

Public Disciplinary Hearings? An Overview of the Debate

BY SARAH DIANE MCSHEA

For many years, the New York State Bar Association has opposed opening attorney disciplinary proceedings to the public. By the time this article is printed, the House of Delegates of the State Bar Association is likely to have voted - perhaps decisively - either to reaffirm its long-held opposition or to recommend that the Legislature amend the Judiciary Law to open these proceedings to the public. The debate has percolated for the past two decades, periodically bubbling up and making headlines in the local press, but otherwise largely ignored even by most practicing lawyers. For the past eighteen months, it has boiled with particular intensity. The State Bar's Special Committee on Public Trust and Confidence has proposed open proceedings as an important part of the effort to improve the public image of the bar, and Steven C. Krane, current President of the State Bar Association, has long advocated opening disciplinary proceedings to the public.

Lawyers Have Reason To Care

The issue is not simply an academic one. All lawyers have reason to be concerned about this proposal and its implications. Have you (or any of your partners or associates) ever failed to return a client's phone calls? Failed to pay a vendor on time? Forgotten to update your OCA registration within 30 days of your move to new offices? Called an adversary an unprintable name? Had a case marked off the calendar because you had to be in two courts at the same time? Missed a conflict when taking on a new matter or client? If so, you may have violated one or more of the disciplinary rules. If you commit one of these infractions and a complaint is filed, a disciplinary committee may bring charges against you. If the proponents of public disciplinary proceedings prevail, those charges will be tried in a public proceeding and perhaps reported in the local papers. Can televised disciplinary hearings be far behind?

The Current Law

The Judiciary Law now provides that disciplinary proceedings do not become public until after a lawyer is *publicly* disciplined. This means that, in the typical case, the charges against the lawyer, the hearing before a referee or hearing panel, and the proceedings before the Appellate Division are strictly confidential. Only if and when the Appellate Division finds the lawyer guilty of misconduct serious enough to warrant public discipline -censure, suspension or disbarment - is the matter made public. (The charges, hearing transcripts, reports and motion papers are then open to public review.) However, if the charges are not sustained or the lawyer or law firm is found guilty only of less serious ethical infractions, the proceeding remains confidential. Thus, lawyers are frequently privately admonished or reprimanded. Some proceedings are dismissed in their entirety and in some cases the lawyers receive a letter of caution or letter of education (Third Department only).

Proceedings Based On Criminal Convictions

Most lawyers who are suspended or disbarred have been convicted of a serious criminal offense or have converted or misused escrow funds. In most of these cases, many of which involve interim suspensions, public hearings would be appropriate.

In New York, lawyers convicted of a state felony, or of an equivalent felony offense in another jurisdiction, are automatically disbarred by operation of law. Disbarment occurs at the moment of conviction. The Appellate Division will order the lawyer's name stricken from the roll of attorneys, but this is a mere formality. Although these automatic disbarment proceedings, which are conducted entirely on paper, are confidential until the Appellate Division order is issued, they could be made public from the outset without any additional harm to the respondent-lawyer.

Lawyers convicted of serious criminal offenses which have not resulted in automatic disbarment ("serious crimes") are entitled to a mitigation hearing before final discipline is imposed. Typically, these lawyers are suspended until the hearings are concluded.

Although these "serious crime" mitigation hearings are presently conducted on a confidential basis, there is no reason why the Appellate Divisions could not direct that they be made public, at least for those lawyers who have been suspended on an interim basis. That would not require any change in the present law and would dispose of a significant percentage of the disciplinary proceedings brought against errant lawyers.

If it is not clear that the "serious" criminal offense warrants suspension or disbarment, the court may elect not to suspend the lawyer during the pendency of the proceeding. Some "serious" criminal offenses - failure to file personal tax returns, shoplifting, drunk driving - result in private sanctions or, at most, a public censure. If proceedings in these cases were public, the concept of private discipline would be rendered meaningless.

Lawyers Who Threaten Public Interest

The Appellate Divisions may also order interim (or indefinite) suspensions for lawyers who pose a threat to the public interest. Typical examples are those lawyers who have: improperly taken escrow funds, failed to cooperate with a disciplinary committee's investigation of complaints, or become incapacitated in ways that render them unable to handle their law practices or obligations to clients and the courts.

In these cases, the disciplinary committees routinely seek the interim suspension of the lawyer on the grounds that the lawyer's continuation in practice poses a clear threat to clients and the public. If the Appellate Division grants the committee's application, the lawyer is suspended for the duration of the proceeding or until further order of the court.

While the present practice is to conduct the subsequent disciplinary proceeding on a confidential basis, the Appellate Division may open the hearing to the public, since there already has been a public disciplinary order entered by the court. Taken together, proceedings against lawyers convicted of serious criminal offenses and lawyers whose conduct has resulted in interim suspension comprise the vast majority of formal disciplinary proceedings in New York. There probably would be little debate about whether to open disciplinary hearings to the public if the proposals were limited to lawyers in these categories.

"Good" Lawyers Who Violate the Rules

One of the strongest arguments against public disciplinary proceedings is that each year a significant number of "good" and reputable lawyers are charged with ethical infractions, some of which are serious and some of which are not. Disciplinary committees, often relying upon complaints filed by disgruntled former clients or adversaries, regularly bring charges against lawyers who are ultimately vindicated or found guilty only of minor violations warranting private discipline or, at most, a public censure. Public disciplinary hearings would, in many of these cases, irreparably tarnish the lawyer's good reputation.

Another significant category of lawyers who may be injured by public hearings that is rarely discussed by the proponents of these hearings consists of lawyers who have been admonished for violating a disciplinary rule and who wish to appeal the admonition. An admonition is a letter issued by a disciplinary committee without a hearing. An admonition constitutes private but formal discipline by the committee. Applications for malpractice insurance routinely ask whether any lawyer in the firm has been disciplined and, naturally, any candidate for judicial appointment or other public service must disclose instances of professional discipline, including private admonitions.

A lawyer or law firm receiving an admonition may contest the matter by demanding a hearing, in which case the disciplinary committee must draft formal charges and prove the lawyer's misconduct. While demanding a hearing carries the risk of more serious discipline if the violation is proven, in fact, many of these cases are dismissed for failure of proof or because the committee ultimately concludes that discipline is not warranted. If disciplinary hearings were public, few lawyers would dare to challenge an admonition - public vindication might be a far worse sanction than private discipline.

The proponents of public disciplinary hearings tend to dismiss these objections as either non-existent or *de minimus*. However, practitioners in the disciplinary field are well aware of the high rate of "acquittals" in lower level disciplinary cases and most favor keeping the process confidential to protect the reputations of honest lawyers who get enmeshed in the disciplinary process.

Proposals Do Not Protect Innocent Lawyers

The latest proposal to open disciplinary proceedings to the public offers only limited protection for those lawyers who are ultimately vindicated, either in whole or in part. The proposal would require a *prima facie* or probable cause showing, before a judge, that disciplinary charges were warranted.

However, this ignores the real problem with the present disciplinary system in New York. The issue is not whether disciplinary prosecutors can make the minimal showing to set forth a *prima facie* case; it is whether the evidence will hold up at the end of a contested proceeding. The sad fact is that in a distressing number of cases, the most serious charges are ultimately dismissed. Requiring probable cause showings would do nothing to address this problem.

Prior proposals to open disciplinary proceedings were accompanied by proposals to improve the quality of the proceedings, which has declined in recent years. At present, the rules of evidence do not apply in disciplinary proceedings. Lawyers are not entitled to any discovery. Disciplinary prosecutors are not required to turn over exculpatory or mitigating evidence. The CPLR does not apply. While there is a right to counsel, a substantial number of the lawyers who face serious discipline are unrepresented. Sadly, many of these lawyers cannot afford private counsel, for the proceedings can be lengthy and

financially onerous. There is no statute of limitations for disciplinary charges, which may be brought many years after the lawyer's alleged misconduct was committed or discovered. Except in a handful of egregious cases, laches has been held not to apply. (See, *Matter of Dondi*, 63 N.Y.2d 331, 482 N.Y.S.2d 431 (1984). Passage of time, combined with unauthorized use of sealed criminal records, justified dismissal of the complaint and was not "inconsistent with the primary concern of protecting the public.") And, despite the fact that most jurisdictions require proof by "clear and convincing" evidence, New York has adamantly insisted that the lowest standard of proof - "fair preponderance" - is sufficient to protect lawyers in these serious proceedings.

Conclusion

The proponents of open disciplinary proceedings argue that the public's dim view of the bar will be improved if we discipline our errant brethren in public rather than in private. They note, perhaps not unreasonably, that the public is skeptical of the bar's ability to discipline its own members and suspicious of any proceedings which are conducted secretly. These arguments are not without some foundation, for the public, and indeed most of the practicing bar, has little idea of what happens in attorney disciplinary proceedings. Conducting these proceedings in public might well have a salutary effect and result in greater fairness for the lawyers involved.

However, public hearings should be limited to those matters in which the lawyer has first been suspended on an interim basis by the Appellate Division after a finding that the lawyer poses a threat to the public interest. Also, it would be unfair if we did not simultaneously provide for greater fairness in the disciplinary process itself by requiring adherence to the rules of evidence and the CPLR and by according lawyers some basic protections, like the right to depose the prosecution's witnesses prior to the hearing and the right to "open file" discovery.

It bears mention that although many jurisdictions now have public disciplinary hearings, the public's opinion of lawyers has not improved one iota in those states. Furthermore, while proponents argue that few members of the public will actually bother to attend disciplinary hearings, New York - the media capital of the country - is certainly likely to have a different experience. In those few instances in which New York lawyers waived confidentiality and demanded public hearings, the proceedings were thoroughly reported in the press.

There is at present no public outcry for public disciplinary proceedings in New York and we would be well-advised to move cautiously before throwing open the hearing doors. By the time this article is published, the State Bar may well have acted. The next move may be up to the State Legislature.

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