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## Disciplinary Actions by the South Carolina Supreme Court and the Board of Commissioners on Grievances and Discipline: Lawyers Beware

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# DISCIPLINARY ACTIONS BY THE SOUTH CAROLINA SUPREME COURT AND THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE: LAWYERS BEWARE

HARRY J. HAYNSWORTH, IV\*

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## I. INTRODUCTION

The final report of the American Bar Association Special Committee on Evaluation of Disciplinary Enforcement in the United States, issued in June 1970, stated:

After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to

outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; [and] many disciplinary agencies have little power to take effective steps against malefactors.<sup>1</sup>

This assessment by the Clark Committee, named for its Chairman, retired Supreme Court Justice Tom C. Clark, was a reasonably accurate statement of the situation in South Carolina at that time. Through 1969 only sixteen lawyers had ever received some form of public discipline and only eight lawyers had ever been privately reprimanded.

Disciplinary enforcement in the United States has improved dramatically since the publication of the Clark Committee Report.<sup>2</sup> Nowhere is this statement more true than in South Carolina. The statistical record, shown in Table 1, speaks for itself. From January 1970 through June 1984, forty-nine lawyers admitted to practice in South Carolina were disbarred, thirteen irrevocably resigned while under investigation for ethics violations, twenty-eight were indefinitely suspended, fifty received public reprimands, and sixty received private reprimands.<sup>3</sup> The largest number of disciplinary sanctions to date occurred in 1983 when nine lawyers were disbarred, three resigned while under investigation for ethics violations, two were indefinitely suspended, eight received public reprimands and eight received private reprimands.

This Article describes and evaluates the disciplinary enforcement system in South Carolina. The Article concludes that: (1) There is no evidence that South Carolina practitioners are less ethical than lawyers in other states; (2) South Carolina's existing disciplinary system is one of the most efficient in the country; (3) the South Carolina Supreme Court has consistently

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1. ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (Hon. Tom C. Clark, Chairman 1970)[hereinafter cited as CLARK COMMITTEE REPORT].

2. See, e.g., McPike & Harrison, *The True Story on Lawyer Discipline*, 70 A.B.A. J. 92 (1984); Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RESEARCH J. 919, 933-46.

3. From 1968-1980, the Board of Commissioners on Grievances and Discipline also issued 86 letters of caution. This practice was discontinued after the South Carolina Supreme Court held that such letters were not authorized by the Rule on Disciplinary Procedure. See *In re Davis*, 276 S.C. 532, 280 S.E.2d 644 (1981); *In re Belser*, 277 S.C. 250, 287 S.E.2d 139 (1982).

TABLE 1. *Disciplinary Sanctions Against South Carolina Lawyers*

Year	Disbarment	Resignation*	Indefinite Suspension	Public Reprimand	Private Reprimand***	Other
1821	1					
1908	1					
1909						1 contempt
1911				1		
1913			1			
1914			1			
1931						1 Disbarment suspended on condition of restitution
1960			1	1		
1961					1	
1962			1		1	
1963						
1964						
1965	1			1	1	
1966			1		1	
1967	2			1	1	
1968	1					1 letter of caution
1969					3	
1970			4		3	
1971	3			2	2	
1972	2		4		3	2 letters of caution
1973			2	1	2	
1974			1	3	1	
1975	4	1	1	2	6	
1976	2	2	6	2	4	15 letters of caution
1977	4	1		5**	10	13 letters of caution
1978	8	1	1	3	5	27 letters of caution
1979	4		1	5	11	8 letters of caution

TABLE 1. *Disciplinary Sanctions Against South Carolina Lawyers (continued)*

Year	Disbarment	Resignation*	Indefinite Suspension	Public Reprimand	Private Reprimand***	Other
1980	3	1		6		1 repay fee; 2 contempt; 20 letters of caution
1981	2		1	3	3	
1982	6	1	3	7	2	1 repay fee
1983	9	3	2	8	8	1 repay fee
1984****	2	3	2	3		1 cause real estate to be deeded to former client; 1 repay fee
<b>TOTAL</b>	<b>55</b>	<b>13</b>	<b>33</b>	<b>54</b>	<b>68</b>	<b>95</b>

\*Only resignations involving lawyers who, at the time of acceptance of the resignation, were under investigation for ethics violations are included. There have been a number of published opinions involving resignations in recent years for nondisciplinary reasons, e.g., transfer of residence to another state, and inability to meet the 12 hour per year mandatory continuing legal education requirement imposed on all South Carolina practitioners by the South Carolina Supreme Court.

\*\*The opinion imposing one of the public reprimands in 1977 was subsequently reversed by the United States Supreme Court. See *In re Smith*, 436 U.S. 412 (1978), reversing 268 S.C. 259, 233 S.E.2d 301 (1977).

\*\*\*Derived from the Annual Reports of the Board of Commissioners on Grievances and Discipline. The Annual Reports are based on an October 1 through September 30 fiscal year. The public discipline cases are based on a calendar year basis used in the official reports of the decisions.

\*\*\*\*The period covered is through June 30, 1984. No private reprimands are reported for 1984 since the 1984 Annual Report of the Board of Commissioners on Grievances and Discipline was not available at the time this material was written.

imposed stiff disciplinary sanctions for what it regards as serious ethical violations and has in recent years implemented several procedural improvements in the way disciplinary cases are handled; and (4) nevertheless, several changes designed to make the system better understood and accepted by both the public and lawyers are desirable.

## II. DISCIPLINARY ENFORCEMENT IN SOUTH CAROLINA PRIOR TO 1970

### A. Statehood Through 1957

The period prior to 1970 may be divided into two stages. The first period extends from statehood until 1958. During this lengthy period, the South Carolina Supreme Court disciplined only six lawyers.<sup>4</sup> The first disciplinary action occurred in 1821 when the supreme court disbarred a lawyer who had been convicted of subornation of perjury.<sup>5</sup> The second action did not occur until eighty-seven years later, in 1908.<sup>6</sup> The last opinion in this era was issued in 1931.<sup>7</sup> From 1931 through 1957, the only significant development in this area was the supreme court's adoption in 1956 of the Canons of Ethics, which had been approved by the American Bar Association in 1908. South Carolina was one of the last states to adopt the Canons of Ethics.

The year 1958 was chosen as the beginning of the second stage because the supreme court promulgated its Rule on Disciplinary Procedure in that year, establishing the Board of Commissioners on Grievances and Discipline (Board).<sup>8</sup> The rule gave the Board the authority to investigate grievances made against lawyers and to make recommendations for sanctions to the supreme court. Prior to the creation of the Board, grievance cases were heard on original petitions filed in the circuit court or supreme court. Local bar associations<sup>9</sup> and the South Carolina Bar

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4. Other lawyers may have been disciplined without a published opinion or may have been allowed to resign. In a 1902 decision, the South Carolina Supreme Court stated: "Proceedings in disbarment have been and still are of very rare occurrence in the annals of South Carolina. One can tell perhaps on the fingers of one hand all the instances of similar accusations on record in our courts." *In re Duncan*, 64 S.C. 461, 480, 42 S.E. 433, 440 (1902). At the time of this statement, there was only one published disciplinary opinion.

5. *State v. Holding*, 12 S.C.L. (1 McCord) 379 (1821).

6. *In re Duncan*, 81 S.C. 290, 62 S.E. 406 (1908).

7. *State v. Jennings*, 161 S.C. 263, 159 S.E. 627 (1931).

8. S.C. SUP. CR. R. Disc. P. §§ 1-42 (Supp. 1984). This Rule, effective September 1, 1958, has been amended several times: February 15, 1962, January 18, 1964, September 18, 1965, September 15, 1967, January 15, 1970, June 12, 1975, January 9, 1978, June 6, 1980, October 20, 1982, February 16, 1983, October 5, 1983, and October 16 and 17, 1984. The January 1978 amendments were the most extensive.

9. See *In re Duncan*, 64 S.C. 461, 475-76, 42 S.E. 433, 438 (1902).

Association Grievance Committee filed some of these cases.<sup>10</sup> The Attorney General, usually after receiving notification that a lawyer had been convicted of a serious crime, filed others.<sup>11</sup> Individual lawyers filed three.<sup>12</sup>

An examination of two of these pre-1958 cases reveals the basic reasons why disciplinary sanctions were so rarely imposed during this period. The first such case is the 1902 opinion, *In re Duncan*.<sup>13</sup> *Duncan* arose as an original disbarment petition filed in the supreme court by a practitioner, D.W. Robinson of Columbia. Robinson based the petition on Duncan's misrepresentation of the status of title to certain real estate, improper use of client security funds, and Duncan's contempt of court citation for refusing to pay trust funds after being ordered to do so by a circuit court judge. All of the allegations arose from a mortgage transaction which involved one of Robinson's clients. The supreme court refused to impose any sanction although the respondent in *Duncan* admitted the commingling charge. The court pointed out that the respondent stated that he was at all times ready and able to repay the money in question, and had in fact paid it to the court prior to the filing of the disciplinary petition, and stated: "Such conduct in an attorney may be and is reprehensible for its laxity, but it is not necessarily fraudulent and it does not furnish ground for disbarment."<sup>14</sup>

The court's emphasis on a fraudulent motive as the basis of serious disciplinary actions permeates the opinion. Describing disbarment proceedings generally, the court stated:

When a court is asked to exercise its summary jurisdiction over

10. See *State v. Jennings*, 161 S.C. 263, 159 S.E. 627 (1931).

11. See *In re Duncan*, 64 S.C. at 476, 42 S.E. at 438. See also *In re Evans*, 94 S.C. 414, 78 S.E. 227 (1913) (Attorney General filed disciplinary proceedings against alcoholic lawyer).

12. See *In re Duncan*, 64 S.C. 461, 42 S.E. 433 (1902); *Ex parte Gadsden*, 89 S.C. 352, 71 S.E. 952 (1911); *In re Sims*, 97 S.C. 37, 81 S.E. 279 (1913). *Gadsden*, which resulted in the first public reprimand issued by the South Carolina Supreme Court, was unusual because the lawyer in question had filed a petition in the supreme court asking the court to "clear his name" in connection with a civil case in which an estate settlement had been set aside based on the lawyer's improper conduct. The case had been settled over the lawyer's objections after an appeal had been filed. Instead of clearing the lawyer's name, the supreme court considered disbaring him. The court finally decided that a public reprimand was sufficient under the circumstances.

13. 64 S.C. 461, 42 S.E. 433 (1902).

14. *Id.* at 483, 42 S.E. at 441.



an attorney to the extent of expelling him from the profession, as in the case before us, it is proper to consider what the courts have the right to require of a lawyer. All the books and authorities that treat of this subject agree that the three main requisites are learning, diligence, integrity, but that the greatest of these is integrity. Ignorance of law and neglect of business may keep a lawyer in the lowest ranks of his profession, and render him liable in damages to his clients for any loss caused thereby, but such should afford no ground for disbarment. But the man who is lacking in integrity, and who does not deal honestly and fairly with his client, the court, and the other party, but who practices deceit or fraud or dishonesty or overreaching craft, no matter how learned and diligent he may be, is unworthy of his profession, and should be disbarred. It has therefore been held that the court may strike the name of an attorney from the rolls for fraudulent conduct, although it may not be so gross as to be criminally punishable. Gross misconduct is always good and sufficient ground for disbarment. But the case must be clear against the attorney, not only as to the act charged, but that it was committed with a bad or fraudulent motive.<sup>15</sup>

Another interesting aspect of *Duncan* is the supreme court's discussion of the procedural aspects of the case. The court pointed out that *Duncan* was the first disciplinary case filed by a lawyer against another lawyer in the supreme court. The court further commented that:

It has been customary in cases such as this to call a meeting of the members of the bar to which the respondent belongs, and in a proper case, after due and thorough deliberation on the accusations brought against him, to select one or more brethren of this bar to institute proceedings for disbarment. By this usual method, charges against a respondent are more thoroughly sifted. The serious step of moving to disbar is only taken when a majority of the respondent's brethren of the bar are satisfied that his name should be stricken from the roll of attorneys, and the proceeding is happily relieved of all suspicion of personal or private animosity and prejudice. We do not wish to be understood to condemn the course pursued by Mr. Robinson in this case, nor to question the purity of his motives. We simply wish to indicate the more commendable method. We know of no previous deviations, except when an attorney

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15. *Id.* at 482, 42 S.E. at 440.

general or a circuit solicitor moved for the disbarment of an attorney who had been convicted of a felony or an infamous offense, submitting the record as the ground of the motion.<sup>16</sup>

Duncan was subsequently disbarred in 1908 for submitting a false affidavit in connection with a motion for a new trial in a criminal case,<sup>17</sup> and he was subsequently convicted of contempt of court in 1909 for continuing to practice law after being disbarred.<sup>18</sup> Accordingly, the disbarment finally vindicated the bold action Robinson had taken in 1902.

The South Carolina Supreme Court has clearly repudiated the quoted language in *Duncan* and does not hesitate to impose disciplinary sanctions in trust fund and serious neglect cases irrespective of the respondent's intent. In fact, trust fund and neglect cases constitute two of the largest categories of cases in which the court has imposed sanctions against South Carolina lawyers.<sup>19</sup>

A second instructive case from the pre-1958 era is *State v. Jennings*,<sup>20</sup> decided in 1931. The respondent in *Jennings* maintained a thriving law practice, was the mayor of Sumter for fourteen years, was chairman of the roads commission for a number of years, and was a successful businessman and bank president. Charges of ethical improprieties were filed against the respondent before the Sumter County Bar Association in 1924. The charges involved improper investment of clients' funds without their consent and without proper disclosure of the nature of the investments, improper satisfactions of liens held by clients without their consent, and improper commingling of the attorney's funds with client trust funds. Included was a charge that the lawyer used \$30,000 belonging to the estate of a minor whom he represented in personal business ventures that failed.

The Sumter County Bar Association investigated the charges but took no action when the respondent assured the bar association that he would alter his conduct. Two years later, the same charges were presented to the South Carolina Bar Grievance Committee. The committee took four years to complete its

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16. *Id.* at 476, 42 S.E. at 438.

17. *In re Duncan*, 81 S.C. 290, 62 S.E. 406 (1908).

18. *In re Duncan*, 83 S.C. 186, 65 S.E. 210 (1909).

19. See Table 3.

20. 161 S.C. 263, 159 S.E. 627 (1931).

investigation, and in 1930 recommended the filing of disciplinary proceedings in the supreme court. The court found that except for the use of funds from the minor's estate, the charges did not show "bad or fraudulent motives, depravity of character, or dishonesty or want of integrity, which would warrant his suspension or disbarment on these charges alone."<sup>21</sup> The court further held, however, that misappropriation of the minor's funds was more serious and, combined with the other charges, justified a sanction. The court disbarred the respondent, but the disbarment order was suspended on condition that the respondent repay the \$30,000 in question at the rate of \$100 per month.<sup>22</sup> The repayment period was therefore twenty-five years.

In the course of the *Jennings* opinion, the court stated:

[A]cts charged against an attorney to warrant his disbarment or suspension must be of such a character as to show that their commission was with a bad or fraudulent motive and they must be supported by a clear preponderance of the evidence. The conduct must be so gross as to show a want of integrity, moral turpitude, depravity of character, or dishonesty. There should be "a clear conviction of moral fraud."<sup>23</sup>

Given the supreme court's insistence on proof of moral depravity, its reliance on petitions from the South Carolina Bar Association and local bar associations, and its discouragement of original proceedings by individual lawyers, it is not surprising that very few disciplinary cases were filed in the pre-1958 period.

### B. 1958 Through 1969

During the period extending from 1958 to the time that the Board of Commissioners on Grievances and Discipline was established at the end of 1969, the number of disciplinary cases brought before the Board and the number of sanctions imposed against lawyers gradually but significantly increased.<sup>24</sup> Although

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21. *Id.* at 268, 159 S.E. at 629.

22. The respondent was also required to obtain and finance a \$15,000 life insurance policy in favor of the minor, who had by that time reached adulthood. *Id.* at 274, 159 S.E. at 631.

23. *Id.* at 266, 159 S.E. at 628.

24. See Table 2.

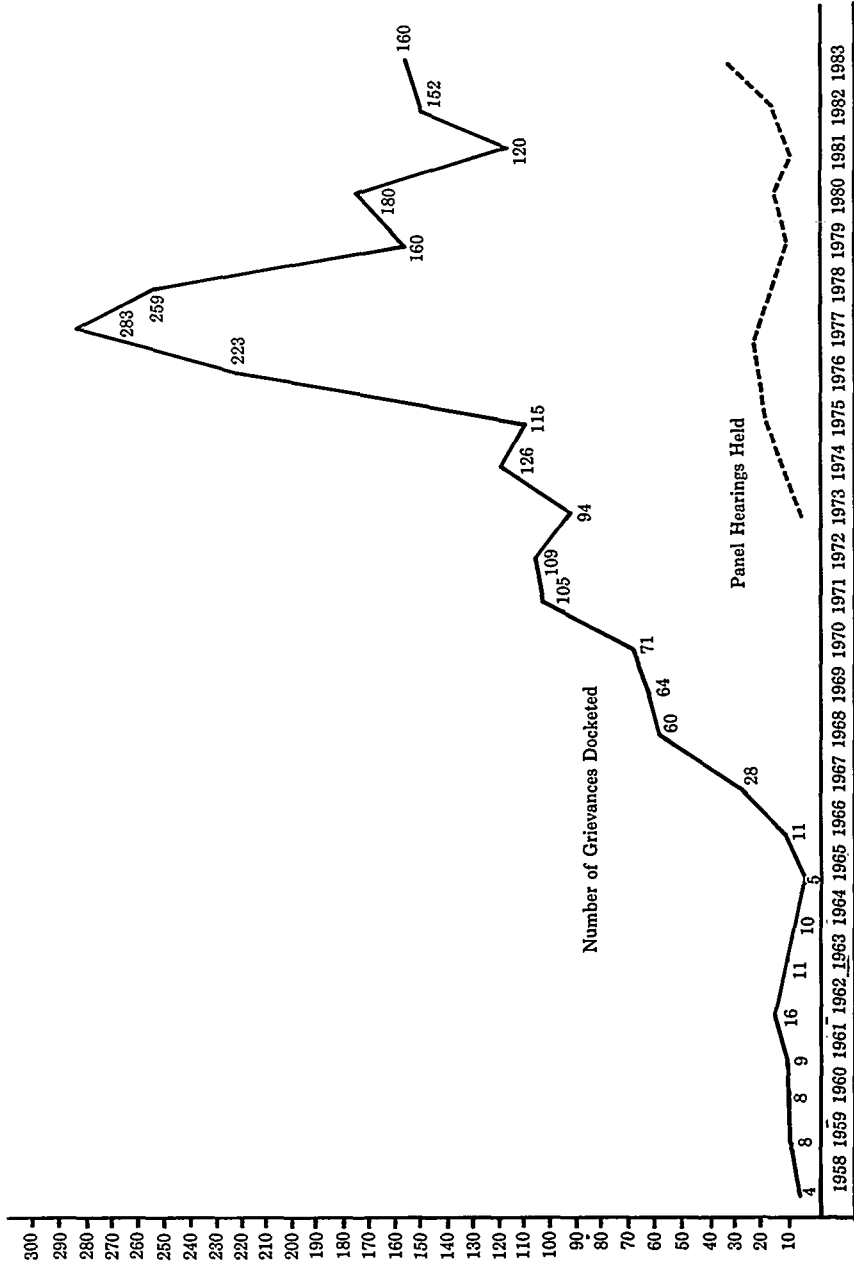


TABLE 2  
 Cases Handled by Board of Grievances and Discipline

the Board handled only four cases in 1958 and eight in 1959, the number of cases the Board handled increased to sixty in 1968 and sixty-four in 1969.<sup>25</sup> The Board also issued eight private reprimands during this period. From 1958 through the end of 1969, the South Carolina Supreme Court also issued nine disciplinary opinions, imposing public sanctions on ten lawyers.<sup>26</sup> These opinions established several basic principles. The most important principle is that the Board merely makes advisory recommendations to the supreme court, which is not bound by the Board's findings of fact or recommended sanctions. As stated in *Burns v. Clayton*,<sup>27</sup> the first case from the Board to reach the supreme court, the following "fundamentals" govern disciplinary proceedings:

[T]hat this is not a criminal proceeding nor an appeal from the judgment of a lower court; that the Board of Commissioners on Grievances and Discipline are officers of this court, commissioned and charged with the duty of investigating alleged misconduct on the part of their fellow members of the bar of this State and of reporting to this court the proceedings of their inquiry, and their findings and recommendations; that the Board's report is advisory only, this court being in nowise bound to accept its findings of fact or to concur in its recommendations; and upon this court alone rests the duty and the grave responsibility of adjudging, from the record, whether or not professional misconduct has been shown, and of taking appropriate disciplinary action thereabout.<sup>28</sup>

The second basic principle is that restitution or settlement of a grievance with a client, or dismissal or acquittal of criminal

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25. See *id.* The Board did not keep records on the yearly totals of grievance inquiries it received until 1982. The Board only reported the number of cases placed on its docket and investigated in the particular year. Grievance inquiries that were not docketed because a formal written complaint was not filed, and inquiries dismissed by the chairman because the facts alleged in the complaint were clearly not sufficient to constitute an ethical violation even if proven, were not included in the reported statistics.

26. One of the cases concerned three lawyers. Disciplinary sanctions were imposed on two of the lawyers; the third was exonerated. See *Burns v. Clayton*, 237 S.C. 316, 117 S.E.2d 300 (1960).

27. 237 S.C. 316, 117 S.E.2d 300 (1960).

28. *Id.* at 331, 117 S.E.2d at 307. Many other states follow a similar rule. See, e.g., *Office of Disciplinary Counsel v. Green*, 470 Pa. 164, 368 A.2d 245 (1976). A more narrow scope of review is authorized in some states. See *People v. Gibbons*, 685 P.2d 168 (Colo. 1984).

charges, does not automatically end grievance proceedings. Instead, such action may affect the gravity of any sanction found justified under the circumstances.<sup>29</sup> A third principle established in the first decade of the Board's existence is that, although a lawyer always has the right to resign from the bar, the court may refuse to accept a proffered resignation when it is tendered after disciplinary proceedings before the Board have been instituted.<sup>30</sup>

### III. DISCIPLINARY ENFORCEMENT IN SOUTH CAROLINA AFTER 1969

By the end of 1969, the supreme court had clearly established its plenary power to regulate the conduct of lawyers admitted to practice in South Carolina,<sup>31</sup> and had formed a viable working relationship with the Board of Commissioners on Grievances and Discipline. Although the Supreme Court Rule on Disciplinary Procedure contained many of the deficiencies specified in the Clark Committee Report,<sup>32</sup> the basic machinery for an effective disciplinary system was in place. The two most important developments since 1969 are: (1) the supreme court's March 1, 1973, adoption of the American Bar Association Model Code of Professional Responsibility,<sup>33</sup> which replaced the Canons of Ethics; and (2) the approval in January 1978 of substantial revisions to the Rule on Disciplinary Procedure.<sup>34</sup> These revisions

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29. See *Cate v. Rivers*, 246 S.C. 35, 142 S.E.2d 369 (1965); *Norris v. Alexander*, 246 S.C. 14, 142 S.E.2d 214 (1965).

30. See *McLeod v. Chandler*, 251 S.C. 305, 162 S.E.2d 256 (1968). See *infra* notes 157-62 and accompanying text.

31. See, e.g., *State v. Holding*, 12 S.C.L. (1 McCord) 379 (1821); S.C. CODE ANN. §§ 40-5-10, 40-5-20 (1976).

32. One of the most serious defects was the requirement that all complaints be verified by the complainant and signed by a lawyer who agreed to act as the complainant's legal counsel. By signing the complaint, the lawyer represented that he had investigated the grievance and believed that reasonable cause for a hearing existed. Moreover, the lawyer agreed to accept responsibility for prosecuting the complaint to conclusion. See S.C. SUP. CT. R. DISC. P. § 7 (1976). These onerous requirements, which for obvious reasons discouraged the filing of complaints, were eliminated in 1978. See Youngblood, *Revised Rule On Disciplinary Procedure*, The Transcript, May, 1978, at 2.

33. S.C. SUP. CT. R. 32 (1976). In 1983, the American Bar Association approved the ABA Model Rules of Professional Conduct to replace the Code of Professional Responsibility. At the time this Article was prepared, New Jersey was the only state that had approved the ABA Model Rules, although several other states were considering their adoption.

34. For a description of the changes, see Youngblood, *supra* note 32, at 2.

basically incorporated the format recommended by the American Bar Association Standards for Lawyer Discipline and Disability Proceedings.<sup>35</sup>

### A. *Disciplinary Procedures*

#### 1. *Administrative Structure*

There are three basic institutional components of the South Carolina disciplinary system: the Board of Commissioners on Grievances and Discipline, the Attorney General's office and the South Carolina Supreme Court. The supreme court selects the members of the Board, who are appointed for a three year term,<sup>36</sup> and a Board Chairman. The number of Board members equals the number of resident circuit court judges, currently twenty-five. Board members must reside in the judicial circuit from which they are appointed. The Supreme Court Rule on Disciplinary Procedure also authorizes the chairman to request the court to appoint associate commissioners to perform investigative duties when the workload is heavy.<sup>37</sup> At the present time there are seven associate commissioners.<sup>38</sup>

The Board rarely meets as a whole. Most of the decisions that require review by a committee are handled by the Executive Committee,<sup>39</sup> which consists of a chairman, appointed by the supreme court, and four other members appointed by the court at the recommendation of the incoming chairman.<sup>40</sup> The Executive Committee reviews all grievances, oversees the preliminary investigative process, directs the issuance of formal complaints, reviews all findings and recommendations from hearing panels, makes independent recommendations of sanctions to the supreme court, and administers all private reprimands.<sup>41</sup> The

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35. See generally ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1979).

36. S.C. SUP. CT. R. DISC. P. § 3A (Supp. 1984).

37. *Id.* § 9E.

38. See SOUTH CAROLINA BAR LAWYER'S DESK BOOK D-11 (1984).

39. In the five year period from October 1, 1978, through September 30, 1983, the full Board held one meeting. During the same period the Executive Committee held 50 meetings. See 1979-1983 Bd. OF COMM'RS GRIEV. & DISC. ANNUAL REPS.

40. S.C. SUP. CT. R. DISC. P. § 4A (Supp. 1984).

41. *Id.* §§ 4B, 9, 11, 14. Under § 11A of the Rule on Disciplinary Procedure, in addition to the executive committee and the chairman of the Commission on Grievances

Board members (along with associate commissioners) conduct investigations and hearings, which are conducted by panels of three Board members.<sup>42</sup>

The Attorney General's office provides two types of input. First, at the request of the Executive Committee, the Attorney General's office will assist in the investigation of grievances.<sup>43</sup> As a general rule, this request is made only in the more difficult, technical cases such as those involving trust account violations. Second, unless there is a disqualifying conflict of interest, the Attorney General's office prosecutes all formal complaints to conclusion.<sup>44</sup> At present, there are six assistant attorneys general who work part-time on disciplinary matters. One spends approximately half of his time, three spend approximately one-fourth of their time, and the remaining two, approximately one-tenth of their time on disciplinary cases. These six are assisted by two full time lay investigators on the Attorney General's staff.<sup>45</sup>

In addition to appointing the members of the Board of Commissioners on Grievances and Discipline, the supreme court performs several other important functions in the disciplinary process. Technically, the supreme court may review every grievance presented to the Board.<sup>46</sup> As a practical matter, the court cannot do so given the volume of grievances filed each year.<sup>47</sup> The court does, however, review every case involving a panel hearing.<sup>48</sup>

The court also deals directly with certain types of special cases. For example, the court, rather than the Board, handles all grievances filed against a member of the Board of Commission-

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and Discipline, a circuit or family court judge and a local bar association's grievance committee can direct that a complaint be issued.

42. *Id.* §§ 9B, 9E, 12.

43. *Id.* § 9A.

44. *Id.* § 12D. When the Attorney General has a conflict of interest, the chairman of the Board of Commissioners on Grievances and Discipline appoints a practitioner to serve as the prosecutor.

45. Telephone interview with Richard B. Kale, Jr., Esquire, Senior Assistant South Carolina Attorney General (Aug. 7, 1984).

46. S.C. SUP. CT. R. Disc. P. § 25 (Supp. 1984).

47. The chairman, however, must maintain written records of the disposition of every grievance submitted to the Board. *Id.* § 4C.

48. *Id.* §§ 14A(3), 14B. The supreme court also reviews complaints when both the panel report and the executive committee recommend dismissal. *See In re Belser*, 277 S.C. 25, 287 S.E.2d 139 (1982).



ers on Grievances and Discipline.<sup>49</sup> The special processing of such grievances is designed to minimize the danger that charges of bias or favoritism will be leveled against the Board. Additionally, the court must enter an order temporarily suspending a lawyer from practice when it receives official notice that a lawyer has been convicted of a serious crime,<sup>50</sup> a term that is broadly defined to include all felonies and other crimes involving moral turpitude.<sup>51</sup> The file on the suspended lawyer is then referred to the Board where action on it is held in abeyance until the lawyer has concluded all direct appeals.<sup>52</sup> If the conviction is reversed on appeal, the court will reinstate the lawyer, but the reinstatement does not terminate the pending disciplinary action.<sup>53</sup> If the conviction is upheld, a panel of the Board hears the disciplinary case to determine the appropriate sanction.<sup>54</sup> The court also enters orders transferring lawyers with serious emotional or physical problems to disability inactive status.<sup>55</sup> A lawyer may not practice law while he is in this status. Any pending disciplinary proceedings against a lawyer in this status are held in abeyance.<sup>56</sup>

Additionally, at the request of the Board or the Executive Committee, the court may issue an order temporarily suspending or imposing probation on a lawyer who “appears to be causing great public harm by misappropriating funds to his own use, or otherwise.”<sup>57</sup> If a lawyer is temporarily suspended under such an order, he or she is precluded from accepting new cases but, with permission of the court, may continue to represent existing clients for thirty days provided all fees collected during that period are deposited in a special trust account. The funds in such a special trust account may be withdrawn only upon

49. S.C. Sup. Ct. R. Disc. P. § 10 (Supp. 1984).

50. *Id.* § 6A.

51. *Id.* § 20. For the purposes of this rule, pleas of guilty or nolo contendere are considered convictions.

52. *Id.* § 6C. See *In re Caskey*, 276 S.C. 410, 279 S.E.2d 129 (1981) (habeas corpus petition is not an appeal for purposes of disciplinary rules).

53. S.C. Sup. Ct. R. Disc. P. § 6E (Supp. 1984).

54. *Id.* § 6B. The conviction is conclusive evidence of the crime and the only issue on review of the panel’s recommendation is the appropriate sanction. See *In re Rish*, 273 S.C. 365, 256 S.E.2d 540 (1979).

55. S.C. Sup. Ct. R. Disc. P. § 19 (Supp. 1984).

56. *Id.* § 19B. See *In re Phillips*, 280 S.C. 2, 310 S.E.2d 433 (1984).

57. S.C. Sup. Ct. R. Disc. P. § 7B (Supp. 1984).

conditions set forth in the court's order.<sup>58</sup> If the order places the lawyer on probation, he or she is precluded from withdrawing any funds from existing bank accounts except as authorized in the probation order.<sup>59</sup> The supreme court also makes the final determination on all petitions for reinstatement of lawyers who have been temporarily or indefinitely suspended or placed on disability inactive status.<sup>60</sup>

## 2. Processing of Grievances

As Table 1 indicates,<sup>61</sup> between January 1970 and the middle of 1984, 137 lawyers admitted to practice in South Carolina have received some form of public disciplinary sanction and 60 have been privately reprimanded. As impressive as these figures are, the cases that result in sanctions represent only a small percentage of the total grievances filed. According to the 1983 Annual Report of the Board of Commissioners on Grievances and Discipline, the Board received a total of 344 grievance<sup>62</sup> inquiries between October 1, 1982, and September 30, 1983.<sup>63</sup> During the same period, the chairman and the Executive Committee dismissed 306 grievances, or 89.4% of the grievances filed, after a preliminary investigation or a hearing.<sup>64</sup> Based on available evidence, the Board's dismissal rate for the 1983 reporting period is not significantly different from that of other jurisdictions.<sup>65</sup>

58. *Id.*

59. *Id.*

60. *Id.* §§ 6A, 7B, 19F-H, 37.

61. See Table 1.

62. A grievance is defined in the Rules on Disciplinary Procedure as "any accusation of misconduct against an attorney which has not resulted in a complaint." S.C. SUP. CT. R. Disc. P. § 2F (1976). A complaint is defined as a "formal written document alleging misconduct" that is issued after an investigation of a grievance reveals that there is probable cause for a grievance hearing. *Id.* § 2D.

63. 1983 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP., reprinted in *The Transcript*, Nov., 1983, at 7. *The Transcript* is a monthly publication of the South Carolina Bar Association.

64. *Id.* Some of these dismissals concerned grievances filed in prior years. The exact number of carryover cases cannot be determined from the report.

65. See, e.g., Econ. Develop. Council of N.Y.C., Inc. Task Force, *Analysis of the Grievance System of the Association of the Bar of the City of New York*, 34 REC. A.B. CITY N.Y. 561, 565, 579 (1979) (California, Illinois, Michigan, and the First Department of New York City dismiss from 85% to 97% of all grievances); Steele & Nimmer, *supra* note 2, at 982 (survey showed dismissal rate is over 90%). In the 1982 reporting period, the dismissal rate by the Board was only 67.4% (265 dismissals of 393 filed grievances).

During this same reporting period, a total of thirty-three formal complaints were served.<sup>66</sup> This statistic is critical because disciplinary sanctions arise only from complaints.<sup>67</sup> The issuance of a complaint, however, does not automatically result in the imposition of a sanction. From October 1, 1982, through September 30, 1983, twenty disciplinary sanctions were imposed and one lawyer resigned while under investigation for ethical improprieties.<sup>68</sup> Although the Board would have processed many of these complaints in prior years, it is not inappropriate to conclude from these figures that approximately 7.5% of all grievances filed with the Board result in some form of disciplinary sanction or resignation. As low as this figure may seem, it is not out of line with the experience in other states.<sup>69</sup>

Thus, there is a significant winnowing process that takes place in the disciplinary system. The process takes place in three procedural stages: (1) the pre-complaint stage, (2) the hearing stage, and (3) the appellate stage. As the above statistics indicate, there are progressively fewer cases dismissed at each stage. The reasons for this decline in dismissals is discussed in the following materials.

#### a. Pre-Complaint Stage

Anyone may file a grievance. Although the Board of Commissioners on Grievances and Discipline does not publish data on the origin of grievances, available statistics from other jurisdictions indicate that disgruntled clients submit the vast majority of grievances and that lawyers, judges, and local grievance

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1982 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP., reprinted in *The Transcript*, Nov., 1982, at 4.

66. 1983 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP., *supra* note 63, at 7.

67. See *supra* note 62 and accompanying text for an explanation of the difference between a grievance and a complaint.

68. See 1983 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP., *supra* note 63, at 7. The annual report states that nine resignations occurred, although only one case concerned a lawyer who, at the time, was under investigation for ethical improprieties.

69. See Steele & Nimmer, *supra* note 2 (only four of seventeen jurisdictions studied had a sanction rate of more than 8%). See also Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 ILL. L. FORUM 193, 214-216. The South Carolina sanction ratio is apparently considerably higher than the national average. See Lawscape, *Tighter Discipline Shown by Statistics*, 63 A.B.A. J. 24 (1977) (in 1975 the national ratio of public discipline to grievance complaints was .02%).

committees submit only a few each year.<sup>70</sup> Most client grievances involve contractual disputes rather than ethical violations that warrant disciplinary sanctions. This is the principal reason why such a high percentage of grievances are dismissed in the pre-complaint stage.<sup>71</sup>

The chairman of the Executive Committee reviews all grievances first. Prior to 1978, before a grievance could be considered, a lawyer had to submit a written statement verified by the complainant and signed by the lawyer, certifying that he had investigated the grievance and believed that reasonable cause existed for a hearing. The lawyer representing the complainant also had to agree to prosecute the grievance to its conclusion.<sup>72</sup> These verification requirements no longer apply. Nevertheless, a written statement reciting the basic facts, signed by the complainant, is necessary.<sup>73</sup>

If the chairman finds that the grievance does not contain sufficient facts that, if true, would constitute misconduct warranting a sanction,<sup>74</sup> he will dismiss it on his own motion and inform the complainant of this fact.<sup>75</sup> In cases which involve fee disputes, as opposed to those which involve excessive fees which may result in disciplinary sanctions,<sup>76</sup> the chairman advises the

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70. See Steele & Nimmer, *supra* note 2, at 973 (study of Michigan disciplinary cases revealed that only 8.1% of all complaints were filed by other members of the profession; this figure includes cases initiated by the agency, such as criminal conviction cases).

71. See Steele & Nimmer, *supra* note 2, at 949-78; Marks & Cathcart, *supra* note 69, at 209-21.

72. The prior rule is published in the 1976 South Carolina Code. S.C. SUP. CT. R. Disc. P. § 7 (1976). These requirements were published as part of the original version of the Rule on Disciplinary Procedure.

73. The Supreme Court Rule on Disciplinary Procedure does not require that a grievance be written, but the Board imposes this requirement through its internal rules. The Board has the authority to adopt rules and regulations not inconsistent with the Rule on Disciplinary Procedure. S.C. SUP. CT. R. Disc. P. § 3E(2)(Supp. 1984).

74. Misconduct is defined as a violation of the lawyer's oath of office, a violation of the Code of Professional Responsibility, a conviction of a serious crime, or conduct that tends to pollute the administration of justice, that brings the courts and the legal profession into disrepute, or that demonstrates a lack of professional competence. S.C. SUP. CT. R. Disc. P. § 5 (Supp. 1984).

75. The state's disciplinary procedure rules do not require that the lawyer against whom the grievance is filed be notified of the dismissal of these frivolous cases. Nevertheless, § 4C of the Rule does require that the chairman maintain a written record of every "inquiry" and its disposition. The retention of files in these types of cases will be discussed in more detail in a later section of this Article.

76. See S.C. SUP. CT. R. 32, DR 2-106 (Supp. 1984).

complainant that the South Carolina Bar Resolution of Fee Disputes Board has jurisdiction to resolve the dispute.<sup>77</sup> According to the 1983 Annual Report of the Board, the chairman dismissed 182 grievances, which represents fifty-three percent of the total grievances filed during the reporting period.<sup>78</sup> Unfortunately, the Board of Commissioners on Grievances and Discipline does not publish statistics describing the charges made in the grievances that the chairman dismisses as frivolous. Data from other jurisdictions, however, indicate that such charges involve fee disputes, minor cases of communication failure, and clients who are unhappy because a lawyer did not get as large a damage award as was desired or failed to obtain an acquittal in a criminal trial.<sup>79</sup>

Where the grievance, on its face, presents a question of serious ethical misconduct, the chairman will write a letter informing the lawyer in question of the grievance and requesting a response.<sup>80</sup> Depending on the seriousness of the charge, the chairman may then, or after reviewing the respondent's response and concluding that the charge is not frivolous, appoint a member of the Board or an associate commissioner to investigate the grievance.<sup>81</sup> In particularly difficult or technical cases, such as those involving trust account violations, the chairman usually assigns the investigation to the Attorney General's office.<sup>82</sup> The investigative report is due within sixty days, unless the time is extended by the chairman for good cause shown.<sup>83</sup>

After it is filed, the Executive Committee reviews the inves-

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77. The role of the Fee Dispute Board in the disciplinary process is discussed *infra* at notes 253-56 and accompanying text.

78. 1983 Bd. of Comm'rs Griev & Disc. Annual Rep., *supra* note 63, at 7. See also Dubin & Schwartz, *Survey and Analysis of Michigan's Disciplinary System for Lawyers*, 61 U. DET. J. URB. L. 1, 6 (1983) (60% of all grievances dismissed by bar counsel).

79. See *supra* note 71 and accompanying text.

80. The Supreme Court Rule on Disciplinary Procedure does not, however, require that the lawyer against whom a grievance is filed be officially notified of the charge until a formal complaint is issued. Compare S.C. SUP. CT. R. Disc. P. § 9D (Supp. 1984) ("An attorney who is the subject of an investigation may be informed in writing of the allegations of misconduct made against him . . .") with *id.* § 13A ("The Board . . . shall cause a copy of the Complaint together with notice of requirement of Answer to be mailed to the Respondent . . .") (emphasis added).

81. See S.C. SUP. CT. R. Disc. P. §§ 9A, 9E (Supp. 1984).

82. *Id.* § 9A(2).

83. *Id.* § 9B. Broad subpoena power under the seal of the supreme court is available, if needed, to assist in the investigation. See *id.* § 23.

tigative report<sup>84</sup> and decides whether to dismiss the grievance or to request the issuance of a complaint. The Executive Committee requests complaints only in those cases in which it finds a prima facie case of ethical misconduct. Essentially, the Executive Committee makes a probable cause determination similar to that made by a grand jury when deciding to issue an indictment.<sup>85</sup>

Not surprisingly, on the basis of the investigative report, the Executive Committee dismisses a large percentage of the grievances it reviews. In 1983, the Executive Committee dismissed 124 grievances and requested the issuance of 32 complaints, a ratio of 4 to 1.<sup>86</sup> The high dismissal rate is due primarily to the large number of grievances filed by disgruntled clients. As might be expected, a preliminary investigation reveals that most complaints involve contractual disputes rather than disciplinary rule violations.<sup>87</sup>

### b. *The Hearing Stage*

The issuance of a complaint is the first step in the hearing stage. Most complaints are issued at the direction of the Executive Committee<sup>88</sup> after an investigation of grievances filed by clients, lawyers, judges, and other third parties. Complaints are also issued in two other types of cases which are internally generated. The first type of case involves a lawyer who has entered a guilty or nolo contendere plea or who has been convicted of a serious crime and has exhausted all direct appeals.<sup>89</sup> As pointed

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84. *Id.* § 9C.

85. As will be discussed in more detail in the next subsection, a disciplinary hearing is not a criminal proceeding and the respondent may not claim the full panoply of constitutional rights available to criminal defendants. One application of this difference is found in the disciplinary rule that gives the Executive Committee the discretion to decide whether the respondent will be allowed to make an oral presentation at the time the investigative report is reviewed. *See id.*

86. 1983 BD. COMM'RS GRIEV. & DISC. ANNUAL REP., *supra* note 63, at 7.

87. *See supra* note 71 and accompanying text.

88. Complaints may also be filed at the direction of a local grievance committee, a judge, the Board chairman, and the vote of five or more commissioners. S.C. SUP. CT. R. Disc. P. § 11A (Supp. 1984). It is not clear what would happen if the majority of the Executive Committee or a majority of the Board objected to a request by anyone else authorized by § 9E to direct the issuance of complaints.

89. S.C. SUP. CT. R. Disc. P. § 6 (Supp. 1984). Convictions of crimes that are not serious are handled in the same manner as other grievances.

out above,<sup>90</sup> the supreme court temporarily suspends such a lawyer upon official notification of the conviction, and refers the case to the Board for a panel hearing. Assuming the conviction is upheld, the Rule on Disciplinary Procedure provides that the certificate of conviction is “conclusive evidence of the commission of that crime.”<sup>91</sup> In other words, the only issue the panel considers in such a situation is the appropriate sanction to be imposed. For this purpose the Court has held that:

While the respondent should be given ample latitude to fully present evidence as to mitigating and extenuating circumstances, he should not be allowed to present evidence inconsistent with the essential elements of the crime for which he has been convicted. As is characteristic of most general rules of evidence, the application of same must be left in considerable measure to the sound discretion of the Hearing Panel.<sup>92</sup>

The second type of complaint that arises internally involves cases in which a lawyer admitted to practice in South Carolina is disciplined in another jurisdiction. Upon receiving notification of the other state’s disciplinary action,<sup>93</sup> the court refers the case to the Board for a hearing to recommend whether the same sanction should be imposed in South Carolina.<sup>94</sup> Unless the respondent shows that (1) the procedure in the other jurisdiction violated his or her rights to due process, (2) there is a “clear conviction” that the evidence presented was insufficient to support the charges, (3) the imposition of the identical sanction “would result in a grave injustice,” or (4) the misconduct “warrants substantially different discipline in this State,” the same sanction is imposed.<sup>95</sup> Thus far, no respondent has convinced

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90. *See supra* notes 50-52 and accompanying text.

91. S.C. SUP. CT. R. DISC. P. § 6B (Supp. 1984).

92. *In re Rish*, 273 S.C. 365, 369, 256 S.E.2d 540, 542 (1979).

93. The American Bar Association National Center for Professional Responsibility maintains a National Discipline Data Bank. Disciplinary agencies report all public disciplinary sanction cases to the center, which in turn sends notice of the sanction to all other states where the disciplined lawyer is admitted to practice. South Carolina is a participant in the National Discipline Data Bank.

94. S.C. SUP. CT. R. DISC. P. § 29 (Supp. 1984). The Rule on Disciplinary Procedure gives the supreme court the authority to impose the reciprocal sanction directly, but the court routinely refers such cases to the grievance board for a hearing and recommendation.

95. *Id.* § 29D.

the court that one of these exceptions should apply.<sup>96</sup>

The procedures applicable to cases in which a complaint has been ordered follow a tightly prescribed format. To understand these procedures, it is first necessary to be aware of the basic nature of disciplinary proceedings. Technically, disciplinary proceedings are not considered civil or criminal in nature but are considered *sui generis*.<sup>97</sup> Some but not all of the constitutional rights applicable to criminal trials apply to disciplinary proceedings.<sup>98</sup> The privilege against self-incrimination applies,<sup>99</sup> but not as fully as in a criminal case. For example, in some states a lawyer's testimony under a grant of immunity may be used in a disciplinary action against the lawyer without violating the privilege.<sup>100</sup> Generally, the court has held that a respondent must receive notice of the charges,<sup>101</sup> has the right to confront witnesses, and has the right to the assistance of counsel.<sup>102</sup> On the other hand, a respondent does not have a right to a jury trial.<sup>103</sup> Furthermore, the court has held that a disciplinary proceeding does not deny due process, even though the judiciary controls the entire disciplinary process by acting directly or indirectly as rule maker, accuser, prosecutor, fact-finder, and sanction im-

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96. Through June 1984, the South Carolina Supreme Court had issued four reciprocal disciplinary decisions, all of which imposed a sanction identical to that imposed by the other states, or the nearest equivalent South Carolina sanction. See *In re Lanier*, 279 S.C. 458, 309 S.E.2d 754 (1983); *In re Zimmerman*, 277 S.C. 342, 287 S.E.2d 474 (1982); *In re Chance*, 276 S.C. 1, 274 S.E.2d 422 (1981); *In re Major*, 275 S.C. 251, 269 S.E.2d 345 (1980).

97. See, e.g., *In re Echeles*, 430 F.2d 347 (7th Cir. 1970); *Office of Disciplinary Counsel v. Campbell*, 463 Pa. 472, 345 A.2d 616, cert. denied, 424 U.S. 926 (1976).

98. See generally Note, *Disbarment In the United States: Who Shall Do The Noisome Work*, 12 COLUM. J.L. & SOC. PROBS. 1, 17-31 (1975); Gray & Harrison, *Standards For Lawyer Discipline and Disability Proceedings and the Evaluation of Lawyer Discipline Systems*, 11 CAP. U.L. REV. 529, 538-43 (1982); Nordby, *The Burdened Privilege: Defending Lawyers in Disciplinary Proceedings*, 30 S.C.L. REV. 363, 383-93 (1979).

99. See *Spevack v. Klein*, 385 U.S. 511 (1967).

100. See *In re Daley*, 549 F.2d 469 (7th Cir.), cert. denied 434 U.S. 829 (1977); *In re Epstein*, 37 A.D.2d 333, 325 N.Y.S.2d 657 (1971). See also Annot., 30 A.L.R.4th 243 (1984). Several states have held that illegally obtained evidence is admissible in a disciplinary hearing. See, e.g., *People v. Harfmann*, 638 P.2d 745 (Col. 1981); *McInnis v. State*, 618 S.W.2d 389 (Tex. Civ. App. 1981).

101. See *In re Ruffalo*, 390 U.S. 544 (1968).

102. See, e.g., *Louisiana State Bar Ass'n v. Levy*, 292 So. 2d 492 (La. 1974). But see *McGrath v. State Bar of Cal.*, 21 Cal. 2d 737, 135 P.2d 1 (1943).

103. See *Ex parte Wall*, 107 U.S. 265, 288 (1883). Only two states, Texas and Georgia, allow jury trials in disciplinary cases. See Nordby, *supra* note 98, at 388.



poser.<sup>104</sup> Finally, the burden of proof adopted by most jurisdictions is a “clear and convincing” standard,<sup>105</sup> which is a standard higher than the “preponderance of evidence” test applicable in civil trials but lower than the “beyond a reasonable doubt” standard applicable in criminal trials.

The procedural requirements of the South Carolina Supreme Court Rule on Disciplinary Procedure fall within these guidelines. Following the issuance of a complaint, a proceeding is conducted in a manner similar to that of a civil case. In fact, the rule states that, unless otherwise provided, the rules of civil procedure and rules of evidence apply.<sup>106</sup> Some exceptions are specified, however. For example, the good cause shown rule applicable in civil trials is not applicable to pleading amendments and motions.<sup>107</sup> Additionally, discovery by the respondent is available only with permission of the chairman and for good cause shown.<sup>108</sup>

The Rule on Disciplinary Procedure imposes stringent deadlines.<sup>109</sup> The complaint must be issued within thirty days after a request by the Executive Committee.<sup>110</sup> The respondent must be personally served with a copy of the complaint or receive it by registered mail,<sup>111</sup> and must file an answer within twenty days after receipt of the complaint, unless the time is extended by the chairman.<sup>112</sup> Failure to file an answer constitutes an admission of the charges,<sup>113</sup> whereupon the only issue that the panel may consider at the hearing is the severity of the

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104. See e.g., *Withrow v. Larkin*, 421 U.S. 35 (1975); *In re Baun*, 395 Mich. 28, 232 N.W.2d 621 (1975).

105. See, e.g., *In re Dodge*, 93 Minn. 160, 100 N.W. 684 (1904). See generally Nordby, *supra* note 98, at 391-92.

106. See S.C. SUP. CT. R. DISC. P. § 24A (Supp. 1984).

107. Compare S.C. CODE ANN. § 15-30-90 (1976) with S.C. SUP. CT. R. DISC. P. § 24A (Supp. 1984).

108. S.C. SUP. CT. R. DISC. P. § 23D (Supp. 1984).

109. The rule states that time limitations specified are directory and administrative rather than jurisdictional and thus will not justify abatement of the proceedings. *Id.* § 24B.

110. *Id.* § 13A.

111. *Id.* Service of the complaint on a nonresident lawyer is made on the Clerk of the South Carolina Supreme Court and a copy is sent by registered mail to the lawyer's last known address. *Id.*

112. *Id.* § 13B.

113. *Id.* § 13C.

sanction.<sup>114</sup> The chairman must set a hearing date not later than sixty days from the date of the complaint service.<sup>115</sup> The chairman may grant one thirty day continuance for good cause. Only the chief justice of the supreme court may grant a further continuance “upon a showing of extraordinary circumstances.”<sup>116</sup> Although a respondent is not entitled as a matter of right to appear before the Executive Committee at the time the investigative report is reviewed,<sup>117</sup> the panel hearing is a true adversarial proceeding with the right to counsel, to cross-examine witnesses including the complainant, and to subpoena records and witnesses needed for the respondent’s defense.<sup>118</sup> The testimony of all witnesses is absolutely privileged, however, and therefore the respondent may not file a lawsuit against the complainant or other witness based on testimony given in the proceeding.<sup>119</sup> The court has held that violation of this prohibition constitutes a ground for disciplinary sanction.<sup>120</sup> Furthermore, unless the respondent requests otherwise in writing, all the proceedings are completely confidential until such time as the supreme court authorizes publication of an opinion containing a public sanction, temporary suspension, or transfer to disability inactive status.<sup>121</sup> At that point, only the supreme court’s order is available for public inspection. The file itself is not subject to disclosure,<sup>122</sup>

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114. See *In re Davis*, 279 S.C. 433, 309 S.E.2d 5 (1983); *In re Hines*, 275 S.C. 271, 269 S.E.2d 766 (1980).

115. S.C. SUP. CT. R. Disc. P. § 12C (Supp. 1984).

116. *Id.*

117. *Id.* § 9D.

118. *Id.* § 23. If the pleadings raise no issues of fact, no hearing is required unless the respondent requests a hearing to present mitigation factors for the appropriate sanction. *Id.* § 12B.

119. *Id.* § 26A.

120. See *In re Edwards*, 279 S.C. 89, 302 S.E.2d 339 (1983) (public reprimand issued for violation).

121. See S.C. SUP. CT. R. Disc. P. §§ 6A, 7B, 19D, 20 (Supp. 1984). A copy of any complaint and answer will be forwarded to the chief circuit judge in the circuit where the respondent maintains an office. *Id.* § 20D. The chief circuit judge is also notified of the final disposition of the complaint, but the judge may not disclose the existence of the complaint to anyone else unless “necessary to protect the public.” *Id.*

122. When a public sanction is imposed on a respondent following conviction of a serious crime or public discipline is imposed in another jurisdiction, that part of the file pertaining to the crime, or the opinion issued in the other state where a public sanction has been issued, is considered part of the public record available for disclosure. *Id.* § 20A. For a discussion of public access to disciplinary records, see generally Annot., 83 A.L.R.3d 727 (1978); Annot., 83 A.L.R.3d 777 (1978).

and the witnesses and all other persons connected with the proceeding are forbidden to discuss it with anyone.<sup>123</sup>

The hearing panels consist of three members of the Board. Board members who served as investigators in the pre-complaint stage of the case, who live in the same judicial circuit as the respondent, or who would be disqualified under the recusal standards applicable to judges cannot serve on the panel.<sup>124</sup> This rule minimizes the danger that a disciplinary procedure will be unconstitutionally tainted by bias.<sup>125</sup> The South Carolina Attorney General's office acts as the prosecutor at the panel hearing.<sup>126</sup> The Attorney General must prove the respondent's misconduct by clear and convincing evidence to justify a sanction.<sup>127</sup> The Rule on Disciplinary Procedure specifies that the hearing panel must file its report within sixty days after receipt of the transcript. The report must contain the panel's findings of fact, conclusions of law, and recommended sanctions, together with all other documents in the file.<sup>128</sup> The chairman may authorize a sixty day extension for good cause shown.<sup>129</sup> The filing of the hearing panel report begins the appellate process.

### c. Appellate Stage

A panel report may be appealed first to the Executive Committee of the Board and then to the supreme court. Both the respondent and the Attorney General may file exceptions and supporting briefs at each level. The parties must file exceptions and briefs with the Executive Committee within twenty days after receipt of the panel report.<sup>130</sup> The Executive Committee

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123. S.C. Sup. Ct. R. Disc. P. § 20D (Supp. 1984).

124. *Id.* §§ 3D, 12F.

125. *See, e.g., In re Baun*, 395 Mich. 28, 232 N.W.2d 621 (1975).

126. S.C. Sup. Ct. R. Disc. P. § 12C (Supp. 1984).

127. *Cf. In re Clarke*, 278 S.C. 627, 300 S.E.2d 595 (1983); *In re Harvey*, 278 S.C. 101, 292 S.E.2d 595 (1982); *In re Rish*, 273 S.C. 365, 256 S.E.2d 540 (1979). Section 24 of the Rule on Disciplinary Procedure authorizes amendments to the complaint and to any other pleading at any time before the final order of the supreme court. S.C. Sup. Ct. R. Disc. P. § 24 (Supp. 1984). The rule specifies that the affected party shall be given a reasonable opportunity to contest the new material. *Id.* Under this rule, charges against a respondent not made in the complaint may be raised during the course of the hearing.

128. S.C. Sup. Ct. R. Disc. P. § 12E (Supp. 1984).

129. *Id.*

130. *Id.* § 14A.

must review the entire record at its first meeting following the expiration of this twenty day time limit.<sup>131</sup> The Rule on Disciplinary Procedure does not specifically authorize oral arguments before the Executive Committee, but presumably the Executive Committee has inherent discretion to grant a request for oral argument. The Executive Committee may remand the case to the panel for additional testimony, or it may take additional testimony.<sup>132</sup> After completing its review of the record, the Executive Committee prepares its report containing any amendments to the findings by the panel and its "independent recommendation as to sanctions."<sup>133</sup> This report and the other records in the file are then forwarded to the supreme court.

The supreme court sets a hearing date after it receives certification of the record and the Executive Committee's report. The court must hold its hearing not less than forty days after giving the respondent notice of the hearing,<sup>134</sup> and the respondent must file his exceptions and brief at least twenty days prior to the scheduled date of the hearing.<sup>135</sup> The Attorney General must file exceptions and a brief within fifteen days after the respondent's brief is filed.<sup>136</sup>

If the sanction recommended is a private reprimand, and neither the respondent nor the Attorney General files exceptions to the recommendation, then the private reprimand will become the final order in the case unless the supreme court notifies the Board to the contrary within sixty days after the record has been certified to the court. The chairman then administers the reprimand to the respondent at a subsequent Board or Executive Committee meeting.<sup>137</sup> A similar procedure is followed when

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131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* § 15A.

135. *Id.* § 15B.

136. *Id.* § 15C.

137. *Id.* § 14B. When the Rule on Disciplinary Procedure was issued in 1958, a panel recommended and issued a private reprimand to the respondent. In 1975, the Rule was changed to require that the full Board review all panel reports. The Board administered a private reprimand if it deemed the action appropriate. The supreme court did not review the file, however, unless the case was appealed by either the respondent or the Attorney General. The requirement of automatic review by the supreme court of all cases in which a panel report has been issued was added as part of the changes in the Rule on Disciplinary Procedure made in 1978.

the panel and Executive Committee recommend dismissal of a complaint. If the Attorney General's office files no exceptions, the dismissal becomes effective within sixty days after certification of the record, unless the court notifies the Board that it intends to take further action.<sup>138</sup>

The supreme court may, in its discretion, order a hearing before issuing its final order.<sup>139</sup> Although the Board's recommendations are merely advisory, they carry great weight. The court reserves the right to make independent findings of fact<sup>140</sup> and to impose whatever sanction the majority of the justices determines to be appropriate.<sup>141</sup> An examination of the published disciplinary cases through June 30, 1984, indicates that the court rejected the Board's recommendation in forty-nine cases and accepted the Board's recommendation in eighty-nine cases. In other words, the court rejected the Board's recommendation in approximately thirty-five percent of the cases in which the opinion reports the Board's action. In thirty-nine of these cases, the court imposed a more severe sanction than the Board recommended. In the remaining ten, the court imposed a less severe sanction than the Board recommended. In eleven of the forty-nine cases, however, the court imposed the same penalty that was recommended by the hearing panel. Therefore, the Court imposed a sanction different from that recommended by both the Board and the hearing panel in thirty-eight cases. Regardless of the figures used, it is clear that the court has exercised its discretion to impose a sanction different from that recommended by the Board and hearing panel in a significant number of cases and that it has imposed a more severe sanction in far more cases than it has imposed a less severe sanction.

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138. *Id.* § 14B. As it was worded when originally issued in 1958, the Rule on Disciplinary Procedure stated that, if a panel recommended dismissal, the proceeding ended. In 1975 the Rule was amended to require review of dismissal orders by the full Board, but supreme court review was not required. Automatic review of dismissals by the supreme court was added as part of the 1978 amendments to the Rule.

139. *Id.* § 17.

140. See *In re Belser*, 277 S.C. 250, 287 S.E.2d 139 (1982); *In re Brooks*, 274 S.C. 601, 267 S.E.2d 74 (1980); *In re Friday*, 263 S.C. 156, 208 S.E.2d 535 (1974).

141. See, e.g., *In re Pride*, 276 S.C. 363, 278 S.E.2d 774 (1981) (respondent has the burden of showing why the Executive Committee's recommended sanction should not be followed); *In re Smith*, 255 S.C. 347, 179 S.E.2d 35 (1971); *Burns v. Clayton*, 237 S.C. 316, 117 S.E.2d 300 (1960).

### 3. *Imposition of Sanctions*

The Rule on Disciplinary Procedure authorizes five types of sanctions: permanent disbarment, indefinite suspension, temporary suspension for a fixed term not to exceed two years, public reprimand, and private reprimand.<sup>142</sup> With the exception of a private reprimand, which is administered by the Board of Commissioners on Grievances and Discipline, the sanctions are published in an opinion issued by the supreme court. Costs of the disciplinary proceeding can be assessed against the respondent.<sup>143</sup> The order imposing the disciplinary sanction may also require the respondent to disgorge any fee when the retention of the fee would be “unconscionable, inequitable, or inconsistent with the findings of misconduct.”<sup>144</sup> Moreover, in cases involving sanctions imposed because of incompetence, the order may require appropriate remedial action, presumably including additional law school coursework.<sup>145</sup>

In addition to the above sanctions, the supreme court will automatically temporarily suspend a lawyer convicted of a serious crime until the conviction is reversed or the lawyer receives one of the above sanctions after a hearing before a panel and review by the court.<sup>146</sup> The court may also temporarily suspend or place on probation any lawyer upon a showing “that the attorney appears to be causing great public harm by misappropriating funds for his own use, or otherwise.”<sup>147</sup> Finally, the court may order the transfer to disability inactive status of any lawyer suffering from serious emotional and physical problems, which

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142. S.C. SUP. CT. R. DISC. P. § 7A (Supp. 1984). The authorization for temporary suspension was added by an amendment approved October 17, 1984. *See Davis Advance Sheets No. 51, October 27, 1984.*

143. *Id.* § 17.

144. *Id.* § 7A. Disgorgement does not affect the client’s right to pursue any civil remedy against the respondent nor does it immunize the respondent against criminal sanctions. *Id.* The disgorgement provision was added to the Rule on Disciplinary Procedure in October 1983. Prior to that time, the supreme court had on several occasions ordered repayment of fees in excessive fee and neglect cases. *See, e.g., In re Burgess*, 275 S.C. 315, 270 S.E.2d 436 (1980) (excessive fee); *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982) (neglect).

145. S.C. SUP. CT. R. DISC. P. § 7A (Supp. 1984). None of the published disciplinary decisions indicate that this provision has ever been invoked.

146. *Id.* § 6.

147. *Id.* § 7B.

order has the same effect as an order of temporary suspension.<sup>148</sup> Although orders in these cases are public,<sup>149</sup> they are not published in the South Carolina Reports or the Southeastern Reporter.<sup>150</sup>

*a. Consent Sanctions and Resignations*

Special rules govern sanctions imposed with the consent of the respondent and resignations by lawyers being investigated by the Board for ethical improprieties. The Supreme Court Rule on Disciplinary Procedure contains two sections regulating consent sanctions. The first section allows a respondent to consent to disbarment by filing an affidavit with the Board admitting the material facts and stating that the consent is “freely and voluntarily rendered.”<sup>151</sup> The court publishes the fact that the respondent has consented to disbarment in an order, but the contents of the affidavit and the underlying facts are kept confidential.<sup>152</sup>

A respondent may, at any time after service of the complaint, tender a conditional admission to one or more of the charges contained in the complaint and indicate a sanction which the respondent is willing to accept.<sup>153</sup> This consent is submitted to the Executive Committee for its recommendation and is then reviewed by the supreme court.<sup>154</sup> If the supreme court accepts the consent, it is published as part of the court’s final order.<sup>155</sup> On the other hand, if the court rejects the consent, the

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148. *Id.* § 19.

149. *Id.* §§ 6A, 7B, 19D. The Rule was changed in October 1982 to make temporary suspension orders public.

150. These orders are published in the Supreme Court slip opinions, however. A notice of the suspension is also sent to *The Transcript* and to the clerk of court in any county in which the respondent maintained an office. A certified copy is also sent to the chief circuit judge in each district. S.C. Sup. Ct. R. Disc. P. § 31 (Supp. 1984).

151. *Id.* § 27A.

152. *Id.* § 27C. See *In re Alexander*, 278 S.C. 281, 294 S.E.2d 784 (1982). Through June 1984, disbarment by consent, which was authorized as part of the 1978 amendments to the Rule on Disciplinary Procedure, had been approved in four cases.

153. S.C. Sup. Ct. R. Disc. P. § 28 (Supp. 1984). See *In re Gamble*, 278 S.C. 651, 300 S.E.2d 737 (1983) (consent to public reprimand).

154. S.C. Sup. Ct. R. Disc. P. § 28 (Supp. 1984).

155. There is no provision in § 28 of the Rule on Disciplinary Procedure similar to § 27C, which regulates disbarment by consent, requiring confidentiality of the underlying facts. Presumably the court will disclose the underlying facts in its order. See *In re Gamble*, 278 S.C. 651, 300 S.E.2d 737 (1983).

case proceeds as if the conditional admission had never been made.<sup>156</sup>

Resignations during pending disciplinary proceedings are not specifically covered by the Rule on Disciplinary Procedure.<sup>157</sup> The court has on several occasions refused to accept a tendered resignation and has indicated this fact in the disbarment order.<sup>158</sup> Until recently, however, it was quite difficult to determine the cases in which the court had accepted a resignation when disciplinary proceedings were pending. The only differentiation in a published opinion between this type of resignation and a voluntary resignation was the designation of the resignation as “irrevocable.”<sup>159</sup> Presumably, the court did not include this term in voluntary resignation orders because a lawyer who voluntarily resigns is eligible for readmission to the bar by complying with the reinstatement requirements in the Rule on Disciplinary Procedure.<sup>160</sup>

In April 1984, the supreme court informed the Board of Commissioners on Grievances and Discipline that it will include the following language in all cases in which resignations of attorneys with pending disciplinary proceedings are accepted: “The Respondent is before the Court pursuant to a complaint concerning violation of the Disciplinary Rules. The Respondent has admitted ethical infractions and has submitted his resignation, conditioned upon never reapplying for admission. The Court considers it would be in the best interest of justice to grant the resignation.”<sup>161</sup> This language avoids the confusion that previously existed in such cases. Except for the substitution of “resig-

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156. S.C. SUP. CT. R. DISC. P. § 28 (Supp. 1984). Evidence that consent was rejected may not be used against the respondent in the hearing. *See* ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 11.2 commentary (1979).

157. However, the Rule on Disciplinary Procedure states that all resignations shall be referred by the supreme court to the Board of Commissioners on Grievances and Discipline for its recommendation. S.C. SUP. CT. R. DISC. P. § 31 (Supp. 1984). Rule 31 covers resignations for any reason, not merely those submitted after the institution of a disciplinary action against the resigning lawyer. *Id.*

158. *See, e.g., In re Bonnette*, 278 S.C. 452, 298 S.E.2d 215 (1982). Through June 1984, the supreme court rejected proffered resignations in eight cases. Resignations were accepted in 13 cases.

159. *See, e.g., In re Gasque*, 270 S.C. 96, 240 S.E.2d 648 (1978).

160. *See* S.C. SUP. CT. R. DISC. P. § 8E (Supp. 1984).

161. Letter from the Deputy Clerk of the South Carolina Supreme Court to the Board of Commissioners on Grievances and Discipline (April 6, 1984).



nation” for “disbarment,” such a resignation is now essentially the same as a disbarment by consent decree. A respondent, however, enjoys one advantage by such a resignation: the ability to maintain publicly that he or she has never been disbarred.

*b. Effect of Disbarment, Suspension and Resignation*

All disbarred, suspended, and resigned lawyers must surrender their licenses to practice.<sup>162</sup> These lawyers must also notify all clients that they will no longer be able to represent them, and must advise the clients to obtain another lawyer of their choice.<sup>163</sup> Additionally, within fifteen days after the issuance of the supreme court’s order, these lawyers must file an affidavit of compliance with the notice requirement with the supreme court and the Board of Commissioners on Grievances and Discipline. The affidavit must contain an address where the lawyer can thereafter be reached and a list of all other jurisdictions in which he or she is admitted to practice.<sup>164</sup> If a respondent fails to comply with this requirement, the chairman of the Board of Commissioners on Grievances and Discipline may appoint one or more lawyers to inventory the respondent’s files and to take any action necessary to protect the interests of the respondent and his or her clients.<sup>165</sup>

A lawyer who has been disbarred, suspended, or who has resigned while under investigation for ethical misconduct is prohibited not only from the practice of law but also from employment in any capacity in a law office. A practitioner who hires the disbarred, suspended, or resigned lawyer, knowing of his or her status, will be subject to discipline.<sup>166</sup> In 1980, the supreme court held a disbarred lawyer in contempt for preparing and filing a

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162. See *In re Hines*, 275 S.C. 411, 272 S.E.2d 169 (1980) (contempt citation for refusal to surrender license).

163. S.C. SUP. CT. R. DISC. P. § 30 (Supp. 1984). In nonlitigation matters, notice must also be given to any lawyer who represents an adverse party. *Id.* § 30B. The Board of Commissioners on Grievances and Discipline must send a copy of the notice of suspension or disbarment to *The Transcript* and to every chief circuit judge in South Carolina.

164. S.C. SUP. CT. R. DISC. P. § 30C (Supp. 1984).

165. *Id.* § 33. See *In re Towles*, 265 S.C. 556, 220 S.E.2d 646 (1975).

166. S.C. SUP. CT. R. DISC. P. § 42 (Supp. 1984). This section was added to the Rule on Disciplinary Procedure in December 1980.

deed allegedly under the supervision of another practitioner.<sup>167</sup>

c. *Reinstatement*

The reinstatement of a suspended lawyer depends on the circumstances of the suspension. If the suspension followed a conviction of a serious crime, a lawyer is automatically reinstated by the supreme court following official notification of the conviction's reversal.<sup>168</sup> If the court ordered the suspension under section 7B of the Rule on Disciplinary Procedure, which authorizes the court to temporarily suspend or to place on probation a lawyer who is under investigation for ethical violations and "appears to be causing great public harm by misappropriating funds to his own use, or otherwise," the court may reinstate the lawyer at any time after a hearing requesting dissolution of the suspension or probation order.<sup>169</sup>

More rigorous requirements apply for the reinstatement of lawyers on disability inactive status and lawyers temporarily or indefinitely suspended. A lawyer on disability inactive status may apply for reinstatement only after one year has passed from the date of the court's order, and thereafter only once each year.<sup>170</sup> The Rule on Disciplinary Procedure provides that reinstatement may be granted only "upon a showing by clear and convincing evidence that the attorney's disability has been removed and he is fit to resume the practice of law."<sup>171</sup> Any disciplinary proceedings pending at the time of the disability inactive status order are reactivated when the court grants the reinstatement.

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167. See *In re Easler*, 275 S.C. 400, 272 S.E.2d 32 (1980).

168. S.C. Sup. Ct. R. Disc. P. § 6E (Supp. 1984).

169. *Id.* § 7B.

170. *Id.* § 19F. Section 19F states that the lawyer "shall be allowed to petition for reinstatement to active status once a year." *Id.* Interpreted literally, this section would allow a lawyer on disability inactive status to apply for reinstatement at any time during the first year following the supreme court's order and, thereafter, to apply annually on the anniversary of the first petition for reinstatement. *But see In re Dawes*, 267 S.C. 597, 230 S.E.2d 446 (1976) (reinstatement petition cannot be filed earlier than one year from order of indefinite suspension arising from physical illness and alcoholism). The court decided *Dawes* prior to the promulgation of Rule 19.

171. S.C. Sup. Ct. R. Disc. P. § 19F (Supp. 1984). A reinstatement petition must contain a list of all physicians and other persons who have treated the lawyer and all institutions in which the lawyer has been treated while on disability inactive status. *Id.* § 19H. The supreme court may also require the lawyer to undergo a medical examination by a doctor designated by the court. *Id.* § 19F.

ment petition.<sup>172</sup>

A lawyer who has been indefinitely suspended may not apply for reinstatement for two years after the entry of the suspension order.<sup>173</sup> If the court denies such a petition, the lawyer may not file a new petition for two additional years.<sup>174</sup> The lawyer must supply certain background information, must take and pass the bar examination, and must establish "by clear and convincing proof that he has rehabilitated himself."<sup>175</sup> To date, the court has reinstated only three indefinitely suspended lawyers.<sup>176</sup> The most recent reinstatement occurred in 1973.

A lawyer temporarily suspended for a period not exceeding two years pursuant to the amendment to the Rule on Disciplinary Procedure that the supreme court adopted October 17, 1984,<sup>177</sup> may petition for reinstatement at any time.<sup>178</sup> All the requirements that apply to the reinstatement of an indefinitely suspended lawyer<sup>179</sup> apply to the reinstatement of a temporarily suspended lawyer, except retaking and passing the bar examination.

#### d. Multiple Sanctions

One final important feature of the Supreme Court Rule on Disciplinary Procedure is the effect of multiple sanctions. The court may impose a permanent disbarment when a lawyer who was reinstated following an indefinite suspension is subsequently found guilty of any ethical misconduct.<sup>180</sup> Prior to the amendment adopted by the supreme court on October 17, 1984, the Rule required that when a lawyer who had received two private

172. *Id.* §§ 19B, 19C.

173. *Id.* § 37. Such a petition is referred to the Committee on Character and Fitness rather than to the Board of Commissioners on Grievances and Discipline. *Id.* § 39.

174. *Id.* § 37.

175. *Id.* § 38A. The supreme court may place conditions on the lawyer's practice as part of the reinstatement order. *Id.* § 38B.

176. See *In re Anderson*, 260 S.C. 186, 194 S.E.2d 888 (1973); *In re Jacobson*, 254 S.C. 270, 175 S.E.2d 226 (1970); *In re Lempeis*, 254 S.C. 284, 175 S.E.2d 234 (1970).

177. See Davis Advance Sheets No. 51, Oct. 27, 1984.

178. S.C. Sup. Ct. R. Disc. P. § 37 (Supp. 1984)(as amended, October 17, 1984). See also *id.* § 8D (as amended, October 17, 1984). Apparently, a temporarily suspended lawyer will not be reinstated automatically at the termination of the designated suspension period. In other words, reinstatement is discretionary with the supreme court.

179. S.C. Sup. Ct. R. Disc. P. §§ 37, 38A (Supp. 1984).

180. *Id.* § 8B.

reprimands was subsequently found guilty of another ethical violation, a public reprimand was the minimum sanction that could be imposed. The Rule further provided that an indefinite suspension was the minimum sanction the court could impose on a lawyer who had received a public reprimand and then committed a subsequent violation. The October 1984 amendment replaced the minimum penalty rule for subsequent violation cases, except for cases involving lawyers previously indefinitely suspended, with a provision allowing the supreme court to set the sanction at its discretion.<sup>181</sup> The amendment gives the court flexibility to impose an appropriate sanction rather than being locked into a rigid standard.<sup>182</sup>

#### 4. *Strategic Suggestions for Defending Against a Grievance*

Most lawyers are understandably shocked, hurt, and probably angry when they receive notice that a grievance has been filed against them. A lawyer in this situation may conclude that the grievance is completely baseless and that it is not necessary, therefore, to reply to the notice letter from the Board of Commissioners on Grievances and Discipline. However, refusing to cooperate in the investigation makes matters worse. Such an attitude certainly arouses the suspicion of the Board and of any investigator assigned to the grievance, and may provoke an investigation that is much more rigorous than it might otherwise have been. Moreover, under the Supreme Court Rule on Disciplinary Procedure, failure to file an answer to a formal complaint is treated as an admission of all charges. Therefore, the only issue left for consideration at the hearing and on appeal is the appropriate sanction.<sup>183</sup> Furthermore, failure to cooperate itself constitutes misconduct justifying a disciplinary sanction,

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181. *Id.* § 8C.

182. The minimum penalty standard was applied in seven cases. Each case concerned a prior public reprimand. In five cases, the lawyer was disbarred. *See In re Davis*, 279 S.C. 433, 309 S.E.2d 5 (1983); *In re Burgess*, 279 S.C. 44, 302 S.E.2d 325 (1983); *In re Kitts*, 278 S.C. 279, 294 S.E.2d 786 (1982); *In re Clay*, 268 S.C. 409, 234 S.E.2d 229 (1977); *In re Burr*, 267 S.C. 419, 228 S.E.2d 678 (1976). In the other two cases, a sanction of indefinite suspension was imposed. *See In re Moore*, 280 S.C. 178, 312 S.E.2d 1 (1984); *In re Craig*, 272 S.C. 197, 249 S.E.2d 915 (1978). *See also In re Lake*, 269 S.C. 170, 236 S.E.2d 812 (1977)(disbarment of lawyer who had previously received a private reprimand).

183. *See supra* notes 113-14 and accompanying text.

and is an aggravating factor that the supreme court has often considered in determining the severity of the sanction.<sup>184</sup> In 1982, the court expressed its views on this issue in *In re Treacy*.<sup>185</sup> The respondent in *Treacy* was charged with neglecting a case for which he had been paid a \$500 fee.<sup>186</sup> The respondent failed to answer inquiries from the Board, failed to file requested documents, and failed to attend scheduled hearings.<sup>187</sup> Although the hearing panel and the Board recommended a public reprimand, the supreme court indefinitely suspended the respondent and ordered him to repay the \$500 fee under penalty of contempt. Commenting on the respondent's refusal to cooperate, the court stated:

The Respondent was granted the right to practice law in South Carolina by the Supreme Court. Both the Hearing Panel and the Executive Committee, as well as the Commission itself serve as arms of this Court. Failure to respond to any of these is the equivalent of a refusal to respond to the Supreme Court. We look with disdain upon the attitude of the Respondent towards those who were charged with the duty of investigating the Complaint of Mr. Jackle. His lack of respect for constituted authority is consistent with his lack of understanding of his duty to his client. His action and lack of action in dealing with the Board of Commissioners is clearly misconduct unbecoming an attorney and is reason for sanction.<sup>188</sup>

Because most grievances involve attorney-client contract disputes and not serious ethics violations that warrant disciplinary sanction,<sup>189</sup> a full explanation of the facts and an expression of willingness to take corrective action may convince the chairman or the Executive Committee that no probable cause for a complaint exists. Often a telephone call or a letter from the respondent to the complainant, an offer to return a file, or an offer to repay all or part of a fee will satisfactorily resolve the matter. In this connection, although not part of his official duties, the chairman frequently acts as an intermediary in resolv-

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184. See, e.g., *In re Sify*, 279 S.C. 113, 302 S.E.2d 858 (1983); *In re Kitts*, 276 S.C. 242, 277 S.E.2d 602 (1981); *In re Crosland*, 270 S.C. 546, 243 S.E.2d 198 (1978).

185. 277 S.C. 514, 290 S.E.2d 240 (1982).

186. *Id.* at 515, 290 S.E.2d at 240.

187. *Id.* at 516-17, 290 S.E.2d at 241.

188. *Id.* at 517-18, 290 S.E.2d at 241-42.

189. See *supra* notes 78-87 and accompanying text.

ing grievances.<sup>190</sup>

When a grievance alleges misconduct which warrants disciplinary sanction, an agreeable settlement with the complainant does not terminate the disciplinary proceeding, even if the complainant withdraws the grievance.<sup>191</sup> Nevertheless, the respondent's willingness to cooperate in the investigation, an offer of restitution, and a promise to take other corrective action are mitigating factors considered in determining the sanction.<sup>192</sup>

In addition to adopting a cooperative attitude, a lawyer in a grievance situation should take other important steps. First, the lawyer should review the Supreme Court Rule on Disciplinary Procedure and significant disciplinary decisions involving similar facts. Second, the lawyer should analyze the charges made in the grievance realistically. It is extremely important to comply with the strict time deadlines and other procedural requirements in the Rule<sup>193</sup> when preparing a defense, and it is critical that a lawyer realize that there is no statute of limitations applicable to a grievance, absent some actual prejudice from the lapse of time.<sup>194</sup> Furthermore, neither restitution, compromise with a complainant, the complainant's refusal to prosecute,<sup>195</sup> nor pending litigation arising from the same facts warrants dismissal or abeyance of a disciplinary proceeding.<sup>196</sup>

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190. Informal attempts at mediation by disciplinary agencies are a common practice. See Steele & Nimmer, *supra* note 2, at 985-86.

191. See S.C. Sup. Ct. R. Disc. P. § 35 (Supp. 1984).

192. See *In re Burr*, 265 S.C. 84, 217 S.E.2d 143 (1975).

193. See *supra* notes 109-116 and accompanying text.

194. *State v. Jennings*, 161 S.C. 263, 159 S.E.2d 627 (1931). This is also the rule in most other states. See, e.g., *In re Bosson*, 60 Ill. 2d 439, 328 N.E.2d 309 (1975); Annot., 93 A.L.R.3d 1057 (1979) (remoteness in time may be a mitigating factor in determining the appropriate sanction). But see *In re Vaught*, 268 S.C. 530, 235 S.E.2d 115 (1977) (delay in processing charges against attorney prompted court to elect a less stringent disciplinary standard).

195. See S.C. Sup. Ct. R. Disc. P. § 35 (Supp. 1984). See also *In re Galloway*, 278 S.C. 615, 300 S.E.2d 479 (1983) (disbarment ordered despite full restitution). Unlike a malpractice action, a disciplinary sanction may be imposed even when a client has suffered no monetary damage. See *In re Davis*, 276 S.C. 532, 280 S.E.2d 644 (1981). Similarly, when fraudulent activity is the basis of the discipline, the respondent need not be criminally convicted before a disciplinary sanction is imposed. See *Cate v. Rivers*, 246 S.C. 35, 142 S.E.2d 369 (1965).

196. See S.C. Sup. Ct. R. Disc. P. § 34 (Supp. 1984). A disciplinary proceeding will be held in abeyance during the appeal of a conviction of a serious crime. *Id.* § 6C. A proceeding is also held in abeyance during the time a lawyer is on disability inactive status. *Id.* § 19C.

It is quite difficult for a lawyer in a grievance proceeding to remain objective because of the mental anguish inherent in the process. A lawyer should discuss the charges with another lawyer before responding to the Board's grievance notice. If the charges appear meritorious, a lawyer should retain another lawyer to represent him or her in the disciplinary proceeding. A lawyer should certainly retain counsel if a formal complaint is filed. Retained counsel may prevent a respondent from making overbroad, damaging admissions. More importantly, retained counsel is probably able to present the respondent's defense more effectively than could the respondent.

Retained counsel is particularly valuable when a respondent must admit he or she has a serious alcohol, drug, or mental problem that is the cause of the grievance, and must accept disability inactive status while seeking treatment.<sup>197</sup> If the therapy is effective and the respondent is reinstated, the disciplinary proceeding is reactivated.<sup>198</sup> Nevertheless, the Board and the supreme court will certainly consider the fact that the disability has been overcome.<sup>199</sup>

When a sanction is likely to result from a grievance, the ability to confront this fact early in the proceeding may diminish a respondent's emotional trauma. Accepting the fact that some sanction will result may allow a respondent to obtain a less severe sanction than might otherwise be given. For example, the respondent may tender a conditional admission and consent to discipline;<sup>200</sup> the earlier the consent offer, the better a respondent's chance of receiving a private or public reprimand instead of a more severe public sanction. Once misconduct has been found at a formal hearing, it is not likely the supreme court will

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197. Disability inactive status is technically not a disciplinary sanction under the Supreme Court Rule on Disciplinary Procedure. Compare *id.* §§ 7, 8 with *id.* § 19. For this reason, disability inactive status does not carry the same stigma as a public sanction. Prior to adoption of § 19 as part of the Rule on Disciplinary Procedure in 1978, the supreme court generally indefinitely suspended lawyers with serious mental or physical illnesses. See *In re Howey*, 267 S.C. 430, 229 S.E.2d 264 (1976); *In re Chipley*, 254 S.C. 588, 176 S.E.2d 412, cert. denied, 401 U.S. 1010 (1970).

198. See S.C. SUP. CT. R. DISC. P. § 19 (Supp. 1984).

199. Emotional or physical illness is not a defense to a disciplinary action, but may be a mitigating factor. See, e.g., *In re Glickman*, 271 S.C. 167, 246 S.E.2d 174 (1978); *In re Wooten*, 260 S.C. 12, 193 S.E.2d 808 (1973); but cf. Annot., 26 A.L.R.4th 995 (1983).

200. See S.C. SUP. CT. R. DISC. P. § 28 (Supp. 1984). See also *supra* notes 153-56, 376-78 and accompanying text.

approve consent for a sanction less severe than that recommended by the hearing panel.

The same considerations are present when the respondent's only alternatives to a published disbarment order are resignation or disbarment by consent. The earlier in the proceeding the resignation request is filed, the more likely the court will accept it.<sup>201</sup> If the court turns down a tendered resignation, as it has done frequently,<sup>202</sup> the respondent may avoid the public disclosure of the underlying facts by consenting to disbarment.<sup>203</sup> A resignation in this situation is preferable because a lawyer may then publicly maintain that he or she has never been disbarred.

A forceful presentation of mitigating factors and an analysis of similar cases in which the court has approved a sanction acceptable to the respondent are important in any case in which there is proof of misconduct warranting a sanction.<sup>204</sup> Retained counsel is much more likely to make an effective impression on the hearing panel than is an emotionally distraught respondent.

### B. Sanction Cases from January 1970 Through June 1984

Table 3 shows the breakdown of the 123 sanction opinions in which the South Carolina Supreme Court specified the type of misconduct, and the 60 private reprimands the Board of Commissioners on Grievances and Discipline imposed during the same period, classified according to the disciplinary rules in the Code of Professional Responsibility (CPR).<sup>205</sup> Table 3 also shows

201. See *In re Garris*, 279 S.C. 460, 309 S.E.2d 755 (1983)(lawyer's resignation tendered after argument before the supreme court but before opinion issued held to be untimely).

202. See, e.g., *In re Garris*, 279 S.C. 460, 309 S.E.2d 755 (1983); *In re Bonnette*, 278 S.C. 452, 298 S.E.2d 215 (1982). Through June 1984, the South Carolina Supreme Court accepted 13 resignations and rejected 8 tendered resignations from lawyers who were under investigation for ethical misconduct.

203. See S.C. SUP. CR. R. Disc. P. § 27C (Supp. 1984). See also *In re Harvey*, 278 S.C. 101, 292 S.E.2d 595 (1982).

204. See generally Nordby, *supra* note 98, at 417-51. There are numerous annotations analyzing cases of various types of misconduct. See, e.g., Annot., 11 A.L.R.4th 133 (1982) (excessive fees); Annot., 36 A.L.R.3d 735 (1971)(sexual misconduct).

205. S.C. SUP. CR. R. 32 (Supp. 1984). The definition of misconduct in § 5 of the Supreme Court Rule on Disciplinary Procedure includes violations of the attorney's oath of office, conviction of a serious crime, incompetence, and conduct tending to pollute the administration of justice, as well as violations of the Model Code of Professional Responsibility. All of these forms of misconduct are encompassed in the Code's disciplinary



the percentage of cases in which a particular category of offense was present. For example, trust fund and related violations under DR 9-102 of the CPR were a significant element in fifty-two, or twenty-eight percent, of the 183 cases in the analysis. The total of the percentage figures in Table 3 exceeds 100% because many cases involved more than one major type of misconduct.

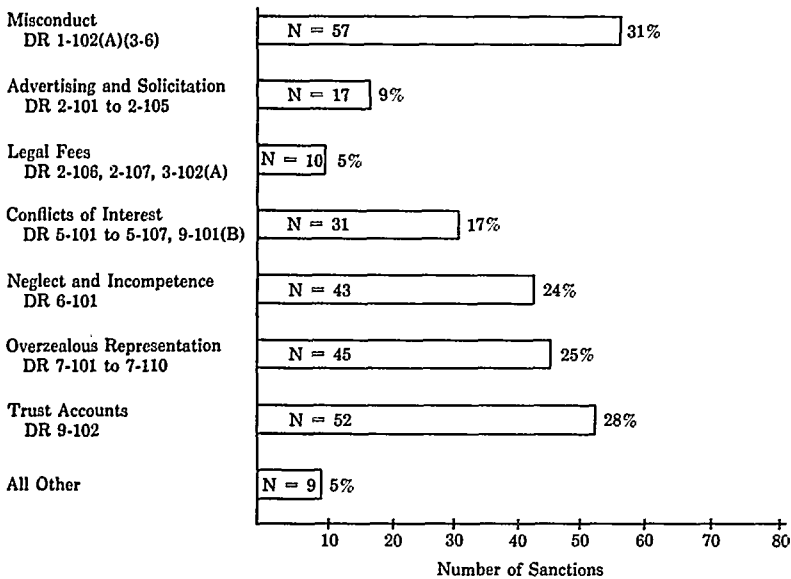


TABLE 3  
Sanctions Categorized by CPR Disciplinary Rules  
January 1970 Through June 1984

Table 4 shows the type of sanctions imposed in the 183 cases that were used in compiling Table 3. Table 4 indicates that disbarment or indefinite suspension, for which few reinstatements have been authorized,<sup>206</sup> was ordered in forty percent of the cases, and that a public or private reprimand was ordered in sixty percent of the cases. The number of disbarments may be understated because four disbarments by consent and thirteen resignations under investigation for misconduct are excluded

rules.

206. See *supra* note 176 and accompanying text.

from Tables 3 and 4 and from the other tables in this section because the court did not indicate the nature of the misconduct in the published opinions.<sup>207</sup> Including these seventeen additional cases increases the percentage of disbarments from twenty-five percent to thirty-one percent and increases the percentage of disbarments and indefinite suspensions from forty percent to forty-five percent.

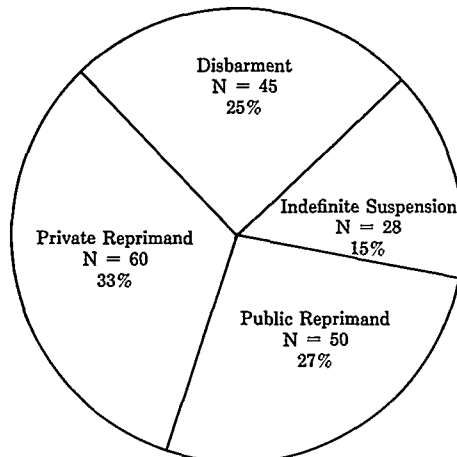


TABLE 4  
 Type of Sanctions All Cases  
 January 1970 Through June 1984

Because the statistical data on disciplinary sanctions in other states vary greatly, it is not possible to compare the data in Tables 3 and 4 with data from other jurisdictions in any meaningful manner. The available statistics indicate that the breakdown of the cases in South Carolina does not differ significantly from that in other states, with two possible exceptions. First, the percentage of sanction cases involving neglect appears to be higher in South Carolina than in most states.<sup>208</sup> Because there is no evidence that South Carolina lawyers are more prone to neglect than are lawyers in other states, the most logical explanation for this difference is the greater willingness of the

207. See S.C. Sup. Cr. R. Disc. P. § 27 (Supp. 1984).

208. According to the study conducted by Steele and Nimmer published in 1976, the percentage of sanctions for neglect in seven of the largest jurisdictions was as follows: California, 16.9%; Florida, 24.0%; Michigan, 48.4%; New York City, 14.4%; New York State, 8.3%; Texas, 8.1%; Wisconsin, 17.8%. Steele & Nimmer, *supra* note 2, at 995, Table 18.

South Carolina Supreme Court to impose disciplinary sanctions for violations of DR 6-101(A)(3). Whatever the reason, the supreme court has made it clear that persistent neglect, as distinguished from mere isolated acts of negligence, warrants disciplinary sanction.<sup>209</sup> A second distinctive feature of the South Carolina disciplinary sanction cases since 1969 is the percentage of disbarments. For example, based on 1983 nationwide data compiled by the ABA National Discipline Data Bank, the percentage of disbarments to other forms of public discipline was twenty-four percent.<sup>210</sup> In South Carolina the equivalent disbarment percentage for 1983 was forty-seven percent.<sup>211</sup> Moreover, the range of sanctions in South Carolina is not as great as in most other states. Several suggestions for changes in the sanctions authorized by the Supreme Court Rule on Disciplinary Procedure are discussed in Part IV of this Article.<sup>212</sup>

Table 5 shows the number of years a lawyer has been admitted to practice at the time of a public disciplinary sanction. The Table does not include private reprimands because the identity of the respondent is confidential. The most surprising finding from Table 5 is that lawyers admitted to practice for ten years or less received only thirty-nine percent of public sanctions from January 1970 through July 1984.<sup>213</sup> This statistic is somewhat surprising because of the tremendous increase in the number of lawyers in South Carolina in recent years: from the beginning of 1974 through the end of 1983, the number of lawyers increased

209. See *infra* notes 275-83 and accompanying text.

210. ABA STANDING COMM. ON PROF. DISC. AND CENTER FOR PROF. RESP., STATISTICAL REPORT RE: PUBLIC DISCIPLINE OF LAWYERS BY DISCIPLINARY AGENCIES, 1979-1983, Chart II (Part I) at 70 (1984). Only disbarments, suspensions and public reprimands are included in the calculations reported in the text. In 1982, the disbarment rate was 33%. *Id.* This increase resulted for the most part from the doubling of the number of consent disbarments between 1982 and 1983. In 1981, the national disbarment rate was 28%. *Id.*

211. See Table 1. The equivalent disbarment percentage for South Carolina cases was 38% in 1982 and 33% in 1981. *Id.*

212. See *infra* notes 379-95 and accompanying text.

213. The only other published data relating disciplinary sanctions to years admitted to practice is from California where a survey of disciplinary cases from 1972-1973 revealed that 64% of the sanctions were imposed on lawyers admitted to practice 10 years or less. Hufstедler, *President's Message: Another Look at Discipline*, 49 CAL. ST. L.J. 224 (1974). The author of the article reporting the survey stated that the results were not surprising because over 60% of the California bar had been admitted to practice for less than 10 years. *Id.* at 226.

from 2,904 to 5,385, an eighty-five percent increase.<sup>214</sup> To test the impact of this increase on the distribution of sanctions based on years of practice, the South Carolina public discipline cases in the five year period from 1974-1978 and in the succeeding five year period from 1978-1983 were analyzed. Comparing the two

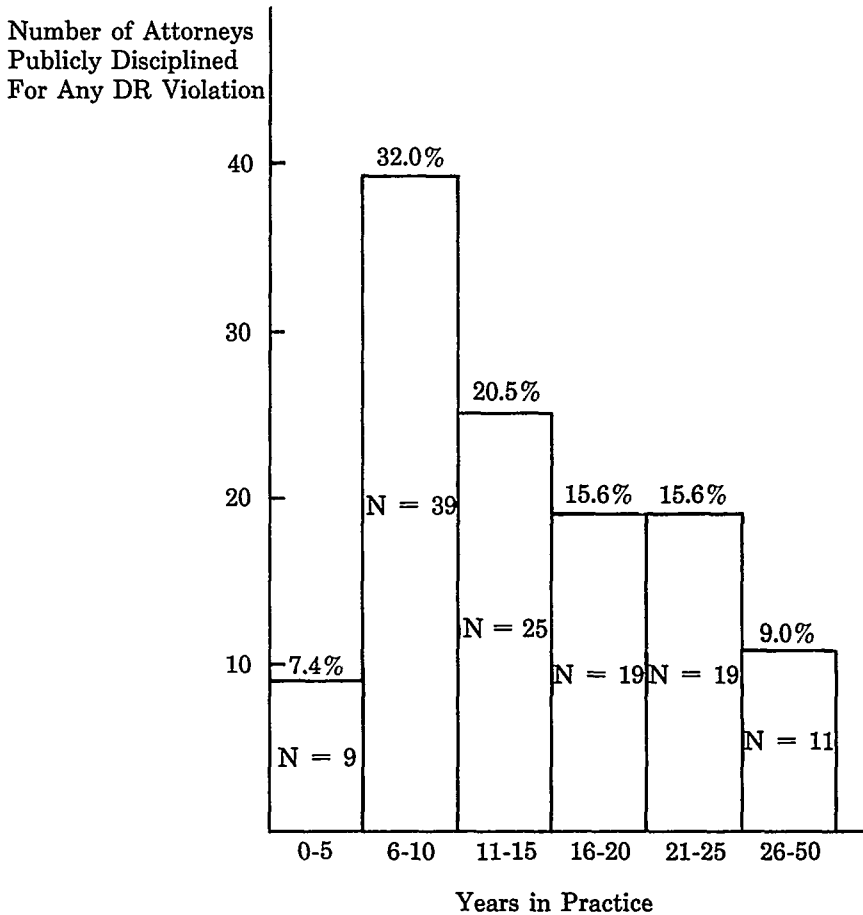


TABLE 5  
 Years Admitted to Practice at Time of  
 Disciplinary Sanction  
 January 1970 Through June 1984

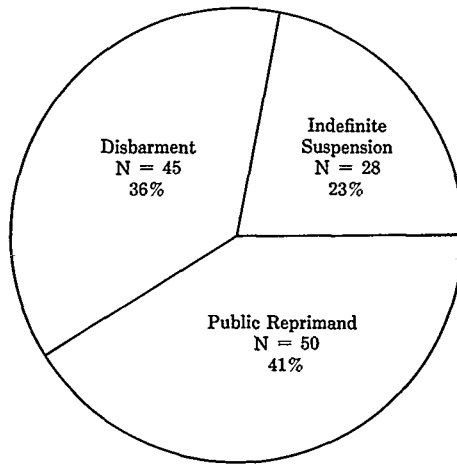
214. Data supplied by Robert N. DuRant, Executive Director of the South Carolina Bar.

periods reveals that the percentage of cases in which sanctions were imposed upon lawyers in practice for ten years or less increased from thirty-seven percent to forty-three percent. This increase is less than the increase in the number of lawyers during the same period.

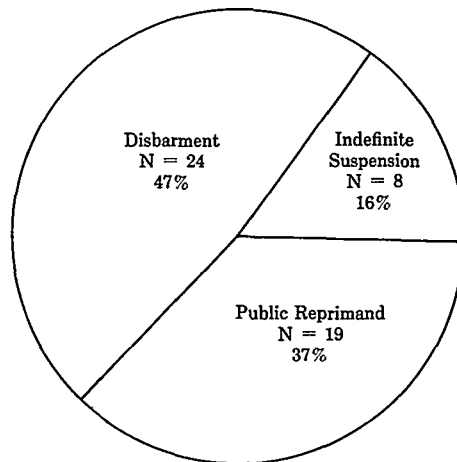
The data in Table 5 indicates that lawyers in practice six to ten years at the time of a sanction are more vulnerable to disciplinary sanctions than those in any other category. Because one or two years elapse between the time a grievance is filed and the time a sanction order is issued, the most vulnerable period is apparently from four to eight years after a lawyer is admitted to practice.

Tables 6 and 7 compare public sanctions against all lawyers with public sanctions against lawyers admitted to practice ten years or less during the period January 1970 through June 1984. Although the disbarment rate for lawyers admitted to practice ten years or less is higher than that for all lawyers (forty-seven percent versus thirty-six percent), the difference between the two groups is reduced considerably by including indefinite suspensions, which historically have the same effect as disbarments, in the comparison (sixty-three percent versus fifty-nine percent). Thus, these tables indicate that the pattern of public sanctions against lawyers admitted to practice ten years or less is not significantly different from the overall pattern of public sanctions.

Table 8 relates the five most numerous categories of ethical violations to the number of years in practice at the time of a disciplinary sanction. One of the most interesting observations derived from this table is the similarity between the relative percentages of CPR violations in the sanction cases involving lawyers admitted to practice six to ten years and those admitted to practice twenty-one to twenty-five years. The other general conclusions that can be drawn from Table 8 are: (1) that trust account violations are among the most prevalent type of ethical violation in every age category and; (2) that, on a comparative basis, neglect and conflict of interest violations are less prevalent for lawyers admitted to practice fifteen years or less compared to lawyers admitted to practice more than fifteen years at the time a public disciplinary sanction is imposed.



**TABLE 6**  
Public Sanctions of All Lawyers  
January 1970 Through June 1984



**TABLE 7**  
Lawyers Admitted to the Bar 0-10 Years When Sanctions Applied  
January 1970 Through June 1984

The remaining material in this section examines more closely the disciplinary sanction cases in terms of each category of misconduct represented in Table 3.

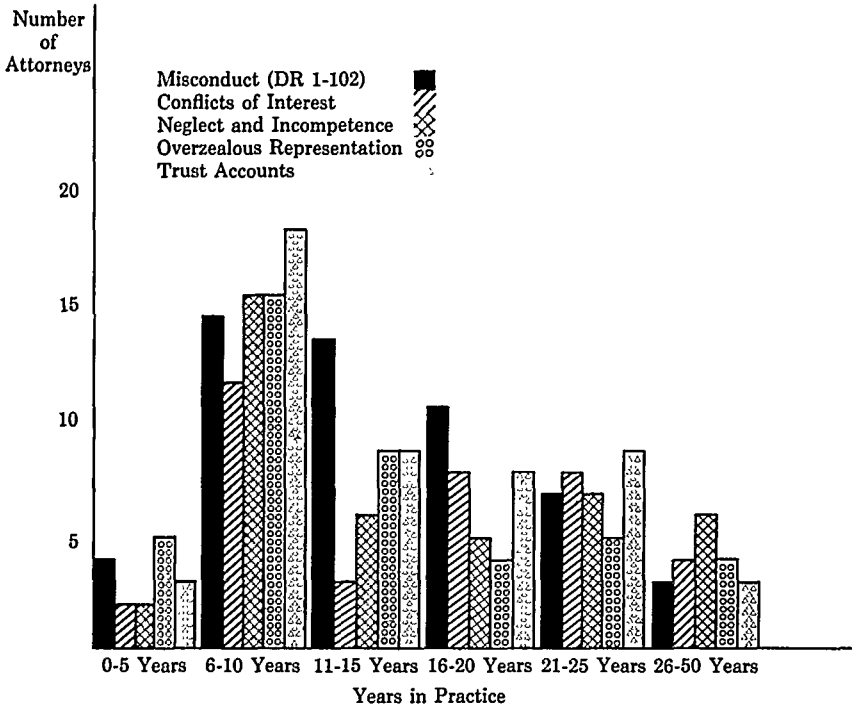


TABLE 8  
 Years in Practice at the Time of Disciplinary Sanction Related  
 to CPR Violations  
 January 1970 Through June 1984

1. DR 1-102(A) Misconduct

The key provisions in DR 1-102(A)<sup>215</sup> for purposes of this Article are subsections (3)-(6) which state that a lawyer shall not:

- (3) Engage in illegal conduct involving moral turpitude.

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215. DR 1-102(A)(1) and (2) are violated whenever a lawyer is guilty of violating any disciplinary rule or causing someone else to violate a disciplinary rule. Therefore DR 1-102(A)(1) and (2) are technically applicable to every disciplinary sanction case. The principal thrust of DR 1-102(A)(3-6), on the other hand, is on activities which adversely reflect on a lawyer's fitness to practice law but which do not clearly fall under one of the other disciplinary rules in the Code of Professional Responsibility.

- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.<sup>216</sup>

The most significant feature of DR 1-102(A)(3-6) is the fact that it is not limited to misconduct related to the practice of law.<sup>217</sup> In fact, twenty-two of the fifty-seven cases concerning DR 1-102(A)(3-6) violations were cases in which sanctions were imposed following convictions of crimes. Moreover, in several other cases, evidence of improper behavior unrelated to the respondent's law practice, including resisting arrest and disorderly conduct, had an impact on the sanction ultimately imposed.<sup>218</sup>

Table 9 shows a breakdown of the DR 1-102(A)(3-6) cases by form of disciplinary sanction. A comparison of this data to that displayed in Table 4, which gives a breakdown of the sanctions in all cases, indicates that the percentage of disbarments is significantly higher and that the number of private reprimands is significantly lower in the DR 1-102(A)(3-6) cases. These differences are due in large measure to the sanction pattern in cases in which discipline is imposed following conviction of serious crimes.

As Table 10 indicates, the supreme court has ordered disbarment in fifty-five percent of the serious crime cases and indefinite suspension in twenty-three percent of these cases. In other words, in almost four out of every five serious crime cases, the respondent has been disbarred or indefinitely suspended.

The South Carolina Supreme Court has been particularly strict in cases concerning convictions for possession and distri-

216. S.C. SUP. CT. R. 32, DR 1-102(A)(Supp. 1984).

217. This is the general rule throughout the United States. *See, e.g.*, Maryland State Bar v. Agnew, 271 Md. 543, 318 A.2d 811 (1974). *See also* S.C. SUP. CT. R. Disc. P. § 5B (Supp. 1984).

218. *See, e.g.*, *In re Sampson*, 259 S.C. 471, 192 S.E.2d 859 (1972)(resisting arrest and disorderly conduct considered by the court in imposing an indefinite suspension).



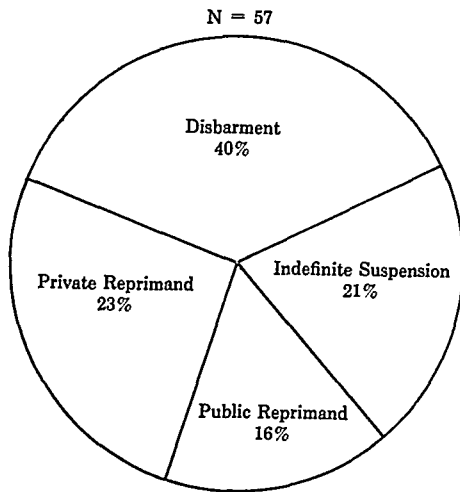


TABLE 9  
Sanctions in DR 1-102(A)(3-6) Cases

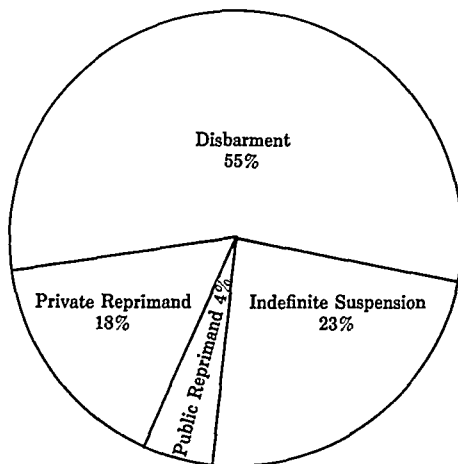


TABLE 10  
Sanctions Following Conviction of a Serious Crime

bution of illegal drugs,<sup>219</sup> fraud,<sup>220</sup> obstruction of justice,<sup>221</sup> and

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219. See, e.g., *In re Ramsey*, 279 S.C. 29, 301 S.E.2d 470 (1983) (disbarment ordered when lawyer was found guilty of conspiracy to distribute marijuana and cocaine and of distributing cocaine). In 1975, the Board of Commissioners on Grievances and Discipline imposed a private reprimand against a lawyer who had pleaded guilty to possession of marijuana. See 1975 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP. Possession of marijuana has always been regarded as a less serious crime than distribution. Additionally, until 1978, the supreme court did not review private reprimands. See *supra* note 137 and ac-

contempt.<sup>222</sup> The court's treatment of failure to file income tax returns cases may be changing, however.<sup>223</sup> In 1974, the court indefinitely suspended a lawyer for pleading guilty to five counts of failure to file tax returns.<sup>224</sup> In 1975, the court indefinitely suspended<sup>225</sup> one lawyer and disbarred another<sup>226</sup> following nolo contendere pleas to failing to file tax returns. In 1983, however, the court imposed only a public reprimand following a guilty plea for knowingly and willfully failing to file a federal income tax return.<sup>227</sup> Since the court did not discuss the prior cases in the opinion, at this time it is not possible to predict whether the court is adopting a new policy in tax cases.<sup>228</sup>

The DR 1-102(A)(3-6) cases that do not involve criminal convictions are not particularly remarkable. Table 11 shows the disciplinary sanctions that have been imposed in these cases. The pattern of sanctions in Table 11 is closer to that in Table 4 than to the serious crime cases. Perhaps the most distinctive feature in Table 11 is the wide variety of misconduct mentioned. Included are cases of fraud,<sup>229</sup> misrepresentation,<sup>230</sup> check kiting schemes,<sup>231</sup> issuance of bad checks,<sup>232</sup> disorderly conduct,<sup>233</sup> and

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companying text.

220. *See, e.g., In re Bonnette*, 278 S.C. 452, 298 S.E.2d 215 (1982)(tendered resignation rejected and disbarment ordered following conviction on 15 counts of fraudulently obtaining money).

221. *See, e.g., In re Van Winter*, 273 S.C. 156, 255 S.E.2d 347 (1979)(disbarment).

222. *See, e.g., In re Holman*, 277 S.C. 293, 286 S.E.2d 148 (1982).

223. Willful failure to file income tax returns is specifically listed as a serious crime in S.C. Sup. Ct. R. Disc. P. § 20 (Supp. 1984).

224. *In re Martin*, 264 S.C. 1, 212 S.E.2d 251 (1974)(plea of guilty to five counts of failure to file).

225. *In re Ray*, 264 S.C. 292, 214 S.E.2d 328 (1975).

226. *In re Towles*, 265 S.C. 556, 220 S.E.2d 646 (1975) (commingling and neglect also alleged).

227. *In re Gamble*, 278 S.C. 651, 300 S.E.2d 737 (1983).

228. In 1975, the Board of Commissioners on Grievances and Discipline imposed a private reprimand for failure to file a tax return. At that time, however, the supreme court did not review private reprimands. *See supra* note 137 and accompanying text.

229. *See, e.g., In re Boineau*, 269 S.C. 189, 236 S.E.2d 821 (1977)(resignation accepted following revocation of real estate license).

230. *See, e.g., In re Rothwell*, 278 S.C. 391, 296 S.E.2d 870 (1982)(public reprimand issued).

231. *See In re Cauthen*, 267 S.C. 448, 229 S.E.2d 340 (1976).

232. *See, e.g., In re Hartzog*, 257 S.C. 84, 184 S.E.2d 116 (1971).

233. *See, e.g., In re Thomason*, 279 S.C. 197, 304 S.E.2d 821 (1983)(drunken and disorderly conduct). *See also In re Norwood*, 273 S.C. 780, 260 S.E.2d 177 (1979) (disobeying court order prohibiting removal of property from former wife's house). Several

failing to cooperate with Board investigations.<sup>234</sup> Most of the cases also involved violations of other provisions in the CPR.

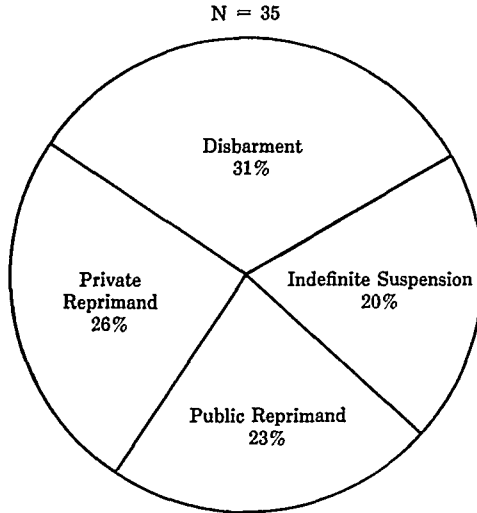


TABLE 11  
Sanctions in Other DR 1-102(A)(3-6) Cases

### 2. Advertising and Solicitation

South Carolina lawyers have received four sanctions for improper advertising and twelve sanctions for improper solicitation. The distribution of the sanctions in these cases is shown in Table 12. The most distinctive feature of the advertising and solicitation cases is the high percentage resulting in public reprimands and the low percentage resulting in disbarments and indefinite suspensions when compared with the sanction percentages of all cases shown in Table 4.

Actually, the contrast is more striking when the advertising and solicitation disbarment cases are examined more closely. In the single advertising case in which the court disbarred a lawyer,<sup>235</sup> the respondent was also guilty of numerous acts of neglect and had previously received a public reprimand.<sup>236</sup> Accordingly,

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private reprimands have been issued for such conduct. See, e.g., 1979 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP. (assault on a fellow lawyer during a trial recess).

234. See, e.g., *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982).

235. *In re Burgess*, 279 S.C. 44, 302 S.E.2d 325 (1983).

236. See *In re Burgess*, 275 S.C. 315, 270 S.E.2d 436 (1980).

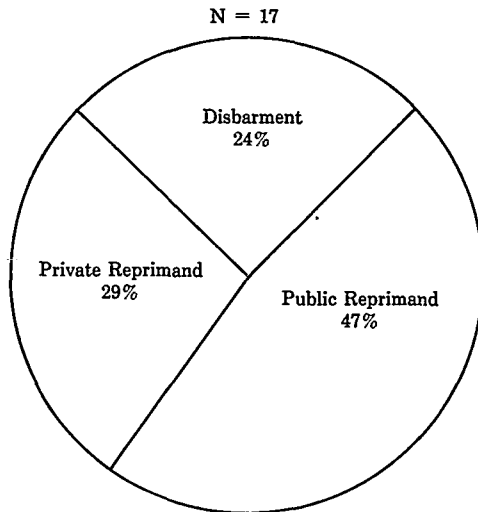


TABLE 12  
 Sanctions in Advertising and Solicitation Cases

the Supreme Court Rule on Disciplinary Procedure in effect at the time the opinion was rendered mandated that indefinite suspension was the minimum sanction the respondent could receive.<sup>237</sup> Furthermore, the court clearly indicated that the real reason for the disbarment order was the respondent's pattern of persistent neglect.<sup>238</sup> Similarly, in one of the three solicitation cases in which the court ordered disbarment, the respondent was also guilty of several other acts of misconduct, including conversion of client funds, which would have justified disbarment independently of the solicitation charges.<sup>239</sup> A second solicitation disbarment case also involved other acts of misconduct.<sup>240</sup> The third solicitation disbarment case involved a reciprocal referral scheme between a doctor and a lawyer and seven instances of proven improper solicitation.<sup>241</sup>

Three other cases illustrate the supreme court's apparent reluctance to impose stiff sanctions for solicitation. In all three, the court imposed a public reprimand although the Board of Commissioners on Grievances and Discipline recommended

237. See *supra* notes 180-82 and accompanying text.

238. See 279 S.C. at 48, 302 S.E.2d at 327.

239. See *In re Hartzog*, 257 S.C. 84, 184 S.E.2d 116 (1971).

240. See *In re Morris*, 270 S.C. 308, 241 S.E.2d 911 (1978).

241. See *In re Reaves*, 272 S.C. 213, 214, 250 S.E.2d 329, 330 (1978).

more severe sanctions.<sup>242</sup> In one of these cases, the respondent had been found guilty of two charges of solicitation. The dissenting opinion stated that these instances of solicitation were part of an ongoing referral arrangement with an automobile repair shop.<sup>243</sup> The second case involved improper solicitation on three occasions by an employee in the respondent's law office.<sup>244</sup> In the third case, the respondent was guilty of solicitation in one case and failure to promptly pay over settlement proceeds in another case.<sup>245</sup>

### 3. *Legal Fees*

Legal fee disputes may result in the imposition of disciplinary sanctions for violation of three disciplinary rules in the CPR. The first rule is DR 2-106, which prohibits excessive fees.<sup>246</sup> Eight sanction cases involved violations of DR 2-106. The second rule is DR 2-107, which requires that a legal fee be divided in proportion to the services and responsibilities performed by each firm when more than one law firm is involved in a case.<sup>247</sup> Only one sanction case cites this provision.<sup>248</sup> The third rule is DR 3-102, which prohibits sharing legal fees with nonlawyers.<sup>249</sup> Only one sanction case directly involves this provision.<sup>250</sup>

Table 13 shows the pattern of sanctions in legal fee cases. In all of these cases, except one in which a private reprimand was

242. See *infra* notes 243-45. These three cases are particularly significant because the supreme court, since 1969, has ordered a sanction less severe than that recommended by the Board of Commissioners on Grievances and Discipline in only 7 cases, but has increased the sanction recommended by the Board in 39 cases.

243. See *In re Crosby*, 256 S.C. 325, 327, 182 S.E.2d 289, 290 (1971).

244. See *In re Craven*, 267 S.C. 33, 225 S.E.2d 861 (1976). The court stated that it did not follow the Board's recommendation primarily because *Craven* arose prior to the court's published opinion in *In re Bloom*, 265 S.C. 86, 217 S.E.2d 143 (1975), which warned that stiffer sanctions would be imposed in future solicitation cases.

245. See *In re Houston*, 271 S.C. 259, 247 S.E.2d 315 (1978).

246. S.C. Sup. Ct. R. 32, DR 2-106 (Supp. 1984).

247. *Id.*, DR 2-107.

248. *In re Brown*, 275 S.C. 180, 268 S.E.2d 284 (1980).

249. S.C. Sup. Ct. R. 32, DR 3-102 (Supp. 1984).

250. *In re Julian*, 260 S.C. 48, 194 S.E.2d 195 (1973). In *In re Craven*, 267 S.C. 33, 225 S.E.2d 861 (1976), one of the respondent's employees had solicited clients. Although this situation is usually present when DR 3-102 is invoked because the lawyer typically pays the employee a bonus or a percentage of the fee, the issue was not discussed in the supreme court opinion.

imposed,<sup>251</sup> the impropriety concerning legal fees was one of several ethical improprieties the respondent committed. In a majority of cases the legal fee issue was a minor factor in the court's ruling on the appropriate sanction.<sup>252</sup> In other words, the sanction pattern would probably be quite different if fee violations had been the principal issue in these cases.

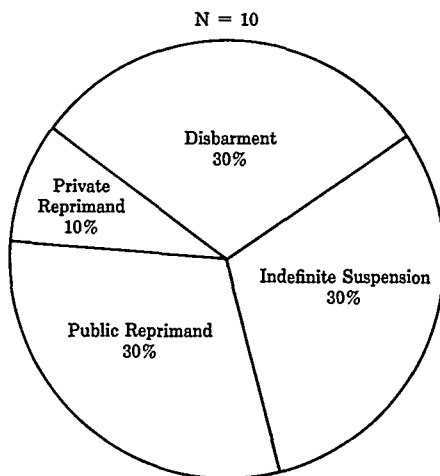


TABLE 13  
 Sanctions Involving Legal Fees

The number of sanction cases involving legal fees is probably quite small compared to the total number of grievances about legal fees received by the Board of Commissioners on Grievances and Discipline.<sup>253</sup> The vast majority of these fee grievances are dismissed because the conduct involved does not warrant a disciplinary sanction.<sup>254</sup> Where a genuine dispute over the amount of a legal fee exists, the Board routinely refers the complainant to the South Carolina Bar Fee Disputes Board.<sup>255</sup> Many of the meritorious grievances concerning legal fees filed with the Board involve complaints about the failure of a lawyer

251. See 1975 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP.

252. Overcharging was clearly the principal violation in only two of the cases. See *In re James*, 267 S.C. 474, 229 S.E.2d594 (1976); *In re Sampson*, 259 S.C. 471, 192 S.E.2d 859 (1972).

253. See *supra* notes 71-87 and accompanying text.

254. See *supra* note 87 and accompanying text.

255. For a more detailed description of the activities of the Fee Disputes Board, see *infra* notes 412, 414 and accompanying text.

to handle a legal matter in a timely manner. These cases are discussed in the section concerning the sanction cases involving neglect.<sup>256</sup>

#### 4. Conflicts of Interest

Conflict of interest cases comprise seventeen percent of all sanction cases decided by the South Carolina Supreme Court between January 1970 and July 1984.<sup>257</sup> The distribution of sanctions in these cases is shown in Table 14. The sanction pattern for the conflict of interest cases does not differ significantly from the pattern for all sanction cases shown in Table 4.

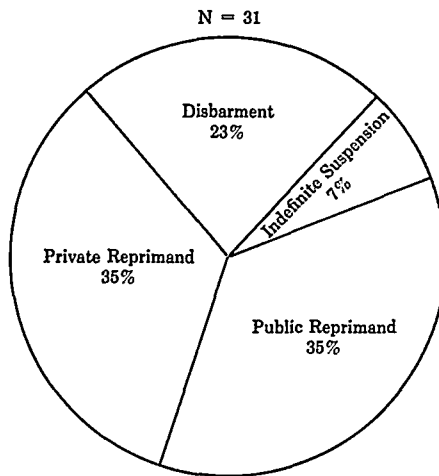


TABLE 14  
Sanctions Involving Conflicts of Interest

Violations of Code of Professional Responsibility Disciplinary Rule 5-104, concerning improper business transactions with clients, have been a significant factor in twelve sanction cases. The court ordered disbarment or indefinite suspension in fifty percent of these cases. With one exception, the respondent in each case was also found guilty of violating other disciplinary rules.<sup>258</sup> The exception is *In re Rollins*,<sup>259</sup> a 1984 case in which a

256. See *infra* notes 275-83 and accompanying text. See also Table 15.

257. See Table 3.

258. See, e.g., *In re Morris*, 270 S.C. 308, 241 S.E.2d 911 (1978) (solicitation, charging an excessive fee, converting client security funds, engaging in an improper business transaction with a client, and providing false testimony in an insurance claim).

lawyer, who had been appointed general guardian of a minor, was disbarred for investing \$95,000 of the minor's funds in a highly speculative close corporation that gave the lawyer a \$7,000 interest-free loan. The respondent in *Rollins* also borrowed \$5,000 from the minor's estate on a secured basis to facilitate the sale of a house the lawyer owned.<sup>260</sup>

Multiple Code of Professional Responsibility violations have also been present in several cases resulting in public or private reprimands. For example, in a 1977 case,<sup>261</sup> the respondent purchased real estate from an uneducated, unsophisticated couple on an unsecured basis and later represented the wife in a claim against the husband arising out of the original transaction. The respondent subsequently obtained a liability release from the wife after she had retained another lawyer.<sup>262</sup> Both the hearing panel and the Board of Commissioners on Grievances and Discipline recommended a private reprimand.<sup>263</sup> The supreme court, however, imposed a public reprimand and indicated that, but for a delay of more than ten years in filing the grievance, it would have imposed a more severe sanction.<sup>264</sup>

Eight cases have involved improper loans to clients in violation of DR 5-103(B), which states:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examina-

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259. *In re Rollins*, 281 S.C. 467, 316 S.E.2d 670 (1984).

260. *Id.* at 468, 316 S.E.2d at 670.

261. *In re Vaught*, 268 S.C. 530, 235 S.E.2d 115 (1977).

262. *Id.* at 533-34, 235 S.E.2d at 116-17.

263. *Id.* at 531, 235 S.E.2d at 115.

264. *Id.* at 536, 235 S.E.2d at 118. A somewhat similar case with an unusual twist is *In re Pyatt*, 280 S.C. 302, 312 S.E.2d 553 (1984). The respondent in *Pyatt* convinced clients to transfer property on which a mortgage was about to be foreclosed to two individuals, one of whom was his wife. *Id.* at 303, 312 S.E.2d at 554. The property was later conveyed to the respondent's brother, who leased the property back to the respondent's clients. *Id.*, 312 S.E.2d at 554. The respondent subsequently represented the brother in an eviction action against the former clients. *Id.*, 312 S.E.2d at 554. Although the Board of Commissioners on Grievances and Discipline recommended indefinite suspension, the supreme court ordered a public reprimand, which would automatically be increased to indefinite suspension unless the property was reconveyed to the former clients within 30 days of the order. *Id.* at 304, 312 S.E.2d at 554. *Pyatt* is the first case in which the court has ordered a respondent to return in specie property that is not in his or her possession.



tion, and costs of obtaining and preserving evidence, provided the client remains ultimately liable for such expenses.<sup>265</sup>

Most of these cases involved loans to plaintiffs who had filed personal injury actions. In its first opinion on this issue, the supreme court imposed a public reprimand but stated that it was reluctant to impose any sanction for this misconduct because very few other states did so.<sup>266</sup> A number of subsequent cases indicate that the court has overcome its original reluctance. Interestingly, however, the two most recent cases resulted in private reprimands<sup>267</sup> whereas all prior cases resulted in some type of public sanction.<sup>268</sup>

Violation of the DR 5-105<sup>269</sup> restrictions on representation of joint clients and suits against former clients has been an important factor in eight sanction cases.<sup>270</sup> Additionally, in four cases the respondents failed to follow the rule in DR 5-105(D)<sup>271</sup> which disqualifies all lawyers in a firm from representing a client if one member of the law firm is disqualified.<sup>272</sup> Finally, DR 9-101(B) was violated in four cases.<sup>273</sup> This rule prohibits a lawyer from accepting private employment in a matter in which he had substantial responsibility while he or she was a public employee.<sup>274</sup>

265. S.C. SUP. CT. R. 32, DR 5-103(B)(Supp. 1984).

266. See *In re Sandifer*, 260 S.C. 633, 198 S.E.2d 120 (1973).

267. See 1982 BD. COMM'RS GRIEV. & DISC. ANNUAL REP.

268. The prior six cases resulted in three public reprimands, one indefinite suspension and two disbarments.

269. S.C. SUP. CT. R. 32, DR 5-105 (Supp. 1984).

270. See, e.g., *In re Belser*, 269 S.C. 682, 239 S.E.2d 492 (1977) (joint clients); *In re Vaught*, 268 S.C. 530, 235 S.E.2d 115 (1977) (suit against former client). Disbarment was ordered in one of the eight cases, public reprimand in four cases, and private reprimand in three cases.

271. S.C. SUP. CT. R. 32, DR 5-105(D)(Supp. 1984).

272. See, e.g., *In re McInnis*, 273 S.C. 582, 258 S.E.2d 91 (1979) (law partner represented clients in traffic cases filed in court in which respondent was part-time judge). The court ordered a public reprimand in *McInnis* and in one other DR 5-105(D) case. Private reprimands were administered in the other two cases.

273. See, e.g., *In re Jolly*, 269 S.C. 668, 239 S.E.2d 490 (1977). Public reprimands were issued in three of these cases and a private reprimand was administered in the fourth.

274. S.C. SUP. CT. R. 32, DR 9-101(B)(Supp. 1984).

### 5. Neglect

DR 6-101(A) states that a lawyer shall not:

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.
- (3) Neglect a legal matter entrusted to him.<sup>275</sup>

Although inadequate knowledge and preparation were factors in seven sanction cases,<sup>276</sup> with one exception,<sup>277</sup> all of these cases also concerned neglect in violation of DR 6-101(A)(3).

In a majority of the neglect cases, the evidence indicated that other disciplinary rules had been violated. For example, in several neglect cases the respondent was also found guilty of trust fund improprieties.<sup>278</sup> This fact is significant because clients are not likely to report trust fund problems and other similar types of misconduct as grievances. Such misconduct is usually discovered during the course of an investigation following the filing of the grievance charging some other ethical impropriety such as neglect.

As previously mentioned, the number of sanction cases in which neglect was a significant factor appears unusually high when compared to the statistics available from other states. There is no evidence, however, that the supreme court or the Board of Commissioners on Grievances and Discipline has imposed disciplinary sanctions in cases involving isolated, simple negligence as compared to neglect which involves behavior that evidences indifference, conscious disregard for the rights of clients, or consistent failure to handle cases in a professional man-

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275. S.C. SUP. CT. R. 32, DR 6-101(A)(Supp. 1984).

276. Six of these cases concerned inadequate preparation in violation of DR 6-101(A)(2).

277. See *In re Christian*, 267 S.C. 410, 228 S.E.2d 677 (1976) (failure to disclose a mortgage).

278. See, e.g., *In re Hines*, 275 S.C. 271, 269 S.E.2d 766 (1980). Client security fund violations were present in seven of the neglect cases. Ten other client security fund cases involved failure to pay settlement proceeds in a timely manner. Although they may technically be viewed as neglect cases, this study includes payment of proceeds cases in the grouping of client security fund cases.

ner.<sup>279</sup> The court has indicated that imposition of a disciplinary sanction for neglect does not prevent a complainant from pursuing any other available remedy, even in cases in which a return of all or part of the legal fee is ordered.<sup>280</sup> In addition, the court has consistently held that, because the primary purpose of disciplinary sanctions is to protect the public, it is irrelevant to a disciplinary proceeding whether a client suffers damages.<sup>281</sup> In other words, a lawyer may receive a disciplinary sanction for neglect even in cases in which a complainant is unable to recover for malpractice.

Table 15 shows the pattern of sanctions in neglect cases. The percentage of each type of sanction roughly parallels those in Table 4,<sup>282</sup> which shows the sanction pattern for all cases used in this analysis. Virtually all disbarment and indefinite suspension cases involve proof of other serious misconduct warranting a sanction.<sup>283</sup> In eleven of the forty-three neglect cases, the supreme court increased the sanction recommended by the Board of Commissioners on Grievances and Discipline. Six of the increased sanction cases were decided in the past three years. These facts indicate the court's hard-line attitude toward lawyer neglect.

279. See, e.g., *In re Burgess*, 279 S.C. 44, 48, 302 S.E.2d 325, 327 (1983) (lawyer who had published misleading advertisements and had been found guilty of neglect was disbarred). The court stated:

Independent of the advertisements found to be inappropriate, the repeated failure of the respondent to perform his duty incident to the several bankruptcy cases, forces the conclusion that this Court would not, at some future date, be justified in reinstating this attorney. There is involved, not an isolated incident but a pattern of activity inconsistent with the duty of this Court to permit only qualified persons to hold themselves out to the public as worthy of hire in the handling of legal matters.

*Id.* at 48, 302 S.E.2d at 327. Even in the cases in which the sanction was imposed for neglect in handling one particular case, there was proof of multiple acts of neglect by the attorney. See *In re Mims*, \_\_\_ S.C. \_\_\_, 311 S.E.2d 926 (1984); *In re Belser*, 277 S.C. 250, 287 S.E.2d 139 (1982).

280. See S.C. Sup. Cr. R. Disc. P. § 7A (Supp. 1984); *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982).

281. See, e.g., *In re Davis*, 276 S.C. 532, 280 S.E.2d 644 (1981).

282. See Tables 4 and 15.

283. The one clear exception appears to be *In re Kennedy*, 254 S.C. 463, 176 S.E.2d 125 (1970). The court in *Kennedy* indefinitely suspended a lawyer who had failed to file suit in two cases for which he collected a fee, even though the Board had recommended a public reprimand. *Id.* at 464, 176 S.E.2d at 125. The court stated that the respondent's poor attitude and sloppy office management justified the increase in the sanction. *Id.* at 464-65, 176 S.E.2d at 125-26.

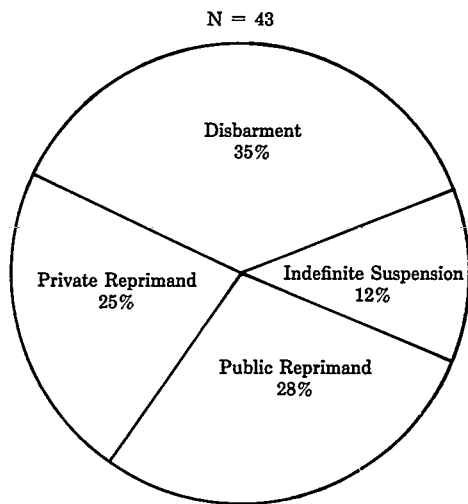


TABLE 15  
 Sanctions Involving Neglect

### 6. *Overzealous Conduct*

Canon 7 of the Code of Professional Responsibility requires that a lawyer “represent a client zealously within the bounds of the law.”<sup>284</sup> The disciplinary rules in Canon 7 establish certain minimum standards that a lawyer must observe while representing clients zealously. The disciplinary rules emphasize the “within the bounds of the law” language in Canon 7. These rules address a wide variety of issues including the filing of frivolous complaints, perjury, and contacts with adverse parties, witnesses, judges and jurors.

Although there are ten disciplinary rules in Canon 7, more than sixty percent of the disciplinary sanction cases involving Canon 7 violations fall within DR 7-102, which prohibits the filing of frivolous claims or defenses, the knowing use of perjured testimony, and active participation in other fraudulent activity while representing clients.<sup>285</sup> At least six DR 7-102 cases involved unnecessary or frivolous suits and defenses.<sup>286</sup> In several

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284. S.C. SUP. CT. R. 32, Canon 7 (Supp. 1984).

285. S.C. SUP. CT. R. 32, DR 7-102(A)(Supp. 1984).

286. See, e.g., *In re James*, 267 S.C. 474, 229 S.E.2d 594 (1976) (indefinite suspension); *In re Edwards*, 279 S.C. 89, 302 S.E.2d 339 (1983) (public reprimand for filing civil and criminal actions against an individual who had filed a grievance). Suits in response

cases, lawyers submitted false or forged documents,<sup>287</sup> knowingly misrepresented facts,<sup>288</sup> suppressed evidence,<sup>289</sup> or failed to take prompt remedial action after discovering fraud or other error.<sup>290</sup>

Four sanction cases involve improper communications with parties known to be represented by another lawyer, contrary to DR 7-104,<sup>291</sup> and three cases involve improper contacts with jurors or members of their families, which is a violation of DR 7-108.<sup>292</sup> Additionally, in four cases, lawyers received private reprimands for settling cases without the client's consent or for failing to follow the client's instructions.<sup>293</sup>

Canon 7 violations were present in twenty-five percent of the sanction cases used in this analysis.<sup>294</sup> As a unit, these cases cast the bar in a bad light. Table 16 illustrates the supreme court's attitude toward the various forms of misconduct involved in these cases.<sup>295</sup>

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to grievances are specifically forbidden by S.C. SUP. CT. R. DISC. P. §§ 20, 26 (Supp. 1984).

287. See, e.g., *In re Wood*, 279 S.C. 303, 306 S.E.2d 596(1983) (disbarment); *In re McGuinn*, 272 S.C. 366, 252 S.E.2d 122 (1979) (public reprimand).

288. See, e.g., *In re Rothwell*, 278 S.C. 391, 296 S.E.2d 870 (1982) (public reprimand); *In re Davis*, 276 S.C. 532, 280 S.E.2d 644 (1981) (public reprimand).

289. See *In re Barron*, 278 S.C. 276, 294 S.E.2d 785 (1982) (public reprimand). See also 1977 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP. (report indicates a lawyer received a private reprimand for trying to persuade an adverse witness not to testify, in violation of DR 7-109(B)).

290. See *In re Cauthen*, 267 S.C. 448, 229 S.E.2d 340 (1976) (indefinite suspension). See also 1979 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP. (report states a private reprimand was administered in two cases concerning errors in briefs).

291. See, e.g., *In re Sampson*, 259 S.C. 471, 192 S.E.2d 859 (1972) (indefinite suspension).

292. See *In re Delgado*, 279 S.C. 293, 306 S.E.2d 591 (1983) (public reprimand); *In re Two Anonymous Members of the South Carolina Bar*, 278 S.C. 477, 298 S.E.2d 450 (1982) (private reprimand); *In re Holman*, 277 S.C. 293, 286 S.E.2d 148 (1982) (disbarment).

293. See June 1969 - January 1974 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP.; 1979 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP.

294. See Table 3. Many of the cases concerned violations of more than one Canon 7 disciplinary rule. For purposes of this analysis, these cases are counted only once.

295. There is no significant difference between the sanctions imposed in cases falling under DR 7-102 and those cases falling under the other disciplinary rules in Canon 7.

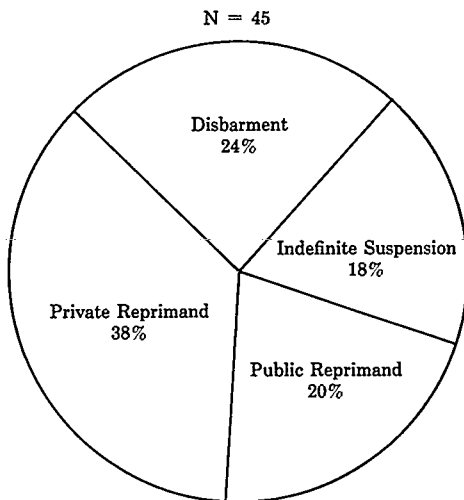


TABLE 16  
 Sanctions Involving Canon 7

### 7. Trust Account Violations

DR 9-102<sup>296</sup> concerns the preservation of a client's money and other property. To comply with the rule, a lawyer must fulfill four requirements. First, a lawyer must deposit all client funds in an account separate from his own.<sup>297</sup> Unearned fees must be deposited in the client trust account and may be withdrawn only when earned.<sup>298</sup> The withdrawal of any funds, other than earned fees, from a client security account constitutes conversion unless the client consents to the withdrawal. Placing client funds in an account that contains nonclient funds, or, alternatively, placing nonclient funds in a client trust account, constitutes commingling.<sup>299</sup> Repayment of improperly withdrawn funds does not prevent the imposition of a sanction.<sup>300</sup> Restitution may, however, be considered by the Board or the court as a

296. S.C. SUP. CT. R. 32, DR 9-102 (Supp. 1984).

297. *Id.*, DR 9-102(A).

298. *Id.*, DR 9-102(A)(2). If the client disputes the lawyer's right to the fee, the disputed amount cannot be withdrawn until the dispute is resolved.

299. *See, e.g., In re Moore*, 280 S.C. 178, 312 S.E.2d 1 (1984); *In re Galloway*, 278 S.C. 615, 300 S.E.2d 479 (1983).

300. *See, e.g., In re Moore*, 280 S.C. 178, 312 S.E.2d 1 (1984); *In re Garris*, 279 S.C. 460, 309 S.E.2d 755 (1983).

mitigating factor in determining the appropriate sanction.<sup>301</sup> A second requirement is that all securities and other property belonging to a client must be deposited in a safe deposit box or other safe place.<sup>302</sup> Thirdly, a lawyer must maintain accurate records showing all receipts and disbursements from any client trust fund and the receipt and withdrawal of any other property belonging to the client in the possession of the lawyer.<sup>303</sup> Finally, except as otherwise authorized by law, a lawyer must promptly pay or deliver all funds or other property belonging to a client to that client at his or her request.<sup>304</sup>

These four responsibilities are reasonably clear and, presumably, known by every lawyer. Even so, violations of these rules constitute one of the most prevalent types of misconduct for which sanctions are imposed. Since 1969, trust fund violations have been a major factor in 52 of the 183 South Carolina sanction cases.<sup>305</sup> As might be expected, commingling and improper withdrawals from client security accounts are the most prevalent violations of DR 9-102.<sup>306</sup> Additionally, failure to promptly pay client security funds after settlement, at the direction of the client, or to promptly deliver other property to a client has been present in thirty-three percent of the client security fund cases.<sup>307</sup>

A majority of DR 9-102 cases involve the violation of more than one provision of DR 9-102 or of the other disciplinary rules.<sup>308</sup> In many of these multiple violation cases, the failure to promptly disburse funds or to return property was probably the basis of the grievance which led to the discovery of the other misconduct. A client may know that he has not received his portion of a settlement, but he may not be aware that the reason for

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301. See, e.g., *In re Mason*, 271 S.C. 111, 245 S.E.2d 424 (1978); *In re Burr*, 265 S.C. 84, 217 S.E.2d 143 (1975).

302. S.C. SUP. CT. R. 32, DR 9-102(B)(1), (B)(2)(Supp. 1984).

303. *Id.*, DR 9-102(B)(3).

304. *Id.*, DR 9-102(B)(4).

305. See Table 3.

306. Such misconduct was present in at least 35 of the 52 trust fund cases.

307. See, e.g., *In re King*, 279 S.C. 48, 301 S.E.2d 752 (1983); *In re Boensch*, 277 S.C. 148, 283 S.E.2d 442 (1981).

308. See, e.g., *In re Drose*, 275 S.C. 414, 272 S.E.2d 173 (1980) (commingling, incomplete records, use of client security funds for payment of personal debts, and failure to promptly disburse settlement funds); *In re Bishop*, 272 S.C. 306, 251 S.E.2d 748 (1979) (various trust fund violations, neglect, and improper loans to clients).

the delay is that his lawyer has misappropriated the settlement proceeds.<sup>309</sup>

A comparison of Table 17 and Table 4<sup>310</sup> indicates that the South Carolina Supreme Court has dealt harshly with DR 9-102 violations. Sixty-five percent of the DR 9-102 violations resulted in disbarments and indefinite suspensions while only forty percent of all other sanction cases used in this analysis resulted in those same penalties.<sup>311</sup> Moreover, the court has increased the sanction recommended by the Board of Commissioners on Grievances and Discipline in twenty-one percent of the DR 9-102 cases.<sup>312</sup> Additionally, the number of private reprimands for trust account violations is only one third of the average for all cases.

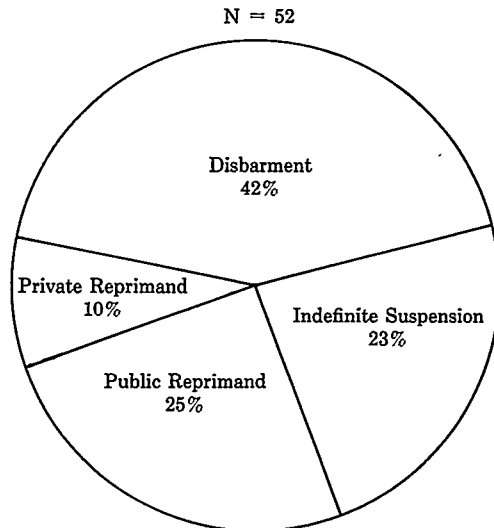


TABLE 17  
 Sanctions Involving Trust Account Violations

309. When a check from a lawyer is returned for insufficient funds, the filing of a grievance creates another situation in which the facts reported in the grievance may be merely the tip of the iceberg.

310. See Tables 4 & 17.

311. Many of the resignations and disbarments by consent for trust account violations are excluded from this analysis because the supreme court's opinions do not disclose the reasons for discipline. Frequently, this omission may be determined from a published order of temporary suspension. If these cases were included, the overall percentage of disbarments and indefinite suspensions in trust fund cases would be significantly higher.

312. See, e.g., *In re Julian*, 260 S.C. 48, 194 S.E.2d 195 (1973) (increase from a public reprimand to indefinite suspension).



In summary, based on the existing cases, the chances are greater than fifty percent that a lawyer found guilty of a trust fund violation will either be disbarred or indefinitely suspended, but there is only one chance in ten that he or she will receive only a private reprimand.

### 8. *Remaining Sanctions*

Nine sanction cases do not fall under any of the categories previously discussed. Two of these cases involve false statements in applications for admission to the bar in violation of DR 1-101(A).<sup>313</sup> In one of these cases the respondent was disbarred,<sup>314</sup> and in the second, the lawyer received a private reprimand.<sup>315</sup> Disciplinary Rule 2-110,<sup>316</sup> regulating withdrawal from representation, was a factor in four sanction cases. In two cases, the lawyer involved refused to follow through with an appeal and also failed to file a motion requesting permission to withdraw.<sup>317</sup> In another case, the respondent undertook representation of a client who was already represented by another lawyer before that lawyer had the opportunity to file a motion to withdraw.<sup>318</sup> In the fourth case, a private reprimand was administered to a lawyer who threatened to withdraw from employment unless his contingency fee was increased.<sup>319</sup>

The only sanction concerning Canon 4, which requires a lawyer to preserve the confidences and secrets of a client, is a

313. S.C. SUP. CT. R. 32, DR 1-101(A)(Supp. 1984).

314. *In re Elliott*, 268 S.C. 522, 235 S.E.2d 111 (1977) (false information supplied concerning place of birth, high school and college attended, and past criminal record).

315. See 1978 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP. (failure to disclose information with respect to violations of law).

316. S.C. SUP. CT. R. 32, DR 2-110 (Supp. 1984).

317. See *In re Baldwin*, 278 S.C. 292, 294 S.E.2d 790 (1980); *In re Burr*, 267 S.C. 419, 228 S.E.2d 678 (1976). S.C. SUP. CT. R. 32, DR 2-110(A)(1)(Supp. 1984) states: "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission." S.C. SUP. CT. CIR. CT. R. PRAC. § 7 (1976) states: "An attorney may be changed by consent or upon cause shown, and upon such terms as shall be just, upon the application of the client, by order of the Circuit Judge, and not otherwise."

318. *In re Sampson*, 259 S.C. 471, 192 S.E.2d 859 (1972) (other attorney not notified of the change until after the respondent took over the case).

319. See 1979 Bd. COMM'RS GRIEV. & DISC. ANNUAL REP. (respondent threatened to withdraw and also contacted an adverse party without the consent of the party's attorney in violation of DR 7-104(A)).

1978 case in which a lawyer was publicly reprimanded for threatening to divulge client confidences while demanding payment of an expense item the client disputed owing.<sup>320</sup>

In the two remaining cases,<sup>321</sup> lawyers made improper attempts to obtain liability releases from clients in violation of DR 6-102.<sup>322</sup> The most recent case on this issue<sup>323</sup> was decided in 1983. The respondent refused to return a file unless the client signed a broad release from liability.<sup>324</sup> Both the hearing panel and the Board of Commissioners on Grievances and Discipline recommended that the complaint be dismissed on the grounds that the respondent was not really aware of the contents of the release form because it had been prepared by his secretary, who testified that she used the same form when previously employed by other lawyers.<sup>325</sup> Disagreeing with the findings and recommendations of the hearing panel and the Board, the supreme court found the evidence sufficient to prove that the respondent knew the contents of the release and ordered a public reprimand.<sup>326</sup> The opinion in *Clark* provides a clear message to lawyers who use similar forms.

#### IV. EVALUATION OF SOUTH CAROLINA'S DISCIPLINARY SYSTEM AND SUGGESTED CHANGES

Available statistics demonstrate that South Carolina's disciplinary system must be ranked among the most aggressive in the country in terms of the total number of sanctions imposed.<sup>327</sup> Moreover, the state's existing system is quite efficient. Although a large percentage of grievances is dismissed either before or after a preliminary investigation, the number of dismissals is not out of line with other jurisdictions.<sup>328</sup> Additionally, the Supreme Court Rule on Disciplinary Procedure contains stringent deadlines and reporting requirements designed to move cases

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320. *In re Strobel*, 271 S.C. 61, 244 S.E.2d 537 (1978).

321. *In re Clarke*, 278 S.C. 627, 300 S.E.2d 595 (1983); *In re Vaught*, 268 S.C. 530, 235 S.E.2d 115 (1977).

322. S.C. Sup. Ct. R. 32, DR 6-102 (Supp. 1984).

323. *In re Clark*, 278 S.C. 627, 300 S.E.2d 595 (1983).

324. *Id.* at 629-30, 300 S.E.2d at 597.

325. *Id.* at 631, 300 S.E.2d at 598.

326. *Id.* at 632, 300 S.E.2d at 598-99.

327. See Table 1; see also *supra* notes 2-3, 334-36, 381-83 and accompanying text.

328. See *supra* notes 62-69 and accompanying text.

through the system expeditiously.<sup>329</sup>

Furthermore, in recent years, the South Carolina Supreme Court has implemented several procedural changes which greatly improve the organization and efficiency of the Board of Commissioners on Grievances and Discipline.<sup>330</sup> The 1978 changes in the Rule on Disciplinary Procedure, which incorporated most of the recommendations of the Clark Committee Report and the American Bar Association Standards for Lawyer Discipline and Disability Proceedings, are particularly noteworthy.<sup>331</sup> Another example of the court's sensitivity to needed changes is the 1983 amendment to the Rule on Disciplinary Procedure allowing the appointment of associate commissioners to assist the Board in handling investigations.<sup>332</sup> Over a period of years, associate commissioners can help reduce significantly the number of carryover cases.

On the other hand, there is no evidence that the number of sanctions imposed on lawyers admitted to practice in South Carolina is caused by an unusual degree of ethical insensitivity or incompetence or by any extraordinary factors, such as a greater than average proclivity to engage in criminal or fraudulent conduct. For example, the ratio of grievances per lawyer in South Carolina is below, or not significantly higher than, the grievance per lawyer figure in most other states.<sup>333</sup>

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329. See *supra* notes 109-16 and accompanying text.

330. The establishment of a client security fund, a requirement of 12 hours annually in continuing legal education, and the creation of a specialization certification program by the court can legitimately be viewed as complementing the disciplinary system. These actions are part of the supreme court's goal of protecting the public and enhancing the competence of lawyers practicing in South Carolina.

331. See Youngblood, *Revised Rule on Disciplinary Procedure*, The Transcript, May, 1978, at 2.

332. See S.C. SUP. CT. R. DISC. P. § 9E (Supp. 1984).

333. Based on 1982 data, the ratio of grievances per lawyer in South Carolina was 7 grievances per 100 lawyers. Of the 7 jurisdictions that have approximately the same number of lawyers as South Carolina, only Mississippi, with a ratio of 4 grievances per 100 lawyers, was below South Carolina. The highest ratio in this category was in Arizona, which had 29 grievances per 100 lawyers. The number of grievances per 100 lawyers in the other 5 jurisdictions used in the sample were: Alabama, 13; Kansas, 7; New Mexico, 24; New York (3d Dept.), 17; and West Virginia, 14. The number of grievances per 100 lawyers in eight of the most populous states for 1982 was as follows: California, 10; Florida, 13; Illinois, 9; Michigan, 15; New Jersey, 8; Pennsylvania, 9; Virginia, 8; and Wisconsin, 10. ABA STANDING COMM. ON PROF. DISC. AND CENTER FOR PROF. RESP., STATISTICAL REPORT RE: EXPENSE, CASE VOLUME, AND STAFFING OF LAWYER DISCIPLINARY ENFORCEMENT IN STATE JURISDICTIONS DURING 1982, Chart I (1983).

Compared to other states, perhaps the most distinctive feature of the South Carolina disciplinary system is the willingness of the supreme court to impose public sanctions in cases which, in many states, would be dismissed or would result at most in a private reprimand. The court's record in neglect cases is the clearest illustration.<sup>334</sup> In addition to following a consistent pattern of insisting on sanctions in cases of serious neglect,<sup>335</sup> the court, on several occasions, has ordered restitution of fees and has made it clear that restitution will not bar any civil claim a client might have.<sup>336</sup>

This well-designed, efficient disciplinary system with impressive statistics is not necessarily as effective as it could or should be. The broader questions that must be answered are whether the disciplinary system is fulfilling its avowed purposes and, if it is not, what changes are desirable. These questions will be addressed in the remaining portion of this section.

Lawyer discipline has been thought to accomplish four purposes: removal of deviant lawyers from the system, deterrence of future misconduct, rehabilitation, and protection of the public.<sup>337</sup> Punishment of the offending lawyer is not a stated purpose.<sup>338</sup>

Because disbarment and indefinite suspension are obviously harsh sanctions that have disastrous professional and personal consequences, disciplinary boards and courts have been reluctant to impose these sanctions except in the most egregious cases. In South Carolina, no evidence exists showing that a significant number of cases that should result in disbarment or indefinite suspension are receiving less severe sanctions. To the contrary, the South Carolina Supreme Court has ordered indefi-

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334. See *supra* notes 275-83 and accompanying text.

335. See *supra* notes 279-83 and accompanying text.

336. See, e.g., *In re Hopkins*, — S.C. —, 318 S.E.2d 112 (1984) (repayment of \$18,000 attorney's fee ordered). See also S.C. SUP. CT. R. DISC. P. §§ 7A, 9E (Supp. 1984) (disgorgement of fees does not bar any other civil or criminal remedy).

337. See generally *Steele & Nimmer, supra* note 2, at 999-1014; Nordby, *supra* note 98, at 377-82, 403-09. See also ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 1.1 and commentary (1979).

338. See, e.g., *Maryland State Bar v. Agnew*, 271 Md. 543, 318 A.2d 811 (1974). The South Carolina Supreme Court first recognized this principle in its initial disbarment case, *State v. Holding*, 12 S.C.L. (1 McCord) 379 (1821). See also *State v. Belcher*, 249 S.C. 301, 153 S.E.2d 921 (1967); *Burns v. Clayton*, 237 S.C. 316, 117 S.E.2d 300 (1960).

nite suspension or disbarment in some cases in which rehabilitation was perhaps feasible or in which a suspension for a determined period followed by conditional readmission might have been a more appropriate remedy.

Nationwide there has been an increased emphasis on the rehabilitative function of the disciplinary system in recent years. Procedures such as those in the Supreme Court Rule on Disciplinary Procedure that allow lawyers with serious drug abuse, emotional, or physical problems to be placed on disability inactive status while undergoing treatment rather than being automatically disbarred or indefinitely suspended, represent a significant and positive change in attitude.<sup>339</sup> Moreover, the increased use of public and private reprimands in recent years in all states, including South Carolina, is in part a result of an increased awareness of the need to stress rehabilitation.<sup>340</sup>

In South Carolina, deterrence is accomplished principally through published supreme court opinions imposing public sanctions and published reports from the Board of Commissioners on Grievances and Discipline summarizing its activities. One purpose of these published opinions and annual reports is to alert lawyers to the types of conduct which fall below acceptable standards and therefore warrant disciplinary sanctions.<sup>341</sup>

The publication of disciplinary actions, particularly in the local media, is also an important method of informing the public that the judicial system and the bar are serious about self-regulation. The Supreme Court Rule on Disciplinary Procedure requires such publication.<sup>342</sup> Dissemination of public information about the disciplinary system also helps to build public confi-

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339. See S.C. SUP. CT. R. DISC. P. § 19 (Supp. 1984). See also *id.* § 7A (competency training can be ordered). The absence of adequate provisions for disabled lawyers was one of the criticisms of disciplinary systems made in the Clark Committee Report. See CLARK COMMITTEE REPORT, *supra* note 1, at 110-115. See generally Skoler & Klein, *Mental Disability and Lawyer Discipline*, 12 J. MAR. J. PRAC. & PROC. 227 (1979).

340. See generally Steele & Nimmer, *supra* note 2, at 935-38. Chart IV, Part I of the 1984 Statistical Report Re: Public Discipline of Lawyers by Disciplinary Agencies, 1979-83, published by the ABA Committee on Professional Discipline and Center for Professional Responsibility, indicates that during the five year reporting period used in the report, the number of disbarments rose cumulatively by 41% while the number of public reprimands rose cumulatively by 54%, the number of probations rose cumulatively by 58%, and the number of sanctions such as fines, costs, restitution, and probation rose cumulatively by 201%. The ABA data does not include private reprimands.

341. See generally Gray & Harrison, *supra* note 98, at 553-57.

342. See S.C. SUP. CT. R. DISC. P. §§ 6A, 7B, 19D, 20G (Supp. 1984).

dence in the judicial system and the bar. The public confidence generated in this manner outweighs the adverse affect on the bar's image that may result from allowing the public to see the bar's dirty linen.<sup>343</sup>

Requiring restitution is another way to achieve the public protection function of the disciplinary system. The emphasis in requiring restitution, however, is on client protection rather than on protection of the public in general. The supreme court has ordered restitution in many recent cases<sup>344</sup> and has emphasized the importance of this remedy by amending the Rule on Disciplinary Procedure in October 1983 to specifically include restitution as one of the authorized sanctions.<sup>345</sup>

A logical conclusion to be drawn from the above analysis is that South Carolina's disciplinary system achieves its basic goals. This statement is certainly true of the grievances processed in the system. One important question that remains unanswered, however, is whether all cases that should be handled as disciplinary cases are in fact reported to the Board of Commissioners on Grievances and Discipline. To put this issue in its proper prospective, two additional factors must be considered.

First, the disciplinary system is designed to deal only with behavior that evidences indifference to, or conscious disregard for, the responsibilities a lawyer owes to clients and to the public.<sup>346</sup> The system cannot, and should not, conclusively decide every act of negligence or other breach of the attorney-client relationship.<sup>347</sup> Malpractice actions, fines, assessment of attorneys' fees and other civil and criminal suits are available for dealing with deviant behavior not sufficiently egregious to justify disci-

343. See generally CLARK COMMITTEE REPORT, *supra* note 1, at 143-46.

344. See, e.g., *In re Pyatt*, 280 S.C. 302, 312 S.E.2d 553 (1984); *In re Burgess*, 275 S.C. 315, 270 S.E.2d 436 (1980).

345. See S.C. SUP. CT. R. DISC. P. §§ 7A, 9E (Supp. 1984).

346. See, e.g., ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 1.1 (1979) ("The purpose of lawyer discipline and disability proceedings is to . . . protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are unable or are likely to be unable to properly discharge their professional duties").

347. See ABA Comm. on Professional Responsibility and Ethics, Formal Op. 335 N.1 (1974); ABA Comm. on Professional Responsibility and Ethics, Informal Op. 1273 (1973) (distinguishes neglect, which can result in a disciplinary sanction under DR 6-101(A)(3) of the ABA Model CPR, and negligence).

plinary sanctions.<sup>348</sup> Disciplinary, criminal, and malpractice related actions should not, however, be mutually exclusive.<sup>349</sup> There are cases in which both sets of remedies are appropriate.<sup>350</sup> In such cases, the fact that a lawyer receives a civil or criminal sanction should not preclude the imposition of a disciplinary sanction for the same behavior or vice versa.<sup>351</sup> More-

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348. The number of these nondisciplinary sanctions has increased dramatically in recent years. See generally R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* § 6 (2d ed. 1981); Sofear, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHNS L. REV. 680 (1983); Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619 (1977).

349. The Preamble and Preliminary Statement of the ABA Code of Professional Responsibility states that the Code does not define standards for civil liability of lawyers for professional conduct. This statement is generally interpreted to mean that the Code cannot be used to create new civil causes of action against lawyers but the provisions in the Code are admissible as evidence of the required standard of conduct for lawyers. See, e.g., *Bickel v. Mackie*, 447 F. Supp. 1376, 1383-84 (N.D. Iowa), *aff'd*, 590 F.2d 341 (8th Cir. 1978); *Bush v. Morris*, 123 Ga. App. 497, 181 S.E.2d 503 (1971). See also *Lipton v. Boesky*, 110 Mich. App. 589, 313 N.W.2d 163 (1981) (violation of a Code disciplinary rule creates a rebuttable presumption of malpractice). See generally Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 281 (1979); MALLEN & LEVIT, *supra* note 348, at §§67, 256. The interconnection between the Code of Professional Responsibility and malpractice actions is dramatically illustrated by the following statistics: 62.43% of all malpractice claims concern either neglect or some other form of incompetence and 14.14% concern claims alleging failure of a lawyer to obtain proper consent of the client or to follow the client's instructions. Gates, *The Newest Data on Lawyers' Malpractice Claims*, 70 A.B.A. J. 78, 80, Figure 5 (1984).

There are a number of situations in which the courts are called upon to enforce the Code of Professional Responsibility that do not concern either a disciplinary proceeding or a malpractice or similar action. Courts, for example, frequently use the guidelines in A.B.A. Code of Professional Responsibility DR 2-106 in awarding attorney fees. See, e.g., *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974). Similarly, courts regularly use the guidelines in DR 5-105 in deciding disqualification of counsel motions based on alleged conflicts of interests. See, e.g., *Woodruff v. Tomlin*, 593 F.2d 33 (6th Cir. 1979). See also *In re Goodwin*, 279 S.C. 274, 305 S.E.2d 578 (1983) (contempt citation); *Brode v. Brode*, 278 S.C. 457, 298 S.E.2d 443 (1982) (appeal against wishes of client); *State v. Wright*, 271 S.C. 534, 248 S.E.2d 490 (1978) (assertion of questionable defense in criminal trial).

350. See, e.g., *In re Estate of Gould*, 547 S.W.2d 863 (Mo. App. 1977) (lawyer disbarred for his misconduct in handling an estate, subsequently removed as executor of the estate and denied attorney's fees).

351. See, e.g., S.C. Sup. Ct. R. Disc. P. §§ 6, 7A, 9E (Supp. 1984); *In re Ramsey*, 279 S.C. 29, 301 S.E.2d 470 (1983) (criminal conviction); *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1980). In a disciplinary action following a criminal conviction, the underlying facts cannot be relitigated. See S.C. Sup. Ct. R. Disc. P. § 6B (Supp. 1984). On the other hand, when the disciplinary action follows a civil judgment against the lawyer, the courts have generally held that the respondent is not collaterally estopped from challenging the

over, the dismissal of a civil or criminal action should not preclude the imposition of a disciplinary sanction for the same conduct.<sup>352</sup> In other words, in order to evaluate the effectiveness of lawyer discipline, one must view the disciplinary system as an important, but not exclusive, method for resolving attorney-client disputes and ethical problems.

Secondly, available evidence indicates that lawyers and judges, who are in a better position than clients to recognize conduct warranting investigation by a disciplinary board, do not report all such conduct<sup>353</sup> despite their being ethically obligated to do so.<sup>354</sup> This reluctance to report fellow lawyers is due in large measure to an ingrained, self-protective, guild attitude. Some of this reluctance may, however, result from a perception that the disciplinary system is based essentially on a criminal justice model and is too harsh and impersonal.<sup>355</sup>

Whatever the reasons, the fact remains that there are probably a significant number of unreported disciplinary cases. Conversely, many grievances processed by the disciplinary system do

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findings in the prior action. *See, e.g., In re Guggi*, 273 Or. 463, 541 P.2d 1392 (1975); *Committee on Legal Ethics v. Mullins*, 226 S.E.2d 427 (W. Va. 1976). Different standards of proof in criminal, civil, and disciplinary actions explain these holdings. *See supra* notes 104-05 and accompanying text.

When the disciplinary action is brought first, it is an unsettled question whether the findings of fact in the disciplinary action are binding in a subsequent civil action. *Compare In re Gould*, 547 S.W.2d 863 (Mo. App. 1977), with *Kuehn v. Garcia*, 608 F.2d 1143 (8th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980) and *Lipton v. Boesky*, 110 Mich. App. 589, 313 N.W.2d 163 (1981). Although the burden of proof is lower in a civil action than in a disciplinary action (preponderance of the evidence versus clear and convincing evidence), some states require mutuality of parties as a prerequisite to applying collateral estoppel. *See generally* Wolfram, *supra* note 349, at 297-300.

352. *See, e.g., S.C. Sup. Ct. R. Disc. P. § 6E* (Supp. 1984) (reversal of a criminal conviction will not terminate a disciplinary proceeding); *In re Davis*, 276 S.C. 532, 280 S.E.2d 644 (1981). A malpractice action, for example, may be barred by the statute of limitations or dismissed because the plaintiff cannot prove any damages caused by the malpractice. As was pointed out earlier, the statute of limitations does not apply in disciplinary actions and damages are not a prerequisite to imposition of a sanction.

353. *See Ramage-White, The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509 (1978); Thode, *The Duty of Lawyers and Judges to Report Other Attorneys' Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95. *See also* Steele & Nimmer, *supra* note 2, at 973 (only 8.1% of all grievances filed by lawyers and judges).

354. *See S.C. Sup. Ct. R. 32, DR 1-103(B)* (Supp. 1984). This disclosure duty also exists under the Model Rules of Professional Conduct. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3.

355. *See Martyn, Lawyer Competence and Lawyer Discipline: Beyond the Bar*, 69 GEO. L.J. 705, 711-12 (1981).



not warrant disciplinary action but may warrant some other remedy. The combination of underreporting potential sanction cases and overreporting nonsanction cases places a serious strain on the disciplinary system—a strain that grows more severe as the number of client-generated grievances increases. Coping more successfully with this underreporting-overreporting problem is perhaps the most challenging issue facing disciplinary boards in this country.

The following suggestions for improving the disciplinary system in South Carolina, many of which will probably be regarded as controversial, should not be taken as a condemnation of the present system. Rather, the purpose of the suggestions is to improve a good system.

#### A. *Screening Process Modifications*

Some restructuring of the screening process is needed because of the increase in the number of cases. During the past two years, the Board of Commissioners on Grievances and Discipline averaged approximately one grievance per day. While many grievances are frivolous, all must be carefully studied to make certain that worthy cases are not overlooked. Letters must be written to the complainants acknowledging receipt of the grievances. In cases that are dismissed, letters should be sent explaining the reasons for the dismissal. Furthermore, a file containing a summary of the charges and the reasons for the action taken must be maintained for each grievance, even those that are dismissed without investigation.<sup>356</sup> The chairman of the Executive Committee, who is usually an active practitioner, is responsible for performing all of these screening steps in addition to the many other time-consuming duties assigned to the chairman by the Supreme Court Rule on Disciplinary Procedure. No matter how conscientious the chairman may be, there are limits to the amount of time he or she can reasonably be expected to spend on Board duties. At some point, either the chairman will not be able to read all the grievance letters as carefully as they should be read, or a nonlawyer employee of the Board must do the preliminary screening.

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356. See S.C. SUP. CT. R. DISC. P. § 4C (Supp. 1984).

Many disciplinary agencies solve this time problem by delegating preliminary screening to the legal staff employed by the agency. This is the system recommended in the ABA Standards for Lawyer Discipline and Disability Proceedings.<sup>357</sup> Assuming modest turnover in the legal staff, this approach will likely result in more long-term consistent treatment of cases than is possible under the present system, in which the chairman usually serves for one year and cannot serve for more than three years.<sup>358</sup> Legal staff screening would also reduce the likelihood of a case backlog because of a chairman's practice obligations or other responsibilities. With the ever increasing number of grievances, it may take several years to clear up a substantial backlog of cases created in prior years.

Implementing a bar counsel screening system in South Carolina will necessitate major staff changes. As mentioned previously,<sup>359</sup> several assistant attorneys general currently handle, on a part-time basis, some investigations and all of the prosecution of formal complaints. Assigning screening functions to the Attorney General's office would create two potential problems. First, the Attorney General would have to allocate more manpower to the Board's work; and second, he would probably have to obtain additional funding from the legislature for these increased responsibilities.

Alternatively, the supreme court could include funds for legal staff<sup>360</sup> assigned to the Board in its budget or pass the cost on to the bar in the form of a yearly assessment. This approach has the institutional advantage of bringing the entire disciplinary system under the direct control of the court. On the other hand, the court might not wish to allocate part of its funds for this purpose, and many members of the bar may object to the assessment of additional fees.<sup>361</sup>

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357. See ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS §§ 3.8, 3.9, 8.4 (1979).

358. See S.C. SUP. CT. R. DISC. P. §§ 3A, 4A (Supp. 1984).

359. See *supra* note 45 and accompanying text.

360. Based on the time now spent by the assistant attorneys general currently assigned to disciplinary cases, it would take at least two full-time staff lawyers to perform the functions performed by the Attorney General's office. The Board would also have to hire an investigative staff. Assigning screening responsibilities and some of the investigative responsibilities now performed by Board members and associate commissioners to staff counsel would also necessitate additional legal manpower.

361. According to 1982 data compiled by the ABA Standing Committee on Profes-

A third possibility would decentralize the screening process somewhat by encouraging the establishment of local bar association client relations committees with authority to accept grievances that do not present a prima facie case of misconduct warranting disciplinary sanctions. At least three such committees already exist in South Carolina.<sup>362</sup> The most active is the Charleston County Bar Association Grievance Committee, which in 1983 handled approximately fifty complaints of alleged professional misconduct against Charleston attorneys.<sup>363</sup> The Charleston Grievance Committee advises all complainants that only the Board of Commissioners on Grievances and Discipline has authority to impose disciplinary sanctions; and it refers to the Board any case alleging serious ethical impropriety.<sup>364</sup>

The 1983 Annual Report of the Charleston Grievance Committee indicates that approximately one-half of the complaints it received concerned minor communication problems in which the lawyer had taken appropriate action but had failed to inform the client of the status of the matter in a timely manner. A substantial number of the remaining cases concerned fee misunderstandings, minor disputes over payments from settlement funds, and the client's right to the return of a file or any unearned portion of a fee at the termination of the attorney's representation.<sup>365</sup> Most of the disputes were amicably resolved with a member of the committee acting as an intermediary between the client and the lawyer.<sup>366</sup> In the cases that could not be resolved,

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sional Discipline and Center for Professional Responsibility, in 38 states the entire cost of administering the disciplinary system is paid for by bar association dues or court assessed fees. ABA STANDING COMM. ON PROF. DISC. AND CENTER FOR PROF. RESP., STATISTICAL REPORT RE: EXPENSE, CASE VOLUME, AND STAFFING OF LAWYER DISCIPLINARY ENFORCEMENT IN STATE JURISDICTIONS DURING 1982, Chart III (1983).

362. A telephone poll of the bar presidents in South Carolina's major metropolitan areas located local bar association grievance committees in Charleston, Greenville and Spartanburg. For many years, the Richland County Bar Association had a grievance committee but the committee was discontinued a few years ago.

363. See 1983 GRIEV. COMM. OF CHARLESTON COUNTY BAR ASS'N ANNUAL REP. (available at Charleston County Bar Office).

364. Telephone interview with Gordon P. Schreck, Esq., Chairman of the Grievance Committee of the Charleston County Bar (Aug. 7, 1984).

365. The Charleston Grievance Committee refers genuine fee disputes to the South Carolina Bar Resolution of Fee Disputes Board. *Id.* The Board of Commissioners on Grievances and Discipline also routinely follows this practice.

366. The 1983 Annual Report makes the interesting observation that many clients are not interested in having the respondent fired or sanctioned. 1983 GRIEV. COMM. OF

the complainants were sent letters reminding them of their right to file a grievance with the Board of Commissioners on Grievances and Discipline, and, in appropriate cases, suggesting that they might wish to consult an attorney concerning the possibility of a civil suit.<sup>367</sup>

Members of local committees, who do not have the caseload responsibilities of the chairman or members of the state's grievance Board, have more time to perform this mediation role. Moreover, lawyers against whom allegations are filed are generally willing to work out a settlement agreeable to the client because of peer pressure from members of the local committees and the lawyers' fear of the mental anguish and potential blemishes on their official records which would result if the grievances were filed with the Board of Commissioners on Grievances and Discipline. In short, these local committees perform a valuable screening function and, by informally resolving minor attorney-client disputes, promote the public image of the bar.<sup>368</sup>

Local committees should be called client relations committees rather than grievance committees to distinguish them from the Board and to describe their function accurately. Uniform guidelines governing the operation of these client relations committees could be developed by the Board of Commissioners on Grievances and Discipline and approved by the court.<sup>369</sup> These guidelines should describe the authority of the local committee, the circumstances under which allegations of misconduct must be forwarded to the Board, and the disclosures concerning the committee's limited jurisdiction that will be required to be made to all complainants. The guidelines should also require a local

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CHARLESTON COUNTY BAR ASS'N ANNUAL REP. The clients' primary goal is to get their legal problems resolved in an expeditious manner. *Id.*

367. The Greenville and Spartanburg County Bar Association Grievance Committees follow similar guidelines. Telephone interview with Patrick Grayson, Esq., Greenville County Bar Association (Aug. 7, 1984); telephone interview with Timothy Cleveland, Esq., Spartanburg County Bar Association (Aug. 16, 1984).

368. Because the vast majority of grievances are lawyer-client disputes which do not warrant disciplinary sanctions, the need to have an effective mechanism for mediating these nondisciplinary cases is great. Disciplinary agencies have traditionally undertaken this task, subject to time limitations. *See generally* Steele & Nimmer, *supra* note 2, at 985-90.

369. The California Supreme Court approved guidelines for local client relations committees in 1973. *See Annual Report of the Board of Governors*, 49 CAL. ST. B.J. 607, 609 (1974).

committee to keep files on each complaint, containing the same information that the Board of Commissioners on Grievances and Discipline is required to include in its files. In addition, the committees should submit periodic reports to the Board using an approved reporting format developed by the Board. These record keeping requirements will enable the Board, and the court, to monitor the activities of these client relations committees.

The vast majority of client complaints against lawyers will still be filed with the Board. As a practical matter, these client relations committees will probably be established only in the larger cities. Nevertheless, the committees can potentially reduce the number of grievances being filed with the Board, or at least slow the rate of the caseload increase.<sup>370</sup>

### *B. Hearing Stage Modifications*

It is well established that a disciplinary hearing is *sui generis* and, consequently, the full panoply of constitutional due process rights available in civil and criminal trials do not apply.<sup>371</sup> Nevertheless, given the potential impact on the respondent's legal career, a sense of "fairness" should be built into the disciplinary process. With this principle in mind, there are three changes in the hearing stage procedures under the South Carolina Rule on Disciplinary Procedure that should be seriously considered.

First, there is no provision in the Rule that specifically authorizes the Attorney General to request a review of a complaint, prior to a hearing, to determine whether the grievance should be dismissed because of insufficiency of evidence or other weaknesses discovered during the investigation that follows the decision to issue a complaint. By contrast, a solicitor has an ethical duty not to force a criminal defendant to undergo the trauma of a trial in such circumstances.<sup>372</sup> The apparent inability of the Attorney General to exercise similar discretion in a disciplinary proceeding once a complaint has been issued

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370. On the other hand, if the South Carolina Supreme Court decides to abolish the existing committees, the number of grievances filed with the Board of Commissioners on Grievances and Discipline would increase substantially.

371. See *supra* notes 97-108 and accompanying text.

372. See S.C. Sup. Ct. R. § 32, EC 7-13 and DR 7-103(A)(Supp. 1984).

presents a serious issue of fairness.

Removing the requirement in the Rule that discovery is available only upon approval by the chairman of the Board of Commissioners on Grievances and Discipline<sup>373</sup> should also be seriously considered. Historically, the chairman has rarely authorized depositions or any other type of discovery. The apparent purpose of the "good cause" requirement is to prevent the use of discovery as a delaying or harrasing tactic by the respondent. These and other discovery abuses, however, can be curbed by limiting the discovery period, authorizing protective orders, and imposing monetary and other sanctions.<sup>374</sup>

At the very least, the process should allow the respondent to take the complainant's deposition as a matter of right. Additionally, the respondent should be given the same access to statements of witnesses and exculpatory and mitigating evidence allowed a criminal defendant.<sup>375</sup> The inability to review the disciplinary file, combined with the absence of a right to discovery, unduly restricts the ability of an attorney representing a respondent to prepare a defense to a grievance or to advise a respondent on the best course of action.

A final change that should be considered is the elimination of the requirement that a lawyer must admit all of the facts in a complaint when consenting to discipline other than disbarment by consent.<sup>376</sup> The principal purpose of the consent rule is to encourage a proper disposition of a disciplinary complaint prior to a hearing, and if not then, before the appellate process is completed. Allowing the Attorney General and a respondent room for bargaining over the facts stipulated in the consent order would significantly increase the number of cases in which a respondent will view consent discipline as a viable alternative.<sup>377</sup>

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373. See S.C. SUP. CT. R. Disc. P. § 28D (Supp. 1984).

374. See S.C. SUP. CT. CIR. CT. PRAC. R. 87H, 96 (1976 & Supp. 1984)(protective orders). See also Comment, *supra* note 348. Section 8.29 of the ABA Standards for Lawyer Discipline and Disability Proceedings authorize discovery as a matter of right by both sides for "a limited period following the filing of an answer." The commentary to § 8.29 states that the time for discovery should be strictly limited to no more than 90 days.

375. See S.C. SUP. CT. CIR. CT. PRAC. R. 103 (Supp. 1984); Note, *The Prosecutorial Duty to Disclose Exculpatory Information*, 34 S.C.L. REV. 67 (1982). See also S.C. SUP. CT. R. 32, EC 7-13 and DR 7-103(B)(Supp. 1984).

376. See S.C. SUP. CT. R. Disc. P. § 28A (Supp. 1984).

377. Through June 1983, consent discipline under S.C. SUP. CT. R. Disc. P. § 28 (Supp. 1984) had been approved in only one case. See *In re Gamble*, 278 S.C. 651, 300

Because the supreme court must approve all consent orders,<sup>378</sup> the danger of abuse is minimal.

### C. Sanction Modifications

Until the adoption of an amendment approved in October 1984, the Supreme Court Rule on Disciplinary Procedure authorized only four types of sanctions: permanent disbarment, indefinite suspension, and public and private reprimands.<sup>379</sup> In fact, there were actually only three sanction categories because only three lawyers placed on indefinite suspension have ever been reinstated.<sup>380</sup> As Table 4 indicates,<sup>381</sup> forty percent of all sanction cases from January 1969 through June 1984 resulted in either disbarment or indefinite suspension. If consent disbarments and attorney resignations while under investigation for misconduct are included in the figures, the percentage of disbarments and indefinite suspensions increases to forty-five percent.<sup>382</sup> This figure is significantly higher than that of other states.<sup>383</sup>

The harshness of this South Carolina sanction scheme is illustrated by the 1983 case of *In re Lanier*.<sup>384</sup> The respondent in *Lanier* was admitted to practice in both North and South Caro-

S.E.2d 737 (1983)(consent to public reprimand). As a practical matter, whenever serious charges and factual disputes exist, it may be difficult to reach an acceptable agreement on consent discipline prior to a hearing. After a hearing, however, the supreme court may not be willing to accept a sanction less than that recommended by the hearing panel or by the Board. The change in § 28A suggested in the text would make it easier to negotiate a prehearing consent agreement. See also *supra* notes 153-56, 200 and accompanying text.

378. See S.C. SUP. CT. R. DISC. P. § 28A (Supp. 1984).

379. S.C. SUP. CT. R. DISC. P. § 7A (Supp. 1984). The Rule on Disciplinary Procedure also authorizes disgorgement of attorney's fees and remedial action where the misconduct is based in part on incompetence.

380. See *supra* note 176 and accompanying text. According to data compiled by the National Discipline Data Bank, in 1983 there were 612 suspensions and 157 reinstatements in the United States. The equivalent figures for 1982 were 557 suspensions and 117 reinstatements; for 1981, 490 suspensions and 112 reinstatements; for 1980, 413 suspensions and 144 reinstatements; and for 1979, 390 suspensions and 152 reinstatements. ABA STANDING COMM. ON PROF. DISC. AND CENTER FOR PROF. RESP., STATISTICAL REPORT RE: PUBLIC DISCIPLINE OF LAWYERS BY DISCIPLINARY AGENCIES 1979-1983, Chart II (1984).

381. See Table 4.

382. See *supra* note 207 and accompanying text.

383. See *supra* notes 210-11 and accompanying text.

384. 279 S.C. 458, 309 S.E.2d 754 (1983).

lina and was suspended in North Carolina for a one-year period following a guilty plea to a charge of felonious possession of marijuana.<sup>385</sup> Under the reciprocal discipline provision in the Supreme Court Rule on Disciplinary Procedure, a lawyer disciplined in one state is supposed to receive the identical discipline in South Carolina unless the respondent can prove mitigating factors.<sup>386</sup> Although the respondent's suspension had lapsed and he was once again practicing law in North Carolina, the South Carolina Supreme Court issued an order of indefinite suspension stating that this was the closest equivalent sanction authorized by the Rule on Disciplinary Procedure.<sup>387</sup>

The supreme court's adoption in October 1984 of a rule authorizing temporary suspension for a definite period up to two years<sup>388</sup> provides much needed flexibility in the South Carolina sanction scheme. Unlike the procedure recommended by the ABA Standards for Lawyer Discipline and Disability Proceedings,<sup>389</sup> however, the new South Carolina suspension rule does not allow a lawyer suspended for six months or less to be reinstated automatically at the termination of the suspension period. The revised Rule on Disciplinary Procedure requires the filing of a petition for reinstatement in all cases of suspension for a definite period, and the granting of the petition is discretionary.<sup>390</sup> Because of the supreme court's workload, adoption of the automatic reinstatement rule in the ABA Standards should

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385. *Id.* at 459-60, 309 S.E.2d at 755.

386. *See* S.C. SUP. CT. R. DISC. P. § 29 (Supp. 1984).

387. The Rule on Disciplinary Procedure requires a lawyer who is indefinitely suspended to wait at least two years to apply for reinstatement. *Id.* § 37. Because the respondent's North Carolina suspension was completed, it appears that the court could reasonably have held that the case was a proper one for a lesser sanction under the reciprocal discipline provision in § 29. Notably, one lawyer in South Carolina who plead guilty to possession of marijuana received only a private reprimand in 1975. *See* 1975 Bb. COMM'RS GRIEV. & DISC. ANNUAL REP.

388. *See* Davis Advance Sheets No. 51, Oct. 27, 1984 (amending S.C. SUP. CT. R. DISC. P. §§ 7A, 37, 38 (Supp. 1984)). Another important change made by the October 1984 amendments was the elimination of a former provision in § 8 of the rule which imposed an automatic minimum sanction against previously disciplined lawyers. *See supra* notes 180-82 and accompanying text.

389. ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 6.4 (1979). The ABA Standards also allow a suspension for a set term of up to three years as opposed to the two-year standard adopted by the South Carolina Supreme Court in October 1984. *See id.* § 6.3.

390. S.C. SUP. CT. R. DISC. P. §§ 37, 38 (Supp. 1984). *See supra* notes 177-79 and accompanying text.



be seriously considered.

Two other provisions in the ABA Standards for Lawyer Discipline and Disability Proceedings should also be carefully studied. First, under the ABA Standards, a disbarred lawyer may apply for reinstatement after five years.<sup>391</sup> Under the South Carolina Rule on Disciplinary Procedure, however, disbarment is permanent.<sup>392</sup> Second, probation for up to two years is specifically authorized by the ABA Standards.<sup>393</sup> For example, a lawyer undergoing treatment for alcohol abuse on an out-patient basis could be placed on probation and continue to practice law under the supervision of another lawyer without being placed on disability inactive status.<sup>394</sup> Similarly, an inexperienced lawyer who has committed a relatively minor ethical violation could be

391. ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 6.2 (1979).

392. S.C. SUP. CT. R. DISC. P. § 8A (Supp. 1984).

393. See ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 6.7 (1979).

394. *Id.* § 6.7 commentary. Under the ABA Standards, probation may be used as an independent sanction or in conjunction with another sanction. See *In re LaRocque*, 295 N.W.2d 97 (Minn. 1980) (probation following one year suspension); *In re Heffernan*, 315 N.W.2d 13 (Minn. 1984) (public reprimand, three-month suspension and three-year supervised probation). Probation may also be used in conjunction with letters of admonition. See ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS §§ 8.19, 8.20 (1979). See also *infra* notes 396-405 and accompanying text.

Section 7A of the Supreme Court Rule on Disciplinary Procedure authorizes the imposition of remedial action when the misconduct is caused by incompetence. It appears that remedial action, which is a form of probation, may only be ordered if either a private sanction or public reprimand is imposed. It is also unclear whether a remedial action under § 7A could be used as a condition of a lesser sanction, *e.g.*, a public reprimand if the probationary terms are met, but if not, then indefinite suspension. The South Carolina Supreme Court utilized this concept in a case decided before the promulgation of the Rule on Disciplinary Procedure. See *State v. Jennings*, 161 S.C. 263, 159 S.E.2d 627 (1931) (disbarment suspended on condition of \$30,000 repayment of funds improperly withdrawn from the estate of a minor). The court also recently used this technique to require a lawyer to return property to former clients. See *In re Pyatt*, 280 S.C. 302, 312 S.E.2d 553 (1984) (public reprimand would be automatically increased to an indefinite suspension if property was not conveyed to clients within 30 days).

The Rule on Disciplinary Procedure also authorizes the supreme court to direct that a lawyer reinstated after an indefinite suspension "limit his practice to certain areas of the law; work under the supervision of another attorney; require reports at intervals or any other reasonable requirement that will insure the protection of the public and the administration of justice." S.C. SUP. CT. R. DISC. P. § 38B (Supp. 1984). This rule is closer to the concept of probation envisioned by A.B.A. Standard § 6.7 than the more limited remedial action rule in § 7A of the Supreme Court Rule on Disciplinary Procedure.

placed on supervisory probation instead of having to suffer the stigma of a public sanction or a private reprimand.<sup>395</sup> These provisions, which emphasize the rehabilitative aspect of disciplinary proceedings, would provide desirable additional flexibility in the South Carolina sanction format.

#### D. *Authorization of Admonitions*

One of the principal recommendations of the landmark Clark Committee Report of 1970 was the adoption of letters of admonition in cases in which the respondent's conduct was not serious enough to warrant an official sanction, but was indicative of a failure to observe acceptable standards of conduct. The admonition letter would warn the respondent that similar behavior in the future might result in a sanction. The letter of admonition would be kept as part of the permanent records of the disciplinary agency and would be admissible in any future grievance proceeding involving the respondent, who would have the right to protest the admonition and demand a full hearing.<sup>396</sup> Many states<sup>397</sup> have adopted the admonition letter and the concept is included in ABA Standards for Lawyer Discipline and Disability Proceedings.<sup>398</sup>

Between 1968 and 1980, the Board of Commissioners on Grievances and Discipline issued eighty-six admonitions, which it called "letters of caution."<sup>399</sup> The supreme court ordered this practice discontinued in 1981,<sup>400</sup> stating that the letters were not specifically authorized by the Rule on Disciplinary Procedure. The court's reaction was apparently prompted by the fear that letters of caution were being used in cases in which at least a private reprimand was warranted. Substantial evidence existed supporting the court's fear. An examination of the summaries

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395. See S.C. SUP. CT. R. Disc. P. § 7A (Supp. 1984).

396. See CLARK COMMITTEE REPORT, *supra* note 1, at 7, 92-96.

397. See Steele & Nimmer, *supra* note 2, at 940, Table 1 (of the 43 jurisdictions surveyed, 79% authorize admonition letters); Dubin & Schwartz, *supra* note 78, at 8-9 (194 admonition letters issued between October 1, 1981, and September 30, 1982).

398. ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS §§ 8.10, 8.17 (1979). Under §§ 8.18 and 8.19 the respondent can contest the letter of admonition and demand a formal hearing.

399. See Table 1.

400. *In re Davis*, 276 S.C. 532, 280 S.E.2d 644 (1981). See also *In re Belser*, 277 S.C. 250, 287 S.E.2d 139 (1982).

published in the Board's annual reports reveals very little difference between the fact patterns of many of the private reprimands and those of the letters of caution. Significant differences may have existed but they were not readily apparent in the published summaries in the annual reports. Moreover, in 1980 the Board issued twenty letters of caution but no private reprimands, although, in 1979, the Board issued eight letters of caution and eleven private reprimands.<sup>401</sup>

Clearly, the supreme court was justified in questioning the use of letters of caution. However, perhaps it is time to reexamine this issue. The danger in refusing to allow letters of caution is the implication to lawyers and the public that the conduct in question is being officially condoned because the grievance is officially dismissed.<sup>402</sup> Although the cases in which admonitions or letters of caution are justified do not warrant a sanction, the conduct involved usually merits at least a warning to the offending lawyer, and, where appropriate, suggestions for corrective action.<sup>403</sup> Additionally, the inclusion of a summary of the facts prompting letters of caution as part of the Board's annual report will have an *in terrorem* effect on other lawyers.<sup>404</sup>

The potential abusive use of letters of caution can be minimized by requiring the Board to submit to the supreme court an annual report stating the basic facts of each case and the reasons why a letter of caution rather than another remedy was deemed appropriate. If this procedure is not considered sufficient, the court could assign the task of reviewing letters of caution to one or more of its members.<sup>405</sup> Another possible monitoring device

401. See 1979 & 1980 Bd. COMM'RS GRIEV. & DISC. ANNUAL REFS.

402. See CLARK COMMITTEE REPORT, *supra* note 1, at 92-96.

403. Under the ABA Standards for Lawyer Discipline and Disability Proceedings, a lawyer issued a letter of admonition can be placed on supervised probation. See ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS §§ 8.19, 8.20 (1979). This provision increases the flexibility of the sanction scheme.

404. Several of the letters of caution issued by the Board served that purpose. For example, a letter of caution issued in 1980 stated that it was improper to charge a contingency fee for any recovery received by a client for personal injury protection insurance coverage and warned that disciplinary sanctions would be imposed in the future for similar conduct.

405. A supreme court justice could review a file before the letter of caution was issued or review on an annual basis all the files in which letters of caution were issued. If abuses were discovered, the supreme court could discontinue the authorization or impose additional restrictions on their use.

for the system is to limit letters of caution to only those grievances that have been previously assigned to an investigator, and to have a procedural rule under which a vote by the Executive Committee on whether to recommend a letter of caution would be taken only after the Executive Committee had voted in favor of dismissing the grievance.

### *E. Competency Peer Review System*

The issue of neglect is present in the majority of the disciplinary sanction cases which involve failure to act competently according to the mandate of DR 6-101.<sup>406</sup> Relatively few disciplinary sanctions have been imposed for inadequate knowledge and preparation, although there have been a significant number of malpractice verdicts against lawyers for these categories of incompetence.<sup>407</sup>

Disciplinary sanctions and malpractice verdicts, however, deal with only the most serious cases of incompetence. For many years, the organized bar has been searching for effective ways of discovering and remedying minor acts of incompetence so that these more serious adverse consequences can be avoided.<sup>408</sup> Continuing legal education programs, particularly mandatory education programs such as the yearly twelve-hour requirement in South Carolina, are helpful, but education programs alone will not cure the incompetence problem.

Another technique for dealing with incompetence is a peer review system in which lawyers with competence problems may be counseled and supervised by other practitioners under the auspices of a duly authorized bar association peer review committee. A model peer review system was proposed by the highly-respected ALI-ABA Committee on Continuing Professional Ed-

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406. This has certainly been true in South Carolina. *See supra* notes 276-77 and accompanying text.

407. *See, e.g.,* *Jennings v. Lake*, 267 S.C. 677, 680-81, 230 S.E.2d 903, 904-05 (1976); *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975). *See generally* MALLEN & LEVIT, *supra* note 348, §§ 200-17.

408. *See, e.g.,* ABA TASK FORCE ON PROFESSIONAL COMPETENCE, INTERIM REPORT (1982); SPECIAL COMM. FOR A STUDY OF LEGAL EDUCATION OF THE ABA, LAW SCHOOLS AND PROFESSIONAL EDUCATION (1980)(often referred to as the Crampton Report); Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts, 83 F.R.D. 215 (1979)(often referred to as the Devitt Committee Report).

ucation in 1980.<sup>409</sup> The disciplinary system could be interfaced with a peer review system by authorizing the Board of Commissioners on Grievances and Discipline to refer to the peer review committee grievance cases concerning minor acts of incompetence that do not deserve disciplinary sanctions.<sup>410</sup> The peer review committee would in turn be directed to refer to the Board serious cases of incompetence that come to it from other sources.<sup>411</sup> This mutual referral concept is similar to the long standing cooperation between the Board of Commissioners on Grievances and Discipline and the South Carolina Bar Resolution of Fee Disputes Board, which has jurisdiction to resolve fee disputes that do not concern serious ethical issues under DR 2-106 of the Code of Professional Responsibility.<sup>412</sup> Because of the

409. ALI-ABA COMM. ON CONT. PROF. EDUC., A MODEL PEER REVIEW SYSTEM (1980). The model suggests three types of peer review: a voluntary program in which lawyers seek assistance from other more experienced lawyers, a disciplinary peer review program which involves a cooperative effort between a disciplinary board and a peer review committee, and a law practice peer review program in which a peer review team evaluates the office procedures of a law firm.

410. The Board already has this authority in cases in which misconduct has been found. The Supreme Court Rule on Disciplinary Procedure states:

[W]hen misconduct is based wholly or partly upon professional competency in the practice of law, the hearing panel and/or the Executive Committee shall recommend such reasonable action as necessary to insure competency in the practice of law, such as requiring the respondent to undertake additional professional training. All such action shall be subject to the direction and supervision of the Court or its designee.

S.C. Sup. Ct. R. Disc. P. § 7 (Supp. 1984). Under the proposal suggested in the text, this authority to require or recommend competency counseling would be extended to cases that are dismissed by the Board because they are not serious enough to merit a disciplinary sanction. Additionally, the suggestion implies that the supreme court will designate the peer review committee as the supervisory agent for all competency training and supervision ordered in sanction cases. The Board of Commissioners on Grievances and Discipline simply does not have time to devise and supervise competency and remedial programs. Perhaps this is the reason that the Board has apparently never issued a ruling under the authority in § 7A of the Rule on Disciplinary Procedure.

411. The peer review committee should also have authority to remand cases referred to it by the Board of Commissioners on Grievances and Discipline when the lawyer refuses to cooperate with the peer review committee or fails to complete the approved remedial program successfully.

412. The Board of Commissioners on Grievances and Discipline regularly refers minor fee dispute cases to the Resolution of Fee Disputes Board, which in 1983 handled 65 cases. An internal study of the Fee Disputes Board conducted by the South Carolina Bar reveals that from 1978, when it began operations, through June 11, 1984, the Disputes Board had processed 265 cases. Telephone interview with Ann Wilson, South Carolina Bar Assoc. (Aug. 14, 1984). The fee charged by the lawyer was reduced in 25% of the cases. *Id.* The total amount of reductions was \$38,844. *Id.* Another 21% of the cases were

volume of grievances it receives each year, the Board of Commissioners on Grievances and Discipline is likely to be the largest source of cases processed by a peer review committee. Therefore, a peer review system has the potential to play a very important role in the overall effort to rehabilitate lawyers with competency problems.

A number of difficult issues must be resolved before the peer review concept could be implemented.<sup>413</sup> First, acceptable and objective standards for determining the types of incompetence that should be submitted to the peer review committee must be developed. For example, cases involving a lawyer who negligently overlooks a filing deadline on a single occasion should be distinguished from cases in which a lawyer is unaware of basic procedural rules or has demonstrated an inability to present evidence in an effective manner in one or more trials. Additionally, different types of remedial programs designed to deal with specific types of incompetence should be devised. An effective remedial program for counseling a lawyer whose competence problems are caused by lack of an adequate docket control system or other poor office management procedures is quite different from the type of program that is required to counsel a lawyer who has difficulty handling trial work in a competent manner.

An appropriate organizational framework for the peer review system must also be devised. The Resolution of Fee Disputes Board is perhaps a good model to follow.<sup>414</sup> The Fee Disputes Board has an Executive Council which screens and refers cases to various circuit panels located throughout the state. The circuit panels are composed of five to fifteen lawyers, depending on circuit caseloads.

Implementing a peer review system raises other difficult is-

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settled prior to a hearing. The remainder of the cases resulted in a finding of no merit (46%) or no jurisdiction (7%). *Id.*

413. See generally ALI-ABA COMM. ON CONT. PROF. EDUC., REPORT ON THE HOUSTON CONFERENCE—ENHANCING THE COMPETENCE OF LAWYERS 219-97 (1981); Committee on Prof. Resp., *The Disposition of Cases of Professional Incompetence in the Grievance System*, 32 REC. A.B. CITY N.Y. 130 (1977); Martyn, *supra* note 355, at 723-32; Smith, *Peer Review: Its Time Has Come*, 66 A.B.A. J. 451 (1980).

414. The charter and by-laws of the Resolution of Fee Disputes Board were originally adopted by the South Carolina Bar House of Delegates in January 1978 and amended on June 3, 1982.

sues. These issues include the confidentiality of disclosures made by a lawyer to a member of the peer review committee,<sup>415</sup> the admissibility in a malpractice case or disciplinary proceeding of the fact that the lawyer had been subjected to peer review,<sup>416</sup> the conditions under which peer review would be mandatory as opposed to voluntary, and the relation of the peer review program to the Silent Partner Program which the South Carolina Bar recently implemented.<sup>417</sup> Despite these problems, a peer review system has great potential and deserves careful study in South Carolina and other states.<sup>418</sup>

### F. Expunction of Records

The Supreme Court Rule on Disciplinary Procedure does not contain a provision for expunging files on dismissed grievances. Unquestionably, files concerning cases in which some kind of sanction was imposed should be maintained. There is also a persuasive argument for keeping dismissed files for a reasonable period of time on the grounds that such retention will enable the Board of Commissioners on Grievances and Discipline to more easily detect lawyers who have multiple grievances filed against them. While the grievances may justifiably be dismissed individually as nonmeritorious, a series of grievances against the same lawyer over a short time span may be indicative of more serious underlying ethical problems which merit an investigation. Most of these multiple grievance cases are likely to occur over a two or three year time span. Therefore, there is no need to keep dismis-

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415. See, e.g., ALI-ABA COMM. ON CONT. PROF. EDUC., A MODEL PEER REVIEW SYSTEM 55 (1980).

416. The ALI-ABA Model Peer Review System recommends that referral to the peer review committee should be inadmissible in a malpractice suit, but admissible in a disciplinary action when the lawyer fails to participate in the program or fails to remedy the problem. See *id.* at 45-46.

417. A descriptive brochure of the Silent Partner program may be obtained from the South Carolina Bar, P.O. Box 11039, Columbia, South Carolina 29211. It is strictly a voluntary program under which a lawyer seeks assistance from a list of silent partners maintained by the South Carolina Bar Lawyer Referral Service. The lawyer requesting the referral does not have to identify himself to the Lawyer Referral System, which maintains records only on the number of referrals requested.

418. Perhaps the South Carolina Supreme Court Commission on Continuing Lawyer Competency could be assigned the task of conducting a study and making recommendations on this concept.

sed files beyond that period.<sup>419</sup>

Unless an expunction rule exists, lawyers may fear that there is a permanent blemish on their official record even though a grievance has been dismissed. Attorneys may also feel that improper inferences may be drawn by the Board of Commissioners on Grievances and Discipline from old dismissal files when an unconnected grievance is filed several years later. This fear may in turn inhibit lawyers and judges from referring to the Board evidence of misconduct they have observed unless the misconduct is blatantly unethical.<sup>420</sup>

### G. *Addition of Lay Members to the Board of Commissioners on Grievances and Discipline*

While some lawyers may consider this suggestion a radical departure from the traditional framework of self-regulation, at least thirty-two states, including North Carolina and Georgia, now have nonlawyers serving on their disciplinary boards.<sup>421</sup> The ABA Standards for Lawyer Discipline and Disability Proceedings recommend that each hearing panel have one lay person and two lawyers.<sup>422</sup> Under this proposal, lawyers will always constitute the majority of the panels. Additionally, the panel's recommendations, like those of the Executive Committee, are merely advisory to the supreme court. Thus, as a practical matter, the impact of lay members on the Board of Commissioners on Grievances and Discipline is primarily symbolic.<sup>423</sup>

The real value of adding lay members is increased public confidence in the disciplinary system and the enhanced public

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419. ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 3.12.1 (1979) recommends a three year self-executing expunction rule.

420. The South Carolina Supreme Court recently authorized the Board of Commissioners on Grievances and Discipline to purge all pre-1980 dismissal files. This fact has not as yet been publicized. In any case, the inclusion of a specific expunction provision in the Rule on Disciplinary Procedure is probably necessary to reassure lawyers that improper use of old files is not taking place.

421. See Gray & Harrison, *supra* note 98, at 544-46. According to a 1975 survey, only nine states authorized lay members at that time. 1 ABA B. LEADER 9 (1975).

422. See ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE, STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS §§ 3.4, 3.6 (1979).

423. See generally Lobe, *Confessions of a Nonlawyer on a Disciplinary Board*, 1 ABA B. LEADER 9 (1975).



image of the bar.<sup>424</sup> A collateral benefit of the addition is the ability to reduce the number of formal hearings for each lawyer-member of the Board. The increasing number of investigations and hearings in the past few years has substantially increased the time commitments required by Board members. The use of associate commissioners<sup>425</sup> will alleviate some of the pressure of investigative duties, but will have no impact on the backlog of hearings because associate commissioners have no hearing authority.

#### H. Increased Publicity Concerning the Board of Commissioners on Grievances and Discipline's Activities

Lawyers specifically and the public generally need additional information about the disciplinary system.<sup>426</sup> Publication of the names and the basic facts about lawyers who have been temporarily suspended or publicly disciplined in *The Transcript* and in newspapers in areas where the respondent maintained an office is useful but insufficient.<sup>427</sup>

The Board's annual report each year is supposed to be published in *The Transcript*. Apparently, however, the report is not circulated to the media. The annual report contains basic statistical data about the Board's activities and a brief summary of the facts in all public sanction and private reprimand cases. Additional useful information could easily be included in these annual reports. For example, an analysis of dismissed cases would give lawyers a better idea of the types of conduct generating client complaints.<sup>428</sup> If this information were disseminated to the media, the public would be provided with information concerning the types of conduct that will not result in sanctions. Conse-

424. See generally Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619 (1978); Shallenberger, *Nonlawyers Welcome on the California Bar Board*, 64 A.B.A. J. 800 (1978).

425. See S.C. SUP. CT. R. DISC. P. § 9E (Supp. 1984).

426. Empirical research in the mid 1970's indicated that lack of knowledge about the disciplinary system was widespread. See Steele & Nimmer, *supra* note 2, at 956-64. See also CLARK COMMITTEE REPORT, *supra* note 1, at 143-46.

427. The information provided the public discloses only the name of the lawyer and the discipline imposed by the supreme court. There is no information on how to file a grievance included in these releases, which are primarily designed to alert the disciplined or suspended lawyer's clients. Thus, they are not really useful to the public at large.

428. See Gray & Harrison, *supra* note 98, at 553-57 (1982).

quently, such dissemination could ultimately reduce the number of frivolous grievances filed.

Categorizing offenses and types of practice may reveal patterns of misconduct which warrant a special warning to lawyers by the Board. The Board could include these warnings in its annual report or in special articles published in *The Transcript*. One such notice was published in the May 1984 issue of *The Transcript*. The Board reported that it had received a number of grievances concerning lawyers who, without proper authority, signed clients' names to legal documents, as well as several complaints concerning alleged unauthorized payments to doctors out of settlement proceeds.<sup>429</sup> Similar articles in the future would be helpful.<sup>430</sup>

The publication of additional statistics would also be useful.<sup>431</sup> Information comparing grievance cases from South Carolina with those from other states would be particularly interesting. This information is readily available from the ABA National Discipline Data Bank.<sup>432</sup> Generating and distributing this additional information will take considerable staff time, but it will enhance the educational and deterrent effects of the disciplinary system as well as increase public awareness of, and confidence in, the bar and the judicial system.<sup>433</sup>

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429. See *The Transcript*, May, 1984, at 8.

430. The Board published a similar warning article on advertising and solicitation on the first page of the January 1977 issue of *The Transcript*. An open letter reminding lawyers of the absolute duty to return all documents and property that belong to a client following a dismissal was also published in the October 1984 issue of *The Transcript*. Finally, some material on the most frequent types of grievances filed against lawyers was included in a 1978 article on changes in the Rule on Disciplinary Procedure. See Youngblood, *Revised Rule on Disciplinary Procedure*, *The Transcript*, May, 1978, at 2, 5.

431. California, Illinois, Michigan, New York and many other states publish quite detailed annual statistics on the operation of their grievance systems. In 1980, the National Organization of Bar Counsel developed a Model Form for Universal Statistical Reporting of Disciplinary Activities that could provide the basis for generating a significant amount of additional useful statistical information about the Board's activities.

432. The A.B.A. Center for Professional Responsibility, which operates the National Discipline Data Bank, annually publishes composite statistics on the operation of each state's disciplinary system. Since South Carolina participates in the National Discipline Data Bank, the Board could use the Data Bank report forms to generate additional statistical information to include in its annual reports. The Model Form developed by the National Organization of Bar Counsel is in many respects superior to the National Discipline Data Bank report form. See *supra* note 431. The Data Bank report form, for example, does not include information on private reprimands or admonitions.

433. The Supreme Court Rule on Disciplinary Procedure requires that, except for

### I. Implementation of Proposed Rules on Attorney Trust Accounts

On August 16, 1983, the South Carolina Supreme Court issued proposed detailed regulations governing trust accounts and trust property held by law firms.<sup>434</sup> The proposed rules authorized the Board of Commissioners on Grievances and Discipline to order random examinations of lawyers' trust account books and records and to conduct preliminary investigations of trust account books and records when it receives information that a lawyer is not in compliance with the rules. If the examination reveals problems that warrant further investigation, the Board could petition the supreme court for an order appointing an accountant to conduct an audit at the firm's expense. The court proposed corresponding changes in the Supreme Court Rule on Disciplinary Procedure to deal with violations of the Rules on Trust Accounts.<sup>435</sup> On December 16, 1983, however, the supreme court issued an order stating that the Rules on Trust Accounts would not become effective until further order of the court.<sup>436</sup>

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orders involving public sanctions and temporary suspensions and cases in which the respondent has waived confidentiality, all information concerning a grievance must be kept completely confidential. *See* S.C. SUP. CT. R. DISC. P. § 20 (Supp. 1984). The ABA Standards differ in two respects: (1) Except for the deliberations of the hearing committee, Board, or court, hearings are open to the public unless restricted by a protective order issued to preserve the confidentiality of particular evidence or witnesses; and (2) the pendency, subject matter, and status of an investigation may be disclosed if "the proceeding is based upon allegations that have become generally known to the public" *Id.* § 8.24(c). *See* Gray & Harrison, *supra* note 98, at 546-50. Although the open hearing policy is based essentially on a public confidence argument, *see* S.C. SUP. CT. R. DISC. P. § 8.25 commentary (Supp. 1984), there are equally persuasive countervailing public policy reasons for a closed hearing policy. A rule allowing a limited disclosure that an investigation is pending in a case of widely-known alleged misconduct, however, can help avoid the public relations problem that exists when the press inquires about a particular case. Under the existing rule, the Board must issue a statement stating that it cannot disclose whether or not an investigation is pending. A more readily acceptable approach would permit the issuance of a statement confirming or denying that the investigation is pending and pointing out that confidentiality is required unless and until the supreme court issues a sanction order.

434. The order was attached to Issue No. 23 of the Davis Advance Sheets, Aug. 20, 1983.

435. *Id.*

436. S.C. SUP. CT. ORDER, Dec. 16, 1983. Although the court has not yet issued a further order, a *per curiam* opinion concerning trust fund violations issued in January 1984 states: "This case emphasizes the need for a rule governing the handling of trust accounts in this state." *In re Moore*, 280 S.C. 178, 183, 312 S.E.2d 1, 3 (1984).

The supreme court did not explain its action.

The extraordinary number of disciplinary cases involving trust account violations in South Carolina<sup>437</sup> is a clear indication of the need for these proposed rules. At least twelve other states have authorized similar audit and verification requirements in recent years.<sup>438</sup> The justification for these procedures is twofold: (1) The rules would promote lawyer competence by requiring effective record keeping procedures<sup>439</sup> and (2) the investigative and audit powers would provide a way to detect trust account violations before clients are seriously hurt and restitution becomes impossible.

The random audit power is crucial to the success of the plan. Many serious trust account violations are hard to detect. Not all clients who fail to receive the appropriate share of settlement proceeds file a grievance with the Board of Commissioners on Grievances and Discipline; therefore, many investigations which could detect misappropriations are never commenced. The ability to initiate investigations, rather than waiting for the filing of grievances, is a preferable and more effective enforcement mechanism.<sup>440</sup> Moreover, the *in terrorem* effect of a possible random audit will certainly sensitize practitioners to the im-

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437. See Tables 3 and 17. See also *supra* notes 296-312 and accompanying text.

438. See Gray & Harrison, *supra* note 98, at 568. Delaware, Maryland, Virginia, North Carolina, and Florida are included in the list. *Id.* at 568 n.130. The Delaware trust account rules, which in many respects are more stringent than the proposed South Carolina Rules, are analyzed in Carpenter, *The Negligent Embezzler: Delaware's Solution*, 61 A.B.A. J. 338 (1975).

439. The proposed South Carolina Supreme Court Rules on Trust Accounts specify the books and records that must be kept and provide concrete guidelines for various issues that have caused difficulties. The rules, for example, specify how retainer fees and settlement checks are to be handled. In this respect, the proposed rules are superior to those adopted in some other states.

440. Another suggestion for uncovering lawyer misconduct which might otherwise escape detection by a disciplinary board is to monitor malpractice cases. See Committee on Prof. Resp., *supra* note 413, at 135-36 (clerk of court should be required to file notice of all malpractice claims with the disciplinary board). Statistically, less than 30% of all malpractice claims result in a lawsuit, and payment is made prior to filing a complaint in approximately 20% of the cases. See Gates, *supra* note 349, at 81, Figure 10. Thus, for this system to be fully effective as a detection device, malpractice insurers would have to report claims they process to the disciplinary board in the state where the insured is admitted to practice. Additionally, the disciplinary committee would have to screen non-payment cases in order to detect those cases that concerned ethical misconduct but which were dismissed because the statute of limitations had expired or because damages were not provable.

portance of keeping their trust accounts in conformity with the court's requirements. Finally, by providing a concrete form of accountability, a random audit procedure would enhance the credibility of South Carolina's disciplinary process.

### J. Supreme Court Opinions

On the whole, the disciplinary opinions issued by the South Carolina Supreme Court are reasonably thorough and instructive. The court has consistently taken a hard-line approach to certain types of misconduct, such as neglect and improper handling of trust accounts.<sup>441</sup> By now, the court's message is clear that such conduct will not be tolerated.

The court has also, on numerous occasions, included statements in its opinions designed to warn lawyers of potential widespread problems.<sup>442</sup> On some occasions, however, the court has failed to provide a detailed statement of facts or has failed to distinguish prior cases in which a different sanction had been imposed for similar conduct.<sup>443</sup> The court has, on occasion, failed to discuss an ethical issue that the facts presented.<sup>444</sup> Although these are minor criticisms, they are mentioned because published opinions are the principal vehicle by which the court expresses to the bar its views on lawyer behavior. If published opinions are to completely fulfill their deterrent purpose, they must be as thorough as the circumstances warrant. Perhaps the inclusion of additional excerpts from the panel hearing reports would be helpful, particularly in cases in which the facts are novel or complex, or in which the nature of the misconduct is not obvious.<sup>445</sup> Facts and conclusions may appear clear to the court because it has the entire case file before it when the case is being decided. This is not always true for a lawyer reading a short published opinion. Brief opinions may confuse rather than

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441. See *supra* notes 275-283, 296-312 and accompanying text.

442. See, e.g., *In re Delgado*, 279 S.C. 293, 306 S.E.2d 591 (1983) (contacts with jurors); *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982) (failure to cooperate with the Board of Commissioners on Grievances and Discipline).

443. Compare, e.g., *In re Lake*, 269 S.C. 170, 236 S.E.2d 812 (1977) with *In re Drose*, 275 S.C. 414, 272 S.E.2d 173 (1980). See also *supra* notes 226-28 and accompanying text for a discussion of cases concerning failure to file income tax returns.

444. See *In re Boensch*, 277 S.C. 148, 283 S.E.2d 442 (1981) (50% referral fee).

445. For a recent opinion where the Court used this technique advantageously, see *In re Moore*, 280 S.C. 178, 312 S.E.2d 1 (1984).

help the reader.

Another potentially useful device, adopted by many other states, is the practice of issuing prospective sanction opinions in cases in which the supreme court concludes that more stringent sanctions for a particular form of misconduct should be imposed.<sup>446</sup> The court used this technique in 1982 when it published a private reprimand opinion concerning contacts with families of jurors.<sup>447</sup> The lawyers' names were not mentioned in the caption of the case. This type of opinion enables the court to provide an appropriate advance warning without being subject to criticism for punishing a particular lawyer for behavior that, before the opinion was published, was not considered serious enough to warrant a severe sanction. A prospective sanction opinion can also be useful as a fair way to deal with conduct which is not specifically proscribed by the disciplinary rules, which does not cause a client to suffer damage or other injury, and upon which the existing authority on the proper behavior is unclear or nonexistent.<sup>448</sup>

## V. CONCLUSION

The message delivered by the South Carolina Supreme Court during the past fifteen years is unmistakably clear: lawyers who fail to comply with the disciplinary rules in the Code of Professional Responsibility do so at their peril. Now that the supreme court has established the ground rules, perhaps it is time to place a greater emphasis on rehabilitation of lawyers and to explore methods of resolving grievances that do not warrant disciplinary sanctions. Additionally, procedures should be developed to make the disciplinary system better understood by the bar and by the public. Publishing additional information about the activities of the Board of Commissioners on Grievances and Discipline will be an important first step in achieving this goal.

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446. See, e.g., *In re Bunker*, 279 Minn. 47, 199 N.W.2d 628 (1972).

447. *In re Two Anonymous Members of the South Carolina Bar*, 278 S.C. 477, 298 S.E.2d 450 (1982).

448. See *In re Goodwin*, 275 S.C. 274, 305 S.E.2d 578 (1983)(contempt citation upheld but no sanction imposed for lawyers' conduct after discovering that their client intended to commit perjury).

