

Year in Review: Opinions, Rules and Statistics

The past year has been significant for the lawyer discipline and regulation system in Minnesota, and not because a new director was appointed approximately seven months ago. Several important lawyer disciplinary decisions were issued by the Supreme Court this calendar year, and changes to rules affecting lawyers occurred. It also appears that the number of complaints received has increased for the first time in several years.

As of November 15, 2006, seven attorneys have been disbarred this year: William Pugh, Martha Schmitt, Richard Day, Peter Mayrand, Willard Wentzel, Brian Peterson and Eric DeRycke.¹ In addition, 26 lawyers have been suspended so far this year, four of whose suspensions were stayed, and ten lawyers have been publicly reprimanded, seven of whom also are undergoing a period of probation.

The reasons for lawyers being disbarred are varied and instructive as to the nature of lawyer misconduct and discipline proceedings. While there is no one best route to disbarment, misuse of client money remains the most common. For example, Pugh and Schmitt were both criminally convicted of theft; both had been temporarily suspended from the practice of law while those criminal proceedings were pending, and now are disbarred. Day and Mayrand had been suspended after the Director's Office was unable to locate them for service of the

petition for disciplinary action.² Both faced allegations of misappropriation and other misconduct and, being in default and with the allegations deemed admitted, were disbarred. Wentzel also was found to have intentionally misappropriated client funds; his misconduct outweighed his claims of substantial mitigation. Peterson was found to have

taken advantage of an elderly woman whose funds he controlled, with misconduct including misappropriation and a criminal sales tax conviction. In addition, some of Peterson's actions occurred while he already was on disciplinary suspension. DeRycke had trust account overdrafts, neglected client matters, failed to cooperate in the disciplinary process and had a lengthy public disciplinary history.

Other Opinions

The Court issued several other significant lawyer discipline decisions this past year. In contrast to the *Wentzel* decision referred to above, the Court suspended Edward Rooney for 18 months for intentional misappropriation based upon Rooney establishing several mitigating circumstances, perhaps most importantly that he made full restitution even before the director first learned of overdrafts in Rooney's trust account and made inquiry. Daniel Moulton was recently suspended for 90 days for failing to timely file and pay employer withholding taxes. There often remains confusion concerning tax misconduct. Failure to file individual income tax returns is misconduct; failure to pay income taxes is not.³ Both failure to file and failure to pay are misconduct as to employer withholding (as it is other people's money involved). In the *Moulton* opinion the Court also stated that because cooperation with disciplinary proceedings is required under the rules,⁴ it should not be considered in mitigation.

Some other important decisions by the Court this year did not result in discipline of the lawyer. Sharon Ramirez was reinstated conditionally to the practice of law subject to passage of the bar exam. Ramirez was disbarred in 1997 for misappropriation that also resulted in her criminal conviction. She was the second disbarred attorney reinstated in the past two years, a result that was exceedingly rare before that. In addition, eight lawyers were reinstated from suspension this past year.

Finally, in what is known as *In re Panel File 20783*, the Court upheld a request for information by the director. The case involves a judicial candidate's statements about an incumbent judge, and whether these statements were made in reckless disregard for the truth. The

Court held that the Director's Office could require the attorney to reveal his sources for the information. A district court had earlier ruled otherwise.⁵ The Supreme Court also set out appropriate standards for the district court to apply to such matters in future.

New Rules

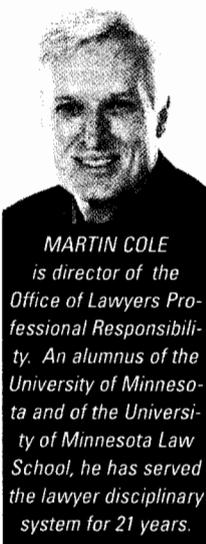
The Rules for Attorney Registration are not a direct part of the lawyer discipline system. They do affect Minnesota attorneys, however, and when not complied with may create a disciplinary investigation. Two such rule changes this year are the new malpractice insurance reporting requirement and new classes for inactive status.⁶

The malpractice reporting rule, which was mentioned in this column last month, in essence requires that lawyers who represent private clients must report annually whether they maintain malpractice insurance, with what company, and whether they intend to maintain it for the upcoming year. This will be public information available from the attorney registration office. Among the new fee status categories created by revisions to Rule 6, one will require increased registration fees for inactive out-of-state attorneys who wish to maintain their Minnesota licenses.

More Statistics

A possibly troubling statistic for this past year is that complaints received by the Director's Office have increased, perhaps fairly significantly. For several years, the number of complaints has remained constant at around 1,150-1,200 per year. Recently, an upsurge has occurred, and at the current pace at least 1,250 complaints will be received this year. While this would not be statistically significant for one year, what is troubling is that the number of complaints received in the most recent six months would annualize at 1,350. In fact, two of the four busiest months for new complaints in the past ten years occurred in August and October 2006. If this pace continues, 200 additional complaints per year would seriously stretch the system's current resources.

Part of what accounts for this increase is that requests to resign from the bar are running at four times the



MARTIN COLE
is director of the
Office of Lawyers Professional Responsibility. An alumnus of the University of Minnesota and of the University of Minnesota Law School, he has served the lawyer disciplinary system for 21 years.

previous average (37 thus far), mainly due to the attorney registration rule change for out-of-state attorneys identified above. Resignations are treated as complaint files for statistical purposes. But this accounts for only a fraction of the increase.

Win Some, Lose Some

Finally, it was recently suggested (facetiously I think) that it would be instructive to write this column about cases which the Director's Office "lost." Although we may occasionally be disappointed with the outcome of a matter decided by a Lawyers Board Panel⁷ or the Supreme Court, the disciplinary system is intended to protect the public and to achieve a fair and just result. It should not be surprising, therefore, that occasionally the discipline imposed will be less than we as prosecutors have asked for; that does not make the Director's Office the losing party.⁸ Like-

wise, since the Director's Office often will be advocating on behalf of the public for a higher level of discipline, as long as the discipline imposed is within a reasonable range, it is appropriate that sometimes Lawyers Board panels or the Court may draw the line a bit differently than requested.

One reason for such results is that, for the most part, cases that are heard by Supreme Court referees or panels are those cases that should be heard. The most obvious determinations rarely go to hearing since where clear evidence of serious misconduct exists the attorney may stipulate to probable cause or discipline, or the director may obtain approval from the panel chair without a hearing based upon clear documentary evidence or a criminal conviction.⁹ Thus, usually the cases heard by Lawyers Board panels or Supreme Court referees are the "close calls" that should receive a full evidentiary hearing. ▲

Notes

¹ Citations to the recent Supreme Court decisions discussed in this article are not provided. There are too many footnotes already. Copies of all disciplinary decisions can be found on the Lawyers Board website using the lawyer public discipline search function. www.courts.state.mn.us/lprb/SearchLawyer.aspx

² Rule 12(c), Rules on Lawyers Professional Responsibility (RLPR), provides that when an attorney cannot be found within the state, he may be suspended. The attorney then has one year in which to seek permission to answer the petition, and if he does not do so, the director may petition for an order to show cause, which then results in final discipline being imposed.

³ See, e.g., *In re Tyler*, 495 N.W.2d 184, 186 fn. 1 (Minn. 1992).

⁴ Rule 8.1(b), Minnesota Rules of Professional Conduct (MRPC), and Rule 25, RLPR.

⁵ Rule 25, RLPR, provides that the reasonableness of requests for information by the director may be challenged in Ramsey County. The attorney is denominated by initials

or by panel file number if the matter is still at a confidential investigation stage.

⁶ Rules 2 and 6, Rules of the Supreme Court on Attorney Registration.

⁷ Pursuant to Rule 9, RLPR, Lawyers Board panels hear several different types of cases: 1) hearings to determine whether there is probable cause to believe that public discipline is warranted, in which the panel can also issue an admonition or dismiss the matter; 2) hearings in which a respondent attorney is challenging an admonition issued by the director; and 3) public reinstatement hearings of suspended, disbarred or disabled lawyers.

⁸ This notion is reinforced by the Court's approach to Rule 24, RLPR, which awards costs to "the prevailing party." Respondents have argued that, in cases where the lawyer gets suspended when the director was seeking disbarment, for example, that the respondent was in fact the prevailing party. The Court still considers the Director's Office to be the prevailing party in such matters.

⁹ See Rule 10(a), (c) and (d), RLPR.

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