

# LAWYERS AND ILLICIT DRUGS

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What is the appropriate discipline for a lawyer's "recreational" drug use? The South Dakota Supreme Court recently grappled with this issue, first disbarring, then reversing itself and suspending two deputy state's attorneys who admitted possession and use of controlled substances. While the Minnesota Supreme Court has never had before it the difficult issue of disciplining a *prosecutor* for a drug conviction, it this year has had occasion to consider what discipline is appropriate for a private lawyer's illegal drug use.

## SOUTH DAKOTA DISBARMENT

As a result of a drug investigation in Rapid City, two deputy state's attorneys in South Dakota pled guilty to one misdemeanor count each of possession of marijuana and received minimal criminal sentences. In the lawyer disciplinary proceedings which followed, attorney Johnson, who practiced primarily on the civil side of the state's attorney's office, admitted that he had used marijuana with others at least 100 times since being admitted to practice in 1986, and that he had used cocaine once. He testified that he was not addicted to drugs, and had never sold them. The referee recommended a 90-day suspension.

The second deputy state's attorney, Jeffries, who did primarily criminal work, admitted that he had possessed and used marijuana hundreds of times, had sold it to his friends (for no profit), and that he had used cocaine some 15 times. The referee recommended disbarment.

In an obvious effort to get its point home to the bar in South Dakota, the court disbarred both lawyers.[Ftn 1](#) The message was this - "[I]f you get involved in the use of drugs and are caught, expect to be disciplined."[Ftn 2](#) The decisions did not dwell on the status of these lawyers as public attorneys, but the court did note that a higher standard of conduct applied to them as deputy state's attorneys, in order to "preserve the public trust in the justice system."

In the two cases, the court was divided sharply over both the appropriate discipline and the rationale therefor, perhaps reflecting the difficulties of society as a whole with respect to the appropriate punishment for victimless crime. Three justices expressed in separate opinions a preference for a discipline of suspension, albeit disagreeing widely as to how long that suspension should be. One justice said that he considered disbarment too harsh, but went along with the majority on the rationale that the minority view was so lenient as to "subject this court and the legal profession to justifiable ridicule."[Ftn 3](#) Pointing out that disbarment would be inconsistent with South Dakota precedent,[Ftn 4](#) a dissenting justice described the majority decision as "punishment, punishment, punishment, punishment and punishment."

## THE COURT RECONSIDERS

The court apparently was ill at ease with the severity of the sanctions imposed: It later granted

rehearing in both cases, vacated the judgments of disbarment, and imposed periods of suspension.[Ftn 5](#) In so doing, the majority recognized that South Dakota precedent for attorney discipline cases involving possession of illicit drugs did not support the finding of disbarment. They found that the misdemeanor convictions, were “not of the type of ‘serious crime’ for which we have previously ordered an attorney disbarred.”[Ftn 6](#)

While finding that Jeffries, who was using illegal drugs at the same time he was actively prosecuting others for their illegal drug activity, came “perilously close” to deserving disbarment, the court suspended him for three years. The court suspended Johnson, who had never tried a drug case, for two years. In both cases, the court noted that the lawyers’ illegal drug use did not appear to have adversely affected their abilities as attorneys and deputy state’s attorneys, or to have occurred on the job, and found that there was no harm to the public.

Even the second time around, however, the court remained divided over the right result and agreed on no single rationale. A justice - formerly in the majority, now in the minority - aptly described the *Johnson* decision as “eclectic - a composite of compromise to such an extent that it attempts to serve splinters of irreconcilable positions - and fails to attain an identifiable correctness.”[Ftn 7](#) What precedential value these cases can hold is dubious.

### THE MINNESOTA APPROACH

In Minnesota, the Supreme Court has traditionally imposed severe sanctions, including suspension and disbarment, on lawyers convicted of selling or trafficking in illegal drugs.[Ftn 8](#) Until recently, however, it had not had to consider a lawyer discipline case involving simple drug possession, use, or consumption.

The sanctions imposed in other jurisdictions for such misdemeanor criminal conduct vary widely, from dismissal (Oregon - attempted possession) to suspension for an indefinite period (New Jersey/South Carolina). In two cases involving private attorneys and stipulated dispositions, the Minnesota Court imposed as discipline a public reprimand with two years’ probation.

One case involved an attorney who had pled guilty in North Dakota to a single federal misdemeanor count of possession of cocaine.[Ftn 9](#) The second involved an attorney’s plea of guilty to one misdemeanor count of possession of a controlled substance in violation of Minnesota law.[Ftn 10](#) Neither of these cases involved a situation where there was any demonstrated relationship between the attorney’s drug use or possession and his representation of clients. By contrast to the South Dakota cases, both attorneys were in private practice. Both attorneys were charged with violations of Rules 8.4(b), Minnesota Rules of Professional Conduct.[Ftn 11](#) [sic]

Compared to those imposed by other jurisdictions, the sanctions imposed on these attorneys are progressive, in that they allow the lawyers to preserve the ability to practice. Accordingly, the terms of the disciplinary probation are carefully drawn: The attorney must maintain total abstinence from all controlled substances; must attend meetings of either Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) at least once a week and provide quarterly attendance verifications to the Director; and, importantly, must submit to random urinalysis.

### PROTECTING THE PUBLIC

The random urinalysis (UA) condition imposed by the Director's Office is in addition to, and different from, that imposed on each attorney pursuant to the terms of his or her probation. The criminal probationary requirements have imposed on average one or at most two UAs a month for these attorneys. The Director's Office has sought as a target that each lawyer have on average a total of five UAs a month (including the UAs from the criminal probation), with at least three of them randomly scheduled. The frequency and randomness of the UA conditions reflect in part the different goal of the disciplinary probation: not simply deterrence, but protection of the public, and specifically clients, from a lawyer's relapse into drug use. The seemingly more stringent UA requirements of the disciplinary probation stem from prior experiences where lawyers failed UAs when disciplinary conditions were more akin to those of the criminal probation. Under the UA conditions now imposed, there have been no failures to date.

The attorneys are required to call the Director's Office three times a week to find out whether they need to be tested that day. Should the lawyer fail to call, fail to show up for a UA, or fail the test, appropriate steps can be taken quickly to ensure that the lawyer is not violating the terms of the probation.

Similar probationary conditions requiring total abstinence from drugs and alcohol, attendance at AA or NA, and random urinalysis testing have been imposed with respect to Minnesota attorneys who have not been criminally convicted of drug offenses, but where it is evident during the course of the disciplinary investigation that there is a chemical dependency problem. Attorneys need not fear that disclosure of a chemical dependency problem will automatically result in the Director's Office seeking public discipline, or that every probation will necessitate random UA conditions. These probationary conditions have been imposed both in public and private probations only as warranted, with the aim of protecting the public and assisting the attorney to seek and obtain help where needed.

## NOTES

<sup>1</sup> In re: Jeffries 488 N.W.2d 674 (S.D. 1992); In re: Johnson 488 N.W.2d 682 (S.D. 1992).

<sup>2</sup> Id. at 685.

<sup>3</sup> Id at 687.

<sup>4</sup> In 1985 South Dakota resolved a number of attorney discipline cases where there had been no criminal convictions with admitted use of cocaine by imposition of suspension of 90 days. See e.g., In re: Discipline of Hopp 376 N.W.2d 816 (S.D. 1985); Matter of Discipline of Willis 371 N.W.2d 794 (S.D. 1985); Matter of Discipline of Strange 366 N.W.2d 495 (S.D. 1985); Matter of Discipline of Kessler 366 N.W.2d 499 (S.D. 1985); Matter of Discipline of Brende 366 N.W.2d 500 (S.D. 1985).

<sup>5</sup> In re: Johnson 500 N.W.2d 215, 218 (S.D. 1993) (two years); In re: Jeffries 500 N.W.2d 220 (S.D. 1993) (three years).

<sup>6</sup> Id. at 216.

<sup>7</sup> Johnson at 218.

<sup>8</sup> See e.g., In re: Pebbles 443 N.W.2d 832 (Minn. 1989); In re: Ruetter 361 N.W.2d 68 (Minn. 1985); In re: Trygstad 388 N.W.2d 9 (Minn. 1983) and In re: Wegner 291 N.W.2d 678 (Minn. 1979).

<sup>9</sup> In re: Linnerooth 496 N.W.2d 408 (Minn. 1993).

<sup>10</sup> In re: West 499 N.W.2d 499 (Minn 1993).

<sup>11</sup> Rule 8.4 provides: "It is professional misconduct for a lawyer to : ... b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.