

# PRIOR DISCIPLINE AGGRAVATES CURRENT MISCONDUCT

**BY MARTIN A. COLE**

Recently the Director's Office received an investigation report from a district ethics committee recommending that the Director issue an admonition to the attorney based upon the attorney's neglect of his client's matter and failure to communicate with the client. Admonitions may be issued by the Director or by a Lawyers Board Panel for isolated and nonserious violations of the Minnesota Rules of Professional Conduct. Rule 8(d)(2), Rules on Lawyers Professional Responsibility (RLPR).

The committee's recommendation went further, however, to state that an admonition was recommended *unless* the attorney had a history of prior discipline, especially for similar misconduct. If such prior discipline existed, the committee recommended that the Director file charges of unprofessional conduct and seek public discipline. The lawyer in fact had five prior nonpublic disciplines spread out over several years, three of which involved similar misconduct. Charges are now pending.

How much should an attorney's disciplinary history affect the disposition of a current complaint against the lawyer? The rules state that an attorney's prior discipline is admissible in subsequent disciplinary proceedings, since it is relevant in determining the appropriate level of discipline. Rule 19, RLPR, makes an attorney's prior discipline admissible to determine the appropriate level of discipline, but not admissible to prove that a violation occurred or to establish the lawyer's character.

Prior dismissed complaints are generally inadmissible, but there are exceptions in some situations: prior dismissed complaints may be admissible to establish a pattern of related conduct or if the particular matter was summarily dismissed without investigation. Note however that dismissed complaints, whether dismissed after investigation or summarily dismissed, are completely expunged three years after the dismissal, except upon special application to the Lawyers Board for retention. Rule 20(e), RLPR. This process limits the subsequent use of dismissed complaints even where otherwise admissible.

## SUPREME COURT STANDARDS

The Minnesota Supreme Court has repeatedly set out the legal standards it applies for considering an attorney's prior discipline: "In determining the appropriate discipline, we carefully consider the nature of the misconduct; the cumulative weight of the disciplinary violations; the harm to the public; and the harm to the legal profession."[1] "Once misconduct is established, aggravating and mitigating factors should be considered in determining the appropriate discipline."[2] "[P]revious misconduct of the same type is considered an aggravating factor when determining the appropriate discipline."[3] "[T]he discipline to be imposed must be reviewed in light of the earlier misconduct."[4] Why? Because, "[o]nce disciplined, this court expects a renewed commitment to comprehensive ethical and professional behavior from attorneys."[5]

The Court made these points even more clear in one fairly recent case, in which the referee who heard the case found that an attorney's previous misconduct was not an aggravating factor, and indeed that the attorney being on disciplinary probation for similar misconduct mitigated his current misconduct. The Court found these positions to be clearly erroneous and restated that prior discipline is always an aggravating factor in determining the level of discipline.[6]

In addition, the Supreme Court recently rejected a stipulation for a six-month suspension submitted by the Director and the respondent attorney, largely because of the attorney's disciplinary history. Rather than just increasing the recommended discipline, the Court offered the parties an opportunity to present reasons why more severe discipline should not be imposed. The Court ultimately accepted the recommended discipline, but only after briefing and oral argument had persuaded them it was appropriate.[7]

## NOT AN EASY DECISION

Just how much prior discipline aggravates current misconduct varies and is not always an easy decision. At the public discipline level, prior discipline, or even the lack of prior discipline, should not affect the result when the lawyer has misappropriated client funds or committed other serious criminal misconduct involving dishonesty; disbarment should ensue either way. Prior discipline may be the deciding factor in some cases involving serious misconduct, however, when the issue is how long a suspension is warranted or whether probation or a short suspension is more appropriate. Obviously other factors such as remorse, actions taken to remedy the harm to the client or courts, or lack of cooperation will also be considered, but prior discipline may be the most important factor that the Court will consider.

When the current misconduct is less serious, the decision becomes more challenging. In the case of the admonition-level neglect identified at the beginning of this column, for example, if the attorney had one prior admonition ten years ago for unrelated conduct, it would count for little if anything in aggravation. Two admonitions for similar neglect in the recent past, however, must be considered in determining whether supervised probation (public or private) is more appropriate to protect the public than another admonition, since probation likely will include a supervisor who can help the attorney implement procedures to avoid similar complaints in the future. If the attorney has a more extensive or recent pattern of private misconduct, as the attorney did in that instance, then a new finding of misconduct likely requires the Director to seek public discipline.[8]

A more challenging situation the Director's Office faces when considering the effect of an attorney's prior discipline history is when, for example, the attorney has received two *unrelated* private disciplines over a several-year period, then commits a new, perhaps again unrelated, but also again non-serious rule violation. When is the new complaint the one proverbial "straw" that "breaks the camel's back"? Can the Director issue another private admonition to such a repeat offender? For what purpose? But is public discipline fair, despite the attorney's disciplinary record, when the new violation, even if undisputed, is reasonably minor? At what point does the public have a right to

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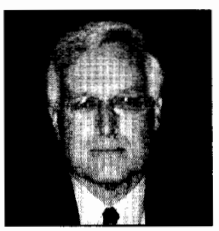

know about the risk that a particular attorney presents? Even multiple private disciplines, at least until an attorney is subsequently publicly disciplined, are just that — private. If a prospective client contacts the Director's Office to inquire about an attorney's disciplinary record, only public discipline may be disclosed. Rule 20(a)(2), RLPR.

Another difficult decision arises when an attorney who has previously been publicly disciplined commits new misconduct, but of a non-serious nature. Must she automatically be publicly disciplined again, or can private discipline still be imposed? Although this particular scenario has not had to be addressed recently, it would appear certain that a previously publicly disciplined lawyer is unlikely to receive more than one private disposition before further public discipline will be sought.

## CONCLUSION

Obviously the best way to avoid the dilemma of how much weight should be given to prior discipline is to not commit misconduct, so that no such disciplinary history will ever exist. Nevertheless, the impact of receiving a single admonition usually is not career threatening, since most attorneys who are privately admonished are never disciplined again. An attorney who has accumulated two or more private disciplines, however, should seriously review his or her practice and take renewed steps to avoid additional misconduct, as future private discipline may no longer be available, and even minor infractions in such a situation may soon result in public discipline. ☐

## NOTES

1. In re Isaacs, *451 N.W.2d 209, 211 (Minn. 1990).*
2. In re Pokorny, *453 N.W.2d 345, 348 (Minn. 1990).*
3. In re Cutting, *671 N.W.2d 173, 175 (Minn. 2003).*
4. In re Thedens, *602 N.W.2d 863, 867 (Minn. 1999).*
5. In re Jensen, *542 N.W.2d 627, 632 (Minn. 1996).*
6. In re Albrecht, *660 N.W.2d 790, 796 (Minn. 2003) (90-day suspension followed by additional two years of probation imposed, rather than merely extending probation as recommended by referee).*
7. In re Jambor, *A04-1504 (Minn. April 1, 2005).*
8. See e.g. In re Mitchell, *368 N.W.2d 273 (Minn. 1985), in which the attorney neglected a collection matter, a comparatively minor offense, but was publicly reprimanded and placed on probation due to his previous history of related misconduct.*