

## THE VALUE OF PRIVATE DISCIPLINE

By

Martin A. Cole, Director

Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (November 2008)

The Minnesota Rules on Lawyers Professional Responsibility authorize two types of non-public, or private, discipline: an admonition and a stipulated private probation.[Ftn 1](#) In the past few months, the value and vitality of private discipline has been a source of considerable discussion, both within the Lawyers Board and as part of the Supreme Court Advisory Committee to Review the Lawyer Discipline System.[Ftn 2](#)

In Minnesota, admonitions may be issued for unprofessional conduct (*i.e.*, a violation of a Rule of Professional Conduct) that is “isolated and non-serious.” Private probations may be agreed to by the Director and the lawyer for a period of up to two years, subject to approval by the Lawyers Board Chair or Vice-Chair. All private disciplinary dispositions are subject to appeal by complainants.[Ftn 3](#)

### Advisory Committee Report

Among the issues relating to private discipline that the Supreme Court Advisory Committee considered is whether private disciplinary options should be eliminated altogether, and whether private discipline was issued in too many instances in which public discipline was in fact warranted. While in the end the Advisory Committee did not make specific recommendations for change, the inquiry itself is evidence that even knowledgeable people within the lawyer disciplinary community question whether private discipline fulfills its purposes.

The justification most often put forward in support of issuing private discipline in appropriate instances is that many attorneys who commit one truly isolated act of misconduct, and who receive an admonition, are never disciplined again. The private discipline thus serves an educational function without the attorney’s reputation being affected by one lapse. If there was no private discipline option available, the argument runs, many of these matters would be dismissed instead, since public discipline could seem unduly harsh for a truly minor infraction. Thus, fairness and rehabilitation are furthered through private discipline, and presumably the complainant is more satisfied with some discipline being imposed than none at all.

Probation is most often used in instances where the violation was partly caused by poor office procedures or record-keeping, such that guidance from a more experienced practitioner or the Director's Office could resolve the problem, again without publicly announcing the attorney's failings. Attorneys with chemical dependency or mental health issues who did not commit serious or repeated misconduct also may benefit from a period of probation in which to deal with their problems. Anecdotal evidence reveals that several lawyers' careers were "saved" in this manner, and that they returned to productive and ethical careers.

After reviewing the use and history of private discipline in Minnesota, the Advisory Committee determined that "private disciplinary options serve a valid purpose in the circumstances for which they were intended." [Ftn 4](#) The more difficult question for the Advisory Committee, as it long has been for the Board and Director's Office, is whether "the circumstances for which [private discipline was] intended" includes the issuance of multiple private disciplines to an attorney over time, rather than issuing charges of unprofessional conduct and seeking public discipline after one or two admonitions. Defining what conduct fits under the definition of "isolated and non-serious" has bedeviled the system for as long as I've been involved in it. [Ftn 5](#)

### **Define Isolated**

Should a second admonition still be considered isolated? Should a third? A fourth? Does it matter whether the complaints involve violations of totally distinct types of rules (neglect, a conflict of interest, an advertising issue)? How long a period between private disciplines seriously diminishes their relevancy? If an attorney has been publicly disciplined, maybe even suspended and reinstated, must a truly minor violation committed after reinstatement require further public discipline? There are far more tough questions than clear answers. Following the receipt of the Advisory Committee report, the Lawyers Board expressed its willingness to again review this issue and establish guidelines to better facilitate consistency within the system and to assist the bar and the public in better understanding the operation of the disciplinary system.

Who makes the decision whether misconduct is isolated and non-serious or whether private probation is a viable option? If the Director agrees to issue an admonition to an attorney who has prior private discipline, then obviously the Director is making the decision (subject to appeal). If private probation is approved for an attorney with similar prior misconduct, then the Board Chair or Vice-chair has played a role. If a Lawyers Board panel issues an admonition when the Director has issued charges of unprofessional conduct (seeking public discipline), then the Board's judgment that the matter remain private has been imposed. In addition to affirming or reversing challenged admonitions, in rare instances the Supreme Court has issued a private disciplinary decision.

It is a difficult act to balance at what point fairness and protection of the public requires the public to know about allegations against an attorney, and with it gain knowledge of the attorney's private discipline

history. Reasonable minds may differ on this issue, but once it is determined that the educational value of private discipline has failed, then public protection and a right to know should allow the complete picture of the attorney to become available. At that point, fairness should tip towards the public.

### Forever?

Another aspect of private discipline debated by the Advisory Committee dealt with the possible expunction of private discipline. Currently, dismissed complaints are completely expunged after three years.<sup>Ftn 6</sup> The Director's Office cannot even keep a docket entry log of expunged complaints.

Private discipline, however, is retained permanently. Prior discipline of course may be cited in subsequent disciplinary proceedings for several purposes.<sup>Ftn 7</sup> Private discipline also may be disclosed upon the authorization of the affected attorney. Seeking admission to another state or an application for a judgeship are examples of where such disclosure is most often made.

The Advisory Committee recommended a rule change to extend expunction to admonitions that are more than 10 years old if the attorney has had no subsequent discipline. The Lawyers Board opposed the change, believing that the case had not been made that such a change is necessary or would benefit the public. The proposed rule is under advisement by the Supreme Court as this column is written.

### Conclusion

Private discipline in Minnesota will remain a viable option for the foreseeable future. It often is the proper balance of public protection, complainant satisfaction, deterrence, and lawyer education. When lawyers who receive private discipline learn from it and are never the subject of further proceedings, it certainly has fulfilled a valid purpose for which it was intended.

### Notes

1 Rules 8(d) and (e)(3), Rules on Lawyers Professional Responsibility (RLPR). Lawyers Board panels also may issue admonitions following a hearing. Rule 9(j), RLPR.

2 The Advisory Committee submitted its report to the Supreme Court earlier this year. Proposals for changes to the RLPR were heard by the Court in September, and remain under advisement at the time of writing this column. Most of the more administrative recommendations of the Advisory Committee have been implemented by the Board and Director's Office. A copy of the Advisory Committee report may be found at <http://www.mncourts.gov/lprb/AdvisoryReport.pdf>.

3 Rule 8(e), RLPR.

4 Report of the Supreme Court Advisory Committee to Review the Lawyer Discipline System, May 19, 2008, p. 27. The report also encouraged greater public reporting of private discipline. Presently, this column includes an annual summary of private discipline, which may be expanded in future issues of *Bench & Bar*.

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

6 Rule 20(e), RLPR.

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