

# Private discipline in 2018

In 2018, 117 files were closed by the Office of Lawyers Professional Responsibility (OLPR) with the issuance of an admonition, a form of private discipline reserved for professional misconduct that is isolated and non-serious.<sup>1</sup> This number is up from private discipline in 2017 (90 admonitions), but on par with 2016 and 2015. Additionally, 14 files were closed with private probation, the same number as in 2017. Private probation, which must be approved by the board chair, is generally appropriate for attorneys with more than one non-serious violation who may benefit from supervision.

This sampling of admonitions is offered to highlight issues that lead to private discipline.

## The no-contact rule

Rule 4.2 provides that:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.<sup>2</sup>

Periodically, lawyers are disciplined for violating this rule. In 2018, the Minnesota Supreme Court affirmed an admonition where an attorney communicated with a represented co-

defendant immediately following one party's settlement of the case.<sup>3</sup> The Court's opinion is illuminating because it walks through the elements of the rule violation (ongoing representation, merits of the matter, and knowledge of representation), and rejects respondent's attempts to narrowly interpret the rule. The case also illustrates the extensive remedies available in Minnesota to respondents subject to private discipline—the right to appeal to a panel of the Lawyers Board and to the Minnesota Supreme Court itself—and it reminds us that technical violations of the rule are still rule violations warranting discipline.

**Lesson:** Always clarify with counsel—not the represented party—the scope of the representation so you do not violate the no-contact rule.

## Confidentiality

All information relating to your representation of a client is confidential under the ethics rules.<sup>4</sup> Because it is confidential, information relating to the representation should not be disclosed

unless it falls within one of several specifically enumerated exceptions to the confidentiality rule.<sup>5</sup> One of the exceptions is to prove that services were rendered in an action to collect a fee.<sup>6</sup> In sharing confidential information, it's important to bear in mind that you should only be sharing information necessary to establish your claim. An attorney was recently admonished when his response to LawPay went beyond proof of services rendered, delving into confidential communications relating to the representation that had little to do with the fee dispute. Specifically, the response to LawPay—and a third party who had referred the client to the attorney—quoted and enclosed unredacted attorney-client communications relating to the merits of the claim the attorney was handling. In the lawyer's view, the information demonstrated the unrealistic expectations of the client. LawPay, in contrast, was basically looking for a copy of the signed fee agreement and proof of services rendered, such as invoices, which respondent did *not* provide.

**Lesson:** Tread carefully when disclosing information relating to your representation to third parties, making sure there is an exception that will cover your disclosure—and only disclose the information necessary to address the issue at hand.

## Misuse of "evidence"

Rule 4.4(a) provides:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.<sup>7</sup>

In a harassment restraining order proceeding, an attorney met with the opposing *pro se* party and advised the party that the lawyer intended to admit into evidence at the upcoming hearing a police report involving the *pro se* party's boyfriend (who was not the subject of the HRO). The report disclosed confidential medical information about the boyfriend unrelated to any issue in dispute in the HRO proceeding. The *pro se* party agreed to dismiss her HRO because she did not want the medical information, which was embarrassing, to be part of the court record.

During the ethics investigation, the attorney was unable to present credible arguments as to why the information was potentially admissible or relevant, leading to the conclusion that its use in negotiations had no substantial purpose other than to embarrass the *pro se* party sufficient to prompt the dismissal of the HRO. This matter also presented a close question as to whether the rule violation was isolated and non-serious, given that the attorney's action led directly to the dismissal of a pending proceeding.

**Lesson:** Make sure you have a meritorious, good faith basis for the means you are using to accomplish your client's goals.



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### Conclusion

Private discipline is just that—private.<sup>8</sup> With few exceptions, unless an attorney provides written authorization, the Office does not disclose private discipline to third parties. Fortunately, most attorneys who receive admonitions often have no further disciplinary issues. However, if an attorney engages in further misconduct, prior private discipline may be relevant in determining the appropriate level of discipline for subsequent conduct, and may be disclosed if future actions result in public proceedings.<sup>9</sup> ▲

### Notes

<sup>1</sup> Rule 8(d)(2), Rules of Lawyers Professional Responsibility (RLPR).

<sup>2</sup> Rule 4.2, Minnesota Rules of Professional Conduct (MRPC).

<sup>3</sup> *In re Charges of Unprofessional Conduct in Panel File No. 41755*, 912 N.W.2d 224 (Minn. 2018).

<sup>4</sup> Rule 1.6(a), MRPC, provides “a lawyer shall not knowingly reveal information relating to the representation of a client.”

<sup>5</sup> Rule 1.6(b), MRPC, lists 11 exceptions authorizing disclosure of confidential information.

<sup>6</sup> Rule 1.6(b)(8), MRPC, comment [9].

<sup>7</sup> Rule 4.4(a), MRPC.

<sup>8</sup> Rule 20(a), RLPR. Note, Rule 20 addresses in detail the circumstances under which the OLPR may disclose information to third parties and others involved in the lawyer regulation system.

<sup>9</sup> Rule 19(b)(4), RLPR.

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