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PUBLIC LEFT IN THE DARK ON LAWYER DISCIPLINE

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South Carolina's system for disciplining lawyers is among the most closed in the nation.

It operates in secret -- taking public disciplinary action in just 2 percent of the more than 4,500 complaints against lawyers it has handled in the past seven years. It requires people to give up their right to freedom of speech when they file a complaint against a lawyer. It threatens them with jail for contempt of court if they disclose that they've filed a grievance.

It is glacially slow. Many cases drag on for years, often allowing bad lawyers to continue practicing while the court decides what to do.

And when it does punish lawyers, it keeps nearly two-thirds of its actions secret, which means people might unknowingly hire incompetent, deceitful or drug-impaired lawyers.

Even if a lawyer is publicly punished with a reprimand, suspension or disbarment, the files in more than half of the cases of misconduct -- often the most severe ones -- are sealed.

That denies the public details of what happened and the ability to understand the Supreme Court's decision-making process.

Chief Justice Ernest Finney concedes that the system has serious problems. But, he says, the Supreme Court, which regulates lawyers, is aggressively reviewing the entire process with a view toward making it more open and responsive.

Both the South Carolina Bar and the Board of Commissioners on Grievances and Discipline, which administers discipline for the Supreme Court, have proposed detailed plans to revise the system. And Finney has scheduled a public hearing Sept. 15, when plans to open the system will be hashed out.

Finney, who took over as chief justice in December, wants to make the system more public. He says he also has been ``dissatisfied'' with the slowness and has met with the attorney general to discuss ways to speed cases along.

The Supreme Court could simply issue an order redrafting the entire system, but Finney says he wants reform done in a thoughtful, reasoned manner. The system has served the state fairly well for more than a 100 years, Finney says. ``I think I deserve more than nine months to fix it.''

The system may have served the state well in Finney's view, but it received a failing grade from a consumer advocacy group several years ago in a national survey of lawyer disciplinary systems.

In that study, South Carolina was one of 27 states out of 34 surveyed that flunked because of closed disciplinary systems that are run by lawyers and often are lenient.

South Carolina now is one of a shrinking list of 18 states that continue to keep the disciplinary process secret and enforce secrecy with gag rules.

The 1988 survey was conducted by Help Abolish Legal Tyranny, or HALT, which wants public control of lawyer discipline.

HALT has not conducted a survey since then. But Bill Fry, HALT's executive director, says he's not aware of a lot of reform.

``Strangely enough,'' Fry says, ``many of them are proud of their system.''

In the 1988 survey, HALT found less than 2 percent of the more than 70,000 complaints filed nationwide against lawyers resulted in public discipline.

A review by The State of the last seven years of disciplinary actions in South Carolina shows that just 2 percent of the more than 4,500 public cases received public discipline.

The review also found that when the Supreme Court does investigate a lawyer, it often takes two years or more for the court to make a decision in cases of public disciplinary actions.

Sally Speth, the chairwoman of the Board of Commissioners on Grievance and Discipline, said she believes the system is faster now than it once was.

Since she took over as director in October 1993, the backlog of cases has dropped from three to four years to about one year, officials said. Speth says 41 cases remain backlogged from before 1994.

Part of the reason for the backlog is that the system relies largely on 60 volunteer lawyers around the state to investigate. But recently the grievance board has gotten more full-time help in investigations and prosecution from the attorney general's office.

Speth concedes that the system still is bogged down with frivolous complaints, fee disputes and people who are simply mad at an attorney for losing a case.

In addition, it deals with a large number of complaints about lawyers who just don't know how to run their offices very well, and attorneys whose problems stem from drug or alcohol addiction and need medical treatment.

Such complaints are weeded out by the disciplinary system through a complicated series of investigations and reviews designed to focus action on lawyers who appear to have violated the ethics code.

The vast majority of cases are dismissed as frivolous or as those not involving ethics

violations, such as fee disputes.

The Bar currently is drafting a program to remove many such cases from the disciplinary process and handle them differently.

Change or be changed

If the state Supreme Court doesn't open its system, it may be forced to do so.

A federal lawsuit was filed earlier this year contending that the system violates the right to freedom of speech. The lawsuit was brought by Anderson County Sheriff Gene Taylor, who had filed a grievance accusing a magistrate of incompetence.

Although he knew he wasn't supposed to disclose that he had complained, the sheriff told a newspaper anyway. He was hauled into the Supreme Court on a charge of contempt for violating the confidentiality rule.

Rather than being gagged by the Supreme Court, he used the occasion as a soap box to speak out even more.

Taylor, a former TV reporter, held an impromptu news conference in the lobby of the Supreme Court to say he was risking jail to stand up for the public's right to speak out against bad lawyers and judges.

``When the Supreme Court told me I was facing prison without a jury trial for telling the media about a problem with a magistrate -- a government official -- I was appalled," Taylor said. ``The whole process was very disgusting."

Faced with a public spectacle, the state Supreme Court sidestepped the issue and dropped its contempt charge on a technicality.

Taylor wasn't willing to let them off so easily and took his case to federal court. A federal judge has put it on hold to give the Supreme Court time to revise its system.

While Taylor managed to get a public hearing, there's no easy way to know how many private citizens have been hauled before the court for violating the gag rule. Court officials say they keep no such record and would have to look at each separate disciplinary case file to find out.

Shortly after Taylor's hearing, the Supreme Court held a secret hearing for another man charged with contempt. When a reporter tried to get into the hearing, court officers denied that a hearing was going on, barred the reporter from the courtroom and ordered the whole matter kept secret.

The only reason the case became public was because the man accused of contempt, Ron McDaniel, a Ridgeland insurance agent, was so angry that he called the media to complain -- risking contempt again.

Steve Bates, executive director for the S.C. branch of the American Civil Liberties Union, said the court must change or risk having the federal courts force it to do so.

``Based on all the other federal courts that have considered this issue, the confidentiality rules are unconstitutional," he said.

Problems

In addition to the free speech issues, the confidentiality rule denies the public the ability to see how the Supreme Court operates and to ensure the decisions are fair and free of favoritism.

For example, in 1992, Mitchell Byrd, a prominent Rock Hill lawyer, was arrested in Operation Avalanche, which was billed as the state's largest cocaine investigation.

Byrd was charged with buying and selling cocaine. His case was then referred to the Board of Commissioners for Grievances and Discipline. At the time, Byrd's father, Dan Byrd, was the chairman of the grievance board.

Although other attorneys had been disbarred for committing felonies, Mitchell Byrd received only a one-year suspension. His disciplinary file was then sealed because he agreed to the suspension.

Supreme Court Justice Jean Toal says the agreed-upon one-year suspension was basically a plea bargain to speed the case along.

She says the one-year suspension doesn't mean much because the court still has the power to keep a suspended lawyer out of law for much longer than one year. After being suspended, a lawyer cannot resume practice until the court agrees the person is fit.

But Toal says the scale of punishment the court uses for various types of misconduct needs to be reviewed. While Toal insists favoritism played no role in Byrd's lighter punishment, she concedes there's no way for the public to make sure because the file is closed.

``You're pointing out an obvious area that we will be looking at," she says.

Because the system is closed, it's also hard to determine if lawyers involved in apparent misconduct are even considered for punishment at all.

One such case is that of J. David Hawkins, a Charleston attorney who is the brother of U.S. District Judge Falcon Hawkins.

J. David Hawkins lost a $7.35 million judgment in a highly publicized malpractice case in 1993. The judgment was appealed and later settled for an undisclosed amount.

He was accused of having an affair with the wife of prominent Charleston businessman William J. Gilliam and then giving Gilliam advice on everything from divorce strategy to child custody to dividing property and money.

At one point, Gilliam even moved into Hawkins' home because of his marital problems.

For months the case dominated courthouse gossip across the state, but so far -- even though lawyers are required to report any lawyer who breaches the ethics code -- there is no indication that any disciplinary action has been taken against Hawkins.

If some form of disciplinary action is in the works, there's no way for the public to know, even though it's been more than a year and a half since the malpractice judgment.

Hawkins declined to comment except to say, ``Basically, I'm not in a position to talk about it.''

Then there's the case of attorney Charles E. Houston Jr., whose misdeeds as a lawyer were first complained about in March 1989, but who remained in practice for five years before the Supreme Court disbarred him.

The Supreme Court's eventual decision came too late for many of Houston's clients. Because of the court's secrecy provisions, the clients hired Houston during those five years without knowing about complaints against him for everything from refusing to talk to his clients to stealing their money.

When the court finally disbarred him last year, it characterized his behavior as a ``long-term pattern of ethical noncompliance'' by an attorney ``who failed to comply with even the most basic ethical requirements of his profession.''

Shirley Walker, a Walterboro resident, is one of those clients. She said she never would have hired Houston in September 1990 had she known that nearly two years earlier another client had complained to the Supreme Court about his shoddiness.

Walker hired him to represent her and her family after a car accident. Houston accepted a $4,000 settlement on behalf of Walker, but pocketed the money and never told her about it.

Eventually, Houston returned $1,000 to Walker. She says she doesn't want to talk about the case anymore because it brings back too many bad memories.

Light is coming

Justice Toal agrees there are problems, but says pointing fingers at the court and name-calling doesn't solve them.

``I don't believe we need to be bludgeoned into submission and called names in order to submit,'' Toal said.

She says the Supreme Court heard the alarm bell in 1994 when former Family Court Judge Sam Mendenhall pleaded guilty to trading sex for rulings.

The Judicial Standards Commission had known about the complaint for three years, but allowed Mendenhall to retire without disciplining him. He wasn't disbarred until after he pleaded guilty in criminal court.

``It needs some changing, there's no question about that,'' Toal says.

The state Bar has proposed opening the entire process after allowing lawyers 45 days to respond to complaints.

Last year, the grievance board recommended that the system remain closed. That and other recommendations may be subject to change, and board officials say their recommendations

are being kept secret until presented formally for the September hearings.

The Supreme Court is planning work sessions to study various proposals to revise the system. And, court officials say, the public hearings in September will allow those frustrated with the secret system to speak out.

Toal says she believes the system was designed originally to protect the people who complain, not lawyers.

In those days, she says, lawyers and judges often were among the most powerful members of small communities, and the secrecy code was intended to protect citizens who were afraid to speak out against the establishment.

``Judges and lawyers were the absolute pinnacles of society,'' she says. ``They ran things, and they had the power.''

Toal says that system remained largely intact until the late 1960s and '70s, as South Carolina and other states began to pass Sunshine laws, which are intended to guarantee the public open access to government meetings and documents.

But so far in South Carolina, the changes have left the system closed. This fall, Toal says, she expects to see the Supreme Court begin opening up the system.

``The notion that you want to protect against unwarranted accusations needs to be balanced against the public's right to know,'' she said. ``There needs to be a much better balance than we have now.''

Not everyone agrees. Prominent defense lawyer **Jack Swerling**, a member of the grievance board, says he wants the system to remain the way it is. He is concerned that many people would not complain because of embarrassment about what happened or fear of reprisals.

He points out that federal grand jury investigations have the same secrecy provisions.

In the lawyer grievance system, officials note, people who file complaints lose the right to publicly reveal what goes on, but get immunity from prosecution for what they say in the complaint process.

``If you open it up, a lot of people won't come forward,'' **Swerling** says. He says openness also is not fair to lawyers who are wrongly accused.

Unlike any other profession, he says, lawyers deal with people who are in conflict. Because of that, they work with unhappy people -- people who often blame the lawyers when they lose.

A good lawyer's reputation would be damaged unfairly by frivolous or mean-spirited public complaints, he says.

Swerling believes the public should trust lawyers to police themselves, and points out that they do so more closely than most other professions.

``We want the profession to have a good image,'' he says. ``There's pride in our profession.

There's pride in representing the public interest. . . . If there's a bad lawyer, we want him out."

J. Steedley Bogan, a Columbia lawyer who has headed the state Bar's campaign to open the system, says secrecy is a throwback to another time. The No. 1 priority in disciplinary reform should be opening it up to public view, he said.

Bogan says he firmly believes what a former U.S. senator once said about the need for open government:

``Sunlight remains the world's best disinfectant."