

PRO SE OR ANTI SE?

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Nowhere in the rules of legal ethics is it ordained that a lawyer may not believe that there exists a conspiracy against him, nor . . . that a lawyer may not prefer to find fault with others than himself.

Thus did a recently suspended attorney, appearing *pro se*, respond to the Court's opinion suspending him. "*Pro se*" was itself objectionable to this attorney; the correct designation should be "counsel for respondent" (himself), and using "*pro se*" was "cattily effeminate."

Perhaps the correction should be "attorney *anti se*." The combination of attorneys representing themselves and stubbornly claiming they did no wrong has recently led to severe discipline in several cases.

One disciplined attorney had missed several court appearances and refused to pay judgments held by practice-related creditors. The Director and referee recommended probation. The Court suspended the attorney for an indefinite period, apparently in part because of his defiant refusal to admit misconduct. He claimed, for example, that knowingly failing to appear for a July 3 motion hearing was justified because it was "only one day before a national holiday." In another situation, after incurring sanctions for not appearing in court, he sent an NSF check to opposing counsel. After she then filed an ethics complaint, he sent a replacement check, stating "I do believe you owe me an apology for forcing me to spend the time to respond to your vindictive complaint."

Another respondent attorney recently managed to convert private discipline into a public petition by appealing his admonition and insisting he did nothing wrong. The underlying matter involved an unpaid attorney's fee award against him. Respondent did not appeal from the judgment against him, but when adverse counsel demanded payment, respondent sent a letter directly to the represented adverse parties. The letter threatened a suit for fraud and RICO violations, and advised the parties that they should not consult their attorney. After respondent insisted at a hearing on the admonition appeal that the letter was appropriate, a Lawyers Board panel instructed the Director to file a public petition against him.

Among the factors identified by the ABA *Standards for Imposing Lawyer Sanctions* as aggravating the seriousness of a disciplinary offense is "refusal to acknowledge wrongful nature of conduct." Of course, attorneys subject to disciplinary charges have due process rights and the right to present spirited, good faith defenses.

How can an attorney tell the difference between a good faith defense and an obdurate refusal that will increase discipline? There is a simple answer: hire competent counsel. Having retained counsel, the

respondent attorney should ask for an objective evaluation and listen when it is given.

Few of us have the objectivity to judge our own conduct accurately. While the obdurate *pro se* respondent is more common, occasionally an attorney accused of misconduct will abase himself and offer to accept whatever discipline the Director thinks is appropriate. Once, an attorney answered interrogatories about his trust account by stating that there were shortages, only to have the Director's audit show that there were none. In another case when an attorney was told that the Director's office believed suspension was the appropriate discipline, he started to hand over his license on the spot – counsel slowed him down, and he ultimately received no public discipline.

When disciplinary allegations are erroneous or overstated, an attorney should exercise due process rights and contest them. For example, in a recent case a Supreme Court referee determined that an attorney's violation of a gag order was constitutionally protected. The disciplinary petition was then dismissed pursuant to stipulation. A Lawyers Board panel, a referee, or the Supreme Court may conclude that charges are unproven or less serious than alleged. The Director's Office may reconsider allegations when a defense is cogently presented. Good faith defense of one's rights should not be chilled by the fear that it will be taken as an aggravating circumstance.

Just as plainly, the Court cannot continue to license and certify as trustworthy an attorney who will not admit obvious misconduct. An attorney who, for example, borrows large sums from a vulnerable client, and insists he has no conflict of interest, is ethically blind and cannot be trusted to discern right from wrong.

Whether or not an attorney is *pro se*, obduracy can also be found in repeat offenders. Three times in recent months the Court has disbarred or suspended attorneys whom it had previously disciplined. Of one attorney, the Court said: "Respondent has not exhibited the renewed commitment to professional conduct expected of a previously disciplined attorney." Of another, it said, "where leniency has been shown once, we are reluctant to do so again." (The Court did not suspend this attorney in his first proceeding because of his contrition and resolve to avoid misconduct.) In judging whether an attorney who has violated the rules is apt to do so again, recognition of misconduct is a key consideration.

Recognition of misconduct is also important in reinstatement proceedings. The petition for reinstatement of a disbarred attorney was denied when, "he suggested that his former partner (now deceased) was more culpable than he, and that his partner bore the responsibility for their misconduct." There are exceptional circumstances in which refusal to admit proven misconduct may not adversely affect the lawyer. When Alger Hiss sought reinstatement as a lawyer, decades after his controversial perjury conviction, he continued to protest his innocence. The Massachusetts Supreme Court reinstated him.

Choosing counsel who will counsel as well as represent is crucial in deciding on the right approach. The most effective counsel for accused attorneys appear to be those who are able to fight zealously when accusations are unwarranted or overstated, and to counsel the attorney to own up when wrongdoing is clear. Counsel who routinely attack complainants, the Director's Office and others, or who fasten on minor procedural points while resisting clear evidence of misconduct, generally appear to be less effective. Expert counsel will know that disciplinary mitigating circumstances are also recognized, including efforts to rectify misconduct, cooperation in proceedings, rehabilitation, and remorse. ABA Standard 9.32.

An attorney faced with charges of misconduct would do well to consider whether these words of the Court might come to be said of him:

Finally, the fact that this case involves a pattern of misconduct involving multiple offenses, as well as the fact that respondent has adamantly refused to acknowledge that in violating rules of practice, he also violated his ethical responsibility as an attorney at law, seems to us to indicate that probation at this point would fail to protect the public and ensure the integrity of the judicial system itself. In order that those ends may be attained, respondent must first acknowledge that he comprehends his ethical responsibilities when he undertakes a course of representation of clients. Until he can demonstrate that he does recognize those responsibilities and demonstrates that he can and will comply with the ethical rules governing attorneys at law, we reluctantly conclude that he can no longer be permitted to practice law.

In serious disciplinary matters the counsel who *is* respondent is all too seldom counsel *for* respondent in any constructive way.