By Martin Cole

To Protect and Deter

"To Serve and Protect" is the well-known motto of police forces everywhere. While there isn't an official, comparable motto for lawyer discipline agencies, many courts have supplied one, even if unwittingly. "To Protect and Deter" could be so proclaimed, since courts have often declared that the purposes of lawyer discipline are protection of the public and the courts [from lawyer misconduct] and to deter similar misconduct [of the disciplined lawyer and of the bar in general]. For example, one of the Minnesota Supreme Court's most recent pronouncements of this axiom was in June of this year:

> In imposing discipline, our purpose is not to punish the attorney, but rather to protect the public, to protect the judicial system, and to deter future misconduct by the disciplined attorney as well as by other attorneys.[1]

Almost every state's highest disciplinary authority[2] has declared their state's policy to be some close variation of this theme.

Protect ...

Protecting the judicial system from misconduct and from lawyers who commit misconduct is certainly a worthy purpose for lawyer discipline. The adversary system, along with various public records (real estate, probate, etc.), must be able to depend upon the honesty, competence, and timeliness of lawyers. Disbarment and suspension from practice of a lawyer certainly protects the judiciary from that lawyer's conduct. The courts, of course, can play a vital role in this task themselves through the imposition of sanctions, contempt proceedings, and less formal measures such as oral warnings.

"Protection of the public" intuitively seems of equal importance. The issue is defining exactly what this phrase means. Obviously a suspended or disbarred lawyer should not continue to practice law and the intent is thus to protect the public directly from these individuals. Disbarred and suspended lawyers are also supposed to notify courts, opposing counsel, and clients of their discipline and to return client files and refund any unearned fees received.[3] These requirements serve both of the protection functions of public discipline.

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Beyond regulating such direct impact, protecting the public includes giving reasonable notice to the public about lawyers who commit serious misconduct. When a public petition is filed seeking suspension or disbarment of a lawyer, Lawyers Board policy requires the Director's Office to issue a press release. Another press release is issued upon receipt of all public discipline decisions, which are available from the court itself as well. The LPRB/OLPR website[4] contains a lawyer-search service by which the public (or other lawyers) can ascertain whether a lawyer has been publicly disciplined, with links to the actual court decision. The site also offers an up-to-date report on the status of the attorney's license covering payment of lawyer registration fees and CLE compliance. There is a separate listing of all currently suspended and disbarred lawyers. We can debate the actual effectiveness of these measures, which is hard to quantify but, at a minimum, the public can easily access information concerning any lawyer they are considering hiring.

... and Deter

The deterrence of others is often analyzed from two differing theoretical approaches. One is that deterrence is accomplished best by imposing the highest level of discipline in all instances—that is, if you commit a certain act of misconduct, let's say misappropriation of client funds, then disbarment is inherently more likely to deter others from committing the same misconduct than suspension, suspension more than reprimand, etc. There is indeed a neat logic to this analysis. It is a major premise behind deterrence theory in the criminal law—that the knowledge of certain, serious sanctions if caught will keep others from committing similar acts. This line of reasoning argues for severe discipline in all cases even though it contains echoes of punishment.

Another theoretical approach to analyzing deterrence posits that any level of sanction for a particular act of misconduct, for our purposes meaning at least any public discipline, has the same deterrence value as any other level of discipline. Thus, for example, in the legal profession, where a reputation is highly valued, the risk of being publicly disciplined at all should serve as sufficient deterrent, at least for any lawyer capable of being deterred. With either theory of deterrence, it is impossible to conduct a meaningful study of how many lawyers did not commit an act of misconduct, and why not.

Deterrence of the individual lawyer is somewhat more susceptible to empirical research, however. Attached as a

Minnesota Lawyers Publicly Disciplined *as of 8/5/10

YEAR	Disbarment	Suspension	Probation	Reprimand	TOTAL
2000	6	19	10	2	37
2001	3	15	9	2	29
2002	4	18	6	1	29
2003	6	14	4	0	24
2004	5	10	3	1	19
2005	6	22	6	1	35
2006	8	26	9	5	48
2007	5	21	5	0	31
2008	4	20	11	2	37
2009	5	23	4	6	38
2010*	4	7	5	3	19
TOTAL	56	195	72	23	346

sidebar is a chart showing the number of instances of public discipline in Minnesota since the beginning of 2000. There have been 346 public discipline decisions issued by the Minnesota Supreme Court as of August 5, 2010,[5] although since this figure includes repeat offenders, the number of lawyers publicly disciplined in this period is fewer. What does a review of these cases reveal about public discipline as a deterrent?

Of the 56 lawyers disbarred since 2000, only 15 had been publicly disciplined previously. Now, some disbarments are reciprocal discipline from another jurisdiction and some are based upon criminal convictions of attorneys not directly related to the practice of law, such that the attorney may have generated few prior complaints. Even so, it was somewhat surprising to discover that so many disbarred attorneys had not been publicly disciplined before. Also of interest was that of the 15 disbarred attorneys who had been publicly disciplined before, 14 had been suspended and several of them reinstated before committing additional serious misconduct. For those 14 attorneys, the deterrence value of their earlier discipline seems to have been minimal.

At the other end of the public discipline spectrum from disbarment are public reprimands or reprimands with probation. Attorneys who received reprimands or probation in 2000-2005 were analyzed to see if the lawyer had committed further serious misconduct in the five to ten years subsequent, *i.e.*, whether being publicly disciplined at the lowest public level has so far deterred them from further misconduct, as the above theory would have us believe. Nineteen of these 45 individuals already have been publicly disciplined again. This number does not include any of the lawyers who have been privately disciplined since their public reprimand and, of course, in some instances it may be too early to tell.

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Conclusion

Public discipline has a major impact on an attorney, but that is not its purpose. Protecting the courts and the public by preventing some lawyers from practicing (for some period of time) and by giving permanent notice to the public of the lawyer's public disciplinary history are part of public discipline's purpose. Public discipline cases also have a deterrent impact on other lawyers, who learn what violations of the disciplinary rules can result in public discipline, and on most of the lawyers receiving the discipline. ▲

Notes

[1] *In re Waite*, 782 N.W.2d 820, 827 (Minn. 2010).

[2] In the majority of states, the state's supreme court imposes public discipline as part of its inherent authority to regulate the practice of law. In some mandatory bar states, however, the court has delegated final disciplinary authority to the bar association, subject only to discretionary review by the court.

[3] Rule 26, Rules on Lawyers Professional Responsibility.

[4] Our new web address is *http://lprb.mncourts.gov*.

[5] Only the Minnesota Supreme Court can impose public discipline, either following a contested disciplinary proceeding or upon a stipulation filed by the director and the attorney in which they jointly recommend a particular level of discipline. Public discipline can be disbarment, suspension, reprimand, or reprimand with probation.

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