# DISCIPLINARY RECIDIVISM

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Since the start of 2010, 121 attorneysFtn 1 have been publicly disciplined by the Minnesota Supreme Court (as of July 3, 2013). Twenty-five of these lawyers had been publicly disciplined previously. An additional 41 of them had been privately disciplined previously.Ftn 2 Fifty-five lawyers (45%), therefore, had never been disciplined prior to receiving public discipline.

As these numbers indicate, a majority of respondent attorneys who come before the disciplinary system on allegations of misconduct serious enough to warrant disbarment, suspension, probation, or a reprimand have been disciplined at least once previously. Of these, a fairly sizeable number of the attorneys have "worked their way up the ladder" of disciplinary infamy, including many who have been publicly disciplined.

These are the recidivists of the lawyer discipline system. Recidivism is usually defined as a tendency to relapse into a previous condition or type of behavior, especially a negative behaviorFtn 3—for these attorneys that means violating the Rules of Professional Conduct. Spotting recidivism after the fact is, of course, not so difficult when there is a regular pattern of complaints unbroken by any recognizable period in which the lawyer remains complaint-free. Recognizing early warning signs of a pattern of increasingly serious misconduct might be much more difficult, but surely would be useful and worthwhile if possible. Does any helpful information emerge from studying Minnesota's "recidivist" cases?

## Defining Recidivism

In order to study recidivism, it first is important to determine how narrowly or expansively the term "recidivist" should be defined. For example, is it fair to call an attorney a recidivist who was publicly disciplined in 2010 after one prior unrelated private admonition in 1994? What if that one admonition instead were as recent as 2009? What if that admonition were for misconduct very similar to what resulted in the

public discipline? Is recidivist now a more accurate label? What if the lawyer has three prior admonitions, but they are unrelated to the current misconduct and are 7, 15 and 16 years old? While it is true that any prior discipline, public or private, may be considered as an aggravating factor in determining the appropriate level of discipline,Ftn 4 is that the same as considering those attorneys to be recidivists for purposes of discipline? Defining recidivism can be just as difficult as determining how best to deal with it.

On the other end of the spectrum, there certainly are some attorneys who have built remarkably lengthy disciplinary records, possibly still without being disbarred, and about whom there should be universal agreement as to their recidivist status. How do we explain an attorney suspended, not disbarred, during this study period who had two prior public suspensions, three additional public reprimands/probations and ten admonitions in a 24-year career? Surely there should be a point at which enough is simply enough, or is too much.

For study purposes, let's use as a conservative working definition that a disciplinary recidivist is an attorney who has been disciplined at least four times in a ten-year period, whether for related misconduct or not. This definition would fit for only 12 of the 121 cases in which the attorney was publicly disciplined since 2010. Yet these attorneys use up extensive disciplinary resources over and over again. Could or should some of these attorneys have been disciplined more severely at an earlier stage in their careers? Were they needlessly given a "break" when perhaps a sterner approach might have prevented additional continued misconduct? This is impossible to know, of course, but do some case studies give cause for speculation?

**Some Case Studies**

- A petition was filed against Attorney 1 in 2009 for one matter involving incompetence and lack of client communication. The attorney had six prior private disciplines, including four admonitions and a private probation in the ten-year period from 1996 to 2005. The referee recommended a public reprimand and probation, which the attorney challenged and the Minnesota Supreme Court affirmed. The attorney has received no subsequent complaints.

The attorney had had only the one allegation since his sixth private discipline in 2005, but if that 2005 matter had resulted in a public reprimand and probation (or had public discipline been imposed even earlier instead of the fifth private discipline in 2003), might the latter complaints have been avoided? Unless and until an attorney is suspended, we are left to hope that public discipline has a deterrent effect on the attorney. Is that a valid hope with "recidivists"?

- A petition was filed against Attorney 2 in 2011 for three matters, one involving a conflict of interest, one a lack of diligence, and two involving unreasonable fees. The attorney had five prior private disciplines, including two admonitions and two private probations in the five-year period from 1997 to 2002. But there were no complaints thereafter until the 2011 matter. The director and the attorney stipulated to a public reprimand and probation, which the supreme court accepted. The attorney has received no subsequent complaints.

The attorney had had only the one new allegation since his most recent private discipline in 2002, but, again, what if that 2002 matter had resulted in a public reprimand and probation rather than a second private probation, thus putting the public on notice of this attorney's history? Might the latest misconduct not have occurred?

- Finally, a petition was filed against Attorney 3 in 2013 for one matter in which the attorney had failed to correct a false statement of material fact in a marital dissolution case. The attorney had a private probation and two public probations (one an extension of the first) in the period from 2002 to 2008. The public matters principally involved violations of the attorney's criminal probation following a DWI conviction. There had been no client complaints since 2005. The director and the attorney stipulated to a 30-day suspension, which the supreme court accepted. If the attorney had been suspended at some earlier point in the process (and then presumably reinstated), however, might the recent client matter have been avoided?

**Any Solutions?**

These cases reflect the difficulty in fashioning the appropriate discipline in situations involving a "recidivist" attorney, especially where there are gaps, sometimes significant gaps, in the pattern. The violations may be unrelated, or not exceptionally serious when viewed individually. There may be mitigation or other "human" elements present as well. How can we know at the time that the next discipline will or will not be the last? While it might not be appropriate to impose some type of automatic "three strikes (and you're out)" rule, perhaps some manner of stopping such conduct far earlier might be manageable.Ftn 5

So … are there any behavior modification approaches that might be applied to lawyer discipline—and that might work? The simplest example, of course, is getting treatment for those lawyers who suffer from some type of mental health problem or a chemical dependency problem. Early recognition and intervention with impaired attorneys who have committed misconduct can act to reduce or even eliminate their pattern and their likelihood of repeating it. Thus, Minnesota has an effective Lawyer Assistance Program (in Minnesota Lawyers Concerned for Lawyers (LCL)) and has

been a leader in the use of probation as a disciplinary tool. Many private probationers are attorneys who have committed a limited number of violations (often similar, and not dishonest) for whom the disciplinary solution appears straightforward: Provide a supervisor/mentor for a young solo practitioner who lacks office procedures or know-how or just lacks someone to consult with before acting; provide oversight and training in trust account recordkeeping; or require psychological counseling or chemical dependency treatment.

Public probations are for more serious misconduct, or to follow reinstatement from suspension for even more serious misconduct. Nine attorneys who were publicly disciplined in this period had been suspended previously. After reinstatement, these lawyers had most clearly relapsed into their prior patterns of misconduct—perfect examples of recidivism. Were they reinstated prematurely? There is a tendency to feel that if the lawyer has "done the time," they are entitled to be reinstated, but perhaps greater care needs to be taken, at a minimum, in allowing attorneys to return to solo practice without daily supervision.

## Conclusion

If it is difficult to even define what it means to be a disciplinary recidivist, it is not hard to understand why it is even harder to deal with the problem, especially to predict future behavior. Everyone has a tendency to want to believe that a lawyer's promises of no future misconduct will prove true. We want to give people a break or a second (or third or fourth) chance. Perhaps this will remain a problem without a simple solution, but an occasional harder line can be drawn in select cases. If even a handful of recidivist misconduct can be prevented, even one step earlier, it will prove worthwhile.

## Notes

1 Actually, the number of different attorneys would be 112, as nine attorneys were publicly disciplined twice during the study period.

2 Some of the attorneys previously publicly disciplined had also been privately disciplined. For purposes of this article, only those who had been privately disciplined but never publicly disciplined are being listed in the previous private discipline column.

3 *See, e.g.*, *Merriam-Webster Online Dictionary*.

4 *See*, Cole, "Prior Discipline Aggravates Current Misconduct," *Bench & Bar of Minnesota*, August 2005.

5 For example, as a former soccer referee, I was empowered to issue a yellow card (warning), or even a red card (ejection), to a player simply for persistent infringement of the laws of the game, without regard to how individually serious those infractions were.