Problems and Suggested Solutions in Disciplinary Procedures— A Panel Discussion

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PROBLEMS AND SUGGESTED SOLUTIONS IN DISCIPLINARY PROCEDURES—
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Members of the Panel: Shelden D. Elliott, Professor of Law, New York University; Albert W. Graessele, Jr., of the Jacksonville Bar; William B. Roman of the Miami Bar; Hervey Yancey of the Tampa Bar; Darrey A. Davis of the Miami Beach Bar, President-Elect of The Florida Bar, Moderator.

Mr. Davis: Those of you that heard the panel discussion of last evening gathered the impression, as expressed by the distinguished lay and lawyer members of that panel, that they believe that the bar association or the organized bar should be doing something about those few lawyers who refuse to live up to the minimum standards of conduct required of lawyers. The Florida Bar is doing something about that. We have had more than 160 complaints that have been heard by the Board of Governors. Our purpose today is to outline to you briefly some of the problems that are being confronted by your bar with regard to the enforcement of standards of conduct of lawyers. We now deal not with the conduct of lawyers as set by the Canons of Ethics but with what happens to those few lawyers who decline to adhere to those minimum standards and what problems are encountered in seeking adherence to them.

I think that perhaps I had better take just a moment to outline very briefly the procedure we use. Some of you are familiar with it but I am afraid some are not.

The Integration Rule promulgated by the Supreme Court takes care of disciplinary procedure. It provides that a grievance committee in each of the judicial circuits of Florida shall be appointed by the Board of Governors. And I might say here that this committee is the only one of The Florida Bar that is appointed by the board—the others are appointed by the president. These committees consist of at least three but not more than five members of the bar, and they are empowered to investigate all charges of misconduct, under the guidance of the Board of Governors.

If the local, or the circuit, grievance committee finds that there is reasonable or probable cause to believe that an accused attorney is guilty of professional misconduct, it files a report with the Board of Governors, with a supporting document. It must then give notice [459]
to the attorney and provide an opportunity for a hearing. On the local level he must be afforded a right to be heard, and at the board level he is again given an opportunity to be heard and to present testimony and evidence.

If the board from its investigation and that of the circuit committee finds reasonable grounds to believe that the accused attorney has been guilty of professional misconduct, it must then prepare a written complaint specifying the facts and the charges, which is served upon the attorney and filed with the Clerk of the Supreme Court. The Supreme Court then appoints a referee to conduct a hearing, and that hearing must be held where the attorney resides. The Board of Governors is then required to appoint a lawyer to present the facts and evidence before the referee. After he has held the hearing, or what amounts to the trial, the referee must submit to the board a written report giving his findings of facts and recommendations. The board then has the power to dismiss the complaint, remand it to the referee for further findings, or certify the record to the Supreme Court. The accused attorney, within sixty days after the filing of service upon him, may petition the Court to review the recommendations, upon which the Court reviews the whole procedure. I think it is obvious that the Integration Rule gives to The Florida Bar the power to discipline its own members, subject to review by the Supreme Court.

There are three important elements in any disciplinary procedure. First, there must be an investigation of charges of alleged professional misconduct. Second, there must be a trial on the charges—trial in the sense that there must be an adversary proceeding—and opportunity for presentation of all facts and for argument. The third and last essential element is a review of these proceedings by a court.

Disciplinary proceedings are not for the purpose of benefiting the lawyers of the organized bar. They are for the public interest and for the protection of the public. That is an axiom that we must keep in mind always. It is not for our benefit but for that of the public.

I am firmly convinced that there are two-fold responsibilities imposed upon any member of the bar who has the duty of administering disciplinary procedure or having to do with grievance matters. The first, of course, is obvious—to protect the public against those unscrupulous lawyers who will not adhere to proper standards of conduct. There is another duty that is equally important—to protect the reputation and good name of a lawyer, which is his most cherished possession and can easily be destroyed.

I will conclude my remarks by saying that the panel today will
limit the scope of its discussion to Article XI of the Integration Rule, outlined above. We will not attempt to cover any other disciplinary procedures, such as the power given to the State Board of Law Examiners to investigate professional misconduct, nor will we touch upon the power given to circuit courts to investigate and cause disbarment proceedings to be filed.

In connection with the arrangement of this panel, we undertook to ask every grievance committee, or its chairman, of all the circuits to advise us as to their particular problems so that we could be in a position to discuss them. We also asked the members of the board to give us some of their thoughts as to the problems with which they were confronted. We have a Supreme Court committee whose primary duty is to handle grievance matters at that level, and we inquired of this committee as to its problems.

Based upon the information received from these sources and from the experience of the members of the panel, we will discuss some of the questions that have arisen. If any further questions occur to you we shall be glad to attempt to answer them.

I want to direct the first question to Mr. Elliott, who, although he is not familiar with our local ground rules on disciplinary procedure, is an expert on disciplinary procedures generally. Mr. Elliott, since a great many of these matters involve young lawyers who have been out of law school only a year or so, do you not think that law schools should devote more time to teaching legal ethics? If law students were inculcated with the standards of conduct would not disciplinary problems be greatly lessened? What is your point of view?

*Mr. Elliott:* I think I may have already anticipated that in my remarks a little while ago. I think definitely that they should. I think the law schools are coming increasingly today to recognize that they should. I think that the course we used to give in legal ethics was in part responsible for the dropping of it in the curriculum. To teach ethics to a group of beginning law students who do not have an adequate background of education in law and procedure is like teaching the Golden Rule in a vacuum. You need to pose problems against reality, and that is when the students will learn to appreciate their significance.

You may recall the student's definition of legal ethics in the old days as something that the older lawyers tell the younger lawyers to keep the latter from taking away their business. As it is being revived, I am glad to say, it is taught at a much more mature level
by more experienced people to students who are more receptive to it. I think it is a "must" in the curriculum.

Mr. Davis: Mr. Elliott, do you not think that teaching legal ethics as the standard of conduct of attorneys is just as important as teaching substantive law such as torts or contracts, particularly in view of what we have seen here, that there is a difference of opinion between lawyers as to the interpretations of the Canons of Ethics?

Mr. Elliott: I think it is, and I think the time for it should be after the students have had an adequate background in torts, contracts, and procedure, so that the problems the attorney encounters in real life can be presented to them with some reasonable awareness on their part of how that problem could arise. Then you give them an idea of how it should be handled in practice.

Mr. Davis: I am going to ask Mr. Yancey to discuss the next question with us. Should circuit grievance committees be given the power to mete out punishment in the nature of reprimands in instances involving minor offenses and thereby burden the Court with only serious offenses?

Mr. Yancey: My reaction, Mr. Davis, is that they should not. Even in the larger circuits the members of the grievance committees are far the most part acquainted with the lawyers with whom they deal. If it is left up to the members of the committees to mete out minor punishments in their own circuits I am afraid that they would be subjected to too many considerations that should have no effect on the punishment. I feel positive in my own mind that every member of every local grievance committee has a strong sense of responsibility to the public on the one hand and to the attorney involved on the other. That is another of our problems. The committee is faced with the necessity of being prosecutor, defender, and judge; and I do not think that minor punishment should be meted out by local committees. I think that should be handled by the Board of Governors.

Mr. Davis: You do agree, then, that there is need of some way to approach those situations that do not merit going all the way through a referee's trial?

Mr. Yancey: I certainly do, Mr. Davis. My estimate of the number of cases that actually go through a trial by referee as compared with the number of complaints that are taken to members of the local grievance committees would be about one to fifteen or twenty. Often a complainant feels indignant at the treatment he has received at
the hands of his lawyer, and perhaps the committee agrees with him. Yet, when the evidence has been taken and the Canons of Ethics and the rules of the Florida Supreme Court examined and all authorities exhausted, there is really nothing that would justify either disbarment or suspension. Nevertheless, something should be done to make the attorney aware that his conduct has not been satisfactory.

Mr. Davis: If our authority is to be vested in the Board of Governors, how complete a record should the grievance committee prepare? How full a hearing do you need to make sure that the board has before it facts that would merit a reprimand? You indicate that it might not require a full hearing and might save the grievance committee's time if you could have that particular form of discipline. I am concerned about how you would prepare the information for the Board of Governors to act.

Mr. Yancey: I can speak only as a member of a local grievance committee. I am not familiar with the procedure in other circuits, although last night I learned about a lot of things that go on in other circuits that we never heard of. But I do think that if it begins to appear from the investigation that, although the attorney does not merit disbarment or suspension, some sort of admonition is justified, the record should be made as complete as possible. In the Thirteenth Judicial Circuit, where I have served as a member of a committee, our practice has been to be extremely careful to obtain every scintilla of information possible and put it into the record, either in the form of answers from witnesses or in documentary form, even though we were acting only in a general capacity equivalent to that of a committing magistrate, that is to say, determining probable cause. This is for the protection of both the public and the attorney.

Q. Suppose there is dissension between an attorney and his client about fees, and your committee might feel that the attorney did charge somewhat higher fees than he should under the circumstances. The medical board has an arbitration committee of local doctors, among which such a matter is arbitrated. It may not be a matter of professional misconduct in which your committee could take part, but do you think it might be referred to the Board of Governors, or should the local board handle it or a board of arbitration?

Mr. Graessle: That is not a grievance matter; the committee has no right to try to set a lawyer's fee or to settle a controversy concerning this.
Mr. Davis: Let us get back to the question at hand. Do you think the local committee should have the power to administer a private reprimand? Because under our procedure either a man is guilty of unprofessional conduct or he is not guilty. If he is not guilty, then the local committee dismisses it and that is the end of it.

An example that occurs to me is advertising, or something that might be innocuous, but is a technical offense. You cannot place the stamp of approval on it by saying, "Let's dismiss it; we find there is no professional misconduct." You would not set that up as an example for young attorneys to follow. Now, do you want to send that to the board? Then the board is met with the same problem. Either it is misconduct or it is not; they say it is and it goes to the Supreme Court for a referee's hearing. Somewhere along the line somebody ought to have the power to say, "We don't agree with this, yet it doesn't justify taking any drastic action." Mr. Roman, what do you do in Miami when you have one like that? By the way, how many have you had there since integration?

Mr. Roman: We have had roughly 300 complaints since the Integration Rule went into effect. We probably take the law into our own hands a little. I have in mind the case of a young attorney who advertises by using too large a sign. We tell him to remove the sign, and if he complies we do not bother to send that up, because we know what would happen to him. There is no point in going through all the procedure. It is the only way that it could be handled under our present system. A reprimand has to come from the Board of Governors after the second hearing before the board. We see no reason to go to the expense of a formal hearing, taking testimony, and so forth, when there is no question but that the reprimand is enough. I think this points up the weakness of this rule, that nowhere along the line can a reprimand be administered without going through the full procedure.

Mr. Davis: Suppose you get a conflict, a difference of opinion, between the grievance committee and the accused attorney as to whether his conduct constitutes a violation of the Canon of Ethics. What happens then?

Mr. Roman: There is nothing you can do then but go on and have a formal hearing and send a report to the board with your recommendations. Of course local committees do not recommend the type of punishment in this instance. All they can recommend to the Board of Governors is that disciplinary action be taken.
Mr. Graessele: We had a case involving an attorney who advertised himself as an expert on filling out income tax returns while continuing the practice of law in the same office. In good faith he thought he was not violating the Code of Ethics. He would not accept the ruling of the grievance committee holding this conduct improper, but he agreed to stipulate all the facts and submit the case to the Supreme Court for its findings and abide by the result. Thus, with no contest as to the facts, we were able to have a Supreme Court hearing in a short period and by-pass the usual time-consuming procedure. This policy can be followed only when the accused attorney believes that he is acting in good faith and the conflict is merely on the meaning of the Code of Ethics.

Q. I think this question points up a rather considerable defect in the administration of discipline. My experience on these different committees has indicated that by far the majority of the cases that come to us on the local level involve three types of situations: (1) the attorney has failed to remit funds; (2) he has accepted a fee but failed to institute the action; and (3) he has made improper deductions for costs. I have found that in most of these cases the attorney comes in, upon the complaint being lodged, and tenders the required funds, in the nature of a confession and as a partial avoidance. The problem of the grievance committees at that point is, shall they recommend further action to the circuit court or shall they drop the matter in the absence of the power of reprimand? They are faced with two choices, and the result is that more often than not they say, "Well, go and sin no more." However, if the committee had the power of reprimand I think it could be exercised so as to impress upon counsel and all others at the bar that future violations would be more severely punished. Will you clarify the point as to whether the present rule contemplates a giving of the reprimand by the board or by any agency? Shouldn't some distinction be made between a public and a private reprimand?

Mr. Davis: I do not think the rule contemplates anywhere along the line that any sort of punishment shall be meted out until the referee concludes his trial and makes a recommendation to the Supreme Court. So, ultimately, only the Supreme Court can enforce any sort of punishment.

Mr. Roman: Don't you think it is more than that? I know that at the Board of Governors level lawyers have been told to go and sin no more when they have been slightly on the wrong side of the line.
I think it does some good, but actually we have no more right to do that than the local committee has.

Mr. Elliott: I might just make this comment. I would construe a statement of "Go and sin no more" as being in itself a form of reprimand.

Mr. Roman: That is the point I am making. There are reprimands being given in that informal way, and we might as well recognize it and have it as part of our rule at some stage.

Mr. Davis: Mr. Yancey, what is your point of view when charges are filed by a member of the public and from every indication it appears that they are unfounded? Should you explain to the person that he has no just cause for complaint or just dismiss it?

Mr. Yancey: Legal ethics is so closely bound up with the public relations of the bar that if the matter is dropped without any explanation I think the committee has done the bar irreparable harm. To make the complaining individual appreciate the fact that he has had a fair and intelligent hearing and understand that there is no basis for disciplinary action against the attorney will do more to further the public relations of the bar than any amount of advertising, though this is sometimes impossible. Last week after I had spent about three hours trying to explain to a lady why she had no proper grievance against a particular attorney she said, "Well I knew I wouldn't get you to say anything against him, no matter what it was."

Mr. Davis: Now, that raises another question. What safeguards are there to protect the lawyer's reputation and good name from unfounded charges? Mr. Roman, what do you think should be done about protecting a lawyer's good name?

Mr. Roman: Well, of course all of the proceedings are private and secret. We follow through the procedure of having an informal preliminary hearing, at which time we call in the complainant and the accused attorney in order to arrive at a basis for the complaint. Often the misunderstanding is cleared up and everybody is satisfied. I think it is the listening post which Mr. Elliott mentioned in his talk; and, as Mr. Yancey says, it is a public relations matter to keep the public informed as to what happens to their complaints and of the action taken.

Mr. Elliott: Do you call in the attorney no matter how obviously unfounded the charges are, or do you dispose of some without imposing on his time or possibly his temper?

Mr. Roman: We call him in, because we feel that he should know
the charge that has been filed against him; he may be able to take steps to keep the same thing from happening in the future.

Q. I would like to get the opinion of the panel on a certain point. A person was arrested and charged with a traffic violation. When he got to the jail he convinced the sheriff that he was a lawyer and also persuaded him to accept his personal check in lieu of bond. Then when he got home — several hundred miles distant — he stopped payment on the check. It was not a question of insufficient funds. Is that such conduct as should come before the grievance committee or be handled in the criminal court?

Mr. Davis: I am delighted that we have Mr. Henry S. Drinker here to answer that question. Mr. Drinker, would that constitute professional misconduct in your opinion?

Mr. Drinker: I don't know. I would be doubtful. No, I don't think it would constitute unprofessional conduct. It indicates a character that cannot be trusted to practice law, but it seems to me that would be a close case. You can be disciplined only for professional misconduct. But if you embezzle from someone on the outside, that is perfectly good grounds for dismissal. There are a lot of lawyers who do things just as tricky as that, and I should think it would be a hard question to decide.

Mr. Graessle: If it came to me, unless there was a lot more to it I would not treat it as a matter for the local grievance committee at that stage.

Mr. Davis: Well, the first thing we would have to do would be to determine if the man was a lawyer, and if so the grievance committee would have to sweat it out and maybe start the process then.

Q. Some of us feel that the present rule contemplates that our local committee is not supposed to do anything until the complaint is lodged with it. If that is correct, what is the responsibility of the committee if what appears to be unprofessional conduct comes to its attention but no complaint has been made?

Mr. Roman: I think it is very clear that the committee has the authority to undertake an investigation of any matter that comes to its attention — no matter how it is brought. I don't think you can proceed under the disciplinary procedure until an affidavit is filed, but anyone, including the committee, can file the affidavit.

Mr. Davis: There is one other thing that I am going to ask Mr. Graessle to discuss. How far should a circuit committee go in ferreting out professional misconduct when no affidavit is filed? There must
be some happy medium between inquiring into dark corners and ignoring misconduct unless somebody comes forward with an affidavit.

Mr. Graessle: If it is just rumors and not legal proof it is the duty of the committee to call the lawyer in and have an informal discussion. If there seems to be something wrong, then it should be investigated. There is always the human element to consider, and if a misguided crusader gets on the committee who is always keeping things stirred up, you had best get him off.

Mr. Davis: You mean it is up to the board to get good men on the grievance committees.

Mr. Graessle: The committee is no better than the men who are on it, and the same thing is true all the way up to the Court.

Mr. Davis: Do you agree that if our present system is to operate efficiently it must operate efficiently on the local level?

Mr. Graessle: Yes, it is definitely necessary. We have never had that problem to my knowledge. I think we have had some wonderful committees that have done some fine work, and we have had no criticism except from a few whose cases went to the Supreme Court.

Q. Mr. Sokolsky said last night that in his city there were certain lawyers that everybody in the city knew were allied with crime as lawyers. We may have some cities in Florida where that is the case. If this is known to the local grievance committee should the committee take the matter up and proceed to investigate?

Mr. Graessle: I think that proposition is no different from any other. Certainly if a man is committing a felony and the committee is aware of it he should be checked on. Criminal difficulties, however, must be distinguished from civil.

Q. Have you a procedure in Florida for screening lawyers before they are allowed to study at law school?

Mr. Davis: No, not before they study.

Mr. Drinker: We have had that procedure for twenty-five years in Pennsylvania and it has worked tremendously. It is very hard to get a committee, after a man has been allowed to study law for three years and take his examination, to turn him down because they find something a bit shady. Before a man is allowed to study law he has to pass a character committee, composed of fifteen members. He has to appear before two of these members, and they ask him the story of his life. He has to have a sponsor, a man who is responsible and is known to the committee; and he has to have three other sponsors who vouch for him.
Mr. Roberts: You should explain that under the laws of Pennsylvania a law student must register as such.

Mr. Davis: I am going to ask Mr. Elliott to comment on your questions, and then I want to hear from Mr. S. T. Dell, who is a member of the State Board of Law Examiners.

Mr. Elliott: I think that Judge Roberts and Mr. Drinker brought out the answer, that there are a number of factors involved in the law schools' responsibility. First, there may be a university policy governing admission which does not give the law school the right to go into all these details. Second, the physical burden of conducting an adequate investigation is a problem that would differ among law schools. I know that some schools have quite detailed inquiries and requirements for admission while others do not. It seems to me that the answer lies with the bar examiners and with such requirements as Pennsylvania and California have that a law student register at the beginning of the study of law or before, filling out the appropriate character forms.

Mr. Roberts: I happen to know of one case on the Board of Law Examiners of Philadelphia County. A young boy was recommended by a clergyman, who gave him a fine character reference. The committee, of course, made investigations and discovered that this young man's father several years before had gone through a fraudulent bankruptcy with the boy's knowledge. They called him in and talked it over with him, and he said he thought his father was entitled to do that sort of thing under the circumstances. So they sent for the clergyman that had recommended him and said, "Would you want this boy to come to the bar and represent the people in your congregation?" He said, "I didn't know about this thing, and I withdraw my recommendation." And they persuaded the boy to go into another business. Now that was a case that would have made a bad thing at the bar, but it was caught before it went to the bar.

Mr. Dell: Mr. Davis, I am pleased to report that your State Board of Law Examiners has for the past year been perfecting a procedure whereby an exhaustive questionnaire is being given in the law schools of the State of Florida. If anything is revealed that indicates a man may have a moral block he is called before the board and an investigation is made. We are trying to alleviate the situation of a man's spending three years in law school and then coming before the board on the eve of his graduation to be told that he cannot be admitted. That is being handled by your State Board of Law Examiners at the present time.
Mr. Watts (Chairman, State Board of Law Examiners): May I supplement the remarks of Mr. Dell to this extent, that we have in Florida not only adopted the plan that he has mentioned but we have recognized for some time the point that Mr. Drinker made with regard to applicants coming to us with a diploma under their arms and the burden is placed on us to show them their lack of moral fitness to practice law. This is not only being done in Florida but in other states, and it is my belief that the Pennsylvania system is by far the best that has been formulated. The national conferences and bar associations have spent a great deal of time on this very important subject. There are numerous problems involved, as Dean Elliott has mentioned, with regard to the requirements that the law schools themselves can place, but we do believe that the requirements can stem from the bar examiners and that this is a very pressing subject that should be handled with great force and tact.

Mr. Davis: Then you think that might help with some of our disciplinary problems?

Mr. Watts: Very definitely so. We are very certain that proper and adequate care with regard to admissions will eliminate to a very great extent the problems in discipline.

Q. I believe that one essential feature that has not been mentioned is that each county has its own board of law examiners, so that the applicant who applies for a qualifying certificate to study law has to clear not only the state board but the board of law examiners from the county in which he lives.

Mr. Watts: There is the question of character between the state board and the local board. The state board does not make a statewide investigation but refers the action to the local board. The state board usually adopts the recommendation of the local board, but it is not bound to do so.

Mr. Grassele: You remember at the outset that Mr. Davis told you that in every instance when the Board of Governors receives a report of any grievance committee recommending any action it shall give the accused attorney an opportunity to be heard and to present testimony in evidence. You have heard from the local committees that they have a hearing and a transcript of testimony, at which the attorney is present. So when a serious situation comes before the board the attorney has had a lot of time to think; he will come up with the same witnesses and the board will sit there from four to five hours when it is practically the same thing over. We can't send for the complaining witnesses if they don't have the money to get to where
the meetings are held — and they are held all over the state. So sometimes you hear only one side of the case. It is not right but that is the way the rule is working now, and something should be done about it.

Q. What about a case in which charges are filed against an attorney and he declines to appear before the local grievance committee? He declines to appear before the Board of Governors, and it goes to the referee. Then he comes forward and proves conclusively that there is no professional misconduct. What sort of attitude should he have when charges are filed against him?

Mr. Drinker: I think that the fact that someone has made a complaint against him should cause him to want to appear immediately before whatever body is hearing the matter and say, "What is it and what can I do to get it straightened out?"

Q. We, too, in our circuit have had situations in which lawyers took an antagonistic attitude toward the committee — the committee had no power and they weren't going to have anything to do with it. When the proper time came for them to present their side of the case they would do it.

Mr. Drinker: Of course such an attitude grows more out of ignorance than anything else. Naturally a committee has to establish the guilt of the accused attorney and the probable cause beyond every reasonable doubt. I think there should be something in the Canons of Ethics or the rules of the Supreme Court by which he could be punished for his refusal to co-operate in a matter of vital interest to him and for putting everyone concerned to unnecessary trouble. He should at least be reprimanded. You cannot go ahead and convict him just because he failed to appear, but he should, in my estimation, receive some disciplinary action for his behavior.

Q. If any of you have any recommendations as to the amendment of this rule we would like to have them.

Mr. Davis: The Florida Bar has a special committee, headed by Mr. Bedell of Jacksonville, the purpose of which is to consider a revision of Article XI. The general consensus of the members of this panel seems to be that it is necessary to have some revision of Article XI, though there is some divergence of opinion as to what the changes should be.

Mr. Elliott: May I suggest that any changes in this rule must come with the approval of the Court and with the bar implementing it.

Mr. Davis: This has been a very interesting session, and we thank you all for participating in it.