"Philadelphia Lawyers": Policing the Law in Pennsylvania

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Abstract (Summary)

With these and other concerns in mind, in 1968 the American Bar Association charged a Commission to study the disciplinary systems in place in the various states.55 The final product, known as the "Clark Report" (for its Chair, former Supreme Court Justice Tom Clark), described a "scandalous situation that requires the immediate attention of the profession."56 "With few exceptions," the Report stressed, "the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility."57 What's more, acts of discipline were "practically nonexistent in many jurisdictions," practices and procedures were "antiquated," and many disciplinary agencies lacked the power to move against malefactors. Over the course of its 200-plus pages, the Clark Report identified thirty-six distinct "problems" with state-level attorney discipline and offered corresponding "recommendations," particularly involving issues of central coordination, changes in practices involving funding, record-keeping, reciprocal punishments, reinstatements, reporting, and evidence gathering, and treatment of witnesses.58

Pennsylvania allows for both private and public disciplinary options. Private discipline can take one of two forms: an informal admonition, imposed by the Chief Disciplinary Counsel;104 or a private reprimand, imposed by the Board.105 According to the Board's own "Glossary of Terms," an informal admonition is "the lowest form of private discipline usually administered for first time minor offenses," while a private reprimand is "usually for minor misconduct or the next level of discipline for an attorney who previously received an informal admonition."106 Beyond this, our interviews suggest that private discipline is in essence something like an "intervention," particularly for first-time offenders and/or individuals with offenses that, while serious, do not generally rise above misdemeanor criminal matters or especially grave professional infractions. As one disciplinary official explained, when referring to the decision to impose an informal admonition or private reprimand for something like a drunk driving offense, the thinking here is that "We don't want to see this happen again" and thus the lawyer would sit down with the relevant officials and discuss the seriousness of the offense, but that if it were private discipline there would be no public record of the event.107 And thus this variety of sanction does not generally influence an attorney's ability to practice law - nor, one would expect, one's reputation, given that the information is not accessible by the general public and need not be transmitted to potential clients, etc.108 For such reasons, private discipline has been subject to scholarly criticism, especially because such admonitions "have little sting and convey a weak message about the unacceptability of a lawyer's conduct" and likely "breed public suspicion" with "limited deterrent effect."109

In this spirit, sanctions such as disbarment are not intended to be punitive in nature168 (although they might seem to be so in the mind of the offending attorney) and are essential because "the disciplinary system could not fulfill its dual functions of determining fitness to practice and protecting the courts and the public if it could find an attorney to be so unfit that he should be suspended or disbarred and yet lack the power to effect the appropriate response."169 But, one of the points we seek to convey here is that, while "punishment" as such may not be the purported purpose or intention of disciplinary measures, in practice certain options can have punitive implications that almost certainly exceed what might be expected "on paper." This is not necessarily to find fault with the disciplinary outcomes reached, but rather to urge a broader understanding of what "counts," if you will, as "punishment" - particularly when contrasted with the putatively more public-interested notion of "discipline."

Whatever it is called, the implications have been evident and immediate: as Table III revealed above, since the inception of this option in 2005, there have been over four times as many "consent" disbarments as "conventional" disbarments, as well as two times as many censures on consent. It seems that one reason for this is the opportunity for apparent mutual gain. Indeed, one disciplinary official asserted that she "had never seen responsible counsel not think it's [consent discipline] a good idea," and specified, as to more direct benefits, that "In the old days, even mail fraud needed a hearing, technically, and the respondent has to pay all the costs - so to find a way

to discipline without that benefits all parties involved."186 Additionally, especially for cases involving the most serious offenses (e.g. misappropriation of client funds), a "wise lawyer," we were told on more than one occasion, would almost certainly move his/her client in this direction if for no other reason than to start the "clock" running on the five-year period outside the profession.187

Full Text (20550 words)

[Headnote]

Abstract

Unlike other professions within the Commonwealth, Pennsylvania attorneys generally "police" themselves, meaning that ethical infractions and ramifications of criminal convictions are addressed not by a state administrative agency, but rather by peers working in a disciplinary capacity under the authority of the state supreme court. Recent socio-legal and social science research has addressed the various statutory "collateral consequences" that attach to criminal convictions, but we know comparatively little about consequential discipline instituted by the profession itself. Based on an examination of 419 disciplinary dispositions from 2005-2009, as well as interviews with elites, this study provides the first-ever examination of the process and legal -political implications of peer-policing of the legal profession in Pennsylvania. Specifically, we set forth four primary findings.

First, despite global perceptions to the contrary, Pennsylvania attorneys are punished rather harshly by their peers, at least with respect to publicized discipline (certain disciplinary actions are not publicized and hence not open to examination). Second, our study reveals a trend we are calling "disciplinary amplification," or the tendency for sentences to increase in severity as cases proceed on appeal. Third, we highlight the prevalence of discipline reached "on consent" and explore the implications of this increasingly popular mode of disposition. Finally, our data illustrate a counter-intuitive phenomenon we are calling "self-discipline," or the tendency for certain suspended or disbarred attorneys to deliberately prolong their banishment as a tactic to eventually secure reinstatement.

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"I can't imagine why clients would not run like crazy away from that [suspended] lawyer?"1

I. Introduction

To refer to an attorney as a "Philadelphia lawyer" was, in the colonial era, a sign of great respect: that is, a moniker

signifying an individual who was learned, worthy, noble and adeptly attuned to the details and technicalities of the law.2 With the passage of time, however, the designation has devolved to characterize a practitioner of a different hue - still shrewd and skilled, but inclined more toward exploitation than grandeur.3 Indeed, in its modern contemplation, a reference to a "Philadelphia lawyer" is more likely to underscore the presumptively disreputable and disingenuous qualities of those within the Bar, such as an inclination toward improprieties,4 as opposed to the unimpeachable integrity imagined by those with the highest of aspirations for the profession.5

And yet, while we have lawyer jokes at the ready,6 we are focused less on the historical trajectory of the profession or the ethical failings of some of its members,7 and more on the institutions, policies, and actors that profess to regulate the practice of law in the public interest. Indeed, the stated "goals" of the Disciplinary Board of the Supreme Court of Pennsylvania are to "protect the public, maintain the integrity of the legal profession and to safeguard the reputation of the courts."8 However, what is distinctive about the supervision of lawyers within the Commonwealth is that other professions - e.g. medicine, accounting, dentistry, real estate - are supervised by the Bureau of Professional and Occupational Affairs, a traditional administrative agency composed of state employees who are charged with overseeing most aspects pertaining to quality control, public safety, and so on.9 By contrast, while the Pennsylvania Supreme Court reserves inherent and exclusive powers over the conduct of attorneys who are its officers,10 the actual administration of discipline is not carried out by state employees, but rather disciplinary officials who work within and are paid by the profession itself,11 as opposed to working for the state per se. While this by no means implies that the profession is separate from the state - again, the state supreme court has authority over its officers - attorneys in Pennsylvania are policed by their peers in kind and in degree more so than is allowed for practitioners in any other profession within the Commonwealth.12

What's more, attorneys in Pennsylvania are accountable to the profession not only for professional infractions, but also for criminal convictions. That is, when an attorney commits a professional offense (e.g. failure to respond to a client in a "timely manner"), then s/he can face discipline coming from within the profession; but, when an attorney is convicted of a criminal offense (e.g. possession of cocaine), s/he will encounter punishment from the criminal court and discipline from the profession. It is this linkage, between criminal convictions and consequent professional discipline, which piqued our interest in this topic and encouraged us to examine these disciplinary implications as variations on the familiar notion of "collateral consequences" within the socio-legal and social science literatures.

Such "consequences," while often lumped together in media renditions or other generic contemplations, are actually more accurately conceived of in at least three distinct manifestations. First, the term is occasionally used to refer to what are more appropriately construed as "collateral sanctions" that is, legal penalties, disabilities, or disadvantages that are imposed on a person automatically upon conviction for felony, misdemeanor, or other offense - even without being formally a function of the sentence itself.13 Restrictions on voting rights are probably the bestknown form of collateral sanction,14 although restrictions on the right to serve in the military or on a jury,15 and per se firearms restrictions16 would fit here as well.

At other times, "collateral consequences" is the generic term for "discretionary disqualifications," which are - by contrast with collateral sanctions - penalties, disabilities, or disadvantages that a civil court, administrative agency, or official is authorized but not required to impose following a conviction for an offense related to the conviction.17 Matters pertaining to insurance, public benefits, and employment and licensing restrictions are usually categorized here as well. Deportation of noncitizen legal residents convicted of criminal offenses was until recently another such penalty; however, in its ruling in Padilla v. Kentucky, the U.S. Supreme Court found that because statutory changes have rendered deportation "virtually inevitable" for broad classes of crimes, deportation-as-consequence is now an "integral part" of the penalty faced by non-citizen offenders, and is therefore no longer properly conceived of as discretionary.18 In finding so, the Court for the first time extended the Sixth Amendment right to counsel to a conviction consequence outside the courtimposed punishment and, as commentators have suggested, took an "important first step toward imposing constitutional discipline on the plea-bargaining process."19

Finally, "collateral consequences" can also end up being the catch-all term used to refer to the general psychological, sociological, and even economic consequences of a criminal conviction - including things such as the stigma felt by former offenders,20 the impact on the family and/or community when vast segments of the population are incarcerated or are reentering society,21 and the implications of a conviction on employment prospects even for those working outside the professions and/or not requiring licensure or certification - such as entry-level service, retail, or custodial positions, to suggest just a few examples.22 Importantly, the first two categories (where the state is the actor instituting the consequence) are typically construed as civil regulations rather than criminal punishments,23 meaning they do not amount to double jeopardy, but meaning as well that - even though they have a

profound and potentially permanent effect on those within and those who have previously passed through the criminal justice system24 - they are generally scattered throughout the criminal code,25 and with the recent exception of deportation as a consequence,26 they may not be specified during a trial or surfaced in plea negotiations.27

Certain varieties of collateral consequences, such as the relationship between a felony conviction and the voting rights of felons have properly received extensive academic attention;28 yet, discretionary, «on-state consequences such as the suspension or removal of a professional license have generated little scrutiny. This is especially intriguing when we consider that within the Commonwealth of Pennsylvania (and most other states) private actors within the profession enjoy the prerogative under the Supreme Court to privately discipline their own for the ostensible purpose of preserving the integrity of the Bar and protecting the interests of the public at large. But it is also curious given what we might charitably call a collective ambivalence toward the legal profession.29 Put simply, people need lawyers - basic governance and certainly private disputes and criminal matters require legal counsel - even while they likely do not understand the law and may not trust its practitioners. This suggests that there is a compelling case for evaluating and explicating exactly how the profession goes about the process of internal quality control.30 In few states is this more true than in the Commonwealth, because with 59,527 active members of the profession, and another 10,367 in inactive status,31 Pennsylvania's attorney population has seen a more than 500% increase in its ranks over the last few decades,32 while serving a state with the sixth largest population in the United States.33

As with our previous case studies of disciplinary mechanics within the professions in various states,34 we have confined our investigation to one jurisdiction in order to probe deeply the inner workings of the institutions and the perspectives of practitioners within the venue. While aggregate disciplinary statistics are available through the website of the Disciplinary Board of the Supreme Court of Pennsylvania (for limited years and with sparse context), our work represents the first-ever academic exploration of the instances and implications of peer policing of the legal profession within the Commonwealth. To explore the nuances of this disciplinary framework, we conducted interviews with elites (disciplinary officials and attorneys who represent defendants within the process); we carried out a quantitative analysis of the 419 public disciplinary dispositions reached during a five-year stretch of time (2005-2009); we employed content analysis of court opinions and Disciplinary Board materials; and, we enjoyed the opportunity to sit in on reinstatement hearings.

With the above introduction to the thrust of this study, we present the following findings. First, despite evident cynicism35 and criticisms from advocates36 that suggest that the profession is unlikely (or unable) to self-police,37 we find that attorneys in Pennsylvania are actually disciplined relatively harshly. We must stress that this conclusion factors in only instances of public discipline because, as we will explain in more detail below, the majority of disciplinary actions within the Commonwealth are of the "private" variety. What this means is that there is no public record of the sanction (other than an official account of aggregate totals) and correspondingly no way of gauging the relationship between the prescribed discipline and the underlying offense, no way to compare disciplinary dispositions between similarly-situated offenders, over time, no way to track rates of recidivism, and so on.

Second, we are introducing the term "disciplinary amplification" to describe a phenomenon that surprised us and that runs counter to trends in criminal courts, for example, and only for purposes of providing some kind of frame of reference for this process. "Amplification" in this context refers to the tendency for sentences to become increasingly harsher (i.e. "amplified") as individual cases move through the process, specifically progressing from the first body to review the case (the Hearing Committee) to the final body to rule on the matter (the Pennsylvania Supreme Court). We stress that this is merely an emerging pattern, rather than a predetermination, and the universe of cases is comparatively small. That said, this trend is intriguing because, while the two domains are certainly different, sentencing (re)appraisals in a criminal setting, for example, would tend toward the opposite result - i.e. diminishing in severity as cases moved through pipeline.

Third, our research illuminates the increasing significance of disciplinary sanctions arrived at by "consent." Such dispositions, especially those involving disbarments, have become quite prevalent since their introduction in Pennsylvania in 2005. 38 Our research reveals that this option has become especially appealing to defendants because it starts the "clock" running earlier in the process, meaning that those who are particularly likely to be eventually disbarred by conventional means can surrender their license earlier and immediately begin serving their mandatory five-year term outside the profession, as opposed to undergoing the traditional process, which could be drawn out over a year or more. What's more, our interviews with disciplinary officials revealed a developing sense of mutual benefit under such terms, since a disposition can be reached without expending as many resources, without engaging in potentially rancorous hearings, and without exposure to the uncertainty that can arise in any arena of adjudication. As one disciplinary official put it, consent discipline is a "win-win option."39

Finally, we have located what might be considered a "hidden" element, a phenomenon we refer to as ",^//-discipline." Flowing from our third conclusion, but consistent with our first one, we find that a significant number of those seeking reinstatement to the profession (following disbarment, in particular) appear to effectively and strategically "discipline" themselves by waiting more than the minimum amount of time required before seeking reentry. Put differently, interviews with practitioners, as well as our own inferences from the data, suggest a surprising and (we think) counter-intuitive tendency: while attorneys who have been suspended for more than twelve months can apply for reinstatement at the end of this period, and while disbarred attorneys can do the same at the end of five years, we find that - of those who do reapply at all (and, we must stress, most do not) - the majority do not seek reentry at the earliest possible instance, but rather wait an additional period of time before seeking readmission to the Bar. To flesh this out in numerical terms, while a disbarred attorney would have to wait sixty months before instituting the process of reinstatement, which is likely to take at least a year itself, the average amount of time spent outside the practice of law for those who were eventually reinstated was over 126 months - or more than twice the length of the required banishment.40 In the Discussion section below we elaborate on these data and offer some explanations for this phenomenon.

The next section of this paper will provide an overview of the history of attorney discipline, with particular attention to the organization and operations of the system within the Commonwealth of Pennsylvania. Following that, Section III sets forth our quantitative data in the form of seven tables and two figures, as well as color and context gleaned from interviews with those who animate this process. Section IV elaborates on those data and discusses them in the context of the abovementioned findings. Finally, in Section V, we offer some concluding thoughts and a forecast for future research.

II. Attorney Discipline

A. Origins

In a broad sense, individuals who are members of a "profession" are held to certain expectations regarding training, character, behavior, and comportment.41 On account of their degree of specialization and technical capacity, they often enjoy the opportunity to generally police their own practitioners,42 and, perhaps more controversially, to devise the terms of membership.43 This assumed authority extends to cover the requirements of admission,44 as well as retention45 - conditions that may not be the same.46 To draw toward the focus of this paper, we should stress that attorney self-regulation has often garnered considerable public suspicion,47 and has frequently been construed as a mechanism for maintaining market control,48 as a means of obscuring discriminatory exclusions of women and minorities,49 as politically motivated,50 as a cabal of chumminess where practitioners protect their own,51 and so on. Such criticisms are in many cases deserved, particularly when higher profile offenders evade sanctions,52 when the "procedural excesses" of the lawyer-designed system are exploited,53 and when studies suggest that disciplinary actions have often been disproportionately pursued against sole practitioners rather than larger firm lawyers, for example.54

With these and other concerns in mind, in 1968 the American Bar Association charged a Commission to study the disciplinary systems in place in the various states.55 The final product, known as the "Clark Report" (for its Chair, former Supreme Court Justice Tom Clark), described a "scandalous situation that requires the immediate attention of the profession."56 "With few exceptions," the Report stressed, "the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility."57 What's more, acts of discipline were "practically nonexistent in many jurisdictions," practices and procedures were "antiquated," and many disciplinary agencies lacked the power to move against malefactors. Over the course of its 200-plus pages, the Clark Report identified thirty-six distinct "problems" with state-level attorney discipline and offered corresponding "recommendations," particularly involving issues of central coordination, changes in practices involving funding, record-keeping, reciprocal punishments, reinstatements, reporting, and evidence gathering, and treatment of witnesses.58

The impact of the Clark Report was "immediate" as one analyst put it, with at least twenty-four jurisdictions employing lawyers in their disciplinary agencies within five years.59 Indeed, by 1992, according to the McKay Report (the next major ABA stock-taking effort), "revolutionary" changes had occurred.60 As it stands today, there are disciplinary agencies within every state and they annually receive more than 125,000 complaints (generally from citizens) against the over 1.3 million attorneys presently active in the United States,61 although only a small percentage of these complaints result in disciplinary actions and consequences can vary considerably between states.62

B. Organization