing his property.

Rule 1.15(a) provides, in part, “*All funds of clients or third persons* held by a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable interest-bearing trust accounts” (emphasis added). Without notifying the pro se opposing party, the attorney disbursed the funds to her client at her client’s request. While the attorney’s client may have authorized the release of the funds, they were not the client’s funds to release. Only the pro se opposing party could authorize the release of the funds. It was clear from correspondence that the funds were to be held until the finalization of the dissolution proceedings and used to satisfy any property award made to the attorney’s client. The attorney’s release of the funds to her client prior to the end of the dissolution without authorization by the pro se opposing party and without informing the pro se opposing party of the distribution of the funds violated Rule 1.15(a).