Lawyer Discipline and Professional Standards in California: Progress and Problems

R. F. Outcault Jr.

George E. Peterson

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation

Available at: https://repository.uchastings.edu/hastings_law_journal/vol24/iss4/3

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
Lawyer Discipline and Professional Standards in California: Progress and Problems

By R. F. Outcault, Jr.*

and

George E. Peterson**

Lawyers have in recent years become the objects of increasing criticism expressing dissatisfaction with professional standards and ineffectual disciplinary procedures. Similarly, the need for revision of rules of conduct, particularly restrictions on advertising, has been argued in a steadily growing number of legal publications.

The organized bar has generally been responsive to these and to a host of other demands when adequate resources to effect reform have been available and when the reform proposal fairly reflects commonly accepted attitudes of the lawyer membership. Thus, proposals for more efficient disposition of disciplinary matters or for higher standards of professional competency are consistent with a generally accepted attitude that the privilege of self-discipline and the power to set professional standards create a responsibility to meet public expectations in these areas. On the other hand, pressures for revision of the restrictions on advertising illustrate a basic disagreement concerning the proper role of the bar as a vehicle for social reform and the ac-

---


** B.A., Loyola University, 1969; J.D., Loyola University, 1972; member, California Bar.


3. See note 137 infra.

[675]
ceptable degree of restrictions which the bar may impose on the freedom of action of its members.

The California State Bar has made remarkable progress in the development of its disciplinary structure. Two recent examples of reform illustrate this: the processing of complaints against attorneys has been greatly expedited by delegation of chief authority in this area to the Disciplinary Board and by enlargement of the full-time investigative and professional staff; and the State Bar’s Client Security Fund, effective for over a year, now provides statewide protection in the event of misappropriation of clients’ funds.

The profession is rapidly moving toward parallel reforms in other areas. The state bar is at a point of decision regarding the issue of professional incompetency as a disciplinable offense. Pressures from within the profession and from the media may prompt a similar re-examination of the rules prohibiting indirect advertising. In all of these areas, it is timely to examine the approach currently taken in California and to ascertain future directions.

Disciplinary Structure and Proceedings

The well-noted conclusions of the Clark Report\(^4\) on the present status of disciplinary enforcement have prompted a general re-examination by state bars of methods of lawyer discipline. Because of its large membership, the State Bar of California has had to make continuous efforts to keep abreast of the disciplinary problem. The structure and methods developed over a long period of years have enabled the state bar to compare itself favorably with the recommendations of the Clark Report, to the point where California may well have provided an example of the quintessential disciplinary structure commended to other states. The function of the state bar in disciplinary proceedings is ancillary to the authority of the California Supreme Court, which has original jurisdiction in disciplinary matters.\(^5\) The bar is not itself vested with judicial power,\(^6\) nor does it operate as an administrative board in the normal sense. It is \textit{sui generis},\(^7\) em-

\(^4\) Clark Report, \textit{supra} note 2.
\(^6\) \textit{In re} Richardson, 209 Cal. 492, 498, 288 P. 669, 671 (1930).
\(^7\) Brotsky v. State Bar, 57 Cal. 2d 287, 300, 368 P.2d 697, 703, 19 Cal. Rptr. 153, 159 (1962); Fish v. State Bar, 214 Cal. 215, 4 P.2d 937 (1931). “Although it has been held that an accusation is in the nature of a criminal charge . . . and that a proceeding on such a charge is a \textit{quasi}-criminal action . . . this court has uniformly treated disbarment proceedings as peculiar to themselves, and governed exclu-
powered by the State Bar Act to provide a "complete alternative and cumulative method" in disciplinary affairs, while operating as an arm of the court and subject to supreme court review in all its actions.

Disciplinary proceedings follow three major stages. The first stage involves investigation, hearing and recommendation of findings and discipline by local administrative committees. This is followed by a determination by the Disciplinary Board of the issues of guilt and extent of discipline. Finally, the supreme court may order disbarment or suspension or, upon request, review lesser penalties of reproval imposed by the Disciplinary Board. The same legislation clothing the state bar with disciplinary power over attorneys also authorizes the Board of Governors to formulate substantive and procedural rules for the disciplinary process. Upon approval by the supreme court, the Rules of Professional Conduct thus promulgated become binding upon all members of the California bar.

Disciplinary proceedings against members of the state bar may be instituted by the supreme court or, more commonly, by invoking the disciplinary machinery of the state bar. The authority of the court to disbar or suspend attorneys is inherent in its disciplinary power over the conduct of officers of the court and may not be delegated by the state legislature to other boards. By enactment of the State Bar Act, the legislature provided "a complete alternative and cumulative method" of discipline in addition to that exercised by the court.

---

12. Id. §§ 6075-87.
13. Barton v. State Bar, 209 Cal. 677, 680-81, 289 P. 818, 819 (1930). See generally, CLARK REPORT, supra note 2, 10-18, discussing the inherent power of courts to discipline members of the bar and recommending that any legislative interference be struck down by the courts.
14. See Barton v. State Bar, 209 Cal. 677 (1930). See also In re Shattuck, 208 Cal. 6, 279 P. 998 (1929); Matter of Application of Riccardi, 64 Cal. App. 791, 222 P. 625 (1923). This inherent authority has been made statutory: CAL. BUS. & PROF. CODE §§ 6100-17 (West 1962).
The Board of Governors, acting through the Disciplinary Board and local administrative committees, is authorized to receive complaints or to initiate its own investigation concerning attorney misconduct.

As stated in the code, the nature of such misconduct may be "wilful breach" of the Rules of Professional Conduct or any cause set forth in the state laws which would warrant disbarment, suspension or other discipline. In cases involving the former violations, the statutes empower the board to issue public or private reprovals to the attorney involved or to recommend to the supreme court that he be suspended from practice for up to three years. In proceedings involving the latter variety of offense, the board may recommend disbarment or suspension, or may reprove the attorney publicly or privately without such recommendation.

Proceedings under the auspices of the state bar, whether initiated by complaint or by a bar-instituted investigation, commence with

---

17. See Cal. Bus. & Prof. Code § 6086.5 (West Supp. 1972), authorizing the board to establish one or more "disciplinary boards" to act in its stead.
18. Id. §§ 6040-53 (West 1962).
19. Id. § 6077.
20. Id. § 6078.
21. Id. § 6077. Reprovals by the board are subject to review by the supreme court on petition of the person complained against. Id. §§ 6082, 6083(b). Decisions of the board recommending suspension, like those recommending disbarment, are immediately filed with the clerk of the supreme court, accompanied by findings of fact and a transcript of the evidence and proceedings. Id. §§ 6080, 6081. See Brotsky v. State Bar, 57 Cal. 2d 287, 304, 368 P.2d 697, 706, 19 Cal. Rptr. 153, 162 (1962).
23. Id. § 6043 (West Supp. 1972). The complaint may be in any form, written or oral, formal or informal, verified or unverified. Rule 21, Rules of Procedure. See Herron v. State Bar, 212 Cal. 196, 298 P. 474 (1931). "The law does not define the characteristics or contents of any such complaint. The use of the word 'complaint' is made without qualification. It is not even required to be in writing." Id. at 199, 298 P. at 475; accord, Chronicle Pub. Co. v. Superior Court, 54 Cal. 2d 548, 567, 354 P.2d 637, 646, 7 Cal. Rptr. 109, 118 (1960).

Nevertheless, the local administrative committee has discretion to require the complainant to file a verified complaint, stating specifically the charges and facts supporting the complaint. Cal. Bus. & Prof. Code § 6042 (West Supp. 1972). See id. foll. § 6087, Rules 21-21(b) (West 1962).

24. "Information leading to a State Bar Investigation is derived from many sources, such as news accounts, court decisions, and general information submitted by persons not making complaints." Board of Governors, The State Bar of California, Guides to State Bar Disciplinary Procedures 14 (1971) [hereinafter cited as Guides to Disciplinary Procedures].

Statutory authorization for such investigations is found in Cal. Bus. & Prof. Code § 6044 (West 1962).
a preliminary investigation. The preliminary hearing is conducted informally by an investigating committee. The conclusion may be that there are insufficient facts to warrant further proceedings, or a notice to show cause may be issued and formal disciplinary proceedings instituted.

Service of the notice to show cause institutes the formal adversary proceeding, informing the attorney that he is to appear before a trial committee at a specified time and date and stating the charge against him. The trial committee is a local administrative committee, apart

25. CAL. BUS. & PROF. CODE foll. § 6087, Rule 21 (West 1962). The committee may conduct a "pre-preliminary" investigation to determine whether it should proceed to a full preliminary hearing. "Pre-preliminary" investigations often feature a request by the committee that the attorney submit an explanation by letter reply. The request form is known as a "Rule 21" letter. GUIDES TO DISCIPLINARY PROCEDURE, supra note 24, at 15.

26. "In preliminary investigations the proceedings shall be informal, but thorough with the object of ascertaining the truth." CAL. BUS. & PROF. CODE foll. § 6087, Rule 21 (West 1962). The investigating committee has considerable discretion in the manner of conducting the hearing. Rules of legal evidence are not binding at this point, since the attorney is not yet an adversary party. Hearsay statements may be accepted, especially on nonvital issues, and witnesses usually are not placed under oath. "At this stage, the investigation is one to determine probable cause by informal methods. In some cases, the entire questioning may be by the committee, with questions suggested to it by the attorney and the examiner. In other cases, as where there is an examiner for the State Bar, the facts may be elicited by direct questioning of the witness or witnesses." GUIDES TO DISCIPLINARY PROCEDURES, supra note 24, at 20.

The attorney is entitled to request and obtain, prior to the hearing, notice of the nature of the charges. CAL. BUS. & PROF. CODE foll. § 6087, Rule 8 (West 1962). He is entitled to be represented by counsel, to have process issue, present evidence and witnesses and to cross-examine. Id. § 6085.

For due process requirements in state bar procedures generally see In re Ruffalo, 390 U.S. 544 (1968); Spevack v. Klein, 385 U.S. 511 (1967).

27. A determination of "N.S.F." (not sufficient facts) would be made where the charges are unfounded or frivolous. GUIDES TO DISCIPLINARY PROCEDURE, supra note 24, at 7. See CAL. BUS. & PROF. CODE foll. § 6087, Rules 21, 21(a) (West 1962). The board may receive requests for further investigation when filed within three months of the mailing of notice of summary termination of proceedings. Id. Rule 20.


"In effect, a 'dismissal' or, more properly, declination to issue a Notice to Show Cause, is a finding of lack of probable cause of issuance of a Notice . . . upon the facts then before the preliminary committee.

"Such action may be generally likened to action of a grand jury in refusing to indict or to that of a prosecuting officer in declining to issue a criminal charge on the basis of the facts or evidence then presented." GUIDES TO DISCIPLINARY PROCEDURES, supra note 24, at 30.

from the investigating committee, and is responsible for receiving evi-
dence and making findings of fact as well as recommendations to the
Disciplinary Board as to dismissal or penalty.\(^\text{30}\)

The Rules of Procedure give the Disciplinary Board great flexi-
bility in acting on the report and recommendations submitted to it.
Upon consent of the attorney, the board may accept the findings made
by the trial committee and conclude that the findings warrant a pun-
ishment the same as or less severe than that recommended.\(^\text{31}\) With
the attorney's consent, the matter may also be referred back to the
trial committee for a further recommendation on discipline, or placed
on the board's calendar for argument solely on the issue of the measure
of discipline.\(^\text{32}\) Or, again upon consent of the attorney, the board may
adopt findings of fact other than those made by the committee and
impose a more severe penalty.\(^\text{33}\) The board may also take additional
evidence or set aside the committee report and hear the case de novo.\(^\text{34}\)
As noted above, the board may decide without the attorney's consent
and in the regular course of procedure either to reprove the attorney,
subject to supreme court review, or to recommend to the supreme court
that the attorney be disbarred or suspended.\(^\text{35}\)

Disciplinary procedures following conviction in the criminal courts
follow a different pattern than that outlined above.\(^\text{36}\) Under section
6101 of the Business and Professions Code, the conviction of an attorney
for either felony or misdemeanor involving moral turpitude is cause for
disbarment or suspension.\(^\text{37}\) The clerk of the court in which an attorney

also \textit{id.} foll. \$ 6087, Rule 11 (trial hearings conducted by a committee different from
the investigating committee), Rule 14 (provisions for discovery), Rule 28 (pleading),
Rule 29 (legal evidence only may be received at the hearing), Rules 32-33 (the an-
swer), Rule 35 (transcript is prepared only when the committee recommends disbar-
ment or suspension).

"The State Bar Rules do not expressly permit alternative and inconsistent plead-
ing. However, the practice is well established and entirely proper." \textit{Guides to Dis-
ciplinary Procedures}, \textit{supra} note 24, at 54.


"At this stage, further proceedings in the case are usually based on the record as
made before the trial committee. Study of the record, including exhibits, therefore is
important. If a transcript exists it, of course, should be the basis of the study. Other-
wise, reliance must be placed on notes or recollection of the substance of the testimony
and exhibits." \textit{Guides to Disciplinary Procedures}, \textit{supra} note 24, at 97.


\(^{33}\) \textit{Guides to Disciplinary Procedures}, \textit{supra} note 24, at 97-98.


\(^{37}\) \textit{id.} \$ 6101.
is convicted or the state bar forwards a certified copy of the record of conviction to the supreme court when the nature of the offense or the circumstances surrounding the act appear to involve moral turpitude.\textsuperscript{38} If the record clearly shows moral turpitude or if there is probable cause to believe such was involved, an interim order of suspension by the supreme court is automatic.\textsuperscript{39} Once conviction is final,\textsuperscript{40} and after affording the attorney an opportunity to be heard, the court may conclude that the crime or its surrounding circumstances involved moral turpitude, thereafter entering an order of disbarment or suspension according to the gravity of the offense.\textsuperscript{41} At either the stage when the conviction is final, or prior to the interim suspension order, the court may refer issues to the state bar for hearing and recommendations.\textsuperscript{42} The Board of Governors in turn assigns the case to a hearing committee, the procedures being generally the same as described above for nonconviction disciplinary matters.\textsuperscript{43}

Although not clearly stated in the Code or in the Rules of Procedure, the authority of the state bar to discipline its members permits the bar to initiate proceedings when the supreme court is powerless to disbar. The court has recognized, for example, that while the statutes prevent it from disbaring for convictions involving moral turpitude until conviction is final, the state bar is not thus limited. The fact that the matter is pending before the court does not deprive the bar of jurisdiction to institute original proceedings concerning the same conduct as was the basis for the conviction.\textsuperscript{44} The bar may then recommend to the court that the attorney be disbarred on the basis of his

\textsuperscript{38} Id. The delineation of which crimes involved moral turpitude is an admittedly difficult task. The outer boundaries are established as between such crimes as murder, embezzlement or extortion on the one hand, and convictions of violations of police regulations or simple assault and battery on the other. \textit{In re Hatch}, 10 Cal. 2d 147, 150, 73 P.2d 885, 886 (1937). Moral turpitude is also present in offenses involving an intent to defraud, and "the related group of offenses involving intentional dishonesty for purposes of personal gain..." \textit{In re Hallinan}, 43 Cal. 2d 243, 248-49, 272 P.2d 768, 771 (1954). In doubtful cases the determination depends on the circumstances of each particular case. \textit{In re Hatch}, supra.

\textsuperscript{39} \textsc{Cal. Bus. \\& Prof. Code} § 6102(a) (West 1962).

\textsuperscript{40} \textit{Id.} § 6102(a), (b). Subdivision (b) provides that an order suspending imposition of sentence pending probation is, nonetheless, a final conviction, even though it may be ultimately dismissed upon fulfillment of probation. \textit{See Cal. Pen. Code} § 1203.4 (West Supp. 1972).

\textsuperscript{41} \textsc{Cal. Bus. \\& Prof. Code} § 6102(b) (West 1962).

\textsuperscript{42} \textit{Id.} § 6102(c).

\textsuperscript{43} \textit{See id.} foll. § 6087, Rules 60-78.

\textsuperscript{44} \textit{In re Phillips}, 17 Cal. 2d 55, 58, 109 P.2d 344, 346 (1941) (dictum); \textit{In re Hatch}, 10 Cal. 2d 147, 151, 73 P.2d 885, 887 (1937) (dictum).
conduct, apart from the fact of conviction.\textsuperscript{45}

It is clear that conviction is not a condition precedent to disciplinary measures.\textsuperscript{46} Thus dismissal or acquittal of criminal charges has no res judicata effect upon the identical issues when brought before the bar.\textsuperscript{47} Similarly, it would seem that where pursuant to a referral by the supreme court the bar finds no moral turpitude involved in an attorney's criminal conviction, the bar may yet prosecute on the basis of some wilful breach of the Rules of Professional Conduct.

Recent Procedural Reforms

In order to make the enforcement structure perform more efficiently, the state bar instituted several reforms in the manner in which complaints are handled and records are maintained.\textsuperscript{48} More significantly, the number of paid, full-time investigators and hearing examiners has doubled,\textsuperscript{49} and the possibility of employing a staff large enough to eliminate use of volunteers is being studied.\textsuperscript{50} This last improvement would not only eliminate many delays but would also permit more thorough and expert investigations.\textsuperscript{51} The state bar has considered the area of disciplinary enforcement to be vital to the proper carrying out of its responsibilities to the public, and has allocated from state bar funds approximately $637,000 annually for these purposes.\textsuperscript{52}

An equally important improvement was made in the transfer of review functions from the Board of Governors to the Disciplinary

\begin{footnotes}
\footnotetext[45]{In re Phillips, 17 Cal. 2d 55, 109 P.2d 344 (1941) (dictum). "Where the trial court suspends the rendition of its judgment, this court . . . cannot disbar the attorney, for there has been no final adjudication of his guilt . . . . In such a case, if it is thought that the attorney has been guilty of conduct warranting disbarment, it is incumbent upon the State Bar to proceed upon its own initiative under article 5 of the State Bar Act. Following the disciplinary procedure therein provided, a recommendation can be made upon which this court may then make an order of disbarment." Id. at 58, 109 P.2d at 346 (dictum).}
\footnotetext[46]{Best v. State Bar, 57 Cal. 2d 633, 371 P.2d 325, 21 Cal. Rptr. 589 (1962); CAL. BUS. & PROF. CODE § 6106 (West 1962).}
\footnotetext[47]{Res judicata is not applicable because of the different prosecuting parties, and a different purpose of protecting the public rather than punishing. See Yapp v. State Bar, 62 Cal. 2d 809, 402 P.2d 361, 44 Cal. Rptr. 593 (1965).}
\footnotetext[48]{See Metropolitan News, August 15, 1972, at 7.}
\footnotetext[49]{Id.}
\footnotetext[50]{The State Bar of California, The State Bar in the Seventies 3-5 (1971) [hereinafter cited as California State Bar Report].}
\footnotetext[51]{But cf. Kane, Lawyer Discipline in Florida, 44 FLA. B.J. 522 (1970).}
\footnotetext[52]{Metropolitan News, August 15, 1972, at 7. Projected cost of discipline for 1980 is almost $1 million annually, which is paid solely by the state bar without legislative assistance. California State Bar Report, supra note 50, at 4.}
\end{footnotes}
This shift was deemed necessary because of the steadily increasing volume of disciplinary matters requiring consideration and the need for a committee which could devote substantially all of its time to developing special expertise in this area.

The Disciplinary Board consists of fifteen members appointed by the Board of Governors. The board members serve terms of three years, without compensation. In addition to their duties as review board in all cases arising out of formal proceedings before local administrative committees, the members are also called upon to perform discipline-related functions. In this latter category, the Disciplinary Board supervises all disbursements from the State Bar Client Security Fund recommends improvements in the Rules of Procedure, and compiles special reports and recommendations on disciplinary reform which are submitted to the Board of Governors.

This centralized disciplinary structure is well-suited to California's large lawyer population, and, indeed, a similar handling of complaints has been recommended by the American Bar Association as a model for other states. The system permits complaints to be received with minimum requirements as to formality, but is not dependent upon complaints before launching its own investigations. The mechanics of lawyer discipline are sufficiently independent from local control so as to mitigate the danger of lax enforcement where close personal relationships exist. Unnecessary duplication of effort in the investigatory and hearing stages has been avoided, while proper attention has been accorded to due process requirements. Further, uniform discipline has been enforced throughout the state. But perhaps the most important benefit is that the state bar has been able to regulate itself adequately, thus relieving the courts of that burden.

54. In the past five years the number of cases reviewed by the Disciplinary Board has increased by 50 percent. Similarly, the number of formal hearings increased by 30 percent over the same period, and preliminary investigations increased by 75 percent. Metropolitan News, August 15, 1972, at 7.
55. CAL. BUS. & PROF. CODE foll. § 6087, Rule 81(a), (b) (West Supp. 1972).
56. Id. Rule 83.
57. See text accompanying notes 86-91 infra.
58. "The board of governors by specific action may delegate additional authority to and impose other functions upon the disciplinary board." CAL. BUS. & PROF. CODE foll. § 6087, Rule 84 (West Supp. 1972).
All of this has not brought the state bar to the point where it can regard its responsibility to the public as discharged. As noted by a former president of the state bar, disciplinary enforcement is a task requiring the constant dedication of the bar’s membership and continuing improvement. Nevertheless, it is also necessary that the public be made aware of the solid accomplishments which have been made in this field, and of the state bar’s concern that more progress be forthcoming.

**Client Security Fund**

The misappropriation of clients’ funds by attorneys is, fortunately, a relatively infrequent abuse of the lawyer’s fiduciary position. The public reaction to such defalcations as occur, however, is not proportionate to the frequency of this misconduct. Since the bar has been entrusted with devising and enforcing disciplinary measures and is charged with maintaining high standards of professionalism among its own ranks, it is not surprising that thefts of clients’ monies by individual lawyers should cast opprobrium upon the entire profession.


61. Between 1967 and 1969 the Disciplinary Board imposed or recommended discipline to the supreme court in thirty-seven cases involving misappropriation of funds belonging to forty-nine clients. Full or partial restitution was made to nineteen clients by the attorney involved or his partner. During the same period, an additional 14 lawyers resigned in Los Angeles and San Francisco Counties alone while disciplinary proceedings regarding misappropriation of funds were pending. It should be noted that 50 percent of the resignations were in Los Angeles County where the bulk of disciplinary matters arise. State Bar Survey, 1969-70, on file at the California State Bar Ass’n. These figures should be contrasted with a current bar membership of 36,000, increased from 27,500 in 1967; complaints received annually currently total 3,707, increased from 2,497 in 1967; preliminary investigations annually total 1,213, increased from 686 in 1967. Metropolitan News, August 15, 1972, at 7. See also Hunter, *The Clients’ Security Fund—What Shall We Do About It?*, 38 J.B. Ass’n of Kan. 23, 25 (1969) [hereinafter cited as Hunter].

62. See Hunter, supra note 61, at 25. “Rightly or wrongly, the image of the lawyer in the public mind is not a creditable one. Each instance of defalcation by a lawyer does immeasurable harm to the whole profession, no matter how gently it is treated by the press. The fact that a lawyer is accused or found guilty of stealing his client’s money is news, and, unfortunately, bad news for the profession.” Sterling, *A Client’s Security Fund*, 36 Cal. St. B.J. 957, 958 (1961) [hereinafter cited as Sterling].

Embezzlement of clients’ funds has, no doubt, added to the now legendary image of the legal profession as an institution harboring both greatness and base dishonesty. *See, e.g.*, Hogan, *Notes on Legal Ethics*, 2 Hastings L.J. 81 (1951), quoting the inscription upon the tombstone of St. Ives: “St. Ives was a native of Brittany, a lawyer but not a thief, which was a source of great wonder to the people.” *Id.* at 82.
Rule 9 of the Rules of Professional Conduct\(^6\) provides a basis for disciplinary action in the event that an attorney commingles his clients' funds with his own, regardless of whether the clients' money is preserved or is actually dissipated.\(^6\) In the absence of any mandatory auditing,\(^6\) however, this method supplies only limited protection for the client against negligent misallocation of funds and none at all against deliberate misappropriation. The bar's disciplinary authority is usually invoked only after the fact, when the client has already been harmed. Disbarment or suspension of the offending attorney at that point is insufficient to fully restore public confidence in the bar.\(^6\) Indeed, Rule 9 is not only grossly inadequate from the standpoint of safeguarding clients' funds, but may actually lull clients into a false sense of security by prescribing use of the term "trust funds account."\(^6\)

**Evolution of the Security Fund**

Recently, after long study by the state bar,\(^6\) greater protection was made available by implementation of a client security fund.\(^5\) Although a similar fund was administered on a limited basis by the

---

63. [CAL. BUS. & PROF. CODE] foll. § 6076 (West 1962). Rule 9 provides: "A member of the State Bar shall not commingle the money or the property of a client with his own; and he shall promptly report to the client the receipt by him of all money belong to such client. Unless the client otherwise directs in writing, he shall promptly deposit his client's funds in a bank or trust company . . . in a bank account separate from his own account and clearly designated as 'Clients' Funds Account' or 'Trust Funds Account,' or words of similar import."


65. See CLARK REPORT, supra note 2, at 172-74. The report recommends a court rule requiring attorneys to maintain records pertaining to client funds, and that such records be audited annually. However, the report also noted that, while such audits may aid in preventing misappropriation of funds, they are not the total solution.


67. "To a layman untrained in legal analysis the name, trust funds account, may suggest some outside control and responsibility over the account; some periodic audit of the account; and some fiduciary in the background to make good on embezzlements and defaults." Blackman v. Hale, 78 Cal. Rptr. 569, 580 (1969), rev'd on other grounds, 1 Cal. 3d 548, 463 P.2d 418, 83 Cal. Rptr. 194 (1970).


Los Angeles County Bar Association since 1963, California was a relative latecomer in the establishment of a state-wide plan. Since 1958, thirty-three other state bars have put security funds in operation, as have twenty-one local bar associations.

In California, as in other states, the initial proposal was not received without opposition. While agreeing that the public is entitled to expect honesty and integrity in the legal profession, the critics of the fund argued that this did not create an obligation on the part of the bar to make pecuniary restitution for every miscreant member. To provide such a fund would, it was argued, only serve to publicize the dishonesty of some lawyers, and would be received as a public confession that the profession was so corrupt that it had to insure the public against the dishonesty of its members. Other objections were also studied by the state bar, among them that the small number of embezzlements perpetrated each year by lawyers did not warrant a remedy of this magnitude and cost; that the plan was socialistic; and that attorneys would be encouraged to be lax in their dealings with clients' funds, knowing that any loss would be made up by the security fund.

It was also argued that once restitution was made from the security

70. The security fund currently sponsored by the Los Angeles County Bar Association provides $10,000 total compensation for clients of member attorneys only; recovery for any single client is limited to $5,000. Interview with Donald Hegler, Los Angeles Bar Association, April 5, 1973.

Until recently, a similar fund was maintained by the San Diego County Bar Association. In January 1973, this fund was abolished in light of the broader coverage available from the state bar. Interview with Julie Hegg, San Diego County Bar Association, April 5, 1973.


The constitutionality of a security fund has rarely been questioned. In In the Matter of a Member of the Bar, 257 A.2d 382 (Del. 1969), the Delaware Supreme Court found the establishment of a security fund to be within the inherent power of the court to sustain the standards of the bar. The basic constitutionality of the California security fund has not been challenged. Cf. Lathrop v. Donahue, 367 U.S. 820, 881 (1961) (Douglas, J., dissenting). See generally Hersh v. State Bar, 7 Cal. 3d 241, 496 P.2d 201, 101 Cal. Rptr. 833 (1972) (holding assessment of increased fees for security fund was premature); Slaughter v. Edwards, 11 Cal. App. 3d 285, 90 Cal. Rptr. 144 (1970).

72. McKnight, supra note 68. See Hunter, supra note 61, for a brief outline of the major arguments against the security fund and a rebuttal.

73. Hunter, supra note 61, at 66; McKnight, supra note 68, at 964.

74. Hunter, supra note 61, at 25; Sterling, supra note 62, at 959-60.

75. Smith, supra note 66; Sterling, supra note 62, at 960.

fund the bar would feel less compelled to seek disciplinary action against the guilty lawyer. Finally, opposition to the plan cited the necessarily limited compensation which the fund would be able to pay, and pointed out that the disappointment engendered by the inability of the bar to fully compensate claims would outweigh any benefits gained in the area of public relations.77

Some of these latter points were cogent and the security fund was designed accordingly to avoid these foreseeable weaknesses.78 The other arguments were regarded as less compelling. Proponents of the security fund contended that since the people had trusted the bar to govern itself, subject only to supervision by the supreme court, and, as the profession held out its members as deserving of the confidence placed in them by clients, a moral obligation or "debt of honor" was created to guarantee that public trust.79 Since the dishonest conduct of a few lawyers would inevitably gain publicity, it was incumbent upon the majority to take measures which would aid in restoring the public's confidence. To insure funds entrusted to lawyers would no more confess a prevalence of corruption among lawyers generally than did the adoption of federal depositor's insurance reflect ill upon the banking corporations. The legal profession simply acknowledges that occasionally a lawyer may engage in dishonest conduct, and that the general membership of the bar is desirous of alleviating any resulting loss. If such a scheme is socialistic, surely it is no more so than other cooperative devices such as legal aid services and workmen's compensation.80

Administration of the California Client Security Fund

The security fund eventually adopted in California has much in common with funds previously established in other states. The size of the fund and the manner of its administration must, of course, be adjusted to the number of the bar's membership and the volume of complaints which can be anticipated.81 However, the salient features

77. Sterling, supra note 62, at 960.
78. See text accompanying notes 92, 95-97 & 102 infra.
80. Sterling, supra note 62.
81. Bar associations with membership much smaller than the California State Bar may find it sufficient for their purposes to raise a relatively small amount to be administered by a board of Security Fund Trustees or by the Board of Governors. Administrators are given discretion regarding the amounts of reimbursements made, on which there is no stated maximum except the total of assets available in the fund. Compare Fla. Stat. Ann., By-Laws under the Integration Rule of the Florida Bar, art. XVII, §§ 3(d), 6 (Supp. 1973) and Md. Ann. Code, Rule 1228 (1971), with text accompanying notes 83-94 infra.
of the California plan regarding conditions of payment and to whom reimbursement will be made are typical.\textsuperscript{82}

With respect both to funding of the project and administration of complaints, California was fortunate to have an integrated bar with a large membership as well as a centralized disciplinary structure. Thus the state bar was able to establish a relatively high ceiling of $25,000 compensation for losses arising from any one transaction,\textsuperscript{83} without at the same time having to assess a prohibitive increase in membership fees.\textsuperscript{84} Because all attorneys admitted to practice in the state are members of the state bar, the new security fund avoids the limitations inherent in those funds applicable only to defalcations of members of a voluntary association.\textsuperscript{85}

\textsuperscript{82} See Hunter, supra note 61, at 24-25, briefly outlining typical provisions; including subrogation of the fund to the rights of clients receiving payments from the fund, and a condition that there exist some evidence of dishonest conduct on the part of the lawyer. See text accompanying notes 95-97 infra.

\textsuperscript{83} CAL. BUS. & PROF. CODE foll. § 6087, Rule 114D (West Supp. 1972). Although the reimbursement available from various funds is frequently adjusted upward, a $10,000 limit appears normal (Maryland, New Jersey, North Dakota, Los Angeles County), with a few states providing $25,000 (New Hampshire) and one state allowing $50,000 (Arizona). A.B.A. STANDING COMMITTEE ON CLIENTS' SECURITY FUND, MODEL PLAN at 28 n.26 (1970). Most security funds feature such a maximum reimbursable amount available to any one client or to compensate for losses caused by any one lawyer, the total amount to be divided among several claimants. It would seem that those funds which place no specific limit on reimbursement would provide the least compensation because of fear of depletion of the fund. See the Standing Committee on Clients' Security Fund, Report, 96 A.B.A. REP. 595, 597 (1971), for statistics on assets of various security funds, claims paid and annual contributions made to the fund.

\textsuperscript{84} The California State Bar has legislative authorization to increase annual membership fees by ten dollars, to be applied only for purposes of the client security fund. CAL. BUS. & PROF. CODE § 6140.5(b) (West Supp. 1972). See also Hersh v. State Bar, 7 Cal. 3d 241, 496 P.2d 201, 101 Cal. Rptr. 833 (1972).

\textsuperscript{85} Denying reimbursement to an applicant because the defaulting lawyer is not a member of the bar association does little for public relations, since the public does not distinguish between members and non-members in selecting attorneys. In an eighteen month period between July 1, 1965 and December 31, 1966, twenty-nine New York lawyers were found to have misappropriated the funds of forty-four different clients. None of the lawyers involved were members of the New York Bar Association. Letter from Frederick C. Stimmel, Counsel, New York State Bar Association, to John W. Bryan, Chairman of the Standing Comm. on Client Security Funds of the ABA, April 15, 1970. Similarly, in the period between 1950-61, thirty-two members of the New Jersey State Bar were indicted for defalcations, but only eight of the attorneys were members of the state bar association. Bryan, Clients' Security Fund Ten Years Later, 55 A.B.A.J. 757, 758 (1969).

An apparently adequate solution has been found, however, in Delaware and Maryland. Although both states have voluntary bar associations, all lawyers must pay an annual assessment as a condition of practice in these states. Thus, the security funds have adequate resources to protect all clients in either state. Special Committee on
The Disciplinary Board, already operating as the central body within the state-wide disciplinary structure, was the convenient choice for overall administration of the security fund. A Security Fund Committee, to be appointed by the Board of Governors, will assist the Disciplinary Board in this additional function. Administrative matters such as receipt of applications for reimbursement and investigation and hearings relative to the merits of such applications may be delegated to staff attorneys of the state bar and to district committees, the latter also to be appointed by the Board of Governors. Findings of fact and recommendations of the district committees are thereafter reviewed by the Security Fund Committee. The conclusions of both the district committees and of the Security Fund Committee are, how-

86. See text accompanying notes 53-58 supra.
88. Id. Rules 106, 110. The three-tiered structure of district committee, Security Fund Committee and Disciplinary Board obviously parallels the method of investigating and hearing disciplinary matters. See text accompanying notes 9-10 supra.

Hearings held by district committees are somewhat less formal than those conducted by hearing committees in disciplinary matters. Compare id. Rule 108 (proceedings regarding applications to the security fund need not be conducted according to technical rules of evidence; the burden of proof shall be by a preponderance of the evidence) with id., Rule 29 (in formal disciplinary proceedings legal evidence only may be received) and Medoff v. State Bar, 71 Cal. 2d 535, 455 P.2d 800, 78 Cal. Rptr. 696 (1969) and Brawner v. State Bar, 48 Cal. 2d 814, 818, 313 P.2d 1, 3-4 (1957), and cases cited therein (charges of unprofessional conduct must be proved by clear and convincing evidence). It should also be noted that district committees, the Security Fund Committee and the Disciplinary Board may have access to State Bar disciplinary files and records pertaining to alleged losses. CAL. BUS. & PROF. CODE foll. § 6087, Rule 120 (West Supp. 1972).

Rules of Procedure 111 provides that an attorney shall be given notice and opportunity to be heard and present evidence regarding alleged losses. Therefore, because of the overlap in the Disciplinary Board's functions in disciplinary proceedings and security fund reimbursements, an attorney may be compelled to defend himself against allegations of dishonest conduct in two proceedings before the board. This raises problems when security fund proceedings precede disciplinary hearings, and the board commences the latter hearings after already having found dishonest conduct on the basis of hearsay and other evidence. The board is placed in the awkward position of having to "unring the bell": in the second proceeding. This problem was foreseen, and the board was therefore given discretion to postpone consideration of applications to the security fund until completion of disciplinary matters or pending court proceedings. Id. Rule 114(B).

89. CAL. BUS. & PROF. CODE foll. § 6087, Rules 110(B), 112 (West Supp. 1972). The rules provide an abbreviated procedure in the event the staff attorney making the initial review of an application concludes that a prima facie case for reimbursement has not been shown. Such negative reports are filed with the Security Fund Committee and, if approved, constitute rejection of the application. Id. Rule 105(B).
ever, only advisory.90 The Disciplinary Board, which receives these reports, has the final authority to determine whether in fact a reimbursable loss has occurred as a result of dishonest conduct, and the amount of payment to be made.91

Compensation to the defrauded client is conditional upon a finding of a "reimbursable loss," as defined in the state bar rules. The loss of "money, property or other things of value," occasioned by the wrongful defalcation, embezzlement or conversion by an active member of the state bar, is the general definition of a reimbursable loss.92 Although the lawyer must have been domiciled in California at the time of the wrongful act, it is not required that the act itself have taken place in the state.93 Nor is it necessary that the wrongful act have occurred as a breach of the lawyer-client relationship in order that compensation be made. Whether the lawyer was acting as a lawyer or as a fiduciary, such as executor, trustee, guardian or escrow holder,94 his client's losses are still reimbursable.

To obtain relief from the fund, an applicant must show that the lawyer has been disciplined by the bar or was convicted of a crime based upon the alleged dishonest conduct, or that he has voluntarily resigned from practice in the state.95 Applicants may also show that

90. Id. Rules 113A, 114A.
91. Id. Rule 114.
92. Id. Rule 103(E)-(G). The definition of "dishonest conduct" given in subdivision F is similar to the language found in the Los Angeles Security Fund Rules and that of other state security funds. "Fraudulent and dishonest acts . . . but not limited to the defalcation or embezzlement of money, wrongful taking of property . . . but not including malpractice or negligence" (Los Angeles); "misapplication, misappropriation or embezzlement" (Washington); "any wrongful act committed by a practicing attorney against his client, including but not limited to, the defalcation or embezzlement of money, the wrongful taking of property, or the failure to remit money or turn over property when due to a client, not including any loss sustained as a result of any acts of malpractice" (Illinois and West Virginia); "a dishonest act" (Ohio). ABA STANDING COMMITTEE ON CLIENTS' SECURITY FUND, MODEL PLAN at 28 n.29 (1970).
94. Id. Rule 103(G). Coverage in some states is limited to losses arising out of the attorney-client relationship. See, e.g., FLA. STAT. ANN., Integration Rule of the Florida Bar, art. xvii, § 2(g) (1972). Such limitations are unsatisfactory, however, since the public is not liable to recognize the distinction between lawyers functioning as lawyer and as, for example, executor of an estate, since the latter is a position commonly assumed by lawyers. See Bryan, Clients' Security Fund Ten Years Later, 55 A.B.A.J. 757, 759 (1969). The California State Bar chose to follow what appears to be the trend toward allowing reimbursement for losses arising out of fiduciary relationships usually associated with the practice of law. See Standing Committee on Clients' Security Fund, Report, 96 A.B.A. REP. 595, 596 (1971).
they have reduced their claim for compensation to a civil judgment against the attorney. The Disciplinary Board has been given flexibility in this area, however, and may find an application to be "an appropriate case" even in the absence of the above evidence.

Because the fund was intended to protect individuals, especially the unwary, who might otherwise suffer great hardship from their lawyer's thefts, payments are not made to insurers, sureties, bonding companies, governmental entities or to persons whose losses were covered by insurance or bond. Similarly, the dishonest attorney is prevented from recovering his losses from the fund, either directly or through his spouse, relatives, partners or any business entity controlled by any of these persons.

As is the case with most security funds, payments are made only upon condition that the client makes a pro tanto assignment to the state bar of his rights against the lawyer involved. Finally, recovery from the state security fund is precluded for losses arising out of dishonest conduct which occurred prior to the effective date of the fund's enactment. However, losses occurring prior to that date may be reimbursed by the funds still administered by local bar associations.

Although the California State Bar cannot boast of being the pathfinder in the field of client security funds, it has sufficient basis for pride in a fund which is both well structured and adequately funded. Claims should be handed as expeditiously as possible in fairness to the client, and to the membership of the state bar. Past experience with

---

96. Id.  
97. Id.  
98. Id. Rule 103(G)(4)(b).  
99. Id. Rule 103(G)(4)(d).  
100. Id. Rule 103 (G)(5).  
101. Id. Rule 103 (G)(4)(a), (c).  
102. Id. Rule 116. Of course, subrogation of the state bar to the rights of the client becomes worthless if the client has not secured a civil judgment against the attorney and the statute of limitations has expired on the cause of action. It may be possible, in such cases, for the Disciplinary Board to require the attorney to waive the statute of limitations as a condition to probation following disciplinary proceedings.

Another problem in this area arises when the supreme court accepts the Disciplinary Board's recommendation for probation in a disciplinary case, conditional upon restitution to the client. If reimbursement is subsequently made to the client from the security fund, the state bar will be subrogated to the rights of the client. The bar will then be in the position of having to recommend revocation of probation should the attorney default in payments to the bar.

103. Id. Rule 103(G)(3).  
104. See note 70 supra.
respect to embezzlements by attorneys indicates that the $25,000 maximum compensation should be more than adequate.\textsuperscript{105}

In a profession trained to argue the strict letter of the law as the standard for others, the California bar has joined other state bars in voluntarily holding itself to a higher, moral responsibility.\textsuperscript{106} It is perhaps too much to expect that the often-expressed skepticism of lawyer morality will not suddenly be reversed. But the fund is a step in the right direction toward restoring public confidence, and it is one worthy of recognition.

**Professional Incompetence as a Disciplinable Offense**

Dealing with incompetent practitioners is the perennial problem of any profession committed to high standards. In the history of the American bar, it has existed at times in critical proportions.\textsuperscript{107} Although the system of accreditation of law schools and maintenance of examination procedures for admission to practice have made the situation less desperate than in the past, there is continuing criticism that the bar is not taking adequate measures to protect the public from careless and ill-trained lawyers.\textsuperscript{108} It was in this spirit that Chief Justice Burger strongly admonished the bar, and trial lawyers in particular, to raise standards of professionalism among practitioners.\textsuperscript{109} In California, Attorney General Younger sponsored a legislative proposal to make incompetency a disciplinable offense.\textsuperscript{110} State bars and the American Bar Association are studying the merits of recognized specialization as one possible remedy to this problem.\textsuperscript{111}


\textsuperscript{106} As is typical with most funds, payments are made a matter of grace, for which the state bar disclaims legal responsibility. *Cal. Bus. & Prof. Code* foll. § 6087, Rule 115 (West Supp. 1972). Applicants for reimbursement are informed of this fact on the application form. *Id.* Rule 104(C).


\textsuperscript{110} Senate Bill 58 (1972) would have amended section 6068 of the Business and Professions Code to include among the duties of an attorney the duty to provide competent representation. Senate Bill 342 (1972), also sponsored by the Attorney General, would have added section 6032 to the code, requiring a certified criminal law specialist in trials of what formerly were capital cases. The state bar opposed both measures on grounds that they were premature; the bar had a special committee studying the problem of incompetency as a basis for discipline, and a pilot program for specialization was already underway. Metropolitan News, Aug. 15, 1972, at 1, 7.

\textsuperscript{111} See Special Committee on Specialization and Specialized Legal Education,
Gross negligence amounting to habitual disregard of the interests of a client is already a basis for discipline in California as a violation of the attorney's oath to discharge his duties to the best of his knowledge and ability.\textsuperscript{112} Similarly, conversion of clients' funds or their commingling with the funds of the attorney,\textsuperscript{113} knowingly making false statements to clients\textsuperscript{114} and other intentional acts in disregard of the interests of clients may constitute moral turpitude, justifying suspension or disbarment.\textsuperscript{115} However, neither the statutes nor the Rules of Professional Conduct have been construed to apply where the attorney involved was guilty of ordinary carelessness, lack of adequate preparation or for simply attempting to handle matters beyond his professional abilities.\textsuperscript{116}

The ABA Code of Professional Responsibility\textsuperscript{117} offers a rule

\begin{itemize}
\item \textsuperscript{112} CAL. BUS. & PROF. CODE § 6067 (West 1962). “Habitual disregard by any attorney of the interests of clients is ground for disbarment, even when such neglect is grossly negligent or careless, rather than willful and dishonest.” Demain v. State Bar, 3 Cal. 3d 381, 387, 375 P.2d 652, 655, 90 Cal. Rptr. 420, 423 (1970).
\item \textsuperscript{113} Although the cases do not expressly state that ordinary negligence is not a basis for discipline, the factual circumstances involved consistently show intentional or particularly egregious breaches of duty to the client. See, e.g., Simmons v. State Bar, 2 Cal. 3d 719, 470 P.2d 352, 87 Cal. Rptr. 368 (1970) (disregard of duties to clients and failure to communicate with them); Grove v. State Bar, 66 Cal. 2d 680, 427 P.2d 164, 58 Cal. Rptr. 564 (1967) (habitual neglect of clients' interests); Clark v. State Bar, 39 Cal. 2d 161, 246 P.2d 1 (1952) (gross negligence in accounting for guardianship estate, knowingly presenting false account to the court); Copren v. State Bar, 25 Cal. 2d 129, 152 P.2d 729 (1944) (commingling and conversion of clients' funds, obtaining funds by false statements, failure to repay loans from clients, failure to render services for which lawyer was employed); Stephens v. State Bar, 19 Cal. 2d 580, 122 P.2d 549 (1942) (knowingly making false statements to clients regarding status of lawsuits, failure to transfer lawsuit within one year after order for change of venue and complete disregard of disposition of clients' case); Bruns v. State Bar, 18 Cal. 2d 667, 117 P.2d 372 (1941) (failure to render services for which lawyer was employed, knowingly making false representations to clients regarding status of lawsuit, failure to maintain proper records while acting as fiduciary); Waterman v. State Bar, 8 Cal. 2d 17, 63 P.2d 1133 (1936) (failure to render services for which lawyer was employed, advising client not to respond to subpoenas of state bar); Marsh v. State Bar, 210 Cal. 303, 291 P.2d 583 (1930) (gross negligence in failure to file complaint, failure to appear for trial). See generally Sullivan v. State Bar, 45 Cal. 2d 112, 287 P.2d 778 (1955); Call v. State Bar, 45 Cal. 2d 104, 287 P.2d 761 (1955).
\item \textsuperscript{114} See, e.g., Black v. State Bar, 7 Cal. 3d 676, 499 P.2d 968, 103 Cal. Rptr. 288 (1972) and cases cited therein.
\item \textsuperscript{115} See, e.g., Copren v. State Bar, 25 Cal. 2d 129, 152 P.2d 729 (1944).
\item \textsuperscript{116} See CAL. BUS. & PROF. CODE § 6106 (West 1962).
\item \textsuperscript{117} See note 112 supra.
\end{itemize}
which would reach considerably farther than the California case law. Indirectly it could also have a far-reaching impact on methods of legal practice and preparation of law students. In DR 6-101\textsuperscript{118} it is stated that a lawyer shall not handle legal matters “without preparation adequate in the circumstances,”\textsuperscript{119} nor shall he “neglect a legal matter entrusted to him.”\textsuperscript{120} By codifying these two standards, the section would impose disciplinary sanctions for the same conduct which would give rise to a cause of action against the lawyer for malpractice. However, the code also provides a third standard: that a lawyer shall not “handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.”\textsuperscript{121} As noted in the preamble to the code, this would constitute the minimum level of performance at which lawyers might practice without incurring disciplinary action.\textsuperscript{122}

**Enforcement of the Proposed Standards**

At the outset it should be noted that difficult evidentiary problems exist in the enforcement of all three of the proposed minimum standards. The burden of proof in disciplinary proceedings is by “clear and convincing” evidence.\textsuperscript{123} Lawyers are not obliged to keep records of research they have performed or the hours they have devoted to a particular matter. Enforcement of the code provisions regarding adequate preparation and neglect of cases might, therefore, as a practical matter, be limited to instances of gross negligence. For example, the state bar may be able to prove neglect or inadequate preparation where an attorney is charged with failure to file a complaint within the period allowed by the statute of limitations or failure to note relevant statutes in a brief submitted to the court, but not where the lawyer is charged with incompetence in conducting a trial or failure to set-

\textsuperscript{118} The ABA Code is divided into Canons containing both Disciplinary Rules (DR), which are mandatory, and Ethical Considerations (EC) which are aspirational and “represent the objectives toward which every member of the profession should strive.” \textit{Id.}, Preamble.


\textsuperscript{120} \textit{Id.}, DR 6-101(A)(2).

\textsuperscript{121} \textit{Id.}, DR 6-101(A)(3).

\textsuperscript{122} \textit{Id.}, DR 6-101(A)(1).

tle a matter prior to trial. In these areas where much is left to the
discretion of counsel and in which litigants of malpractice claims have
experienced difficulty even under a lower burden of proof, it is ques-
tionable that DR 6-101 will offer much to strengthen the current dis-
ciplinary standards.

The real impact of DR 6-101 lies in the competency provision.
Its potential targets are not only the general legal practitioner who at-
ttempts legal problems requiring special expertise, but also the specialist
who ventures beyond the limits of his usual practice to accept a case
which involves matters with which he has grown unfamiliar. In either
case, the attorney involved could be subject to reproval, suspension or
disbarment if he knows or should know that he is not competent to
handle the matter without the assistance of another lawyer who is
competent. Since the rule is entitled, "Failing to Act Competently,"
the assumption should be that, even if the lawyer is not competent but
nevertheless successfully concludes the matter, this will be an ade-
quate defense. The code does not state the standard by which it is
determined that an attorney should know that he is not competent in a
particular matter, but at least one commentator has suggested that it

124. Malpractice litigation, for example, involves a balancing of competing in-
terests, the courts giving weight to the consideration that lawyers should not be penalized
for errors of judgment except in regard to fundamental rules of law and mechan-
ical procedural matters. As the California Supreme Court has said: "The attorney is
not liable for every mistake he may make in his practice; he is not, in the absence of an
express agreement, an insurer of the soundness of his opinions or of the validity of
an instrument that he is engaged to draft; and he is not liable for being in error as
to a question of law on which reasonable doubt may be entertained by well-informed
lawyers." Lucas v. Kamm, 56 Cal. 2d 583, 591, 364 P.2d 685, 689, 15 Cal. Rptr. 821,
Ishmael v. Millington, 241 Cal. App. 2d 520, 59 Cal. Rptr. 592 (1966); Theobald v.
Byers, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961); Moser v. Western Harness Raci-
ning Ass'n, 89 Cal. App. 2d 1, 200 P.2d 7 (1948).

See generally Green, The Duty to Give Accurate Information, 12 U.C.L.A.L. REV.
464 (1965); Isaacs, Liability of the Lawyer for Bad Advice, 24 CALIF. L. REV. 39
(1935-36); Comment, Attorney Malpractice, 63 COLUM. L. REV. 1292 (1963).

125. ABA Code, DR 6-101(A)(1). A similar duty to consult other lawyers of
more competence in a given field was found by the district Court of Appeals in Lucas
v. Hamm. "[T]he law today has its specialties, and even as the general practitioner
in medicine must seek the aid of the specialist in his profession, so the general practi-
tioner in law, when faced with a problem beyond his capabilities, must turn to the ex-
pert in his profession to the end that his client is properly served." 11 Cal. Rptr. 727,
731 (1961). The California Supreme Court did not discuss this language in affirming
trial court's finding of nonliability. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821
(1961).

126. See Brown, A.B.A. Code of Professional Responsibility: In Defense of
ought to be the standard applicable in civil cases, that of the lawyer of ordinary skill and capacity.\textsuperscript{127}

The Disciplinary Rule also makes no reference to the attorney's subjective good faith as a relevant factor. However, the accompanying Ethical Considerations state that if the lawyer expects to become competent through study and investigation, he may accept employment in the matter.\textsuperscript{128} This consideration of good faith and due care tempers an otherwise unduly rigid rule and is consonant with the approach of California courts in disciplinary proceedings.\textsuperscript{129} Although commentary suggests otherwise,\textsuperscript{130} the Ethical Considerations should be consulted in reference to disciplinary action, since they state a higher standard than the Disciplinary Rules\textsuperscript{131} and are expressly offered for guidance in specific situations.\textsuperscript{132}

The obvious effect of the competency standard could be to hasten development of legal specialization. The practice of law in metropolitan areas is rapidly moving in this direction, even without the added spur of the Disciplinary Code, although this may not be the case in rural areas or in less populous states generally.\textsuperscript{133} Foreseeably, an increasing number of law students would be motivated to place particular emphasis on limited subject areas, and many will be encouraged to obtain post-graduate training. While this does not necessarily spell the demise of the general legal practitioner, it could lead to a substantial increase in the cost of legal services. With legal fees already beyond the reach of the poor and much of the middle class, the bar should be well-satisfied that specialization among a large segment of the profession is prudent before adding the additional pressure of DR 6-101.

**Advertising as a Basis for Discipline**

Advertising and solicitation\textsuperscript{134} by attorneys has demanded the at-


\textsuperscript{128} ABA Code, EC 6-3, 6-4.


\textsuperscript{131} See note 118 supra.

\textsuperscript{132} ABA Code, Preamble.


\textsuperscript{134} "Advertise: to give notice to, inform or notify, give public notice of, an-
tention of bar ethics committees more than perhaps any other single proscribed practice within the profession. \(^1\) Understandably, then, this area of regulation has generated an appropriate amount of commentary. \(^1\) In recent years, however, critics of the basic stricture have indicated a growing trend of sentiment away from strict regulation in this area. \(^1\) In this vein, it has been argued that the current manner of bar regulation may militate against pressing public interests \(^1\) and operate unfairly against segments of the bar. \(^1\)

---

nounce publicly, notice or observe.” BLACK’S LAW DICTIONARY 74 (4th ed. rev. 1968). “Solicit: to appeal for something; to ask earnestly; to ask for the purpose of receiving.” Id. at 1564. See CAL. BUS. & PROF. CODE §§ 6150-54 (West 1962) (making solicitation a misdemeanor when conducted through runners and cappers). Advertising, considered to be a less odious method of solicitation, is prohibited by Rule 2 of the Rules of Professional Conduct. Id. foll. § 6076, Rule 2. Advertising generally is also regulated by Rules 2a, 10, 18, 20-21. See text accompanying notes 149-51 infra.

See generally H. DRINKER, LEGAL ETHICS 210-73 (1953); Note Advertising, Solicitation and Legal Ethics, 7 VAND. L. REV. 677 (1954).

135. Commentary on this subject points out that fully one-third of the opinions of the ABA Committee on Professional Ethics concern advertising and solicitation. See Shuchman, Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code, 37 GEO. WASH. L. REV. 244, 245 (1968) [hereinafter cited as Shuchman]; Comment, Controlling Lawyers by Bar Associations and Courts, 5 HARV. CIV. R.-CIV. LIB. L. REV. 301, 351 (1970). A glance at the opinions of the Committee of Legal Ethics, Los Angeles County Bar Association, reveals a similar devotion of the committee’s attention to this area. See LOS ANGELES COUNTY BAR ASSN, ETHICS OPINIONS (1968) [hereinafter cited as ETHICS OPINIONS].


138. Because restrictions on advertising forbid direct as well as indirect advertising, attorneys may be dissuaded from appearing in public forums designed to educate the public in the legal processes. See text accompanying notes 156-57 infra. Such regulations generally may prevent lower and middle income groups from becoming acquainted with their rights, and have, until recently, prevented the growth of group legal services. See GROUP LEGAL SERVICES, 34 CAL. ST. B.J. 318 (1959) [hereinafter cited as GROUP LEGAL SERVICES]; Brown, Law Offices for Middle Income Clients, 40 CAL. ST. B.J. 720 (1965); Zimroth, GROUP LEGAL SERVICES AND THE CONSTITUTION, 76 YALE L.J. 966 (1967).

139. Whatever justification may exist for maintaining restrictions on advertising, the fact remains that the impact of such regulations is largely confined to the sole practitioner representing small business concerns and clients from lower and middle income groups. Attorneys employed by large, established law firms have no need for
At its earliest inception, the bar's restriction on advertising was a logical extension of the common law crimes of champerty, maintenance and barratry, the historical forebearers of the rule against solicitation. Advertising was prohibited as a similar, though less egregious, breach of decorum, which tended to promote oppressive and vexatious litigation. Perhaps more to the point, advertising was considered to be unfitting for a dignified professional to whom public service was foremost and the gaining of livelihood was incidental.

Although modern justifications for the rules against advertising continue to place greatest emphasis on the tendency of advertising practices to commercialize the profession and thereby lessen its traditional sense of dignity, there is also apprehension that advertising, the usual forms of advertising, since their clients tend to be familiar with legal problems and are able to pay for expensive representation. See J. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 119-29 (1966). Attorneys in this latter category, however, frequently employ more subtle forms of advertising, such as use of social clubs and entertainment of clients, which feature the same motive and function as the more visible methods which are punished. C. WYZANSKI, WHEREAS-A JUDGE'S PREMISES 234-35 (1965). See H. DRINKER, LEGAL ETHICS 218 (1953); ETHICS OPINIONS, supra note 135, at 353. See in re Cohn, 10 Ill. 2d 186, 196, 139 N.E.2d 301, 306 (1956) (Bristow, J., concurring), noting the irreconcilability of the rules against solicitation with the condoned practice of gaining clients at country clubs.

The impact of advertising restrictions on the First Amendment rights of lawyers is beyond the scope of this article. However, this timely issue has been thoroughly explored in recent commentary. See Comment, Controlling Lawyers by Bar Associations and Courts, 5 HARV. CIV. R.-CIV. LIB. L. REV. 301 (1968); Comment, Advertising, Solicitations and the Profession's Duty to Make Legal Counsel Available, 81 YALE L.J. 1181, 1185-91 (1972). See also Zimroth, Group Legal Services and the Constitution, 76 YALE L.J. 966 (1967).

140. Champerty consists of an agreement to bear the cost of litigating the claim of another in consideration for a share of the proceeds. The speculative nature of such a bargain was considered to be immoral, as trading in pain and suffering of others.

Maintenance consists in assisting another, with money or advice, in litigating a claim in which the offender has no interest.

Barratry is the offense of frequently committing champerty or maintenance, stirring up lawsuits or quarrels generally. See Radin, Maintenance by Champerty, 24 CALIF. L. REV. 48 (1935); Zimroth, Group Legal Services and the Constitution, 76 YALE L.J. 966, 969-71 (1967).


142. H. DRINKER, LEGAL ETHICS 210-12 (1953).

143. See, e.g., Mayer v. State Bar, 2 Cal. 2d 71, 39 P.2d 206 (1934). "If the respect of the people in the honor and integrity of the legal profession is to be retained, both lawyers and laymen must recognize and realize the fact that the legal profession is a profession and not a trade . . . . It is not a business, using bargain counter methods to reap large profits for those who conduct it." Id. at 74, 39 P.2d at 208. "[W]e do not believe that the profession of law is, or ought to be, merely a
if left unbridled, will create an atmosphere in which solicitation and general unethical conduct will thrive. Thus, the attendant consequences of advertising are described as including obstruction of justice resulting from increased litigation and congestion of court calendars; breach of the attorney’s duty to his client by overreaching, overcharging and underrepresentation; unethical practices such as assertion of fraudulent claims, corruption of public officials and subornation of perjury, and detriment to the public image of the profession as well as loss of a high-minded sense of professionalism. Also foreseen, perhaps most realistically, is the problem of deceptive advertising and

'highly competitive business.' And because it is not, and because it is necessary that the public should not be given the idea that it is so considered by the members of the profession, the rule against solicitation of business by advertisement is a reasonable regulation.” Barton v. State Bar, 209 Cal. 677, 683, 289 P. 818, 820 (1930). See also Pitts, Group Legal Services: A Plan to Huckster Professional Services, 55 A.B.A.J. 633 (1969); Note, Group Legal Services, 79 Harv. L. Rev. 416, 422 (1965).

The attitudes expressed in the quotations above contrast sharply with the practice of maintaining “treaties” between the state bar and various commercial institutions and industries, assuring the legal profession of non-competition in certain areas of the legal “market.” Such arrangements have been made between the state bar and the California Bankers Association, the California Land Title Association, automobile associations and associations of insurance companies and adjusters. See Group Legal Services, supra note 138, at 333-34 (1959). See generally Greenwood, The Elements of Professionalization, in PROFESSIONALIZATION 12-13 (H. Vollmer & D. Mills eds. 1966); Llewellyn, The Bar’s Troubles, and Poultices—and Cures?, 5 L. & CONTEMP. PRON. 104 (1938); Riesman, Some Observations on Law and Psychology, 19 U. Chi. L. Rev. 30, 34 (1951).

144. See Luther, Legal Ethics: The Problem of Solicitation, 44 A.B.A.J. 554 (1958). “It is properly said that prevention of controversy and litigation will improve the social order. It lessens instances in which the lay public may feel that a person’s honest intentions and desires have been frustrated by what the layman chooses to call ‘technicalities’ of the law.” ETHICS OPINIONS, supra note 135, at 240.

It can no longer be contended that litigation of colorable claims is contrary to the public interest. Several recent decisions of the United States Supreme Court have illustrated that actions which in the absence of solicitation might never have been brought can serve to advance important social goals. United Mine Workers v. Illinois Bar Ass’n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar Ass’n, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

145. The typical example of overreaching features the lawyer pressuring the dazed and semi-conscious accident victim into signing a contingency fee contract for any further lawsuit concerning the accident. Such practices are, of course, proscribed by rules against solicitation. See Zimroth, Group Legal Services and the Constitution, 76 Yale L.J. 966, 977-78 (1967), illustrating that even “ambulance chasing” should be judged after reference to the circumstances rather than according to a general proscription.

146. Luther, Legal Ethics: The Problem of Solicitation, 44 A.B.A.J. 554, 555 (1958); contra Note, A Critical Analysis of Rules Against Solicitation by Lawyers, 25 U. Chi. L. Rev. 674, 684 (1958) (pointing out that solicitation alone does not increase the likelihood that a lawyer will be overly anxious to settle).

147. Barton v. State Bar, 209 Cal. 677, 289 P. 818 (1930); see note 143 supra.
the possibility that lay persons would select lawyers on the basis of ads rather than according to relative capability.¹⁴⁸

**California Restrictions on Advertising**

In California, restrictions against solicitation of professional employment are delineated in Rules 2 and 2a of the Rules of Professional Conduct.¹⁴⁹ Advertising practices are limited indirectly by Rules 10 and 18.¹⁵⁰ Rule 2 states the strict tenet that members of the State Bar "shall not solicit . . . by advertising or otherwise," illustrating this by reference to such practices as volunteering counsel, use of any broadcast or printed media to advertise one's professional status and efforts to attract publicity by rendering favors to representatives of the media.¹⁵¹ Concessions from this proscription are few and narrowly drawn. To other lawyers and to clients an attorney may distribute notices of newly formed partnerships, change of address and other marginally commercial matters.¹⁵² In addition, a veteran is permitted to advertise his resumption of the practices of law.¹⁵³ Attorneys may advertise their professional status and place of business to the general public.

¹⁴⁸. Hildebrand v. State Bar, 36 Cal. 2d 504, 522, 255 P.2d 508, 519 (1950) (Traynor, J., dissenting); State v. Nichols, 151 So. 2d 257, 260 (Fla. 1963); Jacksonville Bar Ass'n v. Wilson, 102 So. 2d 292, 294-95 (Fla. 1958). Justice Traynor's dissent in *Hildebrand* notes that clients who are inexperienced in selecting counsel may be induced by advertising to select unsuitable counsel. However, this observation ignores the obvious; inexperienced clients have difficulty in selecting counsel even in the absence of advertising.

Judicial decisions have, in several situations, found the policy against solicitation to be outweighed by competing social interests. *See*, e.g., Magida v. Continental Can Co., 231 F.2d 843 (2d Cir. 1956), *cert. denied* 351 U.S. 972 (1956) (solicitation of shareholders to join in shareholders' action); *In re Ades*, 6 F. Supp. 467 (D. Md. 1934) (solicitation necessary to obtain enough clients for filing of bankruptcy proceeding, aiding client in collection of a debt); Gunnels v. Atlanta Bar Ass'n, 191 Ga. 366, 381, 12 S.E.2d 602, 610 (1940) (solicitation by local bar for claims against usurious finance companies).


¹⁵⁰. "A member of the State Bar shall not advise the commencement, prosecution or defense of a case, unless he has been consulted in reference thereto, except when his relation to a party or to the subject matter is such as to make it proper for him to do so." *Id.* Rule 10 (West 1962).

"A member of the State Bar shall not advise inquiries or render opinions to them through or in connection with a newspaper, radio or other publicity medium of any kind in respect to their specific legal problems, whether or not such attorney shall be compensated for his services." *Id.* Rule 18.

Rules 10 and 18 are particularly relevant to regulation of "indirect" advertising. See text accompanying notes 158-74 infra.


¹⁵³. *Id.* Rule 2a.
public only by means of telephone directories, recognized law lists and customary use of business cards.Rules 20 and 21 also provide a narrow relaxation of the prohibition for the advertising of group legal services and free legal aid offices.

The prohibition of Rule 2 was recently applied in Millsberg v. State Bar. In that decision, the California Supreme Court publicly reproved an attorney for permitting the advertising of his professional skills by an association of rental owners. Although the attorney was employed by the association and was involved in a wide range of activities for the association, it was held that the manner in which such activities were advertised in the association's magazine was proscribed by Rule 2. The attorney had wilfully violated the rule by permitting the use of his name and profession in a manner calculated to attract new members to the association.

The outer parameters of what appears above to be a rather straightforward prohibition have been obscured, however, in the area of indirect advertising. Often, as a result of their role in society, lawyers have attracted public attention by activities which may or may not have been commercially motivated. In order to prevent attor-

154. Id. Rule 2; see ABA Code, supra note 117, at DR 2-102.
155. Rule 20 provides that the furnishing of group legal services is not in itself a violation of the rules against solicitation, subject to the condition, inter alia, that attorneys rendering such services be identified only in response to individual inquiries. Similar qualifications are stated in Rule 21 with respect to participation by attorneys in legal aid offices and the publicity thereof. Cal. Bus. & Prof. Code foll. § 6076, Rules 20, 21 (West Supp. 1972). Compare ABA Code, supra note 117, at DR 2-103(D), DR 2-104(A)(2). See Blakslee, Legal Aid Offices and Advertising, 53 A.B.A.J. 1148 (1967).
156. 6 Cal. 3d 65, 490 P.2d 543, 98 Cal. Rptr. 223 (1972).
157. Id. at 75, 490 P.2d at 549, 98 Cal. Rptr. at 229.
158. The American Bar Association's Canons of Professional Ethics, Canon 27, originally made the distinction between direct and indirect advertising as follows: "Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable." ABA, CANONS OF PROFESSIONAL ETHICS No. 27, quoted in Opinions on Professional Ethics; see ETHICS OPINIONS, supra note 135, at 438-40.
159. Although the question of whether publicity is unethically obtained is answered largely by reference to the lawyer's good faith, certain conduct having the effect of advertising is proscribed because of the impact such conduct might have on the public's attitude toward the bar. Compare Ethics Opinion No. 1967-12, 43 Cal. St. B.J. 52, 55 (1968) and ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 285 (1967) (emphasizing good faith) with ETHICS OPINIONS, supra note 135, at 239-42, 450-53 and Informal Decision No. C-230(g), ABA Committee on Professional Ethics
neys from subverting the rules against advertising by indirection, the various bar association ethics committees have sought to regulate these subtle forms of attracting clients.

Thus, committee opinions have circumscribed the manner and degree to which members of the bar may participate in radio and television broadcasts, and in public appearances as lecturers and panelists. Efforts have also been made to limit news and feature stories about members of the bar. The bar has also deemed it improper for lawyers to publish books relating to their professional experiences and has admonished its members regarding self-laudation in newspaper articles and publications in nonlegal periodicals.

Although these activities appear to involve no more than what would be expected from persons active in public affairs, the bar has, nevertheless, for many years regarded this conduct as a covert manner of self-advertising potentially injurious to the dignity of the profession. Even seemingly innocuous forms of stating that a named individual is an attorney may therefore be examined to determine whether the public could construe the statement as an attempt to obtain publicity and whether the attorney’s motivation was to derive some degree of advertising.

Because of the multiplicity of factual circumstances which may garner some degree of publicity for an attorney, it is difficult to formulate precise standards which are applicable to all cases. Lack of certitude is further compounded by the abstract nature of the interest that the bar seeks to protect. The question of when conduct may be regarded as overly commercial and thus lowering the tone and traditional dignity of the bar is necessarily a matter of degree.

\*\*\*


163. ETHICS OPINIONS, supra note 135, at 422-25.

164. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, Nos. 43, 270, 432, 854 (1967); ETHICS OPINIONS, supra note 135, at 222-24.

165. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, Nos. 162, 273 (1967); ETHICS OPINIONS, supra note 135, at 179-81, 231-32, 260-61.


168. See, e.g., ABA COMM. ON PROFESSIONAL ETHICS, Informal Opinion No. 884
The criteria which are applied to determine whether publicity is actually advertising in the sense proscribed by Rule 2 are equally indefinite. Advising the practitioner that his public activities may be judged, variously, by his own subjective motives or by how his activities could be construed by the public\(^\text{169}\) or perhaps by the evaluation by the ethics committee of the nature of the program on which the lawyer is to appear,\(^\text{170}\) may offer too little in the way of guidance.

It is suggested that the pervasive nature of bar regulation in the area of advertising,\(^\text{171}\) together with the lack of consistency in committee rulings on the subject,\(^\text{172}\) may inhibit members of the bar from ac-

\(^{169}\) (finding the phrase “A Lawyer’s Time and Advice are his Stock in Trade—Abe Lincoln” printed at the bottom of lawyer’s statement forms was unduly commercial, and constituted self-laudation); \(^\text{id.}\) Informal Opinion No. 747 (A lawyer may not wear jewelry bearing the insignia of his state bar association, thus indicating that he is a member-lawyer of the association). See generally Note, Ethics, 1 SAN DIEGO L. REV. 130, 132 (1964).

169. See note 159 supra.

170. See, e.g., Informal Decision C-230(g), supra note 159. Although the ABA had previously condemned participation by attorneys and judges on commercially sponsored television and radio broadcasts, Decision C-230(g) made an exception for Meet the Press; in the opinion of the committee, the program was “of a distinctly public service type,” despite its commercial sponsorship. The general rule as stated by the ABA is “public information programs, such as the panel or interview types, sponsored by bar associations . . . or those non-commercial programs of this type” are proper for participation by lawyers and judges, “provided, always, that such programs conform to the proper standards of the bench and bar.” ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 298 (1961). “[A] combination of the professional and the commercial in the same program inevitably detracts from the dignity of the legal profession.” Id. No. 186 (1951). Commercial sponsorship permits the inference that participating lawyers are both assisting the sponsor and seeking employment from the audience. Id. No. 286 (1965).

ABA CODE, supra note 117, at EC 2-2 (lawyers “acting under proper auspices” and motivated by public spirit should participate in educational programs concerning legal issues).

Some ethics opinions suggest that when programs are sponsored by a local bar association, rather than by a commercial sponsor, the predominant impression will be that the bar is desirous of performing a public service only, and that attorneys involved are interested solely in informing the public. See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 298 (1967); ETHICS OPINIONS, supra note 135, at 239-42.

171. The scope of bar regulation is described as follows: “Perhaps in no phase of its self-discipline is the Bar of this state, and of the country in general, more careful, circumspect and exacting than in its strict avoidance of any act or conduct which borders on advertising.” ETHICS OPINIONS, supra note 135, at 215.

172. For example, the ethics committee of a local bar association ruled that an attorney addressing a non-profit organization on general legal issues could give his name and profession, but not a personal biographical sketch. ETHICS OPINIONS, supra note 135, at 418-22. However, the same committee had, nine years earlier, also ruled that a lawyer addressing a property owners’ association might properly detail his own trial experience as well as give emphasis to the fact that he specialized in the area of
tively taking part in matters of community interest. Of course, a practitioner may seek an advisory opinion from his local bar's ethics committee prior to addressing a citizens group or appearing on a radio broadcast to discuss consumer rights or constitutional questions. It is likely, however, that many lawyers will be dissuaded from taking the initiative in such activities. The dissenting opinions in Millsberg suggests that rather than encouraging attorneys to be simply more circumspect in their public appearances, the bar may be dampening the enthusiasm of its members to carry out their responsibilities in the area of pro bono publico activities.\textsuperscript{173} An attorney can hardly be criticized if, upon consideration of the indefinite standards by which his conduct will be judged, he declines to make appearances which may subject him to censure. It may be asked whether this result does not also diminish the prestige of the profession.\textsuperscript{174}

Obviously, there are important and somewhat conflicting interests involved in this area of professional regulation. Increasing public interest in the law and how it is administered as well as increasing examination by the mass media of all manner of public and private activities which were not the subject of much public interest in the past, may in time result in the profession taking a different view of limitations on advertising.

**Conclusion**

The state bar of California has proven its determination to maintain effective self-discipline among its membership. The continuing contribution of time and funds is, of course, no more than the price or the privilege of self-regulation. There is no assurance that control of lawyer discipline will be left in the hands of lawyers unless the public

---

\textsuperscript{173} Millsberg v. State Bar, 6 Cal. 3d 65, 77, 490 P.2d 543, 550, 98 Cal. Rptr. 223 (1971) (Mosk, J., dissenting). For example, when the television program *The Advocates* was aired, the show's lawyer-moderator, Roger Fisher, received a critical letter from the president of a local bar association, suggesting that Fisher's appearances might constitute advertising as well as improper appearances in the media in a theatrical role as a lawyer. Fisher, *Lawyers, Television and Public Affairs*, 53 Chi. B.R. 250, 257 (1972).

\textsuperscript{174} See Note, *Ethics*, 1 SAN DIEGO L. REV. 130 (1964), describing resulting publicity attending disciplinary proceedings on charges of advertising by a prominent New York law firm.
is satisfied that adequate measures are being taken. Unfortunately, the general public seems largely unaware of the progress which has been achieved in this area.

Reporting to the public is, however, not the only task left unfinished. There remains the need for continual input regarding the disciplinary standards and the manner of their enforcement. This is especially necessary with respect to those rules which affect nonprofessional activities or which have an impact on the role of the organized bar in the community. Standards of professionalism such as those restricting advertising or regulating competency require careful and persistent consideration. Evaluation of these rules in the context of competing interests may warrant a reorientation by the state bar.