

Felonies and Serious Crimes In Lawyer Discipline

BY LAZAR EMANUEL

The rules governing the commission of crimes by New York lawyers and the resulting scope of discipline by the courts require research in several places, including the New York Code of Professional Responsibility, the New York Code of Rules and Regulations (NYCRR) and the Judiciary Law.

The basic authority to subject New York lawyers to disciplinary action is contained in DR 1-105(A) (22 NYCRR §1200.5-a):

A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs...

A lawyer may be disciplined for misconduct in his other life activities than those arising from or connected with his law practice or his relations with clients. As Roy Simon advises us in his Overview of DR 1-102 defining a lawyer's misconduct (Simon's New York Code of Professional Responsibility Annotated, 2002 Edition, p. 18):

DR 1-102 governs every aspect of a lawyer's life, whether or not the lawyer is acting as a lawyer and whether or not the misconduct arises out of the lawyer's practice. It covers a lawyer's professional, business, social, and private life. And since 1996, DR 102 has governed misconduct not only by individual lawyers but by law firms as entities...

The list of disciplinable conduct by lawyers external to their law practices would fill several pages. As reflected in reported cases, the list includes: selling firearms without a license; failure to file tax returns; shoplifting; possession of marijuana; manufacturing and selling intoxicating liquor; manslaughter; prostitution; sale of heroin; padding a corporate expense account; antitrust activity as a corporate officer; plagiarism; extortion; violation of a divorce decree; and driving while under the influence.

When the misconduct committed by a lawyer or law firm constitutes a crime as defined in any jurisdiction, the first function of the New York disciplinary authorities is to inquire into the nature of the crime. For the purpose of this inquiry by the authorities, crimes are divided into two categories: serious crimes and felonies.

Definition of "Serious Crime"

The term "serious crime" is defined in both Judiciary Law § 90(4)(d) and 22 NYCRR § 603.12(b). The Judiciary Law definition reads as follows:

...the term serious crime shall mean any criminal offense denominated a felony under the laws of any state, district or territory of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which is, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

Because this definition specifically excludes from the definition of serious crimes criminal offenses which constitute felonies under New York law and because crimes which constitute felonies under New York law require the penalty of automatic disbarment, the definition of a serious crime in 22 NYCRR § 603.12(b) substitutes for the first sentence in the Judiciary Law definition the following:

The term serious crime shall include any felony, not resulting in automatic disbarment under the provisions of subdivision 4 of section 90 of the Judiciary Law, and... (the balance of the NYCRR definition is the same as in the Judiciary Law).

In other words, a crime, wherever committed, which meets the definition of a felony under New York law is a felony as defined in the disciplinary rules, but a crime which does not, is not a felony but a serious crime. This distinction is easy to follow when it's applied to conduct which is defined as a felony in other jurisdictions but not in New York, but it's much harder to follow when it's applied to crimes in other jurisdictions which are not denominated there as felonies, but which, in their very nature (bribery, extortion, theft) contain elements generally defined as felonious in New York.

The distinction between a felony and a serious crime is confirmed by Judiciary Law §90(4)(e):

For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district or territory of the United States and classified as a felony therein which if committed within this state would constitute a felony in this state.

The New York Penal Law divides felonies into five basic categories, Class A-Class E. Class A is in turn divided into two subclasses. Penal Law §55.05(1).

Significance of Distinction

Why is the difference between a felony and a serious crime so important? Because commission of a felony as defined under New York law carries with it the burden of immediate and automatic disbarment:

Any person being an attorney and counselor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counselor-at-law, or to be competent to practice law as such. Judiciary Law, §90(4)(a).

The New York courts construe this provision literally. When the Appellate Division which has jurisdiction over a lawyer receives notice that the lawyer has been convicted of a felony in New York, the court will order the lawyer's name to be stricken from the roll of lawyers.

Whenever any attorney and counselor at law shall be convicted of a felony as defined in paragraph e of this subdivision, there may be presented to the appellate division of the supreme court a certified or exemplified copy of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys. Judiciary Law, §90(3)(b).

To enable the courts to act upon the conviction as soon as possible, the convicted lawyer is required to file the record of his conviction with the appellate division within thirty days following the conviction. This requirement extends to all criminal convictions, not only for felonies, and to convictions in any "court of record of the United States, or of any state, territory or district, including this state." The requirement applies whether the conviction is by a plea of guilty or nolo contendere or from a verdict after trial "or otherwise." Judiciary Law, § 90(4)(c).

The Rules Governing Serious Crimes

The rules controlling serious crimes offer more discretion to the courts than those governing felonies. A lawyer who is convicted of a serious crime is subject to suspension pending a final determination by the appellate division. The procedure for determining the appropriate disciplinary action is contained in 22 NYCRR § 603.12.

The first question for the disciplinary authorities becomes: is the crime a serious crime as defined in Section 603 (see, above). This determination is assigned in the first instance to the Departmental Disciplinary Committee, which begins its inquiry as soon as it has notice that a lawyer has been convicted of a crime in any jurisdiction.

Even in cases in which a lawyer has been convicted of a crime in another jurisdiction which is defined as a felony in that jurisdiction, the lawyer can argue that the crime is not a serious crime for purposes of discipline in New York. In *Matter of Nicholas Khoudary*, Appellate Division, First Department (Dec. 2001), Khoudary was admitted in New York and New Jersey. He was convicted in the federal district court for the district of New Jersey of "structuring of a currency transaction to evade filing an IRS required currency transaction report," a felony under federal laws. The New Jersey courts suspended Khoudary for two years, retroactive to the date on which he was first suspended temporarily.

The First Department Disciplinary Committee determined that Khoudary's crime was a serious crime. Khoudary argued that his offense should not be construed as a serious crime, but the Appellate Division confirmed that it was a serious crime because it constituted a felony under federal law. The court added:

Permitting respondent to continue to practice would not be appropriate. A lawyer convicted of a felony and serving criminal probation should not be permitted to practice law... This rule requires suspension during the course of disciplinary proceedings (citing, *Matter of Witchell*, 220 AD2d 153).

After determination by the Departmental Committee and/or by the Appellate Division that the crime is a serious crime, the matter is usually referred to a referee appointed by the court. The referee is instructed to hold a hearing and issue a report to the court recommending "why a final order of censure, suspension or disbarment should not be made." In some cases, the Departmental Disciplinary Committee or a Hearing Panel designated by the court will serve in lieu of the referee.

At the hearing to determine the scope of discipline, the lawyer may submit evidence rebutting the finding that his crime was a serious crime and supporting either no or minimal discipline.

The lawyer may not, however, challenge the criminal conviction itself.

A certificate of the conviction of an attorney for any crime shall be conclusive evidence of his guilt of that crime in any disciplinary proceeding instituted against him and based on the conviction... 22 NYCRR 603.12(c).

The lawyer is not permitted to offer any evidence which is inconsistent with the essential elements of the crime "as determined by the statute defining the crime."

He may, however, present evidence which was not available to him at the time of conviction.

The hearing officer(s) will submit their report to the Appellate Division, which will make the final decision imposing discipline.

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