

## AN OVERVIEW OF THE DISCIPLINARY PROCESS

by

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It's not uncommon for lawyers to panic when a client, opposing party or judge files a complaint against them.

They rack their brains thinking of the myriad ways in which they could have done things differently. They wonder whether the complainant dislikes them, or whether the complainant is really upset about something else. They think that if only the complainant had talked with them about the issue(s) before filing the complaint, perhaps they could have amicably resolved their differences.

The first step to avoiding those altogether natural feelings of nervousness and panic is to understand the process by which complaints are addressed.

In accordance with the Minnesota Rules on Lawyers Professional Responsibility, upon receipt of a complaint against an attorney, the director's office determines whether there is a reasonable belief that misconduct may have occurred. If so, then a "Notice of Investigation" is issued.

Most complaints are investigated preliminarily by a volunteer investigator on behalf of a local district ethics committee. The lawyer is required to respond to the complaint; the complainant is then entitled to respond to the lawyer's submission. (If the complainant is or was the attorney's client, then the complainant receives a copy of the attorney's response. Otherwise, the response is summarized and the complainant is given the opportunity to respond.)

At the conclusion of the DEC investigation, a recommendation is made to the director as to the appropriate disposition based on the facts and circumstances of that particular situation.

Disciplinary determinations fall into two categories: private and public. Private dispositions include determinations that discipline is not warranted (which are expunged after three years), admonitions and stipulated private probations. Public discipline is imposed directly by the Supreme Court and includes public reprimands,

public probations, suspension (indefinite or for a defined period of time) and disbarment.

Under Rule 8(d)(2) of the RLPR, an admonition is issued only for professional misconduct that is both "isolated and non-serious."

In the event a violation of the rules is found, it does not necessarily mean that the attorney's conduct was malicious or that the violation was the result of the respondent-attorney's incompetence as a practicing lawyer. In some situations, however, regardless of whether an innocent oversight is to blame, a rule violation is a rule violation regardless of how technical it may seem.

The Minnesota Supreme Court, in considering an appeal of a private admonition in *In re MDK*, 534 N.W.2d 271, 272 (Minn. 1995), noted the fact that "no one was misled and that [the attorney] took remedial measures does not reduce a violation of a rule, however technical, into no violation and thus no discipline at all."

Certain conduct, even when the attorney had a genuine belief of compliance with the rules, can violate the disciplinary rules.

At issue in *State v. Clark*, 738 N.W.2d 316, 338 (Minn. 2007), was Rule 4.2 of the Minnesota Rules of Professional Conduct, which prohibits a lawyer from communicating about the subject of a representation with a person the lawyer knows to be represented by counsel unless the lawyer has the consent of that other lawyer or is authorized by law or court order. The high court wrote, "While this evidence could support an argument that [defense counsel] gave tacit consent for the interview \*conducted by the prosecutor+, we conclude that tacit consent . . . is not sufficient to meet the requirements of Rule 4.2."

If an attorney receives an admonition from the Director's Office, what then?

First, the attorney has appeal rights under Rule 8(d)(2)(iii) of the RLPR. The lawyer's appeal results in a de novo evidentiary review before a Lawyers Board panel.

When considering whether to undertake an appeal, considerations should include time, expense, likelihood of success, etc. The lawyer should also consider that an admonition need not be viewed solely as a blot on the attorney's record or character, but also as a learning experience.

The majority of lawyers who have received an admonition never come through the disciplinary system again. Most lawyers, therefore, learn from their violations and

perhaps even achieve a greater appreciation for the rules and conduct in conformance thereto, thus giving meaning to the isolated aspect of an admonition.

Similarly, stipulated private probations need not be viewed negatively. Probationers are being given the opportunity to have someone work through their issues with them, much like a mentor that the lawyer may enlist on his or her own.

Such an experience can have a marked positive effect on an attorney's practice.

What is important to remember is that private discipline is not necessarily a black mark on an attorney's record so much as an opportunity to recognize one's errors and conform his or her future practice accordingly. The Director's Office, however, is limited in its ability to control an attorney's future actions; at the end of the day, the value of private discipline will be what you make of it.