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From Grievance and Complaint to Sanction: Attorney Misconduct in Ohio

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I. INTRODUCTION

Lawyers across the nation are increasingly confronted by the chilling prospect of being accused of misconduct. Over the last six years in Ohio, for example, 44,687 grievances or allegations of misconduct were raised against lawyers.[1] In 1997 alone, 7,485 grievances were lodged against 45,156 registered Ohio practitioners.[2] Although the vast majority of these grievances were dismissed as frivolous, not raising a question of ethical misconduct, or not supported by probable cause, many nevertheless cost lawyers valuable time, effort, resources, and most importantly, peace of mind.

Grievances become formal complaints when either a certified grievance committee or Ohio's Disciplinary Counsel finds probable cause to believe that an attorney's conduct violates the Ohio Code of Professional Responsibility ("OCPR") and a probable cause panel of the Ohio Board of Commissioners on Grievances and Discipline (the "Board") certifies the complaint. At this point, a trial committee is appointed to prosecute the complaint and the process is open to the public.[3] From 1992 through 1997, a total of 570 certified formal complaints against Ohio lawyers resulted in

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[1] Telephone Interview with Jonathan Marshall, Chair, Ohio Board of Commissioners on Grievances and Discipline (Feb. 18, 1998).

[2] *Id.*; Telephone Interview with Cindy Farrenkopf, Attorney Registration Clerk, Supreme Court of Ohio (Feb. 18, 1998) (estimating that another 4,500-5,000 lawyers are licensed in Ohio but not registered).

[3] *See supra* note 1.

fines, public reprimands, definite and indefinite suspensions, and disbarment.[4]

A significant decline in complaints against lawyers is unlikely, given the growing demand for legal services, because of the ever-increasing regulation and sophistication of society, the steady flow of new lawyers to the bar, and the heightened public concern for accountability, especially of privileged members of a self-regulated profession. Because all lawyers are vulnerable to complaints, it is important to understand the standard of proof that is required before one is found guilty of and disciplined for misconduct.

II. THE BURDEN OF PROOF FOR DISCIPLINARY ACTIONS IN OHIO

Ohio follows the approach of most states, which requires the prosecuting authority to prove by clear and convincing evidence that the accused lawyer's conduct violates the state's Code of Professional Responsibility.[5] The prosecuting authority's burden of proof does not generally shift to lawyers charged with misconduct to explain suspicious circumstances.[6]

On the continuum of evidentiary standards, the clear and convincing standard falls between "preponderance-of-the-evidence" and "beyond a reasonable doubt." The preponderance standard requires the evidence of a violation to be just barely more persuasive than the evidence of no violation. The reasonable-doubt standard requires evidence that leads to an "indubitable conviction free of any plausible explanation" that one is guilty of wrongdoing.[7] Under all three standards, the burden of proof concerns not the quantity of evidence but rather its persuasive force.[8] For example, a party could satisfy the clear and convincing standard with the testimony of one witness even though the opposing party presents the testimony of four witnesses who are not as persuasive.[9]

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4 Gov. Bar R. V § 11(E)(2)(a) (Anderson Supp. 1997) (once a complaint is "certified to the Secretary of the Board by a probable cause panel, the complaint and all subsequent proceedings in connection with the complaint shall be public.")

5 *See* Ohio v. Schiebel, 564 N.E.2d 54 (Ohio 1990), *cert. denied sub nom.*, Warner v. Ohio and Schiebel v. Ohio, 499 U.S. 961 (1991); Gov. Bar R. V § 6(J) (Anderson Supp. 1997) (requiring hearing panel to follow clear and convincing evidence standard); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 109 (1986).

6 WOLFRAM, *supra* note 5, at 108.

7 *Id.* at 109.

8 PAUL C. GIANNELLI & BARBARA ROOK SNYDER, RULES OF EVIDENCE HANDBOOK 143 (1996).

9 WOLFRAM, *supra* note 5, at 110.

In *Ohio v. Schiebel*,[10] the Ohio Supreme Court characterized clear and convincing evidence as "'that measure or degree of proof . . . which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'"[11] The application of evidentiary standards however, "is not susceptible to measurement in individual cases because the operation to which the standards relate is a largely subjective mental task applied to a matrix of indeterminate data."[12] Individuals assessing data or evaluating the facts under the clear and convincing evidence standard inevitably base their assessment upon "unarticulated assumptions, values, and biases."[13]

III. THE OHIO SUPREME COURT'S RECENT APPROACH TO THE "CLEAR AND CONVINCING EVIDENCE" REQUIREMENT IN DISCIPLINARY ACTIONS

Many Ohio Supreme Court cases involving lawyer discipline do not fully specify the nature of the testimony and documents used to prove Code violations. Several recent cases however, provide some insight into the kind and quantity of facts necessary to establish sanctionable misconduct.

In *Office of Disciplinary Counsel v. Cicero*,[14] the court affirmed the Board's conclusion that clear and convincing evidence showed that the attorney violated OCPR Disciplinary Rule ("DR") 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice) and Gov. Bar R. IV § 2 (duty of a lawyer to maintain a respectful attitude toward the courts).[15] There, the attorney "led several members of the bar" and others "to believe [falsely] that [the attorney] had an ongoing sexual relationship with the judge."[16]

Cicero, the respondent, indicated to the opposing prosecuting attorney that the judge would probably deny a continuance because the judge wanted the case concluded before the Christmas holidays so that she could have sex with him. Cicero's client also suggested to other inmates that

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[10] 564 N.E.2d 54 (Ohio 1997), *cert. denied sub nom.*, Warner v. Ohio and Schiebel v. Ohio, 499 U.S. 961 (1991).

[11] *Id.* at 60 (citing Cross v. Ledford, 120 N.E.2d 118, paragraph three of the syllabus (Ohio 1954); In re Adoption of Holcomb, 481 N.E.2d 613, 620 (Ohio 1985)).

[12] WOLFRAM, *supra* note 5, at 110.

[13] *Id.*

[14] 678 N.E.2d 517 (Ohio 1997).

[15] *Id.* at 518.

[16] *Id.*

they should retain him because of his liaison with the judge. Cicero admitted exaggerating the level of intimacy with the judge while she presided over the case, underscoring the falsity of his statements that a romantic liaison existed while the case was pending before her. This was underscored by the testimony of a witness that both Cicero and the judge confided to her that they had a sexual relationship after the judge recused herself from the case and not during the case as Cicero suggested.[17]

In *Cleveland Bar Ass'n v. Sweeney*,[18] the Ohio Supreme Court ruled that there was clear and convincing evidence that the attorney had violated "DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice), 1-102(A)(6) (engaging in conduct adversely reflecting upon his fitness to practice law), 6-101(A)(2) (failing to prepare a legal matter properly), 7-102(A)(2) (knowingly advancing a claim or defense that is unwarranted under existing law), and 7-102(A)(5) (knowingly making a false statement of law or fact)."[19]

First, respondent Sweeney engaged in a series of settlement negotiations on behalf of a person who never discussed or authorized his representation.[20] Second, Sweeney filed a notice of appeal on July 27, 1989, for a client in a medical malpractice action. From August 1989 until January 1990, he requested, and the court granted, several extensions to permit him to file a merit brief. The court granted a final extension that ran until January 23, 1990, and when he again failed to file a brief, the court *sua sponte* dismissed the appeal. Sweeney claimed that he failed to file a timely brief because he was involved in an automobile accident, and that a rough draft of the brief was lost in a taxi cab due to the driver's negligence. There was clear and convincing evidence that he had violated DR 6-101(A)(3) (neglecting an entrusted legal matter).[21]

Third, Sweeney represented a client in a wrongful death action in which the client voluntarily withdrew her complaint on March 1, 1989. On March 21, 1989, Sweeney filed a 42 U.S.C. § 1983 claim in federal court that was dismissed with prejudice ten months later for lack of perfected service. On May 14, 1991, Sweeney filed the identical complaint in federal court and it too was dismissed. Sweeney then appealed and challenged the dismissal of the March 21, 1989 complaint without discussing any issues related to the dismissal. The federal court of appeals found that Sweeney's brief was deceptive and misleading and noted that

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17 *Id.*

18 643 N.E.2d 89 (Ohio 1994).

19 *Id.* at 91-92.

20 *Id.*

21 *Id.* at 90.

the time for appealing the 1989 complaint had passed long ago. Sweeney acknowledged making mistakes in handling the appeal and also his failure to pay the costs the federal appeals court assessed against him. The Ohio Supreme Court ruled that there was clear and convincing evidence that Sweeney had violated DR 6-101(A)(3).[22]

Finally, on February 26, 1988, Sweeney filed an age discrimination suit for another client for which he received a retainer of $1,700. Approximately three years later, the court dismissed the complaint, citing unjustifiable resistance to discovery. Throughout the pendency of the claim, Sweeney failed to return his client's calls, and she learned of the dismissal in 1992 from one of his employees. Sweeney admitted that the dismissal was caused by his being "'asleep at [the] switch.'"[23] There was clear and convincing evidence that Sweeney had violated DR 6-101(A)(3).[24]

In *Office of Disciplinary Counsel v. Fowerbaugh*,[25] the attorney stipulated to all disciplinary charges, including "violating DR 6-101(A)(2) (handling a legal matter without preparation adequate in the circumstances), 6-101(A)(3) (neglecting an entrusted legal matter), 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 1-102(A)(6) (engaging in conduct that adversely reflects upon his fitness to practice law)."[26] Based on the evidence in *Fowerbaugh*, the Ohio Supreme Court found clear and convincing evidence of the aforementioned violations.

After being retained to represent a client in obtaining a parentage and child support order for the client's minor child in May 1992, Fowerbaugh failed to return the client's numerous telephone calls between then and July 1993.[27] Further, Fowerbaugh ignored his client's requests to have the putative father pay for the paternity blood test and misrepresented to the client that he was proceeding with the paternity action.[28]

After repeated client requests for court documents proving that the paternity action was filed, Fowerbaugh superimposed an official time stamp from another document onto the client's complaint that the court had already rejected. He also added a fictitious case number, falsely assigned

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22 *Id.* at 90-91.

23 *Id.* at 91 (citation omitted).

24 *Id.*

25 658 N.E.2d 237 (Ohio 1995).

26 *Id.* at 237-38.

27 *Id.* at 238.

28 *Id.*

an actual judge to the case, and sent the fake complaint to the client.[29] He then indicated to the client that the court had scheduled a hearing date, and continued to mislead the client by confirming the false date.[30] He further misled the client by mailing a fake "official request" for production of documents, after which he informed the client that the fictitious hearing date was canceled due to the court's scheduling error.[31] Although he terminated the attorney-client relationship and returned the client's retainer, Fowerbaugh never informed the client about his misrepresentations and his failure to file the paternity action.[32]

In *Cincinnati Bar Ass'n v. Stern*,[33] the attorney-respondent was indefinitely suspended for violating:

> DR 9-102(A) (failing to deposit client funds in an identifiable bank account), 2-110(A)(2) (failing to deliver all property to which his client was entitled), 9-102(B)(4) (failing to promptly pay or deliver as requested by the client the funds which the client was entitled to receive), 6-101(A)(3) (neglecting a legal matter entrusted to him), 7-101(A)(1) (failing to seek the lawful objectives of a client), 7-101(A)(2) (failing to carry [out] a contract of employment), . . . Gov. Bar R. X §§ 3(A)-(B)(1) (failing to comply with educational and reporting requirements), and Gov. Bar R. V § 4(G) (failing to cooperate with relator in the investigation of a grievance).[34]

Stern undertook to represent a client in a divorce but made no filings on behalf of the client, and he refused to respond to the client's telephone calls regarding the case's status. He also failed to return the client's retainer after the client dismissed him. He did not cooperate with the relator's investigator, and also failed to register as an attorney with the Ohio Supreme Court or to comply with continuing legal education requirements.[35]

In *Dayton Bar Ass'n v. Marzocco*,[36] an attorney-trustee was permanently disbarred for disobeying a court order when he failed to pay a settlement involving his mismanagement of a trust. There was clear and convincing evidence that attorney Marzocco violated DR 1-102(A)(1) (violating a DR), 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), 1-102(A)(5) (engaging in conduct

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29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 679 N.E.2d 265 (1997).
34 *Id.* at 265-66.
35 *Id.* at 265.
36 680 N.E.2d 970 (Ohio 1997).

prejudicial to the administration of justice), 1-102(A)(6) (engaging in conduct that adversely reflected upon his fitness to practice law), and 2-106(A)-(B) (charging or collecting an illegal or clearly excessive fee).

Marzocco signed a settlement order that required him to pay $35,500 to the successor trustee because of his unprofessional administration of the trust. He failed to pay this sum. In attempting to avoid the settlement order, he transferred title to all of his property to his wife for no consideration, thereby forcing the successor trustee to file suit to avoid the conveyance. He applied to the trust for legal fees incurred in defending his actions as trustee and for unpaid fees due him for his work as trustee, both of which fees were clearly unwarranted given his mishandling of the trust.[37]

An attorney was suspended for eighteen months in *Office of Disciplinary Counsel v. Dukat*,[38] for mail fraud and for violating DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) and 1-102(A)(6) (engaging in conduct that adversely reflected upon his fitness to practice law). The Disciplinary Counsel established clear and convincing evidence of these violations by showing that the attorney tacitly approved a company financial officer's scheme to file a false payroll report to reduce the company's workers' compensation payments due its insurance carrier. Clear and convincing evidence of these violations was found despite the fact that the attorney "did not partake in the mechanics of, supervise, or profit from the fraud."[39]

In *Office of Disciplinary Counsel v. Sweeney*,[40] Sweeney was indefinitely suspended for violating "DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) and 2-107(A)(1) (division of fees among lawyers in proportion to the services performed by each lawyer)."[41] The violations resulted from his conviction of a felony under "[s]ection 1027, Title 18, U.S.Code (false statements in relation to documents required by ERISA)."[42] In *Sweeney*, the Disciplinary Counsel met its burden of demonstrating the above violations by clear and convincing evidence by proving the following facts. While serving as counsel to the Sheet Metal Workers' National Pension Fund and simultaneously being affiliated with the Washington D.C. firm of Katz &

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[37] *Id.* at 971-72. For example, the attorney made an unsecured loan of the entire trust's corpus to his brother without any expectation of the payment of interest or principal on a regular basis. *Id.* at 971.

[38] *Id.* at 972.

[39] *Id.* at 973.

[40] 679 N.E.2d 671 (Ohio 1997).

[41] *Id.* at 671-72.

[42] *Id.* at 672.

Ranzman, Sweeney submitted false legal bills to the pension fund. He falsely attributed the legal bills to work by Katz & Ranzman when the work was properly attributable to him.[43]

IV. CONCLUSION

There is no precise formula for the type and quantity of evidence necessary to prove sanctionable misconduct by lawyers. We will all benefit, however, if the Ohio Supreme Court continues to develop the law defining the clear and convincing evidence standard in disciplinary cases.

The court has relied heavily on the Board's findings and recommendations in determining whether there is clear and convincing evidence of lawyer misconduct. The Board's full reporting, both of the facts and of its own reasoning, will greatly assist both the court and the bar. The recent report of the Commission to Review Ohio's Disciplinary Process recommended that the Board report more fully the bases for its decisions and its reasoning and specifically suggested that the Board consider publishing a newsletter.[44]

A clear picture of the conduct that is sanctionable will help demystify the lawyer discipline process for the profession and the public. Moreover, a better understanding of the lawyer discipline process will promote public confidence in the profession's ability to engage in meaningful self-regulation.

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[43] *Id.*

[44] REPORT OF THE COMM. TO REVIEW OHIO'S DISCIPLINARY PROCESS, RECOMMENDATION 13, at 13 (1996) (suggesting also that copies of the Board's reports be provided to the state and local bar associations).