One of the most challenging and occasionally distressing aspects of regulating lawyer discipline is the task of deciding how to discipline one lawyer after another for similar misconduct in slightly different circumstances. Such cases often involve belligerent, out-of-control lawyers who have been reported to the Disciplinary Board and who have failed to respond to the allegations. These cases provide the ultimate test for the Discipline Committee and for the bar association's ability to maintain discipline as a viable tool for controlling the legal profession.

Disciplinary violations must either be admitted or proven by clear and convincing evidence. In a surprising large number of cases, however, the principal question is whether the lawyer is willing to admit to the misconduct. These cases present a number of difficult choices for the Discipline Committee. The lawyer's denial of the charges, the evidence, and the available sanctions must be considered in determining the appropriate discipline.

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maintain trust account records that resulted in the negligent misappropriation of client funds be the same as a suspension for an improper business trans- action with a client by an attorney with prior discipline? Can we prospectively determine into what discipline level less common misconduct should be skated?

Obviously, the answer is not simple to articulate. The Director's Office and the Court may look to other jurisdictions to determine whether like cases have been decided, keeping in mind that other states may be harsher or more lenient than Minnesota in their disciplinary approach. Authoritative texts such as the Restatement Third: The Law Governing Lawyers (1988) may be consulted.

There is always some less-than-perfect comparison and contrast required before reaching a disposition in lawyer discipline cases.

The legal literature may be surveyed. Recalling the broad range of conduct that may result in a reprimand or admonition, this "apples to oranges" comparison may indeed seem impossible. Ultimately some subjective comparisons must be made by the Court or disciplinary counsel.

One bright line factor that should be expected is whether the conduct involved dishonesty. If there is an element of fraud, misrepresentation, or dishonesty involved in a particular type of misconduct, or if it involves criminal statutes, then dishonesty or supervision is far more likely to be sought. Unless there is substantial harm involved, however, deficiencies of lawyer performance in areas such as competence or diligence, though not unimportant by any means, usually must be found to occur over multiple matters before a lawyer will lose his or her license.

**Final Touches**

Once the appropriate level of discipline is determined, the Court considers aggravating and mitigating circumstances, and so must the Director's Office in making recommendations. The most common aggravating factor in lawyer discipline cases is an attorney's prior disciplinary history, especially if for conduct that is similar or recent. Noncooperation with the disciplinary process is also an important aggravating factor, and if sufficiently egregious may be an independent basis for discipline.

A host of factors have been considered in mitigation by the Court, including chemical dependency or psychological disorders that caused the particular misconduct and have been subject to successful treatment. Other factors considered in mitigation include remorse, restitution where appropriate, exceptional personal difficulties, otherwise good character, and civic or professional activities. Just as noncooperation can be considered aggravating, cooperation with the disciplinary investigation occasionally has been considered in mitigation. Since cooperation is required under both the Rules of Professional Conduct and the Rules on Lawyer Disciplinary Responsibility, however, the Director's Office generally argues that this factor is of little weight, unless it is exceptional, cooperation when an attorney self-reports his misconduct when otherwise would not have come to light.

The application of these "human" factors in aggravation and mitigation ultimately is what makes comparing the outcomes of lawyer discipline cases seem like comparing apples to oranges. Finding a prior decision for similar misconduct containing similar aggravating and mitigating factors is rare. There is always some less-than-perfect comparison and contrast required before reaching a disposition in lawyer discipline cases. Without some identifiable framework in which to analyze matters, however, that task would be almost impossible. The Director's Office will use the basic framework described above to seek consistency in its recommendations.