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Discipline for conduct unrelated to law practice

By: Thomas E. Peisch and Erin K. Higgins July 16, 2015

Most lawyers understand that the Rules of Professional Conduct can be applied to conduct that is unrelated to the practice of law, and that private conduct can result in discipline, including suspension or disbarment.

Authority for this is found in a variety of places, including the Rules of the Supreme Judicial Court, various court decisions, and the text of the Rules of Professional Conduct themselves.

The overwhelming majority of cases in which this occurs involve conduct that has resulted in criminal prosecution. In a small but significant number of matters, however, discipline has been imposed even in the absence of a criminal proceeding.

A review of the regulatory landscape begins with SJC Rule 4:01, §3, which boldly proclaims that any conduct that violates the Rules of Professional Conduct is grounds for discipline "even if the act or omission did not occur in the course of a lawyer-client relationship or in connection with proceedings in a court."

Likewise, the preamble to the Rules of Professional Conduct, codified in SJC Rule 3:07, provides:

"A lawyer's conduct should conform to the requirements of the law, both in professional service to clients *and in the lawyer's business and personal affairs*." (Emphasis supplied).

Additionally, Rule 8.4 of the Massachusetts Rules of Professional Conduct contains a number of broad provisions that might apply to private conduct, including:

- the commission of a criminal act "that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" (Rule 8.4(b));

- engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation" or that is "prejudicial to the administration of justice" (Rule 8.4(c), (d));

- stating or implying "an ability to influence improperly a government agency or official" (Rule 8.4(e)); and

- a "catch-all" provision prohibiting "any other conduct that adversely reflects on his or her fitness to practice law" (Rule 8.4(h)).

The first reported case of discipline imposed on a lawyer for non-practice-related conduct was issued in 1946, several decades before the Rules of Professional Conduct and its predecessors were enacted. See *In re Welansky*, 319 Mass. 205 (1946).

In that case, the involved lawyer was the owner of the Cocoanut Grove nightclub in Boston. In November 1942, the overcrowded nightclub was destroyed by a fire, killing several hundred patrons and injuring many more. Although Welansky had not been involved with the club's operation during the weeks leading up to the fire, and in fact was in the hospital during that time, he was prosecuted and convicted of multiple counts of involuntary manslaughter and received a lengthy prison sentence. See *Commonwealth v. Welansky*, 316 Mass. 383 (1944).

At the conclusion of the criminal proceedings, the trial judge ordered Welansky to appear and show cause why he should not be disbarred. Welansky and his counsel contended that he should be permitted to prove that he had not committed the charged crimes. The trial judge refused to let Welansky put on evidence of his actual innocence, but offered to allow him to put on evidence "for any other proper purpose," an offer Welansky declined. See *Welansky*, 319 Mass. at 207. The trial judge thereafter entered an order of disbarment.

The SJC overruled Welansky's exceptions to the order of disbarment, holding that an attorney should not be permitted to retry in disciplinary proceedings the question of whether he or she was in truth guilty. *Id.* at 208.

The court also rejected the argument that disbarment was inappropriate because the crime had no relation to Welansky's conduct as a member of the bar. *Id.* at 209. The court left open the question of whether Welansky might have successfully argued for a lesser sanction than disbarment if he had presented evidence that his crimes did not involve moral turpitude or unfitness of character, noting that Welansky chose not to present such evidence. *Id.* at 210.

More recently, there is a long line of cases in which the court has imposed discipline when the practice of law was not involved in the underlying conduct. See, e.g., *In re Grella*, 438 Mass. 47 (2002) (two-month suspension for misdemeanor assault and battery on estranged wife); *In re Goldberg*, 434 Mass. 1022 (2001) (reprimand for assault on police officer and indecent exposure); *In re McGarvey*, 31 Mass. Att'y Disc. R. _____ (2015) (one year and one day suspension for multiple operating under the influence offenses, leaving scene of property damage, marked lanes violation, operating with a suspended license, multiple probation violations, and failure to report convictions to bar counsel); *In re Franchek*, 30 Mass. Att'y Disc. R. _____ (2014) (six-month suspension for operating under the influence, operating to endanger, and failing to report convictions to bar counsel); *In re Lawson*, 24 Mass. Att'y Disc. R. 425 (2008) (six-month suspension for operating under the influence, second offense); *In re Ferguson*, 21 Mass. Att'y Disc. R. 231 (2005) (four-month suspension for assault and battery on wife and perjury).

As noted, the vast majority of reported disciplinary cases involving private conduct arise when the lawyer has faced criminal charges. See, e.g., *In re Concemi*, 422 Mass. 326 (1996) (disbarment for conviction of 35 felony counts of bank fraud and conspiracy); *In re Grew*, 23 Mass. Att'y Disc. R. 232 (2007) (one-year suspension for misdemeanor insurance fraud); *In re Harrington*, 18 Mass. Att'y Disc. R. 292 (2002) (three-year suspension for misdemeanor conversion of government property); *In re Voccola*, 18 Mass. Att'y Disc. R. 560 (2002) (indefinite suspension for federal tax evasion, falsely self-identifying as attorney while suspended from practice, and violating conditions of release).

Importantly, the SJC has reiterated on many occasions that for a felony conviction, the presumptive sanction is disbarment or an indefinite suspension. See, e.g., *In re Finneran*, 455 Mass. 722 (2010).

Moreover, if a lawyer is convicted of any "serious crime," as defined in SJC Rule 4:01, §12(3), the lawyer immediately can be suspended from the practice of law, regardless of the pendency of any appeal from the conviction. See SJC Rule 4:01, §12(4).

Many attorneys do not know that they are required by SJC Rule 4:01, §12(8) to report any criminal conviction to the Office of Bar Counsel within 10 days, and that that obligation attaches to even the most minor of offenses. Importantly, "conviction" also includes an admission to sufficient facts, which is the most common manner of disposition of minor criminal cases. See SJC Rule 4:01, §12(1); see also *Karasavas v. Gargano*, 31 Mass. L. Rptr. 624 (2014) (crediting expert testimony that a CWOF, or continuance without a finding, is "by far the most common outcome in the District Court for first [time] offenders").

SJC Rule 4:01 now codifies the principle that a convicted lawyer is barred in a disciplinary action from re-litigating the circumstances of the underlying conviction. See SJC Rule 4:01, §12(2). Moreover, even if a lawyer is acquitted of criminal charges, the Office of Bar Counsel may continue to investigate and prosecute disciplinary charges against the lawyer that are based upon the same or substantially similar allegations. See SJC Rule 4:01, §11; see also *In re Segal*, 430 Mass. 359 (1999) (lawyer acquitted of federal charge of making false statements to a federally insured bank was nevertheless suspended for two years for same conduct, where evidence at disciplinary hearing showed that lawyer had knowledge of improper secondary financing scheme).

The decided cases appear to deal particularly harshly with situations in which the lawyer has interacted unsatisfactorily with a tribunal, even in those instances in which the interaction has not involved appearance as counsel for a party. Two prominent examples are *Finneran, supra*, and *In re Balliro*, 453 Mass. 75 (2009).

Finneran involved discipline imposed on a former speaker of the House of Representatives who committed perjury while testifying under oath in a voting rights lawsuit. The respondent was unsuccessful in convincing the court that he was entitled to leniency in light of the fact that his conduct did not relate to his law practice.

The court ordered disbarment and pointed out that that was the presumptive sanction in any case in which a lawyer was convicted of perjury or obstruction of justice.

Balliro was a troubling situation involving a Massachusetts assistant district attorney who was the victim of a domestic assault in another state. She repeatedly refused to cooperate with law enforcement there and testified falsely at the abuser's criminal trial that the abuse had not taken place. She was not prosecuted criminally for her false testimony, but the out-of-state authorities reported her to her Massachusetts employer, which, in turn, directed her to self-report to the Office of Bar Counsel.

After protracted proceedings, the SJC ordered her suspended from practice for six months for violating Rule 8.4. The court cited earlier decisions in *In re Concemi, supra*, and *In re Grella, supra*, and concluded that a term suspension was the appropriate resolution of the case.

What are the takeaways in all this for Massachusetts lawyers? First, it is important to understand that bar membership remains a privilege that easily can be lost by private conduct. The SJC and Board of Bar Overseers have repeatedly justified disciplinary action in these circumstances on the basis of the public perception of lawyers as officers of the court and members of an "honorable profession."

Second, every lawyer should be aware of the consequences of a "conviction" as that term is defined in SJC Rule 4:01, §12(1).

Third, any conviction promptly should be reported to the Office of Bar Counsel, as the failure to self-report can be deemed an aggravating factor in the imposition of discipline. See, e.g., *In re O'Brien*, 15 Mass. Att'y Disc. R. 449 (1999) (failure to report operating under the influence conviction was aggravating factor in imposition of term suspension).

Finally, a lawyer who finds herself in this unenviable position should consider availing herself, if possible, of the opportunity to present evidence that the conduct for which she was convicted did not involve the practice of law or reflect adversely on her fitness as a lawyer. See *Welansky*, 319 Mass. at 210; see also *Concemi*, 422 Mass. at 331 n.5 (distinguishing cases where attorneys received lesser sanctions for conduct undertaken solely as private citizens).

Further, if appropriate, an attorney may be able to offer evidence of special mitigating factors, such as a physical or psychological condition affecting the attorney's ability to conform her conduct to the law and her professional obligations. See *Concemi*, 422 Mass. at 330 n.4 (listing cases in which special mitigating factors were found to justify a lesser sanction).

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