



PROFESSIONAL RESPONSIBILITY

SUMMARY OF ADMONITIONS

BY EDWARD J. CLEARY

In any given year, roughly one half of all matters that result in professional discipline result in private dispositions issued by the Office of Lawyers Professional Responsibility (OLPR) and do not involve the Supreme Court. These are files which generally involve minor misconduct, albeit misconduct nonetheless. Private discipline consists of stipulated probations and admonitions. Admonitions are the least serious form of discipline and are issued for misconduct that is "isolated and nonserious," Rule 8(d)(2), Rules on Lawyers Professional Responsibility (RLPR). Stipulated probations involve more serious misconduct or multiple instances of misconduct, and are in lieu of pursuing charges of unprofessional conduct. Rule 8(d)(3), RLPR.

In the past year, approximately 100 lawyer disciplinary files were closed with the issuance of an admonition to the lawyer, a number that is consistent with the number of cases closed with that disposition in each of the last several years. As in prior years, many admonitions were issued for isolated instances of neglect or for failure to adequately communicate with a client in a matter. Other types of misconduct that resulted in an admonition being issued include improper advertising, failure to pay debts, solicitation of clients, and inappropriate communication with represented parties. Here are summaries of several of the admonitions issued in 2000.

RELEASE OF PROPERTY CONTRARY TO COURT ORDER

An attorney represented the husband in an acrimonious marital dissolution. The final decree made a very specific provision for review and duplication of the couple's family photographs. The wife was to deliver the original photographs to the attorney, who would then allow them to be reviewed by his client and those to be duplicated were to be marked. Before the husband had completed reviewing the photographs, the attorney terminated representation. The attorney released the original photographs to his client, contrary to the terms of the decree. Here the attorney had a duty to follow through on the terms of the final decree. The attorney violated Rule 8.4(d), Minnesota Rules of Professional Conduct (MRPC).

RECORDING AN INVALID POWER OF ATTORNEY

An attorney represented a bank in a loan transaction. Husband and wife were involved in dissolution of marriage proceedings. While the husband and wife were separated, an unknown third party forged the husband's signature on a statutory power of attorney (P/O/A). The wife applied for a loan, secured by a mortgage on the husband's property through a bank. The bank approved the loan application and scheduled the loan closing. The wife and the named attorney-in-fact attended the closing. The wife told the attorney for the bank that her husband was too ill to attend the closing, and had instead executed the P/O/A. The bank paid off the husband's existing mortgage and disbursed the remaining cash proceeds of approximately \$28,800 to the wife. Eventually, the husband's attorney learned of the mortgage transaction and advised the bank's attorney that the P/O/A was forged. Shortly thereafter, the title company notified the bank's attorney that it would not record the P/O/A because the notary's commission had expired, rendering the P/O/A facially invalid. A paralegal in the firm took steps to have the P/O/A notarized, possibly without the attorney's knowledge. The title company still refused to record the P/O/A. The bank's attorney then forwarded the documents directly to the county recorder's office for recording, despite the assertion that the husband's signature was forged and without conducting any further investigation, which the attorney should have done. The attorney's participation in recording the invalid P/O/A violated Rule 8.4(d), MRPC. The panel hearing the attorney's appeal of the admonition noted that the foreseeable consequences to the husband in having the forged document filed of record made the attorney's misconduct "arguably serious." There was no evidence, however, that the attorney participated in or knew of the intended fraudulent use of the P/O/A, and the attorney was new to the practice of law. These circumstances led the Office to issue an admonition, rather than seek public discipline.

FAILURE TO PAY ATTORNEY REGISTRATION FEE

An attorney failed to timely pay his attorney registration fee, resulting in his suspension.

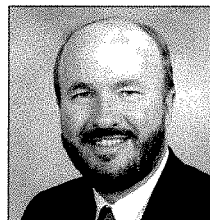
The attorney was advised by the Director's Office that continued practice while fee-suspended constituted unauthorized practice of law. After proof of payment was provided, the Director's Office closed the file without further action. A year later, the attorney again failed to timely pay his attorney registration fee, and again his license was suspended. The attorney appeared in court to try a visitation dispute. Written submissions were made after the trial was concluded. The judge discovered that the attorney was suspended, and the clerk's office returned the written submissions to the attorney. The attorney then paid his overdue attorney registration fee. In response to a Notice of Investigation from the Director's Office, the attorney stated that he was unaware that his license was suspended, and that because his practice is so busy, he often pays obligations late. The attorney's conduct in engaging in a pattern of failing to timely pay his attorney registration fee and continuing to practice law while fee suspended violated Rule 5.5, MRPC.

FAILURE TO DISCLOSE EXCULPATORY EVIDENCE TO THE GRAND JURY

An attorney for a governmental subdivision was involved in a grand jury proceeding concerning potential criminal charges against an individual. The attorney was asked whether there were any arrangements made with testifying witnesses. The attorney informed the jurors that no deals whatsoever had been made with witnesses. Later, the grand juror who had initially asked the question inquired further, and the attorney advised the jurors that at least one witness testified subject to use immunity. The attorney's conduct in advising that no deals had been made violated Rules 3.4(c) and 8.4(c), MRPC.

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and as a public defender for 20 years and is past president of the Ramsey County Bar Association. His book, *Beyond the Burning Cross*, won a national award in 1996.



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FAILURE TO ADVISE OPPOSING PARTY OF SETTLEMENT OFFER

The client in a breach of contract case directed the attorney to present a proposed settlement to the opposing party at a settlement conference. The attorney did not do so. In fact, the attorney advised the magistrate that discussions concerning settlement "would be premature and inadvisable." The Director issued an admonition for violation of Rule 1.2(a), and the attorney appealed. The Lawyers Board panel that heard the appeal affirmed 2-1. The attorney then appealed to the Supreme Court, which found that the panel did not abuse its discretion in concluding the attorney violated Rule 1.2, MRPC, but declined to adopt a bright-line rule that under all circumstances, Rule 1.2(a) places an absolute duty on an attorney to communicate an offer of settlement from the attorney's client to the opposing party. *In Re Panel File Number 99-5*, 607 N.W.2d 429 (Minn. 2000).

FAILURE TO PUT A RETAINER IN THE TRUST ACCOUNT

An attorney represented a client in a criminal matter. The client paid the stated retain-

er of \$12,500 in two installments, early in the representation. The attorney did not put the retainer payments into his trust account. Sometime during the representation the client received a retainer agreement from the attorney, signed by the attorney, which stated immediately above the signature line "Client understands that the retainer/fee of \$12,500 which is fully earned and non-refundable (1) will not be held in a trust account and (2) will not be refunded if client later chooses not to hire [attorney] or chooses to terminate [attorney's] services." The client never signed the retainer agreement and never agreed to a non-refundable fee. In addition, the client understood that the attorney would refund one-half of the retainer if the matter did not go to trial. The failure to deposit the retainer into the trust account, without a signed retainer agreement with the client, violated Rule 1.15, MRPC, and Lawyers Professional Responsibility Board Opinion 15.

USING A SUSPENDED ATTORNEY'S NAME AS OFFICE NAME

The Minnesota Supreme Court suspended an attorney from practice and

required him to petition for reinstatement pursuant to Rule 18, RLPR. After the suspension order was issued, another attorney purchased the suspended attorney's interest in his law office, a professional association. The attorney practiced under the name of the suspended attorney, P.A., and employed the suspended attorney as office administrator. Despite notification from the Director's Office that he was in violation of Rule 7.5(a), MRPC, the attorney declined to discontinue use of the designation. The attorney's continued use of the suspended attorney's name as a firm name violated Rule 7.5(a), MRPC.

LOANS FROM A CLIENT

An attorney represented a client in a personal injury matter. During the representation, the client lent funds to the attorney's wife, who acted as his paralegal, and the paralegal lent funds to the client. None of the loan transactions were reduced to writing, and the attorney did not advise the client to seek the advice of other counsel regarding the loan transactions. The loans were repaid either during



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or at the conclusion of representation. Entering into business (loan) transactions with the client violated Rules 1.8(a) and (e), MRPC.

FAILURE TO PROPERLY ADVISE A TRIBUNAL

An attorney represented a party seeking to be appointed special administrator of his grandmother's estate. Before seeking the appointment, the attorney asked his client if he knew of any will other than the July 1999 will he was asserting as the final will. The client advised the attorney that another heir had said there was a new testament, but had refused to show it to him. Once the client had advised the attorney of this alleged new will, the attorney was under an obligation to inquire before going forward. Nevertheless, the attorney took no further action to determine whether a new will in fact existed. The attorney then met with a judge and requested an *ex parte* order appointing the client as special administrator for his grandmother's estate. The petition for Formal Appointment of Executor, which the attorney prepared, said that the petitioner was unaware of any later will. The attorney did not advise the judge that he was aware of the possible existence of another will. After the meeting with the judge, the attorney contacted the law firm that drafted the July 1999 will, and learned that it had been revoked by a subsequent will. The attorney's failure to advise the judge in an *ex parte* proceeding of all material facts violated Rules 3.3(d) and 8.4(d), MRPC.

* * * * *

These are just a few examples of admonitions issued in 2000. It is important to keep in mind that a pattern of otherwise "isolated and non-serious conduct" can lead to other dispositions, including private probation and, in some instances, public discipline. Do not view a "small" ethical transgression as a "cost of doing business." Small matters have a way of becoming large problems. If you think you may be facing an ethical dilemma, you probably are being confronted by such a problem. Err on the side of caution and call the OLPR before acting. An advisory opinion attorney is available at the office during business hours to give advisory opinions to attorneys who call with questions about their *own prospective* conduct. The phone numbers are (651) 296-3952 and (800) 657-3601.

The author would like to thank Candice Hojan of the OLPR for her assistance in preparing this article.

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BAR GEARS UP FOR LEGAL HOLIDAY JUNE 20-22

You could argue — under oath, if need be — that this year's MSBA convention will be one of the best ever. We're certainly doing our part to build the case:

EXPERT TESTIMONY

Leading politicians, journalists, and educators will be on hand to provide their take on issues facing the profession and the public. Among the headliners:

Julian Bond, civil rights activist, Georgia legislator, professor, and chair of the NAACP.

■ Minnesota Gov. Jesse Ventura (invited).

David Gergen, journalist, author, and advisor to three U.S. presidents.

■ University of Minnesota President Mark Yudof.

William C. Moyers, journalist, authority on national drug policy, and current president of the Johnson Institute in St. Paul.

IN CHAMBERS

Here's your chance to help set policy for the coming year. All MSBA members registered for the convention will have a seat at the General Assembly. Speak up on the issues, and cast your vote.

EXTENSIVE DISCOVERY

Sit back and get comfortable while we present the facts at a series of presentations and annual meetings.

Check our website or your printed program for the full lineup of Minnesota CLE courses, as well as programs sponsored by commit-

tees, sections, and law-related organizations. It's a long list, including topics as varied as e-commerce, forensics, racial profiling, law practice management, elder law, and cross examination.

ATTORNEY PRIVILEGE

When was the last time you worked some fun into your workday? Join us at the convention, and knock elbows with colleagues at the annual Welcome BBQ and Presidents' Reception.

CHANGE IN VENUE

Duluth has hosted the past three annual conventions — and while many of us have left our hearts there, we're moving to St. Paul for this year's annual bash. Join us at the city's new RiverCentre complex, an easy walk from the river and the heart of downtown.

PRETRIAL PUBLICITY

Look out the front door at RiverCentre, and you'll see the new Science Museum. Look out the back door, and you'll see the Ordway Theatre. And that's just the beginning of the reasons to head for St. Paul this summer. Follow the links from our website for more ideas.

ELECTRONIC FILINGS

Click on the "Convention" links from the Bar's website at www.mnbar.org for the full lineup of events. We're adding new information each week, along with a screen allowing you to register online (if you prefer, you can also print out and complete a form). Printed convention programs will be mailed in early May.

FUNDING FOR COURTS, LEGAL AID LEAD LEGISLATIVE AGENDA

As budgetary battles took shape at the Legislature in St. Paul early in March, MSBA worked on several fronts to promote the budget for the courts, including increased funding for civil legal services, and to oppose Gov. Ventura's proposals for a sales tax on services.

The courts budget includes funds to improve compensation for judges and law clerks and also monies for civil legal services.

With respect to civil legal services, MSBA seeks to increase the state-appropriated funding base by \$2 million from \$6.4 to \$8.4 million per year. This is the level recommended several years ago by the Joint Legal Services Access & Funding

Committee, a bipartisan group of legislators, judges, lawyers and citizens, appointed by the Minnesota Supreme Court at the direction of the Legislature. The state funding base has not increased since 1997.

The proposed Judiciary budget calls for substantial increases to maintain the quality of the Minnesota judiciary and to assure access to justice. According to a letter sent to members by MSBA President Kent Gernander, "Increased costs are being driven by higher caseloads, mandated services, and transfers of fiscal responsibility from local governments to the state. The courts need resources and support."

Some of the appropriations

requested would improve compensation of judges, law clerks and other staff, pay added costs of guardians ad litem for children, interpreters, psychiatric exams, and paupers' petitions, and provide added funds for public defense and civil legal services.

Gernander called on all members of the MSBA to contact their legislators in support of the courts' budget proposals.

On another front, MSBA has joined forces with other Minnesota trade and professional organizations to form MN-STOP, the Minnesota Sales Tax Opposition Partnership.

At his State of the State speech in early January, Gov. Ventura proposed a major reshaping of Minnesota's sales

tax structure. The tax would be lowered from 6.5 percent to 6 percent, but would be broadened to include currently exempt professional services - including legal services. The MN-STOP partners share a common goal in opposing the proposed extension of the sales tax to services and are discussing formulation of a common position on the issue.

MSBA President Kent Gernander devoted his February 2001 "President's Page" column to the issue of taxing legal services, listing ten reasons for opposing the tax. His remarks, together with position statements from other MN-STOP partners, are available for review on the Web at <http://www.mnstop.org>



Ramsey County Chief Judge Lawrence Cohen (second from left) was among the attendees at a Feb. 22 reception for law school students. The "Evening with the Bar" event drew some 65 students from Minnesota law schools.

ALL THE NEWS THAT'S FIT TO DOWNLOAD

More than 8,000 MSBA members have begun receiving a weekly electronic bulletin that compiles a week's worth of legal news into a web-based digest with links to newspapers, magazines, broadcast networks and journals worldwide.

"We developed Legal News Digest because we realize most of our members don't have time to sift through hundreds of sources to find the news they need to stay current on the legal profession," said Jayne Brask, MSBA membership director. "We began the service last

year to keep bar leaders informed and we got such a good response, we decided to offer it to all members."

The MSBA now sends a weekly message to all email addresses in our database. The email includes a link and a brief summary of the hot issues.

If you're not among the 8,000 members in our database, and would like to receive Legal News Digest, contact Pat Everheart, LND editor, at p-everheart@statebar.gen.mn.us. You can view LND at www2.mnbar.org/digest.

MEADOW CREEK IS STATE MOCK TRIAL CHAMP (AGAIN)

Defending champ Meadow Creek Christian School of Andover defeated Minneapolis South High School in the state Mock Trial competition in St. Cloud Wednesday. Last year Meadow Creek defeated South in the final.

Meadow Creek will represent Minnesota at the national championship in Omaha in May. Last year, the Meadow Creek won the state competition and placed 11th out of 42 in the National Mock Trial Championship in Columbia, S.C.

Teams from 165 Minnesota schools competed during regional trials beginning in January.

In the Mock Trial Program, which is in its 15th season, students take on the roles of lawyers and witnesses during the trials. Each team prepares

its case with the help of a teacher-coach and a volunteer attorney-coach. More than 600 lawyers and judges statewide volunteered this year. This year's case involves a boating death that resulted from underage drinking at a post-prom party.

The program is sponsored by the Minnesota State Bar Association.

For details on the state tournament and a list of the schools competing, visit <http://www2.mnbar.org/mocktrial/state/overview.htm>

For information on the Mock Trial Program, go here: <http://www2.mnbar.org/mocktrial/index.htm>

For details on the National Championship in Omaha, go here: <http://www.national-mocktrial.org/>

LAWYER POPULATION UP IN 2001

The number of active practicing lawyers in Minnesota increased from 18,793 to 20,183 in the period 2000-2001, according to a Lawyer Population Study recently released by the American Bar Association.

The 7 percent increase places Minnesota near the top among the 50 states in terms of the rate at which its lawyer

population is growing.

Leading the pack was Missouri, which recorded a 24 percent increase over the two years, while trailing was Colorado, which experienced a 14 percent drop in its lawyer population. Overall, 44 states registered increases and six states registered declines in their numbers of active, resident attorneys.

MSBA JUDICIAL ENDORSEMENT PROCESS FAULTED

Late in February the Minnesota State Bar Association was ordered to establish and register a political committee and pay a \$500 late filing fee in connection with its year 2000 move to endorse candidates for state appellate courts. The matter was also referred to the Ramsey County Attorney's office as required by the statute, Minn. Stat. Chapter 10A.

Under terms of Minn. Stat. 10A, organizations making independent expenditures on behalf of candidates are required to have established a political committee or fund before making expenditures and must register with the Campaign Finance and Public Disclosure Board no later than 14 days after making expenditures in excess of \$100. Although the MSBA Executive Committee reviewed

arrangements for the plebiscite and endorsement process in light of the Minnesota Fair Campaign Practices Act and decided on that basis to go forward, at no time did the MSBA consider whether such endorsements could be construed as violating any provisions of Minn. Stat. Chapter 10A.

A complaint alleging violation of provisions of the statute was filed against the MSBA by Greg Wersal, an unsuccessful candidate for the Supreme Court in the 2000 election.

In response to issuance of the findings and order, MSBA President Kent Gernander said, "We've reviewed the findings of the Campaign Finance and Public Disclosure Board and intend to comply with its order. We respect the law and did not intentionally violate it."