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### On the Abuse and Limits of Lawyer Discipline

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## Essay

### On the Abuse and Limits of Lawyer Discipline

VINCENT R. JOHNSON

*Despite being routinely underfunded, lawyer disciplinary processes must operate in ways that merit the confidence of both society at large and the American legal profession. This means that those who participate in lawyer grievance adjudication must be vigilant against systemic abuse (whether deliberate or unintentional) and mindful of factors that limit institutional competence. This Essay argues that, in many instances, disciplinary authorities should abstain from deciding grievances that would require them to rule on unresolved scientific questions, particularly if controversial matters are involved. The Essay further urges that grievance rulings must be consistent with American constitutional principles which favor robust debate of public issues and hold that even unpopular parties have a right to legal counsel. A lawyer should never be subject to discipline based on allegedly misleading advertising absent persuasive evidence that the lawyer knowingly, recklessly, or negligently made a provably false assertion of fact.*



## On the Abuse and Limits of Lawyer Discipline

VINCENT R. JOHNSON\*

At what point does filing a grievance amount to an abuse of lawyer disciplinary processes? And even if there is no abuse, when does a disciplinary authority lack competence to adjudicate a complaint? Is the necessity of ruling on a disputed scientific question the type of quandary that, in some cases, makes it impossible for a grievance authority to decide allegations of misconduct?

In October 2011, a Charlotte School of Law professor filed a complaint with the District of Columbia Office of Bar Counsel against four lawyers with Crowell & Moring LLP (“the lawyers”).<sup>1</sup> The complaint accused the lawyers of publishing a misleading advertisement.<sup>2</sup>

The backdrop for this accusation was the ongoing legal and social battle between Big Coal and environmentalists.<sup>3</sup> The precipitating cause for the complaint was the fact that eight days after a peer-reviewed medical study linked birth defects to the environmental devastation caused by mountaintop mining, the lawyers ran an advertisement on their website.<sup>4</sup> The advertisement stated, among other things, that “[t]he study failed to account for consanguinity [sic], one of the most prominent sources of birth defects.”<sup>5</sup>

The advertisement provoked a firestorm of criticism on the ground that it demeaned the people of Appalachia by perpetuating stereotypes of inbreeding.<sup>6</sup> In response, the lawyers removed the offending language, and

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<sup>1</sup> Memorandum from Jason Huber to the Office of Bar Counsel, Board on Professional Responsibility, District of Columbia Court of Appeals (Oct. 4, 2011), *available at* <http://amlawdaily.typepad.com/files/huber-ethics-complaint-re-crowell.pdf> [hereinafter *Complaint*]; *see also* Brian Baxter, *Crowell Hit with Ethics Complaint over Inbreeding Comment*, AM. LAW DAILY (Oct. 6, 2011, 2:24 PM), <http://amlawdaily.typepad.com/amlawdaily/2011/10/crowell-ethics-complaint.html>; Debra Cassens Weiss, *Law Prof Files Ethics Complaint Against Crowell Lawyers for Appalachian Inbreeding Suggestion*, A.B.A. J. (Oct. 7, 2011, 8:35 AM) [http://www.abajournal.com/news/article/law\\_prof\\_files\\_ethics\\_complaint\\_against\\_crowell\\_lawyers\\_for\\_appalachian\\_inb/](http://www.abajournal.com/news/article/law_prof_files_ethics_complaint_against_crowell_lawyers_for_appalachian_inb/).

<sup>2</sup> *Complaint*, *supra* note 1, at 1–2.

<sup>3</sup> *See id.* at 2–5 (discussing the tension between the mountaintop mining company and the scientists who published the study).

<sup>4</sup> *Id.* at 3–4.

<sup>5</sup> *Id.* at exhibit B.

<sup>6</sup> *See, e.g.*, Debra Cassens Weiss, *Did Crowell & Moring Insult Appalachians with Inbreeding Suggestion?*, A.B.A. J. (Jul. 12, 2011, 7:06 AM),

apologized for “any offense taken.”<sup>7</sup>

In the D.C. complaint, the professor alleged that the lawyers

failed to recognize decades old empirical research that established that consanguinity is no more prevalent in Appalachia than anywhere else in the country. Controlling for inbreeding is therefore not necessary. Thus, due to a lack of proper context and support for the Authors’ consanguinity comment, the Advertisement as a whole was materially misleading and violated Rule 7.1(a) and Rule 8.4(c).<sup>8</sup>

Seemingly the only way that disciplinary authorities could rule on this complaint was by making factual findings about whether inbreeding is disproportionately prevalent in Appalachia or about whether consanguinity causes most birth defects. Indeed, that may have been the purpose of the complaint—a desire to build favorable precedent on factual issues important to the victims of mountaintop mining. However, inasmuch as the reasoning of disciplinary authorities rarely becomes public, the complaint may have been filed simply to discourage lawyers from representing coal operators or to penalize them for seeking to do so.

Lawyer disciplinary authorities generally have little or no expertise on scientific questions like the prevalence of inbreeding or the causes of birth defects. It is therefore questionable whether the all-too-limited financial and human resources available for policing the legal profession should be spent on this kind of dispute. These types of issues are far removed from the run-of-the-mill cases where lawyers are disciplined under the advertising rules for misleading statements about fees,<sup>9</sup> credentials,<sup>10</sup>

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[http://www.abajournal.com/news/article/did\\_crowell\\_moring\\_insult\\_appalachians\\_with\\_inbreeding\\_suggestion/](http://www.abajournal.com/news/article/did_crowell_moring_insult_appalachians_with_inbreeding_suggestion/) (discussing the local media reaction and the law firm’s attempt to distance itself from the offensive statements).

<sup>7</sup> Complaint, *supra* note 1, at 2.

<sup>8</sup> *Id.* at 8; see D.C. RULES OF PROF’L CONDUCT R. 7.1(a) (2011) (“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it: (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading . . . .”); *id.* R. 8.4 (“It is professional misconduct for a lawyer to: . . . (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . .”). These rules are substantially identical to similarly numbered provisions in the American Bar Association’s Model Rules. See MODEL RULES OF PROF’L CONDUCT R. 7.1 & 8.4 (2011).

<sup>9</sup> See, e.g., *In re Pacior*, 770 N.E.2d 273, 274 (Ind. 2002) (per curiam) (imposing discipline based on misleading statements about free initial consultation).

<sup>10</sup> See, e.g., *N.C. State Bar v. Culbertson*, 627 S.E.2d 644, 649 (N.C. Ct. App. 2006) (concluding that a lawyer’s statement that he was “published” in the Federal Reports was misleading).

experience,<sup>11</sup> or foreign language abilities.<sup>12</sup>

Whether mountaintop mining causes birth defects or other adverse health consequences is a matter of great public concern.<sup>13</sup> That is why the merits of resulting legal claims should be fully aired. For decades, the Supreme Court has recognized that there is a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>14</sup> This means that lawyers and their clients should not be discouraged from raising colorable issues related to questions of legal responsibility. Unfortunately, the filing of a disciplinary complaint against lawyers who are willing to make the case of unpopular clients threatens to truncate public discussion of important social issues and chill the exercise of First Amendment rights.

The argument behind the D.C. complaint seems to be that the topic of consanguinity (at least in Appalachia) is beyond the range of legitimate debate because a study of marital records thirty years ago concluded that inbreeding was not “unique or particularly common to” Southern Appalachia.<sup>15</sup> Yet, lawyer grievance committees have limited fact-finding powers and procedures. Surely, such a body should not be the tribunal to rule on whether a previous scientific study was so definitive as to forbid, on grounds of misrepresentation, arguments related to consanguinity in cases seeking to hold coal companies responsible for the health-related consequences of their actions.

Not every difference of opinion amounts to a misrepresentation. The fact that one lawyer has disregarded a fact that another lawyer thinks is important, and has raised an issue that the other believes lacks merit, does not necessarily mean that the first lawyer has misrepresented the evidence. Rather, the divergence of perspectives may simply mean that the facts are sufficiently complex that there is support for differing views.

Of course, a point may come where the facts are so clear or overwhelmingly established that to deny them is to perpetrate a fraud. This might be true today if a lawyer places an advertisement stating, as a matter of fact, that smoking tobacco does not cause lung cancer. However, as a general matter, disciplinary tribunals should be wary of declaring that

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<sup>11</sup> See, e.g., *In re Huelskamp*, 740 N.E.2d 846, 848 (Ind. 2000) (per curiam) (involving misleading statements about military and teaching experience).

<sup>12</sup> See, e.g., *In re Wells*, 709 S.E.2d 644, 646–47 (S.C. 2011) (per curiam) (holding that “We Speak Spanish” was misleading on the facts of the case).

<sup>13</sup> See Clara Bingham, *A Call to Arms: Citizens Need to Save Appalachia*, COURIER-JOURNAL (Louisville, Ky.), July 10, 2011, at H1 (arguing that mountaintop removal coal mining results in increased cancer rates and higher costs to treat illnesses); Ivy Brashear, Editorial, *Readers Forum; Community Challenge; Mountaintop Mining Poses Threat to Health*, COURIER-JOURNAL (Louisville, Ky.), July 25, 2011, at A6 (urging citizens of Eastern Kentucky to fight against mountaintop removal coal mining).

<sup>14</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>15</sup> Complaint, *supra* note 1, at 42 exhibit G.

there is no room for disagreement on scientific questions.

It would be dangerous for disciplinary authorities to allow grievances to be used as tactical weapons for advancement of partisan purposes ancillary to civil litigation. This is particularly true inasmuch as most states hold that the filing of a grievance against a lawyer is absolutely privileged.<sup>16</sup> Preventing the actual or apparent abuse of the lawyer disciplinary process is one reason why, even though there is a mandatory duty to report misconduct by another lawyer,<sup>17</sup> it is generally agreed that reporting may be deferred until the conclusion of pending litigation from which knowledge of the misconduct emerged.<sup>18</sup>

Courts and ethics advisory committees often wisely decline to rule on political questions because those matters are more properly within the purview of other branches of government.<sup>19</sup> So too, it may be prudent for disciplinary authorities to avoid adjudicating unsettled scientific controversies, which are better resolved in the courts. Such a choice might be justified on the ground that the unresolved state of the relevant science means that the grievance is not ripe for adjudication.

A decision not to rule promptly on a complaint identifying alleged lawyer misconduct would not be unprecedented. “[D]isciplinary authorities often suspend or abate their own inquiry [into a grievance involving the same conduct as a pending civil or criminal action] so as to be able to work with a complete record and avoid duplicative investigation.”<sup>20</sup>

If a disciplinary authority decides to rule on a grievance arising from a purportedly misleading advertisement involving unsettled scientific issues, then it is critical for decision-makers to remember the constitutional principles that have emerged from both the lawyer advertising cases and the law of defamation. The power to impose lawyer discipline is limited by the precedent in each of those areas.

The lawyer advertising cases hold that while inherently misleading

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<sup>16</sup> See 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.4 (3d ed. Supp. 2009) (indicating that in most states the privilege does not turn on good faith or good cause).

<sup>17</sup> See ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (2011) (“Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct.”).

<sup>18</sup> See Vincent R. Johnson, *Legal Malpractice Litigation and the Duty to Report Misconduct*, 1 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 40, 82–87 (2011) (discussing public policy considerations in favor of deferred reporting of misconduct during pending litigation).

<sup>19</sup> See John Caher, *Judicial Ethics Committee Punts on Query over Same-Sex Marriage*, N.Y. L.J., Jan. 13, 2012, at 1 (reporting that the New York Advisory Committee on Judicial Ethics decided to sidestep the question of whether a judge can refuse to perform same-sex marriages on religious grounds because the question “raises serious legal issues . . . [which] must be raised and addressed by persons with standing in the appropriate legal venue”).

<sup>20</sup> THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* 58 (10th ed. 2008).

statements can be banned, communications that are only potentially misleading must be addressed by less restrictive means, such as additional disclosure requirements.<sup>21</sup> The Constitution favors more speech, not less.<sup>22</sup> The mere fact someone might misunderstand an advertisement is not enough to justify the imposition of discipline.

The defamation cases make clear that speech about an issue of public concern is protected by the First Amendment, unless it includes, expressly or implicitly, a provably false assertion of fact. Statements of opinion that do not imply false facts cannot give rise to liability.<sup>23</sup> In this regard it may be noted that the first part of the statement that is the focus of the D.C. complaint appears to be indisputably true: the study that linked mountaintop mining to birth defects “failed to account for consanguinity [sic].”<sup>24</sup> The second part of the statement—that consanguinity is “one of the most prominent sources of birth defects”<sup>25</sup>—might be deemed to be not provably false (depending on the state of relevant science) or might simply be a matter of opinion as to the meaning of conflicting facts.

One fair interpretation of the advertisement at issue is that the lawyers were offering to represent coal companies by making whatever arguments were supported by the law and facts. This line of analysis would presumably insulate lawyers from liability for alleged misconduct. Lawyers ordinarily have a legal privilege to represent their clients even when their doing so is disadvantageous to other persons.<sup>26</sup>

In one recent case, the Supreme Court of South Carolina dismissed

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<sup>21</sup> The Supreme Court explained that:

[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information . . . .

*In re R.M.J.*, 455 U.S. 191, 203 (1982); *accord In re Anonymous Member of S.C. Bar*, 684 S.E.2d 560, 564 (S.C. 2009) (per curiam).

<sup>22</sup> *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977) (“Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less.”).

<sup>23</sup> *Cf. Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (concluding that statements of opinion could support an action for defamation because they were “sufficiently factual to be susceptible of being proved true or false”).

<sup>24</sup> Complaint, *supra* note 1, at 1, 3.

<sup>25</sup> *Id.* at 1.

<sup>26</sup> *See, e.g., Reynolds v. Schrock*, 142 P.3d 1062, 1071–72 (Or. 2006) (en banc) (recognizing a privilege sufficient to defeat a claim against a lawyer for aiding and abetting a client’s breach of fiduciary duty); *Maynard v. Caballero*, 752 S.W.2d 719, 721 (Tex. App. 1988) (holding that the lawyer’s privilege to represent his client defeated an action for tortious interference).

grievance charges based on misleading advertising.<sup>27</sup> The court found that an advertisement stating variously that a lawyer would “work to protect” and would “protect” injured employees from employer retaliation was not “misleading in that it created the false impression that by retaining [the attorney] an injured employee would not lose his or her job by filing a worker’s compensation claim.”<sup>28</sup> As the court explained, “[t]his broad statement . . . was merely a statement of [the attorney’s] role as an advocate on behalf of a client. Within this advocacy role, [the attorney] appeared to convey that he would use whatever means, including statutory remedies, which were available to guard against a client’s loss of employment.”<sup>29</sup>

In his complaint, the Charlotte School of Law professor argued that the lawyers’ “misleading statement regarding consanguinity . . . is rooted in the harmful stereotype that Appalachian communities are more inbred than communities elsewhere in the country.”<sup>30</sup> He asserts that “[i]t is sound policy for the Bar to punish the use of misleading stereotypes in attorney advertising.”<sup>31</sup> Whether this is true, as a general rule, is certainly open to question.

First, determining whether a statement is rooted in a harmful stereotype would often require a disciplinary committee to speculate, and it might invite punishment of unpopular speech. The advertisement that gave rise to the D.C. complaint did not expressly invoke any stereotype; it simply said that consanguinity was a relevant issue in birth defect cases.<sup>32</sup>

Second, some stereotypes are merely expressions of opinion and to that extent should be constitutionally protected.<sup>33</sup> It seems doubtful that a

<sup>27</sup> *In re* Anonymous Member of South Carolina Bar, 684 S.E.2d at 566.

<sup>28</sup> *Id.* at 561, 565.

<sup>29</sup> *Id.* at 565.

<sup>30</sup> Complaint, *supra* note 1, at 8.

<sup>31</sup> *Id.*

<sup>32</sup> In response to complaints about the advertisement, Crowell & Moring issued the following statement:

Consanguinity is one of a number of commonly addressed issues in studies of this type, regardless of geography. Scientists address this consideration regularly because it can matter to scientific conclusions, and do so regardless of locale. We did not raise this issue with particular reference to any region, and we did not mean to imply any such thing. That said, we apologize for any offense taken . . . .

Ken Ward, Jr., *Mountaintop Removal and Birth Defects: Just What Are the Coal Industry’s Lawyers Talking About?*, CHARLESTON GAZETTE (July 11, 2011), <http://blogs.wvgazette.com/coalattoo/2011/07/11/mountaintop-removal-and-birth-defects-just-what-are-the-coal-industrys-lawyers-talking-about/>.

<sup>33</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 24 (1990). Although the court declined to enact a “so-called opinion privilege” it stated that “protection for statements of pure opinion is dictated by *existing* First Amendment doctrine” and, as such, “‘full constitutional protection’ extends to any



consumer lawyer should be disciplined for saying that insurance companies or multi-national corporations are greedy and victimize ordinary persons. This is true even if that opinion is rooted in offensive and inaccurate stereotypes.

Third, employing lawyer discipline to banish offensive stereotyping might divert attention away from the relevant constitutional inquiry. The question, framed in light of the First Amendment, is not whether an utterance reflects bad taste or is found by others to be offensive, but whether the statement is false. Unless the statement is provably false, it enjoys an important degree of constitutional protection.

Finally, while lawyers must respect the rights of third persons, they also have an obligation to zealously represent their clients in litigation.<sup>34</sup> Thus, relevant provisions in lawyer ethics codes impose discipline for disrespect of the rights of third persons only if a lawyer, in representing a client uses “means that have *no substantial purpose other than to embarrass, delay, or burden a third person.*”<sup>35</sup> Imposing discipline based on perceived stereotyping would render meaningless this carefully drawn language, which is now part of the law of a multitude of jurisdictions.<sup>36</sup>

Just a few decades ago, an American Bar Association committee headed by former Supreme Court Justice Tom C. Clark<sup>37</sup> declared the state of lawyer discipline in the United States to be scandalously deficient.<sup>38</sup> During the intervening years, the field of lawyer discipline has been greatly improved.<sup>39</sup> Yet, today, in every jurisdiction, the process for policing the legal profession labors under the realities of limited resources and the need for public confidence in the decisions made.

It would be unwise for disciplinary authorities to venture into the unmapped territory of disputed scientific questions or to stray from well-established constitutional principles in a misguided effort to effectively discipline attorneys. It would also be imprudent for the relevant authorities to allow grievances to be effectively used as tactical weapons incidental to

statement relating to matters of public concern ‘that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual.’” *Id.*

<sup>34</sup> MODEL RULES OF PROF’L CONDUCT, PREAMBLE (2006) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

<sup>35</sup> MODEL RULES OF PROF’L CONDUCT R. 4.4(a) (2011) (emphasis added).

<sup>36</sup> *See, e.g.*, CONN. RULES OF PROF’L CONDUCT R. 4.4(a) (2012) (adopting the text of Model Rule of Professional Conduct R. 4.4(a)); DEL. RULES OF PROF’L CONDUCT R. 4.4(a) (2010) (same), available at <http://courts.delaware.gov/rules/DLRPCFebruary2010.pdf>.

<sup>37</sup> Tom C. Clark, OYEZ (Mar. 12, 2012), [http://www.oyez.org/justices/tom\\_c\\_clark](http://www.oyez.org/justices/tom_c_clark).

<sup>38</sup> *See* A.B.A. SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970) (“After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession.”).

<sup>39</sup> *See* Vincent R. Johnson, *Justice Tom C. Clark’s Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 49–52 (2005) (discussing efforts to modernize lawyer discipline).

heated civil litigation. These various considerations require disciplinary authorities to exercise restraint and judgment in interpreting and enforcing the malleable provisions of lawyer ethics codes.