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# LAWYER DISCIPLINE IN OHIO, 1988: SOME OBSERVATIONS

by  
STANLEY A. SAMAD\*

Table I summarizes the disposition of disciplinary cases reaching the Supreme Court of Ohio for final action<sup>1</sup> in 1988, and eight earlier years. This note discusses the volume of activity during 1988 compared with earlier years, the sanctions that were given, and rule changes affecting discipline. It comments on the types of offenses and the shortfall of Ohio's disciplinary system as measured by the American Bar Association Standards for Lawyer Discipline and Disability Proceedings (hereinafter "ABA Standards"). It recommends a further change in the rules.

## VOLUME OF ACTIVITY

With reference to Table I, the volume of disciplinary activity during 1987 was abnormally low, due to changes in the rules and in the personnel administering the system. For example, a case heard by a panel of the Board of Commissioners on Grievances and Discipline (hereinafter "the Board") on February 6, 1987, was not decided by the Court until August 19, 1987 — about twice the time of previous years.<sup>2</sup> The number of cases finally decided during 1988, however, approached a more nearly normal level of activity as the backlog of cases from 1987 began to move through the system. For example, only eighteen cases involving suspension, for both fixed and indefinite periods, were decided during 1987. During 1988, the number was thirty-eight, thus approaching the figure of forty-one for 1986.

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<sup>1</sup> Excluded from the Table are reinstatements from one year suspensions, contempt citations and any actions not published. (Reinstatement from definite periods of suspension are by motion, but are "automatic", provided costs have been paid and no disciplinary charges are pending. SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO, R. V § (24) [hereinafter GOV. BAR R.].

<sup>2</sup> Office of Disciplinary Counsel v. Dodge, 32 Ohio St. 3d 118, 119, 512 N.E.2d 650, 651 (1987). See Toledo Bar Ass'n. v. Westmeyer, 35 Ohio St. 3d 261, 520 N.E.2d 223 (1988), wherein the hearing before a panel of the Board was held on March 30, 1987, and the Court's decision was dated March 16, 1988. The case was uncomplicated and resulted in a one year suspension.

In 1986, the Court amended its rule concerning sanctions to include a definite period of suspension of six months' to two years' duration,<sup>3</sup> *vice* the one year suspension that had been established in 1981. Since the amended rule did not become effective until October 1, 1986, and since cases were delayed in their processing as noted above, the effect of the rule change was not felt until 1988.

An analysis of the thirty-eight cases of suspension for 1988 reveals that nine were automatic on the lawyer's conviction of a felony,<sup>4</sup> twelve were the result of disciplinary proceedings, and seventeen were for periods ranging from six months to two years pursuant to the October 1, 1986 amended sanctions.

The author predicts a decline in the number of sanctions of indefinite suspension, as well as in public reprimands, and an increase in the number of suspensions of six months' to two years', as a result of a "fine tuning" of sanctions brought about by the October 1, 1986 amendment. For example, in *Columbus Bar Association v. Ramey*,<sup>5</sup> decided in 1972 when the sanctions were public reprimand, indefinite suspension, and permanent disbarment, the respondent was publicly reprimanded for preparing a will for a non-relative, in which he named himself sole beneficiary.<sup>6</sup> By way of contrast, in *Mahoning Bar Association v. Theofilos*,<sup>7</sup> decided in 1988, wherein the respondent prepared a will for a non-relative in which he named himself and his son sole beneficiaries, the Board recommended six months' suspension, and the Court gave a one year suspension.<sup>8</sup>

In *Office of Disciplinary Counsel v. Michaels*,<sup>9</sup> decided in 1988, respondent was given a definite period of suspension of eighteen months' duration and five years' probation, for conviction of manslaughter and reckless operation of a motor vehicle while drunk.<sup>10</sup> Given the option of public reprimand, a one year suspension, indefinite suspension, or permanent disbarment, as was the case prior to October 1, 1986, the respondent surely would have been indefinitely suspended.

The examples could be multiplied.

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<sup>3</sup> Gov. BAR R., *supra* note 1, at R. V § (7)(c), effective Oct. 1, 1986.

<sup>4</sup> *Id.* at R. V § (9)(a)(iii).

<sup>5</sup> 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972).

<sup>6</sup> *Id.*

<sup>7</sup> 36 Ohio St. 3d 43, 521 N.E.2d 797 (1988).

<sup>8</sup> *Id.* at 45, 521 N.E.2d at 799.

<sup>9</sup> 38 Ohio St. 3d 248, 527 N.E.2d 299 (1988).

<sup>10</sup> *Id.*

Not surprisingly, neglect of a client's cause<sup>11</sup> and mishandling of a client's funds,<sup>12</sup> with or without misrepresentation,<sup>13</sup> continued as the leading cause of discipline during 1988. The next leading cause was the conviction of lawyers for felonies. Two judges were given public reprimands for unintended violations of the Code of Judicial Conduct.<sup>14</sup> Other types of misconduct were represented by single instances, e.g., unauthorized practice of law by a lawyer under suspension,<sup>15</sup> practicing before a federal court to which the respondent was not admitted,<sup>16</sup> and contributing to the delinquency of a minor.<sup>17</sup>

The author was struck by the number of instances in which substance abuse was either a cause or a factor in the misconduct leading to discipline. In nine reported cases resulting in sanctions ranging from permanent disbarment to one year's suspension, drug or alcohol abuse or both appear. Where the respondent admitted his dependency and sought medical treatment, however, the Court acted with greater compassion than in earlier years.<sup>18</sup>

<sup>11</sup> Toledo Bar Ass'n. v. Reinhart, 37 Ohio St. 3d 136, 524 N.E.2d 510 (1988) (permanently disbarred for multiple instances of neglect, including failure to appear at his hearing).

<sup>12</sup> Cleveland Bar Ass'n. v. Raines, 37 Ohio St. 3d 165, 524 N.E.2d 512 (1988) (grand theft from an estate and failure to account, permanently disbarred).

<sup>13</sup> Misrepresenting to the clients that their cases had been filed was a factor in Toledo Bar Ass'n. v. Reinhart, 37 Ohio St. 3d 136, 524 N.E.2d 510, also referred to in note 8, *supra*.

<sup>14</sup> Office of Disciplinary Counsel v. Cartwright, 36 Ohio St. 3d 601, 521 N.E.2d 459 (1988), and Office of Disciplinary Counsel v. Riley, 36 Ohio St. 3d 601, 521 N.E.2d 799 (1988). The judges violated CODE OF JUDICIAL CONDUCT CANON 7A(1)(b) (1988): "A judge or candidate for election to judicial office shall not . . . (b) make speeches for a political organization or candidate or preside at a political meeting or publicly endorse a candidate for public office."

<sup>15</sup> Akron Bar Ass'n. v. Thorpe, 40 Ohio St. 3d 174, 532 N.E.2d 752 (1988).

<sup>16</sup> Office of Disciplinary Counsel v. Scuro, 36 Ohio St. 3d 205, 522 N.E.2d 572 (1988) (six months' suspension).

<sup>17</sup> Office of Disciplinary Counsel v. King, 37 Ohio St. 3d 77, 523 N.E.2d 857 (1988) (one year suspension).

<sup>18</sup> During 1988, substance abuse was explicated as a factor in nine cases cited below. It was doubtless a factor in other cases that are not fully reported (e.g., in resignations). For comparison with an earlier period, see Samad, *The True Story of Lawyer Discipline in Ohio: 1967-1983*, 18 AKRON L. REV. 363, 384-86 (1985). Toledo Bar Ass'n. v. Bridgeforth, 40 Ohio St. 3d 2, 531 N.E.2d 317 (1988) (delay in handling a legal matter, drug and alcohol abuse, one year suspension with probation); Office of Disciplinary Counsel v. Clark, 40 Ohio St. 3d 81, 531 N.E.2d 671 (1988) (convicted of smuggling and dispensing marijuana and tax evasion, indefinite suspension); Cuyahoga County Bar Ass'n. v. Siewert, 40 Ohio St. 3d 172, 532 N.E.2d 751 (1988) (neglect of a legal matter, alcohol abuse, two year suspension on condition); Columbus Bar Ass'n. v. Gill, 39 Ohio St. 3d 4, 528 N.E.2d 945 (1988) (recovering alcoholic and drug addict, who converted client's funds, indefinite suspension but may petition for readmission in one year); Office of Disciplinary Counsel v. O'Neill, 39 Ohio St. 3d 337, 530 N.E.2d 1317 (1988) (convicted of illegal possession of drug documents, indefinite suspension); Office of Disciplinary Counsel v. Michaels, 38 Ohio St. 3d 248, 527 N.E.2d 299 (1988) (conviction of manslaughter and reckless operation of a motor vehicle while intoxicated, eighteen month's suspension and five year's probation); Office of Disciplinary Counsel v. Jones, 38 Ohio St. 3d 338, 528 N.E.2d 190 (1988) (neglect of a legal matter, convicted of two counts of drug abuse, and continuing pattern

It appeared to recognize the medical view or disease model of drug and alcohol dependency rather than the moralist's "sin model."<sup>19</sup> The author projects that drug and alcohol abuse will continue as significant causative factors in violations leading to discipline.

### REINSTATEMENT

Less than ten percent of the disciplinary cases reaching the Ohio Supreme Court result in permanent disbarment. A substantial number of attorneys resign when faced with serious disciplinary violations. The more serious offenses by those who have not abandoned the practice and who have not been guilty of prior disciplinary violations result in indefinite suspension. Thus, the door to readmission to practice after a minimum period of two years following the entry of a final order of suspension is left ajar. As Table I indicates, of those indefinitely suspended who seek readmission, nearly ninety-two percent are successful.

What is noteworthy for 1988 is the one unsuccessful application, for readmission *Office of Disciplinary Counsel v. Bell*.<sup>20</sup> Respondent, a Cleveland attorney, had been given an automatic indefinite suspension for the conviction of a felony (Falsification) in 1983. This was followed by a disciplinary hearing that resulted in an indefinite suspension in 1984.<sup>21</sup> The falsifications were in connection with several private adoption proceedings filed in the Probate Division of the Common Pleas Court of Summit County, Ohio. He had also charged excessive fees. He petitioned for reinstatement in 1987 and presented evidence by credible witnesses of his present good character and competency. His readmission, however, was opposed by the Cleveland Bar Association, the relator Disciplinary Counsel, and the Probate Divisions of the Common Pleas Courts of Cuyahoga and Summit Counties. His readmission was denied by a split decision of the Court, although the Board had recommended readmission.

The only reason cited by the Court for its rejection of the Board's recommendation was that the gravity of Bell's misconduct continued to persuade the majority of the Court that he was unworthy to practice law.

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of criminal misconduct, indefinite suspension); *Office of Disciplinary Counsel v. Soucek*, 37 Ohio St. 3d 42, 523 N.E.2d 513 (1988) (convicted of possession of one kilo of cocaine with intent to sell, indefinite suspension); *Office of Disciplinary Counsel v. Bica*, 35 Ohio St. 3d 264, 520 N.E.2d 221 (1988) (forgery of client's check, failing to deposit client's funds in a trust account, prescription drug dependency, indefinite suspension).

<sup>19</sup> *Columbus Bar Ass'n. v. Gill*, 39 Ohio St. 3d at 5-6, 528 N.E.2d at 946-47.

<sup>20</sup> 39 Ohio St. 3d 276, 530 N.E.2d 404 (1988).

<sup>21</sup> *Office of Disciplinary Counsel v. Bell*, 15 Ohio St. 3d 118, 472 N.E.2d 1069 (1984) (conviction of OHIO REV. CODE § 2921.13, Falsification and charging excessive fees).

The fallacy of the majority was pointed out by Justice Douglas in his dissent when he observed that the rules for readmission do not place primary emphasis on the seriousness of the original offense but upon the issue of rehabilitation.<sup>22</sup> Had the offense, though serious, been unpardonable, Bell should have been permanently disbarred in 1984.

The reality of the reinstatement process is this: no lawyer who has been indefinitely suspended in Ohio has ever been reinstated over the objection of his local bar association, who was usually the relator.<sup>23</sup> Here, Bell was opposed both by the Cleveland Bar Association, and the Disciplinary Counsel as relator. If a lesson is to be learned from *Bell*, it is this: the erring attorney should first make peace with his local bar association and his prosecutor (relator).

### RULE CHANGES

During 1988, the rules relating to disciplinary procedures were amended in two important respects,<sup>24</sup> and a proposed change was submitted for public comment on a third.<sup>25</sup>

No longer will a prior sanction followed by a second offense result in a mandatory enhancement of the sanction. A prior disciplinary sanction, however, will be a factor in determining the second sanction. Thus, Ohio has finally aligned itself with the ABA Standards in another particular.<sup>26</sup>

Secondly, provision was made for default judgments against those lawyers who have been served but who fail or refuse to answer the complaint. This, too, is consistent with the ABA Standards.<sup>27</sup>

<sup>22</sup> Gov. BAR R., *supra* note 1, at R. V § (28): "Requisites for Reinstatement. No person shall be reinstated unless he has established by clear and convincing evidence to the satisfaction of the panel hearing the petition for reinstatement that he had made appropriate restitution to the persons who were harmed by his misconduct and that he possesses all of the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against the Petitioner. The order of reinstatement may be conditioned upon the Petitioner's subsequently taking and passing a regular bar examination of the Supreme Court and thereafter taking the prescribed oath of office."

<sup>23</sup> See Samad, *supra* note 15, at 386-95.

<sup>24</sup> Gov. BAR R., *supra* note 1, at R. V § (8) was amended to read, in part, as follows: "Prior disciplinary offenses shall be considered as a factor that may increase in the degree of discipline to be imposed for subsequent misconduct." Gov. BAR. R. V §§ (13) and (32) were amended effective July 27, 1988, to provide for a motion for default.

<sup>25</sup> PROPOSED Gov. BAR R. V §§ (7), (10) and (23) provide for probation in connection with suspension. 39 Ohio Official Reports Advance Sheets A-7-13 (Nov. 21, 1988).

<sup>26</sup> STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 6.7 (1979) reads, "Probation should be imposed for a specified period, not in excess of two years." [hereinafter ABA STANDARDS].

<sup>27</sup> *Id.* at § 8.28 reads: "Failure by respondent to timely file an answer should be deemed an admission of the formal charges."

The proposed amendment would provide for a definite period of suspension which may be stayed in whole or in part, and the imposition of a period of probation in conjunction with suspension.<sup>28</sup> Thus, the Court may order a fixed period of suspension, stay the suspension during a probationary period, and reinstate the period of suspension if probation is violated. This change, too, is consistent with the ABA Standards, although those Standards limit the period of probation to two years. The proposed rule imposes no temporal limit.

## CONCLUSION

The author has had prior occasion to evaluate Ohio's disciplinary procedures with reference to ABA Standards, and to find Ohio's procedures wanting in several important respects.<sup>29</sup> However, in the three years since his study, most of the disparity has been removed, although two significant gaps remain.

Ohio continues to operate a hybrid, decentralized system of relationships, with a Disciplinary Counsel at the state level, and accredited Grievance Committee of the Ohio State Bar Association and the larger local bar associations who are also authorized to serve as relators. The ABA Standards on the other hand, call for a unitary, centralized system of investigation and prosecution.<sup>30</sup>

The issue of centralization of the system was considered and rejected by a blue ribbon committee appointed by the Chief Justice in 1985.<sup>31</sup> The Court adopted the Committee's recommendations in that respect. Ohio's hybrid system is working well, and is not likely to be changed in the foreseeable future.

One easily rectifiable shortfall in the Ohio procedure remains. The Court rules provide for a "Mental Illness" suspension,<sup>32</sup> but fail to provide for a "Disability Inactive Status" as advocated by the ABA

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<sup>28</sup> See *supra* note 22.

<sup>29</sup> Samad, *supra* note 15, at 397-401.

<sup>30</sup> *Report of the Special Committee on Evaluation of Disciplinary Enforcement*, 95 *REP. A.B.A.* 783 (1970); ABA STANDARDS, *supra* note 26, at § 3.1: "The court should establish one permanent statewide agency to administer . . . the lawyer discipline and disability [system]."

<sup>31</sup> See Frank, *Ohio Turmoil Sparks New Disciplinary Plan*, 11 *BAR LEADER*, Mar.-Apr. 1986, at 6. The author served on that committee. The characterization "blue-ribbon" is that of the Bar Leader.

<sup>32</sup> *GOV. BAR R.*, *supra* note 1, at R. V § (12)(b): "MENTAL ILLNESS SUSPENSION. After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination provided in (c) thereof, the Board shall forthwith certify the complaint to the Supreme Court and the Supreme Court may suspend the Respondent from the practice of law."

Standards.<sup>33</sup> The increasing incidence of substance abuse,<sup>34</sup> the graying of the Ohio bar with the physical and mental ravages of age<sup>35</sup> and chronic illness that will inevitably strike some members of the bar,<sup>36</sup> warrant the adoption of the ABA Standards in this regard.

The “Disability Inactive Status” on both mental or physical grounds permits the suspension of a lawyer from practice, temporarily or permanently, without moral stigma, and permits resumption of practice on proof of the removal or abatement of the impediment — on medical facts rather than on proof of moral rehabilitation.

The Court has taken a step in this direction by acknowledging a disease model of addiction.<sup>37</sup> It has encouraged lawyers in need of help to seek the aid of Lawyers’ Assistance Committees by freeing members of the Committees of the “snitch” provision of the Code of Professional Responsibility.<sup>38</sup> The Court should take the final step of amending its rules to recognize the “Physical Disability Inactive” status as recommended by the ABA Standards.

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<sup>33</sup> ABA STANDARDS, *supra* note 26, at §§ 12.1-12.6.

<sup>34</sup> See *supra* note 15.

<sup>35</sup> See, e.g., Cincinnati Bar Ass’n. v. Chatfield, 34 Ohio St. 3d 47 (Advance Sheets, Dec. 21, 1987), withdrawn from publication, *Notice of Errata*, 34 Ohio Official Reports Advance Sheets A-3 (Dec. 28, 1987). Respondent was said to be suffering from Alzheimer’s disease and was suspended for mental illness.

<sup>36</sup> See, e.g., Stark County Bar Ass’n. v. Lukens, 48 Ohio St. 2d 187, 357 N.E.2d 1083 (1976). Respondent was afflicted with diabetes and associated porphyria, and was hospitalized during part of the period when the misconduct — delay in handling clients’ cases — occurred. *Id.* at 198, 357 N.E.2d at 1089. He had received several warnings from the Stark County Bar Association. *Id.* Provision of a “Personal Disability Inactive Status” would have permitted his suspension without stigma, as mental illness permitted respondent’s suspension without stigma in *Chatfield*, *supra* note 35.

<sup>37</sup> See Columbus Bar Ass’n. v. Gill, 39 Ohio St. 3d at 7, 528 N.E.2d at 948.

<sup>38</sup> The Court has added the following paragraph to the Code of Professional Responsibility DR 1-103 (1988), DISCLOSURE OF INFORMATION TO AUTHORITIES: “(c) Any knowledge obtained by a member of a committee or subcommittee of a bar association designed to assist lawyers with substance abuse problems shall be privileged for all purposes under DR 1-103.” DR 1-103(A) requires a lawyer to report only “unprivileged knowledge” of misconduct as defined by DR 1-102.

TABLE I — OHIO LAWYER DISCIPLINARY ACTIONS\*\*\*  
1980-1988, INCLUSIVE

SOURCE: OFFICIAL OHIO STATE REPORTS AND DISCIPLINARY  
ACTIONS REPORTED IN THE ADVANCE SHEETS THERETO

Year	Disbar	Ind. Susp.	Disciplinary Action			Sub Total	Resig- nation	Reinstatement		Sub Total	Grand Total
			Def. Susp.	Public Repri.	Dismiss			Grant	Deny		
1988	3	21	17	11	1	53	10	6	1	7	70
1987	2	15	3	6	1	27	10	2	1	3	40
1986	3	32	9	15	1	60	11	9	0	9	80
1985	7	11	9	21	5**	53	5	8	0	8	66
1984	2	21	10	14	1	48	5	5	0	5	58
1983	2	19	7	7	0	35	5	10	0	10	50
1982	4	15	7	14	1	41	5	7	1	8	54
1981	4	15	5	12	0	36	5	3	1	4	45
1980	2	10	*	6	0	18	7	7	1	8	33
<b>TOTAL</b>	<b>29</b>	<b>159</b>	<b>67</b>	<b>106</b>	<b>10</b>	<b>371</b>	<b>63</b>	<b>57</b>	<b>5</b>	<b>62</b>	<b>496</b>

\*One year suspensions not available until 1981 and thereafter; six months to two years not available until Oct. 1, 1986 and thereafter.

\*\*One case was dismissed as moot on reaching the Supreme Court because the lawyer resigned. This is counted as a resignation rather than a dismissal.

\*\*\*Excluded are reinstatements from one year suspensions, contempt citations and actions not reported.