

SANCTIONS: PROTECTION OR PUNISHMENT

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[An attorney disciplinary] proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them.

Ex parte Wall, 107 U.S. 265 (1883)

"What role does compassion play in the Director's job?" This question was posed at a recent informal seminar, and the response may have raised an eyebrow or two. *Should* compassion for the offending lawyer play a role in the disciplinary system's mission to protect the public from lawyers not fit to practice? Can it, without softening the edges of the system such that lawyers are tempted to cut corners with ethics, believing that if they get caught they can simply show remorse and thereby avoid significant discipline? Inherently tangled in the uneasy juxtaposition of the *purpose* of lawyer discipline vs. *what the purpose is not*, lies the answer.

That the purpose of lawyer discipline is not to punish is perhaps the most quoted axiom of lawyer discipline proceedings. Used most obviously and often by lawyer respondents imploring the Court to impose lenient sanctions, it is frequently cited without reference to the remainder of the quotation. What the purpose of discipline is not, however, without the concomitant overarching balance of what the purpose is, does harm to self-regulation of the profession. Let's be honest here. The *purpose* is not to punish, but the natural consequence of protecting the public will almost certainly have some punitive *effect* on the offending lawyer.

The U.S. Supreme Court had cause to review an early source of the above quotation in *Ex parte Wall*, in 1883. [Ftn 1](#). The factual background can be summarized no better than by the very petition presented to the Court:

Whereas, it has come to the knowledge of the court that one J.B. Wall, an attorney of this court, did, on the sixth day of this present month, engage in and with an unlawful, tumultuous, and riotous gathering, be advising and encouraging thereto, take from the jail of Hillsborough county, and hang by the neck until he was dead, one John, otherwise unknown, thereby showing

such an utter disregard and contempt for the law and its provisions, which as a sworn attorney, he was bound to respect and support, as shows him to be totally unfitted to occupy such position.

2 S.Ct. at 570. The hanging took place outside the courthouse door, during the noontime recess, on the 6th of March. On March 7, written charges against Wall were filed with the Florida court, which issued an order for Wall to appear the very next day and show cause why his name should not be struck from the rolls. The attorney appeared and denied the charges (not that he had been present, but that he had advised and encouraged the crowd), but disputed the jurisdiction of the court to decide the issue.

The jurisdictional dispute centered on grounds including that the offense charged was a crime for which it was possible he would be indicted and convicted, and such had not occurred. The Florida court found jurisdiction, heard the testimony of one eyewitness, and disbarred the attorney by order of March 10.

On appeal, the Supreme Court acknowledged that the use of such summary proceedings to disbar an attorney was not normal. Disciplinary proceedings were quite different over a century ago; consider that there were no formally adopted ethical codes for lawyers. Typically, in that day and age, where an attorney had committed an indictable offense outside the practice of law, and denied the charge, the court would not proceed to strike the attorney's name from the rolls until after the indictment and conviction. In affirming the disbarment, however, the Court noted the compelling circumstances of the case and distinguished the retributive purpose of the criminal process of indictment, conviction and sentencing, *i.e.* punishment, from that of the disciplinary proceeding before it – that being protection of the public.

TO PUNISH OR TO PROTECT

Courts have never viewed disbarment itself as punishment. Ftn 2. Surely few would argue with the notion that to strip away one's license to practice a chosen profession is a serious consequence which *feels* like punishment to the offender. Accordingly, other states have modified the *Wall* quotation slightly to more accurately state, "[t]he purpose *is not so much* to punish, as to . . ." or "[t]he purpose *is not primarily* to punish, but to . . ." Ftn 3.

The Supreme Court further cautioned that sympathy for the attorney as a person should never detract the Court from carrying out its purpose of protecting itself or the public. That decision could be read to support the notion that compassion for the lawyer has *no* role in determining lawyer discipline. Early state disciplinary decisions in fact support a similar stance. For example, in the 1938 case of *In re Chmelik*, 289 N.W. 283 (Minn. 1938), the Minnesota Supreme Court disbarred an attorney despite the most sympathetic of circumstances. The attorney had failed to respond to two clients regarding collection matters that had been forwarded to him to handle. He then failed to respond to disciplinary authorities investigating the misconduct.

The Court's opinion notes the following facts on behalf of the attorney: he had been practicing satisfactorily since 1922; in 1931 his mother died and he thereafter was required to care for his senile father, including running the family's 200-acre farm; he commenced taking sedatives to rest from the responsibilities of caring for the invalid father, which produced a "toxic psychosis," the symptoms being: "lack of initiative and ambition, a pleasant agreeable nature and unconcern about his usual grievances"; after the death of his father in 1937 he ceased using the sedatives and was in the process of regaining his physical and mental health. Despite these factors, the Court disbarred the lawyer, noting:

As far as the public is concerned *irresponsibility brings the same misfortune as willful misconduct*. The public is entitled to protection from a practitioner in that mental condition and the profession is entitled to be protected from the consequences resulting from one practicing while mentally sick.

Id. at 285. Much later, the Minnesota Supreme Court still maintained that "the enlistment of a natural human sympathy . . . cannot be permitted to deter us from performance of this duty." *In re Hanson*, 103 N.W.2d 863, 864 (Minn. 1960).

The current standard for determining the appropriate sanction is, "weighing the nature of the misconduct, the cumulative weight of the disciplinary rule violations and the potential harm to the public, the legal profession and the administration of justice." *In re Weems*, 540 N.W.2d 305, 308 (Minn. 1995). This standard focuses on the misconduct, not the lawyer as an individual, and again appears to place little weight on compassion.

COMPASSION

Compassion, however, has crept into the balance in determining sanctions. First, consistency and precedent in imposing sanctions is important, but not determinative. The Court looks at the unique facts in each case in determining sanctions. Far from the criminal justice system's restrictive sentencing guidelines, in lawyer discipline matters the Court has wide discretion in fashioning the appropriate sanction, which on occasion results in decisions impossible to square. Second, in addition to considering the above-cited factors regarding the misconduct, the Court also considers mitigating and aggravating factors.

Nonetheless, compassion for the offending lawyer is a slippery slope where public protection is the test. Some might question whether the use of mitigation to reduce the severity of sanctions is appropriate in a system where the purpose is to protect the public. Other courts have gone so far as to criticize the use of mitigation to reduce sanctions, reasoning that "the decline of public confidence in the legal profession and the trend toward lighter attorney disciplinary sanctions is no coincidence." Ftn 4. Most today would agree, however, that it is appropriate for the Court to consider mitigation and acknowledge rehabilitation.

While Minnesota has appropriately strict standards in evaluating mitigation claims based on alcoholism, mental health disorders, and chemical dependency issues, Ftn 5, other factors raised in mitigation are more difficult to assess. Should compassion be shown where lack of experience in the law, personal misfortune or emotional problems are raised as mitigation? After all, mitigation does not excuse the misconduct, nor protect the public from an attorney not currently fit to practice. As the *Chmelik* court noted, the obligations to clients and to the profession remain the same, whatever the mitigation raised.

The danger of slipping down the compassion slope might be avoided with careful evaluation of the mitigation raised juxtaposed with the misconduct. For example, youth and inexperience in the law might mitigate misconduct such as failure to follow courtroom procedures, but not falsification of documents. Untreated depression could relate causally to neglect of client files, but is not a marker for dishonesty. Further, erosion of public confidence in the profession and self-regulation might be bulwarked should the Court carefully and consistently explain the factors relied on to reach a sanction which appears inconsistent with precedent.

The pendulum with respect to compassion has obviously swung somewhat, and appropriately so. Some early disciplinary decisions clearly seem disproportionate to the misconduct. To preserve the integrity of

self-regulation, however, and to bolster the sagging image of the profession, effort must be made so that the pendulum does not swing too far. Public protection must remain the bellwether.

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Having submitted my resignation as Director effective the end of March, I trust that this article will cause no alarm that its author is about to wage a campaign to invoke more stringent discipline for attorneys who have committed misconduct. Nor did I choose to write on this topic as my last article from a sense that disciplinary sanctions in Minnesota are generally too lenient. But protection of the public must be the paramount purpose, and primary concern, if self-regulation is to remain credible and vital.

My warmest thanks and heartfelt appreciation to the many hundreds of lawyer and nonlawyer volunteers in Minnesota who have participated in the 21 district ethics committees, the Lawyers Professional Responsibility Board, the Client Security Board, the Henson-Dolan Committee, and bar committees dealing with professional responsibility issues. To the Office of Lawyers Professional Responsibility, and the Court, I extend my thanks, and my utmost respect and appreciation for the very difficult job that they do every day.

Footnotes:

1. 107 U.S. S.Ct. 569, 27 L.Ed. 552 (1883).
2. See, e.g. *In re Smith*, 19 N.W.2d 324, 325 (Minn. 1945) ("To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment.").
3. See, e.g. *State ex rel Nebraska State Bar v. Rhodes*, 453 N.W.2d 73 (Neb. 1990) and *In re Larson*, 485 N.W.2d 345 (N.D. 1992).
4. *State Bar Association of Nebraska v. Vieth*, 470 N.W.2d 549, 558 (Neb. 1991).
5. *In re Johnson*, 322 N.W.2d 616 (Minn. 1982) (alcoholism); *In re Weyhrich*, 339 N.W.2d 274 (Minn. 1983) (psychological disability).