

C O M M E N T A R Y

SITTING IN JUDGMENT

A Hearing Committee Member's Observations on Pennsylvania's Lawyer Discipline Process

By Jonathan W. Hugg

In six and a half years as a hearing committee member for the Disciplinary Board of the Supreme Court of Pennsylvania I had a frontline view of the disciplinary system for lawyers in Pennsylvania. I saw lawyers cry, apologize, rationalize, smile (usually nervously) and sometimes simply stare blankly into space when confronted with allegations of misconduct.

They usually admitted fault (although maybe not completely), and the only remaining issue was the sanction. Usually the lawyer was unrepresented and alone, seemingly by choice. In the rare instance when the lawyer had an attorney, there was always tension as counsel struggled to exercise client control.

A member of the Disciplinary Board appointed me to serve as a hearing committee member. The Pennsylvania Supreme Court appoints the 13 members of the

board (including two nonlawyers), who in turn select several hundred hearing committee members across the commonwealth.

Hearing committee members sit on local three-lawyer panels when the Office of Disciplinary Counsel (ODC), which investigates and prosecutes alleged violations of the Rules of Professional Conduct, brings formal charges against a member of the bar and there is a dispute over the allegations or discipline that requires a hearing.

The hearings are public and on the record. The ODC must prove its case by clear and convincing evidence. Disciplinary hearings sometimes loosely resemble criminal bench trials, with openings and closings, rulings on evidence, sworn testimony from victim-clients, investigators, experts and the lawyer/respondent, and cross-examination.

Frequently, however, it is just the responding lawyer pleading for leniency, since he or she has already admitted violating the rules. The ODC and the lawyer/respondent submit briefs. The hearing committee then drafts a detailed written report to the Disciplinary Board with findings of fact, conclusions of law and a recommendation of proposed discipline (if any) based on precedent and the circumstances of the case. There may be further argument before the board or even before the Pennsylvania Supreme Court.

Hearing committee members serve for up to two terms of three years each. I sat for an extra six months because in my last matter I presided over a protracted case with three days of testimony from dozens of witnesses, including two mental health experts, over several months. Now that my service as a hearing committee member is over, here are four impressions about lawyers and our disciplinary process.

1. Lawyers Must Be More Self-Aware about Ethics

Happily, the ODC and the disciplinary process are usually out of sight and out of mind. We tend to think of ethics as a CLE credit we scrounge for each year and professional responsibility as something

our opponents cynically ignore. For our own protection, this detached attitude should change.

Now more than ever lawyers need to think about how the ODC views them. Consciously or not, the ODC seems to be interpreting the Rules of Professional Conduct more aggressively against lawyers. I suspect that this may be a reaction to more vocal public criticism of the legal profession, beginning with the Great Recession.

Six years ago the typical disciplinary hearing involved a straightforward case of a lawyer misappropriating (i.e., stealing) client funds. Today, however, the ODC seems willing to charge subjective matters as ethical violations that it may once have considered malpractice for the courts to address or just bad judgment or poor customer service that a client could remedy by simply finding another lawyer.

Missing a deadline or a statute of limitations, losing a file, not communicating with a client, confusing the scope of attorney-client privilege, not paying taxes or rent or petitioning for bankruptcy may all be signs of sloppiness in a lawyer's professional or personal affairs. It probably

never occurs to us that the ODC could brand these mistakes as evidence of ethical violations or flawed character and argue that they weigh for discipline. It would help everyone if the ODC, like the State Ethics Commission, issued advisory opinions. Until then lawyers need to step back and consider how the ODC might second-guess them. Thinking about professional responsibility is just good risk management.

2. The Lawyer Who Represents Himself Is. ...

Amazingly, self-representation is the norm in the disciplinary process. Lawyers will spend a lot of money on foreign cars and fancy clothes but usually nothing to protect their law licenses.

Lawyers, of course, should know better. We mock pro se litigants, but lawyers who represent themselves in the disciplinary process are even more hapless. They worsen their plight by ignoring their obligation under the Rules of Professional Conduct to respond to ODC requests for information and thereby convert an opportunity to explain into another cause for the ODC to charge them. They miss pleading deadlines and unnecessarily default, thereby admitting

Consciously or not, the Office of Disciplinary Counsel seems to be interpreting the Rules of Professional Conduct more aggressively. ...



Need ethics credit? PBI can help.

During December earn up to six credits at the Pennsylvania Bar Institute's "Ethics Potpourri" program. Credits qualify as "wild card" credits for reporting purposes.

Program Topics

- "Can a Single Masterpiece Sustain a Lawyer's Lifetime?" and Other Questions that Cross a Lawyer's Way
- After the Engagement Letter: When Legal and Business Ethics Collide
- Disciplinary Diversion for Lawyers and Judges
- Lawyer Rankings & Ratings: The Impact on Ethics and the Profession
- What to Do When You Receive That "OMG" Letter
- A Self-Regulating Profession

Locations/Dates

- Mechanicsburg, Dec. 13
- Pittsburgh, Dec. 18
- Philadelphia, Dec. 20

For more information, go to the PBI website, www.pbi.org, or call 800-932-4637.

— *Source: PBI*

misconduct when they may have had a defense.

At hearings, like many white-collar professionals lacking thorough witness preparation, pro se lawyers come across as too self-assured and often as clueless. They will in one breath admit misconduct and apologize but in the next minimize their transgression and act as if they are saying sorry for nothing. They seem to demand recognition that a disciplinary proceeding is some kind of ritualized show trial, and they seem to expect "professional courtesy" from the ODC and hearing committee members. Invariably this approach backfires.

Retaining a lawyer to speak for and counsel you can mean the difference between an informal, off-the-record warning on the one hand or public discipline, suspension or even disbarment that endangers or ends your livelihood on the other. Notably, some professional liability policies offer reimbursement for the costs of disciplinary proceedings. Lawyers should not assume that they must stand alone. They need to investigate the resources available to them and find a way to hire counsel.

3. Lawyers Are Hard on Other Lawyers

Article V, Section 10(c), of the Pennsylvania Constitution grants the Pennsylvania Supreme Court exclusive authority over the practice of law (e.g., *Beyers v. Richmond*, 937 A.2d 1082 (Pa. 2007)). The legal industry may be the only field of commerce in Pennsylvania with constitutional protection from regulation by outsiders.

The legitimacy of this unique prerogative rests upon the public's seeing the Supreme Court actively police alleged attorney misconduct through the Disciplinary Board, the hearing committees and the ODC. Thus there is subtle political and institutional pressure to give some credit even to seemingly frivolous complaints against counsel (like the letters to the ODC from

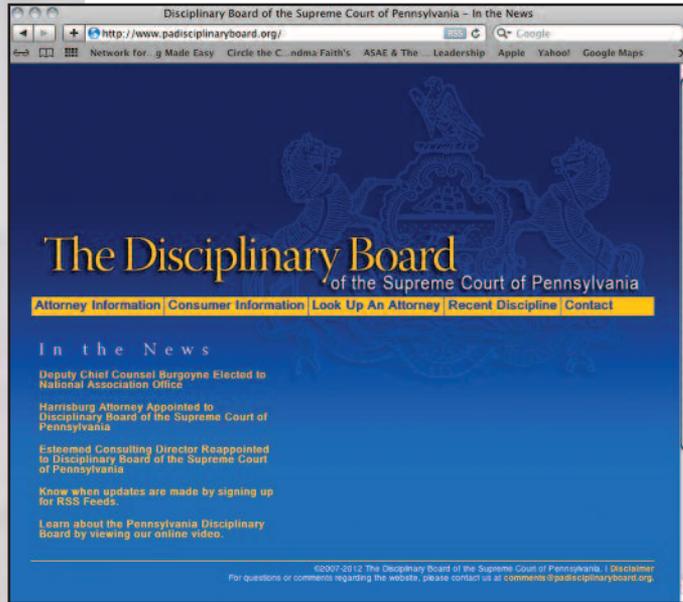


incarcerated ex-clients of a friend of mine) and to make an example of lawyers who cross the line, particularly repeat offenders. Reinforcing this predisposition is that the ODC seems to be predominantly staffed by former prosecutors.

Of course, on the one hand we desire earnest and zealous enforcement to uphold the integrity of our profession. On the other hand, however, the ODC sometimes displays little appreciation for how hard it is to satisfy some clients or the business difficulties faced by some lawyers in private practice. (Incidentally, I am unaware of the ODC ever seeking discipline against a public-sector or government lawyer.)

I have heard the ODC repeatedly argue that a lawyer's personal financial problems were aggravating factors warranting harsher discipline. This contention rings hollow against the backdrop of the Great Recession and only shows insensitivity to the economic troubles with which some of us have grappled in recent years.

Unfortunately, some hearing committee members share the ODC's perception.



Amazingly, self-representation is the norm in the disciplinary process. Lawyers, of course, should know better.

Hearing committee members tend to come from more connected, prominent and prosperous law firms. Some have observed that hearing committees have an unconscious bias against small firms, solo practitioners and court-appointed criminal lawyers that may operate less formally and with fewer safeguards than do big downtown law firms.

While we certainly should not expect less of our solo and small-firm colleagues, the standard of care for compliance with the Rules of Professional Conduct should not be that every lawyer must function as if he or she works in a big firm. The disciplinary system could moderate some of the big-firm chauvinism of hearing committees by making service on committees similar to mandatory jury duty, with every lawyer taking a turn. This would

broaden both the perspective of hearing committees and increase the bar's consciousness and understanding of the disciplinary system.

4. Lawyers Facing Discipline Are 'Crazy' (?)

There is considerable evidence that lawyers suffer disproportionately more from mental illness and alcohol and drug abuse. Talk of these crippling maladies (and, more recently, also of gambling addiction) pervades the disciplinary system. Thus the defense at almost every hearing and the discussion at every seminar I attended as a hearing committee member inevitably turned to the Pennsylvania Supreme Court's decision in *Office of Disciplinary Counsel v. Braun*, 553 A.2d 894 (Pa. 1989).

Braun is a powerful countervailing force against discipline. There the Supreme Court held that it is appropriate to consider psychiatric illness as a mitigating factor in a disciplinary proceeding if there is clear and convincing evidence, through expert testimony, that the condition caused the misconduct.

While *Braun* may sound like a strict standard, lawyers routinely contend that substance abuse or psychological problems alone caused their misconduct and that they are entitled to leniency simply because they have sought treatment (albeit belatedly).

Even without expert testimony, hearing committee members frequently and uncritically accept into evidence and weigh these pleas in mitigation. There are doubtlessly many instances where a lawyer/respondent should properly invoke emotional difficulties and drug use as an explanation. However, lawyers are not doctors and should not indulge the self-serving belief that only lawyers that are clinically ill or addicted put their law licenses at risk.

The systematic misuse and manipulation of the *Braun* defense has become a potentially serious, demoralizing flaw in the conduct of the disciplinary system that undercuts personal accountability and will inevitably harm the public credibility of the bar.

Some have observed that hearing committees have an unconscious bias against small firms, solo practitioners and court-appointed criminal lawyers. ...

Furthermore, the public and our profession are ill-served by relying merely on the disciplinary system to detect and react to lawyers in crisis. The Supreme Court, the Disciplinary Board, the ODC and the bar should develop a means of prospectively identifying a lawyer needing help, before the lawyer reaches a breaking point, and there should be a way to compel the lawyer to take assistance as a condition of being able to continue to practice. No one can reasonably dispute that this would be preferable to the current system of intervening only after the lawyer has caused harm.

• • • •

As I served as a hearing committee member I often thought about how strange and distant disciplinary proceedings would seem to the (rare) layperson spectator who chose to attend.

In the 21st century, a self-administered system based upon the enforcement of a code of ethics is an odd way to regulate a multi-billion dollar industry and protect the public. Compared to other professions of equal importance in modern life such as medicine or banking, the self-regulation and under-regulation of the business of law is truly striking.

Except for the two nonlawyer members of the Disciplinary Board, lawyers sit in judgment of themselves. Doctors and bankers, however, answer to multiple independent state and federal bureaucracies staffed by lawyers. Furthermore, there are encyclopedias of rules about access to doctors and credit and their cost. The closest equivalent in the Rules of

The systematic misuse and manipulation of the *Braun* defense has become a potentially serious, demoralizing flaw in the conduct of the disciplinary system. ...

Professional Conduct is Rule 1.5(a), which prohibits us from charging “an illegal or clearly excessive fee.” Even then the rule offers little concrete guidance. The de facto rule is “whatever the market will bear.”

By failing to assure that normal people and businesses can afford counsel, the disciplinary system renders itself irrelevant to most of the public, for, obviously, one first must have a lawyer to avail oneself of the protection of the rules. Though laudable, no number of pro bono programs, or so-called “civil Gideon,” will ever satisfy this unmet need. Rather, the answer lies in our Supreme Court’s constitutional mandate over the practice of law.

For the Rules of Professional Conduct to be more than just aspiration and for the rules truly to protect the public, the court must intervene in the market and our businesses to assure access to counsel. ♦

Helping you meet your PA CLE requirements

The logo for Mypacle, featuring the word "Mypacle" in a bold, sans-serif font. The "My" is in green and "pacle" is in white, all set against a dark blue rectangular background.

It's fast. It's easy. It's FREE.

Online transcripts, approved courses and more.
Open your free account today at www.pacle.org.

The logo for www.pacle.org, featuring the text "www.pacle.org" in white and green on a blue background.

**SUPREME COURT OF PENNSYLVANIA
CONTINUING LEGAL EDUCATION BOARD**



Jonathan W. Hugg

Jonathan W. Hugg is a partner in Thorp Reed & Armstrong LLP's commercial and corporate litigation practice group. He speaks frequently on election and campaign finance law, First Amendment

issues in the workplace and preventing lender liability. He previously served as an assistant district attorney in the appeals unit of the Philadelphia District Attorney's Office. Readers can contact him at (215) 640-8547 or jhugg@thorpreed.com.

If you would like to comment on this article for publication in our next issue, please email us at editor@pabar.org.