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Punishing Ethical Violations: Aggravating and Mitigating Factors

by H. Patrick Furman

In the past several years, the Colorado Supreme Court seems to have increased the severity of sanctions meted out to lawyers who violate the Code of Professional Responsibility. The court often rejects the recommendations of the Grievance Committee and imposes a harsher sanction than that recommended by the Committee.

The body of law relating to the punishment of lawyers is growing weekly. The court uses both case law and the American Bar Association Standards for Imposing Lawyer Sanctions ("Standards"),¹ adopted by the ABA in 1986, when meting out punishment. The punishment phase of disciplinary proceedings is taking on more of the characteristics of sentencing in a criminal case: lawyer discipline and criminal sentencing share many of the same underlying purposes and use many of the same criteria for determining the appropriate punishment.

This article briefly reviews the general criteria for imposing sanctions that are set out by the Standards and reviews the factors the court uses, in both aggravation and mitigation, to determine sanctions against lawyers who violate their ethical obligations. Finally, the article looks at probation as an alternative in sanctioning lawyers.

General Considerations

It is important to note at the outset that the punishment recommended by the Grievance Committee is advisory only. The court "has the independent responsibility to determine appropriate discipline."² The court often imposes a sanction different (and, perhaps, heavier) than the recommended sanction. In doing so, the court relies heavily on the Standards. The court's repeated use of the Standards indicates the justices' agreement with the principle, set out in the Standards, that truly effective lawyer discipline requires adherence to a clearly defined set of criteria in determining punishment.³

The primary goal of the sanctioning system adopted in the Standards is to protect the public. The other goals are to protect the integrity of the legal system, insure the proper administration of justice, deter future unethical behavior by the lawyer involved, rehabilitate the lawyer if rehabilitation is appropriate and educate the public and the profession generally, in order to deter unethical behavior among all members of the profession.⁴ These goals are similar to many of the purposes of the Colorado Criminal Code in CRS § 18-1-102.5 with respect to sentencing. The appropriate sanction is determined with reference to these goals.

The Standards set out a model that courts may follow when imposing sanctions. The model requires the court to answer four questions:

- 1) what ethical duty the lawyer violated;

- 2) what the lawyer's mental state was;
- 3) what the extent was of the potential or actual injury caused by the conduct; and
- 4) whether there are any aggravating or mitigating circumstances.⁵

Standards 4.0 through 8.4 provide the sanctions that generally are appropriate for the various types of violations. The aggravating and mitigating circumstances are then used to justify deviations from that sanction. Again, there is a similarity to parts of the model used in sentencing in criminal cases⁶ and to the principle that *mens rea* is part of the culpability requirement in criminal cases.⁷ The Colorado Supreme Court generally follows this model. Each of these four main factors is discussed briefly in the following section.

The Four Main Factors

The nature of the duty that is violated has a major impact on the type of sanction imposed. The duties lawyers owe to clients (such as loyalty, diligence, competence and candor) are considered the most important duties,⁸ and violations of these duties generally are punished more severely under the Standards than are violations of duties owed to the profession or to the justice system.

The mental state of the lawyer who commits the violation is the second major factor in determining the appropriate sanction. The mental states described in the Standards are those of "intent, knowledge, and negligence."⁹ As in criminal law, an intentional violation of an ethical duty is considered more serious than a knowing violation of an ethical duty, which, in turn, is considered more serious than a negligent violation. For example, a lawyer who deals with client property improperly normally will be suspended if he or she acted knowingly, but only publicly censured¹⁰ if the lawyer acted negligently.¹¹

The third major factor is the extent of the actual or potential injury caused by the unethical action of the lawyer. It is important to remember that actual injury need not have occurred; potential injury is just as serious as the actual infliction of injury. For example, as noted above, the Standards recommend a public censure of a lawyer who deals negligently with client property. The recommended sanction is reduced to an admonition¹² if the actions of the lawyer caused little or no actual or potential injury to the client.¹³

The final major factor to be considered when imposing sanctions is the presence of aggravating or mitigating factors. The balance of this article is devoted to a discussion of these factors as used by the Colorado Supreme Court in disciplining lawyers.

Aggravating and Mitigating Factors

Aggravating factors under the Standards are those considerations that may justify an increase in the degree of discipline to be imposed. The ten factors listed in Standard 9.2 are (1) prior disciplinary offenses, (2) dishonest or selfish motive, (3) a pattern of misconduct, (4) a multiplicity of offenses, (5) obstructing the disciplinary process, (6) deceptive practices in connection with the disciplinary process, (7) a lack of acknowledgement of the wrongful conduct, (8) the vulnerability of the victim of the conduct, (9) substantial experience in the practice of law and (10) indifference toward making restitution.

Mitigating factors under the Standards are those considerations that may justify a reduction in the degree of discipline to be imposed. The thirteen factors listed in Standard 9.3 are (1) the absence of a prior disciplinary record, (2) the absence of any selfish or dishonest

motive, (3) personal or emotional problems, (4) good faith efforts to make restitution or mitigate the damage caused, (5) cooperation with the disciplinary process, (6) inexperience in the practice of law, (7) character, (8) physical or mental impairment, (9) any delay in the disciplinary process, (10) interim rehabilitation, (11) the imposition of other sanctions, (12) remorse and (13) the remoteness of prior offenses.

Over the past few years, the Colorado Supreme Court has used these aggravating and mitigating factors extensively in determining the appropriate sanction. No specific weight is assigned to any factor and, in most cases, more than one factor is involved. The court engages in a general balancing of the factors. The most commonly used factors are discussed in the following sections.

Prior Disciplinary Record

The presence of prior disciplinary offenses is an aggravating factor and the absence of any prior disciplinary record is a mitigating factor. The mitigating value of a "clean record" is significantly reduced when counsel has only recently been licensed to practice law.¹⁴ Under Standard 9.32(m), the remoteness in time of a prior offense is considered a mitigating factor. However, the Colorado Supreme Court has not accepted remoteness in time as a mitigator, as discussed below.

In Colorado, even relatively minor prior offenses are used in aggravation. The Colorado Supreme Court has used prior disciplinary offenses in aggravation when the prior offense was only a negligent offense punished with a letter of admonition and private sanction.¹⁵ Obviously, the court uses more serious prior offenses in aggravation, as well.¹⁶

The remoteness of the prior disciplinary offense does not appear to be a mitigating factor in Colorado. The court, at most, seems to use the remoteness of a prior offense only to lessen the impact of what otherwise is considered an aggravating factor. For example, in *People v. Good*,¹⁷ the Grievance Committee did not consider counsel's prior suspension as an aggravating factor because it was based on conduct that was from fifteen to twenty years old. However, the court held that the prior discipline was still a relevant factor to be considered in imposing discipline. The court also pointed out that some of the current disciplinary offenses were similar to the prior disciplinary offenses and began only two or

three years after counsel was reinstated following the initial discipline.¹⁸

Similarly, in *People v. Barber*,¹⁹ the court rejected the remoteness of the prior disciplinary offense as a mitigating factor when the prior offense occurred only three years prior to the offense in question. The court noted that counsel had been put on notice, at the time of the prior offense, that subsequent offenses would bring a harsher sanction.

Dishonest or Selfish Motive

The presence of a dishonest or selfish motive is an aggravating factor under the Standards. The absence of the same is a mitigating factor. A dishonest or selfish motive usually is evidenced by an intention to receive a financial benefit.

In *People v. Shipp*,²⁰ counsel agreed to pay a jail inmate a referral fee for cases the inmate referred to the attorney. This violation of the ban on referral fees established by DR 2-103(B) was aggravated by the intent to secure financial gain. The court rejected the Grievance Committee recommendation of a public censure and suspended counsel for sixty days.²¹

In *People v. Franks*, counsel took money from clients, did little or no work, and then left the country. The court found that a selfish or dishonest motive was present and used this finding, along with other aggravating factors, to disbar counsel.²² The absence of a selfish motive has been used a number of times as a mitigating factor.²³

Personal Problems and Character

The court will consider the presence of personal or emotional problems as a mitigating factor. Problems that the court has considered include financial difficulties,²⁴ family tragedies²⁵ and physical or mental disabilities, including alcoholism.²⁶

Evidence of such problems or disabilities must be presented to the hearing panel if the court is to consider them. Mere argument that they exist will not suffice.²⁷ If substance abuse was a partial cause of the unethical behavior, counsel's effort to deal with the problem can mitigate the sanction.²⁸

Cooperation with the Disciplinary Process

The Colorado Supreme Court views cooperation with the disciplinary process as a mitigating factor and non-cooperation as an aggravating factor. Total

non-cooperation, in the form of a failure to respond to the disciplinary complaint, will result in the court entering a default judgment and deeming the allegations of the complaint admitted.²⁹ In addition to the effect on the merits of the grievance, total non-cooperation is an aggravating factor, and was so viewed even before the court began using the Standards.³⁰

Less egregious forms of non-cooperation also will be considered as aggravating factors. A failure to cooperate with the investigatory stage of the disciplinary process,³¹ making misleading statements during the disciplinary proceeding,³² a delay in cooperating with the disciplinary process³³ and other failures to cooperate fully³⁴ all have been used as aggravating factors.

Conversely, cooperation with the disciplinary process can serve to mitigate the sanction the court imposes.³⁵ Full and complete cooperation (along with other mitigating factors) enabled an attorney who otherwise would have been disbarred to receive only a suspension.³⁶

While there is no specific value placed on cooperation as a mitigating factor, it is a factor that repeatedly has been used by the court and over which counsel has some control even after he or she has committed an ethical violation. Again, there is a similarity to sentencing in criminal cases. Both the Colorado³⁷ and federal³⁸ sentencing schemes establish cooperation with the authorities as a mitigating factor.

Length of Practice

Substantial experience in the practice of law is seen as an aggravating factor under the Standards, while inexperience in the practice of law is seen as a mitigating factor. Using the experience of counsel in fashioning the appropriate sanction raises these two questions: why should experience be a factor, and where does the court draw the line?

Suggesting that experience in practicing law justifies a more severe sanction has superficial appeal on the theory that "he (or she) should have known better." However, in this author's opinion, that theory is erroneous for three reasons. First, a new lawyer, who has just finished law school and passed the bar exam (both of which have an ethics component) should be as fully informed of a lawyer's ethical obligations as a seasoned veteran is. Second, many of the ethical rules and guidelines are simple and straightforward proscriptions

against immoral and illegal acts, such as stealing and lying. It does not take years of practice to understand that committing these types of acts is both wrong and unethical. Finally, any lawyer, whether new or experienced, should have the common sense to seek help when faced with an issue, ethical or otherwise, that he or she does not understand.

Nevertheless, the fact is that length of practice is a factor established by the Standards and accepted by the Colorado Supreme Court. Thus, the more practical issue becomes the point at which counsel moves from being inexperienced to being experienced. The Standards do not establish a specific point in time at which counsel is deemed "experienced," nor does the case law. However, some general boundaries are emerging.

The court has held that an attorney has "substantial experience," and is subject to aggravation on that basis, when the attorney had thirteen years of experience.³⁹ At the other end, the court has held that an attorney with six to eight years of practicing law is "inexperienced."⁴⁰

The particular field of practice in which the misconduct arises can influence the decision as to whether a particular length of time in practice constitutes experience or inexperience. In *People v. Pooley*,⁴¹ the attorney had been practicing law for eleven years, but had only been practicing in the specific field (medical malpractice) in which the problem arose for two years. This level of experience was seen as a mitigating factor. However, in *People v. Nichols*,⁴² two years of practice was not seen as a mitigating factor because the ethical violation involved a failure "to perform the most basic legal tasks, not [an] inability to comprehend the legal issues surrounding those tasks."⁴³

Other Factors Under The Standards

The Standards consider a pattern of misconduct and the existence of multiple offenses an aggravating factor. The court may find a pattern of misconduct when counsel has violated several disciplinary rules in connection with the representation of a single client or has violated a disciplinary rule in connection with several clients.⁴⁴

A willingness to make restitution, or an indifference toward the same, is a factor the court will consider. Counsel must indicate voluntarily a willingness

to make restitution. If the restitution is forced or compelled, Standard 9.4(a) views the fact of restitution as irrelevant. A refusal to acknowledge the wrongful nature of the conduct is an aggravating factor and, conversely, the presence of genuine remorse is a mitigating factor.⁴⁵

The imposition of other sanctions against the attorney may affect the sanction imposed in the disciplinary proceeding. The one Colorado case directly addressing this issue held that the imposition of a money judgment directly against counsel in the probate case that was the subject of the grievance constituted a mitigating factor.⁴⁶ The Illinois Supreme Court has held that the imposition of a separate sanction may satisfy the goals of the disciplinary process and, thus, eliminate the need for any disciplinary action.⁴⁷

The imposition of sanctions by an attorney discipline body in another jurisdiction also has an impact. The court generally imposes the same discipline upon an attorney who is licensed in another state and is disciplined in the other jurisdiction, unless one of four exceptions has been established.⁴⁸

This rule is set forth in Colorado Rules of Civil Procedure ("C.R.C.P.") Rule 241.17 and also is the procedure recommended by Standard 2.9. The exceptions allow for a different result when (1) the foreign jurisdiction's procedures did not comport with due process, (2) the proof used in the foreign jurisdiction was so infirm that the court cannot rely on the foreign jurisdiction's determination, (3) imposition of the same sanction would be a grave injustice or (4) the misconduct warrants a substantially different form of discipline.⁴⁹ A sanction imposed on this basis ordinarily will run concurrently with the sanction imposed by the other jurisdiction.⁵⁰

Again, it should be noted that many of these factors are identical or similar to many of the factors used by judges when imposing sentences in criminal cases.

Miscellaneous Factors

The court is willing to find mitigation in a factor that is not explicitly mentioned in the Standards. In *People v. Auld*,⁵¹ the attorney reluctantly agreed to hold illegal weapons proffered to him by an undercover police officer posing as a potential client. When the district attorney offered to drop the criminal charges if the attorney acted as an infor-

mant against some of his other clients, the attorney refused. The court noted that accepting contraband in exchange for legal services previously had been held to merit a one-year suspension,⁵² but that informing on clients previously had resulted in the even more serious sanction of a two-year suspension.⁵³ Balancing the seriousness of this offense against the refusal to violate the attorney-client privilege, the court held that a six-month suspension was the appropriate sanction.

Probation as an Alternative Sanction

Under Standard 2.7 and the commentary following it,

[p]robation is a sanction that allows a lawyer to practice law under specified conditions. . . . Probation is a sanction that should be imposed when a lawyer's right to practice law needs to be monitored or limited rather than suspended or revoked.

A number of other states have imposed probation as a sanction in disciplinary cases. Conditions in these cases have included reports on caseload status,⁵⁴ supervision by another lawyer,⁵⁵ periodic audits of trust accounts,⁵⁶ continuing legal education,⁵⁷ participation in substance abuse programs⁵⁸ and periodic mental or physical examinations.⁵⁹ While the Colorado Supreme Court often bases reinstatement on the fulfillment of certain conditions,⁶⁰ it does not use probation as a sanction.

A probationary alternative, in appropriate cases, serves all of the purposes of the Code of Professional Responsibility. Therefore, in this author's opinion, the court should consider the adoption of a probationary alternative in ethical violations in Colorado.

Conclusion

The imposition of sanctions on lawyers who have committed ethical violations can be viewed as analogous to the imposition of a sentence in a criminal case. The goals of protecting the public, deterring future misconduct and rehabilitation are common to both proceedings. Many of the other goals underlying the two proceedings are similar.

The aggravating and mitigating factors established in the Standards and adopted by the Colorado Supreme Court also are strikingly similar to the factors that sentencing courts consider in criminal cases. Counsel facing a disciplinary

proceeding should take advantage of every opportunity to cooperate with the disciplinary process and to engage in remedial action in order to mitigate the severity of the sanction.

NOTES

1. Published by the ABA/The Bureau of National Affairs, Inc. 1986.

2. *People v. Flores*, 772 P.2d 610, 614 (Colo. 1989).

3. Standards, Preface at 01:801.

4. Standard 1.1.

5. Standards, Preface at 01:805.

6. See, CRS § 16-11-203, the criteria for granting probation.

7. CRS § 18-1-501 *et seq.*

8. Standards, Preface at 01:805.

9. Standard 3.0 and commentary following.

10. The Standards use the term "reprimand" as the equivalent of a public censure under the Colorado definitions. See, Standard 2.5; C.R.C.P. 241.7(3).

11. Standards 4.12, 4.13.

12. Admonition, as used in the Standards and in this article, includes either a private censure or an admonition under the Colorado definitions. See, Standard 2.6; C.R.C.P. 241.7(4) and (5).

13. Standards 4.13, 4.14.

14. *People v. Garrett*, 20 Colo.Law 382 (Feb. 1991) (S.Ct. No. 90SA448, *anncl'd* 12/24/90).

15. *People v. Macy*, 789 P.2d 188 (Colo. 1990).

16. See, e.g., *People v. O'Leary*, 783 P.2d 843 (Colo. 1989).

17. 790 P.2d 331 (Colo. 1990).

18. *Id.* at 332.

19. 19 Colo.Law. 2596 (Dec. 1990) (No. 89SA498, *anncl'd* 10/29/90).

20. 793 P.2d 574 (Colo. 1989).

21. Justices Vollack and Erickson dissented and would have imposed a harsher sanction.

22. 791 P.2d 1 (Colo. 1990).

23. See, e.g., *People v. Creasey*, 19 Colo. Law. 1725 (Aug. 1990) (No. 90SA80, *anncl'd* 6/25/90); *People v. Hensley-Martin*, 795 P.2d 262 (Colo. 1990).

24. *People v. Shipp*, 19 Colo.Law. 1713 (Aug. 1990) (No. 90SA95, *anncl'd* 6/18/90).

25. *People v. Vernon*, 782 P.2d 745 (Colo. 1989).

26. *People v. Kengle*, 772 P.2d 605 (Colo. 1989).

27. *People v. Dohe*, 19 Colo.Law. 2599 (Dec. 1990) (No. 90SA288, *anncl'd* 10/29/90).

28. *People v. Smith*, 778 P.2d 685 (Colo. 1989).

29. *Dohe*, *supra*, note 27; *People v. Richards*, 748 P.2d 341 (Colo. 1987); *People v. Jackson*, 747 P.2d 654 (Colo. 1987).

30. *People v. Gross*, 543 P.2d 1264 (Colo. 1975).

31. *People v. Chappell*, 783 P.2d 838 (Colo. 1989).

32. *Hensley-Martin*, *supra*, note 23.

33. *People v. Moya*, 19 Colo.Law. 1728 (Aug. 1990) (No. 90SA142, *anncl'd* 6/25/90).

34. *Creasey*, *supra*, note 23. See also, *Garrett*, *supra*, note 14.

35. *Shipp*, *supra*, note 24.

36. *People v. Wilber*, 796 P.2d 976 (Colo. 1990).

37. CRS § 16-11-203.

38. 18 U.S.C. 3553(e); 28 U.S.C. 994(n).

39. *Creasey*, *supra*, note 23.

40. *Hensley-Martin*, *supra*, note 23.

41. 774 P.2d 239 (Colo. 1990).

42. 796 P.2d 966 (Colo. 1990).

43. *Id.* at 969. See also, *Garrett*, *supra*, note 14; *People v. Lamberson*, 20 Colo.Law. 379 (Feb. 1991) (S.Ct. No. 89SA89, *anncl'd* 12/24/90), in which the Supreme Court noted with apparent approval a Grievance Committee Hearing Board finding that five years' experience constituted an aggravating factor when the violations included such obvious offenses as writing checks on an account with insufficient funds and using one client's funds to pay another client's expenses.

44. *People v. Wyman*, 782 P.2d 339 (Colo. 1989); *People v. Cuevas*, 772 P.2d 610, 614 (Colo. 1989); *Kengle*, *supra*, note 26.

45. *Creasey*, *supra*, note 23.

46. *People v. Sullivan*, 20 Colo.Law. 383 (Feb. 1991) (S.Ct. No. 89SA161, *anncl'd*, 12/24/90). The three dissenters argued that this judgment was not a mitigating factor because counsel subsequently declared bankruptcy. They considered the bankruptcy filing an aggravating factor.

47. *In re Lamberis*, 443 N.E.2d 549 (Ill. 1982) (expulsion by the school where counsel was writing his master of laws thesis adequate punishment).

48. *People v. Trevino*, 20 Colo.Law. 141 (Jan. 91) (No. 90SA311, *anncl'd* 11/13/90); *People v. Gilson*, 780 P.2d 1088 (Colo. 1989).

49. *Trevino*, *supra*, note 48 (harsher sanction imposed due to nature of conduct).

50. *People v. Chatz*, 788 P.2d 157 (Colo. 1990).

51. 788 P.2d 1275 (Colo. 1990).

52. *People v. Davis*, 768 P.2d 1227 (Colo. 1989).

53. *Smith*, *supra*, note 28 (two justices would have disbarred the attorney).

54. *The Florida Bar v. Neale*, 432 So.2d 50 (Fla. 1980).

55. *In re Margos*, 285 N.W.2d 541 (N.D. 1971); *In re Hessberger*, 451 N.E.2d 821 (Ill. 1983).

56. *The Florida Bar v. Montgomery*, 418 So.2d 267 (Fla. 1982).

57. *The Florida Bar v. Glick*, 383 So.2d 267 (Fla. 1982).

58. *Tenner v. State Bar*, 617 P.2d 486 (Cal. 1980); *In re Heath*, 678 P.2d 736 (Or. 1984).

59. *In re McCallum*, 289 N.W.2d 146 (Minn. 1980).

60. *Moya*, *supra*, note 33.

