THE ROLE OF PROBATION IN THE DISCIPLINARY SYSTEM

BY BETTY M. SHAW

As the Minnesota Supreme Court has repeatedly said, the purpose of attorney discipline is not to punish the attorney but to protect the public, the courts, and the administration of justice.[1] Probation is one of the tools used by the discipline system to protect the public while attempting to educate the attorney and correct the attorney's misconduct. There are essentially three ways that an attorney may be placed on probation. An attorney may agree to a private probation under Rule 8(c)(3), Rules on Lawyers Professional Responsibility (RLPR). He or she may be placed on probation as a disciplinary sanction by the Court pursuant to Rule 15(a)(4), RLPR, or placed on probation following reinstatement from suspension or disbarment pursuant to Rule 18, RLPR.

Since 1992, about 290 attorneys have either stipulated to private probation or have been placed on probation by the Minnesota Supreme Court. While there are general conditions that apply to all probations such as cooperation with the discipline system and compliance with the Rules of Professional Conduct, the other terms of the probation vary according to the individual attorney's circumstances and violations. About half of the probations are supervised by volunteer attorneys who report regularly to the Director's Office. The remaining probations are supervised by the Director's Office. Volunteer supervisors, who verify in advance that they will notify the Director's Office when a probationer is not in compliance, are most often used when the probationer's misconduct involved neglect, lack of communication, or other client-related misconduct. Neglect and inadequate communication remain the number one client complaint and are involved in more than a third of public and private probations. Other client-related misconduct resulting in probations includes problems with the termination of a representation and misrepresentations to clients about the status of a matter. In the last five years improper fee practices have been the basis for numerous private probations.

Volunteer supervisors routinely review probationers' office procedures and monthly file inventories and a random sample of their active files to help the attorney and to monitor the attorney's compliance with the terms of the probation. Sometimes volunteer supervisors are used to monitor and review retainer agreements and fee practices and to monitor caseloads and practice restrictions. Many of these generous volunteers are first recruited by the person who is on probation and then go on to supervise other attorneys they do not know.

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Trust account books and records violations continue to be involved in a large number of probations. The paralegals in the Director's Office perform regular books and records reviews for probationers who have had trust account violations. They also monitor tax filing for those with tax noncompliance issues. The Director's Office monitors compliance with psychological counseling requirements, aa attendance, and random urinalysis regimens.

During the ten-year period from 1992-2001, about 32 attorneys were placed on probation each year (an average of approximately 20 private probations and 12 public probations). New private probations ranged from a low of 13 in 1999 to a high of 24 in 1994 and 1999. The number of new public probations ranged from a low of 9 in 1992 to a high of 16 in 1993.

Balancing the discipline system's primary purpose of protecting the public from attorney misconduct with the effort to assist attorneys as they attempt to make amends for their misconduct and continue their chosen career is sometimes a difficult and delicate challenge. Seventy-five percent of the 290 attorneys placed on probation since 1992 have had no public discipline or further probations. In these instances, it appears that the dual purposes of probation were well-served. Certainly a 75 percent success rate indicates that probation can be an effective tool.

While a large majority of probations succeed, a significant number do not. Between 1992 and 2002, 73 attorneys placed on probation received additional probation(s) or public discipline. Eight were disbarred, 39 were suspended, three were placed on disability inactive status and the remainder had one or more additional private or public probations. For the clients harmed by the subsequent misconduct of those attorneys, probation cannot be seen as a panacea.

The number of new probations with a mental health component has increased in recent years from 9.9 percent in 1999 to 12.2 percent in 2000 to 22.1 percent in 2001. For many attorneys struggling with chemical or mental health problems, probation can be a career-saving resolution. Among the many success stories are attorneys whose problems were identified and addressed while only relatively minor misconduct had occurred. They completed private probation and have had no further disciplinary problems. In two or three instances the Director's Office has extended private probations in order to give the attorney more time to complete probation without more serious discipline. Despite the discipline system's best efforts, some probations involving chemical dependency and mental health issues do not succeed. Recently chemical dependency and/or mental health issues have been involved in many probation revocations or extensions.[2] At least 25 of the 73 attorneys

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(34 percent) who had subsequent significant additional discipline after their first probation, had mental health or chemical dependency issues.[3] In instances where the attorneys on probation stop cooperating or offer only "lip service" cooperation, the Director's Office will seek revocation of the probation even before additional client complaints are received.[4] In other instances, the Director's Office or the volunteer supervisor may not immediately know that the probation is at risk. On a number of occasions, the attorney stopped attending therapy sessions and problems recurred. Because volunteer supervisors cannot know on a daily basis whether there has been a change in behavior or office obligations are going unmet, and because the supervisor's report and psychological reports are usually received on a quarterly basis, it may be difficult to detect what might have been early warning indicators in a probation at risk. Wherever possible, consistent with public protection, the Director's Office works with these attorneys to try to make the probation succeed.

At present the attorney discipline system's probation function can serve only as a loosely woven safety net. There are not sufficient staff and volunteer resources to provide the close monitoring some attorneys on probation seem to require. Even where the Director's Office has set up special probations with multiple supervisors to assist an attorney on probation, success cannot always be assured.[5]

Problem prevention is the best tool of all for any disciplinary system. Attorneys who are unsure about whether their proposed conduct complies with the Rules of Professional Conduct can receive a telephone advisory opinion from the Director's Office at (651) 296-3952 or (800) 657-3601. If an attorney is feeling stressed and overwhelmed and concerned about practice problems, or if attorneys or judges see a colleague faltering, there are now resources available to call. The new Lawyer Assistance Program administered by Lawyers Concerned for Lawyers can be reached in the metro area at (651) 646-5590 and at (866) 525-6466 in greater Minnesota. □

NOTES

1. In re Serstock, *316 N.W.2d 559, 561 (Minn. 1982).*
2. *Revocations occur where additional misconduct results in suspension, disbarment or transfer to disability status. Extensions occur when additional misconduct results in a longer period of public and/or private probation. Private probations are extended by stipulation. Public probations are imposed and/or extended by Supreme Court order.*
3. *It cannot be said with certainty that the chemical dependency or mental health issue caused the new misconduct in every instance.*
4. In re Danielson, *620 N.W.2d 718 (Minn. 2001)* and In re Hoedeman, *620 N.W.2d 714 (Minn. 2001).*
5. In re Graham, *609 N.W.2d 894, 902 (Minn. 2000).*