Disciplinary Counsel: The "Super" Prosecutor

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I. INTRODUCTION

As we know from criminal procedure class in law school, a person accused of committing a crime in Ohio is afforded numerous rights. Just to name a few, there is the right to remain silent, the right to compulsory process, the right to a trial by jury, the right to an attorney, the right to confront witnesses and the right to a speedy trial. Further, a prosecutor in Ohio has ethical and constitutional obligations that must be fulfilled when prosecuting an accused. Of course, the prosecutor must provide the accused all exculpatory evidence under *Brady v. Maryland*.[1] Also, under the specific Ohio disciplinary rules applicable to prosecutors, a prosecutor has the responsibility as a "minister of justice" and not simply that of an advocate.[2] Although criminal defendants are guaranteed such rights, a lawyer accused of violating Ohio's disciplinary rules is not; and none of the criminal prosecutor's responsibilities apply to disciplinary counsel or a certified grievance committee.

This article will explore whether disciplinary counsel is really akin to a "Super Prosecutor." This particular prosecutor does not need to provide notice to the accused that an investigation has commenced, does not need a search warrant or probable cause to search private places or things, is not required to provide the accused a "constitutional" speedy resolution, is not required to share exculpatory evidence and knows the accused has no right to remain silent. Practicing law in Ohio is not a right and therefore, when a lawyer is accused of professional wrongdoing, there are very few substantive due process rights afforded. This seems logical, and few would disagree with the manner in which our disciplinary system functions. However, most lawyers in Ohio are likely unaware that they lack such rights unless they have been through the process.[3]

The contrast between the substantive rights an accused is guaranteed in a criminal prosecution and the de minimis rights afforded an attorney accused of wrongdoing in a disciplinary action is significant. The power and investigatory tools that disciplinary counsel has at his disposal should not be underestimated. There is not much that disciplinary counsel cannot do in the name of an "investigation." Ultimately, a discretionary investigation can lead to severe sanctions, including disbarment or suspension. It is possible that a lawyer's records and files can be subpoenaed and retrieved without any prior notice. Further, there is no constitutional due process "right" to a speedy grievance investigation or resolution and extensions are routinely granted. Perhaps the greatest power available to this "Super Prosecutor" is the ability to force the attorney to explain fully himself and his conduct. There is no right to remain silent and not talking to disciplinary counsel may result in a more severe sanction and even a separate disciplinary violation for failure to cooperate.

II. DISCIPLINARY COUNSEL'S FUNCTION AND SOURCE OF POWER

The Ohio Constitution grants to the Supreme Court of Ohio inherent authority and original jurisdiction over the discipline of attorneys in Ohio. See Section 2(B)(1)(g), Article IV; *Everage v. Elk & Elk*, 159 Ohio App. 3d 220, 2004-Ohio-6186. Pursuant to this jurisdiction, the Supreme Court of Ohio promulgated Gov.Bar R. V to govern the disciplinary procedure for members of the bar. With that rule, the Court created the Board of Commissioners on Grievances and Discipline to assist in the Court's disciplinary responsibilities. Gov.Bar R. V(1)(A). The Board has exclusive jurisdiction to recommend disciplinary action against an attorney and is authorized to received evidence, make findings, and submit recommendations to the Supreme Court concerning complaints of attorney misconduct. Gov.Bar R. V(2). *Everage*, supra. Before the Board may act on an allegation of misconduct filed against an attorney, however, the allegation must be investigated by a certified grievance committee[4] or the Disciplinary Counsel. If the investigative body determines that there is probable cause that misconduct has occurred, a complaint against the attorney will be certified to the secretary of the board, at which time it becomes public. Gov.Bar R. V(11)(E)(2)(a).

Disciplinary Counsel's power derives from the Supreme Court Rules for the Government of the Bar of Ohio. Rule V outlines disciplinary procedure and disciplinary counsel's authority. See Gov Bar R. V. The Office of the Disciplinary Counsel is headed by the Disciplinary Counsel, who is an attorney appointed by the Board of Commissioners on Grievances and Discipline with the approval of the Supreme Court. The appointment is for a four-year term with removal by the Supreme Court for just cause only. See Gov.Bar R. V(3)(B)(1). The Disciplinary Counsel appoints attorneys to serve as assistant disciplinary counsel and also certifies bar counsel designated by certified grievance committees. Gov.Bar R. V(3)(B)(2). The disciplinary "Super Prosecutor" operates under Gov.Bar R. V's procedure for discipline. The "Super Prosecutor's" function is to enforce and prosecute alleged violations of the Ohio Rules of Professional Conduct,[5] similar to how a criminal prosecutor's function is to enforce the criminal statutes found in the Ohio Revised Code. The focus of both types of prosecutor is to protect the public interest. Specifically, disciplinary counsel's specific purpose is "to ensure that members of the bar are competent to practice a profession imbued with the public trust."[6] However, the rights of the lawyer accused of wrongdoing differ greatly from the criminal accused of wrongdoing. This difference affords disciplinary counsel an arsenal of weapons and advantages that are not at the disposal of the criminal prosecutor. Overall, Gov.BarR. V is to be construed liberally and only prejudicial irregularities or errors resulting in a miscarriage of justice warrant invalidation of a proceeding conducted under the Rule. SeeGov. Bar R. 11(D). Meanwhile, our Constitution mandates very strict protections of the criminally accused from investigation through appeal. These protections limit the power of the criminal prosecutor in a manner that do not restrict disciplinary counsel when prosecuting an attorney's alleged misconduct. Whether this is completely fair is up for debate. The Supreme Court of Ohio has held that disciplinary proceedings are neither civil nor criminal and are instituted to safeguard the courts and to protect the public from misconduct by those licensed to practice law.[7] However, the Supreme Court of the United States, has described the lawyer disciplinary process as quasi-criminal.[8]

III. YOU MAY NOT REMAIN SILENT

The Fifth Amendment to the United States Constitution provides:

> [N] or shall any person . . . be compelled in any criminal case to be a witness against himself . . .

The Self-Incrimination Clause primarily comes into play during criminal investigations, but of course, it also protects against self-incrimination during trial. Nothing frustrates a prosecutor more than when an investigation dead ends because the accused refuses to talk and there is no other available source of inculpatory evidence. Likewise an entire prosecution can fall apart if the accused's confession is excluded due to a violation of his 5th Amendment right to remain silent. The Self-Incrimination Clause also requires that the prosecutor not comment to the jury on the accused's silence before or during trial.

In contrast, if an attorney is accused of wrongdoing by disciplinary counsel the attorney *must* talk. In fact, a respondent attorney must either fully explain himself or risk a more severe sanction or even a separate disciplinary violation. The "Super Prosecutor" is afforded a very special power in this regard.

Rule 8.1 states:

In connection with. . .a disciplinary matter, a lawyer shall not do any of the following:

> (a) knowingly make a false statement of material fact;
> (b) in response to a demand for information from . . .disciplinary authority, fail to disclose a material fact or *knowingly* fail to respond . . .

An attorney who is the subject of an investigation may be disciplined for failure to cooperate with such investigation. Rule 8.1 explicitly mandates that the accused respond to a demand for information from disciplinary counsel. This "response" requires the lawyer to provide inculpatory information, if any. Regardless of how the accused attorney views the merits of the grievance, the attorney may be disciplined for failure to cooperate. For example, in *Medina County Bar Association v. Muhlbach*, 83 Ohio St.3d 224, 699 N.E.2d 459 (1998), no action was taken with regard to the subject matter of the original complaint, but a six month suspended suspension was imposed because the lawyer did not respond upon notice of the disciplinary complaint.[9] If an underlying violation is found, failure to cooperate can also be treated as an aggravating factor in deciding an appropriate sanction.[10]

Additionally, disciplinary counsel can require others to help with the investigation of the attorney. Any justice, judge,

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or attorney may be called on to assist in an investigation or to testify in a hearing before the Board or a panel, as to any matter that he or she would not be bound to claim as privileged as an attorney. Gov.Bar R. V 4 (G). A justice, judge, or attorney shall not neglect or refuse to assist or testify in an investigation or hearing. See Gov.Bar R. V (4)(G).[11] If any person subpoenaed as a witness neglects or refuses to obey a subpoena, to attend, to be sworn or affirm, or to answer any proper question, the failure is considered a contempt of the Supreme Court and may be punished accordingly. See Gov.Bar R. V(11)(C). Neither the accused attorney nor a witness to the attorney's alleged misconduct has the right to remain silent during disciplinary proceedings. This powerful tool at the "Super Prosecutor's" disposal provides an effective means of uncovering the truth that the criminal prosecutor does not enjoy.

IV. YOU DO NOT HAVE THE "RIGHT" TO A SPEEDY RESOLUTION

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy. . . trial . . .

The Speedy Trial Clause regulates delay regarding initiating a formal criminal charge and the pre-trial deprivation of the accused's liberty before the start of trial. The right to a speedy trial keeps defendants from sitting in jail for an indefinite period before trial. It also improves the chances that an adequate defense can be prepared. If a trial is delayed for a long time then witnesses may start to disappear, evidence may be lost or destroyed and memories may fade.

The first step in the disciplinary process is the filing of a grievance, however, disciplinary proceedings are not subject to general statutes of limitations or speedy trial provisions. Unlike the constitutional time limits imposed on the criminal prosecutor, disciplinary counsel is not constrained by statutes of limitations.[12] As a consequence, past conduct stretching back numerous years may still form the basis of a grievance. For example, in *Office of Disciplinary Counsel v. Talbert*, 71 Ohio St.3d 438, 644 N.E.2d 310 (1994), a fourteen-year old claim was considered in a disciplinary proceeding. Although delay in filing a grievance may at some point lead to a finding that fundamental fairness has been violated, that point in time is arbitrary.[13] In theory, grievance investigations should proceed within a specified time frame. According to Gov.Bar R.V(4)(D), an investigation is to be concluded within 60 days from the date of the receipt of the grievance, and a decision regarding the disposition of the grievance made within 30 days after the conclusion of the investigation. However, the Secretary of the Board of Commissioners on Grievances and Discipline may grant disciplinary counsel an extension of time to complete an investigation for good cause. Gov.Bar R. V 4(D)(1). If an extension is granted, the investigation is to be completed within 150 days from the date of receipt of the grievance. These time limits are not analogous to a speedy trial statute or a statute of limitations, but instead are intended to protect the public from further misconduct during a prolonged investigation.[14] As demonstrated by the case law, the Supreme Court of Ohio rarely finds that disciplinary counsel's delayed investigation prejudiced the accused attorney.[15]

V. YOU ARE NOT FREE FROM SEARCHES AND SEIZURES

The Fifth Amendment to the United States Constitution provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

Probable cause, and even a search warrant, is required for a criminal prosecutor or law enforcement investigator to search the alleged criminal's personal belongings for evidence a crime was committed. Comparatively, disciplinary counsel has wide latitude to simply issue subpoenas for information needed during an investigation. Subpoenas may be issued pursuant to the provisions of the Board of Commissioners on Grievances and Discipline Procedural Regulation (BCGD). BCGD Proc. Reg. 7(A) provides that, upon application of disciplinary counsel, the Secretary, or chair of a Certified Grievance Committee...shall have the authority to cause testimony to be taken under oath in disciplinary investigations and proceedings. A subpoena may also be utilized to compel the production of documents in the county where the witness resides. BCGD Proc. Reg. 7(B)(2). A notice of the subpoena is not required to be issued to the respondent unless probable cause for the grievance has been found. In other words, disciplinary counsel may issue subpoenas for information during the investigatory stage without informing the attorney accused of misconduct about the subpoena or the information sought.

The power of disciplinary counsel to obtain information

needed during an investigation is fairly absolute and judges are not given preferential treatment. Recently, according to the Morning Journal[16] in Lorain County, Disciplinary Counsel requested ten tape recordings of proceedings in Lorain County Court of Common Pleas Judge James Burge's courtroom that date back to August 2012. Disciplinary Counsel sent the request to the Lorain County Administrator and the head of the IT department for the county. The reason for the request of the tapes was not disclosed by Disciplinary Counsel to Judge Burge, although Judge Burge surmised it is obviously related to Disciplinary Counsel's investigation of him relative to his handling of a particular sentencing. This situation demonstrates that even judges are subject to disciplinary counsel's broad authority to request or subpoena information that disciplinary counsel deems relevant to an investigation.

VI. CONCLUSION

Thankfully, the typical lawyer in Ohio will never have to defend against allegations of misconduct. For the lawyer that does find himself in this unfortunate position, understanding the disciplinary process and in particular, the role of disciplinary counsel as "Super Prosecutor" is critical in order to help the accused lawyer avoid surprises and better equip him to mount a defense. Unlike the criminal prosecution where the focus is on protecting the accused's constitutional rights from investigation through appeal, a disciplinary prosecution is focused on protecting the public's trust and interest. Ultimately, we need disciplinary counsel to be a "Super Prosecutor" so that the integrity of the profession we have all chosen is preserved.

Endnotes

1 373 U.S. 83 (1963).

2 See: Comment [1] to Disciplinary Rule 3.8, which governs the special responsibilities of a prosecutor.

3 The power to regulate the legal profession rests solely in the Supreme Court of Ohio and lower courts have no direct role in the disciplinary process. *Smith v. Kates*, 46 Ohio St.2d 263, 348 N.E.2d 230 (1976). The Supreme Court carries out its duties with the assistance of three disciplinary bodies: the Disciplinary Counsel, the certified grievance committees of state and local bar associations, and the Board of Commissioners on Grievances and Discipline. Disciplinary Counsel and the certified grievance committees are separate bodies. Both are the investigatory and prosecutorial arms of the grievance process, both can investigate allegations of misconduct by judges or attorneys and both can initiate complaints as a result of the investigation. See Gov.Bar R. V(3)(B) and Gov.Bar R. (3)(C); Arthur F. Greenbaum and Ruth Bope Dangel, *Lawyer's Guide to the Ohio Code of Professional Responsibility* §§ 10.1, 10.6-10.43(1996). Although both bodies have the same overall investigatory power and function, there are nuances between the two which are beyond the scope of this article.

4 Certified grievance committees of state and local bar associations are certified by the Board of Commissioners on Grievances and Discipline to investigate allegations of attorney misconduct. With the exception of Cuyahoga County, there can be no more than one certified grievance committee per county. There are thirty-four certified grievance committees across Ohio. The majority of the members are attorneys admitted to the practice of law in Ohio, but, as of January 1, 2000, at least three members, or ten percent of the committee, whichever is greater, must be non-attorneys. Gov.Bar R. V(3)(C); Gov.Bar R. V(3)(C)(1)(a).

5 The Ohio Rules of Professional Conduct were adopted by the Supreme Court of Ohio on July 1, 2006, and became effective February 1, 2007. The Ohio Code of Professional Responsibility, adopted effective October 5, 1970, and not the Rules, continues to apply in all disciplinary matters involving conduct that occurred on or before January 31, 2007.

6 *Fred Siegel Co., LPA v. Arter & Hadden*, 85 Ohio St.3d 171,178, 707 N.E.2d 853, 859 (1999) (The focus of a disciplinary action is not to provide redress to individuals injured by an attorney's conduct.); *Office of Disciplinary Counsel v. Trumbo*, 76 Ohio St.3d 369, 669 N.E.2d 1186 (1996).

7 *See Ohio State Bar Ass'n v. Illman*, 45 Ohio St.2d 159, 342 N.E.2d 688 (1976); *Ohio State Bar Ass'n v. Weaver*, 41 Ohio St.2d 97, 322 N.E.2d 665 (1975).

8 *In re Ruffalo*, 391 U.S. 961 (1968).

9 See also, *Cleveland Bar Ass'n v. James*, 109 Ohio St.3d 310, 2006-Ohio-2424, 847 N.E.2d 438; Lake County Bar Ass'n v. Vala, 82 Ohio St.3d 57, 693 N.E.2d 1083 (1998); *Cuyahoga County Bar Ass'n v. Dyck*, 59 Ohio St.3d 68,570 N.E.2d 1105 (1991).

10 *Akron Bar Ass'n v. Pringle*, 75 Ohio St.3d 242, 661N.E.2d 1107 (1996). BCGD Proc. Reg., Section 1010(B)(1) sets forth the following aggravating factors, which do not control the Board's decision, but may be considered in favor of recommending a more severe sanction:
(a) prior disciplinary action;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) lack of cooperation in the disciplinary process;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of and resulting harm to victims of misconduct;
(i) failure to make restitution.

11 See also Ohio Code of Judicial Conduct Canon 3(D)(3).

12 *Columbus Bar Ass'n v. Teaford*, 6 Ohio St.2d 253, 217 N.E.2d 872 (1966).

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