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## 'The Attorney's Field Guide to Losing Your License'

A DIY handbook for going beyond censure. Refer to this guide when you sense you're near the line or you don't know where the line is.

By **Marc Garfinkle** | April 06, 2018

Representing attorneys in disciplinary matters is full of surprises. Still, one situation occurs so often as to be predictable. That is the moment, usually at the beginning of our interview, where the lawyer asks anxiously, "What's the worst that can happen?" or "Am I going to lose my license?" Although the two questions sound essentially the same, the answers are not quite identical.



**Credit: Shutterstock.com**

To the first I might respond, "Generally speaking, *anything* can happen." The Supreme Court owns your license. It can suspend you—even disbar you—for *any* violation, in the appropriate circumstances. Your character, disciplinary history, offerings in mitigation or aggravation, cooperation with the investigation, rehabilitation, candor and many other factors can impact the decision to suspend your license. To the second question I might answer, "Not necessarily. Unless you comingled or stole client funds, your particular discipline will be determined on a highly individualized basis."

Truth is, I had been hoping to one day write a handbook for keeping lawyers out of trouble. Problem is, there already is such a book: *The Rules of Professional Conduct*. Any lawyer that knows and understands all the rules, can recognize them at a distance

on a cloudy day, and follows them all assiduously through change and reinterpretations, will probably avoid ethics problems forever.

On the other hand, if the RPCs are anything like the Bible or the motor vehicle code—and I suspect they are—few among us can claim a perfect record or recite them by heart. A rabbi once told me that a Jew has 613 commandments and prohibitions to follow. “Oops!” I thought. My ship was already sunk, since I had been totally unaware of 603 of them—that’s 98.37 percent of them—my entire life, and I probably had run roughshod through most of them. Worse, I was already struggling with the 10 I knew about.

Of the many rules imposed upon us today—at home, by religion, by agreement, by custom, by profession—we pick and choose those which we will abide. Thus, there are some we do not honor, substituting instead our judgment for the rule of law. We might run a stop sign at three a.m. on a clear night if no one is in sight, or inadvertently deduct the cost of an office light bulb, even though we later returned it, defective, for store credit. We may not know exactly what will happen in those scenarios if we are “busted,” but it’s pretty sure we’re not going to jail.

Attorney discipline is not so clear-cut. Beside the rules themselves, there has never been a guide to help lawyers on the job recognize when they might be crossing into perilous territory. There is no diode that beeps in an ethical danger zone, nor a canary that dies when a case or client turns toxic. That is, until now. The rules being the last word on avoiding suspension, all that was left for me to write was the book from the other side—how to get suspended. Once you are aware of what you did, and you know what it takes to get suspended, you should be able to figure out where you stand, no? It’s easy; you’re a lawyer, right? Of course you are! So remember, follow my advice—I wrote this for *you*.

### **“The Attorney’s Field Guide to Losing Your License”**

This guide is intended to help attorneys determine whether their alleged conduct puts them in jeopardy of suspension or disbarment. Don’t let this fall into civilian hands. Refer to this guide when you sense you’re near the line or you don’t know where the line is. If you are caught up in an ethics matter, this little book can help you lose your license. Just remember to use the few basic concepts and stratagem which we have outlined below, and suspension or disbarment might be just around the corner.

## **Remember that you can control much of your destiny.**

Not sure the offense was serious enough to deserve suspension? Maybe you're right. There is much that you can do to make things worse, if you are proactive. Understand that it will be your *character*, even more than your acts, which will draw the OAE's scrutiny. You have a lot of control over that. Prove yourself unfit. Show how you haven't learned your lesson, or that you don't understand what you did wrong, or say that you'd do it again if you had to, all things being equal. Those approaches are simple but they are tried and true.

There are, of course, some offenses for which suspension is certain; but there are many, many more where suspension is in doubt. In those cases, the decision may be based more upon who you are than what you did. The OAE might want insight into your character before they lift your license. Disappoint them, and you can score big. Don't leave this to chance! Avoid voluntary community service, involvement with bar associations, mentoring, self-improvement programs, and the like. Cut back on the local, school-based activities you once did, and double-down on your bad habits. There are plenty of ways to demonstrate poor character.

## **Prior experience helpful; related experience best.**

Attorneys with the best chance of losing their licenses are those with disciplinary histories. Repeat offenders are now having their disciplines enhanced, and some frequent fliers are disbarred. Lawyers who might otherwise have been censured or reprimanded can be suspended, or better, if they've been in trouble before. Remember: repeat offenders may be given priority, so don't overlook any historical advantage you might have.

While long colorful histories of lesser violations can be helpful, a prior violation for the same kind of act or omission could really tip the scale. And if you violate an order of a court—or better yet, an Ethics Order of the Supreme Court—your odds improve dramatically.

## **Diversify: Add a criminal conviction.**

The OAE gets to know about all attorney wrongdoing, on and off the job. Many forms of misconduct, properly executed, can get you suspended, but a criminal conviction would probably seal the deal. Theft offense? That alone will usually do it. Out of state

conviction? No problem: if you have pled guilty or have been found guilty of a crime in *any* jurisdiction, that might be the only credential you will need. Ironically, another good strategy would be to *not* tell the OAE about the conviction. In that case, when it is discovered, you will be charged with additional ethics violations, which could help put you over the top in a close case.

### **Don't forget lack of remorse.**

This is a good one, because it is always available. Regardless of the charge or how insignificant the offense, the opportunity always exists to make matters worse: just fail to show remorse. Ethics committees—like criminal courts—can be swayed to lenience when respondents acknowledge responsibility and demonstrate remorse. Don't let that happen. Rather than sucking it up and being humble, you might challenge the authority or jurisdiction of the OAE or call the three-person hearing panel a “kangaroo court.” If you don't have that much moxie, consider blaming someone else for your present misfortune. They hate that.

### **Show the OAE you don't “get it.”**

The OAE is obsessed with figuring out whether respondents actually have learned from the experience and whether the bad conduct is apt to recur. When in doubt, they'll kick you out. This opens the door for several effective approaches. For example, you can tell the DRB that you still don't understand the purpose of the rule. Equally effective is conveying that you don't understand why they think your offense is such a big deal. One successful respondent argued that he knew a dozen lawyers who had done the same prohibited thing—or worse—and that they were still getting away with whatever it was. The possibilities are endless.

### **Go pro se.**

Sure. Why not? After all, you have a plenary license. Even though you have heard that Ethics is a minefield, you have read the rules yourself, haven't you? There aren't that many of them. You have the RPCs and you have this handy guide. Even if you decide to seek counsel, it is usually best to wait. The wrong attorney might see your case's strengths and weaknesses early on and prescribe measures to avoid suspension or disbarment. Since the early answers count most, some attorneys prefer to forestall retaining counsel until they have effectively secured the suspension on their own.

## Conclusion

I hope this guide has been helpful. I doubt it will be; it seems that those lawyers who read full-page columns on legal ethics rarely risk losing their licenses. Still, dear reader, perhaps you might forward this to a needy colleague. Glad I could help.

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