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LAWYER DISCIPLINE IN OHIO DURING THE 1980'S: A DECADE OF PROGRESS?

by
STANLEY A. SAMAD*

Through a series of articles, the author has traced the development of lawyer discipline in Ohio since 1967,¹ with special emphasis on the decade of the 1980's.² This article is intended as an evaluation of the progress in lawyer discipline in Ohio during that decade. The norms for evaluation are the standards for lawyer discipline established by the American Bar Association (ABA) substantively and procedurally. Substantively, the "law of lawyering" appears primarily (although not exclusively)³ through either the 1969 ABA Model Code of Professional Responsibility (CPR), or the 1983 ABA Model Rules of Professional Conduct and Responsibility (RPC). Procedurally, the model is the 1989 ABA Model Rules for Lawyer Disciplinary Enforcement (RLD) and the 1979 ABA Standards for Lawyer Disciplinary and Disability Proceedings (hereinafter "ABA Standards") that preceded the RLD during most of the decade.⁴

This article will first complete the decade by commenting on disciplinary activity for 1989 and will then evaluate progress by reference to the aforesaid Models and Standards.

LAWYER DISCIPLINE DURING 1989

Table I⁵ summarizes the disposition of disciplinary cases reaching the Supreme Court of Ohio for action in 1989 that are published in the Advance Sheets to its official reports. Excluded from Table I are contempt citations against lawyers, and reinstatements from definite periods of suspension that are perfunctory and not discretionary. The table includes the automatic indefinite suspensions of Ohio lawyers upon the conviction of felonies in Ohio or equivalent offenses under the laws

* B.A. (1942), J.D. (1948), University of Cincinnati; LL.M., Case Western Reserve University (1959); LL.M. (1964), J.S.D. (1969), New York University. Former Dean, and Professor of Law (Retired), The University of Akron. Member, Grievance Committee, Akron Bar Association. The views are those of the author.

¹ Samad, *The True Story of Lawyer Discipline in Ohio: 1967-1983*, 18 AKRON L. REV. 363 (1985).

² Samad, *Ohio Revised Rules for the Government of the Judiciary and the Bar: A Critique*, 13 CAP. U.L. REV. 25 (1983); Samad, *An Update/Analysis of Lawyer Discipline in Ohio*, 59 OBAR 936 (June 1986); Samad, *Lawyer Discipline in Ohio: An Update*, 15 Ohio N.U.L. Rev. 47 (1988); Samad, *Lawyer Discipline in Ohio*, 1988, 23 AKRON L. REV. 47 (1989).

³ The lawyer is obligated to obey the criminal code, an oath of office and the rules of the courts, as well as the codes of ethics. Sanctions include criminal prosecution, contempt proceedings, injunctive proceedings, etc., as well as disciplinary proceedings.

⁴ The Model Rules for Lawyer Disciplinary Enforcement were approved by the American Bar Association House of Delegates on August 9, 1989.

⁵ *Infra* at 463.

of another jurisdiction.⁶

An inspection of the table for 1989 indicates a decline in the level of activity from the previous year and is a slight increase for 1987. This decline is not the result of fewer grievances filed against attorneys, but is due to procedural changes designed to effect a greater measure of due process to the respondent on the one hand, and fairness to the complainant on the other. These changes, together with the decentralized nature of relationships have slowed the process.

The processing of a grievance under the current Government of the Bar Rule V (hereinafter "Gov. Bar R. V") against a lawyer practicing in Summit County, Ohio (an "Ohio Lawyer"), for example, is demonstrated by Table II. The relator (investigator and prosecutor) may be the Disciplinary Counsel of the Supreme Court of Ohio or the Grievance Committee of the Akron Bar Association. The grievance may be sent by the grievant directly to the Akron Bar Association, or sent to the Board of Commissioners of Grievances and Discipline of the Supreme Court (hereinafter "Board of Commissioners") and forwarded by that Board to the Grievance Committee to the Akron Bar Association. If the grievance is dismissed, as most are, the grievant is informed of his right to file an appeal with the Secretary of the Board of Commissioners. If, subsequent to the grievance, a formal complaint is to be filed, there must be a finding by the relator of probable cause, only after "first giving the . . . attorney who is the subject of the complaint or investigation notice of each allegation and the opportunity to respond [informally] to such allegation."⁷ The formal complaint is forwarded through the Secretary of the Board of Commissioners to a three-member panel called the Complaint Review Board (now Probable Cause Panel). This panel will determine from the formal complaint and file provided by the relator if probable cause truly exists. Only on its certification to the Board of Commissioners can the matter be tried.

Experience demonstrates that very few appeals by complainants from the initial screening out by the various relators are made and even fewer are successful. Experience also demonstrates that very few formal complaints are rejected by the Complaint Review Board for want of probable cause. These and other safeguards built into the system result in delay; however, they are consistent procedurally with ABA Standards and the RLD.

With reference to the types of misconduct sanctioned in 1989, four disbarments are noted. In each, there appeared a serious matter of dishonesty or fraud, or as the Court put it, "[A] pattern of dishonesty and evasion of responsibility."⁸ For

⁶ *I.e.*, suspensions pursuant to SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO, R. V § (9) (a) (iii) [hereinafter GOV. BAR R.].

⁷ GOV. BAR. R. V § (5)(a).

⁸ Disciplinary Counsel v. Allison, 44 Ohio St. 3d 100, 541 N.E.2d 70, *reh'g denied*, 45 Ohio St. 3d 715, 545 N.E.2d 909 (1989) (involving dishonesty, fraud, theft, commingling funds and writing bad checks). The other disbarments were: Disciplinary Counsel v. Bowersock, 44 Ohio St. 3d 170, 541 N.E.2d 619 (1989)

the most part, the disbarments were not for misconduct against clients, but offenses against the public, the legal system, or to the profession.⁹

Not all dishonesty was so harshly sanctioned. For example, in *Disciplinary Counsel v. Leeth*,¹⁰ the respondent was convicted of theft by deception in receiving money illegally from an insurance company, a felony of which he was convicted. Leeth, however, did not contest the ethical complaint and agreed to the indefinite suspension which he received. In *Columbus Bar Association v. Ryan*,¹¹ respondent misappropriated money of estates in three instances and failed to register for active practice as required by Gov. Bar R. VI, but, given to substance abuse and qualifying for treatment, he was only indefinitely suspended. Conviction of one count of felonious assault for which the respondent was serving time in prison resulted in an indefinite suspension in another case.¹² Multiple neglect (five counts) and failure to cooperate by answer and appearance resulted in indefinite suspension in *Disciplinary Counsel v. Morford*.¹³

Predicting the appropriate sanction in the matter of disbarment versus indefinite suspension is difficult. Given the *Allison* formula¹⁴ for "pattern of dishonesty" in felonious convictions and given evidence or an "evasion of responsibility" expected of a professional -- non-cooperation with the inquiry, failing to answer the complaint, not personally appearing at the hearing -- disbarment will most surely follow, especially in cases involving public officials and those involving notoriety.

Public prosecutors, it seems, are sometimes not sanctioned for misconduct as prosecutors even if the misconduct is egregious.¹⁵ However, an assistant county prosecutor was publicly reprimanded for his failure to turn over timely exculpatory records that had been properly requested by the defense.¹⁶

Flexibility in the sanctions and authorization of probation installed by rule changes in 1986 provided a variety of responses in 1989: two two-year suspensions; four one-year suspensions; and three six-month suspensions, one with an additional

(involving grand theft, exploiting the aged, illegal interceptions, selling unregistered securities, and practicing law in another state without a license); *Disciplinary Counsel v. Gorman*, 43 Ohio St. 3d 166, 539 N.E.2d 1120 (1989) (involving a former United States Attorney guilty of check kiting while in office and conflict of interest); and *Disciplinary Counsel v. Sullivan*, 41 Ohio St. 3d 6, 534 N.E.2d 838 (1989) (involving fraud by wire, mailing false statements in loan and credit applications and failing to register as an attorney).

⁹ See *id.*

¹⁰ 42 Ohio St. 3d 97, 537 N.E.2d 223 (1989).

¹¹ 45 Ohio St. 3d 374, 544 N.E.2d 686 (1989).

¹² *Disciplinary Counsel v. Colburn*, 42 Ohio St. 3d 173, 538 N.E.2d 110 (1989).

¹³ 46 Ohio St. 3d 173, 545 N.E.2d 1254 (1989).

¹⁴ See *supra* note 8 and accompanying text.

¹⁵ See, e.g., *In re Friedman*, 76 Ill. 2d 392, 392 N.E.2d 1333 (1979). Prosecuting attorney knowingly presented false testimony to prove bribery by two defense counsel. A majority of the Court held he violated DR 7-102(A)(4), "knowingly using perjured testimony," but discipline was withheld in part because of good motive (bringing corrupt attorneys to justice). *Id.* at 1335-36.

¹⁶ *Cuyahoga County Bar Ass'n v. Gerstenslager*, 45 Ohio St. 3d 88, 45 N.E.2d 491 (1989).

period of probation. Initially, the sanction is recommended by the relator to the three member hearing panel, who, in turn, recommend the sanction to the entire Board of Commissioners. The Board, in turn, makes its recommendation to the Court, which either the relator or respondent may contest. At each of these levels, the sanction may be altered.

The 1986 ABA Standards for Imposing Lawyer Sanctions and RLD Rule 10C establish factors to be considered in imposing sanctions.¹⁷ If the experience of the Grievance Committee of the Akron Bar Association is typical, the ABA's sanctioning standards have not been imparted to local relators and, therefore, cannot have been followed. Quite likely, this experience is typical of other local relators.

SUBSTANTIVE CHANGES DURING THE DECADE

Substantively, the landmark development in the law of lawyering¹⁸ during the decade of the 1980's was the ABA's development, and promulgation in 1983, of the proposed Model Rules of Professional Conduct and Responsibility (RPC). The RPC was not simply an update of the rules of the 1969 Model Code of Professional Responsibility, but was a different approach to the standards of ethical lawyering. The Ohio State Bar Association lost no time in publishing in full the Proposed Final Draft of the RPC in the January, 1981, edition of its Journal.¹⁹ Shortly after the ABA adopted the RPC, a committee of the Ohio Supreme Court undertook a study of these new Rules. The Ohio State Bar Association recommended to the Court in 1984 that the RPC not be adopted.²⁰ At the time of its negative recommendation, a "tempest" was "brewing" between the then Chief Justice, supported by a majority of the Court, and the Ohio State Bar Association.²¹ A favorable recommendation by the State Bar, the author suggests, would not likely have been persuasive. Although three of Ohio's neighboring states have adopted the RPC,²² and the remaining two are close to

¹⁷ MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Rule 10 provides:

C. *Factors to be Considered in Imposing Sanctions.* In imposing a sanction after a finding of lawyer misconduct, the court or board shall consider the following factors:

- (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
- (2) whether the lawyer acted intentionally, knowingly, or negligently;
- (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and
- (4) the existence of any aggravating or mitigating factors."

¹⁸ See, Samad, *Evolution of a Code of Lawyering: The Model Rules of Professional Conduct*, 56 OBAR 1692, 1696-98 (1983).

¹⁹ *Update: Proposed Model Rules of Professional Conduct*, 54 OBAR 43 (1981).

²⁰ *Report of the Special Meeting of the Council of Delegates, July 19, 1984*, 57 OBAR 1048 (1984).

²¹ Quade, *Tempest Brewing: Ohio Bench and Bar Battle*, 69 A.B.A.J. 574 (1983).

²² Kentucky, Michigan and West Virginia.

adopting it, the Ohio State Bar Association has not given the RPC a second look.

The amendments that Ohio made to the CPR during the decade of the 1980's, Disciplinary Rules 2-101, 2-102, 2-103, 2-104 and 2-105, deal with advertising, solicitation and specialization. Albert L. Bell, General Counsel for the Ohio State Bar Association, has labelled the changes "dramatic" and has described them in some detail.²³ The precipitant to the change to DR 2-101 concerning advertising was the ABA's draft of an alternative disciplinary rule. The draft prohibited only advertising that contained false, fraudulent, misleading, deceptive or unfair statements or claims. The ABA was moved to promulgate such revisions to DR 2-101 by virtue of a United States Supreme Court decision²⁴ adverse to the ABA's restrictive rule on advertising, followed by pressure from the antitrust division of the United States Attorney General. Ohio's amendments to DR 2-102 (Professional Notices, Letterheads, and Offices) and DR 2-103 (Recommendation of Professional Employment), were precipitated by the rebuke to its rules of *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.²⁵ The foregoing precipitated changes in DR.2-104 (Suggestion of Need for Legal Services) and DR 2-105 (Limitation on Practice).

The only other substantive change was the addition of paragraph (C) to DR 1-103 (Disclosure of Information to Authorities, or the "snitch provision"). For purposes of the rule, the amendment defines as "privileged" knowledge obtained by a member of a lawyer's assistance committee while such member was performing duties as a member of the committee -- a committee which, *inter alia*, serves to assist lawyers given to substance abuse.

PROCEDURAL CHANGES DURING THE DECADE

Gov. Bar R. V, Disciplinary Procedure, was amended in several significant respects. An on-site evaluation by an ABA team followed by a report of a blue ribbon panel of judges, lawyers and lay persons appointed by Chief Justice Frank Celebrezze led to the following changes, the thrust of which was to more nearly align Ohio's procedure with the ABA Standards:²⁶

- (1) The creation of a probable cause panel to determine prior to the filing of a formal complaint that probable cause exists;²⁷

²³ Bell, *Lawyer Advertising: Dramatic Revisions to Ohio's Rules*, 59 OBAR 492 (1986).

²⁴ *Bates and O'Steen v. State Bar Ariz.*, 433 U.S. 350 (1976), *reh'g denied*, 434 U.S. 881 (1977).

²⁵ 471 U.S. 626 (1985).

²⁶ *Report of the Ohio Supreme Court Advisory Committee on Lawyer Discipline in Ohio*, Mar. 24, 1986. The ABA on-site team recommendations are summarized in the Report at page 2. The author was a member of that Committee. The characterization of the Committee as "blue ribbon" is that of Frank, *Ohio Turmoil Sparks New Disciplinary Plan*, B. LEADER, March-Apr. 1986, at 6.

²⁷ Gov. BAR R. V, § (10)(a).

- (2) A procedure for an appeal by the grievant from a dismissal of the grievance by the relator;²⁸
- (3) The creation of an opportunity on the part of the intended respondent to appear and be heard by the relator prior to the filing of a formal complaint;²⁹
- (4) A removal of confidentiality after the filing and service of formal charge, and a public hearing on the complaint;³⁰
- (5) That the standard of proof, theretofore undefined by the rules, be “clear and convincing”;³¹
- (6) Flexibility in the range of sanctions including suspension from practice for a fixed period ranging from six months to two years, with provision for probation;³²
- (7) The mandatory enhancement of sanctions based on prior misconduct.³³

The ABA on-site committee had recommended the centralization of the investigation and prosecution in a single relator.³⁴ This suggestion was rejected by the blue ribbon Advisory Committee by the narrowest vote.³⁵ As a palliative to the risks of uneven handling of complaints by a myriad of relators, the relators were to be “certified” by the Board of Commissioners as meeting minimal standards set by Rule V, section (6)(c).

Effective December 5, 1989, the Court added paragraph (44) to Gov. Bar R. V to permit reciprocal discipline.³⁶ This addition, patterned on RLD Rule 22, affords a measure of full faith and credit to disciplinary proceedings in other states. Given discipline in another state, the Court shall impose identical or comparable discipline

²⁸ *Id.* § (10)(c).

²⁹ *Id.* § (5)(a).

³⁰ *Id.* § (23)(b).

³¹ *Id.* § (16).

³² *Id.* § (7).

³³ *Id.* § (8)(a).

³⁴ Since the Clark Report of 1970 (*Report of the Special Committee on Evaluation of Disciplinary Enforcement*, Tom C. Clark, Chairman, 95 REP. A.B.A. 783 (1970)), the ABA has consistently and vigorously advocated a single, centralized relationship, or Disciplinary Counsel; ABA Standards §§ 3.1, 3.3 and 3.9; MRD, R. 2 and R. 4. The history of Ohio’s hybrid system which is centralized as to the adjudicative function but decentralized as to the relationship function is described in Samad, *The True Story*, supra note 1.

³⁵ The vote was 11 for centralization and 12 against. Initially, the vote was a tie; the twelfth vote “Against” was a tie-breaking vote by the Chairman.

³⁶ The Court, independent of the Advisory Committee, provides in Gov. BAR. R. V § 13(B) for default judgments. Such judgments are consistent with ABA Standard § 8.28, Failure to File Answer: “Failure by a respondent to timely file an answer should be deemed an admission of the formal charges.”

unless the attorney proves by clear and convincing evidence lack of jurisdiction, fraud, or that the misconduct established warrants substantially different discipline in Ohio. Absent such reciprocal discipline, no action could be taken against the miscreant until a new disciplinary proceeding was instituted, tried and concluded in Ohio.

CONCLUSION

As the foregoing discussion indicates, substantive changes in the law of lawyering in Ohio have not kept pace with changes in its procedural rules. Those substantive changes made in the matter of publicity and solicitation, however dramatic, were thrust upon the state. The Ohio State Bar Association should now reconsider its opposition to the RPC. As the feud between the Court and the Bar Association has ended with a change in Court personnel, a favorable recommendation by the Bar Association would likely be persuasive.

The shortfall in procedure as measured by the ABA Standards has been reduced to the following: Relatorship (investigative and prosecutorial function) remains decentralized in Ohio, rather than centralized as recommended by the RLD. The reasons are historic, and the structure is not likely to change in the near future. The Court has sought to eliminate some of the problems of decentralization by a process of certifying Grievance Committees. As a result, only the larger bar associations and the Ohio State Bar Association have certified committees. However, a reduction in the number of players, playing independently, only mutes the distortions; it does not eliminate them. Yet, the current system is too deeply rooted, and the system is too inexpensive to be replaced in this century.

Ohio's permanent disbarment, as opposed to a long period of suspension (a minimum of five years under the RLD), can be easily rectified. Few lawyers, after a five year period of inactivity, are likely to apply, and even fewer will likely succeed. But, unless the Court considered its processes infallible, it should recognize both the possibility of error, and the notion of human rehabilitation.

Finally, as this author has so vigorously advocated elsewhere,³⁷ and as the blue ribbon Advisory Committee unanimously advocated, physical and mental disability should not be characterized as disciplinary in character. A procedure should be developed to remove those so afflicted without stigma, and only during the period of their disability. The Court provides such for judges.³⁸ Why not for lawyers?

The Court has come a long way since it set out in 1957 to perfect its

³⁷ See, e.g., Samad, *The True Story*, *supra* note 1, at 400.

³⁸ Gov. Jud. R. III, § (7).

disciplinary procedure. It has only a short way to go to meet national standards.³⁹

³⁹In addition to the foregoing, Gov. BAR R. V is silent as to immunity of a grievant from civil liability by virtue of statements made in his complaint. Ohio case law provides only qualified immunity (*McChesney v. Firedoor Corp. of America*, 50 Ohio App. 2d 49, 361 N.E.2d 552 (1976) (Summit County Court of Appeals decision), whereas MRD, R. 12 provides for absolute immunity to complainants and witnesses. The Advisory Committee voted to retain qualified immunity.

Both the ABA Standards § 6.10 and MRD, R. 10A(5) provide for an "admonition" by Disciplinary Counsel. The Advisory Committee recommended "private admonition" as a sanction, but the proposal was not adopted by the Court.

MRD, R. 10, Sanctions, A, Types of Sanctions, § 8 provides: "Limitation by the court on the nature or extent of the respondent's future practice." Ohio has no comparable provision. The Court can, however, under Gov. Bar R. V § (7)(d) order "probation of respondent for such period of time and *upon such conditions* as it determines." (emphasis added). Thus, the Court can limit the nature and extent of practice during probation.

TABLE I -- OHIO LAWYER DISCIPLINARY ACTIONS*
1980 - 1989, INCLUSIVE**

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

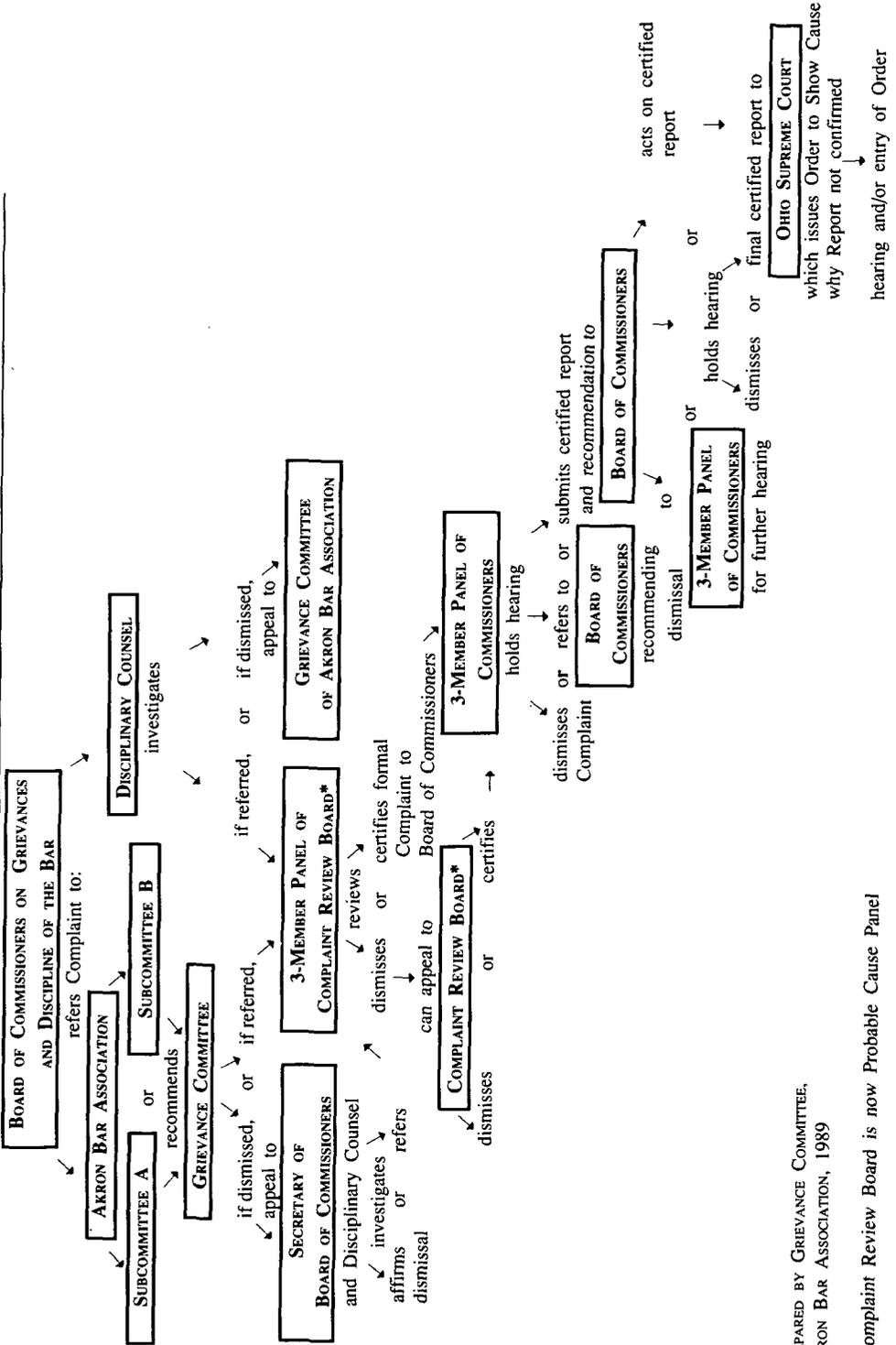
Year	Disciplinary Action				Reinstatement				Sub Total	Grand Total	
	Disbar	Ind. Susp.	Def. Susp.	Public Repri.	Dismiss	Sub Total	Resig- nation	Grant			Deny
1989	4	19	9	9	0	41	5	1	0	1	47
1988	3	20	17	11	1	52	10	6	1	7	69
1987	2	15	3	6	1	27	10	2	1	3	40
1986	3	32	9	15	1	60	11	9	0	9	80
1985	7	11	9	21	5**	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
TOTAL	33	178	76	115	10	412	68	58	5	63	543

* 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 definite period suspensions, contempt citations and actions not reported.

TABLE II PROCESSING OF A COMPLAINT AGAINST AN AKRON LAWYER



PREPARED BY GRIEVANCE COMMITTEE,
AKRON BAR ASSOCIATION, 1989

* Complaint Review Board is now Probable Cause Panel