

PROBATION AS A DISCIPLINARY DISPOSITION

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An effective lawyers professional responsibility system must try to be many things to many people. The primary function of any lawyer disciplinary system is to protect the public, the bench, and the bar from lawyers who are untrustworthy, incompetent, disabled, or otherwise unfit. The director's office spends a high percentage of its time and resources investigating and presenting public disciplinary cases in which risk to the public exists and notice to the public of an attorney's misconduct is essential.

A second important function is educational. Through advisory opinions, seminars, articles, and participation in rules-making, the people involved in professional responsibility work try to share with the bench and bar their knowledge and reflections on attorney ethics. As in many areas of law, there are growing bodies of literature, rules and cases, and a corresponding need for expertise.

A third function, perhaps less well known, is to help lawyers who have violated the disciplinary rules, but whose conduct likely can be corrected so that they can continue to serve the public. The Court and the Director's Office take this function seriously, although they cannot allow it to override their primary duty of protecting the public. As a result, Minnesota is a national leader in the effective use of probation as a disciplinary disposition.^{[Ftn1](#)}

Minnesota has two types of probation. The first type is imposed directly by the Minnesota Supreme Court under Rule 15(a)(4), Rules on Lawyers Professional Responsibility (RLPR), and through its inherent power to regulate the bar. The Court may place an attorney on probationary status for a period of time or until further order of the Court. Such public probations may be ordered in conjunction with other discipline or after reinstatement from a period of suspension.

The second type of probation is a private, stipulated probation which is entered into by the director and an attorney, subject to approval by the chairperson of the Lawyers Professional Responsibility Board. Rule 8(c)(3), RLPB [sic]. Such a probation is used in lieu of the director filing charges of unprofessional conduct against an attorney and seeking public discipline. If the director and the respondent stipulate, then the respondent is placed on probation for a specified period of time, generally two years. If the respondent complies with the conditions set forth in the stipulation, the matter is then closed after the probationary period. A private, permanent record is maintained.

In 1986, 90 attorneys were on probation during some portion of the year. The Minnesota Supreme Court ordered 34 probations, while the remaining 56 probations were stipulated to by the director and the attorney.

Common examples of situations leading to probation include:

1. Supreme Court ordered probation for several years, following suspension, for failure to file income tax returns.

2. Private probation for a chemically dependent attorney who has neglected a couple of files but is recovering from the dependency.
3. Inadequate books and records, without shortages of client funds, may result in a supervised probation with periodic review of books and records.
4. Multiple instances of neglect or noncommunication without serious client prejudice.

Many probations are supervised by volunteer attorneys. These attorneys are usually nominated by the probationer, and approved by the Director's Office. As with the district ethics committees, the viability of the probation alternative depends a great deal on the efforts of volunteers.

Supervision of a probationer is not conducted on an intense day-to-day basis. The supervisor usually meets with the attorney at least quarterly regarding the attorney's practice and compliance with the terms of the probation. Supervisors also may be requested to review an attorney's books and records to assure compliance with the rules or monitor the attorney's abstinence from alcohol or attendance at AA meetings.

The requirements for successful completion of probation vary. Requirements may include establishing and maintaining proper books and records or office procedures, achieving a passing score on the professional responsibility exam, restitution to clients, the continuance of psychological treatment, or completion of a legal matter previously commenced. All attorneys placed on probation are, of course, required to cooperate with the Director's Office in the investigation of any further complaints of unprofessional conduct and abide by the Rules of Professional Conduct.

As might be expected, the success record for probations has been mixed. Unfortunately, about one-third of all private probationers have ended up with public discipline, either after probation revocation, or some time after "successfully" completing probation. Some of the factors which seem to indicate that the attorney is a poor candidate for probation include failure to communicate, dishonesty, or unwillingness to admit that a problem exists.

There are successes to report. A number of attorneys with chemical dependency or psychological problems have avoided public discipline and further problems in their practice by stipulating to probations including treatment plans. Others, benefiting from an experienced supervisor, have initiated office procedures which have resolved problems of neglect and noncommunication.

Balancing the duty to protect the public with a natural inclination to try to help an attorney with a problem is a delicate matter. When there has been dishonesty, client harm, repeated noncooperation or some other serious misconduct, probation may be unworkable. There is room for compassion in working with an attorney whose misconduct is limited and who is willing to solve his or her problem. Being soft-hearted, however, cannot replace being hard-headed when serious misconduct indicates a danger to the public or a threat to the standards of the bench and bar.

NOTES

¹ *Admonitions, issued for 'isolated and non-serious' rule violations, serve all three functions identified above.*