RECOMMENDATION 7 OF THE ABA COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT: THE CLASSIC LAWYER v. CLIENT CONFRONTATION

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In these times, the two most compelling issues for the organized bar of New Jersey confront lawyers against the general lay public. One, concerning the classic confrontation of lawyer v. client in ethically related matters, gives rise to the other, the bar's consistent anguish over its public image. From my observation point, the case of lawyer v. client—emanating from charges of unethical behavior or steady habits of flagrant unprofessionalism—must be resolved before the bar of New Jersey can hope to repress the impasse of a generally disconcerting image.

This essay is limited to concerns of lawyer ethics and professionalism and how they relate to client expectations and misapprehensions. It deals with a single issue: the extent of confidentiality surrounding the New Jersey procedure that determines whether a lawyer has violated the Rules of Professional Conduct or has otherwise acted irresponsibly or improperly. Moreover, it begs the question of whether a certain code of ethics should be given greater consideration and thereby credibility as a reason for public complaint.

In numerous letters to my office, clients constantly complain about their lawyer's discourtesy, intemperance and impatience. Their most irritating concerns are the inability to obtain straight answers to pressing questions and, most commonly, unreturned phone calls. Obviously, some questions defy the kind of straight answers a client may be seeking. A polite response, however, could often serve as a satisfactory alternative. Yet, complaints that focus on these and similar problems are most often the first to be disregarded by a district ethics committee, simply because they do not violate ethical standards.

Still, these were among the most fundamental questions raised by the American Bar Association's Commission on Evaluation of Disciplinary Enforcement (Trombadore Commission).

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This is the panel that issued a comprehensive report in May, 1991 (Trombadore Report)[1] which recommended twenty-two model reforms of the system that disciplines wayward attorneys. The Trombadore Report generated considerable consternation among all segments of the bar, but by far the most volatile issue was Recommendation No. 7, which stated:

> All records of the lawyer disciplinary agency except the work product of disciplinary counsel should be available to the public from the time of the complainant's initial communication with the agency, unless the complainant or respondent, upon a showing of grounds that would be sufficient in a civil proceeding, obtains a protective order for specific documents or records. All proceedings except adjudicative deliberations should be public.[2]

What followed the release of the Trombadore Report, endorsed unanimously by the Trombadore Commission's seven members, has escalated into the most argumentative subject confronting the nation's bar, as evidenced by the amount of discussion, debate and lobbying during the ABA's midwinter convention in February. In New Jersey, the issue has generated considerable stridence within the bar, partly because the ABA commission chairman was Raymond Trombadore, a Somerville, N.J. attorney who is a past president of the New Jersey State Bar Association.[3] Trombadore spent countless hours during the early 1980's in his role as chairman of the state bar association committee that ultimately helped New Jersey become the first state to adopt the Rules of Professional Conduct that presently guide the ethical behavior of attorneys.

The hostility generated by the Trombadore Report was flamed by the fact that Recommendation No. 7 is diametrically opposed to the public disclosure procedure that has always existed, and continues to prevail, in New Jersey. Not only did this issue arouse the ire of New Jersey's lawyers to the extent that it became the focal point of heated discussions within the state bar association and the twenty-one county bar associations, but it opened the door to full media exposure and, thereby, to public attention and scrutiny. In many instances it invited public participation in the debate. That was prompted in September, 1991 when the New Jersey Supreme

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[1] ABA Comm. on Evaluation of Disciplinary Enforcement, 1991 Report [hereinafter *1991 Report*].

[2] *Id.* at 23.

[3] Trombadore was appointed to the commission when it was founded in February, 1989. He ascended to the chairmanship in June, 1990, upon the death of its original chairman, former New York University Law School Dean Robert McKay.

Court appointed its own ethics commission with responsibility for conducting public hearings on the issue, researching the prevailing system as a preface to any recommendations for reform, and reporting back to the court before the end of 1992.

Immediately after public release of the Trombadore Report, the New Jersey Supreme Court announced it would create its own commission (Supreme Court Commission) to review the matter. Soon afterward, Matthias D. Dileo, president of the state bar association, announced that he would refer the report to his association's Special Committee on Professional Responsibility for study and recommendation.[4] Francis X. Crahay, a retired appellate division judge, chaired this committee (Crahay Committee). But just about the time the Supreme Court Commission was appointed by Chief Justice Robert N. Wilentz[5] in September, 1991, and two months before the Supreme Court Commission conducted its first public hearing, the Crahay Committee released its "Report and Recommendations of the New Jersey State Bar Association Regarding the Report of the ABA Commission on Evaluation of Disciplinary Enforcement" (Crahay Report).[6] The introduction in the Crahay Report noted that the findings of the Crahay Committee had already been reviewed by the state bar association's board of trustees. It commented: "Because of the nature of New Jersey's disciplinary structure, we see no need to 'open' the disciplinary process or to take costly steps which further centralize the review and prosecution of ethics complaints."[7]

The Crahay Report made it abundantly clear that the New Jersey State Bar Association would accept no compromise of disclosure in the disciplinary process, much less a recommendation to remove all confidentiality from the system. According to the Crahay Report: "[T]he [Trombadore] [C]ommission says that it is 'convinced that the secrecy in disciplinary proceedings continues to be the greatest single source of public distrust of lawyer disciplinary systems.' There is no meaningful supporting data to support the asserted 'conviction.' "[8] The Crahay Report cited an ABA report prepared by a commission chaired by the onetime Associate Justice

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[4] Herb Jaffe, *New Law Chief Aims at Brighter Lawyer Image*, THE STAR-LEDGER, June 9, 1991, A25, col.1.

[5] *Id.*

[6] *Report & Recommendations of the New Jersey State Bar Association Regarding the Report of the ABA Commission on Evaluation of Disciplinary Enforcement* (Sept. 1991) [hereinafter *Crahay Report*].

[7] *Id.* at 1.

[8] *Id.* at 7.

of the Supreme Court of the United States, Tom C. Clark (Clark Report).[9] The Clark Report, released in 1970, castigated the bar for the epidemic of unethical actions that were commonplace in all states. It offered recommendations that led to major reforms of the disciplinary procedures throughout the country. It retained, however, the belief that full confidentiality was required.[10]

In 1979, the ABA House of Delegates adopted a model procedure that removed confidentiality once there was evidence of probable cause that the complaint had merit.[11] That would occur after a preliminary investigation and hearing produced sufficient reason to carry the complaint further. That reasoning is now employed in thirty states. Three others—Oregon, Florida and West Virginia—have implemented forms of full disclosure, similar to the positions in Recommendation No. 7.[12] New Jersey remains among the minority of states that anxiously holds to the dark ages. Under Rule 1:20-10, Discipline of Members of the Bar, on confidentiality:[13]

> (a) Generally. All proceedings conducted and records made pursuant to R. 1:20 shall be confidential and shall not be disclosed to or attended by anyone except as authorized by these rules or as provided by the Supreme Court and as follows:
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> (1) On the scheduling of oral argument for final discipline by the Supreme Court, in which event the recommendation of the board that is the subject thereof, together with any briefs filed pursuant to an order of the Court, shall be made public; or
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> (2) At the request of or with the consent of the respondent and upon the ultimate determination of any disciplinary proceeding; or
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> (3) On the entry of final orders of the Supreme Court in respect of disciplinary matters; or
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> (4) Upon the order of the Supreme Court.[14]

The Crahay Report, and its approval by the state bar association's board of trustees, did not recognize that the ABA policy vote by the House of Delegates in 1979 superseded the antiquated posi-

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9 A.B.A. Special Committee on Evaluation of Disciplinary Enforcement, 1970 Report [hereinafter *Clark Report*].

10 *Id.* at 138-42.

11 A.B.A. MODEL RULES FOR LAWYER DISCIPLINE AND DISCIPLINARY PROCEEDINGS Rule 16 cmt. (1979).

12 For a full discussion of the Oregon, Florida and West Virginia approaches, see *1991 Report, supra* note 1, at 23-26.

13 N.J. CT. RULE 1:20-10 (1991).

14 *Id.*

tion New Jersey took following the revelations of the Clark Commission in 1970. The state bar said: "The Clark Commission [R]eport fully explored this issue [non-disclosure of accusations] and came down squarely on the side of maintaining the confidentiality of disciplinary records. . . . The [New Jersey State Bar Association] believes that the reasoning of the Clark Commission [R]eport remains sound and viable to this date and that nothing in the [Trombadore Report] persuades to the contrary."[15]

The diametrically opposite viewpoints of Crahay and Trombadore were exchanged during a public dialogue at the New Jersey Law Center, at which time the views of the state bar association were made public.[16] Crahay defended the association's position, a defense that subsequently was challenged by scores of individuals in testimony before the Supreme Court Ethics Commission[17] and in a letter-writing campaign to The Star-Ledger from persons throughout the state. According to Crahay:

> The system is a good one. We have [lay people] on every level [of our discipline system]. I have worked in those committees, representing attorneys. I have served with lay people . . . on a Supreme Court committee which had disciplinary functions. I have never once heard anyone suggest that there was cronyism, or the good-boy or good-girl buddy system. Not once. There is no need for this extreme proposal. . . .
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> But you ask the man on the street . . . "What's wrong with the legal profession?" They usually tell you two things: "They charge too much and they don't return phone calls." I've asked around and I have not had one person say to me, "the confidentiality of your disciplinary system is disturbing." There is just not a public need, and the harm that comes is far, far greater.[18]

Trombadore disagreed with Crahay's position and stated:

> Can we as a profession responsible to a public continue to maintain a system of lawyer discipline and expect the public to trust that system, to respect the integrity of that system, when we are not prepared to let the public see how that system operates and understand its integrity and its fairness? To me, that's the issue.

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15 *Crahay Report*, *supra* note 6, at 8-9.

16 Media/Bench/Bar Dialogue, *Public Access to Complaints Against Lawyers*, New Jersey Law Center [hereinafter *Dialogue*] (Oct. 24, 1991).

17 The New Jersey Supreme Court Ethics Commission conducted public hearings on Recommendation No. 7 on November 21, 1991, December 11, 1991, January 15, 1992, and February 6, 1992.

18 *Dialogue*, *supra* note 16, at 19.

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> Until 1970, practically every disciplinary system in the United States was a secret system. Totally confidential. Only the results were made public and then in ninety percent of the cases you didn't know what happened, because you didn't get any results, because ninety percent of the cases were, and still are, dismissed and are never made public. Of over 100,000 complaints filed in the United States in 1989, over 85,000 were dismissed and never made public.
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> So we've have had this tremendous history of confidentiality and secrecy in lawyer regulation, in the way we regulate the conduct of lawyers. That has come under a great deal of scrutiny. The report of the New Jersey State Bar Association [Crahay Report] says people in New Jersey like the way we operate; they're happy with the way we operate. I've read in at least one publication here in New Jersey that the only people who seem to think people in New Jersey are dissatisfied are Ray Trombadore and the members of his ABA commission.
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> That commission spent two and a half years studying lawyer discipline in this country, and I have spent thirty years operating in lawyer discipline in this state. We concluded that in spite of tremendous progress made since 1970, lawyer disciplinary systems by and large are not trusted by the public, not respected. [Attorney discipline systems are] [s]till treated as being infected with inherent conflict because they are self-regulating. [Attorney discipline systems are] [s]till grossly disrespected because they operate so slowly and so secretly and are so soft on lawyers, when you're all done.[19]

As an after-thought, Trombadore added: "[T]hree years after I [complained about a lawyer] to the secretary of a committee, I was told that a private reprimand was issued. I can't even talk about it, it's still secret. And it took three years to get a slap on the wrist for that lawyer."[20]

Under a private reprimand, the lawyer receives a written, non-public discipline for what is generally believed to be a minor ethical infraction.[21] Because it is private, however, no one knows for certain what happens to the lawyer and what he or she did to warrant the reprimand. During one of the public hearings conducted by the New Jersey Supreme Court Ethics Commission, the following collo-

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19 *Id.* at 15.

20 *Id.*

21 *State of the Attorney Disciplinary System Report* (1990) (prepared by the Office of Attorney Ethics, New Jersey Supreme Court).

quy unfolded:[22]

Morristown attorney Thomas Chesson, secretary of the District Ethics Committee for Morris and Sussex counties, stated: "If you open up the process, you are using up the method of private reprimands. You're losing that as a form of attorney punishment."[23]

United States Third Circuit Court of Appeals Judge Robert E. Cowen, however, countered: "Why should there be such an animal as a private reprimand?"[24] Cowen, a member of the Supreme Court Ethics Commission, went on to say to Chesson, who appeared before the commission as a witness: "If even the complainant doesn't know there has been a private reprimand, does that make sense to you?"[25]

The entire posture of confidentiality waves a red flag, in almost every dimension of a free society, especially to the media whose very premise is the freedom afforded under the First Amendment. Client witnesses appearing before the Supreme Court Commission have expressed their objections to being exposed to contempt if they dare publicly discuss their complaint of lawyer misbehavior. One argument commonly raised is that ethics committees often do not notify complainants of the findings, especially if the lawyer is privately reprimanded.

In March, 1990, a United States District Court in Florida overturned the state's rule that prohibited anyone who filed charges of unethical behavior against lawyers from speaking freely about their complaints. The court declared the rule unconstitutional.[26] The Florida case involved a private reprimand of a lawyer. The bar had advised the complainant that even though the charge he filed was truthful, it was "confidential and that any violation of confidentiality would be punished by contempt."[27] The plaintiff argued that the confidentiality rule violated the free speech clause of the First Amendment.[28] The court, noting that the rule served to inhibit complaints, commented: "Why a complainant would be more inclined to file a grievance against his lawyer, with the knowledge that he is thereby forever barred form speaking publicly about the griev-

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22 Hearings of the New Jersey Supreme Court Ethics Commission, Elizabeth, N.J. (Jan. 15, 1992).

23 *Id.*

24 *Id.*

25 *Id.*

26 Doe v. Supreme Court of Florida, 734 F. Supp. 981 (S.D. Fla. 1990).

27 *Id.* at 982.

28 *Id.* at 984.

ance, is unclear."[29]

The court concluded: "The idea that the suppression of truthful criticism of lawyers would somehow enhance or protect the reputation of the bar is not persuasive. To the contrary, continuing the prohibitory effect of the rule after a grievance against an attorney is found to be meritorious is far more likely to engender suspicion than foster confidence."[30] It added that the rule "is not narrowly tailored to meet the specific interest it is said to serve. Rather, it broadly stifles speech when the ends it purports to achieve can be met by more narrow means. So broad an encroachment upon First Amendment freedoms cannot stand."[31] Instead of appealing the decision, the defendants—the Florida Supreme Court and the Florida State Bar Association—amended the disciplinary rules to conform to the decision.[32]

On February 4, the ABA House of Delegates soundly defeated Recommendation No. 7, although it approved twenty of the twenty-two recommendations in the Trombadore Report. One other provision was voluntarily removed. The result of the defeat of Recommendation No. 7 reverted ABA policy to the position the House of Delegates adopted in 1979: no disclosure of a complaint until the ethics committee to which the complaint has been filed can determine whether there is probable cause.

In the meantime, the state bar association had prepared a statement to be read on the house floor by one of its delegates, Michael Prigoff. The overwhelming defeat of Recommendation No. 7 made it unnecessary to present the statement, which would have encouraged a return to the 1970 position and full confidentiality. "Nothing we have seen in the report of the Trombadore [C]ommission suggests that the conclusions of the Clark [C]ommission in 1970 relative to this issue have changed," the statement said.[33]

The Supreme Court Ethics Commission, however, has not been influenced by either the outcome of the House of Delegates vote or the reactionary position of the state bar association. It will either stay with the existing system, recommend the 1979 ABA position of disclosure upon probable cause, or suggest full disclosure similar to Recommendation No. 7.

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29 *Id.* at 985.

30 *Id.* at 988.

31 *Id.*

32 *See* 35 FLA. STAT. ANN. § 3-7.1(d) (West 1992).

33 Remarks in Opposition to Recommendation No. 7 (1992) (unpublished manuscript) (prepared by N.J. State Bar Association delegates to ABA).