

Statement of the Association of Professional Responsibility Lawyers Re: American Bar Association 2009 Annual Meeting Report 111A

The Association for Professional Responsibility Lawyers (APRL) recommends that the ABA House of Delegates not approve the recommendations in Report 111A.

APRL's Interests

APRL is an independent national organization of lawyers whose practices concentrate on professional licensing and discipline, professional responsibility and the law of lawyering. Its membership practices in every American jurisdiction and includes foreign lawyers. APRL conducts study and educational programs nationally and internationally. APRL members are particularly interested in matters relating to attorney licensing and discipline, risk management and multijurisdictional practice.

Reasons for APRL's Recommendation

APRL has reviewed Report 111A and the report of the National Association of Criminal Defense Lawyers opposing the recommendations in Report 111A ("NACDL Report"). While APRL claims no particular expertise in matters of criminal justice, the NACDL Report expresses concerns regarding complication of criminal proceedings and possible obstacles to vindication of the rights of criminal defendants that at least call for caution in acting upon the recommendations of Report 111A.

Report 111A is concerned with possible negative effects on individual lawyers, notably prosecutors, from judicial findings of misconduct (especially "prosecutorial misconduct") that may not be attributable to the individual lawyer or, if so attributable, may not amount to disciplinable or sanctionable misconduct on the part of that lawyer. The NACDL Report questions the extent of any such problem. While APRL is aware of instances in which courts have made inappropriate findings that have created collateral difficulties for lawyers who were the subjects of those findings, APRL is not aware of any widespread or systemic problem of that sort. Report 111A itself points out that a finding of "prosecutorial misconduct" need not involve disciplinable or sanctionable misconduct on the part of any lawyer and points to no instance in which any court or agency misunderstood this point to the detriment of any prosecutor. Insofar as Report 111A is concerned with purely reputational harms to prosecutors, APRL has no special expertise but is not aware of a significant problem.

Report 111A would have the ABA urge courts to make findings of misconduct in an underlying civil or criminal case *only* if the court affords the lawyer a fair opportunity to address any charge of misconduct, and find that the lawyer’s act or omission was purposeful, knowing or intentional, or otherwise violated an applicable disciplinary rule or law. At a minimum, this would add an extra layer of substantive and procedural complexity if findings of that sort are unnecessary to determine the rights of the parties in the underlying matter.

To the extent that there is an allegation of personal misconduct on the part of a lawyer in civil or criminal case, APRL believes that the court should either (1) refer the matter of the personal misconduct of the lawyer to the appropriate disciplinary authority; or (2) conduct a separate or ancillary proceeding to determine whether the lawyer engaged in professional misconduct. Either approach would enable the lawyer accused of misconduct an opportunity to address a charge of misconduct without making it part of the underlying original case.

Report 111A also urges disciplinary agencies¹ not to make a finding of professional misconduct based on an order, opinion or ruling by a court in the underlying action. Such an application of issue preclusion will often be impossible under existing law. Where it is possible, and applied with rigorous attention to the presence of all necessary elements, it does not seem inappropriate.

In many jurisdictions, it is already clear that this cannot be done because of the elevated burden of proof in disciplinary cases. In many states, allegations of professional misconduct must be proven by “clear and convincing” evidence or some other standard higher than the “preponderance of the evidence.” Collateral estoppel or issue preclusion is possible only when the burden of proof in disciplinary and underlying cases is the same, and most of the misconduct determinations addressed by Report 111A would require only a preponderance of the evidence.²

In addition, and most relevant to the thrust of Report 111A, there must be a complete identity of issues and a full and fair opportunity for the lawyer to have

¹ APRL is not clear on what the Criminal Justice Section means by use of the term “disciplinary agencies.” In many jurisdictions disciplinary agencies investigate and prosecute attorney misconduct but the actual hearing or trial is conducted by a separate adjudicative tribunal, court or committee.

² In most jurisdictions, however, when a lawyer is convicted of or pleads guilty to a criminal offense upon which a finding of professional misconduct could be made, the facts necessary to prove that the lawyer engaged in the criminal conduct are conclusively established.

addressed those issues in the underlying civil or criminal case. This point was addressed in *In re Dillon*.³ There, assistant bar counsel did try to seize on a finding of “prosecutorial misconduct” to assert issue preclusion against a prosecutor. This was particularly inappropriate because it had already been determined that the original finding was erroneous (though the state had not sought relief in time to affect the criminal case). The prosecutor was exonerated by the disciplinary board and, when the bar counsel appealed, a justice of the Massachusetts Supreme Court rejected the appeal precisely because the prosecutor had not had a full and fair opportunity to litigate the issue of “prosecutorial misconduct.” Although the prosecutor there suffered considerably from that proceeding, it appears to be an isolated instance of inappropriate bar prosecution; the bar counsel and his superiors should have known better under existing law. APRL questions the need for an ABA resolution without evidence of a recurring problem. Moreover, if a resolution is justified, its focus ought not to be on entangling the lawyer in the underlying proceeding, but on holding a collateral proceeding focused on the lawyer’s conduct.

To the extent that the lawyer has not been provided a full and fair opportunity to defend, due process would forbid issue preclusion.⁴ On the other hand, if the lawyer *has* had the requisite full and fair opportunity and if the issues are indeed identical and the burden of proof is the same,⁵ there is no reason to deny preclusion.

³ 20 Mass. Attorney Discipline Reports 575 (2004)

⁴ *Neely v. Comm’n for Lawyer Discipline*, 976 S.W.2d 824, 829 (Tex. App. 1998) (refusing to give collateral estoppel effect in disciplinary case to order entered in prior divorce case awarding sanctions against lawyer for filing frivolous pleadings).

⁵ Those were both true in *In re Cappocia*, 709 N.Y.S.2d 240 (2000), cited by Report 111A as an example of collateral estoppel in disciplinary proceedings.