

Impaired Driving Convictions and the Disciplinary Process (Part 2 of 2)

By Cynthia C. Bullington

In last month's Practicing Wellness column, I discussed investigative procedures and the Attorney Grievance Commission's (AGC's) conceptual process in handling impaired driving convictions. Most attorneys are unfamiliar with the public disciplinary machinery, particularly how convictions involving substance abuse are handled at the public disciplinary stage. The AGC resolves most attorney convictions without public disciplinary action, such as by contractual probation, admonitions, closings, or dismissals. This article addresses the structure of the public disciplinary process and results that may occur once public disciplinary proceedings are brought.

Disciplinary Prosecutions of Convictions Involving Substance Use

"Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession."¹ These goals may be achieved by ensuring that an attorney is fit to represent the public and by dissuading conduct that brings the profession into disrepute. "This section makes clear that the purpose of discipline cannot be punishment, but does not preclude the effect of discipline from being punishment. It would be a rare attorney, indeed, who would not feel 'punished' if precluded from practicing law."²

Attorneys may be disciplined for conduct unrelated to the practice of law. A "lawyer is a professional 'twenty-four hours a day, not eight hours, five days a week,'" and the "concept of unprofessional conduct now embraces a broader scope and includes conduct outside the narrow confines of a strictly professional relationship that an attorney

has with the court, with another attorney or a client."³ Further:

The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.⁴

A felony drunk driving conviction will result in public disciplinary proceedings by operation of the court rules.⁵ On a felony conviction, the AGC is not involved in deciding whether to initiate a disciplinary proceeding.

With every felony conviction, no matter the category, an attorney is automatically suspended from the practice of law as of the date of the entry of the plea or verdict. This is an interim suspension that continues until the matter is heard by a panel assigned by the Attorney Discipline Board. An attorney subject to an automatic suspension may petition the board to terminate

the suspension before the panel hearing, but such petitions are rarely granted. The requirements of MCR 9.119 also take effect, including requiring the subject attorney to provide notice of the automatic suspension to clients, courts, and opposing attorneys.

An attorney convicted of a crime is conclusively proven to have committed professional misconduct by the filing of a certified copy of the conviction with the board.⁶ Thereafter, the board will generate an order for the respondent to show cause and require the filing of a written disclosure of the evidence the respondent intends to offer at the hearing. At this stage, the respondent may propose a consent discipline to the AGC under MCR 9.115(F). Entering into a consent discipline provides the respondent a known result and a corresponding reduction in the administrative fee charged pursuant to MCR 9.128. The administrative fee in matters resolved by consent is \$750; for contested cases, the administrative fee is \$1,500. In both instances, the respondent remains responsible for out-of-pocket costs incurred by the disciplinary system.

As noted, a formal complaint may also be filed against an attorney in matters related to the impaired driving conviction. For example, an attorney may be convicted of drunk driving, and a separate charge for possession of cocaine is disposed of pursuant to a .7411 plea. In these instances, admissions made by the attorney in the course

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of a plea-taking may be used as the basis of a formal complaint charging the illegal conduct of cocaine possession. A formal complaint may also be filed in situations in which the attorney convicted of a misdemeanor has not answered the request for investigation or has lied on his dues statement by denying that he has an unreported conviction.

Any conviction may impact an attorney's fitness to practice law. Attorneys have a higher duty than the public to avoid criminal behavior.⁷ Section 5.0 of the American Bar Association's Standards for Imposing Lawyer Sanctions (ABA Standards) addresses the public's perception of the need for integrity by lawyers:

The most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when lawyers engage in illegal conduct.

In *Grievance Adm'r v Deutch*,⁸ the Michigan Supreme Court reviewed the dismissal of disciplinary proceedings brought as a result of impaired driving convictions. The Court reversed the dismissals, but provided a "safety valve" to the automatic establishment of a finding of misconduct under MCR 9.104(B). While a finding of misconduct will enter following the filing of any misdemeanor or felony conviction, the order may also impose no discipline.⁹ A finding of misconduct but "no discipline" will still result in the imposition of costs and the publication of a notice in the *Michigan Bar Journal* of the panel's finding. The Court reasoned:

In such a case, resources have not been wasted despite the fact that professional discipline was not, in the end, imposed. The attorney has had to acknowledge that he committed "misconduct," and both the administrator and the respondent-attorney have had a full opportunity to inform the panel of mitigating and aggravating factors that often, particularly in cases of recidivism, reveal the true nature and degree of the problem. Moreover, the Attorney Grievance Commission has

created a record of misconduct that will be helpful and relevant under MCR 9.115(J)(1) should that attorney commit further, future acts of misconduct.¹⁰

Hearings on convictions solely concern discipline, although the underlying facts leading to the conviction may be considered by the panel.¹¹ The board and its panels must employ the ABA Standards in formulating discipline following a finding of misconduct.¹² The ABA Standards are applied in a two-stage process. The first-stage analysis involves a consideration of the ethical duty violated, the lawyer's mental state, and harm. Once these factors have been determined, there is a second-stage analysis of any factors in aggravation and mitigation (some factors are weighted more heavily than others depending on the facts of the case) and any other factors that may make the results of the foregoing analytical process inappropriate for a stated reason.¹³

In a decision issued after *Deutch, supra*, the board reviewed an appeal by a respondent from an order of discipline placing him on probation following a first-offense, impaired driving conviction. During the disciplinary investigation, the AGC had offered the respondent a two-year contractual probation, which he declined, seeking to limit the term of the contractual probation to one year, which the AGC refused. The board vacated the order of probation and entered an order of "no discipline," holding:

Therefore, in our opinion issued after remand by the Supreme Court in *Deutch*, we explained that fitness to practice remained a fundamental criteria in the assessment of what level of discipline, if any, is appropriate in a particular case:

We recognize that under *Deutch* a lawyer's criminal conduct will be considered "misconduct" irrespective of whether it "reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." MRPC 8.4(b). However, there can be no question that these are relevant considerations in determining the level of discipline, if any, to be imposed. Indeed, the concept of "fitness" is central to the function of regulating the bar. It is a prerequisite to acquiring (State Bar Rule 15,

§1), maintaining (MCR 9.103(A)), and regaining (MCR 9.123(B)(7)) the license to practice law. "Fitness" is arguably the touchstone or key variable to be addressed whenever the level of discipline is assessed. See, e.g., Standards for Imposing Lawyer Sanctions (ABA, 1991), §9.1. [*Grievance Adm'r v Deutch (After Remand)*, 94-44-JC (ADB 1998), lv den 460 Mich 1205 (1999)].¹⁴

Following the decision in *Grievance Adm'r v Reams*, the AGC has refined its decision-making process in determining whether to bring a public disciplinary proceeding. Currently, for the AGC to authorize a public disciplinary proceeding against an attorney based on an impaired driving conviction, additional factors need to be present beyond the face of the conviction and the belief that a dependency exists. Such additional factors may include the presence of prior convictions related to impaired driving, probation violations, or an excessive number of prior admonitions.

After the conclusion of a hearing, the panel is required to issue a report and order of discipline.¹⁵ Attorneys who face public discipline for the first time because of a conviction for impaired driving will typically receive either probation with conditions or a reprimand with conditions. Orders of probation may enter only if there has been a finding that "during the period when the conduct which is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction."¹⁶

A finding of "no discipline" is the exception and not the norm. Between 2006 and the present, there have been more than 41 disciplinary proceedings against attorneys convicted of a crime involving some element of driving a vehicle after consuming alcohol or other controlled substance. Most of these actions have resulted in the entry of some type of discipline. "An order finding misconduct and imposing no discipline will rarely be entered."¹⁷ Further:

A "no discipline" order is not a milder, gentler form of reprimand. For an order finding misconduct but imposing no discipline to be appropriate, the misconduct

would have to be so highly technical, the mitigation so overwhelming, or the presence of other special circumstances so compelling that the imposition of a reprimand would be practically unfair. A reprimand need not always heap the scorn of the profession upon a practitioner. Since a reprimand *can* simply amount to a declaration that a Rule was violated—essentially reiterating what was already said in a finding of misconduct—it will be an exceedingly rare case in which a reprimand should not be imposed upon a finding of misconduct.¹⁸

With multiple convictions, lack of cooperation, or prior discipline, the discipline imposed by a panel is likely to increase. For example, one attorney who was convicted of OUIL, 2nd, and who failed to appear for the disciplinary hearing was disbarred by the panel—discipline beyond that requested by the AGC. Felony drunk driving is likely, although not exclusively, to result in a 180-day suspension. A 180-day suspension is a significant discipline milestone because it requires a reinstatement proceeding for the attorney to return to the practice of law. All orders of discipline may include conditions relevant to the established misconduct to be completed within a specified period up to two years. In cases involving substance dependency, conditions imposed for a specific period might include requiring a respondent to:

- Abstain from alcohol and non-prescription controlled substances during the period of the contractual probation and provide a quarterly affidavit to the AGC of compliance with this provision.
- Participate in a monitoring agreement with the State Bar Lawyers and Judges Assistance Program (LJAP) or, as an alternative, attend a course of treatment for two years with a therapist who possesses a master's degree and licensure as a certified addictions counselor.
- Sign any and all waivers necessary to allow LJAP (or a therapist) to provide quarterly progress reports concerning the LJAP program (or a therapist's course of treatment). The waivers will be irrevocable for the term of the probation.

- Submit to random preliminary breath tests at the direction of the grievance administrator or his staff. Respondent shall remain responsible for the cost of the testing and shall provide any waivers necessary for the release of information to the administrator.
- Ensure that quarterly reports are provided from LJAP (or a therapist) to the administrator's probation supervisor. Reports should generally include a diagnosis, prognosis, and recommendation. All reports must state whether positive progress is being made.
- Attend a set number of Alcoholics Anonymous/Narcotics Anonymous or similar type of meetings weekly with verification of attendance.

What should you do if you or your client receives a notice that the administrator has filed a judgment of conviction or a formal complaint?

- If a formal complaint was issued, file a timely answer. An answer must be filed within 21 days unless the panel has granted an extension. If an attorney does not file a timely answer, the administrator will have a default entered. Thereafter, if the default is maintained and absent extraordinary circumstances, the respondent attorney will be suspended from the practice of law for a minimum of 30 days.
- If a disciplinary proceeding was filed based on a judgment of conviction, the board will issue a show cause order requiring that the respondent attorney file a mitigation notice 10 days before the hearing. Failure to comply may result in being precluded from presenting mitigating evidence.
- Consider whether to submit a consent discipline proposal to the administrator. Consent discipline results in a known outcome and cost savings.
- Conduct research on similar cases. The Attorney Discipline Board's website is www.adbmich.org. The telephone number for the board is (313) 963-5553. The State Bar of Michigan posts ethics opin-

ions online at www.michbar.org and has recently made available for its members a free research tool called Case-maker, also available from its website.

- Be sure to take action because the disciplinary proceedings will continue even if the respondent attorney does not participate. Do not hesitate to contact any of the attorney staff of the AGC with questions. The telephone number for the AGC is (313) 961-6585. ■

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FOOTNOTES

1. MCR 9.105.
2. *Matter of Grimes*, 414 Mich 483, 491; 326 NW2d 380 (1982).
3. *Id.* at 495, quoting *State v Postorino*, 193 NW2d 1 (Wis, 1972).
4. MCR 9.103(A).
5. MCR 9.120(A).
6. MCR 9.104(B).
7. *In re Markowitz*, 393 Mich 6, 11-12; 222 NW2d 504 (1974).
8. *Grievance Adm'r v Deutch*, 455 Mich 149; 565 NW2d 369 (1997).
9. *Id.* at 169.
10. *Id.* at 163.
11. *Grievance Adm'r v Jacques*, 97-157JC (ADB, 1997).
12. *Grievance Adm'r v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000).
13. See *Grievance Adm'r v Mark L. Brown*, 00-74-GA (ADB, 2002); *Grievance Adm'r v Che A. Karega*, 00-192-GA (ADB, 2002); *Grievance Adm'r v Ralph E. Musilli*, 98-216-GA (ADB, 2000).
14. *Grievance Adm'r v Reams*, 06-180JC (ADB, 2008).
15. MCR 9.115(J).
16. MCR 9.121(C)(1)(a).
17. *Musilli*, n 12 *supra* at 6, relying on *Grievance Adm'r v Bowman*, 462 Mich 582, 589; 612 NW2d 820 (2000).
18. *Musilli*, n 12 *supra* at 6-7.