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Time for a Whupping

Across the country, attorney discipline systems disgrace the profession.

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On the heels of widely publicized ethical abuses by court-appointed guardians and conservators, the D.C. Court of Appeals has begun the process of raising mandatory bar dues by 25 percent to improve the District's badly broken attorney discipline system.

There is no question that an additional $2 million a year will help. But more dollars alone will not cure the burgeoning backlog of cases, end the continual delays, or restore lost public confidence in our ability to hold unethical lawyers accountable. These problems are more deep-seated and demand a more radical response than simply throwing money at the system and hoping for the best.

And the District is not alone. Across the country, attorney discipline systems are failing to protect the public from lawyers who commit malpractice. Plagued by inadequate resources and hamstrung by secrecy requirements, discipline systems yield a tiny trickle of disbarments, suspensions, and reprimands. The resulting public mistrust is a black mark against all in our profession.

Last fall, HALT, a public interest group working to improve access and accountability in the civil justice system, completed a comprehensive evaluation of discipline systems in all 50 states and the District, using data compiled by the American Bar Association and our own state surveys. We then graded states' performances in six key areas: adequacy of discipline imposed, publicity and responsiveness, openness of the process, fairness of disciplinary procedures, public participation, and promptness.

Our report cards confirm a nationwide pattern of toothless sanctions, unnecessary secrecy, biased procedures, and endless delays. Of the 51 jurisdictions, 39 (including D.C. and Maryland) earned a C-minus or lower, 21 (including Virginia) received D's or lower, and Pennsylvania and North Carolina flunked outright.

In state after state, we found that most complaints are not investigated or are dismissed on technicalities. When discipline is imposed, it typically takes the form of a private admonition or closed-door reprimand. In 2000, 114,000 complaints were filed against the nation's 1.2 million lawyers. Of those, only 3.5 percent led to formal discipline, and just 1 percent resulted in disbarment. Four states—Delaware, Nevada, New Hampshire, and Wyoming—did not disbar a single attorney. In 10 other states, only a single attorney was voluntarily disbarred. Is it any wonder then that a 2002 Columbia Law School survey found that more than two-thirds of Americans do not think lawyers are even "somewhat honest"?

With better communication technology, publicity about lawyer discipline services has slowly improved, but many states remain stranded in the dark ages. About half said that they do not publicize their discipline services in the phone directory. And such states as Alaska, Arkansas, Delaware, Kentucky, and North Dakota post no information about their discipline systems on the Internet. Even states with Web sites do not necessarily provide good information. New York, for example, is splintered into six different decentralized agencies. If an individual from Long Island attempts to access information about her local disciplinary agency, she is directed to a site about lawyers licensed in the Hudson Valley.

Attorney discipline proceedings frequently are secret hearings where a panel of lawyers sits as both judge and jury. In every jurisdiction but Iowa, lawyers have a majority voice on these panels. About one-third of states do not provide for any lay participation. In many, injured consumers are forced into silence by gag rules that threaten fines or jail time for talking about a complaint or its outcome. Even states without gag rules often try to restrain speech, urging complainants to keep their grievances confidential.

Justice delayed may be justice denied, but it is par for the course in attorney discipline cases. Even the state that earned our highest grade—Massachusetts with a B-minus—took an average of 681 days to issue formal charges and well over two years to impose discipline. In Washington state, it took one victim 13 years to get an incompetent lawyer suspended.

A SYSTEM IN CRISIS

In the nation's capital, despite the Sisyphean efforts of Bar Counsel Joyce Peters and her staff, the attorney discipline system is a case study in what goes wrong. With inadequate funding and insufficient caseworkers, complaints often languish, as reported in *Legal Times* ("Citing Backlog, Bar Enforcers Push for Funds," Page 1, June 23, 2003). In 2002, for example, only 575 of 1,393 complaints filed actually reached the investigation phase. By year's end, the D.C. Board on Professional Responsibility had decided a scant 82 cases.

Officials openly acknowledge the system's inexcusable sluggishness. Joanne Doddy Fort, chair of the BPR, told *Legal Times* that staffers "are just overloaded at the moment" and that space is so limited that some lawyers in the bar counsel's office have been working in the hallways of the D.C. Court of Appeals.

But the problem is not just one of delays. All too often the discipline system bends over backward to protect attorneys rather than the public.

Consider the case (reported in *The Washington Post*) of an elderly woman duped out of nearly $27,000 by her attorney. Instead of disbarring the man, as bar counsel recommended, the BPR imposed a temporary suspension. As Assistant Bar Counsel Julie Porter stated in her appellate brief, "If clear and convincing evidence that a lawyer engaged in fraudulent and predatory acts directed at an elderly, uneducated and vulnerable client is not enough to place a lawyer's moral fitness to practice law at issue, Bar Counsel is at a loss to understand what would."

Finally, discipline bodies too often are charged with conflicting missions. The mission statement for the D.C. agency requires it to fulfill "a dual function: to protect the public and the courts from unethical conduct by members of the D.C. Bar and to protect members of the D.C. Bar." A system serving two conflicting masters is bound to prove ineffective.

NOWHERE ELSE TO GO

Unfortunately, clients injured by attorney misconduct have few meaningful alternatives. In the District, people cannot sue their lawyers under the D.C. Consumer Protection Procedures Act because 10 years ago the D.C. Court of Appeals held that the act exempts lawyers. Only a handful of states allow consumer fraud suits against lawyers, and those that do limit them to intentional fraud.

Similarly, legal malpractice suits are usually not viable options. Outside the major metropolitan areas, it is almost impossible to find attorneys willing to take these cases; lawyers simply do not want to sue other lawyers. And unlike medical and other malpractice claims, clients victimized by lawyers must prove that absent their attorney's misconduct, they would have won their underlying case—a burden of proof almost impossible to meet.

Client security funds also offer little help. Arbitrary limits and inadequate funding result in many funds that only pay lip service to client protection. Consider California, where the fund will only reimburse a token $35 regardless of the loss. Or Illinois, where the total annual payment for all claims is $100,000—less than $1.35 per attorney. Or the District, which, unlike most other jurisdictions, does not require attorneys to contribute to the fund. Worst of all is New Mexico, where the fund has simply gone bankrupt. Nine other states have hidden all information about their funds, and numerous others offer only incomplete data.

THREE DECADES OF CRITICISM

Unfortunately, these problems are anything but new. In 1970, an ABA blue-ribbon committee, led by then-retired Supreme Court Justice Tom Clark, conducted a thorough review of the nation's attorney discipline system and found a "scandalous situation" that required "immediate attention." Ultimately, the Clark Committee itemized 36 specific defects, including deliberate efforts to discourage any publication of information about disciplinary activities.

Twenty-two years later, a second ABA panel led by New York University Dean Robert McKay, reported that the public has a "growing mistrust" of lawyer discipline." The McKay Commission concluded that the practice of allowing bar officials to control state disciplinary systems was perceived as a gross conflict of interest. The commission memorably criticized attorney discipline as "too slow, too secret, too soft and too self-regulated."

Sadly, little has changed. To correct the entrenched nationwide pattern of laxity, secrecy, bias, and delay, five fundamental reforms are needed.

- More resources, including additional staff and office space, should be provided to relieve a growing backlog of cases. With added funds, discipline systems could publicize their services in additional venues, develop more-informative Web sites, improve complaint forms, and set up procedures that would allow the public to register grievances by telephone.
- Cases should be heard by panels where nonlawyers have a majority voice. Attorneys should serve as expert witnesses and otherwise provide guidance, but they should not preside as judge and jury over their colleagues.
- The discipline system must come out into the open. Private reprimands should be replaced with public discipline. Hearings should be open. And complaints and sanctions should be a matter of public record, available to every citizen.
- Discipline policies should more closely approximate the rules governing the civil justice system. Gag rules should be abolished. If the preponderance of the evidence demonstrates that an attorney has violated the rules of professional conduct, the attorney should be sanctioned.
- The pace of discipline must speed up. Imposing real deadlines—a preliminary hearing within 90 days, for example—would be a giant step toward cutting red tape and creating a system that actually brings justice to victims of misconduct.

With better resources, complaints could be given the attention they deserve. Greater nonlawyer participation would remove the taint of the old boys' network. Expanded openness would begin to restore public confidence. More even-handed procedures would bring much-needed fairness. Deadlines that were enforced would finally stop the endless delays. In sum, these reforms could help replace an abject failure with a system that actually protects consumers.

THE RESISTANCE

Unfortunately, many in the profession resist these changes. Some oppose dues increases, although more revenue is essential. Others claim that nonlawyers are not sufficiently informed about the profession to make disciplinary decisions, despite the fact that jurors with no special expertise regularly decide equally sophisticated questions. Some assert that more open and streamlined procedures could serve to damage the reputation of innocent attorneys—a morally bankrupt approach that protects lawyers first and consumers second, if at all. And still others complain that prompt deadlines give them insufficient time to develop defenses, despite the fact that time limits are routinely enforced in every other administrative and judicial proceeding imaginable.

Remarkably, some opponents of reform seem to believe that by pushing ethics problems under the rug, they somehow protect the broader reputation of the profession. As David Jordan, chair of the New Hampshire Bar Association Public Protection Fund, admitted a few years ago, "[W]e don't tell anyone about the fund. Half the board doesn't want the public to know about the fund because it says that lawyers are crooks."

But all who practice law have a shared interest in creating a discipline system that investigates promptly, deliberates openly, and weeds out unethical or incompetent attorneys. By addressing long-recognized failures, we can create a discipline system that engenders consumer trust and respect, rather than alienation and resentment. After three decades of neglect, can we do less?

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