Confidentiality—To What Point?

Robert Meserve*

The disciplinary supervision of a court over the members of its bar is regarded as one of its inherent powers.

"With this background of precedent there is little room for doubt as to the scope and effect of the provision in the Constitution of 1777 that attorneys might be regulated by rules and orders of the courts. The provision was declaratory of a jurisdiction that would have been implied, if not expressed."¹ Discipline is undertaken, it seems, to protect "the integrity and standing of the bar, the administration of justice, [and] . . . the public interest,"² for "the public, as well as the legal profession and the courts, must be protected from those who do not measure up to their responsibilities. Government largely depends on the stability of the courts and, to a considerable extent, upon the integrity of the members of the legal profession. The purpose of disbarment proceedings is not to punish the individual, but to determine whether the attorney should continue in that capacity."³

To this end, the court, or bar associations under common law practice, commonly select a grievance committee, a board of bar overseers or a like body to investigate the actions of lawyers who are alleged to have been guilty of professional misconduct and, in appropriate cases, to institute proceedings, usually eventually before the court, looking to the possible discipline of such lawyers. They may, or may not, report evidence taken and findings made in adversary preliminary proceedings.⁴

Customarily, in such cases, where investigative procedures are still being pursued, up to the point, at least, where an information, complaint or application is filed with the court itself, the fact of such a proceeding, as well as evidence developed in the investiga-

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*President of the American Bar Association, 1972-73. Member of the Massachusetts Bar. A.B., 1931, Tufts University; L.L.B., 1934, Harvard University.


2. Massachusetts Supreme Judicial Court Rules ch. 4 [hereinafter cited as Rule Four], § 18(4) (Bar Discipline and Clients' Security Protection) (relating to necessary finding for reinstatement).


4. Rule Four § 8(2), (3) (Procedure).
tion, is confidential, by custom or rule. Thus Rule Four of the Massachusetts Supreme Judicial Court provides in part:

1. All proceedings involving allegations of misconduct by an attorney shall be kept confidential unless (a) the court otherwise orders, or (b) the respondent-attorney requests that the matter be public, or (c) the proceeding is predicated upon a conviction of the respondent-attorney for a crime . . . . and

3. All participants in any investigation or proceeding pursuant to this Chapter Four shall conduct themselves so as to maintain the absolute confidentiality of the proceedings in accordance with this section. 5

In addition to those exceptions specified in the first clause itself, the Rule provides further:

2. The provisions of this section shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or considering reciprocal disciplinary action, or to law enforcement agencies investigating qualifications for government employment where discipline under the Chapter Four has been imposed, or, except as the court may direct, where the proceedings are pending and the Board in its discretion believes disclosure is warranted. In addition, the Board shall transmit notice of all public discipline imposed by this court to the National Discipline Data Bank maintained by the American Bar Association. 6

The public interest clearly is served by having the matter complained about investigated fully. The procedure of investigation is analogous to that of a grand jury into alleged crime. It might well defeat the purpose of such an investigation if it were a public proceeding; and, of course, the public and the bar are accustomed to the confidentiality of proceedings before a grand jury, a confidentiality which the prosecutor, jury members and stenographers are sworn to preserve.

To reveal, prematurely, the fact of the investigation is to give the offender, if in fact there has been an offense, an opportunity to

5. Rule Four § 20 (1), (3) (Confidentiality).
flee, or, more realistically, perhaps, with relation to lawyers, an opportunity for the unscrupulous to attempt to conceal the offense, e.g., to repair, in part, the wrong done by making restitution to the wronged client, thus perhaps closing the client's complaining mouth.

Moreover, quite apart from affirmative action on behalf of the person under investigation, wronged persons, and persons, perhaps even other lawyers, who may or may not be wronged but have knowledge of the facts, may be more ready to come forward with the truth when they are satisfied that the preliminary investigation, at least, will be confidential, even though at some later stage, as they must realize, their testimony may be made public if adversary proceedings result.

These are, in my opinion, realistic considerations, and considerations which are not always in the mind of those complaining when the complete confidentiality of the investigatory process is attacked. They have, however, been stressed in some of the cases and commentary.

The remaining reason given for the confidentiality of such investigations is the often observed fact that something around ninety percent of the claims asserted against lawyers do not, upon examination, warrant disciplinary action. Many claims are the product of a mind which will not accept as reality the fact that, in most lawsuits, at least one party is going to lose. Other complaints rise only to the level of controversy as to the amount of the fee (not "clearly excessive") properly charged by a lawyer, or concern delays, and other circumstances, which may, or may not, be the lawyer's fault, or may even involve malpractice (as by missing statutory deadlines), but clearly do not, or may not, warrant disciplinary action as distinguished from civil liability. And many other complaints, which seem on their face to assert actual wrongful action by a lawyer, whether or not the accusation be malicious, are, upon investigation, found clearly to lack any merit and not to warrant action against the person complained against.

To permit the fact of investigation to be broadcast is to run the

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7. Florida Bar v. Simon, 171 So. 2d 372 (Fla. 1964); In re Klausmeyer, 24 Ohio St. 2d 143, 144, 265 N.E.2d 275, 278; Earle, Should Confidentiality Rule Be Changed?, 47 Florida BAR JOURNAL 148, 149 (1973).

risk of damaging the lawyer’s reputation where he has done nothing wrong. This is a serious risk indeed, particularly in a profession where, despite cynical lay statements to the contrary, a lawyer’s reputation for honesty and integrity comprises a great part of his stock in trade.

As Mr. Justice Cardozo stated, when he was Chief Justice of the New York Court of Appeals:

The argument is pressed that, in conceding to the court a power of inquisition, we put into its hands a weapon whereby the fair fame of a lawyer, however innocent of wrong, is at the mercy of the tongue of ignorance or malice. Reputation in such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored. The mere summons to appear at such a hearing and make report as to one’s conduct may become a slur and a reproach. Dangers are indeed here, but not without a remedy. The remedy is to make the inquisition a secret one in its preliminary stages.9

While one need not adopt literally the flowery phraseology of the great and learned Justice, it is, I believe, often clearly true that a lawyer who may be the object of an unwarranted accusation surely has an interest in not having such accusation made generally public, at least until the element of probable cause has been established. This is equally true whether the accusation be based upon actual malice and falsehood, as sometimes occurs, upon ignorance, or upon circumstances easily and honestly explicable. To a degree, at least, the confidentiality desired by the innocent lawyer may not only be fair to him, but consistent with the public interest, which does not require that unfair and unwarranted accusations be publicized.

If, of course, the lawyer affirmatively wishes that the matter be made public, and that he be given immediately an opportunity to state publicly his side of the controversy, the stated reason for privacy which relates to his reputation is obviously no longer one which should weigh with the court or other investigative body.10 And so the Massachusetts rule gives the attorney the option to make the fact of investigation public, and it is probably difficult to suppose a case where the public interest in confidentiality of investigation, heretofore referred to, would be sufficiently involved as to overcome the desirability of satisfying such a wish of the party being investigated.

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by the time he decides he wants the full sunshine treatment." This is not necessarily so, perhaps, but Rule Four assumes that it is, and not without practical reason.

Also, where the attorney has already been the subject of a criminal proceeding ending in his conviction, he has a public record in the very matter being investigated. Where such a public record is the basis for the investigation looking to discipline, the rule permitting full disclosure would seem to be clearly appropriate. And any attempt to preserve a nonexistent privacy might properly invite public suspicion of the entire process and lead to the assumption that no one proposes to do anything about it.

Facts which might motivate exercise of the discretionary power given the court to waive the requirement of confidentiality, in circumstances other than those just discussed, are hard to imagine; but it may well be that there are such, as Rule Four suggests.

And the other exceptions set forth in the second subsection of the Rule seem clearly warranted, the last sentence, of course, not relating to a breach of the rule against confidentiality at all.

The difficult question arises in determining the point at which the general rule of confidentiality should cease to govern in normal cases.

The discussion, to this point, suggests that there is reason for a policy of confidentiality in disciplinary matters, but perhaps only so long as the proceedings remain merely investigatory. This would seem to continue to be so, even though the attorney be given a preliminary opportunity to state his view of the matter under investigation, as by filing a written answer to the complaint, for example.\(^12\)

When once a finding of probable cause has been made, however, the general public interest in open proceedings, which manifests itself in regard to other court activities, and in litigated matters generally, would seem to apply. No argument for special treatment of the accused\(^13\) lawyer seems convincing.

Many lawyers, with some apparent reason, are generally suspi-

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cious of a profession which undertakes, in effect, to regulate itself and to purge itself of those who diserve their client’s interests. Such persons are fearful that matters really warranting disciplinary action will be swept under the rug to avoid a disclosure which may be damaging to the whole bar; that only the most obvious offenders will be brought to the bar of justice; and that, for fear or to curry favor, those possible offenders who have achieved high standing will go unpunished. On the other hand, some are also afraid that aggressive members of minority groups will be “disciplined” while others, who do not so rock the social boat, may avoid appropriate punishment, i.e., that enforcement will be selective.

One of the answers to such fears is obviously a general openness and publicity in the judicial disciplinary process. Yet any man publicly accused of wrongful conduct is, by that accusation alone, diminished in public esteem, surely until acquittal, and perhaps permanently. That fact does not suffice to make trials generally private.

It is appropriate to suggest that public trials of criminal cases are required not only to make sure that they are conducted without prejudice to defendants, but to demonstrate, to all citizens, that the wrongs of society are righted without special favor to anyone, and that those found “not guilty” are, in fact, innocent and not the recipients of special favors. So, at some stage, innocent or guilty, the accused, to get the benefit of public acquittal, must face the obloquy of public accusation.

The lawyer who suffers wrongful accusation and is cleared of such charges should, ultimately, be happy to have his conduct vindicated in proceedings that everyone can see are impartial, and in which the inadequacy of the case against him is demonstrated, if it is. Publicity is the price he pays for fair trial, and the lawyer should not, at least in those cases where probable cause to believe him an offender has been found by his peers, expect to be exempted from public trial of that issue. Nor is the bar harmed when the cleansing process proceeds in daylight. On the contrary, it is benefited when its concern with discipline is publicly demonstrated. And it is generally folly on an accused’s part to assume that the fact that he was accused, and that probable cause was found, will not ultimately be public knowledge. So should he hope that his acquittal will be publicly noted.

Sympathy for the special plight of the lawyer accused would be misguided, indeed, if it leads to a private hearing and a public feeling that, because he is a well-liked or established lawyer, or
because he is not a lawyer who advocates unpopular causes, or for any other "special" reason, such as concealing professional wrongs from the public, his case will be handled behind closed doors. Prejudice is seen to exist because of such privacy, either in the accused lawyer's favor or against him. Lawyers, once probable cause is found, should be treated as other litigants, civil or criminal.

If we adopt these principles, surely proceedings before the court, after probable cause is found, should be open except, perhaps, in that rare class of cases (if any exists) where the court finds, for good reason, some prejudice to the public good in public hearing, as, perhaps, in the case of some offense of a particularly sexually titillating and scandalous character involving alleged conduct of third parties. That is, it seems, a problem which would relatively infrequently, if ever, arise as to lawyers and professional discipline.

There is, however, under many modern procedural rules, the possibility that factual hearings will be held, after the finding of probable cause, but before boards or grievance committees and factual findings made by such bodies, which, like a master's report, will constitute the evidence, or at least a part of the evidence, upon which the court will ultimately base its decision in the particular case. Should such "administrative" or preliminary evidential hearings be public?

Logically, an affirmative answer would seem to follow. Practically, the formality thus imparted to these preliminary proceedings, which might lead, for example, to the requirement of courtroom hearings, in place of hearings in a lawyer's office, might suggest that the public interest would be served by opening the record once the matter is brought before the court, after this type of adversary hearing of the merits, as a result of the filing of a complaint or information.

If the committee or board found facts which cleared the lawyer of the charges, and no further proceedings resulted, the accused lawyer might well be given an option to open the record or not. And perhaps the record of such a hearing should only be opened when it is offered in evidence before the court where prosecution follows. But it should eventually be available to the press and public in the precise form in which it comes before the court.

Some prejudice can clearly result when the hearing record in such cases of "administrative" hearing is thrown open before that record is offered in open court. Lawyers—even members of grievance committees and boards of overseers—are not judges. Their
rulings, if erroneous, may result in the admission of matter which may unjustly injure the reputation of innocent respondents, and may later be excluded by a court; or such rulings may exclude exculpatory answering evidence later admitted. Would any real public interest be affected if the rule requiring public decisions and public trials were limited to actual courtroom proceedings?

In any event, I suggest that the rule of confidentiality, as applied to the investigatory phases of the disciplinary proceeding, serves the public interest. However, once a finding of probable cause is made, any preliminary fact-finding hearing concluded, and a complaint lodged with the court, the writer urges that normal rules should apply, and that all subsequent proceedings should be public. Such public action is, I suggest, in the interest of all concerned—the lawyer accused, the court, the profession and the public.