Fordham Law Review

Volume 60 | Issue 1 Article 3

1991

Professional Discipline in 2050: A Look Back

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ESSAY

PROFESSIONAL DISCIPLINE IN 2050: A LOOK BACK

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This piece was originally commissioned by the American Bar Association Center for Professional Responsibility. Along with two companion pieces reflecting varying perspectives on the same subject, it was presented as part of the Seventeenth Annual Conference on Professional Responsibility, presented at Scottsdale, Arizona June 6-9, 1991. It appears here with the permission of the American Bar Association.

About a year ago, in April 2049, accountants from the regional office of the National Disciplinary Commission for Lawyers and Allied Professionals ("NDCLAP") conducted a random audit of redacted client billings at the Phoenix office of Skadden, Gibson—one of the Big Eleven. The office came out smelling almost like roses used to smell; only eight instances of "churning" or presumptive overbilling were identified. After negotiations with NDCLAP prosecutors, always a preferable alternative to formal proceedings, Skadden, Gibson made restitution to the affected clients. The firm also accepted a modest fine along with a notice of discipline in the *National Law Review*. That notice depressed the price of the firm's stock, of course, but only briefly and not by much. While the matter was pending before NDCLAP, Skadden, Gibson conducted its own investigation to identify and internally discipline the lawyers or allied professionals who had padded their hours or charged for unnecessary work. The firm's management also decided, on grounds of undue ethical risk, to modify its policy of requiring lawyers to bill 2300 hours a year, even though no one knew for sure whether that policy had encouraged the padding of hours.

Anyone familiar with NDCLAP's work will find the Skadden, Gibson matter utterly routine. Still, as we hit mid-century, it might be well to rehearse the developments that have shaped the handling of such a case. It may surprise you to learn that professional discipline used to operate quite differently.

I. The Birth of NDCLAP

First, the disciplinary system used to be administered by the state supreme courts and their agencies, often the state bars, rather than by NDCLAP. The first catalyst for the change to NDCLAP was a shift in

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the types of grievances against lawyers. This shift made it implausible for state supreme courts to claim special expertise in regulating professional conduct. After turn-of-the-century reforms finally contained the "litigation explosion," only a modest percentage of lawyer wrongdoing occurred in judicial proceedings. Moreover, trial courts and administrative tribunals dealt with most of that wrongdoing directly—through disqualification, contempt, or sanctions under the Rules of Procedure. Even when the trial courts did refer lawyer misconduct to an outside agency, they were apt to send it to the National Boards of Trial or Criminal Advocacy for decertification proceedings, not to the state disciplinary bodies.

The lion's share of the complaints against lawyers in the late 20th century involved false advertising, fee abuse, neglect, misappropriation, and lack of communication. Here, the chief victims were unsophisticated, individual clients, who today are protected from such professional overreaching primarily by the internal security offices of the Legal Maintenance Organizations ("LMO's")—the closed-panel group legal service plans to which most people subscribe. (These plans can simply drop offending providers from their rolls, which is the kiss of professional death.) During the 1990's, although the bar continued to view these forms of wrongdoing as ethical problems, the public came to see them as "consumer" problems, much like the problems customers used to encounter with auto mechanics. Accordingly, by the year 2000, the state supreme courts found themselves in fierce competition with state and federal consumer protection agencies for jurisdiction over cases involving lawyer wrongdoing.

Some of the most egregious professional misconduct has always arisen in transactional work and regulatory compliance work for business clients, work far removed from the courts. Often, the victims of this misconduct are not clients but unwitting third parties or the government itself, as when a tax lawyer helps a company take unwarranted tax deductions. Because disciplinary enforcement used to be almost completely reactive rather than proactive—i.e., enforcers used to wait for complaints before investigating—and because most complaints came from clients, this was a very minor part of the 20th-century disciplinary docket. But the public came to regard the reactive philosophy of lawyer discipline as unacceptable in the wake of the Savings and Loan crisis of the 1990's, when law firms were widely criticized for blinking at the shenanigans of their banking clients. Today, with NDCLAP initiating many of its own investigations, randomly auditing the work of all practice entities, and requiring extensive compliance reports, disciplinary enforcement for the benefit of nonclients is much more important than it once was.

By the year 2000, the volume of transactional and compliance work was tremendous, partly because law firms were pushing the lawyering envelope toward what were then called "ancillary" businesses. Lawyers came to do most of this work in tandem with allied professionals in large law firms or in corporate legal departments. This work had much more to do with federal agencies like the EPA, SEC, IRS, OTS, and PDQ than with the state supreme courts. These agencies began to set up their own programs for disciplining the professionals practicing before them. The organized bar bitterly opposed these programs on the ground that the agencies were using professional discipline as a pretext to enlist lawyers as watchdogs against their own clients. Under the circumstances, an independent federal disciplinary agency became a tolerable compromise.

The state supreme courts' disciplinary jurisdiction had always been tied to their authority to license lawyers. The second catalyst for change to NDCLAP-administered discipline occurred when Congress federalized licensing for lawyers in 2010. The political alliance that produced federal licensing reflected the fragmentation of the modern bar. "Federalist" bar groups stressed the need for lawyer mobility in serving national clients, the uniformity of modern American law, and the seemingly arbitrary discrepancy in state bar exam pass rates. Among the federalists were the American Bar Association ("ABA") Business Law Section, the voice of the mega-firms; the American Corporate Counsel Association ("ACCA"), representing the 20% of the bar who by 2010 worked in-house for national and multinational corporations; the Federal Bar Association, consisting of lawyers who worked for or practiced before federal agencies; and the National Legal Specialty Boards—private certification bodies that began to flower after 1990, when the Supreme Court gave lawyers a constitutional right to advertise the fact that they were privately certified as specialists.[1] The losers in the debate over national licensing, the "antifederalists," were the state supreme courts and bar associations and the now defunct ABA General Practice Section, the home of the "little lawyer."

When licensing went federal, Congress also adopted the Federal Code of Lawyering ("Federal Code"), drafted under the auspices of the National Organization of Disciplinary Officials, formerly the Organization of Bar Counsel. Drawing heavily on the *Restatement (Second) of the Law Governing Lawyers*, the Federal Code set truly uniform national standards for lawyers, as the ABA's ethics codes had never quite succeeded in doing. For a brief time, Federal Code enforcement was severed from licensing and remained local. Each lawyer still had to designate a home state and accept the disciplinary jurisdiction of that state's supreme court. But in 2015, when it became clear both that some states were enforcing the Federal Code much more actively than others and that the state supreme courts often disagreed over how to interpret the Federal Code, discipline also went federal. Help Abolish Legal Tyranny ("HALT"), a consumer organization, and the Attorneys' Liability Assurance Society ("ALAS"), the dominant malpractice insurer, success-

1. Peel v. Illinois Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281 (1990).

fully lobbied Congress for this change. HALT argued that the organized bar had "captured" some state supreme courts and turned them into paper tigers. ALAS contended that an effective national disciplinary process was the best way to prevent crushing malpractice claims. In setting up a federal disciplinary system, Congress allowed the state courts to continue to protect the integrity of their own processes by sanctioning lawyers for misbehavior in those courts, as the federal courts had always done. Everything else, including consumer problems, went to NDCLAP.

The third catalyst for the change to NDCLAP was a funding crisis. Beginning with the ABA's Clark Report[2] in 1970, and especially after the McKay Report[3] in 1991, the philosophy of lawyer discipline changed. The old emphasis had been on "cleansing the profession," removing the few bad apples who committed serious offenses. This was cheap; annual spending on discipline in the U.S. as late as 1975 was only $18 per lawyer. But "cleansing," for all its attention to the honor of the legal profession, was not responsive to most of the public's concerns about lawyers. And so, it gave way to a philosophy of deterrence and rehabilitation, a philosophy supported by the aggressive new breed of bar counsel who were increasingly making careers of investigating and prosecuting disciplinary cases. The disciplinary process in this period became user-friendly, with intake personnel helping clients prepare complaints. It also began to respond even to minor grievances. As a result, the number of lawyers sanctioned during the 1990's rose considerably faster than did bar membership, though disbarments and suspensions—the traditional "cleansing" sanctions—dwindled in favor of public censure, restitution, probation, and eventually fines.

The more responsive the disciplinary process became, the more grievances it received. The expense of processing every grievance in a timely fashion became enormous, despite the creation of a "fast track" for minor offenses and the diversion of many cases to fee and malpractice arbitration panels or to special counseling programs for lawyers afflicted with poor office management skills, substance abuse problems, or what came to be called "incivility syndrome." By 1996, led by developments in California before the Big Quake, the average annual disciplinary outlay per lawyer swelled to $1000.

Lacking any general taxing power, the state supreme courts had to cover this expense by charging lawyers ever-higher annual license fees, though some courts generated modest additional revenues by making

2. ABA Special Comm. on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (Final Draft 1970) (The report is commonly named for the chair of the drafting committee, Supreme Court Justice Tom Clark).

3. ABA Comm'n on Evaluation of Professional Enforcement, Report to the House of Delegates (1991) (This report is commonly named for the original chair of the commission, legal educator Robert McKay).

fines a disciplinary sanction. The license fees squared nicely with the benefit principle of public finance—the principle that providers and their clients rather than the general public should pay for professional regulation. But as the financial burden grew, many lawyers began to argue that all citizens, not just lawyers and clients, had an interest in the quality of the legal system and thus benefitted from the disciplinary process. This implied that license fees should be supplemented by general appropriations from state legislatures. Some state legislatures began to make appropriations, thereby reducing the financial burden on the bar. They insisted, however, on satisfying themselves that their appropriations were well spent. By 2005, state legislatures were as involved as the courts in overseeing lawyer discipline. By the time control shifted to NDCLAP in 2015, the old argument that only courts should regulate the practice of law sounded quaint indeed.

II. ENTITY DISCIPLINE

In addition to illustrating our postmodern reliance on federal discipline, the Skadden, Gibson matter illustrates our emphasis on the practice entity rather than on the individual practitioner as a disciplinary target. Lawyers a century ago would have been shocked by the idea. As late as 1950, a majority of American lawyers practiced alone and even the lawyers who practiced in firms were by our standards only loosely organized. Today, of course, the sole practitioner is as extinct as the bald eagle. And thanks to the mergers and internal growth that accelerated so dramatically after 1980, nearly 90% of today's lawyers practice in entities employing at least 200 professionals. These entities include prosecutors' and defenders' offices, legal services programs, law departments in corporations, government agencies, LMO's, and, of course, law firms.

As practice entities grew to their present size, they began to look and behave like the large corporations that some of them actually became. Most legal tasks were assigned to teams. Entity governance became a matter of departments, committees, formal rules, policy manuals, standard operating procedures, long chains of command, and lay administrators. Many ethically sensitive tasks—fee setting, file maintenance, billing, public relations, calendaring, handling of client funds and property, and avoiding conflicts of interest—came to be performed by central staff, not by the lawyers who directly serviced clients. In short, the delivery of legal services became highly bureaucratized. In this climate, ethical lawyering seemed to depend more on the culture, structure, policies, and procedures of an entity than on the values of individual lawyers.

Policymakers began to dimly perceive the disciplinary implications of all this in the 1970's and 80's. Though the disciplinary agencies of the period only had jurisdiction over individuals, a few curious provisions in the old ABA Code of Professional Responsibility were addressed to law firms as well as lawyers. An example was DR 9-102(A), requiring lawyers *and* law firms to keep client funds in trust accounts. In 1983, the

Model Rules of Professional Conduct went further and began to turn issues of entity governance into ethical issues. Most notably, Model Rules 5.1(a) and 5.3 imposed on managing lawyers a duty to ensure that all lawyers and employees in their offices behaved ethically.

These governance provisions in the Model Rules, along with pressure from malpractice insurers, propelled us into the era of law office "monitoring." By 1998, for example, all but the smallest firms used new business committees and sophisticated data bases to avoid conflicts, and maintained ethics committees to decide other sensitive questions. In retrospect, we can see that the development of such monitoring techniques took longer than it should have because the governance provisions of the Model Rules could at first be enforced only against individual lawyers. The trouble was that disciplinary authorities never knew which lawyers to blame when, for example, a firm became embroiled in a conflict because it lacked an appropriate intake procedure. Only a firm collectively, and not specific individuals, could be blamed for a structural or policy defect of this sort, but the agencies had no authority to proceed against firms.

Pointing out the problem, a seminal article in *Cornell Law Review*[4] in 1991 called for expanding disciplinary jurisdiction to include law firms and other practice entities. Drawing an analogy to the federal regulation of corporate crime, the article suggested that practice entities be subject to discipline not just for collective monitoring failures, but vicariously for the misconduct of the individuals working within them, even when complainants and disciplinary authorities could not show exactly just which lawyers had misbehaved, something that became harder to show once the bulk of legal work was done in teams. By proceeding against a firm, the article noted, disciplinary agencies could avoid scapegoating a particular lawyer for sins that might just as easily have been committed by others in the firm. A disciplined entity, the article added, could generally decide for itself whether to adopt new monitoring procedures and whether to discipline specific providers internally. That is more or less what happened in the Skadden, Gibson case.

Entity discipline found its way into the law by the year 2000. The Model Rules were amended to address entities as well as individuals. At first, the state supreme courts gained jurisdiction over practice entities simply by requiring licensed individuals to work only for organizations that made themselves amenable to the disciplinary process. Then, in 2020, NDCLAP established a true system of entity licensing, much like the system that the SEC had long used to regulate brokerage houses.[5] After that, discipline was funded partly by a Congressional appropriation and partly by an annual tax on all practice entities, proportioned to the number of lawyers and allied professionals working for the entity.

4. Schneyer, *Professional Discipline for Law Firms?*, 77 Cornell L. Rev. — (1991).
5. *See* 15 U.S.C. § 78*o* (1988).

The modern focus on entities as disciplinary targets has, of course, affected the mix of disciplinary sanctions. Firm dissolution, the analogy to disbarment, is almost unheard of; it makes no sense except in response to a chronic and pervasive pattern of institutional wrongdoing. On the other hand, fines are common, because law firms as such have proven more attentive to their bottom lines and better able to pay than individual lawyers. Public censure has also proven to be an effective sanction, since well-known practice entities have a huge stake in preserving their institutional reputations; firms with good ethical track records find it much easier than others to hold onto good lawyers and clients alike. Some firms are placed on "preventive" probation until they adopt the monitoring or hiring practices that NDCLAP considers essential to prevent further wrongdoing. Often, a combination of these sanctions is imposed, typically after negotiations between NDCLAP and firm management, as in the Skadden, Gibson case.

To maximize detection and minimize administrative expense, NDCLAP rules call for a substantial reduction in discipline whenever a practice entity comes forward and reports its own ethical violations. This carrot has proven much more effective than the 20th-century stick of requiring lawyers to report violations.[6] It has even encouraged practice entities to form their own ethical compliance offices, which in turn help to prevent wrongdoing. Sanctions are also reduced whenever an accused firm can show that it had appropriate monitoring procedures in place at the time of an underlying infraction by a "rogue" lawyer.

All these developments in entity discipline were presaged by the United States Sentencing Commission's treatment in 1991 of an analogous subject—criminal sanctions for organizational offenders.[7] Ironically, the Sentencing Commission's guidelines for organizational sanctions had a greater impact on the evolution of lawyer discipline in the United States than the ABA's McKay Commission, whose report was published the very same year. You might want to examine both reports in the Archives.

6. *See* Model Rules of Professional Conduct Rule 8.3(a) (1983).

7. U.S. Sentencing Commission, *Sentencing Guidelines for Organizational Defendants*, 49 Crim. L. Rep. (BNA) 2059 (May 8, 1991).