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## Self-regulation and Approaches to Maintaining Standards of Professional Integrity

Stanley S. Arkin

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# SELF-REGULATION AND APPROACHES TO MAINTAINING STANDARDS OF PROFESSIONAL INTEGRITY

STANLEY S. ARKIN\*

*The article presents an examination of self-regulation in the legal community. The disciplinary process employed by one judicial district in New York City is utilized as a model for examining procedures and provides a basis for offering suggestions for upgrading effectiveness. The problems inherent in the self-regulation of the legal profession are examined from both the practitioner and the lay viewpoint. After focusing on the objectives of self-regulation, the author suggests two important areas of concern—disorder in the courtroom and the “marginal practitioner.” The article concludes with several suggestions for reforms in the area of self-regulation including: stiffer requirements for admission to the bar; the extension of legal aid and no fault concepts; the increased use of small claims courts; the necessity for continuing legal education courses in substantive and ethical areas of law; and the necessity for law schools to devote more time to the ethical considerations of practicing law. In addition Mr. Arkin suggests that client security funds be established, that a mediation procedure should be implemented and that grievance procedures become more centralized.*

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## I. INTRODUCTION

The practice of law in the United States is one of the few professions which largely regulates itself. Minimum educational requirements set by lawyers must be met by new members of the profession; a formal and comprehensive Code of Professional Responsibility has been drafted by the American Bar Association and adopted by most state bar associations as the guide to acceptable conduct by lawyers; and most states have disciplinary machinery administered by practicing lawyers for dealing with attorneys whose professional conduct or ability to continue to practice has been questioned.

Because of an all too small and consistently dwindling public confidence in the legal profession<sup>1</sup>—certainly due in some measure to the Watergate scandals—it is more important than ever before that self-regulation appear effective as well as be effective in maintaining high professional standards and responsibility.

Using as a model the disciplinary processes utilized by one judicial district in New York City, this paper examines such procedures and offers suggestions for generally upgrading and increasing their effectiveness. In addition, other means of securing professional integrity and enhancing public confidence in the competence and integrity of the bar are explored.

## II. WHAT IS SELF-REGULATION?

Self-regulation is not unique to the legal profession. Most professions have some form of internal regulatory mechanism for judging their members, but have retained less control over those procedures than has the legal profession. For example, although internal control of the medical profession is largely in the hands of doctors, review in many states is given to agencies and boards with lay members. Yet in malpractice lawsuits the standards by which a lay jury measures a doctor's negligence are generally far less strict than those by which charges of an attorney's incompetence are judged.<sup>2</sup>

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1. In a Harris Survey released October 6, 1975, only 6 percent of those questioned stated that they had a great deal of confidence in law firms as an American institution; in 1974, the figure was 18 percent; and in 1973, 24 percent.

2. See D. HARNEY, *MEDICAL MALPRACTICE* (1973); A. HOLDER, *MEDICAL MALPRACTICE LAW* 335-73 (1975); KLEIN, *COMPLAINTS AGAINST DOCTORS: A STUDY OF PROFESSIONAL ACCOUNTABILITY* (1973); C. KRAMER, *MEDICAL MALPRACTICE* (4th ed. 1976); Haughey, *Lawyers' Malpractice:*

Similarly, the conduct of police agencies has been increasingly subjected to civilian review.<sup>3</sup> In the securities area, lay juries have been permitted an ever expanding role in regulatory control over brokers and dealers for violation of laws, SEC regulations, and even the self-regulatory rules of the exchanges.<sup>4</sup>

With respect to self-regulation in the legal profession, the bar imposes disciplinary sanctions against lawyers whose misconduct falls into three categories: (1) conduct prosecutable as a criminal offense, and thus subject to the sanctions of the criminal justice system; (2) conduct giving rise to traditional civil remedies such as malpractice,<sup>5</sup> breach of contract, suits for equitable accountings,

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*Comparative Appraisal*, 48 NOTRE DAME LAW. 888 (1973); King, *Legal Malpractice The Coming Storm*, 50 CALIF. ST. B.J. 363 (1975).

3. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 200 (1967). See ABA, *THE URBAN POLICE FUNCTION* 144-70 (1972); Locke, *Police Brutality and Civilian Review Boards: A Second Look*, 44 J. URB. L. 625 (1967); Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023 (1970); Weiler, "Who Shall Watch the Watchmen?" *Reflections on Some Recent Literature About the Police*, 11 CRIM. L. Q. 420 (1969); Note, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499 (1964); Comment, *Police Disciplinary Procedures: A Denial of Due Process*, 7 JOHN MARSHALL J. PRAC. AND PROC. 111 (1973); Comment, *Reviewing Civilian Complaints of Police Misconduct — Some Answers and More Questions*, 48 TEMP. L.Q. 89 (1974).

4. See generally *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Van Gemert v. Boeing*, 520 F.2d 1373 (2d Cir.), cert. denied, 423 U.S. 947 (1975); *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178 (2d Cir.), cert. denied, 385 U.S. 817 (1966); *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), cert. denied, 323 U.S. 737 (1944); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946); Lowenfels, *Implied Liabilities Based Upon Stock Exchange Rules*, 66 COLUM. L. REV. 12 (1966); Note, *Private Actions as a Remedy for Violations of Stock Exchange Rules*, 83 HARV. L. REV. 825 (1970); Comment, *Implied Civil Liability Arising From Violation of the Rules of the National Association of Securities Dealers*, 8 LOYOLA U. L. REV. (L.A.) 151 (1975); Comment, *Civil Remedies and Stock Exchange Rules — An Emerging Concept of Implied Liability*, 1969 U. ILL. L.F. 551; Comment, *Civil Liabilities for Violation of NASD Rules: SEC v. First Securities Co.*, 121 U. PA. L. REV. 388 (1972); 64 COLUM. L. REV. 1336 (1964).

The development of the law in this area is somewhat predictive of what may occur in other "self-regulated" areas. The courts have held that the securities industry has been allowed to regulate itself by rule, and where it has failed in such regulation, not only have the individual offenders been held liable but the stock exchanges themselves (which are in charge of such regulation) have been held civilly liable for their dereliction. In the unlikely event that this reasoning were applied to the legal profession, the bar associations could conceivably become liable for damages caused by an attorney whom they should have disciplined.

5. See generally Gillen, *Legal Malpractice*, 12 WASHBURN L.J. 281 (1973); Haughey, *Lawyers' Malpractice: A Comparative Appraisal*, 48 NOTRE DAME LAW. 888 (1973); King, *Legal Malpractice The Coming Storm*, 50 CALIF. ST. B. J. 363 (1975); Rothstein, *Lawyers' Malpractice in Litigation*, 21 CLEV. ST. L. REV. No. 2, 1 (1972); Wallach & Kelly, *Attorney*

and civil contempt; and (3) professional misconduct or inadequacy not rising to the level of actionable civil or criminal charges.

In the first two categories a determination of misconduct is typically not made in the first instance by the self-regulatory agencies, and any sanctions imposed by the bar are in addition to those which may be imposed by the courts. Only in the third category is the determination of possible misconduct and the corresponding sanctions solely a self-regulatory matter. Accordingly, self-regulation is not as broad as the phrase might indicate.

Self-regulation in this third category involves determination of standards for entering the profession, judging applicants by those standards,<sup>6</sup> establishing an ethical code of conduct for practicing members of the profession, and judging members by that code.<sup>7</sup>

A variety of disciplinary mechanisms are involved. In some jurisdictions there have been battles between the legislature and the courts<sup>8</sup> as to who should determine ethical standards and who

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*Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA LAW. 257 (1970); Comment, *Legal Malpractice*, 27 ARK. L. REV. 452 (1973); Note, *Legal Malpractice—Is the Discovery Rule the Final Solution?*, 24 HASTINGS L. J. 795 (1973); Note, *Standard of Care in Legal Malpractice*, 43 IND. L. J. 771 (1968); Note, *Attorney's Negligence*, 5 LINCOLN L. REV. 154 (1970); Comment, *Legal Malpractice in Mississippi*, 43 MISS. L. J. 691 (1972); Comment, *Attorney's Negligent Failure to Comply with Procedural Deadlines and Court Calendar Orders—Sanctions*, 47 TEX. L. REV. 1198 (1969); Comment, *The State of Legal Malpractice in Oklahoma*, 9 TULSA L.J. 129 (1973); Note, *Improving Information on Legal Malpractice*, 82 YALE L. J. 590 (1973).

6. J. CARLIN, *LAWYERS' ETHICS: A STUDY OF THE NEW YORK CITY BAR* 162 n.1 (1966); JACKSON, *CHARACTER REQUIREMENTS FOR ADMISSION TO THE BAR* (1951); Dershowitz, *Preventive Disbarment: A Critique of the ABA Proposal to Design Tests Capable of Predicting Misconduct Among Lawyers*, 1966 (unpublished, Harvard Law School); Note, *Admission to the Bar—“Good Moral Character”—Constitutional Protections*, 45 N.C.L. REV. 1008 (1967); 106 U. PA. L. REV. 753, 755 (1958).

7. See generally Carlin, *supra* note 6, at 150; GARRETT, *A REPORT BY JUSTICE: COMPLAINTS AGAINST LAWYERS* (1970); O. PHILLIPZ & P. MCCOY, *CONDUCT OF JUDGES AND LAWYERS: A STUDY OF PROFESSIONAL ETHICS, DISCIPLINE AND DISBARMENT* (1972); ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT* (Final Draft June 1970) [hereinafter cited as CLARK REPORT].

8. It is submitted that the role of the court in imposing and enforcing disciplinary sanctions is within the concept of “self-regulation.” The bench is certainly a part of the bar (whether elected or appointed), although somewhat detached from the day-to-day concerns of practicing lawyers.

Judges, too, as a part of the profession (as well as being public officials) are (with the exception of federal judges who are subject only to impeachment and internal discipline by their brothers) subject to self-regulation. Thirty-eight states currently have commissions on judicial conduct. FIRST REPORT OF THE TEMPORARY STATE COMMISSION ON JUDICIAL CONDUCT [New York] (1975) [hereinafter cited as FIRST REPORT OF THE TEMPORARY COMMISSION].

The image of the bench and bar is as one in the eyes of the public, and discipline of errant

should be in charge of disciplining lawyers.<sup>9</sup> In most jurisdictions, however, the courts have ultimate control over imposition of sanctions with some legislatures requiring certain discipline in particular cases.<sup>10</sup>

In most states, however, the implementation of the regulatory mechanism is in the hands of bar associations. Some states grant authority to local bar associations to process complaints, conduct investigations, hold evidentiary hearings, and make recommendations to a statewide grievance committee. In other states the local bar groups have the authority to recommend disciplinary action directly to the court, which typically appoints a hearing examiner or selects certain of its own members to hear the case.

Essentially then, the local bar associations serve a screening function.<sup>11</sup> Complaints may be dismissed or a lawyer censured (usually non-publicly) and the matter terminated. However, the bar association may refer the matter to the courts where generally there will be a hearing *de novo* by a court-appointed referee with the court

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judges is at least as important as that of errant practitioners. But this problem is somewhat outside the scope of this paper, and accordingly, is mentioned only in context. However, it is a problem of growing concern, and more attention is being focused upon it.

In New York, for example, the legislature established the "Temporary State Commission on Judicial Conduct" in 1974 to investigate complaints of judicial misconduct and initiate investigations on its own motion. An amendment to New York's Constitution which would create a permanent commission on judicial conduct with power to commence removal proceedings and authority to suspend, publicly censure, and retire a judge for disability, subject to the judge's right to a hearing before New York's Court on the Judiciary, was approved by the State's voters on November 4, 1975.

Recently, also in New York, the Court on the Judiciary confirmed a referee's finding that Wilfred A. Waltemade had been guilty of judicial misconduct while a State Supreme Court Justice in New York and Bronx Counties. The confirmed report found that the judge "frequently subjected litigants and their attorneys to completely unwarranted abuse that was often violent, occasionally hysterical, and usually degrading and demeaning." N.Y.L.J., October 28, 1975, at 1.

9. See, e.g., O. SCHROEDER, *LAWYER DISCIPLINE: THE OHIO STORY* 1-23 (1967).

10. In New York, for example, conviction of a crime designated a felony under New York law mandates automatic disbarment. N.Y. JUDICIARY LAW § 90(4) (McKinney 1968).

With respect to convictions of non-felony crimes, an attorney may not relitigate the issue of his guilt during disciplinary proceedings, but may introduce evidence in mitigation and explanation. See *Levy v. Association of the Bar of the City of New York*, 37 N.Y.2d 279, 333 N.E.2d 350, 372 N.Y.S.2d 41 (1975).

11. See, e.g., CHICAGO COUNCIL OF LAWYERS, *REPORT ON DISCIPLINARY PROCEDURES FOR PROFESSIONAL MISCONDUCT* (1972); Note, *Disciplinary Enforcement Problems and Recommendations: An Indiana Survey*, 46 IND. L.J. 134 (1970); Comment, *The Clark Report and the Revised New Mexico Disciplinary Procedures*, 2 N. MEX. L. REV. 292 (1972); Comment, *Procedures for Disciplinary Attorneys in Virginia*, 29 WASH. LEE L. REV. 439 (1972).

reviewing the referee's determination and then imposing punishment. The power to suspend or disbar is universally reserved to the courts.

### III. GRIEVANCE PROCEDURES EMPLOYED BY THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

New York's Judiciary Law section 90(2)<sup>12</sup> delegates the power "to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice" to the Appellate Divisions of each judicial department.<sup>13</sup> Section 90(7) of the Judiciary Law<sup>14</sup> authorizes the Appellate Divisions to designate a district attorney within a department, or any other attorney and counsellor-at-law "to conduct a preliminary investigation and to prosecute any disciplinary proceedings . . . ."

The Appellate Division for the First Department<sup>15</sup> has issued "Rules Governing the Conduct of Attorneys" which apply, *inter alia*, "to all attorneys . . . admitted to practice, or who have offices in" the First Department.<sup>16</sup> The First Department's rules provide for the court's appointment of a "Departmental Disciplinary Committee" which "may be a grievance committee of a recognized bar association, and/or another existing or specially created disciplinary agency or committee."<sup>17</sup> The Departmental Disciplinary Committee appointed by the First Department is currently the Committee on Grievances of the Association of the Bar of the City of New York,<sup>18</sup> which is "charged with the duty and empowered to investigate and prosecute matters involving alleged misconduct by attorneys."<sup>19</sup>

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12. N.Y. JUDICIARY LAW § 90(2) (McKinney 1968).

13. New York State is divided into four judicial departments, each of which has an intermediate appellate court—the "Appellate Division." N.Y. JUDICIARY LAW §§ 70, 71 (McKinney 1968).

14. *Id.* § 90(7).

15. The First Department consists of the Bronx and Manhattan.

16. N.Y. Ct. R. § 603.1 (McKinney 1975).

17. *Id.* § 603.4(a).

18. *Id.*

19. *Id.* This section of the New York Court Rules specifies that from time to time the Appellate Division may designate "the appropriate committees of the New York County Lawyers Association and of the Bronx County Bar Association . . . to investigate and prosecute matters involving alleged misconduct of attorneys."

The First Department has delegated to the Association of the Bar the power to appoint a chief counsel and supporting staff<sup>20</sup> which investigates charges of professional misconduct and presents evidence of misconduct to the Grievance Committee.<sup>21</sup>

Article XIX of the By-Laws of the Association of the Bar of the City of New York sets forth the operating procedures of the Grievance Committee. Briefly stated, if, following an investigation into alleged professional misconduct,<sup>22</sup> either the Grievance Committee, its chairman, vice-chairman, or chief counsel deems it a matter "of sufficient importance," written charges are served on the attorney concerned (the "respondent"). A written answer must be filed. An evidentiary hearing<sup>23</sup> is then held by the committee. The respondent must appear unless excused by the committee or its chief counsel, and may be (and usually is) represented by counsel.

At the conclusion of the evidence, the committee may either dismiss or sustain the charges, and as to any charges sustained, either admonish the respondent or recommend that such charges be prosecuted in the courts.<sup>24</sup> The committee *must* recommend court prosecution in the First Department when it "determines that probable cause exists for the filing of disciplinary charges . . . ."<sup>25</sup>

If the committee recommends court prosecution, under the As-

20. *Id.*

21. Investigations may be commenced *sua sponte* or upon receipt of a written and signed complaint by the Appellate Division or the Grievance Committee. *Id.* § 603.4(b).

22. The First Department Rules define "professional misconduct" as follows:

Any attorney who fails to conduct himself both professionally and personally, in conformity with the standards of conduct imposed upon members of the Bar as conditions for the privilege to practice law and any attorney who violates any provision of the rules of this court governing the conduct of attorneys, or any Disciplinary Rule of the Code of Professional Responsibility, as adopted by the New York State Bar Association, effective Jan. 1, 1970, as amended, or any Canon of the Canons of Professional Ethics, as adopted by such bar association and effective until Dec. 31, 1969, or any of the special rules concerning court decorum shall be deemed to be guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law.

*Id.* § 603.2. As for the other departments, the Judiciary Law contemplates that each Appellate Division shall have power to say what constitutes professional misconduct within its department. *Erie County Water Authority v. Western New York Water Co.*, 304 N.Y. 342, 107 N.E. 2d 479, *cert. denied*, 344 U.S. 892 (1952).

23. Witnesses and documents may be subpoenaed upon application to the Appellate Division by the chairman of the committee or its counsel. N.Y. Ct. R. § 603.5(a) (McKinney 1975).

24. *Id.* § 603.9.

25. *Id.* § 603.4(c).



sociation's By-Laws a written report must be submitted to the Association's Executive Committee which must approve the recommendation.<sup>26</sup>

When public interest requires prompt action or when an attorney's conviction of a crime involves moral turpitude, the Executive Committee can bypass the Grievance Committee procedure and authorize direct court prosecution.

When disciplinary proceedings are instituted by the committee in the Appellate Division, that court may "appoint a referee, Justice or Judge to hold hearings or may discipline an attorney without appointing such referee, Justice or Judge, on the basis of the record of hearings before such committee."<sup>27</sup> If a hearing is conducted, the referee, justice, or judge files with the court a report at its conclusion setting forth his findings of fact and conclusions of law. Once the hearing transcript and the report are filed, the court, upon motion of either party or on its own, may confirm or disaffirm the report in whole or in part, may make new findings with or without taking further evidence, or may order a new hearing.<sup>28</sup>

Thus, the findings and conclusions in disciplinary proceedings are not strictly binding on the Appellate Division. The court must itself decide whether or not the charges have been sustained.<sup>29</sup> Although the hearing examiner's findings are entitled to serious consideration by the court,<sup>30</sup> it may, even on credibility issues, substitute its own judgment.<sup>31</sup>

All grievance proceedings conducted by the committee and any proceedings before the Appellate Division are private and confidential.<sup>32</sup> However, "in the event that charges are sustained by the justices of the appellate division . . . the records and documents in

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26. The First Department Rules, however, make no provision for review by the Executive Committee. Section 603.4(a) of the New York Court Rules specifically appoints the Committee on Grievances as the "Departmental Disciplinary Committee" and grants no authority regarding disciplinary procedures to the Association's Executive Committee.

27. N.Y. Ct. R. § 603.4(c) (McKinney 1975).

28. N.Y.R. CIV. PRAC. 4403 (McKinney 1963).

29. See, e.g., *In re Broome*, 13 App. Div. 2d 657, 213 N.Y.S.2d 821, 822, *rev'd on other grounds*, 10 N.Y.2d 942, 179 N.E.2d 942, 224 N.Y.S.2d 21 (1961).

30. *In re Gondelman*, 258 App. Div. 1085, 18 N.Y.S.2d 52, *modified on other grounds*, 259 App. Div. 889, 20 N.Y.S. 2d 410, *aff'd*, 285 N.Y. 624, 33 N.E.2d 553 (1941).

31. See, e.g., *In re Kahn*, 38 App. Div. 2d 115, 123, 328 N.Y.S.2d 87, 95-96, *aff'd sub nom.*, 31 N.Y.2d 752, 290 N.E.2d 435, 338 N.Y.S.2d 435 (1972).

32. N.Y. JUDICIARY LAW § 90(10) (McKinney 1968); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK BY-LAWS art. XIX, ¶ 15.

relation thereto shall be deemed public records."<sup>33</sup>

Section 90(8) of New York's Judiciary Law provides for an appeal as of right from a final Appellate Division order in a disciplinary proceeding "upon questions of law involved therein," subject to certain limits on the appellate jurisdiction of the New York Court of Appeals contained in the New York Constitution, Article 6, Section 7. Otherwise, appeal is by permission of the Appellate Division or the Court of Appeals.<sup>34</sup>

#### IV. EFFECTIVENESS OF BAR ASSOCIATION GRIEVANCE PROCEDURES

The grievance mechanism of the Association of the Bar of the City of New York, while admirable, has serious inadequacies. Indeed, the Association's Executive Committee has established a Special Committee on Grievance Procedures to study existing problems and to make recommendations.

In a study of the City Bar's grievance procedures, sociologist Jerome Carlin concluded:

Very few violators are caught and punished . . . [o]nly about 2 per cent of the lawyers who violate generally accepted ethical norms are processed, and fewer than 0.2 per cent are officially sanctioned. . . .<sup>35</sup>

Although some debate may be had with Carlin's figures, there is no doubt that many violators of the Code of Professional Responsibility<sup>36</sup> and those guilty of ethical and criminal violations are not disciplined. The number of complaints handled by the Association of the Bar of the City of New York has increased consistently over the past decade.<sup>37</sup> However, the vast majority of the increase in violations has come in two areas which did not, in the eyes of the Grievance Committee, call for disciplinary action—complaints against attorneys outside the Committee's jurisdiction and com-

33. N.Y. JUDICIARY LAW § 90(10) (McKinney 1968).

34. N.Y. CIV. PRAC. § 5602(a) (McKinney 1963).

35. J. CARLIN, *supra* note 6, at 170.

36. ABA SPECIAL COMM. ON EVALUATION OF ETHICAL STANDARDS, CODE OF PROFESSIONAL RESPONSIBILITY (Final Draft July 1969) [hereinafter cited as CODE OF PROFESSIONAL RESPONSIBILITY].

37. Categories of Complaints Received by Association of the Bar of the City of New York, Grievance Committee, by 2 year periods:

plaints which set forth no unethical behavior.<sup>38</sup> The complaints re-

37. (Cont.)

	<u>1975-74</u>	<u>1973-72</u>	<u>1971-70</u>	<u>1969-68</u>	<u>1967-66</u>
OFFENSES AGAINST CLIENTS	1,183	1,180	1,512	1,560	1,090
DIRECT OFFENSES AGAINST COLLEAGUES	59	59	67	74	73
INDIRECT OFFENSES AGAINST COLLEAGUES	37	34	26	22	36
DIRECT OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE	22	15	27	22	29
INDIRECT OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE	141	118	185	146	125
OTHER PROFESSIONAL MISCONDUCT	98	170	112	219	136
NON-PROFESSIONAL MISCONDUCT	53	50	95	241	180
CRIME	66	65	66	53	96
MISCELLANEOUS	9	30	17	17	25
COMPLAINTS AGAINST ATTORNEYS OUTSIDE COMMITTEE'S JURISDICTION	1,054	799	609	447	441
COMPLAINTS WHICH SET FORTH NO UNETHICAL BEHAVIOR	1,881	1,925	1,530	1,410	1,714
TOTAL COMPLAINTS	4,603	4,479	4,246	4,226	3,934

#### DISCIPLINARY ACTION TAKEN BY TWO-YEAR PERIODS

	<u>1975-74</u>	<u>1973-72</u>	<u>1971-70</u>	<u>1969-68</u>	<u>1967-66</u>
REF. DIRECTLY TO APPELLATE DIVISION	38	46	22	24	20
HEARINGS	60	84	88	101	92
LETTERS OF ADMONITION	212	275	328	318	106
TOTAL COMMITTEE ACTION	311	405	427	446	206
DISBARRED	31	28	14	23	26
SUSPENDED	34	18	17	22	7
CENSURED	14	5	2	5	6
TOTAL COURT ACTION	175	150	101	110	88

Association of the Bar of the City of New York, Grievance Committee Annual Reports for the years 1966-1975.

38. They include, for example, requests for advice, minor fee disputes, minor disagreements in personal business transactions, and minor disagreements not attributable to misconduct.

mained constant for indirect offenses against colleagues,<sup>39</sup> indirect offenses against the administration of justice,<sup>40</sup> crimes,<sup>41</sup> and miscellaneous offenses.<sup>42</sup> The number of complaints actually decreased for offenses against the client,<sup>43</sup> direct offenses against colleagues,<sup>44</sup> direct offenses against the administration of justice,<sup>45</sup> other professional misconduct,<sup>46</sup> and non-professional misconduct.<sup>47</sup>

Actions taken by the Committee have been at a fairly constant level,<sup>48</sup> maintaining consistency with the stable number of substantive complaints. Court actions such as disbarment, suspension, or public censure, however, have grown rather dramatically.<sup>49</sup> This would seem to indicate a tougher attitude either by the Committee through more zealous and effective prosecution or by the courts through increased rates of conviction.

As a former member of the Association's Grievance Committee and one who has represented fellow lawyers who have appeared before it, this author believes the grievance procedures have had some degree of success, and have acted as a significant deterrent to misconduct. The Association expends considerable resources in terms of time of its members, indicating a concern by the Bar to regulate itself and promote high standards of professional conduct.

## V. SOME PROBLEMS ASSOCIATED WITH SELF-REGULATION

After an extensive evaluation of the disciplinary mechanisms in existence during the later 1960's, the American Bar Association's Special Committee on Evaluation of Disciplinary Enforcement (The Clark Committee)<sup>50</sup> reported

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39. *E.g.*, solicitation, advertising, and fee splitting.

40. *E.g.*, fraudulent representation, false swearing, actions in bad faith, abuse of process, violation of court rules, and concealment of evidence.

41. *E.g.*, larceny, forgery, perjury, bribery, and income tax evasion.

42. *E.g.*, minor offenses such as disorderly conduct, violation of administrative codes, etc.

43. *E.g.*, conversion, overreaching, neglect, misinforming, conflict of interest, and fraud.

44. *E.g.*, "personal relationships," agreements, and by-passing another attorney.

45. *E.g.*, improper influence.

46. *E.g.*, derelictions and non-cooperation.

47. *E.g.*, financial irresponsibility and fraud.

48. The actual volume has been erratic, but no discernible trend is apparent. See note 37 *supra*.

49. Total court action (action taken and pending) has doubled in the last decade. See note 37 *supra*.

50. CLARK REPORT, *supra* note 7.

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.<sup>51</sup>

The Clark Report dealt with 36 problem areas and made recommendations for changes in the grievance procedures in each area. Many of the current state disciplinary procedures reflect changes instituted since that report was issued. However, many of the Clark Report's recommendations have not been adopted, even by those states that have generally attempted to remedy the problems enumerated by that report.

One problem area which was described in some detail in the Clark Report is the "local and fragmented nature of the disciplinary structure."<sup>52</sup> The Committee recommended "[s]tatewide centralization of disciplinary jurisdiction under the ultimate control of the highest court of the state."<sup>53</sup> The two main defects of a decentralized structure are the actual presence of, or the appearance of, partiality when the disciplinary agency in a small community investigates "one of its own"<sup>54</sup> and the lack of uniformity between the various jurisdictions within a state.<sup>55</sup>

A second problem is that the investigating and prosecuting staffs of the disciplinary agencies are often inadequately trained and prepared for their work. Work on such agencies requires special training in professional ethics, custom, and usage as suggested in the Clark Report.<sup>56</sup> However, what is perhaps more urgently required is maturity and general lawyering experience. Just as the intricacies of the legal profession present problems beyond the scope of most lay people, they sometimes present problems that can be understood only by people who are aware of the pressures on attorneys and the various alternatives available to them. Of course, it is not suggested that all of the staff members of a Grievance Commit-

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51. *Id.* at 1.

52. *Id.* at 24-29.

53. *Id.* at 24.

54. *Id.* at 25.

55. *Id.* at 25-26.

56. *Id.* at 57-59.

tee should be "senior" people, but a substantial number of top people should be. When younger, more inexperienced lawyers are given authority, they should be closely supervised and their work carefully reviewed.

A basic affliction of the present system is the reluctance of lawyers to report misconduct of fellow lawyers.<sup>57</sup> It is very difficult for any regulatory agency to effectively control the profession without extensive voluntary cooperation from lawyers. Many "offenses" are participated in by the client and may become known only to fellow lawyers.

Certainly lawyers have a professional and moral obligation to assist the bar in its self-regulating effort. Indeed, the Code of Professional Responsibility makes it an affirmative duty of a lawyer to "reveal voluntarily . . . all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules."<sup>58</sup> And Disciplinary Rule 1-103(A) states: "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."<sup>59</sup>

Yet it would be unseemly to suggest that lawyers abandon discretion and judgment and basic human decency to become avid informers on one another. On the other hand, if self-regulation is to be effective, lawyers with unprivileged knowledge of professional misconduct must come forward or face disciplinary proceed-

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57. J. HANDLER, *THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY* 144 (1967).

The same problem was experienced by the New York Temporary State Commission on Judicial Conduct with respect to the reluctance of "many attorneys . . . to report injudiciousness" of judges. *FIRST REPORT OF THE TEMPORARY COMMISSION*, *supra* note 8, at 9.

58. *CODE OF PROFESSIONAL RESPONSIBILITY EC 1-4*. See also *ABA CANONS OF PROFESSIONAL ETHICS* No. 29; *ABA CANONS OF JUDICIAL ETHICS* No. 11.

59. Emphasis added. DR 1-102 provides as follows:

A. A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

ings themselves in those cases where their own conduct amounts to a "misprision."<sup>60</sup>

A further flaw of the present system lies in the inadequate representation of substantial segments of the bar on its grievance committees. While there has been movement recently in New York to rectify this problem, until recent years the composition of the Grievance Committee was heavily tilted toward "Wall Street" lawyers. At present the Association of the Bar's Grievance Panel is significantly represented by individual and small firm practitioners, as well as by those who practice criminal law, matrimonial law, and other small firm specialties.

The problems with this under-representation of certain segments was pointed out in the Clark Report:

- (1) Disciplinary agencies composed of members who lack expertise in the fields of practice likely to be involved in the complaints they are required to pass on, such as negligence and criminal law, may be unable to evaluate the accused attorney's conduct intelligently.
- (2) Effective self-discipline requires that all segments of the profession actively support the disciplinary process. Practitioners who are the subject of complaints and who find that the disciplinary agency is composed of attorneys unfamiliar with the problems they face in their practice may feel that the propriety of their conduct is not being reviewed by a panel of their peers. This may lead to resentment of the disciplinary agency by a substantial segment of the profession.<sup>61</sup>

Carlin also points out that there are differences of opinion between various segments of the bar as to what standards to enforce:

While the more general standards are accepted by most lawyers in all strata of the bar, the distinctively professional standards [relation among colleagues, methods of obtaining business and conflicts of interest] are accepted for the most part only by elite lawyers.<sup>62</sup>

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60. See generally 18 U.S.C. § 4 (1970) which provides:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than \$500 or imprisoned not more than three years, or both.

61. CLARK REPORT, *supra* note 7, at 46.

62. J. CARLIN, *supra* note 6, at 165.

The "elite" or secure lawyers may simply be unaware of the pressures on lower strata lawyers. As Carlin stated:

[L]awyers at the top experience maximum pressure to conform to distinctively professional standards, as well as the more ordinary, ethical norms; at the same time they are insulated from pressures to violate. Conversely, lawyers at the bottom of the status ladder are maximally exposed to pressures to violate, and least subject to pressures to conform.<sup>63</sup>

To rectify this problem the Clark Report recommends an "[i]ncreased emphasis by the appointing authority on including single and small-firm practitioners, members of minority groups and attorneys engaged in negligence and criminal law in the membership of disciplinary agencies."<sup>64</sup>

The problem might be more effectively solved by having the appointing authority set up grievance panels independent of organized bar associations and representative of a cross-section of practicing attorneys. Although the current rules in New York's First Department designate the City Bar Association's Grievance Committee as the "Departmental Disciplinary Committee" for the Department, the rule allows for the possibility of a "specially created disciplinary agency or committee."<sup>65</sup>

Certainly a lawyer's clients, his specialty, or the location of his office should not be considerations for disqualification of appointment to a grievance panel. The basis for individual appointment should be excellence in practice and unimpeachable integrity. In addition, the panel generally should be a representation of the entire legal community.

Poor record-keeping by disciplinary agencies is epidemic. Oftentimes it is difficult to trace the path of current investigations and complaints.<sup>66</sup> A complaint otherwise not warranting disciplinary procedures might be viewed in a different light by a grievance committee if the complaint represented a pattern of misconduct by a particular lawyer.

Of great concern are the limited options open to a dissatisfied client. Currently he can file a civil suit for damages or an accounting, or he can complain to the disciplinary agencies. But many

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63. *Id.* at 168-69.

64. CLARK REPORT, *supra* note 7, at 46.

65. N.Y. CT. R. § 603.4(a) (McKinney 1975).

66. CLARK REPORT *supra* note 7, at 77-81.



clients might not want to have their lawyer "brought up on charges" as much as they would like to have him answer some questions or to have a dispute settled. The Grievance Committee of the Association of the Bar of New York handles many complaints which result in little more than a correspondence with the lawyer instructing him to call his client. These "complaints" are filed as such with the Grievance Committee because the client has nowhere else to go. Many of the disputes could be settled by mediation if such a body were available. The New York County Lawyer's Association, for example, has a mediation committee to arbitrate fee disputes.

Other problems which will not be discussed in any detail, but which are persistent and difficult are: financing; time delays;<sup>67</sup> the fact that few investigations are initiated without complaints; coordinating problems between different jurisdictions; and issues relating to the public disclosure of grievance proceedings.

## VI. CONSTITUTIONAL DIMENSIONS OF SELF-REGULATION

Disciplinary proceedings are "of a quasi-criminal nature"<sup>68</sup> and may result in the deprivation of a valuable property right and privilege—a license to practice law and earn a living.<sup>69</sup> Thus, disciplinary proceedings must provide the due process protections guaranteed by the constitution. As the Supreme Court stated in *Johnson v. Avery*: "The power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights."<sup>70</sup>

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67. Aside from an inadequate or ineffectual staff or outright procrastination commonly associated with any bureaucratized institution, there are delays in grievance prosecutions that are compelled by the existence of other pending proceedings against a lawyer and attendant constitutional and statutory safeguards.

The problem of the indicted lawyer is illustrative. However outrageous the alleged conduct is which results in criminal prosecution, the presumption of innocence, the privilege against self-incrimination, and grand jury secrecy (and a prosecutor's natural, if not undesirable, reluctance to disclose his evidence before trial) all render a grievance proceeding extremely difficult if not impossible. The result is that an indicted lawyer, even though eventually convicted may have practiced years in the interim between charges and disposition. *But cf. Doe v. Rosenberry*, 255 F.2d 118 (2d Cir. 1958) (holding that testimony taken in a federal grand jury investigation of an attorney could be made available by the federal court to a bar association grievance committee considering charges against the attorney).

68. *In re Ruffalo*, 390 U.S. 544, 551 (1968).

69. *See, e.g., Erdmann v. Stevens*, 458 F.2d 1205, 1209-10 (2d Cir. 1972).

70. 393 U.S. 483, 490 n.11 (1969). *See also Willner v. Committee on Character & Fitness*, 373 U.S. 96, 106 (1963) (petitioner denied due process when denied admission to the bar without a hearing on the charges against him).

In *Law Students Civil Rights Research Council, Inc. v. Wadmond*<sup>71</sup> a three-judge federal court held that the Appellate Division judges could be enjoined in the federal court from enforcing an unconstitutional state statute dealing with the bar.

The disciplinary procedures utilized in New York's Second Judicial Department (not significantly distinct from those of the First Department) have been recently challenged on constitutional grounds before a three-judge federal court in the Eastern District of New York.<sup>72</sup> The major due process challenge in that case was based on the application of section 90 of the New York Judiciary Law,<sup>73</sup> wherein the Appellate Division sits as a trier of fact. Specific objection was made because the trier determined the facts without hearing the witnesses and without an opportunity to determine their credibility; denied an opportunity to orally argue the case; and was not obligated to give reasons for its decision, even when rejecting the report of the hearing examiner. Because section 90 also failed to accord attorneys an appeal as of right to the Court of Appeals from an adverse decision of the court of original jurisdiction (the Appellate Division), it was contended that the statute violated equal protection as well as due process rights.

Over the dissent of one judge who found persuasive the contention that the disciplinary procedure violates the due process and equal protection clauses, the majority in *Mildner v. Gulotta*<sup>74</sup> dismissed the complaints. The court held that the constitutional claims had "no substantial merit" and that neither 42 U.S.C. § 1983 nor the court's constitutional question jurisdiction authorized "an inferior federal court to pass upon the procedure employed by the State courts to discipline attorneys who practice before them or to interfere with their judgments in such matters."<sup>75</sup>

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71. 299 F. Supp. 117 (S.D.N.Y. 1969), *aff'd on other grounds*, 401 U.S. 154 (1971) (The court indicated that while it had the *power* to issue an injunction against the use of various questionnaires regarding the bar, it found "no immediate occasion for doing so." 299 F. Supp. at 133).

72. *Mildner v. Gulotta*, 405 F. Supp. 182 (E.D.N.Y. 1975).

73. N.Y. JUDICIARY LAW § 90 (McKinney 1968).

74. 405 F. Supp. 182 (E.D.N.Y. 1975).

75. *Id.* at 184. The case was brought under § 1983 as a civil rights action. The court specifically held that § 1983 does not extend the right to litigate in federal courts evidentiary questions which had been adjudicated on the merits in state proceedings upon the claim that there was no evidence to support the state action. Plaintiff's attorneys had asserted that the lack of evidentiary basis for the decision was itself a denial of due process or equal protection.

The point is that there has been insufficient sensitivity to the constitutional problems inherent in disciplinary procedures. Not only are there the issues litigated in the *Mildner* case, but there are questions relating to the standards of proof, the types of evidence, the right to free counsel, and the right to a public hearing. Since grievance proceedings are quasi-criminal in nature, should not the standard of proof be strict and as clearly defined as possible, such as the "clear and convincing" standard? What of illegal evidence such as unlawful electronic surveillance or other violations of the fourth or fifth amendments? Some illegal evidence is admissible to a federal grand jury, and indeed, may be highly probative. But is such evidence a fair, just, and lawful basis for disbarment? Even lawyers may be unable to afford adequate representation before a grievance panel or a court-appointed referee.

The *in camera* nature of grievance proceedings also raises a question. Recently, certain attorneys involved in a New York City grievance proceeding requested a public hearing and were refused that opportunity. In respect to certain segments of the bar engaged in representing litigants involved in controversial causes, a public hearing may be of crucial significance.

## VII. SELF-REGULATION AND THE MAINTENANCE OF STANDARDS OF PROFESSIONAL INTEGRITY: DISORDER IN THE COURTS AND THE MARGINAL PRACTITIONER

### A. Courtroom Conduct

To a large extent the public's view of the bar is sculptured by what it sees and hears of lawyers' courtroom conduct. By discussing the question of disruptive courtroom conduct in the context of this paper, it is not suggested that this problem occurs frequently. But this class of conduct does have great impact on the image of the bar.

One of the reasons put forth for the apparent increase in disruptive activity by defense counsel is that "many lawyers representing public interest or politically radical clients have too strong an emotional bond with them and lack the detachment necessary to perform the lawyer's function."<sup>76</sup> In such circumstances there may be a tendency to react more personally to adverse actions by prosecutors or judges, and to be overcome by frustration caused by per-

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76. N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT 135 (1973).

ceived or real injustices. It has been suggested that discipline by self-regulatory mechanisms is a way of dealing with this problem.

Traditionally, American lawyers are more concerned and involved with social and political issues than are lawyers elsewhere. Even in England, for example, the organized bar (composed of about 2,000 barristers) resembles a club, and has "remoteness from the concerns and passions of ordinary life."<sup>77</sup> This may be the reason for the fact that so few lawyers are ever disciplined for misbehavior in the English courts.<sup>78</sup>

By contrast, American lawyers are more passionate about many of the important cases that they argue. Anthony Lewis explains:

Because the function of the American lawyer is different, he cannot be expected to have the same degree of detachment. Perhaps in theory one ought to be able to argue a case about the fourteenth amendment and capital punishment with the same detachment as one about a commercial contract. But in the real world, lawyers who are engaged in great social and political issues must be more committed than would be appropriate in the Strand. I do not regret that. I feel as Professor Benjamin Kaplan of Harvard evidently did after a year in London observing that legal system. "The American scene is disordered," he wrote, "but it is lively."<sup>79</sup>

It is strongly submitted that the bar and the public need to develop more tolerance to such reactions. While disruptive courtroom tactics, moments of outrage, and deliberate confrontations cannot be condoned, they should be viewed in perspective. Certainly any increase in sensitivity which helps a lawyer better understand the needs of his client is a positive development. Personal identification, to the extent that it helps a lawyer better represent his client, should not be needlessly discouraged. Sir Thomas Erskine, the great English barrister, said in 1792 during his defense of Thomas Paine for seditious libel:

If an advocate entertains sentiments injurious to the defence he is engaged in, he is not only justified, but bound in duty, to conceal them; so, on the other hand, if his own genuine sentiments, or anything connected with his character or situation, can

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77. Lewis, *Lawyers and Civilization*, 120 U. PA. L. REV. 851, 862 (1972).

78. DORSEN & FRIEDMAN, *supra* note 76, at 141.

79. Lewis, *supra* note 77, at 863.

add strength to his professional assistance, he is bound to throw them into the scale.<sup>80</sup>

Despite all the attention devoted to forensic conduct, there is comparatively little discussion about what a lawyer may or may not do in the courtroom. Indeed, the Code of Professional Responsibility has only one disciplinary rule dealing with trial conduct.<sup>81</sup> The fact is that proper rules of professional courtroom conduct are for the most part undefined. Most courts assume that lawyers should know what they may properly do. Mr. Justice White of the Supreme Court

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80. DORSEN & FRIEDMAN, *supra* note 76, at 136, quoting 22 HOWELL'S ST. TR. 414 (1792). See also Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 301, 333 (1970).

81. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106, Trial Conduct provides:

- (A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.
- (B) In presenting a matter to a tribunal, a lawyer shall disclose:
  - (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.
  - (2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.
- (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
  - (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
  - (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
  - (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
  - (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
  - (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.
  - (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
  - (7) Intentionally or habitually violate any established rule of procedure or of evidence.

The Canons of Professional Ethics, which were in effect until 1970 when the American Bar Association adopted the Code of Professional Responsibility, dealt almost entirely with attorney's conduct in impending or ongoing litigation. Only one of the 47 canons spoke directly to "Professional Advocacy Other than Before Courts."

expressed the prevailing point of view in a case involving out of court conduct by a lawyer:

[M]embers of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment . . . all responsible attorneys would recognize [certain conduct] as improper for a member of the profession.<sup>82</sup>

In some ways it is paradoxical that a profession that insists upon the need for definitive rules to regulate other people's conduct has generally failed to establish rules to regulate the conduct of its own members in court. But there is something to be said in favor of the absence of defined rules. Many lawyers have different styles of presenting a case. They may question witnesses, submit their evidence, cross-examine, or argue to the judge in a variety of ways. Telling a lawyer exactly how he must perform in court may impose too great a restriction on his performance since situations may arise that require unorthodox responses. Therefore, a lawyer should be given some leeway in the vital task he is performing.

There are two methods currently used to deal with misconduct in the courtroom: the contempt citation and discipline by bar associations. Suffice it to say that there have been some over-reactions to attorneys' conduct in the courtroom that are honest responses to perceived injustices.

The tolerance suggested for the self-regulatory process should be communicated in a responsible and thorough manner to the public so as to avoid undue negative impressions of the bar caused by this sort of conduct.

### B. *The Marginal Practitioner*

A second problem is the role of the marginal practitioner. Carlin describes him as follows:

Lawyers with low-status clients tend to have an unstable clientele; that is, they have a higher rate of turnover in business and individual clients. . . . Lawyers with low-status clients also report more competition from other lawyers in obtaining clients, and that they have been hurt by such competition. This reflects

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82. DORSEN & FRIEDMAN, *supra* note 76, at 139, quoting *In re Ruffalo*, 390 U.S. 544, 555 (1968) (White, J., concurring).

the weak and intermittent demand for legal services from lower-status clients, the relatively large number of lawyers whose practice is restricted to such clients, and the many nonlawyers who are willing and able to perform similar services often at a lower price.

Insecurity of practice leads to violation of basic bar norms

. . . .<sup>83</sup>

In addition to the fact that temptations and opportunity for ethical violations are higher among marginal practitioners, those attorneys are more prone to make mistakes because of the large volume of cases they must carry to survive. The sheer magnitude of their case loads may lead them to overlook certain aspects of each individual case.

Much grievance committee work has to do with the misconduct of the marginal practitioners. Such misconduct is typically of a "petty type" involving the inexpert handling of a case, disputes over fees or problems with solicitation. However vigilant grievance procedures might be, the enormous pressures on the marginal practitioners coupled with the lack of a stable, prideful association to the profession are circumstances which preclude significant deterrents to sloppiness, "corner cutting," or conduct "unbecoming a member of the bar."

A related problem, of course, is that many people can afford no other type of attorney. In other words, a fairly sizable segment of our society must turn to marginal practitioners for legal advice.

One solution to this situation is the elimination of the need for this kind of practitioner. If "free" legal advice were available, or if matters could be handled by the individual himself without resort to an attorney, many of the problems with marginal practitioners would disappear (along with many of the marginal practitioners). Steps are being taken in many jurisdictions which in effect implement this type of proposal, including expansion of legal aid services to cover larger segments of the population, introduction of no-fault insurance in the negligence area, and increased receptiveness through small claims courts of "litigation without lawyers."

An elimination or substantial reduction in marginal practitioners, in addition to reducing the number of offenses lawyers commit against clients, would free the disciplinary agencies for other work,

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83. J. CARLIN, *supra* note 6, at 66-68.

such as increased independent investigations, and thus generally increase public confidence in the profession.

### VIII. THE PROBLEM OF "SELF" IN SELF-REGULATION

Shakespeare, Dickens, or someone with great perception but little charity towards our profession might insinuate that self-regulation is a bit like the fox watching the chicken coop. It is submitted, however, that this is not the case. Disciplinary proceedings essentially determine one thing—the fitness of an attorney to continue the practice of law, not whether the attorney as an individual has transcended the rules of proper conduct which bind all society.

Very few, if any, seriously suggest that the standards of ethicality and competence for law practice should be determined solely by lay people.<sup>84</sup> While bar exams and admission standards have been criticized,<sup>85</sup> such criticism has been based on their content and not because the standards for admission are set by lawyers. The same expertise required to determine who is initially fit to practice law is needed to determine who is no longer fit to practice.

Likewise, no one suggests that determination of the fitness of a person to be a medical doctor should be made solely by lay persons. There are certain types of knowledge and skill a physician must possess and other physicians are best equipped to set the standards by which they are judged. Similarly, while legal knowledge is not directly analogous to some of the technical aspects of medical knowledge, lawyers also receive training in and utilize a highly specialized form of knowledge. Judging a lawyer's capacity to use such knowledge competently and ethically requires an insight into law that most lay people do not possess.

Interestingly, as of 1970, Georgia, North Carolina, and Texas permitted lay jury trials in disciplinary proceedings. The Clark Report recommended the elimination of such a practice<sup>86</sup> and noted that, at least in Georgia where an accused attorney may elect a jury trial, no such request has ever been made.<sup>87</sup> The conclusions of the Clark Report were as follows:

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84. Interestingly, the New York legislation which created the Temporary State Commission on Judicial Conduct requires at least two lay people to be members of the Commission. FIRST REPORT OF THE TEMPORARY COMMISSION, *supra* note 8, at 1.

85. See generally note 6 *supra*.

86. CLARK REPORT, *supra* note 7, at 136.

87. *Id.*



In order to evaluate charges of professional misconduct properly, the trier of fact should be familiar with the practices peculiar to the profession. Conduct involving, for example, complicated real estate transactions, conflicts of interest, advertising, and confidential communications cannot be evaluated readily by laymen totally unfamiliar with the concepts underlying the standards set forth in the Canons of Professional Ethics and Code of Professional Responsibility. Trial by a jury of laymen may mean that the accused attorney is judged by different standards than those the profession has required of him. This may inure as much to the accused attorney's benefit as to his detriment. For example, a jury of laymen unfamiliar with the abuses that necessitate the prohibition against improper solicitation may exhibit their hostility to a standard they do not understand by exonerating the accused attorney.

The possibility of a jury trial, which in fact is little availed of, serves only to delay and weaken effective disciplinary enforcement.<sup>88</sup>

Additionally, inclusion of lay persons in the regulatory process might raise serious constitutional problems. Analogously, there is recent authority holding unconstitutional a process where a nonlawyer judge is permitted to sit on criminal cases.<sup>89</sup>

Finally, it must always be remembered that where substantial rights of third parties are involved, other actions, both civil and criminal, are available.

Indeed, when re-examining some of the shortcomings of the current disciplinary processes previously discussed, it is clear that the problems stem from regulation of a profession such as law rather than the self-regulating aspect of such regulation. To take some specific examples, look at failures of lawyers to report the misdeeds of fellow lawyers. Given this inclination, lawyers are no more likely to voluntarily cooperate with newspaper people, government agencies, or citizens groups than they are to do so with bar association grievance committees. If methods can be developed to increase the "reporting" done by lawyers, such developments would be advantageous to a self-regulatory or non self-regulatory process.

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88. *Id.* at 136-37.

89. See *Gordon v. Justice Court*, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), cert. denied, 420 U.S. 938 (1975); *North v. Russell*, appeal docketed 44 U.S.L.W. 3028 (July 22, 1975).

It is submitted that lawyers investigating other lawyers does result in an independent investigation. Lawyers are a contentious profession, and while there is great pride in being a member of the bar, it would be grossly naive to compare the brotherhood of lawyers, such as it is, to one of the more nefarious brotherhoods which infect our society.

Some contend that no lawyer is going to go out of his way to prosecute a fellow lawyer. This may be a valid criticism in small communities where discipline is often a part-time job scattered among various practicing lawyers in the community, all of whom are close personal friends. But if the value of self-regulation is truly being measured, a fairly modern, up-to-date system should be examined. The investigating and prosecuting lawyers for the Association of the Bar of the City of New York are, in many cases, committed to a career in such a job. It is not the case of a lawyer investigating a fellow lawyer with similar interests, but rather a person whose very job is investigating the conduct of practicing lawyers. Furthermore, one need only look to the statistics of the Association of the Bar's Grievance Committee to come away with the certain conclusion that lawyers are capable of doing justice to their brethren.

#### IX. SUGGESTIONS FOR REFORM

Certainly if the quality and competency of the bar were raised generally, there would be fewer disciplinary problems. In discussing the problem, one would be remiss in failing to suggest that if stiffer requirements existed for admission to the bar, both ethically and intellectually, there would also be a resulting diminution of marginal or intolerable practitioners. Again, the expansion of legal aid and no-fault concepts and the increase of small claims courts for situations where lawyers are not required contribute to an environment which should discourage the continued existence of many practitioners whose practice spawns disciplinary problems. The goal is not a reduction in the overall number of lawyers, but instead to place a greater emphasis on quality and to redistribute some of our legal resources to agencies such as legal aid or public defenders.

Law schools can and must play a greater role than most presently do in imbuing future lawyers with a sense of ethics and a commitment to the profession. Continuing education of lawyers is an obligation of the organized bar. Perhaps as a condition of retaining one's license to practice law there should be a requirement that

all members of the bar demonstrate their own continuing legal education.

Maintaining a high ethical standard requires two things: the fear of quick and sure punishment for violation of ethical standards, and a knowledge and understanding of those standards.<sup>90</sup> If self-regulation, or indeed any form of regulation of the profession, is to be effective there must be a large number of lawyers who follow ethical guidelines simply because they will be punished for violating them.

Federal Judge Jack B. Weinstein of the Eastern District of New York is of the view that students begin developing ethical standards in law school,<sup>91</sup> and they pick up much of their ethical guidance from their professors whether the professors intend to give such guidelines or not.<sup>92</sup>

To the extent that violations of the Code are the result of ignorance about the specifics and interpretations of the Code, law school can do much to educate students, and thereby affect their behavior as lawyers. However, to the extent that violations occur because of a "flaw in the moral fiber" of the lawyer, ethics courses will likely be unsuccessful.

Nonetheless, continued work in developing effective methods of imparting some form of knowledge and sense of ethics among law students is highly recommended.<sup>93</sup> The American Bar Association recently adopted new rules which require law students of accredited law schools to take a course on the Code of Professional Responsibility as a prerequisite to graduation. But ethics and professional responsibility cannot be taught in a vacuum. As Judge Irving R. Kaufman, Chief Judge of the United States Court of Appeals for the Second Circuit, wrote:

But the separation of ethical from substantive and procedural questions must inevitably yield a one-dimensional view of the realities of day-to-day lawyering. I am constrained to agree with the observation of one commentator that "the place to teach

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90. Wright, *Self-Discipline of the Bar: Theory or Fact?*, 57 A.B.A.J. 757 (1971).

91. Weinstein, *On the Teaching of Legal Ethics*, 72 COLUM. L. REV. 452, 455 (1972).

92. *Id.* at 456.

93. See, e.g., FIRST REPORT OF THE TEMPORARY COMMISSION, *supra* note 8, at 21; Smedley, *The Pervasive Approach on a Large Scale—"The Vanderbilt Experiment"*, 15 J. LEGAL ED. 435 (1963); Van Hecke, *Education for Professional Responsibility*, 17 LA. L. REV. 513 (1957); Weckstein, *Perspective Courses and Co-Curricular Activities*, 41 U. COLO. L. REV. 398 (1969).

ethics at the law schools is not in special courses, but in every course offered."<sup>94</sup>

A second role education plays relates more to "poor performance" by attorneys rather than unethical behavior. No lawyer can be expected to keep up with all the details of ever changing case law, especially a lawyer who works in fairly broad categories. But there is no excuse for a lawyer to "forget" that a witness to a will should not be a beneficiary,<sup>95</sup> or that certain causes of action have restricted time periods for filing.<sup>96</sup> There can be no excuse for a lawyer to take a case in an area in which he has no expertise (a fact which the Code of Professional Responsibility recognizes).<sup>97</sup> By requiring lawyers to keep abreast of new events and trends, we can minimize to some degree the level of incompetence that exists within the profession. The concern shown by the California Bar for continuing education exemplifies these points.<sup>98</sup>

Client "security funds" are a necessary concomitant to self-regulation. If the bar wishes to be responsible for regulating the conduct of its members, there must exist a concrete vehicle evidencing in a material sense the bar's collective responsibility for a lawyer's misfeasance.

New Zealand established the first reimbursement practice in 1929.<sup>99</sup> Queensland, Australia, followed in 1930, and Alberta, Canada, in 1939. Shortly thereafter, England and South Africa provided similar methods to protect clients. As of 1968, 19 countries had adopted variations of the plan.<sup>100</sup> Although there was some consideration for such a plan in Oklahoma as early as 1953,<sup>101</sup> it was not until 1959, when Vermont instituted such a plan, that the United States had a jurisdiction that so protected clients.<sup>102</sup>

Lawyers who object to client security funds see compensation to clients for unethical behavior of lawyers as "someone else's business." Unfortunately, if the profession does not regulate itself legal

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94. Kaufman, *The Law*, SATURDAY REV., Nov. 1, 1975, at 17.

95. See M. BLOOM, *THE TROUBLE WITH LAWYERS* 69, 74-75 (1968).

96. See generally *id.*

97. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-101.

98. *Proposed California Plan for Maintenance of Professional Standards*, 6 ALI-ABA CLE REV. 1 (1975).

99. INSTITUTE OF JUDICIAL ADMINISTRATION, *LAWYER INDEMNITY PLANS* 14-15 (1955).

100. M. BLOOM, *supra* note 95, at 29.

101. *Id.* at 20-30.

102. *Id.* at 30.

malpractice may become an increasing phenomenon. If the medical profession is any guide as to what will happen to the legal profession, these lawyers will be paying for other lawyers' mistakes in the form of insurance premiums. A client security fund has the advantage of being cheaper to operate because no profit factor for an insurance company need be included. Moreover, the profession could establish some degree of control over the criteria for, and amount of such awards, a function which would be assumed by courts and juries under malpractice suits.

One common suggestion is that the staff of disciplinary agencies be of a higher caliber. Lawyers who work for disciplinary committees should be held in higher esteem and compensated accordingly.

As far as possible, grievance procedures should be centralized. Because of the negative impact that local and fragmented procedures has had on actual discipline and on the public's perception of the profession, any hint of impropriety must be avoided. Indeed, the very words "self-regulation" imply a protective, self-serving scheme. That image must be avoided. Having a lawyer in a community with only 20 lawyers subject to regulation by the other 19 will not avoid producing such an image. Every complaint received should be reviewed by a state-wide grievance panel before it is turned down or prosecuted *and* before any publicity is released.

A serious problem is the fact that a good deal of misconduct goes unreported. Therefore, the effectiveness of the complaint procedure must be increased. Clients, who are the largest source of complaints, may be unaware of grievance procedures and can not be charged with knowing what constitutes misconduct.

More publicity of grievance procedures is one way of letting the public know that there is a forum for complaints and that complaints are dealt with seriously. The shroud of secrecy surrounding grievance proceedings for protection of an attorney's reputation can and should be maintained by omitting names and addresses in news reports, much like the procedure utilized in reporting news of court proceedings involving juveniles.

Additionally, the complainant should always be informed of the progress and disposition of a grievance proceeding he has commenced against a lawyer. Often, charges of misconduct are dismissed and the complainant is never informed. Such a practice cannot serve to engender a public trust in the self-regulatory process.

Moreover, other sources of information should be developed. District Attorneys' offices and public defenders who are in court daily must be sought out by grievance committees to cooperate in reporting misconduct. Grievance committees must also be receptive to leads from news articles raising questions of misconduct.

Finally, a mediation organization should be established and made available to clients for informal disposition of complaints not amounting to professional misconduct or inadequacy. There should be some place a client can go without necessarily accusing his lawyer and turning the lawyer-client relationship into an unduly hostile one. Of course, any settlement reached through such mediation should not be allowed to interfere with, or be considered a substitute for, discipline where appropriate.

If the history of other professions is any guide lawyers have no choice. Lawyers must effectively regulate themselves or others will step in.

#### PANEL DISCUSSION

The following excerpts are taken from the panel discussion which followed the paper presented by Mr. Stanley Arkin.

In addition to Mr. Arkin the panel consisted of Mr. Harvey Levin, an instructor of law at the University of Miami who served as the moderator of the panel; Mr. Edward Atkins, who has recently served as vice-chairman of The Florida Bar Special Study Committee on Long Range Reorganization of Grievance Procedure, and is currently a member of the Board of Governors of the Florida Bar and president-elect of the Florida Bar; Mr. Clarence Jones, an investigative reporter for station WPLG-TV in Miami; Mr. Larry Jinks, executive editor of the Miami Herald; the Honorable Alan Schwartz of the 11th Judicial Circuit Court Dade County, General Jurisdiction Division, who also serves as a Florida Bar disciplinary referee; and Mr. Burton Young, past president of the Florida Bar and recent chairman of The Florida Bar's Special Study Committee on Long Range Reorganization of Grievance Procedures.

MR. LEVIN: *Mr. Arkin has identified a number of issues relating to self-regulation and the purpose of this panel discussion is to dispose of and develop the sources of conflict in the area of the self-regulation debate.*

*There are three principle sources of self-regulation that we will be discussing. They are (1) the confidentiality in the disciplinary*

process; (2) lay participation in the disciplinary process; and (3) whether members of the bar can and should regulate themselves.

*With respect to the first source of conflict, confidentiality in the disciplinary process, a central issue is determining at what level the disciplinary process should be opened up to the public. Many states now keep matters confidential until the issue comes before the supreme court of the state. That is under review now by various state bar associations as well as by the American Bar Association. Judge Schwartz, would you comment on the issue of at what point the disciplinary process should be opened up to the public?*

JUDGE SCHWARTZ: My opinion is that at the very least, confidentiality should terminate at the time that probable cause is shown for the prosecution of the attorney in question. I can see no justification whatsoever for drawing any distinction between disciplinary matters against attorneys and criminal proceedings against attorneys and others. The distinction between those two situations which now exists is indefensible. The only basis upon which it can be defended and the one upon which the public regards it as being defended is that the bar has the authority to make its own rules with respect to its own members. This is a general view in this field and I think a well justified one. However, the confidentiality provision of the bar regulation must yield at that level.

MR. YOUNG: I think you have to examine the reasons why confidentiality should be retained or waived. We have a serious problem in America today. People generally do not believe in lawyers, do not believe in courts, and do not believe basically in the system of justice. They do not think justice is being dispensed fairly. I think it is up to the legal profession to take the extra step in trying to show the public that the profession is, in fact, doing the job of self-regulating, and that the lawyers, at least in Florida, are making a concentrated effort to do their job. The problem is that no one knows about it except the lawyers that are involved in the program.

The question is: Since we are doing the job, why must we expose so much to so many? The reputation of the lawyer is the only thing he has. Unfortunately, when you go public even the guy who gets acquitted may have his reputation ruined. I think Mr. Arkin expressed that view.

But the greater question is the maintenance of public confidence, and I think that lawyers may need to surrender certain personal rights in order to instill such confidence. My opinion is not shared by the majority of Florida lawyers or by the Board of

Governors of The Florida Bar. However, the committee that I was involved with very recently proposed that confidentiality indeed be waived following a finding of probable cause at the grievance committee level in matters involving major misconduct. If that finding is concurred in by a reviewing member of the Board of Governors and by staff counsel and there is no objection by the lawyer, the matter should be made public. If there is an objection, there is a right of immediate review. There will be problems of course with regard to the lawyer who is wrongfully charged. That is a price I believe we have to pay. We are in a quasi-public business and must recognize that the only thing that is going to separate us from tyranny and preserve democracy is the legal profession. When the people get sufficiently fed up, they are going to change the system. We can not afford to run that risk.

MR. ATKINS: First of all, let me point out if I may, that when Burton Young said that the Board of Governors of The Florida Bar does not agree with what he said, he meant the majority does not agree, not all of them. Basically, Burton and I agree with regard to the stage at which confidentiality should be waived, assuring the necessary safeguards to the members of the profession and also assuring the public by telling them that which, in my judgment, they have a right to know.

We have got to start off with the recognition that we are a service profession. As a service profession, those that we serve have a right to expect competent legal services ethically rendered. They have a right to be assured that we are doing the job which we are supposed to do. The time has passed when proof of this is going to be achieved simply by reiteration that we at the bar are doing a good job. It is an absolutely justifiable inquiry on the part of the public to make sure that our grievance machinery is viable and effective. The public should be in a position where they can judge this for themselves. They simply cannot do so if we continue to hide it under a basket someplace and ultimately tell them they have to accept our word for it. I think confidentiality should be waived under the circumstances where the safeguards are there, such as was proposed before the Board of Governors.

MR. JONES: As an investigative reporter, many of the people who call me are people who think they have been screwed by a lawyer, and who feel that the bar is not disciplining that lawyer. It is a very difficult kind of case to investigate. It is one of the most frustrating that I deal with, and it occurrence. Someone comes in,



probably on an average of once a month, to say that he has in some way been misrepresented by a lawyer. Sometimes he has been to the bar association and he does not know if the bar association has done anything about it or not. I do not know whether the bar disciplines its own. I do not think any of us do because they will not let us see what goes on inside. That is the real problem here.

If you have a licensed profession that deals with rights that are so sacred in our society, how is one to know whether the man who is licensed to represent his client does a good and honest job? There are atrocious stories in this state and in every state, not only with the handling of criminal and civil cases, but also with the disciplining of lawyers. There was a time when certain attorneys would not even file a written brief when representing other lawyers who had charges filed against them. They were sure they had won the case before it was even argued. In my opinion the bar has for too long considered itself an aristocracy.

All of these questions revolve around the central issue of how public the disciplinary process is. No matter what is done in secrecy, the public will never be convinced of its effectiveness because they cannot see what is being done. With some reservations, I advocate making the process public from the filing of the initial complaint.

We have to have a system to tell the public when complaints are filed and provide them with the bare essentials of the allegations.

One idea for disciplinary proceedings is similar to the British system where the public would know that a complaint has been filed. They would not know all the details of the complaint, but would simply know at the initial stage that the complaint is there, and that the bar is supposedly acting on it.

Another step would be when filing the complaint, the allegation in the complaint would have no libel privilege. The public and the press could see the complaint, but if the press then published or broadcast the allegation in its full detail, it would have no privilege for that publication. The press would have to prove what it printed or broadcast is true until the point where probable cause is established. I believe that all of the ills that effect disciplinary proceedings can in some measure be solved by opening them up to the public.

MR. JINKS: I was talking to somebody before this session began, and said that I felt a little bit as if I were an independent who had been invited to participate in a discussion of the secret rites

of a social fraternity. The bar is not a social fraternity of course, and that is why we are here talking about this.

As Mr. Arkin spoke I wrote down that what he seems to be saying to laymen is "trust us." I for one am not quite willing to extend that degree of trust. I am also not quite willing to go as far as Clarence Jones would advocate, although my tendency is to come down hard on the side of complete opening of proceedings. It does seem to me that there needs to be some kind of protection against frivolous grievance. Perhaps Mr. Jones would say that there is a kind of protection involved in making public the details of anything that is frivolous. However, I certainly would agree with Judge Schwartz, Mr. Young, and Mr. Atkins that there is a point within the proceedings well before the conclusion where the whole proceeding should become public. That point is established by the finding of probable cause.

If I understood Mr. Arkin correctly, he was saying that there are times when clients who have filed grievances cannot themselves find out what the disposition was. I think that is outrageous. As long as you have that kind of situation, the general attitude of the public toward the legal profession is going to decline.

MR. ATKINS: The policy of the Florida Bar is that a complaining witness is to be notified with regard to the disposition of the complaint that he has made. I think that is nothing but common courtesy, and certainly is required when dealing with people who come forward to make complaints.

MR. ARKIN: I will comment a little on newspapers. There is a lot to be said for what the press has done in this country and continues to do.

But I ask you, should there not be controls by an outside agency as to what and how a piece of news is placed in the newspaper? I am sure the newspaper people would say absolutely not. So take a hypothetical situation where a complaint is received against a prominent member of the Florida Bar. It may be unjustifiable, but it is a complaint nonetheless. There would be front page coverage. That certainly is not fair to the attorney just because he happens to be more prominent and more newsworthy. This is a serious problem. Newsworthiness has nothing whatever to do with justice.

My suggestion is not that criminal proceedings should not be equated with these quasi-criminal disciplinary proceedings. They should be. But I would like to pull back from publishing all the gory details of charges against an individual when he is charged with a

crime. I have seen the absolute ruination of a human, his family, and everything he does or stands for based on charges alone, even if he is eventually vindicated or acquitted.

I am not in favor of complete secrecy. At an appropriate time the information should be made public, and more regularly public than is done now. For example, in New York, when somebody is disbarred, suspended, or publicly censured, it is published in the *Law Journal*, and hence is read by a very small percentage of lawyers. It is not put in the *New York Times* unless the attorney happens to be somebody very prominent.

I am not saying that having public scrutiny of proceedings is not good. By and large I am in favor of it. I would like to see our grand jury proceedings opened up to the public—terrible abuses go on there. There are far more terrible abuses in our grand jury system than ever can be conceived of in bar disciplinary proceedings. This is because if the lawyer transgresses so far as to make it heinous, misrepresentative, or ugly, he can be criminally prosecuted and civilly sued.

These alternative remedies are available and they are public and tough. The fact that in a typical grievance case we have proceedings in confidentiality until the point of disposition does not affect those heinous cases. An individual has no redress against publicity which is pursued without control or direction and may forever harm and ruin that individual.

A compromise suggested is publicizing the proceedings at the determination of probable cause. In effect, that means once it goes beyond the screening procedure and has been reviewed, it should be published. Although I find it hard to quarrel with that kind of decision in some respects, there remain serious problems. What probable cause means and how it is defined is a very difficult thing. Probable cause presumably means it gets to a point where there is clear and convincing evidence or substantial evidence, whatever that means, as opposed to just some evidence. Perhaps it means there is enough evidence to make it beyond a reasonable doubt, at least without hearing the other side—a grand jury standard in some states. Maybe that is enough. I do not know, but I am against the airing of these kinds of proceedings, or any kind of accusatory proceedings, until a point comes when we can be fairly sure that the individual's rights will not be jeopardized by a false accusation.

I have had clients who were indicted on the front page, but acquitted on page 66 or not at all. The *Wall Street Journal* or the

New York Times would say to me that it is not newsworthy that he was acquitted.

This is not an issue which can be decided easily in the the sense that we must have it opened up in order to cure the sore. On the other hand, I am not an advocate demanding that it must be kept secret. I do not argue for the profession to the exclusion of decency and civilization. But I am arguing that accusatory charges aired in a newspaper or other public medium, without showing and proving substantial justification for those charges, is an evil thing. If there has been a whitewash, a bribe, a payoff, a handshake, or even a lawyer who won a case without a brief, that is newsworthy. That is corruption. But the charges themselves are not.

JUDGE SCHWARTZ: I will respond to that. What Mr. Arkin is saying is that there is no distinction to be drawn between the freedom of the press as provided in the first amendment and the rights of attorneys or of other accused persons—that if attorneys and other accused persons are subject to regulation, then the press should be regulated on the same basis. We can not accept that kind of equality under our system and under our Constitution.

I will respond to it in another way, by assuming that there is no such equality. The fact is that if someone who has an unjustified grievance against a prominent member of the legal community goes to the State Attorney instead of going to the Florida Bar—it is not subject to any confidentiality.

The State Attorney presumably has thousands of complaints, not only against attorneys but against everyone else. Of those thousands, most never go any further, never see the light of day, and are not reported in any way. When the State Attorney, presumably acting in good faith, finds that there is probable cause or reason to file that information, or take the case to the grand jury and secure an indictment, the fact is that it is a matter of public notice whether the defendant is an attorney or not. It is impossible for me to draw any meaningful distinction between those two situations.

Finally, what we are talking about is at what level under our grievance procedure confidentiality should terminate. I suggest that the way to get at this situation is rather to scrap the entire procedure we have now. This would eliminate the system under which lawyers regulate themselves in the sense that they do now because I can not see any justification for that system anymore than I can see justification for a system in which a panel of bartenders determines whether a bar is going to lose its liquor license or not.

I think that the system should be just as it would be in the case of the regulation of any other profession. There should be a completely independent system in which there is a professional prosecutorial staff and administrative judges. If the attorney desires, perhaps he should have a jury trial. But the same system should operate in disciplining members of other professions, and also operate within the criminal system.

MR. ARKIN: I agree with Judge Schwartz about an independent agency. Probably the only answer we have is to take it out of a guild voluntary membership organization and put it into a state agency.

However, Judge Schwartz appeared to come out exactly contrary to what I was suggesting before. We can equate grievance proceedings with criminal proceedings and charges. However, rather than that being the justification for having them aired in a newspaper, what I was suggesting was that the very fact that the criminal proceedings are aired at the stage they are, and in the manner they are by our newspapers, is objectionable and should be cured. Rather than expand the press privilege to cover these proceedings, there ought to be a severe contraction of the right to cover this kind of accusatory proceeding.

MR. JONES: I think most of the abuses in famous cases were abuses by lawyers and judges. It was the judge who held the press conference and who called the press. It was the attorneys who leaked their sides of the case. Perhaps what we need in terms of pre-trial publicity is more bar control over the lawyers, rather than bar control over the press.

MR. YOUNG: The public does not know whether the bar is or is not capable of disciplining itself, monitoring its conduct, or maintaining the quality of the performance of the profession. Everything is confidential. If they knew that the bar was doing its job, if they were able to sit there and see what goes on in the referee's hearing, I think that would eliminate the problem. But the public does not know what is going on. I think that if the process opens up, and if, indeed, it is shown that we are not regulating ourselves, if we are ripping off the public, then there is a reason for having others judge our ethical properties and perhaps our level of competence.

Until that time comes, however, I am not willing to allow a layman to determine whether I should have returned a telephone call to a client or whether I should have filed a motion to dismiss rather than a motion to strike, and am therefore, not competent in

the manner in which I practice law. I think to permit this would be basically wrong. No one would stand for having a layman determine whether a person is qualified to enter the practice of law or determine which academic courses should be taken before one can be admitted to take a bar examination. I do not think a layman is competent to determine whether a lawyer has breached the Code of Professional Responsibility or whether he has acted incompetently.

I do think that laymen should be part of a review program to determine every few years whether our disciplinary program is operating and functioning properly. The Florida Bar adopted such a program several months ago. Every several years there is going to be a commission composed of laymen and lawyers to review whether our disciplinary program is working. But you must take one step at a time. I think when we open the process up the public is going to be quite satisfied to see that the job is being done properly.

MR. ATKINS: It may help to set some parameters. To begin with, there is no question but that the legal profession (actually the supreme court has the authority and lawyers are the agents through which the court operates to do the ultimate disciplining) has the competency and the integrity to do the job and to do it properly.

I honestly cannot conceive that the best interests of the public or the best interest of the profession can be served by the legal profession being under the aegis of the Board of Business Regulation, along with the cosmetologists, the barbers, etc. In essence that is what I understand Judge Schwartz to be suggesting here. If he is not suggesting that, then at least that is what was suggested by a senator from the central part of the state. Whether such responsibility should continue with the Board of Governors of the Florida Bar or whether it should reside with a disciplinary board which is also under the direction of the supreme court is a good question.

With the work of the Board becoming as extensive as it is, I think there is merit to at least considering the possibility of setting up a disciplinary board which would be responsible to the supreme court for the handling of disciplinary problems here in Florida.

A free and independent judicial system is vital to our democratic system. It must have lawyers functioning in it, and it is inconceivable that in the final analysis we can continue to do that if we are going to be subjected to constant scrutiny and disciplining by an outside force.

I wonder if we are not approaching the entire concept somewhat inaccurately, especially in this particular day and time. Mr. Arkin

commented upon this and he is right to a certain extent. We have in our disciplinary program a two-pronged objective. One is to monitor the conduct of the attorney. The second is to maintain the competency of the bar. Constantly the focus has been on monitoring the conduct. There is no question that with the advent of the Code of Professional Responsibility promulgated in Florida in 1970, the primary thrust now is not just a matter of monitoring conduct, but rather competency. We did not have appropriate disciplinary measures in the canons. Now we do. I am leaning toward the viewpoint that we should start placing greater emphasis on our program with regard to competency of the lawyers in various phases. Perhaps we ought not start viewing our entire procedure as one not so much of discipline, but rather one of lawyer-qualification.

MR. JONES: We agree on one thing. I think lawyers are the best judges of lawyers' competence and of their ethics. But unless the public gets an opportunity to see what the lawyers do in judging other lawyers, there will still remain the possibility of a "fix" and a suspicion throughout the public that the "fix" is in.

MR. ATKINS: I think that everybody here, including Mr. Arkin, agrees that a basic proposition centers around the public knowledge of what is going on. Those of us who are concerned with the process and have dealt with it are convinced that it is working out well. But like justice, it can be the best in the world, and if the people do not see that justice is done, they are just not going to believe it. Until they see that our system is an effective, viable system they are not going to have faith in it. In the final analysis we all agree that the people are entitled to a greater measure of information with regard to what we are doing so that they can judge for themselves.

JUDGE SCHWARTZ: Perhaps the greatest argument against self-regulation of the bar and for the idea that the bar is in effect a guild system, is the fact that, despite Mr. Atkins' obviously correct statement that everybody here agrees with the proposition that there should be a termination of confidentiality at a given point, many or most members of the Florida Bar do not share in that view and it is not the position that has been accepted by the Board of Governors of the Florida Bar. The apparent reason for this, and I surmise this on the basis of reading the material that was sent out in support of the opposite position, is to protect the lawyers against the public. As a matter of fact, we are supposed to protect the public from ourselves. What right do we have to do that?

I do not like the idea of subjecting lawyers to lay boards to determine whether they acted competently. It is not a realistic proposition. But aside from our feeling that we do not want to be with the cosmetologists, nobody has asked the cosmetologists whether they want to be with us. Aside from that fact, how can one theoretically justify the bar's present position without saying that we are better than they are or we want to be regulated only by ourselves? How can that be justified on any viable, conceptual, theoretical basis?

MR. LEVIN: *Mr. Jinks, do you think administrative law judges or lawyers could do enough to restore the viability of our legal system?*

MR. JINKS: I think there should be some lay participation in the grievance process. I do not understand that process well enough to say precisely how it should function. However, it seems to me that there probably is a middle ground between the positions that I have heard here.

MR. ARKIN: Lay people could be better lawyers than some lawyers, many lawyers. There is nothing special in terms of intrinsic intelligence or judgment to being a lawyer. What I was suggesting in my opening remarks was that judgment on any particular issue is a philosophical concept which is better enhanced by knowledge. Knowledge is a general thing. The best lawyers in my view are lawyers who do not just read cases, but read books, know people, and participate in activities aside from the narrow activities of certain kinds of lawyers. The more information you have, the better judgments you can make. We are talking about a very specialized area with subtle judgmental decisions to make. In my view those are the kinds of lawyers who should sit on those kinds of panels.

On the other hand, the answer could be, and I have not heard it, that if you have five lawyers and two lay people, cannot the lawyers discuss with the lay people the legal issues and inform them as judges instruct juries? Intelligent lay people can understand. We have lay people judging the medical profession. But what is the benefit? What is the point? Is it just image? Because somehow people believe there is no whitewashing if you have a couple of lay people on a panel? The next step would be to ask whether there should be two lay people and five lawyers or five lay people and two lawyers.

MR. LEVIN: *Mr. Arkin, if civil juries are capable of handling*



*fraud cases why cannot they handle commingling of fund cases when the attorney is the one subject to the charge?*

MR. ARKIN: That is a very good point. First, in terms of self-regulation lay people do have an immense input. We have not had that mentioned. If a lawyer files a complaint after the statute of limitations he could be sued for malpractice. That is a lay person making a public complaint in a civil forum to be judged by his peers. A client can also make a criminal complaint. A large portion of a lawyer's conduct is subject to lay influence and judgment.

We have juries who are able to decide complicated fraud and anti-trust cases, or who serve in federal criminal cases which are extremely complex. Given these facts why cannot or should not laymen be used for lawyer disciplinary proceedings? It is hard to answer the question. I suppose the best answer would be that the jury system only works well in certain kinds of cases. It does not work well across the board. Nobody will say to you that a jury can judge all cases. I believe in the jury system, but I also believe it has defects. It has impairments and disabilities and it cannot be used in all cases. In the normal grievance case I do not think we need it.

I am really not against having certain lay people in on the process. It really makes no difference because they become our friends anyway, but I think the kinds of judgments that have to be made are better made by lawyers.

QUESTION: *I would like to suggest an answer as to why the bar would like to regulate itself. It is a closed monopoly in that entry is controlled by determining who can practice the law. Once they get there and make a mistake, who judges them? There is mediation short of court proceedings. Lawyers judge them. They do not make the charge public. It has been said by a number of people that codes of professional responsibility are nothing but anti-competitive restraints of trade. Dentists do not testify against dentists, etc. I suggest to you, and I agree with Judge Schwartz, that we should open this up to the public because there is no incentive for a lawyer to bring an action against another lawyer. Who is the best judge? Is it not the public and courts?*

MR. ARKIN: All lawyers are not the same as all other lawyers. That is the nature of our profession, so that when you are getting one lawyer to judge another lawyer you are getting another human being who is especially able to do that.

As far as the monopoly aspect of the profession, are you suggesting that we elect lawyers—that within our communities we have a

panel of nominees for lawyers as they do in China where they elect peoples lawyers? There may be some virtue to that. I am not quarreling with it to a bottom line point, but I do not think we have reached a point in society where we have the commune gathered together and we select someone to be our advocate. We do not do it that way. We have to have special knowledge and special qualifications.

QUESTION: *For the purpose of my question, I am addressing myself solely to those issues which would not be legitimate ones for court proceedings. Your analogy between the legal profession and other endeavors is logically appealing, but I question whether we should make a judgment solely on the basis of an analogy, because we are subject to a tautology there. I question whether we should not focus more deeply on the competency of the judge and the lawyer in these minute legal areas. It takes 3 years in law school to gain even the slightest measure of competent thinking. I question many areas of technical competency of lawyers. Can we delegate those kinds of questions to laymen? I also wonder what you would have to say to the additional expense of educating, instructing, and funding a lay board to make such determinations?*

JUDGE SCHWARTZ: I am sure I was guilty of either not making myself clear or not saying what I meant. I tried to suggest that the parade of "horribles" that Mr. Young had presented here was just that. There are no disciplinary proceedings, nor have there ever been, nor will there ever be, relating to a claim that a lawyer filed the wrong pleading or made a mistake in one of those particular areas of the law.

Mr. Atkins was just stating that he did not think that the bar was doing enough as far as the provision of the Code of Professional Responsibility which requires that a lawyer be competent. What he is talking about is lawyers whose lack of competence boggles the mind. He is not talking about or will he ever talk about lawyers who file wrong pleadings. This is not a viable issue to be decided.

Let us assume that the accused lawyer has been before a grievance proceeding or an administrative judge or a panel including lay people and such a charge is made. As in the criminal court, there would be a directed verdict or a dismissal. That is exactly what would occur in such a situation. It would never be a problem.

QUESTION: *Are you saying that in terms of lawyers' technical competency no such question would ever come before a grievance committee?*

JUDGE SCHWARTZ: If we are using the term "technical," in the way that I think you are, then I would say yes.

QUESTION: *I mean, for instance, whether a lawyer violated the Rule Against Perpetuities in drafting a will?*

JUDGE SCHWARTZ: Absolutely not.

QUESTION: *If a lawyer failed to file a complaint within the statute of limitations, for instance? We can go on and on because if you are saying that such questions will never come before a board of grievance, I question whether we have not just damned ourselves to the public?*

JUDGE SCHWARTZ: There are other means besides grievance proceedings in order to detect and eliminate lawyers who write wills which violate the Rule Against Perpetuities, or allow statutes of limitations to run out. When a lawyer lets the statute of limitations run because he has a problem in his office and does not go into the office or does not return phone calls for 2 years, that is not a technical matter of the law. If there is a question of whether the law of Vermont or the law of New Hampshire applies in very technical situations and a lawyer makes a determination that one does rather than the other and is wrong, and as a result the statute of limitations has run, that will not be subject to grievance procedure as long as there is some good faith in a decision like that.

There are alternative measures, such as malpractice actions, as Mr. Arkin said. Very often in cases such as these you could not get past a directed verdict in a malpractice case, let alone in a grievance proceeding.

MR. YOUNG: Let me respectfully disagree. First, I think we are going to be in trouble if we do not direct ourselves in our grievance procedure more to matters dealing with incompetence. We never could do that before, but now we can.

Canon 6 of the Code of Professional Responsibilities says that a lawyer is charged with acting competently. True, it is not used very much, but it is going to be used a great deal more. It is going to be a question for discipline as compared to that of malpractice because there is no room in this profession for "dummies" when the public is being hurt.

Competency is intertwined with self-regulation. There are two aspects to self-regulation: One is competency and the other is ethical transgression. It used to be you had to file a malpractice case in competency matters, but now we have the tools for grievance actions and they are going to be used.

In Florida we are spending hundreds of thousands of dollars a year in our grievance programs, and thus we are going to be more and more involved with the competency aspect. That is why I think it would be inappropriate and unjust to involve laymen as judges in these particular matters at this particular level. However, as we suggested before, laymen do have a right to see that we are doing our job.

*QUESTION: I would like to make one observation, and ask a couple of questions. First, after having practiced law for many years and having served on the grievance committee of the Florida Bar for a long period of time, my experience with the grievance committee and with grievance procedure has been that the Florida Bar and its grievance members are militant and diligent in their protection of the bar and of the public. I think that fact does get lost in the conversation.*

*I also have, as a practicing attorney, seen grievances and complaints against my fellow lawyers. I think that in the bar generally there is a tendency not to make waves against their fraternity brothers which I regret. However, once that wave is started the grievance committee does function well.*

*Second, my question. As to an independent Board of Review, Board of Control, or Board of Supervisors and staff, I question if the panel has given any thought to the economics and logistics of that kind of board. From my experience the staff would be phenomenal and the expense staggering. Lawyers already charge too much and the cost of legal services would escalate. If somebody has a different view I would like to hear it.*

*On the question of the legal profession being controlled by outsiders, I submit, and ask if you agree, that the law profession is different than any other profession. We are a part of the judiciary. We are part of the concept of separation of powers under our constitutional precept. As such it would in my opinion be exceedingly dangerous, if not unconstitutional, for a legislative committee, board, or agency, to undertake to control, regulate, and supervise the functions of the bar. We are officers of the court and responsible to the court, which is the judicial branch of our government. That is where the responsibility lies and should lie.*

**MR. ATKINS:** If the independent board which you refer to in your question is one I commented on in passing earlier, the answer is yes, thought has been given to it. For the 1975-76 administrative year of the Florida Bar, not counting the value of the time of the

lawyers who serve on grievance committees or as referees or as bar counsel, there is approximately \$280,000 in the budget.

MR. LEVIN: *I have one final question to ask Mr. Arkin. Stock exchanges have on occasion been liable for damages resulting from a broker who should have been disciplined by the stock exchange but was not, and went on to injure his client. If we allow attorneys to regulate themselves, and an attorney who should be disciplined but is not, goes on to injure a client, do you think that bar associations should similarly be held liable for the injuries which ensue?*

MR. ARKIN: I do believe we ought to have client indemnity funds, and I think the funds should be the initial recourse of the offended client, with the fund having a claim over subrogation against the lawyer.