

## COMPARING DISCIPLINE: APPLES TO ORANGES?

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One of the most challenging and occasionally distressing aspects of regulating lawyer conduct is sitting across the table from a respondent attorney and informing her that she assuredly is going to be disciplined, or at least that the Director's Office will be seeking to impose discipline. Some such attorneys are belligerent, upset at our office or at a client who dared to complain about them, or refuse to acknowledge their misconduct. Others are there voluntarily, having self-reported their conduct, timidly awaiting their fate. Either way (or more likely something in between), the words disbarment, suspension, probation, reprimand or even admonition can seem like a career-threatening dagger to an attorney.

Disciplinary violations must either be admitted or proven by clear and convincing evidence. In a surprisingly large number of cases, however, the principal discussion with a respondent attorney or her counsel focuses more on what discipline is warranted than on any dispute as to the factual basis for charges. An attorney facing discipline wants to know up front what sanction she is facing.

Trying to impose consistent discipline for often very disparate acts of misconduct is not an easy process. Respondent attorneys, the Director's Office, Lawyers Board panels, the Supreme Court and the public all desire consistency in lawyer disciplinary decisions. Can similar sanctions for dissimilar conduct or dissimilar sanctions for what appears to be the same misconduct be reconciled and explained? Is it like the idiom "comparing apples to oranges," which many scholars hold to be impossible, or is it more like comparing related, albeit slightly different, items . . . say, two varieties of apples?

There are two discipline spectrums to consider: one for similar misconduct of varying degrees of seriousness; the other for similar levels of discipline arising out of wholly different rule violations. The first group may be viewed as comparing varieties of apples to apples, while the latter spectrum more closely resembles the difficult apples-to-oranges comparison. Is there a framework that can be applied to future cases in an effort to better promote consistent comparisons within these spectrums?

### **Apples to Apples**

There are not, and probably never will be, any inflexible "sentencing" guidelines in the area of lawyer discipline. The human element in such cases is simply too variable. Nevertheless, it seems at least

that discipline for related acts of misconduct ought to be reasonably predictable. Intuitively, for example, we expect that an attorney who seriously neglects a client's matter will be disciplined more than an attorney whose neglect is relatively minor and results in little or no harm. Likewise, an attorney who neglects multiple client matters should receive more severe discipline than an attorney who neglects only one file.

Such a logical approach mirrors the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1992), which sets out guidelines for when disbarment, suspension, reprimand and admonition are appropriate within 12 categories of misconduct. The *Standards* offers a straightforward framework for imposing the most appropriate discipline and thus for comparing the discipline imposed in different cases: after misconduct is established, first determine what level of discipline is appropriate for that conduct and then (and only then) apply any aggravating and mitigating circumstances to raise or lower the level of discipline. Although our Supreme Court has never adopted the ABA standards, it has cited to them with approval on many occasions and essentially analyzes lawyer discipline cases similarly.

One difficulty in comparing the discipline imposed, even under the *Standards*, is that nuances of misconduct that warrant imposition of greater or lesser discipline cannot always be clearly delineated. The ABA standards lump all suspensions, all reprimands or all admonitions for related conduct into one group each, but suspensions in fact are imposed for 30, 60 or 90 days, four or six months, a year, two years, etc. Within the category of suspension therefore, more egregious conduct can result in increasingly longer periods of suspension.

But what of conduct that falls into the public reprimand category, or warrants only a private admonition? Misconduct in these categories can cover a similar range of seriousness, but cannot be nuanced as with suspensions. Conduct that just barely crosses the line into public discipline may receive a reprimand, as will more serious conduct that falls just barely below the line for suspension. Justifying a reprimand to an attorney who can find a prior decision in which this same sanction was imposed for what may appear to be more serious misconduct of the same type can prove exceedingly difficult.

Another factor that affects the consistent application of disciplinary standards is time. The Supreme Court has on occasion increased the discipline for similar misconduct if it perceives that prior decisions and levels of discipline have not had the desired deterrent effect. For example, this was done in a line of cases in the 1980s dealing with the issue of candor to the court, incrementally increasing the length of suspensions from 30 days to 90 days to six-months, when the Court perceived that the prior discipline was not creating the desired deterrent effect.

Despite these limitations, a framework such as provided by the ABA *Standards* allows for comparing discipline for like or related misconduct. Attorneys charged with committing most types of serious misconduct can research the *Standards*, along with prior Minnesota Supreme Court decisions, and ascertain with reasonable accuracy what awaits them.

### **Apples to Oranges**

What if, however, the misconduct for which an attorney faces discipline is less common, such that it has resulted in few, if any, prior public decisions in Minnesota? It is far more difficult to compare sanctions across spectrums of misconduct. Should a suspension for failure to maintain trust account records that resulted in the negligent misappropriation of client funds be the same as a suspension for an improper business transaction with a client by an attorney with prior private discipline? Can we prospectively determine into what discipline level less common misconduct should be slotted?

Obviously, the answer is not simple to articulate. The Director's Office and the Court may look to other jurisdictions to determine whether like cases have been decided, keeping in mind that other states may be harsher or more lenient than Minnesota in their disciplinary approach. Authoritative texts such as the *Restatement Third: The Law Governing Lawyers* (1988) may be consulted. The legal literature may be surveyed. Recalling the broad range of conduct that may result in a reprimand or admonition, this "apples to oranges" comparison may indeed seem impossible. Ultimately, some subjective comparisons must be made by the Court or disciplinary counsel.

One bright line factor that should be expected is whether the conduct involves dishonesty. If there is an element of fraud, misrepresentation, or dishonesty involved in a particular type of misconduct, or if it violates criminal statutes, then disbarment or suspension is far more likely to be sought. Unless there is substantial harm involved, however, deficiencies of lawyer performance in areas such as competence or diligence, though not unimportant by any means, usually must be found to recur over multiple matters before a lawyer will lose his or her license.

### **Final Touches**

Once the appropriate level of discipline is determined, the Court considers aggravating and mitigating circumstances, and so must the Director's Office in making recommendations. The most common aggravating factor in lawyer discipline cases is an attorney's prior discipline history, especially if for conduct that is similar or recent. Noncooperation with the disciplinary process is also an important aggravating factor, and if sufficiently egregious may be an independent basis for discipline.

A host of factors have been considered in mitigation by the Court, including chemical dependency or psychological disorders that caused the particular misconduct and have been subject to successful treatment. Other factors considered in mitigation include remorse, restitution where appropriate, exceptional personal difficulties, otherwise good character, and civic or pro bono activities. Just as noncooperation can be considered aggravating, cooperation with the disciplinary investigation occasionally has been considered in mitigation. Since cooperation is required under both the Rules of Professional Conduct and the Rules on Lawyers Professional Responsibility, however, the Director's Office generally argues that this factor is of little weight, unless it is exceptional, such as when an attorney self-reports his misconduct when it otherwise likely would not have come to light.

The application of these more “human” factors in aggravation and mitigation ultimately is what makes comparing the outcomes of lawyer discipline cases seem like comparing apples to oranges. Finding a prior decision for similar misconduct containing similar aggravating and mitigating factors is rare.

There is always some less-than-perfect comparison and contrast required before reaching a disposition in lawyer discipline cases. Without some identifiable framework in which to analyze matters, however, this task would be almost impossible. The Director’s Office will use the basic framework described above to seek consistency in its recommendations.