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Punishment in practice

Andrew John Hosmanek
University of Iowa

PUNISHMENT IN PRACTICE

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Andrew John Hosmanek

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Thesis Supervisor: Associate Professor Amy E. Colbert

Graduate College
The University of Iowa
Iowa City, Iowa

CERTIFICATE OF APPROVAL

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PH.D. THESIS

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This is to certify that the Ph.D. thesis of

Andrew John Hosmanek

has been approved by the Examining Committee
for the thesis requirement for the Doctor of Philosophy
degree in Business Administration at the August 2015 graduation.

Thesis Committee: _____
Amy E. Colbert, Thesis Supervisor

_____
Kenneth G. Brown

_____
Nancy R. Hauserman

_____
Emily Hughes

_____
Sara L. Rynes

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ABSTRACT

Ethical breaches committed by professionals are an important problem, both within the professions and for society as a whole. In this study, I examined breaches committed in one of the oldest and most-regulated professions, law, across three states. Using a sample of 377 actual disciplinary cases, I quantitatively evaluated the breaches and the punishments assessed to determine if justice is being applied proportionally and consistently. This study showed several potential disconnects between how decision-makers say they will punish, and how they actually punish.

Punishment theory states that punishments should be applied in accordance with the blameworthiness of the offense and offender. I identified the factors in these cases that should correspond to blameworthiness, and found that some of the theorized factors (such as target and intentionality) did not matter in determining punishment. The study showed that neither prior good acts nor prior discipline mattered for punishment. It also showed that an offender's noncooperation with his or her own investigation may be one of the most important factors in determining punishment, which raises questions of justice.

Additionally, my study shows that impaired professionals who commit ethical breaches may be treated differently than unimpaired professionals. While mental impairment or any kind of substance abuse ought to be mitigating factors, only professionals with alcohol problems were treated more leniently. Textual analysis revealed that decision-makers used a significantly more passive tone when dealing with alcohol-impaired offenders.

PUBLIC ABSTRACT

When professionals commit ethical breaches, they harm their clients, their professions, and often themselves. These offenders are punished, often in a very public manner. However, there are no large-scale studies examining whether these punishments are applied proportionally and consistently, according to the characteristics of the offender and his or her offense.

I examine 377 actual disciplinary cases from a highly regulated profession (law) in three states. I found there may be important disconnects between how the decision-makers say they will punish, and how they actually punish. I found that punishments are not being applied consistently across states. And, I found that professionals impaired by alcohol are receiving different treatment than other offenders.

This study delves into the questions of why we punish, who we punish, and how we punish them. It contrasts the law's stated goals of punishment with heretofore-unknown latent factors that are statistically important in determining actual punishments. And, it seeks to explore the special problems facing impaired professionals.

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CHAPTER I

INTRODUCTION

When professionals commit ethical breaches, many people are harmed. The client of an unethical lawyer may lose her money or freedom. Colleagues at the unethical professional's firm have their reputations tainted by the act. And, all members of the profession in that area may suffer when an ethical complaint is filed and proven against one of their peers.

The corporate landscape in the United States is beset with scandalous behavior, seemingly on a daily basis. The items in the news range from behavior that is "merely" unethical, to downright illegal. Many of the individuals involved in these ethical breaches are members of regulated professions, such as securities trading, accounting, and law. While these professions have evolved strong normative codes of ethics, no large-scale studies have examined the most common types of ethical breaches being committed, how breaches are being punished, and if punishment is being administered consistently across offenders. In this dissertation, I define a professional ethical breach as an action by a licensed professional that violates the shared moral judgments of that profession, as set forth in that profession's ethical codes. In later sections, I show why it is important to have a good definition of what constitutes a professional ethical breach, and why we need to know what types of breaches occur.

While many professions have written codes of ethics that explain the behaviors that are allowed or prohibited, the codes themselves are generally silent as to the appropriate punishment for these breaches. Thus, punishments are assessed on a case-by-case basis, without reference to an overarching framework for consistent application of punishment. My study brings more order to this area by identifying common features of the breaches being committed, analyzing the types of punishment available, and combining the two into a predictive model. Most importantly, I evaluate how punishment is actually being applied in practice, by quantitatively comparing case

outcomes to the predictive model. This helps to assess whether offenders are being punished proportionally (in accordance with the blameworthiness of the offense) and consistently (equally across people).

This study examines one of the oldest and most highly-regulated professions, law, to gain an understanding of the most common elements of ethical breaches that occur in practice. Typologies have been created for a variety of behavioral breaches, such as theft or loafing, in the workplace (S. L. Robinson & Bennett, 1995), and for ethical breaches in one specialized profession (police work) (Lasthuizen, Huberts, & Heres, 2011), but no one has applied this type of analysis to professional ethical breaches in a broader sense. I identify some of the most common elements of professional ethical breaches by using an inductive approach (using information derived from written disciplinary opinions, court cases, and codes of ethics) informed by existing theory in the legal and management literatures, as well as ethical frameworks.

There are various theories as to *why* behavioral breaches should be punished, ranging from the criminal justice literature (Bibas, 2006; Kadish, 1999) to social psychology (Carlsmith, Darley, & Robinson, 2002) to management (Arvey & Ivancevich, 1980; Trevino & Weaver, 1998). However, very little attention has been given in the management literature as to *how* we should punish ethical breaches. A major contribution of this study is my extension of the existing theory on punishment into the realm of ethical breaches for professionals. Here, I look to the criminal justice literature, which has a rich tradition of normative debate on how society punishes. As explained in more detail below, criminal justice theory has settled upon four major justifications for punishment, three of which are used in my analysis. Incapacitation is a form of punishment that removes the offender from society (Carlsmith et al., 2002), thereby preventing them from doing additional harm. This can be analogized to revoking or suspending the license of a practicing professional. Deterrence is a form of punishment that sends a message to the offender, and/or society, not to repeat the offense

(McFatter, 1982). This can be analogized to a public reprimand or brief suspension for a professional. Rehabilitative punishments are more centered on the offender (McFatter, 1982). These punishments have the goal of remedying a defect in the offender, educational or dispositional, which contributed to the offense. In the professions, this could mean drug or alcohol treatment, or a requirement for further education in a practice area.

Professional disciplinary boards choose from these varying types of punishments, and must also choose the severity of whatever kind of punishment they choose. Unlike criminal law, there are not specific punishments (type or severity) provided in the written ethical codes of the professions. Therefore, the disciplinary boards must draw upon their shared ethical norms to prescribe a punishment that is proportional. Proportionality means that the severity of the punishment given must fit with the blameworthiness of the offense (Frase, 2004). In this dissertation I integrate arguments from common ethical frameworks and the criminal justice literature to show how proportionality of punishment can be evaluated. I show how the legal profession has evolved a mixed framework, drawing from both formalist (rules-based) frameworks and utilitarian ethical frameworks, to decide on punishments.

I integrate the ethics, management, and legal literatures on punishment, as well as theory and evidence from professional ethical codes and ethical frameworks, to create a predictive model for punishments assessed for ethical breaches. As set forth in more detail in Chapter 2, I argue that the ethical frameworks used by the legal profession use the severity of the breach and the intentionality of the breach to determine blameworthiness. I then use this concept of blameworthiness to explain how the judgments around proportionality of punishment are being made, based on shared norms and underlying ethical frameworks adopted by professionals.

However, as in any field, theory and practice may diverge. Therefore, I examine how ethical breaches in the legal profession are *actually* being punished. I analyze

hundreds of disciplinary cases to determine what kinds of punishments are being given, and how the actual punishments may differ from those theorized. I utilize regression analysis to determine how closely the evidence fits to my predictive model. I give more detail on my analytic strategy in Chapter 3.

In addition to analyzing the features of the breaches being committed, I also analyze offender characteristics, to determine whether offenders are being punished with consistency. While I expect the characteristics of the breach to be most important in determining punishment, I am mindful that characteristics of the person can influence how one is treated by decision makers (Mittal et al., 2013; Sartorius, 2002). For example, a large number of disciplinary cases involve impaired professionals. These people may be suffering from mental illness, drug addiction, or other significant impairments. I conduct analyses of the types of ethical breaches committed by impaired professionals, analyze whether they are punished in the same way as unimpaired professionals, and how different impairments may influence punishment. I also explore whether there are differences in the language used by disciplinary boards against impaired professionals. I utilize qualitative coding and computer aided textual analysis, which is a mix of qualitative and quantitative techniques, to analyze the linguistic features of cases dealing with impaired and unimpaired offenders.

Theoretical and Practical Implications

My primary objectives in this dissertation are fourfold: to identify the common features of professional ethical breaches, to theorize how different breaches are likely to be punished, to compare how ethical breaches are actually being punished to the predictive equation, and to determine whether impaired professionals are punished differently than others. In the preceding section, I described what I will do to achieve these objectives. Now, I turn to the reasons that these objectives are important, and what theoretical and practical contributions I aim to make.

The first contribution of my dissertation is to describe the common features of ethical breaches for legal professionals. While each ethical breach may be unique in its facts, there are commonalities in the types of breaches that are committed. My study examines a variety of theory and evidence (including disciplinary opinions, court cases, and professional codes of ethics) to find the most common features of ethical breaches. The concept of ethical frameworks informs this list. In Chapter 2, I argue that the legal profession has adopted a mix of formalist (rules-based) and utilitarian ethical frameworks. I show how these frameworks relate to the written codes of ethics for the profession, and their underlying norms. Based on these theories and frameworks, I discuss how factors such as the intentionality and the target of each breach help us determine the blameworthiness of each breach.

After setting forth the types of breaches, I then argue how the different types of breaches are likely to be punished. I combine the identified common features of breaches into a predictive model for punishment. I then test the model by analyzing the actual punishments meted out. In this way, I determine whether ethical breaches are being punished proportionally to blameworthiness. By creating and testing this model, I hope to create a useful guide to the major types of professional ethical breaches, and their corresponding punishments. This is an important contribution. While every professional disciplinary case may require an analysis of the specific facts ("Supreme Ct. Atty. Disc. Bd. v. Qualley," 2013), it is important that punishment is applied appropriately and with consistency to achieve its aims (Kadish, 1999; Trevino, Weaver, & Reynolds, 2006). I believe my study is the first to propose a comprehensive quantitative theoretical model for punishment based on professional ethical breaches. My model may assist future research in professional ethics and punishment by serving as a starting point for additional studies. Researchers could also use the model to assess proportionality of punishment in other professions, such as accounting, medicine, or social work. Longitudinal research could examine how proportionality and type of punishment affects

recidivism and the type or target of future breaches. My model may also affect the application of punishment in practice. While the professions are unlikely to modify their disciplinary systems based on one study, my model and results may provoke discussion among disciplinary boards and the judiciary if it is shown that punishments are not being applied consistently. If my model is seen as practically useful, it could serve as a touchstone for drafting committees when ethical codes are amended in the future.

Additionally, my study has important implications for a growing subgroup of professionals. Studies show that professionals such as lawyers and physicians may be impaired by mental health issues or addiction at twice the rate of the general population (Association, 2011a). My study examines the kinds of ethical breaches most often committed by impaired and non-impaired professionals. It also analyzes whether impaired professionals are punished differently. This study yields information about the most likely ethical pitfalls that impaired professionals face in their work, and what they will face when the time comes for them to be punished. This makes an important contribution to the growing literature on impaired professionals (Allan, 1997; Association, 2011a, 2011b; Grady, 2013), which right now is focused almost totally on the scope of the problem and the causes of impairment. While it is important to understand these items, researchers should also consider external manifestations of the impairment epidemic, e.g., are impaired professionals committing more financial breaches targeted against clients to fund drug abuse? My study provides researchers with a list of common impairments, and a predictive model useful for studying impaired professionals. From a practical standpoint, my model and findings have implications for those who punish impaired professionals, and for those who defend them, about how impairment would affect a professional's chances in the disciplinary system after an ethical breach.

In addition to the general theoretical and practical implications of this research, my dissertation makes contributions to three separate literatures. Scholars in the fields of

management, professional practice, and ethics have all examined ethical breaches, but separately. First, my dissertation contributes to the management literature on ethics and punishment in the workplace. Current management research on punishment at work suffers from underdeveloped theory on the justifications for punishment, and a lack of good evidence on what types of punishment are appropriate or effective (Trevino & Weaver, 1998). However, the management literature can be augmented by bringing in the legal and ethical literatures on punishment. This is a major goal of my study. Criminal law literature has a long and rich history of debate on the justifications for punishment. Some of these legal ideas have been extended to the workplace (Carlsmith et al., 2002), but not enough has been done to integrate the two disciplines. Additionally, while the study of ethics generally is well-represented in management literature, very little of the business ethics literature considers punishment for ethical breaches (Trevino et al., 2006).

Second, the legal profession has grappled with the problem of ethical breaches for centuries. While the literature on law and lawyering often references the problem of ethical breaches, it has not developed a good typology of breaches or likely punishments. Legal writing tends to be very strong in the areas of normative arguments and historical background. However, law review articles generally are weaker than management articles in quantitative analysis and use of theory. Therefore, my dissertation, with its strong quantitative analysis and integrated theory, makes important contributions to this literature by clarifying the types of breaches being committed and suggesting a framework for consistent application of punishment.

Third, there is a wealth of thought on breaches and punishment in the ethics literature. One could literally spend the rest of one's life digesting philosophical arguments on what an ethical breach is and whether, when, and how, it should be punished. While the study of ethics is a fascinating and well-developed literature, its breadth is a weakness when seeking answers to specific important problems. By bringing

in specific theory from the criminal justice literature, and using theory and analytical techniques from management research, I contribute to a specific subfield in the ethics literature, that of professional ethics. While the ethics literature is strong on theory and philosophy, it can be weak on practical application. My study further improves the ethics literature by bringing in practical examples and evidence from the field. Bridging the legal, ethics and management literatures will result in better theory in each field on how to handle ethical breaches and punishment in the workplace.

My study makes an important contribution to each of these three literatures by using real-life evidence. My dataset consists of over 400 written disciplinary opinions from three states. Each of these documents contains a recital of the professional's work history, the nature of their ethical breach, a discussion of mitigating or aggravating factors, and the punishment administered, along with a discussion of the reasons for the punishment. The written opinions in these cases are issued after a thorough adversary process, in which the disciplinary board and the professional present evidence and make arguments. Although the ethics subfield is becoming increasingly important to management scholars, I am not aware of any large-scale studies that make a quantitative analysis of actual ethical breaches and punishments in this way. While we have some individual-level studies of unethical behavior and punishment in the management literature, these studies tend to use small samples (Bersoff, 1999) or are experimental, "paper people" studies that use hypothetical scenarios of ethical breach (Wiltermuth & Flynn, 2012). My study examines large numbers of actual professionals who committed actual breaches and were punished. This examination of the evidence will lead to better knowledge about the ethical breaches actually occurring in practice. This knowledge will allow me to build better theory on ethics and punishment in the workplace with confidence. The real-life nature, the size, and the richness of my dataset are all importance pieces of this study's contribution.

My study also has very important practical implications. Ethical breaches by members of the legal profession affect thousands of people each year. In the most recent count, there were 1,268,011 lawyers (Association, 2013b) licensed to practice in the United States. While most professionals will never encounter disciplinary proceedings, the costs of ethical breaches by professionals who do are substantial. These breaches result in harm to the victim of the breach, as well as harm to the profession, harm to society, and ultimately, harm to the offender upon being punished. This large-scale analysis of ethical breaches may provide important information to at-risk professionals and disciplinary authorities, potentially leading to the development of preventative measures for common breaches.

Having introduced an outline of the dissertation, and the importance of this study, in Chapter 2 I will review the relevant literature on ethics and punishment and set forth specific hypotheses and research questions. In Chapter 3 I will describe the sample and my statistical methods used to test the data.

CHAPTER II

LITERATURE REVIEW

The purpose of Chapter 2 is to review the ethics and punishment literatures relative to my research questions, and to develop the hypotheses in my predictive model. In order to do this, I first review the main aspirational code of ethics for my sample, the ABA Model Code of Professional Responsibility, and the accompanying commentaries and literature. I expand on this national code by giving an overview of the corresponding state-level ethical regulations for legal professionals for each of the three states in my sample. In this way, I explain the underlying expectations for ethical behavior in each profession, as well as some of the rationale behind these expectations. These ethical codes do not specifically set out certain punishments for certain ethical breaches, nor do they give specific justification for punishment in every case. However, these codes are important in that they reflect more than a century of ethical thought and theory in each of the professions examined. The codes guide normative expectations on what behavior is unethical and the reasons why it is considered unethical. Therefore, I chose to review the ethical codes first. I also define what a professional ethical breach is, for the purposes of this dissertation.

Next, I review the management literature related to behavior that could be considered ethical breaches in business and professional settings. I synthesize the theory behind the regulation of legal ethics with some of the existing management theory on ethics. I compare the normative rules of professional codes of ethics with management theory on what constitutes unethical behavior at work. There are several management constructs which are related to ethics and ethical breaches, which I briefly define and explain. I also discuss how this dissertation draws from, and contributes to, the management literature in this section.

Finally, I review and integrate three different literatures' perspective on punishment (criminal justice, ethics, and management) in order to predict how ethical

breaches will be punished. This is one of the most important contributions of my dissertation. Many consider management theories on punishment to be relatively underdeveloped (Trevino & Weaver, 1998). However, legal and ethical scholars have debated these issues for centuries. There is a limited amount of management literature that discusses the justifications for punishment in organizations. I review this literature and show how it integrates with criminal justice theory and ethical frameworks, in order to justify the use of punishment in the workplace. I then use these integrated literatures and theories to develop hypotheses arguing how different types of ethical breaches will be punished. To do this, I hypothesize punishment effects due to proportionality (the idea that the severity of punishment must be proportional to the severity of the offense) and blameworthiness (how the judgments around proportionality are being made, including judgments about the severity of the offense). These hypotheses are the foundation of my predictive model, which will serve as the major theoretical model for the empirical portion of my dissertation. I also propose theoretical moderators for the breach-punishment relationship, including the special case of impaired professionals.

Professional Ethics

A profession is, generally, an occupation which requires specialized education and licensure to practice. The professions include such practices as medicine, law, veterinary medicine, pharmacy, architecture, engineering, public accounting, real estate, and the like. Professionals are held to certain standards of practice, including ethical standards, by their licensing bodies. These standards are written in the professions' codes of ethics, which typically include a variety of injunctions against theft, harming clients, dishonesty, and other ethical breaches. Law is one of the most highly-regulated professions in the United States today. This makes sense, as lawyers are in a special position of trust with their clients, and have the potential to do great good or great harm.

Law is also one of the oldest professions. This combination of longevity and importance has given rise over the years to highly developed rules of ethics for the legal profession.

In the United States, each state typically has its own licensing bodies for professionals practicing in that state. Examples are a state bar association for lawyers and a board of medicine for physicians. Most professional licensing bodies, including their disciplinary boards, are composed at least in part of people who are themselves licensed in that profession. The state licensing bodies, in conjunction with state government, have the authority to admit or deny admission to practice for professionals, promulgate ethical standards, and punish breaches of ethics. Many professions also have national organizations which also publish codes of ethics. However, these codes are generally viewed by state licensing bodies as aspirational rather than mandatory. State licensing bodies may look to the national codes as model standards when developing their own state-specific rules, but are not required to do so.

In this dissertation, I will refer to a national code of professional ethics in the United States for lawyers, Model Rules of Professional Conduct, published by the American Bar Association (ABA). Many states have adopted the Model Rules, adding or deleting provisions as deemed necessary by each state's licensing body. Most states, therefore, have ethical codes for lawyers that are similar to the national code, but with state-specific differences.

Legal Codes of Ethics

To understand how professional ethical breaches will be punished, we must understand how the professions define a breach. In many cases, breaches are defined by written codes of ethics. I will review the codes of ethics for legal professionals at the national level, and then for the states in my sample. It is important to note that while the national and state ethical codes for law help to define unethical behaviors, none of these

codes set out specific punishment for breaches. Rather, punishment is determined on a case-by-case basis for each offender.

The ABA's written ethical standards are the Model Rules of Professional Conduct ("Model Rules"). For this study, I used the 2013 Model Rules, the most current when I began my analysis. The Model Rules were derived from two earlier documents: The 1969 Model Code of Professional Responsibility ("Model Code (1969)") and the 1908 Canons of Professional Ethics. The Canons of Professional Ethics themselves trace their roots to the Code of Ethics of the Alabama Bar Association, written in 1887 (Association, 1969). The Alabama Bar Association, in turn, derived their rules from a compilation of lectures by Judge George Sharswood, published in 1854, and a legal textbook from 1836 (Association, 1969). The ABA Model Code of Professional Responsibility arose from a 1964 initiative by the ABA's president to examine and make changes to the Canons of Professional Ethics, and were used through 1983 (Association, 1969). The ABA determined that the Canons were outdated in many respects, and did not enable practical penalties for violations of the ethical rules therein (Association, 1969). Therefore, the ABA decided to begin from scratch in drafting the Model Code of Professional Responsibility, rather than merely amending the Canons (Association, 1969).

While the Model Code (1969) has been replaced by the Model Rules, it is important to briefly examine the underpinnings of the Model Code (1969) and its commentary for its justifications of ethical regulation. The Preamble of the Model Code (1969) sets forth the context for the rules, and their importance. The Preamble begins by recognizing the importance of the rule of law:

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights

become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Next, the Preamble sets forth the unique position of the lawyer in America:

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

The Preamble then sets forth the Code's purposes, as well as the importance of lawyers maintaining their ethical standing in the eyes of the public and other lawyers:

The Model Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor … in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.

In its Preliminary Statement, the Code states that it is intended to be adopted by "appropriate agencies" (e.g. state Bar Associations) both as aspirational guidelines for good conduct and to guide disciplinary actions when a lawyer violates professional standards. However, neither the ABA nor the Model Code (1969) provides disciplinary procedures or penalties for violating the Disciplinary Rules. This function is expressly delegated to the respective "enforcing agency" (e.g. a state bar association or the state courts) for that lawyer (Association, 1969). Each state has professional licensing bodies which have the authority to set and enforce ethical rules. The enforcement of the rules is generally carried out by a state disciplinary board. The disciplinary boards are often composed mostly of members of their respective profession, but they also include some "lay members," (i.e., people who are not licensed in that profession). The disciplinary boards derive their authority to punish from state law, and, in the case of lawyers, the

power of the court system to regulate those who practice before it. In most states, a professional who is punished by a disciplinary board for ethical breaches may appeal the decision to the state's highest court.

The Preliminary Statement notes that "the severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances" (Association, 1969). Later in Chapter 2, I will extend this basic guideline by proposing my predictive model.

The ABA House of Delegates adopted the Model Rules in 1983 to replace the Model Code. The Model Rules continue to be used and updated through the present time (Association, 2013c). There are eight rules with sub-parts: Client-Lawyer Relationship (Rule 1), Counselor (Rule 2), Advocate (Rule 3), Transactions with Persons Other Than Clients (Rule 4), Law Firms and Associations (Rule 5), Public Service (Rule 6), Information About Legal Services (Rule 7) and Maintaining the Integrity of the Profession (Rule 8). The Model Rules build upon the Model Code in many places, but are more practical and prescriptive, whereas the Model Code had many sections which were merely aspirational. The Preamble of the Model Rules echoes the statement in the Model Code that "Lawyers play a vital role in the preservation of society," and clarifies that the Model Rules serve to define the relationship of lawyers to the legal system in furtherance of this goal.

As explained in more detail in Chapter 3, I selected the states of Iowa, Florida, and Wisconsin as my sample for this dissertation. Each of these states has ethical codes for lawyers based on the ABA Model Rules. The ABA tracks differences between the state codes and the Model Rules (Association, 2013a). While there are differences in ethical rules for lawyers specific to each state, overall, the goal of insuring consistent and effective punishment is the same. My review of these three states' ethical codes and the ABA Model Rules indicated that they are all quite similar in substance. However, I

believe it is important to discuss pertinent differences among the state codes and between the state codes and the Model Rules.

Iowa Rules of Professional Conduct

The Iowa Rules of Professional Conduct follow the Model Rules closely, with the majority of the rules being identical (Association, 2013a). However, Iowa adds or augments many provisions on lawyer advertisement and communications (Association, 2013a). These advertising provisions are considerably more stringent than the Model Rules. In fact, Iowa has long been known as the state which most ardently regulates lawyer advertising. Justice Uhlenhopp, dissenting in *Humphrey*, stated, "The Iowa rules do not merely regulate 'tools' of communication; they have a virtual stranglehold on lawyer advertising. By stringent control of techniques and content, they directly affect the dissemination of information to the public." ("Committee on Professional Ethics v. Humphrey," 1985). In the same case, Chief Justice Reynolds (concurring specially) gave rationale for these strict standards: "[State] courts, struggling in the face of financial constraints to fulfill their most basic functions, have not been supplied with sufficient resources to expand their regulatory responsibility in order to police even the ingenious activity of the minority of lawyers who have utilized print advertising to promote dishonest scams. Such a lawyer defrauded many Iowa clients without the knowledge of the court before his license could be revoked." ("Committee on Professional Ethics v. Humphrey," 1985). Additionally, Iowa considers it an ethical violation for a lawyer to engage in sexual harassment or unlawful discrimination, or to let their staff or agents do so (Association, 2013a). Not every state has this rule, and so Iowa lawyers face extra regulation in this area.

Florida Rules of Professional Conduct

The Florida Rules of Professional Conduct have many identical provisions to the ABA Model Rules, and many other provisions which are nearly identical except for the

addition of headings and subheadings. As in Iowa, there are substantial additions to provisions on lawyer advertising and communications (Association, 2013a). Like Iowa, these provisions impose more stringent rules on advertising than the ABA Model Rules (Association, 2013a). Florida also places additional burdens on its lawyers with respect to prompt and truthful communications with their own clients. These additional requirements may reflect the demographic makeup of Florida, which includes a large population of elderly people and people who do not speak English as their primary language. These populations may be more vulnerable to unethical lawyers. Thus, these rules may help to protect these groups.

Wisconsin Rules of Professional Conduct

The Wisconsin Rules of Professional Conduct contain many provisions which are identical to the ABA Model Rules and many provisions which are nearly identical in substance, but are slightly modified in verbiage. Wisconsin adds a considerable amount of regulation in the area of client trust accounts (Association, 2013a). I did not identify any *a priori* reasons why Wisconsin had these additional financial regulations, but protecting client trust accounts is an important function of disciplinary boards in any state. Wisconsin places fewer additional restrictions on lawyer advertising (over and above the ABA Model Rules) than Florida or Iowa. Wisconsin is not known for having large percentages of the vulnerable populations noted in Florida, nor does it have Iowa's very strict tradition on lawyer communications. In all other aspects, the Wisconsin Rules of Professional Conduct are similar to the ABA Model Rules.

In summary, I found, for the very most part, consistency among the states' ethical codes for lawyers, and consistency between the states' codes and the ABA Model Rules (from which they were derived). Of course, there are more differences in each of the states' codes than those described above, as each state has evolved its own particular ethical issues important to its own population. However, my goal in this study is not to

highlight the differences between each state, but rather to compile a multi-state sample of cases decided under basically similar ethical rules. If I were to utilize only one state in the sample, questions could logically arise as to whether my findings were due to quirks of that state alone. However, it would be less useful to combine multiple states in the sample if their ethical codes were dissimilar. After comparing the similarities and differences of these three states' ethical codes for lawyers, along with the ABA Model Rules, I believe it makes sense to use these three states in my sample.

Management Literature on Ethics and Punishment

As mentioned above, the written ethical codes for law show the shared norms and values that have evolved in this profession over the centuries. While the profession's own perspective on ethics is very important, we should also consider the larger question of ethics at work in general. The management literature gives a broader treatment to unethical behavior in the workplace, for professionals and non-professional workers alike. For this dissertation, I will review management literature on ethics in three areas: 1) a brief overview of ethics constructs in the management literature, 2) why we should punish ethical breaches at work, and 3) how ethical breaches should be punished at work. The management field, like the legal and medical fields, has a wealth of literature on ethics. Over the past two decades, ethics research in management has gone from a so-called "Sunday School" topic, viewed as too subjective or unimportant for serious research (Trevino, 1986), to a highly important field (Trevino et al., 2006). The management literature on ethics ranges from the historic basis for ethical thinking, to the role of ethics in the workplace, to drivers of unethical behavior, to specialized applications such as ethical leadership. A good deal of this literature is beyond the scope of the questions examined in this dissertation. However, it will be useful to review the management literature on ethics where it discusses and defines ethical breaches and how they should be punished.

Ethics Constructs in the Management Literature

The definition of ethical (or unethical) behavior in a management setting is less clear than in law, where written ethical guidelines exist. In the management literature, workers' actions are most often viewed through the lens of behavioral ethics. Behavioral ethics is defined as "individual behavior that is subject to or judged according to generally accepted moral norms of behavior" (Trevino et al., 2006). This definition could certainly encompass the vast majority of behavior at work for most people. Three general areas of management ethics research are specific unethical behaviors (lying, cheating, stealing), behaviors that reach a certain moral minimum standard (compliance with law, truthfulness), and behaviors that exceed this moral minimum (whistle-blowing, charitable actions) (Trevino et al., 2006). Management behavioral ethics research focuses on antecedents of unethical behavior, factors that influence unethical behavior, or outcomes of unethical behavior (Trevino et al., 2006). Behavioral research, then, is essentially focused on the individual, and how inside and outside forces may influence their ethical actions.

The management literature uses different nomenclature for ethical breaches than the professional literature. The constructs in the management literature on ethics also differ slightly from their equivalents in the professional literature. Therefore, I feel it is necessary to briefly and concisely mention these constructs. Management constructs dealing with ethical issues may include the terms "deviance" or "deviant workplace behaviors." Deviance is defined as behavior that violates organizational norms and causes harm to the organization or its members (S. L. Robinson & Bennett, 1995). Deviance most often refers to deviation from organizational norms only, not from the law or an ethical code (S. L. Robinson & Bennett, 1995). Yet another construct is Counterproductive Work Behaviors (CWBs), which may be defined as actions, undertaken by workers, that damage the goals or the person or organization (Marcus & Schuler, 2004). Research questions for ethics scholars may overlap the above constructs

in many areas (Trevino et al., 2006), but each of these constructs differs from the professional ethical breach studied in this dissertation. Management definitions of unethical behavior include broad requirements such as violation of organizational norms, moral standards, or potential harm to the organization (Marcus & Schuler, 2004). Professional ethical breaches may certainly be counterproductive, deviant, or the result of unethical decision making. They may be amoral, or against norms. However, as set forth below, a professional ethical breach must specifically violate that profession's rule-based code of ethics. Having given an overview of ethics constructs in the management literature, we next turn to a discussion of punishment.

Why Should We Punish Ethical Breaches?

Despite receiving relatively little attention in management scholarship, the study of punishment related to ethical breaches is important. Observers of unethical behavior expect offenders to be punished (Trevino, 1992; Trevino et al., 2006). If the offender is not punished, (among other results) the observers' sense of fairness is violated (Trevino et al., 2006). Furthermore, in the professions, great harm can be done by ethical breaches to clients, colleagues, and the profession as a whole. Punishment is appropriate to prevent or deter future breaches (Arvey & Ivancevich, 1980; Carlsmith et al., 2002), to signal to outsiders that the breach is not representative of the profession (Abbott, 1983; Trevino, 1992) or to rehabilitate the offender. For a variety of reasons (which might include the confidentiality of employee records, or difficulty in gaining institutional review board approval for punishment interventions), we do not have a good picture of whether those who engage in unethical behavior at work are punished. However, the cases in my dataset are non-confidential public records, showing that offenders who commit ethical breaches in the professions are actually being punished. By analyzing these cases as set forth below, I hope to augment the management literature on punishment with empirical findings and theory. The study of punishment at work also

has practical applications. While scholars may disagree on whether it is appropriate to punish in the workplace (Church, 1963; Solomon, 1964), the reality is that it happens (Trevino & Weaver, 1998). Punishment for ethical breaches at work is necessary and real, particularly in the professions, and thus it is an important topic for study. Below, I will review two major schools of thought on why we should punish: the classical justifications of punishment, and ethical frameworks.

Classical Justifications of Punishment

In a following section, I will detail the classical justifications of punishment as derived from criminal justice. However, it is also important to review the justifications for punishment found in management literature. It is worth noting that the theoretical justifications for punishment in organizations are often similar to those in criminal justice (Carlsmith et al., 2002; Trevino & Weaver, 1998; Wheeler, 1976). As with the construct of ethical breaches, however, some of the terminology is different between management and law.

It has been suggested that punishment in organizations can be organized into schools of thought, representing the justifications for punishment (Trevino & Weaver, 1998). The first school of thought is consequentialism – the idea that punishment is justified if it achieves the desired outcome of the disciplinary decision maker (Trevino & Weaver, 1998). This is an instrumental, utilitarian, or "ends" related view (Butterfield, Trevino, & Ball, 1996; Kadish, 1999), and does not embrace the concepts of due process or proportionality as found in criminal justice. *Retributive* views of punishment, also known as "just deserts," are backward-looking, and punish the offender simply because the breach deserves a punishment (Carlsmith et al., 2002; Kadish, 1999; P. Robinson & Darley, 1997; Trevino & Weaver, 1998). An *expressivist* punishment is one that signals outrage or blame at the offender, or a "community's solidarity in the face of challenge or threat" (Trevino & Weaver, 1998). Managers may see this as a chance for "vicarious

learning" among observers of the breach (Butterfield et al., 1996). This justification of punishment has a relationship to breaches by members of a profession. Adherence to professional ethical codes is a strong signifier of intra-professional status (Abbott, 1983), and goes to the legitimacy of the profession (Rynes, Trank, Lawson, & Ilies, 2003). Governing boards of a licensed profession have an advantage, namely, a monopoly on licensing and regulating members of that profession (Khurana & Nohria, 2008). It is important that the governing boards keep public confidence by punishing those members who deviate from their ethical code (Khurana & Nohria, 2008). When an offender breaches that code, punishment sends a signal to the public that that offender is not representative of the community of professionals (Trevino, 1992). Finally, punishment may be justified as *reintegrative* (Trevino & Weaver, 1998) or *restorative* (Goodstein & Butterfield, 2010). Punishments with these components aim to restore the offender's dignity, remove the stigma of offense, and reintroduce the offender into their community (Trevino & Weaver, 1998). These justifications of punishments are theorized to have application to ethical breaches: "Restorative justice also redirects thinking about who matters in ethics—those who have committed transgressions, their victims, and those who may play a significant role in fostering the reintegration of these individuals back into their departments and organizations." (Goodstein & Butterfield, 2010). The theoretical justifications for punishment are useful, because they give reasons for why we should punish a breach. Next, I will detail certain ethical frameworks, and the reasons found within these frameworks for punishing ethical breaches.

Ethical Frameworks

The various ethical frameworks in the management literature offer competing views of why we should punish ethical breaches. For example, formalist frameworks argue that we should punish a breach of the rules simply for that reason: it is a breach of the rules. Utilitarian frameworks argue that we should punish breaches because their

outcomes are harmful. There are many other individual theories regarding ethical frameworks, ranging from religious-based ethics, to analysis of personal values, to application of objective standards (Oddo, 1997). An analysis of every proposed ethical framework would require an examination of centuries of philosophy, and is beyond the scope of this dissertation. However, it is within the scope of this dissertation to briefly review the two most important types of frameworks used in the study of behavioral ethics in management, and to foreshadow how these frameworks might influence punishment for ethical breaches.

Formalist Frameworks

One of the two major types of ethical frameworks are formalist frameworks (Cropanzano & Grandey, 1998). These may also be known as rule-based frameworks or deontological (derived from the Greek work meaning duty) frameworks (Cropanzano & Grandey, 1998). Formalists focus on the processes, or means, of making ethical decisions (Trevino et al., 2006). People who decide under formalist frameworks believe that there are universal standards of ethics, and that behaviors at odds with these standards must be unethical (Cropanzano & Grandey, 1998).

One kind of formalist framework is idealism (Forsyth, 1980; Trevino et al., 2006). Idealists compare ethical decisions to certain principles or ideals of proper behavior. If the behavior violates those ideals, it is held to be unethical. While this is a means-based view, idealists may also take into account the results of the unethical action when deciding on a punishment. For example, it has been shown that idealists will judge other people quite harshly when the other person's unethical behavior causes negative consequences (Trevino et al., 2006). Idealistic frameworks value the intrinsic "goodness" of the ethical decision, and are less concerned with the position or attributes of the actors and their situation. Idealists may believe in a higher set of principles (religious or otherwise) that ought to govern decision making. One example is the Vincentian

religious tradition, a framework used at certain universities in teaching business ethics (Oddo, 1997). This framework evaluates ethical decisions on the basis of whether the rights and dignities of human beings are protected, and whether a decision will adversely affect people who are impoverished (Oddo, 1997). It is important to consider idealism as a potential framework for the purposes of this dissertation, because the legal profession holds its members to idealistic standards and higher principles than the general public (e.g., "A lawyer should … exemplify the legal profession's ideals of public service")("Iowa Rules of Professional Conduct," 2012). As I will argue in subsequent sections, the presence of this idealism informs the punishment meted out for ethical breaches.

As mentioned above, formalist frameworks are rule-based at their core. Generally speaking, these rules could be written or unwritten. However, two sub-frameworks of formalism deal with explicit rules. Oddo (1997) argues that professional ethical codes and corporate codes of ethics are themselves ethical frameworks. Of particular interest, of course, is the idea that professional ethical codes may serve as the ethical framework for people in those professions. Oddo argues that these codes set out normative guidelines for members' behavior, and are comprehensive rule systems. While I agree that ethical codes are an important component of professional ethics, I will argue later in this chapter that there are more regulatory forces in professional ethics than just the codes.

Another important sub-framework is that of justice. Justice (as used in the management literature) is a rules-based, equity-concerned framework (Cropanzano & Grandey, 1998). Justice concerns the rewards (or punishments) a person gets in a system (distributive justice) or the fairness of the process that determines those rewards (procedural justice) (Colquitt, Conlon, Wesson, Porter, & Ng, 2001). The managerial construct of justice can be analogized to criminal justice. The distributive justice in the criminal system concerns the amount and type of punishment given (prison sentence,

fine, etc.) This could be analogized to the criminal justice concept of proportionality (Frase, 2004), which says that the severity of the punishment must fit the severity of the offense. Procedural justice in the criminal system concerns whether due process was followed and Constitutional rights were observed. In the section on criminal justice and punishment, I will argue that the concepts embodied in the management construct of justice also shape professional ethical discipline.

Utilitarian Frameworks

The other major type of ethical framework I will explain is the utilitarian framework. Utilitarian frameworks look at the results of making ethical decisions, rather than the underlying processes (Cropanzano & Grandey, 1998). Under a utilitarian (also known as teleological) framework, an action is ethical if it produces the greatest good for the greatest number of people, as compared to the alternatives (Cropanzano & Grandey, 1998).

Utilitarianism is seen as more flexible than the strict "legalism" of formalist frameworks (Cropanzano & Grandey, 1998). However, a criticism of utilitarianism is that it may lead to "rule-bending" when the person making decisions thinks they can achieve a good outcome in spite of deviating from the ethical rules (Cropanzano & Grandey, 1998). Thus, some scholars have proposed a system of "rule utilitarianism" whereby the decision-maker uses a set of rules that ought to create the greatest good if applied (Cropanzano & Grandey, 1998). This hybrid system may be more palatable to a utilitarian ethicist, because the rules are legitimized through their outcomes, not just on the basis of individual rights or justice.

Utilitarian frameworks have many adherents. For the purposes of this dissertation, however, I will not delve further into purely utilitarian frameworks. While I find many of the utilitarian arguments to be persuasive, the facts are that professional ethical systems do have set systems of rules, and a violation of these rules, regardless of

outcome, will trigger a professional disciplinary action of some kind. As a practical matter, therefore, the professional ethical breaches studied in this dissertation are punished under frameworks that most closely resemble formalism. It is important to note, however, than when determining the severity of punishment, disciplinary boards do consider the impact and outcome of the breach once they determine a rule has been broken. Therefore, there is an element of utilitarianism in professional ethics. However, I argue that this is second to the formalist framework itself.

How Should We Punish Ethical Breaches?

While there is a fair amount of management research on *why* we should punish, this literature is not clear on *how* we should punish. I will give a brief review of the existing research in management literature, but the section on legal literature will ultimately be more helpful. Punishment in organizations has been defined as a "noxious stimulus" administered in response to a transgression (Wheeler, 1976), or, more simply, a manager's application of negative consequences (or withholding of reward) to a worker (Trevino & Weaver, 1998). We know that both punishment and rewards can, at times, influence ethical behavior (Bennett, 1998; Trevino et al., 2006). However, there is not good consensus in the management literature on how these actions might *reliably* influence that behavior (Abramson & Senyshyn, 2010; Trevino et al., 2006).

We ought to punish unethical behavior, because to not do so would be ineffective management and would violate expectations of fairness among employees and observers (Trevino et al., 2006). However, we must carefully consider how the punishment is given. For instance, some research has shown that weak punishment for ethical breaches is worse than no punishment at all (Tenbrunsel & Messick, 1999). Other research indicates that punishment is not effective in controlling bad behavior when too much punishment is given (Bennett, 1998). Many sources state that punishment may produce negative side effects such as resentment and weakened motivation (Trevino & Weaver,

1998; Wheeler, 1976). Punishment may possibly produce undesirable behaviors on the part of the employee, such as absenteeism, or aggression against the punisher (Arvey & Ivancevich, 1980). While many managers find punishing employees unpleasant, disturbingly, some enjoy it (Butterfield et al., 1996). In order for punishment in an organization to be effective, it must be fair and just (Trevino & Weaver, 1998) and applied consistently across people (Arvey, Davis, & Nelson, 1984; Bennett, 1998). That begs the question, how would one design a punishment system that is fair across employees, and in each instance? Are written codes of ethics in organizations effective in reducing unethical behavior in business?

It would stand to reason that utilizing a written code of ethics (an "ethical infrastructure") for businesspeople would reduce unethical behavior (Trevino et al., 2006). Unfortunately, many scholars believe that imposed ethical codes in business (such as the Sarbanes-Oxley Act) may have little or no positive effect on ethical behavior (Abramson & Senyshyn, 2010; Trevino et al., 2006). One reason for this may be that while the ethical infrastructure is an external force in favor of ethical behavior, there are other internal forces in the organization (such as management) that might be exerting stronger pressures on the workers in the opposite direction (Trevino et al., 2006). Another reason may be that when punishments are specifically spelled out in a code (e.g. Federal Sentencing Guidelines, Environmental Protection Agency regulations), businesspeople may shift away from an "ethical decision making" framework to a cost/benefit "business decision making" framework intended to maximize utility, not ethics (Tenbrunsel & Messick, 1999). These points hold with the idea that ethics arise from shared moral judgments. If the moral judgments come from outside the organization or profession, people are less likely to follow that framework.

There is good evidence from the management literature that punishment should be applied with consistency across individuals and offenses. "Consistency" is a difficult term to define in this instance, because every case of unethical behavior is different, and

every individual offender is different. However, there is general agreement that punishments should, at the very least, not be arbitrary or capricious in application or magnitude (Arvey et al., 1984; Bennett, 1998). When punishment is applied in ways that employees view as inconsistent, those who are punished will experience lower perceptions of justice, and may lash out at each other or their supervisors (Bennett, 1998) and may experience lower job satisfaction (Arvey et al., 1984). In order to ensure the most beneficial effects from punishment, then, punishment should be proportional to the blameworthiness of the offense and the offender, as explained in more detail below. Logically, it would be unjust to increase or decrease punishment based on personal characteristics of the offender that do not have to do with blameworthiness, such as race, gender, or disability. In following sections, I will explain additional theory from the legal perspective on this point.

The management literature on punishment at work and its effective application is important to consider for its broader points. It contains useful information on why we should punish ethical breaches. However, the reasons for punishment and their underlying justifications are not as well-developed as in some other literatures. Specifically, the criminal justice literature has centuries of debate and theory regarding how punishment should be fit to transgressions. This body of work can be used to inform and augment the management literature. In the next section, I outline the classical justifications of punishment from the legal literature, integrate these concepts with the ethical frameworks discussed above, and explain the theory behind how we logically ought to punish breaches in the professions.

The Legal Literature on Ethics and Punishment

The oldest professions, such as medicine and law, have long recognized the need for ethical codes and punishment of breaches (Abbott, 1983). In many ways, these codes are modeled after criminal justice concepts of punishment. The criminal justice literature

includes a wealth of information about why we should punish, as well as how we should punish. These two questions are more tightly integrated than in the management literature, perhaps because it is relatively axiomatic that criminal behavior must be punished. However, as in the management literature, I believe that the justifications of punishment and the ethical frameworks speak more to why we punish, and that there are additional theory and factors that speak to how we punish. Therefore, I will follow the outline of the previous section in detailing how and why we should punish.

Why Should We Punish Ethical Breaches?

The topic of why breaches should be punished, from a legal perspective, has a rich history. The theoretical reasons for punishment in this literature range from rehabilitating and reintegrating offenders, to sending a message to offenders and would-be offenders, to removing offenders from society, to punishing simply because it is the right thing to do. In the following subsections, I will detail several schools of thought on why we should punish.

Classical Justifications of Punishment

In criminal justice, there are four venerated paradigms of punishment, known as the classical justifications of punishment (Bibas, 2006; Kadish, 1999; McFatter, 1982; P. Robinson & Darley, 1997). The first justification is *retribution*, or "just deserts" (Carlsmith et al., 2002; Dressler, 1990; P. Robinson & Darley, 1997). This paradigm holds that an offender should be given a punishment equal to his crime or his internal "moral wickedness" because society has a right to do so, and doing so puts the scales of justice back in balance (Carlsmith et al., 2002). It is generally held that retribution is the dominant paradigm in our criminal justice system today (Kadish, 1999; McFatter, 1982). However, retribution is not a common goal of professional ethics regulations (Kross, 1998). If professionals commit breaches that rise to the level of criminal activity, they may be prosecuted for their crimes. This occurs in the criminal justice system and is

outside the scope of the professional disciplinary boards. When disciplinary boards punish professionals, they do so under the other three paradigms: incapacitation, deterrence, and rehabilitation.

Incapacitation is a punishment that removes the offender from society to prevent further harm (Carlsmith et al., 2002; McFatter, 1982). In criminal justice, this would normally be carried out by placing the offender in prison. In a professional setting, this would equate to revocation of an offender's license to practice, or a suspension that requires the offender to cease practice for a time until certain conditions are met. For a professional, an incapacitative punishment is quite harsh, and may have many collateral consequences. The professional stands to lose their livelihood for the duration of the punishment, and may lose some or all of their clients by their inability to serve them during the punishment time period. They may also lose current and prospective clients, and their professional reputation, when the incapacitative punishment is publicized. Legal disciplinary opinions are public record, and sometimes are picked up by newspapers or highlighted in professional trade publications. Also, some states, such as Iowa, require that professionals who are suspended notify all their clients by letter of their punishment. Based on these factors, I argue that incapacitative punishments are the most severe punishments available to professional ethical disciplinary boards.

Deterrence takes two forms: *general deterrence* and *specific deterrence* (Frase, 2004; McFatter, 1982). General deterrence is the idea that a punishment should send a message to all potential offenders, and cause them to think twice before committing the same offense (Frase, 2004). Specific deterrence is where a punishment is directed against a specific offender, in order to influence them to not commit that offense (or any offense) again (Frase, 2004). Deterrence is a part of professional ethics regulatory systems. In most states, the legal professions is regulated mainly by members of the profession who work on behalf of a state licensing authority (Association, 2013c). For instance, in the state of Iowa, complaints about lawyer ethics are initially handled by an ethical

regulatory board composed mostly of lawyers and a few laypeople. The final disciplinary authority is the Iowa Supreme Court, which is composed entirely of lawyers in their role as Justices of the Iowa Supreme Court. Thus, although laypeople may be involved at various stages in the disciplinary process, the legal professions is essentially self-regulated. The stated goals of professional ethical regulatory boards typically include projecting a positive image of the profession, and preventing harm to the profession's regulation in the eyes of the public. Thus, an ethical regulatory board's punishments for professional ethical breaches of a certain severity must convey an element of moral outrage, which sends a message to the public (showing the offense is not typical of the profession) as well as a message to the board's constituents (reminding other professionals in that state not to commit such a breach) and to the offender himself (reminding him not to offend again). I propose that deterrence punishments are neither the most nor least severe punishments available to professional ethical regulatory boards, but exist in the middle.

Rehabilitation is a type of punishment that is more centered on the offender (Kadish, 1999; McFatter, 1982). Under the rehabilitative paradigm, the punishment should be tailored to change the offender in such a way that they do not reoffend, and possibly so that they may reintegrate into society. In criminal justice, this could include assignment to a treatment center for addiction or behavioral issues, or completion of substance abuse or anger management classes. On the professional side, rehabilitative punishments may take a variety of forms. Professionals who have mental health issues or addictions may be required to complete therapy or treatment programs before being allowed to resume their practice. A professional who has shown a lapse in a particular subject matter area might be required to complete a certain number of hours of education in that area before doing that type of work again. Ethical regulatory boards may, in some instances, direct an offender into a diversionary program for drugs or mental illness, which is kept confidential. This punishment is in lieu of sanctions intended to

incapacitate or deter the offender. Based on the above factors, I propose that rehabilitative punishments are the least severe punishments used by ethical regulatory boards.

Restorative justice is a growing theoretical area in punishment scholarship. Justice (or punishment) of this type aims to provide aid and closure to the victims of the transgression, while also restoring the offender to their pre-offense status and reintegrating them into the community (Goodstein & Butterfield, 2010). This type of punishment seems to have considerable potential for professional ethical breaches, but it is not currently being used in any of the states represented in this study. In fact, beyond mere reimbursement of lost fees, most disciplinary cases do not offer any balm to the victims of the offender.

While there are differences in severity between incapacitation, deterrence, and rehabilitation, the different punishments also have qualitative differences, depending on the situation and the reason for a certain punishment being assessed. Therefore, as set forth in more detail in the methods section, my predictive model will treat punishment type as an ordinal variable. In general, however, I will treat incapacitation as the highest level of punishment, rehabilitation as the lowest level, and deterrence as a level in the middle. In accordance with the principle of proportionality, I will argue that a more severe offense should be one factor that leads to a more severe punishment. Having explained the types of punishments available, I will now explain how ethical frameworks fit into the professional disciplinary environment.

Ethical Frameworks

Revisiting the idea of ethical frameworks, we can see that the criminal justice system primarily resembles a rules-based, or formalist, ethical framework, in that a known violation of the criminal laws will trigger prosecution and punishment regardless of outcome. Specifically, we can say that the goals of the justice sub-framework of ethics

(as defined in the management literature) are quite similar to some of the goals of the criminal justice system. Both systems seek to distribute appropriate rewards (or the inverse of rewards, punishment) to people. Both systems also are concerned with the process leading to the distribution of rewards or punishment. For criminal offenders, this takes the form of consistency of punishment, due process, the right to confront witnesses against them, and other Constitutional protections.

The criminal justice system has an element of utilitarianism as well, because the outcome of the crime is considered when determining punishment. This outcome could include the nature of the target (e.g., a crime against children or the elderly may have an enhanced punishment), collateral damage to innocent bystanders, or the impact of the crime on society (e.g., shooting into an occupied building may be charged as terrorism rather than merely a crime against property). As stated above, the elements of the offense are considered a part of the blameworthiness of the offender, with respect to that offense.

While the criminal justice system is not an ethical framework *per se*, it was created based on the shared moral judgments of society about right and wrong. There are important parallels between ethical frameworks, the criminal justice system, and disciplinary systems for professional ethics. The idea of a formalist framework with utilitarian elements, and its resultant assessment of blameworthiness, can be analogized to ethical breaches. If a lawyer takes illegal drugs with a client, he causes more damage and acts more wickedly, and thus is more blameworthy for that breach than a lawyer who takes the same illegal drugs alone. This concept of categorization has also been recognized in the management literature, e.g., CWBs may be classified along two axes: severity of misconduct and target of misconduct (S. L. Robinson & Bennett, 1995). The defining idea, in both criminal justice and in ethics, is that because every breach is different, the punishment (distributive justice) must be tailored to the offense ("Supreme Ct. Atty. Disc. Bd. v. Qualley," 2013), but in all cases, proper procedures (procedural justice) must be followed in determining that punishment, and the punishment must be

applied consistently (Bennett, 1998). Therefore, an analysis of blameworthiness must be conducted in each case in order to assign a just, proportional, and consistent punishment. To understand how this analysis is likely to be conducted, we must consider the classical justifications for punishment in criminal justice (defined above), as well as characteristics of the offender and the offense. In the next section, I will explain more about how the concepts of blameworthiness, proportionality, and consistency should influence the punishment given.

How Should We Punish Ethical Breaches?

In the previous section, I discussed the reasons that we punish ethical breaches. In this section, I will describe how that punishment ought to occur. Punishment can have a variety of goals, from retribution toward the offender, to rehabilitating the offender (Bibas, 2006; Kadish, 1999). However, no matter what the goal, the punishment must be just. In order to be just, the punishment must be proportionate to the offense (Frase, 2004). Proportionality means that the severity of the punishment should be in accord with the severity of the offense (Frase, 2004). The Eighth Amendment to our Constitution includes an element of proportionality, in prohibiting cruel and unusual punishments, as well as excessive fines or bail. Philosophers have also argued in favor of proportionality, in stating that "the evil of the punishment [should not exceed] the evil of the offence," (Bentham & Dumont, 1887), and that the least amount of punishment necessary should be used to punish an offense (Beccaria, 1764). Thus, proportionality is an important consideration in determining whether a punishment is just.

This begs the question, how do we determine when a punishment is proportional? I argue that a punishment is proportional when it matches the blameworthiness of the offense and the offender. However, blameworthiness is not an easy concept to define. When deciding a case, there are a variety of variables that impact the punishment decision. Decision-makers (such as judges) make judgments about both the offense and

the offender that play into their punishment decision. These include judgments about the severity and nature of the offense, as well as judgments about the offender himself. Taken together, all these factors constitute the "blameworthiness" of the offender and offense in that case.

Scholars do not always agree on what factors should be considered in determining blameworthiness. However, at their core, all criminal justice determinations take into account the *actus reus* (the guilty act, or the breach itself) and the *mens rea* (guilty mind) of the offender (Bibas, 2006; Kadish, 1999; Roth, 1979). The nature of the guilty act necessarily includes not only the breach, but also its effects, which are in part dependent upon the victim of the act (Kadish, 1999; P. H. Robinson, 2003). For instance, an offender who fires a shot into an empty house may be guilty only of vandalism or criminal mischief, while one who fires a shot into an occupied house may be guilty of terrorism or even murder (Iowa Code Chapter 708A; Iowa Code Chapter 707). The second offender is more blameworthy, and thus should receive more punishment than the first. Thus, we can see that one part of the blameworthiness calculation concerns the severity of the offense. Another part of the blameworthiness calculation is the offender's state of mind, or *mens rea,* in committing the offense (P. H. Robinson, 2003). As I will argue in detail below, this means that the intentionality of the breach is an important factor. An intentional breach is more wicked, and therefore more blameworthy, than an unintentional breach. Finally, blameworthiness takes into account the mental capacity of the offender, along with any factors that should be considered to excuse or mitigate the offense (Dressler, 1984; P. H. Robinson, 2003). This is where my analysis of impairment, as well as other aggravating and mitigating factors, explained in more detail below, enters the blameworthiness equation.

As set forth above, the proportionality of punishment to offense depends on blameworthiness, which in turn is composed of a number of factors. Blameworthiness is a case-by-case comparison, as every offender and every offense is unique. However, we

should also be mindful of trends in punishment across offenders. We would expect that punishment is meted out as consistently as possible across similarly situated offenders, in order to achieve its goals, and to be just (Bennett, 1998). Our criminal justice system strives to achieve this goal, based on Constitutional guarantees of due process and equal protection, as well as a variety of state and federal laws that prohibit government discrimination based on gender, race, or disabilities. Nevertheless, studies have shown large-scale disparities in punishment based on factors such as race (Baldus, Woodworth, Zuckerman, & Weiner, 1997). Therefore, as set forth in more detail below, I intend to examine the consistency of punishment, particularly as applied to impaired offenders versus unimpaired offenders. Consistency is an important element in assessing the overall justness of the professional disciplinary system examined.

Having examined the dependent variable, punishment, I now turn to a discussion of the independent variables in this dissertation. The independent variables give us information about the blameworthiness of the offender, and how this translates into the proportionality of the punishment.

Independent Variables

In the following sections, I argue that certain characteristics of the offense and the offender combine to determine the blameworthiness of that offender, and thus, his punishment. Generally speaking, the severity and intentionality of the breach are two factors decision-makers use to determine the blameworthiness of the offense and offender. Intentionality is discussed below, under "characteristics of the breach," and receives further discussion under the section on impairment. Severity encompasses a collection of variables, including target of the offense, criminality of the offense, and certain characteristics of the offender. For clarity's sake, I have organized the independent variables under the two main headings: characteristics of the breach and characteristics of the offender.

Characteristics of the Ethical Breach

The characteristics of an ethical breach itself may be analogized to the *actus reus*, or guilty act, analyzed by the criminal justice system in determining punishment. In this section, I will explain how the characteristics of the breach are likely to affect punishment. These characteristics include the target of the breach, the intentionality of the breach, and whether the breach was also a violation of criminal law.

The Target of the Ethical Breach

The first independent variable I examine is the target of the breach. As noted above, I argue that both the criminal justice system and the professional ethical system examined in this dissertation are primarily rules-based. However, as explained previously, I argue that both systems contain utilitarian elements, namely, that the outcome of the crime or breach is considered in determining the punishment. Criminal justice has long recognized that the target of a crime can be considered in determining the blameworthiness of the offender (Bibas, 2006; Kadish, 1999). I argue that it is similarly important to consider the target of an ethical breach when punishing an offender, because the nature of the target of the breach has an impact on the outcome.

Breaches against a Client

Certain people or populations are inherently vulnerable, such as children, the elderly, or the disabled. Further, certain people are rendered vulnerable because of a trust relationship with the offender. For instance, there are specific crimes in many states relating to the endangerment of one's own children, or the abuse of a dependent adult in one's care. While the actions underlying these crimes (e.g., battery) might have been unlawful no matter who was the victim, the law recognizes that we have a special duty to people over whom we have control or power. This criminal law concept can be applied to the legal profession, where the attorney has superior knowledge and control over his

client. Later in this section I will explain how the legal profession has codified special regulations based on this trust relationship.

In a more general sense, we can also differentiate crimes that are targeted at another human from those which are not. In the criminal justice system, crimes range from those targeted at a specific individual (such as murder) to crimes targeting unknown people (such as a terrorist bombing) to so-called "victimless" crimes (such as marijuana use). Generally, a crime is targeted against other people, the offender is considered more blameworthy. However, even in a victimless crime, the offender is considered to have done a wrong to society, and is therefore blameworthy to some degree (Bibas, 2006).

Professional ethical breaches also have a variety of targets. If a lawyer takes money from a client, that client is the target of the act. This is a breach of the special trust relationship between professional and client, and the legal profession has long recognized the potential for damage here. The Preamble to the ABA Model Rules states, "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice" (Association, 2013c). Further, the Model Rules require that a lawyer zealously represent his client's interests, and state that the responsibility to the client trumps any personal interests or those of third parties (subject to requirements of truthfulness) (Association, 2013c). This code is the premier source of ethical regulations and theory for the legal profession. The code states the professional's responsibility to the client comes first, before colleagues, the profession, and self.

Lawyers are in a special trust relationship with their clients, having access to their most confidential information, and in some cases, their financial resources. This requires a "special type of control within the professional role" – a first and foremost duty to protect the client (Abbott, 1983). Because the professional has so much power over their client, and because the client must trust the professional (often blindly, because the professional has specialized training and knowledge), a breach of the professional/client

relationship has potential for the greatest harm of any breach. Breaches targeted at clients are also likely to be highly visible (Abbott, 1983), as they often generate more disgust, and garner more media attention, than a victimless breach. Generally speaking, high visibility ethical breaches result in harsher punishment than low visibility breaches (Abbott, 1983). High visibility breaches cast the offender, and his or her profession, in a negative light and decrease public confidence in that profession. In order to signal appropriate disapproval of the breach, and to attempt to restore public confidence in the profession, a professional disciplinary board will likely assign a harsh punishment to someone who targets their breach at a client. Ethical breaches targeting a client are likely to result in more blame, and harsher punishment, being assessed against the offender as compared to breaches with other targets.

Breaches against Colleagues

The ABA ethical code recognizes that licensed professionals enjoy a special status over members of the general public, and thus have certain responsibilities to their colleagues and the profession. Lawyers are considered officers of the court, which means they owe ethical responsibilities such as candor toward the tribunal (honesty to the judiciary or hearing officers, Rule 3.3) (Association, 2013c) and fairness to opposing parties and counsel (Rule 3.4) (Association, 2013c). However, most ethical codes put the professional's responsibility to the client above the responsibility to their colleagues, within the bounds of decency (Abbott, 1983). For instance, while a lawyer may not lie to the judge or an opposing lawyer, he is bound to the duty of zealous advocacy for his client (Preamble) (Association, 2013c), and so may not volunteer information that would harm his client (except in exceptional circumstances). Similarly, some litigators are notorious for being abrupt and even abrasive with other lawyers and court personnel during the pressure of a trial. However, the ethical codes do provide punishment for offenders who unduly create hardship, friction, cost, or delay for their colleagues. One

example of the rationale for this is found in ABA Ethical Consideration 7-37, which notes that "haranguing and offensive tactics by lawyers [against other lawyers] interfere with the orderly administration of justice and have no proper place in our legal system" (Association, 1969) (and see Model Rule 3.4) (Association, 2013c). When a member of a profession offends against another professional, or a person otherwise employed in that field (such as a clerk of court or a nurse) the reputation of the entire profession suffers. An ethical breach toward a colleague may not have the same potential for harm as against a client, but is still harmful (Abbott, 1983). Several past studies show that breaches toward colleagues usually result in less punishment than breaches toward clients (Abbott, 1983). However, a breach directed toward a human victim logically ought to result in more punishment than a victimless breach. I argue that breaches against colleagues will likely result in medium levels of punishment against the offender.

Victimless Breaches

Previously I noted the concept of "victimless crimes," such as illegal drug use, where the offense is not directed at any other person. In these cases, the criminal justice system considers the offense to be directed at the fabric of society itself (Bibas, 2006), sometimes classified as a "breach of the peace." Certain professional ethical breaches are similarly not directed against another person. These could include illegal drug use, poor financial recordkeeping, or failure to keep current on continuing educational requirements. I argue by analogy that when a professional commits an ethical breach not against a person, the victim is the profession itself, and its reputation. In counseling lawyers to avoid any appearance of impropriety, the ABA's Ethical Consideration 9-2 confirms this argument, stating, "Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer" (Association, 1969) (and see Preamble) (Association, 2013c). So-called victimless ethical breaches erode the peace and stability of the profession, and if exposed, cause the public to question the integrity of the

profession and its members. This is commensurate with the rules-based framework of professional codes of ethics: any breach of the rules, even one without a defined target, should and will be punished. However, victimless breaches do not carry the same risk of harm as a breach directed at a client or a colleague. This idea is supported by the criminal justice theory that offenders who commit crimes without defined victims are considered less blameworthy, and thus deserving of lesser punishment (Byrnes, 1998). The utilitarian aspect of professional codes of ethics reflects this idea, because the outcome of the breach plays a role in determining punishment, and breaches without a victim tend to be less harmful. I argue that the three "levels" of breach targets (client, colleague, and victimless) ought to correspond to differing severities of punishment. Therefore, I hypothesize:

> *Hypothesis 1: An ethical breach targeted against a client will result in a more severe level of punishment for the offense than a breach targeted against a colleague, which will in turn result in a more severe level of punishment than a breach without a victim.*

Intentionality of the Ethical Breach

When determining a punishment for bad behavior, it is important to consider the offender's level of intent (Trevino, 1992). In the criminal justice system, it is generally held that an offender must have had "intent" to commit a crime (also known as *mens rea*, or a guilty mind)(Kadish, 1999). Some crimes are categorized as general intent, and some as specific intent (Roth, 1979). A crime of general intent is one where the offender acts intentionally or recklessly (without regard for potential victims) to do an act prohibited by law. An example would be battery – intentionally striking another person without justification (Roth, 1979). A specific intent crime requires some special intent to cause an outcome, or a special *mens rea.* For instance, larceny requires taking another's property with the intent to deprive that person of the use of the property (i.e. to steal it)

(Roth, 1979). Intent may be considered as a vertical continuum or axis, with specific intent at the top, recklessness and/or negligence as lower levels (Roth, 1979). Intoxication or other impairment, therefore, may be a partial defense to specific intent crimes, as it reduces the offender's ability to form specific intent (Roth, 1979). Generally, there is no such thing as a "crime of neglect" or a crime committed without guilty intent. There are a very limited number of crimes (such as speeding and statutory rape) which are considered crimes of strict liability. These strict liability crimes are created by legislatures, and are very rare, because the criminal justice system is not intended to punish those who did not act voluntarily and intentionally to break the law. To do so raises serious Constitutional issues.

Professional ethical boards do not distinguish between general and specific intent in considering ethical breaches. Boards punish ethical breaches that are committed with either kind of intent, and also those that are committed without intent. Those breaches committed without intent are sometimes referred to as "negligent" rather than "unintentional," reflecting the concept in tort law that negligence is an unintentional breach of a duty (in this case, the responsibility to follow the ethical code). In this dissertation, I use the terms "unintentional" or "not intentional" in order to avoid any confusion with the tort action of negligence.

Even though the offender may have had no intent to harm anyone, unintentional breaches are still punishable when a professional breaks the rules. For instance, a lawyer who fails to maintain his continuing education credits will be punished for that breach, even if he had simply inadvertently overlooked the requirement, and even if no one was harmed. In some cases, however, unintentional breaches by a lawyer may cause great harm to a client – loss of wealth or freedom are possible.

Unintentional breaches certainly may have poor results for injured parties. However, I argue that offenders who commit unintentional breaches are less blameworthy than those who commit intentional breaches. I first note that many

professional ethical codes devote much more of their space to regulating intentional behaviors than unintentional behaviors (AMA, 2014), which is an indicator of their relative importance. I also argue that an intentional breach will bring more disrepute to the profession, because observers of ethical breaches are negatively influenced by perceptions of intentionality (Trevino, 1992). The more visible a breach is, the worse it reflects on the profession, and more blameworthy that breach is (Abbott, 1983). In accordance with the rules-based ethical framework that underlies professional codes of ethics, an intentional breach is more wicked, and a worse breach of the rules, than an unintentional breach.

The utilitarian elements of professional codes of ethics, relating outcomes to punishment, would tend to find an offender who commits an intentional breach to be more blameworthy. The types of intentional breaches committed by professionals (theft, sexual misconduct, forgery) are more likely to lead to worse outcomes than unintentional breaches (neglect, failure to maintain continuing education, failure to keep good financial records). Based on these frameworks, arguments, and theories, I argue that intentional breaches of ethics codes ought to, and will, result in a higher level of punishment against the offender than unintentional (or neglectful) breaches. Therefore, I hypothesize:

> *Hypothesis 2: An intentional ethical breach will result in a higher level of punishment for the offense than an unintentional breach.*

Criminal Offense

Many of the more heinous types of ethical breach (theft, illegal drugs, sex crimes, forgery) are also crimes. As stated above, the more visible the ethical breach, the more shame it brings upon the profession (Abbott, 1983). Also, breaches viewed as more intentional are more likely to reflect on the profession negatively (Trevino, 1992). I argue that an ethical breach that is also a criminal offense is likely to be both visible and perceived as intentional. One reason for this is the definitional requirement that an

offender possess *mens rea*, or a guilty mind, in committing a crime. Another reason is that police and criminal court records are public, and often receive considerable attention in the media when the offender is a licensed professional. In many states, commission of a criminal offense is a per se breach of the lawyer ethics code because committing a crime reflects poorly on that professional's fitness to practice law ("Iowa Rules of Professional Conduct," 2012). Based on the above factors, I therefore hypothesize:

> *Hypothesis 3: An ethical breach that is also a criminal offense will result in a higher level of punishment for the offense than a breach which is not a criminal offense.*

Characteristics of the Offender

In the previous two sections, I argued that there are certain characteristics of an ethical breach, and the target of that breach, which might result in more punishment for the offender. The final piece of the predictive model is the offender himself or herself. The offender may exhibit conduct or behaviors outside of the substance of the breach that leads the disciplinary authorities to assign more or less punishment. These behaviors may be aggravating (lack of cooperation in the disciplinary action, past offenses), mitigating (strong volunteer service) or unclear as to result (impairment by drugs, alcohol, mental health issues, or other impairment).

These extra-breach behaviors relate to the ethical frameworks underlying professional ethics codes. First, these behaviors relate to the formalist nature of the codes, in terms of the codes' reliance on rules. Lack of cooperation and prior offenses are both examples of rule-breaking. Strong volunteer service is evidence of rule-following and conformity to societal norms. Next, extra-breach behaviors relate to the utilitarian elements of professional disciplinary systems. Non-cooperation leads to longer, more expensive disciplinary proceedings – a further injury to the profession and the victim. Repeated breaches are more embarrassing to the profession and its members

than an isolated incident. On the other hand, recognition of volunteerism benefits the profession and may offset, in a larger sense, some of the harm caused by an offender over time. In the subsections below, I detail the three types of extra-breach behavior I analyze, and hypothesize their effects on punishment.

Non-Cooperation

The first behavioral factor is relatively clear. When an attorney does not cooperate with the disciplinary proceedings against himself or herself, the Court will generally deem the allegations of the main claim admitted, and add additional punishment for the non-cooperation. "We expect and demand attorneys to cooperate with disciplinary investigations. A failure to do so is an independent act of misconduct, in violation of the prohibition to 'not engage in conduct that is prejudicial to the administration of justice'" ("Supreme Ct. Atty. Disc. Bd. v. Marks," 2009). Non-cooperation in the disciplinary proceedings is likely to make the offender appear more blameworthy, less remorseful, and will enhance his or her reputation for unethical behavior. Therefore, I hypothesize:

> *Hypothesis 4: An offender who shows non-cooperation in the disciplinary proceeding will receive a higher level of punishment for the offense than one who cooperates.*

Previous Ethical Breaches

It has been said that past performance is the best predictor of future performance. It comes as no surprise, then, that the same principle may apply to ethical performance in practice. Many legal disciplinary cases involve a professional who has offended in the past. Sometimes, the past offense resulted in a comparatively low level of punishment, such as a private admonition or public reprimand. However, these initial punishments often come with a directive that future breaches will result in more punishment ("Supreme Ct. Atty. Disc. Bd. v. Marks," 2009). Failure to heed this warning may be

seen as an aggravating factor ("Supreme Ct. Atty. Disc. Bd. v. Marks," 2009). Also, the simple presence of previous discipline may enhance punishment for the current matter ("Supreme Ct. Atty. Disc. Bd. v. Marks," 2009). Repeat offending may result in a perception of more blameworthiness on the part of the offender, particularly where the offenses are similar and repetitive in nature, because the offender can no longer excuse the behavior as accidental. The professional may also be cast in an unattractive light as a habitual offender or one who has disregard for the rules of ethics. Therefore, I hypothesize:

> *Hypothesis 5: An offender who has a prior record of disciplinary breaches will receive a higher level of punishment for the offense than one who does not.*

Volunteer Work

As mentioned above, when considering how to punish an offender, the disciplinary board often looks at past behaviors. While previous unethical behavior may be an aggravating factor, disciplinary boards may also consider overtly ethical behavior as a mitigating factor in assigning punishment. This could take the form of volunteer service to the profession, to one's clients, or to society in general. For instance, the Iowa Supreme Court will often note prior good acts: "We consider as a significant mitigating factor . . . [an attorney's] admirable record of volunteer community service . . . and his extensive pro bono practice'" ("Supreme Ct. Atty. Disc. Bd. v. Boles," 2012). It is not clear how much weight disciplinary boards place on volunteerism when determining punishment for an ethical breach. However, providing services *pro bono* (without payment) is a shared value for the legal profession ("Iowa Rules of Professional Conduct," 2012). I would expect that recognized volunteerism and pro bono service would result in lesser punishment for an offender. Therefore, I hypothesize:

Hypothesis 6: An offender who is recognized as having a record of volunteer service will receive a lower level of punishment for their offense than one who is not.

Impairment

Impaired professionals are involved in a disproportionate number of ethical breaches. For the purposes of this dissertation, I define an impaired professional as a person suffering from a mental illness or mental health issue, alcohol or drug addiction, gambling addiction, or other condition identified by the disciplinary board as an impairment. ABA studies found that lawyer abuse alcohol at about twice the rate of the general population, and that their rate of depression is also twice as high (Association, 2011b). It has been well known for years that impairment is a major problem among professionals. However, no large-scale studies have examined the relationship between impaired professionals, the type of professional ethical breaches they commit, and how those breaches are punished.

There are reasons that impaired professionals might commit different frequencies of the types of ethical breaches set forth in the predictive model, than their unimpaired counterparts. We know that mental and addiction-related impairment can affect cognitive processing and attention span. Therefore, it is possible that more disciplinary cases showing neglect or incompetence (those defined as "unintentional") will involve impaired professionals, as compared to unimpaired professionals. However, impairments such as mental illness and addiction are often associated with violating social norms. Therefore, it is possible that more cases dealing with societally outrageous breaches of ethics – those intentional breaches involving sexual misconduct, criminal behavior, and the like – will involve impaired professionals. It is possible that impaired professionals may show different frequencies of different targets for their breaches than the unimpaired. For instance, because we know that impaired professionals abuse substances

at a rate higher than the general population, we might expect that impaired professionals will commit more "victimless" breaches than their unimpaired colleagues. Or, conversely, we might expect that impaired lawyers will be more likely to target breaches at their clients, such as theft, in order to get funds for their gambling or substance addiction.

The problem is this: while there is a fair amount of research on the scope of the problem of impaired professionals, there is unfortunately very little theory or empirical research on how exactly impairment affects their ethical decisions or punishment (Magnavita, 2007). It is the opinion of at least one researcher that impaired physicians may be treated very differently from state to state and even from case to case (Magnavita, 2007). There is even less information available as to how specific types of impairment (e.g. anxiety, depression, alcohol abuse) might relate to specific ethical breaches. This is an interesting topic, but there is not enough information currently available to form specific hypotheses. Therefore, I propose the following research question:

Research Question 1: Do impaired professionals commit certain types of ethical breaches (as delineated by target and intentionality) with greater or lesser frequency than unimpaired professionals?

Having posed the question of what types of breaches impaired professionals will commit, I now move to the question of punishment for those breaches. There are many reasons, both social and psychological, that we might punish an impaired professional more or less than their unimpaired colleague. We can relate these calculations back to the ethical frameworks, and the criminal justice system of determining blameworthiness.

Utilitarian frameworks decide whether an action was ethical based solely on the result. Under this type of framework, it would not matter whether the actor was impaired when they did the action. However, as detailed above, professional disciplinary systems involve only a small amount of utilitarianism. Primarily, these systems are rules-based. A violation of the rules, no matter the outcome, is seen as an ethical breach. This too,

then, would seem to say that impairment does not matter – a breach of the rules is a breach of the rules, no matter the status of the actor. However, we must also consider the criminal justice concepts of proportionality and blameworthiness.

The principle of proportionality holds that the distribution of reward (or, in this case, punishment) must be equitable in relation to the severity of the offense. Blameworthiness considers the act and the person (and any of that person's impairments) in regards to punishment (P. H. Robinson, 2003), and involves additional judgments of the decision-maker. Because impaired professionals may have less control over their behavior, one could argue they are less blameworthy (Roth, 1979). Therefore, we might expect that impaired professionals would be punished less severely than their unimpaired colleagues for ethical breaches. As a practical matter, proportionality and blameworthiness do carry over from the criminal justice world to the ethical disciplinary system. Many professional regulatory boards specifically count impairment as a mitigating factor ("Board v. Henrichsen," 2013). Some states even provide diversionary programs to give help, rather than punishment, to impaired professionals who commit ethical breaches ("Iowa Supreme Court Atty. Disc. v. Cannon," 2012).

However, there is a strong societal stigma associated with impairments such as mental illness and addiction (Mittal et al., 2013; Sartorius, 2002). Disciplinary boards may feel that these impaired professionals need to be removed from practice to protect the public. Also, an offender's impairment may be seen as an aggravating factor if the impairment is not successfully treated after discovery ("Board v. Roush," 2013). Therefore, it may be that impaired professionals are punished more, not less, severely than their unimpaired colleagues.

While we know that there are processes and decision rules in place to deal with impaired professionals, we do not know their effects. Specifically, we do not know whether impaired professionals typically receive more or less punishment than their unimpaired counterparts. In other words, are impaired professionals being punished

consistently with unimpaired professionals? We also do not know whether the specific type of impairment (e.g. drug addiction versus mental illness) will matter in the severity of punishment assigned. This is an important question, and answering it will be a major contribution of this dissertation. We do not have enough evidence to hypothesize whether impaired professionals will receive more or less punishment for similar ethical breaches committed by their unimpaired colleagues. As detailed above, there are good arguments for both possibilities. Therefore, I pose the following research question:

> *Research Question 2: Will impaired professionals be punished more or less severely for similar ethical breaches, as compared to their unimpaired colleagues?*

If it is found that impairment moderates punishment severity, then I will analyze the tone used by the disciplinary boards against impaired and unimpaired lawyers. I will examine the boards' written opinions to determine if there are differences in how disciplinary boards communicate with these two groups. Although the disciplinary boards have written guidelines and case law to aid in their decisions, I expect that there may be latent factors in their judgments against impaired professionals. Scholars have noted that judges have a tendency to underestimate or overestimate the effect that certain cues have on their judgments (McFatter, 1982; Roehling, 1993). It has also been shown that judges who deal in a large volume of decisions may go into an "automatic" mode of decision making which results in less conscious attention to the processes of judging, and little insight into their reasoning (McFatter, 1982; Roehling, 1993). If judges do, in fact, use different cues or processes in evaluating impaired professionals, then these should be revealed in their use of language in the written disciplinary opinions. The linguistic constructs I expect to possibly find include differences in blame, denial, commonality, cooperation, and the like. However, I am not aware of any studies setting forth likely or theorized specific differences in tone used in ethics cases or against impaired professionals. These uncertainties make it inappropriate to hypothesize the specific

linguistic features that may differ in cases with impaired professionals. Therefore, I propose the following research question:

Research Question 3: Will cases involving impaired professionals show differences in tone, as compared to their unimpaired colleagues?

In this Chapter, I detailed the literature of ethics and punishment in the management and legal fields, as well as ethical frameworks. I defined both punishment and the concept of an ethical breach. I showed how theory has developed in management, law, and ethics relating to the justifications for punishment. I applied this theory and the language of professional ethical codes to develop a predictive model that sets out different types of ethical breaches. I then hypothesized relative levels of punishment for each type of ethical breach. I proposed research questions relating to impairment of offenders, which might affect the types of breaches committed and the level of punishment given for ethical breaches. I also proposed to investigate possible differences in the content of the written disciplinary opinions for impaired and unimpaired professionals. In Chapter III, I will explain my methods for gathering and analyzing data relating to these hypotheses.

CHAPTER III

STUDY METHODOLOGY

In this chapter I describe how I examined evidence of punishment in practice to test my predictions. First, I explain how I selected the professional disciplinary cases that form the dataset. Next, I detail how I coded and analyzed the cases to place them within my model. Finally, I describe the methods that I used to analyze the actual results against my predicted results.

Sample

The data in my sample is composed of a collection of cases. Specifically, the cases are written disciplinary opinions regarding the professionals accused of committing ethical breaches. As explained in more detail below, different states have slightly different procedural routes that these cases follow, in terms of which licensing bodies have the power to punish. For all of my data, I chose written opinions which issued from the highest level of punishing authority in that case, whether that was a state association or a state supreme court. Each case contains considerable factual detail about the professional who committed the breach, the facts surrounding the breach, applicable law and ethical standards, aggravating or mitigating factors, and the outcome of the case. The cases range from 2 pages to more than 25 pages in length. All of the cases used in my sample are public records. Nevertheless, I sought and received clearance from the University of Iowa Institutional Review Board for this dissertation data.

To the extent possible, I did not want differences in punishment to be solely due to one state's idiosyncrasies. Therefore, I decided to compose my sample of disciplinary opinions from multiple states. As set forth in more detail below, I chose to use the states of Iowa, Florida, and Wisconsin for my sample.

Disciplinary and licensing boards for lawyers operate at a state, not national, level. In examining disciplinary decisions against lawyers from multiple states, I saw

some minor variations in the codified standards of ethics and the decisions themselves. I sought to identify states with enough similarity in ethical codes that the decisions could be readily compared. There were two very important inclusion criteria: I needed states which had a significant volume of disciplinary cases for lawyers, and licensing boards with enough institutional transparency to make their decisions publicly available.

While each state has its own body of law and regulations on professional ethics, the ABA code of ethics is often recognized as a conceptual framework for making ethical decisions. The ABA's Model Rules for lawyers have been adopted by many states (Association, 2013d) including Iowa (2005), Florida (1986) and Wisconsin (1987). Each of these states has modified the Rules to fit their needs, and the ABA tracks these modifications ("ABA Prof. Resp. Policy Charts,"). Even after modification, these three states' lawyer disciplinary rules have a common core and common aims, as set forth by the Model Rules. I reviewed the legal disciplinary systems in many different states. I began with the ABA's list of states which had adopted the Model Rules, knowing that these states would have similar legal disciplinary frameworks. From this list, I set out to find states that had similar, accessible, and enough legal disciplinary decisions. There were no *a priori* reasons to assume that geography or demographics would lead to differences in the professional populations of these states. However, I did not wish to choose states which were all in one region, or overly similar in population size.

I am a member of the Iowa Bar and have considerable experience reading and interpreting the Iowa rules for lawyer ethics, which follow the ABA Model Rules. Iowa's legal ethics decisions are publicly available without cost, and there are a sufficient volume of cases to study (43 cases referred to the Iowa Supreme Court in 2012 alone). Therefore, it is natural that I chose the state of Iowa as part of my sample.

I then sought a more populous state to include in my sample. The state of Florida has a reputation for being among the most ethically colorful in the country. Florida led the country in federal public corruption convictions from 2000-2010 (Wilcox & Krassner,

2012). Adjusted for population (19,000,000) Florida ranked 19th in the United States for corruption (Simpson, 2012). Due perhaps to its higher population, Florida has a higher number of lawyer disciplinary cases each year than Iowa. Florida follows the ABA Model Rules, with a fair amount of specific additions targeted to consumer protection against lawyers. Many of its lawyer discipline cases are publicly available, without cost, and are detailed.

I wanted to add a third state which was in between Iowa and Florida in population size. I investigated and rejected many states in this category because they did not provide detailed disciplinary decisions, or required a payment for a copy of each decision. The third state I found which fit all my inclusion criteria was Wisconsin. It is approximately twice as large as Iowa (5,726,000 people) with a mix of urban and rural areas. It has a reasonably high volume of disciplinary cases (108 legal ethics decisions in the past 3 years). Wisconsin follows a modified version of the ABA Model Rules, its disciplinary cases are freely and publicly available, and the cases are similar in format and detail to those from Iowa and Florida.

Thus, my sample originated with all the publically available disciplinary cases from Iowa, Florida and Wisconsin, 2012-2014. There were 465 cases, with a roughly equal amount from each of the states. However, a number of cases had to be removed from the sample due to incomplete or redacted information (for instance, many of the Iowa cases included only brief summary information about the offender and breach) leading to a final sample size of 377. In the final sample, 47% of my cases were from Wisconsin, with the remainder being more or less equally divided between Iowa and Florida. I did not expect to find differences in disciplinary trends between states based on demographics. However, mindful that these could appear, I conducted appropriate post hoc analyses to determine any significant differences between states.

Coding

I coded the disciplinary cases for several variables which relate to the breach, the persons involved, and the punishment. Table 1 shows an abbreviated example of the coding for nine cases, three from each of the states in my sample. First, I examined the case to see how many breaches the offender committed. When a case mentioned multiple breaches, I kept a count of the breaches. However, I chose not to aggregate the other independent variables (such as target or intentionality) for these multiple-breach cases. This was a practical consideration driven by the nature of the data itself. Typically, the disciplinary authorities do not analyze and set out a specific punishment for each breach. Rather, they are more likely to focus on one or more very serious breaches and use these to determine an overall punishment. In fact, often the authorities will state that they do not "reach" (consider) the minor breaches in a case, where the main breaches warrant serious punishment on their own. Thus, there often is not full information available for these ancillary breaches. Therefore, I chose to code for the most serious breach in each case, as stated by the decision-maker in the case.

Next, I coded for the target of the breach. As set forth above, I conceptualized that breaches would have three potential targets: a client, a colleague, or no target. I classified these target variables as ordinal, because they represent different categories of increasing severity. However, there is not enough information about their relative severity to place the variables on a numerical continuum such as one would find with a continuous variable. A code of "2" for this category means that a client was the target of the breach, a code of "1" means that a colleague was the target of the breach, and a code of "0" means the breach is considered "victimless" as to target.

Coding the target of the breaches was relatively objective and straightforward. The cases give a good description of the type of ethical breach committed, and the victim, if any. Cases in which a client was harmed typically include an assessment of 1) whether a breach was committed that harmed the client, 2) the nature of that breach, and 3) the

consequences of the harm. Ethical breaches against a colleague are also typically detailed in the disciplinary case, including the impact of the harm. "Victimless" ethical breaches, where no harm was done to anyone but the offender, encompass the remaining cases. Examples of victimless breaches would be illegal drug use by the offender, or a failure to maintain continuing education requirements.

Next, I coded each case for characteristics of the breach as set forth above. First, I coded for the intentionality of the breach. In my predictive model, breaches are classified as intentional or unintentional. As in most studies of real-life phenomena, not every ethical breach fits perfectly into two "black and white" categories. It could be argued that there are one or more grey areas between intentional breach and unintentional breach. After consultation with various experts, I made the decision to restrict my analysis to these two categories in order to simplify the model and fit it best with existing theory. Therefore, an intentional breach was coded as "1," and any other breach was coded as "0," placing it into the unintentional category. In many cases, coding the intentionality of the breach was straightforward. Forgery, theft, and sexual misconduct are all easy examples of intentional breaches. Many cases clearly deal only with neglect or incompetence, such as failure to return phone calls or file documents. But, there were cases with breaches both intentional and unintentional, or where the intent appeared to be more than mere negligence, but possibly less than actual intent. Because this judgment had a potential element of subjectivity, I enlisted a second coder to code a subset of cases. The coder was a non-lawyer, but I prepared an extensive coding manual (Appendix A) to guide her work. After each of us coded approximately 100 cases, I chose a random subsample of 20 cases from the second coder's work. I evaluated our percentage of agreement and disagreement on coding decisions for intentionality, and found 95% agreement (19 out of 20 cases). The case which was discrepant had been noted by the coder as somewhat confusing, but I was able to resolve the discrepancy through legal analysis of the facts in the case.

The other characteristic of the breach that I coded is whether the breach is also a violation of criminal law. In making this decision, I looked to the language of the cases themselves, which explicitly state whether the offender was charged with and/or convicted of a criminal offense. While there were cases where I recognized certain conduct as potentially violating criminal law, I did not have all the facts available and thus did not wish to make "judgment calls" on the potential criminality of actions.

Finally, I coded each case for factors relating to characteristics of the offender. First, I coded for how many previous run-ins the offender has had with the disciplinary system, as set by the opinion of the disciplinary board. The text of the case is the most accurate measure of this, because the disciplinary board often recounted prior instances of discipline that were confidential or sealed from the public. I coded this as a continuous variable. Next, I coded for whether the offender was given credit for significant volunteer or pro bono service. Again, the best measure of this is the text of the cases. Evidence of volunteer service usually comes in through the form of character witness testimony in the disciplinary appeal process, and all the documents in that appeal process are confidential and cannot be accessed. Next, I coded for indicia of impairment. A qualitative scanning of legal disciplinary cases over the past eight years in Iowa revealed several types of impairment in lawyers: mental illness, alcoholism, drug use, gambling, and other addictions. I created a dichotomous variable for each of these specific impairments and code a "1" or "0" for their presence. As control variables, I coded for gender and whether the offender was represented by an attorney, or represented themself (*pro se*).

I conceptualized the dependent variable, punishment, as an ordinal variable corresponding to the three punishment types, in order of increasing severity: rehabilitation, deterrence, and incapacitation. The cases themselves do not always state whether a punishment is intended to be rehabilitative, deterrent, or incapacitative. They do, however, state the qualitative nature of the punishment as well as any associated time

limit (e.g. public reprimand, 90 day suspension). Thus, I had to separate the punishments given into categories. The first category, rehabilitative, is fairly easy. Here I included any punishments which specifically mentioned rehabilitation, as well as diversion programs or probation. I then had to decide how to divide the remaining two categories, deterrence and incapacitation. It was clear that punishments such as disbarment, license revocation, or emergency suspensions to protect the public fell into incapacitation. However, it was more difficult to decide how a standard suspension of a given length should be categorized. After consulting with subject matter experts, and reading hundreds of the cases in my sample, it became clear that one of the main "fighting issues" in these disciplinary actions was whether a suspension would be of a length such that the offender must reapply for his or her license after suspension. In Wisconsin and Iowa, any suspension of six months or longer is effectively a license revocation that requires the attorney to petition the disciplinary board to regain a license to practice after the suspension is served. In Florida, this rule applies to any suspension longer than 90 days. This appeared to be an appropriate breakpoint between deterrence and incapacitation, as petitioning for one's license back is a laborious process, and the burden is on the offender to prove he or she should be allowed to practice again. Therefore, after coding the exact nature of each punishment, I recoded the cases into ordinal categories, where 0 = no punishment or a finding of not guilty, 1 = rehabilitative punishment, 2 = deterrent punishment, and 3 = incapacitative punishment.

A decision handed down by a disciplinary authority may ultimately contain elements of more than one of these types of punishment. Disciplinary authorities do not mix punishment types indiscriminately. Rather, they limit punishment to the lowest level necessary. This is commensurate with punishment theory, which demands the punishment be proportional and appropriate to the offense (Carlsmith et al., 2002) and the ethical framework of justice, which demands equitable punishment (Cropanzano & Grandey, 1998). If rehabilitation will suffice as punishment, then the authorities will not

capriciously incapacitate the offender or issue notices intended to cause general deterrence. In some cases where the offense is serious enough to warrant incapacitation or deterrence, a rehabilitative component is added as a condition of reinstatement (for instance, an educational requirement). However, the offender is more likely concerned with the highest level of punishment they will face, rather than supplementary rehabilitative punishment. Therefore, I coded for the highest type of punishment present in each case, and made notes as appropriate on supplementary punishments.

Table 1 – Example Coding of Cases in the Sample

State	Case No	Gender	# of Breaches	Target	Intentional?	Criminal?	Non Cooperative?	Prior Discipline?	Volunteerism?	Punishment	Breaches
FL	SC12-2596	M	2	Client	Yes	No	No	No	No	Deterrence	Sexual overtures to vulnerable clients, attempts to exchange sex for legal work
FL	SC10-1019	F	2	Client	Yes	No	No	Yes	No	Incapacitation	Disparaged client, told court she believed client would lie under oath
FL	SC12-333	M	2	Client	No	No	Yes	No	No	Incapacitation	Attorney failed to keep adequate trust account records, trust account check bounced
IA	13-0274	M	1	Colleague/ Other	Yes	Yes	No	No	No	Incapacitation	Domestic abuse, alcohol abuse, chemical dependency
IA	13-0397	M	1	Client	Yes	No	No	No	No	Deterrence	Filing frivolous pleading, making false statements to the court
IA	13-1153	M	1	Colleague/ Other	Yes	Yes	No	No	No	Deterrence	Cursed at a judge, jailed for contempt
WI	2008AP2337-D	F	34	Colleague/ Other	Yes	Yes	Yes	Yes	Yes	Deterrence	Wage law violations in attorney-owned bed and breakfast business, harassment, assault, destruction of property
WI	2011-OLR-8	M	3	Colleague/ Other	Yes	Yes	Yes	No	No	Deterrence	Tavern fights, failure to report criminal charges
WI	2013-OLR-11	M	2	Client	Yes	Yes	No	Yes	No	Deterrence	Destroying evidence, entering into plea negotiations without client's consent

Analytic Strategy

In Chapter 2, I set out arguments and theories regarding how certain predictor variables are hypothesized to affect the punishment that will be meted out to offenders. I now explain how I used these variables to create a predictive model through ordinal regression. This model shows whether each predictor variable is statistically significant in determining punishment. It also shows, for each case, the likeliest punishment outcome, the probability that that case would actually be assigned to that outcome, and the probability of the case ending up with the actual outcome it received.

Because my dependent variable is ordinal, I used ordinal regression in SPSS 22 to analyze this data (IBM, 2014b; Liu, 2009). Ordinal regression is an adapted form of logistic regression, a technique that is appropriate for studies where the dependent variable is dichotomous. This method has been used in other studies analyzing judicial decision-making (Werner & Bolino, 1997). Ordinal regression is more frequently used in other fields, such as medicine, as compared to psychology or management research (Hedeker & Gibbons, 1994, 1996; Smithson & Verkuilen, 2006). However, it is quite useful when analyzing an ordinal dependent variable (Hedeker & Gibbons, 1994; Liu, 2009).

Ordinal regression helps to predict the presence or absence of an ordinal outcome based on other predictor variables (IBM, 2014b; Liu, 2009). It functions in much the same way as regression with a continuous dependent variable, but yields different measures and test statistics. Linear regression typically shows a R-squared statistic to denote the amount of variance explained by the model. Ordinal regression is limited to "pseudo-R-squared" statistics, which represent the same basic idea, with some limitations (Liu, 2009). For my data, I will report the Cox & Snell's, Nagelkerke's, and McFadden's pseudo-R-squared statistics, to show the predictive value of the model (IBM, 2014b; Liu,

2009). Cox & Snell's R-squared compares the log likelihood for the model to the log likelihood of a baseline model (IBM, 2014b). However, it is not possible, even with a perfect model, to have a Cox & Snell R-squared of 1.0 (IBM, 2014b). Nagelkerke's R-squared adjusts the Cox & Snell R-squared to run from zero to 1.0 (IBM, 2014b). McFadden's R-squared, also known as a likelihood ratio (Liu, 2009), compares the predictive model to an intercept-only model (IBM, 2014b). Each of these statistics are reported in Chapter 4, and I discuss their implications accordingly.

Additionally, I report the likelihood-ratio chi square statistic, which shows goodness-of-fit for the model (IBM, 2014b). This statistic tests whether the full predictive model provides a better fit than a null model, or one with no independent variables (Liu, 2009). While this fit statistic does not provide finely-detailed information, such as the fit statistics often reported in structural equation modeling, we get some useful information as to whether the model fits or does not fit at all.

I originally intended to report output from the probability functions yielded by ordinal regression. The "predicted category" measure shows which of the ordinal outcomes (punishment levels) a case is predicted to result in, based on the values of the independent variables for that case (IBM, 2014b). For instance, based on my hypotheses, I would expect that a case with an intentional breach against a client, that is also a criminal offense, committed by a professional with prior disciplinary history, would result in the highest level of punishment. The predicted category probability shows the likelihood that a certain breach will receive the theorized matching level of punishment in the predictive model, based on the pattern of independent variables in that case. Actual category probability takes into account the independent variables and the actual ordinal outcome (dependent variable), and displays the probability that a given case would be assigned to the actual outcome it received (IBM, 2014b). For instance, if a breach resulted in the level of punishment predicted by the model, then this statistic should be relatively high. However, if a case has mismatch between predicted punishment and

actual punishment, this statistic should be relatively low, as that was an unlikely result. While I do report certain outputs from these functions in Chapter 4, I ultimately decided that the odds ratio gives more useful information about the importance of the variables in the model.

Because some cases include multiple breaches, it is important to consider issues with correlation in data within subjects, depending on my choice of analytic techniques. Initially I considered utilizing SPSS 22's General Linear Modeling features, extended by Generalized Estimating Equation procedures, which allow for ordinal regression with clustered data (IBM, 2014a), based on multi-level analysis techniques for mixed-effects ordinal regression models (Hedeker & Gibbons, 1994). However, after much study and consultation with statistical experts, I concluded that multi-level analysis was not appropriate for this data. In this dissertation, the dependent variable (punishment) is at "level 2" (the top level – here represented by the disciplinary case), while the independent variables are at "level 1" (a sub-level – here represented by each offense within a case). Multi-level analysis techniques such as the GLM function above and hierarchical linear modeling do not allow for predicting a level 2 dependent variable from level 1 independent variables. A better technique is to aggregate the breaches so that the independent variables and dependent variables are at the same level (O'Boyle, Banks, & Gonzalez-Mulé, 2014). After reviewing and coding the cases, I made the decision to code a count of breaches for each case. However, ordinal regression has a fairly severe limitation regarding continuous independent variables with many values. In creating its output, ordinal regression creates a "case" for every possible combination of independent variables. Approximately 51% of the cases involved one breach, 32% of the cases had two to five breaches, 8% had six to ten breaches, and 9% had more than ten breaches. With values ranging from 1 to 177 (M = 4.90, *Median* = 1.0, SD = 12.47) for breach count, this would have created a matrix with a high percentage of empty cells, and thus would have rendered the results of the ordinal regression questionable. Because of this

limitation of ordinal regression, I decided to dichotomize the breach count variable by recoding it into cases with one breach versus cases with multiple breaches. Each of these categories represented about half the cases in my sample. As I stated above, I did not aggregate the other independent variables in multiple-breach cases (such as target or intentionality) because this information was often missing from the cases. Rather, I used the language of the cases themselves to code for the most serious breach used by the decision-maker in meting out punishment.

Research Questions 1 and 2 deal with whether impaired professionals commit different types of breaches, and are punished differently than unimpaired professionals. Some of this can be accomplished through quantitative statistical analysis, as set forth above. The correlation matrix of the variables in my equation shows certain significant correlations between the target and intentionality of the breach, and types of impairment. This gives information regarding Research Question 1. For Research Question 2, I analyze punishment outcomes. I examine the coefficients in the ordinal regression equation to explain whether impairment (or any of its subcategories) had a significant effect on punishment level. I also explain how a change in impairment status is predicted to affect the predicted (punishment) category.

After exploring these questions, I then delve into the language used by the disciplinary boards in Research Question 3. I decided to use content-analysis software for this step. I used DICTION 6.0 content-analysis software (Digitext, 2010) to perform content analysis of the language in the cases (Kabanoff, 1997). This software is considered a top choice for analyzing "linguistic elements" of speakers through the use of construct-validated custom dictionaries (Bligh, Kohles, & Meindl, 2004) and has been used in many published articles in management and the social sciences. DICTION 6.0 searches for five main semantic features (Activity, Optimism, Certainty, Realism and Commonality) and has 35 sub-dictionaries that measure linguistic features such as Blame, Hardship, Praise, Exclusion, and Denial (Digitext, 2010). The texts entered into the

DICTION software are analyzed against these dictionaries and sub-dictionaries to determine the relative frequency of certain words, and to show statistically significant differences in usage.

The technique of analyzing the language of decision makers, such as judges, is used in organizational research (Karren & Barringer, 2002; Roehling, 1993). Utilized in this setting, it is known as a "policy-capturing" methodology, which can reveal how the decision makers use the information available to make their decisions (Karren & Barringer, 2002). Content analysis of this kind is often, by its nature, exploratory. There have not been content analysis studies of the language used by ethics disciplinary boards, so there is not sufficient information or theory to form specific hypotheses about which DICTION linguistic features will show differences in language or tone. However, the DICTION sub-dictionaries are organized generally among "positive" (e.g. commonality, cooperation) and "negative" (blame, denial) lines, which relate to the tone of the text analyzed. I expected the textual analysis of the cases to roughly align with the results of Research Questions 1 and 2. In other words, if it was found that impaired professionals are punished more harshly, then I would also expect to find more use of the negative linguistic features tested by DICTION. Assuming certain quantitative differences in breach and punishment for impaired professionals, I analyzed the language used in the cases, and reported the results.

In Chapter 3, I delineated the methodology used in compiling my sample, making coding decisions, coding the data, and analyzing the data. In Chapter 4, I will report the results of these analyses.

CHAPTER IV

RESULTS

In the previous chapter, I described the sample and methods of analysis I used to test my theoretical model. In this chapter I will report the results of that analysis. First, I will briefly report descriptive statistics and correlations. Next, I will detail the results of the ordinal regression I used to test my model, and report which hypotheses were supported.

Descriptive Statistics and Correlations

In Table 1, I report the descriptive statistics and intercorrelations for my study variables. Because several of my variables are ordinal or categorical, I report their frequencies in Tables 2 and 3 for greater clarity. In this section of the paper, I note certain interesting findings. First, it should be noted that there are significant correlations between some of the independent variables. For example, intentionality of the breach and criminality of the breach are moderately correlated (r = .40). This makes sense, because most (if not all) criminal acts require intentionality, as set forth in the above chapters. Additionally, alcohol use is correlated with drug use (r = .50) and addiction (r = .48), which makes sense from a practical standpoint. Alcohol use is also moderately correlated with criminality (r = .35). However, there is a relatively low base rate of alcohol use (8%), drug use (6%), addiction (5%), and gambling (1%) in these cases, contrary to what I expected. Also, my sample had more gender diversity than originally expected, with 23% of the cases involving female attorneys.

Approximately 13% of the cases involved a victimless breach (Table 4), another 17% involved a breach targeted at a colleague, and 70% involved a breach directed at a client. The latter category was somewhat higher than expected, but perhaps indicates that breaches targeted at clients are more likely to escalate into complaints filed with the formal attorney disciplinary system. Interestingly, 73% of the breaches were intentional.

Again, this may be reflective of the idea that intentional breaches are serious and more likely to lead to formal discipline, while unintentional breaches may be resolved by a private reprimand. I also noted that 96% of the cases resulted in a punishment at one of the two highest levels (deterrence or incapacitation) (Table 3). Only about 2% of cases were resolved with a rehabilitative punishment, and less than 2% of cases resulted in a finding of "not guilty" or no punishment. The implications of this will be discussed in Chapter 5.

Regression Model

As set forth in Chapter 3, I used ordinal regression to test my predictive model. The results of this regression are reported in Table 5. My independent variables were number of breaches, intentionality, target of breach, criminality, non-cooperation, prior disciplinary record, and volunteerism. My control variables were state, gender, and self-representation (pro se).

My results indicate that my hypothesized model was a better fit to the data than an intercept-only model (χ^2 (12) = 71.5, $p < .01$) (Norušis, 2012). Also, my pseudo-R-squared statistics show the relative fit of the model compared to certain benchmarks. Cox & Snell's R-squared compares the log likelihood for the hypothesized model to the log likelihood of a baseline (intercept-only) model (IBM, 2014b). My results yield a Cox & Snell's statistic of .174, which shows incrementally better fit than the baseline model. It is not possible, even with a perfect model, to have a Cox & Snell R-squared of 1.0 (IBM, 2014b). Therefore, Nagelkerke's R-squared adjusts the Cox & Snell R-squared to run from zero to 1.0 (IBM, 2014b). My Nagelkerke's R-squared is .213, which again shows incrementally better fit than a baseline model. McFadden's R-squared, also known as a likelihood ratio (Liu, 2009), compares the predictive model to an intercept-only model (IBM, 2014b). My McFadden's R-squared statistic is .113, showing better fit than an intercept-only model. While these pseudo-R-squared statistics are useful in

showing fit compared to certain null models, they cannot be interpreted in exactly the same way as the R-squared statistic in a typical regression model, which would signify percentage of variance explained by the regression model (Norušis, 2012).

Tests of Hypotheses

Table 5 shows the results of the ordinal regression with my independent variables and controls for Hypotheses 1-6. Ordinal regression is a special case of logistic regression, and gives similar outputs, with a few exceptions. An ordinal regression essentially calculates the relative probability of outcomes based on a given set of regression coefficients (independent and control variables) (Norušis, 2012). However, the analysis does not tell us the actual percentage likelihood of a given outcome. Rather, it tells us the relative probability of an outcome given a change in one of the inputs. As an example, suppose we were testing the effect of smoking on heart disease. We might have a group of smokers and a control group of nonsmokers. Using ordinal regression, we might be able to predict how much more likely it is that the smokers will develop heart disease as compared to the nonsmokers, with all other factors held equal. What we would not be able to predict, using ordinal regression, is what percentage of each group would develop heart disease. We would simply be able to see the relative risk between the two groups (smokers and nonsmokers).

The output from an ordinal regression is expressed as a "logit," or the log of the relative odds that an outcome will occur (Norušis, 2012). The column titled "Estimate" gives coefficients which tell us how much the logit will change, given a change in the value of an input (Norušis, 2012). However, this particular estimate is made more useful by exponentiating its value (the inverse of the natural logarithmic function, determined by raising *e* to the power of the logit), which gives us the odds ratio (Norušis, 2012). The odds ratio is a measure of effect size, and again gives us the relative probability of a change in outcome given a change in predictors, albeit in a more easy-to-understand

format. Using our previous example of smoking and heart disease, if the smoking group had an odds ratio of 2.0, then that group would be twice as likely as the nonsmoking group to develop heart disease. However, we would not know the absolute percentage likelihood from this particular calculation – the odds ratio does not give us this information.

Other statistics shown in the table include the standard error, Wald statistic (the square of the ratio of a given coefficient to its standard error)(Norušis, 2012), degrees of freedom, test of statistical significance (p = .05), and the upper and lower bounds of a 95% confidence interval surrounding the parameter estimate. It should be noted that in Table 5, all independent and control variables have been inputted to the regression, and as such, a result for a given variable controls for all other variables in the regression equation.

Hypothesis 1 stated that a breach against a client (coded as Target = 2) will result in a higher level of punishment than one against a colleague (Target = 1), which will in turn result in a higher level of punishment than a victimless breach (Target = 0). The effect sizes (odds ratios) for these variables were .916 (victimless) and .877 (colleague), which is commensurate with the hypothesized relationship between target and punishment severity. However, thetarget variable was not statistically significant at the p = .05 level, and thus Hypothesis 1 was not supported.

Hypothesis 2 stated that an intentional ethical breach will result in a higher level of punishment than an unintentional breach. The odds ratio for this variable is 1.748, which would indicate a higher level of punishment for intentional breaches. However, p = .051 for this variable, and thus did not reach the traditional significance level of .05.

Hypothesis 3 stated that a breach which was also a crime (Criminal = 1) would result in a higher level of punishment. This hypothesis was supported. The odds ratio of 2.953 shows that a criminal breach is approximately 3 times more likely to result in a higher punishment, as compared to a non-criminal breach, all else held equal.

Hypothesis 4 stated that an offender who does not cooperate in the disciplinary process will receive a higher level of punishment than one who cooperates. This hypothesis was supported. The odds ratio of 2.359 shows that an offender who does not cooperate is about 2.4 times as likely to receive a higher punishment than one who cooperates.

Hypotheses 5 and 6 dealt with the offender's good or bad prior history. Specifically, Hypothesis 5 stated that an offender who had a prior record of discipline would receive a higher punishment. Hypothesis 6 stated than an offender who had a prior good record of volunteerism or pro bono work would receive a lower punishment. Neither of these hypotheses were supported. Odds ratios were 1.467 for prior discipline, and 1.652 for volunteerism. The former is commensurate with the hypothesized direction of the relationship, the latter is counterintuitive.

I included several control variables in the equation as well, two of which were statistically significant. First, I alluded to the problem of multiple breaches within cases in Chapter 3. My coding assistant and I coded each case with the number of breaches committed as a continuous variable. These ranged from 1 to 177 (M = 4.90, *Median* = 1.0, SD = 12.47). Unfortunately, running an ordinal regression with a continuous independent variable of this range results in a very unsatisfactory model that cannot be reliably interpreted (Norušis, 2012). This is because the regression creates a "case" for every possible combination of every independent variable, and a continuous variable with many values will create many cases with empty cells (Norušis, 2012). Therefore, I had to find a way to simplify this variable. Approximately 50% of the cases involved only one breach, while the remainder involved multiple breaches. Thus, I made the decision to dichotomize this variable.[1] As shown in Table 5, in cases where the offender committed

[1] I performed a post hoc analysis with breach count as a continuous variable, and the only significant change in the regression model was that noncooperation was no longer statistically significant.

multiple breaches, he or she was about twice as likely to receive a more severe punishment. While this was not hypothesized as a primary factor in predicting punishment, future studies might consider giving more weight to this variable, as discussed in Chapter 5.

Next, as mentioned in Chapter 3, I included state as a control variable. My cases came from the states of Iowa, Florida and Wisconsin (Table 8). All of these states base their disciplinary codes on the ABA model rules (Association, 2013c), and thus I did not expect any difference in punishment severity between states. However, as seen in Table 5, there was a significant difference in punishment severity by state. Viewing the odds ratios, we see that an offender is about 3 times more likely to get a stronger punishment in Iowa or Florida than Wisconsin, all else held equal. Potential reasons for this finding will be discussed in more detail in Chapter 5. I re-ran the regression model without the Wisconsin cases, and the results were essentially unchanged, except that the multiple breaches variable was no longer statistically significant. I also controlled for gender of the offender, and whether the offender hired an attorney for their defense or defended themselves (*pro se*). Neither gender nor *pro se* status were statistically significant in the regression.

Research Questions

In addition to the six hypotheses, I proposed three research questions. The first research question inquired whether impaired professionals committed certain types of breaches more frequently than unimpaired professionals. The results for the first research question are shown in Table 9. I found that professionals who are impaired by alcohol and drugs do commit different kinds of breaches as measured by target and intentionality. Namely, they are more likely to commit breaches that do not involve an outside victim, such as driving under the influence of alcohol, or being arrested for their own drug use. Professionals impaired by alcohol are also more likely to commit intentional breaches,

although the subsample for this test is small (n = 31 for alcohol-impaired professionals). Based on corrected comparisons of the column proportions, each of the foregoing results is statistically significant at the p = .05 level (two-sided test). I did not find any statistically significant differences in breach type for mentally impaired professionals, or those suffering from gambling or nonspecific addictions.

Research Question 2 asked whether impaired professionals will be punished more or less severely for their breaches than unimpaired professionals. In order to explore this question, I added the independent variables of mental impairment, alcohol use, drug use, gambling, and addiction into the ordinal regression. First, I created a dummy variable, Impairment, which was set to "1" where any of the previous types of impairment was present, or "0" if it was not. I ran an ordinal regression with this variable in the equation, and reported the results in Table 10. Next, I removed the dummy variable and ran the regression with each type of impairment as a separate variable in the equation. The results of this analysis are reported in Table 11.

With all impairment types combined into one variable, there was no statistically significant difference in punishment for impaired professionals versus unimpaired professionals. When I ran the regression with the individual impairment variables, only alcohol use resulted in a statistically significant finding. The odds ratio for this particular independent variable is 2.847 where alcohol use is not present (Alcohol = 0). This suggests that an offender who had alcohol use mentioned in their case is about three times more likely to receive a *lesser* punishment than an unimpaired offender, with all other factors held equal. In other words, the decision-makers in these cases may have considered alcohol use as a mitigating factor, but did not consider mental impairment, drug use, gambling problems, or addiction to be either mitigating or aggravating factors.

Research Question 3 was contingent on the findings in Research Question 2. Specifically, I stated that if I found impairment moderated punishment severity, I would analyze cases involving impaired professionals for differences in tone and severity.

Because my quantitative analysis found no systematic difference in punishment for impaired offenders as a whole, I did not perform a textual analysis of impaired versus unimpaired cases as a whole. However, I did find a difference in punishment severity between cases that mentioned alcohol use and those that did not. Therefore, I decided to perform a textual analysis on the cases in these two groups. My baseline group was cases without alcohol use, and my comparison group was cases with alcohol use. In order to perform this analysis, I used DICTION 6.0 text analysis software (Digitext, 2010). DICTION allowed me to analyze both types of cases for differences in tonal categories such as tenacity, blame, concern, realism, and many others (please see Table 12 for a full list of categories). These tonal categories are encapsulated in "custom dictionaries" in the software, and have been developed over time, through analysis of a large variety of texts, ranging from political speeches, to shareholders' annual reports, to court cases (Digitext, 2010). DICTION breaks each case into 500 word sections, and compares the words in each section to these custom dictionaries. The user can then contrast one group of cases (here, alcohol cases) against one or more other groups (here, non-alcohol cases). If there are statistically significant differences in tone, the software will flag the specific tonal categories that reflect this. In my sample, one category, passivity, showed a significant difference, with alcohol cases being significantly more passive in tone. The passivity dictionary includes "terms of compliance … docility and cessation (arrested, capitulate, refrain, yielding). Also contains tokens of inertness (backward, immobile, silence, inhibit) and disinterest (unconcerned, nonchalant, stoic), as well as tranquility (quietly, sleepy, vacation)" I discuss the implications of this finding in detail in Chapter 5.

Other Findings

In Chapter 3, I mentioned that I would briefly describe the probability functions returned from the ordinal regression analysis, namely, predicted category, predicted category probability, and actual category probability. I believe that the ordinal regression

table and the calculated odds ratios provide more useful information than these probability functions. In fact, these probability functions are more often transformed into the odds ratio for analysis (Norušis, 2012). However, I will briefly outline my findings. First, I said I would look at the predicted category for mismatches. With the benefit of hindsight, I see this particular measure gives no useful information on its own. Next, I mentioned I would analyze the predicted category probability. This shows the likelihood that a certain breach will be matched with its theoretically "correct" level of punishment in the predictive model, based on the independent variables in that case (IBM, 2014b). I found significant correlation ($r = .370$, $p < .05$) between predicted category probability and the actual results in the cases. In other words, the theoretically "correct" punishment results were fairly highly correlated with the actual results. Taken together with the findings from the ordinal regression, I believe this correlation gives evidence that the model is fairly well-specified. Finally, I said I would look at actual category probability, or the likelihood that a given case actually received the "correct" level of punishment predicted by the model. I found that the actual category probability for these cases ranged from a minimum of .01 to a maximum of .94, indicating variability in the predictive value of the model on a case-by-case basis (as would be seen in any regression model). The mean for actual category probability was .54. In other words, about 54% of cases actually received the same level of punishment predicted by the model. While this statistic should not be given much weight on its own, I believe that, taken with the other findings, it is commensurate with my overall findings of a fairly well-specified model. Tables 5 and 6 represent what is known as the "confusion matrix" (Norušis, 2012), which shows how predicted punishments match up with actual punishment. This shows that the model correctly predicted a deterrent punishment (Category 2) about 77% of the time (147/192) and an incapacitative punishment about 60% of the time (100/167). The model did not predict any rehabilitative punishments or acquittals, so these rare cases are not included in the columns of the table.

In this Chapter, I presented my overall results, tests of hypotheses, findings related to my research questions, and the results of some additional analyses. In Chapter 5, I will discuss what these results mean in context, discuss limitations of the study and findings, and give directions for future research.

Table 2. Descriptive Statistics and Intercorrelations between Study Variables.

Variable	*M*	*SD*	1	2	3	4	5	6	7	8	9	10	11
1. Punishment Level	2.40	.62											
2. Multiple Breaches (1 = Yes)	.49	.50	.17*										
3. Target	1.57	.72	0.06	.20*									
4. Intentionality (1 = Yes)	.73	.44	.16*	.11*	-0.06								
5. Criminality (1 = Yes)	.30	.46	.16*	-0.05	-.20*	.40*							
6. Noncooperation (1 = Yes)	.29	.45	.17*	.17*	.18*	0.03	-0.09						
7. Prior Discipline (1 = Yes)	.46	.50	.14*	.22*	0.08	.110*	-0.03	.20*					
8. Volunteerism (1 = Yes)	.05	.22	0.01	0.02	-0.03	0.06	0.06	0.04	0.01				
9. Mental Impairment (1 = Yes)	.17	.38	.11*	0.03	-0.09	0.04	0.04	0.00	0.08	.19*			
10. Alcohol Use (1 = Yes)	.08	.28	0.01	-0.01	-.25*	.12*	.35*	-0.02	0.09	0.02	.23*		
11. Drug Use (1 = Yes)	.06	.23	0.06	0.05	-.13*	0.10	.23*	-.11*	0.04	0.05	.25*	.50*	
12. Gambling (1 = Yes)	.01	.09	0.04	0.09	-0.03	0.05	0.07	-0.06	0.04	-0.02	-0.04	0.08	.11*

Note. N = 377. Correlations marked with * are significant at $p < .05$.
Key: Punishment Level: 1 = Rehabilitative, 2 = Deterrent, 3 = Incapacitative. Target: 0 = None, 1 = Colleague, 2 = Client.

Table 2 – Continued

Variable	*M*	*SD*	1	2	3	4	5	6	7	8	9	10	11	12
13. Addiction (1 = Yes)	.05	.21	0.09	-0.01	-0.06	0.05	.16*	-0.05	0.03	0.07	.17*	.45*	.49*	.27*
14. Florida	.28	.45	.09	.03	-.12*	-.04	-.12*	.00	-.08	-.01	.17*	-.06	.02	-.06
15. Iowa	.25	.43	.05	-.21*	.10*	-.27*	-.13*	-.06	-.10	.19*	.11*	.03	.06	.02
16. Wisconsin	.47	.50	-.13*	.16*	.02	.27*	.20*	.05	.16*	-.10	-.20*	.03	-.08	.03
17. Gender (1 = Male)	.77	.42	-0.06	0.00	0.04	0.08	0.06	0.04	0.07	-0.02	0.08	0.03	-0.05	-0.02
18. Pro Se (1 = Yes)	.26	.44	.13*	0.07	0.07	0.02	-0.04	0.09	.14*	0.06	.14*	0.00	0.01	0.02

Note. N = 377. Correlations marked with * are significant at $p < .05$.
Key: Punishment Level: 1 = Rehabilitative, 2 = Deterrent, 3 = Incapacitative. Target: 0 = None, 1 = Colleague, 2 = Client.

Table 2 – Continued

Variable	13	14	15	16	17	18
14. Florida	.01					
15. Iowa	.08	-.36*				
16. Wisconsin	-.08	-.58*	-.55*			
17. Gender (1 = Male)	.03	.07	-.09	.02		
18. Pro Se (1 = Yes)	-.01	.26*	.09	-.31*		

Note. N = 377. Correlations marked with * are significant at $p < .05$.
Key: Punishment Level: 1 = Rehabilitative, 2 = Deterrent, 3 = Incapacitative. Target: 0 = None, 1 = Colleague, 2 = Client.

Table 3 - Frequency of Punishment Types

Type	Frequency	Cases
No Punishment	1.6%	6
Rehabilitative	2.1%	8
Deterrent	51.2%	193
Incapacitative	45.1%	170

Table 4 - Frequency of Target Types

Type	Frequency	Cases
No Target	13.3%	50
Colleague	17.0%	64
Client	69.8%	263

Table 5 - Ordinal Regression Results

		Parameter Estimates							
		Estimate	Odds Ratio	Std. Error	Wald	df	Sig.	95% Confidence Interval	
								Lower Bound	Upper Bound
Threshold	[CodedPunishment = .0]	-5.719		.736	60.420	1	.000	-7.160	-4.277
	[CodedPunishment = 1.0]	-4.843		.669	52.418	1	.000	-6.155	-3.532
	[CodedPunishment = 2.0]	-.968		.596	2.638	1	.104	-2.137	.200
Location	No Target	-.088	.916	.353	.062	1	.804	-.780	.605
	Target = Colleague	-.132	.877	.327	.162	1	.687	-.773	.509
	Target = Client					0			
	Intentional	-.558	1.748	.286	3.802	1	.051	-.003	1.120
	Not Intentional					0			
	Criminal	-1.083	2.953	.280	14.992	1	.000*	.535	1.631
	Not Criminal					0			
	Non-Cooperative	-.858	2.359	.259	10.963	1	.001*	.350	1.366
	Cooperative					0			
	Prior Discipline	-.383	1.467	.236	2.644	1	.104	-.079	0.846
	No Prior Discipline					0			
	Volunteerism	.502	1.652	.506	.986	1	.321	-.489	1.494
	No Volunteerism					0			
	Iowa	1.203	3.329	.305	15.577	1	.000*	.605	1.800
	Florida	.993	2.699	.312	10.158	1	.001*	.382	1.604
	Wisconsin					0			

Table 5 - Continued

	Parameter Estimates							
	Estimate	Odds Ratio	Std. Error	Wald	df	Sig.	95% Confidence Interval	
							Lower Bound	Upper Bound
Female	.424	1.528	.265	2.569	1	.109	-.095	.943
Male					0			
Pro Se Representation	-.305	.737	.278	1.207	1	.272	-.850	.239
Not Pro Se					0			
Multiple Breaches	-.730	2.075	.239	9.312	1	.002*	.261	1.199
One Breach					0			

Link function: Logit. Variables marked with * are significant at $p < .05$.

Table 6 - Predicted Punishment Level v. Actual Punishment Level (Number of Cases)

		Predicted Punishment		
		2.0 Count	3.0 Count	Total Count
Actual Punishment	.0	6	0	6
	1.0	7	1	8
	2.0	147	45	192
	3.0	67	100	167

Table 7 - Predicted Punishment Level v. Actual Punishment Level (Percentage of Cases)

		Predicted Punishment		
		2.0 Frequency	3.0 Frequency	Total Frequency
Actual Punishment	.0	100%	0%	100%
	1.0	88%	13%	100%
	2.0	77%	23%	100%
	3.0	40%	60%	100%

Table 8 - Composition of Sample by State

State	Frequency	Cases
Iowa	27.6%	104
Florida	25.2%	95
Wisconsin	47.2%	178

Table 9 - Differences in Target and Intentionality of Breach for Impaired Professionals

		Target			Intentional?	
		None	Colleague	Client	No	Yes
		Count	Count	Count	Count	Count
Mentally Impaired	No	37	53	223	87	226
	Yes	13	11	40	15	49
Alcohol	No	36	60*	250*	99*	247
	Yes	14*	4	13	3	28*
Drugs	No	42	62*	251*	100	255
	Yes	8*	2	12	2	20
Gambling	No	49	64	261	102	272
	Yes	1	0	2	0	3
Addiction	No	46	61	253	99	261
	Yes	4	3	10	3	14

Variables marked with * are significant at $p < .05$. Results are based on two-sided tests with significance level .05. For each significant pair, the key of the category with the smaller column proportion appears under the category with the larger column proportion. Tests are adjusted for all pairwise comparisons within a row of each innermost subtable using the Bonferroni correction.

Table 10 - Ordinal Regression Including Impairment

Parameter Estimates

		Estimate	Odds Ratio	Std. Error	Wald	df	Sig.	95% Confidence Interval	
								Lower Bound	Upper Bound
Threshold	[CodedPunishment = .0]	-2.061		.769	7.191	1	.007	-3.567	-.555
	[CodedPunishment = 1.0]	-1.185		.708	2.805	1	.094	-2.572	.202
	[CodedPunishment = 2.0]	2.693		.705	14.598	1	.000	1.312	4.075
Location	No Target	-.150	.861	.361	.172	1	.678	-.858	.558
	Target = Colleague	-.133	.875	.327	.166	1	.684	-.775	.508
	Target = Client					0			
	Intentional	.553	1.739	.287	3.719	1	.054	-.009	1.115
	Not Intentional					0			
	Criminal	1.043	2.838	.284	13.504	1	.000	.487	1.600
	Not Criminal					0			
	Non-Cooperative	.856	2.353	.259	10.893	1	.001	.348	1.364
	Cooperative					0			
	Prior Discipline	.364	1.439	.237	2.349	1	.125	-.101	.829
	No Prior Discipline					0			
	Volunteerism	.555	1.741	.510	1.182	1	.277	-.445	1.554
	No Volunteerism					0			
	Iowa	1.166	3.210	.307	14.440	1	.000	.565	1.768
	Florida	.962	2.618	.314	9.408	1	.002	.347	1.577
	Wisconsin					0			

Table 10 - Continued

	Parameter Estimates							
	Estimate	Odds Ratio	Std. Error	Wald	df	Sig.	95% Confidence Interval	
							Lower Bound	Upper Bound
Female	.438	1.549	.265	2.724	1	.099	-.082	.958
Male					0			
Pro Se Representation	-.302	.739	.278	1.181	1	.277	-.847	.243
Not Pro Se					0			
Multiple Breaches	.711	2.035	.241	8.701	1	.003	.238	1.183
Single Breach					0			
Impaired	.230	1.259	.280	.676	1	.411	-.318	.778
Not Impaired					0			

Link function: Logit. Variables marked with * are significant at $p < .05$.

Table 11 - Ordinal Regression with Each Type of Impairment

		Parameter Estimates							
		Estimate	Odds Ratio	Std. Error	Wald	df	Sig.	95% Confidence Interval	
								Lower Bound	Upper Bound
Threshold	[CodedPunishment = .0]	-2.066		1.656	1.557	1	.212	-5.311	1.179
	[CodedPunishment = 1.0]	-1.189		1.629	.533	1	.465	-4.382	2.003
	[CodedPunishment = 2.0]	2.723		1.632	2.781	1	.095	-.477	5.922
Location	No Target	.079	1.082	.368	.046	1	.830	-.643	.800
	Target = Colleague	-.128	.880	.329	.151	1	.697	-.773	.517
	Target = Client					0			
	Intentional	.557	1.746	.290	3.702	1	.054	-.010	1.125
	Not Intentional					0			
	Criminal	1.232	3.428	.298	17.069	1	.000	.648	1.816
	Not Criminal					0			
	Non-Cooperative	.906	2.475	.263	11.841	1	.001	.390	1.423
	Cooperative					0			
	Prior Discipline	.420	1.523	.240	3.057	1	.080	-.051	.892
	No Prior Discipline					0			
	Volunteerism	.653	1.922	.518	1.592	1	.207	-.362	1.668
	No Volunteerism					0			
	Iowa	1.154	3.171	.313	13.592	1	.000	.541	1.768
	Florida	.972	2.642	.321	9.145	1	.002	.342	1.601
	Wisconsin					0			

Table 11 – Continued

	Parameter Estimates							
	Estimate	Odds Ratio	Std. Error	Wald	df	Sig.	95% Confidence Interval	
							Lower Bound	Upper Bound
Female	.466	1.593	.269	3.003	1	.083	-.061	.992
Male					0			
Pro Se Representation	-.322	.725	.282	1.306	1	.253	-.874	.230
Not Pro Se					0			
Multiple Breaches	.743	2.101	.245	9.190	1	.002	.262	1.223
Single Breach					0			
Impaired	-.334	.716	.325	1.058	1	.304	-.970	.302
Not Impaired					0			
Alcohol Use	1.046	2.847	.523	4.006	1	.045	.022	2.071
No Alcohol					0			
Drug Use	.288	1.334	.584	.243	1	.622	-.857	1.433
No Drugs					0			
Gambling	-.007	.993	1.383	.000	1	.996	-2.719	2.704
No Gambling					0			
Addiction	-1.146	0.318	.676	2.873	1	.090	-2.472	.179
No Addiction					0			

Link function: Logit. Variables marked with * are significant at $p < .05$.

Table 12 - Mean Word Counts per Custom Dictionaries for Alcohol v. Non-Alcohol Cases

	Alcohol	
	.0 Mean	1.0 Mean
Self-reference	1.37	1.09
Tenacity	19.74	19.18
Leveling Terms	4.17	4.70
Collectives	3.19	3.66
Praise	3.69	4.11
Satisfaction	.87	.90
Inspiration	3.42	2.95
Blame	1.14	.89
Hardship	3.83	4.30
Aggression	7.16	7.67
Accomplishment	9.19	8.89
Communication	10.79	9.48
Cognition	6.43	5.75
Passivity	4.92	6.58*
Present Concern	6.44	7.32
Human Interest	11.20	11.88
Concreteness	24.49	23.89
Past Concern	3.18	3.30
Centrality	6.91	7.66
Rapport	4.15	4.56
Cooperation	2.73	2.96
Diversity	1.42	1.25
Exclusion	2.30	2.32
Liberation	.59	.63
Denial	4.74	4.47
Motion	.72	.75
Insistence	74.51	70.75
Embellishment	1.08	1.16
Variety	.47	.49
Complexity	4.78	4.87
Activity	49.68	48.91
Optimism	49.16	49.29
Certainty	44.25	44.14
Realism	44.99	44.44
Commonality	52.13	52.70

Mean marked with * is significant at $p < .05$ based on a two-sided test adjusted by the Bonferroni correction.

CHAPTER V

DISCUSSION

In this study, I set out to analyze whether professionals who commit ethical breaches are being punished consistently, and proportionately with the blameworthiness of their offenses. The Iowa Supreme Court has stated many times that the purpose of a disciplinary proceeding "is not alone, or even primarily, intended to punish the lawyer. Rather the primary goal in disciplinary cases is to protect the public" ("Iowa Supreme Court Atty. Disc. v. Murphy," 2011). In order to protect the public, of course, disciplinary boards must select and apply a punishment based on the offender's conduct and circumstances. The Iowa Supreme Court notes:

> "Though a one-size-fits-all approach to professional discipline is inappropriate, we seek to achieve consistency with prior cases when determining the proper sanction. We recognize, however, that consistency is achieved through the difficult process of carefully considering and balancing all the relevant circumstances in each case, not by lumping conduct into broad categories of sanctions" ("Iowa Supreme Court Atty. Disc. v. McGinness," 2014)(Internal citations omitted).

What the disciplinary authorities *say* about their punishment decisions is important, but I argue that what they *do* is more important still. In this dissertation, I analyzed the actual decisions made by disciplinary boards, to see how well they followed through on their goals of consistency, and punishing offenders according to blameworthiness. As stated in the quote above, every case and every offender is different. However, I did find some factors that were consistently associated with more or less punishment for ethical breaches. In this Chapter I will explain these factors in more detail, and discuss the theoretical and practical implications of these findings. I will also discuss the limitations of this study, and give thoughts on future directions for this area of research.

Theoretical Contributions and Practical Implications

Professionals who commit ethical breaches have a very negative impact on society. There is a good deal of theory and literature on why and how we should punish professional ethical breaches. Punishment theory, and the written ethical codes which flow from it, are invoked and tested often in adversary proceedings between offenders and disciplinary boards. However, these are individual proceedings. While each proceeding is extremely important to the people involved, the cumulative effect of these proceedings is important to society and the professions. I undertook this dissertation because I believed it was necessary to get a big-picture view of professional ethics and punishment. To my knowledge, there are no other detailed, large-scale quantitative studies on professional ethical breaches and punishment like this dissertation. After spending hundreds of hours analyzing these cases, and reading the stories of professionals who went astray, I remain convinced that we must understand *who* we punish, and *why*.

Who We Punish

As mentioned in Chapters 1 and 2, I undertook this dissertation in part due to personal interest. As a licensed attorney for approximately 10 years, it is my responsibility to know the rules of ethics and the consequences of breaking these rules. The Iowa Supreme Court issues one or more disciplinary opinions each week, and the most salacious of these are often re-printed in our industry publications. When I began this project, therefore, I had certain preconceptions about who we punish, based on these more visible cases. From a qualitative standpoint, most of the well-discussed disciplinary cases seemed to involve male solo practitioners who committed egregious and highly visible breaches such as sexual abuse ("Iowa Supreme Court Atty. Disc. v. Marzen," 2010) or forgery upon the Court ("Iowa Supreme Court Atty. Disc. v. McGinness," 2014). However, as I coded the cases and read the stories therein, I realized this

stereotype was not accurate. The offenders in these cases were predominantly (76.9%), but certainly not exclusively, male. And, they came from all areas of the legal profession – solo practice, large firms, government attorneys, and prosecutors. Most of the breaches were not of a highly scandalous nature, but rather involved fairly mundane misdeeds, such as removing unearned money from client trust accounts, or not showing up for hearings.

Many professional assistance groups point out the high percentage of impaired attorneys that enter the disciplinary system. National studies have estimated that the majority of cases involve an attorney impaired by alcohol or drugs (Allan, 1997). State-level studies conducted by the ABA in New York and California put the percentage at 50-70% (Allan, 1997). Interestingly, my sample of cases did not reflect this. Altogether, only 23.3% of my cases involved a professional with one or more of the following impairments: mental impairment (17% of cases), alcohol use (8%), drug use (6%), addiction in general (5%), or gambling (1%). This does not mean the aforementioned surveys are incorrect, or that impairment among professionals is not a major problem. Nearly a quarter of the professionals in my sample suffer from one or more impairments, so this is not a rare problem by any means. Also, it should be noted that many impaired professionals may not have made it into my sample, because they may have been routed to a diversionary program instead of the formal disciplinary system. Each of the states in my sample provides for alternatives to traditional punishment where an attorney shows impairment and a willingness to be treated. If the attorney completes the diversionary program successfully, then his or her ethical breaches are not reported or punished. Because these programs are generally confidential in nature, it would be nearly impossible to get detailed information on the offenders and breaches involved.

A final trend that bears mentioning is recidivism. Over 46% of the offenders in my sample had already been disciplined at least once in the past for ethical breaches. Many of the cases detailed long and colorful disciplinary histories for the attorneys being

punished. This may suggest shortcomings of the disciplinary systems' goal of protecting the public, which I will discuss further in the next section.

Why We Punish

My theoretical model suggested that there would be several important factors in determining how each offender would be punished for their breach(es). I hypothesized that the target of the breach (client, colleague, or none) and the intentionality of the breach would be the most important factors in determining blameworthiness, and thus severity of punishment. I further hypothesized that a breach which was a criminal offense would result in a more severe punishment. I hypothesized that an offender who shows non-cooperation in the disciplinary process would receive more severe punishment, as would an offender who has a prior record of discipline. I also hypothesized that an offender with an acknowledged record of volunteer work would receive a less severe punishment. All of these factors should theoretically reflect on blameworthiness, by showing the offender's conduct in this case and in previous situations.

I also posited three research questions. First, I wished to explore whether impaired offenders would commit different types of breaches than unimpaired offenders. Next, I wanted to know if impaired professionals would be punished more or less severely than unimpaired professionals for similar breaches. Finally, I sought to determine whether cases involving impaired professionals would show differences in tone used by the disciplinary authorities. In this section, I will discuss the results for these hypotheses and research questions, and their implications.

Target

I hypothesized, based on ethical frameworks, punishment theory, and the language of the ethical codes I examined, that the target of the breach would be an important factor in determining severity of punishment. I was surprised to find that this

was not true, at least for this sample of cases. Professionals, such as attorneys, share a special trust relationship with their clients, and wield superior power and knowledge over them. Licensed professionals also enjoy special privileges over the public in general, as they are granted an exclusive right to practice that profession. The stated goals of the ethics codes I examined included duty to one's client above all, protection for the public, and protection for the reputation of the profession. It seemed reasonable that an ethical breach against one's client would be the most visible and egregious breach one could commit, followed by a breach against a colleague. This finding indicates a possible malfunction of the disciplinary systems in this study, especially considering that 69.8% of the cases involved a breach against a client. I do not believe this means that the decision-makers in these cases ignored the target of the breach, rather, they may have allowed other factors to assume greater importance. I will discuss these factors below.

Intentionality

I also hypothesized that an intentional breach would result in a more severe punishment than an unintentional breach. This was based on punishment theory from the criminal law literature, which holds that intentionally harmful behavior is more wicked, and therefore more blameworthy, than unintentional harm. In my study, I found that 72.9% of the cases involved an intentional breach. In my ordinal regression, intentionality approached the traditional significance level of .05 ($p = .051$), and the 95% confidence interval for this variable narrowly includes zero (95% CI: -1.120, .003). The odds ratio for intentionality is 1.748, meaning an intentional breach is almost twice as likely to result in higher punishment than an unintentional breach. The result for intentionality may be related to the finding on criminality (explained in more detail below). Not all intentional breaches are crimes, but all criminal breaches are intentional. Also, both intentionality and criminality have statistically significant zero-order

correlations with punishment severity ($r = 0.16$, $p < .05$) and so this dependency between variables may have affected the results of the regression.

Additional Factors

In addition to target and intentionality, I tested several other factors that I hypothesized would play into the punishment decision. The first factor was criminality, or whether the ethical breach was also a criminal offense. This was highly significant in determining severity of punishment. If the offender's breach was criminal, that person was three times more likely to receive a harsher punishment. This makes sense, as criminal behavior is among the most wicked, and therefore blameworthy, conduct a professional can commit. Many of the cases included highly despicable acts such as rape, drug trafficking, massive financial fraud, and domestic abuse. These crimes often resulted in quite a bit of media coverage, which of course highlighted that the offenders were attorneys. Breaches of this type are threatening to the profession, as it damages the status of attorneys in the eyes of the public, and reinforces negative stereotypes that may already exist. Also, conviction for a serious crime reflects very poorly on the fitness of an attorney to practice law and serve as an officer of the court. The ethical codes I examined mention that committing a crime is a potential ethical breach, if it reflects poorly on the attorney's fitness to practice. However, the cases I read did not explicitly count criminality as an aggravating factor in punishment. I argue that criminality should be considered as a significant aggravating factor in punishing ethical breaches, for the reasons set forth above.

Once an offender is notified by the disciplinary authorities of a case pending against him or her, the offender is required to cooperate with the inquiry or risk further punishment. While disciplinary actions are adversary proceedings, and the offender has due process rights, he or she must communicate with the disciplinary authorities and provide information they request. However, many offenders do not cooperate. This non-

cooperation ranges from failing to respond at all, to attempting to counter-sue the disciplinary authorities or state supreme court judges. Each of the states in my sample specifically noted that non-cooperation was an aggravating factor in determining punishment. I found that an attorney who was non-cooperative was approximately 2.4 times as likely to receive a stricter punishment than one who did cooperate. In many cases, when an offender did not cooperate, the disciplinary authorities simply deemed all the allegations of the breach admitted, and only allowed the offender to beg for leniency in punishment. This obviously puts the offender at a disadvantage. The practical implication of this finding is that offenders now have proof that non-cooperation is very harmful to their case. From a theoretical perspective, this finding is more complicated. The crux of an adversarial system, whether it be our criminal justice system or a professional disciplinary system, is that both sides have the right to do whatever they can within the bounds of the law to zealously argue their case. In our criminal justice system, people accused of crimes have important Constitutional protections, such as the 5th Amendment right against self-incrimination. A criminal defendant cannot be compelled to testify at trial, or to reveal information that might harm his case. However, accused offenders in professional disciplinary systems do not have these rights, and thus face a dilemma: provide information that will be used against them, or suffer additional punishment for not cooperating.

Next, according to the cases, all the states in my sample specifically considered prior discipline as an aggravating factor in punishment, and claimed that they specifically counted good acts, such as volunteerism or pro bono work, to be a mitigating factor. However, my analysis showed that neither of these mattered, statistically, in determining punishment. This is a very interesting finding. Wisconsin, especially, touts its progressive disciplinary system, which supposedly gives more severe punishments to repeat offenders. My finding casts doubt on the consistent application of this principle. This seems especially salient because almost half of the people in my sample were repeat

offenders. From a practical standpoint, judges and decision-makers should ensure they are giving appropriate weight to an offenders' prior disciplinary record, in order to conform their results with their stated decision criteria. The finding on volunteerism also has practical implications. In the cases, I noted that a major part of many offenders' defense strategy was to present evidence of volunteerism, letters of reference, and other character evidence. It appears this strategy is not effective in reducing punishment for ethical breaches, and so they may wish to devote their resources more to defense of the substantive issues. At the same time, the judges and decision-makers in these cases should either increase their consideration of volunteerism and good character, or revise their statements that these factors matter in determining punishment.

The number of breaches by the offender was significant in determining severity of punishment. As mentioned above, roughly half the cases involved only one breach, while the other cases involved multiple breaches. It stands to reason that multiple breaches would indicate more wicked behavior, and would demand more punishment. This was borne out by the analysis, as an offender with multiple breaches was about twice as likely to receive more severe punishment. However, it is also important to remember that in many cases involving at least one serious breach, the disciplinary board will punish the offender with revocation based on that first breach alone. In these cases, the written opinion often explicitly states that the board based its decision on the gravity of that major offense and did not consider the ancillary breaches. License revocation is the disciplinary equivalent of the "death penalty," i.e. no additional punishment above that level is available. Therefore, my dependent variable is somewhat truncated. For instance, the attorney in my sample who committed 177 breaches could only receive the same maximum punishment (revocation) as an attorney who committed one very serious breach. This result is also somewhat in tension with my finding on prior discipline. Taken together, these two results say that an attorney who commits multiple ethical breaches at once will likely receive more punishment, but one who commits multiple

ethical breaches over time will not. In some of the cases, offenders were able to engage in a kind of "plea bargain," in which they agreed to plead guilty to one offense, while having other offenses dismissed. My finding on multiple offenses suggests this might be a useful practical strategy for those who defend professionals accused of ethical breaches.

Although I did not expect to find significant differences in punishment severity between states, I did. Namely, attorneys in Iowa and Florida are approximately three times as likely to receive harsher punishments than their Wisconsin counterparts, with all other factors held equal. I believe this is likely due to systemic problems with the Wisconsin attorney disciplinary system, of which I was unaware when I began this dissertation. I found that the Justices of the Wisconsin Supreme Court, who have final jurisdiction over all disciplinary proceedings, have made frequent calls for reform of the system: "[T]he OLR disciplinary system is about 15 years old. Several anomalies and proposed amendments have been brought to the court's attention. It is time for the court to institute a review of the system rather than to make piecemeal adjustments at this time" ("In the Matter of Disciplinary Proceedings Against Osicka," 2014)(Justice Abrahamson, concurring). In his dissent in the same case, Justice Prosser raised additional concerns: "Why is OLR [Wisconsin's attorney disciplinary board] continuing to file charges against an attorney who has ceased practicing law? Why is it piling up legal costs that it expects Osicka to pay? These prosecutions raise questions about how OLR uses its limited resources to protect the public interest — questions about its priorities" ("In the Matter of Disciplinary Proceedings Against Osicka," 2014). Many of the Wisconsin Supreme Court opinions raised serious questions about the consistency of punishment applied in their cases. In some cases, as above, the OLR was taken to task for overzealous prosecution. In others, the OLR was criticized for failing to draft proper complaints against the offenders, which left the court unable to mete out as much punishment as they thought the offenders deserved. Had I known of these political issues, I would not have chosen Wisconsin for my sample. However, the finding does have practical implications

for lawyers who are licensed in Wisconsin, namely that the disciplinary system is unstable and they may receive too much or too little punishment for an ethical breach. Consistency of punishment is important, both for effectiveness, and for reasons of justice. My results suggest that offenders in the Wisconsin system are not receiving consistent punishment.

My research questions focused on the subject of impaired professionals. First, I wanted to know whether impaired professionals received more or less punishment for their breaches. Impairment can be a double-edged sword for those who commit ethical breaches. It can be considered a mitigating factor, "Mitigating circumstances, while not excusing the disciplinary violations, may have a bearing on severity of sanction… While depression does not minimize the seriousness of unethical conduct, it can impact our approach to discipline" ("Iowa Supreme Court Atty. Disc. v. Grotewold," 2002). But, the burden is on the offender to show a nexus between the impairment and the breach: "The determination that mental health difficulties are a mitigating circumstance in the imposition of discipline is dependent upon the relationship between the unethical conduct and the mental health difficulties" ("Iowa Supreme Court Atty. Disc. v. Bowles," 2011). Also, if the attorney does not seek help for the impairment and follow through on treatment, the impairment may flip from a mitigating factor to an aggravating factor: "In Weaver, we considered Weaver's *untreated* depression and alcoholism as aggravating factors" ("Iowa Supreme Court Atty. Disc. v. Cannon," 2012). In this study, I did not find any effect of overall impairment on punishment severity. However, after breaking down the different kinds of impairment, I did find that alcohol use was associated with a lesser punishment. The other types of impairment in my sample (mental health, drugs, gambling, and addiction) did not significantly affect punishment severity. This is a somewhat interesting finding, as the explicit language of the cases say that any impairment ought to be a mitigating factor, but in reality, only alcohol is. Although alcohol dependence carries a social stigma in the United States (Keyes et al., 2010), my

results suggest that drug abuse and mental health issues may be more greatly stigmatized among professionals. I believe this raises serious concerns about justice in these disciplinary cases, particularly where the most frequent impairment (mental health, 17% of cases) is apparently not given much weight by decision-makers.

My textual analysis of cases involving alcohol revealed a significantly higher prevalence of words and tone associated with the Passivity index, as defined thusly: Passivity includes "Words ranging from neutrality to inactivity. Includes terms of compliance (allow, tame, appeasement), docility (submit, contented, sluggish), and cessation (arrested, capitulate, refrain, yielding). Also contains tokens of inertness (backward, immobile, silence, inhibit) and disinterest (unconcerned, nonchalant, stoic), as well as tranquility (quietly, sleepy, vacation)" (Digitext, 2010). I have included four examples of quotes that reflect passivity (or the lack thereof) in Table 13. As noted above, the cases involving alcohol also were more likely to be "victimless" breaches, possibly where the offender harmed only him or herself. The decision-makers in these cases may have identified the offenders more as victims of their own behavior, and thus less agentic (and more passive) in their breaches. Thus, the decision-makers may have implicitly decided to punish these alcohol-impaired offenders less. Also as mentioned above, it is believed that attorneys suffer from alcoholism at twice the rate of the general public. The decision-makers in these cases are attorneys themselves, and thus may also suffer from alcoholism at a similar rate. They may have more sympathy toward fellow alcoholism sufferers than they would for those with mental impairments or drug problems. This is very speculative, of course, but might yield interesting directions for future research.

Table 13 – Examples of Passive Tone in Alcohol and Non-Alcohol Cases

Case No	Alcohol Impaired	Passivity Index*	Quotes Regarding the Tone of Passivity or Non-Passivity
2011AP1700-D	Yes	11.08	"Attorney Brandt acknowledged that he is addicted to alcohol. He made excuses for the drunk driving convictions at issue in that case by claiming they were related to the stress of the OLR's investigation and the fact that he had been a victim of criminal activity by a former non-lawyer employee who converted approximately $104,000 from his business and trust accounts to her own use." "Attorney Brandt has not responded to the order to show cause."
11-1626	Yes	9.04	"Based on … her concern that Weaver may be drinking, Boyle had officers from the intensive supervision unit perform a safety check on Weaver to 'find out what was going on.'" "Weaver's daughter had called because she had been trying to reach Weaver for six days without success. She was concerned not only for her father, who gets depressed and suicidal when he drinks…" "…they discovered Weaver intoxicated, despondent, and making comments about suicide." "The record contains numerous examples of Weaver's refusals to seek the help that is necessary for him to successfully cope with his depression and alcoholism."
SC10-1175	No	4.42	"For the reasons discussed herein, we find that Respondent acted deliberately or knowingly and therefore disapprove the referee's finding that Respondent acted negligently." "The referee found that Respondent provided a fictitious case number in the letter to create a tactical benefit to protect the landlord's lien." "Respondent caused potential injury to the public and the legal system by submitting his false affidavit to a civil court, providing his untruthful testimony before the referee, and by creating and posting the letter stating a false case number."
2007AP1281-D	No	3.74	"In particular, Attorney Hupy challenges the referee's conclusions that he committed three violations of the Rules of Professional Conduct for Attorneys." "…that animosity has continued to the present day … They and their respective law firms have competed for personal injury clients since 1989." "Attorney Hupy made a number of other arguments against a conclusion of professional misconduct on Counts 1 and 2 relating to the postcard and brochure article. He asserted that the postcard and article were protected speech under the First Amendment…"

Note: Passivity index indicates the average number of Passive words (as defined by DICTION's custom dictionaries) found, on average, in a 500-word block of the case.

How We Punish

The dependent variable in this study was severity of punishment. As mentioned in Chapter 4, this variable was trichotomized into rehabilitative, deterrent, and incapacitative categories in accordance with my theoretical model. I was surprised to find that over 96% of the cases resulted in one of the top two levels of punishment. This may be skewed because I could not get statistics for cases that were sent to diversionary programs. However, approximately a quarter of the cases in my study involved attorneys with impairments, and about half of the cases involved first-time offenders. These cases might have been better served by applying a rehabilitative punishment. There is a rich debate in the criminal justice literature as to whether rehabilitative punishments are useful (P. H. Robinson, 2003) or whether retribution is the best model for punishment (P. Robinson & Darley, 1997). It is generally accepted that retribution is the dominant punishment model in criminal justice today (McFatter, 1982). The high frequency of use of the harshest punishments available in my study leads me to believe that retribution, or "just deserts" may be creeping in to professional disciplinary systems. Professionals are generally in charge of self-regulating their professions. It could be seen as beneficial to devise disciplinary systems that work to the benefit of the profession as a whole, which would include trying to help and rehabilitate professionals who have offended. Casting out a member of the profession perhaps ought to be a last resort, not a first line of defense. In my study, over 45% of the cases involved incapacitating, or casting out, an offender. An incapacitation rate this high could potentially signal a problem with the disciplinary system for the profession, or perhaps its selection and admissions system.

Another item of potential concern is the very low frequency of cases that did not result in punishment. Only 1.6% of the cases resulted in a dismissal, no punishment, or a finding of not guilty. In an adversarial system, this rate seems low. The US Department

of Justice reported in FY2012 that 93% of their criminal cases resulted in conviction (Justice, 2012), with the remaining 7% being acquittal or dismissal. However, 97% of these convictions resulted from guilty pleas – only 3% of defendants went to trial (Justice, 2012). In the professional disciplinary systems in my study, there is little room for plea bargaining - every case essentially "goes to trial." In some cases, the offender and the disciplinary board will stipulate to the facts of the case and a recommended punishment, but the final authority (often the state supreme court) will still review the facts and law and impose their own punishment. I would have expected a conviction rate in the disciplinary cases at least similar to the general criminal conviction rate, but it is higher (98.4% v. 93%). There are two possible explanations. The first is that the disciplinary systems use a lower burden of proof than the criminal courts: "The board has the burden of proving an attorney's ethical misconduct by a convincing preponderance of the evidence … This burden is less than proof beyond a reasonable doubt, but more than the preponderance standard required in the usual civil case" ("Iowa Supreme Court Atty. Disc. v. Schmidt," 2011). The second possibility is that, as described in detail above, defendants in professional disciplinary systems do not have the same Constitutional protections as criminal defendants, and thus may be at a power imbalance with the disciplinary authorities.

Limitations and Future Directions

As with any research, there are limitations in my study. First, the trichotomization of my dependent variable led to some limitations in how I analyzed the data. Because of this choice, I had to use ordinal regression, which yields different, and potentially less useful, information than traditional linear regression. It does not allow for conventional statistics such as percentage of variance explained, nor does it allow coefficients to be interpreted as easily. Also, measuring punishment as an ordinal variable resulted in the loss of some information. The cases typically related an exact

number of days or months for a suspension, or years for a revocation. I coded for this information before transforming the data to an ordinal variable, so in future research, I could experiment with examining punishment as a continuous variable. Also, many of the cases contained a financial penalty to the offender in the amount of the state's costs of litigating the disciplinary action. These ranged from hundreds of dollars to tens of thousands of dollars. This could be incorporated into the dependent variable, or it could be explored as a proxy variable for the level of non-cooperativeness of the offender.

Next, in this study, I did not analyze the qualitative characteristics of the breach types (e.g., stealing client money, financial mismanagement, assault, DUI). It is possible that the qualitative nature of the breach may have an effect on the punishment, beyond the factors identified above. I did code for this information in the form of notes about each case. In future research, I could determine how to categorize this information, and incorporate it into the regression analysis.

Additionally, because I did not find a statistically significant difference in how severely impaired attorneys are punished, I did not delve into the textual analysis of these cases as deeply as I originally imagined. The finding that cases involving alcohol embodied more passive language was interesting. It leads me to question whether there may be differences in language and tone between other sub-categories of cases, e.g., male v. female, intentional v. non-intentional, mentally impaired v. non-impaired, and the like. For instance, research exists that suggests people with mental impairments may be stigmatized in a way that isolates or rejects them from others (Keyes et al., 2010), and that alcoholism in women is viewed more negatively than in men (Gomberg, 1988). Further exploration with the textual analysis software might detect these differences, and could lead to routes for additional inquiry.

Most of my analysis consisted of examining the main effects of variables such as intentionality or target. The only proposed moderator in my model was impairment. It is possible that there could be significant interactions between variables, for instance,

intentionality and target. Ordinal regression is far from ideal for testing multiple interactions, however, because it creates and tests a "case" for every possible combination of independent variables, and if the dataset has a relatively high percentage of empty "cases," it will jeopardize the validity of the results. Thus, there would be several options for testing interactions. First, the size of the sample could be increased. Next, the number of independent variables could be reduced. Finally, the analysis could be shifted to linear regression with a continuous dependent variable. This is a possibility for future research.

Conclusion

Although more research is needed to fully understand the landscape of professional ethical breaches and their punishment, this study represents a step forward in analyzing these problems. As the first large-scale quantitative study of the punishment of professional ethical breaches, this dissertation yields information about the targets and intentionality of breaches, the demographics and conduct of the professionals who commit breaches, and how these factors combine in determining punishment. This study shows several potential disconnects between how decision-makers say they will punish, and how they actually punish. Punishment theory states that punishments should be applied in accordance with the blameworthiness of the offense and offender. I identified the factors in these cases that should correspond to blameworthiness, and found that some of the theorized factors (such as target and intentionality) did not matter in determining punishment. The study showed that neither prior good acts nor prior discipline mattered for punishment. It also showed that an offender's noncooperation with his or her own investigation may be one of the most important factors in determining punishment, which raises questions of justice. It revealed that a political debate between the Wisconsin Supreme Court and its attorney disciplinary board may be causing inconsistent punishment of attorneys in that state. And, it showed interesting differences in tone when

decision-makers deal with professionals battling alcohol problems. Each of these findings lead to potential future lines of inquiry, with the goal of working toward more and better justice for professionals, the victims of their ethical breaches, and the professions as a whole.

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APPENDIX

CODING MANUAL

Overview of the Study

Ethical breaches committed by professionals are an important problem, both within the professions and for society as a whole. The goals of this study are to determine what types of ethical breaches are being committed, to theorize how the breaches ought to be punished under appropriate ethical frameworks, and to examine how the breaches are actually being punished. In this study, I will examine breaches committed in one of the oldest and most-regulated professions, law, across three states. I will also research differences in breach and punishment for impaired professionals, who are an important subgroup of offenders. I will test my hypotheses and analyze my research questions by examining actual evidence of breaches in practice. My dataset will consist of hundreds of written cases where professionals committed breaches and were punished. I will quantitatively evaluate the cases and the punishments assessed, to determine if justice is being applied proportionally, and whether impaired professionals are being punished differently than others. I will also use computer-aided textual analysis to explore differences in tone used against impaired professionals.

Method

I collected over 400 professional disciplinary cases from the states of Iowa, Wisconsin, and Florida. Each of these cases are narrative accounts of one or more ethical breaches committed by a particular attorney, the punishment assigned for the breach(es), and the rationale for the punishment. The cases also give a brief history of the attorney's career, the procedural posture of the disciplinary case (i.e. how the ethical breach was discovered, who filed the complaint, whether the offender complied with the disciplinary process, what happened at the initial hearing, and how the complaint came to its final stage of appeal), a description of mitigating or aggravating circumstances in the case (e.g., prior disciplinary history, mental health

issues, addiction issues, and the like), relevant case law or precedent, and the disciplinary board's decision on how to apply the law in this case. The cases give the name of the offender, and from the name and use of pronouns (e.g. "he," "she,") the offender's gender can be determined. The cases also note whether the offender represented himself/herself (pro se) or was represented by counsel. If the ethical breach in the case was a criminal offense (whether prosecuted or not), the case will note this as well.

Automated Coding – Demographic Variables

I will explore the use of NVivo 10.0 qualitative analysis software to determine which of the variables can be coded through automation. I believe I will be able to automatically code the case number, state where the breach occurred, pro se representation or representation by counsel, and offender's first and last name through the use of structured queries. I should be able to automate the coding for gender by using structured word queries to compare the number of times "he" is used in the text versus "she," with a preponderance of the latter indicating a female offender.

Automatic Coding - Impairment Variables

I will use word queries to count and tabulate references to indicators of impairment, including the terms mental health, mental illness, depression, anxiety, PTSD, bipolar, schizophrenia, psychosis, gambling, alcohol, drugs, and addiction. However, I expect that I will need to quickly review each case to be sure that the disciplinary board is applying these terms to the case at hand, and not prior cases being compared to this case. Also, I am mindful that I may find other indicators of impairment, and so I may need to add additional categories here.

IVs Requiring Hand Coding

I expect that certain variables will require hand coding (i.e., cannot be automated). First, there may be multiple breaches within each case. Therefore, the coder will need to code the number of the breach (1, 2, 3, etc.) and align the remaining IVs with that breach. Next, the target of the ethical breach will require hand coding: client, colleague or no target. This will require

hand coding because there is not a consistent place where this information would be presented in each case. I do not believe there should be much, if any, disagreement on coding this variable, because the disciplinary board clearly sets out in the text who the target is. However, I do not feel confident automating the coding of this variable, because the disciplinary board conveys this information in the context of a narrative, using a variety of phrases. The question of whether the breach is also a criminal offense must also be hand coded. While I could use structured word queries for "criminal" or "crime," I do not feel confident that this would conclusively denote the information I wish to encode in this variable, because these terms could come up in a variety of other contexts. I also wish to hand code whether the offender was non-cooperative with the investigation. Again, I could use word queries, but there are a variety of phrases the disciplinary boards use for this construct (e.g., "non-cooperative," "obstruct," "failed to reply," etc.) Finally, the intentionality of the breach will require hand coding, as well as an element of judgment. I supply greater detail below on what breaches are considered intentional. Briefly, any breach which is criminal or would consist of an intentional tort is intentional. Breaches that are negligent, or merely involve malpractice, are not. As a trained attorney and legal author, I have a very clear definitional sense of what constitutes an intentional breach in the legal world. However, my coder may or may not have legal training, and my audience for this paper may not. I am mindful that I will need to code a number of cases to more fully develop a plan for how to very clearly define intentional breaches versus breaches that are not intentional. I would like the opportunity to code at least 100 cases to sharpen this definition before I turn over the data to an outside coder.

DVs

The dependent variable in my study is, broadly, punishment. In coding the cases, I intend to code for the actual punishment administered (e.g. public reprimand, 3 month suspension, 6 month suspension, revocation, etc.) As discussed during my dissertation proposal defense, these "actual" punishments can then be converted to the punishment types outlined in my dissertation

proposal (rehabilitation, deterrence, and incapacitation). As we discussed, this conversion would take place according to Table A.1:

Table A.1: Punishment Types and Examples

Punishment Type	**Examples of this Type**
Rehabilitation	• Rehab/treatment center assignments (drugs, alcohol, other addictions) • Assignments to complete more legal education • Assignments to associate with a more experienced lawyer • Any other punishment intended to help the offender improve himself or herself and that does not fit into deterrence or incapacitation
Deterrence	• Public reprimand • Suspension of less than 6 months (180 days) (longer suspensions require reapplication to the practice of the profession, which may or may not be granted)
Incapacitation	• Suspensions longer than 6 months (180 days) • Disbarment or revocation of license

I would prefer to code the actual punishment type and then do the conversion post-coding, so that I do not have to introduce a potential element of error by asking my coder to do the conversion simultaneously. This will also give me more flexibility later if the committee or reviewers disagree with any elements of the conversion table. I also have included a column (not a variable) for a general qualitative description of the breach. I do not have specifics plans for analyzing this column, but I feel it may be useful information to have.

General Coding Procedure

1. Read the whole case.

2. Code each case into the provided spreadsheet, which is substantially similar to Table 2 below.

3. Some of the categories will require text entry if the information is not already provided for you. In general, the Case ID, State, Last Name, First Name, and Gender should be already filled in when you receive the spreadsheet. However, you will be asked to enter text into the fields for Punishment and Breach Description, as set forth in more detail below.

4. The category "Target" is an "ordinal" variable, and as such, will require you to enter numerical data - either a 0, 1, or 2. There is more detail below explaining when you should enter each number.

5. The remaining categories are known as "dichotomous" or "indicator" variables, and as such, you will enter a "1" or "0" for each category. There is more detail below explaining when you should enter each number.

6. When you have completed coding the cases assigned to you, please contact me at andrew-hosmanek@uiowa.edu. Please contact me at any time with questions.

Table A.2: Example Coding Spreadsheet

Breach#	State	Lastname	Firstname	Gender	Target	Intentional?	Criminal?	NonCoop?	ProSe?	PriorDisc	Volunteer	MentalImp	Alcohol	Drugs	Gambling	Punishment	BreachDescrp
13-0103	1	IA	Stowe	Brian	M	2	1	1	0	1	1	1	1		1		Revoke	Stealing client funds
13-0128	1	IA	Marks	Samuel	M	2	0	0	1	1	1	1	1				3mos	Negligence
12-1516	1	IA	Powell	Rodney	M	2	0	0	0	0	1	1					3mos	TrustAccount
12-2089	1	IA	Roush	Stanley	M	0	1	1	0	1	1	1	1	1	1		60days	Cocaine poss
2007AP2617-D	1	WI	Anderson	Scott	M	2	0	0	0	1	1						60days	Negligence
2010AP726-D	1	WI	Brady	Leonard	M	2	1	1	0	1							Revoke	Stealing client funds
2009AP916-D	1	WI	Coplien	Sandra	F	2	0	0	1	1	1						6mos	Negligence
2009AP1678-D	1	WI	Brown	Carol	F	2	1	0	0	1	0						PublicReprimand	TrustAccount
SC13-1327	1	FL	Davis	Hugh	M	2	0	0	1	1	1		1				9mos	Negligence
SC09-1012	1	FL	Adorno	Henry	M	2	1	0	0	0	1	1					3years	Dishonesty

Code	Definition	Excludes. . .	Examples
Case ID	The docket number assigned to the disciplinary case by the Court or disciplinary board	The case title (e.g. State v. Smith), party names, legal reporter volume and page, any other information	13-0103

Code	Definition	Excludes. . .	Examples
Breach #	If there are multiple breaches in a case, you will assign each one a sequential number, beginning with 1	Any other information	1

Code	Definition	Excludes. . .	Examples
State	The state in which the disciplinary case is being adjudicated	Any other information	IA, WI, FL

Code	Definition	Excludes. . .	Examples
LastName	The last name (also known as surname or family name) of the offender	Any other information	Smith, Johnson, Rodgers

Code	Definition	Excludes. . .	Examples
FirstName	The first name (also known as given name) of the offender	Any other information	Andy, Amy, Erik

Code	Definition	Excludes. . .	Examples
Gender	The gender of the offender	Any other information	M = male, F = female. If transgendered individuals are encountered, please note this.

Code	Definition	Excludes. . .	Examples
Target	The target of the offender's breach. Includes: 2. Client(s) 1. Colleague(s) 0. Self or no-target Please code the targets on the scale above (2 = Client, 1 = Colleague, 0 = self or no target). Please code for the highest level of target (e.g. if the breach targeted a client and a colleague, code it as client)	People who are merely affected by the breach, but not targeted (e.g., if an offender steals money from a client, the client is the target, not the other lawyers in the offender's law firm, even though they might have their reputations affected indirectly.)	2: A lawyer stole money from his client's trust account and took it for his own use. 1: A lawyer stole business and money from his partners at his law firm. 0: A lawyer used drugs and crashed his car.

Code	Definition	Excludes. . .	Examples
Intentional	Was the breach intentional? Includes: 1. Yes 0. No A breach is intentional if it is done willingly and knowingly. The offender does not have to intend the exact outcome of the breach, but has to intend to commit the breach itself (Roth, 1979). Any breach that is also a criminal act is, by definition, intentional. Any breach that is described as negligent, non-intentional, or reckless is, by definition, not intentional.	Any other information	1: "Stowe misappropriated client funds when he stole two checks from his client and housemate, Ryan Yager. Stowe made out each check for $200, forged Yager's signature on both checks, and deposited the funds in his Iowa Trust & Savings Bank account in Emmetsburg. Stowe did so without Yager's knowledge or permission." (intentional conduct) 1: "Based on his conduct, the State convicted Stowe on two counts of felony forgery, pursuant to Iowa Code section 715A.2." (intentionality based on criminal act) 0: "Marks acknowledged that when things with the estate became challenging, he would "push it to the back burner." ... Marks received nine delinquency notices, which he failed to cure prior to the commission hearing. Additionally, in 2009, he received disciplinary action because of his neglect of this same estate. … Marks did not act with diligence in probating the Rumley estate, in violation of rule 32:1.3." (neglect) 0: "Attorney Coplien failed to inform her client of these various filings, failed to respond to these petitions, and missed scheduled court dates. Attorney Coplien failed to respond to her client's numerous attempts to contact Attorney Coplien by telephone." (neglect)

Code	Definition	Excludes. . .	Examples
Criminal	Was the breach a violation of criminal law? Includes: 1. Yes 0. No A breach is considered a violation of criminal law, for the purposes of this study, if the court or disciplinary board refers to it as such. I do not wish for you to independently research whether such conduct *could* be considered criminal. Rather, if the court notes that the offender was charged with or convicted of a crime, or will be, or should be, then this will suffice.	Any other information	1: "Based on his conduct, the State convicted Stowe on two counts of felony forgery, pursuant to Iowa Code section 715A.2." 0: "In 2010, a bookkeeper with Powell's law firm reported to the Board that Powell was improperly using his office trust account. A subsequent audit revealed a trust account shortage. Additional audits also revealed a shortage, and another office bookkeeper made another complaint to the Board." (no mention of criminal conduct)

Code	Definition	Excludes. . .	Examples
NonCooperative	Was the offender noncooperative with the disciplinary board, court, or other authorities in the case? Includes: 1. Yes 0. No An offender is considered non-cooperative, for the purposes of this study, if the court or disciplinary board refers to the person as such. I do not wish for you to independently research whether such conduct *could* be considered non-cooperative. Rather, if the court notes that the offender was non-cooperative, then this will suffice.	Any other information	1: "The Board sent four separate communications regarding the matter to Marks over a period of eight months. Marks did not respond until two months after the fourth communication, promising to follow up within two weeks of that communication. He failed to follow up." 0: "Adorno provided full and free disclosure to the disciplinary board and had a cooperative attitude toward the proceedings;"

Code	Definition	Excludes. . .	Examples
ProSe	Did the offender represent himself/herself *pro se* (without an attorney?) Includes: 1. Yes 0. No This information is located at the top of the case.	Any other information	1: "Brian Loren Stowe, Waverly, pro se." 0: "Thomas G. Crabb, Des Moines, for respondent."

Code	Definition	Excludes. . .	Examples
PriorDisc[ipline]	Has the offender had prior discipline from this board or court? Includes: 1. Yes 0. No An offender is considered to have prior discipline, for the purposes of this study, if the court or disciplinary board states as such. I do not wish for you to independently research whether any conduct *could* be considered prior discipline. Rather, if the court notes that the offender has prior discipline, then this will suffice.	Any other information	1: "This is not the first time the court has evaluated Stowe's fitness to practice law. On April 25, 2011, we granted the Board's request for a disability suspension of Stowe's license and the appointment of a trustee, due to his mental impairment and drug addiction." 0: "Attorney Brown (formerly known as Carol Brown Biermierer) was admitted to the practice of law in Wisconsin in 1993. She has not previously been disciplined."

Code	Definition	Excludes. . .	Examples
Volunteer[ism]	Has the offender engaged in volunteerism, service, or pro bono work that is mentioned by the court? Includes: 1. Yes 0. No	Any other information	1: "has also freely given his time and professional assistance to nonprofit organizations and low-income individuals in need of legal assistance." 0: [it is unlikely that the court will highlight a lack of volunteerism. Rather, it will simply not be mentioned or present in the case].

Code	Definition	Excludes. . .	Examples
MentalImpairment	Does the offender have any mental impairment that is mentioned by the court? Includes: 1. Yes 0. No This category may include, but is not limited to, depression, anxiety, PTSD, bipolar disorder, psychosis, schizophrenia, and the like.	Drugs, alcohol, addiction, other impairments	1: "Stowe claims he developed posttraumatic stress disorder, but did not seek counseling or treatment. He alleges he became severely depressed and began suffering from violent nightmares." 0: [it is unlikely that the court will highlight a lack of mental impairment. Rather, it will simply not be mentioned or present in the case].

Code	Definition	Excludes. . .	Examples
Alcohol	Does the offender have any alcohol problem that is mentioned by the court? Includes: 1. Yes 0. No	Drugs, other impairments	1: "Acknowledging his progressing alcoholism, he stated that he had nonetheless continued to effectively attend to all client matters. He traced his criminal behavior to his alcoholism" 0: [it is unlikely that the court will highlight a lack of alcohol problems. Rather, it will simply not be mentioned or present in the case].

Code	Definition	Excludes. . .	Examples
Drugs	Does the offender have any drug problem that is mentioned by the court? Includes: 1. Yes 0. No	Alcohol, other impairments	1: "Eventually, according to Roush, his drinking and family-related stress led him to try crack cocaine. He initially used it every couple months, beginning in 2007 or 2008, and was using it approximately every month by the time of his November 2011 arrest. Roush would purchase about $200 worth of crack cocaine each time." 0: [it is unlikely that the court will highlight a lack of drug problems. Rather, it will simply not be mentioned or present in the case].

Code	Definition	Excludes. . .	Examples
Gambling	Does the offender have any gambling problem that is mentioned by the court? Includes: 1. Yes 0. No	Alcohol, drugs other impairments	1: [no examples found yet] 0: [it is unlikely that the court will highlight a lack of gambling problems. Rather, it will simply not be mentioned or present in the case].

Code	Definition	Excludes. . .	Examples
Punishment	What punishment(s) was given to the offender? This is a text field.	Any other information	- Revocation of license/disbarment - 3 year suspension - 60 day suspension - Public reprimand - Alcohol or drug counseling or treatment

Code	Definition	Excludes. . .	Examples
BreachDescription	A brief text description of the breach.	Any other information	- Stealing client funds - Negligence - Trust Account violations - Dishonesty