

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

BY ROY SIMON

Last month, I discussed New York Judiciary Law §90(10), which mandates (with narrow exceptions) that all disciplinary proceedings against lawyers remain confidential (i.e., closed to the public) unless and until a court in the Appellate Division imposes public discipline. I also discussed recommendations that § 90(10) be amended to allow public disclosure of disciplinary proceedings before the Appellate Division imposes public discipline – for example, to open proceedings to the public once the disciplinary authorities have established a prima facie case against an attorney.

So far, the New York State Bar Association has opposed all efforts to open disciplinary proceedings before discipline is imposed, and the New York State Legislature has shown no interest in amending §90(10) on its own initiative. But a strong case can be made that §90(10) in its present form violates the First Amendment to the United States Constitution. This month's article discusses judicial opinions from New York and elsewhere that have tested the constitutionality of rules and statutes imposing confidentiality on disciplinary proceedings against lawyers and other professionals. My central question is whether mandatory confidentiality violates the First Amendment.

### Confidentiality and the First Amendment in New York Courts

No state or federal court sitting in New York has heard a First Amendment challenge to §90(10). However, several lower courts have heard First Amendment challenges to confidentiality provisions in statutes governing other professions. The decisions of those courts suggest that a First Amendment challenge to §90(10) would fail.

For example, in *Johnson Newspaper Corp. v. Melino*, 151 A.D.2d 214 (3d Dep't 1989), a newspaper chain sought access to a disciplinary proceeding against a professional governed by Education Law § 6510(3). The Supreme Court noted New York State's strong policy of public access to judicial and administrative proceedings, but found "a countervailing presumption of confidentiality with respect to disciplinary proceedings" and therefore held that "the closure of professional disciplinary proceedings does not violate petitioner's First Amendment access to government."

The Third Department affirmed. The court first noted that there was "little precedential law to guide us in our determination," then turned to a two-tiered test that the United States Supreme Court had developed in *Press-Enterprise Co. v. Superior Court of California of Riverside*, 478 U.S. 1 (1986). Tier one of the Press-Enterprise test asked "whether the place and process have historically been open to the press and general public." The court observed that New York has "no historical basis for open professional disciplinary hearings." Tier two of the test asked "whether public access plays a significant positive role in the functioning of the particular process in question." The court said that the public has not played a significant role in licensing or policing professionals in New York because those matters had generally been left to the expertise of the Department of Education. The court thus held that there was "no qualified right of access under the 1st Amendment as to such hearings."

Similarly, in *J.P. v. Chassin*, 189 A.D.2d 137 (4th Dep't 1993), the court refused to find a First Amendment right of access to medical disciplinary proceedings. Citing *Press-Enterprise Co. v. Superior Court of California of Riverside*, *supra*, the Fourth Department said: "It has been the traditional policy of this State to maintain confidentiality in professional misconduct proceedings until final determination." That policy of confidentiality, the court said, "serves the public purpose of removing any disincentive to the filing of professional misconduct complaints by protecting any private or confidential information that a complainant would not want publicly disclosed." (In other words, the purpose of confidentiality is to protect the complainant, not the accused professional.) The Chassin court therefore concluded:

[I]n the absence of a clear declaration by the Legislature of an intention to alter what has been the recognized and established practice, and in light of the categorical support given by the Court of Appeals toward maintaining confidentiality in professional disciplinary proceedings, it would be inappropriate for this Court to inaugurate such a seismic change.

However, one case from the First Department has reached the opposite conclusion. In *Doe v. Office of Professional Medical Conduct*, 188 A.D.2d 347 (1st Dep't 1992), a physician facing a disciplinary hearing sought a declaration that all aspects of the professional disciplinary proceedings against him would be "strictly confidential and may not be disclosed to the public unless and until an adverse determination is rendered in such proceedings ...." The court denied the declaration, distinguishing *Johnson Newspaper* on grounds that the "policy and tradition" of the Education Department (whose confidentiality practices had been challenged in *Johnson*) differed from the policy and tradition of the Health Department (which ran the Office of Professional Medical Conduct). Specifically, the Health Department had a policy of "maintaining confidentiality while complaints are investigated, but conducting open proceedings once complaints are substantiated and charges are served." The First Department found this policy to be "rational and in accord with the strong public policy of this state of assuring public access to administrative proceedings."

The main precedent cited by the First Department in *Doe* was *Herald Co. v. Weisenberg*, 59 N.Y.2d 378 (1983). There, endorsing New York's "strong public policy" of public access to judicial and administrative proceedings, the Court of Appeals held that an unemployment insurance hearing "is presumed to be open, and may not be closed to the public unless there is demonstrated a compelling reason for closure and only after the affected members of the news media are given an opportunity to be heard." But *Herald Co.* cannot be very encouraging to those who want to open lawyer disciplinary proceedings, for the Court of Appeals also noted that "[w]here the Legislature has chosen to temper or abrogate the presumption of openness, it has done so in specific language." Of course, the Legislature has done so in specific language in § 90(10) of the Judiciary Law, whereas the Labor Law at issue in *Herald Co. v. Weisenberg* did not contain any provision for closed unemployment hearings.

### **Courts Outside New York**

Several courts outside of New York – including the United States Supreme Court – have been more receptive to challenges to confidentiality provisions governing disciplinary proceedings.

In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), a state court jury had found a corporate newspaper publisher guilty of violating a Virginia statute that imposed criminal penalties for breaching

the confidentiality of proceedings before Virginia's Judicial Inquiry and Review Commission. The Supreme Court reversed the conviction on First Amendment grounds, holding that the state's interests in protecting the reputation of its judges and in maintaining the integrity of its courts were insufficient to justify the criminal penalties.

In *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990), a client had filed a grievance against his attorney, and the Bar reprimanded the attorney for violating the Code of Professional Responsibility. The client then wanted to speak and write about the incident, but Florida Bar Rule 3-7.1 prohibited complainants from disclosing any information regarding Bar disciplinary proceedings, and the Florida Bar had announced that it would prosecute violators for contempt of court. When the client challenged the rule on First Amendment grounds, the court ruled in his favor and declared the confidentiality rule unconstitutional.

In striking down Florida's confidentiality rule, the court rejected the Bar's asserted interests as inadequate or illogical. For example, the Bar claimed that confidentiality encouraged the filing of complaints and the cooperation of witnesses, but the court said:

Why a complainant would be more inclined to file a grievance against his lawyer, with the knowledge that he is thereby forever barred from speaking publicly about the grievance, is unclear. Indeed, it is just as likely that potential claimants would be dissuaded from initiating disciplinary proceedings if they reasonably believed that filing a petition with the Florida Bar would subject them to a perpetual bar from speaking out about the grievance. Thus, an equally compelling assertion can be made that the effect of Bar Rule 3-7.1, along with the attendant threat that violators of the rule will be held in contempt of court, may actually serve to discourage the filing of complaints ....

Similarly, citing the Supreme Court's opinion in *Landmark Communications*, the *Doe* court said:

If maintaining the reputation of the judiciary as an abstract end is insufficient to justify encroaching upon the robust exercise of free speech, then maintaining the reputation of lawyers or the Bar is, in our view, equally insufficient. ... [P]rotecting the reputation of an individual, or indeed the profession as a whole, would be insufficient justification for absolutely barring the dissemination of truthful information.

The Montana Supreme Court has distinguished but not disagreed with *Doe v. Supreme Court of Florida*. In *Goldstein v. Commission on Practice of Supreme Court*, 297 Mont. 493 (2000), a 4-3 decision, the Montana Supreme Court held that Montana's confidentiality rule governing lawyer disciplinary proceedings did not violate the Montana State Constitution. (The rule was not challenged on First Amendment grounds, and the court did not mention the First Amendment in its opinion.) Montana's confidentiality rules provided that "[a]ll disciplinary proceedings which are prior in time to the filing of a formal complaint with the Clerk of the Supreme Court and all documents in connection therewith shall be confidential." But once a formal complaint was filed, the proceedings became public except for (a) deliberations of the disciplinary body, and (b) information or proceedings governed by a protective order. The Montana Supreme Court distinguished *Doe v. Supreme Court of Florida* on grounds that the Florida rule had imposed confidentiality even after disciplinary authorities had found a grievance to be meritorious, whereas Montana's rule imposed confidentiality only before the filing of a formal complaint.

The New Hampshire Supreme Court has also addressed the confidentiality issue. In *Petition of Brooks*, 140 N.H. 813 (1996), a client who had filed grievances against three separate attorneys argued that New Hampshire's confidentiality rule violated his right to free speech by subjecting him to possible contempt proceedings for divulging information related to the complaints. The New Hampshire Supreme Court agreed, concluding that the rule hampered "speech traditionally accorded the most solicitous protection of the first amendment; namely, criticism of the government's performance of its duties."

The *Brooks* court expressly rejected the Bar's argument that the confidentiality rule was necessary to protect the reputation of the State Bar as an institution, and to protect the reputations of individual attorneys who were the subject of frivolous complaints. In *Landmark Communications, supra*, the United States Supreme Court had held that "injury to official reputation is an insufficient reason for repressing speech that would otherwise be free," and that the institutional reputation of the courts "is entitled to no greater weight in the constitutional scales." Based on these holdings, the New Hampshire Supreme Court concluded: "Surely the reputation of the State bar is entitled to no more protection than is the reputation of the State judiciary." Accordingly, the *Brooks* court held that New Hampshire's confidentiality rule failed First Amendment scrutiny because it was "not sufficiently narrowly tailored to meet compelling State interests."

More recently, in *Doe v. Doe*, 127 S.W.3d 728 (Tenn. 2004), the Tennessee Supreme Court heard a challenge to Tennessee Supreme Court Rule 25, which mandated confidentiality regarding attorney disciplinary proceedings. The Tennessee Attorney General asserted three compelling interests to justify the rule: "(1) protection of the reputation of an attorney and the Bar from meritless complaints; (2) protection of the anonymity of complainants and other persons supplying information to the Board; and (3) maintenance of the integrity of pending investigations." The court found these interests to be insufficient and consequently held that Rule 25 violated the First Amendment.

### **The New Jersey Supreme Court Speaks**

Building on *Landmark Communications*, *Doe v. Florida Supreme Court*, *Petition of Brooks*, and *Doe v. Doe*, the New Jersey Supreme Court recently decided *R.M. v. Supreme Court of New Jersey*, 185 N.J. 208, 883 A.2d 369, 2005 WL 2660498 (N.J. Oct. 19, 2005). There, the plaintiff challenged New Jersey Rule 1:20-9, which generally required complainants to maintain strict confidentiality until the disciplinary authorities decided to file a complaint. (Rule 1:20-9 was thus much narrower than New York Judiciary Law § 90(10), which mandates confidentiality throughout disciplinary proceedings until public discipline is imposed.)

In *R.M.*, a client (R.M.) had filed a grievance against her lawyer. In response, the grievance authorities sent R.M. a standard form letter, which said:

Under Supreme Court Rule 1:20-9(a), once you file this grievance form you are REQUIRED thereafter to keep all communications about this ethics matter CONFIDENTIAL during the investigation until and unless a complaint is issued and served. Only at that time does confidentiality end and the matter become public. ... [D]uring the investigation you may not disclose the fact that you have filed an ethics grievance to persons other than members of the attorney disciplinary system, except to discuss the case with other witnesses or to consult an attorney.

Rule 1:20-9 contained five exceptions (e.g., the respondent attorney waived or breached confidentiality, or the matter became “common knowledge to the public”), but none of the exceptions applied. The woman therefore challenged Rule 1:20-9 on First Amendment grounds, arguing that it was “an impermissible restraint on free speech” because it prevented her from making truthful statements about the ethics process (including the fact that she had filed a grievance) and unduly suppressed criticism of the system of attorney discipline.

The State countered that mandating confidentiality in disciplinary proceedings until a formal ethics complaint is filed furthers three “compelling interests”: (1) protecting the reputations of lawyers who are unfairly accused of wrongdoing; (2) encouraging attorneys who have engaged in minor misconduct to agree to “diversion” in lieu of discipline (i.e., to agree to conditions such as reimbursing legal fees to clients, completing a client’s legal work, participating in an alcohol or drug rehabilitation program, or getting psychological counseling); and (3) preserving the integrity of the disciplinary system and its investigative process.

The R.M. court began its analysis by reviewing basic First Amendment principles:

... The First Amendment protects “[a]ll ideas having even the slightest redeeming social importance.” Although the protection of speech is not absolute, laws that punish the dissemination of truthful information are generally presumed to be constitutionally infirm. To sustain government proscription of the publication of truthful speech, the State has the burden of demonstrating that the law furthers a compelling interest. Moreover, even if the regulation of speech advances a compelling interest, the State must also show that the regulation is narrowly tailored to achieve that interest. [Citations omitted.]

Applying these standards, the New Jersey Supreme Court concluded that Rule 1:20-9, both as written and as applied, violates the First Amendment because “it is not narrowly tailored to advance a compelling interest.” Protecting the reputations of attorneys and the bar does not justify restricting a grievant’s speech, and “such restrictions breed resentment rather than respect.” The confidentiality rule also prohibits a grievant from criticizing ethics committees for unreasonably delaying an investigation and such a restriction cannot survive First Amendment scrutiny. Ethics committees are part of the government that the public has a right to discuss and debate, and the judicial branch “is no more immune from the reach of the First Amendment than the executive or legislative branches.”

Finally, the court rejected the State’s asserted interests in encouraging diversion and in protecting the integrity of pending investigations. Both were worthy goals, but neither was “a compelling interest that justifies a prohibition on speech that would otherwise be free.” Accordingly, the court held that “a grievant is not barred from divulging the fact that he or she filed a grievance, the content of that grievance, and the result of the process.”

### **Conclusion: The Impact on New York**

The New Jersey Supreme Court is not the first court to hold that confidentiality rules relating to lawyer disciplinary proceedings violate the First Amendment. As discussed above, the Tennessee Supreme Court, the New Hampshire Supreme Court, and the United States District Court for the Southern District

of Florida have also upheld First Amendment challenges to rules prohibiting grievants from publicizing complaints against their attorneys. Moreover, the United States Supreme Court has condemned confidentiality rules governing hearings on alleged judicial misconduct. But the New Jersey Supreme Court's opinion is likely to have greater impact on New York than the earlier rulings because New Jersey is our neighbor state, and because the New Jersey Supreme Court's opinion is detailed, carefully reasoned, brand new, and sweeping in its condemnation of strict confidentiality.

The reasoning employed in Florida, Tennessee, New Hampshire, and New Jersey strongly suggests that §90(10) violates the First Amendment. Section 90(10) is among the strongest confidentiality rules in the nation regarding lawyer disciplinary proceedings, and the few exceptions in §90(10) that permit open disciplinary proceedings have seldom been invoked in practice. With the New Jersey precedent in place, it is only a matter of time before a complainant in New York challenges §90(10) of the Judiciary Law on First Amendment grounds. Given the solid phalanx of precedent that has developed outside New York since 1990, the challenger is likely to win.

The State Bar and the Legislature should avoid the embarrassment of having §90(10) declared unconstitutional. Lawyers should be the first ones to seek to change a law that violates the sacred First Amendment. Indeed, forty jurisdictions across America now allow public access to lawyer disciplinary proceedings at some point before public discipline is imposed. The latest of these forty jurisdictions is Pennsylvania. On October 16, 2005, the Pennsylvania Supreme Court amended its court rules to permit public access to disciplinary proceedings once the grievance authorities have filed a formal petition for discipline against a lawyer and the lawyer has either filed a response or the time for filing a response has expired – see amended Rule 402. (Complaints against lawyers that do not result in a petition for discipline will remain confidential.)

I hope that the New York State Bar Association and the New York Legislature will now revisit the issue of open disciplinary proceedings in light of the growing line of cases holding that strict confidentiality for attorney disciplinary proceedings from beginning to end is unconstitutional. In light of those cases, and in light of Pennsylvania's recent example, the Legislature should then amend §90(10) to open disciplinary proceedings to the public once the disciplinary authorities have filed formal charges and the respondent attorney has either filed a response or let the time for filing a response expire. A thoughtful legislative amendment to §90(10) will be much better for the public and the profession than a judicial decision striking down §90(10) on First Amendment grounds.

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