

University of Miami Law Review

Volume 30
Number 4 *The Second Annual Baron de Hirsh
Meyer Lecture Series*

Article 8

7-1-1976

Performance Evaluation, Education, and Testing: Alternatives to Punishment in Professional Regulation

Kenneth J. Kavanaugh

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Kenneth J. Kavanaugh, *Performance Evaluation, Education, and Testing: Alternatives to Punishment in Professional Regulation*, 30 U. Miami L. Rev. 953 (1976)
Available at: <https://repository.law.miami.edu/umlr/vol30/iss4/8>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

COMMENTS

PERFORMANCE EVALUATION, EDUCATION, AND TESTING: ALTERNATIVES TO PUNISHMENT IN PROFESSIONAL REGULATION

KENNETH J. KAVANAUGH*

This article outlines the existing concept of self-regulation and focuses on the deficiencies and inadequacies of that concept. The author proposes that to be effective, self-regulation must encompass more than the traditional disciplinary functions of bar association grievance committees. Specific proposals include: mandatory recertification of attorneys; requiring continued professional education for specialties and for areas in which an individual lawyer has demonstrated weakness; creating administrative machinery to monitor the entire spectrum of professional regulation; assigning quality ratings to individual attorneys; and implementing an aggressive public information program to solicit the public's opinion and to publicize steps the legal profession has taken in the self-regulation process.

I.	INTRODUCTION	954
II.	THE EXISTING CONCEPT OF SELF-REGULATION	956
	A. <i>Fault Concept</i>	960
	B. <i>Communication Failures</i>	960
	C. <i>Competence</i>	961
	D. <i>Pre-Programmed Inertia</i>	962
	E. <i>Steps Taken to Improve Enforcement</i>	963
III.	CONSIDERATIONS NOT ADDRESSED BY THE EXISTING CONCEPT	965
	A. <i>The Public Has a Vested Interest in the Legal Profession</i>	965
	B. <i>The Code of Professional Responsibility is Not a Factor in Day to Day Decision-Making</i>	966
	C. <i>Effective Regulation Must Induce Affirmative Action</i>	967
IV.	A COMPREHENSIVE SYSTEM OF PROFESSIONAL REGULATION IS NEEDED	968
	A. <i>Administration</i>	969
	B. <i>Recertification</i>	970
	C. <i>Continuing Education</i>	972
	D. <i>Coordinated Effort</i>	974
	E. <i>Public Information</i>	975

* J.D., University of Miami, former member, Editorial Board, *University of Miami Law Review*; Associated with Blackwell, Walker, Gray, Powers, Flick & Hoehl, Miami, Florida.

F.	Quality Ratings	977
G.	Continued Upgrading of Discipline	979
V.	ANALYSIS	979
A.	Expense	980
B.	Bar Resistance	981
C.	Time Demands on the Practitioner	981
D.	Danger of Over-Control	982
VI.	CONCLUSION	983

I. INTRODUCTION

The guiding principle for marketing professional services should not be "let the buyer beware" but rather "let the buyer believe." A client is unprotected in his relationship with his attorney in that he does not deal at arms length in the law office as he would in the commercial marketplace. The "buyer" of legal services is expected to believe in his counsel because he knows that the attorney is licensed, adheres to a professional code of ethics, and is subject to professional discipline. If these safeguards fail to engender public confidence that an attorney can be relied upon simply because he is an attorney, then a dangerous situation exists for the legal profession.

There are indications that the general public does not have such confidence. A number of surveys have been conducted to determine the attitude of the public toward lawyers. Lawyers are not held in as high esteem as doctors, teachers, and other professionals. Significant percentages of the public believe that lawyers will act unethically, and that the profession as a whole is not interested in policing its ranks.¹

The heavy involvement of lawyers in the Watergate scandal attracted the attention of the news media to the legal profession,

1. This lack of confidence has been identified for a number of years. In 1960, 20 percent of the respondents to a Missouri survey rated the general reputation of lawyers as "below average" among other professional groups. In a 1970 North Dakota survey, 15 percent were not satisfied with the service they had received from lawyers, and 41 percent felt that some lawyers would act contrary to their code of ethics to protect their own client's interests. During the same year, 19 percent of the respondents to a Texas survey had an unfavorable opinion of lawyers. Thomason, *What the Public Thinks of Lawyers*, 46 N.Y.S.B.J. 151 (1974). A 1974 survey by the American Bar Association indicated that 26 percent of the respondents thought that lawyers would engage in unethical activities and 36 percent felt that lawyers were not concerned about removing the "bad apples" from the legal profession. ABA PRELIMINARY REPORT ON THE LEGAL NEEDS OF THE PUBLIC, 94-95 (1974). In 1975 only 6 percent of those questioned in a Harris Survey stated that they had a great deal of confidence in law firms as an American institution. Harris Survey, Oct. 6, 1975.

and the coverage has been generally unfavorable.² Certainly this incident has had an adverse impact on the public's regard for lawyers.

The organized bar, however, has been sensitive to public opinion, and has been concerned about the effectiveness of professional discipline. In 1967 the Special Committee on Evaluation of Disciplinary Enforcement was created by the American Bar Association. The Committee was directed "[t]o assemble and study information relevant to all aspects of professional discipline, including the effectiveness of . . . enforcement procedures"³ The Committee was chaired by Tom C. Clark, an Associate Justice of the United States Supreme Court. Its analysis of the existing state of professional discipline was severe and it advocated far-reaching reforms. The Committee limited the scope of its study to the formal disciplinary process, and did not attempt to address the broader topic of professional regulation which conceivably includes measures other than formal discipline⁴ such as the teaching of ethics in law schools, the screening of bar applicants and possible lay participation in the disciplinary process.⁵

Presently, lawyers are regulated almost exclusively from within the legal profession: legal education is accredited by the American Bar Association; entrance to practice is controlled by state boards of bar examiners; and discipline of an attorney is carried out by other attorneys under the supervision of the courts. It has been argued that the concept of the practice of law as a learned profession demands that the profession be solely responsible for the regulation of its members.⁶ Critics of this concept of self-regulation cite the wide-spread public dissatisfaction with lawyers, and argue that regulation by the legal profession has been ineffective in dealing with incompetence and abuse.⁷

2. See, e.g., Greene, *The Legal Profession Finds Itself on Trial, Moves Toward Change*, Wall Street Journal, May 8, 1974, at 1, col. 6; Peters, *The Screwing of the Average Man: How Your Lawyer Does It*, THE WASHINGTON MONTHLY, Feb. 1974, at 33; *America's Lawyers: "A Sick Profession"?*, U. S. NEWS & WORLD REPORT, Mar. 25, 1974.

3. ABA, *Problems and Recommendations in Disciplinary Enforcement* xiii (Final Draft 1970) [hereinafter cited as the CLARK COMMITTEE].

4. See generally Kane, *Lawyer Discipline in Florida*, 44 FLA. B.J. 522 (1970); Manning, *If Lawyers Were Angels: A Sermon in One Canon*, 60 A.B.A.J. 821 (1974).

5. See CLARK COMMITTEE, *supra* note 3, at xv-xvi.

6. See note 61 *infra* and accompanying text.

7. See note 60 *infra* and accompanying text.

This comment will examine the limitations of the present system of professional discipline, discuss considerations not adequately addressed by the present system, but which are important to the public and to lawyers, and examine some new directions that could be taken to develop a profession in which the public can rely with confidence.

The self-regulation process in Florida is used throughout this comment as a representative example of a competently administered system of professional regulation. Since 1950, Florida has had an integrated bar rule, which requires that a lawyer be a member in good standing of the state bar in order to practice within the state.⁸ Florida was cited by the Clark Committee as having substantially revised its disciplinary rules prior to the Committee's report.⁹ Because many of the programs recommended by the Committee have been a part of the state's disciplinary system for some time, it may be that shortcomings observed in the system of regulation in Florida are due in large part to the inherent limitations of the system as opposed to inefficient implementation of the system.

II. THE EXISTING CONCEPT OF SELF-REGULATION

The power to regulate the conduct of attorneys is considered inherent in the ultimate power of the judiciary to discipline officers of the court.¹⁰ Disciplinary proceedings are intended primarily to protect the public against the bad faith or incompetence of attorneys. These proceedings may result in the ultimate sanction of disbarment, and are conducted to purge the bar of unworthy practitioners¹¹ so that they will be unable to injure the general public. Such proceedings, however, are not relied upon as a means of actually punishing guilty attorneys.¹² Traditional punishment, when appropriate, is left to the criminal justice system.

The Supreme Court of Florida administers its jurisdiction over attorneys through grievance committees, referees, and the Board of Governors of the Florida Bar. A grievance committee has been es-

8. Petition of Florida Bar Ass'n, 40 So. 2d 902 (Fla. 1949).

9. CLARK COMMITTEE, *supra* note 3, at 192.

10. See *State ex rel. Florida Bar v. Evans*, 94 So. 2d 730, 733-34 (Fla. 1957).

11. *Florida Bar v. King*, 174 So. 2d 398, 403 (Fla. 1965), citing *State ex rel. Florida Bar v. Rubin*, 142 So. 2d 65 (Fla. 1962).

12. *Id.*

tablished in each judicial circuit,¹³ although certain populous circuits have more than one committee.¹⁴ The purpose of the grievance committee is to conduct investigations of alleged misconduct, make determinations as to whether there is probable cause of misconduct, and impose a private reprimand for minor misconduct.¹⁵ The grievance committee conducts the initial review of the bulk of complaints against attorneys.¹⁶

The disciplinary process may be initiated by the complaint of a judge observing misconduct of an attorney in court proceedings, by the imposition of discipline in a foreign jurisdiction, or by the conviction of a crime. However, the disciplinary process most often begins with a complaint from the attorney's client.¹⁷

The grievance committee makes an initial investigation to determine if there is probable cause to believe that the accused attorney has violated a disciplinary rule of the Code of Professional Responsibility (the Code).¹⁸ If the committee does not find probable cause, it disposes of the matter by informing the complainant and the attorney that there are insufficient grounds to proceed.¹⁹

13. There are 20 judicial circuits in Florida. FLA. STAT. § 26.01 (1975).

14. The Eleventh Judicial Circuit, serving the Miami metropolitan area, has 12 grievance committees. 49 FLA. B.J. at 390 (Sept. 1975).

15. "Minor misconduct" is described in the disciplinary rules as "a relative rather than a precise term." FLA. INTEGRATION R. art. XI, R. 11.04(6)(c)(ii). Misconduct is not considered minor when any of the following conditions exist:

- (a) The accused has been disciplined by private reprimand more than once in the preceding ten years.
- (b) The accused has been disciplined by a measure more severe than a private reprimand in the past ten years.
- (c) The accused is the subject of other pending disciplinary proceedings at the time of the order.
- (d) The misconduct involves any of the following: dishonesty, misrepresentation, deceit, fraud, commission of a felony, failure to account for money or property, performance of the offending act with knowledge and intent that such would breach the standards of ethical and professional conduct, misconduct similar to that for which the accused has been previously punished.

Id. Transgressions more serious than minor misconduct are the basis for public reprimand, probation, suspension, or disbarment imposed by the Supreme Court of Florida. See FLA. INTEGRATION R. art. XI, R. 11.10.

16. FLA. INTEGRATION R. art. XI, R. 11.04(1) provides:

The purpose and function of a grievance committee is to conduct investigations of alleged misconduct of a Member of the Florida Bar justifying disciplinary action and to determine whether or not to make a finding of probable cause. A grievance committee may discipline for minor misconduct.

17. CLARK COMMITTEE, *supra* note 3, at 60.

18. FLA. INTEGRATION R. art. XI, R. 11.04(6)(a)(b).

19. See FLA. INTEGRATION R. art. XI, R. 11.04(6)(a). Rule 11.12(4) states that a com-

When a finding of probable cause has been made,²⁰ a referee is appointed to preside over the adversary quasi-judicial proceeding.²¹ The attorney maybe questioned and his files may be examined.²² The referee makes a finding of fact, a recommendation as to whether the accused attorney should be found guilty of misconduct, and a recommendation as to the disciplinary measures to be applied.²³

The Board of Governors conducts an administrative review of the referee's report and may make its own findings and recommendations. The Board has authority to issue a private reprimand.²⁴

The Supreme Court of Florida reviews a finding of guilt upon petition of any party to the proceedings. Ordinarily, only the supreme court may impose discipline more severe than private reprimand.²⁵ However, if no petition for review to the supreme court is sought, the measure recommended by the referee will be imposed unless the court asks for briefs or oral arguments on the matter.²⁶

A study of the procedural machinery through which discipline is administered reveals that great emphasis is placed on protecting the rights of the attorney, with fewer counterbalancing safeguards provided to protect the rights of the general public to have a competent and honest bar. The thrust of the disciplinary process is to prove the guilt or innocence of the accused attorney.

The grievance committee may impose a private reprimand for minor misconduct, but the accused attorney may reject the reprimand, thereby forcing the matter to be carried to more formal proceedings.²⁷ Presumably, a reprimand could be imposed for any act by an attorney which falls below a standard of conscientious representation.²⁸ However, because a reprimand must ultimately with-

plainant may be advised in confidence of the pending status or final disposition of his complaint. As a matter of policy, all complainants are notified of the final disposition of their complaints. See Statement by Mr. Edward Atkins in the Panel Discussion following Arkin, *Self-Regulation and Approaches to Maintaining Standards of Professional Integrity*, 30 U. MIAMI L. REV. 803, 835 (1976).

20. A finding of probable cause may also be made by the Board of Governors of the Florida Bar. FLA. INTEGRATION R. art. XI, R. 11.05(2).

21. FLA. INTEGRATION R. art. XI, R. 11.06.

22. *Id.* at R. 11.06(7).

23. *Id.* at R. 11.06(9)(a).

24. *Id.* at R. 11.06(9)(c).

25. See generally FLA. INTEGRATION R. art. XI, R. 11.09 and R. 11.10. The Supreme Court may impose probation, public reprimand, suspension, or disbarment. *Id.* at R. 11.10.

26. *Id.* at R. 11.09(3)(f).

27. See FLA. INTEGRATION R. art. XI, R. 11.04(6)(c)(i).

28. See *Florida Bar v. Brigman*, 299 So. 2d 7 (Fla. 1974) (representation which falls below the high standard required in professional conduct when representing a client, but which was not dishonest and did not involve mishandling funds, could warrant a public reprimand).

stand review by the supreme court, proof of misconduct must be by more than a mere preponderance of the evidence.²⁹ Common complaints that members of the public have against lawyers are that they charge too much, are too slow, or fail to keep the client sufficiently informed.³⁰ Normally these types of complaints do not result in sanctions against the attorney.³¹

Existing alternatives to professional regulation, such as criminal prosecution and civil malpractice suits, place similar emphasis on protecting the rights of the accused attorney.³² But these alternatives fail to deal effectively with injuries to members of the public caused by actions of the attorney which may represent inadequate legal services, yet not be actionable misconduct under the Code.³³

There are certain characteristics of the existing disciplinary scheme which limit its ability to regulate an attorney's performance and conduct. Discipline is understandably viewed as appropriate only if the attorney is at fault. The problem is that injury to the client or to the public without intentional misconduct or gross negligence on the part of the attorney invokes no "regulatory" response. Finally, while competence is discussed in the Code³⁴ it is not effectively regulated.³⁵

29. See *Florida Bar v. Rayman*, 238 So.2d 594 (Fla. 1970).

30. Thomason, *What The Public Thinks of Lawyers*, 46 N.Y.S.B.J. 151, 152 (1974).

31. However, if a lawyer's fees are "clearly excessive" as opposed to "merely excessive" disciplinary action may lie. See *Florida Bar v. Moriber*, 314 So. 2d 145 (Fla. 1975). Furthermore, carelessness, inattention to duty, and failure to keep the client informed may warrant action even though there is no moral turpitude. See *Florida Bar v. Graves*, 153 So. 2d 297 (Fla. 1963).

32. Misconduct by lawyers is perceived as falling within categories of offenses, with the most severe being prosecutable as a criminal offense, the next category giving rise to civil remedy, and the least severe being the subject of professional discipline. The same transgression may give rise to all three sanctions. However, criminal prosecution, civil suit, and professional discipline primarily deal with acts that differ in quality and severity. See Arkin, *Self-Regulation and Approaches to Maintaining Standards of Professional Integrity*, 30 U. MIAMI L. REV. 803, 805 (1976).

33. Examples include the failure to aggressively represent a client or perhaps the inability to adequately perform the required services.

34. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101. This rule states:

(A) A lawyer shall not:

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.
- (3) Neglect a legal matter entrusted to him.

35. See Arkin, *supra* note 32 at 811.

A. *Fault Concept*

Under the existing "regulatory" scheme, the necessity of finding "fault" severely restricts the regulatory machinery's ability to control the actions of attorneys. While fault has not been made an express requirement under the Code as a basis for discipline, the types of discipline imposed seem to be determined by the degree of fault found.³⁶ In addition, this fault must be established beyond a mere preponderance of the evidence.³⁷

The significance of the "fault" standard as it exists is that the careless, ill prepared, or ignorant attorney who continually produces inadequate legal work is often beyond effective regulation.³⁸

The limitations of the current "fault" standard are inherent in the "quasi-criminal" nature of the proceedings. The standard must be retained to adequately protect the rights of an accused attorney, but the limitations of a system which relies completely on such a restrictive standard as the basis for any regulatory action must be recognized. Performance evaluation, required education, and testing programs would provide a more adequate response to undesirable conduct by an attorney, if added to the disciplinary processes of the existing regulatory machinery.³⁹

B. *Communication Failures*

The purchaser of legal services is paying an expensive price to have an expert analyze his affairs, determine his rights and liabili-

36. See, e.g., *Florida Bar v. Moran*, 273 So. 2d 379 (Fla. 1973) (neglect in prosecution of cases and misrepresentation by attorney as being court appointed counsel justified public reprimand but not suspension); *Florida Bar v. Reed*, 249 So. 2d 417 (Fla. 1971) (gross mismanagement of estate warranted suspension); *Florida Bar v. Beaver*, 248 So. 2d 477 (Fla. 1971) (counseling client to secrete assets and perjure himself as to their existence in divorce proceedings justified suspension but not disbarment).

37. *Florida Bar v. Rayman*, 238 So. 2d 594 (Fla. 1970). There, attorneys were charged with soliciting funds to influence a judge and retaining them for their own purposes. The Board of Governors had ordered they be disbarred. The supreme court vacated the judgment and dismissed the charges stating that "we have a continuing duty to require charges such as these to be supported by clear and convincing evidence." *Id.* at 598. See also *Florida Bar v. Schanbrun*, 257 So. 2d 6 (Fla. 1971) where the Bar did not meet the burden of proof required under *Rayman* and the court rejected a disbarment recommendation, although it publicly reprimanded the attorney.

38. See generally Marks and Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 UNIV. ILL. L.F. 193, 217; Comment, *Legal Ethics and Professionalism*, 79 YALE L.J. 1179 (1970).

39. See section IV *infra*.

ties, and act in his best interests. He often seeks legal help in times of crises. Thus, his lawyer has the power to substantially affect his well-being through the exercise of the attorney's professional judgment. Since his interests are at stake, the client has a right to expect that he will be kept fully informed during the status of any proceedings as to how the lawyer is manipulating his future.

Many complaints against attorneys involve the failure to keep clients informed.⁴⁰ A continued failure to communicate with a client might be tantamount "to neglect of a legal matter entrusted to him" and perhaps constitute a basis for discipline under the Code,⁴¹ but the attorney is usually asked by the grievance committee to get together with his client and work things out.⁴² Because the attorney's failure to inform his client adequately is probably not actionable misconduct, except in instances such as the communication of a settlement offer, the attorney who is often inattentive and insensitive to the desires of his client will likely be beyond regulation under the existing system.

C. Competence

A substantial percentage of the complaints made against attorneys involve incompetence.⁴³ The misconduct orientation of the disciplinary machinery has tended to create a distinction between ethical incompetence and substantive law incompetence, with the latter considered to be outside the scope of discipline in all but the most extreme circumstances.⁴⁴

Ethical incompetence has been a problem. In approximately 60 percent of the complaints against Florida lawyers in 1974, the responding attorney stated that he did not know the alleged action violated the Code.⁴⁵

Regulation of professional competence has been exercised almost exclusively by bar examiners. There has been a growing awareness that this exercise of control should be expanded to ethical

40. See ABA, PRELIMINARY REPORT ON THE LEGAL NEEDS OF THE PUBLIC 95 (1974).

41. See FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 6-101(A)(3). See also FLA. INTEGRATION R. art. XI, R. 11.02.

42. Arkin, *supra* note 32 at 818.

43. One state court administrator stated that the "bulk of the cases that come to my attention . . . involve [substantive] incompetence." CLARK COMMITTEE, *supra* note 3, at 187.

44. Outcault and Peterson, *Lawyer Discipline and Professional Standards in California: Progress and Problems*, 24 HASTINGS L.J. 675, 692-96 (1973).

45. 49 FLA. B.J. at 9. (Sept. 1975). See also Section IV C. *infra*.

competence as well as substantive knowledge.⁴⁶ The bar examinations in many jurisdictions include questions testing knowledge of the Code,⁴⁷ and the American Bar Association now requires law schools to teach at least one course in professional ethics to maintain accreditation.⁴⁸

To be effective, professional regulations must ultimately affect performance, and cannot be limited to merely testing the attorney's ability to perform nor to responding only to severe breaches of conduct. The evolution of the machinery that presently monitors legal practitioners has not been well coordinated or sophisticated. One aspect, the formal disciplinary system, attempts to "punish" quasi-criminal acts; while another segment of the machinery, the board of bar examiners, seeks to exclude potential practitioners who, at least at that point, lack the *ability* to act competently. Since each aspect was created for a different purpose, each has developed divergent goals. In addition, the burden of demonstrating professional fitness is imposed in entirely different ways. In the bar examination the applicant has no vested right to practice and he is competing against his contemporaries for acceptance into the profession.⁴⁹ In the disciplinary process, the attorney has, in effect, a right to practice law which cannot be divested unless the bar meets a heavy burden of proof showing the lawyer to be unfit. Consequently, the ability of the profession to maintain a standard of excellence through self-regulation has been hampered.

D. *Pre-Programmed Inertia*

Certain built-in factors of the system have caused the regulatory machinery to fail to regulate more often and more efficiently than it does. By placing the burden of proof on the regulator rather than on the actor, making that burden very heavy, and effectively limiting the regulatory response to the more severe forms of miscon-

46. See generally Brickman, *Contributions of Clinical Programs to Training for Professionals*, 4 CONN. L. REV. 437 (1971-72); Smith, *Is Education for Professional Responsibility Possible?*, 40 U. COLO. L. REV. 509 (1968).

47. Florida included a question on the Code of Professional Responsibility for the first time in the October 1975 bar examination.

48. ABA, *APPROVAL OF LAW SCHOOLS*, Standard 302(a)(iii) (1973).

49. In Florida each examinee must score within 20 points of the average grade of the top 10 percent of those taking the test. RULES RELATING TO ADMISSION TO THE FLORIDA BAR, art. II § 10(d) (1976).

duct, the system has developed to insure that the disciplinary machinery will function only when absolutely necessary.

The Clark Committee Report touched on this phenomenon when it noted that grievance committees treated serious misconduct complaints as private disputes between the attorney and his client, and that lawyers and judges were often reluctant to report instances of professional misconduct.⁵⁰

The result of this inertia is evidenced by the disciplinary statistics in almost every jurisdiction. An insignificant percentage of practicing attorneys are disciplined in a given year.⁵¹ It is difficult, however, to estimate how many attorneys are violating the Code and escaping effective regulation simply because the violations are not detected by the regulatory machinery. The Clark Committee noted that few investigations are initiated without specific complaint.⁵² Complaints are formally made against very few members of the bar, and there are strong indications that a much larger number act unethically.⁵³ Most discipline involves criminal, as distinguished from solely ethical, violations. Thus, regulation of the general competency level and of minor misconduct is inadequate.

E. Steps Taken to Improve Enforcement

The Clark Committee found that disciplinary enforcement within the existing machinery was ineffective and made recommendations in 36 areas. The Committee noted that state disciplinary agencies were undermanned and underfinanced, that disbarments were ineffective because disbarred attorneys were able to practice in neighboring jurisdictions or were reinstated as a matter of course,

50. CLARK COMMITTEE, *supra* note 3, at 97-100, 167-71.

51. A 1974 survey of Boston lawyers noted that "[c]urrently professional discipline . . . is meted out to less than .1% of all practicing attorneys" and that "the overwhelming majority of disciplinary proceedings involve clear criminal violations." Burbank and Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK U.L. REV. 66, 70 (1974) [hereinafter cited as *Boston Survey*]. A 1973 survey of Colorado disciplinary actions indicated that in the years 1970 and 1972 disciplinary action was taken against less than 2 percent of the attorneys in the state. Note, *Standards of Discipline for Attorneys in Colorado and the Significance of the Code of Professional Responsibility*, 50 DENVER L.J. 207, 212 (1973). Between 1951 and 1962 there was an average of 1,450 complaints filed each year against members of the New York City Bar. Of these, an average of 17 attorneys were censured, suspended, or disbarred each year. J. CARLIN, *LAWYERS' ETHICS* 151 (1966) [hereinafter cited as *Carlin*].

52. CLARK COMMITTEE, *supra* note 3, at 60.

53. CARLIN, *supra* note 51, at 54, 160.

and that lawyers often stymied disciplinary proceedings rather than encouraged them.⁵⁴

The Clark Committee limited its review to an examination as to how efficiently the existing system was being administered, and did not attempt to examine alternative systems of professional regulation.⁵⁵ The "ideal" disciplinary structure⁵⁶ described by the Committee was one that would handle each complaint in a timely manner and without improper influence. The system would insure that once actionable misconduct has been established, the disbarred attorney could not, through inadequate recording of the disciplinary action or poor communication between jurisdictions, be permitted to practice law in neighboring counties or states.

In its recommendations the Committee advocated: changes in the structure and jurisdiction of the disciplinary machinery; increased financing; and better exchange of information at all levels. It concluded that the enforcement structure was "failing to rid the profession of a substantial number of malefactors" and it called for "more centralization, greater power and swifter action."⁵⁷

As an advocate for effective operation of the machinery to combat inefficiencies in the present system, the Clark Committee report was read with concern by the profession. Many jurisdictions responded by instituting substantial changes, and a trend seems to exist for the continued improvement of the operation of the disciplinary machinery.⁵⁸

It is submitted, however, that even if the recommendations of the Clark Committee are implemented, the increased efficiency of the disciplinary machinery will improve only one aspect of the comprehensive regulation needed to insure the existence of a competent, responsible profession. Implementation of the proposals of the Clark

54. CLARK COMMITTEE, *supra* note 3, at 1-2.

55. See note 4 *supra* and accompanying text.

56. The Clark Committee recommended a general disciplinary structure centralized at the state level. It outlined procedural steps to be followed from the receipt of the complaint by a professional staff to final proceedings in the state's highest court. CLARK COMMITTEE, *supra* note 3, at xiv-xvi. Florida has adopted a system substantially the same as that proposed by the Committee. See FLA. INTEGRATION R. art. XI.

57. CLARK COMMITTEE, *supra* note 3, at 3.

58. See generally Gardner, *Report on Disciplinary Enforcement in New Hampshire*, 15 N.H.B.J. 199 (1974); Outcault & Peterson, *Lawyer Discipline and Professional Standards in California: Progress and Problems*, 24 HASTINGS L.J. 675 (1973); Note, *Standards of Discipline for Attorneys in Colorado and the Significance of the Code of Professional Responsibility*, 50 DENVER L.J. 207 (1973).

Committee is essential to make the formal disciplinary process deal effectively with blatant misconduct. However, formal discipline, even if efficiently administered, will not adequately insure that all attorneys have a basic understanding of the Code or that they are competent in their areas of substantive practice. A larger perspective must be gained. A higher standard must be set.

III. CONSIDERATIONS NOT ADDRESSED BY THE EXISTING CONCEPT

A. *The Public Has a Vested Interest in the Legal Profession*

Laws, courts, and the legal profession exist only to defend and assert the rights of individuals and the public. The privileges given members of the profession⁵⁹ are not for the benefit of the practitioner, but are only intended to better enable him to represent his client.

Proposals have been made to include lay people in disciplinary bodies, make regulation of lawyers a legislative function, and make public all disciplinary proceedings. These proposals have asserted a public "right" to control, or at least to be informed of, the discipline of lawyers.⁶⁰

The proposals have been countered by assertions that "lawyering" is a profession, and by definition a profession regulates itself; the federal or state constitutional form of government makes the judicial function separate and free from legislative control; and that it is eminently desirable that control of the profession rest with those that are familiar with the theory and operation of the law.⁶¹

Proponents of the existing system argue that lawyers supervising other lawyers is the best way to preserve the quality of the profession. The thrust of their arguments stresses the protection of

59. The client is free to disclose damaging information to his attorney, and the confidentiality of the information is protected by the attorney-client privilege. An individual is supposedly protected from incompetent legal advice by statutes prohibiting the unauthorized practice of law. See *International Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 185 (M.D. Fla. 1973); FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY, E.C. 3-1.

60. See, e.g., CLARK COMMITTEE, *supra* note 3, at 138-46; *The Bar and Watergate: Conversation with Chesterfield Smith*, 1 HASTINGS CONST. L.Q. 31 (1974); See also Leach, *The New Look in Disciplinary Enforcement in England*, 61 A.B.A.J. 212 (1975); Comment, *Legal Ethics and Professionalism*, 79 YALE L.J. 1179 (1970).

61. See, e.g., Arkin, *supra* note 32, at 825; Becker, *In Defense of Lawyers and the Legal Profession*, 47 N.Y.S.B.J. 93 (1974); Carrington, *The Ethical Crises of American Lawyers*, 36 U. PITT. L. REV. 35 (1974); Gunter, *Regulation of the Legal Profession—Judicial or Legislative?* 10 GA. S.B.J. 589 (1974).

the rights of the public:⁶² little emphasis is given to protecting the practitioner. However, in practice the disciplinary machinery places great value on preserving the individual rights of the practitioner, without balancing the possible harm to the public against possible harm to the accused attorney before deciding whether discipline is warranted. The arguments supporting the status quo thus illustrate the present disparity between theory and practice in self-regulation of the bar.

Rights of the public are given such little recognition that once a complaint has been communicated to the disciplinary body, the decisions as to whether to impose discipline, or readmit a disbarred attorney are considered to be solely within the realm of the legal profession under the supervision of the judiciary. Often neither the general public nor the complainant are party to the proceedings. In many jurisdictions they are not even informed of the outcome if disciplinary action is not taken.⁶³

B. *The Code of Professional Responsibility Is Not a Factor in Day to Day Decision-Making*

The Code and the machinery to enforce it can only affect the state of professional responsibility if practitioners consider the requirements of the Code in making decisions. If the Code is merely the authority to remove a practitioner or limit his practice *after* misconduct, it does not adequately "regulate" the acts of those continuing to practice in that it fails to influence their *future* conduct.

A survey of Boston lawyers⁶⁴ was conducted in 1974 to determine the attitudes of practitioners toward the Code and to test their knowledge of its tenets. The survey was technically sophisticated in that it validated responses of each individual by comparing his answers to related questions. Each respondent was asked his opinion of the Code; his specific knowledge was tested; and finally he was asked to make decisions in factual situations.

In evaluating the responses, the authors of the survey commented, "the suspicion which grows throughout the survey is that

62. It is argued that the public is best served by an independent profession of lawyers since only lawyers have sufficient knowledge of the intricacies of the law and the standards of practice to be able to judge adequately the work of attorneys.

63. This, however, is not the case in Florida, *See* note 19 *supra*.

64. Boston Survey, *supra* note 51.

many, maybe most, lawyers do not in fact use the Canons of Ethics as a moral guide and research tool."⁶⁵ Approximately 90 percent of the attorneys responding indicated that they *should* abide by the Code regardless of their own feelings and approximately 70.5 percent stated that they were generally familiar with it. Yet 56.7 percent indicated that they *actually* relied on their own standards rather than the Code.⁶⁶ Furthermore, the study concluded that many lawyers who claim to know the Code, do not actually have a working facility with it.⁶⁷

C. *Effective Regulation Must Induce Affirmative Action*

Implicit in the design of the existing disciplinary system is the assumption that the ultimate threat of disbarment will motivate lawyers to follow the disciplinary rules. If this threat alone does not in fact induce all lawyers to follow the Code, programs in addition to a formal disciplinary system designed to "punish" misconduct must be developed. The thrust of past officially sanctioned, regulatory reform has been to improve the efficiency of the present machinery in detecting violations of the Code and imposing the proper punishment in a timely manner.⁶⁸ Very little emphasis has been given to developing alternative methods of motivating lawyers.

It has long been recognized by authorities in motivational research that positive inducement, as opposed to threat of punishment, is the most effective approach to affecting future performance. Techniques advocated in fields of business management, military leadership, education, and child psychology stress tangible rewards, promotion, recognition of desired behavior, peer group influence, and periodic re-education as means of influencing the desired changes in future performance.⁶⁹ Punishment is considered a last resort to be used only to reach a small percentage of the group that fails to respond to positive inducement. Punishment is not relied upon as the primary tool in inducing desired behavior.⁷⁰

65. *Id.* at 97.

66. *Id.* at 108-117.

67. *Id.* at 105. For example, although 70.5 percent claimed to be generally familiar with specific canons, only 17.2 percent chose the correct answer to a question about lawyer-client privilege when the lawyer knows that a crime will be committed. *Id.* at 96-97.

68. *E.g.*, CLARK COMMITTEE, *supra* note 3.

69. See generally S. GELLERMAN, *MANAGEMENT BY MOTIVATION* (1968); H. GILES, *EDUCATION AND HUMAN MOTIVATION* (1957).

70. *Id.*

It is apparent that the existing system merely imposes the passive responsibility on attorneys to refrain from misconduct. It has not been successful in motivating positive action.⁷¹ As a result the general level of ethical awareness and competent performance of practitioners is below the minimum standards that should exist in a profession that is central to our political-economic system.⁷²

The profession must somehow induce attorneys to take an active role in raising their own levels of ethical and substantive competence. There must be motivation for attorneys to seek out the standards that apply to them, and then to comply with those standards.⁷³

IV. A COMPREHENSIVE SYSTEM OF PROFESSIONAL REGULATION IS NEEDED

If self-regulation of the profession is to remain a viable concept, explicit goals must be identified and all resources available to the profession must be effectively used to realize those goals. Elaborate bureaucratic machinery, such as the disciplinary structure of the bar and the Board of Bar Examiners, must evolve into efficient institutions able to cope with problems beyond their originally contemplated scope. They must be able to further the general goals that are identified as necessary to properly regulate the profession.⁷⁴ It is submitted that new directions must be taken to encourage the professional development of attorneys and to test their competence and regulate the quality of their work. In order to accomplish this end it is proposed that:

- a. administrative machinery be created to monitor the entire spectrum of professional regulation;⁷⁵
- b. the practicing attorney be obligated to demonstrate his

71. In Florida the education requirements imposed on an attorney to maintain a special designation is a step toward motivating an attorney in a constructive way. See FLA. INTEGRATION R. art. XXI. See also section IV B *infra*.

72. Attorneys are not aware of fundamental requirements of the Code. See note 67 *supra* and accompanying text. A large number of attorneys do not accept the distinctively professional standards of the Code. See CARLIN, *supra* note 51, at 165.

73. See section IV *infra*. Maintaining competence in order to minimize complaints in the profession, preparing for recertification tests, and attaining a high quality rating should provide inducements for an attorney to take a more active interest in professional responsibility.

74. See section IV E *infra*.

75. See section IV A *infra*.

ethical and substantive competence through periodic recertification;⁷⁶

c. the attorney be obligated to continue professional education to strengthen areas in which he personally has demonstrated weakness;⁷⁷

d. responsibilities be assigned to law schools, continuing legal education (CLE) committees, the Board of Bar Examiners, grievance committees, public information representatives of the bar, and recertification boards to contribute recommendations, statistical data, instructional material, and examination material to a centralized regulatory body;⁷⁸

e. an aggressive public information program be implemented to solicit public evaluation of the bar and individual attorneys;⁷⁹

f. a test program be undertaken to assign quality ratings to individual attorneys based on recertification scores, experience, and performance evaluation;⁸⁰ and

g. the efficiency of the present disciplinary process be continually re-evaluated and upgraded.⁸¹

A. Administration

An administrative body should be created to receive all complaints, compliments, and recommendations pertaining to either the profession as a whole or to individual attorneys.⁸² Such an administrative body could be established under the immediate supervision of the Board of Governors. Its composition would be predominantly administrative and clerical personnel, with few attorneys

76. See section IV B *infra*.

77. See section IV C *infra*.

78. See section IV D *infra*.

79. See section IV E *infra*.

80. See section IV F *infra*. A formal system of rating attorneys might have a chilling effect on the freedom of thought, expression, and style of attorneys. For this reason, it is proposed that a closely monitored test be conducted to determine the extent of the advantages of such a system in light of the possible dangers.

81. See section IV G *infra*.

82. The Clark Committee discussed the importance of maintaining comprehensive records of complaints and disciplinary proceedings. The problems stemming from the failure to maintain permanent records was one of the most persistent themes of hearings conducted during the preparation of the Committee report. See CLARK COMMITTEE, *supra* note 3, at 87-94.

involved. The goals of the organization would be to: (1) maximize the use of available data by providing information to all interested groups within the bar; (2) relieve volunteer attorneys of all administrative duties in order to free their available time for essential committee work; and (3) minimize administrative expenses by centralizing resources.

An initial administrative review could be made to acknowledge receipt of a comment, and then statistically record, categorize, and forward it to the appropriate body for action. A record would be made of any comment pertaining to an individual attorney and placed in his file. If the administrative review indicated no violation of the Code, the comment would merely be recorded with no further analysis of the file. A copy of each comment recorded in a file would be forwarded to the individual attorney. If he desired, the attorney could add information pertaining to a comment, or petition to have it removed. A large number of adverse comments about an individual attorney within a short period would trigger an administrative audit of his file.

B. *Recertification*

Some program of regulation of the quality of attorneys *after* they have been admitted to practice has been advocated by many writers,⁸³ and is essential to any meaningful system of regulating the profession. Recent programs permitting specialization in the practice of law have included procedures for the attorney to demonstrate his experience and education in that specialty.⁸⁴ It would be a logical development to extend the obligation to all attorneys to demonstrate their understanding of ethical and substantive principles in general areas of the law.

The principal means of recertification would be the administration of tests in ethics, general legal practice, and specialty areas. Test preparation materials would be distributed to individuals outlining the scope of each test and any areas of special emphasis. Commercial firms would be encouraged to develop test review mate-

83. See, e.g., Allen, *New Horizons in Professional Responsibility*, 52 NEB. L. REV. 24 (1972); Brickman, *Contributions of Clinical Programs to Training for Professionalism*, 4 CONN. L. REV. 437 (1971-72); Marks and Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 UNIV. ILL. L.F. 193; Comment, *Legal Ethics and Professionalism*, 79 YALE L.J. 1179 (1970).

84. See FLA. INTEGRATION R. art. XXI, FLORIDA DESIGNATION PLAN.

rials, much like the existing bar review materials, designed to assist the attorney in preparing for the examination with a minimum expenditure of time. The tests would be designed so as to test knowledge of general principles and ability to recognize problem areas, without requiring the attorney to demonstrate the detailed knowledge of the law that is expected in bar examinations. The tests would also check his awareness of source material and practice aids.

Areas of special emphasis would be selected based on input from client complaints, grievance committee recommendations, or trends of poor performance in previous bar examinations and recertification tests. If, for example, there are a large number of complaints about individual attorneys who have failed to keep their clients informed, the grievance committee would identify this as a problem area. The continuing legal education committee could conduct research into effective client communication techniques used in the legal, medical, and other professions, and then establish an educational course in "client communication," with a recommended reading list of publications in the area.

The attorney preparing for his recertification test would review the test preparation materials and note that "client communications" was an area of special emphasis. He could review the suggested readings, order a commercial test review packet, or enroll in the Continuing Legal Education course. The full course in such a subject might consist of a short correspondence course, a seminar, or a formal series of lectures, depending on the nature of the subject. The test and instructional materials would include only that information necessary for an attorney to perform competently and would be designed to demand a minimum expenditure of time.⁸⁵

If an attorney failed to pass a test, he would be given an additional period of time to prepare for a retest. If he failed the retest, he would be suspended from the practice of law. He then could not practice until he successfully completed a retest. It is critical to the entire scheme of professional regulation that both the bar and the general public recognize that the right to practice law is not a vested right, but rather it is a license that should be administratively suspended if the attorney fails to meet reasonable, minimum standards of performance.

85. The tests would be so structured that the attorney who conscientiously maintained his competence on a day to day basis probably would not have to prepare specifically for the tests.

Extensive use of automated data processing systems, the retention of professional education and testing firms, and the pooling of assets of the American Bar Association with those of the state bar associations would tend to reduce costs of administration while continually upgrading the quality of the tests and instructional material. "Cost-effectiveness" could be stressed to continually compare the value of knowledge gained by the attorney with the expenditure of his time and money. The goal would be to have the average recertified attorney demonstrate the minimum level of knowledge necessary to act competently with the least expenditure of his time and money.

The intervals at which an individual attorney would need to be recertified would depend on a number of factors. If the score on his last recertification test was high, this might lengthen the time before his next recertification test. Likewise, if he has received a number of favorable performance evaluations,⁸⁶ this could also lengthen the time between tests. If he received a low test score, few favorable evaluations, and many complaints, the attorney would be required to take the recertification test within a shorter period of time.

C. *Continuing Education*

Mandatory courses of study could be used as an alternative to formal discipline. Continuing legal education programs have been the lifeblood of efforts to develop a thoughtful and expert core of the practicing bar. These programs are the culmination of pooled experience and expertise and the resulting product has been made available to practicing attorneys at a minimum cost.

These courses have tended to make the concerned, competent members of the bar more knowledgeable in their profession, but have failed to have significant impact on a large number of attorneys who may either be unaware of the programs, do not have enough time to take advantage of them, or who simply do not care.⁸⁷

The value of continuing education has been recognized in the development of specialization programs.⁸⁸ However, educational requirements to retain specialty designations generally have not

86. See section IV F *infra*.

87. See generally MORELAND, PROFESSIONAL EDUCATION OF THE BAR: GROWTH AND PERSPECTIVE (1972).

88. See FLA. INTEGRATION R., BY-LAWS, art. XVII § 4(b),(c) for Florida's Designation Plan.

been geared to the ability of individual attorneys.⁸⁹ The attorney who has limited his practice over many years to developing an expertise in one area of the law is often required to devote the same number of hours to continuing education as is the new attorney who barely meets the minimum experience requisite for designation. In addition, the alternative methods of legal education available to the specialist may not cover an area of the law in which an individual attorney is weak.

If the intent of requiring continuing education is to set higher standards for those who hold themselves out as specialists in an area of law, that standard should be an objective, ascertainable one. Once that standard is met by the individual, the requirements for continuing education should not remain constant. Attorneys that develop extensive experience and expertise should not be required to complete *any* education to retain their specialties as long as there are no significant complaints against those attorneys.

As continuing education is a valid tool in developing competence in specialty areas, it could also be used as an alternative to discipline by helping an attorney strengthen an area of demonstrated weakness in ethics or in general principles of law. Continuing professional education should be used in regulating the ethical and substantive performance of the bar. In addition to preparing attorneys for periodic recertification testing, the completion of professional education courses could be utilized as a remedial measure in those areas in which an individual attorney has performed poorly.

For example, many attorneys brought before grievance committees plead that they do not know that the alleged act violates the Code.⁹⁰ In such cases, grievance committees have been reluctant to impose harsh discipline in the absence of a wilful violation. The availability of mandatory education as an alternative to punishment would allow the grievance committee to react to an attorney's failure to meet his responsibilities in the most appropriate and constructive manner.

Thus, when the facts demonstrate that the accused attorney has failed to represent his client competently, the grievance com-

89. All attorneys having the same specialty designation are required to complete a specified number of hours of study, irrespective of their experience in practice or relative level of competence, provided however, that the Florida Bar may waive all or any part of such requirement for good cause shown. FLA. INTEGRATION R., BY-LAWS, art. XVII § 9(b).

90. 49 FLA. B.J. (Sept. 1975). See also section II C *supra*.

mittee or other disciplinary body could direct that he successfully complete a specific course of instruction, and then be required to take a recertification test in that area. If the attorney failed to successfully complete these requirements, he would be administratively suspended from practice until he complied with the educational and testing requirement.

D. *Coordinated Effort*

At present there is no formal coordination of the activities of the various entities⁹¹ within the professional community which affect the state of professional competence and ethics. There is an awareness among commentators, editors, members of bar examination boards, and members of continuing education committees that criticisms of the competency and ethical standards of the bar are serious indictments against the profession.⁹² They are aware that adequate discipline is important to all members of the profession and that achievement of this goal should not be relegated completely to disciplinary bodies. Too often, however, their comments and suggestions are aspirational only, and their efforts to motivate—usually in the form of journal articles and continuing education materials—successfully reach only those who are already motivated.

A formal program involving all such bodies in professional regulation could make the best use of all assets available to the legal profession. For example, if a large percentage of attorneys taking a recertification test indicate it is not improper to threaten criminal prosecution when negotiating the settlement of a civil suit, there is an obvious need to inform the profession of the prohibition against such threats.⁹³ Law schools, bar journals, and education courses could discuss this disciplinary rule and the reasoning behind it. Bar examiners, recertification boards, and grievance committees could subsequently test the effectiveness of the educational effort.

Formal coordination rather than reliance on each entity's abil-

91. *E.g.*, law schools, Continuing Legal Education committees, the Board of Bar Examiners, grievance committees, public information representatives of the bar, and recertification boards.

92. *See generally* Panel Discussion following Arkin, *supra* note 32.

93. "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 7-105.

ity to react separately should tend to identify problem areas earlier and provide quicker and more complete responses. Coordination could be effected through the same administrative body that collects complaints and other information.⁹⁴

E. Public Information

There is a pervasive criticism⁹⁵ of the legal profession that it "hides its own dirty linen." The present structure of the disciplinary procedure preserves the "in-house" character of investigation and disciplinary measures. The secretive nature of the procedures continues until the specific disciplinary problem is made a matter of public record, which normally occurs upon judicial review of a disciplinary action. This pattern has been both attacked and defended by leaders in the profession.⁹⁶ The Clark Committee recommended public disclosure early in the disciplinary process, as well as publication of the achievements of disciplinary agencies.⁹⁷

The resistance to more disclosure is based on a fear that such disclosure would be unfair to lawyers who were falsely charged and that it might undermine public confidence in the profession. However, such public confidence may already be non-existent,⁹⁸ and the benefits to the profession in making the proceedings public at an early stage may outweigh possible burdens to a wrongly charged lawyer.⁹⁹

There is evidence that the lack of communication between the public and the profession distorts the picture that the public has of the lawyer's role in the adversary process. As a result the public does not understand, nor can it effectively determine those situations that constitute a breach of professional ethics.¹⁰⁰ This failure of com-

94. See section IV A *supra*. The use of automated data processing techniques would facilitate communication and coordination. See section V *infra*.

95. See Boston Survey, *supra* note 51, at 71.

96. See generally Panel Discussion following Arkin, *supra* note 32.

97. CLARK COMMITTEE, *supra* note 3, at 176-77. In a straw vote conducted at a meeting of Florida grievance committee chairmen, the overwhelming majority of chairmen favored waiver of confidentiality of disciplinary information in various situations. 47 FLA. B.J. 7 (1975). See FLA. INTEGRATION R. art. XI, R. 11.12.

98. See note 2 *supra*.

99. For a more complete discussion of when disciplinary proceedings should be made public see Panel Discussion following Arkin, *supra* note 32.

100. A large percentage of complaints received by grievance committees do not state a breach of ethics on their face. See *The Bar and Watergate: Conversation with Chesterfield Smith*, 1 HASTINGS CONST. L.Q. 31, 35 (1974).

munication also causes lawyers to have a distorted view of the image they project.¹⁰¹

American society is becoming more complex each day and even its least sophisticated members are growing more aware of their legal rights and liabilities. Citizens are questioning the effectiveness of their institutions in all aspects of society. Failures in the legal system have been exposed, and lawyers in general have been branded as "[t]yphoid Marys [of paranoia] . . . encouraging their clients to think with selfish defensiveness, to imagine and prepare for the worst from everyone else."¹⁰²

It would be a gross misjudgment of public awareness for the profession to continue to project an image of an omnicompetent bar that is collectively above reproach when it is obvious to the public that serious problems exist. The best way to build public confidence is to set high standards in the profession, assist lawyers in meeting those standards, deal quickly and decisively with the few that fail to measure up, and tell the public what has been accomplished.¹⁰³

Once the commitment is made to be candid with the public, a renaissance in both public and professional awareness might develop. A campaign by the bar to help maintain high standards in the legal profession could include: solicitation of recommendations as to how to improve the legal system; solicitation of reports of good work performed by individual attorneys; and requests for complaints about incompetent and unethical attorneys. Such a campaign could be presented in a dignified manner so as to have none of the taint of "Madison Avenue" advertising that the Code seeks to avoid in its prohibition against individual attorney advertising.¹⁰⁴ A public information program could also be a vehicle for increasing the use of attorney referral programs and for educating the public as to the need for legal protection in consumer, real estate, and other transactions.

It is reasonable to assume that an active public information program would result in a greater demand for legal services as well as develop a source of feedback concerning attorney performance.

101. See Thomason, *What the Public Thinks of Lawyers*, 46 N.Y.S.B.J. 151 (1974).

102. Peters, *The Screwing of the Average Man: How Your Lawyer Does It*, THE WASHINGTON MONTHLY, Feb. 1974 at 37.

103. See Panel Discussion following Arkin, *supra* note 32.

104. CODE OF PROFESSIONAL RESPONSIBILITY, E.C. 209.

F. Quality Ratings

Many sectors of society use performance evaluation as a means of regulating activity and as a tool in making decisions to promote or eliminate members of an organization. Performance evaluation in the business community is becoming more commonplace, especially within certain industries.¹⁰⁵ Since objective performance indicators are available to measure such business phenomena as profit, production, and sales, there has been less reliance on subjective evaluation, at least in formal performance ratings.¹⁰⁶ The military also relies on performance evaluation, which often results in better individual efforts.¹⁰⁷

Performance evaluation within the legal profession, however, is limited. Large law firms closely supervise the work of junior partners and associates. Individuals are given greater responsibility or "promoted" to partnership if they are judged to be good performers. Large law firms are considered to produce better legal work¹⁰⁸ and firm attorneys tend to more readily accept and comply with the requirements of the Code than do members of small firms or sole practitioners.¹⁰⁹ Therefore, there appears to be a definite correlation between performance evaluation and desirable attorney conduct, at least within the framework of a large law firm.¹¹⁰

The *Martindale-Hubbell Law Directory* rates the "legal ability" of attorneys and undertakes to generally recommend certain attorneys as having "very high" reliance, diligence, and adherence to ethical standards. Ratings are based on years of practice and subjective evaluations by judges and other attorneys. Access to these ratings is limited to members of the legal profession. There is no evidence as to how these ratings affect performance of attorneys.

New clients may reach the practicing attorney through an informal system of referrals. These referrals are based on a combination of *quid pro quo* trade-offs of new clients and reliance on reputation

105. See T. WHISLER, *PERFORMANCE APPRAISAL: RESEARCH AND PRACTICE* (1962); F. LOPEX, *EVALUATING EMPLOYEE PERFORMANCE* (1968).

106. See AMERICAN MANAGEMENT ASSOC., *PERFORMANCE RATING AND JOB ANALYSIS FOR SALES PERSONNEL* (1950).

107. See generally M. JANOWITZ, *THE PROFESSIONAL SOLDIER* (1960); E. TUCKER, *THE LARGE LAW FIRM* (1965).

108. Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 UNIV. ILL. L.F. 193 (1974).

109. See CARLIN, *supra* note 51, at 119-32. See also Arkin, *supra* note 32 at 816.

110. E. TUCKER, *THE LARGE LAW FIRM* (1965).

within the profession. Individuals seeking legal services are generally concerned with finding an attorney who is known to be reliable. Since there is no way for an individual to evaluate an attorney, laymen rely on employers, community leaders, or friends to identify a reliable attorney.¹¹¹

On the other hand, the peculiar nature of the legal profession is intrinsically adversary and thrives on innovative thinking. This independent nature of lawyers in general is indicated by the large number of attorneys that practice alone.¹¹² Therefore, conclusions as to the effects of a formal scheme of rating the quality of attorneys would be completely speculative. However, it appears that a comprehensive system of professional regulation might use a rating scheme to some advantage.

Along with the adoption of a comprehensive regulatory scheme to complement the existing disciplinary structure, a test program should be initiated to develop standards for rating attorneys. Maximum weight should be given to objective factors such as recertification test scores and years of experience. Less weight should be given to subjective factors such as client comments, evaluations by judges and attorneys, and formal complaints. Primary reliance on relevant objective factors should increase the attorney's ability to predict his rating if he works for specific goals such as higher test scores, etc. A system that relied heavily on subjective ratings might cause attorneys to be overly cautious in their dealings with clients, judges, and other attorneys.¹¹³ However, the scheme should prevent attorneys that generate many unsatisfied clients from obtaining a favorable rating. Comparison of raw scores against averages among attorneys with similar practices should validate the data, and result in a small number receiving a marginal rating, the majority receiving an average rating, and a small number receiving an above average rating. The ratings should be made available to the public and their existence publicized through the public information program.

Conceivably the use of ratings will cause new clients to be better informed consumers in the selection of attorneys, motivate law-

111. Thomason, *What the Public Thinks of Lawyers*, 46 N.Y.S.B.J. 151, 154-55 (1974).

112. Approximately 35 percent of the members of the Florida Bar are sole practitioners. 48 FLA. B.J. 478 (1974). Sole practitioners average less income per attorney than do attorneys that practice in a partnership. Roehl, *Partnerships* in THE LAWYER'S HANDBOOK, D4-1, D4-5 (1975).

113. See Section IV E *supra*.

yers to strive to obtain the highest rating, and identify the marginal practitioners that barely meet the minimum standards of practice.

G. *Continued Upgrading of Discipline*

The Clark Committee identified serious shortcomings in discipline, and provided an impetus for the profession to make significant, far reaching changes. A scheme to regulate and evaluate the ethics and competence of the bar should merely complement, not supplant, efforts to discipline attorneys guilty of misconduct.

The creation of an administrative body to screen all inquiries and complaints from the public would relieve grievance committees of a burden which is essentially unrelated to their *disciplinary* function. If the grievance committee receives complaints which simply state a violation of the Code on their face, the subsequent fact finding and judgment can be swift and thorough.

Bar entrance and recertification testing in the tenets of the Code will make the plea of ignorance unavailable to the accused attorney. The availability of mandatory education and retesting as an alternative to formal punishment will allow the exercise of discipline to be more flexible.

V. ANALYSIS

No proposal for drastic change in the legal profession can be accepted with blind enthusiasm in the name of reform. The cumulative effect of years of thoughtful judgement mixed with as many years of human failings cannot be ignored.

The possible advantages and disadvantages of each change in the existing system must be identified and evaluated before the change is implemented. The interests of the members of the profession, the judicial system, and the public must be kept in proper perspective. Finally, new programs must be implemented gradually to minimize disruptive effects. The profession should approach change with an open mind, and make use of modern management techniques in designing an administrative mechanism for professional regulation.

Automatic Data Processing (ADP)¹¹⁴ could be used extensively while still preserving the privacy of attorneys and members of the

114. See generally ARNOLD, INTRODUCTION TO DATA PROCESSING (1966).

public. Data on types of complaints and testing performance could be continuously analyzed to detect trends and inform interested segments of the bar. Routine clerical functions such as acknowledging receipt of complaints and posting individual attorney records could be expanded at reduced transactional cost.

A. *Expense*

Any change from the present system will require substantial initial expenses. This will be especially true if the existing system must be studied in depth and if a comprehensive organization is developed to replace it.

The state bar association, funded by membership dues, investments, and Continuing Legal Education revenues, is normally self-supporting. Expenses for administration, education, and discipline are met entirely from bar revenues.¹¹⁵ However, unless funds from government sources or national organizations such as the American Bar Association are made available, the initial costs of a new regulatory system would be borne directly by the bar membership at large. Any estimate as to those initial costs would be purely speculative until a thorough analysis is made.

The fiscal impact can be minimized in several ways, however. The systems analysis which is conducted to develop the ultimate regulatory scheme can also determine the optimum time-phasing in implementation. Thus actions could be taken to reduce costs to an absolute minimum. Transactional costs, such as recertification tests and education courses, can be identified through ADP and charged directly to the user.

However, at some point the bar must be willing to accept the conclusion that the cost to the profession of an inadequate regulatory system in terms of loss of credibility and integrity is too great to accept. At that point the decision will have to be made whether to raise dues and/or borrow funds in order to properly regulate the legal profession. The alternative might be the loss of professional identity and control. If abuses are allowed to accumulate it is very possible that the "profession" of practicing law will become the "business" of lawyering, subject to the same rules imposed on other businesses that cannot regulate themselves.¹¹⁶

115. See *Florida Bar Statement of Cash Receipts and Disbursements*, 49 FLA. B.J. 18 (Sept. 1975).

116. The U.S. Supreme Court recently held that the practice of law, although a "learned

B. *Bar Resistance*

Resistance to comprehensive regulation by a large segment of the bar membership is inevitable. Many lawyers are apathetic to the need for discipline. The cost of implementation and the loss of individual autonomy will generate active opposition to any substantial change, and the intellectual distaste for super-bureaucracies will be hard to overcome.

It will be necessary to fully inform the membership of the shortcomings of the present system, and then to involve as many members as possible in structuring a new regulatory framework. With such participation resistance to change should be minimized.

C. *Time Demands on the Practitioner*

The practitioner invests a substantial amount of time in law school and in preparation for the bar examination. In operating his practice, a lawyer's time is his most valuable asset. The more successful lawyers consciously control the expenditure of time, and are sensitive to unproductive demands on it.¹¹⁷ The "marginal practitioner"¹¹⁸— the lawyer who performs a large volume of routine legal functions—often does not have enough time to do competent work and he is apparently more likely to "cut corners" in searching for income.

When new time demands required by preparing for periodic testing and completing continuing education courses are placed on attorneys, the effect on the bar, hopefully, will be to upgrade legal services. However, the new demands may compound the problems of the marginal practitioner. A comprehensive regulatory system might not immediately "solve" many of his problems, but will increase his economic pressures.

At least one writer concludes that the economic demise of the marginal practitioner is desirable. Stanley Arkin argues that improvements to the legal system such as free legal services for indigents and prepaid insurance programs will preempt the simple legal services performed by the marginal practitioner and force him out of his present business.¹¹⁹ The public would then receive necessary

profession," was "commerce" and subject to the provisions of the Sherman Act. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), noted in U. MIAMI L. REV. 464 (1976).

117. Regan, *Timekeeping Systems*, in THE LAWYER'S HANDBOOK, CI-1 (1975).

118. See generally CARLIN, *supra* note 51, at 176-82.

119. Arkin, *supra* note 32, at 824.

legal services and the profession would be rid of an undesirable element.

The well established practitioner will be able to take the greatest advantage of educational programs and quality rating schemes to increase his prestige and attract a greater share of the most profitable types of legal business. The large bulk of attorneys who do not participate extensively in self-improvement programs will assume a substantial time and cost burden without any immediate competitive advantage. The inequity in the relative impact on different segments of the bar may be the unavoidable price of an effective and necessary "total" regulatory system.

D. *Danger of Over-Control*

Much of the appeal in the practice of law is the opportunity to acquire prestige and a comfortable income while still maintaining substantial independence. A large percentage of attorneys remain sole practitioners in spite of the fact that this type of practice tends to produce less income than a partnership.¹²⁰

The present system of discipline interferes very little with this independence. Decisions of the attorney are successfully attacked only in cases of extreme incompetence or negligence. His professional judgment and tactical decisions are considered to approach an art form, and are consequently difficult to evaluate objectively. Malpractice litigation has not exploded in the legal profession as it has in the medical profession.¹²¹

As a consequence, the attorney may have experienced a satisfaction that his competence and integrity are beyond question. The crux of the present problem, of course, is that the ethics and competence of some attorneys are indeed questionable.

The growth of the federal government, the proliferation of administrative agencies at all levels, and the economic dominance of big business and labor has created a cultural aversion to bureaucracies of any type. In addition, the very nature of advocacy and the adversary process makes independent thought and freedom from conflicting interests essential to the legal system.

These factors mandate that all necessary precautions be taken

120. See CARLIN, *supra* note 51, at 119-32.

121. See Haughey, *Lawyers' Malpractice: A Comparative Appraisal*, 48 NOTRE DAME LAW. 888 (1973).

to structure a regulatory system that preserves the intellectual independence of the attorney, while requiring him to maintain his competence and act responsibly. There should be continuous review by the bar and the judiciary to insure that the integrity of the system is not jeopardized by over-zealous policing.

VI. CONCLUSION

The scope of self-regulation must be broadened to make use of all available management techniques in developing a truly responsible profession. Punishment for misconduct, while necessary, can no longer be relied upon as the only way to regulate lawyers. In the final analysis the legal profession must pay the price of effective regulation if it is to continue to be the only body given the authority to regulate lawyers.