



SUMMARY OF ADMONITIONS

BY KENNETH L. JORGENSEN

Admonitions are private lawyer discipline sanctions that are issued for isolated and nonserious violations of the Minnesota Rules of Professional Conduct (MRPC). Last year 107 admonitions were issued to Minnesota licensed lawyers. Former Lawyers Board Chair Chuck Lundberg recently wrote about the significant role admonitions play in our system of self-regulation; they show that the Rules of Professional Conduct really do matter.¹ Here are summaries of several admonitions issued during 2003.

■ INCOMPETENT REPRESENTATION — DOMESTIC ASSAULT MATTER. The lawyer represented the husband in his divorce, and related Order for Protection proceeding. Husband was also charged with domestic assault. Husband was an avid hunter. During the representation, husband expressed concern to his lawyer that under federal law he would be prohibited from owning a firearm if convicted of the domestic assault charge. Based on the lawyer's erroneous advice that federal law would not apply to the domestic assault charge, the husband pled guilty to a misdemeanor charge of domestic assault. Before sentencing the husband obtained a second opinion from another lawyer who advised him that his guilty plea would prohibit possession of a firearm. See 18 U.S.C. §§921 et seq.

The husband demanded that the lawyer file a motion to withdraw his guilty plea. The lawyer complied but also simultaneously filed a motion to withdraw from representing husband. At the hearing on both motions, the lawyer advised the court that he and his client were at odds over the propriety of the motion to withdraw the client's guilty plea because the lawyer did not "believe personally there [was] any merit to the [motion]." Later during the hearing the lawyer again stated his erroneous opinion that there was "no factual or real basis" to withdraw the guilty plea because federal law would not preclude the husband from owning a firearm.

After the trial court permitted the husband to withdraw his guilty plea because of his lawyer's erroneous advice, the husband filed an ethics complaint. The lawyer was admonished for incompetent representation in violation of Rule 1.1, MRPC, due to his failure to research the law concerning the effect of the misdemeanor conviction

upon his client's right to possess a firearm.

■ FAILURE TO ACCOUNT AND RETURN UNEARNED FEES. The lawyer represented a client in the following matters: (1) a property claim against the client's insurer for fire damage; and (2) a related criminal arson investigation. The lawyer's pursuit of the property damage claim was held in abeyance pending the criminal arson investigation. When the arson investigation did not result in criminal charges, the client wrote the lawyer inquiring about the status of the property damage claim. Unbeknownst to the client, the lawyer had taken a government position four months earlier and was no longer in a position to pursue the property damage claim.

When the lawyer returned the client's file nearly a year later, the client filed an ethics complaint and inquired about an accounting for the fees he had paid. The lawyer's records reflected a credit balance of \$556 that had existed since he had ceased working on the matter nearly 16 months earlier. The lawyer refunded the \$556 and received an admonition for violating Rule 1.16(d), MRPC, for failing upon the termination of the representation to refund an advanced fee payment that had not been earned.

■ CONFLICT OF INTEREST AFTER PRENUPTIAL REPRESENTATION. The lawyer represented husband and wife "to be" in drafting and negotiating their prenuptial agreement. During the next several years husband and wife separated and reconciled on several occasions. On each occasion when either husband or wife sought to obtain legal advice from the lawyer about marital dissolution issues, the lawyer declined to represent husband or wife without the consent of the other. Eventually wife initiated marital dissolution proceedings with the assistance of other counsel. The lawyer agreed to represent the husband and filed an answer to the divorce petition. When the wife filed an ethics complaint, the lawyer withdrew from representation. A private admonition was issued to the lawyer for representing husband in a matter (the pending divorce) that was substantially related to the lawyer's prior representation of a former client (i.e., the wife in the drafting and negotiation of the prenuptial agreement) without obtaining wife's consent. See Rule 1.9(a), MRPC.

■ COMMUNICATION WITH UNREPRESENTED PARTIES. The lawyer was retained to assist

the client in a dispute with his neighbors over a fence. After being retained, the lawyer visited the client's property and began videotaping the fence and the area in dispute. During the course of this process the neighbors entered into a discussion with the lawyer and his client. At one point in the conversation the neighbors asked the lawyer, "What is your position in this whole thing?" The lawyer replied, "I'm just helping [name of client]." The lawyer failed to disclose that he was a lawyer and had been retained to represent his client and appear before the city council concerning the dispute over the fence. After the lawyer appeared at the city council meeting representing his client, the neighbors filed an ethics complaint.

The lawyer received a private admonition for violating Rule 4.3, MRPC, that requires a lawyer dealing with an unrepresented party to clearly disclose whether his or her client's interests are adverse to the unrepresented party. Rule 4.3 also prohibits lawyers dealing with adverse parties from stating or implying that the lawyer is disinterested in the matter.

■ FAILURE TO SAFEGUARD CLIENT PROPERTY. The lawyer's client in a criminal matter became dissatisfied with the lawyer's representation after he was convicted and demanded the return of his client file. The lawyer delegated responsibility for returning the client file to a nonlawyer office employee. When the employee returned the client's file, she also included videotapes and cassette tapes belonging to unrelated client matters that had been stored in the same banker's box.

Thereafter, the dissatisfied client attempted to negotiate a reduced fee for return of the inadvertently sent video and cassette tapes. Due to the lawyer's inadequate office procedures for inventorying client property, the lawyer was unable to determine how

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many tapes were missing and to which clients the tapes belonged. The lawyer received an admonition for failing to maintain sufficient office procedures to ensure the safekeeping of client property. See Rules 1.15(c) and 5.3, MRPC. The lawyer also found it necessary to institute a replevin proceeding against his former client in order to retrieve the missent video and cassette tapes.

■ **PROBATE CONFLICT OF INTEREST.** The lawyer was retained by the personal representative (the decedent's son) to probate an estate. Among the claims against the estate was a personal services claim in excess of \$10,000 by the son for services allegedly provided to the decedent during the 12 years prior to his death. There was no written contract or other documentary evidence of the decedent's agreement to pay his son for the personal services.

When one of the heirs objected, the lawyer continued to represent the son in litigating the personal services claim against the heirs. At no time did the lawyer suggest to the son that he resign as personal representative in order to pursue the personal services claim, nor did the lawyer raise the conflict of interest issue with the court. The lawyer was admonished for violating Rule 1.7, MRPC, by representing the son in his personal services claim against the estate that the lawyer was also representing as the attorney for the son in his capacity as personal representative. See also American College of Trusts and Estate Counsel, *Commentaries on the Model Rules of Professional Conduct*, 3rd Ed. 1999. The ACTEC comment to Rule 1.7 advises that a lawyer who represents the personal representative of an estate should not also represent a creditor in connection with a claim against the estate, even where the creditor is the fiduciary individually.

■ **FAILURE TO COMMUNICATE THE BASIS FOR A FEE.** In June, the lawyer was retained by a mother to represent her daughter in a criminal matter. When the lawyer met with the mother and the daughter he was told they had "little to offer" for legal fees, but that a family friend might be willing to put up \$3,000 to \$5,000. In July, the lawyer appeared with the daughter for a court hearing and had her sign an engagement agreement. However, the amount or basis for the fee was left blank. During the next two months the lawyer made no effort to communicate the basis or rate for his fee. In September, the daughter discharged the lawyer. When the lawyer sent the daughter a bill for his services, she filed an ethics complaint alleging the lawyer had agreed to represent her without charge.

The evidence gathered during the ethics investigation did not support the daughter's claim that the lawyer had agreed to represent

her without charge. The lawyer did receive an admonition, however, for failing to communicate the basis or the rate of the fee within a reasonable time after commencing the representation. See Rule 1.5(b), MRPC.

■ **IMPROPER ASSISTANCE TO OUT-OF-STATE LAWYERS.** The lawyer was a recent admittee who was hired by a Florida lawyer not licensed to practice in Minnesota. The Florida lawyer was attempting to establish an injury practice in Minnesota before applying for admission. In order to persuade clients to hire the firm, the recent admittee told clients about the Florida lawyer's experience in injury law and on at least two occasions introduced clients to the lawyer without disclosing that the lawyer was not licensed to practice in Minnesota. The recent admittee also used letterhead and business signage that listed the Florida lawyer, but failed to disclose that he was not admitted to practice in Minnesota.

The recent admittee was admonished for assisting the Florida lawyer in the unauthorized practice of law by introducing the Florida lawyer to Minnesota injury clients in order to persuade clients to hire the law firm. See Rule 5.5, MRPC. The admonition also cited the recent admittee for listing the Florida lawyer on letterhead and business signage without disclosing that the lawyer was admitted only in the state of Florida. See Rule 7.5, MRPC.

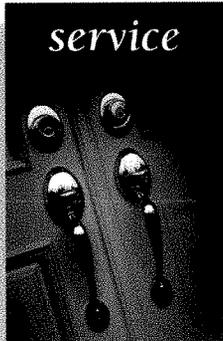
■ **DIRECTION TO REMOVE LAWYER CORRESPONDENCE FROM CLIENT'S MEDICAL FILE.** While representing a client in an injury claim, the lawyer wrote a medical provider regarding the permanency of the client's injury. The letter included suggested language for use on the client's permanency chart notes in the event the provider made a permanency finding. In addition, the provider was instructed not to place the letter from the lawyer in the client's patient file.

The lawyer was admonished for suggesting a procedure that could conceal material having potential evidentiary value in violation of Rule 8.4(c), MRPC. See also Rule 3.4(a), MRPC. A provider that followed the lawyer's instruction could make the correspondence from the lawyer inaccessible to defense counsel. Information that showed the actual wording of the provider's chart notes that came not from the provider, but instead from the lawyer, could constitute relevant evidence in any subsequent legal proceeding. The lawyer's violation was mitigated by the fact that there was no suggestion or other attempt to influence the provider's decision to make a permanency finding. Moreover, the firm agreed to cease the practice after the ethics complaint was filed. □

NOTES

1. Lundberg, "In Pursuit of Ethical Lawyering," *Bench & Bar* (February 2004) p. 14.

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