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Invoking the Fifth Amendment Privilege In an Attorney Disciplinary Proceeding

There is little doubt that the so-called Q&A deposition is a powerful investigative tool in the arsenal of the counsel to the respective Disciplinary/Grievance Committees of the Appellate Division's First and Second Departments.[1] Where an attorney who is subject to a complaint of misconduct is either requested, or commanded pursuant to subpoena, to appear for such an deposition, the question is: what, if any, are his/her options?

The first option is, of course, to appear and voluntarily testify. The second is to appear and decline to testify asserting his/her Fifth Amendment constitutional right against self-incrimination. Although the validity of a good faith assertion of this privilege cannot be questioned, does it really help the attorney in the long run?[2] The answer is that, it depends.

If the Respondent is substantially exposed to the genuine possibility of a separate criminal proceeding based upon the same subject matter as that which he will be called upon to address at the "Q&A", then invoking the privilege is nearly mandated. This is particularly so, since disciplinary counsel have no authority to grant immunity and rarely if ever, will the District Attorney consider conferring immunity unless the office is actively and independently pursuing the same matter.

Moreover, even assuming that a criminal investigation or prosecution was being pursued, that fact alone generally would not entitle the respondent/attorney to a "stay" of proceedings before the Disciplinary Committee. Quite to the contrary, the Rules specifically hold that such stays may not be appropriate.[3] Similarly, acquittal on criminal charges based upon "substantially similar material allegations" will not alone justify termination of the disciplinary investigation.[4]

If the attorney decides, for whatever reason, that it is in his best interest to assert his constitutional privilege and decline to testify at the Q&A deposition, he should be aware of one significant and undisputed fact, namely, that he has not offered his own explanation of the allegations against him. The consequences are quite simply that the Committee is left with no option but to rely on any unrefuted evidence at hand in formulating the charges against the attorney.

Moreover, if the Respondent continues to assert the constitutional privilege at the hearing on those charges he, in

effect, will limit his defense and will not, as a matter of record, contest through his own testimony the charges against him.

While his assertion of his Fifth Amendment Privilege clearly may not be held against the respondent, his failure to contest the Committee's prima facie case is just as clearly a factor the finder of fact may and will consider on the issue of guilt and/or mitigation.[5]

Negotiation Strategy

Is there any room to negotiate the Respondent's privilege against self-incrimination with disciplinary counsel? The answer is a resounding: perhaps! Let's look at the following example:

The Respondent has received a request to appear for a Q&A concerning allegations that he has mishandled client funds. The matter is, of course, still in the investigative stage and no charges have been served. The Respondent is advised by an attorney that disciplinary counsel will very likely argue that any statements made by Respondent at the deposition constitute "admissions" of serious misconduct sufficient to warrant an order of temporary suspension during the pendency of formal disciplinary proceedings.[6]

The Respondent has consistently denied being guilty of "conversion" of funds (DR 1-l02(A)(4)) since his actions lacked venal intent, a necessary element. The respondent further contends that that denial raised a genuinely disputed issue of fact sufficient to defeat an interim suspension motion.

Nevertheless, Respondent feared that the suspension motion might be granted since it would be based merely upon his responses to the selective questioning by disciplinary counsel and not in the context of a full adversary hearing to which he would be entitled at the subsequent formal disciplinary proceeding. Moreover, Respondent had a genuine concern that this proceeding could result in the initiation of criminal charges.

Upon the advice of counsel, Respondent made the following offer to disciplinary counsel: respondent agreed to testify at the Q&A deposition upon condition that disciplinary counsel agree not to use any of respondent's testimony in support of any motion for an interim suspension. If disciplinary counsel declined to accept respondent's offer, the respondent had no alternative but to exercise his privilege against self-incrimination by declining to testify.

Predictably, disciplinary counsel refused to agree and Respondent invoked his privilege by declining to testify. Disciplinary counsel's subsequent motion for an interim suspension, based in substantial part on the claim that

respondent failed to refute the Committee's "uncontroverted" evidence, was granted by the Appellate Division.[7]

Respondent brought on a motion in the Court of Appeals for leave to appeal and for a stay, both of which were granted.[8] He argued, among other things, that the Appellate Division's suspension order was improper since respondent "controverted" the allegation by his denial of guilt, and that the evidence failed to establish that he acted with "venality". Thereafter, the Court of Appeals reversed the interim suspension order noting that although Respondent's denial may not have "controverted" allegations made under DR 9-102 (attorney record keeping responsibilities), it "did give rise to a question of whether Respondent violated DR 1-102(A)(4), which . . . has been held to require a showing of intent to defraud, deceive or misrepresent . . . ".[9]

Significantly the Court of Appeals fully recognized that the respondent had exercised his constitutional privilege: "[W]ith regard to any specific questions about his handling of client funds, Respondent affirmed that he had 'no alternative but to exercise [his] constitutional right against self-incrimination.'"[10]

The epilogue to this saga, which to this point had so clearly a favorable result, namely immediate restoration of respondent's right to practice law, is, unfortunately, not so pleasant since Respondent was ultimately disbarred. The Court found not only that he acted with "dishonesty", but in doing so reversed the referee's findings to the contrary. Further, as noted above, the Court considered Respondent's invoking of his privilege against self-incrimination as an aggravating factor on the issue of sanction.[11]

Respondent sought leave to appeal to the Court of Appeals from the disbarment order, arguing, among other things, that his right against self-incrimination was violated by the Appellate Division's holding against him that his assertion of his privilege was an aggravating factor, albeit limited to sanction. Since the Court of Appeals denied leave, we do not have an adjudication on the merits of this issue.[12]

Conclusion

A determination by a respondent of whether or not it is in his or her best interest to invoke his Fifth Amendment privilege in a disciplinary Q&A investigation is always to be taken with great care, concern and seriousness within the context of the particular matter. The primary example shown above demonstrates that it is in fact possible to exercise this constitutional right without running the risk of extreme adverse consequences emanating from an aggressive prosecutor determined to capitalize on the respondent's

lawful assertion of a privilege clearly mandated by the Constitution. Indeed in the case in point the respondent continued practicing law for nearly two years beyond the time of his initial suspension, which, of course, he had every right to do, notwithstanding the prosecutor's efforts to the contrary.

In any event, it seems obvious that no respondent can make a valid decision on this critical issue without being fully aware of all possible consequences.

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[1]The "Q&A", not to be confused with the novel by Edwin Torres of the same name, is a non-judicially supervised in-house fact-finding and/or fact-confirming deposition conducted by disciplinary counsel. While the Respondent enjoys his constitutional due process protections, there is a void in the rules, which fail to set forth any procedure for securing judicial rulings on objections by Respondent's counsel.

[2] Spevack v. Klein, 385 U.S. 511 (1966).

[3] 22 NYCRR 605.9(b)(1).

[4] 22 NYCRR 605.9(b)(2).

[5]In *Matter of Russakoff* (192 AD2d 223, 601 NYS2d 313, 314), the Court found as an "aggravating" factor on the issue of sanction that: "When asked to testify about his escrow records, the Respondent invoked his constitutional privilege against self-incrimination, claiming that his testimony could be used to suspend him."

[6] 22 NYCRR 603.4(3), 691.4(1).

[7]*Matter of Russakoff*, 10/31/91 order of App. Div., 2nd Dept., Docket No. 91-06504.

[8] Supra, See: 12/11/91 Temporary Restraining Order of Judge Richard D. Simons and 1/14/92 Order granting leave to appeal (Mot. No.1376).

[9] *Matter of Russakoff*, 79 NY2d 520, 524, 583 NYS2d 949 (1992).

[10]Id.

[11]See: Footnote 5.

[12] *Matter of Russakoff*, 82 NY2d 658, 604 NYS2d 557 (1993).