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## Weathering the Worst Storm: How Attorneys Might Successfully Defend Their Reputation Against Attack from the Bench

Giel Stein  
gstein@clarkhill.com

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# ESSAY

*Giel Stein*

## Weathering the Worst Storm: How Attorneys Might Successfully Defend Their Reputation Against Attack from the Bench

**Abstract.** Based on the author's personal experience with a judicial referral to a professional responsibility authority, this Essay offers lawyers a strategy to emerge from such an ordeal undisciplined. The essence of the strategy, which can be applied to a bar authority referral from any source, is to treat the process of defending oneself under such circumstances as a negotiation with bar authority counsel. The benefits of approaching such referrals as a negotiation and following the advice of Robert Fisher and William Ury about the importance of preparation, active listening, separating the people from the problem, and being hard on the problem are examined.

**Author.** Giel Stein is a Senior Counsel and Special Assistant United States Attorney with the United States Social Security Administration, Office of General Counsel, concentrating in federal sector trial work. Mr. Stein is also an appointed Hearing Board Member of the Illinois Attorney Registration and Disciplinary Commission and an Adjunct Professor of Law at Northwestern University Law School and the University of Illinois, where he teaches trial advocacy and civil discovery. In addition, Mr. Stein performs mediations for the Chicago Federal Executive Board and the Center for Conflict Resolution. He is a graduate of the University of Chicago (B.A./M.A.) and Northwestern University (J.D./Ph.D.).

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Someone once told me there are two kinds of lawyers: Those who have been accused of misconduct and those who will be accused of misconduct. While overly pessimistic, that expression holds a certain degree of truth. Like it or not, if you are a practicing lawyer, you are at risk of being referred to a bar authority for professional misconduct (a “referral”). “Even reputable, ethical attorneys can find themselves forced to deal with such proceedings.”<sup>1</sup> Referrals can be made by clients, fellow lawyers, and judges.<sup>2</sup> While a referral from any source can be harmful, a referral from a judge can be particularly damaging. Such challenges to the character and competence of the lawyer who is the subject of the referral (the “respondent”) are difficult to overcome, especially because of the high regard in which judges are held.<sup>3</sup> And yet, despite their gravity, referrals

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1. Kenneth M. Mogill, *Trying an Attorney Discipline Case*, 93 MICH. B.J. 44, 44 (2014).

2. Since the passage of the Model Rules of Professional Conduct, lawyers have been obligated to report ethical misconduct by other lawyers under Rule 8.3. MODEL RULES OF PROF'L CONDUCT r. 8.3 (AM. BAR ASS'N 1983) (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”). This obligation dates back to DR1-103 of the Model Code of Professional Responsibility. MODEL CODE OF PROF'L RESPONSIBILITY DR1-103 (AM. BAR ASS'N 1980) (“A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or judge shall reveal fully such knowledge or evidence . . .”). Judges have a similar duty under Rule 2.15 of the Model Code of Judicial Conduct. MODEL CODE OF JUDICIAL CONDUCT r. 2.15 (AM. BAR ASS'N 2010) (“A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.”).

3. See, e.g., ROBERT A. CARP ET AL., JUDICIAL PROCESS IN AMERICA 18 (10th ed. 2016) (1990)

from judges are seldom, if ever, discussed. There is good reason for such silence. It can be embarrassing and professionally injurious to publically disclose that the propriety of one's professional conduct has been questioned by anyone, let alone a judge.

Using my own experience with a state court judge as an example, this Essay aims to break the silence and offer lawyers a strategy to successfully deal with a judicial referral. The essence of the strategy is to treat the process of defending oneself before a disciplinary authority as a negotiation rather than an adversarial contest of wills. Defined as "the ability to persuade someone to do something," negotiation is a powerful tool.<sup>4</sup> By applying the renowned "principled negotiation"<sup>5</sup> advice of Roger Fisher and William Ury concerning preparation, active listening, separating the people from the problem, and being hard on the problem, lawyers can increase their chance of emerging with a clean record from the tribulation of defending themselves against a judicial referral.<sup>6</sup>

### I. WHY NEGOTIATE?

Before delving into a discussion of how to apply Fisher and Ury's negotiation advice to interactions with a bar authority prosecutor over a judicial referral, it makes sense to first explain why such an approach might be effective. After all, bar authority prosecutors are not mandated to negotiate with respondents.<sup>7</sup> It is their job to "prosecute disciplinary cases."<sup>8</sup> So why might a bar authority prosecutor nevertheless respond favorably to the negotiation style of a respondent who has been referred by a judge? I mean, if ever there was an "open and shut case," this is surely it, right? Maybe.

It is a fact of life that conflict at every level, although prevalent, rarely erupts into actual struggle. Most labor disputes conclude without a strike, most international quarrels are resolved short of war, and most litigation

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("In general, judges are held in inordinately high esteem, and most Americans would be proud if a son or daughter achieved this position.").

4. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 182 (3d ed. 2011) (1981).

5. *See id.* at 11 (describing the method of principled negotiation as "a method of negotiation explicitly designed to produce wise outcomes efficiently and amicably").

6. *See id.* at 11–12 (outlining the basic principles of the principled negotiation method).

7. *See, e.g.*, ILCS S. CT. R. 752 (establishing the duties of the Administrator during an investigation of a licensed attorney where no requirement for negotiation between the prosecutor and respondent is stated).

8. *Id.* R. 752(b).

settles before trial.<sup>9</sup> The struggle phase of conflict tends to so burden the adversaries that it is usually avoided by a negotiated outcome that gives each side approximately what it might have expected at the end of the struggle.<sup>10</sup> The conflict spawned by a judicial referral need not be much different. Assuming there are meritorious arguments to be made in the respondent's defense, a judicial referral for professional misconduct can be amenable to a negotiation approach by the respondent. The key to understanding why is knowing the negotiation-theory concept of a "Best Alternative to a Negotiated Agreement," or BATNA.<sup>11</sup>

Adverse parties' estimations of their BATNA determine their desire to negotiate. As Fisher and Ury put it, a party's BATNA is "the standard against which any proposed agreement should be measured."<sup>12</sup> In considering whether to embrace or rebuff a proposed negotiated solution, parties compare the perceived utility of a negotiated result against their BATNA.<sup>13</sup> To the extent that a negotiated outcome is more auspicious than a party's BATNA, the party will likely be more inclined to negotiate.<sup>14</sup> To the extent that a negotiated outcome falls short of a party's BATNA, that party will be inclined not to negotiate.<sup>15</sup>

In the case of a judicial referral, the respondent's BATNA is clear: Avoid discipline by securing an adjudicated finding that no rules of professional conduct were violated. The prosecutor's primary interest "is not to punish the attorney, but rather to protect the public, maintain the integrity of the legal profession, and protect the administration of justice from reproach."<sup>16</sup> The prosecutor's likely BATNA is to achieve this objective by obtaining an adjudicated finding that the respondent should

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9. Andrew Sher, *FRCP 26 vs. FRE 498: Why Settlement Negotiations Should Be Privileged Against Third-Party Discovery*, 16 CARDOZO J. CONFLICT RESOL. 295, 297 (2014) (citing Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 706 (2004)) (noting the conventional estimate that ninety-five percent of cases settle).

10. See Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 160 (1998) ("[Alternative dispute resolution methods] represent a reaction to the psychological brutality of the adversary system. Repelled by the emotional toll litigation exacts from participants, mediators seek to provide a less traumatic means of resolving conflict.").

11. FISHER & URY, *supra* note 4, at 102.

12. *Id.*

13. See *id.* ("Instead of ruling out any solution that does not meet your bottom line, you can compare a proposal with your BATNA to see whether it better satisfies your interests.").

14. See *id.* at 104–05 (expressing a party's willingness to settle a negotiation if they feel the negotiated offer is better than their BATNA).

15. See *id.* (implying the party will take a negotiated offer if its BATNA is less powerful).

16. *In re Winthrop*, 848 N.E.2d 961, 981 (Ill. 2006).

be disciplined for violating rules of professional conduct. If a negotiation approach fails, both sides will spend a great deal of time, energy, and resources pursuing their BATNAs with no guarantee of success.

By treating your defense before a professional responsibility authority as a negotiation rather than an adversarial contest of wills, you might diminish the attractiveness of the bar authority prosecutor's BATNA, thereby increasing his receptiveness to your efforts to reach a mutually satisfactory outcome.<sup>17</sup> Even if bar authority prosecutors will not formally negotiate with respondents, they are always attuned to the strengths and weaknesses of both sides of the case. Following the teachings of Fisher and Ury about preparation, active listening, separating the people from the problem, and being hard on the problem can, as discussed below, demonstrate to the bar authority prosecutor that you pose no threat to the public, the integrity of the legal profession, or the administration of justice. In other words, a well-executed negotiation strategy can satisfy the bar authority prosecutor's primary interest and obviate the need for any further formal proceedings. That is why it is possible and worthwhile for respondents to approach their referral as they would a negotiation, especially if they have been referred by judge.

## II. BE PREPARED

If you hope to negotiate a positive outcome from a referral by a judge for professional misconduct, you must be prepared. "Negotiation power . . . is not something of which you have a certain quantity that can be applied anywhere for any purpose. It requires hard work in advance to bring your resources to bear on being persuasive in a particular situation. In other words, it requires preparation."<sup>18</sup> If you are like most respondents, then facing a bar authority referral will be a novel (hopefully once-in-a-lifetime) experience. Preparing for the challenge at hand should, of course, begin with retaining counsel experienced in the area of professional responsibility law.<sup>19</sup> But do not rest all your weight on your

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17. See FISHER & URY, *supra* note 4, at 103 ("Whether you should or should not agree on something in a negotiation depends entirely upon the attractiveness to you of the best available alternative."); see also Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 993-94 (2008) (acknowledging "where the participants feel that they have a strong 'BATNA' . . . the chances of an agreement are reduced").

18. FISHER & URY, *supra* note 4, at 180; see also DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND PRACTICE* 1 (2d ed. 2007) (1989) ("[N]othing is more important to your success as a negotiator than preparation . . .").

19. 31 AM. JUR. *Trials* 633, § 1 (2016) (explaining the "greatest mistake" a lawyer accused of misconduct can commit "is to attempt to defend against the charges as his own counsel. He is the

lawyer. Using negotiation strategy to resolve a professional misconduct referral is unconventional and may be an unfamiliar approach to many veteran practitioners. So work alongside your lawyer and start by learning the process in which you have become embroiled.

The administrative process for referrals is similar across the country.<sup>20</sup> In Illinois, where my referral unfolded, referrals go to the Attorney Registration and Disciplinary Commission (ARDC).<sup>21</sup> The ARDC referral process generally consists of five stages: Investigation, Inquiry Board, Hearing Board, Review Board, and Illinois Supreme Court review.<sup>22</sup> During the Investigation stage, an ARDC prosecutor examines the referral made against the respondent.<sup>23</sup> The ARDC prosecutor may seek the ARDC Administrator's permission to close the referral or to forward it to the Inquiry Board for a determination of whether sufficient evidence exists to charge the respondent with one or more professional conduct rule violations before the Hearing Board.<sup>24</sup> If the Inquiry Board approves the filing of charges, as opposed to closing the matter, the ARDC prosecutor will file a complaint with the Hearing Board.<sup>25</sup> Hearing Board determinations are based on discovery—including the discovery of witnesses—motion practice, and an adversarial hearing.<sup>26</sup> The hearings themselves are formal trials conducted on the record, during which the

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stereotypical person who, in Abraham Lincoln's words, has 'a fool for a client and an ass for a lawyer.'").

20. See generally Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROF. 209 (2011) (detailing the procedure and statistics for the attorney-discipline process across all fifty states).

21. See *id.* at 241 ("The Attorney Registration and Disciplinary Commission is charged with regulating and disciplining attorneys for ethical violations of the Illinois Rules of Professional Conduct."); *ARDC Overview*, ATT'Y REGISTRATION & DISCIPLINARY COMMISSION SUP. CT. ILL., <https://www.iardc.org/overview.html> (last visited May 8, 2016) (expressing one duty of the Attorney Registration and Disciplinary Committee is to regulate the discipline of attorneys).

22. See ILCS ATT'Y REGISTRATION DISCIPLINARY COMM'N R. 51–55, 101–108, 201–291, 301–314 (identifying the rules that coincide and direct the investigations by the Administrator, the Inquiry Board, and the Hearing Board); see also *ARDC Overview*, *supra* note 21 (summarizing the levels of attorney disciplinary proceedings in the State of Illinois).

23. See ILCS ATT'Y REGISTRATION DISCIPLINARY COMM'N R. 51–55 (indicating the prosecutor receives the charges and evidence before properly reviewing the allegations); see also *ARDC Overview*, *supra* note 21 (noting the prosecutor and staff will investigate complaints on attorneys).

24. See ILCS ATT'Y REGISTRATION DISCIPLINARY COMM'N R. 54–55 (granting the prosecutor the power to close the investigation if there is insufficient evidence of lawyer misconduct or to pass the referral to the Inquiry Board for further action if the prosecutor finds sufficient evidence of misconduct).

25. *Id.* R. 101–102, 211.

26. *Id.* R. 235, 251, 253, 260.

ARDC prosecutor and respondent's counsel deliver opening statements, offer evidence, direct and cross-examine witnesses, and make closing arguments.<sup>27</sup> Hearing Board determinations are appealable to the Review Board.<sup>28</sup> Review Board determinations are, with leave, appealable to the Illinois Supreme Court.<sup>29</sup>

The respondent's odds of having the referral resolved without discipline are greatest during the Investigation stage.<sup>30</sup> In this phase, the scope of the conflict is confined between the ARDC prosecutor investigating the referral and the respondent.<sup>31</sup> The referring judge has already stated his or her case. Now the prosecutor has two basic choices. The first option is to escalate the judge's referral to the Inquiry Board because there is "sufficient evidence to establish that the respondent engaged in misconduct or the unauthorized practice of law or the Administrator believes consideration by the Inquiry Board is warranted."<sup>32</sup> Alternatively, the prosecutor can recommend the referral be closed out because "there is insufficient evidence to establish that the respondent has engaged in misconduct or to establish an allegation of unauthorized practice of law."<sup>33</sup> Unencumbered by the views of an Inquiry Board or those of a Hearing Panel (as neither body has weighed in yet), the ARDC prosecutor's discretion over the fate of the referral is at its peak.<sup>34</sup> For

27. See ARDC *Organizational Information*, ATT'Y REGISTRATION & DISCIPLINARY COMMISSION SUP. CT. ILL., <https://www.iardc.org/overview.html> (last visited May 8, 2016) ("Proceedings before the Hearing Board . . . are governed by the Illinois statutes and Supreme Court rules that govern civil practice . . .").

28. See ILL. COMP. STAT. ATT'Y REGISTRATION DISCIPLINARY COMM'N R. 284, 301–302, 304, 311 (proclaiming the ability of either party to appeal the determination of the Review Board).

29. See ILL. COMP. STAT. SUP. CT. R. 753(e) (asserting the Illinois Supreme Court reviews the process of appeals from the Hearing Board); see also ILL. COMP. STAT. ATT'Y REGISTRATION DISCIPLINARY COMM'N R. 415 (reiterating the review procedure for an appeal is the same as Illinois Supreme Court Rule 753).

30. In 2014, the ARDC concluded 6,165 investigations. ATT'Y REGISTRATION & DISCIPLINARY COMM'N, ANNUAL REPORT OF 2014, at 16 (2014), <https://www.iardc.org/annualreport2014.pdf>. ARDC prosecutors closed 5,901 (95.7%) investigations that year. *Id.* Of the 201 referrals that went to the Inquiry Board, 50 (24.8%) were closed after its review. *Id.* Of the 218 remaining referrals, 126 proceeded to the Hearing Board. *Id.* at 23. The Hearing Board closed 5 (3.9%) matters without imposing discipline. *Id.* at 26.

31. See ILL. COMP. STAT. ATT'Y REGISTRATION DISCIPLINARY COMM'N R. 54–55 (indicating there are no parties involved in the investigation process besides the prosecutor and respondent).

32. *Id.* R. 55.

33. *Id.* R. 54.

34. 31 AM. JUR. *Trials* 633, § 24 (2016) ("The considerable powers of bar counsel should be understood: he has the authority to file formal charges and set the case for hearing, or he may dispose of it without further investigation. He may sit on a case indefinitely, or he can see that it is thoroughly prosecuted.").



the moment, only the prosecutor needs to be persuaded to close the referral (with the Administrator's ultimate approval).

As a matter of common knowledge, as more people become involved in a conflict, it will expand and become harder for any one participant to persuade the others.<sup>35</sup> Moreover, once things start to go south for a party, it becomes progressively difficult to avoid an adverse final result.<sup>36</sup> "What is worse, once [a group has] painfully developed and agreed upon a position, it becomes much harder to change it. Altering a position proves equally difficult when additional participants are higher authorities who, while absent from the table, must nevertheless give their approval."<sup>37</sup> Thus, even if a respondent could turn the views of an initially reluctant bar authority prosecutor around, it will be increasingly difficult for that prosecutor to secure the referral's dismissal after it has moved deeper into the process. The importance of demonstrating a referral does not merit discipline during the earliest phase of its lifespan makes preparation all the more vital.

In addition to learning the referral process, being prepared also means that no matter how daunting it may be to face a referral from a judge: "Don't be a victim."<sup>38</sup> Now that you know the early stage of the referral process is the best time to get a referral resolved without discipline, act on that knowledge. The bar authority will invite your response after it receives the judge's referral.<sup>39</sup> Once you have that invitation, there is no time to waste.<sup>40</sup> Begin preparing a comprehensive defense. Do not assume that the judge's referral contains a fair and balanced presentation of the controversy. While judges act as neutrals when they preside over the court's docket, they are not the arbiter of their own professional misconduct referral.<sup>41</sup> Instead, their role as the referring party in such a

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35. See MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT* 351–52 (1973) (explaining, in accordance with Gresham's Law of Conflict, as the scope of the conflict expands, there is an increasing reliance on force coupled with a move away from persuasion, conciliation, and the promulgation of mutual understanding and good will).

36. See *id.* at 352 ("These processes [of escalation] give rise to a mutually reinforcing cycle of relations that generate actions and reactions that intensify conflict.").

37. FISHER & URY, *supra* note 4, at 8.

38. *Id.* at 144; see also 31 AM. JUR. *Trials* 633, § 1 (2016) (observing a disciplinary proceeding respondent "quickly becomes the 'victim' and feels besieged by a host of claimants perceived as carrion seeking only to feast off his personal and professional misfortunes").

39. See ILL. COMP. STAT. ATT'Y REGISTRATION DISCIPLINARY COMM'N R. 53, 55 (allowing the respondent to answer after given notice of the referral).

40. See *id.* R. 53 (mandating the respondent has fourteen days to respond to the prosecutor's first requests for information).

41. See *People ex rel. Brazen v. Finley*, 519 N.E.2d 898, 902 (Ill. 1988) (explaining only the Supreme Court of Illinois and the ARDC can discipline or sanction the unprofessional conduct of

matter is more akin to that of a complainant who in all likelihood is not impartial. Consequently, as you carefully review the referral, study what it contains and search for what it is missing.

When I examined my referral, I discovered that it consisted solely of the judge's own order in the underlying case that I was litigating before him. The referral concerned what was said before and during my deposition of a third-party witness and whether I concealed that deposition from the court. And yet, the referral did not include the transcripts of the recording of my interaction with the witness before I placed him under oath, the ensuing deposition, the status hearing during which I discussed the deposition with the court, or any of the motions in which I mentioned the deposition.<sup>42</sup> I also noticed that the judge's referral did not mention the allegation that spawned the controversy: The third-party witness's statement that his own lawyer and a state prosecutor threatened him with lifetime detention if he testified in my client's favor.<sup>43</sup>

After you have collected all the relevant materials, it is time to prepare a thorough defense. Needless to say, that presentation should not simply consist of a stack of unexplained documents. No matter how strong the supporting evidence, you must weave it into a coherent and persuasive written argument. "It's sobering to think that bad [writing] can lose strong cases. But this surely happens all the time."<sup>44</sup> As any lawyer knows, no legal argument is complete without supporting authority.<sup>45</sup> Thankfully, there is a lot of professional misconduct jurisprudence from which to

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attorneys). Unlike most state courts, federal courts can decide matters of professional misconduct and impose their own discipline in addition to referring the matter to the local bar authority. *See* FEDERAL PROCEDURE, LAWYERS EDITION § 20:213 (2014) ("[W]hen appropriate, a federal court retains the power to impose discipline or refer questionable conduct for further investigation.").

42. The court had all of these materials.

43. Such an attempt to deter witness testimony is a crime in Illinois, where I deposed the third-party witness. *See* 720 ILL. COMP. STAT. 5/32-4(b) (2013) ("A person who, with intent to deter any party or witness from testifying freely, fully and truthfully to any matter pending in any court, or before a Grand Jury, Administrative agency or any other State or local governmental unit, forcibly detains such party or witness, or communicates, directly or indirectly, to such party or witness any knowingly false information or a threat of injury or damage to the property or person of any individual or offers or delivers or threatens to withhold money or another thing of value to any individual commits a Class 3 felony.").

44. BRYAN A. GARNER, *THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS*, at xvi (3d ed. 2014) (1999).

45. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1, at 57 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) ("Provide citations to authorities . . ."); Kris Franklin, *The Rhetoric of Legal Authority Constructing Authoritativeness, the "Ellen Effect," and the Example of Sodomy Law*, 33 RUTGERS L.J. 49, 52 (2001) ("[L]egal arguments are *constructed* on a foundation of supporting authorities, and, like any construction, they can fail if their foundation is not secure." (alteration in original)).

draw. States' rules of professional conduct are annotated, most state bar authority decisions are available for review, numerous federal and state court decisions address nearly every conceivable question of professional misconduct, and the secondary sources (law reviews, treatises, and professional publications) are filled with useful analysis.

When your defense is ready, take the counter-intuitive step of inviting the bar authority prosecutor assigned to your case to meet with you. The purpose of this meeting is to personally deliver your written presentation to the prosecutor and begin what will hopefully be the first of several discussions. A proactive approach of this kind has its benefits.<sup>46</sup> Professional misconduct referrals ultimately concern an attorney's character and fitness to practice law.<sup>47</sup> There is no better way to impress those qualifications on the prosecutor than through face-to-face interaction.<sup>48</sup> Reaching out to the prosecutor also signals that you are taking your situation seriously and being cooperative.<sup>49</sup> Bar authorities appreciate such behavior.<sup>50</sup> Moreover, getting your side of the "story" to the prosecutor early on reduces the amount of time he has to think about your case with only the referring judge's views shaping his impressions.

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46. "Opening up" to bar authority prosecutors and inviting their inquiry can be a risky overture that should not be undertaken without careful consideration. The merits of a respondent's defense, the respondent's ability to effectively communicate those merits, and the prosecutor's reputation are some of the factors that should inform the wisdom of engaging the prosecutor beyond what is minimally required. Sometimes such engagement may not be advisable.

47. See *In re Howard*, 673 A.2d 800, 802 (N.J. 1996) ("The principal reason for discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general . . . Any misconduct, whether professional or private, that reveals a lack of good character essential for an attorney constitutes a basis for discipline." (internal quotations and citations omitted)).

48. Various theories have demonstrated that in-person communication is more revealing and persuasive than other forms of communication. See Alice F. Stuhlmacher & Maryalice Citera, *Hostile Behavior and Profit in Virtual Negotiation: A Meta-Analysis*, 20 J. BUS. & PSYCH. 69, 86 (2005) (concluding meta-analytic results show "virtual negotiations [involve] more hostile behavior and lower profits than face-to-face negotiations"); see also Bibb Latane, *The Psychology of Social Impact*, 36 AM. PSYCHOLOGIST 343, 344-49 (1984) (stating face-to-face communication maximizes a person's ability to influence another due to the high degree of immediacy that is not present in virtual media communication (telephone, video, email, texting)); Rodney A. Wellens, *Use of Psychological Distancing Model to Assess Differences in Telecommunication Media*, 5 TELECONFERENCING & ELECTRONIC MEDIA 347, 347-61 (1986) (mentioning in-person communication promotes feelings of psychological closeness as compared to other forms of communication (e.g., computer mediated interactions) promote a psychological distance associated with weaker interpersonal bonds and less cooperation).

49. See, e.g., *In re Rothstein*, IL Disp. Op. M.R. 26703, 2014 WL 2535073, at \*2 (Ill. Sup. Ct. May 16, 2014) (noting cooperation with the disciplinary process should be considered in mitigation).

50. *Id.*

### III. LISTEN ACTIVELY

Once the fruits of your preparation have drawn the prosecutor's attention, show him you are listening carefully to his concerns and those of the referring judge. "The need for listening is obvious, yet it is difficult to listen well, especially under the stress of an ongoing negotiation."<sup>51</sup> When defending something as precious as your reputation against an accuser as powerful as a judge, "you may be so busy thinking about what you are going to say next, how you are going to respond to that last point or how you are going to frame your next argument, that you forget to listen to what the other side is saying now."<sup>52</sup> Equally important, you could fail to show the other side that they have been heard and understood.<sup>53</sup> That is where active listening comes in.<sup>54</sup>

Active listening is a communication technique whereby the listener demonstrates to the speaker—by, for example, paraphrasing or stating an implication of what the speaker said—that he has heard and understood.<sup>55</sup> When employed effectively, active listening demonstrates to the other side that their views are appreciated and frees them up to hear and hopefully accept your position.<sup>56</sup>

People listen better if they feel that you have understood them. They tend to think that those who understand them are intelligent and sympathetic people whose own opinions may be worth listening to. So if you want the other side to appreciate *your* interests, begin by demonstrating that you appreciate *theirs*.<sup>57</sup>

To listen actively, you must avoid the urge to immediately counter everything the other side says.<sup>58</sup> Instead, take the time to understand their perceptions and show them that you are engaged in that effort.<sup>59</sup> For example, every so often, while conversing with the ARDC prosecutor

51. FISHER & URY, *supra* note 4, at 36.

52. *Id.*

53. *See id.* at 36–37 (explaining the importance of actively listening to increase understanding).

54. *Id.* ("[Active] listening enables you to understand their perceptions, feel their emotions, and hear what they are trying to say. Active listening improves not only what you hear but also what they say.")

55. *See* Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 748–49 (2001) (distinguishing the definition of active listening).

56. *See* FISHER & URY, *supra* note 4, at 37 ("[The other party] will also feel the satisfaction of being heard and understood [when using active listening]. . . . [T]he cheapest concession you can make to the other side is to let them know they have been heard.")

57. *Id.* at 53 (alternation in original).

58. *See id.* at 36–37 (establishing active listening is allowing the other party to express their perceptions without feeling interrupted or misunderstood).

59. *Id.* at 36 ("Listening enables you to understand their perceptions . . .").

assigned to my referral, I would say: “I think you have touched on a legitimate problem and if I understand you correctly you are saying that . . .” and “The judge makes several strong points and I hear that he is concerned about . . .” or “Let me make sure I correctly understand your valid comments . . .” Notice how each one of my encapsulations of the other side’s position included a comment on the strength of their case as they saw it.

Active listening can be a difficult skill to master, especially for lawyers. We are trained to be somewhat dismissive of our opponent’s point of view. But if you want to negotiate a positive outcome with the bar authority prosecutor assigned to your referral, you should realize that “[u]nderstanding is not agreeing. One can at the same time understand perfectly and disagree completely with what the other side is saying.”<sup>60</sup> You are more likely to impress the merits of your arguments on an opponent after you have convinced them that you grasp their arguments.<sup>61</sup>

Once you have made their case for them, then come back with the problems you find in their proposal. If you can put their case better than they can, and then refute it, you maximize the chance of initiating a constructive dialogue on the merits and minimize the chance of their believing you have misunderstood them.<sup>62</sup>

Misunderstandings can be fatal to your defense against a referral. Unless you show the bar authority prosecutor that you understand her concerns and those of the referring judge she may believe you have not heard her or, worse still, that you refuse to pay attention and need to be taught a lesson.

#### IV. SEPARATE THE PEOPLE FROM THE PROBLEM

More so than most professional challenges, a judge’s referral for professional misconduct is personal for all the principal players. Judges routinely see lawyers engage in what they view as misbehavior. In nearly all such instances, however, judges will find a way to deal with the situation short of penning out a bar referral.<sup>63</sup> On those rare occasions when

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60. *Id.* at 37.

61. *See id.* at 37–38 (encouraging negotiators to discuss the other side’s argument in terms favorable to them before seeking to refuting their points with your own, reasoning that the other side will be more likely to listen to your argument).

62. *Id.* at 38.

63. *See* Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting*, 73 OHIO ST. L.J. 437, 474 (2012) (noting judicial underreporting of

judges do take the trouble to compose a referral, odds are they are driven by a level of personal frustration.<sup>64</sup> The process can also be personal for the bar authority prosecutor. Referrals from judges may draw increased scrutiny and perhaps even political pressure. And as for the target of the referral, I guarantee you: it is personal—*very* personal. Should you ever have your professionalism questioned by a judge, get ready for that challenge to take its toll on nearly every aspect of your life.

Negotiation theory suggests that when faced with trying personal challenges, it is wise to “separate the people from the problem.”<sup>65</sup> This starts with recognizing your own negative emotions and how they could obstruct a defense beneficial to you. “Anger over a situation may lead you to express anger toward some human being associated with it in your mind [i.e. the referring judge or the bar authority prosecutor]. Egos tend to become involved in substantive positions.”<sup>66</sup> As your perceptions grow myopic, you may stop listening or communicating adequately, not just to your own lawyer but to the prosecutor. So cabin whatever resentment you harbor for the referring judge or for the bar authority prosecutor and deal with the reality as *they* see it. “As useful as looking for objective reality can be, it is ultimately the reality as each side sees it that constitutes the problem.”<sup>67</sup> That fact also points the way to a solution.

When your emotions are held in check, you will be able to show the bar authority prosecutor that you can put yourself in the referring judge’s shoes. This negotiation strategy does not just seem inconsistent with your objective of attacking the judge’s position; it *is* inconsistent—at least psychologically. That is precisely why it works. “A well-known theory of psychology, the theory of cognitive dissonance, holds that people dislike inconsistency and will act to eliminate it.”<sup>68</sup> By acknowledging the legitimacy of the referring judge’s concerns while also disagreeing with his reasoning, you create cognitive dissonance for the bar authority prosecutor. To reconcile that tension, the prosecutor will be tempted to distance himself from the judge’s problematic reasoning (provided you

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attorney misconduct and discussing its possible causes); Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revalued*, 159 U. PA. L. REV. 751, 774 (2011) (“Lawyers rarely report each others’ misconduct. Judges are similarly reluctant to refer complaints to disciplinary authorities . . .”).

64. See Charles B. Plattsmier, *Self Regulation and the Duty to Report Misconduct: Myth or Mainstay?*, 2007 PROF. LAW. SYMPOSIUM ISSUES 41, 44 (explaining a “sense of frustration” is “often found as the motivation that spurred the lawyer or the judge to report misconduct”).

65. FISHER & URY, *supra* note 4, at 19.

66. *Id.* at 22.

67. *Id.* at 25.

68. *Id.* at 56.

have shown it to be problematic) and hopefully join you in solving the problem. Do not worry that the dissonance will concede your defense. Remember: showing the prosecutor that you understand the judge's concerns is not the same as stating that you agree with his analysis.<sup>69</sup>

The judge who referred me did not believe I was surprised when a third-party witness appeared without his lawyer at a deposition and proceeded to volunteer that his lawyer and a state prosecutor threatened him. The judge also found that I did not tell the court that I deposed the witness about his allegation, that my deposition concerned a matter within the scope of the witness's representation<sup>70</sup> and intruded on attorney-client privilege, that I broke my promise to the witness's lawyer that I would not depose his client, and that I had nothing to gain from the deposition because the witness intimidation allegation was inadmissible hearsay. Throughout my interactions with the ARDC prosecutor I tried to show him I could stand in the judge's shoes by stressing that I understood and shared the judge's concerns about candor to the court, the sanctity of attorney-client relationships, the need to keep promises, and the dangers of hearsay.

Separating the people from the problem also means that you should speak as much as possible about yourself rather than the judge.<sup>71</sup> The judge's views are already sufficiently weighty and harmful to you. Focusing on what the judge did, or blaming the judge, will draw further attention to the weakest part of your defense—your powerful accuser. No matter the reason for the judge's findings (animosity toward your firm, contempt for your client, personal bias), "even if blaming is justified, it is usually counterproductive."<sup>72</sup> If you accuse the judge of acting in a way that the bar authority prosecutor thinks is unlikely, the prosecutor could dismiss your arguments as spiteful and disrespectful. "Assessing blame firmly entangles the people with the problem."<sup>73</sup> The better course is to "describe a problem in terms of its impact on you."<sup>74</sup>

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69. *See id.* at 37 (reiterating the respondent can understand the prosecutor's case but may still disagree with what they are saying).

70. Model Rule of Professional Conduct 4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order." MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2013).

71. *See* FISHER & URY, *supra* note 4, at 38–39 (suggesting the most persuasive strategy is to talk about yourself and the impact it has had on you).

72. *Id.* at 27.

73. *Id.*

74. *Id.* at 39.

During my defense, I said things like: "I was surprised by the deponent's witness intimidation accusation because I had never confronted such a dramatic statement" rather than "The judge cannot speculate about how I felt." "I told the court about the deposition during our hearing because I felt confident that his Honor would want to stop witness intimidation" instead of "The judge ignored the hearing transcript." "I hope that if you examine my analysis of Model Rule 4.2 and attorney-client privilege law, you will see that I violated neither" rather than "The judge does not understand the law." As negotiators know, "a statement about how you feel is difficult to challenge. You convey the same information without provoking a defensive reaction that will prevent them from taking it in."<sup>75</sup> You want the bar authority prosecutor to "take in" what you say.

By separating the people from the problem, you also lessen your burden and your potential exposure. Negotiators refer to this as reducing the area of conflict.<sup>76</sup> Rather than having to persuade the bar authority prosecutor that he should reject every single aspect of the referring judge's analysis, you only have to carry that burden on a smaller number of disputed material points. It is unnecessary to contest every conclusion in the judge's referral. Some of those conclusions can and should go unchallenged or even be admitted. In my case, I unequivocally admitted that my decision to depose a witness outside the presence of his lawyer was, as the judge found, unwise. In hindsight, I should have erred on the side of caution and said nothing to the witness. Sometimes, taking the "leave no stone unturned" approach can make you seem needlessly contentious. If you ultimately fail to persuade the prosecutor to close the judge's referral, each remaining point of contention between you and the referring judge may support the imposition of discipline. Fewer points of contention could mean a lesser penalty, or better yet, no penalty.

#### V. BE HARD ON THE PROBLEM

Part and parcel of separating the people from the problem is being hard on the problem. "This is the place . . . to spend your aggressive energies."<sup>77</sup> Your objective is to persuade the bar authority prosecutor that no discipline is warranted, and nothing should hold you back from trying to secure that objective. Do not assume, for example, that the

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75. *Id.*

76. *Id.* at 26.

77. *Id.* at 55-56.



prosecutor is inclined to side with the judge or, if he is so inclined, that you cannot change his opinion. “People tend to assume that whatever they fear, the other side intends to do.”<sup>78</sup> When accused of wrongdoing by a judge, it is easy to assume that all who hear about it will immediately think the worst. After all, judges are supposed to issue well-reasoned decisions that reflect their skilled examination of fact and law.<sup>79</sup> But remember, even a judge’s referral for professional misconduct is just an accusation. Courts do not generally decide questions of professional misconduct.<sup>80</sup> Once the judge makes his referral, it is the bar authority prosecutor’s turn to examine it and try to prove the truth of those allegations with clear and convincing evidence.<sup>81</sup> Do not hamstring your attack on the problem by deducing the prosecutor’s intentions from your fears.

As you attack the problem presented by the judge’s referral, focus on the bar authority prosecutor’s interests. Interests are a party’s needs, desires, and concerns.<sup>82</sup> “Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to so decide.”<sup>83</sup> We tend to assume that because another side is opposed to us, their interests must also be opposed. If a judge made a referral, then the bar authority must have an interest in upholding it. If the respondent has an interest in defending himself, then the prosecutor must have an interest in disciplining him. In a professional misconduct case, however, the bar authority prosecutor will rely on the relevant professional responsibility law to decide whether to push the referral toward discipline or seek to close it out. This fact can be tremendously advantageous to your defense because it concentrates you and the prosecutor on the objective criteria of the relevant law. “It is far easier to deal with people when both of you are discussing objective standards for settling a problem instead of trying to

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78. *Id.* at 26.

79. Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings For Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 36 (“A judge . . . functions essentially within the framework of an ‘umpire,’ fastidiously examining the law and applying the relevant law to the facts before the judge in order to arrive at just, well-reasoned and well-supported decisions.”).

80. *See supra* note 41 and accompanying text.

81. *See, e.g.*, ILCS S. CT. R. 753(c)(6) (2010) (stating the standard of proof is clear and convincing evidence for disciplinary hearings).

82. *See FISHER & URY, supra* note 4 at 42 (suggesting each side’s conflicting position stems from their own “needs, desires, concerns and fears”).

83. *Id.* at 43.

force each other to back down.”<sup>84</sup> Moreover, as the socially and politically weaker party (compared to the referring judge), you want to “[c]oncentrate on the merits of the problem, not the mettle of the parties.”<sup>85</sup> Given that you must establish the legitimacy of your interests to impress them on the other side, showing the bar authority prosecutor you understand your legal and obligations is the key to persuading him in your favor.

In my case, I presented the bar authority prosecutor with a detailed argument that tied my unique factual circumstances to the relevant professional responsibility law. “Concrete details not only make your description credible, they add impact.”<sup>86</sup> In response to each of the referring judge’s allegations, I presented evidence of the following while stressing my understanding of why someone might disagree with my analysis:

I was surprised when the third party witness arrived for his deposition. Beforehand, the witness’s lawyer told me that his client had “no relevant or material information” to offer me, the lawyer moved to quash my deposition, we agreed that I would not depose his client, and I instructed my client to inform detention facility authorities that the witness will not be deposed.

I did not conceal my deposition of the third party witness from the court. I gave the court the transcripts of my recorded conversation with the witness before I deposed him. Regarding the deposition itself, I stated in several motions that I deposed the witness, and I discussed the deposition with the judge during a status hearing.

I did not violate Model Rule 4.2<sup>87</sup> by communicating with the third party witness about his allegation that his lawyer and the state prosecutor threatened him with lifetime detention if he testified in my client’s favor. Under the crime–fraud exception, that allegation was outside the scope of the witness’s representation by the lawyer who threatened him.<sup>88</sup>

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84. *Id.* at 84.

85. *Id.*

86. *Id.* at 52.

87. See MODEL RULES OF PROF’L CONDUCT r. 4.2 (AM. BAR ASS’N 2013) (declaring an attorney cannot speak to a represented client unless authorized to do so).

88. See *Haines v. Liggett Grp.*, 975 F.2d 81, 90 (3rd Cir. 1992) (stating the crime–fraud exception applies “to assure that the ‘seal of secrecy’ between lawyer and client does not extend to communications from the lawyer to the client made by the lawyer for the purpose of giving advice for the commission of a fraud or crime” (alteration in original)); see also *In re Decker*, 606 N.E.2d 1094, 1101 (Ill. 1992) (noting the crime–fraud exception “applies when a client seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity”). The premise of the exception is that when legal advice is given to further a crime, the communication is not made by an attorney

I did not violate attorney–client privilege by deposing the third party witness about his allegation of witness intimidation. The alleged threat was illegal conduct not covered by attorney–client privilege.<sup>89</sup> Even if it was covered, the witness waived the privilege by volunteering his allegation.<sup>90</sup>

I did not break my promise to the third party witness’s counsel not to depose his client. I could not have promised the lawyer that I would refrain from exploring his client’s allegation against him because I did not know about that allegation until the witness volunteered it. At that moment, failing to explore the allegation would have violated my duty to my client.<sup>91</sup> Such a failure would have also violated the interests of justice.<sup>92</sup>

A witness’s allegation of intimidation is not hearsay because threats are “verbal acts,” not assertions, admissible as circumstantial evidence of another purpose (e.g. criminal behavior and lack of credibility).<sup>93</sup>

Focusing your discussion with the bar authority prosecutor on how the relevant law should guide his decision rather than on what the referring judge wants will not guarantee your success. It will, however, offer a way

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“within the just scope of the relation between legal adviser and client.” 8 JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2298, at 572 (John McNaughton rev., 8th ed. 1961) (1904).

89. See *United States v. BDO Seidman, LLP*, 492 F.3d 806, 818 (7th Cir. 2007) (“The crime-fraud exception places communications made in furtherance of a crime or fraud outside the attorney–client privilege.”); see also *In re Decker*, 606 N.E.2d at 1101 (“[W]here the crime-fraud exception applies, no attorney–client privilege exists whatsoever, and the communication is not privileged.”).

90. See *Appleton Papers, Inc. v. EPA*, 702 F.3d 1018, 1024 (7th Cir. 2012) (“[A] party that voluntarily discloses part of a conversation covered by the attorney–client privilege waives the privilege as to the portion disclosed and to all other communications relating to the same subject matter.”); *Ctr. Partners v. Growth Head GP*, 2012 IL 113107, ¶ 35 (“[T]he attorney–client privilege may be waived by the client when the client voluntarily testifies to the privileged matter.”).

91. See MODEL RULES r. 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

92. *United States v. Carlson*, 547 F.2d 1346, 1355 (8th Cir. 1976) (explaining to exclude the statements of a witness who refused to testify because of intimidation “would be antithetical to the truth-seeking function of our judicial system and would not serve the interests of justice”). “To allow witness intimidation to prevent in-court testimony would violate any reasonable notion of the interests of justice.” David A. Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. REV. 867, 900 (1982) (discussing *Carlson*, 547 F.2d at 1346).

93. *People v. Klisnick*, 390 N.E.2d 1330, 1337–38 (Ill. Cir. Ct. 1979) (rejecting hearsay argument and affirming admission of testimony about a threat as evidence of criminal behavior); see also *Tompkins v. Cyr*, 202 F.3d 770, 779 (5th Cir. 2000) (affirming admission of testimony about threats because they were verbal acts and not hearsay); *United States v. Bellomo*, 176 F.3d 580, 586 (2d Cir. 1999) (explaining statements offered as evidence of commands or threats directed to the witness are not hearsay); *United States v. Thomas*, 86 F.3d 647, 654 n.12 (7th Cir. 1996) (explaining threats were not hearsay when “not admitted to prove the truth of the words asserted, but rather were admitted as ‘verbal acts’ that potentially affected the credibility of witnesses”).

for you to vigorously attack the problem—i.e. the merits of the referring judge's conclusions—without incurring the high costs of attacking the judge. I never offered my view of why the judge reached conclusions that were belied by record transcripts, motion content, and well-settled authority. Had I answered those questions, I would have moved from being hard on the problem to being hard on the people, and maybe even risked sounding paranoid. If your interest-based arguments raise any delicate “why” questions, trust that the bar authority prosecutor will be savvy enough to answer them on his own.

## VI. CONCLUSION

Perhaps the most difficult part of facing a judicial referral for professional misconduct is realizing that all hope is not lost. Despite support and encouragement from many, I still grappled with self-doubt, despair, and many sleepless nights. When it came time to deal with the bar authority prosecutor, I fell back on my negotiation-theory training more out of instinct than by conscious choice. Had I known then that someone has a strategy to successfully close out a judicial referral, my ordeal may have been less taxing. This Essay aims to offer those who will someday walk a mile in my shoes that measure of relief. Although the proper implementation of the problem-solving strategies offered by negotiation theory cannot guarantee any respondent the best possible outcome, it can at least increase the chances of its realization.