

The Unique Art of Settling Lawyer Disciplinary Matters

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Contrary to the perception of some lawyers that the Director's Office is highly adversarial, most public discipline cases are resolved by stipulation. Since January 1, 1997, 62 Minnesota lawyers have been publicly disciplined by the Minnesota Supreme Court, receiving either a public reprimand, with or without probation, disciplinary suspension or disbarment.

Only 23 of those 62 decisions were issued by the Court either after a contested disciplinary matter or after the lawyer defaulted in the disciplinary proceedings. Thirty-nine matters, or almost two-thirds of all public discipline cases, were resolved after the respondent and the Director's Office "settled" the matter and submitted a stipulation for discipline to the Court, containing a joint recommendation as to the appropriate sanction. Five of those 39 stipulations were reached after trial where the parties agreed to the court-appointed referee's findings and recommendation.

Settling a case in the lawyer discipline area, or stipulating with the Director's Office, is different than it is in either the civil or criminal areas. For example, unlike in civil litigation, the Director cannot just agree to a "bottom line" disposition without either side admitting anything, or in this instance, without the respondent attorney making sufficient factual admissions to support the recommended sanction. Thus, the Director and respondent may agree fairly quickly on what is the correct level of discipline, but get hung up on what facts the respondent is willing to admit, or what, if any, allegations the Director is willing to eliminate.

If the attorney is facing possible criminal prosecution for these same acts, and wishes to avoid making any admissions against interest, yet also wishes to avoid asserting the privilege against self-incrimination, then the stipulation process becomes even more difficult.

Unlike many criminal plea negotiations, the Director's Office is usually unable or unwilling to allow the attorney to plead to just the least serious offenses. Criminal prosecutors face difficult resource allocation issues or difficulty in proving crimes beyond a reasonable doubt. They may see accepting a plea to lesser criminal offenses as preferable to using precious resources to fully try a matter, especially if jail time is unlikely in any event. This approach is not used in lawyer discipline cases, however. For example, an attorney charged with misappropriation of client funds (and miscellaneous other "lesser" violations) may be willing to agree to be disbarred, but then wants only to admit to neglect or other acts not involving dishonesty, but not to misappropriation. Such admissions simply will not support disbarment, and thus the Director is unable to settle on such terms.

Further, since a rule change in 1989, the Court has not accepted conditional admissions in lawyer disciplinary proceedings. Prior to that time, an attorney could tender an admission of the Director's

allegations conditioned upon the Court's imposition of a particular level of discipline. In a proceeding involving a professional's character, it was deemed unseemly to allow an attorney to admit an offense such as dishonesty only if conditioned upon a certain sanction, but if the sanction was rejected, then to deny the same conduct.

In suspension cases, another aspect to this process is the knowledge that a reinstatement hearing is a possibility in the future. One important part of any reinstatement hearing is the attorney's ability to recognize his or her prior misconduct and so articulate why such misconduct is now unlikely to recur. Without a clear resolution of exactly what the attorney did that warranted suspension in the past, it would be nearly impossible to obtain an adequate answer to this question.

Despite these inherent difficulties, the majority of public discipline cases are resolved by stipulation. Many attorneys are willing to admit their misconduct and rely on the sound judgment of the Court. For attorneys in the Director's Office and for respondents' counsel, the "art" of settling a lawyer disciplinary case requires the ability to convince a respondent attorney to do just that.