



Law Society
of Scotland



International
Conference of
Legal Regulators

Workshop D1: Creative and proactive alternatives to discipline

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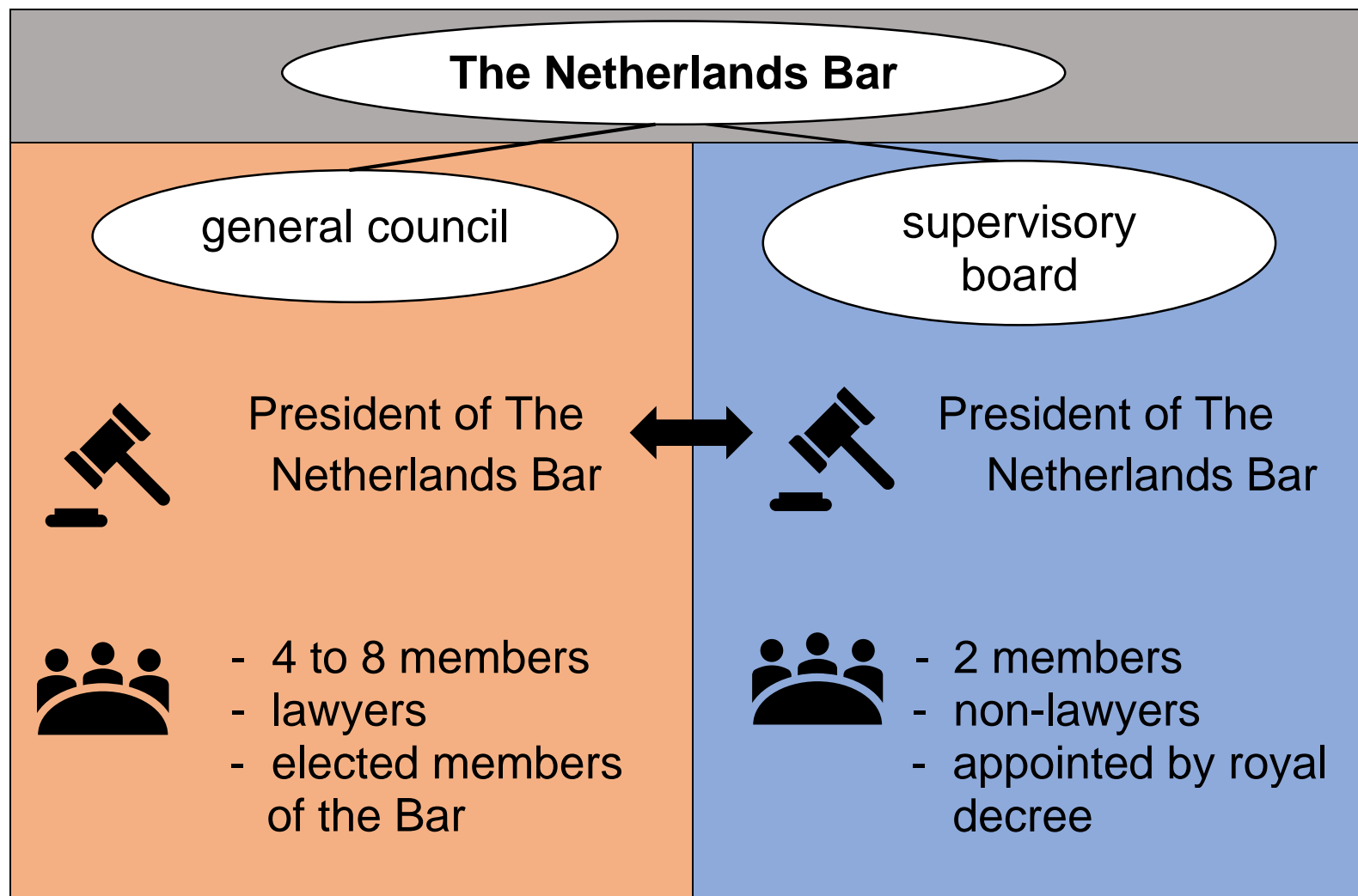
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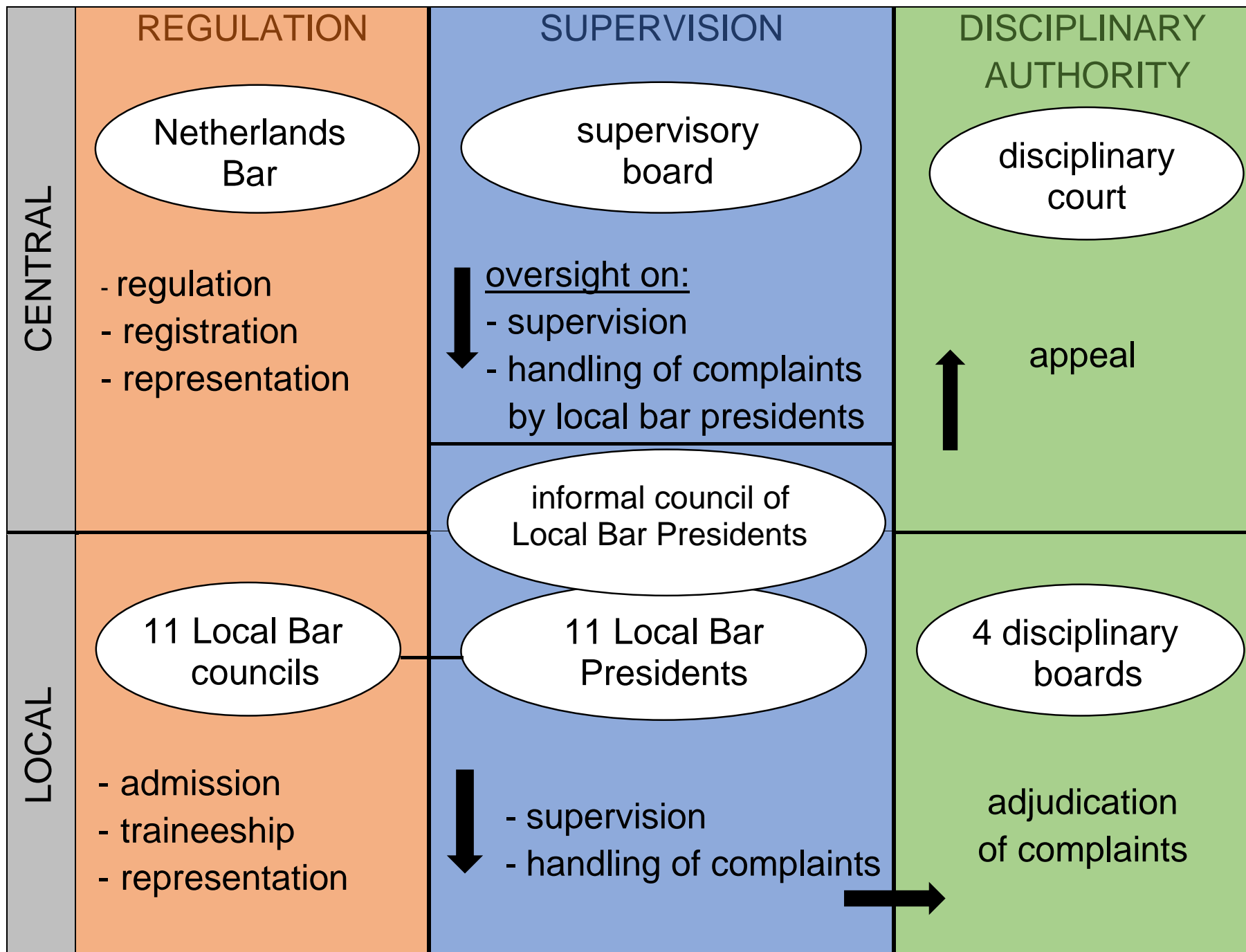
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Creative and Proactive Alternatives to Discipline

Johan Rijlaarsdam

President of The Netherlands Bar
Chairman of the supervisory board





ALTERNATIVES TO		DISCIPLINE
REGULATION <div>The Netherlands Bar</div> <ul style="list-style-type: none">- LawCare - counsellors- peer review- self-assessments- continuous education- registration of associations for specialised lawyers- registration requirement for legal aid board- legal area register	SUPERVISION <div>11 Local Bar Presidents</div> <ul style="list-style-type: none">- guidance and training- monitoring financial situation of law firms- coaching- encouraging partnerships- mediation- pressure to leave practice	DISCIPLINARY AUTHORITIES <div>disciplinary boards and court</div> <ul style="list-style-type: none">- warning- reprimand- financial penalty- suspension of practising- disbarment





International Conference of Legal Regulators

Creative & Proactive Alternatives to Discipline

Victoria Rees, Director, Professional Responsibility



NOVA SCOTIA
BARRISTERS' SOCIETY

FITNESS TO PRACTISE PROGRAM





- First program in Canada created for lawyers
- Consensual - allows the Society to divert complaints away from traditional discipline route, where:
 - There is evidence that the lawyer may be suffering from an incapacity,
AND
 - It is in the public interest



CAPACITY

A member's ability to practice law with reasonable skill and judgment that is not substantially impaired by a physical, mental or emotional condition, disorder or addiction

*Members can self-report or be referred with consent by a Committee or the Executive Director



Process

- a) Member enters into an **Interim Agreement** with the Fitness to Practise Committee, comprised of lawyers and health professionals
- b) Undergoes a medical or psychiatric assessment
- c) Begins treatment
- d) Engages in random testing, if appropriate
- e) Either has practice formally supervised, steps away from practice for a period of time or exits practice, where appropriate



Memorandum of Understanding with all levels of the Judiciary

- To encourage reporting and identification of conduct concerns earlier, we have entered into a process, similar to policies in place in Ontario, whereby:
 - Judges have a clear procedure for identifying and reporting conduct of concern by lawyers before the courts
- In our experience, this is often where real problems start to show up, but for various reasons, including potential conflict in a small jurisdiction, judges have been reluctant to come forward. This has been an effective risk management tool



Management System for Ethical Legal Practice





- In 2013, we asked ourselves:
 - Are we making a difference in terms of our mandate to protect the public?
 - Is this measured by the number of complaints, sanctions, disbarments?
 - How quickly matters are processed?
 - Is our goal to measure these numbers, or in fact to change behaviour of lawyers?
- Conducted research on best practices in professional regulation, to find ways to help lawyers manage themselves and their practices better, with less need for intrusive regulator intervention



- Created the MSELP: includes a self-assessment tool and extensive resources to help law firms evaluate their own performance against ten key standards/elements linked to the *Code of Conduct*, and to take steps to improve in certain areas in a measurable way
 - <https://nsbs.org/management-systems-ethical-legal-practice-mself>
 - <https://nsbs.org/mself-self-assessment-pilot-project>
- Created the Legal Services Support Team to improve the way lawyers conduct their practices, and change the dialogue between lawyers and the regulator (reduce fear = increase trust)



Early Resolution of Complaints





- In Canada, a majority of jurisdictions have authority in our *Legal Professions Acts* for complaints to be resolved or dismissed at an early stage, without investigation or referral to a Committee
- The criteria for dismissals include:
 - The complaint is for a frivolous or vexatious purpose (e.g., to obtain information in support of a civil action that cannot be obtained through a traditional discovery)
 - The complaint involves concerns which are outside our jurisdiction to address (e.g., unhappy with a court decision)
 - If the facts set out in the complaint are all true, it would not result in a finding of professional misconduct or conduct unbecoming worthy of sanction



- Some provinces (Nova Scotia and Alberta), have taken further steps by empowering professional staff to:
 - Mediate
 - Engage in alternative dispute resolution
 - Obtain undertakings from lawyers
 - Take steps in order to resolve complaints which do not require full investigation, and much sooner
- the triage process helps staff identify patterns of problematic behaviour sooner, and engage with lawyers to correct these problems before they become more serious



- We have begun to adopt principles of Restorative Justice to the complaints resolution process.
- These principles include:
 - **Relational** – consider and respect relationships between individuals and the impact someone's conduct, including our own, may have on these relationships – how can we assist in dispute resolution and repairing relationships without causing further harm?
 - **Comprehensive and Holistic** – consider the problem from a broader perspective, what might be underlying the problem raised and/or our response to it



- **Broader scope of inquiry** – who has been impacted? Are there systemic problems at play?
- **Responsive** – ask questions to understand the full context
- **Collaborative/Non-adversarial** – more conducive to ‘truth-finding’; avoids a ‘one-sized fits-all’ approach to problem solving
- **Forward Focused** – preventative, educational – focus on responsibility and accountability rather than blame



Creative Responses





- Average 1 to 2 formal hearings each year
 - Approximately **half** proceed by way of **Settlement Agreement** and are not contested
- Staff and Investigation Committee adopt creative approaches to addressing conduct concerns
 - In an effort to **change behaviour** rather than just **punish**, and to do so without need of a formal hearing



Examples:

- a young, racialized lawyer was struggling to maintain her community law firm and implement effective practice management systems in the face of various complaints about poor QOS and client communications
- We created a practice management mentorship team at our cost: a senior racialized lawyer mentor, a wellness coach for the firm, and administrative support and coaching for staff.
- less costly than a full practice investigation; eliminated future complaints against this lawyer, and increased trust.



Examples:

- Mid-sized firm receiving two serious complaints against two of their lawyers in respect to conflicts of interest.
- We developed a pre-program questionnaire to assess at what level of education we needed to start, sent in a Bar Course instructor and a senior member of the Bar to conduct and education program.
- To measure effectiveness we had the firm complete a further assessment after the program to measure learning
- On the basis of the full firm's participation, we considered the complaints resolved with no further action. There have been no further complaints against lawyers in that firm.



QUESTIONS?

Creative and Proactive alternatives to discipline

By Patrick A. Dillen

Secretary-General FBE

Past President - Brussels Bar



Creative and proactive alternatives to discipline



Angle : Disciplinary is the solution of the last resort

unless :

- the infringement is so utterly unacceptable it can only adequately be addressed by a disciplinary decision
- there is an explicit demand of a plaintiff

The aim is to repair disfunctions in helping those who are of good faith and willing and to only sanction the few for whom sanctioning is the only solution.

Creative and proactive
alternatives to
discipline



1. Prevention

2. Mediation of the President of the Bar
3. Provisional and protective measures
4. Disciplinary procedure

Creative and proactive alternatives to discipline



1. Prevention :

- Distribution of newsletters and **info** on website where it should be easily accessible
- **Schooling** requirements (20h/year), including Professional Rules
- Promotion of the role of the President as an **ally** in the exercise of your professional activity

The lawyer who wants to do something , can ask his/her President who will :

- verify whether the proposed action is admissible in the light of professional rules &
- give advice to the lawyer &
- look together with the lawyer for a compliant way of achieving the lawyer's goals
- In certain cases lobby to amend the rules in order to reconcile the lawyer's proposed activity with the fundamental principles

Creative and proactive alternatives to discipline



- Therefore the lawyer him/herself will address the President :
 - This is voluntary but recommended if projects or actions raise any doubts about compliance (examples : prohibition of payment of commissions ; no cure no pay...)
 - Mandatory in case of
 - scope of the profession (New) (// Juliet Oliver)
 - seconded lawyers in the company (offices) of a client
 - use of confidential correspondence in procedures (exceptional)
 - agreements to work together (with lawyers and non-lawyers)
 - issuing a writ or complaint against lawyers, bailiffs, notaries, magistrates
 - being subjected to a seizure, writ or judicial complaint

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1. Prevention
- 2. Mediation of the President of the Bar**
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Creative and proactive alternatives to discipline



2. Mediation of the President of the Bar:

People (lawyers or other) address the President about a problem which is not necessarily a breach of the Ethical Rules; i.e.

- Disagreement between partners or associates in a Firm
- Fees (this will be transferred to a commission : success rate = +/- 75 %)
- Communication problems between client and lawyer or non transmission of documents to the colleague who took over a case (this can be the indication the lawyer has a problem in which the Bar can help (the bar has a minimum income insurance, can delegate someone for temporarily support or have a Tutor appointed (seldom))
- Incidents at hearings
- All non formal complaints/demands for intervention where the main interest of the client is that the problem gets solved

Creative and proactive alternatives to discipline



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Creative and proactive alternatives to discipline



3. Provisional and protective measures:

People (lawyers or other) address the President about a specific application of the Ethical Rules; i.e.

- A. Informal decision of the President of Bar (prepared by his/her cabinet)
 - A question is raised by a Party – this is transmitted to the other Party for remarks - these remarks are transferred to the first Party for further remarks and accompanied by a first analysis – another round of remarks and the decision is taken. The parties could be heard if desired.
 - The compliance with these decisions is 99,9%

Creative and proactive alternatives to discipline



3. Provisional and protective measures (next):

B. Injunctions by the President of the Bar

- This is a more formal decision of the President (formal motivation, operative part ...)
- Against these decisions proceedings before the ordinary courts would be possible (very rare) as a sort of second instance
- Non respect of an injunction (or an informal decision) is an infringement of the Ethics Code

Creative and proactive alternatives to discipline



3. Provisional and protective measures (next):

C. “Court Ban” (seldom)

- = A prohibition to be present at the courts, tribunals or any judicial instance
- The lawyer has the right to be heard and has the possibility to present his defence
- The decision is taken by the President of the Bar and has to contain a motivation – max period is 3 months
- Possibility to prolong by the Council (same period) with possibility to be heard
- Second instance before Disciplinary Court of Appeal

Creative and proactive alternatives to discipline



3. Provisional and protective measures (next):

- D. Paternal/Maternal admonition – Mention in the personal file
- The lawyer has the right to be heard and has the possibility to present his defence
 - The President, who is the only person who has the possibility to open a disciplinary investigation (see later), estimates the infringement is proven (mainly because of a confession) but it is not necessary to open an investigation (// Prosecutor = opportunity)

Creative and proactive alternatives to discipline



3. Provisional and protective measures (next):

E. List of indicators :

- A coach will be in contact with the lawyer , will go and see him/her and will assess the situation
- He will try to assist the lawyer if necessary to put him back on track.

Creative and proactive alternatives to discipline



1. Prevention
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- 4. Disciplinary procedure**

Creative and proactive alternatives to discipline



Some figures :

8.000 lawyers	Total without Fee	Fee	Disciplinary complaints
2014	2.186 (697+1.489)	492 (312+180)	44 (10+34)
2015	2.429 (790+1.639)	434 (301+133)	83 (22+61)
2016	2.052= (678+1.374)	483 (320+163)	65 (13+52)

Since 2016 the ombudsperson Ligea also deals with grievances of clients and lawyers. (about 50 files/year)

Prevention and Disciplinary Sanctioning at the Brussels Bar



Conclusions :

- The Brussels Bar not only tries to put a lot of effort in prevention, but also wants to profile itself as the ally of its lawyers in the adaptation of their activity (in a large sense) to a rapidly changing professional environment.
- Transparency is now guaranteed by a newly installed “Committee of surveillance” with lay members.
- Low numbers of disciplinary cases or sanctions don’t necessarily mean there is no efficient enforcement of the professional rules, it can also mean prevention and support work :

“one cannot measure the level of security of a country by the number of its prisoners”