

# Confidential Disciplinary Proceedings and the First Amendment? (Part I)

BY ROY SIMON

Disciplinary charges in more than three dozen states become public at some point before discipline is imposed, but in New York, except in the rare case where an accused attorney waives confidentiality, Judiciary Law § 90(10) mandates that all disciplinary proceedings be closed to the public unless and until a court in the Appellate Division imposes public discipline. Under §90(10), neither the complainant nor the disciplinary authorities have the right to speak about the charges or the disciplinary process.

For many years, the American Bar Association, the New York courts, and various committees of the New York State Bar Association have recommended amending §90(10) so that disciplinary proceedings become public once the disciplinary authorities find probable cause to believe that an attorney has violated the Code of Professional Responsibility. But the New York State Bar Association House of Delegates has consistently rejected recommendations to make disciplinary proceedings public before discipline is imposed, and the legislature has shown no inclination to amend §90(10) on its own volition.

Now, however, a new factor has come into play. In *R.M. v. Supreme Court of New Jersey*, 2005 WL 2660498 (N.J. Oct. 19, 2005), the New Jersey Supreme Court has held that its own court rule prohibiting complainants from publicizing their grievances before the disciplinary authorities file formal charges violates the First Amendment to the United States Constitution. That raises a serious question: Does the mandatory confidentiality imposed by Judiciary Law §90(10) also violate the First Amendment? This two-part article looks at the history and policy of §90(10) and judicial opinions on confidentiality from New York and elsewhere, and then considers whether Judiciary Law § 90(10) passes muster under the First Amendment.

## Judiciary Law § 90(10) and Its “Good Cause” Exception

The most important sentence of Section 90(10) of the New York Judiciary Law provides as follows:

Any statute or rule to the contrary notwithstanding, all papers, records and documents ... upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential.

The statute continues that, “upon good cause being shown,” the justices of the appellate division may, in their discretion, issue a written order permitting such papers, records and documents to be divulged. In the discretion of the presiding justice, such an order may be made either without notice to the persons or attorneys affected by the order. And if disciplinary charges are sustained, then all records and documents relating to the disciplinary charges “shall be deemed public records.”

Despite the “good cause” exception, the justices of the appellate division have seldom permitted the papers, records, and documents to be divulged. I found only three cases in which pending disciplinary proceedings had been opened to public scrutiny.

The only Court of Appeals case among these three was *Matter of Cappocia*, 59 N.Y.2d 549 (1983). In that oddball case, attorney Andrew Cappocia waived confidentiality in the disciplinary proceedings against him and demanded an open public hearing. The Third Department denied the request, but the Court of Appeals held: “In the absence of good cause shown why a hearing ... should not be open to the public, on a written waiver of confidentiality by the attorney respondent in such proceedings and a request by that attorney that the hearings be open, it is error to deny such request.” The *Cappocia* case thus gives the accused attorney an almost unfettered right to open disciplinary hearings, but does nothing to help the public or the press pry off the lid of secrecy.

In *Matter of Application of the New York News, Inc.*, 113 A.D.2d 92 (1st Dep’t 1985), however, the press did lift the veil of secrecy. The New York News and the New York Times both petitioned the appellate division to open up the disciplinary proceedings concerning the notorious Roy M. Cohn after Mr. Cohn had attacked the Departmental Disciplinary Committee panel in the press, saying they were “just out to smear me up” and were a “bunch of yo-yos” who were inspired by a political purpose and had prosecuted him corruptly. The First Department concluded that “good cause to disclose the record of a disciplinary proceeding, if it is ever to be found to exist, exists in the matter at bar ....” Elaborating, the court said:

When it is shown that a respondent in a pending disciplinary proceeding has publicly accused the disciplinary instrumentality of this Court of having been constituted of incompetents who prosecuted him for a political purpose, upon meritless charges, with the intent of “smearing” him ... good cause has been proved for entry of an order opening the records of that proceeding for public examination. [I]t could not have been the Legislature’s intent that a respondent’s right to confidentiality would extend beyond his making of such an attack upon the Committee’s members. ...[R]espondent Cohn may not both publicly attack the Committee panel for having corruptly prosecuted him, and closet from public view the record of the proceeding before the Committee. Such an advantage, leaving the target of an attack helpless, is not favored by the law.

The *New York News* case is therefore of little help to the public. It does not give the public any unilateral right of access to disciplinary proceedings, but merely holds that an attorney who attacks the disciplinary proceedings in the press may have waived the right to confidentiality under §90(10).

The third “good cause” case is *Matter of Aretakis*, 16 A.D.3d 899 (3d Dep’t 2005), which presents unique facts. Before any disciplinary proceedings began, attorney John Aretakis made certain public statements concerning two Roman Catholic priests. The priests filed complaints against Mr. Aretakis, who disclosed the complaints to the *Albany Times Union* newspaper without first obtaining judicial authorization. The Committee on Professional Standards then charged Aretakis with violating Judiciary Law § 90(10). Aretakis responded by moving for an order nunc pro tunc permitting him to divulge the contents of the complaints made against him and for an order dismissing the petition of charges. The Third Department granted both motions, stating:

Clearly, respondent's request constitutes a waiver of the confidentiality protections afforded to him by the provisions of the statute and, with respect to safeguarding the complainants who provided the information, we need note only that the matters referred to in their complaints had to do with public statements already made by respondent and, thus, were already part of the public domain. Accordingly, we grant respondent's motion for an order nunc pro tunc and for dismissal of the petition of charges.

Thus, all three "good cause" cases resulted from an express or implied waiver of confidentiality by the accused attorney. None of the cases suggests that the press or the public could force open disciplinary proceedings absent a waiver by the attorney.

### **Policies Underlying §90(10)**

According to the courts, the strict confidentiality imposed by §90(10) serves two purposes. One purpose is to safeguard information that a potential complainant may regard as private or confidential, thereby removing a possible disincentive to clients to file complaints of professional misconduct. Another purpose is to prevent the irreparable harm to a professional's reputation that can result from unfounded accusations.

Thus, the statute protects both complainants and attorneys. But in the *Capoccia* case described above, the court was blunt about which purpose is more important. The confidentiality provisions set forth in § 90(10), the court said, "were enacted primarily, if not only, for the benefit of the attorney under investigation." This point was noted more than seventy-five years ago in *People ex rel. Karlin v. Culkin*, 248 N.Y. 465 (1928), where Justice Cardozo said, in his inimitable poetic fashion:

[T]he 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. ... Indeed, ... professional reputation 'once lost, is not easily restored.'

But Justice Cardozo did not argue that disciplinary proceedings should be secret until professional discipline is imposed. Rather, he said, the remedy is to "make the inquisition a secret one in its preliminary stages," and he noted that the need of secrecy "is the greater when the proceeding is in the stage of preliminary investigation."

### **Proposals for Change**

Despite the need to protect attorneys from unjustified attacks, several bar committees over the last two decades have proposed that disciplinary proceedings be open to the public at some stage before discipline is imposed.

In 1985, for example, the New York State Bar Association's Committee on Professional Discipline recommended opening disciplinary proceedings at an earlier stage, but the House of Delegates rejected the recommendation.

In 1992, the American Bar Association's Commission on Disciplinary Enforcement (commonly known as the "McKay Commission," after its Chair, former N.Y.U. Law School Dean Robert B. McKay) recommended that disciplinary proceedings be opened to the public once probable cause is found to believe that the accused attorney has engaged in professional misconduct. But the New York State Bar Association Committee on Professional Discipline, which had changed its mind since 1985, opposed the ABA recommendation and persuaded the House of Delegates to reject it. Instead, the House of Delegates passed a resolution stating that Judiciary Law § 90(10) in its existing form "strikes an appropriate balance between the protection of the public and the preservation of the rights of attorneys not yet found guilty of professional misconduct."

In 1995, the Chief Judge's hand-picked Committee on the Profession and the Courts (the "Craco Committee," after its Chair, Louis Craco) concluded that "the confidentiality accorded attorney discipline in New York is an anachronism that burdens rather than enhances the profession." The Craco Committee therefore urged the Legislature to amend Judiciary Law Section 90(10) to open disciplinary proceedings to public scrutiny once formal charges are filed against a lawyer. The Craco Committee noted that thirty-two other jurisdictions already opened their disciplinary proceedings to the public at some stage.

The Craco Committee also urged that the four appellate departments adopt a uniform standard for determining when formal charges should be filed, and proposed as a uniform standard that formal charges should be filed against a lawyer upon a finding that a *prima facie* case exists against the lawyer. Finally, the Craco Committee recommended that before the disciplinary authorities determine whether a *prima facie* case against the accused lawyer exists, the lawyer should be permitted to appear before the grievance committee personally or in writing, and, in the discretion of the disciplinary authorities, present witnesses. Summing up, the Craco Committee said:

The Committee unanimously concludes that a regime of controlled openness to public scrutiny is in the interest of both the public and the profession. The public gains the knowledge, appropriate for it to have, both about particular cases and about the adequacy of the process.

The profession, in turn, benefits from increased public confidence in the integrity and effectiveness of the bar's ability to police itself.

Also in 1995, the State Bar's Task Force on the Profession submitted a report recommending that disciplinary proceedings be open to the public upon a finding of probable cause, and in 1996 the State Bar's Special Committee to Review the Craco Report endorsed the Craco Committee's recommendations regarding open disciplinary proceedings, but the House of Delegates rejected these recommendations.

In 1997, however, the Office of Court Administration sought to implement the Craco Committee's recommendations (with some modifications) by recommending four specific amendments to § 90(10). The amendments would have (1) opened attorney disciplinary proceedings "on the 40th day following the service of formal charges on the attorney"; (2) prohibited the disciplinary authorities from serving charges on an attorney until the attorney had first been accorded "a reasonable opportunity to be heard in person and/or by counsel concerning the complaint, inquiry or investigation upon which such charges are to be based"; (3) established a four year statute of limitations in attorney discipline proceedings (subject to some exclusions and tolling provisions); and (4) increased the burden of proof in attorney discipline matters to "clear and convincing evidence" (rather than the current "preponderance" standard), and provided that the rules of evidence "shall apply to the conduct of any hearing on attorney

discipline charges.” The Legislature did not act on these proposals, but in 1999 the Chief Judge’s Committee to Promote Public Trust and Confidence in the Legal System echoed the recommendation that disciplinary proceedings be opened to the public once a *prima facie* case has been established.

In 2000, the Special Committee on Public Trust and Confidence in the Legal System recommended opening disciplinary proceedings to the public once a *prima facie* case had been established, but the House of Delegates delayed a vote on the proposal to allow more time for public comment. Comments from lawyers and bar organizations were sharply divided. Indeed, the State Bar’s Committee on Professional Discipline initially voted 13-11 against opening the disciplinary process, but six months later reversed course and voted 12-7-1 in favor of opening the process. The State Bar’s Executive Committee was also almost evenly split, voting 12-10 against the Special Committee’s proposal to open disciplinary proceedings.

Opinions were divided because the arguments on both sides were strong. Proponents argued forcefully that secrecy eroded public trust and that opening disciplinary proceedings to public view once a *prima facie* case was established would increase public confidence and trust in the legal profession. Opponents argued that opening disciplinary proceedings before discipline was imposed risked irreparable harm to an attorney’s reputation based on charges that were unfounded.

Ultimately, the House of Delegates voted 108-40 to reject the Special Committee’s recommendation, and that is where matters stand in New York today.

Next month, in Part II of this article, I will discuss judicial opinions from New York and elsewhere analyzing the rules and statutes imposing confidentiality on disciplinary proceedings against lawyers and other professionals.

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*Roy Simon is the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University School of Law, and the author of SIMON’S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED, published annually by Thomson West.*