

PRIVATE PROBATION: SAVING A CAREER?

By

Martin A. Cole, Director

Minnesota Office of Lawyers Professional Responsibility

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On average, the Minnesota Supreme Court orders a period of probation for seven attorneys each year. Almost all of these are attached to a public reprimand for some act (or acts) of misconduct sufficiently serious to warrant public discipline, yet not so serious as to require that the attorney be suspended. Attorneys reinstated from suspension are almost always placed on probation for two years as well.

There is another type of probation employed by the Minnesota discipline system that accounts for even more attorneys annually – that being what is referred to as private probation (as in not a form of public discipline imposed by the Supreme Court).[Ftn1](#) Unlike determinations that discipline is not warranted (DNW) or admonitions, private probation can only be created by a stipulation with the respondent attorney, and then only after approval by the Lawyers Board Chair that it is appropriate. This last step acts as a check on the director's discretion, largely to ensure that matters of serious misconduct are not being resolved privately when public discipline is truly appropriate.

In an average year, 15 Minnesota attorneys agree to and are placed on private probation subject to various conditions.[Ftn2](#) Monitoring the public and private probations is a large task, as reported in the Lawyers Board/Office of Lawyers Professional Responsibility's annual report.[Ftn3](#)

Recidivism Rate

One of the major goals and hopes for both the director and the respondent attorney when entering into an agreement for private probation should be that this attorney will never “darken the director's door” again – following completion of their term of probation, that is, the attorney will commit no further misconduct and never be disciplined again. Thus, not to put too strong a phrase to it, the goal is often to save the

career of the particular attorney and turn around their practice or life before they become the subject of a public discipline petition.

Does this actually happen? And if so, in how many instances? Based upon a very unscientific review,[Ftn4](#) at least two-thirds, and possibly as many as three-fourths, of the attorneys who agreed to private probation since 2003 have not been the subject of further disciplinary action. Overall, I consider this a remarkable success story.

Such success is the result of several factors. The principal factor in a successful probation is the motivation and level of cooperation of the attorney herself. If the attorney has acknowledged her failures and truly desires to “turn it around,” then she is a good candidate for probation and far more likely to succeed at it.

A second important factor in a successful probation is the volunteer probation supervisor. A large percentage of probations call for a supervisor to oversee the probationer’s compliance with the conditions of the probation. All supervisors are volunteers (usually suggested by the probationer himself) who spend time assisting attorneys; such assistance may involve reviewing the attorney’s office procedures to ensure prompt attention to files and clients, or offering other advice on such things as establishing conflict check systems.

In some private probations, the Director’s Office may act in effect as the probationer’s supervisor. Most of these involve an attorney who has had some minor trust account record-keeping issues. Our staff likely has conducted an audit of the attorney’s records, found deficiencies but no shortages or dishonesty. During the term of the probation, the Director’s Office will monitor the probationer’s trust account to make sure that the attorney’s books and records comply with the rules. If the records fail to comply, the Director’s Office will identify the issues and offer direction on how to resolve the problem. Again, a motivated and cooperative attorney should quite easily complete their probation and need never be heard about again.

One Example

By way of example, one case may illustrate the issue. Several years ago, an attorney with no discipline in approximately 20 years of practice suddenly received seven valid complaints in a relatively short period of time, all from clients with similar allegations of neglect, lack of communication, and refusing to refund unearned advance fees. Normally, such a quantity of complaints may lead to public discipline. After investigation, it turned out there were issues in the attorney’s private life that had affected his performance, and that he was treating advance fees as non-refundable despite clear changes in the rules that eliminated such terminology.[Ftn5](#) He committed

misconduct, but there appeared to be explanations that seemed correctible, and little demonstrable harm had occurred once he was willing to make appropriate refunds.

A stipulation for private probation was negotiated and accepted. A supervisor helped the lawyer improve his office procedures and create new fee agreements. The supervisor also helped as a sounding board for the attorney on various issues and made favorable reports of the attorney's attitude throughout. The attorney did not receive another complaint during the two years of probation, and has not received any complaints in the five years since the probation ended, a long enough time frame to assume that the attorney is back on course.

Chemical and Mental Health Issues

As hinted at above, there exists a group of probationers who have asserted either chemical dependency or mental health issues as causes for their misconduct. Some serious misconduct requires public discipline notwithstanding such mitigating circumstances. In other instances of misconduct, especially what the Court has referred to as passive misconduct (lack of diligence or communication, missed court appearances or other deadlines), if the misconduct was the result of alcoholism or depression, and the attorney is willing to deal with the problem, then private probation may be agreed to in order to allow the attorney an opportunity to obtain treatment and show that their performance will return to an appropriate level. Such probations may include not only a volunteer supervisor, but the attorney may also be required to contact the Director's Office and report for chemical testing and provide evidence of attendance at AA or some other substance-based program. In many instances, these probations may truly save a career or even save a life. These situations have also, on occasion, resulted in attorneys later acknowledging that being placed on probation was the best thing that ever happened to them. Without the disciplinary "intervention," their conduct might not have changed.

One point bears some expansion. Private probation is a form of discipline, resulting from a finding of violations of the Rules of Professional Conduct. As with all discipline, records are retained permanently and may be offered as evidence of prior discipline in any subsequent proceeding.^{[Ftn6](#)} And just as there are many, many success stories, there are also failures, which may result in a petition for public discipline and the revocation of the private probation. The flip side of a motivated and cooperative probationer is one who has agreed to probation only reluctantly and who does not really believe they have committed misconduct or need any assistance, or who chooses to not cooperate with the probation terms. Such attorneys sometimes do not change their practice habits; other probationers may fail to conquer their chemical dependency

or mental health demons, even with sincere effort, and commit additional misconduct. Fortunately, these attorneys are in the minority.

Conclusion

Not all attorneys qualify for private probation. Their misconduct may be too serious or rather may be isolated and non-serious;^{Ftn7} they may simply be unwilling to agree to any conditions, even at the risk of being charged and publicly disciplined. But for those whose misconduct is correctible and who are amenable, private probation has frequently provided a lifeline to a renewed successful career.

Notes:

1 See Rule 8(d)(3), Rules on Lawyers Professional Responsibility (RLPR).

2 Since the beginning in 2003 (12+ years), 190 attorneys have been on private probation. These cases resolved 301 complaint files, since many probations involve more than one complaint against the attorney.

3 LPRB/OLPR annual reports may be found at:

<http://lprb.mncourts.gov/AboutUs/Pages/AnnualReports.aspx>.

4 I did not run complete disciplinary history checks on all 190 attorneys noted above.

5 Rule 1.5(b), Minnesota Rules of Professional Conduct.

6 Rule 19(b)(4), RLPR.

7 Admonitions are issued for isolated and non-serious misconduct. Rule 8(d)(2), RLPR.