By Timothy M. Burke

Summary of private discipline

"The more things change, the more they stay the same" may be a cliché, but in the area of lawyer conduct, there is some truth in the saying. In 2015, as in many other years, more complaints arose out of family law and criminal matters than from other types of matters. Also as in many other years, complaints frequently alleged neglect and/or non-communication (i.e., my lawyer is not doing anything on my case and/or is not responding to my requests for information about my case). By no means, however, are these the only areas in which complaints are generated or the only types of complaint.

Most complaints involving what appear to be allegations of isolated and nonserious misconduct are investigated by a district ethics committee (DEC). The DEC, after investigation, will recommend whether the Director's Office should find a violation of the Minnesota Rules of Professional Conduct (MRPC) has been committed and, if so, the appropriate form of discipline.

Many matters in which a lawyer violated the MRPC are resolved through private discipline.[1] In calendar year 2015, 124 admonitions were issued to Minnesota attorneys. Admonitions are a private form of discipline, issued for isolated and nonserious misconduct.[2] In addition, 16 lawyers agreed with the Office of Lawyers Professional Responsibility (Director's Office) to enter into stipulations for private probation that were approved by the chair of the Lawyers Professional Responsibility Board. These probations generally require the lawyer to implement procedures designed to prevent similar misconduct in the future and to report on the implementation and progress of those procedures.

TIMOTHY M. BURKE is Senior Assistant Director with the Office of Lawyers Professional Responsibility, where he has served since 1993. Burke is a graduate of the University of Minnesota Law School.

These synopses are offered for educational purposes only, and in certain instances the facts may have been changed or simplified in order to make a particular violation clearer.

Improper Retainer Agreement

Retainer agreements and the handling of fees are areas in which lawyers can stumble. Oftentimes a lawyer may want to receive funds in advance of the services to be rendered. Presumptively, all funds received before services are rendered must be deposited into a client trust account. If a lawyer wants to deposit funds received before services are rendered into the lawyer's own account, then the lawyer must comply with certain specific requirements. Failure to comply with all these requirements can lead to discipline.

In one matter, the lawyer was retained to represent a person incarcerated pursuant to a sentence of life in prison. The lawyer was retained to investigate and research potential grounds for bringing a post-conviction action. The retainer agreement called for a flat fee. The retainer agreement failed to comply with all of the requirements of Rule 1.5(b), MRPC, in that the agreement did not notify the client that: (1) the fee would not be held in a trust account until earned; (2) the client had the right to terminate the client-lawyer relationship; and (3) the client was entitled to a refund of all or a portion of the fee if the agreed-upon services were not provided. The lawyer therefore was obligated to deposit all funds received in advance of the legal services being performed into the trust account. Because the lawyer did not do so, an admonition was issued.

Failure to Refund Unearned Fee

Rule 1.5, MRPC, requires a lawyer to refund the unearned portion of an advance fee. This issue often arises in the context of flat or fixed fee representations, in which a lawyer is paid a definite sum for representation in a particular matter. Where representation ends before the matter is concluded, a refund generally will be in order.

In one matter, the lawyer was retained for representation against criminal charges. The retainer agreement provided for the lawyer to represent the client through the conclusion of the criminal matter. The client paid an advanced fixed fee in exchange for the lawyer representing the client through the conclusion of the criminal matter. The retainer agreement provided that if the representation terminated before the matter was concluded, the client would be entitled to a refund of some or all of the fee. So far, so good.

During the pendency of the matter, the client discharged the law firm and retained another lawyer. The client asked for a refund of the unearned portion of the advanced fixed fee she had paid to the lawyer, and the lawyer refused. The lawyer claimed that no refund was required because the value of the services rendered to the client—as calculated on an hourly fee basis—exceeded the $10,000 that the client paid.

An hourly fee analysis, however, is inappropriate in determining whether a fixed fee has been fully earned. The lawyer's agreement with the client was not an agreement to provide legal services to be billed on an hourly basis. The fixed fee agreement stated in advance an agreed-upon value for specific services to be rendered. When those services were not fully rendered, a refund was due to the client no matter how many hours the lawyer had spent on the matter. In determining the value of the partial set of services rendered, the time spent may be considered, but it is not the exclusive factor. Other factors to be considered are how far the lawyer advanced the client's objectives as set forth in the fee agreement and the task(s) remaining to be done to accomplish those interests after the attorney-client relationship ended. In this matter, the criminal matter had not been fully resolved and further proceedings remained. The lawyer was issued an admonition for violation of Rules 1.5(b)(3) and 1.16(d), MRPC. These rules, respectively, require a lawyer after termination of representation to refund "the unearned portion of the fee" and to refund unearned advance fee payments upon termination of representation.

Advertising and Solicitation

Occasionally, the Director's Office receives a complaint about a lawyer's advertising and/or solicitation. Some of the rules governing advertising and solicitation are technical, and failure to fully comply can result in discipline.

In one matter, the lawyer sent a letter to a prospective client. The lawyer's letter advertised the lawyer's services and solicited the prospective client's business. The lawyer's letter did not contain the phrase "advertising material" anywhere on the letter, much less clearly and conspicuously on the letter, as Rule 7.3(c), MRPC, requires, and an admonition was issued.

Occasionally, a lawyer will argue that substantial compliance with Rule 7.3(c), MRPC, is sufficient. The Supreme Court, however, has rejected a similar contention. In *In re MDK*, 534 N.W.2d 271 (Minn. 1995), the lawyer sent a solicitation letter that enclosed a copy of the lawyer's yellow pages advertisement. Below the signature block appeared the text, "Enclosure: Ad." The Supreme Court affirmed an admonition issued to the lawyer for violation of Rule 7.2(f), MRPC, the predecessor to Rule 7.3(c), MRPC. In other words, the Court expects full compliance with the rule. "That no one was misled and that [the lawyer] took remedial measures does not reduce a violation of a rule, however technical, into no violation and thus no discipline at all. Rather, [the lawyer's] salutary actions result in a level of discipline not being increased."

Communication with Represented Party

"Reply All" can be a dangerous tool for a lawyer. A lawyer may receive a communication from another lawyer on which that lawyer has also included her client as a recipient. When the lawyer receives that email, intends to reply, clicks "Reply All," drafts the response and then hits "Send," the lawyer has now communicated directly with that represented person. Rule 4.2, MRPC, prohibits a lawyer from communicating with a person the lawyer knows is represented by counsel. This fact situation has been presented to the director. Each of the lawyer's emails that went to the opposing party violated Rule 4.2, MRPC, and the lawyer received an admonition.

Conclusion

As noted in prior articles summarizing private discipline, the majority of Minnesota lawyers are never disciplined during their career, and most attorneys who receive private discipline never repeat their isolated act of misconduct.

To help lawyers avoid engaging in conduct that violates the Rules of Professional Conduct, the Director's Office offers an advisory opinion service. A Minnesota lawyer may call the Director's Office during business hours to receive an opinion about a question regarding the caller's own *prospective* conduct involving a professional responsibility issue. Such a call oftentimes can prevent misconduct and let the lawyer avoid private discipline. ▲

Notes

[1] In private discipline matters, the complainant, if any, and the respondent lawyer receive a copy of the written determination. The Director's Office retains a copy of the discipline. With limited exceptions, the Director's Office may not disclose the existence of private discipline. Rule 20, Rules on Lawyers Professional Responsibility.

[2] Rule 8(d)(2), Rules on Lawyers Professional Responsibility.

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Minnesota CLE—Raising the Bar

Meet Heather Gilbert

'Discovering the passion that drives you'

Tell us about your experiences as a legal sign language interpreter before going to law school.

After graduation in 2002 with a BA in American Sign Language/English Interpretation, I began interpreting for Disney World and the surrounding Orlando area. I interpreted for cruise lines, medical providers, employers, theaters and government services. In 2003, I moved to Minnesota for graduate school, achieved my national interpreter certification credentials and shortly thereafter started working for the state at Deaf and Hard of Hearing Services, a division of the Department of Human Services (DHS). While in that position, I worked as an interpreter for Minnesota government employees that were deaf or hard of hearing and also for the Minnesota Legislature.

While working at the state, I also achieved my legal interpreting credentials to qualify for Minnesota and federal court interpreting. When I decided to attend law school, I ended my position at the state and started working under a grant from DHHS as an advocate for deaf and hard of hearing people experiencing discrimination in emergency medical and emergency legal settings.

When you went to law school did you expect that you would open your own law practice after graduating or did you make that decision later?

I started law school with the single-minded intention to represent deaf individuals in discrimination claims, although I didn't think I would start my own firm one week after getting my license to practice. But after I graduated, there were so many deaf people eager to have an ASL lawyer, and so few law firms hiring in the grim 2012 market, that I secured a free office space, available conference room, and several mentors and co-counsel to get started. Within six months, I had acquired nearly 30 clients (not all of which were discrimination claims) and secured a website, logo and a law clerk. It really wasn't intentional to start a law firm on my own, but now that it has happened, I see that it was the best decision I could have ever made. As a self-employed business owner for the five years leading up to graduation, I knew how to incorporate, understood the ebb and flow of income, and had a great CPA and business coach. I kept my overhead low and used the Mitchell Hamline law library for a while until I could afford my own Westlaw account.

Are disability discrimination cases the foundation of your practice?

Disability discrimination is the foundation of our practice, however, the reason we have added more attorneys is because there is such a great need in Minnesota for ASL fluent attorneys with expertise in other practice areas. We offer several types of transactional legal services including business law, estate planning, and family law. The only civil litigation cases we take are discrimination claims.

We are discovering there is such a huge need for affordable private practice legal services in Minnesota and the surrounding states for the deaf and hard of hearing community that we are expanding our practice to serve those needs. We have people contacting us for representation all over the state, which requires a lot of travel. We have court hearings, depositions and meetings that require more than one attorney. Reviewing medical records, interviewing clients and witnesses, and writing briefs is too much for one attorney once the case load starts to grow. For the past three years I have had a lot of support from clerks and paralegals, but that isn't enough anymore.

Do you have advice for an attorney who wants to build a niche practice?

Finding a niche starts first and foremost by discovering the passion that drives you and the vision you have to make it happen. I advise a prospective start-up to secure a business coach and/or life coach to help develop this foundational perspective. I have both, and along with a good CPA, they are the most valuable professional resource in which I invest. Knowing and owning your passion, vision and mission is the foundation on which I stand when business is slow, when litigation gets tough, and when I am tempted to give up. Everything else you need to know you can learn at the MN CLE courses. ▲

HEATHER GILBERT, president of Gilbert Law PLLC, represents individuals with disability discrimination claims against medical providers, employers, and public entities. She is fluent in American Sign Language and is the only attorney in Minnesota who is also a court-certified sign language interpreter. Gilbert Law, known as Minnesota's "deaf-friendly" law firm, provides a wide-array of legal services in American Sign Language in addition to disability discrimination, including estate planning, family law, and business law.