LEGAL PROFESSION—DISBARMENT AND REINSTATEMENT PROCEDURES IN OHIO—RULE XXVII—SUPREME COURT RULES OF PRACTICE

On December 5, 1956, the Ohio Supreme Court announced the amendment effective January 1, 1957, of Rule XXVII of the Court's Rules of Practice concerning disciplinary and reinstatement procedures.[1] The new rule accomplishes several important changes in these procedures and marks the beginning of a new approach to the problem of discipline of the bar.

The origin of new Rule XXVII stems from a study made in 1953 by a committee of the American Bar Association concerning the principles of discipline. The report of that group was adopted by the House of Delegates of the American Bar Association and later by the Council of Delegates of the Ohio Bar Association. Thereafter, a special committee was appointed by the state bar organization to formulate a rule which would effectuate the principles of this report. On April 29, 1955, this special committee petitioned the Ohio Supreme Court to amend their existing rule by adopting the disciplinary rule they had formulated.[2] Following the filing of briefs and an open hearing the Court took the matter under advisement. The new rule as announced by the Supreme Court deviates from the proposal of the Ohio Bar Association committee in several particular aspects, but embodies the principles and essential features of that proposal.

The essence of the new rule is that the Supreme Court shall have exclusive jurisdiction over disciplinary matters.[3] Under the prior procedure, the power to discipline was vested in the Supreme Court, the Court of Appeals and the Courts of Common Pleas.[4] In most cases, the action to discipline an attorney was brought in the common pleas court in the county where the attorney practiced. The changes promise improvement in at least two respects. First, it removes the adjudication of the charges to a higher level, and thus will reduce, if not abolish, the local pressures brought to bear in these cases. Secondly, by centralizing the tribunal for adjudication, the consideration given and the sanctions meted out will be more consistent.

In order to implement the concept of exclusive jurisdiction, the new rule provides for the creation of a Board of Commissioners on Grievances and Discipline.[5] The Board will be composed of seventeen members, appointed from as many districts set forth in the rule, for staggered terms of three years each.[6] The function of the Board is to take evidence, make findings and submit recommendations to the Supreme Court concerning complaints of misconduct, unprofessional

[1] 29 Ohio Bar 971 (1956).
[2] 30 Ohio Bar 1 (1957); 28 Ohio Bar 469 (1955).
[3] Ohio Supreme Ct. Rule, XXVII (4).
[4] Ohio Rev. Code §4705.02.
[5] Ohio Supreme Ct. Rule XXVII-(1).
[6] *Id.* (3).

practices and petitions for reinstatement.[7] Although the Board has exclusive jurisdiction in these matters, it is specifically provided that a local bar association may investigate and report to the Board concerning any complaints coming to its attention.[8]

The new rule sets forth in some detail the procedure to be followed in actions brought to discipline an attorney for alleged misconduct or unprofessional practices. The complaint, which initiates the proceeding, must be in writing and allege the misconduct or unprofessional practices involved. The complaint must be signed by one or more members in good standing of the Bar of Ohio and certified by a designated official in the state or local bar association. The signers of the complaint assume the responsibility for prosecuting the complaint to its conclusion.[9] If the Board finds that the complaint on its face does not charge misconduct or an unprofessional practice, the complaint will be dismissed. Otherwise, a copy will be sent to the attorney so charged, who shall have twenty days in which to file his answer.[10]

After this period has expired, the rule provides for a formal hearing before a panel of three members of the Board, none of whom shall be from the district where the complaint originated.[11] The panel may dismiss the complaint if it does not merit disciplinary action,[12] or may find the attorney guilty of misconduct as defined in the rule.[13] If the panel determines that the discipline to be applied is a private reprimand, they may administer this themselves. If, however, they determine that one of the more severe forms of discipline is warranted, they must make a report to the entire Board, setting forth their findings of fact and recommendation.[14] The matter is then reviewed by the entire Board. Again, the Board may dismiss the complaint if they find it is without merit, or may themselves administer a private reprimand if they determine this to be the proper discipline.[15] If their determination is that one of the other forms of discipline is warranted, they must certify their findings and recommendation to the Supreme Court,[16] which will then issue to the attorney an order to show cause why the report of the Board should not be confirmed.[17] Provision is then made for the filing of briefs by the parties and for a hearing on the order.[18]

The new rule also makes explicit the procedures to be followed on

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[7] *Id.* (13) (a) (b) (c).
[8] *Id.* (4).
[9] *Id.* (8).
[10] *Id* (9)
[11] *Id.* (10).
[12] *Id.* (11).
[13] *Id.* (12).
[14] *Id.* (13).
[15] *Id.* (14).
[16] *Id.* (15).
[17] *Id.* (16).
[18] *Id.* (17) (18).

an application for reinstatement from a suspension for an indefinite period. No petition for reinstatement may be filed or considered within two years following the order of suspension.[19] The rule then provides for the contents of the petition, the most important allegations being facts which establish "by clear and convincing evidence that he has rehabilitated himself and possesses all the qualifications, mental, educational and moral, which would have been a requirement of an application for admission to the Bar of Ohio at the time of his original admission."[20] The requisites for reinstatement are proof of rehabilitation and possession of all the qualifications for admission to the bar, including passing one of the regular bar examinations of the Supreme Court of Ohio.[21]

The procedure for consideration of the petition for reinstatement parallels that of the original complaint. A panel of three Board members must hold a hearing to take evidence relevant to the petitioners rehabilitation and possession of all of the qualifications for admission to the Bar of Ohio.[22] The panel certifies its report to the entire Board. The Board will review the panel's recommendations and make its final recommendation which is then certified to the Supreme Court. The Court will issue an order to the petitioner to show cause why the report of the Board should not be confirmed. Briefs may be filed by the parties, but no oral argument is allowed. The Supreme Court will then enter the appropriate order. If the order of the Court allows reinstatement, it is made conditional on the petitioner taking and passing a regular bar examination.[23]

New Rule XXVII has left the forms of discipline substantially unchanged, *i.e.*, disbarment, suspension or reprimand, private or public.[24] However, the rule works a fundamental change in the effect to be given a disbarment or indefinite suspension. An attorney disbarred under the new rule shall never thereafter be readmitted to the practice of law in Ohio. An attorney suspended for an indefinite period must wait at least two years before applying to the Court for readmission, and the matter is then governed by the requisites and procedures specified in the rule. Under the old governing statute,[25] a disbarred attorney might apply to the court which imposed the discipline for a modification, although the Supreme Court reserved the right to approve or disapprove an entry of reinstatement.[26] An attorney suspended for an indefinite period might do likewise, with no definite waiting period, and without the requirement of passing a bar examination. Furthermore, the new rule

[19] *Id.* (21).
[20] *Id.* (22).
[21] *Id.* (24).
[22] *Id.* (25).
[23] *Id.* (26).
[24] Compare *Id.* (6) & Ohio Rev. Code §4705.02.
[25] Ohio Rev. Code §4705.02.
[26] Ohio Supreme Ct. Rule, XXVII, (1) repealed January 1, 1957.

provides that there shall be no suspension for a definite period, as was possible under the old procedure. A suspension for a definite period contradicts the theory of discipline for an attorney. In the first place it is in the nature of a punishment, rather than a withdrawal of the privilege of practicing law in the best interests of the public. Secondly, and even more important when the period expires, the attorney is automatically reinstated to practice. There is no determination that he has been rehabilitated and possesses the qualifications essential to the practice of law, to rebut the earlier finding. The new rule has effectively overcome this fundamental weakness in the earlier procedure.

At the very heart of any system of disciplinary procedures are the grounds for which the disciplinary action may be imposed. The former grounds are defined as "mis-conduct or unprofessional conduct in office involving moral turpitude or for the conviction of a crime involving moral turpitude." Some doubt had been raised as to whether this section provided the sole causes for disciplinary proceedings. It has long been recognized and often reiterated that the power to discipline attorneys is an inherent power of the courts; inherent to the judicial branch of government.[27] It follows then that the courts have the power to define what shall constitute the grounds for discipline and any attempt by another branch of government to invade this inherent power is in violation of the principle of separation of powers. That the courts are not limited to these statutory grounds was made clear beyond doubt in the recent case of *In re McBride*,[28] where the court held, "Statutes authorizing the disbarment, suspension or discipline of attorneys on stated grounds do not operate as a restriction on the general powers of courts over attorneys, who are their officers, to disbar, suspend or otherwise discipline them on grounds other than those specified."[29]

Nonetheless, a significant body of case law has developed in which the courts have determined that certain coduct by attorneys does or does not constitute "misconduct or unprofessional conduct in office involving moral turpitude." The extent to which the new rule makes these decisions meaningless is not clear. The new rule is concerned with misconduct by an attorney, which is defined as "any violation of any pro-

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[27] *In re* McBride, 164 Ohio St. 419, 132 N. E. 2d 113 (1956); State *ex rel* Turner v. Albin, 118 Ohio St. 527, 161 N. E. 792 (1928); *In re* Thatcher, 80 Ohio St. 492, 89 N. E. 39 (1909). *But see,* In re Linthicum, 32 O.L.R. 254 (1909). For similar holdings from other jurisdictions, see *In re* Richards, 333 Mo. 907, 63 S. W. 2d 672 (1933); Barton v. State Bar of California, 208 Cal. 677, 289 Pac. 818 (1930); *In re* Opinion of Justices, 279 Mass. 607, 180 N.E. 725 (1932); People *ex rel* Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487, (1928); State Bar Commission *ex rel* Williams v. Sullivan, 35 Okla. 745, 131 Pac. 703 (1913); *In re* Robinson, 48 Wash. 153, 92 Pac. 929 (1907).

[28] *Supra,* Note 27.

[29] *In re* Hartford, 282 Mich. 124, 275 N.W. 791 (1937); *In re* Keenan, 313 Mass., 186, 47 N. E. 2d 12 (1943); State Bar Commission *ex rel* Williams v. Sullivan, *supra* Note 27.

vision of the oath of office taken upon admission to the practice of law in this state, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude."[30] It is obvious that the tests for the conduct which will result in discipline are more clear under the new rule than under the old statute. The very abstract tests of misconduct or unprofessional conduct involving moral turpitude have been replaced by the more understandable terms of the oath of office and the several Canons of Ethics. Yet, even these standards are subject to different interpretations as to their exact meaning and application to particular conduct. The long range effectiveness of the new rule will in great measure be determined by the interpretation and application by the Court of these standards to the particular acts of alleged misconduct.

It is impossible at this early time to assay the overall effect this new rule will have on the problem of discipline of the Bar of Ohio. Certain effects are discernible now. Several sections of the Revised Code are rendered meaningless.[31] Many of the cases involving disciplinary actions are impliedly overruled.[32] The basic framework for handling disciplinary proceedings has been substantially improved. There are, however, deeper questions. What effect will this rule have on raising the conduct of attorneys to a higher level of professional responsibility? What effect will this new rule have on raising the public regard for the legal profession? These and other questions can only be answered in the future.

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[30] Ohio Supreme Ct. Rule XXVII (6).

[31] Ohio Rev. Code §§4705.02-.05.

[32] Such cases as, *In re* Rothenberg, 31 Ohio L. Abs. 370 (1940); State *ex rel* Hawke v. Le Blond, 108 Ohio St. 126, 140 N. E. 510 (1923); *In re* Burke 21 C. C. 34, 11 C. D. 397 (1900); *In re* King 54 Ohio St. 415, 43 N. E. 686 (1896); *In re* Palmer, 9 C.C. 55, 6 C. D. 397 (1894) are clearly overruled. There are, however, numerous other cases decided under those or prior sections of the code which are now meaningless. The language in those cases is broad enough that the holdings may still be given some weight.

CONSTITUTIONAL LAW: EQUAL PROTECTION OF THE LAWS: POWER TO GRANT INJUNCTION TO COMPEL DESEGREGATION IN THE PUBLIC SCHOOLS

Plaintiffs were Negro school children living in Hillsboro, Ohio. The Negro children of Hillsboro had for many years, by their own volition, attended separate schools. In September, 1954, however, plaintiffs presented themselves at what formerly had been a "white school" and requested that they be permitted to attend school on an equal basis with the whites. They were admitted and attended classes for several days. Shortly thereafter, the school board announced that it was dividing the town into school districts arranged in such a way as to assign the

Negroes to a separate school district composed of the extreme northern and southern areas of the town. Plaintiffs brought suit for injunctive relief in the Federal District Court, basing Federal jurisdiction on §1983 of the Federal Civil Rights Statute.[1] Defendants relied on a plan which called for full integration by the fall of 1957, asserting that integration could not be effected before that date because of inadequate classroom facilities. In the face of evidence that there had been a decrease in enrollment since the previous year, the District Court denied the injunction on the grounds advanced by the defendants. On appeal, held, the failure to grant the injunction was an abuse of judicial discretion by the District Court in not protecting the basic civil liberties of the plaintiffs, where their rights were unquestioned and no issues of fact were in dispute. The case was remanded to the District Court with instructions to frame a decree directing compliance no later than the beginning of the school year of 1956. *Clemons v. Board of Education of Hillsboro,* 228 F. 2d. 853 (6th Cir., 1956) *cert. denied,* 350 U. S. 1006 (1952).

The celebrated *School Segregation Cases* of May, 1954,[2] were followed a year later by a Supreme Court decision addressed to the problem of implementing the substantive holding.[3] The cases were remanded to the Federal District Courts, sitting as courts of equity, with directions to issue decrees in conformity with the principles announced in the prior decision and to exact compliance on the part of the local authorities "with all deliberate speed."[4] The Court, in recognition of the difficulties inherent in atempting radically to alter social institutions which had existed for decades on a contrary assumption,[5] set forth certain qualifying factors which the District Courts should consider in fashioning decrees. Among these were

> . . . problems relating to administration arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis . . .[6]

A detailed analysis of the Federal Court cases which have applied the *Brown* doctrine reveals a common, if obscure, emphasis upon the manifest good faith of the local school board in bringing about desegregation at the earliest possible time.

In *Jackson v. Rawdon,*[7] there were only twelve Negroes eligible to attend school, three of whom brought a class action and only two of

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[1] 17 Stat. 13 (1871), 42 U.S.C. §1983 (1952).

[2] Brown v. Board of Education, 347 U. S. 483 (1954).

[3] Brown v. Board of Education, 349 U. S. 294 (1955).

[4] 349 U. S. at 301.

[5] Plessy v. Ferguson, 163 U. S. 537 (1896), in which the Court declared that separation was not a denial of equal protection so long as the physical facilities were "equal."

[6] Brown v. Board of Education, 349 U. S. 294 at 300-301.

[7] 135 F. Supp. 936 (N. D. Tex., 1955).

whom appeared in court. The Court found that the school board had been extremely cooperative, had conducted its deliberations in a most sincere manner and had studied numerous proposed plans in an attempt to find the best solution to the problem they faced. In an attempt to provide a temporary solution, the board had made special arrangements to have the plaintiffs attend school in Fort Worth and had procured a special bus to transport them to and from school. The plaintiffs testified that they were satisfied with that arrangement and were well adjusted at the school they were attending. Denying equitable relief, the Court held that an injunction would be unjust to the school trustees and to the students.

A rather unique fact situation was presented by *Borrough v. Jenkins*.[8] There the plaintiffs had made arrangements with another school district to attend that school and pay tuition there based upon their expressed desire to attend that school. Later the plaintiffs wished to attend the school in the district in which they lived. The school board refused to let them do so unless they paid tuition. The Court recognized the anomaly of requiring a pupil to pay tuition to attend the school located in his own school district, but grounded its denial of an injunction on (1) financial commitments made by the school district in reliance upon plaintiffs' registration in the other district; (2) plans prepared by the school board which would effect integration by the beginning of the next school year; and (3) expressions of a sincere willingness on the part of the school board to attempt to work out the problem at the earliest possible time with all regard to the rights of the plaintiffs.

Some of the language used in *Mathews v. Launius*[9] seemed to serve notice on the plaintiffs that the fullest cooperation was expected from them as well as the defendants.

> In all probability a fuller cooporation by the plaintiffs and the persons similarly situated with the defendants will be required.[10]

The main problem in the *Mathews* case was the lack of adequate finances to carry out any sort of integration program which could be put into effect. The Court, recognizing the existing crowded classroom facilities and the ". . . necessity to readjust the system that has been followed for decades."[11], refused to grant the injunction but retained the case on its docket pending the preparation of plans by the defendants to integrate the schools.

Willis v. Walker,[12] an action brought to secure the admission of 34 Negro pupils to the county high school and 207 Negro pupils to the elementary schools, presents a fact situation which closely resembles that of the principal case. There the plaintiffs had been admitted to the schools and attended for several days before they were ejected. After

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[8] 137 F. Supp. 260 (E.D. Okla., 1955).
[9] 134 F. Supp. 684 (W. D. Ark., 1955).
[10] *Id.* at 686.
[11] *Ibid.*
[12] 136 F. Supp. 177 (W.D. Ky., 1955).

that time the school board continued to admit white pupils although claiming that the facilities were overcrowded. The Court concluded that the *only* reason plaintiffs were being denied admission was because of their race.

> The defendants, by their answers, plead the overcrowding of existing school buildings and the inadequacy of transportation facilities. I think that these conditions are to be taken into consideration by the court in fixing a date for integration, but I do not think either of them is a defense for unlimited delay. This is especially true when the record reflects, as here, that no white children, either before or after the application for admission of the plaintiffs were denied admission.[13]

The court further held that refinancing and reconstruction plans relied upon by the school board were too vague and depended upon too many independent, variable factors to be grounds for additional delay. Defendants were ordered to admit the high school students immediately (there were at that time no high school facilities in the area for the Negro population) and the elementary school students by the beginning of the next school term.

In none of the cases since the *School Segregation Cases* has the element of the good faith of the school authorities been brought so clearly to the surface as in the principal case. The painstaking research, reargument, and the delicate wording of the implementation ruling in the *School Segregation Cases* were directed at areas of the country where segregated schools have been an integral part of the social and legal structure of the community. Such could hardly be the case in Hillsboro, since segregated schools have been illegal in Ohio for almost 70 years.[14] Thus an Ohio school board would be placed in an extremely difficult position in arguing for additional time to integrate its facilities no matter what the extenuating circumstances. Absent the geographical setting of the case, it presents a fact situation similar to the bulk of the cases decided since the *School Segregation Cases, i.e.* inadequate classroom facilities, lack of transportation, and insufficient funds to make the necessary changes. The fact that this is an Ohio situation suggests that in the future the federal courts will give less weight to physical facilities if it clearly appears that their use as an argument for additional time is a delaying action tantamount to bad faith. As the *School Segregation Cases* grow older the situation in the South will become increasingly like that in Ohio. When that occurs, the principal case should become of vital significance in judging the good faith compliance of the local authorities, for the more established the precedent becomes, the more local school boards in the South will be faced with the problem of the Hillsboro authorities in their argument for additional time.

Walter Reebel

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[13] *Id.* at 181.

[14] Board of Education v. State, 45 Ohio St. 555, 16 N. E. 373 (1880).