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Disciplinary Differences

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Disciplinary Differences?

DWIGHT AARONS

While any young lawyer dreads the thought of facing an attorney disciplinary proceeding, do minority lawyers have reason for even more trepidation? Are attorney disciplinary proceedings biased against minority attorneys?

Yes, to both queries, at least according to some who perceive that attorney disciplinary proceedings are racially biased. This belief exists despite the work of two prestigious ABA panels that have virtually reformed the lawyer disciplinary process.

In 1970, the ABA Special Committee on Evaluation and Disciplinary Enforcement and, 19 years later, the ABA Commission on Evaluation of Disciplinary Enforcement recognized that the dearth of women, minority, and small firm practitioners in the disciplinary process created the suspicion that the process is biased against such lawyers. Both panels recommended the appointment of more of these types of lawyers to remedy the statistical imbalance of service on disciplinary agencies.

The Commission suggested that in each state the highest court that regulates attorneys maintain data on the number of women, minority, and small firm lawyers serving in disciplinary positions and that specific goals be established to further the goal of adequate representation on the boards. The goal was to be achieved through the establishment of a National Discipline Data Bank. Information that is typically acquired in attorney disciplinary

proceedings was to be reported to the National Discipline Data Bank.

Notwithstanding the recommendations made by the ABA, state bar associations have apparently been lax in meeting the objective of greater participation in the disciplinary proceedings. Moreover, there is no reliable statistical information on the attorney discipline rate of women or minority lawyers. Part of the reason may be that the National Discipline Data Bank does not collect information on the race or gen-

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der of the attorney being disciplined.

Another factor that may contribute to the disproportionate number of women, minority, and small firm attorneys who undergo disciplinary procedures was identified by Leonard H. Becker, bar counsel for the District of Columbia bar. Not only do minority attorneys practice in areas in which most disciplinary complaints are filed, but their clients traditionally file disci-

plinary complaints because, as individuals who sought representation on relatively small matters, and who often may not be able to afford to hire a second lawyer to sue the first, "they have nowhere else to turn," Becker noted in the May/June 1992 issue of *The Washington Lawyer*.

"Although it is easy to reject the argument that the system deliberately singles out minority practitioners for discipline, it is less easy to dispose of the notion that the system does bear down disproportionately on sole practitioners and small-firm lawyers, who, our experience suggests, may tend to be more in the racial minority than their uptown, big-firm counterparts. . . . No reform effort will be truly meaningful unless it has contended openly and frankly with these questions, however difficult they may be," Becker noted.

Statistical information could provide insight on the merits of assertions of discrimination. Presently, however, such data is unavailable. Rather, there is much anecdotal evidence that the organized bar is hostile to women and minority lawyers. For instance, in one case an African-American, facing a recommendation of professional misconduct, claimed that he did not obtain a fair and impartial hearing before the disciplinary committee because of the systematic exclusion of African-Americans from all disciplinary boards.

The attorney subject to discipline in this case offered statistics that

showed that less than 1 percent of the members of disciplinary boards and committees was African-American, which was less than the percentage of African-American attorneys in that state. In this case, the majority of the state's supreme court rejected the claim of unfairness.

While this example may not conclusively demonstrate that the disciplinary charges against that attorney were unfounded, it does support the query of racial differences in the disciplinary process. In light of the historical lack of participation by certain groups on the decision-making side of disciplinary procedures, one might easier understand why the African-American attorney questioned why his conduct was deemed a violation of disciplinary standards and similar conduct by other attorneys was not.

One mechanism for assessing whether the attorney disciplinary process is biased is already in place in most jurisdictions. Many state bars and supreme courts have formed commissions and task forces charged with considering issues of gender, racial and ethnic bias within the legal system. These efforts have focused on correcting and eliminating discriminatory acts by lawyers and judges, while ignoring the attorney disciplinary system or the manner in which the bar disciplines itself.

As one judge who reviewed a claim of racially discriminatory enforcement of disciplinary rules wrote: "Although, there is no testimony regarding the statistical significance of the numbers in the record, there is much anecdotal evidence to the effect that the bar association, here as elsewhere in our nation, has, in times past, been less than welcoming to African-American lawyers."

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TIPS FOR A GOOD PRACTICE

Establishing good work habits will avoid most problems, says Carol Wilson, who handles lawyer grievance cases in Dallas. Whether it is your mistake or the coercion of others, "it's your license on the line."

- Make a calendar of your deadlines and court appearances—color code them on a monthly calendar for all of your clients
- Photocopy everything you give to your clients, especially information relating to fee agreements.
- Put your fee agreements with your clients in writing.
- Even if business is not booming, avoid cases that appear problematic. "If they treated their (wife, business partner, etc) that way, why would they treat you any better?" — Carol Wilson
- Outline the opportunities for success and failure of the case in writing to the client. Discuss every issue and make certain the client understands them before proceeding.
- Return phone calls the same day—especially the difficult ones.
- Log your hours on the phone and during research each day; do not re-create time for billing purposes.
- Send regular bills.
- If a young lawyer thinks a senior lawyer has asked him to do something inappropriate, write a memo to the file detailing the concerns and date it—if it's in a large law firm, discuss concerns and questions about procedure with the managing partner or section chair
- Find a good mentor who will model good habits for you.
- Use materials from bar associations—such as sample forms, checklists, business considerations—when starting a firm
- If you have a question about a procedure or about a client, make sure you consult someone with experience; have someone available as a sounding board
- When in doubt, consult the ABA Model Rules for Professional Conduct.

— Rekha Balu

Question: Can in-house counsel for a corporation make an offer of employment to outside counsel that is contingent on the outside counsel's agreement never to represent anyone against the corporation in the future?

Answer: No. ABA Model Rule 5.6(a) states that a lawyer shall not participate in offering or making a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship. See ABA Formal Opinion 94-381 (1994).

From the ABA Center for Professional Responsibility list of common ethics questions