

Lawyer Criminals

All lawyers are people; some people commit crimes; therefore some lawyers commit crimes. This simple piece of questionable deductive reasoning may best explain why criminal convictions of licensed attorneys are a regrettably regular source of lawyer discipline. While we'd no doubt like to think that—as educated, licensed professionals who have undergone a character and fitness review as part of the admission process—lawyers would not violate the criminal law, the sad truth is otherwise. Obviously the number of lawyer-criminals is small as a percentage of the legal profession, but lawyers committing and being convicted of crimes cause immeasurable harm to the image of the bar.

Rule 8.4(b), Minnesota Rules of Professional Conduct, states that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Comment [2] to Rule 8.4 makes clear that not all criminal offenses should be subject to discipline, but that lawyers should be answerable for offenses that indicate a lack of some characteristic that is relevant to the practice of law. Included in that category are offenses involving violence, dishonesty, and serious interference with the administration of justice; the Comment also cites as examples certain acts

of fraud and the willful failure to file income tax returns. The Comment then notes that a repeated pattern of lesser criminal violations also can indicate an indifference to legal obligations and thus violate the rule. A conviction is not required to find a violation of Rule 8.4(b); the rule requires only that the attorney be found to have

committed a criminal act. A criminal conviction is, however, conclusive proof that the attorney committed the conduct that constituted the crime.¹

Even within the parameters of the rule, discipline for lawyer crimes can be broken down in additional ways: criminal acts committed within the practice of law as opposed to those committed

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outside the practice; felony-level offenses as opposed to misdemeanors; crimes involving dishonesty, crimes involving violence, or any number of other possible categories. Such different categories have been treated somewhat differently by the supreme court in its disciplinary decisions.

Jail-House Lawyers

The most notorious lawyers, and those who have caused the most harm to the profession's image, are those lawyers who have misappropriated substantial amounts of client funds, been disbarred and criminally convicted, and who end up serving time in federal or state prisons. The recent death of David Moskal allowed for considerable retelling in the press and in the blogosphere of his high-profile theft case. The names of other such prominent lawyer-criminal-thieves include John Flanagan, Mark Sampson, Anthony Danna, James O'Hagan, and Stephen Rondestvedt; even now the mention of their names at a bar function can cause older heads to solemnly nod in recollection and dismay. Obviously, the better-known the lawyer, the larger the number of sympathetic victims, or the greater the amount of money taken the greater the public's and the press's inter-

est, and the greater the harm to the legal profession. Plus, a quick scan of the list of lawyers against whom the Client Security Board has paid claims shows the financial harm some of these individuals cause all lawyers.²

Some of these worst offenders' disbarments were not in fact the direct result of their criminal conviction. In some instances the attorney, perhaps recognizing that their license was going to be lost in any event, quickly stipulated to disbarment even before the criminal proceedings had been completed. Their disbarment then was based solely upon their misappropriation, not any criminal conviction that came later. Nevertheless, they certainly must be considered to be part of the lawyer-as-criminal group. They stole client money; theft is a criminal act.

Lawyers who commit other types of serious criminal acts also will face substantial discipline. The supreme court has often noted that the presumptive discipline for any felony conviction is disbarment, absent substantial mitigating circumstances.³ That felony convictions always are expected to result in some level of public discipline also is shown by the fact that under Rule 10(c), Rules on Lawyers Professional Responsibility, an expedited procedure exists for a Lawyers Board Panel chair to authorize a public petition based upon a felony conviction or guilty plea.

Felony convictions that arise out of conduct committed by a lawyer within the practice of law almost always have resulted in disbarment, as the court's presumptive standard noted above would indicate. Felonies committed but not directly in connection with the attorney's law practice, however, while still resulting in public discipline, have more often been considered on a case-by-case basis. Felony convictions involving fraud, serious drug offenses, or child pornography that resulted in substantial jail time have warranted disbarment. Other felony-level offenses, such as tax non-filing, violation of protective orders, or drug possession have resulted in lesser levels of public discipline, depending upon the exact nature of the

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criminal act and what mitigation the lawyer establishes.

At the other end of the spectrum, non-felony criminal offenses may not automatically result in public discipline, even if they involve dishonesty. For example, lawyers have been convicted of shop-lifting of items of relatively minor value. Many of these individuals were placed into a diversion program or onto probation by the criminal justice system; private probation by the disciplinary system therefore may be an appropriate disciplinary sanction if the lawyer does not have a prior disciplinary history. Misdemeanor possession of certain illegal drugs occasionally has resulted in private probation as well, often with a condition of random urinalysis testing included. A first-time DWI conviction likely will not create any disciplinary issue at all, but repeated instances, especially if resulting in a felony-level DWI conviction, certainly will.

Investigate or Wait?

One of the most difficult decisions upon learning of a lawyer committing a criminal act is when and how aggressively should the lawyer discipline system investigate the allegations. These matters come to the director's attention in various ways. Criminal charges being filed against a lawyer often will result in publicity in the media of which we become aware. Should the Director's Office seek approval from the Lawyers Board Executive Committee to immedi-

ately open an investigation,⁴ or wait until someone files a complaint? To wait runs the risk of the press calling about the matter, and the Director's Office being unable to even confirm that the matter at least is under investigation.

Once an investigation is commenced, then what? Particularly if the matter arises outside the practice of law, the director may allow the criminal justice system to run its course before making a decision whether to proceed further. On the other hand, major criminal allegations of theft, where additional client money seriously may be at risk, may not allow for even short-term inaction. The lawyer discipline system must proceed notwithstanding the pending criminal proceedings, at a minimum until the lawyer is temporarily suspended from practice pending completion of the disciplinary proceedings.⁵ If that occurs, then the disciplinary system can more safely allow the criminal justice system solely to handle the matter.

Conclusion

As citizens, but especially as professionals licensed in the law, lawyers should be expected to comply fully with the criminal law without prompting. The Rules of Professional Conduct nevertheless implicitly recognize that "some lawyers [will] commit crimes." In most instances, a lawyer who commits a criminal act should expect that serious disciplinary consequences will follow. Thankfully, the number of lawyers who do so is small. ▲

Notes

¹ Rule 19(a), Rules on Lawyers Professional Responsibility (RLPR).

² <http://www.mncourts.gov/csb/csbpaid.html>. All licensed attorneys contribute to the fund as part of the annual lawyer registration fee. Due to the health of the fund, however, the assessment is currently suspended. The victims of some of these individuals were repaid by the lawyer's firm, such that the Client Security Fund was not required to reimburse those victims.

³ See, e.g., *In re Andrade*, 736 N.W.2d 603, 605 (Minn. 2007). Mr. Andrade was convicted of felony theft by swindle. Despite mitigating circumstances, he was disbarred.

⁴ Rule 8(a), Rules on Lawyers Professional Responsibility (RLPR). The director does not have authority to commence an investigation on his own initiative without Executive Committee approval.

⁵ Rule 16(d), RLPR.

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