New Horizons in Professional Responsibility

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American Bar Association Journal

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Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol52/iss1/3
NEW HORIZONS IN PROFESSIONAL RESPONSIBILITY

Richard B. Allen*

When lawyers are together with laymen, the lawyers are first-rate defenders of the legal profession. Let a layman suggest that lawyers try to dominate too many phases of life or that they charge too much for little or simple work and lawyers will bristle with righteousness and defense for the profession. But listen in when lawyers are together with other lawyers and you will hear plenty of self-criticism. Whether the gathering is a bar association meeting or an informal convention at a luncheon table, there will be endless statements of what's wrong with the legal profession and what ought to be done. The suggestions will range from non-activism ("the bar ought to stick to its own business and forget about all these do-good, pro bono publico things") to social activism ("the bar ought to take positions on important issues of the day, like the Vietnam War").

The truth is that the bar is given to introspection—it contemplates itself and its place in society to a greater extent than any other organized segment or group drawn together by common training, profession or vocation. But the introspection takes place intramurally, and the public impression given by the profession is that it is opposed to progress, indeed to change, and wedded to whatever anachronism the past has to offer. Lawyers know this is not so, because they are the ones who continually discuss change—not only in the law but in the profession's organization, objectives and activities. The advocates of change are on all sides of all questions. In many respects their efforts tend to neutralize the result. But a result is reached, and because the road to its achievement is strewn with blunted advocacy and compromise, the result is truly a consensus. Perhaps this is for the good, as the decision wrought in this manner by the bar has a soundness that commands widespread agreement and respect, although it may have been tortuously slow in coming.

In the last five years the organized bar in the United States—represented by the American Bar Association, which provided the

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1. No layman has approached the scathing denunciation of lawyers mounted by F. Rodell, WOE UNTO YOU, LAWYERS (1939), yet Professor Rodell has spent his life teaching young men and women to enter the legal profession.
leadership, and by the state bars, which have given staunch support to the A.B.A.,—has moved forward to two major and sweeping decisions for change and progress and appears well on the way to a third.

The first two waves of progress coursed on almost parallel time-tables. The first to come to fruition was the Code of Professional Responsibility, the landmark reformulation of the ethical standards of the legal profession adopted by the A.B.A. House of Delegates in 1969, and now in effect either as court-adopted rules or as rules adopted by the organized bar in forty-three states and the District of Columbia. In four states the code has been approved by the state bar association and presented to the supreme court for adoption. The code was the product of a committee headed by Edward L. Wright of Little Rock, Arkansas, whose prestige and influence in the American Bar Association are indicated by the fact that he went on to become president of the Association in 1970-71. While the Code of Professional Responsibility had the immediate purpose of replacing the Canons of Professional Ethics, which were first adopted in 1908, it is much more than a written statement of those things that are considered unprofessional or proscribed conduct for lawyers. The code is couched in “thou shalt” rather than “thou shalt nots.” Each of the nine canons commences with “A lawyer should,” and three of them go beyond statements of proper conduct strictly within the attorney-client relationship. Canon 1 imposes on the lawyer the obligation to “assist in maintaining the integrity and competence of the legal profession.” Canon 2 provides that the individual lawyer should “assist the legal profession in fulfilling its duty to make legal counsel available,” taking it as a foregone conclusion that the legal profession does have a duty to make its legal services available. And Canon 3 plows new ground in declaring that the lawyer “should assist in improving the legal system.” The implication of this positivism is only now beginning to be realized, especially with regard to law reform. A forerunner of the broadened approach adopted by the Code of Professional Ethics may be found in the 1958 statement on professional responsibility produced by a joint conference of the American Bar Association and the Association of American Law Schools. This statement emphasized the position occupied by the lawyer in modern society and the obligations that derive from that position, and it

stressed that the lawyer should appreciate a sense of attachment to something larger than himself.

The second movement now well under way is the new awareness on the part of the bar of the importance of devising and operating more effective systems of professional discipline. Whether lawyers can generate the professional commitment and financial backing to police the profession in an adequate manner, so as to stave off an assumption of the job of discipline by outside agencies, remains to be seen, but it is clear that the organized bar has moved to improve itself in this area. This new awareness of the importance of professional discipline, not only to the stability and reputation of the profession but also to its ability to move ahead as a leadership group in society for vital reforms, has come about through the work of the American Bar Association’s Special Committee on Evaluation of Disciplinary Enforcement, of which retired Supreme Court Justice Tom C. Clark was chairman. It was created in 1967, held a series of regional hearings throughout the United States, and presented its monumental study and report, Problems and Recommendations in Disciplinary Enforcement, to the House of Delegates in 1970. The House adopted the report and recommendations in 1970 and urged the states, where the power of professional discipline resides, to bring their systems up to the standards outlined. The committee isolated thirty-six problems in the administration of professional discipline it found as a result of its extensive hearings. The dimension of each problem is discussed and solutions are suggested. Since 1970 the American Bar Association has had a special committee charged with the mission of implementing the committee’s recommendations in the states.

The third movement, now only in its incipient stage, is that to create a National Institute of Justice as a federal, nonprofit corporation modeled on the Corporation for Public Broadcasting and able to receive both governmental and private funds. In 1921 Justice Cardozo proposed a national ministry of justice, but he envisioned for it a primary role of law reform. This function is filled in the United States in a nonsystematic but nevertheless fairly adequate manner by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. The new concept of the National Institute of Justice comes from Bert H. Early, Executive Director of the American Bar Association, who expounded it in the April 1972 issue of the West Virginia Law Review. Law reform would be but a part, and perhaps a minor part,

of the program of the institute proposed by Mr. Early. His sights are on higher and broader targets, for he writes that the institute would be "... dedicated to the mission of giving national cohesion and increased public and private support to the now inadequate and piecemeal efforts directed toward improving the justice system at all levels. The National Institute must deal with the system of justice as a whole."6 The American Bar Association, after creating a task force to study the concept of the National Institute of Justice, endorsed further exploration for its establishment and has backed a national conference of representatives not only of the legal profession but of other disciplines to work out the framework for the institute. This conference will be held in December of 1972, and it will be followed in the spring of 1973 by another national convocation at which the institute will be organized.

PROFESSIONAL RESPONSIBILITY AND PROFESSIONAL DISCIPLINE

The most basic yet most sublime aspect of professional responsibility is professional self-governance—the administration of professional discipline by the professional group itself. As a heritage from the English Inns of Court, which nurtured the colonial lawyers who formed the bar in the early days of the United States, the legal profession enjoys the right of self-discipline today. But that right can continue only if the profession competently performs its task of discipline. The standards of conduct and their enforcement must conform to the public's standards and expectations; otherwise, the public will demand and receive a different system of professional governance.

The Clark Committee's report began with an explosive sentence that grated the sensitivity of many lawyers with its truth: "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."7 Justice Clark told the A.B.A.'s House of Delegates when he presented the report that the word "scandalous" was used consciously and purposely. One of the conclusions of the report was, "Unless the profession as a whole is itself prepared to initiate radical reforms promptly, fundamental changes in the disciplinary structure, imposed by those outside the profession, can be expected."8 And it

8. Id. at 805.
noted that in one state—Michigan—the supreme court in 1970 established a disciplinary commission of seven members that includes two laymen.

If the highest achievement of professional responsibility is professional self-governance, then the legal profession must adopt and commit itself to a three-stage improvement in its own disciplinary structure and its operation. First, it must put the machinery of administration of professional discipline in the states in order and start enforcing sanctions for the present range of misconduct. Second, it must move into new areas of professional control in which only a few states now have adequate procedures. And third, it must move forward to new ground by making professional discipline applicable to failures to live up to standards of service as well as to cases of traditional misconduct. These three steps probably will have to be taken in order, for it is unlikely that a given state or jurisdiction would be in a position to take the second without having accomplished the first, or the third without having fulfilled the second, although it is possible that the first and second might be taken in close order, if not simultaneously.

In many states adequate systems of professional discipline are in force, with the necessary financing and professional staff to receive and investigate complaints from the public. But in too many jurisdictions that is not so. Their systems are on paper only; there are no funds to make them run; there is no professional staff to operate them; there is interminable delay in looking into complaints; members of the public are not advised of the disposition of their complaints; sanctions are not applied with an even hand; those who have breached their trust as lawyers continue to be able to hold themselves out to the public as lawyers. Thus, the first step is basic: an adequately financed and staffed system must be established. The blueprint for doing so is in the Clark Committee report, and it is a system that can be built in any size state. The most important feature of any plan is commitment on the part of the bar to make it viable. Given that, there must then be adequate funding, together with an adequate professional staff, which, of course, will depend on the size of the jurisdiction covered, perhaps both as to lawyer population and geographically.

As a second assignment in this area, the bar must develop procedures for dealing with lawyers who may not at the moment be guilty of a traditional form of professional misconduct but who, nevertheless, should not be holding themselves out to the public as practitioners. Few states, according to the findings of the Clark Committee, now have methods of handling instances of lawyers who are disabled from the practice of law by mental illness, senil-
ity or addiction to alcohol or drugs and lawyers who have been convicted of crimes.\(^9\)

Under the disciplinary procedures in most states, there is no way in which a lawyer disabled by mental illness, senility or addiction to alcohol or drugs can be dealt with until he commits one of the traditional professional offenses—the conversion of clients' funds entrusted to him, for instance—and the disabling condition itself is not regarded as a ground on which a disciplinary proceeding may be based. This situation is one that cries for rectification, not only in the interest of the public but also in the interest of maintaining a competent professional group. The solution recommended by the Clark Committee is a suspension of the disabled lawyer until there is a recovery from or change in the disability. The suspension should be automatic if the disability is for mental illness and the lawyer has been declared incompetent judicially under the state's regular procedures. If, on the other hand, the suspension is sought by the bar discipline agency, then of course the lawyer should have an opportunity for a hearing to which the requirements of due process would attach.

The convicted lawyer presents a particularly serious problem for the bar, as generally a conviction is a matter of wide public knowledge, and the fact that the lawyer may continue to practice after his conviction is difficult for lawyers, let alone laymen, to understand. This is particularly true if the crime for which the lawyer has been convicted is one that relates to his professional activities—for instance, use of the mails to defraud insurance companies in personal injury cases or, again, conversion of a client's funds. Most states do not institute disciplinary proceedings against a convicted lawyer until he has exhausted all his appeals. Nowadays this period may be years in length. The Clark Committee proposed that the lawyer convicted of a serious crime (the committee purposely chose not to use the old chestnut "a crime involving moral turpitude") should be suspended pending the direct appeals of the conviction, with a disciplinary proceeding to be instituted based on the conviction. The suspension would continue until the final disposition of the disciplinary proceeding, with immediate reinstatement should the conviction be reversed. Of course, the administration of a rule of this kind would require a determination of what offenses are "serious" crimes, but the resolution of this issue should not be as difficult as deciding what crimes involve "moral turpitude."\(^10\)

While the suggested procedure offered

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10. A few years ago for the purpose of trial of a disciplinary case before
by the Clark Committee is to be preferred and is more comprehen-
sive, a state could improve its practice in the cases of convictions of
lawyers for crimes involving their conduct as attorneys, no matter
whether "serious" or not, by going ahead with dispatch with a dis-
ciplinary proceeding entirely independent of the criminal pro-
ceeding. If this is done, independent evidence of the offense has
to be presented in the disciplinary proceeding, as the factual basis
for the action is not the conviction, but the virtue is that profes-
sional discipline rests on the record in the disciplinary action itself
and is not subject to the vagaries of the course of the criminal case.

The Clark Committee's recommendations do not deal with the
problem presented by the lawyer while under indictment or other
charges, and all persons who have studied it have concluded that it
is indeed difficult and delicate. Indictments, informations or other
forms of charges are but allegations, and, of course, they may be
abused by the prosecutor. Criminal charges sometimes pend for
many months; sometimes the defendant, often the prosecutor, pre-
fers not to go to trial. In the meanwhile, the damage to the legal
profession may be serious, particularly if the crime charged is one
involving the lawyer's professional activities. Ideally, one might
wish that there could be a suspension of the charged lawyer until
the issue of his guilt is resolved, but until our system of the admin-
istration of criminal justice is able to afford a most prompt disposi-
tion of the charges, by trial or ruling, a suspension of the charged
lawyer for this period might be unfair, both in a general and a le-
gal sense. Probably for this reason the Clark Committee did not
offer a recommendation for these particular cases—a most under-
standable course of action in view of the many other more pressing
and immediate problems with which it dealt. Perhaps the ultimate
solution is the achievement of the goal of prompt trials as a com-
monplace in the criminal justice system, for then a temporary
suspension could be imposed, which would provide an incentive for
the charged lawyer to move rapidly to trial or other disposition of
the charges.

A somewhat analogous situation arose in Chicago in 1972 when
Otto Kerner, a judge of United States Court of Appeals for the

the Committee on Grievances of the Chicago Bar Association, I pre-
pared a memorandum of law in which I listed some thirty-five re-
ported disciplinary cases since 1946 in which the respondent-attorney
was being proceeded against because of his conviction for willful fail-
ure to file an income tax return (28 U.S.C. § 7203 (1970)), which is
only a misdemeanor under the federal criminal law. The variations
courts have accorded this offense—whether or not it is one involving
moral turpitude—are amazing to behold. The Supreme Court of Illi-
nois had little trouble with the question in this case, however. In re
Bass, 49 Ill. 2d 269, 274 N.E.2d 6 (1971).
Seventh Circuit, was indicted by a federal grand jury for offenses allegedly committed while he was governor of Illinois and before he was appointed to the Seventh Circuit. Judge Kerner announced immediately that he had asked to be relieved of judicial duties during the pendency of the charges, but he remained a member of the court entitled to full pay. While voluntary withdrawal from court duties may have been a preferable course to continuing to perform regular judicial work, it still may not be the adequate answer. In any event, it is an arrangement that is not practical in the case of the practicing lawyer, who would have no continuing compensation by way of salary during the self-imposed suspension period. And, too, there is the matter of providing service during the interim period to clients whose affairs are in the attorney's hands.

But there is pioneer work to be done in professional responsibility, too, as well as perfecting methods of handling traditional misconduct and installing new procedures and methods for dealing with the disabled and convicted lawyer. There are many fields in which we do not at present discharge the professional responsibility function that seems now to have been spelled out by Canon 1 of the Code of Professional Conduct—that lawyers should assist in maintaining not only the integrity but also the "competence" of the profession. Two fields to which the charge of Canon 1 should direct us without much delay come to mind easily. As a third suggestion for pioneer work, I shall mention one of the recommendations of the Clark committee that has been forgotten or ignored—the establishment of a National Conference on Disciplinary Enforcement.

"Competence" to the bar corporately should mean the ability of the bar to assure the public that every practitioner currently licensed to practice in a given jurisdiction is competent—to use a simpler word, able—to handle a client's business or an assignment from a legal aid agency or a court. Of course, neither the public nor the profession expects every lawyer to have equal ability to do this, but the public does and has a right to expect that the legal profession through individual action or organized agencies sees that the person receives legal services. In a word, "competency" is the corporate ability of the bar to provide the legal services the public requires, whatever they are.

To rise to this level of public aspiration, as the legal profession must, it in turn must demand individual competency, and this it is not now doing. As a first step, we need to rid ourselves of the profession's bane—procrastination—which goes on from there to outright delay and neglect. Bar discipline agencies do not now treat negligence as professional misconduct cognizable by a bar
discipline agency. Even gross negligence, to borrow a term from torts, is usually dismissed as malpractice. Only when to cover his negligence the lawyer has made misrepresentations do the disciplinary agencies take these cases. The disgruntled client usually is left to his cause of action against the lawyer for malpractice, and he attempts to find counsel of his own to handle a distasteful case. The most common cases of the negligence variety coming before disciplinary agencies are those in which the lawyer has accepted employment to bring an action and he neglects to do so within the period of the statute of limitations. If the action has been filed, sometimes it is not pursued, and it is dismissed for want of prosecution. Usually the client has lost contact with his attorney; the attorney dodges the client; he does not return telephone calls. Perhaps the case has gone sour; perhaps the attorney-client relationship has gone sour. Of course, the client is not as much interested in the bar's conducting a disciplinary proceeding against the attorney as he is in getting his money back if he has paid part of the fee, or in getting his case reinstated if that is possible, or in getting a monetary settlement from the attorney if that is feasible.

Cases in which procrastination, delay and negligence are the culprits, either individually or in some combination, form a major part of the agenda of most bar disciplinary agencies. They are not being handled now in a way that comports with the broad charge of Canon 1. The profession, with the ultimate backing of courts that exercise disciplinary powers, usually the courts of last resort of the states, must declare in a sort of fair-warning fashion, that negligence is professional misconduct, and then it must proceed to make the declaration a reality. Of course, the disciplinary agencies will begin with their best cases—attorneys who have shown a pattern of conduct of negligence and clients whose suffering has been most pitiful—and move from there to establish a clear line of authority.11

"Competence" also means to the bar that its members have the present ability by training and experience to handle legal affairs, as they represent themselves to the public by hanging out their shingles. There is a major segment of the profession, quite possibly a majority, who have participated in no continuing legal education activities, perhaps not even read a law review or bar

11. A rudimentary outline of this appears in In re Daggs, 384 Mich. 729, 732, 187 N.W.2d 227, 228 (1971), in which the court said: "Once a lawyer accepts retainer to represent a client, he is obliged to exert his best efforts wholeheartedly to advance the client's legitimate interests with fidelity and diligence until he is relieved of that obligation either by his client or the court. The failure of the client to pay for his services does not relieve a lawyer of his duty to perform them completely and on time, save only when relieved as above."
journal article, since their admission to the bar. Yet they are held out to the public on the same level as other practitioners. This situation must be changed or the legal profession will lose the status of a learned profession, for learning must continue during one’s professional life. Just as the bar must resolve to deal effectively with the negligent attorney, so it must deal with the matter of continuing education and learning. The profession’s most effective way of bringing this about remains to be worked out—indeed, little thought has been given to adopting the principle, let alone discussing means of effecting it. Disciplinary procedures, at least as now constructed, appear unsuited to accomplish this goal. They are rigid in application and harsh in result. It seems more likely that the first steps toward improvement in this field will come by way of requiring evidence of certain activity in continuing professional education in conjunction with periodic registration. Thorough discussions of the principle and the achievement of a professional consensus must precede implementation.

The creation of a National Conference on Disciplinary Enforcement is one of the Clark Committee’s recommendations that has received almost no attention. It is, of course, one that states cannot accomplish; it must be done at the national level, and the committee suggested that it be implemented by the American Bar Association. The functions of the conference, as envisioned by the Clark committee, are

to arrange periodic regional and national meetings of those engaged in disciplinary enforcement; to prepare training courses for judges, disciplinary agency members and staff; to maintain a national memorandum of law file; to provide leadership in periodic review and revision of practices and procedures in disciplinary enforcement; to serve as a central clearing house for information concerning lawyer misconduct; to maintain the National Discipline Data Bank; and to implement the recommendations of this Committee.12

The national discipline data bank has been established at the American Bar Center in Chicago, but that is the only item in the above list that has been accomplished. The services that a national agency of this type could provide to the states are vital to the improved effectiveness of state disciplinary systems, and the bar cannot say it has attained professional responsibility until it has provided for these services.

WHAT THE NATIONAL INSTITUTE OF JUSTICE CAN DO

Although the National Institute of Justice is in the first stages

of development, it is not too early to consider what functions it can perform, what vineyards in which it might labor, what aspirations it might entertain, and what achievements it might expect. There will be no dearth of suggestions for the national institute's program. In fact, so diverse and numerous will be the demands that the very first order of business for the institute will be a resolution of its identity and mission. But its purposes, however varied they ultimately prove to be, cannot fail to include the enhancement of professional responsibility, for it is the legal profession that must serve as the immediate minister of justice in the United States. The bar must forge its own resolve and reach its own commitment to improve its responsibility as the profession charged with the most delicate and important of functions in society, but the National Institute of Justice can prove to be the catalyst that draws together other forces and offers inspiration. The institute may be expected to provide impetus to improvement in broad fields, but let us hope that they are broader than law reform and the nuts and bolts of judicial administration—broad enough to encompass searching and pioneering spurs to professional responsibility.