American Bar Association
Defending Liberty, Pursuing Justice

Center *for* Professional Responsibility

Lawyer Regulation for A New Century

Report of the Commission on Evaluation of Disciplinary Enforcement

February 1992

Commission on Evaluation of Disciplinary Enforcement
(1989-1992)

Raymond R. Trombadore, Chair
Somerville, New Jersey

Robert B. McKay, Chair 1989-1990 (deceased)
New York, New York

Hon. Oscar W. Adams, Jr.
Birmingham, Alabama

Don Mike Anthony
Pasadena, California

John T. Berry
Tallahassee, Florida

Ellen Feingold
Boston, Massachusetts

Donald M. Haskell
Astoria, Oregon

Charles W. Kettlewell
Columbus, Ohio

Timothy Kevin McPike, Reporter
Chicago, Illinois

Charlotte K. Stretch, Special Counsel
Longwood, Florida

DEDICATION

No lawyer, and no client, can be indifferent to the disciplinary enforcement system. If the process is performed sensibly and quickly it will provide for lawyers and clients alike a needed service to assure honorable and effective delivery of legal services. If the disciplinary process does not meet that standard, a disaffected public is likely to impose limits upon the process . . . . Continuity of judicial regulation of the legal profession depends on action taken by the profession itself. *Robert B. McKay, 1990*

The report of the ABA Commission on Evaluation of Disciplinary Enforcement is dedicated to Robert McKay, who served as the Commission's Chair until his death in July 1990. Professor McKay possessed an innate devotion to equality and social responsibility. During his lifetime, he became a symbol of public service and of commitment to the public interest.

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PREFACE

On February 4, 1992, the American Bar Association House of Delegates adopted the Report of the Commission on Evaluation of Disciplinary Enforcement. The Commission was created in February 1989 to conduct a nationwide evaluation of lawyer disciplinary enforcement and to provide a model for responsible regulation of the legal profession into the twenty-first century. In the January 1990 issue of the *ABA Journal*, the late Robert B. McKay articulated the task of the Commission:

The mission of the Commission is no less than to move the system of lawyer discipline into a future only now beginning to be recognized. The solutions projected must be creative, yet pragmatic enough to meet the needs of the new century, which is scarcely further removed than around history's corner.

A draft of the Commission report was circulated for comment in May 1991 to all members of the ABA House of Delegates, Section and Division officers, Standing and Special Committee chairs and liaisons, members of the highest court in each state, state and local bar presidents, presidents-elect and executive directors, disciplinary counsel and the chairs of disciplinary boards, client protection fund administrators and chairs, consumer groups, and to persons who testified at the Commission's public hearings. The Commission received extensive and thoughtful comments. The Commission wishes to thank the many entities and people who spent time reviewing the report, especially the Standing Committee on Professional Discipline.

Based on the comments received, the Commission made several changes to the report and submitted its final report to the House of Delegates in December 1991. Most of the 22 recommendations were approved by the House of Delegates without modification. This edition contains the Commission's recommendations as amended and approved by the House, and separately notes those recommendations rejected by the House. Where amendments were made, comments to the recommendations state the Commission's original recommendation and reasoning. Except where this report discusses the amendments made in February 1992, the text of this report is identical to the December 1991 report to the House of Delegates.

Many recommendations will result in changes to the current ABA Model Rules for Lawyer Disciplinary Enforcement. Other recommendations will affect client protection fund mechanisms, bar regulation and activities, dispute resolution, lawyers' professional liability, professionalism, lawyer competence, and other aspects of professional regulation. The ABA Standing Committee on Professional Discipline and the ABA

Special Coordinating Committee on Professionalism will be the coordinating bodies for the national implementation of these policies.

The Commission would like to thank the staff of the ABA Center for Professional Responsibility --- Charlotte K. Stretch, Special Counsel; Timothy K. McPike, Reporter; and Gerri Sandner, Administrative Assistant --- for their excellent work with the Commission's surveys, hearings, meetings and this report.

INTRODUCTION

Background and Charge

The American Bar Association established the Commission on Evaluation of Disciplinary Enforcement in February, 1989. The Commission's charge was to: (1) study the functioning of professional discipline systems; (2) examine the recommendations of the ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee) and the results of later reforms; (3) conduct original research, surveys and regional hearings; (4) evaluate the state of disciplinary enforcement; and (5) formulate recommendations for action. See Appendix B: Commission Operations, and Appendix C: Members of the Commission.

To accomplish its charge, the Commission had to examine not just complaints that disciplinary systems address, but all complaints. Disciplinary agencies dismiss tens of thousands of complaints annually. These complaints must be reviewed and screened out, burdening the system and frustrating complainants. To address this problem, the Commission makes recommendations that go beyond the scope of the disciplinary system. These recommendations are, in the Commission's view, not only well within our charge, but essential to fulfilling it.

Progress Since the Clark Report

Twenty years ago, the ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee) published *Problems and Recommendations in Disciplinary Enforcement (1970)* (the Clark Report). The Clark Committee conducted the first nationwide examination of lawyer disciplinary procedures in the United States.

The Clark Committee warned of a "scandalous situation" in professional discipline and called for "the immediate attention of the profession." Today this Commission can report that most states have resolved many of the problems identified by the Clark Committee. Our detailed findings are set out in Appendix A: Implementation of Clark Report Recommendations.

It is no exaggeration to say that revolutionary changes have occurred. Twenty years ago, most states conducted lawyer discipline at the local level with no professional staff. Lawyer discipline was a secretive procedural labyrinth of multiple hearings and reviews.

At the national level, there was the ABA's Model Code of Professional Responsibility, but little coordination, guidance or research.

Today almost all states have professional disciplinary staff with statewide jurisdiction. Most have eliminated duplicative procedures. In over half the states, disciplinary hearings are public. Several national organizations exist, including the ABA Center for Professional Responsibility, the ABA Standing Committee on Professional Discipline, and the National Organization of Bar Counsel. These groups formulate standards, conduct research, present educational programs, compile statistics, and consult with disciplinary officials. The ABA Center and the Bureau of National Affairs publish a comprehensive reference manual on professional responsibility. The Center also operates a national data bank on disciplined lawyers. In the two decades since the Clark Report, most states and the ABA have adopted most of its recommendations.

At the local, state, and national levels, the profession has continually reviewed and improved lawyer disciplinary systems since the Clark Report. At the request of state bar associations and state high courts, the ABA Standing Committee on Professional Discipline has evaluated more than thirty disciplinary agencies and made recommendations for improvement. The Committee also provides technical and research assistance in drafting disciplinary rules. The Committee's ongoing evaluation program not only assists state high courts, it also provides the Committee with feedback and new ideas to improve ABA disciplinary policy. Since the Clark Report, the Committee has formulated and proposed many significant improvements to ABA policy, including expungement of disciplinary records, trust account record-keeping rules, Standards for Imposing Lawyer Sanctions, and numerous technical improvements to the Model Rules for Lawyer Disciplinary Enforcement.

This cooperation among local, state, and national bar associations and state high courts has resulted in constant improvement and refining of disciplinary procedures. The most recent product of this ongoing process was the establishment of this Commission.

The Need to Expand Regulation to Protect the Public and Assist Lawyers

Times, however, have changed. The expectations of the public and the client have changed. The existing system of regulating the profession is narrowly focused on violations of professional ethics. It provides no mechanisms to handle other types of clients' complaints. The system does not address complaints that the lawyer's service was overpriced or unreasonably slow. The system does not usually address complaints of incompetence or negligence except where the conduct was egregious or repeated. It does not address complaints that the lawyer promised services that were not performed or billed for services that were not authorized.

Some jurisdictions dismiss up to ninety percent of all complaints. Most are dismissed because the conduct alleged does not violate the rules of professional conduct. The Commission has gathered much information about these dismissed complaints. It convinces us that many of them do state legitimate grounds for client dissatisfaction. The

disciplinary system does not address these tens of thousands of complaints annually. The public is left with no practical remedy. While some states have created fee arbitration and other programs, additional avenues should be created in all states to resolve these complaints.

The disciplinary process also does nothing to improve the inadequate legal or office management skills that cause many of these complaints. Many state bar associations have mandatory continuing legal education, substance abuse counseling, and other programs. However, these programs usually are not coordinated with the disciplinary process. Lawyers with substandard skills often need more help than these programs can provide. The judiciary and profession should create new programs and coordinate all such programs with the disciplinary system.

The Need to Strengthen Regulation of the Profession by the Judiciary

Neither the profession nor the judiciary can permit this situation to continue. Clients, the public, the justice system, and the profession are suffering harm from this state of affairs. If it does continue, the public may remove the authority of the judiciary to regulate lawyers. There have been several attempts to do so in the last twenty years. The failure of the profession and the judiciary to act imperils the inherent power of the court to regulate its officers. It threatens the independence of counsel. The judiciary must expand the regulatory structure and improve the disciplinary system. This is necessary to protect the public and to insure the judiciary's power to regulate the profession. No system will satisfy every client, but the system should strive to right wrong conduct.

The Need for Direct and Exclusive Judicial Control of Lawyer Discipline

To strengthen judicial regulation of the profession, it must be distinguished from *self*-regulation. Control of the lawyer discipline system by elected officials of bar associations is self-regulation. It creates an appearance of conflicts of interest and of impropriety. In many states, bar officials still investigate, prosecute, and adjudicate disciplinary cases. The state high court should control the disciplinary process *exclusively*. It should appoint disciplinary officials who are independent of the organized bar. The Court should oversee the disciplinary system with as much care and attention as it devotes to deciding cases.

The Need to Increase Public Confidence in the Disciplinary System

Secret disciplinary proceedings generate the most criticism of the system. It is ironic that this attempt to shield honest lawyers' reputations has made the profession look so bad. What does the public think of hearings held behind closed doors? What does the public think when the disciplinary agency threatens the complaining party with imprisonment for speaking publicly about the complaint? These do not sound like the judicial proceedings of a free society. Indeed, several federal and state courts have held that such provisions violate federal or state constitutional provisions. The public will never accept the claim that lawyers must protect their reputations by gag rules and secret proceedings.

In many states, not only does the disciplinary agency threaten the complainant, the respondent lawyer can file a libel suit. Disciplinary counsel summarily dismiss complaints with no explanation of the decision. Complainants have no right to have the decision reviewed. The way many disciplinary systems treat complainants does not inspire confidence in the process.

The Need to Expedite the Disciplinary Process

Most complaints allege minor incompetence, minor neglect, or other minor misconduct. Most disciplinary agencies do not consider single instances of incompetence or neglect to be grounds for disciplinary action, although technically these do violate the rules of professional conduct. *See* Model Rules of Professional Conduct 1.1, 1.3. Disciplinary counsel routinely dismiss these complaints.

When a lawyer shows a *pattern* of incompetence, neglect or minor misconduct, most disciplinary agencies have only two options. They can (1) negotiate a private admonition or public reprimand with the respondent's consent, or (2) hold a formal hearing.

Dismissing valid complaints does nothing to correct the lawyer's behavior or compensate the client. Dismissing so many complaints casts suspicion on the disciplinary process. An admonition or reprimand may motivate the lawyer to change, but provides no guidance on *how* to change. Formal disciplinary proceedings cost time and money out of proportion to the minor nature of the offense. They divert resources from serious cases.

In these cases, the complainant needs a remedy and the lawyer needs additional skills and guidance. Programs should be created to provide them. When discipline is appropriate, the system needs expedited procedures commensurate with the sanctions (admonition or reprimand) involved.

The Need to Provide Adequate Resources

In the last twenty years, lawyers have volunteered hundreds of thousands of hours to carry out Clark Committee reforms. Lawyers also have paid millions of dollars to fund disciplinary agencies. Still, funding and staffing have not kept pace with the growth of the profession. Most agencies handle cases of serious misconduct effectively, but some agencies are so underfunded and understaffed that they offer little protection against unethical lawyers. The highest courts in these states should provide the funds needed to operate their disciplinary systems effectively.

The Need for Preventive Measures

Every year, millions of dollars of clients' money are stolen by a relatively few lawyers. Yet, most disciplinary systems lack authority to take basic preventive measures such as auditing trust account records or monitoring trust account overdrafts.

Another area calling for preventive measures is fee disputes. Fee disputes generate many disciplinary complaints. These complaints clog the disciplinary process. Most are summarily dismissed, because the lawyers' conduct did not violate the rules of professional conduct. This is a continuing source of the public's dissatisfaction with the profession. Written fee agreements could prevent many fee disputes, or at least simplify resolution of them.

The Need to Improve Interstate Enforcement

With admirable prescience, the Clark Committee called for the creation of a National Discipline Data Bank. The American Bar Association created the Data Bank in 1968 to help states share disciplinary information. However, since the Clark Report was published, the number of lawyers in the United States has more than doubled. Today, more lawyers are licensed in more than one state. The increasing number of lawyers has created new problems.

It is no longer practical for disciplinary counsel to manually compare the Data Bank's annual report to the state's roster of lawyers. There is no efficient way to know that a name on the report and the roster identifies the same lawyer. A recent survey of disciplinary counsel shows that they seldom use the Data Bank report because of these limitations. Most reciprocal disciplinary actions result from *ad hoc* communications between disciplinary counsel, not from the Data Bank lists. Under present conditions, a lawyer could be disbarred in one state and continue practicing elsewhere without detection.

The Need to Fully Implement Essential Provisions of the Model Rules for Lawyer Disciplinary Enforcement

The Clark Report, as modified and implemented by the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE), reshaped lawyer discipline in the United States. Yet some states have not adopted basic reforms contained in the MRLDE. These basic reforms have withstood the test of time in those jurisdictions that have adopted them. *See* Appendix A. No court can afford to keep rules that impede enforcement, especially when effective procedures exist that have been tested in other jurisdictions. The profession and the judiciary must finish the work started by the Clark Committee by adopting the basic provisions of the MRLDE.

The Need for Immediate Action

During the Commission's investigations, we heard much criticism of the profession. Some of the public's dissatisfaction is a misunderstanding of the lawyer's role. Some is misplaced unhappiness with the results of legal proceedings. Many negative perceptions about the profession are out of proportion to reality. Most lawyers are honest and skillful, and their clients respect them.

Unlike other professionals, lawyers are more likely to be criticized because of the nature of their work. In litigation, fifty percent of the clients lose their cases. In domestic relations, almost everyone leaves the proceedings with some sense of dissatisfaction. Some clients who are unhappy with the results of litigation will continue to complain about their lawyers, and no amount of reform will eliminate that criticism.

However, much of the criticism we heard is justified and accurate. Some practices must change immediately if regulation is to remain under the judiciary. The public views lawyer discipline as too slow, too secret, too soft, and too self-regulated. The Commission can report that most states discipline serious misconduct effectively. This is not enough. The profession and judiciary must face the problems we have identified. They must make necessary reforms to improve both the practice of law and the system of regulating the profession. While no system will satisfy all complainants, these improvements will demonstrate to the public that judicial regulation is effective.

REGULATION OF THE PROFESSION BY THE JUDICIARY

The ABA Board of Governors charged the Commission to examine all aspects of lawyer discipline. Therefore, the Commission seriously considered the criticism that judicial regulation of the profession is inherently flawed. Some critics assert that the legislature should regulate lawyers. The Commission examined both the history and status of professional regulation. We considered the arguments and evidence for and against regulation by the judiciary.

We find a significant distinction between *self*-regulation and judicial regulation of lawyers: regulation of the disciplinary system by elected bar officials, self-regulation, creates basic problems. The most serious of these are the appearance of conflicts of interest and the appearance of impropriety. *See* Recommendations 5 and 6. However, judicial regulation of lawyers is essential to both the courts and the profession.

Recommendation 1
Regulation of the Profession by the Judiciary

Regulation of the legal profession should remain under the authority of the judicial branch of government.

Comments

Exclusive judicial regulation of lawyers has developed since colonial times. In the nineteenth century, both the judiciary and the legislature exercised some control over the profession. Disputes between the two usually arose over bar admissions. By the end of the nineteenth century, however, state courts were asserting an exclusive right to regulate lawyers. They based this right on the constitutional doctrines of inherent power and separation of powers.[1]

This assertion of judicial power resulted from two circumstances. First, the number of law schools and graduates increased. Courts became concerned about the quality of these schools and graduates. They created the bar examination and later character and fitness inquiries as additional admission requirements. Second, neither state legislatures nor state executives were taking action against unethical lawyers. The courts did so, claiming the inherent power to discipline lawyers as officers of the court.[2]

Today, judicial regulation of lawyers is a principle firmly established in every state. A 1987 study by The National Center for State Courts found that thirteen state constitutions expressly grant the judiciary authority to regulate lawyers. The study found state high courts' opinions unanimous that regulation of lawyers is an inherent judicial function.[3]

Judicial regulation of the profession has been challenged repeatedly during the last decade. In 1984, the Florida Legislature considered legislation for legislative regulation of the bar. The California Legislature created a Bar Monitor to conduct an ongoing evaluation of the judiciary's disciplinary function and to report to the legislature. National legal consumer groups have lobbied several state legislatures to regulate lawyers. The Federal Trade Commission unsuccessfully sought Congressional approval to regulate aspects of the lawyer-client relationship.

Supporters of legislative regulation argue that the practice of law affects the public more than it affects the courts. They argue that the legislature, as an elected body, is more likely to regulate in the public interest. They argue that the inherent power and separation of powers doctrines do not require exclusive regulation by the judiciary. Legislatures, they claim, could still regulate to the extent necessary to protect the public interest. They argue that the practice of law is not so technical that it requires lawyers to regulate it. Informed nonlawyers, they claim, could regulate effectively.

Supporters of legislative regulation emphasize the fact that judges are lawyers. They argue it is a conflict of interest for lawyers to regulate themselves because their own economic interests and social status are at stake. When the courts delegate regulation to bar associations, they argue, the conflict is greater.

Finally, supporters of legislative regulation deny that legislative regulation would impair the independence of lawyers. Exclusive judicial regulation is a recent development. They argue that lawyers were challenging government decisions long before it developed. They believe that a lawyer regulatory system created by the legislature could be insulated from political pressure.

The Commission carefully examined these arguments and considered two basic questions. Does judicial regulation of lawyer discipline fail to treat complainants fairly or fail to protect the public because of an inherent conflict of interest? Does legislative regulation of other professions result in better protection of complainants and the public?

To answer these questions, the Commission surveyed nonlawyer adjudicators of lawyer disciplinary agencies. More than thirty lawyer discipline agencies have nonlawyer

adjudicators. We asked them if the system was fair. The Commission also studied several agencies established by state legislatures to regulate other professions. We examined their power to protect the public compared to that of lawyer disciplinary agencies. The Commission also heard many witnesses on the issue during our regional hearings. Finally, the Commission discussed the issue for several hours with the President of the National Clearinghouse on Licensure, Enforcement, and Regulation, an interstate association of legislatively created regulatory agencies.

The Commission found no persuasive evidence that legislative regulation of other professions has resulted in better protection of the public. In general, legislatively created regulatory bodies suffer from the same problems as do judicially created lawyer disciplinary agencies. Public representation is no higher on most other professional regulatory bodies than on lawyer disciplinary boards. In this regard, other professions are as "self-regulating" as the legal profession or more so. Legislatively created regulatory agencies suffer from understaffing, underfunding, and delays in adjudication as much as do some lawyer disciplinary agencies.[4] Most legislatively created agencies' ability to redress complaints is similarly limited to suspending or removing the respondent's license.

In at least one aspect, judicial regulation of the legal profession offers better protection to the public. Almost all state high courts have created client protection funds to compensate victims of lawyer misconduct. Lawyers pay to create these funds. There is no cost to the taxpayer. No legislatively created regulatory mechanisms match lawyer client protection funds in amount of reimbursement, funding by the members of the profession, or nationwide scope.

Finally, a large majority of nonlawyer disciplinary officials believe the system is fair and unbiased.[5] These nonlawyers adjudicate discipline cases and are intimately familiar with the system.

The Commission finds no basis to believe that legislative regulation of lawyers *per se* would be an improvement over judicial regulation. We find no persuasive evidence that legislative regulation of other professions has addressed similar problems more successfully. We find no persuasive evidence that other professions are better regulated or the public better protected because of legislative control. Most important, we find no persuasive evidence that a system regulated by the judiciary is biased for respondent lawyers against complainants. To the contrary, we find strong evidence from those nonlawyers most familiar with judicial regulation that it is fair.

There is no compelling need for or inherent advantage in legislative control of the legal profession. Instead, there are strong reasons to retain judicial regulation. As decisions by every state high court have recognized, lawyers are officers of the court indispensable to the court's operations. As such, the courts must have the power to regulate them.

It has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed.

Ex parte Secombe, 60 U.S. (19 How.) 9, 15 L.Ed. 565 (1856)

It is a fundamental principle of constitutional law that each department of government, whether federal or state, "has, without any express grant, the inherent right to accomplish all *objects naturally within the orbit of that department*, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution" . . . . [emphasis in original]

The primary duty of courts is the proper and efficient administration of justice. Attorneys are officers of the court and the authorities holding them to be such are legion. They are in effect an important part of the judicial system of this state. It is their duty honestly and ably to aid the courts in securing an efficient administration of justice. The practice of law is so intimately connected and bound up with the exercise of judicial power and the administration of justice that the right to define and regulate its practice naturally and logically belongs in the judicial department of our state government.

In re Integration of Nebraska State Bar Association, 133 Nebr. 283, 275 N.W. 265, 114 A.L.R. 151 (1937)

While doctors, plumbers, electricians, barbers, etc. may sell their time and skill to the public by virtue of their license from the state, the attorney alone has the right to set the judicial machinery in motion in behalf of another and to thus participate as an officer of the court in a judicial proceeding. This right springs from his status as an officer of the court. To properly function it is necessary that courts retain control of their officers . . . . "The courts, and not juries or legislators, must ultimately determine the qualifications and fitness of their officers." [citation omitted]

Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325, 144 A.L.R. 839 (1943)

There is another reason why the judiciary must regulate the legal profession. The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, guarantees the right to assistance of counsel in all criminal prosecutions. That assistance must be both effective and independent of political influence.

The Commission believes that legislative regulation will impair the independence of lawyers. While historically legislative regulation was benign, it was also *laissez faire*, so much so that courts assumed regulatory control to stop ethical abuses. *See, e.g., People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 162 N.E. 487, 60 A.L.R. 851 (1928). Legislative regulation that did exist mostly concerned admissions requirements.[6] Modern proponents of legislative regulation would have legislatures regulate aspects of the lawyer-client relationship to protect "consumer" interests. It is precisely in this area that the protection

of the client must be delicately balanced with the independence of the lawyer from political pressure. History offers no basis for comparison.

History offers no comfort that active legislative regulation would protect the independence of counsel. The legislature responds to the political will of the people. From the Alien and Sedition Acts of 1798 to the McCarthy era of the 1950s, history has shown that the people's respect for individual rights can sink dangerously low. Legislatures act accordingly. During such times, an independent judiciary and legal profession are necessary to protect those rights.

It is easy to forget how fragile our liberties are. Beyond our borders are myriad examples of the need for an independent legal profession. Around the world, suppression of the legal profession is a basic tool of authoritarian governments. Amnesty International and the Lawyers Committee for Human Rights have units that specialize in monitoring political arrests of lawyers.

Proponents insist, however, that procedures could be devised to shield lawyers from political pressure under legislative regulation. Since the Commission finds no advantages in legislative regulation, there is no reason to take such a risk. This Commission finds a need to expand the scope and efficiency of regulation. These changes can be accomplished under judicial regulation. The call for legislative regulation as a solution is short-sighted. The solution is illusory.

There is a basic requirement for effective judicial regulation. The state high court must closely oversee the disciplinary system. The Commission conducted a survey of state high court justices. The survey asked the justices about the problems their lawyer disciplinary systems faced. Their answers showed that while they considered discipline important, most were not aware of the many problems we have discovered.

Of course, the Court should delegate day-to-day administration of the system. The disciplinary counsel should have independence and prosecutorial discretion. *See* Recommendations 5 and 6. The Court should, however, give lawyer discipline as high a priority in its attention as the processing of cases. It should keep itself informed of the operations and problems of the disciplinary system. It should anticipate developing problems and take action. The Court should require the disciplinary agency administrators to make periodic, detailed reports to the Court. Disciplinary agency officials should meet with the full Court periodically. *See* Model Rule of Lawyer Disciplinary Enforcement 2G(2).

Judicial regulation of the profession and direct and exclusive judicial control of lawyer discipline will not diminish the role of the organized bar. *See* Recommendations 5 and 6, commentary. Responsibility and authority for implementation of many of the recommendations of this Commission will devolve in large measure upon the organized bar. Programs of mediation and arbitration and lawyer practice assistance programs can and should be administered by the bar as part of a system of lawyer regulation. Lawyer substance abuse counseling programs should function in the same way. *See*

Recommendations 3 and 4. Furthermore, the disciplinary process in most jurisdictions will continue to rely upon volunteer lawyer adjudicators. *See* MRLDE 3A.

Recommendation 2
Supporting Judicial Regulation and Professional Responsibility

2.1 The American Bar Association should continue to place the highest priority on promoting, developing, and supporting judicial regulation of the legal profession and professional responsibility.

2.2 The Association should continue to provide adequate funding and staffing for activities to support judicial regulation and professional responsibility.

2.3 To promote the most efficient allocation of resources, the Association should establish written policies to insure that all of its judicial regulation and professional responsibility activities are coordinated, regardless of the Association entity conducting the activity.

Comments

Judicial regulation of the profession and professional responsibility must remain the highest priorities of the ABA. The ABA should implement this recommendation in its most concrete form --- in difficult decisions allocating people, money, and time. We recognize that many interests compete for ABA resources. However, judicial regulation of the profession is essential to both the courts and the profession. Professional responsibility is equally essential. Lawyers should never forget that they are members of a profession, not a business. Lawyers' primary responsibility is to serve the client, the justice system and the public.

The American Bar Association has been a prime mover in developing discipline, ethics, professionalism, client protection, and other professional responsibility activities. Since the Clark Report, the ABA Center for Professional Responsibility and associated standing committees have focused on these activities. Also, ABA sections, special commissions, and other entities have conducted professional responsibility activities. These activities have included developing educational programs, model rules and procedures, research materials, surveys, technical and legal research, and many other resources. These many activities of many different groups should be coordinated to achieve the most efficient use of resources.

All lawyer disciplinary agencies in the United States depend on such ABA activities. Without these efforts over the last twenty years, professional regulation would be in dire straits today. The ABA's members, House of Delegates, and Board of Governors should remain committed to judicial regulation and to professional responsibility during the next twenty years and beyond as they have during the last.

EXPANDING REGULATION TO PROTECT THE PUBLIC AND ASSIST LAWYERS

Existing regulation, while generally effective in disciplining serious misconduct, does not adequately protect the public from lawyer incompetence and neglect. This failure is having severe repercussions for the legal profession.

In 1988, over forty-four thousand disciplinary complaints were summarily dismissed. In some jurisdictions up to ninety per cent of all complaints filed were summarily dismissed. Most of these were dismissed for failing to allege unethical conduct. Some of these complaints fail to allege grounds for any type of response, even under the expanded system proposed here, but many others do allege facts that should be addressed. The thousands of dismissed complaints in this second category show a gap exists between reasonable client expectations and existing regulation. It is clear that tens of thousands of clients alleging legitimate grounds for dissatisfaction with their lawyer's conduct are being turned away because the conduct alleged would not be a violation of disciplinary rules.[7,8] The disciplinary system was not designed to address complaints about the quality of lawyers' services or fee disputes. Yet in all but a few states it is the only regulatory body available to complainants.

The incompetence and neglect of relatively few lawyers must not continue to sully the image of the rest. We cannot afford to let legitimate disagreements between lawyers and clients go unresolved. Without a mechanism to resolve these complaints and disputes, clients are harmed and the profession's reputation unnecessarily suffers.

The consequences of continuing to ignore these problems are clear. The Federal Trade Commission has made several attempts to gain jurisdiction over some complaints against lawyers. State legislatures have made forays into lawyer regulation with increasing frequency. Legal consumer organizations have grown in membership and in political activism.

Disciplinary proceedings, reimbursement from client protection funds, and civil suits for legal malpractice are all that exists in most jurisdictions to redress client injury. These are insufficient in several respects.

Discipline primarily offers prospective protection to the public. It either removes the lawyer from practice or seeks to change the lawyer's future behavior. Protection of clients already harmed is minimal. Respondents are sometimes ordered to pay restitution in disciplinary cases. However, in many states, the failure of a lawyer to make restitution ordered in a disciplinary proceeding will not bar subsequent readmission to practice.

Clients can seek restitution from client protection funds in those states that have them. Client protection funds are an innovation of the legal profession unmatched by any other profession. Every year lawyers, through payments into the funds, reimburse millions of dollars to clients harmed by unethical lawyers. The profession can truly be proud of this achievement.

However, the ability of client protection funds to compensate clients is limited. Restitution is generally available only when a lawyer has stolen client funds. Many client protection funds have limitations on the amounts that will be paid on any one claim. Many client protection funds require a finding of misconduct by the disciplinary agency before a claim will be considered, delaying reimbursement sometimes for years.

Not only are disciplinary agencies and client protection funds limited in the types of remedies they provide but, except for the most egregious cases, they do not address lawyer incompetence and neglect. Most jurisdictions treat individual instances of incompetence and neglect as not violative of the rules of professional conduct or as a minimal violation not worthy of disciplinary action. Yet these types of cases constitute a large proportion of all complaints filed with disciplinary agencies against lawyers.

Other lawyer conduct not regulated by discipline mechanisms is that which generates fee disputes. Fee disputes may arise because a lawyer fails to provide services in the manner promised, delays performance, fails to clarify the computation of the fee, gives an unrealistic initial estimate of the fee, or behaves in other ways that are unfair to the client and unprofessional. This behavior, while perhaps not a violation of the rules of professional conduct, is clearly a legitimate ground for complaint from a client's perspective. Only a handful of jurisdictions mandate that the lawyer submit to arbitration when there is a prima facie legitimate fee dispute. In all other jurisdictions, most clients who have a legitimate dispute are without an economically feasible remedy. Their only options are to sue or to not pay the fee and be sued by the lawyer. The sum involved may be substantial to the client, but often the cost to litigate will be more than the amount in dispute. The client often files a complaint with the disciplinary agency, but the claim is dismissed. The National Organization of Bar Counsel[9] reports that fee dispute issues constitute the second largest category of complaints dismissed for lack of jurisdiction. The profession can no longer afford to ignore these complaints. For every such complaint filed and dismissed, undoubtedly many more clients simply give up without filing a complaint and then blame the profession.

In most jurisdictions, the only option for aggrieved clients other than the disciplinary agency or the client protection fund is a malpractice suit. While the Commission has heard claims that lawyers are unwilling to sue other lawyers, there is ample evidence to suggest that a client with a reasonable claim for large enough damages will be able to find representation. The problem is not the willingness of lawyers to handle malpractice cases but that the time and expense of a civil suit make only large claims economically feasible. Even when the claim is for a large sum, full civil proceedings are a slow and expensive method of resolving the dispute. Also, many types of lawyer conduct that are legitimate grounds for client dissatisfaction and dispute may not constitute malpractice.

The profession's attempts to deal with substandard practice have not worked. The "code of professionalism" is valuable only to those predisposed to improve their practice. Peer review programs have not been accepted. Mandatory continuing legal education programs may keep lawyers' legal skills current, but they were not designed to remedy substandard skills. While legal malpractice is a growing specialization, it must surely be

the least desirable means of self-regulation. What is required is a variety of methods to address the different types of problems and circumstances that create disputes between lawyers and clients. *See* chart on page 15.

Recommendation 3
Expanding the Scope of Public Protection

The Court should establish a system of regulation of the legal profession that consists of:

3.1 component agencies, including but not limited to:
(a) lawyer discipline,
(b) a client protection fund,
(c) mandatory arbitration of fee disputes,
(d) voluntary arbitration of lawyer malpractice claims and other disputes,
(e) mediation,
(f) lawyer practice assistance,
(g) lawyer substance abuse counseling; and

3.2 a central intake office for the receipt of all complaints about lawyers, whose functions should include: (a) providing assistance to complainants in stating their complaints; (b) making a preliminary determination as to the validity of the complaint; (c) dismissing the complaint or determining the appropriate component agency or agencies to which the complaint should be directed and forwarding the complaint; (d) providing information to complainants about available remedies, operations and procedures, and the status of their complaints; and (e) coordinating among agencies and tracking the handling and disposition of each complaint.

Comments

The availability of more than one mechanism to resolve disputes can backfire and result in increased public dissatisfaction unless a simple and direct procedure exists for making a complaint. Complainants should not be expected to know the distinctions among component agencies. They need a central intake office - one clearly designated agency to which to take any type of complaint. The state's highest court and its agency should provide the expertise needed to determine where prima facie valid complaints should be directed.

Detecting unethical behavior should remain the highest priority of the judicial branch. The central intake agency should screen all complaints for allegations of conduct that violates ethics rules. It should forward those complaints to the disciplinary agency and to any other relevant agency, to insure misconduct is not overlooked.

Lawyer discipline should be directly and exclusively controlled by the highest court in the jurisdiction. *See* Recommendation 5. However, it may be appropriate for bar associations to administer other components of the system, such as arbitration, mediation,

lawyer practice assistance, *etc.*, under the court's authority. Therefore, the disciplinary agency should not be the administrative entity for other component agencies.

A fee dispute arbitration system that is mandatory for the lawyer eliminates the overwhelming advantage lawyers have over the majority of clients who are of modest means and have only the most rudimentary knowledge of the law. The experience of those states that provide mandatory fee arbitration[10] demonstrates that these programs can work without being unduly burdensome on the profession. As is done in disciplinary matters, complaints that do not state legitimate grounds for dispute should be screened out. In cases of valid disputes, mandated fee adjustments can provide the incentive to reform for lawyers who do substandard work. Fee dispute arbitrators should therefore consider the competence and promptness of the lawyer's services in determining whether the fee was appropriate. In many cases involving substandard services, fee adjustments are sufficient to compensate injured clients. When a legitimate fee dispute arises and the lawyer enters arbitration in good faith, the client's opinion of both the lawyer and the profession can be improved. Fee arbitration decisions should follow applicable precedent. Decisions should be in writing and should be provided to both parties.

Providing an additional, voluntary arbitration mechanism for lawyers and clients can greatly benefit both the bar and clients. The ABA Standing Committee on Dispute Resolution reports that these programs have been tested successfully in settings such as bar associations, courts, prosecutors' offices, and neighborhood centers. Disputes to be considered could include contractual, non-disciplinary, and inadequate representation claims that today go unresolved and result in harm to the lawyer's reputation.

Mediation services are useful in preserving ongoing lawyer-client relationships when disputes arise or in matters where a lawyer has placed a lien on a client's file. When handled by a skilled mediator, the process can be simple and efficient, saving time and money for both parties. The lawyer's willingness to have a third party assist in resolving the dispute can demonstrate to the client that the lawyer's intention is to act in the client's best interest.

The Commission makes no recommendations about the structure or procedures of these alternative dispute resolution mechanisms. Several states have programs that could serve as models, and several ABA committees have expertise on this subject. The ABA Standing Committee on Dispute Resolution adopted the following resolution in June, 1990:

ATTORNEY/CLIENT DISPUTE RESOLUTION MECHANISM

RESOLVED, that the Standing Committee encourages experimentation with "alternative" dispute resolution techniques to resolve disputes between attorneys and clients, especially before, but also after, a claim is filed. It is urged that these techniques be viewed as integral and complementary components of the legal and justice systems in the United States. Dispute resolution techniques include mediation, arbitration, negotiation, and conciliation.

COMMENT

ADR in attorney/client disputes is one of the means that state and local bars could use to resolve certain types of disputes. Such disputes could include fee, contractual, non-disciplinary and inadequate representation claims. Moreover, if ADR techniques are used soon after such a claim is made to a bar association, lawyers who participate could be absolved from additional inquiry by the bar association if a settlement is reached. To trigger the ADR process, lawyers could be encouraged to include an ABA-recommended ADR clause in their client contracts for specific claims.

PILOT PROGRAM IDEA SUGGESTED

The ABA Standing Committee on Dispute Resolution would encourage and potentially co-sponsor several pilot projects to test the broad use of dispute resolution in attorney/client disputes.

The pilot projects could experiment with the Multi-Door approach to resolving such disputes. This approach has been tested successfully by the Committee in a variety of fora including the courts, prosecutors' offices, bar associations, and neighborhood centers. At the core is a sophisticated screening/intake process by well-trained personnel. If the complaint is not resolved at this step, then the trained personnel would assist the complainant in selecting the most appropriate dispute resolution processes. The second part of the Multi-Door approach is to develop thoughtful, varied, and structured dispute resolution processes.

In developing the varied dispute resolution processes, special attention should be paid to the issues that gave the existing fee arbitration programs difficulty. These issues include the following:

1. Program Structure
2. Lack of ADR Training
3. Lack of Attorney/Client Education
4. Lack of Program Use
5. User Dissatisfaction
6. Inaccessibility

In responding to the above issues, model rules and training models need to be developed accompanied by an assessment by an outside research group.

The experience of other common law countries is similar to the situation the Commission has discovered in the United States - the great majority of complaints against lawyers, while stating legitimate grounds for dispute, do not allege facts constituting misconduct. A research report prepared by the Law Society of England and Wales states:

A 1990 survey in England and Wales showed that 64% of all complainants to the Solicitors Complaints Bureau had complained about an inadequate professional service -

32% about poor service/incompetence, 18% about delay and 14% about their solicitor not communicating. Statistics from the Law Society of British Columbia also suggest that a significant number of complaints relate to aspects of inadequate professional service: 48% as opposed to 35% alleging professional misconduct.[11]

Most common law countries have already established agencies similar to those we recommend here. The Law Society's research report states:

[M]ost common law jurisdictions have introduced a system of resolving complaints of a less serious nature in a fast and simplified way. This has meant the introduction of conciliation schemes, verbal hearings, and specialist departments dealing with complaints about inadequate professional services.

. . . . .

In England and Wales, the Solicitors Complaints Bureau has introduced a special team of Conciliation Officers aimed at quickly investigating and resolving complaints where conciliation between solicitor and complaining client seems possible. The success of this innovation has led to plans to localize conciliation on a wider basis.

. . . . .

In Australia . . . the handling of complaints about incompetence has been totally separated from the handling of complaints about misconduct . . . .

. . . . .

In comparison to common law jurisdictions, USA and EEC Bar Associations have not shown the same degree of responsiveness to public concern about their complaints handling procedures . . . . The big number of complaints [citing a 1987 ABA discipline survey] and general underfunding and understaffing cause long delays which further reinforce public suspicion that complaints are not handled seriously.

Lawyer substance abuse counseling programs already exist in many jurisdictions. The Commission believes these programs should remain under the operation of those organizations that currently conduct them. These programs should be confidential so that lawyers are encouraged to voluntarily seek their assistance. However, referrals of lawyers to substance abuse counseling programs by the central intake office or the Disciplinary Counsel should be coordinated and monitored by the central intake office.

Recommendation 4
Lawyer Practice Assistance Committee

4.1 The Court should establish a Lawyer Practice Assistance Committee. At least one third of the members should be nonlawyers. The Lawyer Practice Assistance Committee should consider cases referred to it by the disciplinary counsel and the

Court and should assist lawyers voluntarily seeking assistance. The Committee should provide guidance to the lawyer including, when appropriate: (a) review of the lawyer's office and case management practices and recommendations for improvement; and (b) review of the lawyer's substantive knowledge of the law and recommendations for further study.

4.2 In cases in which the lawyer has agreed with disciplinary counsel to submit to practice assistance, the Committee may require the lawyer to attend continuing legal education classes, to attend and successfully complete law school courses or office management courses, to participate in substance abuse recovery programs or in psychological counseling, or to take other actions necessary to improve the lawyer's fitness to practice law.

Comments

See chart on page 15. The Commission finds a great need for a formal method to provide guidance to lawyers with practice problems. A Lawyer Practice Assistance Committee will assist these lawyers by assessing the nature and extent of the problem. The Committee will create, in consultation with the lawyer, a plan to improve needed skills. The Committee may provide direct supervision and guidance or recommend law school classes, continuing legal education, business or office management classes, substance abuse counseling, or other available resources. The Committee may also recommend the creation of needed programs to bar associations or the state's highest court. The Committee will also assist lawyers whose disciplinary cases have been diverted. *See* Recommendation 9.

As Yale law professor Geoffrey Hazard stated:

But there remain many other kinds of cases in which a different inquiry and response is appropriate. Examples include conflict of interest, overcharging, incivility to opposing parties and lawyers, and inattention to clients. These are professional grievances but of a lesser degree.

. . . . .

These cases rarely justify a sanction of suspension, let alone disbarment. However, they fully justify an effort by neutral members of the bar to give guidance in interpretation of practice standards. Because lawyers today are not fully taught by apprenticeship, these standards are not transmitted through practice as they used to be. The traditional panel system has a real place as a medium for establishing practice standards.[12]

DIRECT AND EXCLUSIVE CONTROL OF LAWYER DISCIPLINE

Despite the many reforms made in the disciplinary process in the last twenty years, there is significant distrust of the fairness and impartiality of self-regulation. The Commission finds an important distinction between judicial regulation and self-regulation in the area

of lawyer discipline. Neither the inherent powers doctrine nor the need for professional independence provides a rationale for disciplinary functions to be conducted by elected officers of bar associations.

The disciplinary system should be controlled and managed exclusively by the state's highest court and not by state or local bar associations. This is necessary for two primary reasons. First, the disciplinary process should be directed solely by the disciplinary policy of the Court and its appointees and not influenced by the internal politics of bar associations. Second, the disciplinary system should be free from even the appearance of conflicts of interest or impropriety. When elected bar officials control all or parts of the disciplinary process, these appearances are created, regardless of the actual fairness and impartiality of the system.

While the disciplinary system should be directly controlled by the state's highest court, bar associations can quite properly administer other component agencies of the expanded regulatory structure. Mandatory fee arbitration, voluntary arbitration and mediation, lawyer practice assistance, and other programs will require substantial resources. These programs are not affected by charges of conflict of interest or appearance of impropriety. It is entirely appropriate for the organized bar to cooperate with the Court in the administration of such programs. *See* Recommendation 3 and chart on page 15.

Recommendation 5
Independence of Disciplinary Officials

All jurisdictions should structure their lawyer disciplinary systems so that disciplinary officials are appointed by the highest court of the jurisdiction or by other disciplinary officials who are appointed by the Court. Disciplinary officials should possess sufficient independent authority to conduct the lawyer discipline function impartially:

5.1 Elected bar officials, their appointees and employees should provide only administrative and other services for the disciplinary system that support the operation of the system without impairing the independence of disciplinary officials.

5.2 Elected bar officials, their appointees and employees should have no investigative, prosecutorial, or adjudicative functions in the disciplinary process.

5.3 The budget for the office of disciplinary counsel should be formulated by disciplinary counsel. The budget for the statewide disciplinary board should be formulated by the board. Disciplinary budgets should be approved or modified directly by the Court or by an administrative agency of the Court. Disciplinary counsel and the disciplinary board should be accountable for the expenditure of funds only to the Court, except that bar associations may provide accounting and other financial services that do not impair the independence of disciplinary officials.

5.4 Disciplinary counsel and staff, disciplinary adjudicators and staff, and other disciplinary agency personnel should be absolutely immune from civil liability for all actions performed within the scope of their duties, consistent with ABA MRLDE 12A.

Comments

State and local bar officials provided the impetus for the development of ethical standards and disciplinary mechanisms. Bar officials have also volunteered years of dedicated service to the disciplinary function. These recommendations should in no way be taken as a derogation of that dedication and service. The recommendations are a recognition of basic principles of checks and balances and of separation of powers. A lawyer can appropriately serve the profession as an elected bar official and as an appointed disciplinary adjudicator - but not simultaneously.

Bar associations still can have a fundamental role to play in professional discipline, although not in the processing of cases. In states where no regulatory arm of the highest court exists, bar associations conduct the registration of lawyers and maintain registration records. They provide accounting and financial services, the physical plant and office equipment, ancillary staff services, and many other functions necessary to the operation of the disciplinary agency.

This recommendation modifies existing provisions of Model Rule of Lawyer Disciplinary Enforcement 2.

Several state bar associations have asked whether this recommendation would eliminate the justification for unified state bar associations under *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). This concern is unfounded. The Court in *Keller* clearly distinguishes those activities that do and do not justify the imposition of mandatory dues for unified state bar membership. The Court stated:

Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

. . . . .

Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State." Lathrop, 367 U.S., at 843, 81 S.Ct., at 1838 (plurality opinion).

Keller, 110 S.Ct. at 2236

The Court recognized that unified bar activities were on a continuum ranging from purely "ideological" to purely "regulating the legal profession and improving the quality of legal services." The Court also recognized that in some cases the distinction might be difficult to make. However, the Court identified several activities that are clearly one or the other:

But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession.

Keller at 2237

The Commission recognizes that unified bars can appropriately perform non-prosecutorial and non-adjudicative functions that are essential to the disciplinary system. These are clearly "activities connected with disciplining members of the bar" under *Keller*.

It is important to recognize that the Court in *Keller* identified lawyer disciplinary functions and proposing ethical codes as *examples* of "the other end of the spectrum" to which "petitioners have no valid constitutional objection." These are however only examples. The Court clearly states the *functional* definition of regulatory activities that justify the existence of a unified bar:

Precisely where the line falls between *those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession,* on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern (emphasis added).

Keller at 2237

Thus, under *Keller* unified state bar activities *other than* lawyer discipline or ethics can justify the existence of the unified bar. These activities must: (1) "involve the State's interest in regulating the legal profession and improving the quality of legal services"; or (2) be "activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession."

Recommendations 3.1(b)-(g) establish new programs that can be conducted by unified state bar associations. These new programs are essential components of the expanded system of lawyer regulation recommended by the Commission. As such, they fall within the requirements of *Keller.*

Therefore, the recommendation in no way threatens the unified bar's existence under the rule of *Keller*. To the contrary, the expanded system of regulation proposed by the Commission expands the justification for the unified bar's existence under *Keller*.

Recommendation 6
Independence of Disciplinary Counsel

6.1 The Court alone should appoint and remove disciplinary counsel and should provide sufficient authority for prosecutorial independence and discretion. The Court should also promulgate rules providing that disciplinary counsel shall:

> **(a) have authority to employ and terminate staff, formulate a budget and approve expenditures subject only to the authority of the Court;**
> **(b) have authority, in cases involving allegations of minor incompetence, neglect, or misconduct, to resolve a matter with the consent of the respondent by administrative procedures established by the Court;**
> **(c) have authority to appeal a decision of a hearing committee or the disciplinary board;**
> **(d) be compensated sufficiently to attract competent counsel and retain experienced counsel; and**
> **(e) be prohibited from providing advisory ethics opinions, either orally or in writing.**

6.2 The Court should adopt a rule providing that no disciplinary adjudicative official (including hearing committee members, disciplinary board members, or members of the Court) shall communicate ex parte with disciplinary counsel regarding an ongoing investigation or disciplinary matter, except about administrative matters or to report information alleging the misconduct of a lawyer.

Comments

This recommendation presumes the existence of a full-time disciplinary counsel with statewide jurisdiction. Disciplinary counsel should be insulated from political pressure from the public, members of the bar, and adjudicative officials of the disciplinary agency including members of the Court in order to provide effective and fair enforcement of the rules of professional conduct. Under the provisions of ABA MRLDE 4A, disciplinary counsel is appointed by the state discipline board. However, the Commission has received evidence that this arrangement can inhibit disciplinary counsel from appealing board decisions or otherwise disputing disciplinary policy set by the board. The National Organization of Bar Counsel has reported to the Commission several instances where control by state bar officials and state discipline board officials over disciplinary counsel's budgets, personnel, and decisions to prosecute have muzzled experienced disciplinary counsel and, in some instances, caused them to resign.

The Commission believes that, subject only to removal by the Court, disciplinary counsel should be completely independent. Consistent with the authority to dismiss complaints,

disciplinary counsel should have authority to divert cases involving allegations of minor misconduct, minor incompetence, and minor neglect to administrative, non-disciplinary processes established by the Court. If the respondent lawyer fails to comply with the agreement diverting the cases to another process, the disciplinary counsel can resume disciplinary proceedings. *See* Recommendation 9.

Disciplinary counsel should be compensated sufficiently to attract competent new lawyers as well as to attract and retain experienced lawyers. The Commission believes it is important that agencies with several staff counsel should attempt to balance experienced with inexperienced lawyers. A proper balance supplies both continuity and fresh perspective to the agency.

Many disciplinary counsel provide advisory opinions to members of the bar as a service. This diverts resources away from the detection and adjudication of misconduct. Ethics opinions are more appropriately provided by a committee of the Court, bar associations, or by the state bar's general counsel.

To be fully independent, disciplinary counsel should not perform services of general counsel to the bar and should not use the title "bar counsel."

Legislative History of Recommendation 6

The ABA House of Delegates amended the Commission's original recommendation 6.1. The Commission recommended that disciplinary counsel's independence should be strengthened by permitting the state high court to remove disciplinary counsel only for cause, not at will. The Commission's original recommendation stated:

6.1 The Court alone should appoint and for cause remove disciplinary counsel and should provide sufficient authority for prosecutorial independence and discretion.

The House voted to delete the words "for cause" from the recommendation.

A second change to Recommendation 6 was proposed by the Commission itself. The Commission's original recommendation had included as 6.1(b) the recommendation that disciplinary counsel shall:

(b) have authority to determine after investigation whether probable cause exists to believe misconduct has been committed and to dismiss a case or file formal charges against respondent lawyers;

The Commission's commentary on 6.1(b) in the December 1991 Report to the House of Delegates stated:

Disciplinary counsel should have full prosecutorial discretion, like that of criminal prosecutors in many states, to determine probable cause and to file formal charges without seeking the approval of a hearing committee member. This is contrary to existing

provisions of ABA MRLDE 11B(3). Some states in fact still engage in grand jury style procedures or use three member committees to determine probable cause. This tremendous expenditure of resources wastes time and money to make a decision that is clearly within the competence of any experienced disciplinary counsel. The right of complainants to appeal, as we recommend elsewhere, and of hearing committees to dismiss cases at hearing are more than adequate to check and balance prosecutorial discretion to file charges. If a state's highest court lacks confidence in the disciplinary counsel's competence to make decisions to charge, a new disciplinary counsel should be appointed rather than relying on a wasteful indictment procedure.

Prior to the debate in the House, the Commission withdrew this proposal due to strong opposition to prosecutorial independence to file formal charges. It still remains ABA policy that disciplinary counsel has authority to dismiss a case after investigation. *See* MRLDE 11B.

INCREASING PUBLIC CONFIDENCE IN THE DISCIPLINARY SYSTEM

The Commission is convinced that secrecy in discipline proceedings continues to be the greatest single source of public distrust of lawyer disciplinary systems. Because it engenders such distrust, secrecy does great harm to the reputation of the profession. The public's expectation of government and especially of judicial proceedings is that they will be open to the public, on the public record, and that the public and media will be able to freely comment on the proceedings. The public does not accept the profession's claims that lawyers' reputations are so fragile that they must be shielded from false complaints by special secret proceedings. The irony that lawyers are protected by secret proceedings while earning their livelihoods in an open system of justice is not lost on the public. On the contrary it is a source of great antipathy toward the profession.

Recommendation 7
Access to Disciplinary Information

All records of the lawyer disciplinary agency except the work product of disciplinary counsel should be available to the public after a determination has been made that probable cause exists to believe misconduct occurred, unless the complainant or respondent obtains a protective order from the highest court or its designee for specific testimony, documents or records. All proceedings except adjudicative deliberations should be public after a determination that probable cause exists to believe that misconduct occurred.

Comments

Prior to the Clark Report, in most jurisdictions all proceedings were secret until the state high court issued an order finding misconduct. In 1979 the ABA adopted a policy recommending that disciplinary proceedings should be public upon the filing of formal charges. *See* MRLDE 16. Recommendation 7, as amended by the House of Delegates above, reaffirms MRLDE 16. Today, proceedings are public upon the filing of formal

charges in over half of the states. *See* Appendix A, problem 25 for a history of the evolution of MRLDE 16.

Both complainant and respondent may seek a protective order to seal records. The Commission has not specified grounds for issuing a protective order. That is best left to the highest courts and disciplinary agencies in each jurisdiction. In general, the Commission believes that a complainant should not be forced to choose between having confidences or secrets revealed or filing a complaint; a respondent should not have to chose between presenting a defense or protecting secrets and confidences of other clients. The respondent has no right to assert the complaining client's privilege if the complaining client does not assert it.

Disciplinary counsel should advise all complainants and respondents of the availability of protective orders. Any testimony, documents, or records, including the complainant's initial communication with the agency, for which a protective order is being sought should be confidential until the determination of the Court.

Legislative History of Recommendations 7 and 8

The Commission's original Recommendation 7 stated:

Recommendation 7
Fully Public Discipline Process

All records of the lawyer disciplinary agency except the work product of disciplinary counsel should be available to the public from the time of the complainant's initial communication with the agency, unless the complainant or respondent obtains a protective order from the highest court or its designee for specific testimony, documents or records. All proceedings except adjudicative deliberations should be public.

When the Commission brought this recommendation before the House of Delegates, it accepted as a friendly amendment an amendment from Florida. The first portion of that amendment changed the title of Recommendation 7 from "Fully Public Discipline Process" to "Access to Disciplinary Information." The second portion of that amendment deleted the words "from the time of the complainant's initial communication with the agency," and added the words "after a complaint has been dismissed or a determination made that probable cause exists to believe misconduct occurred," to the first sentence after "should be available to the public." That portion of the Florida amendment was amended by a New York delegate to delete the words "a complaint has been dismissed or." The remaining portion of the Florida amendment added the words "after a determination that probable cause exists to believe that misconduct occurred" to the last sentence.

The Commission's comments pertinent to the original recommendation were:

The arguments in favor of fully open disciplinary systems are supported by hard evidence the years of experience of those states that have them: Oregon, West Virginia and Florida. There is no evidence from those states of any harm to lawyers from making disciplinary records public. The arguments against open disciplinary systems are based on conjecture and emotion, not experience.

In West Virginia, the records of dismissed complaints have been available to the public and press since 1984. After an initial period of interest, the press simply stopped examining the records, presumably because there was such little public interest in the information. In Florida, these records have been available for over a year. Oregon has fifteen years' experience with an open disciplinary system. Records are public in Oregon from the time a complaint is received. The Commission has found no evidence of harm to lawyers from making these records public.

On the contrary, the Oregon bar proudly supports its open system. As the president of the Oregon State Bar testified to the Commission:

Oregon is unique in that complaints about lawyers are available for inspection from filing with the state bar. No other state permits access to these records at this stage. We believe the Oregon experience, while not entirely problem free, should be carefully considered by the ABA Commission on [Evaluation of] Disciplinary Enforcement. It is important that the public feel that disciplinary procedures are fair and open. Without access to complaint information the public is suspicious that lawyers are protecting their own. Access to complaint information permits citizens to evaluate that information to determine if they wish to consult with a lawyer who may have a complaint record with the Oregon Bar.

Our experience indicates that concerns that lawyers are unnecessarily damaged by an open records process have not been substantiated. If a complaint has been dismissed upon investigation, the lawyer has been vindicated. If the lawyer has been disciplined, a prospective client should be allowed to determine whether that action justifies not going to the lawyer for assistance. The public can be trusted to exercise good judgment in deciding how complaint information affects their decision to hire a particular lawyer. A closed system prevents the public from understanding the process, evaluating relevant information concerning the selection of a lawyer, and it engenders great suspicion concerning the process. Fifteen years' experience under our open system has shown it can work and that lawyers are not victimized in the process. It is also worthy to note that people making complaints to the state bar concerning the conduct of lawyers are absolutely immune under Oregon law from civil liability for such acts.

In *Doe v. Supreme Court of Florida*, 734 F.Supp 981 (S.D. Fla., 1990), the U.S. District Court held that Florida's complainant gag rule violated the First Amendment. The District Court said:

Imposing an enforced silence on all aspects of Bar disciplinary matters including investigations, probable cause hearings, and final dispositions is more likely, in our view, to engender resentment, suspicion, and contempt for Florida's Bar and its legal

institutions than to promote integrity, confidence and respect. Moreover, the regulation misapprehends the character of American public opinion and the fairness of our people. As Justice Brandeis wrote in *Whitney v. California*, 274 U.S. 357, 375 - 76, 47 S.Ct. 641, 648, 74 L.Ed. 1095 (1927) (concurring):

Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that public discussion is a political duty; and that this should be a fundamental principle of American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law the argument of force in its worst form (footnote omitted).

The Florida Supreme Court subsequently went beyond the *Doe* decision and promulgated a rule making all disciplinary records public upon the dismissal of the disciplinary case. *See also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) (Virginia statute that subjects persons to criminal sanctions for divulging information regarding judicial misconduct proceedings violative of First Amendment); *Baugh v. Judicial Inquiry and Review Comm'n, 907 F.2d 440 (4th Cir.1990) (confidentiality provision not a valid time and place restriction, thus violates First Amendment); Daily Gazette Co., Inc. v. Committee on Legal Ethics of the West Virginia State Bar*, 326 S.E.2d 705 (W.Va., 1984) (use of private reprimands violates "open courts" provisions of state constitution).

The Commission has carefully considered the need for secrecy to protect innocent lawyers from false complaints. All members of the Commission understand that a lawyer's reputation is not only the basis for his or her livelihood, it is a cherished and integral part of the lawyer's life. The lawyer's reputation defines the value of the lawyer's service to clients and the community.

However, we find in Oregon, Florida and West Virginia ample experience to demonstrate that public proceedings or public records of dismissed complaints do no harm to innocent lawyers' reputations. On the contrary, secrecy does great harm to the reputation of the profession as a whole.

If public interest in a particular lawyer's case is high, the public will learn the essential allegations through other sources. The disciplinary agency is then left in the embarrassing position of "neither confirming nor denying" the existence of an investigation, further damaging the profession's credibility. Secrecy rules do nothing to protect individual lawyers in these situations. In matters of little public interest, there is obviously little possibility that actual damage to a lawyer's practice will occur. Under a fully public and open disciplinary system, lawyers accused of misconduct as well as complainants are free to comment on the proceedings. In many states, respondent lawyers may not publicly reply to information leaked to the media.

An open disciplinary system demonstrates its fairness to the public. Secret records and secret proceedings create public suspicion regardless of how fair the system actually is. A

fully open disciplinary system will preclude the possibility of disciplinary officials committing improprieties such as destroying evidence, shredding files, or covering up complaints against influential lawyers. Disciplinary officials in Florida, West Virginia and Oregon state that public scrutiny of their disciplinary systems motivates staff to do better work.

Making disciplinary records and proceedings public will avoid further constitutional challenges, sparing the profession additional negative publicity. Finally, a fully open disciplinary system eliminates special procedures for sanctions such as "private reprimands" or "admonitions" that were formerly confidential.

Upon the House of Delegates' adoption of amendments to Commission Recommendation 7, the Commission withdrew its original Recommendation 8 because absolute immunity for complainants is already ABA policy. *See* MRLDE 12A. The Commission's original Recommendations 7 and 8 were new in recommending both absolute immunity and a fully open process. Original Recommendation 8 and comments were:

Recommendation 8
Complainant Immunity

8.1 Complainants should be absolutely immune from civil suit for all communications with the disciplinary agency and for all statements made within the disciplinary proceeding. Consideration should be given to making it a misdemeanor to knowingly file a false complaint with the disciplinary agency.

8.2 When informing the public about the existence and operations of the disciplinary agency the agency should emphasize and explain the nature of a complainant's absolute immunity.

Comments

For the lawyer disciplinary system to be effective, complainants must feel free to report possible lawyer misconduct. The system depends almost entirely on complaints from the public. Under the rules of many jurisdictions, communications to the agency that are not false or malicious are immune from civil suit. However, this qualified immunity is insufficient to protect potential complainants from intimidation because the accused lawyer may simply allege malice in order to maintain the suit. That a suit can be filed regardless of the good faith of the complainant is enough to intimidate many who have valid complaints. They are intimidated by the lawyer's great advantage in legal knowledge, access to the courts, and financial resources.

The Commission has carefully considered the argument that if all disciplinary proceedings and records are to be public then in order to protect their reputations, lawyers should be able to sue complainants who make malicious and untrue allegations. We conclude that the potential for harm to individual lawyers is greatly overstated. The

public interest demands that complainants be free from the chilling effect of the threat of lawsuits when filing complaints.

We first note that absolute immunity from suit is granted for complaints and testimony in many types of judicial, licensing, and other governmental proceedings. Other professionals and, indeed, people from all walks of life depend on their reputations for their livelihood and value their reputations as much as do lawyers. Yet, their reputations may be subject to proceedings in which the complaint or testimony is absolutely immune. We see no legitimate justification for granting lawyers a special privilege in this regard.

On the contrary, the special privilege that lawyers *do* have is one of the reasons complainants should be absolutely immune from suit:

Regardless of what may have happened in some jurisdictions to the rights and privileges of attorneys, the right to practice before the court as an officer of the court still remains . . . . [T]he attorney alone has the right to set the judicial machinery in motion in behalf of another and to thus participate as an officer of the court in a judicial proceeding.

Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325, 144 A.L.R. 839 (1943)

Because only lawyers have this privilege, and the knowledge and skill to wield it, limitations should be placed on its exercise. Unfortunately, a small minority of lawyers attempt to intimidate clients who have valid complaints against them by threatening to sue if a complaint is filed. The profession and the courts should not allow any lawyer to use professional privilege to abuse a client. The only way these clients can be protected is by making complaints to the disciplinary agency absolutely immune.

The Commission is aware that some malicious and untrue complaints will be filed against lawyers and that the complainants' absolute immunity will prevent the lawyers from filing suit. The Commission believes this is a consequence lawyers should bear in exchange for the professional privileges they enjoy. For several reasons, however, we are confident that providing absolute immunity to complainants, even in a completely public disciplinary system, will not cause harm to lawyers' reputations.

First, the innocent lawyer is not totally defenseless against malicious and false complaints. Absolute immunity does not protect the complainant who commits perjury or who makes slanderous statements outside the proceedings. Second, the experience of all states has been that little attention is paid to discipline proceedings. Where there has been significant interest, it almost always arose from sources other than and prior to the disciplinary proceedings, such as related criminal investigations or civil litigation. Thus, actual damages are unlikely to result from the disciplinary proceedings themselves. Third, the fifteen year experience of Oregon, where all disciplinary records are public and complainants have absolute immunity, has been that the public understands that unproven allegations are simply that. Oregon lawyers have not had their careers ruined by crank complaints.

We conclude that the small potential for harm to the individual lawyer's reputation is a price the profession should pay to maintain public confidence in the profession as a whole. The public must be convinced that the profession is not only willing to consider but actively seeks out information about unethical lawyers and will protect those who attempt to present it.

Protecting complainants from intimidation does not require giving complainants carte blanche to file false complaints. An appropriate balancing of interests can be achieved by making the filing of a knowingly false claim a misdemeanor criminal offense. A disinterested public prosecutor, rather than the lawyer who is the subject of the contemplated complaint, is the appropriate person to determine whether to institute a proceeding against a complainant. A person filing a disciplinary complaint in good faith has no reason to feel intimidated by this arrangement. Statutes exist making it a misdemeanor to file false statements in many situations. *See, e.g.*, Alabama Code 1975 ? 36-25-25 (false ethics complaint against state official); AS 11.56.805 (Alaska) (false complaint to legislative ethics committee); A.R.S. ? 28-1062 (Arizona) (false statement in traffic complaint); A.C.A ? 12-10-315 (Arkansas) (false 911 call); Cal.Civ.Code ? 47.5 (California) (false criminal complaint); C.G.S.A. Appendix ? 53-168 (Connecticut) (false complaint to police); F.S.A. ? 106.25 (false complaint to campaign financing commission); I.C. ? 18-6711A (Idaho) (false 911 call); S.H.A. ch. 46 P 9-20 (Illinois) (false statement to judicial nominating commission); IC ? 16-10-7-7 (Indiana) (false complaint to state board of health); LSA-R.S. 4:426 (Louisiana) (false complaint regarding registration of athletic agents); LSA-R.S. 18:1511.10 (Louisiana) (false complaint to campaign finance committee); Code 1957, Art. 27, ? 150 (Maryland) (false statement to police officer); M.G.L.A. 151B ? 8 (Massachusetts) (false complaint to anti-discrimination commission); M.C.L.A. 722.722 (Michigan) (false paternity complaint); N.R.S. 618.705 (Nevada) (false complaint under occupational safety and health statute); N.J.S.A. 2A:47A-1 (New Jersey) (false complaint against any licensed professional); NMSA 1978, ? 60-7A-20 (New Mexico) (false complaints against business licensee); T.C.A. ?2-10-108 (Tennessee) (false complaint to campaign financing commission); Code, ? 19-23-26 (West Virginia) (false complaint to racing commission).

Following the withdrawal of Recommendation 8, all subsequent recommendations were renumbered.

Recommendation 8
Complainant's Rights

8.1 Complainants should receive notice of the status of disciplinary proceedings at all stages of the proceedings. In general, a complainant should receive, contemporaneously, the same notices and orders the respondent receives as well as copies of respondent's communications to the agency, except information that is subject to another client's privilege.

8.2 Complainants should be permitted a reasonable opportunity to rebut statements of the respondent before a complaint is summarily dismissed.

8.3 Complainants should be notified in writing when the complaint has been dismissed. The notice should include a concise recitation of the specific facts and reasoning upon which the decision to dismiss was made.

8.4 Disciplinary counsel should issue written guidelines for determining which cases will be dismissed for failure to allege facts that, if true, would constitute grounds for disciplinary action. These guidelines should be sent to complainants whose cases are dismissed.

8.5 Complainants should be notified of the date, time, and location of the hearing. Complainants should have the right to personally appear and testify at the hearing.

8.6 All jurisdictions should afford a right of review to complainants whose complaints are dismissed prior to a full hearing on the merits, consistent with ABA MRLDE 11B(3) and 31.

Comments

This recommendation adds significant new provisions to the Model Rules for Lawyer Disciplinary Enforcement. In almost every jurisdiction, complaints to the disciplinary agency are screened, and those that fail to allege facts constituting a violation of the ethics rules are dismissed by a summary procedure. Other complaints are investigated and dismissed upon a finding that there is insufficient evidence of a violation.

The Commission believes that summary procedures are appropriate for these matters. In general, disciplinary agencies give fair and adequate consideration to the complaints. This conclusion is supported by the fact that in those states that permit complainants to appeal, few of the dismissals reversed on review and sent back for further investigation later result in the imposition of discipline.

Nevertheless, complainants often feel their complaints have not received fair consideration by the agency. The Commission has identified several factors that contribute to this result.

In the vast majority of these matters, the only communication between the complainant and the agency is by mail. Complainants file a complaint and weeks or months later receive a dismissal letter. The complainant has no way of judging how much consideration the complaint has received. Even in those cases in which charges are filed and further proceedings held, complainants are not routinely informed of the status or development of the case.

Complainants in many jurisdictions are notified of the dismissal by a form letter that states only that the complaint failed to allege a violation of the ethics rules or that sufficient evidence of a violation was not found. The complainant is not informed of the facts considered or the reasoning used to arrive at a decision to dismiss. Of all complaints summarily dismissed, a significant portion allege facts that, if true, would not constitute a

violation of the rules of professional conduct, but would be unprofessional behavior that should be addressed. The distinction between unethical conduct and other bad conduct is meaningless to most complainants.

In most jurisdictions, the complainant has no regulatory body other than the disciplinary agency to which to complain, and in most jurisdictions the complainant has no right to appeal summary dismissal of the complaint.

Given these facts, it is understandable that complainants are dissatisfied when their complaints are summarily dismissed or when they are not kept informed of the status of their complaints.

Providing complainants a concise explanation of the facts and reasons for the summary dismissal of the complaint will require little additional effort if those facts and reasons are articulated and recorded at the time the decision is made. The National Organization of Bar Counsel recommends that written guidelines should be issued for dismissing cases that fail to allege misconduct. Sending a copy of these guidelines to complainants when their complaints are dismissed will help them understand the reasons for dismissal.

Most people expect serious consideration of their complaint and the right to a review when dealing with their government. When these basic expectations are not met, the proceeding is likely to be perceived as unfair, regardless of the reality.

We recognize that creating a process for complainant appeals will require additional resources. We note that twenty-one of forty-six states surveyed by the Commission provide complainants a right to appeal and have found sufficient resources to hear these appeals. We believe that the failure of other jurisdictions to provide a right to appeal is responsible for a great deal of public dissatisfaction with the disciplinary system. The time and money required to provide this right will be well spent.

Providing complainants a right of appeal is more than a mere public relations device, however. It is true that in jurisdictions providing this right, few of the dismissals appealed and remanded for further investigation ultimately result in a finding of misconduct. Nevertheless, a complainant appeal procedure does provide a useful check on the effectiveness of disciplinary counsel's initial screening of complaints and on the quality of investigations. The Second Annual Report of the California Complainants' Grievance Panel[13] (May 1989) cites several instances where complainant appeals revealed deficiencies in the screening and investigation of complaints:

The Panel's review of both audit cases and cases considered as a result of requests for further investigation leads it to believe that inadequacies exist in the way complaints against attorneys are evaluated by the State Bar discipline system which result in the prosecution of too few discipline cases.

. . . . .

The Panel's review of Inquiries also suggests that the Intake process is oriented toward the eventual prosecution of only the most serious violations of the Rules of Professional Conduct and the State Bar Act. To analogize to criminal law enforcement, the mere "misdemeanors" such as failure to communicate or failure to return client files do not receive adequate attention and are thus closed prematurely.

. . . . .

[There exists] the apparent tendency of OI [Office of Investigation] investigators to accept without verification the undocumented statements of Respondents in response to Bar queries.

. . . . .

Particularly noteworthy is the tendency to characterize cases involving disputed handling of client monies as "fee disputes" and, given the availability of fee arbitration in those cases, close them on that basis, even where an examination of the facts of the case reveals a potential ethical violation.

Of course, the creation of arbitration and mediation mechanisms, as we recommend elsewhere in this report, should result in the diversion to more appropriate agencies of many complaints that otherwise would have been correctly dismissed by the disciplinary agency. This should significantly reduce the number of complainant appeals and the resources needed to consider them. The existence of fee arbitration does not, however, justify a dismissal where, as stated in the California report, a potential ethical violation has been alleged. A complainant's appeal procedure, then, is important to guard against the "dumping" of disciplinary cases because of a lack of staff or funding and, in turn, to promote adequate funding of the disciplinary agency.

EXPEDITING AND FACILITATING THE DISCIPLINARY PROCESS

The overwhelming majority of complaints made against lawyers allege instances of minor misconduct, minor neglect or minor incompetence. Single instances of minor neglect or minor incompetence, while technically violations of the rules of professional conduct, are seldom treated as such. Complaints alleging minor neglect or minor incompetence are almost always dismissed. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with the system. *See* Recommendation 2.

Cases of minor misconduct seldom justify the resources needed to conduct formal disciplinary proceedings. *See* Recommendation 10. In most cases of minor incompetence, minor neglect, and other minor misconduct, the respondent's conduct does not justify imposing a disciplinary sanction.

What most of these cases call for is a remedy for the client[14] and a way to improve the lawyer's skills. The Commission believes that these matters should be removed from the

disciplinary system and handled administratively. It may be appropriate to compensate the client for the lawyer's substandard performance by a fee adjustment or other arbitrated or mediated settlement. The lawyer may need guidance to improve his or her skills or to overcome other minor practice problems.c

Recommendation 9
Procedures In Lieu of Discipline for Minor Misconduct

9.1 All jurisdictions should adopt procedures in lieu of discipline for matters in which a lawyer's actions constitute minor misconduct, minor incompetence, or minor neglect. The procedures should provide:

9.2 The Court shall define criteria for matters involving minor misconduct, minor incompetence, or minor neglect that may be resolved by non-disciplinary proceedings or dismissal.

9.3 If disciplinary counsel determines that a matter meets the criteria established by the Court, disciplinary counsel may reach agreement with the respondent to submit the matter to non-disciplinary proceedings. Such proceedings may consist of fee arbitration, arbitration, mediation, lawyer practice assistance, substance abuse recovery programs, psychological counseling, or any other non-disciplinary proceedings authorized by the Court. Disciplinary counsel shall then refer the matter to the agency or agencies authorized by the Court to conduct the proceedings.

9.4 If the lawyer does not comply with the terms of the agreement, disciplinary counsel may resume disciplinary proceedings.

9.5 If the lawyer fulfills the terms of the agreement, the disciplinary counsel shall dismiss the disciplinary proceeding.

Comments

A lawyer has the right to refuse a non-disciplinary proceeding and to have a hearing. The refusal does not constitute misconduct, nor should it be considered an aggravating factor in imposing a disciplinary sanction. A lawyer's refusal is, however, a factor to be considered by disciplinary counsel in determining whether to resume the disciplinary proceeding. Disciplinary counsel may decide to do so even if the original complaint alleged only minor incompetence or minor neglect. Such conduct does, in fact, violate the rules of professional responsibility. *See* MRPC, Rule 1.1, 1.3. Disciplinary counsel of course should retain the discretion to dismiss complaints.

The Commission has not attempted to define minor misconduct. The ABA Standards for Imposing Lawyer Sanctions provide guidelines that are useful to the state's highest court for making distinctions between minor and serious misconduct. The Florida Supreme Court has defined minor misconduct:

(1) Criteria. In the absence of unusual circumstances misconduct shall not be regarded as minor if any of the following conditions exist:
a. The misconduct involves misappropriation of a client's funds or property.
b. The misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights or valuable property rights) to a client or other person.
c. The respondent has been publicly disciplined in the past three (3) years.
d. The misconduct involved is of the same nature as misconduct for which the respondent has been disciplined in the past five (5) years.
e. The misconduct includes dishonesty, misrepresentation, deceit, or fraud on the part of the respondent.
f. The misconduct constitutes the commission of a felony under applicable law.

F.S. Bar Rule 3-5.1

Recommendation 10
Expedited Procedures for Minor Misconduct

All jurisdictions should adopt simplified, expedited procedures to adjudicate cases in which the alleged misconduct warrants less than suspension or disbarment or other restriction on the right to practice. Expedited procedures should provide:

10.1 The Court shall define minor violations of the rules of professional conduct that shall subject the respondent to sanctions not constituting restrictions on the right to practice law, consistent with the ABA Standards for Imposing Lawyer Sanctions.

10.2 A hearing shall be held by a single adjudicator [member of a hearing committee].

10.3 The adjudicator shall make concise, written findings of fact and conclusions of law and shall either dismiss the case or impose a sanction that does not constitute a restriction on the respondent's right to practice.

10.4 Respondent and disciplinary counsel shall have the right to appeal the decision to a second adjudicator [member of the statewide disciplinary board], who shall either adopt the decision below or make written findings. The appellate adjudicator shall either dismiss the case or impose a sanction that does not constitute a restriction on the respondent's right to practice.

10.5 The decision of the appellate adjudicator may be reviewed at the discretion of the Court upon application by respondent or disciplinary counsel. The Court shall grant review only in cases involving significant issues of law or upon a showing that the decision below constituted an abuse of discretion. The Court shall either adopt the decision below or make written findings. The Court shall either dismiss the case or impose a sanction that does not constitute a restriction on the respondent's right to practice.

10.6 Upon final disposition of the case, the written findings of the final adjudicator shall be published in an appropriate journal or reporter and a copy shall be mailed to the respondent and the complainant and to the ABA National Discipline Data Bank.

Comments

A discipline case can sometimes take years from the time an initial complaint is made to the disciplinary agency until a dismissal, reprimand, suspension, or disbarment is imposed. To a great extent, these delays can be attributed to procedural rules designed to provide due process to the respondent. In many disciplinary matters, however, fairness can be achieved by simpler, quicker procedures. The expense and delay of full proceedings are incurred unnecessarily. They reduce the time and resources available for other cases.

There are two situations where the Commission believes appropriate due process does not require elaborate procedures that result in delay. The first is where the misconduct alleged would not warrant disbarment or suspension or other restriction on the lawyer's right to practice. The second is where the respondent lawyer is willing to stipulate to the allegations and consent to a sanction agreed upon by the respondent, disciplinary counsel, and adjudicator.

Few states have simplified or expedited procedures for cases involving allegations of minor misconduct.[15] Neither the ABA Model Rules of Professional Conduct nor the rules of most jurisdictions distinguish between minor and serious ethical violations. The ABA Standards for Imposing Lawyer Sanctions do make these distinctions as do the rules of a few states. The Standards have been cited and applied in over two hundred and seventy cases by courts in over two-thirds of the states in determining what sanctions to impose. They have not yet been utilized as a basis for distinguishing between minor and serious violations at the charging stage in order to divert minor cases to a simplified hearing process.

As we note elsewhere in this report, many disciplinary agencies are under-funded and understaffed. The use of full formal proceedings in consent and minor misconduct cases wastes resources, delays cases, and creates backlogs. Respondents and the profession bear unnecessary financial costs. Delays in pending disciplinary actions create unnecessary stress for respondents and complainants. Backlogs and large case loads also create stress for disciplinary officials and lead to loss of skilled counsel and adjudicators.

Lawyer discipline actions are in fact licensing proceedings. Due process accorded to respondent lawyers should be commensurate with the rights and privileges under review. Where the alleged mis-conduct would not warrant a sanction restricting the lawyer's right to practice, there is no justification for more elaborate procedures. The recommended expedited procedures preserve the rights to notice and hearing, to present evidence and confront witnesses, and to seek review.

At first, a respondent facing a possible reprimand or probation might think that full formal hearing and appeal procedures would provide more protection to his or her professional reputation. A more realistic assessment will show that the recommended expedited procedures are fair and equitable and offer sufficient protection, while full formal procedures are burdensome emotionally and financially compared to the rights at stake.

The Commission intends the phrase "sanctions not constituting restrictions on the right to practice law" to include referral of the respondent to the lawyer practice assistance committee, substance abuse counseling, or other component agencies of the expanded regulatory system. *See* Recommendation 3.

Legislative History of Recommendation 10

The Commission's original recommendation included as Recommendation 10.2:

10.2 Disciplinary counsel shall determine upon investigation whether probable cause exists to file charges alleging a minor violation of the rules of professional conduct and, if so, shall file charges with the Court.

During the debate on Recommendation 10, an amendment was proposed to delete the words "probable cause exists" from 10.2. Another amendment was proposed to insert the words "to determine probable cause" at the end of 10.3. Both amendments failed, but the Commission agreed to withdraw 10.2. This action was consistent with the Commission's action in withdrawing its original 6.1(b) concerning prosecutorial independence. *See* discussion under **Legislative History of Recommendation 6.**

Recommendation 11
Disposition of Cases by a Hearing Committee, the Board or Court

The statewide disciplinary board should not review a determination of the hearing committee except upon a request for review by the disciplinary counsel or respondent or upon the vote of a majority of the Board. The Court should not review a matter except: (a) within its discretion upon a request for review of the determination of the Board by the disciplinary counsel or respondent; or (b) upon the vote of a majority of the Court to review a determination of the hearing committee or Board. Except in unusual cases requiring a de novo hearing by the Court, the Court should exercise its jurisdiction in the capacity of appellate review. The Court should issue and publish full written opinions in all disciplinary cases. In any matter finally determined by a hearing committee or the Board, the Court should by per curiam order adopt and publish the findings and conclusions contained in the written report of the committee or Board.

Comments

The Commission recommends a modification of MRLDE 11 to provide that, unless someone appeals the decision of the hearing committee or the Board or unless the Board or Court affirmatively decide to review a matter, cases should be disposed at the earliest possible stage. Of course, the Court must retain ultimate responsibility for all disciplinary matters and, thus, must reserve the right to review any matter or even hold a *de novo* hearing if it so determines. The Commission believes this should occur only in extraordinary cases involving significant questions of law. In all other cases, the Court should rely on its disciplinary counsel, the hearing committee, and the Board to dispose of matters in accordance with established disciplinary law. This will both speed up the process and reduce the burden on the Court.

Recommendation 12
Interim Suspension for Threat of Harm

The immediate interim suspension of a lawyer should be ordered upon a finding that a lawyer poses a substantial threat of serious harm to the public.

Comments

The use of the phrase "irreparable harm" in Model Rule 20A seriously limits the ability of the Court to temporarily suspend respondents who pose a serious threat of harm to clients and the public. The phrase has a definite meaning in civil law regarding the issuance of temporary restraining orders and injunctions. It is not appropriate for disciplinary cases. *See Houston Federation of Teachers, Local 2415 v. Houston Independent School Dist*., 730 S.W.2d 644 (1987) (irreparable harm means that an award of damages months later will not provide adequate compensation); *Three County Services, Inc. v. Philadelphia Inquirer*, 337 Pa.Super. 241, 486 A.2d 997 (1985) in which the court stated:

We note in this regard that the "irreparable harm" alleged by appellee is solely monetary. Ordinarily, since such a loss is fully compensable in a later action for damages, the equitable remedy of a preliminary injunction is not appropriate; it is only where a threatened monetary loss is of such a magnitude as to render an action for damages inadequate as a remedy, as where the loss threatens the existence of a business, that a preliminary injunction may be appropriate. Where, however, the irreparable harm claimed is not solely monetary, and therefore not subsequently fully compensable in damages, the plaintiff need not prove a threat to the existence of his business, but simply that the damage remedy is not adequate.

337 Pa.Super. 241 at 251, 486 A.2d 997 at 1002

In disciplinary cases, the most common situation in which disciplinary counsel seeks interim suspension is where a respondent is stealing clients' money, i.e., damages which *can* be compensated by money. The reasoning and standard applicable to preliminary injunctions is clearly inappropriate to lawyer discipline cases. The standard of "substantial threat of serious harm" is more appropriate to the interests being protected.

Implementing Existing ABA Policy to Expedite the Disciplinary Process

One cause of delay in states that have not adopted the MRLDE is inefficient and outmoded procedures. The MRLDE have been demonstrated to be an effective, efficient set of procedures in those jurisdictions that have adopted their provisions.

The Commission considers the following provisions of the MRLDE and procedures recommended by the ABA Standing Committee on Professional Discipline to be essential to reducing delay in disciplinary proceedings. The highest court in each jurisdiction should adopt rules consistent with the following provisions:

- **Elimination of multiple stages of proceedings**

The disciplinary process should consist of no more than one fact-finding hearing, one intermediate appellate review, and one review by the Court, consistent with MRLDE 11D, E, F and Recommendation.

- **Fixed alternating meeting dates and fixed membership for hearing committees**

Hearing committees should be scheduled to meet periodically rather than *ad hoc*. In jurisdictions with more than one hearing committee, committees should sit in rotation. Members and alternate members should be permanently assigned to committees, rather than *ad hoc.*

- **Disciplinary action with civil or criminal cases pending**

A disciplinary case should not be suspended or delayed because of a pending civil or criminal case involving the same facts except upon a determination by the state disciplinary board that good cause exists to do so, consistent with MRLDE 18G.

- **Service by mail**

Service of the disciplinary charges upon respondent should be sufficient if made by registered or certified mail to the address registered by respondent with the Court, consistent with MRLDE 13A.

- **Discovery**

Respondent and disciplinary counsel should have the right to take depositions and to conduct limited discovery, consistent with MRLDE 15.

- **Interim suspension for conviction of a crime**

The Court should order the immediate interim suspension of a lawyer convicted of a serious crime, consistent with MRLDE 19D.

- **Expedited reciprocal discipline**

The Court should impose a disciplinary sanction upon a respondent lawyer based solely upon a certified copy of a disciplinary order from another jurisdiction, unless it clearly appears upon the face of the record of the other jurisdiction's proceeding that: (1) it deprived respondent of due process; or (2) there was a clear infirmity of proof; or (3) imposition of the same sanction would result in grave injustice; or (4) the misconduct warrants a substantially different sanction, consistent with MRLDE 22.

- **Duty to cooperate with discipline investigation**

It should be a ground for discipline for a lawyer to knowingly fail to respond to a lawful demand from a disciplinary authority, consistent with MRLDE 9(c).

- **Recommendation of sanction**

In jurisdictions where the hearing committee does not impose a sanction, the report of the hearing committee should contain a recommendation of the appropriate sanction when misconduct is found to have been committed.

- **Automatic reinstatement of lawyers suspended for six months or less**

A lawyer who has been suspended for six months or less should be reinstated at the end of the period by filing an affidavit stating that he or she has fully complied with the requirements of the suspension order and has paid any required fees and costs, consistent with MRLDE 24.

- **Discipline by consent**

The Court should adopt procedures to expedite disposition of cases in which the respondent stipulates to allegations and consents to discipline, consistent with ABA MRLDE 21.

- **Resignation in lieu of discipline**

The Court should adopt rules requiring a lawyer who wishes to resign during an ongoing disciplinary investigation or in lieu of a disciplinary proceeding to admit in writing to the charges, consistent with ABA MRLDE 21A.

Implementing Existing ABA Policy to Facilitate the Disciplinary Process

The following provisions of the MRLDE are essential to the disciplinary system's ability to detect and adjudicate lawyer misconduct. A significant minority of jurisdictions have not adopted or effectively implemented these rules.

- **Duty to report misconduct**

All jurisdictions, law schools and the American Bar Association should institute educational programs to encourage the reporting of misconduct consistent with Model Rule of Professional Conduct 8.3 and the Code of Judicial Conduct, Canon 3D(2). Such programs should emphasize: (a) the professional duty to report misconduct, (b) disciplinary case law regarding the failure to report misconduct; and (c) the potential for increased harm to clients, the public, the courts, and the profession caused by a failure to report professional misconduct.

Comments

Model Rule of Professional Conduct 8.3 requires lawyers to report violations of the rules that raise a substantial question as to a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. The Code of Judicial Conduct, Canon 3D(2) requires a judge to do the same. Almost all jurisdictions have adopted some version of these rules or their predecessors. Despite this rule, the National Organization of Bar Counsel informed the Commission that judges and lawyers comprise a very small percentage of all complainants. The enforcement of this rule is rare.

The public's perception that lawyers "protect their own" is unfortunately accurate in the narrow sense that most lawyers are uncomfortable reporting the misconduct of another unless it directly affects the first lawyer or his or her client. In fairness to the profession it must be said that, while lawyers do not frequently report other lawyers, the same is true of people in general. Our society does not encourage such activity, as the pejorative labels "snitching" and "ratting" demonstrate. In our culture the informer is considered a despicable character.

The requirement to report misconduct cuts against the grain. This must be recognized and considered in any program to foster compliance with the rule. However, much of what lawyers do in society cuts against basic instincts, e.g., defending unpopular clients. The failure of lawyers to report the misconduct of other lawyers can result in increased harm to clients, the justice system, and the profession. In cases involving lawyers who abuse drugs or alcohol, the failure to report their misconduct increases the harm those lawyers do to themselves.

It is a lawyer's duty to report misconduct. The profession should educate itself to comply with this duty. For several years, the ABA Standing Committee on Professional Discipline has presented an educational program to judicial organizations on the need to report lawyer misconduct. The program has been successful in changing the attitudes of many judges. These educational efforts need to be conducted at all levels nationally, statewide, and locally, as well as in law schools.

Disciplinary agencies should also in appropriate cases actively enforce the requirement to report misconduct. This will demonstrate to the profession the seriousness of failing to report misconduct. The Commission believes that the creation of other means of resolving lawyer-client disputes and the creation of alternative programs, such as those for substance abuse recovery, will reduce the profession's reluctance to report

misconduct. The Commission urges the ABA Standing Committee on Professional Discipline and the Center for Professional Responsibility to continue to place special emphasis on educating the bar and bench on the duty to report misconduct.

- **Informing the public**

The Court should allocate adequate resources and adopt rules so that the public is adequately informed about access to the discipline system and sanctions imposed against lawyers. The Court and disciplinary agency should:

a) publish a brochure explaining the disciplinary process and how a complaint may be filed and distribute it to law firms, court houses, libraries, bar associations, social service agencies, and other organizations likely to provide information to potential complainants;
b) install an 800 number or dedicated phone line in the central intake office (*see* Recommendation 3.2) for the receipt of complaints against lawyers and advertise the number in the "yellow pages" business telephone directory;
c) publish an annual report of operations of the disciplinary agency and distribute the report to bar associations, the media, and other interested organizations;
d) publish media releases on all disciplinary cases and publish summaries in the state bar journal, consistent with MRLDE 2G(9).

Comments

The Commission found that many disciplinary agencies have made great strides in informing the public about their operations, about how to contact them to report allegations of lawyer misconduct, and about lawyers who have been disciplined. However, despite these efforts in many jurisdictions and because of a lack of effort in other jurisdictions, the Commission received testimony from many witnesses to the effect that it was difficult to discover how and where to file a complaint.

The Standing Committee on Professional Discipline recently conducted a survey of the efforts of disciplinary agencies to inform the public. The survey revealed that many states were making extensive efforts, as the Commission recommends, to assure that complainants receive information about how to file complaints and to inform the bar and public about disciplinary agency operations. The Commission emphasizes that these efforts are not frills. They are essential to demonstrate the profession's commitment to protecting the public. They facilitate persons with valid complaints contacting the disciplinary agency. The Commission views publicizing the agency's operations as a fundamental component of the effort to detect lawyer misconduct. Literature and public appearances should stress the efforts the state's highest court and legal profession make to investigate and adjudicate complaints, as well as give a clear explanation of the disciplinary process.

- **Jurisdiction over all lawyers practicing in the state**

The Court should adopt rules giving the Court jurisdiction over all lawyers practicing law within the jurisdiction, consistent with MRLDE 6A.

Comments

Thirty-three jurisdictions have no rule granting disciplinary jurisdiction over lawyers licensed elsewhere and practicing law in the jurisdiction, such as federal government lawyers and corporate in-house counsel. This presents a significant gap in the ability to enforce the rules of professional conduct. It is burdensome for the in-house lawyer's licensing jurisdiction to conduct an investigation of alleged misconduct when evidence and witnesses are outside the licensing jurisdiction. A further problem is presented by the issue of whether a state court may impose discipline on a federal government lawyer.

The Commission believes it is essential that every state's highest court assert disciplinary jurisdiction over all lawyers practicing law within its borders, regardless of whether the lawyers are admitted to practice in the jurisdiction.

The Commission notes that, in this instance, the distinction between self-regulation, i.e., by the governing body of a bar association, and judicial regulation of the profession is especially useful. It is clear that the highest court of the state can assert its inherent power to regulate a foreign lawyer practicing within its borders. The disciplinary authority of a bar association over a lawyer not licensed in the jurisdiction is much less certain.

- **Granting witnesses immunity from criminal prosecution**

The Court should adopt a rule providing a mechanism for the granting of immunity from criminal prosecution to witnesses in lawyer discipline cases, consistent with ABA MRLDE 12B.

Comments

Many states lack a rule authorizing disciplinary counsel to seek a grant of criminal immunity to witnesses in disciplinary cases. This results in an inability to effectively discipline certain types of lawyer misconduct such as insurance fraud. In these cases, witnesses have participated with the lawyer in criminal activity and will be unwilling to testify against the lawyer without immunity.

IMPROVING THE QUALITY OF DECISIONS

Implementing Existing ABA Policy

The Commission has identified several problems that result in inconsistent application of the rules of professional conduct within jurisdictions and that reduce the quality of adjudication. Workable solutions for these problems exist in the MRLDE.

- **Nonlawyer, minority and solo practitioner adjudicators**

The Court should balance its appointments of disciplinary adjudicators to ensure appropriate representation of all segments of the public and the profession. At least one third [or a higher proportion][16] of all adjudicators should be nonlawyers. An appropriate representative number of adjudicators should be minority members, women and solo or small firm practitioners.

The American Bar Association should establish a program to encourage and assist the appointment of minority, women, and solo and small firm practitioners as disciplinary adjudicators.

Comments

Over two thirds of the states have nonlawyer members sitting with lawyers to adjudicate disciplinary cases. The opinion of disciplinary counsel, lawyer members, and the courts of those states is that nonlawyers are a great benefit to the process. The presence of nonlawyers serves to assure the public that the disciplinary process is not a "whitewash." Nonlawyers bring a perspective that adds depth and breadth to the adjudication.

The appointment of nonlawyers as disciplinary adjudicators has been the policy of the American Bar Association for twenty years. The Commission cannot emphasize too strongly the immediate need for those states that do not appoint nonlawyers to reform their rules to do so. The lack of nonlawyer adjudicators creates distrust among the public and provides a target for critics of judicial regulation of lawyers. The Commission also encourages jurisdictions to consider appointing nonlawyer members in numbers larger than one third of the membership as at least one jurisdiction, Minnesota, has done. The Commission finds no compelling reason why nonlawyer members should be relegated to permanent minority status.

Nonlawyer members (and lawyer members) require training about the disciplinary process and education regarding the rules of professional conduct. This should take the form of orientation seminars, ongoing training in disciplinary procedures and case law, and reference manuals created by disciplinary counsel or the board. On technical points of procedure and law arising during hearings and deliberations lawyer members are able to advise nonlawyer members.

Failing to include nonlawyer members increases suspicion that the profession is protecting its own. It denies the Court, the public, and the profession depth and quality in the adjudicative process. The combination of secrecy in disciplinary proceedings and the failure to include nonlawyers in the system results in public cynicism about lawyer discipline.

Similarly, failing to include women, minority, and solo or small firm practitioners in the adjudicative process creates suspicion that it is biased. It is true that lawyers from larger firms often are more able to volunteer their time to the disciplinary agency. The highest court in each jurisdiction should therefore affirmatively seek out qualified members of

the public and minority, women, and solo or small firm practitioners who would be willing to serve.

To assure itself that disciplinary appointments are balanced, the Court should maintain data on the number of women, minority, and solo or small firm practitioners currently serving. It should set specific goals to achieve and maintain adequate representation of these segments of the public and profession among appointees.

- **Eliminating local discipline components**

All jurisdictions should restructure their disciplinary systems to eliminate local components. All stages of disciplinary proceedings, including intake and screening of complaints, investigation, prosecution, hearing, and appeal should be conducted on a statewide or regional basis under the jurisdiction of a statewide disciplinary official or body, consistent with MRLDE 1, 3E(1), and 4B(1),(2),(3).

Comments

Despite the fact that eliminating local disciplinary enforcement was a major recommendation of the Clark Report, at least twelve jurisdictions still have significant local components in their disciplinary systems. Local components, such as local bar investigative committees, foster cronyism as well as prejudice against unpopular respondents. Local components result in a lack of uniformity in procedures and in the application of the rules of professional conduct. Local components promote delay in the handling of disciplinary cases.

While the distinction between a regional and a local body is sometimes unclear, regional bodies: (1) have uniform rules of procedure, (2) lack discretion to vary their procedures, (3) are directly supervised by a statewide authority, (4) can easily transfer cases among themselves; and (5) have a large enough jurisdiction so that respondents are not routinely known personally by adjudicators.

- **Written opinions**

The Court should write and publish opinions in all disciplinary cases it decides, setting forth the facts of the case, the applicable rules of professional conduct, the reasons for the decision, and the reasons for imposition of the particular discipline if misconduct is found to have occurred. The Court should adopt a rule requiring written reports with the same requirements from the hearing committee and disciplinary board to be published in those cases disposed of before reaching the Court.

The Court should promptly file all written opinions with the ABA National Discipline Data Bank.

Comments

The failure of courts, state discipline boards, and hearing committees to publish opinions results in a lack of precedent to guide the bar and in a failure of disciplinary law to develop. The need for written opinions was a major point of the Clark Report and has been an emphasis of the ABA Standing Committee on Professional Discipline, yet at least twenty-four jurisdictions do not publish opinions in all discipline cases.

Even in those cases that are published, the adjudicators often fail to specify the reasoning behind the imposition of the particular disciplinary sanction. The lack of articulated reasons for imposing particular sanctions results in a lack of guidance to the bar and a lack of consistency in sanctioning misconduct.

- **Standards for Imposing Lawyer Sanctions**

The highest court in each jurisdiction should adopt guidelines for imposing disciplinary sanctions to promote equity and consistency in the disciplinary process, consistent with or similar in concept to the ABA Standards for Imposing Lawyer Sanctions (as modified by recommendation eliminating private sanctions).

Comments

The ABA Standards for Imposing Lawyer Sanctions provide an analytical framework for determining the appropriate disciplinary sanction based on the facts of the individual case. The Standards have been cited in over two hundred and seventy discipline decisions, in both majority and dissenting opinions, by the highest courts in over two-thirds of all jurisdictions. They provide both flexibility and consistency in relating the facts of a case to sound disciplinary policy. Even when the state's highest court disagrees with the level of sanction recommended in the Standards, use of the Standards to analyze a case promotes full consideration of all relevant facts.

Six states have rules or case law that deny readmission to disbarred lawyers in specified circumstances. The Commission strongly believes in the concept of rehabilitation, that lawyers who have committed serious misconduct can reform and should be eligible for reinstatement or readmission. A minority of members of the Commission also believe, however, that some ethical violations are so serious that subsequent rehabilitation is irrelevant, and that respondent's misconduct warrants permanent disbarment.

PROVIDING ADEQUATE RESOURCES

The first recommendation of the Clark Committee concerned the need for increased funding and staffing of disciplinary agencies. In the subsequent twenty years, the profession has responded admirably, funding increases in professional and support staff and in physical facilities costing millions of dollars annually.[17] The public is generally unaware of the tremendous improvements in lawyer regulation and the fact that in most states these improvements were made without cost to the taxpayer. The profession can take pride in these accomplishments.

In the past twenty years, however, the profession has grown, more than doubling the number of practicing lawyers in the country. Disciplinary enforcement has been a victim of this growth. In many jurisdictions funding of the agency has not kept pace with the increase in disciplinary complaints and formal charges. It is clear that funding and staffing must be increased in many jurisdictions.

A major problem in providing adequate funding is the lack of standards to assess the need for more staff and other resources. Without standards, neither disciplinary counsel, the board, nor the Court may realize that current funding and staffing levels are insufficient until a crisis develops.

The need for standards in this area is critical. Standards are fundamental to proper agency management. For several years, the National Organization of Bar Counsel has surveyed disciplinary counsel on salaries. The ABA Center for Professional Responsibility has surveyed disciplinary agencies on staffing and case load levels. These efforts should be continued and developed into workable guidelines for disciplinary agencies to assess present and predict future needs for resources.

Recommendation 13
Funding and Staffing

The Court should insure that adequate funding and staffing are provided for the disciplinary agency so that: (a) disciplinary cases are screened, investigated, prosecuted and adjudicated promptly; (b) the work load per staff person permits careful and thorough performance of duties; (c) professional and support staff are compensated at a level sufficient to attract and retain competent personnel; (d) sufficient office and data processing equipment exist to efficiently and quickly process the work load and manage the agency; (e) adequate office space exists to provide a productive working environment; and (f) staff and volunteers are adequately trained in disciplinary law and procedure.

The Court should insure that adequate funding and staffing are provided for client protection funds, mandatory fee arbitration, voluntary arbitration, mediation, lawyer practice assistance, lawyer substance abuse counseling, and all other programs of the expanded regulatory system proposed under Recommendation 3.

Comments

In New York, where lawyer registration fees were only one hundred dollars bi-annually, the Commission was told that lack of funding resulted in the inability of the disciplinary agency to investigate even the most serious misconduct in a reasonable time. Both funding of the disciplinary agency and lawyer registration fees in that state are controlled by the legislature. It has since raised the registration fee but allocated the increase to the general fund rather than to the agency.

Disciplinary actions, from the complainant's initial contact with the agency to final imposition of a sanction, sometimes take years. Backlogs in disciplinary cases have reached crisis proportions in some jurisdictions before the bar association or Court finally committed the resources to reduce them. Often these were temporary, stopgap measures rather than permanent increases in staff. While it is true that much delay is attributable to inefficient and unnecessary procedures, the most efficient procedures cannot compensate for inadequate staffing, office space, and equipment.

If regulation of the profession is to remain within the province of the judicial branch, the Court must act to insure that adequate funding is available. Adequate funding insures prompt and thorough handling of allegations of misconduct. It permits the agency to hire competent and retain experienced staff. The Commission recognizes that these and other recommendations in this report are going to be expensive. The Commission is unanimous in its conviction that adequate funding of the disciplinary agency should be provided even if it requires a substantial increase in the annual assessment on lawyers.

In some jurisdictions, statutory provisions vest ultimate authority and control over disciplinary agency budgets with the legislature. The Commission believes that, within state constitutional constraints, the highest court should assert its inherent power to regulate the profession to assure adequate funding of the disciplinary system. Lawyer discipline should be funded by fees levied by the highest court in the jurisdiction on licensed lawyers. Funds collected by this levy and disbursements made for lawyer discipline should be controlled exclusively by the highest court in the jurisdiction.

Recommendation 14
Standards for Resources

14.1 Each jurisdiction should keep case load and time statistics to assist in determining the need for additional staff and resources. Case load and time statistics should include, at the minimum:
(a) time records for all counsel and investigators, tracked by case or other task including time spent on non-disciplinary functions;
(b) the number of pending cases at each stage in the disciplinary process for each counsel and for the whole agency;
(c) the number of new cases assigned to each counsel during the year and the total for the agency;
(d) the number of cases carried over from the prior year for each counsel and the total for the agency;
(e) the number of cases closed by each counsel during the year and the total for the agency;
(f) the number of cases of special difficulty or complexity at each stage in the proceedings; and
(g) the ratio of staff turnover.

14.2 The American Bar Association, National Organization of Bar Counsel, and disciplinary agencies in each jurisdiction should cooperate to develop standards for:

(a) staffing levels and case load per professional and support staff member; (b) case processing time at all stages of disciplinary proceedings; and (c) compensation of professional and support staff.

Comments

Time standards for case processing should not be jurisdictional. Lawyers who commit misconduct should not escape discipline because the agency is slow in processing the case. Many states' rules and ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 32 provide that disciplinary proceedings are exempt from statutes of limitations. However, delay in bringing a disciplinary case may result in respondent being unable to present a defense. If so, and if the delay is not attributable to respondent, it denies respondent due process and should constitute a bar to discipline.

Time standards and case load standards are needed, however, for all stages of the proceedings, and should be sophisticated enough to account for differences in difficulty and complexity among cases.

Effective management requires not only realistic standards but also adequate record keeping so that performance can be measured against the standards. In even the smallest disciplinary office this will require the use of at least one personal computer or more to track data such as: (1) elapsed time at each stage of a case; (2) staff hours spent at each stage of each case; (3) case load per counsel at each stage of the process; and (4) all of the foregoing further categorized by complexity of the case and other relevant criteria.

Recommendation 15
Field Investigations

Disciplinary counsel should have sufficient staff and resources to: (1) fully investigate complaints by such means as sending investigators into the field to interview witnesses and examine records and evidence; and (2) regularly monitor sources of public information such as news reports and court decisions likely to contain information about lawyer misconduct.

Comments

Evaluations of lawyer disciplinary systems by the ABA Standing Committee on Professional Discipline and discussions with disciplinary counsel reveal that many jurisdictions either lack the resources or simply fail to appreciate the need for field investigations and proactive research. Without investigators and a travel budget for them, disciplinary counsel are forced to rely mostly on written documents. Complainants and witnesses must sacrifice their time and money to travel to disciplinary counsel's office to be interviewed. In many cases, an adequate and thorough investigation cannot be performed without field work. The failure to provide sufficient resources results in inappropriate dismissal of cases, delay, and unfair burdens on complainants, witnesses, and respondents.

Proactive research includes actively monitoring such sources of information about possible lawyer misconduct as media stories and court decisions. Without the staff resources to monitor this information, lawyer misconduct that is public knowledge may escape disciplinary counsel's attention.

As with other recommendations made in this report, providing adequate investigative resources will cost money. Each jurisdiction's highest court should consult with disciplinary counsel to determine the cost of providing adequate investigative capability and should provide the funds to do so. Neither the judiciary nor the profession can afford to continue conducting investigations by "shuffling paper" in cases that require field investigation.

PREVENTION

The Commission has identified several areas where disciplinary complaints and harm to clients could be greatly reduced by procedures that have demonstrated their effectiveness. The disciplinary system must not only detect and sanction misconduct, it should deter harm to the public.

Recommendation 16
Random Audit of Trust Accounts

The Court should adopt a rule providing that lawyer trust accounts selected at random may be audited without having grounds to believe misconduct has occurred and also providing appropriate procedural safeguards.

Comments

In 1989, client protection funds in twenty-eight jurisdictions received claims for reimbursement of stolen money totaling almost $72 million.[18] "Robbing Peter to pay Paul" is a common pattern of lawyer theft. The first trust money stolen is repaid by trust money subsequently received from other clients. As the pattern continues, the dollar amount stolen usually increases. The lawyer continues to steal in addition to kiting the amounts previously stolen.

Most jurisdictions have rules requiring lawyers to maintain separate trust accounts and rules authorizing trust account audits. However, most jurisdictions require the disciplinary counsel to show cause to believe misconduct has occurred before conducting an audit. Clients who become aware that their funds have been stolen are often unwilling to report the misconduct because they are negotiating with the lawyer to retrieve their money. A common condition of such settlements is that the client will not report the misconduct. The lawyer then steals from another client to pay the settlement. Since the lawyer's trust account is not subject to audit without a complaint being made, the thefts continue and the amount stolen grows.

Trust account overdraft notification, record keeping and random audit rules have been enacted in a sufficient number of states for a sufficient time to judge their efficacy and any problems they might cause practitioners.[19]

In states that have used them, these measures have proven effective to deter and detect the theft of funds even before clients file complaints. Rather than being a regulatory burden on honest practitioners, these requirements have instead provided useful guidance on proper accounting procedures. As the former Attorney General of New Jersey stated about that state's random audit, trust account overdraft, and record keeping rules:

[A]udits are always scheduled at least ten days in advance so as not to disrupt the attorney's office or works schedule. No one loses by this professional and common courtesy. Experience "indicates that announced audits do not interfere with the auditor's ability to detect either record keeping deficiencies or trust violations where they exist . . . ."

Significantly, perhaps surprisingly, although the program initially was greeted with great suspicion, after six years officials of the state courts and the New Jersey Bar Association are giving it high marks . . . it has educated the legal profession about how to keep proper financial records . . . . Equally as important . . . the program deters improper financial activity among lawyers, catches those who are breaking the rules or stealing client money and helps maintain public faith in the profession [citation omitted].

According to the National Law Journal [citation omitted], several bar associations "around the country are so impressed with the prowess of New Jersey's 7-year old program they are considering creating their own."

. . . . .

During the first two years of the Program . . . 96.1 percent [of trust account overdraft notices] were satisfactorily explained. Only 3.9 percent required audits . . . . Within the first 22 months, four attorneys were disbarred and one legal secretary had been criminally prosecuted as a direct result of the Program.

Two significant conclusions emerge. First, the Program has "proven its effectiveness as a disciplinary tool for the early detection of misappropriation and other serious financial violations [citation omitted]." Second, and precisely because the Program has detected at least some attorneys stealing, [the conclusion can be drawn that] the "overwhelming majority . . . faithfully and consistently discharge their financial duties [citation omitted]."

Zazzali, *Disciplining Attorneys: The New Jersey Experience*,
1 GEO. J. L. ETHICS 659 at 684 (1988).

Despite this positive track record, most jurisdictions have not adopted random audit and trust account overdraft notification procedures. Some jurisdictions have considered them

and declined to adopt them. However, arguments originally advanced against these provisions have been discredited by the experience of states that have adopted the measures. In almost all cases of overdraft (e.g., 96.1 percent in New Jersey), there is no intent to steal and only a technical violation of the rules. No disciplinary action is initiated. Random audits of lawyer trust accounts function to assist lawyers to improve office management while detecting lawyer thefts.

Legislative History of Recommendation 16

The original recommendation of the Commission read:

The Court shall adopt a rule providing that disciplinary counsel may audit lawyer trust accounts selected at random without having ground to believe misconduct has occurred.

The Commission accepted an amendment proposed by the Section of General Practice to add the words "and also providing appropriate procedural safeguards" to the end of the Recommendation. The Cuyahoga County Bar Association proposed an amendment to delete the word "Random" from the title of the Recommendation; to delete the words "selected at random without having grounds to believe misconduct has occurred"; and to add the words "providing appropriate procedural safeguards, including the protection of client confidences, and only upon a finding of probable cause" to the end of the Recommendation. This amendment was not approved by the House of Delegates. A delegate from the Philadelphia Bar Association proposed an amendment to provide that lawyer trust accounts require clients to co-sign all accounts, but this amendment was not approved by the House of Delegates. The Commission accepted a friendly amendment to delete the words "disciplinary counsel may audit" and to insert the words "may be audited" after "selected at random."

Implementing Existing ABA Policy

- **Trust account overdraft notification and recordkeeping**

The highest court of each jurisdiction should adopt rules to deter and detect lawyer misappropriation of client funds, including:

a) a mandatory trust account rule for lawyers whose practice does or may require the custody of client funds, consistent with ABA Model Rules for Lawyer Disciplinary Enforcement (hereafter MRLDE) 29A(1);
b) a mandatory minimum financial record keeping rule, consistent with ABA MRLDE 29A(2); and
c) a mandatory trust account overdraft notification rule, consistent with ABA MRLDE 29B

- **Trustee for client files**

The highest court in each jurisdiction should adopt a rule to provide for the appointment of a trustee lawyer to protect clients' interests when a lawyer is disabled, disappears or dies, or is suspended or disbarred, consistent with ABA MRLDE 28.

Comments

Another problem in protecting the public occurs when a lawyer becomes disabled, is suspended or disbarred, or dies or disappears and no one can assume responsibility for the lawyer's clients. The majority of states have adopted rules providing for the appointment by the Court of a trustee when the lawyer is unable or unavailable to dispose of the lawyer's cases. The trustee inventories the files and assists clients in finding another lawyer. However, almost one- third of the states have no formal procedures for the orderly disposition of lawyers' cases in these situations.

Recommendation 17
Burden of Proof in Arbitration of Fee Disputes

The court should adopt a rule for fee arbitration proceedings to provide that, except where the fee agreement otherwise has been established in a continuing relationship, if there is no written agreement between the lawyer and the client, the lawyer shall bear the burden of proof of all facts, and the lawyer shall be entitled to no more than the reasonable value of services for the work completed or, if the failure to complete the work was caused by the client, for the work performed.

Comments

The Commission does not believe that the failure to produce a written fee agreement should be the basis for discipline except in contingent fee cases or where otherwise required by the rules of professional conduct. While the failure to communicate the basis for the fee is unethical because of the potential harm to the client (*see* Model Rules of Professional Conduct, Rule 1.5), the failure to put it in writing is merely sloppy practice. We believe the consequences of failing to produce a written fee agreement should occur in fee dispute resolution. *See* Recommendation (c).

Model Rule of Professional Conduct 1.5 provides:

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) . . . A contingent fee agreement shall be in writing. . . .

The preamble to the Model Rules of Professional Conduct states, "The Rules are designed . . . to provide a structure for regulating conduct through disciplinary agencies." However, the use of the word "preferably" in Rule 1.5 (b) removes any *requirement* that a fee agreement must be in writing, except for contingent fee agreements covered by Rule

1.5 (c). Therefore, the failure to provide a written fee agreement is not a violation of the Rules. However, it might be considered relevant where there is other misconduct.

In its *Recommendations to the American Bar Association Commission on Evaluation of Disciplinary Enforcement*, September 1990, the National Organization of Bar Counsel states:

There are certain chronic, nagging problems between lawyers and clients which are susceptible to straightforward solutions.

A disproportionate number of complaints arise out of disputes between lawyers and clients over fees and files. These problems likely are not disciplinary matters or in any event do not result in much disciplinary action. They nonetheless contribute greatly to consumer dissatisfaction with the legal profession, a dissatisfaction which (at least as to these issues) could largely be avoided or at least minimized with certain simple changes to the disciplinary rules.

The Commission agrees that a written fee agreement, especially in contingent fee and domestic relations cases and with all new clients, is important. It will help reduce misunderstandings and thus reduce potential disputes between lawyer and client. It will improve relations between them by clarifying in advance the basis for the fee. When a dispute develops, a written fee agreement will help resolve it. In short, written fee agreements benefit both the lawyer and the client. The recommendation provides an exception for those lawyer-client relationships in which the fee has been established by an ongoing representation, such as between a business client and a firm that has represented it regularly over a period of time. In these situations, there is no justification for granting the client an advantage in a fee dispute, because the fee agreement can be established by other evidence.

Recommendation 18
Mandatory Malpractice Insurance Study

The American Bar Association should continue studies to determine whether a model program and model rule should be created to: (a) make appropriate levels of malpractice insurance coverage available at a reasonable price; and (b) make coverage mandatory for all lawyers who have clients.

Comments

In the course of examining measures to protect the public, the Commission has considered recommending a court rule requiring all lawyers who have clients to carry malpractice liability insurance. The Commission took testimony from representatives of the Oregon Bar Association Professional Liability Fund, the ABA Standing Committee on Lawyers' Professional Liability, and many individuals on the issue of malpractice insurance. The issue of mandatory coverage is complex. There are many different forms

of coverage and many legal and economic issues to be considered.[20] We recognize that further study is necessary.

Recommendation 19
Effective Date of Disbarment and Suspension Orders

The Court should adopt a rule providing that orders of disbarment and suspension shall be effective on a date [15] days after the date of the order except where the Court finds that immediate disbarment or suspension is necessary to protect the public, contrary to the provisions of MRLDE 27E.

Comment

The imposition of disbarment or suspension on a lawyer can prejudice those clients whose legal affairs require immediate attention. A reasonable time period between the order date and the effective date permits the lawyer to perform legal services necessary to prepare the clients' files for transfer to other counsel, move to reset court dates, and take other steps to wind up the lawyer's practice. In cases where immediate disbarment or suspension is necessary, such as misappropriation of client funds, the Court can affirmatively state in the order that it is effective immediately. The word "order" in this recommendation refers to final orders of the court.

IMPROVING INTERSTATE ENFORCEMENT

The ABA National Discipline Data Bank (hereinafter "Data Bank") is the only national clearinghouse for information about lawyers disciplined for misconduct. Created in 1968, it was a major advance in the ability to detect lawyers who continued practice after suspension or disbarment by moving to another state. The Data Bank is also used by character and fitness committees to check new applicants for bar admissions. Currently the highest courts in all states and the District of Columbia, and several federal courts and agencies report disciplinary actions to the Data Bank and receive data from it.

However, the increase in the number of lawyers in the last twenty years, especially of lawyers practicing in more than one jurisdiction, has greatly reduced the effectiveness of the Data Bank. The process of manually comparing hundreds of names on the Data Bank's annual list to the roster of lawyers in a jurisdiction is too time-consuming. Even when a name on the Data Bank list matches that of a lawyer licensed in the jurisdiction, there is no guarantee the names refer to the same individual.

A recent survey by the National Organization of Bar Counsel indicates that disciplinary counsel rarely use the Data Bank list. Reciprocal discipline is almost always initiated by *ad hoc* communication between disciplinary counsel (i.e., when a discipline counsel knows that a lawyer who has received discipline is licensed in another state) rather than by reference to the Data Bank reports.

The great amount of resources devoted to maintaining the Data Bank is being wasted because of an inefficient distribution method. Yet simple improvements are all that are needed to make the Data Bank effective. All of the needed technology exists. Much of it is already possessed by the ABA, such as ABAnet, the legal computer telecommunication network.

As the interstate practice of law continues to grow, the need for the National Discipline Data Bank increases. Without a fast and thorough system for tracking lawyers who have been disciplined, a lawyer can avoid suspension or disbarment by moving to another jurisdiction. The Commission considers it essential that the ABA and the reporting jurisdictions cooperate to improve Data Bank operations.

Recommendation 20
National Discipline Data Bank

The American Bar Association should provide or seek adequate funding to automate the dissemination of reciprocal discipline information by means of electronic data processing and telecommunications, so that:

20.1 appropriate discipline, bar admissions, and other officials in each jurisdiction can directly access and query the National Discipline Data Bank via a computer telecommunications network;

20.2 a uniform data format and software are developed permitting automated cross-checking of jurisdictions' rosters of licensed lawyers against the National Discipline Data Bank's contents;

20.3 a listing of the contents of the National Discipline Data Bank is disseminated to discipline officials quarterly or semi-annually on an electronic data processing medium suitable for automated comparison with a jurisdiction's roster of lawyers.

Comments

Linking the Data Bank through a computer telecommunications network, such as the existing ABAnet, will permit disciplinary counsel to query the Data Bank immediately upon the receipt of a complaint against a lawyer. Disciplinary counsel will instantaneously receive the most current information about whether the lawyer has been disciplined in another jurisdiction. At the time of this report, desktop computers and modems necessary to access a computer network cost under $500.

A uniform data format for maintaining rosters of licensed lawyers should be agreed upon by the highest courts of all jurisdictions. The Data Bank list can then be distributed to all jurisdictions at frequent intervals on a suitable computer medium (e.g., floppy disk) and in the uniform format. This will permit computerized cross checking of rosters against the Data Bank list.

Recommendation 21
Coordinating Interstate Identification

21.1 The American Bar Association and the appropriate officials in each jurisdiction should establish a system of assigning a universal identification number to each lawyer licensed to practice law.

21.2 The highest court in each jurisdiction should require all lawyers licensed in the jurisdiction to (a) register annually with the agency designated by the Court stating all other jurisdictions in which they are licensed to practice law, and (b) immediately report to the agency designated by the Court changes of law license status in other jurisdictions such as admission to practice, discipline imposed, or resignation.

Comments

A coordinated system of assigning a universal registration number is urgently needed to make interstate reciprocal enforcement of discipline effective. Lawyers who are named in the existing Data Bank list are identified by name, state imposing discipline, address, and date of birth. Because there is no common identifying number employed by all jurisdictions, when a disciplinary counsel matches a name on the list to a name in its roster, he or she must take additional steps to verify that both names refer to the same individual.

The ability to automate the comparison of a state's roster of lawyers to the Data Bank list (*see* Recommendation 20) depends on the use of a uniform registration number. The medical profession has successfully used a universal identification number system for years.

An annual registration requirement is essential for effective discipline within a jurisdiction. Requiring lawyers to report all other jurisdictions in which they are licensed and to immediately report status changes in those other jurisdictions is essential for interstate reciprocal enforcement. The legal profession in the United States has grown too large to rely on the serendipity of informal communication among disciplinary counsel.

IMPLEMENTATION

This report contains recommendations that directly affect disciplinary systems. Other recommendations affect client protection, alternative dispute resolution, professionalism, mandatory malpractice and other areas. Some recommendations create new programs. Effective implementation will require coordination among various ABA standing committees and other ABA entities. The ABA Standing Committee on Professional Discipline will be the coordinating body for implementation of the adopted recommendations.

Respectfully submitted,

Raymond R. Trombadore
Chairperson

February 1992

APPENDIX A: IMPLEMENTATION OF CLARK COMMITTEE RECOMMENDATIONS

The American Bar Association's Special Committee on Evaluation of Disciplinary Enforcement (Clark Committee) published its report, "Problems and Recommendations in Disciplinary Enforcement," (Clark Report) in June, 1970. This Appendix summarizes the findings and recommendations made in Section III of the Clark Report and describes the subsequent implementation efforts of state disciplinary agencies and the American Bar Association. All data was compiled by the ABA Center for Professional Responsibility and the Commission's staff.

Problem 1

Inadequate financing of disciplinary agencies for investigations and the conduct of proceedings.

The Clark Committee found inadequate financing to be the most universal and significant problem of disciplinary enforcement based on data from the Committee's survey of disciplinary agencies. The Committee recommended funding from either court assessment of all lawyers or appropriations from the legislature or both. The Committee rejected the idea of making the payment of costs by respondent lawyers a condition of reinstatement. They believed it would be unfair to deny reinstatement solely on financial grounds.

Current Status

Since the publication of the Clark Report, almost all jurisdictions have expanded the funding and staffing of disciplinary agencies. Full-time, professional disciplinary counsel exist in almost every jurisdiction. Some states' disciplinary agencies have large legal staffs and multiple hearing committees. California has over sixty full-time disciplinary counsel and a special disciplinary court with full-time hearing and appellate judges. Florida has over twenty disciplinary counsel in regional offices. New York has over thirty disciplinary counsel in its several judicial departments. The Illinois Attorney Registration and Discipline Commission employs eighteen full-time disciplinary counsel. Pennsylvania has twenty disciplinary counsel.

Discipline funding for all jurisdictions was over $74 million in 1988. In almost all cases this money came from lawyers, not taxpayers. Forty-seven jurisdictions fund their disciplinary systems solely with assessments on lawyers. Four jurisdictions rely on legislative appropriation of general revenues.

At the national level, the American Bar Association established the Center for Professional Responsibility and the Standing Committee on Professional Discipline. The Center's activities include discipline, ethics, client security funds, and professionalism. The Center employs seventeen lawyers and has a budget of over $2 million. It provides legal and statistical research, educational programs, model rules and codes, the National Discipline Data Bank and other services.

The ABA Model Rules for Lawyer Disciplinary Enforcement provide (the brackets indicate the model rule is considered optional):

[RULE 8. PERIODIC ASSESSMENT OF LAWYERS.

A. Requirement. Every lawyer admitted to practice before this court shall pay to the clerk of this court [state bar] an annual fee for each fiscal year beginning [date] to be set by the court [state bar] from time to time. The fee shall be used to defray the costs of disciplinary administration and enforcement under these rules, and for those other purposes the board shall from time to time designate with the approval of this court . . . .]

Despite the many advances in financing of disciplinary systems, inadequate financing remains a serious problem. *See* Recommendation 13.

Problem 2

Local and fragmented nature of disciplinary structure.

The Clark Committee found in many states disciplinary functions conducted by local jurisdictions so small that all the lawyers knew each other personally. This caused three problems: (1) the difficulty of passing objective judgment on social and professional acquaintances; (2) the appearance of impropriety in attempting to do so; and (3) a lack of uniformity in discipline imposed. The Committee recommended statewide centralization of the disciplinary system under the ultimate control of the state's highest court, with branch offices in major population centers of more populous jurisdictions.

Current Status

Most jurisdictions have revised their discipline systems since the Clark Report and have eliminated local committees. However, a significant minority still perform some discipline functions at the local level. According to the Commission's survey of disciplinary counsel, ten jurisdictions still have local committees that receive complaints from the public. Eleven states use local investigators or committees to investigate complaints. Fifteen states use local bodies to make the decision whether to file formal charges. Evaluations of several of these jurisdictions by the ABA Standing Committee on Professional Discipline reveal that local components of disciplinary systems continue to create the same problems identified by the Clark Report. In all of these evaluations, the Standing Committee has recommended eliminating local components and establishing statewide bodies.

The ABA Model Rules for Lawyer Disciplinary Enforcement provide in relevant parts:

RULE l. [DISCIPLINARY DISTRICTS.

Disciplinary jurisdiction in this state shall be divided into the following districts: If necessary, provisions dividing the state into two or more disciplinary districts].

RULE 2. THE DISCIPLINARY BOARD OF THE SUPREME COURT [STATE BAR] OF [STATE NAME]

A. Agency. There is hereby established one permanent statewide agency to administer the lawyer discipline and disability system. The agency consists of a statewide board as provided in this Rule 2, hearing committees as provided for in Rule 3, disciplinary counsel as provided for in Rule 4, and staff appointed by the board and counsel. The agency is a unitary entity. While it performs both prosecutorial and adjudicative functions, these functions shall be separated within the agency insofar as practicable in order to avoid unfairness. The prosecutorial functions shall be directed by a lawyer employed full-time by the agency and performed, insofar as practicable, by employees of the agency. The adjudicative functions shall be performed by practicing lawyers and public members.

Problem 3

Cumbersome disciplinary structure that causes delay.

The Clark Committee's survey revealed case processing times from several months to five years. Procedures involving six or more stages or three adversary hearings were not uncommon. Some states had local committees investigate, and then statewide committees duplicated the investigation. Some had the state bar's board of governors conduct a final review before formal hearing and again before passing the matter to the state's highest court.

The Clark Committee recommended:
(1) either ex parte [grand jury style] investigations with pretrial discovery or adversary hearing investigations;
(2) appointing three-member hearing committees
(a) with fixed membership
(b) that sit in rotation;
(3) holding investigative and hearing committee meetings on a fixed-interval schedule;
(4) "steadfastly" denying requests for adjournments [continuances];
(5) limiting review to the stage prior to referral to the state's highest court;
(6) replacing all state bar board of governors' review with review by a statewide disciplinary board;
(7) creating a statewide appeals board;
(8) where the high court appoints a referee, using only retired judges or lawyers with disciplinary experience;

(9) giving priority to disciplinary cases on the high court's calendar so they are decided within 30 days of final argument.

Current Status

The ABA Standards for Lawyer Discipline and Disability Proceedings (Lawyer Standards) and the successor Model Rules for Lawyer Disciplinary Enforcement (MRLDE) included all of the Clark Committee recommendations with modifications: (1) grand jury style and adversary hearing investigations (1 above) were dropped in favor of professional staff investigations; and (2) the use of referees by the high court (8 above) was dropped. *See* ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 11.

A significant minority of jurisdictions retain cumbersome disciplinary agency structures and inefficient administrative procedures. Fourteen jurisdictions still use a committee and hearing process to investigate or decide whether to file formal charges. Several jurisdictions still schedule hearing committees on an *ad hoc* basis rather than at fixed intervals. Some even constitute committees *ad hoc* so that, every time a case is ready to be heard, someone has to select committee members and then attempt to find a hearing date acceptable to all. As a result, in these states there is a significant delay in the processing of cases and a waste of staff time in administering hearings.

A small minority of jurisdictions still has multiple levels of hearings and review, i.e., more than a hearing, an intermediate appeal, and a final determination, in the disciplinary process. In several jurisdictions (Florida, Alaska, Arkansas, Kentucky and Utah) the state bar's board of governors still has adjudicative functions. The great majority, however, has removed the state bar's governing bodies from disciplinary adjudication, consistent with the Clark Committee's recommendations and ABA policy. Almost all states' highest courts have eliminated hearings by their referees as an additional step prior to the court's decision in the matter.

Problem 4

Ineffective rotation of membership of disciplinary agencies.

The Clark Committee found that long tenures caused the perpetuation of outmoded practices. Membership failed to reflect the changing composition of the bar. Short tenures caused a failure to develop expertise among the members. The Clark Committee recommended three year terms with a limit on reappointment of two consecutive terms.

Current Status

The Model Rules for Lawyer Disciplinary Enforcement, Rules 2B and 3B, provide that no disciplinary board or hearing committee member shall serve more than two consecutive three year terms.

Since the Clark report, almost all jurisdictions have enacted limitations on reappointment and terms. At least one jurisdiction, Illinois, has an informal policy of "promoting"

outstanding hearing committee members to the statewide board upon completion of that member's allotted number of terms on the hearing committee. This retains expertise and infuses new blood into the process.

Problem 5

Nonrepresentation of substantial segments of the bar on disciplinary agencies.

The Clark Committee found few lawyers serving within the disciplinary agency who were minorities, criminal or negligence law practitioners, or small-firm practitioners, while a significant number of complaints concerned such lawyers. The Committee recognized that part of the problem was the time requirements for serving, which these practitioners often could not afford. Problems created by this lack of representation were: (1) a lack of agency expertise in areas of practice often involved in complaints; and (2) respondents and minorities feeling the agency was not composed of their peers. The Clark Committee recommended "increased emphasis by the appointing authority" on appointing these types of lawyers.

Current Status

The Model Rules for Lawyer Disciplinary Enforcement do not require that solo, small firm, criminal law, or any other specific category of practitioner should be appointed. However, this Clark Report recommendation has not been superseded by any provisions of the Model Rules for Lawyer Disciplinary Enforcement, and it remains as ABA policy. Both the ABA Center for Professional Responsibility and the ABA Standing Committee on Professional Discipline continue to make recommendations to state disciplinary officials that solo and small firm practitioners and practitioners from diverse areas of practice should be appointed when possible.

The Center and Discipline Committee also have consistently recommended that women and minority persons should be appointed to disciplinary positions. Twenty-nine of those jurisdictions surveyed by the Commission report having women or minority members involved in state disciplinary systems, with several others stating that they keep no data on the issue.

Problem 6

Inadequate professional staff.

At the time of the Clark Report, many jurisdictions had few or no full time professional staff and relied mostly on volunteer lawyers. This resulted in inadequate and inconsistent investigations, adjudications, and sanctions. The Committee recommended hiring adequate full-time professional staff.

Current Status

RULE 4. DISCIPLINARY COUNSEL.

A. Appointment. The board shall appoint a lawyer admitted to practice in the state to serve as disciplinary counsel. Neither the chief disciplinary counsel nor full-time staff disciplinary counsel shall engage in private practice.

B. Powers and Duties. Disciplinary counsel shall perform all prosecutorial functions and have the following powers and duties:

(1) To screen all information coming to the attention of the agency to determine whether it concerns a lawyer subject to the jurisdiction of the agency because it relates to misconduct by the lawyer or to the incapacity of the lawyer;
(2) To investigate all information coming to the attention of the agency which, if true, would be grounds for discipline or transfer to disability inactive status and investigate all facts pertaining to petitions for reinstatement or readmission;
(3) To dismiss or recommend probation, informal admonition, a stay, the filing of formal charges, or the petitioning for transfer to disability inactive status with respect to each matter brought to the attention of the agency;
(4) To prosecute before hearing committees, the board and the court discipline, reinstatement and readmission proceedings, and proceedings for transfer to or from disability inactive status;
(5) To employ and supervise staff needed for the performance of prosecutorial functions [and, when circumstances necessitate their use, appoint and supervise volunteer assistant counsel];

. . . . .

(12) To undertake, pursuant to directions from the board, whatever investigations are assigned to disciplinary counsel.

Almost all jurisdictions today have a full time disciplinary counsel. However, in several states intake, investigation, or presentation of charges are not conducted by a full time professional counsel or staff. In Connecticut, regional volunteers receive complaints from the public. In Kentucky, Montana, Mississippi and Tennessee, volunteers rather than disciplinary counsel screen complaints, i.e., determine whether complaints allege a violation of the rules of professional conduct.

In Connecticut, Indiana, Kentucky, Maryland, Montana, New Jersey, the 4th Division of New York, North Dakota, Ohio, South Dakota and Texas, some or all investigations are performed by volunteers not supervised by disciplinary counsel. In several states, full-time disciplinary counsel does not present charges. In Connecticut and New Hampshire, the complainant presents charges. In New Jersey, Montana, Oregon and Arizona, volunteer lawyers present charges.

Several of the jurisdictions that continue to use volunteers to perform disciplinary counsel functions have been evaluated by the ABA Standing Committee on Professional Discipline. The Standing Committee has consistently found problems in these jurisdictions with using volunteers in lieu of disciplinary counsel, and the Committee's

evaluation reports have in every case recommended that the Clark recommendation be followed.

Whether existing staff is *adequate* is a separate question that is difficult to answer because standards do not exist for case processing times or for case loads per staff lawyer. The ABA Center for Professional Responsibility collects statistics on staff levels and case loads, although these are somewhat compromised by the lack of uniform terminology. As stated in the body of this report, adequate funding and staffing continue to be fundamental problems in many jurisdictions. *See* Recommendations 13 and 14.

Problem 7

Absence of training programs for disciplinary agency staff

The Clark Committee found that, even where professional staff existed, there were no training programs or materials for staff and volunteers. The Committee recommended the development of courses and procedural manuals by the proposed National Conference on Disciplinary Enforcement.

Current Status

The National Organization of Bar Counsel (NOBC) conducts semi-annual meetings including training and workshop sessions on disciplinary enforcement topics. These meetings are attended by disciplinary counsel and assistant counsel; generally, volunteer members of disciplinary agencies do not attend. The efforts of the NOBC have resulted in significant improvements in the professional development of its members, and membership continues to grow. The NOBC workshop and lecture sessions provide in-depth analyses of current enforcement problems, compilations and analyses of case law and legal literature, and a forum for communication and consultation.

The ABA Center for Professional Responsibility and the ABA committees it supports hold an annual National Conference on Professional Responsibility. The Conference features lectures and workshops on all areas of professional responsibility, including ethics, discipline, client security funds and professionalism. Presentations are given by nationally prominent authorities. The Conference is attended by a broad spectrum of lawyers including disciplinary counsel, disciplinary adjudicators and administrators, respondents' counsel, judges, law professors and others.

The ABA Center for Professional Responsibility and the Bureau of National Affairs jointly publish the *ABA/BNA Lawyers' Manual on Professional Conduct*, a comprehensive reference manual on professional responsibility.

In individual jurisdictions, lack of funding and staff often results in insufficient training of both disciplinary agency staff and adjudicators. Extraordinary efforts by individual disciplinary counsel or other lawyers have resulted in training manuals, educational programs, and orientation sessions in some jurisdictions. Generally, however, training of disciplinary officials and staff remains a problem. In the Commission's survey of non-

lawyer adjudicators in disciplinary agencies, the lack of orientation programs and the lack of educational materials were cited most frequently as problem areas.

Problem 8

Few investigations without specific complaint.

The Clark Committee found that, while many agencies had authority to investigate on their own motion, most waited for a complaint to be filed. The Clark Report recommended establishing sources of information, such as prosecutors, newspaper clipping services, and the National Discipline Data Bank, as well as an affirmative program to investigate known areas of misconduct, such as fraudulent insurance claims.

Current Status

The ABA Model Rules for Lawyer Disciplinary Enforcement provide:

RULE 4. DISCIPLINARY COUNSEL.

B. Powers and Duties. Disciplinary counsel shall perform all prosecutorial functions and have the following powers and duties:

. . . . .

(2) To investigate all information coming to the attention of the agency which, if true, would be grounds for discipline or transfer to disability inactive status and investigate all facts pertaining to petitions for reinstatement or readmission;

RULE 11. GENERALLY.

A. Screening. The disciplinary counsel shall evaluate all information coming to his or her attention by complaint or from other sources alleging lawyer misconduct or incapacity . . . .

Almost all jurisdictions (forty-three of forty-nine responding to the Commission's survey) have rules permitting disciplinary counsel to open investigations in the absence of a complainant. The extent to which disciplinary counsel actively monitor sources of information such as newspapers and slip opinions varies widely. In some jurisdictions, disciplinary counsel routinely review these sources and open investigations based on information gleaned from them. In many other jurisdictions, inadequate staffing and/or funding prevents disciplinary counsel from thoroughly reviewing these sources of information.

The National Discipline Data Bank operated by the ABA Center for Professional Responsibility provides an annual listing of lawyers disciplined in each jurisdiction. As mentioned in the body of this report, there are limitations on the usefulness of this information as it is currently produced, as well as resource limitations on disciplinary

counsel's ability to compare the Data Bank information to the jurisdiction's roster of lawyers. *See* Recommendation 20.

The Commission did not find any instances of disciplinary counsel engaging in affirmative programs to investigate matters such as fraudulent insurance claims. There are legitimate questions about the propriety of disciplinary counsel engaging in activities that might involve undercover operations with the potential for entrapment, violations of the attorney-client privilege, and other negative consequences. In most jurisdictions, lack of resources makes the issue moot.

Problem 9

Government attorneys, house counsel for corporations and other attorneys who are not subject to discipline in the jurisdiction in which they actually practice.

The Clark Committee found that federal agency lawyers, lawyers whose practice does not require court appearances, and specially admitted lawyers were escaping disciplinary jurisdiction under the court rules in most jurisdictions. The Clark Report recommended modification of disciplinary jurisdictional rules to include these lawyers.

Current Status

In 1982 the ABA Standing Committee on Professional Discipline drafted Model Rules for Federal Agency Disciplinary Enforcement. These were opposed by several federal agencies that had statutory or other authority to impose their own discipline. The Model Rules were defeated in the House of Delegates which, instead, adopted a statement requiring the ABA Standing Committee on Professional Discipline to coordinate disciplinary enforcement among the states and federal agencies. The Committee has attempted to carry out this mandate, but it is neither practicable nor effective.

The current Model Rules for Lawyer Disciplinary Enforcement, Rule 6A provides disciplinary jurisdiction over "any lawyer not admitted in this state who practices law or renders or offers to render any legal services in this state." California Rules of Professional Conduct, Rule 1-100(D)(2) provides:

As to lawyers from other jurisdictions: These rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state; but nothing contained in these rules shall be deemed to authorize the performance of such functions by such persons in this state except as otherwise permitted by law.

These provisions are atypical, however. Most other jurisdictions do not assume disciplinary jurisdiction over lawyers performing legal services within their borders unless the lawyers have been regularly or specially admitted.

Problem 10

Insistence by disciplinary agencies on unnecessary formalities, including verification of complaints.

The Clark Committee found that requirements such as notarization or verification of complaints intimidated some complainants with the threat that they might be sued should the investigation fail to support their complaints. The Clark Report recommended that verification requirements be abolished and other formalities be dispensed with in appropriate circumstances.

Current Status

The 1979 ABA Standards for Lawyer Discipline and Disability Proceedings provided specifically that "Complaints and information about lawyers should not be required to be verified or in any particular form." Standard 8.2.

The ABA Model Rules for Lawyer Disciplinary Enforcement, which replaced the Standards, do not contain a specific statement about requirements for a disciplinary complaint. Rule 11A provides: "The disciplinary counsel shall evaluate all information coming to his or her attention by complaint or from other sources alleging lawyer misconduct or incapacity." There are no stated requirements for the form of complaints in Rule 11A or elsewhere in the Model Rules.

Given the previous ABA policy contained in the Clark Report and Lawyer Standards, Rule 11A must be read to eliminate any formal requirements, e.g., that a complaint be in writing, for complaints from the public. Of course, proper administration requires that complaints be reduced to writing at some stage. The wording of Rule 11A emphasizes that disciplinary counsel should not ignore information about misconduct because of a failure to comply with formal requirements.

While most jurisdictions have rules authorizing disciplinary counsel or the agency to investigate matters without a formal written complaint, most also have rules requiring complaints to be in writing. Many jurisdictions have amended their rules since the publication of the Clark Report to eliminate verification and notarization requirements. However, a significant number still require such additional formalities on the theory that it will emphasize to the complainant that complaints are serious matters. Several of these states have been evaluated by the ABA Standing Committee on Professional Discipline. The Committee consistently found that requiring verification or notarization of complaints inhibits the filing of legitimate complaints. This far outweighs any value in discouraging "frivolous complaints."

Problem 11

Lack of absolute immunity for complainants.

The Clark Committee found that the threat of lawsuit for libel by respondent lawyers had a chilling effect on potential complainants. The Committee found that qualified immunity for complainants was insufficient because lawyers would simply allege malice, using the cost of defending a frivolous suit as a club to deter disciplinary complaints. The Committee premised absolute immunity on the confidentiality of investigations.

Current Status

The ABA Model Rules for Lawyer Disciplinary Enforcement provide absolute immunity for complainants. *See* Rule 12A. Rule 16A provides that disciplinary matters shall be confidential until formal charges are filed. The majority of jurisdictions have amended their rules to provide absolute immunity to complainants. None of these states has reported any significant harm to respondents from malicious complaints.

Twelve of those jurisdictions surveyed by the Commission provide only qualified immunity. Under qualified immunity, a lawyer may sue a complainant if the lawyer alleges the complaint was malicious. In the states with qualified immunity that have been evaluated by the ABA Standing Committee on Professional Discipline, the Committee has consistently reported a chilling effect on potential complainants resulting from respondents' ability to sue them. In each case, the Committee recommended a change to absolute immunity.

Oregon provides absolute immunity and makes all stages of the proceedings a matter of public record. The Standing Committee's evaluation of Oregon reported no significant harm to respondents resulting from these rules. Similarly, at the Commission's hearing in Oregon, no witnesses reported any significant harm to Oregon lawyers resulting from the combination of absolute immunity for complainants and a completely public disciplinary process.

Problem 12

No permanent record of complaints and their processing.

At the time of the Clark Report, many jurisdictions did not retain permanent records of disciplinary actions.

Current Status

The 1979 ABA Standards for Lawyer Discipline and Disability Proceedings provided that the agency should maintain complete records of its operations and statistics to aid in the administration of the system and to facilitate comparison with other jurisdictions. The Standards were later amended to provide for the disposal of records of dismissed cases after three years. The ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 4B(10) and (11) carried forward these provisions.

Today all jurisdictions have some form of case-tracking and recordkeeping procedures. While permanent records exist generally, the lack of automation and continued reliance on manual recordkeeping creates unnecessary administrative burdens in some jurisdictions. The lack of automated recordkeeping also hinders the ability to track and administer case loads and to compile useful statistics. *See* Recommendation 14.

Problem 13

Processing of complaints involving material allegations that also are the subject of pending civil or criminal proceedings.

The Clark Committee found that few jurisdictions had a policy on handling disciplinary complaints when civil or criminal proceedings were involved. The Clark Report recommended deferral of the disciplinary matter provided the respondent acted reasonably to conclude the pending civil or criminal matter.

Current Status

ABA Model Rule for Lawyer Disciplinary Enforcement 18G provides that:

Upon a showing of good cause to the board, the processing of a disciplinary matter may be stayed because of substantial similarity to the material allegations of pending criminal or civil litigation or disciplinary action.

Nineteen jurisdictions have no disciplinary rule providing for the handling of disciplinary matters when pending civil or criminal proceedings are involved. In several of these jurisdictions, the ABA Standing Committee on Professional Discipline found that cases were being stayed routinely without a showing of good cause merely because related civil or criminal cases were pending. The Committee found that this policy resulted in unnecessary delay, sometimes of years, in the disciplinary matters. *See* Recommendation 12.

Problem 14

Absence of subpoena power in the disciplinary system.

At the time of the Clark Report, a few jurisdictions did not provide subpoena power to disciplinary counsel or the board.

Current Status

Three jurisdictions still fail to provide investigative subpoena power to the disciplinary agency: Iowa, New Hampshire and Vermont.

Problem 15

No provision for criminal immunity for witnesses in disciplinary proceedings.

The Clark Committee found that as disciplinary enforcement moved into areas such as insurance and immigration fraud, no willing complainants exist. In these areas of misconduct, witnesses may refuse to testify on grounds of constitutional privilege against self-incrimination. In addition, the United States Supreme Court held that a lawyer could not be disciplined for invoking the 5th amendment privilege against self incrimination in a disciplinary proceeding. *Spevack v. Klein*, 385 U.S. 511 (1967). The Clark Report

recommended permitting a grant of immunity from criminal prosecution in disciplinary proceedings.

Current Status

The ABA Model Rules for Lawyer Disciplinary Enforcement carry forward the Clark recommendation in providing a mechanism to grant criminal immunity to a witness for testimony given in a disciplinary case. Rule 12B provides:

RULE 12. IMMUNITY.

B. From Criminal Prosecution. Upon application by disciplinary counsel and notice to [appropriate prosecuting authority], the court may grant immunity from criminal prosecution to a witness in a discipline or disability proceeding.

Commentary

As disciplinary agencies have grown, they have increasingly recognized the necessity for initiating investigations into areas of misconduct that are unlikely to generate complaints, and the problem of uncooperative witnesses has become more prevalent. Witnesses are reluctant to testify, particularly in the course of investigations into areas of practice involving such acts as ambulance chasing, the filing of false damage claims, immigration frauds, illegal adoptions and other misconduct from which the client derives substantial benefits. The client is reluctant to answer any questions concerning such matters since the truth may implicate him or her as well as the lawyer in criminal conduct. As a result, a client may rely on the constitutional privilege against self-incrimination to avoid disclosure of the misconduct. When that occurs, testimony can be obtained only if there is a procedure by which the witness can be granted immunity from criminal prosecution.

The conferring of immunity on a witness in the course of a disciplinary proceeding concerns the local law enforcement authorities, because it prevents the institution of a criminal prosecution based on the witness's disclosures in the course of his or her subsequent testimony. Any procedure authorizing immunity should therefore require that local law enforcement authorities be served with a copy of the application requesting immunity and that the application itself be judicially determined. This will enable law enforcement authorities to assert any objection they may have to immunizing the witness and to have that objection judicially weighed against the necessity for granting immunity for purposes of the disciplinary proceedings. Because a grant of immunity is a waiver of the state's right to proceed criminally against the individual, legislation may be necessary to implement this Rule. A lawyer granted witness immunity, although protected from criminal prosecution, is still subject to discipline for the underlying misconduct revealed by his or her testimony.

In some cases, the disciplinary counsel may want to grant the respondent criminal immunity in order to compel testimony of the respondent's misconduct. *See In re March*, 71 Ill.2d 382, 17 Ill.Dec. 214, 376 N.E.2d 213 (1978).

Thirty-six jurisdictions still have no rules permitting a grant of immunity from criminal prosecution for testimony in a disciplinary proceeding.

Problem 16

No informal admonition procedure.

The Clark Report recommended authorizing the agency to impose an informal (private) admonition upon a determination that probable cause existed to believe minor misconduct was committed provided that the respondent could request a formal hearing. The complainant would receive notice of the admonition but would be required to hold it confidential. This procedure was deemed preferable to dismissing the complaint or to holding a full hearing on a minor matter.

Current Status

ABA Model Rules for Lawyer Disciplinary Enforcement 10A(5) and 11C provide for the sanction of admonition, as do the rules of almost all jurisdictions. The availability of private sanctions depends on the validity of disciplinary rules imposing confidentiality on complainants and all other parties prior to specified stages in the proceedings. *See* ABA Model Rule for Lawyer Disciplinary Enforcement 16A. The Commission originally recommended that disciplinary proceedings and records be public from the time a complaint is filed. That recommendation was not adopted by the ABA House of Delegates. *See* **Legislative History of Recommendation 7;** *see also* Recommendation 9, in which the Commission proposes diversion of minor misconduct cases.

Problem 17

Dismissing complaints because the respondent has made restitution.

The Clark Committee found that many disciplinary agencies directed their efforts at forcing the respondent to repay converted funds in exchange for dismissing the disciplinary matter. The Clark Report recommended a rule stating that restitution was not grounds for dismissing a complaint.

Current Status

The ABA Standards for Imposing Lawyer Sanctions provide that only restitution made in good faith, i.e., before the initiation of a disciplinary investigation, may be considered as a mitigating factor but should not be a defense. *See* Standards 9.32(d) and 9.4(a).

Several developments since the Clark Report have led to the elimination in almost all jurisdictions of the practice of dismissing complaints because restitution has been made. These include the use of professional disciplinary counsel, detailed rules of procedure, more written disciplinary opinions, and the ABA Standards for Imposing Lawyer Sanctions. However, the degree to which restitution should mitigate a sanction and the circumstances under which it should or should not be considered vary among jurisdictions. *See In re Inquiry Concerning a Judge*, 788 P.2d 716 (Alaska, 1990); *Matter*

of Galbasini, 163 Ariz. 120, 786 P.2d 971 (1990); *Hippard v. State Bar of California*, 264 Cal.Rptr. 684, 49 Cal.3d 1084, 782 P.2d 1140 (1989); *People v. O'Leary*, 783 P.2d 843 (Colo. 1989); *Matter of Clyne*, 581 A.2d 1118 (Del.Supr. 1990); *The Florida Bar v. Shuminer*, 567 So.2d 430 (Fla. 1990); *In re Powers*, 122 Ill.2d 18, 118 Ill.Dec. 444, 521 N.E.2d 921 (1988); *In re Littell*, 260 Ind. 187, 294 N.E.2d 126 (1973); *Louisiana State Bar Ass'n v. Amberg, 553 So.2d 448 (La. 1989); Attorney Grievance Comm'n of Maryland v. McIntire*, 286 Md. 87, 405 A.2d 273 (1979); *In re Donaldson*, 311 N.Y.S.2d 763, 34 A.D.2d 381 (1970); *In re Conduct of Phelps*, 306 Or. 508, 760 P.2d 1331 (1988); *Matter of McGough*, 115 Wash.2d 1, 793 P.2d 430 (1990).

Problem 18

Inadequate procedure for accepting resignation from attorney under investigation.

The Clark Committee found a lack of uniformity among jurisdictions on procedures when a lawyer resigns from the bar to avoid being investigated. The Clark Report recommended a rule providing that the respondent must admit to the material facts of the complaint in order to resign when a complaint is pending.

Current Status

The 1979 ABA Standards for Lawyer Discipline and Disability Proceedings, Standard 11.2 provided:

11.2 Discipline by Consent. If the respondent admits in writing the truth of the charges against him, the respondent and the counsel should be able to agree on the nature and extent of the discipline to be imposed upon the respondent, subject to the approval of the appropriate adjudicative body.

COMMENTARY

Discipline by consent which results in the lawyer withdrawing from the practice of law should be recorded and treated as disbarment, not as resignation.

The ABA Model Rules for Lawyer Disciplinary Enforcement closed a loophole which permitted a lawyer to resign *before* a disciplinary complaint had been filed. The Rules provide:

RULE 6. JURISDICTION.

A. Lawyers Admitted to Practice. Any lawyer admitted to practice law in this state, *including any formerly admitted lawyer with respect to acts committed prior to resignation* [emphasis added] . . . is subject to the disciplinary jurisdiction of this court and the board.

RULE 21. DISCIPLINE BY CONSENT.

A. Board Approval of Tendered Admission. A lawyer against whom formal charges have been made may tender a conditional admission to the petition or to a particular count thereof in exchange for a stated form of discipline. The tendered admission shall be submitted to disciplinary counsel and approved or rejected by the board [considering the recommendation of the hearing committee if the matter has already been assigned for hearing, and] subject to final approval or rejection by the court if the stated form of discipline includes disbarment, suspension or transfer to disability inactive status. If the stated form of discipline is rejected by the [adjudicative body] [board], the admission shall be withdrawn and cannot be used against the respondent in any subsequent proceedings.

COMMENTARY

The respondent should be required to admit the charges before discipline is stipulated, so that evidence of guilt will be available if the respondent later claims that he or she was not, in fact, guilty. Petitions for reinstatement are often filed years after discipline has been imposed, and if there is no admission it may be difficult for the agency to establish the misconduct because relevant evidence and witnesses may no longer be available.

Ten jurisdictions currently do not have rules requiring a lawyer to admit to the allegations of pending disciplinary investigations in order to resign. Lawyers in these jurisdictions can resign to avoid disciplinary proceedings. If they move to another state, they may begin practice there with impunity. There is no mechanism for the second jurisdiction to become aware of the misconduct that caused them to resign.

Problem 19

No provision for service by mail, publication or other means when respondent cannot be personally served.

At the time of the Clark Report, four disciplinary jurisdictions had no provision for service of process by mail. The Report recommended a rule providing for substitute service at the lawyer's address registered with the state bar or state high court or last known address.

Current Status

The ABA Model Rules for Lawyer Disciplinary Enforcement provide:

RULE 7. ROSTER OF LAWYERS.

Disciplinary counsel shall maintain or have ready access to current information relating to all lawyers subject to the jurisdiction of the board including:

. . . . .

(c) current law office address and telephone number; (d) current residence address;

. . . . .

RULE 13. SERVICE.

A. Service of Petition. Service upon the respondent of the petition in any disciplinary or disability proceeding shall be made by personal service, by any person authorized by the chair of the board, or by registered or certified mail at an address shown in the current information roster filed by respondent pursuant to Rule 7 or other last known address.

One third of U.S. jurisdictions (sixteen of the forty-nine) responding to the Commission's survey do not have rules providing for service by mail to the respondent's address registered with the Court or agency. Of those jurisdictions that have been evaluated by the ABA Standing Committee on Professional Discipline, the Committee consistently found that the requirement for personal service caused significant delays in proceedings. *See* Recommendation 12

Problem 20

Inadequate provisions for disability inactive status.

At the time of the Clark Report, most jurisdictions had not formulated procedures for quickly removing from practice lawyers disabled by mental or physical problems or substance abuse. The report recommended a rule providing for indefinite disability status.

Current Status

The ABA Model Rules for Lawyer Disciplinary Enforcement provide:

RULE 20. INTERIM SUSPENSION FOR THREAT OF HARM.

A. Transmittal of Evidence. Upon receipt of sufficient evidence demonstrating that a lawyer subject to the disciplinary jurisdiction of this court has committed a violation of the [state Rules of Professional Conduct] or is under a disability as herein defined and poses a substantial threat of irreparable harm to the public, disciplinary counsel shall:

(i) transmit the evidence to the court together with a proposed order for interim suspension; and (ii) contemporaneously make a reasonable attempt to provide the lawyer with notice, which may include notice by telephone, that a proposed order for immediate interim suspension has been transmitted to the court.

B. Immediate Interim Suspension. Upon examination of the evidence transmitted to the court by disciplinary counsel and of rebuttal evidence, if any, which the lawyer has transmitted to the court prior to the court's ruling, the court may enter an order immediately suspending the lawyer, pending final disposition of a disciplinary proceeding predicated upon the conduct causing the harm, or may order such other action as it deems appropriate. In the event the order is entered, the court may appoint a trustee . . . to protect clients' interests.

C. Notice to Clients. A lawyer suspended pursuant to paragraph B shall comply with the notice requirements . . . .

D. Motion for Dissolution of Interim Suspension. On [two] days notice to disciplinary counsel, a lawyer suspended pursuant to paragraph B may appear and move for dissolution or modification of the order of suspension, and in that event the motion shall be heard and determined as expeditiously as the ends of justice require.

Commentary

Certain misconduct poses such an immediate threat to the public and the administration of justice that the lawyer should be suspended from the practice of law immediately pending a final determination of the ultimate discipline to be imposed. Interim suspension is also appropriate when the lawyer's continuing conduct is causing or is likely to cause serious injury to a client or the public, as, for example, where a lawyer abandons the practice of law or is engaged in an ongoing conversion of trust funds.

The procedures set forth in Rule 20 are similar to those applicable to civil temporary restraining orders, except that an immediate interim suspension order does not expire automatically, but requires a motion for dissolution or modification. Since immediate interim suspension may be imposed ex parte following reasonable efforts to notify the lawyer, a lawyer suspended without a hearing should be afforded an opportunity to seek dissolution or modification of the suspension order on an expedited basis.

Six of the forty-nine surveyed by the Commission lack rules providing expedited procedures for placing incapacitated lawyers on disability inactive status.

Problem 21

Inadequate provisions for reciprocal discipline.

The Clark Committee found that, in cases where a respondent was licensed in more than one jurisdiction, few jurisdictions had rules recognizing disciplinary actions of other jurisdictions. The Committee recommended a rule authorizing imposition of a sanction identical to that imposed in the jurisdiction that had initiated disciplinary proceedings, except where a respondent could show:

1) the other jurisdiction's procedure denied due process;
2) an infirmity of proof in the other jurisdiction's proceeding;
3) the imposition of identical discipline would be a grave injustice; or
4) the misconduct established warrants substantially different discipline under the law of the jurisdiction.

Current Status

The ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 22 provides in relevant parts:

D. Discipline to be Imposed. Upon the expiration of [thirty] days from service of the notice pursuant to the provisions of paragraph B, this court shall impose the identical discipline unless disciplinary counsel or the lawyer demonstrates, or this court finds that it clearly appears upon the face of the record from which the discipline is predicated, that:

(1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
(2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or
(3) The imposition of the same discipline by the court would result in grave injustice; or
(4) The misconduct established warrants substantially different discipline in this state.

If this court determines that any of those elements exists, this court shall enter such other order as it deems appropriate. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate.

E. Conclusiveness of Adjudication in Other Jurisdictions. In all other aspects, a final adjudication in another jurisdiction that a lawyer has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this state.

In seventeen of forty-nine jurisdictions surveyed by the Commission, the rules for reciprocal discipline do not limit the defenses that a respondent may raise to those recommended by the Clark Report and the Model Rules. Thus, a respondent may relitigate the original charges. This wastes resources and impairs the protection of the public in the second jurisdiction. *See* Recommendation 12.

Problem 22

No provision for interim (temporary) suspension of lawyers convicted of a crime pending disciplinary proceedings.

The Clark Committee found that some jurisdictions had provisions for interim suspension for lawyers convicted of crimes of "moral turpitude," but the definition of "moral turpitude" created difficulties. The Clark Committee recommended automatic interim suspension for lawyers convicted of "serious crimes." "Serious crime" was defined as any crime an element of which reflected on a lawyer's fitness, such as fraud, theft, failure to file tax returns, etc. The suspension would be terminated upon reversal of the conviction, but reversal would not terminate disciplinary proceedings based on the same facts.

Current Status

The ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 19 provides in relevant part:

C. Definition of "Serious Crime." A "serious crime" is any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a "serious crime."

D. Immediate Interim Suspension. The court has exclusive power to place a lawyer on interim suspension.

(1) Imposition. The court shall place a lawyer on interim suspension immediately upon proof that the lawyer has been convicted of a serious crime regardless of the pendency of any appeal.

(2) Termination. The court has exclusive power to terminate an interim suspension. In the interest of justice, the court may terminate an interim suspension at any time upon a showing of extraordinary circumstances, after affording disciplinary counsel notice and an opportunity to be heard.

Twenty jurisdictions do not have rules providing for immediate interim suspension for lawyers convicted of a "serious crime." The absence of such a rule in these jurisdictions poses a continuing problem for both the public and the profession, as the Commentary to Rule 19 explains:

Interim suspension is necessary both to protect members of the public and to maintain public confidence in the legal profession. The interim suspension not only removes any danger to clients and the public which the respondent may pose, but also serves to protect the profession and the administration of justice from the specter created where an individual convicted of a "serious crime" continues to serve as an officer of the court in good standing.

. . . . .

Continued practice by a lawyer convicted of a "serious crime" undermines the public confidence in the profession and the administration of justice. It is difficult to understand why a lawyer convicted of stealing funds from a client can continue to handle client funds, why a lawyer convicted of securities fraud can continue to prepare and certify registration statements, or why a lawyer convicted of conspiracy to suborn perjury can continue to try cases and present witnesses. Immediate suspension of a lawyer so convicted, regardless of the pendency of any appeal, is essential to preserve public confidence.

Problem 23

No provision making conviction of a crime conclusive evidence of guilt for purposes of the disciplinary proceeding based on the conviction.

The Clark Committee recommended a court rule making a record of conviction of a crime conclusive evidence of guilt, subject only to respondent's showing of mitigating factors not inconsistent with the elements of the crime.

Current Status

The ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 19, provides in relevant part:

E. Conviction as Conclusive Evidence. A certified copy of a judgment of conviction constitutes conclusive evidence that the lawyer committed the crime, and the sole issue in any hearing regarding the conviction shall be the nature and extent of the discipline to be imposed.

Forty-four of forty-nine jurisdictions surveyed by the Commission have adopted rules to provide that a criminal conviction is conclusive evidence of guilt in a disciplinary proceeding.

Problem 24

Permitting disciplinary proceedings to be tried by a jury.

The Clark Committee found that three jurisdictions allowed jury trials in disciplinary cases. While these jurisdictions seldom used jury trial procedures, the possibility existed that respondents would be judged by persons totally unfamiliar with ethical standards of the legal profession. The Committee recommended elimination of trial by jury in disciplinary proceedings.

Current Status

Two jurisdictions, Georgia and Texas, still permit jury trials in disciplinary cases.

Problem 25

Inadequate provision concerning public disclosure of pending disciplinary proceedings.

The Clark Committee recommended that disciplinary proceedings be confidential until there has been a hearing and a finding that misconduct had been committed, except where proceedings were based on conviction of a crime or the respondent requested a public hearing. The Committee made three assumptions regarding public disclosure of disciplinary complaints: (1) public knowledge of unproven allegations would harm the lawyer's reputation for trustworthiness and, thus, the lawyer's ability to earn a living; (2) subsequent acquittal would not restore the lawyer's reputation or earning power; and (3) it was more important to protect innocent lawyers from this presumed harm than to notify the public of unproven allegations of the lawyer's misconduct, even where probable cause existed to believe the allegations.

Although the Clark Committee mentioned that provisions in a few jurisdictions made disciplinary proceedings public upon the filing of formal charges, it did not explore the experience of those jurisdictions to test its assumptions. The Report stated:

. . . a complaint against [an attorney] is no more than an accusation. Disclosure of the existence of that accusation may itself result in irreparable harm to the attorney.

. . . . .

Unlike the civil service employee who is suspended while charges are under investigation and who can be reimbursed in full if the charges are subsequently found not sustained, the attorney never can recoup the financial loss caused by public disclosure of charges against him, even if he is subsequently exonerated. In fact, since later exoneration is never as newsworthy as the prior accusation, it is likely that the damage visited on him will continue even after the charges have been found not to have been sustained.

It is no answer to argue that prompt public disclosure of a pending disciplinary proceeding protects the public against the attorney who engaged in misconduct. In the first place, that argument assumes that the attorney is guilty before guilt has been established. Second, that argument assumes that the burden of promptly protecting the public can be transferred properly from the disciplinary agency to the attorney accused. Prompt protection of the public from an attorney guilty of misconduct should indeed be a first priority, but it should be accomplished by the adoption of appropriate procedures to minimize the delay between the institution of a formal proceeding and its determination rather than by perpetuation of procedures that may victimize an innocent attorney.

Nor is it any justification to argue that the disciplinary process involves such extensive procedures before a formal proceeding can be instituted that doubtful cases usually are weeded out …. [O]ur profession has never countenanced a procedure on the ground that it harms only a few who later establish their innocence. Whenever procedures that incorporate such a possibility have been advocated, the profession has taken the position that it is better that the guilty go unpunished than that the innocent be victimized. Surely the disciplinary process should not incorporate a procedure that is rejected in other contexts.

Current Status

The 1979 ABA Standards for Lawyer Discipline and Disability Proceedings changed ABA policy as stated in the Clark Report by making disciplinary proceedings public upon the filing of formal charges, i.e., after a determination that probable cause exists to believe misconduct has occurred. The ABA Model Rules for Lawyer Disciplinary Enforcement also make proceedings public upon the filing of formal charges. The Commentary to Model Rule 16 explains:

Once a finding of probable cause has been made, there is no longer a danger that the allegations against the respondent are frivolous. The need to assure the integrity of the

disciplinary process in the eyes of the public requires that at this point further proceedings be open to the public. An announcement that a lawyer accused of serious misconduct has been exonerated after a hearing behind closed doors will be suspect. The same disposition will command respect if the public has had access to the evidence.

ABA policy, as stated in the Standards and Model Rules for Lawyer Disciplinary Enforcement, denies the validity of the Clark Committee's assumptions that public knowledge of allegations harms respondents, and subsequent acquittal will not restore respondents' earning power. However, the Model Rules give some credence to the Clark Committee's assumption that harm to the lawyer will result from public disclosure of mere allegations. The Commission found that little or no significant harm will come to lawyers from the public disclosure of mere allegations and originally recommended fully public proceedings. This recommendation was not adopted; thus, Model Rule 16 remains ABA policy. *See* **Legislative History of Recommendation 7**.

The rules of twenty-six jurisdictions conform to ABA policy and make proceedings public once formal charges of lawyer misconduct have been filed. Oregon's rules make the entire disciplinary process public from the filing of a complainant's allegations, as the Commission recommends. Florida and West Virginia make disciplinary records public from the time a complaint is dismissed or formal charges are filed.

Problem 26

Failure to publish the achievements of disciplinary agencies.

The Clark Committee found that most disciplinary agencies deliberately discouraged publicity about sanctions imposed because they believed the information would harm the reputation of the profession. The Clark Committee found, instead, that withholding this information fostered public dissatisfaction and recommended intensive publicity and educational efforts.

Current Status

The ABA Model Rules for Lawyer Disciplinary Enforcement Rule 2 provides:

G. Powers and Duties. The board shall have the following powers and duties:

. . . . .

(9) To inform the public about the existence and operation of the system and the disposition of each matter in which public discipline has been imposed, a lawyer has been transferred to or from disability inactive status, or a lawyer has been reinstated or readmitted;

. . . . .

Since the publication of the Clark Report, disciplinary agencies have thoroughly reformed their policies on informing the public. A recent survey by the ABA Standing Committee on Professional Discipline, *Outreach by Lawyer Discipline Systems* (1990), indicates that fifty-two of sixty jurisdictions responding to the survey publish or are developing informational pamphlets about the disciplinary system for the public. Thirty-seven of those jurisdictions distribute multiple copies to law offices, courthouses, bar associations, or libraries. Nine have a toll-free 800 telephone number to receive complaints about lawyer conduct. Fifty-eight agencies have made presentations to community or legal groups. Five have participated in radio phone-in programs, and five have participated in television talk shows.

The majority of jurisdictions have reformed their policies on publication of disciplinary opinions. Twenty-nine of forty-nine jurisdictions responding to the Commission's survey publish written opinions in all disciplinary cases reaching the highest court. Twenty-five publish findings in those cases concluded at the hearing or intermediate appellate stage.

Problem 27

No provision for protecting clients when an attorney is disciplined, or disappears or dies while under investigation.

The Clark Committee recommended a court rule requiring that: (1) disbarred or suspended lawyers notify their clients to find another lawyer; and (2) disciplinary agencies petition the court to appoint a trustee to inventory files and take appropriate action when a respondent disappears or dies and no responsible partner exists.

Current Status

The ABA Model Rules for Lawyer Disciplinary Enforcement significantly expand the protection of clients and the public beyond that recommended by the Clark Report. Model Rule 27 contains requirements that suspended and disbarred respondents notify clients, co-counsel, opposing counsel and others as directed by the court by registered or certified mail within ten days after imposition of the sanction. The Rule also requires the respondent to maintain records that notice was given, and to return client property and unearned fees, to make motions for leave to withdraw in cases where the client has not found other counsel. It also prohibits the respondent from undertaking new representation before suspension or disbarment goes into effect.

Rule 28 provides:

RULE 28. APPOINTMENT OF COUNSEL TO PROTECT CLIENTS' INTERESTS WHEN RESPONDENT IS TRANSFERRED TO DISABILITY INACTIVE STATUS, SUSPENDED, DISBARRED, DISAPPEARS, OR DIES.

A. Inventory of Lawyer Files. If a respondent has been transferred to disability inactive status, or has disappeared or died, or has been suspended or disbarred and there is evidence that he or she has not complied with Rule 27, and no partner, executor or other

responsible party capable of conducting the respondent's affairs is known to exist, the presiding judge in the judicial district in which the respondent maintained a practice, upon proper proof of the fact, shall appoint a lawyer or lawyers to inventory the files of the respondent, and to take such action as seems indicated to protect the interests of the respondent and his or her clients.

B. Protection for Records Subject to Inventory. Any lawyer so appointed shall not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom the file relates, except as necessary to carry out the order of the court which appointed the lawyer to make the inventory.

Since the publication of the Clark Report, most jurisdictions have adopted rules providing for notification and the appointment of trustees. Forty-one of forty-nine jurisdictions responding to the Commission's survey have rules requiring disbarred or suspended lawyers to notify clients. Thirty-four jurisdictions have rules for the appointment of a trustee of the respondent's files in appropriate cases.

Problem 28

Disbarred attorneys too readily reinstated by the courts.

The Clark Committee recommended that: (1) disbarred lawyers shall not be readmitted before a specified time exceeding the maximum time for suspension; and (2) reinstatement be granted only after the respondent demonstrated fitness to practice.

Current Status

The ABA Model Rules for Lawyer Disciplinary Enforcement follow the recommendations of the Clark Report. Model Rule 10 provides that suspensions shall not exceed three years, while Rule 25A provides that a disbarred lawyer may not be readmitted until five years after disbarment. Rule 25E requires the lawyer to demonstrate compliance with the conditions of reinstatement or readmission.

Eight jurisdictions have no rules setting a minimum period of time before reinstatement after disbarment. At least six jurisdictions have permanent disbarment.

Problem 29

No procedures for notifying other jurisdictions when a respondent is disciplined for purposes of reciprocal discipline.

The Clark Committee recommended the establishment of a National Discipline Data Bank to serve as a clearinghouse for disciplinary information.

Current Status

The ABA National Discipline Data Bank has been operated by the ABA Center for Professional Responsibility since 1968. Currently all states' highest courts, the U.S.

Supreme Court, most federal courts, and some federal agencies report public sanctions to the Data Bank. The Center publishes annual lists of lawyers sanctioned for use by disciplinary agencies and the public. However, disciplinary counsel are still faced with the task of comparing the Data Bank list with their lists of all lawyers licensed in their jurisdictions and when a name matches, ascertaining that it represents the same individual. This is a time-consuming task. A recent survey indicates that disciplinary counsel seldom use the Data Bank lists because of these shortcomings. *See* Recommendation 20.

Problem 30

No consultation or exchange of information among disciplinary agencies about mutual problems.

The Clark Committee recommended creation of a National Conference on Disciplinary Enforcement with a permanent staff to conduct: periodic regional and national meetings; training courses for judges, agency members and staff; a national memorandum of disciplinary law file; evaluation of disciplinary agencies; a central clearinghouse for disciplinary information; and the National Discipline Data Bank.

Current Status

The ABA Center for Professional Responsibility conducted a series of regional disciplinary conferences from 1980 to 1982 and now conducts an annual National Conference on Professional Responsibility. In addition, the National Organization of Bar Counsel conducts semi-annual national meetings to discuss mutual problems in disciplinary enforcement and to conduct seminars and workshops. *See* the discussion under Problem 7 of this appendix.

The ABA Standing Committee on Professional Discipline conducts an educational program for judges on responding to lawyer misconduct. This program has been presented at statewide, regional and national meetings of judicial organizations and at the National Judicial College in Reno, Nevada. There is a textbook and plans for a videotape.

The Center for Professional Responsibility publishes, in conjunction with the Bureau of National Affairs, the *ABA/BNA Lawyers' Manual on Professional Conduct,* containing relevant ABA and state rules and codes, ethics opinions, and a semi-monthly report on current cases and developments. The Center conducts annual surveys of disciplinary agencies' statistics on case loads, sanctions imposed, budgets, staffing, and case processing times. The Center also provides legal research on disciplinary law and legal ethics.

The ABA Standing Committee on Professional Discipline also conducts evaluations of state disciplinary systems and provides technical assistance to jurisdictions revising their disciplinary procedures. The Center and Standing Committee are charged with monitoring disciplinary developments across the nation and creating resources and programs to promote effective disciplinary enforcement.

Problem 31

Reluctance on the part of lawyers and judges to report instances of professional misconduct.

The Clark Report recommended greater emphasis on the duty to report in law school and the imposition of sanctions for failure to report misconduct.

Current Status

In re Himmel, 125 Ill.2d 531, 127 Ill.Dec. 708, 533 N.E.2d 790 (1989) is the leading case in which a lawyer was sanctioned for failure to report another lawyer's misconduct. Reporting by lawyers and judges of misconduct is still rare, and, in many instances, is motivated more by a desire to disqualify opposing counsel or gain advantage in a legal matter. Since 1984, the ABA Standing Committee on Professional Discipline has presented its educational program, "The Judicial Response to Lawyer Misconduct," to various judicial conferences and organizations. Follow up surveys conducted by the ABA Center for Professional Responsibility indicate that reporting of lawyer misconduct by judges increased in those jurisdictions in which the program was presented. Clearly, more needs to be done on the local, state, and national levels to encourage judges and lawyers to report professional misconduct to disciplinary agencies.

Problem 32

No requirement for trust account recordkeeping; no auditing of trust accounts.

The Clark Committee recommended that lawyers be required to maintain records of trust accounts for a reasonable period after disbursement of trust funds and to submit to an annual audit of these records.

Current Status

The ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 29, requires lawyers to maintain separate trust accounts and to retain specified trust account records. It also requires that financial institutions notify the disciplinary agency of any overdrafts.

The Clark Report was adopted by the ABA House of Delegates in 1970. It contained the recommendation that trust accounts should be subject to annual audit. The recommendation clearly intended that disciplinary counsel could conduct an audit *without* probable cause to believe a lawyer had committed misconduct. The 1979 ABA Standards for Lawyer Discipline and Disability Proceedings, however, only contained a provision for audits when probable cause existed to believe a lawyer had committed misconduct. An amendment to the 1979 Standards to provide for audits of randomly-selected trusts accounts was proposed by the ABA Standing Committee on Professional Discipline in 1984 but was not adopted by the House of Delegates. Thus, the ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 30, only provides for probable cause audits, not random audits.

Almost all jurisdictions have mandatory trust account and record-keeping rules. Only twelve jurisdictions have trust account overdraft notification rules. Only eight permit random audit of trust accounts. The Commission recommends both overdraft notification and random audit rules. *See* Recommendations 16.

Problem 33

No training courses on ethical standards and disciplinary enforcement for judges responsible for lawyer discipline.

The discussion of this recommendation in the Clark Report indicates that the Committee's true concern was about the lack of consistency in the imposition of disciplinary sanctions. In most jurisdictions, the state's highest court is the only judicial body with disciplinary enforcement powers. The Committee was diplomatically recommending, to achieve some consistency, educational courses for justices about the ethical standards and disciplinary procedures that they themselves create and impose.

Current Status

The ABA has adopted detailed Model Rules of Professional Conduct, Model Rules for Lawyer Disciplinary Enforcement, and Standards for Imposing Lawyer Sanctions. These have been published in annotated form, providing commentary and citations to case law. In addition, the ABA's standing committees and Center for Professional Responsibility have conducted and continue to conduct educational programs to state judicial conferences and other judicial organizations on the contents and application of these models. The ABA Center also conducts an annual Conference on Professional Responsibility during which seminars and workshops on these topics are presented.

Problem 34

Lenient treatment by law enforcement of attorneys accused of crimes.

The Clark Committee heard testimony that lawyers who committed crimes asked for and received lenient treatment, such as being allowed to plead to a lesser included offense on the argument that a conviction of the more serious crime would result in disbarment. The respondent would then argue to the disciplinary counsel that mitigation in the disciplinary case should be granted on the ground that the respondent has already suffered the opprobrium of a criminal conviction. The Clark Report recommended formal liaison programs among disciplinary counsel and prosecutors.

Current Status

The statement of this problem in the Clark Report indicates how much lawyer discipline has changed in twenty years. The advent of statewide disciplinary agencies with professional disciplinary counsel and the great increase in disciplinary actions against lawyers have effectively eliminated the ability of respondents to play prosecutors and disciplinary counsel against each other.

The intervening twenty years since the publication of the Clark Report have also seen a radical change in the public's attitude. Watergate, Greylord and other scandals have involved lawyers committing crimes and unethical conduct. It is very unlikely today that a prosecutor would be susceptible to a plea for leniency on the basis that an accused lawyer might lose his or her license.

The ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 19, provides:

RULE 19. LAWYERS CONVICTED OF A CRIME.

A. Transmittal of Certificate of Conviction by Clerk of Trial Court. The clerk of any court in this state in which a lawyer is convicted of a crime shall within [ten] days after the conviction transmit a certified copy of the judgment of conviction to counsel for the lawyer disciplinary agency of every state in which the lawyer is admitted to practice.

B. Determination of "Serious Crime." Upon being advised that a lawyer subject to the disciplinary jurisdiction of this court has been convicted of a crime, disciplinary counsel shall determine whether the crime constitutes a "serious crime" warranting immediate interim suspension. If the crime is a "serious crime," disciplinary counsel shall prepare an order for interim suspension and forward it to the court and the respondent with a certificate of the conviction. Disciplinary counsel shall in addition file formal charges against the respondent predicated upon the conviction. On or before the date established for the entry of the order of interim suspension the lawyer may assert any jurisdictional deficiency that establishes that the suspension may not properly be ordered, such as that the crime did not constitute a "serious crime" or that the lawyer is not the individual convicted. If the crime is not a "serious crime," counsel shall process the matter in the same manner as any other information coming to the attention of the agency.

C. Definition of "Serious Crime." A "serious crime" is any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a "serious crime."

See also the discussion under Problem 22 of this Appendix.

Problem 35

No statewide registration of attorneys.

At the time of the Clark Report, most of the twenty-one states that did not have integrated bars also did not have statewide registration.

Current Status

Today all states have either an integrated bar or a state agency under the authority of the court that registers the current names and addresses of all lawyers.

Problem 36

Limited ancillary bar association services to complement the work of the disciplinary agency.

The Clark Committee recommended: (1) lawyer referral services to help non-lawyers find representation when suing another lawyer; (2) fee arbitration by an arbitration organization not connected to the bar; and (3) client protection funds.

Current Status

Most jurisdictions have referral services that list lawyers willing to handle legal malpractice cases. Only five jurisdictions have mandatory fee arbitration mechanisms. *See* Recommendation 3.1. All but three jurisdictions have client protection funds.

APPENDIX B: COMMISSION OPERATIONS

The Commission on Evaluation of Disciplinary Enforcement was created by the Board of Governors of the American Bar Association in February 1989 at the request of the National Organization of Bar Counsel and upon the recommendations of the Standing Committees on Professional Discipline, Ethics and Professional Responsibility, Lawyers' Responsibility for Client Protection, and the Special Coordinating Committee on Professionalism. The Board of Governors charged the Commission to:

1. study the current functioning of professional discipline systems;
2. examine the recommendations of the original Special Committee on Evaluation of Disciplinary Enforcement (1970 Clark Committee) and the results of subsequent reform efforts;
3. conduct original research, surveys and regional hearings;
4. evaluate the state of disciplinary enforcement; and
5. formulate recommendations for action.

The Commission determined early in the process that in order to identify the greatest number of problems that have developed since the Clark Report in 1970 and to enhance the credibility of the process, the regional hearings and commission meetings would be open to individuals and entities outside of the disciplinary system. Soon after the Commission was formed, it sent letters to other ABA committees, bar executives and presidents, consumer groups and disciplinary counsel requesting their observations about the current systems of disciplinary enforcement and their recommendations for improvements. Press releases were sent to legal publications and the general media to inform the public and lawyers that the Commission would be holding regional hearings and was seeking written or oral testimony.

The Commission held open meetings prior to deliberating about the contents of the report. The meetings were attended by representatives of the National Organization of Bar Counsel, consumer organizations and the media. Guests knowledgeable in the field of lawyer discipline were also invited to speak at Commission meetings.

The Commission held regional hearings in five locations around the country: Los Angeles, New York, New Orleans, Chicago and Portland, Oregon. At the hearings, the Commission heard from supporters and critics of the disciplinary system. Written or oral testimony was presented by more than 200 individuals including disciplinary counsel, respondents' counsel, respondents, complainants, judges, bar presidents, representatives of consumer organizations, law professors and lawyer and nonlawyer volunteers in the discipline system.

The Commission completed three surveys. One survey was designed to obtain the views of all of the justices of the highest court in each state and their recommendations for improvement. More than one hundred justices responded to the survey. A survey of the chief disciplinary counsel in each of the jurisdictions gave the Commission a complete picture of the structure of the disciplinary system in each jurisdiction. The disciplinary counsel also provided their ideas for improvements in the system and indicated which issues they felt were most important for the Commission to consider. A survey of nonlawyer, minority and women members who serve as volunteers in the discipline systems provided a view of how well the systems are working from the point of view of the volunteers.

The Commission also studied the thirty-six recommendations of the Clark Committee and the extent to which they have been adopted, modified or replaced. *See* Appendix A.

The draft report was released in May 1991 and widely distributed. The Commission received many comments on the report and held an additional public hearing in August 1991 at the ABA Annual Meeting in Chicago. The Commission's final report, which was sent to the ABA House of Delegates in December 1991, contained several modifications based on the comments received.

In February 1992, the House of Delegates voted on the Commission Report, amending a few of the recommendations as indicated in this report.

APPENDIX C: MEMBERS OF THE COMMISSION

Raymond R. Trombadore

was appointed Chair of the Commission on Evaluation of Disciplinary Enforcement in August 1990. Mr. Trombadore is a Past President of the New Jersey State Bar Association and currently serves as a member of the House of Delegates of the American Bar Association. He also currently serves on the Executive Council of the National Conference of Bar Presidents, and is a member of the Section on Urban, State and Local Government Law, a member of the Criminal Justice Section, and a member of the Judicial Administration Division. In addition to practicing law in Somerville, New Jersey he currently serves as Chair of the Disciplinary Review Board for the Supreme Court of New Jersey. He previously served as Secretary and Chair of the Somerset County Ethics Committee and also served as Vice-Chair of the Supreme Court Committee for Restructuring of the Disciplinary System in the state of New Jersey. He served as a

charter member of the New Jersey Supreme Court Special Committee on Gender Bias in the Courts and is presently a member of the Supreme Court Standing Committee on Women in the Courts. He is also currently a member of the Supreme Court of New Jersey Task Force on Speedy Trial and a member of the Coordinating Committee of that task force.

Robert B. McKay

served as the Chair of the Commission from February 1989 until his death on July 13, 1990. Professor McKay was Professor of Law Emeritus at New York University School of Law where he served as Dean from 1967-1975. At the time of his death, Professor McKay served as President of the Citizens Union Foundation and as Chair of the New York State Bar Association Special Committee to Consider Mandatory Continuing Legal Education in New York, the Manville Property Damage Settlement Trust, The ABA Task Force on Initiatives and Referendums, Pace Law School Board of Advisors and McGeorge School of Law Advisory Board. He served on the New York State Ethics Commission, The New York City Campaign Finance Board and the United States Court of Military Appeals Advisory Committee. He was also a member of many Boards, including, the American Arbitration Association, the Center for Social Welfare Policy and the Law, the Legal Aid Society of New York, the Mexican-American Legal Defense Fund, and the National Judicial College. Professor McKay was a past president of the Association of the Bar of the City of New York, past Chair of the ABA Section of Legal Education and Admission to the Bar, served on the ABA Board of Governors and was Chair of the New York State Special Commission on Attica.

Justice Oscar W. Adams, Jr.

has been a member of the Supreme Court of Alabama for ten years. Having been elected to this position in two statewide elections, he is the first and only black person ever to be elected and serve as a constitutional officer of the State of Alabama. Justice Adams, individually and in a law firm, engaged in the general practice of law for 33 years prior to ascending to the bench. He represented Martin Luther King and civil rights workers in civil and criminal litigation arising out of the demonstrations in Alabama in the 1960s. After the 1960s, his firm scored landmark victories in complex civil rights litigation. Justice Adams has been a member of many committees and organizations including the Advisory Committee to the Supreme Court of Alabama on Drafting Rules of Criminal Procedure, the Human Rights Committee for the Alabama Prison System, the Board of Trustees of the Lawyers Committee for Civil Rights Under Law, Chairman of the Northern District of the Alabama Black Lawyers Association and the Citizens Coalition. He is a member of the faculty of Cumberland School of Law as instructor in the course on Appellate and Trial Advocacy. Justice Adams has received many awards and citations from local, state and national civic, fraternal and legal organizations. In 1983, the Board of Education of the City of Gadsden named an elementary school after Justice Adams.

Don Mike Anthony

is a partner in the Pasadena, California law firm of Hahn & Hahn, specializing in civil litigation and professional ethics. He is a former member of the State Bar of California Board of Governors, and was vice-president of the State Bar in 1986-87. He has been active in all phases of lawyer discipline in California for 20 years, serving as Chair of the State Bar Committee on Discipline and the Ad Hoc Committee on Discipline. He served on the State Bar Court Executive Committee and Public Information Committee, and was Chair of the State Bar Court Referee Training Workshops. He is currently a member of the State Bar of California Client Security Fund Commission. Mr. Anthony frequently serves as a panelist in continuing education programs on litigation, family law and professional ethics.

John T. Berry

is Staff Counsel for the Florida Bar and Director of the Legal Division composed of Lawyer Regulation, Ethics, Unlicensed Practice of Law and Advertising. He received his B.A. in political science, magna cum laude, from the University of Florida in 1973 and received his J.D. in 1976 from Stetson University College of Law. From 1976 to 1983, he served as Assistant State Attorney in Orlando, Florida. He was in charge of a unit handling organized crime, white collar and regulatory cases. During that time, he worked with many federal, state and local agencies which concentrate in the area of professional and ethical regulation. He is a graduate of the Battelle National Center on White Collar Crime. Mr. Berry has served as an officer of the National Organization of Bar Counsel (NOBC) for the past five years. He was president of the NOBC from 1989-1990. He also served as a liaison to the American Bar Association Joint Committee on Professional Sanctions. He has lectured throughout the U.S. on the topic of lawyer regulation and ethics. Mr. Berry was invited to several states to aid in the evaluation of their lawyer disciplinary systems. He served as an advisor to the Florida House of Representatives Select Committee on Establishing Disciplinary Procedures for charges brought against House members.

Ellen Feingold

is President of Jewish Community Housing for the Elderly, a non-profit developer and manager of over 900 units of non-sectarian housing for low-income elderly. She was the organizer and lobbyist for Massachusetts' civil rights coalition. She participated in the drafting and lobbying of a substantial portion of the state's civil rights and housing laws. She served on a number of government agencies in the civil rights and housing areas. She was Director of Civil Rights for the U.S. department of Transportation. Ms. Feingold was a faculty member of the Kennedy Institute of Politics, Harvard University. She sits on the boards of a number of organizations, including the American Civil Liberties Union and the Civil Liberties Union of Massachusetts, and is a Past President of the latter.

Donald M. Haskell

is a founding partner of the Illinois law firm of Haskell & Perrin. Mr. Haskell now lives in Oregon and is Of Counsel to the firm. Mr. Haskell is currently a member of the ABA

House of Delegates and previously served on the ABA Board of Governors. During his tenure on the Board of Governors, Mr. Haskell served on the Executive Committee and was Chair of the Program Committee and the Compensation Committee. He is a former Chair of the Section of Tort and Insurance Practice. Mr. Haskell is currently a member of the ABA Standing Committee on Lawyers' Professional Liability. Mr. Haskell served on the ABA Special Committee on the Tort Liability System, the ABA Special Committee on Product Liability and the ABA Long Range Planning Committee. Mr. Haskell is currently on the Board of Trustees of the Columbia River Maritime Museum and is a County Commissioner of Clatsop County, Oregon.

Charles W. Kettlewell

is a lawyer in private practice concentrating in lawyer ethics, disciplinary and licensing matters. Mr. Kettlewell has spoken at numerous national, state and local meetings on the subject of ethics and professional responsibility. He is President of the Association of Professional Responsibility Lawyers. Mr. Kettlewell is a Past President of the National Organization of Bar Counsel and former member of the ABA Standing Committee on Professional Discipline. Mr. Kettlewell was a member of the ABA Joint Committee on Professional Sanctions, which published the Standards for Imposing Lawyer Discipline in 1986. He previously served as Assistant Disciplinary Counsel for the State of Ohio. Mr. Kettlewell teaches professional responsibility as an Adjunct Professor of Law at The Ohio State University College of the Law.

Timothy K. McPike

is the reporter to the Commission. He practiced law in Tucson, Arizona then served as a Counsel to the United States Senate Subcommittee on Improvements in Judicial Machinery from 1977 to 1982. From 1982 to 1988, Mr. McPike was Regulation Counsel to the ABA Standing Committee on Professional Discipline. He conducted evaluations of twenty lawyer disciplinary agencies and advised states' highest courts on disciplinary reforms. He created the concepts of the ABA Standards for Imposing Lawyer Sanctions and the Commission on Evaluation of Disciplinary Enforcement, and drafted the 1985 ABA Model Rules For Lawyer Disciplinary Enforcement. He supervised the operations of the ABA National Discipline Data Bank. Mr. McPike has lectured to many judicial and bar organizations on professional regulation and was a lecturer at the National Judicial College. He has been a speaker at the ABA National Conference on Professional Responsibility and had primary responsibility for the Conference's program from 1983 to 1987.

Charlotte (Becky) Stretch

is Special Counsel to the Commission. Before joining the American Bar Association in 1989, Ms. Stretch served as Assistant Director of the Hawaii State Ethics Commission and as Counsel to the Ethics Commission of the City and County of Honolulu. For the Ethics Commissions, Ms. Stretch handled questions of conflicts of interest, gifts, confidential information, financial interest and other ethical considerations for

government employees and conducted training programs on ethics. Ms. Stretch previously was a public defender and then practiced civil and criminal law in a private firm in Honolulu. She was also active in the Hawaii State Bar Association. Prior to that she worked for a major insurance company in New York City, providing advice on disputed claims and contributing to the company's punitive damages handbook.

APPENDIX D:
COMPLETE TEXT OF RECOMMENDATIONS AS ADOPTED BY THE HOUSE OF DELEGATES

Recommendations

RESOLVED, that the American Bar Association adopts the following recommendations, with the understanding that each jurisdiction should determine for itself whether to accept or modify the individual recommendations:

Recommendation 1
Regulation of the Profession by the Judiciary

Regulation of the legal profession should remain under the authority of the judicial branch of government.

Recommendation 2
Supporting Judicial Regulation and Professional Responsibility

2.1 The American Bar Association should continue to place the highest priority on promoting, developing, and supporting judicial regulation of the legal profession and professional responsibility.

2.2 The Association should continue to provide adequate funding and staffing for activities to support judicial regulation and professional responsibility.

2.3. To promote the most efficient allocation of resources, the Association should establish written policies to insure that all of its judicial regulation and professional responsibility activities are coordinated, regardless of the Association entity conducting the activity.

Recommendation 3
Expanding the Scope of Public Protection

The Court should establish a system of regulation of the legal profession that consists of:

3.1 component agencies, including but not limited to:

a. lawyer discipline,
b. a client protection fund,

c. mandatory arbitration of fee disputes,
d. voluntary arbitration of lawyer malpractice claims and other disputes,
e. mediation,
f. lawyer practice assistance,
g. lawyer substance abuse counseling; and

3.2 a central intake office for the receipt of all complaints about lawyers, whose functions should include: (a) providing assistance to complainants in stating their complaints; (b) making a preliminary determination as to the validity of the complaint; (c) dismissing the complaint or determining the appropriate component agency or agencies to which the complaint should be directed and forwarding the complaint; (d) providing information to complainants about available remedies, operations and procedures, and the status of their complaints; and (e) coordinating among agencies and tracking the handling and disposition of each complaint.

Recommendation 4
Lawyer Practice Assistance Committee

4.1 The Court should establish a Lawyer Practice Assistance Committee. At least one third of the members should be nonlawyers. The Lawyer Assistance Committee should consider cases referred to it by the disciplinary counsel and the Court and should assist lawyers voluntarily seeking assistance. The Committee should provide guidance to the lawyer including, when appropriate: (a) review of the lawyer's office and case management practices and recommendations for improvement; and (b) review of the lawyer's substantive knowledge of the law and recommendations for further study.

4.2 In cases in which the lawyer has agreed with disciplinary counsel to submit to practice assistance, the Committee may require the lawyer to attend continuing legal education classes, to attend and successfully complete law school courses or office management courses, to participate in substance abuse recovery programs or in psychological counseling, or to take other actions necessary to improve the lawyer's fitness to practice law.

Recommendation 5
Independence of Disciplinary Officials

All jurisdictions should structure their lawyer disciplinary systems so that disciplinary officials are appointed by the highest court of the jurisdiction or by other disciplinary officials who are appointed by the Court. Disciplinary officials should possess sufficient independent authority to conduct the lawyer discipline function impartially:

5.1 Elected bar officials, their appointees and employees should provide only administrative and other services for the disciplinary system that support the operation of the system without impairing the independence of disciplinary officials.

5.2 Elected bar officials, their appointees and employees should have no investigative, prosecutorial, or adjudicative functions in the disciplinary process.

5.3 The budget for the office of disciplinary counsel should be formulated by disciplinary counsel. The budget for the statewide disciplinary board should be formulated by the board. Disciplinary budgets should be approved or modified directly by the Court or by an administrative agency of the Court. Disciplinary counsel and the disciplinary board should be accountable for the expenditure of funds only to the Court, except that bar associations may provide accounting and other financial services that do not impair the independence of disciplinary officials.

5.4 Disciplinary counsel and staff, disciplinary adjudicators and staff, and other disciplinary agency personnel should be absolutely immune from civil liability for all actions performed within the scope of their duties, consistent with ABA MRLDE 12A.

Recommendation 6
Independence of Disciplinary Counsel

6.1 The Court alone should appoint and remove disciplinary counsel and should provide sufficient authority for prosecutorial independence and discretion. The Court should also promulgate rules providing that disciplinary counsel shall:

(a) have authority to employ and terminate staff, formulate a budget and approve expenditures subject only to the authority of the Court;
(b) have authority, in cases involving allegations of minor incompetence, neglect, or misconduct, to resolve a matter with the consent of the respondent by administrative procedures established by the Court;
(c) have authority to appeal a decision of a hearing committee or the disciplinary board;
(d) be compensated sufficiently to attract competent counsel and retain experienced counsel; and
(e) be prohibited from providing advisory ethics opinions, either orally or in writing.

6.2 The Court should adopt a rule providing that no disciplinary adjudicative official (including hearing committee members, disciplinary board members, or members of the Court) shall communicate ex parte with disciplinary counsel regarding an ongoing investigation or disciplinary matter, except about administrative matters or to report information alleging the misconduct of a lawyer.

Recommendation 7
Access to Disciplinary Information

All records of the lawyer disciplinary agency except the work product of disciplinary counsel should be available to the public after a determination has been made that probable cause exists to believe misconduct occurred, unless the complainant or respondent obtains a protective order from the highest court or its designee for specific testimony, documents or records. All proceedings except adjudicative deliberations

should be public after a determination that probable cause exists to believe that misconduct occurred.

Recommendation 8
Complainant's Rights

8.1 Complainants should receive notice of the status of disciplinary proceedings at all stages of the proceedings. In general, a complainant should receive, contemporaneously, the same notices and orders the respondent receives as well as copies of respondent's communications to the agency, except information that is subject to another client's privilege.

8.2 Complainants should be permitted a reasonable opportunity to rebut statements of the respondent before a complaint is summarily dismissed.

8.3 Complainants should be notified in writing when the complaint has been dismissed. The notice should include a concise recitation of the specific facts and reasoning upon which the decision to dismiss was made.

8.4 Disciplinary counsel should issue written guidelines for determining which cases will be dismissed for failure to allege facts that, if true, would constitute grounds for disciplinary action. These guidelines should be sent to complainants whose cases are dismissed.

8.5 Complainants should be notified of the date, time, and location of the hearing. Complainants should have the right to personally appear and testify at the hearing.

8.6 All jurisdictions should afford a right of review to complainants whose complaints are dismissed prior to a full hearing on the merits, consistent with ABA MRLDE 11B(3) and 31.

Recommendation 9
Procedures In Lieu of Discipline for Minor Misconduct

All jurisdictions should adopt procedures in lieu of discipline for matters in which a lawyer's actions constitute minor misconduct, minor incompetence, or minor neglect. The procedures should provide:

9.1 The Court shall define criteria for matters involving minor misconduct, minor incompetence, or minor neglect that may be resolved by non-disciplinary proceedings or dismissal.

9.2 If disciplinary counsel determines that a matter meets the criteria established by the Court, disciplinary counsel may reach agreement with the respondent to submit the matter to non-disciplinary proceedings. Such proceedings may consist of fee arbitration, arbitration, mediation, lawyer practice assistance, substance abuse recovery programs,

psychological counseling, or any other non-disciplinary proceedings authorized by the Court. Disciplinary counsel shall then refer the matter to the agency or agencies authorized by the Court to conduct the proceedings.

9.3 If the lawyer does not comply with the terms of the agreement disciplinary counsel may resume disciplinary proceedings.

9.4 If the lawyer fulfills the terms of the agreement, the disciplinary counsel shall dismiss the disciplinary proceeding.

Recommendation 10
Expedited Procedures for Minor Misconduct

All jurisdictions should adopt simplified, expedited procedures to adjudicate cases in which the alleged misconduct warrants less than suspension or disbarment or other restriction on the right to practice. Expedited procedures should provide:

10.1 The Court shall define minor violations of the rules of professional conduct that shall subject the respondent to sanctions not constituting restrictions on the right to practice law, consistent with the ABA Standards for Imposing Lawyer Sanctions.

10.2 A hearing shall be held by a single adjudicator [member of a hearing committee].

10.3 The adjudicator shall make concise, written findings of fact and conclusions of law and shall either dismiss the case or impose a sanction that does not constitute a restriction on the respondent's right to practice.

10.4 Respondent and disciplinary counsel shall have the right to appeal the decision to a second adjudicator [member of the statewide disciplinary board], who shall either adopt the decision below or make written findings. The appellate adjudicator shall either dismiss the case or impose a sanction that does not constitute a restriction on the respondent's right to practice.

10.5 The decision of the appellate adjudicator may be reviewed at the discretion of the Court upon application by respondent or disciplinary counsel. The Court shall grant review only in cases involving significant issues of law or upon a showing that the decision below constituted an abuse of discretion. The Court shall either adopt the decision below or make written findings. The Court shall either dismiss the case or impose a sanction that does not constitute a restriction on the respondent's right to practice.

10.6 Upon final disposition of the case, the written findings of the final adjudicator shall be published in an appropriate journal or reporter and a copy shall be mailed to the respondent and the complainant and to the ABA National Discipline Data Bank.

Recommendation 11
Disposition of Cases by a Hearing Committee, the Board or Court

The statewide disciplinary board should not review a determination of the hearing committee except upon a request for review by the disciplinary counsel or respondent or upon the vote of a majority of the Board. The Court should not review a matter except: (a) within its discretion upon a request for review of the determination of the Board by the disciplinary counsel or respondent; or (b) upon the vote of a majority of the Court to review a determination of the hearing committee or Board. Except in unusual cases requiring a de novo hearing by the Court, the Court should exercise its jurisdiction in the capacity of appellate review. The Court should issue and publish full written opinions in all disciplinary cases. In any matter finally determined by a hearing committee or the Board, the Court should by per curiam order adopt and publish the findings and conclusions contained in the written report of the committee or Board.

Recommendation 12
Interim Suspension for Threat of Harm

The immediate interim suspension of a lawyer should be ordered upon a finding that a lawyer poses a substantial threat of serious harm to the public.

Recommendation 13
Funding and Staffing

The Court should insure that adequate funding and staffing is provided for the disciplinary agency so that: (a) disciplinary cases are screened, investigated, prosecuted and adjudicated promptly; (b) the work load per staff person permits careful and thorough performance of duties; (c) professional and support staff are compensated at a level sufficient to attract and retain competent personnel; (d) sufficient office and data processing equipment exist to efficiently and quickly process the work load and manage the agency; (e) adequate office space exists to provide a productive working environment; and (f) staff and volunteers are adequately trained in disciplinary law and procedure.

Recommendation 14
Standards for Resources

14.1 Each jurisdiction should keep case load and time statistics to assist in determining the need for additional staff and resources. Case load and time statistics should include, at the minimum:

(a) time records for all counsel and investigators, tracked by case or other task including time spend on non-disciplinary functions;
(b) the number of pending cases at each stage in the disciplinary process for each counsel and the whole agency;
(c) the number of new cases assigned to each counsel during the year and the total for the

agency;
(d) the number of cases carried over from the prior year for each counsel and the total for the agency;
(e) the number of cases closed by each counsel during the year and the total for the agency;
(f) the number of cases of special difficulty or complexity at each stage in the proceedings; and
(g) the ratio of staff turnover.

14.2 The American Bar Association, National Organization of Bar Counsel, and disciplinary agencies in each jurisdiction should cooperate to develop standards for: (a) staffing levels and case load per professional and support staff member; (b) case processing time at all stages of disciplinary proceedings; and (c) compensation of professional and support staff.

Recommendation 15
Field Investigations

Disciplinary counsel should have sufficient staff and resources to: (1) fully investigate complaints, by such means as sending investigators into the field to interview witnesses and examine records and evidence; and (2) regularly monitor sources of public information such as news reports and court decisions likely to contain information about lawyer misconduct.

Recommendation 16
Random Audit of Trust Accounts

The Court should adopt a rule providing that lawyer trust accounts selected at random may be audited without having grounds to believe misconduct has occurred and also providing appropriate procedural safeguards.

Recommendation 17
Burden of Proof in Arbitration of Fee Disputes

The Court should adopt a rule for fee arbitration proceedings to provide that, except where the fee agreement otherwise has been established in a continuing relationship, if there is no written agreement between the lawyer and the client, the lawyer shall bear the burden of proof of all facts, and the lawyer shall be entitled to no more than the reasonable value of services for the work completed or, if the failure to complete the work was caused by the client, for the work performed.

Recommendation 18
Mandatory Malpractice Insurance Study

The American Bar Association should continue studies to determine whether a model program and model rule should be created to: (a) make appropriate levels of malpractice

insurance coverage available at a reasonable price; and (b) make coverage mandatory for all lawyers who have clients.

Recommendation 19
Effective Date of Disbarment and Suspension Orders

The Court should adopt a rule providing that orders of disbarment and suspension shall be effective on a date [15] days after the date of the order except where the Court finds that immediate disbarment or suspension is necessary to protect the public, contrary to the provisions of MRLDE 27E.

Recommendation 20
National Discipline Data Bank

The American Bar Association should provide or seek adequate funding to automate the dissemination of reciprocal discipline information by means of electronic data processing and telecommunications, so that:

20.1 appropriate discipline, bar admissions, and other officials in each jurisdiction can directly access and query the National Discipline Data Bank via a computer telecommunications network;

20.2 a uniform data format and software are developed permitting automated cross-checking of jurisdictions' rosters of licensed lawyers against the National Discipline Data Bank's contents;

20.3 a listing of the contents of the National Discipline Data Bank is disseminated to discipline officials quarterly or semi-annually on an electronic data processing medium suitable for automated comparison with a jurisdiction's roster of lawyers.

Recommendation 21
Coordinating Interstate Identification

21.1 The American Bar Association and the appropriate officials in each jurisdiction should establish a system of assigning a universal identification number to each lawyer licensed to practice law.

21.2 The highest court in each jurisdiction should require all lawyers licensed in the jurisdiction to (a) register annually with the agency designated by the Court stating all other jurisdictions in which they are licensed to practice law, and (b) immediately report to the agency designated by the Court changes of law license status in other jurisdictions such as admission to practice, discipline imposed, or resignation.

Endnotes

1. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFFALO L.REV. 525 (1983).

2. *Ibid.* p. 535, 537. Note that the author takes a different view of the motivations behind these developments.

3. Courts in New York, North Carolina and Oregon have acquiesced in some legislative regulation of the legal profession while affirming the judiciary's inherent power to regulate. The North Carolina Bar expressed to the Commission a strong belief that its system demonstrates that the state supreme court and the legislature can successfully cooperate in regulating the legal profession.

4. The Commission received testimony that New York lawyer disciplinary agencies, whose funds are controlled by the state legislature, were severely underfunded. Subsequently, the Commission was told that the legislature had increased lawyer registration fees but did not increase agency funding.

5. 323 nonlawyer disciplinary adjudicators answered the Commission's survey. Average responses (1 = strongly agree, 5 = strongly disagree) were: the system protects the public (1.88), disciplines lawyers fairly (1.76), is fair to complainants (1.88). The survey asked "Do you think the system would be more effective if the majority of members were nonlawyers?" Of 309 nonlawyer adjudicators responding to this question, only 13 answered "yes."

6. Alpert, *loc. cit.*

7. The percentage of complaints filed by non-clients varies among jurisdictions. The recommendations of this section are primarily focused on client complainants, although some provisions are equally applicable to clients and non-clients.

8. Under the expanded system proposed here, complaints that fail to allege grounds for any type of response will be dismissed by the Central Intake Office. *See* Rec. 3.2(c).

9. The National Organization of Bar Counsel's membership includes over 400 lawyer disciplinary counsel representing more than 60 state and federal disciplinary jurisdictions in the United States and Canada.

10. Alaska, California, Maine, New Jersey, South Carolina and Wyoming. NAT'L J., p.30, April 8, 1991.

11. "The Handling of Complaints about the Legal Profession - An International Comparison (Draft Report)," Research and Policy Planning Unit, Law Society of England & Wales, 1989, footnote 1, p.6.

12. Hazard, *Drawing the Distinctions on Discipline*, NAT'L J., p.14, Jan.21, 1991.

13. The Complainants' Grievance Panel was established by the Board of Governors of the State Bar of California pursuant to statute in 1986. The Panel audits dismissals of disciplinary complaints and admonitions.

14. The percentage of complaints filed by non-clients varies among jurisdictions. The recommendations in this section are primarily focused on client complainants, although some provisions are equally applicable to clients and non-clients.

15. By "expedited procedures," we do not refer to discipline by consent procedures, but to adversarial hearing procedures.

16. MRLDE 3.A. provides: "each hearing committee shall consist of two members of the bar of this state and one public member."

17. The total amounts spent on lawyer discipline as reported to the ABA: 1984 - $31 million (46 jurisdictions); 1985 - $26.3 million (42); 1986 - $43 million (43); 1987 - $55 million (51); 1988 - $74.4 million (46).

18. 1990 Client Protection Fund Survey, ABA Center for Professional Responsibility, Dec. 1990.

19. Recordkeeping verification rules exist in Arizona, Delaware, Florida, Iowa, Minnesota, New Hampshire, New Jersey, New Mexico, New York (1st & 2nd Departments), Washington and Wisconsin. Trust account overdraft notification programs exist in California, Connecticut, Florida, Idaho, Maryland, Minnesota, New Jersey, North Carolina, Rhode Island, Vermont, Virginia and Washington. Random audit programs exist in Iowa, Nebraska, New Hampshire, New Jersey, New York (1st & 2nd Departments), North Carolina, Vermont and Washington.

20. *See, e.g.*, St. Clair, *Those Monstrous Malpractice Premiums*, 13 LEGAL ECON. 24 (September, 1987); Lynch, *The Insurance Panic for Lawyers*, 72 A.B.A. J. 42 (July, 1986); Mallen, *Cutting Through the Malpractice Maze*, 15 BRIEF 10 (Summer, 1986).