

Tuesday, March 29, 2011

State Bar's Proposal Puts Clients First

Josh King is general counsel and vice president of business development for Avvo Inc. He is a frequent writer and speaker on First Amendment and professional ethics issues in the practice of law. He can be reached at josh@avvo.com



On March 15, the State Bar opened public comment on a proposal to provide the public with more prominent notice when lawyers are accused of stealing significant sums from clients. Under the proposal, the bar would place a prominent "consumer alert" on its profile Web page for attorneys charged with misappropriation of \$25,000

or more. It would not apply just because a client made the allegation of theft, but only in cases where the bar's disciplinary counsel chooses to pursue charges. This alert would call out the existence of the charges, while also noting that the attorney is presumed innocent of such charges until they are proven. The alert would be removed as soon as the charges are resolved.

While few attorneys would be impacted - the bar currently has misappropriation proceedings pending against only 55 attorneys - the problems created by this troubled minority have a massive impact on clients and the bar alike. In 2009, the State Bar's Client Security Fund paid out over \$2 million to victims of misappropriation, with many victims never made whole. The goal of the consumer alert proposal is a modest one: to inform potential clients that the attorney they are considering hiring is under investigation for fraud.

As someone who has hired a lot of lawyers, I can say this without equivocation: knowing that an attorney had been charged with stealing over \$25,000 from another client would be a *highly relevant factor* in my choice of counsel. The bar's proposal is merely an attempt to make it easier for potential clients to have access to this information and make informed choices.

So far, so good - a laudable step toward greater consumer transparency from the bar. However, what of that presumption of innocence? Should we place this prominent "mark of shame" on the profiles of alleged thieves for the entire world to see? Shouldn't we respect that presumption and avoid saddling accused attorneys with this powerfully negative impact on their practices?

In a word, no. While the presumption of innocence is vitally important to an attorney under investigation, you can be sure that any client is equally interested in knowing about the existence of the bar's investigation. Any attempt to hide this fact, or even to make it obscure or hard to locate, is an effort to value the interests of attorneys over those of clients.

We attorneys sometimes have an unfortunate habit of valuing process over substance. And in focusing on the process, it's too easy to lose sight of the fact that our paramount duty is to our clients. For while the presumption of innocence is a key procedural step in the bar's investigation, it's *not important at all* to clients. The presumption is a legal standard, designed to hold the state to its proof. The client doesn't need to respect it. In fact, no right-thinking client *should* respect it. All the client should care about is competent legal representation - and that they aren't at risk of being robbed blind by the person they entrust with their representation.

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Responses are due Friday, March 25, 2011

The consumer alert will give potential clients more information. And based on that information, consumers of legal services will surely avoid contacting attorneys they may have otherwise retained. Clients already represented will have some difficult conversations with their attorneys. None of this will be remotely positive for those under investigation for fraud. However, it will surely be good for their clients and potential clients. My attorney has to explain the injustice of the charges and how he's going to beat the rap? Go ahead, I'm listening. Maybe there are extenuating circumstances. But as the client, I want to be the one to make that call, and not have the matter hidden from me.

But could this be - to borrow the phraseology of my favorite evidence objection - more prejudicial than probative? Is the impact on the attorney's practice greater than whatever benefit the client gains from knowing that the attorney has been charged with stealing? After all, even misappropriation of a large amount of client funds could occur for reasons running the gamut from negligence to out-and-out conversion. Should we trot this warning out where clients can see it and presume the worst?

While the consumer alert would unquestionably be prejudicial to attorneys practicing under its cloud, that really doesn't matter. Clients come first. And our first impulse shouldn't be to ensure that attorneys are treated fairly, but rather to make sure that clients have as much transparency into the attorneys they hire as possible. And this is precisely the kind of transparency that clients crave, need - and so often find lacking - when dealing with legal matters.

It's also true that the consumer alerts will give the bar more prosecutorial power when it comes to pursuing charges of misappropriation writ large. But again, from the perspective of a client, this isn't a bad thing. Theft from clients is serious business. As misconduct charges go, it's also quite binary. Those charged with misappropriation should be able to quickly disprove the charges, show why the misappropriation of client funds was negligent...or leave the practice of law, posthaste. If these consumer alerts can offer more transparency into the pendency of serious misconduct charges while simultaneously giving attorneys more incentive to expeditiously resolve issues with the disciplinary authorities, stay clean and keep meticulous records, that's a win all around for clients and consumers. And the interest of clients is what it's ultimately all about.

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