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The Pervasive Disciplinary Problems of the Bar-Pennsylvania's New Disciplinary System

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The Pervasive Disciplinary Problems of The Bar — Pennsylvania's New Disciplinary System†

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On August 11, 1970, the Clark Committee of the American Bar Association submitted its report to the House of Delegates of that Association, asserting that "After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession."[1] The report urged the various states "to reevaluate and revise their disciplinary structures and to implement the recommendations of this Committee."[2]

This urging was unnecessary in Pennsylvania since the Pennsylvania Bar Association had already triggered action which led to the appointment of a Special Committee on Disciplinary Procedures to survey the situation in our state. The disciplinary structure in Pennsylvania at that time was typically archaic and ineffective.

On August 31, 1970, our Special Committee filed its report concluding that the "present procedures contain a number of serious

† This Article was originally delivered by Mr. Nurick as an address to the Judicial Conference of the Third Circuit on October 1, 1974. Several footnotes have been added by the editors.

* Chairman, The Disciplinary Board of the Supreme Court of Pennsylvania.

1. ABA Special Committee on Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement*, 95 A.B.A. REP. 783, 797 (1970).

2. *Id.* at 804.

infirmities."[3] There was an overlapping of jurisdiction between the state board, the local courts and the agencies or tribunals established by the local courts or local bar associations. This created confusion in the eyes of the profession and the public alike and led to conflicting methods of procedure and inconsistency in sanctions imposed for comparable transgressions. There was no professional staff responsible for the administration of the disciplinary program, nor financing available to establish and maintain such a staff. The system which relied almost exclusively upon the spare time of volunteers fostered an inordinate delay in obtaining effective action. It imposed a heavy burden of investigation on an aggrieved complainant and provided little, if any, assistance to one so aggrieved. Local agencies and local courts were frequently reluctant to impose disciplinary sanctions upon local lawyers and too frequently friendship and politics overrode the public interest.

The report further found that there were no adequate procedures for prompt disciplinary action against attorneys convicted of serious crimes which reflected upon their fitness to practice law, nor were there appropriate procedures for removing attorneys incapacitated by mental illness, senility, addiction to drugs or intoxicants, or other disabilities.

The Pennsylvania Committee urged prompt action "since both the bar and the public are disenchanted with the existing apparatus and are yearning for early remedial steps."[4]

From the findings and conclusions of the Clark Committee and the Pennsylvania Committee, it was obvious that the prevailing disciplinary systems excited universal disapprobation.

The Pennsylvania Committee submitted suggested rules for adoption by the Supreme Court of Pennsylvania which incorporated most of the fundamental recommendations of the Clark Committee. These proposed rules were widely circulated and after intensive study and spirited debate, they were approved in principle by the House of Delegates of the Pennsylvania Bar Association. They also received the endorsement of the Pennsylvania Conference of State Trial Judges.

The committee invited further suggestions and criticisms and received a barrel full of them. Many had merit. All were reviewed, a number were adopted by the committee, and a final report, together with recommended rules, was submitted to our supreme court. The court made several additional revisions and on March 21, 1972, adopted the Rules of Disciplinary Enforcement[5]

3. Special Committee on Disciplinary Procedures of the Board of Governance of the Pennsylvania Bar, Report on Disciplinary Procedures, Aug. 31, 1970, at 3.

4. *Id.* at 4.

5. PA. R. DISCIPLINARY ENFORCEMENT [hereinafter cited as ENFORCEMENT R.].

which became effective on September 1, 1972, later extended to November 1, 1972.

The rules established a state-wide disciplinary tribunal known as "The Disciplinary Board of the Supreme Court of Pennsylvania" with *exclusive* state-wide jurisdiction over discipline.[6] It consists of nine attorneys appointed by the supreme court.[7] The state is divided into four disciplinary districts which follow the same geographical lines as the districts in the federal court system, except that Philadelphia is carved out of the Eastern District and made a district unto itself.[8] This seemed desirable since almost forty percent of the lawyers in Pennsylvania are located in Philadelphia.

The board appoints hearing committees in each of the districts, each committee consisting of three attorneys from the particular geographical area encompassed in the district.[9] At the outset, we started with twenty-four hearing committees but the tremendous volume of complaints required the addition of nine more.

The board has established offices in Harrisburg, Philadelphia and Pittsburgh. Each office is staffed with disciplinary counsel, investigators, and supporting clerical personnel, all subject to the direction of the chief disciplinary counsel, who is located in the Harrisburg office. The investigation and enforcement staff presently includes the chief disciplinary counsel, seven assistant disciplinary counsel, five investigators and the necessary clerical support. The administrative duties of the board itself are handled by a secretary and one clerical assistant. The rules prescribe that disciplinary counsel must be full time employees and they are not permitted to engage in any private practice.[10]

We operate on a fiscal year basis beginning July 1, and for the current fiscal year our budget provides for expenditures of approximately $564,000. These funds are derived from an annual assessment of $35.00 per year (initially $25.00) imposed upon every attorney in active practice in Pennsylvania. In considering the cost of operating the system, due credit must be acknowledged to the 108 lawyers who comprise the hearing committees and the disciplinary board, and who serve without any compensation. It has been estimated that the reasonable value of their services is nearly one million dollars annually.

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6. ENFORCEMENT R. 17-1, 17-5(a).
7. ENFORCEMENT R. 17-5(a).
8. *Id.*
9. ENFORCEMENT R. 17-5(c)(3).
10. ENFORCEMENT R. 17-7(a).

Any grievant can submit his or her complaint to a representative of the staff at any of our offices. There is little red tape and no financial burden imposed upon complainants. In this day in which the spirit of consumerism pervades the climate, it is imperative that our profession provide complainants with an effective forum for the presentation, consideration and disposition of their gripes. In many cases, it is apparent that there has been a bona fide misunderstanding or breakdown in communications between the attorney and client or there has been some slight neglect by the attorney and the mere filing of the complaint activates the long-neglected action which satisfies the client. Thus, our staff serves as both ombudsman and catalyst and even at this point of contact, it renders a valuable service to the public and the profession alike. Our staff has received many expressions of appreciation from grievants who formerly experienced only frustration and futility.

The board may, on its own motion, direct an investigation[11] and disciplinary counsel also have the authority to investigate matters which come to their attention, whether by complaint or otherwise.[12]

After a grievance is submitted and disciplinary counsel determines that it is not frivolous, he notifies the attorney charged and affords him (or her) twenty days in which to state his position if he so desires.[13] Following investigation, the disciplinary counsel then submits his recommendation to chief disciplinary counsel, who reviews the file and reaches his own conclusion. He can recommend only one of three courses of action: (1) dismissal; (2) the imposition of an informal admonition by chief disciplinary counsel; or (3) the filing of formal charges.[14] His recommendation, together with the file, is then submitted to a reviewing member of a hearing committee who, after an objective review of the total file, either concurs in the recommendation or suggests some other action.[15]

If there is a determination that formal charges should be filed, chief disciplinary counsel files a formal petition for discipline in which the charges are set forth specifically.[16] The respondent may file an answer within twenty days if he so desires but our rules merely provide that if he fails to file an answer, "the charges shall be deemed at issue."[17] The proceeding is then assigned to a hearing committee in the appropriate disciplinary district which conducts a formal hearing and submits its findings and recommendations to the disciplinary board.[18] Either party may file exceptions and may

11. ENFORCEMENT R. 17-5(c)(1).
12. ENFORCEMENT R. 17-7(b)(1).
13. ENFORCEMENT R. 17-7(b)(2).
14. ENFORCEMENT R. 17-8(a).
15. *Id.*
16. ENFORCEMENT R. 17-8(b).
17. *Id.*
18. *Id.*

reply to exceptions filed by the other.[19] The respondent may also request oral argument.[20]

The board then adjudicates the matter. If it concludes that informal admonition by chief disciplinary counsel or private reprimand by the board is the appropriate remedy, it so orders.[21] On the other hand, if it concludes that some form of public discipline should be imposed by the supreme court (disbarment, suspension or public censure), it submits its report and recommendations to the supreme court.[22] Our supreme court acts expeditiously on such recommendations and, almost without exception, has approved the recommendations of the board.

Since several states have adopted the fundamental features of our rules and other states—including Delaware and New Jersey—are observing the Pennsylvania system as more or less of a prototype, perhaps mention should be made of some of the obstacles which confronted us at the outset.

As we were battling our way through the thicket of opposition in the early stages, I came upon the following comment which seemed so timely and relevant:

> And it ought to be remembered that there is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things. Because the innovator has for enemies all those who have done well under the old conditions, and lukewarm defenders in those who may do well under the new.[23]

I am sure that the author did not have disciplinary reform in mind since these sage and prophetic words were uttered over 400 years ago by Niccolo Machiavelli, the famous Italian political commentator.

After adoption of the rules the legal cannonade started. A group of attorneys in Philadelphia instituted action in the United States District Court of the Eastern District of Pennsylvania seeking to enjoin the operation of the system.[24] They lunged straight for our jugular. They were not opposing more effective discipline; they were merely attacking the registration and assessment provisions—the lifeblood of the system! The complaint was dismissed

19. ENFORCEMENT R. 17-8(c).
20. *Id.*
21. *Id.*
22. *Id.*
23. N. MACHIAVELLI, THE PRINCE 9 (Great Books, Encyc. Brit. ed. 1952).
24. Cantor v. Supreme Court of Pennsylvania, 353 F. Supp. 1307 (E.D. Pa.), *aff'd*, 487 F.2d 1394 (3d Cir. 1973).

in a comprehensive, eloquent and masterful opinion by Judge Leon Higginbotham which has now been assigned in the Library of Discipline to that special alcove designated "Required Reading." In this lilting prose, Judge Higgonbotham observed that "The plaintiff's multi-faceted attack exemplifies our profession's capacity to proliferate legal labels and characterizations even when their cause is inadequate on substantive grounds."[25]

The disappointed plaintiffs then sought solace and reversal in an appeal to the United States Court of Appeals. On November 1, 1973, the appeal was argued before a panel of that august tribunal and on the very same day, an order was entered dismissing the appeal.[26] Justice prevailed with unusual celerity on that fateful day.

The scene of battle then shifted to the Middle District in which the members of the board were sued for one million dollars by an irate and disgruntled complainant. Our composure was decomposed when our insurer promptly disclaimed coverage. It was regained when Judge Malcolm Muir granted our motion to dismiss[27] thereby following the Biblical injunction "to do justly."

Then came a mandamus suit filed in our commonwealth court which suffered the same fate as the federal litigation.[28] As of the moment, we are suitless, albeit not in the streaker sense.

Since this Conference is designed to emphasize matters affecting the federal judiciary, it seems appropriate to make some comments concerning the relationship between the federal courts and the disciplinary board. At the threshold, let me say that we have been encouraged and gratified by the cooperation we have received from the federal judges in Pennsylvania.

When lawyers, in the early months of our operations, repeatedly demonstrated their affliction by the "P & C" (postponement and continuance) syndrome, we requested the state trial judges to adopt a policy granting priority to our hearings except in situations of unforeseen and compelling circumstances. They readily agreed. We then discussed the subject with the chief judges of all three federal districts in Pennsylvania and I am delighted to report that, after canvassing the judges of their respective courts, they too have subscribed to this policy.

On the question of priority in processing complaints against attorneys who practice in both the state and federal courts—as most do—we respectfully suggest that since Pennsylvania has established an effective system with a trained staff, complaints involving law-

25. *Id.* at 1309.

26. Cantor v. Supreme Court of Pennsylvania, 487 F.2d 1394 (3d Cir. 1973).

27. Burton v. Disciplinary Bd. of The Supreme Court of Pa., Civil No. 73-480 (M.D. Pa. 1973).

28. Brown v. Disciplinary Bd. of The Supreme Court of Pa., No. 243 C.D. 1973 (Commonwealth Court, August 5, 1974).

yers admitted to practice in Pennsylvania should generally be referred to our chief disciplinary counsel. Revised rule 22 of the Western District of Pennslyvania provides for such reference. The other districts in Pennsylvania apparently follow a similar practice although they have no formal rule to that effect.

To what extent should the federal judiciary feel bound by the action of our supreme court imposing public discipline? The principle is thus stated by the United States Supreme Court in *In re Ruffalo*:[29]

> Though admission to practice before a federal court is derivative from membership in a state bar, disbarment by a State does not result in automatic disbarment by the federal court. Though that state action is entitled to respect, it is not conclusively binding on the federal courts.

In Pennsylvania, the various district courts provide for notice and opportunity for hearing either by a rule to show cause or other procedure. This would appear to give proper respect to the action of the Supreme Court of Pennsylvania without abdicating the rule of the federal judiciary. I would respectfully suggest, however, that the various districts in Pennsylvania review and revise their rules in the light of our new disciplinary system so that we may avoid duplication of effort and still meet the prescription of the United States Supreme Court. One might even hope that our three districts will adopt a uniform procedure on discipline even though I shudder at the horrendous task of drafting language that will pass muster with thirty-eight judges! In any event, our staff would be delighted to cooperate in this challenging endeavor.

In these days of economic uncertainty, you might well ask, "How's business with the disciplinary board?" My unequivocal answer is "too damned good!" On July 1, 1973, the beginning of our first full fiscal year, we had a backlog of 821 active complaints. 1,638 new complaints were filed that year while 1,498 were disposed of leaving a backlog on June 30, 1974—the end of the fiscal year—of 961 cases. During the year, discipline was imposed on eight-four lawyers including three disbarments, seven suspensions, one private reprimand by the board and seventy-three informal admonitions by chief disciplinary counsel. Since July 1, 1974, three additional lawyers have been disbarred, one has been scheduled for public censure by the supreme court, five more have been privately reprimanded by the board or are scheduled for reprimand, and

29. 390 U.S. 544, 546 (1968).

nineteen additional informal admonitions have been administered.[30]

On July 1, 1974, fifty-three petitions for discipline involving formal charges were pending at one stage or another and chief disciplinary counsel advises that there are an additional twenty-two cases in which petitions for discipline have been filed or are being prepared. The docket of the disciplinary board itself, however, is completely current and we have been very much gratified that our supreme court has acted with dispatch on all reports and recommendations filed by the board.

Of course we have our problems. The tremendous backlog and heavy inflow of new complaints have deluged us but we are taking various definitive steps to cope with this challenge. Nor are we satisfied with the time lag between the filing of a complaint and final disposition even though there has been an enormous improvement in reducing the inordinate delays inherent in the old system.

Perhaps our most sensitive and difficult problem is how to deal with the public media particularly in cases of wide public interest. We are sometimes contacted requesting information which we are precluded from revealing under our confidentiality rule.[31] As we stated to our supreme court in our annual report:[32]

> In the present malaise which has led to 'Sunshine Laws' and the 'Right to Know' syndrome, it is difficult to convince a zealous and persistent news reporter that a lawyer's reputation can be ruined by the mere public disclosure of a complaint before there is a determination of its merits.[33]

There is no question that our new disciplinary system has effected long overdue reforms; that we have achieved a high degree of acceptance and credibility; and that we are demonstrating to a dubious public that we lawyers *are* fully capable of disciplining ourselves. The task, however, is neither easy nor pleasant and I close

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30. The disciplinary board recently has released updated statistics. As of June 30, 1975, there were seventy-five major cases at various stages of proceedings and thirty-one major cases awaiting preparation and filing of petitions for discipline. A total of 1,696 new complaints were received during fiscal year 1975 and 1,750 were disposed of during the same period. A backlog of 907 complaints remained at the year's end, some of which were carried over from previous years. Discipline determined and imposed includes two disbarments, four suspensions, two public censures before the supreme court, three private reprimands before the disciplinary board, and seventy-nine informal admonitions before disciplinary counsel. At the end of fiscal year 1975, twenty-three major cases were awaiting hearing committee reports, two were awaiting board action, and six were awaiting action by the supreme court. In addition, the board processed four petitions for reinstatement. Letter from J. Leonard Ostrow, Chairman, The Disciplinary Board of the Supreme Court of Pennsylvania, to Benjamin R. Jones, Chief Justice, Supreme Court of Pennsylvania, August 1, 1975.

31. ENFORCEMENT R. 17-23.

32. [1973-1974] Annual Report of the Disciplinary Board of the Supreme Court of Pennsylvania, in 45 Pa. B.A.Q. 456 (1974) (reprinting in its entirety the text of annual report for the year ending June 30, 1974).

33. *Id.* at —, in 45 Pa. B.A.Q. at 457-58.

with the following excerpt from our recent annual report to the supreme court:

> . . . [O]ne who aspires to popularity does not seek or accept involvement in the disciplinary process. Those of us who toil in the field of disciplinary enforcement realize that we are not planting encomium seeds. We can only proceed to discharge our mission with determination, dignity, integrity, fair play to the complainant and the public and requisite due process to the lawyer. While our relatively few detractors are doing their worst, we shall continue to do our best. In the meantime, it is clearly apparent that our new disciplinary system is gaining acceptance by, and the respect of, the public and the profession alike.[34]

Thanks very much for this opportunity to discuss this very sensitive but very important subject with you.

34. *Id.* at —, in 45 Pa. B.A.Q. at 458.