Disciplinary Enforcement Problems and Recommendations: An Indiana Survey

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DISCIPLINARY ENFORCEMENT PROBLEMS AND RECOMMENDATIONS: AN INDIANA SURVEY

In August, 1970, the House of Delegates of the American Bar Association\(^\text{1}\) unanimously approved the final draft of a report which recommended extensive reforms in disciplinary structures and procedure at both state and local levels.\(^\text{2}\) The ABA created the Special Committee on Evaluation of Disciplinary Enforcement in February, 1967, to study the prevalent problems in enforcement of legal discipline.\(^\text{3}\) The Committee’s subsequent investigations and report have stimulated interest in many jurisdictions, several of which have either begun or already instituted reorganization of their disciplinary mechanisms.\(^\text{4}\) This note

\(\text{1. Hereinafter cited as ABA.}\
\(\text{2. ABA AMERICAN BAR NEWS, Sept. 1970, at 1.}\
\(\text{3. ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT xiii (Final Draft, June, 1970) [hereinafter cited as ABA SPECIAL COMM.].}\
\(\text{4. The third Judicial District in New York has restructured and centralized its disciplinary process. The New York State Bar Association won the American Bar Association’s Award of Merit in 1969 for its cooperation in the project. Kentucky and Florida have also recently adopted new disciplinary rules. ABA SPECIAL COMM. at 192.}\

Information concerning existing disciplinary practices was gathered through questionnaires distributed throughout the United States and regional hearings where open discussions were held between judges and attorneys. The report discusses 36 prevalent problems in disciplinary enforcement which are separated into four categories: financing, structure, and staff; practice and procedure; interagency relations; and ancillary problems which are not strictly disciplinary in scope.

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To provide assistance in evaluating local practice and procedure the Committee has made the services of its Reporter available to authorized disciplinary authorities from both state and local agencies. Committees from Utah, Illinois, Ohio, Pennsylvania, and Michigan are among those who have already sought to take advantage of the collective knowledge and experience accumulated by the Committee from agencies around the country. Id.

Reforms are overdue in light of the fact that, historically, discipline within the profession has been regarded by those subject to it with attitudes ranging from apathy to open hostility. Tinkham, Admissions to the Bar in Indiana: A Critical History and Analysis, 4 IND. L. J. 464 (1929). Those who have studied attorney discipline find it a scandalous, “foul situation.” Clark, Address to Nebraska State Bar Association, 47 NEB. L. REV. 359, 369 (1967). There are instances reported which deserve such epitaphs. In one case, an attorney killed his wife while intoxicated. He received a ten-year manslaughter sentence and was disbarred in his home state. Since his disbarment he has practiced in three other states although the original disbarment is still in effect.
ENFORCEMENT PROBLEMS

will analyze the specific disciplinary enforcement problems upon which the Committee based its recommendations and determine the extent to which they exist in Indiana. The feasibility of implementing the proposed solutions also requires evaluation; but first, to facilitate such an analysis, a brief survey of Indiana’s structure and its evolution is necessary.

Requirements for admission to the bar were not included in the 1816 Constitution of Indiana; thus, the opportunity to prescribe requirements passed to the legislature. In 1851 the legislature, in what has been called an inept gesture of “a democracy gone mad,” amended the Constitution to entitle every “voter” of “good moral character” admission to practice law. As of 1926, certification to practice law in all courts of the state could be made by any court of record. This

The state of disciplinary enforcement has not suddenly deteriorated in the past few months. Authorities agree that the handling of grievances against attorneys “has been a perplexing problem for many years.” Bomberger, Res Gestae Apr. 1970, at 13. There is even evidence that at Indiana’s Constitutional Convention in 1850 “law and lawyers were in disfavor with the people.” Note, Admission to the Bar as Provided for in the Indiana Constitutional Convention of 1850-1851, 1 Ind. L. J. 209, 210 (1926). Dissatisfaction with lawyers did not originate in 19th century Indiana, however; even Shakespeare was moved to implore his readers “the first thing we do, let’s kill all the lawyers.”

Attorney discipline fortunately is not as vindictive as Shakespeare might have had it, however. The most commonly espoused reasons for strictly governing an attorney’s conduct are not to punish the attorney but to guard the administration of justice, preserve the purity of the courts, protect the public and safeguard the integrity of the profession. Note, Legal Profession—Resignation from the Bar Under Charges, 26 Mo. L. Rev. 90 (1961). The Committee voices primarily the same sentiments and adds a cautionary note by quoting from a state bar association ethics committee. “A good and decent profession has a headache that cries out for fast relief. We have been put on notice repeatedly. We will compound our own cure or someone will mix up a dose which will curl our hair.” ABA SPECIAL COMM., at 9.

5. Tinkham, supra note 4, at 464.
6. Id.
7. Id. at 465. The author found it especially difficult to reconcile Indiana’s absence of restraint on eligibility to practice with the fact that 122 years earlier England “had deemed the preparation for the practice of law so necessarily arduous and labyrinthine that they had required five years of clerkship as a prerequisite.” Id. Indiana was not alone, however, in what appears to have been a nation-wide “moral let down.” In 1860 only nine of the 39 states required legal training. Indiana was a bit more reluctant than most of the other 38 states to get on with a “moral renaissance,” however. It was not until 1935, after six attempts to amend the constitution through public referendum on this point that requirements were finally imposed. Id. at 465, 466. See Comment, In Re Todd and Constitutional Amendment, 10 Ind. L.J. 510 (1935) for a more detailed treatment concerning the amendment.
8. IND. CONST. art. 7, § 21.
9. Law of April 7, 1881, ch. XXXVIII, § 832 [1881] IND. ACTS (repealed
procedure was abolished in 1931 when the legislature passed an act granting the supreme court exclusive jurisdiction to admit attorneys.\textsuperscript{10}

Six years later, the legislature passed two statutes which arguably created a conflict of jurisdiction in disbarment proceedings. Chapter 88, Acts of 1937 gave the circuit and superior courts the power to disbar attorneys residing in their counties for certain specified offenses.\textsuperscript{11} Chapter 91, Acts of 1937 authorized the supreme court to adopt, amend and rescind rules governing practice and procedure in the state courts.\textsuperscript{12} The Indiana Supreme Court was called upon to define the boundaries of its jurisdiction and that of the circuit courts as provided in these acts in \textit{Beamer v. Waddel}.\textsuperscript{13} In this case, an action seeking disbarment originated in the supreme court. The defendant contended that the circuit court of his county had been given exclusive jurisdiction by Chapter 88 of the Acts of 1937. The court resolved the ambiguity by ruling that Chapter 88 when considered \textit{in pari materia} with Chapter 91 merely provides concurrent jurisdiction over disbarment proceedings.\textsuperscript{14}

Approximately six months later, the holding in \textit{Beamer} was expressly codified in rule 3-21 which provided that original actions to disbar may be brought before the supreme court.\textsuperscript{15} A 1965 amendment to the rule provided: "This court shall have exclusive jurisdiction of original actions to disbar . . . ."\textsuperscript{16} Thus, from 1965 to date, the supreme court has had exclusive jurisdiction to admit or disbar attorneys. The manner in which the supreme court has exercised this jurisdiction to discipline and disbar will be examined in conjunction with the Committee report.

\begin{center}
\textbf{FINANCING STRUCTURE AND STAFF}
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Many of the thirty-six problems the Committee found most common

\begin{itemize}
\item \textsuperscript{10} \textit{See} Lane v. Campbell, 214 Ind. 376, 14 N.E.2d 552 (1938) for judicial interpretation.
\item \textsuperscript{11} \textit{Ind. Ann. Stat.} § 4-7405 (Burns Repl. 1968). The statute states: The Supreme Court of this state shall have exclusive jurisdiction to admit attorneys to practice law in all courts of the state and exclusive jurisdiction to issue restraining orders and injunctions in all cases involving unauthorized practice of law under such rules and regulations as it may prescribe.
\item \textsuperscript{13} \textit{Ind. Ann. Stat.} § 2-4718 (Burns Repl. 1968).
\item \textsuperscript{14} 221 Ind. 232, 45 N.E.2d 1020 (1943).
\item \textsuperscript{15} 45 N.E.2d at 1022.
\item \textsuperscript{16} \textit{Id.} Rules 3-1 to 3-26 have been superseded by the new \textit{Indiana Rules of Procedure}, rules A.D. 1—A.D. 28 (Burns Special Supp. 1970) [hereinafter cited as \textit{Ind. Rules}]. Rule 3-21 is now rule A.D. 23. Only the number of rule 3-21 was changed and not its content as was the case with most rules from 3-1 to 3-26.
\end{itemize}
such as reluctance by local agencies to proceed against prominent lawyers or firms,\textsuperscript{17} substantial lack of uniformity in discipline imposed by different local grievance committees,\textsuperscript{18} lack of intrastate cooperation, lack of adequate staffing and financing,\textsuperscript{19} especially in the smaller county bar associations, and lack of accurate and accessible statewide records,\textsuperscript{20} have their origin in an overly-decentralized disciplinary structure consisting of autonomous county bar agencies. The essence of the problem is the lack of a centralized authority to control and coordinate all phases of disciplinary proceedings. Indiana's system suffers the same inadequacy. The state has a non-integrated bar\textsuperscript{21} in which membership in any local or statewide bar association is voluntary and the various associations are independent of each other. There is no authority that can be exercised to assure uniformity in their disciplinary or grievance, procedures.\textsuperscript{22}

\textsuperscript{17} See note 100 infra.

\textsuperscript{18} According to their own criteria local Indiana bars utilize four alternative sanctions: private censure, public censure, suspension from membership, or referral to the disciplinary commission of the supreme court. See Indianapolis Bar Association, Manual of Procedure as to Grievances, April, 1963, pt. C, §§ 1-4 [hereinafter cited as IBA MANUAL]. The most severe punishment a local bar can impose is denial of membership to the misbehaving attorney. However, it is through their preliminary investigation and potential referral of the matter to the supreme court's disciplinary commission that the offending attorney eventually may be disbarred. See notes 21-22 infra.

\textsuperscript{19} ... the most ... significant problem in disciplinary enforcement.” ABA Special Comm. at 19.

\textsuperscript{20} Id. at 24-29.

\textsuperscript{21} A distinction must be drawn between admission to the bar in Indiana and membership in a bar association. An integrated bar is created by legislative act or court rule or both. This serves the purpose of establishing a quasi-governmental agency which requires all attorneys admitted to the bar in the state to join and pay dues as a condition to the privilege of practicing law. Winters, Integration of the Bar—You Can't Lose, 39 J. Am. Jud. Soc'y 141, 144 (1956); Bomberger, Some Problems of the Indiana Bar, 13 Ind. L.J. 266 (1938).

In Indiana, the supreme court has since 1931 promulgated several rules governing admission to the bar including mandatory registration of name, office and residence. See Ind. Rules A.D. 2. However such registration does not mean that an attorney is a member of any bar association. As a result it is estimated that at least "800 plus" attorneys practicing in the state do not belong to the Indiana State Bar Association. Buchanan, Ex Parts Line, Res Gestae, Sept. 1969, at 15. Membership in city or county bars is also voluntary. These local bars may remain completely detached from the Indiana State Bar Association while processing a complaint under rules formulated by their own governing boards. IBA MANUAL, pt. A, §§ 1-4. See note 22 infra.

\textsuperscript{22} The chairman of the supreme court's disciplinary commission described the interrelationship of his commission and the local bars as follows:

"Looking beyond the Commission, it may be noted that there exists the Indiana State Bar Association, various county bar associations and various city and town bar associations. None of these is integrated. As a result of their own sense of professional responsibility, they have grievance committees and they are by their own constitutions authorized to engage in efforts to police the profession. As a matter of comity, they typically forward matters to the Disciplinary Commission and in this sense, the Commission is the ultimate power in matters of professional discipline, short of the Supreme Court itself."
When complaints are initially processed at the local disciplinary agency level, and referred to the statewide disciplinary commission only if the local agency concludes that such action is warranted, the matter is subject to the potential consequences of close professional, personal and political relationships between the accused attorney and the members of the local agency. Moreover, a system that permits local agencies to initially investigate and dispose of complaints hampers uniform discipline since local criteria will inevitably be used.

A complaint referred beyond the local level is handled by the state disciplinary commission which was established to investigate complaints, conduct informal hearings to determine whether there is probable cause of professional misconduct, report its recommendations to the supreme court, and in applicable cases file an "information" with the court to initiate disciplinary proceedings. Upon the filing of an information, usually, but not invariably, the Commission involves itself in a matter only after bar association procedures have occurred. This is because of the volume of work and the absence of a professional staff and because the Commission needs the local fact finding by the bar association in question in order to determine whether a matter deserves Commission attention.

Nolan, Some Observations About Disciplinary Proceedings: A Report (unpublished), delivered at regional hearing of ABA Special Comm. March 1968, at 2 [hereinafter cited as Nolan, Observations]. Such reliance on local associations is not always possible in a non-integrated bar according to one member of the Board of Governors of the Oregon Bar, speaking shortly after integration. Jaureguy, The History of Disciplinary Matters Before the Oregon State Bar, 3 Ore. St. B. Bull. 9 (1937). The Board found that non-integration resulted in disorganization, lack of facilities in remote areas, reluctance on the part of local grievance committees to prosecute, difficulty in even locating local grievance authorities, lack of financing for the local committees and therefore inadequate investigation. As a result of these inherent problems in the non-integrated structure "cases were not prosecuted, guilty attorneys were not disbarred, innocent attorneys were not vindicated." Id. at 10. The many other advantages of bar integration, which do not pertain directly to disciplinary proceedings, are beyond the scope of this paper. See Winters, Integration of the Bar—You Can't Lose, 39 J. Am. Jud. Soc'y 141 (1956). But see Buchanan, Ex Parte, RES GESTAE, Sept. 1969, at 14. The only way integration of the bar could be disadvantageous to disciplinary enforcement would be if it were inseparably linked with recommendations for improvement of the disciplinary structure and both were rejected because of a strong aversion to integration. Perhaps this is why the Committee is careful to explain that even though integration may greatly facilitate centralization, it is not absolutely essential. ABA SPECIAL COMM. at 29.

23. See note 100 infra.
24. ABA SPECIAL COMM. at 27.
25. An information is "a plain statement of the facts which constitute the grounds of the proceeding, addressed to the court." IND. ANN. STAT. § 3-2004 (Burns Repl. 1968).
26. IND. RULES A.D. 23. This rule requires that in every case the disciplinary commission is to file a written determination of each complaint with the supreme court. In practice a report is not always made to the supreme court when the commission does not recommend further proceedings or has dismissed the matter themselves because they found no substantial issue was raised. A record of all determinations made by the commission is kept, however, by the chairman, to be utilized in the event of an attorney's
notice is issued to the defendant as in civil actions and the court, by majority vote, assigns the case to one of its members. The judge rules on all procedural questions, conducts a pre-trial conference if necessary, hears the evidence and makes a determination with respect thereto. The elected judge may, at his discretion, refer the matter to a commissioner for the purpose of hearing such evidence. The judge must report the findings and recommendations to the court, which, upon review of the record and oral arguments, if permitted, enters its judgment. The supreme court and the disciplinary commission add an element of cohesiveness to Indiana's structure. However, the chairman of the state commission has reported that his organization suffers many of the same problems which hamper local agencies. These include lack of funds, inadequate personnel, unsystematized filing and records, and an absence of continuity in membership.

The Committee suggests that the problems shared by the disciplinary commission and the local agencies can be solved by centralizing the

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In addition, 27 of the pending complaints are still in the State Bar Association's open files awaiting action by the Disciplinary Commission regarding 7 different attorneys. Also, 66 inquiries were received which were never developed into formal complaints.

_id. at 2-3. Given the autonomy of local bar associations, it is impossible to determine what percentage of the total proceedings carried on by all state disciplinary agencies is represented in the report. See notes 21-22 supra.

27. _Ind. Rules A.D. 24._
28. _Ind. Rules A.D. 26._
29. _Id._
30. _Ind. Rules A.D. 27._
structure and carrying that centralization down to the "widest feasible level." In the "ideal" structure exclusive disciplinary jurisdiction is vested in the state's highest court and a single disciplinary agency is established with members distributed throughout the state. Centralization would also include a full-time professional staff to whom all matters are submitted initially for investigation. This professional staff would be responsible for prosecuting or assisting in the prosecution of a complaint at every level of the structure until its final disposition.

After an investigation has been conducted, matters which cannot be resolved by dismissal or administrative warning are referred to an inquiry committee for hearing, where they may be dismissed, terminated by admonition or referred to a formal hearing committee. At the conclusion of the formal hearing, the record, along with findings of fact and recommendations, are sent to the governing board of the state bar or of the state bar association, or to a statewide disciplinary board. The reviewing board approves or modifies the earlier findings and files its proceedings with the state's highest court. The court then makes final determination of the matter on the basis of the record compiled by the formal hearing committee and the briefs and oral arguments of the parties.

Indiana's disciplinary structure is comparable to the Committee's proposed system to the extent that the supreme court has exclusive jurisdiction over disciplinary matters and in so far as a board has been established. However, all similarity ends here because Indiana's efforts to centralize do not include provisions standardizing procedures at

32. ABA Special Comm. at 28.
33. Id. at xiv.
34. Id. at xiv-xvi.
35. Id.
36. Whether the materials are sent to the governing board of the state bar or of the state bar association depends on whether the bar of the state is integrated. See notes 21-22 supra.
37. In jurisdictions with a sufficiently small lawyer population, this board could conduct the formal hearing itself and file its findings with the court which would eliminate one of the procedural stages. ABA Special Comm. at xv.
38. ABA Special Comm. at xiv-xv. As another step toward greater centralization, the Committee advocates establishing a permanent, professionally staffed National Conference on Disciplinary Enforcement. Its duties would be to assist state and local disciplinary agencies in evaluating their enforcement practices and help tailor specific improvements to fit the needs of a particular jurisdiction. The National Conference would also maintain the National Disciplinary Data Bank which the Committee considered so important it submitted an interim report to the ABA House of Delegates summarizing the problem and recommending the Bank's prompt establishment. Id. at 159-60. The House of Delegates authorized the establishment of the Data Bank which is now functioning. They also approved the creation of the National Conference, which has since been established. ABA News, Sept. 1970.
Inordinate delay is a problem of enforcement which can result from an overly cumbersome structure and the absence of efficient procedures. Indiana is susceptible to this problem at all levels of its structure:

By the time the Grievence Committee has investigated the facts, held informal hearings, made a recommendation to the governing body of the local association who then refers the matter to the Disciplinary Commission for action by the Supreme Court years have elapsed. Meanwhile, the association must stand idly by wringing its hands while some bad apple whose case is going through this process continues his misdeeds on an unsuspecting public.39

A case which illustrates that delays continue even beyond the local level in Indiana is In Re Holovachka.40 Holovachka was convicted in 1963 and sentenced to three years for tax evasion committed while he had been a deputy prosecutor of Lake County. Petition for leave to bring an original action for disbarment was filed by the Northwest Indiana Crime Corporation, a non-profit corporation, in May of 1962.41 In June leave was granted and the proceedings were initiated, whereupon the court found Holovachka guilty of moral decay, general depravity, and numerous occasions of abuse of the public through corruption of his office. Even though Indiana prohibits dilatory motions in disciplinary proceedings, Holovachka was not finally disbarred until May, 1964: two years after the matter was first brought to the supreme court level.

This upper level delay can be attributed to many factors. First, there is no provision in the rules giving disciplinary matters priority in scheduling. Second, although dilatory motions are not permitted during

39. Buchanan, Ex Parte Line, RES GESTAE, Dec. 1968, at 12. Most local associations follow substantially the procedure mentioned. See generally IBA Manual, pt. C, § 4. Most smaller bars have no manuals and several indicated that when a matter arises in their area they refer it to a district grievance committee of the state bar association.
40. In re Holovachka, 245 Ind. 483, 198 N.E.2d 381 (1964), cert. denied, 379 U.S. 974 (1965). Other cases which indicate the possible lapse of time once a case reaches the supreme court level are In re Hosea, 245 Ind. 680, 201 N.E.2d 560 (1964) where two years and four months elapsed between the filing of the information and final disposition, and Nolan v. Forste, 247 N.E.2d 60 (1969) where four years and seven months elapsed.
41. Ind. Rules A.D. 23 states, in part, as follows:
This court shall have exclusive jurisdiction of original actions to disbar, suspend or otherwise discipline members of the bar of this state. Such proceedings may be instituted in this court without leave by the attorney general of Indiana or a disciplinary commission appointed by this court. No other person may commence such a proceeding without leave of court first obtained. . . .
the hearing before the commissioner, there may be a considerable lapse of time after the disciplinary commission files an information and before the court refers it to a commissioner. Finally, even after proceedings are commenced, it is possible that there may be an investigation, two hearings, one pre-trial conference, and a final “original” review by the court before determination, which is open to petition for rehearing. When combined with the years that may elapse at the local level, where essentially the same steps have been taken, the progress of the proceedings appears infuriatingly slow to the layman who filed the complaint.

The Committee contends that this delay can be avoided by establishing court rules giving disciplinary cases priority in scheduling and setting firm dates for hearings. It also suggests avoiding the repetitive investigative stages that now cause the transfer of complaints from one disciplinary agency to another, by centralizing the structure. They maintain that one investigation, if properly conducted, would be enough. In their ideal system a permanent professional staff does the investigating. In view of the fact that the staff would be supervised by the disciplinary commission they would be well-informed as to what was essential in compiling an adequate record. Without such a staff, investigations would be conducted by practicing attorneys on a volunteer basis. Delay would therefore result since the volunteer’s primary obligation is to his clients.

Other difficulties with reliance on volunteers are lack of expertise in disciplinary matters and, in all probability, inadequate record keeping. Without records of all complaints filed, the attorney who is never guilty of serious misconduct but continually commits minor infractions may never be effectively sanctioned. Even with these deficiencies, the Committee does not recommend that volunteers be removed from the process completely. There is great value in retaining volunteers but lightening their work load so as to allow sufficient time for them to evaluate cases developed by the staff: a task that should be left to

42. See note 40 supra.
43. The court is not bound by the findings of the commissioner nor limited in its review of the evidence as on appeal. In re Pawlowski, 240 Ind. 412, 165 N.E.2d 595 (1960).
45. ABA Special Comm. at 30-31.
46. See note 35 supra and accompanying text.
47. The Chairman of Indiana's Disciplinary Commission indicated that his "fiduciary obligation to his clients" allowed only an inadequate portion of his time to be dedicated to "Disciplinary Commission days," and even then, in addition to acting as chairman of the commission, he had to function as its clerk. Nolan, Interview.
48. ABA Special Comm. at 49-55.
49. Id.
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practicing lawyers fully conversant with the problems of day-to-day practice. The creation of a centralized professional staff under the supervision of the disciplinary commission could also help to solve the problem of inadequate funding for investigation. Local bar associations, since they have very few members, typically have limited resources. With a centralized professional staff there is the possibility of the legislature appropriating funds for it directly, or perhaps part of the appropriation allotted to the supreme court could be budgeted for the staff.\

PRACTICE AND PROCEDURE

The Committee advanced the proposition that the manner in which investigation of an attorney is initiated is a controlling factor in the effectiveness of the profession's disciplinary enforcement. For instance, most state disciplinary agencies rely upon individuals to file a specific complaint rather than actively seeking to discover attorney misconduct. Such reliance will never uncover professional misconduct which results from collusion or conspiracy between the attorney and client. In Indiana some local agencies may, according their own rules, institute investigation without a written complaint, and the supreme court, in one case, ordered its own disciplinary commission to do likewise.

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50. The Committee does not recommend that the costs of investigative proceedings be assessed against respondent attorneys. They reasoned that making the costs a condition precedent to filing a motion for reinstatement would place an unreasonable premium on the disciplined attorney's financial ability. ABA Special Comm. at 23. Funds for the Indiana Disciplinary Commission currently come out of the supreme court's budget. Nolan, Observations at 3. The amount would have to be substantially increased to support a professional staff.

51. Requiring written complaints is undesirable because an aggrieved party may have no confidence in his ability to adequately state his complaint or fear some form of reprisal if he submits anything in writing. ABA Special Comm. at 73.

52. The Committee felt that responsibility for disciplinary enforcement falls upon the bar itself, therefore, its standards of conduct must be maintained by the profession, not policed by sporadic complaints from laymen. Id. at 61; Accord People ex rel. Karlin v. Culin, 248 N.Y. 465, 480, 162 N.E. 487, 493 (1928). "If the house is to be cleaned, it is for those who occupy and govern it rather than strangers, to do the noisome work." Id.

53. ABA Special Comm. at 89.


The chairman of any committee on grievances may also receive a grievance charge orally and without being subscribed when, in his discretion, such course is justified. Oral charges and grievances should, however, be the exception to the general rule that grievances should be in writing and in the form set out above.

55. Beamer v. Waddel, 221 Ind. 232, 45 N.E.2d 1020 (1943). Defendant, as relator, had earlier instituted an original action in the supreme court for a writ of mandate against a superior court judge. In considering that case it came to the court's attention that there were matters connected therewith that might call for disciplinary action.
However, the problems of inadequate funds, limited staff and reluctance to discipline close associates which are common at the local bar level, lead to almost total dependence upon individual complaints. The Committee points out that centralization is the first step toward eliminating these problems and assuming a more aggressive role. To initiate proceedings without a specific complaint other sources of information about misconduct are needed. Subscribing to a newspaper clipping service, establishing a liaison with the criminal courts and police departments of the state, and perhaps even checking with insurance associations to discover the filing of exaggerated personal injury claims are methods which can be employed to provide the necessary information.

Included in the category of procedural problems is the failure to grant absolute immunity from civil suit to complainants or absolute immunity from criminal prosecution to witnesses who have colluded with an attorney for illegal purposes and thus may incriminate themselves while testifying in disciplinary matters. In the former case, a layman who is fearful of being subjected to suit if his complaint is not substantiated will hesitate to file a grievance. Instead of inhibiting complaints in this manner, the profession should encourage the reporting of unethical conduct. In a case of collusion, it is unlikely that the client will testify against his attorney if he runs the risk of prosecution based upon his own testimony. The Supreme Court of Indiana has not provided immunity in either case. A court rule would be sufficient to establish absolute immunity from civil suit. To insure immunity from criminal prosecution, however, would probably require legislative action.

56. The disciplinary commission itself must receive a complaint in writing before investigation begins at that level. Ind. Rules Ad. 23. Even where the complaint is based on an attorney's felony conviction, verification is required before the commission can file an information. See note 62 infra.

57. ABA Special Comm. at 60-66.

58. The public's interests and the integrity of the legal profession are protected most adequately when the profession encourages "those who have knowledge of dishonest or unethical conduct to impart that knowledge to a grievance committee or some other body designated for investigation." Weiner v. Weintraub, 22 N.Y.2d 330, 332, 292 N.Y.S.2d 667, 669, 239 N.E.2d 540, 541 (1968). In this case the New York Court held that a complaint is absolutely privileged. Accord, Cowley v. Pulsifer, 137 Mass. 392 (1884); McCurdy v. Hughes, 63 N.D. 435, 248 N.W. 512 (1933); Raustead v. Morgan, 219 Ore. 383, 347 P.2d 594 (1959).

59. See note 58 supra.

60. The statute proposed by the Committee includes the following provisions:
1. The power to confer immunity in the course of a disciplinary proceeding shall be vested in the court having disciplinary jurisdiction.
2. Any request that a witness or an accused attorney be granted immunity shall be made upon formal application by an authorized disciplinary agency, a copy of which shall be served upon the local, state and federal law enforcement agencies having jurisdiction within a specified time prior to the return date of the application.
The Committee also recommended a court rule which would provide that disciplinary proceedings be deferred until after the determination of pending civil or criminal suits involving substantially similar material allegations. However, a defendant attorney would not be given the benefit of this rule if he unreasonably delays the pending suit. Indiana's rules are unclear as to whether disciplinary proceedings are to be held in abeyance in this type of situation. Rule A.D. 23(5) provides that if a complaint based upon a felony conviction is verified by a competent source, then disciplinary proceedings shall be initiated. The rule fails to expressly prohibit commencing proceedings on a complaint which

3. A copy of every order conferring immunity shall be served upon the law enforcement agency. ABA SPECIAL COMM. at 91. Section 2 of the proposed statute would allow law enforcement authorities an opportunity to voice any objections to granting immunity in any particular case. If raised, that objection would then have to be weighed by the court against the necessity of granting immunity for the purposes of the disciplinary proceeding. The Committee's proposed statute would also confer immunity from criminal prosecution to the accused attorney but recommends that requests for application of the statute to such attorneys be sparingly made for two reasons:

... the issue of whether a disciplinary proceeding is essentially criminal or civil in nature is being litigated constantly, and it has not been determined finally. Should the courts ever determine that a disciplinary proceeding is essentially criminal, any immunity granted ... will immunize him against the very disciplinary proceeding in which the immunity was granted. Second, whenever the disciplinary agency has developed ... a prima facie case, the accused attorney who refuses to testify on the ground that it will tend to incriminate him thereby virtually abandons any defense to the charges.

Id. at 91. Until Spevack v. Klein, 385 U.S. 511 (1967) courts could hold failure to cooperate with the disciplinary agency as misconduct in itself and disbar for that reason. Spevack held that where the complaint involves conduct which might subject the attorney to criminal prosecution the attorney may invoke his constitutional privilege against self-incrimination and refuse to respond to the agency's inquiries. It is no doubt partially because of this decision that the Committee recommends holding disciplinary proceedings in abeyance until the determination of pending criminal suits. See note 61 infra.

61. The Committee felt that the disciplinary proceedings should be held in abeyance for several reasons. First, whenever two tribunals consider the same facts simultaneously there is the possibility they may reach opposite or inconsistent results. In such cases respect for the integrity of one or the other tribunal is lowered. Also, the outcome of a disciplinary proceeding may prejudice the result in related litigation. A jury may be asked to resolve an issue knowing that the attorney's peers have decided the same issue against the attorney but not appreciating the fact that the burden of proof is lower in disciplinary proceedings than the case they are trying. ABA SPECIAL COMM. at 83.

62. IND. RULES A.D. 23(5) provides as follows:

Upon verification from any source that the commission considers competent involving a complaint based upon conviction of an attorney for a felony, the commission shall file an information.

This rule could be interpreted as a direction to defer disciplinary proceedings until final determination of pending cases but such has not been the case. See In re Holovachka, 245 Ind. 483, 198 N.E.2d 381 (1964). In this case disciplinary proceedings were initiated in June of 1962, almost exactly one year before sentence was delivered in the criminal prosecution.
does not allege conviction. In one case disciplinary proceedings were initiated against an attorney while he was being prosecuted for a criminal offense. However, the complaint which initiated the disciplinary hearings alleged several additional instances of misconduct. Thus, the question of what procedure to follow when disciplinary hearings and criminal suits involve basically the same material allegations was not resolved. Whatever policy is followed, it is clear that rule 23 fails to order the instigation of disciplinary proceedings when no complaint is filed and the attorney is purposely delaying criminal prosecution. If the Committee's recommendations were adopted the question of priority would be resolved and potential delays could be easily avoided.

Under the present Indiana Supreme Court rules the disciplinary commission has full powers of investigation, including subpoena power. The Committee recommends this but suggests that, in addition, subpoena power be extended downward to every authorized disciplinary agency as well as to the attorney under investigation. Subpoena power is essential in that if the parties cannot be compelled to attend or produce evidence there will be little information upon which the agency can base its findings. Some control over the use of the power must be retained, however, to prevent its misuse. A centralized disciplinary agency would provide the necessary supervision.

Some of the most serious matters considered by disciplinary agencies, and which are often mishandled, are complaints alleging that attorneys have violated their fiduciary relationships with their clients. Disciplinary agencies have made it a practice to automatically dismiss complaints if restitution is made. The problem in withholding discipline if restitution is made is that the attorney is not deterred from converting funds in the future. Instead, it may lead to the attorney's cheating a present client to repay a past one; there is obviously little deterrent value in a system which allows someone to steal repeatedly with nothing more to fear than having to give the money back if he is caught.

Indiana has no firm rule on what action is to be taken if an attorney

63. See notes 40 and 62 supra and text accompanying.
64. Ind. Rules A.D. 23.
65. IBA Manual, pt. B, § 3 (1963). The Indianapolis Bar Association manual illustrates the powers of local disciplinary agencies with the following two statements: "The Association does not have the power to subpoena witnesses . . . . No right exists in the Association to compel any cooperation of the respondent attorney."
66. The Committee stated further that if the disciplinary agency could not supply the needed supervision, subpoenas should be obtained by application to the court having disciplinary jurisdiction. ABA Special Comm. at 87-88.
67. ABA Special Comm. at 97.
68. Id.
makes restitution, however, an informal poll conducted by telephone revealed that some local agencies have made it a practice to dismiss disciplinary proceedings upon restitution. In one case, the secretary of a county bar association recalled a situation where a majority of the grievance committee rejected a proposal to investigate other instances of misconduct simply because restitution had been made. A court rule which provides that restitution shall not justify, in and of itself, the termination of a disciplinary investigation would prevent this type of practice.

Resignation by the accused attorney is similar to restitution in that it may terminate disciplinary proceedings. Problems may arise if the disciplinary agency is satisfied with a simple resignation and fails to complete its investigation. If the attorney applies for readmission years later the record of his misconduct will be incomplete and much of the evidence may no longer be available. The Committee recommends a court rule which would allow the attorney to resign only if he acknowledges

69. The presidents or secretaries of ten local bars were contacted during this poll. See also IBA Manual, pt. D, § 7:

If a case of established embezzlement exists, the grievance should not be considered closed merely because the misappropriated funds are, upon prodding .. . delivered to the client.

But see pt. D, §7 which also provides:

Every pressure must be exerted upon the respondent attorney to induce him to account to his client. The same admonition prevails if an attorney accepts a retainer, does nothing, and then refuses to refund the money to the client on demand. If the efforts of the Association are unavailing, the grievance file should be promptly forwarded to the disciplinary commission. . . .

Thus, it appears that in some cases restitution will prevent disciplinary proceedings. The Committee recognizes that arguments can be made for encouraging restitution, such as: few victims of conversion would ever be reimbursed if it were not to the accused attorney's benefit to do so; and the argument that disbarment removes all sources of the attorney's income thus making a civil judgment, as an alternative to reimbursement, worthless. The Committee concluded these arguments were outweighed by other considerations. First, any policy that benefits a single complainant while exposing the public to the same risks is inconsistent with the primary goal of protecting the public. Second, client security funds can be created to protect individual victims. Finally, restitution, although not the primary goal of the agency, should not be disregarded—only demoted to the status of a mitigating factor in disciplinary proceedings.

ABA Special Comm. at 99.

The Indiana State Bar Association established a client security fund of the type the Committee recommends by a resolution of its House of Delegates in July, 1964. The fund is not expressly limited to claimants who have been wronged by members of that association: "provided that the lawyer against whom said claim is being made is a practicing member of the Bar of Indiana. . . ." The claimant must exhaust all civil remedies, and the association will endeavor to provide him with legal assistance in that process. As of July 17, 1970, the amount in the fund was 42,776.80 dollars. Report of Clients' Security Fund Committee of the Indiana State Bar Association, at 2 (July 1970).

70. ABA Special Comm. at 97-100. It would be difficult to enforce such a rule uniformly in a structure composed of a number of autonomous bars.
in writing that the material facts upon which the complaint is predicated are true. The order striking the attorney's name from the rolls of the bar would then contain a phrase such as "for due cause" or "transferred to inactive status" which would alert reviewing authorities to the fact that there was misconduct connected with the resignation if the attorney applies for readmission.\footnote{71}

Indiana has no such rule. However, there is some precedent pertaining to resignation under charges. The court, in \textit{In re Lucas}\footnote{72} held that it was too late to resign after an appointed commissioner had recommended disbarment. Unfortunately, it was not made clear at exactly what point in the proceedings it becomes too late to avoid disbarment by resigning, or if it is possible at any time. Some clarification was provided by two recent orders of the supreme court. Both orders were in response to petitions of resignation submitted to the court by attorneys who were under investigation by bar associations. Resignations were allowed in both cases and disciplinary proceedings were terminated. However, neither attorney was required to sign a statement to the effect that the allegations in the complaints were true. Only one order stated that the deprivation of the right to practice was "for due cause." In this case, the attorney asked that his name be stricken for due cause apparently because simple resignation was not enough to induce the bar association's grievance committee to terminate proceedings concerning his alleged embezzlement. The other attorney was undergoing grievance committee proceedings based upon voluminous complaints of incompetence caused by incapacitating personal problems. His petition of resignation did not ask that the order contain a special designation such as "transferred to inactive status," and none was applied. Therefore,

\footnote{71. \textit{Id.} at 104-05. The order should indicate that the attorney is being disbarred on consent or for due cause or "transferred to inactive status." This would serve to distinguish a resignation under charges from one submitted for other reasons. Indiana has had the benefit of such a distinction. Nolan v. Brawley, -\textit{Ind.-}, 244 N.E.2d 918 (1969). In that case the attorney had been the subject of disbarment proceedings in Wisconsin for converting a client's funds. Informal hearings had been held, and recommendations for disbarment were sent to the state bar commissioners. While disbarment proceedings were pending, the attorney submitted his resignation to the Supreme Court of Wisconsin. An order was entered striking his name from the rolls of the court "for due cause." The Indiana Supreme Court held that the attorney "was, in effect, disbarred" in Wisconsin for due cause. In applying this to the proceedings at bar the court held: Disbarment in another state is the basis for disbarment proceedings in Indiana. Resignation "for cause" during the course of disbarment proceedings must also be a basis for disbarment. 244 N.E.2d at 922-23.}

\footnote{72. 230 Ind. 254, 102 N.E.2d 909 (1952).}

\footnote{73. In light of the confidential nature of the disciplinary proceedings connected with these cases, no specific identification of the orders is made.}
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upon application for readmission unless the members of the reviewing body happen to remember the circumstances surrounding this attorney's resignation, he will not be required to prove he has rehabilitated himself. As these two cases illustrate, Indiana's policy toward resignation under charges does not always alert a reviewing board to prior misconduct. When it does, the board is left with an inadequate record of that misconduct. Implementation of the suggested rule would resolve the inconsistencies in the treatment of resignations and provide a written admission of the prior misconduct.

Indiana has long recognized the danger in licensing unfit persons by requiring applicants for admission to the bar to possess good moral character and fitness.\(^4\) In addition, Indiana's Supreme Court has ruled that a "rusty or incompetent" applicant may be denied admission.\(^6\) Yet, there is no rule which applies similar standards to practicing attorneys. One officer of a local Indiana bar, with a membership of under twenty-five attorneys, explained that his bar thought they had authority to sanction incompetent or alcoholic members. However, it was rarely done because of the close personal relationships that develop between members of a small bar association.\(^7\) A court rule which could be uniformly applied throughout the state would therefore be well received.

The Committee suggests that any attorney shown to be incapacitated by mental illness, senility, or addiction to drugs or intoxicants be indefinitely suspended or transferred to inactive status until such time as the incapacity no longer exists.\(^7\) If adopted, the supreme court would implement its expressed desire to protect the public from incompetent attorneys. Local disciplinary authorities could also be relieved of their unpleasant obligation to sanction their every-day acquaintances if the rule were adopted in conjunction with centralization of the disciplinary structure and the creation of a professional staff who have not established regional friendships and loyalties.

An attorney who has been convicted of a crime yet is permitted to

\(^{74}\) Ind. Rules A.D. 12.
\(^{76}\) This information was compiled in an informal survey taken by telephone. See note 69, supra.
\(^{77}\) The Committee is not referring to occasional imbibing or clashing of personalities between lawyer and client. Their concern is over cases where the attorney's addiction or mental deterioration makes him a risk to all his clients. The Committee would no doubt agree with the Board of Governors of the Oregon State Bar that being intoxicated in a public place or giving an "opinion as to the veracity and perhaps ancestry of" a client are not cases warranting discipline. Jaureguy, The History of Disciplinary Matters Before the Oregon State Bar, 3 Ore. St. B. Bull. 9, 11 (1937).
continue practice, also damages the reputation of the legal profession. In addressing itself to this problem, the Committee stated:

No single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline.78

To remedy this regrettable situation it recommended a court rule providing for suspension of an attorney convicted of a “serious crime”79 while his case is on appeal. Final disposition of a disciplinary proceeding based on the conviction would not be made until all appeals had been exhausted. If the attorney was granted a reversal, he would then be reinstated; if after appeal the conviction still stood, disciplinary proceedings would then commence.80 Existing Indiana rules indicate that a contrary procedure is followed.81 Convicted attorneys are not suspended, and in addition, initiation of disciplinary proceedings is usually held in abeyance until all appeals have been exhausted. This procedure allows lengthy periods of time to elapse before the public is protected from the misconduct of an attorney.

Publication of the actions taken by disciplinary agencies is also necessary in rebuilding the public's confidence in the integrity of the bar. The Committee recommends that the existence of pending disciplinary proceedings be made a matter of public record if the charges are based upon a criminal conviction, or if the respondent attorney requests a public hearing.82 Disclosure is limited to these cases in an attempt to balance the interests of the accused and the public. An attorney who is publicly charged but later acquitted suffers irrevocable harm despite his

78. ABA Special Comm. at 124.
79. “Serious crime” according to the Committee’s proposed rule, means:
   . . . a felony or any specified lesser crime a necessary element of which, as determined by the statute defining such crime, reflects upon the attorney’s fitness. The lesser crimes . . . should include, for example, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file an income tax return, deceit, corruption, coercion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a “serious crime.”
   Id. at 128.
80. The Committee rejected the argument that immediate suspension following conviction of a serious crime violates due process. In the course of the criminal prosecution, the attorney is accorded the right to be advised of the charges, to cross-examine witnesses, and to testify in his own behalf. The only function performed by the court imposing suspension in such a situation is to determine whether the conviction was for a “serious crime.” Id. at 127.
81. See note 62 supra and accompanying text.
82. ABA Special Comm. at 138.
acquittal. On the other hand, the public is reassured of the integrity of the profession and warned of potentially dishonest attorneys when disciplinary proceedings are publicized. The recommendation strikes an equitable balance since an attorney publicly convicted of a crime or seeking a public hearing cannot validly assert that he is being treated unjustly if the disciplinary proceeding is not kept confidential.

The Indiana Supreme Court rule on this matter strikes no balance whatsoever. It simply states that other than a report from the disciplinary commission to the court the “Commission shall not otherwise disclose the result or the nature of such information.” An informal survey of local bar associations indicates that it is also their practice not to disclose the pendency of disciplinary proceedings. In light of the Committee’s recommendation for greater disclosure of the full scope of disciplinary activities, these rules should be re-evaluated.

The need to protect an individual client continues even after the offending attorney has been disbarred. The Committee suggests a court rule for post-suspension or disbarment supervision which demands that the attorney notify all clients within a reasonable time of his inability to continue to represent them. Whenever suspension is for disability, or

83. IND. RULES A.D. 23(4).
84. See also IBA MANUAL, pt. C, § 2, “Public Censure”:
This will consist of a notice to be posted on any bulletin board maintained by the Association, by announcement made at a general meeting, by a letter addressed to the judges of the circuit and superior courts of Marion County, Indiana, by a written report to the Disciplinary Commission and by a written report to the Secretary of the Indiana State Bar Association. Clearly such a provision will not make the actions of the disciplinary agency known to the general public.

The Indiana State Bar Association’s monthly publication, RES GESTAE, has not included a column on “Disciplinary Matters” since June, 1964. The editor indicates that there has been a change in policy and that RES GESTAE is not to be used as a medium for censure or punishment. Interview with Newton M. Goudy, Editor of RES GESTAE, by telephone October 10, 1970. Lawyers have, in effect, a monopoly over their profession. JOHNSTONE & HOPSON, LAWYERS AND THEIR WORK, ch. 5 (1967). This monopoly includes information pertaining to grievance committee functions. See note 83 supra, and accompanying text. Clearly, if the profession itself does not strive to keep the public informed about its self-policing efforts, it will not be done.

ABA SPECIAL COMM. at 143-46. Traditionally the hesitance to publicize such efforts had its origin in the theory that the public image of the profession is damaged by a disclosure of attorney misconduct. This policy is, perhaps centuries too late. See note 4 supra. What is called for is a policy which reassures the public that the profession acknowledges that misconduct sometimes occurs, and that all feasible steps are being taken to maintain the integrity of its predominately honest membership. If this is not done, the public is left with the impression that lawyers as a group do not care or are incapable of independent action. See Royko, Chicago Bar Pot Announces Police Dept. Kettle Blotch, Indianapolis News, May 26, 1970, at 9, col. 1. “The bar association should reconsider letting a panel of non-lawyers, or a mixture of both, weigh the complaints of citizens.”

85. ABA SPECIAL COMM. at 148.
the attorney disappears or dies while under investigation, the disciplinary agency should determine whether a partner or other appropriate representative of the attorney is available to notify the clients. If notification cannot be carried out in this manner, then the court having jurisdiction should make provisions for their protection. Indiana has no rule to this effect. Consequently, these protective steps are only undertaken by the disciplined attorney or his partners on their own initiative.

Indiana is also in conflict with the Committee's recommendations in another area of post-disciplinary supervision. A prevalent problem, according to the Committee, is that attorneys are too readily reinstated. In Indiana, reinstatement is governed by rule A.D. 8 which requires a showing of good cause by the attorney in a hearing conducted by a court-appointed commissioner who makes findings of fact and recommendations. The record must include a finding as to the capacity of the applicant to re-enter practice taking into consideration the length of time during which the applicant has not practiced. There is no minimum period of time set for disbarment, which thus makes it possible for an attorney who has been disbarred to be reinstated before a suspended attorney who must wait until the end of a specific period. Precisely this result has been reached in Indiana. In Bell v. Conner, where the respondent had been guilty of dishonesty, fraud, deceit, and corrupt conduct, the supreme court held that a combination of these offenses and the fact that the attorney had been practicing for 45 years "leads us to the conclusion that respondent should be disbarred." However, the court included a provision permitting him to apply for reinstatement in six months. In Baker v. Miller, the court suspended the respondent for nine months after commenting that there was no specific showing of moral turpitude on the part of the respondent.

Allowing the disbarred attorney to be reinstated before the suspended one, reverses the order of magnitude originally ascribed to their respective misdeeds. The situation in Indiana, therefore, is an appropriate one for the application of the Committee's recommendation. It suggests a court rule that specifies that either a disbarred attorney shall not be re-admitted at all or that a specified period of time, exceeding the maximum period for suspension, must elapse before a disbarred attorney may apply for reinstatement.

86. Ind. Rules A.D. 8.
87. —— Ind. ——, 241 N.E.2d 360, 360-61 (1968).
88. Id.
89. 236 Ind. 20, 138 N.E.2d 145 (1956).
90. Indiana has no maximum period of suspension set out by court rule. There is precedent for suspension up to three years. In re Bradburn, 248 Ind. 29, 221 N.E.2d
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INTERAGENCY RELATIONS

The lack of communication between the federal and state courts and between the states themselves so concerned the Committee that it submitted an interim report to the American Bar Association recommending the immediate establishment of the National Discipline Data Bank.\textsuperscript{81} Cooperation was solicited from all states in the hope that every court and disciplinary agency would submit reports of all formal discipline imposed by them for dissemination to every disciplinary agency within the United States. Without such sharing of information attorneys would be able to practice in some jurisdictions even though they had been disbarred in others. The disciplinary commission of the Supreme Court in Indiana does participate in this project and receives quarterly reports from the Bank. Informal discussions with disciplinary officials of bar associations indicated, however, that this information is not made available to them and there is speculation that the reports will never be circulated lower than the state bar association. Once again, the reason for this truncated allocation of power\textsuperscript{92} and resources is attributable to Indiana's decentralized disciplinary structure.

There is danger in limiting access to this information to the supreme court level. A complaint initiated at the local level may be deemed trivial and thus dismissed; however, if it were viewed in light of discipline imposed in other jurisdictions, it may be indicative of a consistent pattern of professional misbehavior which seriously endangers the public welfare. Part of the reluctance of the court to disseminate such information fully may be out of concern that it will pass into unauthorized hands.

885 (1966). In that case, the respondent was found to have accepted and spread bribes while a city council member. He also failed to report the money as income. But see Supreme Court v. Worrel, 245 Ind. 626, 201 N.E.2d 330 (1964), where the respondent was convicted of passing counterfeit bills and sentenced to one year in prison. He was disbarred by the court but allowed to apply for readmission after one year, apparently because he claimed he had no knowledge that the bills were counterfeit.

91. See note 38 supra.

92. There is some allocation of power to the Indiana State Bar Association, but it is tied to the supreme court's disciplinary commission in the following manner:

A disciplinary commission is hereby created consisting of one [1] member appointed by each member of the Supreme Court from his respective district. The term of each member shall be for a period of five [5] years, which term shall commence on January 1st for the term appointed and shall continue thereafter until his successor is appointed. The Indiana State Bar Association shall appoint three [3] members, who shall be the executive committee of the grievance committee of said bar association. Such three [3] members shall be ex-officio members of the disciplinary commission of this court. They shall serve at the will of the court for a period of one [1] year beginning on September 1st of each year. . . .

Ind. R. Rs A.D. 23.
The risk of this occurring could be minimized by creating the centralized structure the Committee recommends.

**Ancillary Problems**

The last segment of the Committee’s report deals with problems that do not arise solely out of the structure or procedure of disciplinary mechanisms. The first problem is a reluctance on the part of lawyers and judges to report instances of professional misconduct. The legal profession has labeled this the conspiracy of silence when it occurs in the medical profession. The Committee recommends that law school instruction and other legal training place a greater emphasis upon the attorney’s responsibility to assist in the profession’s efforts to police itself. The Committee further advises imposing sanctions upon attorneys and judges who fail to report known misconduct. Indiana’s position on this point is unclear. The oath attorneys must take upon admittance to the bar could be construed as imposing such a duty and it is clear that the Code of Professional Responsibility and Canons of Ethics of the ABA do so. However, the Indiana Supreme Court has not yet adopted the

93. See note 100 infra.

94. The need for discipline is not limited to the medical and legal professions, however. It is estimated that in Florida as early as twenty years ago there were over 75,000 persons whose professional licenses were subject to challenge in disciplinary proceedings. Eliot, The Problem of Discipline, 7 U. of Fla. L. Rev. 396, 397 (1954). The breadth of the licensing field in California includes oil and gas brokers, boxers, wrestlers, horse racers and dealers in prophylactics. Id. The extension of mandatory licensing and the restrictions on permissible practice flowing therefrom are attributable to a desire to protect the public in an age of phenomenal increase in available services. *Id.* It would be a futile exercise to attempt to draft a general conduct code to apply equally to all who must be licensed, however, if there is a nexus between disciplinary enforcement in the diverse "professions" it is the legal profession. The lawyer is the "guardian of 'due process' as it applies to the procedures of other licensing boards." *Id.* at 401. The bar, should therefore set an example in disciplinary enforcement for other occupations. *Id.*

95. "[O]ther legal training" includes judicial training courses and continuing legal education programs conducted by bar associations.

96. .... I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my clients at every peril to myself; I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged. ....

*Ind. Rules A.D. 22.*

97. ABA Code of Professional Responsibility and Canons of Judicial
Code of Professional Responsibility and views the Canons of Ethics only as evidence of proper standards of conduct. Adoption of the Committee's proposal would eliminate the uncertainty and also serve to remove the stigma of "informer" from attorneys who comply with its provisions since they would be left with no choice but to report misconduct or face possible disbarment themselves.

Adding to the difficulty in discovering misconduct is the fact that there are often no requirements that attorneys keep accurate records of client funds in their possession, have the accounts audited, or retain the records after disbursement has been made. In Indiana the only statutory requirements are that the attorney "promptly account to and pay over to a client any moneys coming into . . . [his] . . . hands and to which the client is lawfully entitled." The failure to require that accurate records be complied makes it possible that there will be no evidence to substantiate clients' claims of discrepancies. If records are required but the attorney is not made to keep them for a specified period after disbursement has been made he may destroy them if a complaint is filed. The Committee recommends a court rule be adopted requiring the maintenance of records for a reasonable period of time after final distribution of all funds and that these records be audited annually.

Ethics D.R. 1-103(A): "A lawyer possessing unprivileged knowledge of a violation of D.R. 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

ABA Canons of Professional Ethics No. 29: "The lawyer should expose without fear or fault before the proper tribunals corrupt or dishonest conduct in the profession."

ABA Canons of Judicial Ethics No. 11: "A judge should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counsellors, brought to his attention; and, if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities."

98. The Indiana State Bar Association has approved the Code and transmitted it to the state supreme court with a recommendation for adoption. ABA Coordinator, September, 1970, at 4.


100. Fear of being labelled with such stigma, especially in counties with a small lawyer population, is part of the reason for the reluctance to report misconduct. There is also professional hesitance to deprive brother attorneys of their means of earning a livelihood. The Committee cautions that the adoption of a benevolent, "live and let live" attitude is often done at the public's expense.

Evidence that such sentiment exists in Indiana is provided by Baker v. Miller, 236 Ind. 20, 138 N.E.2d 145, 149 (1956) wherein the court maintains:

This court cannot bring itself to say that a wilful attempt to evade a tax imposed by statute, even if defined by the statute as a felony, should automatically disbar an attorney from his profession, and strip him from his livelihood in which he probably spent most of his life.

101. IND. ANN. STAT. § 4-7408 (Burns Repl. 1968).

102. ABA Special Comm. at 173.
of this recommendation is urged as a means to uncover and preserve evidence of misconduct.

The Committee's final recommendation concerns providing ancillary bar association services to complement the work of disciplinary agencies because relations with the lay public cannot be improved solely through an agency whose dealings are primarily with members of the profession. These ancillary services would deal with conflicts between laymen and attorneys which do not fall within the jurisdiction of the disciplinary agency. For example, establishment of mechanisms for handling claims against attorneys, arbitration of fee disputes and client security funds are recommended. Other than fulfilling a public relations function, the Committee also maintains that these procedures are necessary by virtue of the fact that attorneys seldom agree to accept a case involving a claim against another attorney. The Indiana State Bar Association has taken commendable steps to establish procedures for providing legal assistance for individuals with claims against attorneys in connection with their client security fund. However, the amount in the fund and the extent of legal assistance they can provide are limited by the size of their membership and the free time of volunteers. Centralization would provide a professional staff to aid these volunteers, and integration of the bar could vastly increase the amount of money allotted to such services. In addition to making the services more efficient, centralization and integration would allow them to serve as a tangible demonstration of the concern and responsible attitude of the entire bar.

CONCLUSION

After three years of study the Committee found disciplinary enforcement to be virtually nonexistent in many jurisdictions. Its report warned that unless the legal profession promptly adopts radical reforms it will be faced with public participation in the disciplinary process. There must be more centralization, greater delegation of power and swifter action. The concept of autonomous local agencies must give way to a centralized authority employing a full-time professional staff. Only reforms made on this scale can provide comprehensive and effective disciplinary enforcement.

CORY BRUNDAGE

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103. Id. at 186-91.
104. Id. at 187.
105. See the discussion of the ISBA's client security fund in note 69 supra.
106. See notes 21-22 supra.