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Professional Responsibility

Mac D. Heavener III

PROFESSIONAL RESPONSIBILITY

I. SUPREME COURT DEMANDS STRICTER ENFORCEMENT OF CONFIDENTIALITY RULES

In *In re an Anonymous Member of the South Carolina Bar*[1] the South Carolina Supreme Court warned the South Carolina Bar that it would no longer condone unwitting violations of rule 20 of the Supreme Court Rules on Disciplinary Procedure.[2] The court also held that the confidentiality requirements of rule 20 apply to all parties in a grievance proceeding and even to the attorney under investigation.[3]

This case arose after an attorney represented a couple in an adoption proceeding in which the wife sought to have her new husband adopt her natural child. The family court judge required an unconditional consent from the child's biological father. The biological father was willing to give his consent, but the attorney failed to obtain it. As a result, the couple filed a complaint with the Board of Commissioners on Grievances and Discipline.[4] A board member intervened, obtained the consent, and forwarded it to the attorney. Again, the attorney failed to take further action. The supreme court held that the attor-

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1. 297 S.C. 527, 377 S.E.2d 572 (1989).
2. S.C. SUP. CT. R. DISC. P. 20. The rule provides in part:
A. All records and proceedings involving allegations of Misconduct by an attorney shall be confidential and shall not be disclosed unless:
(1) The Respondent shall in writing request that they be public;
(2) The investigation is predicated upon the conviction of the respondent for a crime or upon public discipline imposed on the Respondent in another jurisdiction.
3. *Anonymous Member*, 297 S.C. at 530, 377 S.E.2d at 574.
4. Anyone can file a complaint with the Board of Commissioners on Grievances and Discipline. Upon the filing of a complaint, the chairman of the executive committee reviews the grievance. If the complaint is not frivolous, the chairman will inform the lawyer in writing and request a written response. The chairman usually appoints a member of the board or an associate commissioner to investigate the grievance. The investigative report usually is due within 60 days. The executive committee makes a probable cause determination when it receives the investigative report. If probable cause exists, the committee will issue a complaint. Next, a panel composed of three members of the board will hear the case. The hearing panel makes findings of fact, conclusions of law, and recommends sanctions if any are appropriate. The attorney may appeal the panel's report to the executive committee and the supreme court. *See generally* Haynsworth, *Disciplinary Actions by the South Carolina Supreme Court and the Board of Commissioners on Grievances and Discipline: Lawyers Beware*, 36 S.C.L. REV. 309, 326-36 (1985) (explains lawyer disciplinary process).

ney's inaction was a neglect of a legal matter entrusted to him and the court issued a private reprimand.[5]

After the attorney responded to the grievance board, he sent copies of his response to the family court judge presiding over the case, the family court coordinator, and the guardian ad litem. The attorney also publicly spoke of the matter.[6] Thus, the attorney violated the rules of confidentiality.

The supreme court used its opinion in *Anonymous Member* as an opportunity to "call the bar's attention to paragraph 20 of the Rules on Disciplinary Procedure . . . ."[7] The court held that this rule applies to all parties to the grievance proceeding, including the attorney under investigation.[8]

Under rule 20 a grievance proceeding can be discussed publicly only in the following three situations: (1) if the attorney under investigation waives the confidentiality of the proceeding by a written request that the proceeding be public; (2) if the investigation is based upon a criminal conviction; and (3) if the investigation is based upon public discipline in another jurisdiction.[9] The attorney under investigation cannot discuss the matter unless one of these conditions is met.[10]

The court's reasoning initially may appear unsound. The apparent purpose of a confidentiality rule is to protect an attorney's reputation from the harm that could result from a frivolous complaint.[11] Therefore, the attorney arguably should not be compelled to accept that protection. In a similar case, the California Supreme Court stated, "Although the State Bar has a duty to protect an attorney by keeping a pending investigation against him confidential . . . the attorney is not compelled to accept that protection."[12] The South Carolina Supreme Court's decision appears rigid because an attorney must file a written request before he is able to speak publicly about his own investigation.

Despite this apparent anomaly, the court's decision can be justified on two grounds. First, the decision's bright-line rule provides certainty. Under rule 20, a violation of the confidentiality requirement is

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5. *Anonymous Member*, 297 S.C. at 523-29, 377 S.E.2d at 573-74. The court based this decision on the Model Code of Professional Responsibility Disciplinary rule 6-101(A)(3), which prohibits a lawyer from the neglect of a legal matter entrusted to him. *See* S.C. SUP. CT. R. 33.

6. *Anonymous Member*, 297 S.C. at 529, 377 S.E.2d at 573.

7. *Id.* at 530, 377 S.E.2d at 574.

8. *Id.*

9. *See* S.C. SUP. CT. R. DISC. P. 20(A).

10. *Anonymous Member*, 297 S.C. at 530, 377 S.E.2d at 574.

11. *See* Peterson v. Sheran, 474 F. Supp. 1215, 1221 (D. Minn. 1979), *aff'd in part, vacated in part*, 635 F.2d 1335 (8th Cir. 1980).

12. Jacoby v. State Bar of Cal., 19 Cal. 3d 359, 368 n.5, 562 P.2d 1326, 1332 n.5, 138 Cal. Rptr. 77, 83 n.5 (1977).

considered to be contempt of court.[13] For example, if the court determines that someone is in contempt for speaking publicly about a grievance proceeding in which no written request has been filed by the attorney charged, but the attorney has been speaking publicly about the proceeding himself, the person could claim that the attorney had waived confidentiality by his conduct. This would require a factual determination. Under the South Carolina Supreme Court's decision, however, no need for a factual determination exists. Unless the investigation is based upon a criminal conviction or discipline in another jurisdiction, the court must ascertain only whether or not a written request is present. Thus, the court's decision promotes judicial economy.[14]

The second and more persuasive justification for the supreme court's decision is found in the language of the rule itself. Rule 20 specifically includes the attorney under investigation in a list of persons who shall not "mention the existence of any such proceeding, nor disclose any information pertaining thereto."[15] Therefore, if the court holds that the rule does not apply to the attorney under investigation, the court contradicts the plain language of the rule itself.

Whether or not it is proper, "[t]raditionally, the disciplinary process has been conducted in secret."[16] A rule on confidentiality serves three purposes. First, the confidentiality rule serves to protect the reputation of an attorney who is the subject of a meritless complaint.[17] Second, the rule protects the person who brings the complaint.[18] Without this confidentiality, the complainant might be harrassed by the attorney under investigation or by his friends. Third, the rule maintains the integrity of the grievance board by protecting the board members from outside influences.[19] Thus, strong policy reasons support a confidentiality rule. Furthermore, some commentators argue that the pro-

13. S.C. SUP. CT. R. DISC. P. 20(E).

14. *Anonymous Member*, 297 S.C. at 530, 377 S.E.2d at 574.

15. S.C. SUP. CT. R. DISC. P. 20(D).

16. S. WOLFRAM, MODERN LEGAL ETHICS § 3.4, at 107 (1986).

17. *See Peterson*, 474 F. Supp. at 1221. This is probably the primary purpose in South Carolina because an attorney is given discretion to determine whether he wants the grievance proceeding to be made public. *See* S.C. SUP. CT. R. DISC. P. 20(A)(1).

18. Younger v. Solomon, 38 Cal. 3d 289, 298, 113 Cal. Rptr. 113, 119 (Dist. Ct. App. 1974). A South Carolina case illustrates this purpose. In *In re* Edwards, 279 S.C. 89, 302 S.E.2d 339, *cert. denied*, 464 U.S. 935 (1983), an attorney who was subject to an investigation sued the complainant for criminal and civil libel actions. The court held that the attorney's actions violated rule 20.

19. People v. Pacheco, 199 Colo. 470, 472, 618 P.2d 1102, 1104 (1980); Shaman & Begue, *Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process*, 58 TEMP. L.Q. 755, 765-66 (1985).

ceedings should follow even higher standards of confidentiality.[20]

On the other hand, strong arguments support the removal of confidentiality rules from grievance proceedings. The most compelling reason is to reinforce the integrity of the disciplinary system in the eyes of the public.[21] If the public is aware of attorney misconduct,[22] and if relatively few grievances result in discipline,[23] the public will suspect corruption and illegitimate dealing. Moreover, "the public has an interest in systems that purport to be operated in order to protect the public."[24] The primary reason for the disciplinary system is to protect the public and the courts from an unfit practitioner.[25] Also, it is inequitable for a judicial system to protect the rights of freedom of speech, freedom of the press, and freedom of assembly in proceedings against nonattorneys that are based upon "probable cause criminal charges," but at the same time deny these rights in proceedings that are based on probable cause against lawyers.[26] Finally, because the public grants lawyers, through licensing requirements, a monopoly to deliver legal services, the public should be allowed to be present at proceedings in which an abuse of a lawyer's license is called into question.[27]

A confidentiality rule should attempt to reconcile the conflict between secrecy and openness.[28] This requires courts to balance the in-

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20. *See* Nordby, *The Burdened Privilege: Defending Lawyers in Disciplinary Proceedings*, 30 S.C.L. REV. 363, 401 (1979) (suggests that disciplinary orders should be captioned anonymously because no legitimate public interest is served by having a respondent's name published).

21. Winter, *Open Up Lawyer Discipline*, A.B.A. B. LEADER, Nov.-Dec. 1980, at 25.

22. The public arguably should not know because all participants in the grievance proceeding are subject to the same confidentiality rules. Rule 20, however, may apply only to participants. The public may know of an attorney's misconduct even without knowing of a grievance proceeding. For instance, the public might learn of misconduct through the press. Furthermore, if the press is not a party to the grievance proceeding, the press cannot be punished for publishing information about it. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837-42 (1978).

23. In 1985 in South Carolina, approximately 7.5% of all grievances resulted in a disciplinary sanction. *See* Haynsworth, *supra* note 4, at 326.

24. S. WOLFRAM, *supra* note 16, at 107.

25. *In re* Burr, 267 S.C. 419, 423, 228 S.E.2d 678, 680 (1976).

26. Gray & Harrison, *Standards for Lawyer Discipline and Disability Proceedings and the Evaluation of Lawyer Discipline Systems*, 11 CAP. U.L. REV. 529, 546-50 (1982).

27. *Id.*

28. A confidentiality rule must comport with the Constitution as well. In Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837-42 (1978), the Supreme Court held that a third person who is not a party to a judicial disciplinary proceeding cannot be subjected to fines for publishing truthful information about the proceeding. The South Carolina rule provides that "[n]o persons whomsoever in any way connected with a matter before the Board, or otherwise, . . . shall mention the existence of any such proceeding, nor disclose any information pertaining thereto . . . ." S.C. SUP. CT. R. DISC. P. 20(D). If the words "or otherwise" include persons who are not involved in the

terests of the attorney under investigation with the interests of the public. The South Carolina rule unfortunately does not achieve this balance. In South Carolina "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."[29] Thus, the public is not informed of any action until the supreme court publishes a decision. Moreover, the general public is not familiar with judicial opinions and cannot be expected to read them. Indeed, the published decision is all that the public receives, and the file itself is not subject to disclosure.[30] Therefore, the South Carolina rule neglects the public interest.

To solve this problem, perhaps South Carolina should adopt the approach of the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement. Under the ABA rules, a grievance proceeding is confidential until the filing and service of formal charges,[31] at which time the proceeding becomes public. This rule protects attorneys from the harm that could result from the publicity of a frivolous complaint.[32] Once the board finds that probable cause exists, however, a frivolous complaint is no longer a serious risk. At this point, the interests of the public become paramount, and if the complaint lacks further merit, the court will vindicate the attorney under investigation through the hearing.[33]

This rule will benefit the bar as a whole. Greater openness in dealing with allegations of impropriety will result in greater respect for the law and the legal profession.[34] The ABA rule will bring renewed confidence and credibility to the disciplinary proceeding. This "renewed

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proceeding, the rule may be an unconstitutional infringement upon protected speech. *See Landmark Communications, Inc.*, 435 U.S. at 837-42. *See generally* Erickson, *First Amendment Limitations on the Confidentiality of Lawyer Disciplinary and Disability Proceedings*, 67 KY. L.J. 823 (1978) (examines confidentiality and First Amendment limits on confidentiality requirements).

29. Haynsworth, *supra* note 4, at 333.

30. *Id.* Some courts, however, have held that the file is subject to public disclosure. *See, e.g.*, Sadler v. Oregon State Bar, 275 Or. 279, 281-86, 550 P.2d 1218, 1220-22 (1976) (held certain records subject to disclosure under state public records law). *See generally* Annotation, *Restricting Access to Records of Disciplinary Proceedings Against Attorneys*, 83 A.L.R.3d 749 (1978); Annotation, *Discovery or Inspection of State Bar Records of Complaints Against or Investigations of Attorneys*, 83 A.L.R.3d 777 (1978) (discusses whether records of complaints against attorneys are subject to public disclosure or discovery devices).

31. MODEL RULES FOR DISCIPLINARY ENFORCEMENT § 16 (1989).

32. *But see In re* Arkansas Bar Ass'n, 282 Ark. 605, 607 (1984) (states that an unjustly accused attorney will receive public vindication from an open hearing).

33. See *id.*

34. *Id.*

confidence and credibility . . . from the public's perspective far outweighs the risk of unjustified criticism and the potential loss of professional reputation."[35]

Mac D. Heavener, III

35. Gray & Harrison, *supra* note 26, at 547.