Law Firm Compliance Programs, Sentencing Guidelines, and the Attorney-Grievance System – How are they Related?

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In early 2005 the Supreme Court overruled, in two 5-4 opinions, the mandatory nature of the Federal Sentencing Guidelines that were established over twenty years ago, these rulings will also affect states that have adopted guideline systems. Despite these decisions, the federal district courts must still consult the Guidelines and consider them when sentencing, after which their sentencing decisions will be reviewed by the appellate courts for unreasonableness.[3]

Changes made to the Guidelines since their formulation by the Sentencing Commission in 1991, reflect a shift from a singular emphasis on corporate programs that prevent and detect criminal conduct, to ones that "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." [4] A suggested corporate response to this requirement, designed to ameliorate the severity of sentences for infractions, carries the name provided by the 2004 amendments to the Sentencing Guidelines: "compliance and ethics program."

The relatively recent focus on ethics in wide-sweeping movements within the legal community highlights the compatibility of a formal compliance and ethics program with the attorney disciplinary system. The ABA charged its Ethics 2000 Commission with a review of the Model Rules of Professional Conduct, and the Texas Supreme Court in turn formed a Task Force to consider the Texas Disciplinary Rules of Professional Conduct in light of the revised Model Rules. Recommendations made by the Task Force embrace the long-standing Model Rules, which would require formal "ethics compliance" programs in law firms.

Factors considered in the assessment of sanctions under the Texas Rules of Disciplinary Procedure, which govern the operation of the disciplinary system, reflect concerns similar to those underlying the seven recommendations for an effective compliance and ethics program in the 2004 Sentencing Guidelines.[5] Additionally, the Chief Disciplinary Counsel's Office recently accepted, as part of a negotiated settlement of a complaint, a forward-looking compliance program instituted by the respondent attorney. These examples lead to the conclusion that subsequent disciplinary rules of professional conduct may ultimately mirror the Model Rules in terms of an ethics compliance program.

This article summarizes the points of the compliance and ethics program detailed in the 2004 Sentencing Guidelines, the tenor of the ABA Model Rules calling for such a program, the similarities between the 2004 Sentencing Guidelines and the sanctions factors in the Texas procedural rules, and the general nature of the compliance program recently submitted in negotiation with the Chief Disciplinary Counsel. Prior to a discussion of these topics, however, appears a brief explanation of the relevance of the attorney disciplinary system for all practicing Texas lawyers.

The Attorney Disciplinary System

Although arguably the course most applicable to all law students, "Professional Responsibility" may stay with students only through some of the more vivid anecdotal examples the professor uses. After graduation, the overall concept of recourse for client dissatisfaction so pales in comparison to the more immediate goal of meeting the demands of supervising attorneys that even the required annual CLE hours in ethics tend to highlight, at best, extreme egregious behavior or a generalized body of rules. Indeed, attorneys who are pulled into the disciplinary system are often surprised to learn that the rules regarding their conduct (the Disciplinary Rules) differ from those governing the grievance system (the Rules of Disciplinary Procedure), and that both sets of rules undergo periodic changes.[6]

This relative ignorance of the specifics of professional ethics, gives way to panic and often sheer terror when an attorney receives a notice from the Chief Disciplinary Counsel that a grievance has been filed against him or her. At such a time, it is not enough that the respondent attorney feels that he or she practices in an overall ethical manner; that ethical practice must now be proven, both in general and with regard to the particular allegations. This is often a daunting task, especially when most attorneys have difficulty reciting the essence of more than a few of the Rules of Professional Conduct.

The respondent attorney, or the attorney against whom a grievance has been filed, becomes involved in the disciplinary process initially with their response to the investigation, which is launched by the Chief Disciplinary Counsel ("CDC") to determine whether "just cause" exists to proceed with the grievance. The goal at that point is to convince the CDC to dismiss the grievance. Even if the respondent attorney so persuades the CDC, the new procedural rules provide that a Summary Disposition Panel can disagree with the CDC and vote for the complaint to continue on in the grievance system. Thereafter, the respondent attorney seeks to convince an Evidentiary Panel, who will conduct a trial-like proceeding, to dismiss the complaint, negotiate a minimal private sanction, or mete out a minimal public sanction after the proceeding.

Texas currently has approximately 70,000 attorneys. With 9,000 grievances submitted each year to the CDC, and around one-third of those, which are classified as complaints, proceeding on in the disciplinary system, statistics suggest the overall likelihood of a grievance being filed against any particular practitioner is great. If a grievance is classified as a complaint, meaning that, if all of the allegations stated within the grievance are taken as true, they constitute a violation of the Disciplinary Rules of Professional Conduct, the CDC will then investigate the matter. Clearly, attorneys who practice in those areas of the law where emotions run high (e.g., criminal law, family law, personal injury law) are more likely to have a grievance filed against them than those that do not, and these are also the areas of practice where the

largest percentages of resulting complaint determinations occur. Additionally, attorneys in these practice areas are more likely to be solo practitioners or members of small firms and less able, without negatively impacting their cash flow, to devote time to responding to a CDC's investigation and, should the complaint go forward from that point, prepare for a proceeding before an Evidentiary Panel or district court.

What attorneys in other practice areas may not realize is that "non-client relations" is the source of the fourth largest number of complaints, which again will trigger a respondent attorney's need to participate in an investigation and, possibly, a trial. Complainants in these instances come from other lawyers, laymen, such as individuals on the opposite side of a matter, and, sometimes, judges. Thus, quite literally, every lawyer who has clients or who works with other lawyers is vulnerable to having a grievance filed against him or her.

Effective Compliance and Ethics Program

In the 2004 Sentencing Guidelines, a provision was added entitled "Effective Compliance and Ethics Program" (prior to this it resided merely in extensive commentary). This provision specifies what a corporation must do to affect a determination of its guilt ("Culpability Score") and assessment of its punishment ("Recommended Conditions of Probation").[7] The added language then sets out what have become known as "the seven minimum requirements," or steps of a program that effectively encourage compliance and ethical conduct.[8]

The seven minimum requirements are as follows:

1. Established standards and procedures, including a code of ethics and conduct

2. Senior level involvement and commitment

3. Hiring, placement, and promotion consistent with the compliance and ethics program

4. Periodic communication and training

5. Ways to monitor effectiveness of program and provide for whistle-blowing

6. Incentives and disciplinary measures for compliance with and deviation from program

7. Responses to violative conduct and modification of program to prevent future incidents[9]

The commentary to these requirements explains how the particular size and nature of an organization determine the details of the program. For example, if an organization's business creates a substantial risk of certain types of criminal behavior, it is that specific type of behavior that the organization's program should "take reasonable steps to prevent and detect."[10] The history of an organization may also indicate the types of conduct it should attempt to prevent and detect.[11]

While the commentary explains that to meet the guideline requirements small corporations must "demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations," it clarifies that a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of larger organizations. [12] Specific examples of compliance with "less formality and fewer resources" are as follows:

(I) the governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization's compliance and ethics efforts;
(II) training employees through informal staff meetings, and monitoring through regular "walk-arounds" or continuous observation while managing the organization;
(III) using available personnel, rather than employing separate staff, to carry out the compliance and ethics program; and
(IV) modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.[13]

Ethical Responsibilities of a Partner or Supervisory Partner in a Law Firm

In formulating the 1990 Texas Disciplinary Rules of Professional Conduct, the drafting committee considered all of the Model Rules of the American Bar Association. In the sections entitled, "Law Firms and Associations," both the Texas Rules and the ABA Rules have two Rules that suggest the need for an ethical compliance program: "Responsibilities of a Partner or Supervisory Lawyer" and "Responsibilities Regarding Nonlawyer Assistants."[14]

The Texas version, adopted in 1989 and made effective in 1990, does not impose vicarious liability on a partner who has no knowledge of the disciplinary violation of another lawyer (or a nonlawyer assistant), nor does it make a senior lawyer liable for failure to have in place adequate measures to control misconduct. However, the ABA counterparts clearly impose liability for failure to implement adequate measures to control misconduct and may impose vicarious liability on partners for their knowledge of the misconduct of others.[15]

Nonetheless, the Texas drafting committee, interested in the avoidance of unethical conduct, recommended, in comments, that a law firm adopt internal controls, and broadly suggested how they may be implemented:

> "The measures that should be undertaken to give such reasonable assurance may depend on the structure of the firm or organization and upon the nature of the legal work performed. In a small firm, informal supervision and an occasional admonition ordinarily will suffice. In a large firm, or in practice situations where intensely difficult ethical problems frequently arise, more elaborate procedures may be called for in order to give such assurance. Obviously, the ethical atmosphere of a firm influences the conduct of all of its lawyers. Lawyers may rely also on continuing legal education in professional ethics to guard against unintentional misconduct by members of their firm or organization."[16]

The Task Force recommended to the Texas Supreme Court the inclusion of a requirement in Rule 5.01 that a partner or supervisory lawyer make a "reasonable effort" to ensure compliance with the rules of professional conduct by others in the firm, which is essentially the language used in the ABA Model Rule. The Task Force also recommended a similar addition to Rule 5.03, regarding nonlawyer assistants. Regardless of whether these suggestions ultimately become part of the Texas Disciplinary Rules, the fact that the Task Force has urged them suggests a receptive climate for formal ethics compliance programs for law firms.

Sanctions Factors in Texas

Once the Chief Disciplinary Counsel's Office has assessed "just cause" to proceed with a complaint, the respondent attorney has a choice of a hearing before an Evidentiary Panel or a trial in district court. The Texas Rules of Disciplinary Procedure provide that in determining the

appropriate sanctions, the Evidentiary Panel or the court must consider a variety of factors.[17] While the Texas Rules target individual attorney conduct, and the federal requirements for an effective ethics and compliance program concern corporations, parallels still appear between the two:

TEXAS DISCIPLINARY RULES	REQS. FOR COMP. & ETHICS PROGRAM
A. nature and degree of professional misconduct involved	**nature and seriousness of criminal conduct**[18]
B. seriousness of and circumstances surrounding the misconduct	**nature and seriousness of criminal conduct**[19]
C. loss or damages to the client	**[appears to be an element of A & B in the Tex. Rules]**
D. damage to the profession	**appears to be an element of A & B in the Tex. Rules]**
E. assurance that future clients will be insulated from same type of misconduct	**established standards and procedures**
F. profit to attorney	**hiring, placement, and promotion consistent with program**
G. avoidance of repetition	**ways to monitor effectiveness of compliance program; responses to conduct and modification of program**
H. deterrent effect on others	**incentives and disciplinary measures**
I. maintenance of respect for legal profession	**Culpability Score drops if expressions of responsibility and remorse appear in pretrial statements and conduct**[20]
J.-L.[21] **conduct of attorney during evidentiary proceeding or trial; other relevant personal or professional information about attorney**	**Culpability Score drops if organization self-reports, cooperates in investigation, and accepts responsibility**[22]

Sample Compliance Program for Law Firms

If "[e]thics is primarily not about defining what is wrong . . . [i]ndividuals and organizations that have a robust, authentic ethics program will spend their major energy articulating and pursuing positive principles, values, and virtues." [23] In other words, while compliance may well follow ethical behavior, the reverse is not necessarily true. An ethics

compliance program, such as the one recently used during a negotiation with the office of the CDC, should follow several critical observations.

First, “ethics is more than compliance.”[24] The amendments to the Sentencing Guidelines calling for an ethical culture may suggest to some that narrowly avoiding the prohibited conduct of the Disciplinary Rules will necessarily result in compliance and some compassion in the event of a slip; that is a misconception. The Rules themselves admit to “stating [only] minimum standards below which no lawyer can fall without being subject to disciplinary action.”[25] Even with the comments, the Rules “do not . . . exhaust the moral and ethical considerations that should guide a lawyer.”[26]

Second, ethics is more than a printed list of prohibitions, posted in a prominent place, promoted by wishful thinking and prayer.[27] Inspirational lists do have their place, as long as they truly inspire. Relevant examples include “Ten Principles of Highly Ethical Business Leaders,” “Nine Good Reasons to Run a Business in an Ethical Manner,” and “Eight Traits of a Healthy Organization Culture.”[28] Formulating and implementing a compliance and ethics program is as ongoing and requires as much enthusiasm as imparting discovery and litigation skills to new associates.

Third, as the Sentencing Guidelines suggest, a compliance and ethics program should be custom-made. For a law firm, this means that policies should reflect, among other things, the type of work the firm does and the characteristics (e.g., skill and experience) of the legal personnel involved. For example, a firm that takes no cases on referral may require no more than a passing awareness of the new referral fee Rules. Conversely, a firm that thrives on such cases should have a fairly extensive awareness of these Rules, their general philosophy, and how to respond to their particular requirements.

As another example, a firm with a lawyer who has gone through the investigatory process with the CDC regarding a complaint based on the alleged failure of the lawyer to communicate with a client, the number one complaint made by clients, may devise a detailed formula for responding to client calls. This plan could reflect an attempt to comply with the relevant Disciplinary Rules and the seven requirements for an ethics and compliance program:

Goal/Source	Response
keep client reasonably informed (TDRPC 1.03(a)); established standards & procedures (req.#1); monitor effectiveness of communication problems (req. #5)	**call client at least monthly to provide status, if status not provided otherwise (such as by calling client for information); document client contact in time-sheet with brief description of topic(s) discussed; if substantive decisions made, document discussion in memo to file; if decisions complex or significant, document in brief letter to client (note: always have 2 ways to document communication, such as on disk and hard copy in file, or on time-sheet and phone bill); calls to client's number and indication that message was left should also be documented; in written status report, invite client to call with questions**
promptly comply with reasonable requests for information (TDRPC 1.03(a)); established standards & procedures (req. #1)	**client calls to be documented on call slips, with copies of same retained in dated volumes; if attorney unable to return call within 1-2 days, legal assistant or secretary should return call to determine client's needs; if attorney involvement still needed, legal assistant or secretary to indicate that in writing to attorney, with date and specification of why client needs to talk to attorney; if attorney cannot call client within 1-2 days, that attorney or legal assistant or secretary should locate another attorney to do so; all attempts at communication should be documented**
periodic communication & training (req. # 4)	**receptionist should be sensitive to callers who express that they have not had a call returned and indicate that on call slip; receptionist could prepare log of callers who seem irate for any reason and distribute at end of day**
incentives and disciplinary measures (req. #6); program modification if needed (req. #7); senior level involvement (req. #2); hiring, placement, and promotion consistency (#3)`	**in meetings every 1 or 2 weeks, briefly discuss particular successes and failures in client communications; management should praise successes and determine solutions for failures; timely communication with clients should be a basis of compensation and hiring, and failure to achieve that could result in discharge**

explain so that client understands (TDRPC 1.03(b)); established standards & procedures (req. #1)	**if client speaks or is more comfortable with foreign language, insure that language is used with client or with individuals designated by that client to receive the information (e.g., close relative); if client is corporation, have designated in writing primary and secondary individuals with whom communication should occur; if client needs to make choices as to certain matters, follow up in writing prior to acting on those choices, if time permits**

While the above may seem time-consuming, a lawyer pulled into the disciplinary system by a client who charges that the lawyer did not return phone calls or otherwise advise the client of key events in a timely fashion, such as the lawyer's determination that the client really has no cause of action, may be surprised to learn how prepared the client is to make his or her case to the CDC. Such a client may have details as to dates and times of calls placed but not returned, while the lawyer may not have retained copies of call slips or phone bills with which to refute the allegations. The client, who will probably have only a single case, while the lawyer is managing many, may argue that he never understood that the periodic telephone calls during which the lawyer supposedly explained that the evidence would not support a cause of action, meant that the lawyer would not be filing suit. If the lawyer has only a recollection of discussing that conclusion with partners and associates and in only general time frames, then corroboration that the firm reached that conclusion at the time of the phone calls with the client may be lacking. Finally, if the lawyer waits until the client demands that suit be filed, regardless of the evidence, before setting out in a carefully drafted letter, sent with return receipt requested, why the firm cannot take the case, the statute of limitations may be so close to running that the client will be left with few options.

A documented adherence to the relevant Disciplinary Rules, based on established procedures, might not only result in dismissal of a complaint based on Rule 1.03, but also could have facilitated the separation of the lawyer from this client sooner, allowing the client time to

find a lawyer who could have viewed the evidence differently, therefore heading off the filing of a complaint at all. With a clear ethics and compliance program, the CDC could view the client's complaint arising in spite of the law firm's ethical approach, and not due to anything the firm was neglecting to do. In addition, with the documentation afforded by adherence to the program, the lawyer would more easily be able to assist the CDC with the investigation, leading to a speedier resolution by the CDC and less time invested by the lawyer.

The compliance program recently accepted by the CDC contained policies on standards of practice, minimum standards, practice management standards, monitoring compliance, and developing best practice guidelines. The standards of practice included policies regarding various aspects of the firm's business, such as client communications, which provided that a client's phone call would be returned within 24 hours, and document retention and destruction. Concerning monitoring, the program called for the designation of an attorney as an internal compliance officer, along with someone outside of the firm, such as the Law Office Management Section of the State Bar or another firm or attorney, to monitor compliance and provide feedback annually.

Conclusion

The Disciplinary Rules have always addressed individual lawyers, not law firms. But numerous individuals in a firm often become involved whenever an individual lawyer is the subject of a complaint, in the case of a small firm or solo practice, virtually everyone assumes additional duties. When their time is spent responding to an investigation and subsequently defending a complaint, not only the firm's income but also its attention to other matters may be affected. Therefore, having measures to avoid grievances in the first place not only benefits both the public and the legal profession, but will also provide a significant benefit to individual attorneys and their law firms.

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[3]United States v. Booker, 125 S. Ct. 738, 745 (2005).

[4]*Compare* United States Sentencing Commission, Guidelines Manual, §8C2.5(f) and §8A1.2, Application Note 3(k) (Nov. 2002), with §8B2.1(a) (Nov. 2004).

[5]*See* Tex. R. Disciplinary P. 2.18.

[6]The Texas Rules of Disciplinary Procedure, for example, changed dramatically for all grievances filed on or after January 1, 2004.

[7]United States Sentencing Commission, Guidelines Manual, §8B2.1 (Nov. 2004).

[8]*See, e.g.,* Kenneth Johnson, The Ethics Recourse Center, "Federal Sentencing Guidelines: Seven Minimum Requirements," http://www.ethics.org/resources/kj3.html.

[9]*See, e.g.,* "Effective Compliance and Ethics Programs–New USSC Guidelines," *Resultor*, published 06/01/04, revised 10/15/04, www.resultor.com.

[10]United States Sentencing Commission, Guidelines Manual, §8B2.1(c), Application Note 6(A)(ii) (Nov. 2004).

[11]*Id.*

[12]*Id.* at §8B2.1, Application Note a(C)(iii).

[13]*Id.*

[14]These are Rules 5.01 and 5.03, respectively, in the Texas Rules and 5.1 and 5.3 in the ABA Rules.

[15]See the discussion in Robert P. Schuwerk and Lillian B. Hardwick, *Texas Handbook of Lawyer and Judicial Ethics* (West 2004), §§10.01 and 10.03. The Texas Rules, however, are

more stringent on this general topic than the corresponding Model Rules by stretching liability to the partner who "knowingly permits" the violations by another lawyer. *Id.*

[16]Tex. Disciplinary R. Prof'l Conduct 5.01 cmt.7.

[17]Tex. R. Disciplinary P. 2.18 and 3.10.

[18]United States Sentencing Commission, Guidelines Manual, §8B2.1(c), Application Note 6(A)(i) (Nov. 2004). While not one of the seven program requirements, subparagraph (c) of §8B2.1 requires that, in implementing the program reflecting the seven requirement, an organization must periodically assess the risk of criminal conduct and take the appropriate steps to modify each of the requirements so as to minimize that risk. The Culpability Score increases if the organization has violated a judicial order, injunction, or a condition of probation, or has obstructed justice or attempted to do so regarding the particular conduct. *Id.* at §8C2.5(d) & (e).

[19]*Id.*

[20]United States Sentencing Commission, Guidelines Manual, §8C2.5(g), Application Note 13 (Nov. 2004).

[21]Tex. Disciplinary R. Prof's Conduct 2.18, pertaining to Evidentiary Panel proceedings, contains sub-paragraphs A-J; Rule 3.10 contains two additional sub-paragraphs, partly due to the different nature of the proceeding.

[22]United States Sentencing Commission, Guidelines Manual, §8C2.5(g) (Nov. 2004).

[23]David W. Gill, "Ethics is More Than Compliance," http://www.ethix.org/body.php3?id=88.

[24]David W. Gill, "Ethics is More Than Compliance," http://www.ethix.org/body.php3?id=88.

[25]Tex. Disciplinary R. Prof'l Conduct preamble ¶ 7.

[26]*Id.* at ¶ 11.

[27]Stuart Gilman, president of the Ethics Recourse Center in Washington, D.C., dubbed these the 3 Ps of Enron's ethics program: print, post, and pray. Heesun Wee, "Corporate Ethics" Right Makes Might," Business Week online, Apr. 11, 2002, http://www.businessweek.com:/print/bwdaily/dnflash/apr2002/nf20020411_6350.htm?mainwindow.

[28]*See* "Tools for Better Business," http://www.ethix.org/tools.html.