"Recalibrating" Attorney Discipline

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Every few years, the Minnesota Supreme Court uses a published opinion in an attorney discipline proceeding to send a message to the bar of this state. Usually the message includes an announcement in which the Court puts attorneys on notice that it intends to treat certain types of professional misconduct more severely than it has in the past.

The Court referred to the concept recently in *In Re Gurstel*, 540 N.W.2d 838, 842 (Minn. 1995): "Minnesota attorneys have been on notice since at least 1972 that the failure to file tax returns is serious professional misconduct, and that suspension or disbarment is the appropriate sanction. *See In Re Bunker,* 294 Minn. 47, 199 N.W.2d 628 (1972)."

Bunker is the fountainhead of all modern Supreme Court decisions which send a message to the bar about changes in attorney discipline. *Bunker* is a wonderful opinion of the type that may once have been common, but is rarely seen anymore, an opinion in which the Court goes on at great length about the honor and dignity of the legal profession, and the important role of attorney discipline in protecting not only the public but also the profession itself from its members who would commit misconduct.

The *Bunker* Court then announced its message: That although previous discipline cases of that type (failure to file tax returns) had uniformly been treated much more leniently, that would no longer be the case in the future: "In recognition of . . . past practice, this court will impose only probationary discipline upon the respondent. However, it should be noted that for violations occurring hereafter, the discipline will consist of either suspension or disbarment." 294 Minn. at 55, 199 N.W.2d at 632.

The Court's recent opinion in *Gurstel* does precisely the same thing, although on a lesser scale. There, following prior practice, a referee had recommended a 60-day suspension for the attorney's failure to file timely withholding tax returns and to pay the taxes when due. The Office of Lawyers Professional Responsibility argued that prior practice for discipline in such cases had become inadequate, and that the proper discipline

should be a six-month suspension. As in *Bunker*, the Court followed past practice for the respondent attorney before it, but then went on to put the bar on notice that similar cases would be dealt with more severely in the future:

"However, it should be noted that for violations occurring hereafter, attorneys who engage in similar professional misconduct should anticipate that, when disciplinary action is taken, the discipline may be more severe than that imposed in this case."

Other cases in which the Court has sent a message to the bar include *In Re Beman,* 451 N.W.2d 647, 648 (Minn. 1990) ("The bar . . . is placed on notice that henceforth we shall consider noncompliance with CLE requirements to be a very serious matter and may well result in more stringent disciplinary sanctions being imposed") and *In Re Lochow*, 469 N.W.2d 91, 98 (Minn. 1991), ("We do feel an obligation to advise the bar that this court is getting increasingly alarmed at the numerous cases of trust account violations by lawyers of this state . . . . We thus can no longer treat lightly any abuse of trust accounts . . . . Therefore, we feel compelled to advise the bar that misuse of trust accounts in the future will (1) almost invariably result in lengthy suspension at the very least and disbarment at worst and (2) that retainer fees not immediately placed in a trust account will be looked upon with suspicion.")

Sometimes the Court may not be as explicit when it sends a message. Sometimes the message may be clear, although implicit rather than explicit. Other times, divining the message may be a matter of reading entrails or tea leaves.

STIFFER PENALTIES

On November 9, 1995 the Court sent what appears to be several messages. On that day, the Court released three opinions which rejected proposed discipline that had been jointly stipulated to by the Director's Office and the respondent attorney. In each case, the Court imposed more severe discipline than what the parties had agreed to, stating in various ways that the Court found the stipulated discipline too lenient. *In Re Brenner*, 539 N.W.2d 606 (Minn. 1995) (discussed below); *In Re Swenson*, 539 N.W.2d 394 (Minn. 1995) (rejecting jointly stipulated public reprimand and instead suspending the respondent attorney for 30 days) ("The Court finds that the agreed-to public reprimand is an inadequate sanction"); *In Re Kludt*, 539 N.W.2d 392 (Minn. 1995) (also rejecting a stipulated public reprimand, ordering, a 30-day suspension instead).

In Re Brenner is certainly the most interesting of these three decisions. The respondent attorney and the Director's Office presented a stipulation proposing a one-year suspension for the misconduct in question. The Court rejected it out of hand: "[T]he court has determined that the parties' stipulation is unacceptable because it does not propose a discipline which is commensurate with the admitted misconduct." 539 N.W.2d at 606. Instead the Court suspended the respondent attorney *indefinitely*, with

leave to reapply for reinstatement no earlier than two years from the date of the opinion (and adding additional conditions for reinstatement).

In dissent, Justice Page made it very clear that, in his opinion, even the majority opinion's resolution of the question was too lenient, and that respondent should instead be *disbarred*. *Id*. at 606-7.

Justice Page's dissent in *Brenner* is interesting for another reason. According to a recent computer search, dissents in Minnesota Supreme Court attorney discipline proceedings have been extremely rare--until recently. There are no reported dissenting opinions before 1982. There was one in 1982, another in 1986, and then none until 1993. In the past two years, however, there have been *six* dissenting opinions to the effect that the discipline imposed by the Court was too lenient and should be more severe. *All six were authored by Justice Page*. (Incidentally, Justice Page was recently appointed liaison justice to the Lawyers Professional Responsibility Board, an important position handled ably over the past several years by Justice M. Jeanne Coyne, and by Justices John Simonett and the late Glenn Kelley before that.)

In any event, there are several messages that might be seen in the November 1995 trilogy of cases in which the Court found the stipulated discipline too lenient and imposed a more severe sanction. First, the Court may be sending a message to the Lawyers Board and the Director's Office indicating that they should be less "lenient" in certain professional discipline cases. There is certainly nothing wrong with that; the Court, after all, has ultimate authority over all disciplinary matters, and it would not be particularly surprising that the appropriate discipline would have to be "recalibrated" from time to time (just as it was in *Bunker, Gurstel, Beman, and Lochow*).

STIPULATION NO GUARANTEE

There is another message, perhaps more subtle but certainly even more important, that the Court is sending to lawyers who may commit misconduct in the future. As a procedural matter, all three of these cases came before the Court based on a stipulation in which the Director's Office and the respondent jointly agreed to the proposed discipline. As a matter of standard form, each stipulation contained boilerplate language confirming that the Court is not bound by the stipulation for purposes of the level of discipline imposed, but may make any disposition it deems appropriate. Such stipulations constitute unconditional and irrevocable admissions of the charged misconduct.

Thus, the respondent attorney in each of these three cases found himself in the unenviable position of having admitted to the misconduct with no guarantee that the agreed upon discipline would be adopted. There is no right in this context (as would be the case in any criminal prosecution) to withdraw the admission and litigate the matter

if the stipulated disposition is rejected by the Court. This has not always been the case. Rule 13(b) of the Rules on Lawyers Professional Responsibility formerly allowed for a "conditional admission," an admission of the charged misconduct conditioned upon a stated disposition. The Supreme Court repealed that Rule in 1988, however, and since that time there has been no way to withdraw an admission to disciplinary charges. For whatever reason, the Court has strongly rejected the idea that an attorney should be allowed to admit ethical charges conditioned on the Court accepting a specific proposed discipline.

Some may argue that this seems unfair, shouldn't attorneys have at least the same rights that persons charged with crimes do? However, an attorney in disciplinary proceedings is decidedly *not* the same as a criminal defendant. An attorney is an officer of the court. It may simply be unacceptable, perhaps sometimes even unseemly, for the Court to be entertaining "conditional" admissions of wrongdoing by its own officers. In other words, either you admit your misconduct and come before the Court with remorse and contrition, or else you refuse to admit and take your chances. What you will not be allowed to do is to say in effect "I will admit I did something wrong, but only if the Court agrees to what I think is the appropriate discipline."

Several conclusions can be drawn from these recent developments. First, it does appear that the Supreme Court is in a period of transition in its treatment of attorney misconduct, and the change is certainly not toward more leniency. There also appears to be a marked hesitance to accept stipulated dispositions where the proposed discipline is deemed unacceptably light. In sum, we may be going through a period of "recalibration" of disciplinary sanctions. The Court is sending a message to the bar that attorneys who commit professional misconduct can expect to be treated more severely in certain cases than previously was the case.