

Guardrails Needed Against Politically Motivated Atty Discipline

By **Deborah Winokur** (August 1, 2023)

Tom Girardi allegedly stole millions from victims of traumatic accidents, yet was celebrated by leaders of the State Bar of California at events he hosted and at parties with bar employees he attended.

His reach was such that he could, and did, exercise troubling influence in the appointment of a state bar court judge.

At the same time, clients and former clients lodged more than 200 complaints with the California State Bar against him, the bulk of which related to client trust account violations.



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The state bar board of trustees' audit revealed that his connections were likely the reason these complaints were swept under the rug.[1]

The agency has since pledged to overhaul its disciplinary process in an effort to restore the public's faith in the law.[2]

The idea of protecting the public is the hallmark of professional discipline.[3] Clearly in the case of Girardi and his alleged offenses against clients, it is easy and logical to understand the need for discipline. Tougher questions come into play, however, when this somewhat amorphous and potentially paternalistic rationale is used to justify bar-directed disciplinary action, particularly in instances that could be construed as politically motivated.

Politically motivated disciplinary investigations have become increasingly evident on both sides of the political spectrum.

On the right, the State Bar of California recently held hearings on an investigation of John Eastman, a lawyer to former President Donald Trump.

The state bar supported its disciplinary charges by arguing that Eastman knowingly and willfully pushed false allegations relating to the 2020 election and promoted an unlawful theory.

Eastman's attorney, however, said that "[l]awyers get to argue debatable issues. ... The State Bar cannot discipline a lawyer for advancing tenable positions." [4]

On the left, Wisconsin Supreme Court Justice Jill Karofsky has faced partisan-based complaints for her questioning of a Trump lawyer during oral arguments related to an effort to overturn Wisconsin's 2020 election results.

Ultimately the Wisconsin oversight panel tossed the complaints but expressed concern about Justice Karofsky's treatment of Trump's lawyer.

Subsequently, Justice Karofsky's attorney admonished the judicial commission for entertaining the complaint and expressed concern about allowing politically motivated actors to "hijack the (judicial) disciplinary system, in an attempt to silence a justice who rightfully tried to stop frivolous and dangerous arguments that undermined our democracy." [5]

Politically motivated attempts to discipline attorneys generally fall under catchall rules, such as conduct that is dishonest or prejudicial to the administration of justice, rather than a specific violation of a duty owed to a client, third party or the tribunal.

The rationale for pursuing these types of complaints is the view that discipline will promote the public's view of the legal process and faith in the fair administration of justice.

However, two questions remain: Is the attorney discipline system the right mechanism to promote those lofty goals? And if so, at what cost?

Sadly, bar admission standards and discipline have been used historically as political weapons to limit immigrants, minorities and women from participating in the bar, and to punish lawyers representing clients with unpopular political opinions or those challenging the government or major corporations, such as those representing workers harmed in workplace accidents.[6]

Legal scholars have noted that the use of politically motivated bar discipline picks up during times of turmoil or major political upheaval.

Viewing discipline with this lens puts a sharper focus on the harm that can flow from attempts to punish attorneys who represent clients espousing unpopular or upsetting opinions or viewpoints.

Since the practice of law has the great privilege of being a self-regulating profession, lawyers have to be the ones to draw a strict boundary against using attorney or judicial discipline as a way to seek a political outcome.

In February, Adams and Reese LLP attorney Lucian Pera and six other leading ethics and professional responsibility attorneys called on the American Bar Association to "launch a once-in-a generation review of the mechanics, structure, reach, and infrastructure of lawyer regulation." [7]

Citing the need to both reinforce existing legal infrastructure and align with new technology and innovation, the group recommended that lawyers representing a broad swath of experience evaluate the current status of legal regulation and make recommendations to appropriately reflect the demands of modern society.

The clarion call of these titans of the industry should be heard by bar leaders and must include a review of how discipline is currently being used as a political weapon — particularly given the historical context of the misuse of discipline.

Attorney discipline falls uniquely within the provenance of the judiciary, so inviting political considerations into the disciplinary process conflates the roles of the branches of government.

It is essential to maintain appropriate guardrails so that attorneys can be confident that their advocacy on behalf of a client is protected from political attack against unfavorable opinions.

In addition, politically motivated disciplinary complaints are derivative of the underlying proceedings and are not necessary to advance the rule of law. They risk creating a sideshow that undermines public confidence in the judicial system.

Furthermore, there is a risk of harm to the public if the proceedings convey the idea that lawyers are not permitted to represent clients with unpopular political ideas.

Ultimately, members of the public and those potentially in need of legal services may find it reassuring to know that lawyers can zealously advocate for their clients without fear of reprisal.

For their part, disciplinary authorities should not proceed with a disciplinary complaint if the outcome sought is political gain.

When and if the ABA takes on an overhaul of the Model Rules of Professional Conduct, it needs to audit the use of discipline and construct a framework to tighten the rules relating to attorney misconduct in order to ensure the fair administration of attorney discipline.

The language of Rule 8.4 on misconduct, and the explanatory comments thereto, do not provide enough structure or perspective to prevent politically motivated complaints.

While it would not have the force of black-letter law, the ABA could help stem the tide of these types of partisan complaints by adding comments that (1) explain the distinction between politically motivated complaints and complaints in the public interest, (2) provide examples of politically motivated discipline, and (3) include a statement that the purpose of discipline is to protect clients, third parties and the judiciary, not to serve as a grounds to air political grievances.

As illustrated by Girardi's alleged conduct and abuse of his clients and the state bar's yearslong indifference, there is a need to revamp attorney discipline and reassure the public that bar authorities will protect them.

As Pera and his fellow reformers suggest, the time is now to focus on modernizing the Model Rules, bringing them in line with the advances in our society. One such reform should focus on the misconduct rules.

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[1] <https://pagesix.com/2022/11/03/tom-girardi-wasnt-disbarred-despite-hundreds-of-complaints/>.

[2] <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-of-california-releases-reports-detailing-past-unethical-conduct-in-handling-girardi-complaints>.

[3] <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1312&context=wmlr>.

[4] <https://www.npr.org/2023/06/23/1183844921/what-weve-learned-from-pro-trump-attorney-john-eastmans-state-bar-trial>.

[5] <https://lawandcrime.com/2020-election/disciplinary-panel-tosses-complaint-against-state-supreme-court-justice-who-said-trump-lawyer-was-trying-to-overturn-this-election-so-that-your-king-can-stay-in-power/>.

[6] https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1242&context=law_lawreview.

[7] <https://news.bloomberglaw.com/us-law-week/its-time-for-the-aba-to-renew-its-role-in-attorney-discipline>.