CHAPTER 3

CONSEQUENCES OF VIOLATING THE DISCIPLINARY RULES

A. SANCTIONS AND PROCEDURES

What happens to lawyers who violate the disciplinary rules? In theory, they are subject to discipline. In many cases, however, nothing happens to lawyers who violate the rules. Attorney discipline procedures vary from state to state, but as a general rule they involve assessment of a preliminary complaint, a determination that there is probable cause to proceed with the complaint, and a formal hearing process at which the attorney’s misconduct must be proved. In order for an attorney to be disciplined, several steps have to take place: reporting of a complaint, investigation by disciplinary authorities, a determination of probable cause, and (barring a concession of wrongdoing) a formal adjudicative proceeding.

Consider what factors might hamper effective enforcement at each stage of this process. For example, what factors might tend to make the filing of a complaint more or less likely? Who is likely to be the source of disciplinary complaints? As we will see, lawyers have an obligation to report certain categories of disciplinary violations by other lawyers, but lawyers report other lawyers less often than such a rule might suggest. Can you think why? Is there a particular category of lawyer that you might expect to bring disciplinary complaints? Do you think judges are likely to bring disciplinary complaints? Clients, of course, are a significant source of complaints. Are certain clients or categories of clients more likely than others to use the disciplinary process to express dissatisfaction with their attorneys? According to one study, “the largest percentage of formal grievances involve criminal practice, personal injury practice, or domestic relations practice.” Patricia W. Hatamyar & Kevin M. Simmons, Are Women More Ethical Lawyers? An Empirical Study, 31 FLA. STATE U. L. REV. 785, 830 (2004). Why might this be the case? What other vehicles might a client use to punish his or her attorney?

Given that the disciplinary system is complaint-based, we might question whether the process is likely to succeed in identifying all lawyers who have violated the rules of professional responsibility. There is little empirical evidence nationwide about the identity of disciplined lawyers,
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but what evidence there is suggests that solo and small-firm practitioners are disproportionately the recipients of attorney sanctions. If this is actually the case, can you speculate about why that might be? Hatamyar & Simmons also conclude that female attorneys are disciplined at lower rates than male attorneys. Why do you suppose that is?

Attorney discipline processes also turn on the availability of staff—often called bar or disciplinary counsel—to investigate and prosecute attorney sanctions. One statistic that might reflect whether the discipline process is hampered by a shortage of staff is the processing time for a disciplinary complaint. In 2011, the average time from receipt of a complaint to the filing of a formal disciplinary charge ranged from 3 months in North Dakota to 646 days in Virginia.¹ These were not by any means anomalous statistics: this time period was 370 days in North Carolina, 474 days in California and a brisk 18 months in Iowa. If the primary purpose of attorney discipline is client protection, how effective is that discipline if years pass between the initial complaint and the ultimate punishment of the attorney?

Part of the lengthy processing time for complaints might reflect the high volume of complaints. The percentage of complaints that result in a probable cause determination and a charge against the lawyer varies from jurisdiction to jurisdiction, but on a national level something less than 4% of complaints filed against lawyers resulted in a finding of probable cause and a formal disciplinary complaint against the lawyer. Why do you suppose there are so many complaints, and why are so many of them deemed to be unfounded by disciplinary counsel?

Given that attorney discipline is a slow and sometimes unlikely consequence of misconduct, the legal system must rely on lawyers’ internal commitment to the rules and values of the profession to ensure compliance with those standards most of the time. Consider Paragraph [16] of the Scope Note to the Model Rules of Professional Conduct: “Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.” Are you confident that voluntary compliance and social norms will adequately ensure compliance with the ethics rules? Consider that question again later in the semester, after you have studied in some detail the rules applicable to the practice of law and the temptations against which they attempt to guard.

Violations of ethical rules can give rise to attorney discipline. Different jurisdictions impose different varieties of discipline and call them by

different names. In general terms, disbarment—taking away the lawyer's right to practice law—is the most severe sanction. Contrary to most perceptions, however, in many jurisdictions, disbarment is not permanent. Attorneys who have been disbarred can, under some circumstances, seek reinstatement to practice.

The next level of sanction is a suspension—removal from the practice of law for a period of time. What do you suppose happens to a lawyer who is suspended from the practice of law? What do you think such a lawyer must do—and avoid doing—during the period of his suspension? Who, besides the lawyer, is harmed by that sanction? Does that seem a sensible result? Some disciplinary authorities may require additional efforts from suspended lawyers, including in some cases retaking the MPRE or taking a course in professional responsibility, before the lawyer can be reinstated.

The next level of sanction involves some form of reprimand. Such sanctions can be public or private (the ABA considers a "reprimand" a public sanction and an "admonition" a private sanction, but not all jurisdictions follow this terminology). As an unhappy client, would you be satisfied with a censure of your lawyer after a finding of wrongdoing? Why or why not? Would it matter to you whether the sanction was private or public? As a prospective client, would you have an opinion about this matter?

One might think that fines would be a likely category of attorney discipline, but under most discipline systems, this is not an available punishment option. Should it be? What about a restitutionary sanction, as, for example, returning money to a client from whom it has been improperly taken? In some jurisdictions, disciplinary authorities have the power to award these; in others, the authorities can and sometimes do condition the resolution of the disciplinary matter on providing restitution to the aggrieved client. And in many jurisdictions, the cost of the disciplinary proceeding can be charged to the disciplined attorney.

How is the sanction selected? In past years there was substantial criticism that sanctions were unevenly and inequitably applied; the same conduct might result in radically different sanctions for identical misconduct in different jurisdictions or even for two different lawyers in the same jurisdiction. In response, the ABA promulgated "Standards for Imposing Lawyer Sanctions." Some states have adopted the standards, while others have adopted their own or permit the consideration of the standards as relevant. The standards recommend considering the nature of the duty violated, the lawyer's mental state, and the injury caused by the misconduct, and then permit consideration of "aggravating" and "mitigating" factors. What sorts of lawyer misconduct do you think should be worthy of the most severe sanction? Can you think of some misconduct that you might view as relatively minor? What kinds of factors might you
view as aggravating or mitigating? The standards have been criticized by some as not providing sufficient guidance to promote uniformity.

NOTES

1. In some jurisdictions, a court may impose as a condition of reinstatement to practice that the lawyer obtain malpractice insurance. See In re Sullivan, 2003 WL 22701634 (Del. 2003). Sullivan was suspended from practice after misconduct, which had resulted in several malpractice suits being brought against him, at least one of which resulted in a civil judgment. As a condition of his reinstatement he was required to obtain malpractice insurance. He claimed that he was unable to obtain coverage and asked that the condition be waived. The court declined. It concluded, “it would be a breach of our duty to the public if we were to permit a lawyer with Sullivan’s history of malpractice to be reinstated as an active member of the Bar without adequate malpractice insurance coverage.”

2. Can a disciplinary authority require a lawyer to pay a malpractice judgment as part of an attorney discipline proceeding? In Kentucky Bar Ass’n v. Greene, 63 S.W.3d 182 (Ky. 2002), the attorney was hired to bring a tort claim on a client’s behalf, but he did nothing and the suit was ultimately barred by the statute of limitations. The client obtained a malpractice judgment for $3,003.74. The attorney was then charged with unethical conduct. The state supreme court, in addition to suspending the lawyer from practice for ninety days, directed him to pay the malpractice judgment. A dissenting justice indicated his disapproval: “I do not believe this Court should use its disciplinary authority to order attorneys to satisfy civil judgments when clients have suffered economic loss as a result of an attorney’s negligence. The existing provisions for collecting judgments are adequate and grafting such requirements onto our disciplinary sanctions unnecessarily expands the role of this Court.”

B. THE TANGLED WEB: GETTING INTO TROUBLE IN A DISCIPLINARY PROCEEDING

STATE OF OKLAHOMA EX REL. OKLAHOMA BAR ASS’N V. ALLFORD

152 P.3d 190 (Okla. 2006)

COLBERT, J.

The Oklahoma Bar Association filed this disciplinary proceeding against Patricia Ann Allford. The Bar and Allford stipulated to the facts and jointly requested that Allford receive a private reprimand. At a hearing before a panel of the Professional Responsibility Tribunal (PRT), Allford contradicted many of the facts to which she had stipulated, demonstrated a failure to comprehend the seriousness of her actions, refused to acknowledge her culpability, and expressed little remorse. The PRT
unanimously recommended that she receive a public reprimand. We reject that recommendation and suspend Allford from the practice of law for six months. . . .

This disciplinary proceeding arises from Allford’s representation of a single client. Richard Mackey paid Allford $750 on March 30, 1992, to probate his mother’s and father’s estates. The probate was not completed by October 16, 2001, when Mackey terminated Allford’s services by a letter in which he stated that she “had failed to keep appointments or return phone calls to review and discuss the completion of the case.” Allford would not return the file and persuaded Mackey to let her attempt to finish the matter.

The probate remained incomplete on January 24, 2003, when Mackey sent another letter terminating Allford and asking for the return of the file. Once again, Allford refused to return the file and persuaded Mackey to allow her to complete the case.

Mackey filed a written grievance with the Bar on April 9, 2004. The Bar opened a formal investigation and sent a letter to Allford on April 27, 2004, asking her to respond to Mackey’s allegations within twenty days. When she finally responded on June 1, 2004, Allford did not respond to the allegations, but stated only that she had been unable to contact Mackey.

The Bar sent Allford a second letter by certified mail on June 9, 2004, and directed her to respond to Mackey’s allegations within five days. Although Allford received the letter on July 1, 2004, she did not respond until Tuesday, July 20, 2004. She still did not respond to the allegations, but stated only:

I have met with Mr. Richard Watson Mackey and he desires that I continue with the probate case on his parents. I have completed an inventory of the real property, which contains fifteen legal descriptions for mineral and surface interests in four counties. An accounting is being prepared regarding the income produced by these interests.

I anticipate this estate will be completed within the next six months. This is satisfactory with Mr. Mackey. I will keep you posted.

At this point, the Bar issued a subpoena for Allford’s deposition, to take place at the Oklahoma Bar Center on July 29, 2004, at 9:00 a.m. Allford did not appear. Instead, she called the Assistant General Counsel, Mike Speegle, at approximately 9:20 a.m. on the day of her scheduled deposition and stated that she did not appear at the appointed time because Mackey did not want her to.

Although Allford eventually did appear by agreement for her deposition, troubling facts surfaced about the events surrounding her receipt of the subpoena. Employees at the Hughes County Sheriff’s office called Allford
when they received the subpoena. Allford came to the Sheriff’s office and accepted personal service on Friday, July 23, 2004, at 8:00 a.m. However, she asked two of the Sheriff’s employees to falsify the date of service to show that it was not served until 8:00 a.m. on July 29th (the date of the scheduled deposition). Because she assured them that the “matter would be dropped and that it wasn’t a big deal,” the employees honored her request. They admitted their role in the deception when the Bar called the Sheriff’s office on the morning of the 28th (the day before the scheduled deposition) to confirm that Allford had been served with the subpoena.

The Bar filed a formal complaint on September 24, 2004. When Allford filed her response on November 15, 2004, she attached Mackey’s affidavit stating that he wished to withdraw his grievance and continue the probate with Allford as his attorney. The disciplinary matter was continued several times and Allford finally completed the probate sometime in 2005.

When the hearing before the PRT convened, Allford formally stipulated to the Bar’s allegations, admitting that she had repeatedly refused to return Mackey’s file and that she had asked the Sheriff’s employees to falsify the service date on the subpoena. Allford’s testimony, however, differed materially from her stipulations. Although she repeatedly affirmed the truth of the stipulations and stated that “I accept full responsibility,” and “I was dilatory,” her responses to specific questions by the panel members were less apologetic and full of inconsistencies between her stated desire to accept full responsibility and her efforts to deflect any real culpability by admitting only to “mistakes.” . . .

Allford began by attributing the situation to the complexity of the probate case and her lack of skill: “I no longer practice in that area of the law. It’s not something that I enjoy doing or felt very skilled at doing.” She then attributed her failure to keep appointments with Mackey to simple miscommunication and lack of a full-time secretary. Finally, she implied that she failed to return phone calls because Mackey would “call right back” after she had already explained “things” to him.

Allford’s testimony contained so many internal inconsistencies that it was apparent she was not willing to admit to any of the facts underlying the stipulations. Allford’s testimony upon being confronted is equally troubling.

[Allford]: What happened was, I want to take full responsibility for that. They asked me what date do you want us to put on this and I said I don’t care, put whatever date you want to, in a fit of anger and I was very upset and just not thinking clearly.

[PRT]: What you have admitted to in these stipulations is different than what you’ve just testified to.

[Allford]: Yes. Yes, I have.
[PRT]: Stipulations say you admitted asking them to put a false date on there. Now you're saying you didn’t really ask that, but instead you said put whatever date you want to on there? There's a big difference there.

[Allford]: There's a big difference, but that's what I said to them and I realize this affidavit was drafted by the assistant district attorney and that was drafted in the worst light towards me, but I want to accept full responsibility. I should not have said that. I should have accepted the papers. I should not have put them in any kind of jeopardy.

[PRT]: Did you ask them to specifically put a false date on there? Not just put any date you want to, but did you ask them to put a false date on there?

[Allford]: I asked them to put whatever they wanted to on it, that I didn't care, in a fit of anger that day.

[PRT]: The AFFIDAVIT . . . said you came in and asked that [they] . . . show that it was served on July 29th at 8 o’clock a.m. Is that a true or false statement?

[Allford]: That's a true statement.

[PRT]: That’s different than what you just testified to.

[Allford]: It is, but I will agree with that statement, yes.

[PRT]: That concerns me. That means you may have given false testimony to us just now by saying put whatever date in that you want to.

[Allford]: I agree to this because I do not want them to be in jeopardy. I should have accepted the papers. They have families. It could be their jobs and—and yes, I agree with this.

[PRT]: Let’s be—let’s be clear. Did you ask [her] to put the date of July 29th on the papers?

[Allford]: If that’s what the AFFIDAVIT says, yes.

Allford was also quite certain that she had admitted her behavior during the deposition, but could not remember specifically what she admitted.

Allford stipulated that she violated Rules 1.1, 1.2, 1.3, 1.4, 4.1(a), & 8.4(a-d) of the Rules of Professional Conduct, addressing competence, diligence, client communication, truthfulness, and conduct involving dishonesty and trustworthiness. The Bar also alleged that Allford violated Rules 1.3 and 5.2 of the Rules Governing Disciplinary Proceedings, by . . . failing to cooperate in the Bar’s investigation.
We are inexorably drawn to the conclusion that even a public censure is insufficient in this matter. The primary problem is no longer Allford’s dilatory representation of her client; it is her refusal to acknowledge the Bar’s and this Court’s authority to oversee her practice and investigate a complaint against her. Allford has failed to accept any real responsibility for her actions. Even the dry, written transcript of her testimony before the PRT displays a degree of irritation toward the Bar and the disciplinary process at odds with the respect demanded of those permitted to practice law in this state. Allford was clearly saying whatever was necessary to get through the process and go on.

The record provides no basis for concluding that Allford’s behavior and attitude will improve if she is allowed to continue her legal practice without interruption. Moreover, the facts of Allford’s misconduct bring into question her professional judgment and expose an attitude of misplaced irritation and a habit of ignoring a growing problem in hopes that it will simply disappear. These characteristics are at odds with the mature, thoughtful, and professional approach to any matter required of attorneys. . . .

Honesty and integrity are the cornerstones of the legal profession. Nothing reflects more negatively upon the profession than deceit. There can be little doubt that the attorney has brought discredit upon the legal profession.

. . . Allford has never before received any formal discipline. Her behavior, although unacceptable, did not result in a client or a member of the public suffering a legal or financial loss. Indeed, the attempted stipulations, however clumsy, reflected her effort to avoid having others lose their jobs because of her actions. We reject the Bar’s suggestion of a private reprimand and the PRT’s suggestion of a public censure and conclude that a 6-month suspension is the appropriate discipline.

**Notes**

1. What was the initial problem that brought attorney Allford to the attention of the disciplinary authorities? Clients often complain about the service they have received from their lawyers. Do the complaints here seem justified?

2. Attorney Allford’s initial problem seemed relatively minor—a disagreement with a client about whether she had been dilatory in pursuing a probate matter. Such complaints are often dismissed, particularly if the lawyer promptly seizes the opportunity to complete the matter to the client’s satisfaction; even if the complaint is not dismissed, such misconduct rarely results in such a severe sanction. What did the lawyer do in this case that justified her six-month suspension?
3. As the opinion makes clear, honesty is important. Cooperation is also significant; it is possible for the disciplinary authority to find the underlying disciplinary complaint to be unfounded but to discipline the lawyer, nonetheless, for failing to cooperate adequately with the disciplinary process.

4. Many things can cause lawyers to violate their ethical obligations. One is addictive behaviors. Attorney Michael Burke was disbarred in the state of Michigan for embezzling $1.6 million from clients. He committed the thefts in order to fund his compulsive gambling habit. By the time he turned himself in, Burke was gambling five days a week; in the previous two months, he had spent $600,000 of his clients’ money gambling. In addition to losing his license, Burke spent time in prison. See Stephanie Francis Ward, Learning the Hard Way, ABA Journal, May 2008.

5. What does a lawyer do after her license to practice law is suspended? Consider the long-term impact on the lawyer’s career after she notifies other jurisdictions of the suspension, and after she notifies her clients and opposing counsel in pending matters. Also consider to what extent a lawyer may work in the legal field, without practicing law, while her license is suspended. See Suspended...Hired?, Bench and Bar of Minnesota, August 2010.

**Problems**

1. Lawyer was an assistant district attorney trying a criminal homicide case. Defense counsel inquired about a police report that contained an exculpatory statement from a witness. The judge asked Lawyer if he knew where the witness was; Lawyer told the judge that his office was looking, but had not yet located the witness. The witness was then located and Lawyer met with her. Four days later the judge renewed his inquiry about the whereabouts of the witness. Lawyer falsely told the judge, on the record, that he did not know where she was. What would be the appropriate discipline for Lawyer? See In re Stuart, 803 N.Y.S.2d 577 (N.Y. App. Div. 2005).

2. Lawyer represented plaintiff in a civil action. Five days before his client’s deposition, Lawyer realized he had forgotten to serve discovery requests on opposing counsel. Lawyer believed his failure to obtain responses from the opposing party before his client’s deposition was a strategic mistake, so he sent an email to opposing counsel pretending he had already sent the discovery requests and demanding that opposing counsel respond to them immediately. When opposing counsel said he had not received any discovery requests from Lawyer, Lawyer sent an email attaching two discovery requests he purported to have served. These documents included falsified certificates of service that Lawyer had created by photocopying old certificates of service. Opposing counsel examined electronic data embedded in the documents and hired a handwriting expert, who determined that the certificates of service were falsified. What discipline would be appropriate? See Iowa Supreme Court Attorney Disciplinary Board v. McGinness, 844 N.W.2d 456 (Iowa 2014).