PRIORITY DISCIPLINE AGGRAVATES CURRENT MISCONDUCT

BY MARTIN A. COLE

Recently, the Director's Office received a report and investigation report from a district ethics committee recommending that the Director issue an admonition to the attorney based upon the attorney's neglect of his client's matter and failure to communicate with the client. Admonitions may be issued by the Director or by a Lawyering Board Panel for isolated and nonserious violations of the Minnesota Rules of Professional Conduct. Rule 3.1(b), Rules on Lawyers Professional Responsibility (1989).

The committee's recommendation went further, however, to state that an admonition was recommended unless the attorney had a history of prior discipline, especially for similar misconduct. If such prior discipline existed, the committee recommended that the Director file charge of unprofessional conduct and seek public discipline. The lawyer in fact had five prior nonpublic discipline cases spread out over several years, three of which involved similar misconduct. Charges are now pending.

How much should an attorney's disciplinary history affect the disposition of a current complaint against the lawyer? The rules state that an attorney's prior discipline is admissible in subsequent disciplinary proceedings, since it is relevant in determining the appropriate level of discipline. Rule 19.31(b), makes an attorney's prior discipline admissible to determine the appropriate level of discipline, but not admissible to prove that a violation occurred or to lay the lawyer's character.

Prior discipline cases are generally inadmissible, but there are exceptions in some situations. prior discipline cases are not admissible to establish a pattern of related conduct or of the particular matter was summarily dismissed without investigation. Note, however, that dismissed complaints, whether dismissed after investigation or summarily dismissed, are completely expunged three years after the dismissal, except upon specific application to the Lawyers Board for retention. Rule 20.1(c), 1978. This process limits the subsequent use of dismissed complaints even where otherwise admissible.

SUPREME COURT STANDARDS

The Minnesota Supreme Court has repeatedly set out the legal standards it applies for considering an attorney's prior discipline: "In determining the appropriate discipline, we carefully consider the nature of the misconduct; the cumulative weight of the disciplinary violations; the harm to the public; and the harm to the legal profession."

"Once misconduct is established, aggravating and mitigating factors should be considered in determining the appropriate discipline." "Previous misconduct of the same type is considered an aggravating factor when determining the appropriate discipline."

"The discipline to be imposed must be reviewed in light of the earlier misconduct."

"Why? Because, 'if prior discipline, this court expects a renewed commitment to professional behavior by attorneys.'"

The Court made these points even more clear in the fairly recent case, in which the court had found that an attorney's previous misconduct was not an aggravating factor, and indeed that the attorney was on disciplinary probation for similar misconduct mitigated his current misconduct. The Court found these positions to be clearly erroneous and noted that prior discipline is always an aggravating factor in determining the level of discipline.

"In addition, the Supreme Court recently rejected a stipulation for a six-month suspension submitted by the Director and the respondent attorney, largely because of the attorney's disciplinary history. Rather than just increasing the recommended discipline, the Court offered the parties an opportunity to present reasons why more severe discipline should not be imposed. The Court ultimately accepted the recommended discipline, but only after briefing and oral argument had persuaded them it was appropriate."

NOT AN EASY DECISION

Just how much prior discipline aggravates current misconduct varies and is not always an easy decision. As the prior discipline, level, prior discipline, or even the lack of prior discipline, should not affect the result when the lawyer has misappropriated client funds or convicted of other serious misconducts involving dishonesty, disbarment should evolve either way. Prior discipline may be the deciding factor in some cases involving serious misconduct; however, when the issue is long a suspension is warranted or whether probation or short suspension is more appropriate. Obviously other factors such as remorse, actions taken to remedy the harm to the client or courts, or lack of cooperation will also be considered, but prior discipline may be the most important factor that the Court will consider.

When the court misconduct is less serious, the decision becomes more challenging. In the case of the admonition-level misconduct identified at the beginning of this column, for example, if the attorney had one prior admonition ten years ago for unrelated conduct, it would count for little if anything in aggravation. Two admonitions for similar misconduct in the recent past, however, must be considered in determining whether supervised probation (public or private) is more appropriate to protect the public than another admonition, since probation likely will include a supervisor who can help the attorney implement procedures to avoid similar complaints in the future. If the attorney has a more extensive or recent pattern of private misconduct, as the attorney did in that instance, then a new finding of misconduct likely requires the Director to seek public discipline.

A more challenging situation the Director's Office faces when considering the effect of an attorney's prior discipline history is when, for example, the attorney has received two undisclosed private dispositions over a several-year period, then commits a new, perhaps again unrelated, but also again non-serious rule violation. When is the new complaint the one proverbial "straw" that "breaks the camel's back"? Can the Director issue another private admonition to such a non-attorney? For what purpose? But is public discipline fair, despite the attorney's disciplinary record, when the new violation, even if undiscovered, is reasonably minor? At what point does the public have a right to know?

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know about the risk that a particular attorney present. Even multiple private disciplines, at least until an attorney is subsequently publicly disciplined, are just that—private. If a prospective client contacts the discipline. If contacted, only public discipline may be disclosed. Rule 20(f)(2)(b).

Another difficult decision arises when an attorney who has previously been publicly disciplined commits new misconduct, but of a non-serious nature. Must the attorney be automatically publicly disciplined again, or can revision of discipline be imposed? Although such a scenario has not had to be addressed recently, it would appear certain that a previously publicly disciplined lawyer is unlikely to receive more than one private discipline before further public discipline will be sought.

CONCLUSION

Obviously the best way to avoid any potential for receiving a simple admonition usually is not commit misconduct, so that no such disciplinary history will ever exist. Nevertheless, the impact of receiving a single admonition usually is not without its own merits. In particular, a judge receiving such a discipline may require a new or less serious admonishment. An attorney who has accumulated two or more private discipline, however, should seriously review no further or their professional conduct to avoid additional misconduct. As future private discipline may no longer be available, and even minor infractions in such a situation may soon result in public discipline.

NOTES

1. In re Jones, 651 N.W.2d 209, 211 (Minn. 1999).
2. In re Polk, 453 N.W.2d 345, 348 (Minn. 1990).
3. In re Cutting, 671 N.W.2d 173, 175 (Minn. 2004).
4. In re Theilen, 622 N.W.2d 863, 867 (Minn. 1999).
5. In re Jessen, 542 N.W.2d 627, 632 (Minn. 1995).
6. In re Afflecke, 660 N.W.2d 791, 796 (Minn. 2003) (per curiam) followed by additional two years of probation imposed, rather than merely extending probation as recommended by referee).
8. See e.g. In re Mitchell, 369 N.W.2d 273 (Minn. 1985), in which the attorney’s disciplinary record is discussed, rather than merely extending probation as recommended by referee).