

Punishment In Practice

Andrew J. Hosmanek
University of Iowa

Abstract

Ethical breaches committed by professionals, often arising out of conflicts with clients or other professionals, are an important problem. In this study, I examine breaches committed in one of the oldest and most-regulated professions, law, across three states. As the first large-scale quantitative study of the punishment of professional ethical breaches, this study 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 resolve these conflicts through punishment, and how they actually punish. I show that, contrary to punishment theory, neither the target nor the intentionality of the offense mattered in determining punishment. I show that neither prior good acts, nor a record of prior offenses, mattered. I show that offenders impaired by mental health issues or substance abuse commit different types of offenses. I also show that decision-makers extend more lenience only to those impaired offenders who abuse alcohol. Finally, I show 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.

Punishment in Practice

An attorney's breach of professional ethics can be a particularly dangerous form of conflict. The breach can arise from a conflict between attorney and client, between peer attorneys, between an attorney and a judge, or, in the case of addiction, between the attorney's conduct and the written rules of ethics. In almost all of these cases, when an attorney commits a breach, people are harmed. The client of an unethical attorney may lose their money or freedom. People who practice alongside an unethical professional may see their reputations harmed by extension. All members of the profession in in area may suffer when an ethical complaint is filed and proven against one of their peers.

The legal profession, like many other professions, manages these conflicts through a disciplinary process involving a complaint, one or more trial-like hearings, and the ultimate assessment of a punishment against the offender. The consequences of this conflict management process can be career-changing, or even career-ending, for the offender. Despite the seriousness of professional ethical breaches, and the serious consequences of punishment for offenders, no large-scale studies have examined the most common types of attorney ethical breaches being committed, how breaches are being punished, and if punishment is being administered consistently across offenders. My study identifies common features of the breaches being committed, analyzes the types of punishment available, and combines 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).

Why Should We Punish Ethical Breaches?

The study of punishment related to ethical breaches is important, especially in the high-stakes world of professional practice. Observers of unethical behavior expect offenders to be punished (Trevino, 1992; Trevino, Weaver, & Reynolds, 2006). If the offender is not punished, the observers' sense of fairness is violated (Trevino et al., 2006).

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). However, the current business ethics literature does not provide sufficient theory to guide our inquiry. Therefore, I turn to the criminal justice literature, which has a rich tradition of theory and argument on punishment, to augment our understanding.

In criminal justice, there are four venerated paradigms of punishment, known as the classical justifications of punishment (Kadish, 1999; McFatter, 1982; Robinson & Darley, 1997). The first justification is *retribution*, or "just deserts" (Carlsmith, Darley, & Robinson, 2002; Dressler, 1990; Robinson & Darley, 1997). This paradigm holds that an offender should be given a punishment equal to his crime because society has a right to do so (Carlsmith et al., 2002). Retribution is not a goal of the disciplinary processes for professionals, but the remaining paradigms are.

Incapacitation is a punishment that removes the offender from society to prevent further harm (Carlsmith et al., 2002; McFatter, 1982). In a professional setting, this would equate to revoking or suspending an offender's license to practice. The professional stands to lose their livelihood for the duration of the punishment, may lose some or all of their clients by their inability to serve them during the punishment time period, and may lose future clients due to the reputational aspects of the punishment. Professional disciplinary opinions are often public record, and sometimes are picked up by newspapers or highlighted in professional trade publications. 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 again (Frase, 2004). The stated goals of professional regulatory boards include preventing harm to the profession's regulation in the eyes of the public. Thus, 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. 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.

How Should We Punish Ethical Breaches?

While there is research on *why* we should punish, management literature is not clear on *how* we should punish. 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).

The criminal justice literature has centuries of debate and theory regarding how punishment should be fit to transgressions in a way that is just. In order to be just, the punishment must be proportional to the severity of the offense and blameworthiness of the offender (Frase, 2004). Decision-makers (such as judges) make these judgments. Scholars do not always agree on what factors should be considered in determining blameworthiness. In the following section, I explain how the independent variables in my study form a basis for evaluating the blameworthiness in a given case.

Criminal justice has long recognized that the target of a crime can be considered in determining the blameworthiness of the offender (Kadish, 1999). Attorneys 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. In order to signal appropriate disapproval of the breach, a professional disciplinary board should assign a harsh punishment to someone who targets their breach at a client.

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. When a member of a profession offends against another professional, 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).

Certain professional ethical breaches are not directed against another person. These may include illegal drug use, poor financial recordkeeping, or failure to keep current on continuing educational requirements. When a professional commits an ethical breach not against a person, the victim is the profession itself, and its reputation. However, victimless breaches do not carry the same risk of harm as a breach directed at a client or a colleague. 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.

When determining a punishment for bad behavior, it is important to consider the offender's level of intent (Trevino, 1992). Even though an offender may have had no intent to harm anyone, unintentional breaches are still punishable when a professional breaks the rules. However, offenders who commit intentional breaches are more blameworthy than those who commit unintentional breaches. 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, etc.). Intentional breaches should result in a higher level of punishment against the offender than unintentional 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.

Many of the more heinous types of ethical breach (theft, illegal drugs, sex crimes, forgery) are also crimes. The more visible the ethical breach, the more shame it brings upon the profession (Abbott, 1983). An ethical breach that is also a criminal offense is likely to be both visible and perceived as intentional. 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 attorney 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.

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).

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.

Many legal disciplinary cases involve a professional who has offended in the past. Repeat offending may result in a perception of more blameworthiness on the part of the offender, because the offender can no longer excuse the behavior as accidental. 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.

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 (Supreme Ct. Atty. Disc. Bd. v. Boles, 2012). Providing services *pro bono* (without payment) is a shared value for the legal profession (Iowa Rules of Professional Conduct, 2012). 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.

Impaired professionals are involved in a disproportionate number of ethical breaches. For the purposes of this study, 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 attorneys abuse alcohol at about twice the rate of the general population, and that their rate of depression is also twice as high (Association, 2011). Unfortunately, there is very little theory or empirical research on how exactly impairment affects a person's 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). 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?

There are many reasons, both social and psychological, that we might punish an impaired professional more or less than their unimpaired colleague. Because impaired professionals may have less control over their behavior, one could argue they are less blameworthy (Roth, 1979). 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). 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. 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?

Methods

The data in my sample is composed of a collection of written disciplinary opinions. 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. My sample originated with all the publicly available disciplinary cases from Iowa, Florida and Wisconsin, 2012-2014. However, a number of cases had to be removed from the sample due to incomplete or redacted information, leading to a final sample size of 377.

I coded the disciplinary cases for several variables which relate to the breach, the persons involved, and the punishment. First, I coded for the number of breaches in the case. Next, I coded for the target of the breach: a client, a colleague, or no target. I classified these target variables as ordinal because they represent different categories of increasing severity. Next, 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. 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. Because this judgment had a potential element of subjectivity, I enlisted a second coder to code a subset of cases. 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.

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. Next, I coded for whether the offender was given credit for significant volunteer or pro bono service. I then coded for indicia of impairment. A qualitative scanning of the disciplinary cases revealed several types of impairment in attorneys: mental illness, alcoholism, drug use, gambling, and other addictions. I created a dichotomous variable for each of these specific impairments and coded 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 themselves (*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.

Results

[Due to size and formatting, all tables are located below the References list]. 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. 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 3), 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 2). 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.

Because my dependent variable is ordinal, I used ordinal regression in SPSS 22 to analyze this data (IBM, 2014; Liu, 2009). The results of this regression are reported in Table 4. 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 ($\chi^2(12) = 71.5, p < .01$) (Norusis, 2012). My results yield a Cox & Snell's statistic of .174, which shows incrementally better fit than the baseline model. My Nagelkerke's R-squared is .213, which again shows incrementally better fit than a baseline model. My McFadden's R-squared statistic is .113, showing better fit than an intercept-only model.

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, the target 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 uncooperative offender 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 that an offender who had a prior good record of volunteerism or pro bono work would receive a lower punishment. Neither of these hypotheses were statistically 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. I initially 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 (Norusis, 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 (Norusis, 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. As shown in Table 4, in cases where the offender committed 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.

Next, I included state as a control variable. My cases came from the states of Iowa, Florida and Wisconsin. All of these states base their disciplinary codes on the ABA model rules (Association, 2013), and thus I did not expect any difference in punishment severity between states. However, as seen in Table 4, 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 the discussion. 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.

In addition to the six hypotheses, I proposed two 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 5. 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 6. 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 7.

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.

Discussion

Managing conflicts through the disciplinary process is very important for the protection of people who rely on professionals' specialized skills and knowledge. 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 attorney. Rather the primary goal in disciplinary cases is to protect the public” (“Iowa Supreme Court Atty. Disc. v. Murphy,” 2011). Professionals who engage in conflict with clients, peers, judges, or the rules of the profession endanger the interests of their clients and the integrity of the profession as a whole. Therefore, the punishment that results from this conflict management process plays an important role in maintaining the integrity of the profession. However, it is not clear whether professionals who commit ethical breaches are being punished consistently, and proportionately with the blameworthiness of their offenses.

What the disciplinary authorities *say* about their punishment decisions is important, but I argue that what they *do* is more important still. 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 would be an important factor in determining severity of punishment. I was surprised to find that this was not true. 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. 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 also hypothesized that an intentional breach would result in a more severe punishment than an unintentional breach. In my study, I found that 72.9% of the cases involved an intentional breach. In my ordinal regression, intentionality did not reach the traditional significance level of .05 ($p = .051$). However, 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.

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 significant. If the offender’s breach was criminal, that person was three times more likely to receive a harsher punishment. Many of the cases included highly despicable acts such as rape, drug trafficking, massive financial fraud, and domestic abuse.

Once an offender is notified by the disciplinary authorities of a case pending against them, 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.

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. 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 the stated decision criteria.

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.

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 study. 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). Many of the Wisconsin Supreme Court opinions raised serious questions about the consistency of punishment applied in their cases.

My research questions focused on the subject of impaired professionals. 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. 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.

As noted above, the cases involving alcohol also were more likely to be "victimless" breaches, possibly where the offender harmed only him or herself. 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.

The dependent variable in this study was severity of punishment. I trichotomized this variable 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. 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. 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.

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. 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.

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

Professional conflicts between attorneys, clients, judges, and the rules of ethics have the potential for great harm. Stakeholders in these conflicts may lose large sums of money, their freedom, or even their life. Therefore, it is important to have a conflict management system that protects the public and the profession and punishes offenders appropriately.

This study shows that the legal profession still has considerable work to do in improving its conflict management system as to punishment. As the first large-scale quantitative study of the punishment of professional ethical breaches, this study 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. 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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(See below for Tables)

TABLE 1
Descriptive Statistics and Intercorrelations between Study Variables

Variable	<i>M</i>	<i>SD</i>	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 1 – Continued

Variable	<i>M</i>	<i>SD</i>	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 1 – 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 2
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 3
Frequency of Target Types

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

TABLE 4
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 4 - 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 5
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 6
Ordinal Regression Including Impairment

		Parameter Estimates					95% Confidence Interval		
		Estimate	Odds Ratio	Std. Error	Wald	df	Sig.	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 6 - 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 7
Ordinal Regression with Each Type of Impairment

		Parameter Estimates					95% Confidence Interval		
		Estimate	Odds Ratio	Std. Error	Wald	Df	Sig.	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 7 – Continued

	Parameter Estimates							95% Confidence Interval	
	Estimate	Odds Ratio	Std. Error	Wald	Df	Sig.	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 4
Ordinal Regression Results

		Parameter Estimates							
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	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 6 - 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 7
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 7 – 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 $p < .05$.