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## The Clark Report and the Revised New Mexico Disciplinary Procedures

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# THE CLARK REPORT AND THE REVISED NEW MEXICO DISCIPLINARY PROCEDURES

Why may not that be the skull of a lawyer?  
Where be his quiddities now, his quillets,  
his cases, his tenures, and his tricks?

*Hamlet*, Act V, Sc. 1, 1.106

Among the variety of benefits accorded the professions generally and the legal profession in particular, is the luxury of self-discipline.<sup>1</sup> The rationale supporting underlying self-discipline include the lack of lay legal expertise and understanding, the requirements of attorney-client confidentiality, and the initial fulfillment of strict standards for admission to the bar. Although there may be substantial merit in these considerations, underlying the case for self-discipline is the tacit acknowledgement that lawyers are horrified by the prospect of the public undecorously rambling through the legal establishment. Or perhaps as Hamlet might have observed, the profession doth protest too much.

Admittedly the present status of disciplinary enforcement in the nation is appalling.<sup>2</sup> While the situation in New Mexico may not be as desperate as in other jurisdictions,<sup>3</sup> it was recognized in Septem-

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1. For a discussion of the inherent power of the courts to discipline attorneys, see ABA Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement*, Section II, (Final Draft: June, 1970) [hereinafter cited as Clark Report]. The House of Delegates of the American Bar Association, in August 1970, unanimously approved a report recommending extensive reforms in disciplinary structures and procedures at both the state and local levels. The report was the work of the Special Committee on Evaluation of Disciplinary Enforcement created in 1927 under the direction of Tom C. Clark. For a review of the subject in New Mexico, see In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931).

2. The Clark Report, *supra* note 1, at § 1, concludes:

After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.

3. See note 6 *infra*. Unfortunately, complete records of the number of complaints and their ultimate disposition under the former procedures are not available, making a comparative statistical analysis impossible. The authors were told by George T. Harris, Jr., former Bar Commissioner and Ethics and Grievances Committee member, and present Chairman of the Disciplinary Board, that although

... very few reliable figures or statistics on the Ethics Committee's workload [are available]... In the year 1967-1968, 92 complaints were made against New Mexico lawyers and investigated by the committee. Sixty-three were disposed of, and 29 left pending at the end of that year. The following year no report was made. During the 1969-1970 year, there were 110 complaints filed,

ber of 1970 that improvements in the State Bar disciplinary procedures were necessary. The result is the new Supreme Court Rule for Disciplinary Proceedings.<sup>4</sup>

The purpose of this Comment is to outline the procedures recently adopted by the Court, to evaluate them in light of the Clark Report,<sup>5</sup> to discuss possible problem areas which the new rules may precipitate, and finally to indicate those situations which the rules fail to cover but which may be dealt with through informal procedural guidelines.

## THE NEW DISCIPLINARY RULES

### A. A Brief Overview

Although the former New Mexico procedures<sup>6</sup> were considerably advanced compared to those in most states, there were serious short-

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90 of which were disposed of; five formal charges were filed with the Bar Commission, and 15 complaints were left pending at the end of the year. During the year 1970-1971, 134 complaints were filed, and no information was available as to disposition.

4. New Mexico Supreme Court Rules, Rule 3 [hereinafter cited as Rule Three]. The new rules have been recently adopted and published, and became effective Jan. 1, 1972.

5. ABA Special Committee on Evaluation Disciplinary Enforcement, *supra* note 1.

6. New Mexico Supreme Court Rules, Rule 3 (1960).

Under the former rule the members of the board of commissioners of the State Bar were appointed referees of the court and "empowered to hear complaints against members of the bar for unprofessional conduct" upon the filing with it of formal charges (note that the board's jurisdiction was limited to members of the State Bar). It was the responsibility of the committee on ethics, grievances, and discipline (members of the commission appointed by its president) to make a preliminary investigation of misconduct to determine whether such formal proceedings should be initiated. Its investigation was instituted upon formal or informal complaint or upon information "received from any responsible source."

Upon the filing of formal charges with the board, service was made on the attorney; the attorney was required to respond in writing, denying or admitting the allegations. A formal, private (unless the respondent requested otherwise) hearing was held before the board at which the members of the ethics, grievances, and discipline committee acted as attorneys for the prosecution. The board then reported its findings of fact, conclusions, and recommendations to the Supreme Court, whereupon the Court either imposed discipline, dismissed the proceedings, or ordered the charges and record placed on file (to be considered further in the event of the filing of other charges or the production of additional evidence. Available modes of discipline were: (a) permanent disbarment, (b) indefinite suspension, (c) censure, or (d) such other action as the Court deemed proper.

From a reading of the Clark Commission Report, we can only conclude that New Mexico's former procedures were considerably advanced over those of many jurisdictions. Out of some twenty-nine applicable recommendations, our former rules were in substantial compliance with eleven; we had already provided for:

- a. investigation without formal complaint;
- b. the keeping of formal records;
- c. subpoena power;
- d. alternative service by post and publication;
- e. adequate procedures for dealing with attorneys incapacitated due to mental incompetency and drug addiction;
- f. reciprocity with other jurisdictions;

comings. There was inadequate provision for *active* supervision of the profession caused by several factors: inadequate financing; lack of full-time, professional staff; lack of supervision of attorneys regularly engaged in practice but not members of the New Mexico Bar, and; inadequate sources of information regarding funds held in trust.

The former procedures made no attempt to protect clients of disciplined attorneys by requiring that notice of suspension or disbarment be given. Likewise, clients of attorneys who disappeared, were found incompetent, or were under investigation were not protected.

In addition to local problems there were those of national scope, such as lack of exchange of information between jurisdictions, and allowing attorneys disciplined in one jurisdiction to practice in others (sometimes within the same city or state).

Most of the serious shortcomings of the former procedures have been remedied by revised Rule Three, providing for fundamental changes in the structure of the disciplinary agency. The State is divided into three districts—Central, Northern and Southern—each having jurisdiction over those attorneys maintaining an office within the district.<sup>7</sup>

The rule requires the Supreme Court to appoint a nine-member Disciplinary Board which effectively oversees the entire State disciplinary structure. The Board has the power and duty to:<sup>8</sup>

- a. initiate investigation upon its own motion or complaint;
- b. appoint a Chief Bar Counsel for the State as a whole, and such Assistant Bar Counsel within each district as necessary;
- c. appoint two or more inquiry committees<sup>9</sup> within each district;
- d. appoint two or more hearing committees<sup>10</sup> within each district and assign formal charges and motions for reinstatement to them; and
- e. review the findings and recommendations of committees and prepare and forward its own recommendations to the Supreme Court.

Critical to the active supervision of the profession envisioned by

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- g. conviction of serious crimes involving moral turpitude as conclusive evidence of misconduct;
  - h. exclusion of jury trial;
  - i. confidentiality of pending proceedings;
  - j. resignation while proceedings are pending; and
  - k. an integrated bar.
7. Rule Three, *supra* note 4, at § 2.
  8. *Id.* at section 4(c).
  9. Each consisting of three members of the bar who maintain an office for the practice of law within that district.
  10. The composition of the hearing committees is identical to that of the inquiry committees.

the Clark Report are the Chief and Assistant Bar Counsel,<sup>11</sup> for it is their responsibility to investigate all alleged misconduct. Upon completion of their investigation, the matter is either dismissed or referred to an inquiry committee.<sup>12</sup>

The inquiry committee<sup>13</sup> determines if probable cause exists necessary to the filing of formal charges in all matters referred to them by Bar Counsel. If probable cause is found, the case is referred to the Chairman of the Disciplinary Board for assignment to the appropriate hearing committee; if no probable cause is found, the committee may either dismiss the case or recommend a private reprimand by the Board.

Upon referral, the hearing committee<sup>14</sup> conducts a formal hearing and submits its findings and recommendations to the Board.

In the event the matter is referred to the Board, it conducts a formal hearing and presents the entire record along with its recommendations to the Supreme Court for final disposition.

### *B. Changes in Procedure: Adoption of Clark Report Recommendations*

The new rules are a significant advance, representing a substantial adoption of the Model Code prepared pursuant to the Clark Report. Deserving notice are the following changes from the former rules:

1. No member of the board may serve more than six consecutive years,<sup>15</sup> and board appointments will be staggered. This is in substantial compliance with Clark Report recommendations concerning rotation of agency members.
2. The introduction of full-time, professional staff<sup>16</sup>—Chief and Assistant Bar Counsel—to maintain active rather than passive supervision of the Bar.<sup>17</sup>
3. The jurisdiction of the Court has been extended to include

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11. Rule Three, *supra* note 4, at § 9. Information regarding Bar Counsel and the new disciplinary procedure in general may be obtained by contacting:

Bill Gilbert  
Disciplinary Board  
P.O. Box 537  
Santa Fe, NM 87501 Phone: 982-4374

12. For a discussion of related problems, see text III, D, *infra*.

13. Rule Three, *supra* note 4, at § 7.

14. *Id.* § 6.

15. However, a board member may be reappointed after a lapse of one year.

16. Rule Three, *supra* note 4, at § 8(A):

The Board shall appoint a Chief Bar Counsel and such Assistant Bar Counsel as may be required for each district.

17. For a fuller discussion of the importance and role of Bar Counsel, see text IV, A, *infra*.

- non-members of the New Mexico Bar who "regularly engage in the practice of law" in New Mexico.<sup>18</sup>
4. To implement the extension of jurisdiction, the new rules call for the periodic registration of all attorneys regularly engaged in practice in New Mexico.<sup>19</sup>
  5. All attorneys who are either members of the Bar or who regularly engage in practice in the State are assessed,<sup>20</sup> providing funds to pay the professional staff.
  6. The subpoena power has been made available to the respondent as well as to inquiry and hearing committees.<sup>21</sup>
  7. The new rules provide the alternative of informal, private admonition, where appropriate.<sup>22</sup>
  8. Restitution, in itself, shall not justify abatement of a pending proceeding<sup>23</sup> nor shall unwillingness or neglect of the complainant to sign a charge or prosecution.<sup>24</sup>
  9. The sanction for resigning while disciplinary proceedings are pending is ordinary rather than permanent disbarment.<sup>25</sup>
  10. Attorneys convicted of serious crimes are to be immediately suspended.<sup>26</sup>
  11. Clients of disbarred or suspended attorneys are afforded additional protections.<sup>27</sup>
  12. Attorneys *must* maintain complete records of all funds, securities, and other properties held on behalf of their client. Such funds must be kept in a separate trust account. Further, the attorney must provide a summary of these records to the Board.<sup>28</sup>

18. Rule Three, *supra* note 4, at § 1. For a discussion of the attendant problems concerning this extension of jurisdiction see text III, C, *infra*.

19. *Id.* § 23.

20. *Id.* § 24.

21. *Id.* § 13. See text , , *infra*, for a related problem.

22. *Id.* §§ 4 and 5(C)(7).

23. *Id.* § 10.

24. *Id.* An essential feature of the new procedures is the ability to initiate investigation without the necessity of a complaint. See text IV, A, *infra*.

25. *Id.* § 17. Under the former rule, N.M. Stat. Ann. § 21-2-1, Rule 3 at 3.04 (1953):

A lawyer who, pending investigation of misconduct or while charges of misconduct against him are pending, voluntarily surrenders his license to practice law in this state, when such surrender has been accepted by this court, shall not thereafter be admitted to practice law in this state.

26. Rule Three, *supra* note 4, at § 15.

27. *Id.* §§ 19 and 20. In addition to comprehensive procedures for notice to clients of disbarred or suspended attorneys, the appropriate district court is empowered "to take such action as seems indicated to protect the interests of clients of the suspended, disappearing, or deceased attorney, as well as the interest of that attorney."

28. *Id.* § 14. See text at *infra* for a related problem.

## PROBLEM AREAS

## A. Immunity

While the New Mexico procedures are silent on the question of immunity, the Model Disciplinary Code<sup>29</sup> provides for a rule giving any complainant immunity from any suit predicated upon the complaint. Perhaps we do not wish such a rigid rule, but we should give the court discretion to grant immunity where it sees fit. The Clark Commission was aware of the deterrent effect upon complainants where a suit against them was "motivated so by a desire 'to teach the complainant a lesson.'" They were not satisfied with a policy of limited immunity as "this would require the almost impossible task of demonstrating that the allegation of malice itself was not made in good faith."<sup>30</sup> Even though the "individual attorney may suffer some hardship as the result of a malicious complaint," such a sacrifice is necessary for a "profession that wants to retain the power to police its own members."<sup>31</sup> Also, such a danger would be mitigated by our recommendations regarding spurious and malicious complaints<sup>32</sup> as well as by the confidentiality of the initial investigation.

The new Code also provides immunity from criminal prosecution to witnesses and accused attorneys upon application by an authorized disciplinary agency, with due notice to law enforcement agencies. This proposal would require legislative authorization.<sup>33</sup> Immunity is crucial to the successful prosecution of misconduct such as solicitation, false special damage claims, immigration fraud and other cases involving conspiracy between attorney and client.

This power is necessary especially in view of the holding in *Spevack v. Klein*<sup>34</sup> that charges of misconduct cannot be predicated solely upon the respondent attorney's refusal to testify against himself. Thus the client may well be the only source of evidence in such cases.

Requests for respondent immunity should be sparingly granted as the question of whether a disciplinary proceeding is essentially criminal or civil is not clearly answered and "should the courts ever determine that a disciplinary proceeding is criminal, any immunity

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29. American Bar Association, Model Disciplinary Code (1970). The Model Code was based on the findings and recommendations of the Clark Report.

30. Clark Report, *supra* note 1, at 75.

31. *Id.* at 76.

32. See IV D *infra*.

33. Clark Report, *supra* note 1, at 90-91.

34. 385 U.S. 511 (1967).

granted to the accused attorney will immunize him against the very disciplinary proceeding in which it was granted."<sup>35</sup>

We feel that the power to grant immunity is essential to the investigation and elimination of misconduct in the nature of an attorney-client conspiracy and that this power should be given to the disciplinary board by appropriate legislation.

### *B. Trust Reports*

As previously noted, Section 14 of the new rule adopts the Clark Commission's recommendation<sup>36</sup> for the *mandatory* keeping of the properties and funds of a client in a trust account, as well as the maintenance of records showing how such funds have been handled. There has been some question whether the attorney should be required to submit a certificate of audit from a CPA, or merely a summary of the record provided by the attorney himself. It should be observed that the use of a summary by an attorney may present problems of undesirable disclosure of a client's financial dealings. It is a long-established principle that an attorney's management of his client's financial interest is strictly confidential. In this regard, the summary presents a dilemma—if it requires too much disclosure, confidentiality will be infringed; if too little disclosure is required, the prophylactic effect of the summary will be jeopardized. Thus, to preserve maximum confidentiality, as well as to effectively audit attorney trust funds, we urge the use of a CPA certification when possible. The attorney summary should only be allowed when the attorney can demonstrate that the employment of a CPA is an unreasonable financial burden on his practice. We urge this stringent requirement to curb the most recurrent disciplinary problem—misuse of client funds.

### *C. Jurisdiction*

The revised rule states:

... any individual admitted to practice as an attorney in any other jurisdiction who regularly engages in the practice of law within this state as house counsel to corporations or other entities, as counsel for government agencies, or otherwise is subject to the exclusive disciplinary jurisdiction of this Court and the Board hereinafter established.<sup>37</sup>

This is a desirable extension of jurisdiction, but it is not at all clear

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35. Clark Report, *supra* note 1, at 91.

36. *Id.* at 173.

37. Rule Three, *supra* note 4, § 1.



how such an extension can be justified. As the Clark Report says, in recommending such an extension of jurisdiction:

[P]rivate practitioners who restrict themselves to appearance before federal agencies, attorneys employed by these agencies and other attorneys who specialize in a form of practice not requiring appearance in court are not formally admitted to practice. . . . Since they are not members of the bar of the local court having disciplinary jurisdiction, they are not subject to disciplinary action by that court.<sup>38</sup>

The report does not address itself to the constitutional problem in justifying the extension, but blithely concludes:

This may be achieved simply and effectively by the adoption of a rule by the court having disciplinary jurisdiction providing that any attorney who regularly engages in the practice of law within its jurisdiction or is admitted to practice for a particular matter thereby submits himself to the disciplinary jurisdiction of that court regardless of where he may be formally admitted to practice.<sup>39</sup>

It will be remembered that the disciplinary power of the Court is implicit in its inherent power to supervise officers of the Court. But as the attorneys over whom the jurisdiction is being extended are by definition *not* officers of the court, some other rationale must be forwarded to justify such an extension.

Statutes regarding unauthorized practice<sup>40</sup> enable Bar Counsel to call to the attention of the prosecutory official any case of unauthorized practice which they discover. Thus the statute can be used to force registration of house counsel and other non-New Mexico Bar attorneys. To accomplish this, the functions of the unauthorized practice committee should be given to Bar Counsel.

However, as regards attorneys employed by the federal government, both the disciplinary procedures and the unauthorized practice statute are subject to constitutional limitations. The leading case in this field is *Sperry v. State of Florida*,<sup>41</sup> involving attempted state regulation of federal patent licenses. The rationale of the case, however, extends generally to the unauthorized practice of law where conflicting federal and state interests are involved. Mr. Chief Justice Warren, speaking for the Court, said:

A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board

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38. Clark Report, *supra* note 1, at 67.

39. *Id.*

40. N.M. Stat. Ann. § § 18-1-26 and 18-1-27 (1953).

41. 373 U.S. 379 (1963).

a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. "No State law can hinder or obstruct the free use of a license granted under an act of Congress."<sup>42</sup>

The possibility of fifty different disciplinary standards and procedures could disrupt federal policies intended to be uniform in application throughout the states.<sup>43</sup> Furthermore, state supervision of federal attorneys might be used to frustrate the programs which those attorneys administer.<sup>44</sup>

The issue of bringing federal attorneys within the new disciplinary structure has created friction between the New Mexico Bar and the local chapter of the Federal Bar Association. To minimize possible antagonism and maintain disciplinary standards, we suggest that a policy of cooperation be pursued. Since it is not clear that federal attorneys could be compelled to register under the New Mexico procedures, continuing to insist upon incorporation of federal attorneys in the New Mexico scheme may further jeopardize cooperation.

In extraordinary circumstances, when a federal attorney is involved in a disciplinary infraction, Bar Counsel can notify the bar to which the attorney belongs for appropriate action.<sup>45</sup>

#### *D. Bar Counsel's Ability to Prosecute Over His Own Dismissal*

Section 9 of the new rules provides:

Counsel's decision to dispose of any matter by dismissal shall be reviewed by a member of an inquiry committee in the appropriate disciplinary district who may, if he disagrees with counsel's proposed disposition by dismissal, direct that the matter be submitted to an inquiry committee other than his own for a probable cause hearing.

Under the provisions of Section 8, Bar Counsel are required to prosecute all complaints before inquiry committees, hearing committees, and the Board. This raises the question of whether Bar Counsel can effectively prosecute a case in which a member of an inquiry committee has rejected Counsel's recommendation to dismiss a com-

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42. *Id.* at 385.

43. For a discussion of the tests for compatibility of state and federal interests as outlined by the New Mexico Supreme Court, see *Head v. New Mexico Board of Examiners in Optometry*, 70 N.M. 90, 370 P.2d 811 (1962), *aff'd*, 374 U.S. 424 (1963).

44. This may be a particularly real danger in emotionally charged, controversial areas of the law such as civil rights. Cf. *Sobol v. Perez*, 289 F. Supp. 392 (E.D. La. 1968) involving harassment of an out-of-state lawyer engaged in civil rights litigation.

45. This will be facilitated by the establishment of the National Data Bank discussed in the Clark Report, *supra* note 1, at 156-160.

plaint. Admittedly, the incidence of an inquiry committee rejecting the recommendation of the Bar Counsel will probably be small. Nevertheless, to insure rigorous prosecution of all grievances, it may be appropriate under such circumstances to have a member of the inquiry committee prosecute the complaint.

### *E. Reinstatement From Disbarment and Suspension*

The Clark Commission recommends that a disbarred attorney shall not be readmitted to practice before the expiration of the maximum period of suspension.<sup>46</sup> Our new procedures, however, allow a motion for reinstatement of disbarred attorneys after a period of three years,<sup>47</sup> whereas the maximum period of suspension is five years.<sup>48</sup> In view of the fact that disbarment is intended to be a more severe measure than suspension, the maximum suspension period should be reduced to three years and the Board should not entertain a motion for reinstatement from disbarment for a minimum period of three years. We feel that a three-year maximum suspension period is appropriate for misconduct warranting suspension and that misconduct warranting more than a three-year penalty be dealt with by disbarment.

The position of attorneys who are suspended for the maximum period (five years under present procedures or, as recommended, reduced to three) or indefinitely,<sup>49</sup> and who move for reinstatement but fail to demonstrate requisite qualifications<sup>50</sup> is not at all clear. In both cases suspension automatically lapses after the maximum five-year period. Such people then appear to be in limbo, neither suspended, admitted, inactive, nor disbarred. This area needs clarification; we recommend that Section 4(2) be strictly interpreted and that if after a five-year period (or three-year period) of suspension an attorney fails to demonstrate requisite qualifications, he automatically be classified as disbarred. Thus, the attorney, the bar, and the public will know where the attorney stands.

There are additional problems with the provisions regarding sum-

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46. Clark Report, *supra* note 1, at 151.

47. Rule Three, *supra* note 4, at § 21.

48. *Id.* § 4(2).

49. *Id.* at § 16. Attorneys judicially declared incompetent or involuntarily committed to a mental hospital may be suspended indefinitely.

50. The qualifications as set down in Rule Three (§ 21(B)) are as follows:

... the respondent-attorney shall have the burden of demonstrating by clear and convincing evidence that he has the moral qualifications and the competency and learning in the law required for admission to practice law in this State, and that his resumption of the practice of law will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest.

mary suspension of attorneys who fail to file a registration statement [Section 23(C)] or pay the required fees [Section 24(D)]. For no apparent reason the sections are not parallel; the sanction for failure to register is discretionary, while the sanction for failure to pay the required fee is mandatory.<sup>51</sup> It would appear that this is a mere oversight. Considering that registration and prompt collection of fees is prerequisite to the functioning of the disciplinary structure, our recommendation is that the sanctions in both provisions be made mandatory.

Moreover, while Section 23(C) provides for automatic reinstatement upon registration, Section 24(D) is silent on that issue. The language of Section 24(D) should be amended to conform to that of Section 23(C), thus allowing automatic reinstatement upon payment of the fee. *Both* sections, however, should be amended to provide that failure to comply with either section within thirty days of the deadline (January 31, annually) will necessitate compliance with the more stringent requirements of Section 21(D), dealing with reinstatement of attorneys disbarred for misconduct. In essence, failure to register or pay fees within thirty days would be deemed misconduct.

#### *F. Tenure of the Inquiry Committee*

A minor omission of the new rules is a statement regarding tenure for members of inquiry committees. The rules provide for a term of years for members of the Board;<sup>52</sup> members of hearing committees "shall serve at the pleasure of the Board."<sup>53</sup> It is unclear whether the rules envision a definite period of service on inquiry committees or an indefinite tenure similar to that provided for hearing committee members. Since the question is unresolved by the new procedures, we suggest that the inquiry committee members be appointed for a definite, limited term, during which time they shall be removed for cause only. The inquiry committee, as the threshold disciplinary body, will make critical determinations upon which the procedural apparatus depends. As participants at the local disciplinary level, inquiry committee members may be in particularly sensitive positions, requiring insulation from a variety of possible pressures. A

51. § 23(C):

C. Any attorney who fails to file the registration statement or supplement thereto, in accordance with the requirements of subsection A of this Section, *may* be summarily suspended and barred from practicing law in this State until he shall have complied therewith.

§ 24(B):

B. Any attorney who fails to pay the fee required under subsection A of this Section *shall* be summarily suspended.

52. Rule Three, *supra* note 4, at § 5(B).

53. *Id.* at § 6(A).

definite but limited term would facilitate this end as well as providing wider representation of the bar. As these considerations apply with equal force to hearing committee membership, the six-year maximum relating to Board members' terms should be applied to both inquiry and hearing committee members.

### G. *Pending Civil or Criminal Proceedings*

The Clark Commission recommends that a rule be adopted "providing that disciplinary proceedings be deferred until the determination of pending criminal or civil litigation involving substantially similar material allegations, provided the responsible attorney proceeds with reasonable dispatch."<sup>54</sup> This rule avoids two tribunals reaching inconsistent results while simultaneously considering the same factual situation and prevents prejudice of the civil or criminal proceeding by the disposition of the disciplinary proceeding.

Our newly adopted procedures, however, state a different rule:

Similarity of the substance of complaints to the material allegations of pending criminal or civil litigation shall not of itself prevent or delay disciplinary action . . . except to the extent provided in Section 15, D.<sup>55</sup>

In the absence of compelling justification for departing from the well-reasoned Clark Report recommendation such a rule is preferable to the one adopted.

## RECOMMENDED INFORMAL POLICY CONSIDERATIONS

### A. *Insulation of Bar Counsel*

The Bar Counsels' responsibilities as outlined in the new procedures place them in a unique position. Under Section 8, Bar Counsel are required to *investigate* and *prosecute* all complaints. They are the only persons in the disciplinary scheme charged with these responsibilities. In addition, they must maintain permanent records of all matters processed and the disposition thereof. The Clark Re-

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54. Clark Report, *supra* note 1, at 82.

55. Rule Three, *supra* note 4, at § 11. Section 15(D) provides:

Upon the receipt of a certificate of conviction of an attorney for a serious crime, the Court shall, in addition to suspending him in accordance with the provisions of subsection A of this Section, also refer the matter to the Board for the institution of a formal proceeding before a hearing committee in the appropriate disciplinary district, without a probable cause hearing before an inquiry committee. The sole issue to be determined in such proceeding before a hearing committee shall be the extent of the final discipline to be recommended by the hearing committee; provided, that a disciplinary proceeding so instituted shall not be concluded by the hearing committee until all appeals from the conviction are concluded.

port recommendations envision the professional staff as the primary activist arm of the disciplinary structure.<sup>56</sup> They are administrators, investigators, and prosecutors. It is their duty not only to investigate upon complaint, but also to initiate any additional disciplinary investigations they deem proper. This self-starting grievance machinery is one of the most commendable and necessary provisions of the new procedures. Reliance on complaints alone will seldom uncover those forms of professional misconduct that involve a conspiracy between attorney and client. Consequently, there is no place in the proposed disciplinary scheme for a part-time or volunteer staff.

In order to insure maximum effectiveness of Bar Counsel, it is imperative that they be insulated from pressure from within and without the bar. To this end it is recommended that Chief Bar Counsel be appointed for a definite renewable term of years and removed only for cause. Moreover, the demands of the office require adequate compensation commensurate with the burdens and delicacy of the position, for "[u]nless adequate funds for professional staffs are provided to initiate large-scale investigations into these [unethical] practices, the profession can never effectively police its own ranks."<sup>57</sup>

The expenses of the disciplinary committees and Bar Councils' salaries "shall be paid by the Board out of the funds collected under the provisions of Section 24."<sup>58</sup> Section 24 requires every registered attorney to pay an annual fee of \$15.00; those attorneys practicing for three years or less pay \$5.00. In our opinion, the revenue collected will be insufficient to pay Bar Counsel a reasonable salary, as well as meet the costs of committee hearings, dispositions, transcripts, etc.<sup>59</sup> We recommend that the Court increase the fee if possible,<sup>60</sup> or in the alternative, that public funds be provided to supplement the amount collected by attorneys' fees. The Clark Report in recommending the use of public funds said:

One of the principal purposes of attorney discipline is to protect the public by removing the wrongdoer, temporarily or permanently. There is a clear public interest, therefore, in providing adequate resources for effective disciplinary enforcement. Recognizing this,

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56. Clark Report, *supra* note 1, at 48-56.

57. *Id.* at 6.

58. Rule Three, *supra* note 4, at § 22(A).

59. Although § 22(B) of the new rules provides authority to assess all costs against the respondent attorney in a disciplinary action, this would only be appropriate when in fact the attorney is found to have acted unethically, resulting in formal discipline. Such cases represent a small proportion of all matters considered.

60. We recognize that the recent increase in annual bar dues may make it difficult to increase the assessment for disciplinary committees.

some jurisdictions have provided funds from general public revenues for their disciplinary agencies.<sup>61</sup>

The institution of new procedures in New Mexico provides an appropriate time to reconsider the financial structure of disciplinary enforcement.

The reasoning advanced by the Clark Commission urging provision of public funds is a persuasive argument for a similar policy in New Mexico. Moreover, if the new procedures fail to provide effective enforcement, the financial burden of subsequent disciplinary agencies may rest entirely on the state.

### *B. Notification of Disposition to Complainant*

There is no mention in the new procedures of notification to a complainant of receipt of his complaint and its final disposition. When the complaint comes from the public, rather than from the initiative of the bar, it is imperative that the complaining party be advised that some action has been taken. This is not only effective public relations between the legal profession and the general public, but might encourage what has heretofore been a skeptical clientele to submit its grievances. Moreover, in cases where charges have been dismissed, notification would be an added protection to the attorney from attempts to defame his reputation. However, to preserve confidentiality, it is recommended that only notification of, receipt of, and information as to final disposition of a complaint, be given to the initiating party.

### *C. Avoiding Delay of Court Review of Disciplinary Actions*

The purpose of the change in disciplinary procedures is to improve their efficiency as well as their rigor. The grievance structure has been streamlined, and the procedures include a variety of safeguards against needless delay. There is no justification for a court to sit on disciplinary matters for several months, or in some jurisdictions, for a year or two.<sup>62</sup> Besides stifling an aggressive disciplinary process, delay of court action works two additional evils: it unnecessarily exposes the public to the offending lawyer, and fails to clear the name of the innocent attorney.

This delay is generally the result of normal court congestion. Disciplinary proceedings, involving public and judicial interest, must receive prompt disposition. We suggest adoption of the Clark Report recommendation that disciplinary proceedings be given priority in

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61. Clark Report, *supra* note 1, at 21-22.

62. *Id.* at 30-39.

the New Mexico Supreme Court. More specifically, we recommend that grievances be brought promptly before the Court after hearing by the Board, and that a final determination be made no later than thirty days following final arguments.<sup>63</sup>

#### *D. Spurious and Malicious Complaints*

Spurious or malicious complaints present still another problem. An unbalanced or litigious client may file a myriad of unfounded complaints against a single attorney. The discretion of experienced Bar Counsel and inquiry committees should be sufficient to protect the profession from such complaints. However, since the rules require that a record be kept of every complaint, the attorney's resultant disciplinary record would unfairly reflect a long list of grievances. To alleviate this problem, it may be necessary to establish a special category for complaints which, after investigation, are deemed to be malicious or spurious in character. In all events, the disciplinary record of each attorney should clearly show the nature of such dubious charges.

#### *E. Protection of Minority Attorneys and Attorneys Engaged in Controversial Litigation*

It is often forgotten that disciplinary procedures serve two functions: First, to protect the public and the bar from unethical attorney practices; and second, to protect attorneys from public harassment and/or pressure from their colleagues.

To protect itself from criticism, the bar may more vigorously prosecute complaints of attorney misconduct which receive prominent exposure than those which are unknown to the public but of a more serious nature. Trials of politically unpopular persons often receive a great deal of publicity; lawyers defending such persons are subject to close public scrutiny. Moreover, a vigorous defense by an attorney may be equated by the public with active support of, or actual complicity in, the actions of the defendants. The resultant public pressure often brings the attorney under careful inspection by members of disciplinary committees.

It is understandable that the desire to avoid public interference and control of the bar might lead those with disciplinary duties to more aggressively prosecute dubious complaints resulting from strong public pressure. However, while the protection of the public and the profession is paramount, it is no less imperative that those charged with disciplinary responsibility *publicly* defend attorneys unjustly

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63. Clark Report, *supra* note 1, at 38.



accused of unethical conduct. In all events, disciplinary proceedings should not be used as a weapon to eliminate politically non-conformist members of the bar.

Recommendations aimed at insulating Bar Counsel and inquiry committee members from public and professional coercion may offer some safeguards to attorneys engaged in controversial litigation. However, lawyers from minority groups and the single or small-firm practitioner may need additional protection. As the Clark Report points out, representation in disciplinary agencies does not generally reflect substantial segments of the bar. There are few lawyers from minority groups and lawyers engaged in tort and criminal practice serving within the disciplinary structure.

To more adequately protect all segments of the bar, we urge the adoption of the Clark Report recommendation of substantial representation of such minorities in the membership of the disciplinary structure at all levels.<sup>64</sup>

### CONCLUSION

The disciplinary procedures recently adopted by the New Mexico Supreme Court include almost every recommendation of the Clark Report. Structural revision, however, even when coupled with a new Code of Professional Responsibility,<sup>65</sup> is no assurance against unethical practices. Wide acceptance within the profession of the need for effective disciplinary enforcement must accompany any formal change. The Clark Commission in its Report said:

If individual attorneys and judges shirk that responsibility, permitting wrongdoers in their midst to escape disciplinary action unless the circumstances are reported by laymen, the public may conclude that "self-policing" is in reality "self-protection."<sup>66</sup>

In short, the new procedures will only work if enough attorneys want them to; and they must work from the beginning. If the bar does not set a rigorous pattern now, attorneys may doubt that extensive disciplinary overhaul is anything more than a neat job of public relations. Convincing enforcement may be the only way to achieve a measure of true self-discipline.

DAVID FREEDMAN  
CHRISTOPHER KEY

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64. *Id.* at 46.

65. The new Code of Professional Responsibility will, like the new procedures, be effective as of January 1, 1972.

66. Clark Report, *supra* note 1, at 168.