

Use of Disciplinary Findings and Sanctions in Civil Matters

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Increasingly, attorneys are being sued for conduct considered in a prior disciplinary investigation. What impact could, and should, disciplinary proceedings or investigations have on a civil case? Should lawyer discipline prosecutors take into account that use may be made of disciplinary findings and/or sanctions in a related civil proceeding?

In the section entitled "scope" preceding the Rules of Professional Conduct (RPC), we read the following:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary proceedings. They are not designed to be a basis for civil liability.

Lawyers representing complainants in malpractice actions argue that disciplinary sanctions should be admissible in the civil case. In support of this contention they point out that the "clear and convincing evidence" standard of proof in discipline proceedings is a higher standard than that required in civil cases. Some go further and argue that because the disciplined attorney had a full and fair opportunity to contest the issue, the disciplinary findings should be binding in any related civil matter on a collateral estoppel basis.

On some level, the issues in a lawyer discipline prosecution and a legal malpractice action are sometimes similar and occasionally overlap. For example, a lawyer discipline proceeding which establishes that the lawyer neglected a legal matter by failing to commence the action within the statute of limitations would often be substantially similar to a malpractice plaintiff's burden to show that the lawyer's conduct fell below that of the reasonably competent attorney. However, the malpractice plaintiff's burden goes further in that she must also prove that the failure to act caused damage, and that but for the failure to act, the plaintiff would have prevailed in the underlying action. Because lawyer discipline proceedings are designed to protect the public rather than compensate injured individuals, evidence of this nature is rarely introduced in lawyer discipline proceedings.

A related issue arises when an attorney stipulates to a disciplinary sanction, particularly when the sanction is private discipline (i.e., admonition or private probation). The complaining party is provided a copy of the private discipline pursuant to the procedural rules requiring that complainants be notified and given an opportunity to appeal.

Although Rule 20, RLPR, provides that private discipline matters are confidential, this rule applies only to the director and his staff. While most complainants respect the confidentiality of private discipline proceedings and sanctions, they are not legally obligated to do so.

Accordingly, any admissions made in a private discipline sanction are not confidential as to the

complainant.

Whether findings in a disciplinary case are admissible in a civil proceeding is an evidentiary issue within the discretion of the trial court.

Generally, Minnesota courts have held that ethical violations by themselves do not give rise to a private cause of action, nor do they constitute prima facie evidence of malpractice. See e.g., *Christensen v. Eggen*, 562 N.W.2d 806 (Minn. App. 1997) violation of ethical rule did not render referral fee contract void as a matter of public policy; *Carlson v. Fredrikson & Byron*, 475 N.W.2d 882 (Minn. App. 1991) liability for malpractice is not established simply by demonstrating that ethical rule was violated; *L&H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372 (Minn. 1989) violation of ethics rule does not by itself give rise to civil cause of action against the attorney.

However, lawyer discipline findings and sanctions can be admitted for limited purposes. See e.g., *Matter of Boss*, 487 N.W.2d 256 (Minn. App. 1992) attorney's prior public reprimand for misconduct which included attorney's concealment and failure to disclose income was admissible in subsequent unrelated civil action because it was probative of attorney's truthfulness and relevant to his credibility as a witness.

The investigation and prosecution of lawyer discipline matters in Minnesota is done without regard to whether the admissibility of the disciplinary findings in a related civil proceeding will be enhanced or jeopardized.

This concept similarly stems from the fact that lawyer discipline is a character and fitness proceeding rather than a victim compensation system.

On occasion, this may make settling a disciplinary case difficult, because the lawyer fears making admissions that could be damaging in the civil action. Nevertheless, if the public is to be adequately protected, and disciplinary sanctions are to be fair and consistent, prosecutorial decisions should be made in a vacuum without speculation as to whether the results may be used elsewhere.