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LEGAL ETHICS

Whatever You Don't Say Will Be Held against You

When a lawyer is accused of a crime

By Marc Garfinkle

It used to be that a "criminal attorney" was a lawyer who defended people accused of crime. This was never an ambiguous term, and defense lawyers bore the moniker with pride. Regrettably, that same description, "criminal attorney," is also an apt description of a lawyer who has been convicted of, or admitted to, a crime.

While criminal conduct by and among lawyers is not new, it is increasing in frequency and broadening in scope. We needn't look far to prove that. Recent editions of the Law Journal have featured articles about a judge who was sentenced to prison for harboring a known fugitive, a lawyer sentenced for taking money from destitute immigrant clients by threatening them with deportation, and an in-house corporate attorney who admitted to using his attorney trust account to bilk his only client out of millions.

And let's not forget Paul Bergrin, Newark's own ex-Marine, ex-prosecutor, ex-defense lawyer supreme, who apparently used murder as a trial strategy to keep troublesome witnesses from coming to court, all the while building a criminal empire on the side. With this backdrop, the Office of Attorney Ethics (OAE) is battling criminality among lawyers with renewed ferocity and with powers that go far beyond those of law enforcement in the criminal arena.

Though most crimes by attorneys are less sensational than those in the headlines, these cases are no longer rare, and all lawyers should understand what happens when a lawyer is accused of a crime. Today's column contains some FGAs (frequently given answers) about attorneys who become "the accused." Clearly, lawyers who read columns on legal ethics are less likely to need this information than those who are indifferent to the rules, but perhaps this will help you to advise and defend our wayward or wrongfully-charged colleagues.

A charge against a lawyer may arise by complaint, indictment, information or equivalent. As soon as possible after learning of the charge, the attorney must report the event, in writing, to the director of the OAE. Not all charges must be reported. Charges from jurisdictions outside of the United States and its territories are excluded from the reporting requirement.

Within New Jersey, only charges of indictable offenses are reportable at this stage. Out-of-state charges that would have been indictable if they had arisen in New Jersey must also be reported, irrespective of their treatment in the foreign state. Municipal court summonses, disorderly (and petty disorderly) persons offenses, and municipal code violations are not reportable. This does not necessarily mean that the Supreme Court doesn't learn about them.

The director of the OAE is empowered to request that the head of every law enforcement agency in New Jersey, including the Attorney General and the U.S. Attorney, "promptly notify the Director of the Office of Attorney Ethics of any criminal charge filed against a New Jersey attorney, including all disorderly, petty disorderly or any second or subsequent motor vehicle charges involving the use of drugs or alcohol and to provide relevant information." R.1:20-13(a)(2). You may assume that this is done. The attorney is not told about this.

The rules also oblige the attorney to advise the director, in writing, of the court's disposition of the matter. This has generally meant the "final disposition"; however, the term is not always clear. Where a matter has multiple dispositions (e.g., the case is transferred to a different court, such as the family division, for disposition, or is downgraded and remanded to a municipal court) the director should be kept abreast, in writing, of all dispositions.

Lawyers charged with crimes often must honor other notice obligations beyond those prescribed in the rules. For example, an attorney employed in a law firm, legal department or agency almost certainly owes disclosure of some sort to the employer. He or she may even be required to do so, contractually. There may also be reporting requirements under the attorney's E&O policy. Attorneys charged with crimes should review their policies for legal defense provision or defense-cost reimbursement.

Where the matter does not involve theft, fraud, commingling of client funds, or other charges suggesting that the attorney cannot

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be trusted, the OAE will not typically proceed in a disciplinary matter until there is a disposition in the criminal aspect. Since criminal convictions serve as irrefutable proof of the allegations, as the "reasonable doubt" standard in that forum is more stringent than the OAE's "clear and convincing" standard, many ethics investigations are truncated or obviated following disposition. It is often wise for the OAE to wait.

Sometimes, however, the OAE may launch an investigation even while the criminal matter is pending or even before any action is taken pursuant to the criminal charge. In such a case, the OAE may request that the Supreme Court order a *temporary* suspension of the attorney's license to practice. The motion may be made at any time during the pendency of the investigation, prosecution, consideration or appeal of the matter. The temporary suspension is never imposed lightly, but in the cases where the OAE requests it, their focus is consumer protection.

In some cases, the attorney might be allowed, either by order or consent of the director, to continue to practice, subject to conditions that protect the public and the profession. Conditions might include denying the attorney access to bank accounts, prohibiting the attorney from handling certain types of transactions, requiring a co-signer or surrogate for certain fiduciary functions, or requiring that real estate transactions be handled by escrow companies.

The practice of law is a privilege, and not a right. Our licensing agency, the Supreme Court, is not bound by constitutional standards of due process with regard to our licenses. For example, at any point in the ethics investigation, the attorney may be asked a question whose answer may result in self-incrimination. Of course, the attorney's constitutional right to refuse to answer is sacrosanct, and an answer may not be compelled, but the attorney's refusal is tantamount to a failure to cooperate with an ethics investigation. As such, it could result in additional charges or application by the OAE for temporary suspension. Additionally, if any violations are later found, the attorney's refusal to answer will later become an aggravating factor in determining the measure of discipline.

If the attorney is acquitted of the charges, the OAE will still pursue any ethical issues. The OAE is not bound by the findings made in the criminal case, and it may consider many matters that were privileged or otherwise disallowable in the Law Division.

Once an attorney is convicted of a crime, discipline will follow. A conviction is not even necessary. Whether the attorney is given PTI, probation or a deferred disposition is of little moment to the OAE. They focus on the attorney's acts and intent, and are unconcerned with the labels and pigeonholes of criminal prosecution.

If the conviction resulted from a verdict or a plea involving a "serious crime," the Supreme Court must immediately suspend the attorney's license.

The definition of "serious crime" specifically includes any New Jersey crime of the first or second degree, any criminal drug offenses (except minor possessory offenses), any felony of the United States or of any state or territory, any crime anywhere which involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, and any attempt, solicitation or conspiracy to commit a "serious crime."

The OAE may also petition the Supreme Court to suspend the attorney's license in a lesser case, should the director so decide. Not surprisingly, however, the OAE director also has the power to lift the suspension in the interest of justice, upon good cause shown.

Attorneys convicted of *theft* crimes—larceny, joyriding, embezzlement, shoplifting, receiving stolen property, improper disposition, burglary or any attempt or conspiracy to commit a theft crime—are in serious trouble. The prescribed discipline for attorney theft has traditionally been disbarment. Fortunately for many, this is not usually imposed. More typically, the discipline involves suspension of the attorney's license for a term of six months to three years. Each matter is scrutinized before the imposition of discipline. The measure of discipline will be the topic of a future column, here.

Of course, the measure of discipline for co-mingling client funds is disbarment. No matter that the debt was repaid or that the client does not care. No matter that this was the lawyer's first offense, or that the lawyer's family was starving. The rule is quite simple: steal or co-mingle a client's money, and you will lose your law license and possibly go to prison.

There you have it … information you should never need to know, about what happens when an attorney is caught breaking the law. Of course, lawyers, like everyone else, can be falsely accused; but the next time you hear of an outlaw lawyer caught red-handed (as they usually are), you may join the chorus of people asking, "What on earth was he thinking?"■