

## OFFICE USES PROBATION TO PREVENT MISCONDUCT

by

**Craig D. Klausing, Senior Assistant Director  
Minnesota Office of Lawyers Professional Responsibility**

Reprinted from *Minnesota Lawyer* (May 5, 2014)

To the extent that members of the public (or even lawyers) think of the Office of Lawyers Professional Responsibility, they likely think of it as the “lawyer discipline office.” While that impression is not inaccurate, it is incomplete.

Certainly holding attorneys accountable for unprofessional conduct is a core function of the director’s office. As stated in the Rules on Lawyers Professional Responsibility, “It is of primary importance to the public and to the members of the Bar that cases of lawyers’ alleged disability or unprofessional conduct be promptly investigated and disposed of with fairness and justice.” However, the director’s office also works with lawyers after they have run afoul of the Rules of Professional Conduct to prevent further misconduct and harm to the public. This is done through attorney disciplinary probations administered by the director’s office.

Where there has been an allegation of attorney misconduct the RLPR provide for several dispositions. First, the director may conclude that the lawyer either has not engaged in unprofessional conduct or that the director cannot meet his burden of proving the alleged unprofessional conduct. In those cases, the director issues a determination that discipline is not warranted. Second, “if the Director concludes that a lawyer’s conduct was unprofessional but of an isolated and non-serious nature, the Director may issue an admonition.” Admonitions are private discipline. In cases of more serious, or repeated misconduct, the director may seek public discipline. However, the RLPR also provide a fourth option; falling between an admonition and public discipline; a stipulation for private probation.

Private probations allow the respondent lawyer to resolve the disciplinary matter short of public discipline while at the same time enabling the director to take steps to protect the public from further misconduct by the lawyer. The protection of the public is achieved in two ways. First, in the stipulation for probation the lawyer may (and the director normally requests that the lawyer does) waive the right to have allegations of additional misconduct considered by a Panel of the Lawyers Professional Responsibility Board. In other words, if the director concludes that the lawyer has either violated the terms of the probation or engaged in further misconduct, the director may immediately file a petition seeking public discipline. Second, the terms of the probation are designed to address the problems which may have contributed to the initial misconduct.

For example, the most common complaints against lawyers involve lack of diligence and failures to communicate. In a private probation resulting from such misconduct the

director may require the lawyer to adopt office policies to better deal with workflow in the office. This might include something as simple as having procedures in place to ensure that correspondence gets opened promptly and reviewed.

Another common disciplinary issue is a lawyer's failure to maintain the required trust account books and records. A failure to maintain those records is not only unprofessional conduct, but can have serious consequences for the lawyer (e.g., if it results in the misappropriation of client funds). A lawyer placed on probation as a result of trust account irregularities will more than likely have as a condition of the probation the requirement that the lawyer maintain law office and trust account books and records in compliance with the Rules of Professional Conduct and Appendix 1 to the rules. Further, the probationer will be required to make those books and records available to the director at regular intervals during the probation. The director will audit the records and provide the probationer with feedback.

In addition to the conditions of the probation, the probationer will usually have a volunteer lawyer acting as a "probation supervisor." The role of the probation supervisor is to assist the director in overseeing the probation and reporting any concerns to the director. The supervisor will meet with the probationer on a regular basis. During those meetings the supervisor will randomly review the lawyer's files to make sure that they are being attended to and to offer words of encouragement (or where appropriate, chastisement) regarding case handling and office procedures. While few lawyers would seek to be on a disciplinary probation, a number of former probationers have reported to the director that they found the experience helpful.

Again, since the protection of public is paramount, if the probationer fails to comply with the terms of the probation or engages in additional misconduct, the director may file a petition for disciplinary action without the necessity of first seeking a probable cause determination. Or, the director and the lawyer may modify or extend the probation agreement with the approval of the lawyers board chair or vice chair.

It should also be noted that not all probations are private. Attorney probations may also be imposed by the Minnesota Supreme Court; either as part of the resolution of a pending disciplinary matter or upon the reinstatement of a previously suspended lawyer. In these cases as well, the court will impose probation conditions designed to prevent further misconduct and harm to the public.

While the Office of Lawyers Professional Responsibility is a disciplinary office, it is more. Through its role in administering disciplinary probations, it also endeavors to be a misconduct prevention office.