

THE DISCIPLINARY SYSTEM AND THE PUBLIC

By

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Disgruntled client questions private discipline of lawyers. Should public be made aware of sanctions?

So ran the headline on a recent 10 inch-wide column in the metro section of the local newspaper. The thrust of the story was that because a lawyer had received private discipline: “[Complainant] believes she has been victimized three times: First by the medical profession, then by her lawyer and finally by the legal profession, which she believes is guilty of a coverup.”

The complainant, an Illinois resident, filed a complaint against a Minnesota attorney for failing to attend a hearing which resulted in the dismissal of her case, and failing to inform her of the dismissal for some eight months after he learned of it. Through her own efforts, complainant was ultimately able to share in the recovery from the bankruptcy proceedings of the defendant, despite the fact her claim had been dismissed. She did not pay any attorney's fees or costs to the lawyer. After investigation of the complaint, the Director's Office determined that an admonition was the appropriate level of discipline.

But is the fact that some Minnesota lawyers receive private discipline for misconduct a cover-up?

Approximately one month after the story about private discipline, the same local paper ignored the Minnesota Supreme Court's decision in a case where a lawyer was disbarred for misconduct resulting in unprecedented financial losses to clients of the firm. Go figure. The private disciplinary decision became public through publicity brought about by the complainant; yet despite a press release from the Director's Office, the public disciplinary decision is not publicized. Thus, the public decision remains almost unknown to the public at large.

INSPIRING CONFIDENCE

The historically "secretive" nature of professional discipline systems, whether for judges, lawyers, doctors, or the clergy, did little to inspire confidence in such systems, and resulted in sometimes justified accusations of "the fox guarding the hen house." Over time, however, increased openness of professional discipline systems has facilitated public access to the disciplinary process and its results. Two questions remain for lawyer discipline: 1) where the line should be drawn in terms of public access to the disciplinary process; and 2) whether, depending on where that line is drawn, private discipline is still a valuable component of the discipline system. Minnesota has recently addressed, and answered, these questions.

In its 1992 McKay report, the American Bar Association considered the issue of increasing public confidence in lawyer discipline.[Ftn 1](#) One recommendation from the report, addressing this point, was to increase the public's access to information about the disciplinary process generally. The McKay committee originally recommended a fully open system with access to information from the time a complaint is filed.

After further proceedings including public hearings, the ABA recommended in its final report that information regarding the disciplinary process be made publicly available only after a finding of probable cause that misconduct has occurred. This is consistent with the practice in 26 jurisdictions, including Minnesota.^{Ftn 2} Only Oregon has a fully open system. Two other states, Florida and West Virginia, allow access to dismissed complaints in addition to opening the system after formal charges are filed.^{Ftn 3}

While not as open as Oregon, Florida or West Virginia, the Minnesota disciplinary system has increased its accessibility to the public in recent years and now allows substantial public access to the disciplinary process through the Rules on Lawyers Professional Responsibility (RLPR):

- 1) Complainants are afforded an opportunity to reply to the lawyer's response to the complaint. Rule 6(d).
- 2) The Director's Office must keep the complainant advised of the progress of the proceedings. Rule 7(e).
- 3) Decisions of the Director's Office are subject to review by a member of the Lawyers Board (on appeal of the complainant) or a panel of the Board (upon appeal by the lawyer). Rule 8(d) and (e).
- 4) A complainant who was a client of the lawyer's at the time of the actions complained of, is entitled to copies of the lawyer's written responses to investigation requests. Rule 20(a)(5).
- 5) A complainant may be present for all parts of the probable cause hearing related to their complaint unless excluded for good cause. Rule 9(i)(6).
- 6) After probable cause has been determined, the files, records, and proceedings of the investigation are no longer confidential, save for work product. Rule 20(a)(2) and 20(c).
- 7) The Director may disclose all prior public discipline. Rule 20(a)(2).
- 8) The Director may exercise discretion in special matters to make certain disclosures, including: the fact that a matter is or is not being investigated or considered, the Director has issued an admonition, a stipulated probation has been approved, or a panel's decision under the Rules. Determinations that discipline is not warranted may be revealed with the consent of the lawyer. Rule 20(b).
- 9) Quarterly Lawyers Board meetings are open to the public, save for matters protected by Rule 20 or other good cause. Rule 4(c).
- 10) Pursuant to Board policy, the Director's Office issues a press release when a petition for disciplinary action is filed in cases seeking suspension or disbarment and after all public disciplinary decisions.

Further, as is evident from the fact that it was the client/complainant who took the private admonition to the press in the example above, the Minnesota rule governing confidentiality of the disciplinary process does not prohibit a complainant from disclosing the results of the disciplinary investigation.^{Ftn 4} In addition, complainants are immune from civil liability for communications within the disciplinary proceeding. See Rule 21(a), RLPR.

STRIKING A BALANCE

Despite substantial access to information relating to the disciplinary system, critics want more. They contend that it should operate like the Better Business Bureau, disclosing all information relating to complaints filed. Aren't lawyers just protecting lawyers? Shouldn't the public have access to all possible information about attorneys before they hire one? Certainly there are arguments to be made in support of the proposition that, like Oregon, Minnesota should completely open its process. But there is an important balance to be struck.

First, the discipline system is not a Better Business Bureau. Its mission is to protect the public, but to do so in a manner that does not unnecessarily punish an attorney. Complaints filed with the Lawyers Board, unlike the Better Business Bureau, potentially subject an attorney to an investigatory process where professional licensure is at stake. Second, it is the judgment of both the Lawyers Board and the Supreme Court Advisory Committee that reviewed the disciplinary system in Minnesota following the McKay report that the balance in Minnesota between confidentiality and public access is appropriate.^{Ftn 5} Since the Board is composed of 40 percent nonlawyers and the Advisory Committee was composed of 37 percent nonlawyers, it would be difficult to attack their views on the basis that lawyers are simply protecting their own.

Finally, while there are certainly situations where a member of the public might benefit from information that a prospective attorney has had a complaint filed against him or her, there are also instances where it might unfairly affect the attorney and the prospective client. For example, the greatest percentage of complaints are filed against attorneys practicing in family law. The fact that multiple complaints have been filed (such as by an exspouse in a divorce case) against a particular attorney could convince a client not to hire the attorney, when in fact the complaints do not fairly reflect that attorney's level of skill or ethics.

While not everyone will agree with the balance struck between confidentiality and accessibility in the Minnesota system, it is in accord with the ABA, it is the result of careful deliberation by Minnesota lawyers and non-lawyers, and it can hardly be described as a cover-up by the legal system.

Minnesota has also answered the question of the usefulness of private discipline, at least for the time being. The Supreme Court Advisory Committee specifically considered the question of whether a system of private disciplinary sanctions should be maintained. The Committee concluded that "admonitions have a place in the discipline system. They serve as early warnings to attorneys, putting them on notice that continued misconduct can lead to more severe consequences."^{Ftn 6} Indeed, the experience in Minnesota is that most lawyers who receive an admonition never receive additional discipline.

The issue of public v. private is beyond the discipline system's scope or control. The Director's Office, pursuant to Board policy, issues a news release after each public discipline decision by the Supreme Court.^{Ftn 7} Depending, however, on the day of the week, whether it is a slow news day in the area, the geographic location in which the lawyer practices (as out-state attorneys assert), and factors known only to news editors, the story might or might not ever make it to print.

NOTES

¹ ABA, Center for Professional Responsibility, "Lawyer Regulation for a New Century." Report of the Commission on Evaluation of Disciplinary Enforcement.

² *Id.* at 120.

³ *Id.*

⁴ *Id.* at 36, 37. So called complainant "gag" rules have been held to violate the First Amendment. See e.g. *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla., 1990).

⁵ The Advisory Committee recommended and the Court has now implemented certain changes to the RLPR that provide additional access to the disciplinary process, for complaints filed after January 1995. See Rule 4(c) (by rule opening Board meetings to the public) and Rule 20 (opening the process after a finding of probable cause).

⁶ "Report of the Advisory Committee to Review Lawyer Discipline in Minnesota and Evaluate the Recommendations of the American Bar Association," (January 28, 1994).

⁷ Johnson, "Changes at the Lawyers Board" *Bench & Bar of Minnesota*, December 1992.