

Public Discipline Is More “Public” Than Ever: The Impact of Web-Based Lawyer Rating Services on Discipline

By Mark J. Fucile

Mark J. Fucile of Fucile & Reising LLP in Portland, OR, advises lawyers, law firms, and legal departments throughout the Northwest on ethics and attorney-client privilege matters. He is a former in-house ethics counsel for a Northwest regional law firm. Mr. Fucile teaches legal ethics as an adjunct professor at the University of Oregon School of Law at its Portland campus.

I. Introduction

In 1970, the American Bar Association’s Special Committee on Evaluation of Disciplinary Enforcement, chaired by retired United States Supreme Court Justice Tom C. Clark, released a comprehensive report on lawyer discipline.¹ The Clark Report described the state of lawyer discipline as “a scandalous situation that requires the immediate attention of the profession.”² One of the many problems the Clark Report identified was the lack of transparency in lawyer disciplinary enforcement. The Clark Report described this particular shortcoming starkly:

Most disciplinary agencies deliberately discourage any publication of information concerning their activities, believing that the public image of the profession is damaged by a disclosure that attorney misconduct exists. The president of a large state bar spoke of this policy:

‘And, of course, we try to keep publicity concerning our disciplinary proceedings out of the newspapers because this gives lawyers a black eye and a bad image.’³

By contrast, today’s Model Rules for Lawyer Disciplinary Enforcement encourage public notice of discipline imposed. Model Rule 17(2), for example, provides that “[d]isciplinary counsel shall cause notices of suspension, disbarment, reinstatement, readmission, and transfers to or from disability inactive status to be published in the journal of the state bar and in a newspaper of general circulation in each judicial district in which the lawyer maintained an office for the practice of law.”⁴ Individual states have expanded the scope of discipline reported to include reprimands and similar local equivalents short of suspension and disbarment.⁵

With the advent of influential web-based lawyer rating services, however, public discipline has become much more “public.” Avvo, for example, lists public discipline in its individual lawyer profiles with various cautionary notes, depending on the kind of regulatory sanction imposed.⁶ At the same time, search data suggests that potential clients seeking lawyers in “consumer” practice areas such as family

law, consumer bankruptcy, and criminal defense, research lawyers in those fields through the web.⁷ This article surveys the increasing notoriety of public discipline and its potential implications for lawyer disciplinary systems.

II. Discipline Reports on Lawyer Rating Services

Reporting of lawyer discipline today falls into two distinct categories, traditional and public online, one of which remains largely confined to a legal profession audience while the other is spreading widely through the consumer population. Anecdotal evidence suggests that many lawyers continue to check the disciplinary notice section of their state bar journal and that adverse publicity from regulatory sanctions may both negatively affect referrals and harm a disciplined lawyer's overall reputation with the bar and bench in the lawyer's practice location. Although many state bars now include a link to a lawyer's disciplinary history in their online directories, effective use of this resource typically requires a degree of sophistication by a prospective client.⁸ The ABA's National Lawyer Regulatory Data Bank likewise requires a level of awareness that many consumers "shopping" for a lawyer may not possess.⁹

Similarly, many courts and disciplinary authorities routinely issue media releases that include lawyer disciplinary decisions.¹⁰ As a practical matter, however, only disciplinary cases involving particularly salacious facts or prominent local personalities usually find their way into general media coverage.

"By contrast, statistics suggest that prospective clients in 'consumer areas' increasingly use the web in researching their legal needs."¹¹ Google search statistics, for example, reflect that such areas as criminal law (including DUI), family law, and tort law draw over 100,000 monthly searches each in the United States.¹² Web sites such as Avvo make searching for a lawyer even easier by featuring simple dialog boxes by practice need (i.e., "Divorce & Separation"), location (i.e., by city and state) and individual lawyer "profiles."¹³ Some, including Avvo, also contain ratings based on proprietary algorithms or survey research.¹⁴ If bar ethics opinions are a rough proxy for lawyer interest in such sites, the increasing number implies that lawyers in at least consumer practice areas believe they need this kind of Internet presence to market effectively.¹⁵

The focus on consumer practice areas in web searches coincides with disciplinary statistics reflecting that these same areas are at the highest risk of drawing bar complaints. The Washington State Bar Association, for example, reported that in 2014, 61 percent of the grievances it received involved lawyers practicing criminal law, family law, or tort law.¹⁶ Including other consumer-related practice areas such as bankruptcy, immigration, and probate pushed the percentage to 70 percent.¹⁷

This interplay has a very direct impact on lawyer rating web sites. Avvo, for example, contains an advisory in red cautioning users when a lawyer has been disciplined—including public sanctions short of suspension: "This lawyer has been disciplined by a state licensing authority."¹⁸ Such advisories are accompanied by a link to a description of the specific discipline imposed. Avvo reveals this information irrespective of whether a lawyer has "claimed" the lawyer's "profile."¹⁹ Given the ubiquity of web-based lawyer rating services, the practical import for lawyers who increasingly rely on them for marketing is that discipline has become much more "public" than in years past.

II. Implications for Lawyer Discipline Systems

The increased notoriety of lawyer discipline has implications for both regulatory systems and the lawyers those systems cover.

From the perspective of regulatory systems, web-based lawyer rating systems and similar online directories that contain disciplinary information effectively achieve one of the principal objectives of the Clark Report articulated over 40 years ago: “It is clear, therefore, that widespread publication is an effective and vital tool in disciplinary enforcement.”²⁰ The comment to Model Rule for Lawyer Disciplinary Enforcement 17 echoes the Clark Report in this regard:

Broad dissemination of information concerning public discipline serves several important purposes. Notification to disciplinary agencies outside the jurisdiction where a sanction has been imposed facilitates appropriate action, such as reciprocal discipline, in jurisdictions where the lawyer is admitted or is seeking admission to practice. Transmittal of notice concerning criminal convictions provides disciplinary agencies with information that may form the basis of a petition for interim suspension. Publication in state bar journals and newspapers of general circulation helps protect the public and the legal community from being misled concerning the lawyer’s eligibility to provide representation. In addition, public awareness of sanctions also enhances confidence in the disciplinary system as an effective means of responding to lawyer misconduct.

For lawyers in those systems, the very public nature of discipline today can trigger more pragmatic considerations.

For prosecutors and respondents’ counsel, the growing public awareness of incidents of discipline and its potential impact on a respondent’s future practice may influence settlement negotiations for “low level” offenses by sharpening interest in “non-public” forms of disposition such as diversion or “private” reprimands or admonitions.²¹ Recent ABA Survey on Lawyer Discipline Systems data reflect that non-public discipline or the equivalent already comprises a significant total of all dispositions nationally.²² Negotiations in any given case, of course, will continue to turn on individual facts. The increasing availability of disciplinary information to prospective clients, however, will no doubt enter the settlement calculus for respondent’s counsel and, as a result, is something that prosecutors will at least have to weigh even if they ultimately reject a particular offer of a non-public resolution.

For lawyers and judges sitting in an adjudicatory capacity, a public sanction at even the level of a reprimand will likely have a greater effect on a respondent lawyer’s future practice than in years past when the sanction was simply reported in the state bar magazine. Recent Survey on Lawyer Discipline Systems results show that public reprimands comprise over a quarter of all public disciplinary dispositions.²³ Ironically, the heightened notoriety of public discipline will likely have less practical impact where the misconduct is severe and a lengthy suspension was imposed, because a lawyer in that situation will not be practicing anyway. But, in a close case where the choice is between a short suspension and a reprimand, adjudicators may hear the argument from a respondent’s counsel that a public reprimand today “means more” than it did even a decade ago—especially if the respondent practices in a consumer area that draws prospective clients from web-influenced sources.

Finally, for respondent lawyers, discipline at even the lower end of the sanctions register can have a lingering economic impact that did not exist a decade ago. This is especially true in consumer-oriented practice areas where prospective clients are most likely to locate counsel through Internet searches, online directories or specialized web sites. Because these practice areas have historically been the most prone to drawing bar complaints, the heightened risk of public exposure of any lawyer discipline provides an even greater economic incentive for lawyers in these areas to conscientiously implement and apply sound client relations and risk management policies aimed at limiting their exposure. For lawyers who have been disciplined, it may also suggest careful mitigation strategies in their marketing that truthfully acknowledge the sanction involved while attempting to limit that blemish in the broader context of their legal careers. If permitted by the rating site involved, a disciplined lawyer may consider, for example, posting an explanation. Similarly, a multi-state practitioner suspended publically in more than one state through reciprocal discipline should attentively seek reinstatement in all of the jurisdictions, once the suspensions end, to avoid having web search engines continue to identify the lawyer as “suspended” in at least some jurisdictions.

III. Conclusion

Technology has influenced many aspects of law practice over the past generation. Ironically, the development of web-based lawyer rating services has achieved a primary goal of the Clark Report by publicizing discipline in a way that its authors could not have imagined. This broad availability of disciplinary information to prospective clients in consumer areas and its lingering economic impact represent a trend that will likely increasingly affect all participants in lawyer disciplinary systems.

Endnotes

1. AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970) [hereinafter CLARK REPORT], http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark_Report.authcheckdam.pdf.
2. *Id.* at 1.
3. *Id.* at 143.
4. More broadly, accompanying Model Rule 16 encourages public availability of most records of formal disciplinary proceedings.
5. *See, e.g.*, Alaska Bar Rule 28(h); Washington Rule for the Enforcement of Lawyer Conduct 3.5.
6. AVVO, www.avvo.com (last visited Sept. 7, 2016).
7. *See* GOOGLE TRENDS, www.google.com/trends/explore (reflecting common search queries for lawyers).
8. *See, e.g.*, online lawyer directories linked through bar association homepages for Oregon State Bar Association, www.osbar.org, –) and Washington State Bar Association, www.wsba.org (last visited Sept. 8, 2016).
9. AMERICAN BAR ASSOCIATION NATIONAL LAWYER REGULATORY DATA BANK, http://www.americanbar.org/groups/professional_responsibility/services/databank.html (last visited Sept. 8, 2016).

10. *See, e.g.*, Oregon Supreme Court media releases (including both disciplinary opinions and related dispositions), available at OREGON JUDICIAL DEPARTMENT NEWS, <http://www.ojd.state.or.us/SCA/Web-MediaRel.nsf/News?OpenForm&Count=100> (last visited Sept. 8, 2016).

11. *See* GOOGLE TRENDS, *supra* note 7; *see also* Bernard Clark, *What Kind of Attorneys Are Searched for on the Internet Most Often?*, MAJUX (Aug. 31, 2012), <http://www.majux.com/what-kind-of-attorneys-and-practices-are-searched-for-on-the-internet-most-often>; Gyi Tsakalakis, *How Do People Find and Hire Attorneys?*, LAWYERNOMICS (Apr. 30, 2013),

12. <http://lawyernomics.avvo.com/legal-marketing-2/how-do-people-find-hire-attorneys.html>.

Id.

13. *See* AVVO, *supra* note 6.

14. For a description of Avvo's rating system, *see* *Browne v. Avvo, Inc.*, 525 F. Supp.2d 1249 (D. Wash. 2007). Some web sites also allow current or former clients to post comments or reviews about their lawyers. *See* *Thomson v. Doe*, 356 P.3d 727 (Wash. App. 2015) (discussing this aspect of Avvo's web site).

15. *See, e.g.*, N.Y. State Bar Ass'n Op. 1052 (2015) (discussing Avvo); N.Y. County Lawyers Ass'n Formal Op. 748 (2015) (addressing LinkedIn); Washington State Bar Ass'n Advisory Op. 201402 (2014) (reviewing lawyer social media "profiles" generally); South Carolina Bar Ethics Advisory Op. 09-10 (2010) (analyzing whether lawyers may permissibly claim "profiles").

16. WASHINGTON STATE BAR ASSOCIATION 2014 LAWYER DISCIPLINE SYSTEM ANNUAL REPORT 8, http://www.wsba.org/~media/Files/Licensing_Lawyer%20Conduct/Discipline/2014%20Lawyer%20Discipline%20System%20Annual%20Report.ashx.

17. *Id.* There is nothing to suggest that Washington is an outlier in this regard. Oregon's report for 2014, for example, contains similar statistics. *See* OREGON STATE BAR 2014 DISCIPLINARY COUNSEL'S OFFICE ANNUAL REPORT Appendix A (Apr. 2015), https://www.osbar.org/_docs/resources/DCO2014ar.pdf.

18. *See* AVVO, *supra* note 6. Readers may wish to conduct their own experiment by running the name of a local lawyer who has been disciplined recently through Avvo's directory to see the result firsthand.

19. *Id.*

20. CLARK REPORT, *supra* note 1, at 145.

21. *See, e.g.*, Oregon State Bar Rules of Procedure R. 2.10 (diversion); Idaho Bar Commission Rules R. 506(g)-(h) (private reprimands and admonitions).

22. The 2013 S.O.L.D. report, for example, reflects (Chart II) 2,034 dispositions involving non-public discipline and 2,600 involving public discipline.

23. *Id.*