"Tell Me What I'm Looking At"

Ethics Violations and the Quantum of Discipline

When faced with an Ethics Committee Grievance or Complaint, attorneys, for reasons lodged deep in the human psyche, fear the worst. Suspension. Disbarment. Prison. So when they speak to me for the first time, their most pressing question usually is, "What is going to happen to me?" My invariable answer (because I have been a lawyer far too long to give any other) is, "It depends."

In legal ethics, each case is judged on its own merits, and the quantum of discipline may depend on many factors. For example, it may depend on whether the violation arose within or outside of the practice of law. It may depend on whether there was a crime or other dishonesty involved. It may depend on the disciplinary history of the respondent, whether restitution was made, whether the respondent has cooperated with the investigation, has provided extraordinary service to the community, has been rehabilitated or failed to attend counseling sessions. It can depend on the number and magnitude of the RPC violations, on the quality and quantity of the Respondent's letters of character reference, on the attitude of the Respondent in answering questions, and on the position taken by other bars to which the respondent belongs.

A respondent's lack of remorse is an aggravating factor, but one's remedial measures may speak for mitigation. A respondent's youth or inexperience may be a mitigating factor, though one's status as a judicial law clerk is an aggravating one. A respondent's pattern of, or repeated, misconduct is an aggravating factor, but exemplary comportment since the violation can mitigate discipline.

Substance abuse can be a two-edged sword. Illegal drug abuse is never a mitigating factor, and implicates the attorney in the criminal acquisition of the substance. Alcohol abuse, on the other hand, may be used to explain, though not excuse, certain ethical wrongdoing, and it may mitigate discipline in special limited circumstances. Knowingly appearing in court in an intoxicated condition, however, will raise additional problems.

Mental disability and illness are treated specially. If the mental problem would affect the attorney's fitness to practice, the attorney may be eligible to transfer to a creature called Disability Inactive Status, whose name suggests its function. As to the effect of the violations which preceded the transfer to this status, the Supreme Court has said, "mental disability, even if genuine, may not be a defense to a charge of misconduct." (*In re: McManus*).

The Court's use of the so-called Jacob's rule acknowledges that, "there may be circumstances in which an attorney's loss of comprehension, competency or will may be of such magnitude that it would excuse or mitigate conduct that was otherwise knowing and purposeful." (*In re: Goldberg*). Note, however, that the Court has not yet found such circumstances in any case, and it has strongly suggested that no such consideration might be available in a case of misappropriation.

Perhaps because of the seemingly countless factors that may determine the quantum of discipline, the ultimate discipline in an ethics matter is generally less predictable than the outcome of typical criminal case. Perhaps this is because disciplinary matters are reviewed by the Disciplinary Review Board or perhaps because the attorney disciplinary system is mandated to protect the public and maintain confidence in the judicial system, while the criminal justice system is, ironically, mandated to discipline the offender. There are other salient differences.

For example, the typical criminal case involves negotiation - "plea bargaining" - efforts to dismiss or downgrade one or more of a defendant's charges in order to gain admissions, enabling the charging body to move the case directly to the punishment phase. Powerfully counter-intuitive to defense lawyers is that plea bargaining does not exist in an ethics proceeding. No ethics Complaint can be resolved with defense counsel offering, "My client will accept discipline for RPC 1.3 (Diligence) and 1.4 (Communication), if the 1.15 (Safekeeping Property) goes away," or with the Deputy Ethics Counsel offering to drop the RPC 8.4 (Misconduct) in exchange for the Respondent's capitulation on the 4.1 (Truthfulness in Statements to Others).

Where clear and convincing proof of a violation can be established, there is no horse-trading of charges; rather, the quantum of discipline now becomes the respondent's battleground. A respondent who acknowledges the charges and anticipates a particular range of discipline may decide that there is more to lose than to gain by prolonging an investigation or insisting on a hearing.

Such an attorney may attempt to enter an agreement for Discipline by Consent, the ethics equivalent of a plea bargain. Available at any time in the process, even after the panel hearing (but prior to the issuance of the hearing panel's report), it allows the respondent and the presenter or investigator to agree on a specific recommendation for discipline. That agreement is subject to the approval of the Disciplinary Review Board, and so the recommendation is just that – a recommendation. Since the DRB rarely in unanimous is their assessment of the appropriate discipline, there is no certainty that an investigator's recommendation will be approved.

Now that we have reviewed some of the factors influencing a disciplinary decision, it is helpful to review the spectrum of discipline to which our legal flesh is heir. First, the measure known as Diversion in Lieu of Formal Discipline may be available if the OAE decides that the matter involves "minor" unethical conduct. Unavailable after a Complaint has been filed and subject to strict limitations, Diversion is *not* formal discipline, and it may remain confidential. It is the ethics equivalent of Pre-Trial Intervention (PTI).

Next is the Admonition, the lowest level of formal discipline, direct descendent of the Private Reprimand, whose shady oasis was obliterated late in the last century by the public's right to know. In an Administrative Determination explaining this dramatic revision in the Rules, the Supreme Court opined, that, "in due time, that public will understand that an "admonition" represents a determination that the ethical misconduct was indeed minor and will judge the attorney accordingly." Really, now.

More serious than the Admonition is the Reprimand, equivalent to the former Public Reprimand, telling the world of the offense and the offender. Sometimes, conditions are imposed upon the reprimanded attorney, such as partial reimbursement of a fee or quarterly submission of trust account reconciliations.

Graver yet is the Censure, which is more severe than a Reprimand, but less so than a Suspension, and that is as clear as I can be on the issue. Irrespective of the Supreme Court's optimistic opinion, the lawyer-employing public is generally unaware of the distinctions between the three non-suspension punishments, and all seem to have similar impacts on the lives of the respondents.

Suspension is next in the hierarchy. It is imposed where the above measures are considered insufficient. Suspension is usually for a fixed term, which may be from three months to three years. The most common terms are three months, six months, one year, two years and three years. Theft events and domestic violence are almost certain to result in a period of suspension. There is also an "indeterminate" suspension which prohibits the attorney from seeking reinstatement for a period of five years, although the Disciplinary Order may provide otherwise or may impose a wide variety of conditions on the suspended attorney.

Suspension is stern. A suspended attorney may not be involved in the practice of law in any capacity. Accepting, paying or sharing law-related fees, other than those earned prior to suspension, is a clear violation. Employment as a clerk, paralegal or consultant to a law-related enterprise will also be a violation. Attorney who violate this will be subject to further discipline, and the Director of the OAE may refer the matter to a law enforcement agency, as the unauthorized practice of law is a crime of the fourth degree and answerable once again in Ethics.

Finally, there is Disbarment. As most lawyers know, clear and convincing proof of knowing misappropriation of client funds will invariably result in disbarment, even if the appropriation was insignificant, temporary and forgiven by the client. That is the essence of the oft-cited rule of *In re: Wilson.* However, almost any ethics offense can result in disbarment if it is egregious enough, and criminal acts which might have brought suspension if occurring outside the practice may result in disbarment if committed in connection with, or under the cover of, a legal practice. Unlike the Rules in New York, New Jersey does not permit reinstatement following disbarment. Disbarment here is forever.

We lawyers are protective of our licenses. When they are threatened, we rise to defend. Avoiding discipline requires the lawyer to know the RPCs, to recognize when they apply, and to honor them in practice. Beyond that, a proactive defense involves stepping up our community service, becoming involved in bar associations and their projects, and otherwise becoming a better citizen and a more dedicated member of the profession. If a grievance is filed against you, your attorney will appreciate having the longest possible list of good things to say about you. You will, too. You never know on what factors your license may depend.

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