A Fool for a Lawyer

Going *Pro Se* before the Ethics Committee

Few events can shake a lawyer's world more violently than notice of an ethics grievance. Whether it blasts through the door as a complete surprise or drops like the second shoe after long anticipation, whether we agree with its premises or vehemently deny them, we usually react with fear, anger and confusion. Anxiety and depression often follow. Our personal lives suffer. There is no overstating its impact.

Since an Ethics complaint may be the most dramatic event in our professional universe, eclipsing in impact even malpractice suits or wrongful termination, it is ironic that the affected attorneys are so often reluctant to retain legal counsel. One would think that any lawyer with a license-endangering problem would immediately seek the advice, if not the assistance, of a colleague. One would think that lawyers, who understand better than anyone the advantages of having counsel, would be quick to "lawyer up." One would think so.

One would be wrong. When I get a call from an attorney who has been served a grievance, the conversation usually moves quickly to the part where s/he needs "to know whether or not I need counsel." For reasons which go beyond (but don't ignore) my pecuniary interest in being retained, my answer will almost always be, "Yes." That was not always the case.

There was a time when, after a consultation, I would tell certain clients that I was comfortable merely advising and educating them, and then sending them out to do battle *pro se*, if that was their wish. They would still get my perspective, my advice and my blessing. I thought I was being practical and fair. These days, while I continue to advise and educate the lawyers who consult with me, I am less comfortable endorsing self-representation at any point in the process. Here is why.

In a recent, but memorable conversation off the record, a member of the OAE's legal staff opined that, "Any attorney who interfaces with the licensing authority without counsel in a matter which can affect that license, is a fool."

I remarked that even *I* didn't feel so strongly about that, although I have always told clients that, at the very least, "I can say nicer things about you than you can say about yourself." Ethics counsel insisted, "It goes beyond that. As attorney, you are your client's buffer."

Again, counsel was right. The buffer, the interface, the filter, the muffler. How true that is. Litigators, mediators and negotiators understand how important that is. As buffer, we can affect how our client is perceived and treated. We can enhance their esteem and complement their appearance. That alone can make the difference in a close case.

When I tell attorneys that they DO need counsel, many then ask whether the Ethics Committee or auditor will draw a negative inference from the fact that they retained counsel. The answer is an emphatic "no." The District Ethics Committees, the auditors, the Committees on Character and Advertising, the DRB and the Supreme Court all appreciate the efficiency and professionalism brought

by experienced counsel. Think about it - is there a judge anywhere who would prefer presiding over a trial with *pro se* parties? However, as my colleague from the OAE was quick to point out, an attorney that is unfamiliar with our ethics rules and disciplinary system can quickly become a liability.

Who among us prefers to travel an unknown distance in strange and perilous environs without an able companion? Who, at least, would fail to pick up a roadmap, a compass, binoculars, night vision gear and some field guides on the way out? Yet, so many of us do just that, despite their ready availability.

One reason may be the self-confidence of counsel, a trait shared by most trail lawyers and lots of others. Perhaps these lawyers have more confidence in their own ability to research, argue and present the matter than they do in a colleague's. How else do you explain why prominent members of the trial bar, who certainly have access to competent ethics lawyers and are able to pay for them, go bareback before an ethics audit, the DRB, the Committee on Character, the Committee on Advertising, and even the Supreme Court?

Perhaps a problem is that our licenses give us a too-strong sense of empowerment. Our truly plenary licenses permit each of us defend a homicide today, draft an IPO tomorrow, and convert a former train station into condominiums next week, calendar permitting. If we are so awesomely empowered, shouldn't we be able, then, to play a game on our home court without disadvantage? After all, a carpenter should be able to fix her own deck; a computer technician should de-bug his own PC, and physicians are told to "heal thyself" – an option that today's surgeons would probably decline, despite all the advances in robotics.

Another explanation for the *pro se* contingent on the Ethics docket is that attorneys are uncomfortable discussing their ethics issues with other attorneys (or anyone else, for that matter). This compounds the problem. These lawyers seem to wait until the situation attains critical mass, and then they are usually relieved when they "can finally talk about it." Other lawyers are not so disabled. Confident that they will not make a misstep, they prefer to handle the matter themselves until they see how deep or how warm the water is. Later, they will decide whether to go it alone. They don't perceive a risk.

Of the lawyers who ultimately retain ethics counsel, many delay, often until the last minute, before making the call. Not infrequently, they are paralyzed for a few days or more following receipt of the grievance. Numbed, they leave the envelope on a desk or in a file and they convince themselves that they will get around to it before the deadline. This is often when the anxiety, sleeplessness, unhealthy ruminations, and the like, take hold. At this point, they may need psychological assistance as much as legal assistance, though most are not likely to seek it. Eventually, especially after suffering a setback in an early round, many attorneys get the help they need, legal and otherwise.

As with litigation, there can be advantages to moving swiftly, surely and with a guide. In Ethics, a delay may obviate a favorable option or send the wrong impression to the Committee. An untoward delay can bring a charge of "failure to cooperate," a separate allegation to confront.

On the other hand, enthusiastic cooperation may not be the best strategy, either. Often, when a lawyer who, uncounseled, has been cooperating with Ethics, later comes to me for representation or advice, I

find myself wishing we could have a do-over. Nervous and trembling, these attorneys dutifully turned over items and information to the Committee that, well, maybe they needn't have. Usually, they were just trying to comply with the investigation, under pain of an additional charge. In all events, early engagement of counsel helps ensure proper handling.

Certainly, some lawyers begin to seek expert help while the envelope from Ethics is still unopened in their sweaty hands. They are nervous and scared. They want information. They know they can lighten their burden by sharing it with a colleague. They know that they don't know what they don't know (!) and so, before they do anything else, they seek the advice of counsel. Most of them will later want representation, also, but right now, more than anything, they just want to know what to expect.

There is a human tendency to expect the worst in bad situations, especially where we lack insight or experience. This phenomenon is familiar to lawyers, who see it frequently in clients. As clients, lawyers are no different. We imagine that the audit or investigation into our practice will uncover every unsavory thought we ever had, that some minor oversight will be found nefarious, and that our discipline will, of course, be the max. This tendency alone is reason to get a lawyer - an objective, informed and experienced lawyer - to walk you through your issues and put them in perspective.

I confess to reading this paper regularly for the Notices to the Bar of attorney discipline. I look to see *inter alia*, which attorneys were involved as ethics counsel for each side. Whenever I see discipline ordered for a *pro se* Respondent, I wonder what s/he was thinking. I wonder if s/he has regrets.

Legal Ethics and Discipline is a challenging and rewarding niche in the practice of law. I often encourage colleagues and law students to consider working in the field. Any of you readers might find it appealing, too. Give it a shot, counsel, if you please, but remember - if a grievance comes blasting through your door, one otherwise normal day, don't represent yourself.

Don't be a fool.

Marc Garfinkle