Giving Lawyers Their Due: Due Process Defenses in Disciplinary Proceedings

Mark J. Fucile

Due process defenses in disciplinary proceedings are not rare. A search of case law will yield many each year. *Successful* due process defenses, on the other hand, are rare. A search of case law will result in at most a handful in any given year.

This article examines three facets of due process defenses in disciplinary proceedings. First, the basic constitutional concept in the disciplinary setting is examined. Second, the avenues for raising due process defenses are surveyed. Third, practical considerations in pursuing due process defenses are discussed.

At the outset, three qualifiers are in order. First, "due process" as used in this article focuses on asserted violations of procedural rights accorded by the Fifth and Fourteenth Amendments to the United States Constitution. It is important to note, however, that state constitutional rights should not be overlooked in analyzing potential due process challenges as state constitutions can offer at least parallel, if not more expansive, procedural rights.[1] Second, because the focus is on procedural rights, facial challenges to professional rules based on other constitutional rights, such as commercial free speech, are excluded.[2] Third, because the focus is on formal regulatory proceedings, other forms of sanctions imposed on counsel that may raise due process issues are not addressed.[3]

Due Process in the Disciplinary Context

The practice of law has long been recognized as a right that, once acquired, is entitled to due process protection. In *Ex Parte Burr*,[4] for example, Chief Justice Marshall noted:

> "[T]he profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him."

Justice Field, writing for the court, echoed this fundamental notion in *Ex Parte Garland*:[5]

> "The attorney and counselor being, by solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency."

Due process challenges in disciplinary proceedings also have a long history.[6] *Ex Parte Bradley*,[7] for example, involved a defense attorney, Bradley, who was summarily disbarred by the judge presiding over the trial of John Surratt for conspiracy in the Lincoln assassination. During the trial, Bradley and the trial judge, Fisher, engaged in a strenuous exchange of mutual insults. Shortly after the trial ended with a hung jury, Fisher got the last word in the dueling insults by ordering Bradley disbarred from the Supreme Court of the District of Columbia for "accosting [Fisher] . . . in a rude and insulting manner[.]" Bradley then sought a writ of mandamus in the United States Supreme Court. Bradley argued primarily that the trial court—rather than the District of Columbia Supreme Court—lacked jurisdiction to disbar an attorney. The U.S. Supreme Court agreed and issued a peremptory writ directing that Bradley be reinstated. In doing so, the Supreme Court also noted that the trial court's *sua sponte* disbarment violated Bradley's due process rights to prior notice and the opportunity to be heard.

That same term, the Supreme Court addressed notice and the opportunity to be heard in the disciplinary context directly in *Randall v. Brigham*.[8] Randall had been disbarred by the defendant Massachusetts trial court judge for defrauding a client. Unlike *Bradley*, however, Massachusetts at the time allowed trial courts to disbar lawyers and Randall had been informed of the allegations against him by letter before he was called before Brigham to answer the charges. Randall then sued Brigham for damages. The Massachusetts court dismissed and the U.S. Supreme Court affirmed. Although the decision turned primarily on judicial immunity, the Supreme Court also found that notice and the opportunity to be heard were both adequate:

> "[N]otice should be given to the attorney of the charges made and the opportunity afforded him for explanation and defense."[9]

A century later, the U.S. Supreme Court returned to these twin concepts in *In re Ruffalo*.[10] *Ruffalo* was a reciprocal discipline case. The lawyer in *Ruffalo* handled personal injury claims against railroads. The Association of American Railroads filed charges against him with the president of his local bar association in Ohio, who was also local counsel for the Baltimore & Ohio Railroad. The gist of the charges going into the hearing was that Ruffalo had improperly solicited clients through a part-time investigator. After Ruffalo and

Mark J. Fucile is a Partner, Fucile & Reising LLP, Portland, Oregon.

the investigator had testified at the hearing, however, the bar prosecutor amended the charges to include one for "deception," contending that it was "morally and legally wrong" for Ruffalo to use a part-time investigator who also worked as an inspector for the Baltimore & Ohio (although not at the yards involved in Ruffalo's cases). Ruffalo objected, but the hearing panel allowed the amendment and Ruffalo was later disbarred by the Ohio Supreme Court primarily on the late-added charge. Ruffalo was also admitted to the Sixth Circuit and it likewise disbarred him as matter of reciprocal discipline. Ruffalo appealed the Sixth Circuit's disbarment order to the U.S. Supreme Court. The U.S. Supreme Court reversed. Noting that accused lawyers are "entitled to procedural due process," the U.S. Supreme Court cited *Randall* in finding that Ruffalo had been denied notice and the opportunity to be heard in the original hearing that the Sixth Circuit had then relied on in disbarring him.[11]

Notice and the opportunity to be heard remain the dual touchstones for assessing due process in disciplinary proceedings in both state[12] and federal[13] courts. It is important to note, however, that disciplinary procedures are accorded wide latitude as long as these two basic concepts are incorporated. The First Circuit put it succinctly:

> "Admittedly, the Due Process Clause applies to disciplinary proceedings. . . . But the Due Process Clause does not demand that a state devise an ideal set of procedures for attorney discipline. It suffices to satisfy due process if a state adopts procedures that collectively ensure the fundamental fairness of the disciplinary proceedings. . . . In other words, the Due Process Clause imposes a floor below which a state cannot descend, not a level of perfection that a state must achieve."[14]

Disciplinary proceedings are classified as *sui generis* by statute,[15] rule[16] or judicial decision.[17] Therefore, specific rules of criminal or civil procedure do not necessarily apply unless adopted by reference into a state's lawyer discipline rules. This can lead to variances from criminal or civil practice but still fall within the ambit of due process as long as the basic rights of notice and the opportunity to be heard are preserved. Comparatively recent examples include:

- *In re Squire*,[18] finding no due process violation where bar prosecutors did not disclose the names of potential witnesses contacted but not called at trial.
- *In re Fisher*,[19] concluding no due process violation for failure of bar prosecutors to disclose exculpatory expert contacted but not called at trial.
- *Statewide Grievance Committee v. Burton*,[20] holding no due process violation even though accused attorney was not afforded prehearing discovery.
- *In re Wiles*,[21] finding no due process violation where rules only allowed discovery depositions in exceptional circumstances.
- *In re Barach*,[22] determining no due process violation where a finding of misconduct was based on a preponderance of evidence rather than clear and convincing evidence.

As noted, however, if the bedrock rights of notice and opportunity to be heard are violated, then the accused lawyer is entitled to either dismissal, or, depending on the nature of the violation, remand. *In re Best*,[23] is an example of the former. The Montana Supreme Court dismissed a disciplinary action with prejudice where an accused attorney was not given the opportunity to respond before the Montana Commission on Practice issued a non-appealable private admonition.[24] *In re Sanai*,[25] is an example of the latter. The Washington Supreme Court remanded a disciplinary case for a new hearing after an initial hearing was conducted *in absentia* due to the accused attorney's claimed inability to attend for health reasons.

Avenues for Raising Due Process Defenses

A discussion of avenues for raising due process defenses should begin with the route least likely to succeed: direct review by a federal district court. The reasons are twofold. First, *Younger v. Harris*,[26] articulates the policy that federal courts should generally abstain from interfering with ongoing state judicial proceedings. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*,[27] applied "*Younger* abstention" to bar disciplinary proceedings:

> "So long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate, federal courts should abstain."

Abstention has been applied to both federal actions seeking injunctions against state disciplinary proceedings[28] and federal civil rights claims against state bar disciplinary authorities prosecuting pending matters.[29] In short, once a state disciplinary proceeding has begun, federal courts will generally abstain from stopping it.

Second, the "*Rooker-Feldman*" doctrine—named for *Rooker v. Fidelity Trust Co.*,[30] and *District of Columbia Court of Appeals v. Feldman*,[31]—holds that subject matter jurisdiction under 28 U.S.C. § 1257 to review state appellate judgments only lies with the United States Supreme Court and not federal district courts.[32] The "*Feldman*" of "*Rooker-Feldman*" involved bar applicants who were not allowed to sit for the District of Columbia bar exam because they were not graduates of ABA-accredited law schools. The U.S. Supreme Court found that to the extent they were seeking review of the denial of their own applications (as opposed to a facial challenge to the underlying rule), the federal district court lacked jurisdiction. Accordingly, the doctrine has found ready application to lawyers who lost state disciplinary proceedings and then sought to have the

outcome reviewed by a federal district court on asserted due process grounds.[33] In sum, once a state disciplinary proceeding is over, federal subject matter jurisdiction limits review to the United States Supreme Court through a petition for a writ of *certiorari*.

A federal court is allowed to assess due process considerations in deciding whether to impose reciprocal discipline following earlier state proceedings. Indeed, that was the procedural posture in Ruffalo. As in Ruffalo, however, a federal court's decision on reciprocal discipline does not affect the discipline originally imposed by the state court. Therefore, the combination of Younger abstention and the Rooker-Feldman doctrine effectively means that due process defenses must be raised initially in state disciplinary proceedings as illustrated by the Best and Sanai decisions. If unsuccessful in the final layer of state appellate review, due process defenses are only subject to discretionary review by the United States Supreme Court.

State disciplinary systems vary in their specific approaches to error preservation.

Practical Considerations

Three primary practical considerations stand out in raising due process defenses.

First, aim narrowly. Reported decisions on due process challenges in disciplinary cases are heavily weighted toward "shotgun" approaches by *pro se* defendants. These challenges often combine legal broadsides with thinly veiled attacks on either disciplinary systems as a whole or those administering them.[34] Predictably, this approach typically elicits at most a polite back-of-the hand from appellate courts.[35] By contrast, narrowly tailored challenges like the *Best* case discussed earlier are more likely to succeed provided they focus on issues that go to the heart of due process protection. In addition to the legal merits of a narrowly tailored focus, this approach can have more practical credibility with a reviewing court than an angry broadside by an accused lawyer.

Second, make a thorough record and carefully preserve error. State disciplinary systems vary in their specific approaches to error preservation.[36] Regardless, it remains critical to develop the record below so there will be an adequate basis for a reviewing court to analyze the particular due process issues involved.[37] Moreover, on a practical level, making a thorough record enhances the credibility of the argument advanced rather than appearing to be a mere afterthought.[38] In *Ruffalo*, for example, the U.S. Supreme Court specifically noted Ruffalo's immediate objection to the failure of notice that formed the core of his due process argument.[39]

Third, orient any due process defense around the central tenets of notice and opportunity to be heard. *Ruffalo* focused on the former and *Best* and *Sanai* highlight the latter. The crux of both the lawyer's argument and the U.S. Supreme's conclusion in *Ruffalo* can be fairly summarized in one sentence: "The charge must be known before the proceedings commence."[40] With *Best*, the disciplinary authority issued the private admonition without giving the accused attorney the ability to contest the finding even though, as the Montana Supreme Court noted, even a private sanction would have potentially material consequences for the lawyer later in *pro hac vice* or other admission applications or potential reciprocal discipline.[41] In *Sanai*, the Washington Supreme Court found that the hearing officer had abused his discretion in denying a continuance to accommodate the accused attorney's medical condition: "Because '[a] ttorney disciplinary hearings must meet the requirements of due process,' we hold that the hearing officer abused his discretion by refusing to grant [the accus ed attorney] . . . a continuance based on his medical condition so he could attend and participate in the proceedings."[42]

Conclusion

Successful due process defenses are rare in the disciplinary context. If circumstances present due process issues, however, it is important to frame them around the core principles of notice and the opportunity to be heard and make a thorough record for subsequent appellate review.

Endnotes

1. *See, e.g., In re* Best, 229 P.3d 1201 (Mont. 2010) (examining due process issues under both state and federal constitutions). Procedural defects that do not rise to the level of due process violations may also offer important defenses. *See, e.g., In re* Hendrick, 208 P.3d 488 (Or. 2009) (ordering remand where disciplinary board chair failed to give accused attorney a peremptory challenge to hearing panel members to which the attorney was entitled under applicable procedural rules).
2. *See e.g.,* Florida Bar v. Went for It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L.Ed.2d 541 (1995).
3. *See, e.g.,* Lasar v. Ford Motor Co., 399 F.3d 1101 (9th Cir. 2005) (assessing due process where trial court sanctioned lawyer and imposed lifetime *pro hac vice* ban in the federal district concerned).
4. 22 U.S. (9 Wheat.) 529, 530, 6 L.Ed. 152 (1824).
5. 71 U.S. (4 Wall.) 333, 379, 18 L.Ed. 366 (1866).
6. *See also* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1871) (subsequent damage action).
7. 74 U.S. (7 Wall.) 364, 19 L.Ed. 214 (1868).
8. 74 U.S. (7 Wall.) 523, 19 L.Ed. 285 (1868).
9. *Id.* at 540.
10. 390 U.S. 544, 88 S. Ct. 1222, 20 L.Ed.2d (1968).
11. *Id.* at 550-51.
12. *See, e.g., In re* Marshall, 157 P.3d 859, 871 (Wash. 2007).
13. *See, e.g., In re* Cook, 551 F.3d 542, 549 (6th Cir. 2009).

14. *In re* Barach, 540 F.3d 82, 85 (1st Cir. 2008).
15. *See, e.g.*, Or. Rev. Stat. § 9.529.
16. *See, e.g.*, ABA Model Rule for Lawyer Disciplinary Enforcement 18 A.
17. *See, e.g.*, Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 433 n.12, 102 S. Ct. 2515, 73 L.Ed.2d 116 (1982).
18. 617 F.3d 461 (6th Cir. 2010).
19. 202 P.3d 1186 (Colo. 2009).
20. No. DBDCV030351055S, 2007 WL 4733049 (Conn. Super. Dec. 17, 2007) (unpublished).
21. 210 P.3d 613 (Kan. 2009).
22. 540 F.3d 82.
23. 229 P.3d 1201 (Mont. 2010).
24. Because the private admonition was not subject to appeal by rule, the accused attorney filed an original petition akin to a mandamus in the Montana Supreme Court.
25. 225 P.3d 2003 (Wash. 2009).
26. 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed.2d 669 (1971).
27. 457 U.S. at 435.
28. *See, e.g.*, Gillette v. North Dakota Disciplinary Bd. Counsel, 610 F.3d 1045 (8th Cir. 2010).
29. *See, e.g., Plouffe v. Ligon*, 606 F.3d 890 (8th Cir. 2010).
30. 263 U.S. 413, 44 S. Ct. 149, 68 L.Ed. 362 (1923).
31. 460 U.S. 462, 103 S. Ct. 1303, 75 L.Ed.2d 206 (1983).
32. *See also* Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 125 S. Ct. 1517, 161 L.Ed.2d 454 (2005) (clarifying application of the *Rooker-Feldman* doctrine).
33. *See, e.g.*, Mothershed v. Justices of Supreme Court, 410 F.3d 602 (9th Cir. 2005).
34. *See, e.g., In re* Paulson, 216 P.3d 859 (Or. 2009) (attacking system); *In re* King, 232 P.3d 1095 (Wash. 2010) (accused attorney sued hearing officer and then claimed conflict).
35. *See, e.g., In re* Wiles, 210 P.3d at 616 ("In summary, [accused attorney's]. . . objections to the disciplinary process are untimely, without support, and lack merit. We, therefore, turn to his substantive arguments.").
36. *See, e.g., In re* Hendrick, 208 P.3d at 492 (noting the Oregon court's *de novo* review in disciplinary matters); *In re* Wiles, 210 P.3d at 615-16 (failure to object as provided by the applicable Kansas rules constituted waiver).
37. *See, e.g.*, Neely v. Commission for Lawyer Discipline, 302 S.W.3d 331, 351 (Tex. App. 2009) ("As to this issue [*i.e.*, due process], [accused's attorney] . . . has failed to provide argument, analysis, citations to the record, or legal authority.").
38. *See, e.g., In re* Wiles, 201 P.3d at 615-16 ("In fact, he failed to raise any objection . . . until after he filed . . . his brief before this court.").
39. 390 U.S. at 546.
40. *Id.* at 551.
41. 229 P.3d at 1204-05.
42. 225 P.23 at 208.