Due Process in Lawyer Disciplinary Cases: From the Cradle to the Grave

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DUE PROCESS IN LAWYER DISCIPLINARY CASES: FROM THE CRADLE TO THE GRAVE

WILBURN BREWER, JR.*

I. INTRODUCTION ........................................ 925
II. THE MEASURE OF DUE PROCESS IN DISCIPLINARY PROCEEDINGS ........................................ 927
III. THE ATTORNEY'S RIGHTS IN DISCIPLINARY PROCEEDINGS ........................................ 930
   A. The Right to a Hearing Before an Adjudicating Court ........................................ 930
   B. The Right to Separate Legal Functions Within Disciplinary Proceedings ...................... 931
   C. The Right to an Impartial Tribunal ........................................ 932
   D. The Right to Discovery ........................................ 933
   E. The Right Against Self-Incrimination ........................................ 934
   F. The Right to Notice ........................................ 935
   G. The Right to Confidentiality ........................................ 939
   H. Other Considerations ........................................ 940
IV. CONCLUSION ........................................ 941

I. INTRODUCTION

Attorney Goodfellow arrives at the office with an air of worriment. He is distraught. Having endured law school, passed the bar examination, received the blessing of the Committee on Character and Fitness, and having practiced for fifteen years with an unblemished record, he has received a complaint from the Board of Commissioners on Grievances and Discipline. He now seeks my aid as counsel.

Calm down, Goodfellow. What is the nature of the complaint? Among other things, it alleges that attorney Goodfellow has:
   A. been a bad fellow;
   B. engaged in contumacious conduct;
   C. failed to conduct himself in an upright manner; and
   D. engaged in conduct that violates the lore of the profession.
The complaint requests appropriate sanctions without specificity.

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Discipline could range from a private reprimand to outright disbarment.

What does this mean, he asks. I respond, I do not know. What have you done that warrants these charges? You must serve interrogations and requests to produce, he insists. We will then take depositions of the witnesses and serve requests to admit. Sorry, Goodfellow, no right to discovery exists in a disciplinary case. At this point, attorney Goodfellow is visibly agitated. Well, what can we do, he asks.

Well, Goodfellow, you need to understand that because you are well educated and trained as a lawyer, and because you are a part of the system, you have fewer rights than ordinary people. Do you understand that? No, he cries, this cannot be. The law treats everyone equally. Patience, Goodfellow. Let me explain your rights. You have the right not to remain silent. You are obligated to cooperate and to give evidence against yourself. Everything you say can and will be used against you. You do not have the right to an appointed lawyer, although you have the right to counsel at your own expense. Now Goodfellow begins to doubt his attorney. Wait a minute, he says, even petty thieves in magistrate's court have greater rights. How about the right to a jury trial? No, no right to a jury trial, and a standard of substantially less than reasonable doubt will determine your guilt.

Do we at least have the right to a hearing? Yes, you have a right to a hearing. The Board, which has investigated your case and filed the charges, will provide a hearing panel. A prosecuting attorney assigned by the Board will present the case. The panel will make a recommendation to the Executive Committee of the Board, which, based on the record, will make a recommendation to the supreme court. The supreme court, also relying on the record, will then make independent findings and decide the case.

Let me see if I understand the process. The Board has investigated my case, has determined probable cause, will present the case through its own prosecutor, and then will decide my case for purposes of submission to the supreme court? In other words, the court, through the Board, acts as investigator, prosecutor, and judge, all rolled into one? Yes, that is what I am telling you. Now I understand, he says. My only real resort is to throw myself on the mercy of the court. Now you understand, I tell him, that is correct.

Is the system fair? Can attorney Goodfellow be tried on a charge as nebulous as being a bad fellow? Are attorneys less than equal in a system that constitutionally guarantees equality for all? In protecting his license to practice law and his good name and reputation, does attorney Goodfellow in fact and in law have fewer rights than an alleged shoplifter in magistrate's court? Is it fair or right that the court, acting through its agent and servant, the Board of Commissioners on Grievances and Discipline, possesses and exercises all of the powers that are
brought to bear in a disciplinary case? Consider for a moment that the court makes all the rules. It determines who is admitted to practice. It defines the standards of conduct. Through its agents it investigates, prosecutes, judges, and disciplines attorneys. The court, subject only to self-restraint and boundaries defined in the Constitution, has great latitude in regulating lawyers.

No other profession, occupation, business, or calling is subject to the singular control that the court exercises over attorneys. In other matters, the legislative and executive branches, through statutes and administrative regulations, govern conduct when necessary to protect the public. The court typically decides cases according to standards and objectives set by others. Investigations and prosecutions of criminals generally are performed separately and independently by agencies that enjoy a large degree of discretion. This is typical of the checks and balances in our democratic system. This is not the case for attorneys, however, and this concept must be understood in order to evaluate due process in attorney disciplinary proceedings.

II. The Measure of Due Process in Disciplinary Proceedings

There is no right to practice law. It is a privilege given to a chosen few who enjoy a monopoly. As Judge Cardozo noted, "membership in the bar is a privilege burdened with conditions."1 Hence, the peculiar difference in the regulation of lawyers' conduct is explained by the fact that lawyers are a part of the judicial system. They are the administrators of the system, officers of the court, and stand in a fiduciary relationship to the court and the system of justice. In addition, courts have acknowledged that because the practice of law should benefit the public, disciplinary proceedings are brought not to punish attorneys, but to protect courts and the public from the official ministrations of attorneys unfit to practice.2

Based on the relationship between lawyers, the public, and the judicial system, early English courts determined that courts possess innate powers to regulate and discipline lawyers as part of the process of protecting "a profession which should stand free from all suspicion."3

1. In re Rouss, 221 N.Y. 81, 116 N.E. 782 (1917).
2. In re Ruffalo, 390 U.S. 544, 550 (1968); In re Ming, 469 F.2d 1352, 1353 (7th Cir. 1972); In re Echeles, 430 F.2d 347, 349 (7th Cir. 1970); Wilbur v. Howard, 70 F. Supp. 930, 933 (E.D. Ky. 1947), rev'd, 166 F.2d 884 (6th Cir. 1948). South Carolina recognizes the tenet that disciplinary power should be used to protect the profession and the public rather than to punish the lawyer. See, e.g., In re Galloway, 278 S.C. 615, 300 S.E.2d 479 (1983); In re Burr, 267 S.C. 419, 228 S.E.2d 678 (1976); In re Kennedy, 254 S.C. 463, 176 S.E.2d 125 (1970); State v. Jennings, 161 S.C. 263, 159 S.E. 627 (1931).
In 1824, Chief Justice Marshall expressed the same concept in the United States: "Some controlling power, some discretion, ought to reside in the Court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised . . . ." Later, in In Ex parte Secombe, the Court reflected:

The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself.

The privilege of practicing law cannot be removed lightly or capriciously. Attorneys "can only be deprived of [their office] for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded." Clearly, then, the inherent authority of courts to discipline lawyers carries with it the necessity that this authority is administered according to the principles of due process.

The combination of two factors has sparked a great deal of debate in the cases and among commentators about the application of due process principles to disciplinary actions. First, the purpose of disciplinary proceedings is to protect the public and the legal profession rather than to punish the lawyer, and second, due process is an elusive and fluid concept.

Some believe that the injury which disciplinary action can inflict on a lawyer is such that due process principles developed in criminal cases should apply. Others believe that the proceedings are civil and are thus governed by rules of civil procedure. Still others believe that disciplinary proceedings are neither civil nor criminal but rather have a distinct nature of their own. Proponents of the last view argue that

hand and disbarred for stealing a guineas).

5. 60 U.S. (19 How.) 9 (1856).
6. Id. at 13.
10. See In re Echeles, 430 F.2d 347 (7th Cir. 1970); [Manual] Law. Man. on Prof. Conduct (ABA/BNA) 101:2101-04 (1984). Conceptually, South Carolina is in this cate-
because the primary purpose of the court’s disciplinary power is not to punish, the proceedings do not need to include all of the elaborate safeguards found in criminal proceedings. This rationale is sound. The distinction between disciplinary actions and criminal proceedings is valid because an attorney may be disciplined for acts or omissions that are not criminal, or for conduct that may not involve fault, such as mental infirmity or some other disability.  

In In re Ruffalo the United States Supreme Court considered the measure of due process to which an attorney should be entitled in a disciplinary proceeding. In Ruffalo an attorney was charged with twelve allegations of misconduct in his handling of claims against railroads under the Federal Employers’ Liability Act. The Ohio Board of Commissioners on Grievance and Discipline used his testimony regarding those allegations to bring a thirteenth charge. The Ohio Supreme Court later disbarred the attorney based on that final allegation. The Supreme Court noted that the procedure used by the grievance board would never pass muster in any civil or criminal litigation. The Court characterized disciplinary hearings as “adversary proceedings of a quasi-criminal nature” that require the grievance board, pursuant to procedural due process, to inform a respondent of charges against him before the proceedings commence. Otherwise, proceedings are a trap to respondents who are unable to expunge earlier incriminating testimony. 

Ruffalo left some doubt about the extent to which due process in disciplinary actions matches the standards of criminal law. Later cases, both state and federal, have construed Ruffalo as not requiring “the full panoply of rights afforded to an accused in a criminal case.” The

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13. Id. at 551 (quoting In re Ruffalo, 370 F.2d 447, 462 (6th Cir. 1966) (Edwards, J., dissenting)).

14. Id.

15. Id.

16. Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984) (quoting People v. Harfmann, 638 P.2d 745 (Colo. 1981), cert. denied, 471 U.S. 1016 (1985); see also In re Evans, 834 F.2d 90 (4th Cir. 1987); Committee on Professional Ethics v. Durham, 279 N.W.2d 280 (Iowa 1979); In re Gillard, 271 N.W.2d 785 (Minn. 1979); Mississippi State Bar v. Young, 509 So. 2d 210 (Miss. 1987).
question is, therefore, what elements of due process must be incorporated into a disciplinary proceeding to ensure the respondent a fair hearing.\textsuperscript{17}

III. THE ATTORNEY'S RIGHTS IN DISCIPLINARY PROCEEDINGS

A. The Right to a Hearing Before an Adjudicating Court

In \textit{Mildner v. Gulotta}\textsuperscript{18} a three judge panel reviewed the constitutionality of New York's disciplinary procedures. The majority noted that the state has wide latitude to establish and apply standards and procedures to regulate professional conduct.\textsuperscript{19}

The \textit{Mildner} action combined three cases in a single trial before a referee who reported his findings to the appellate division. This general procedural practice required the appellate division to issue an opinion based on the record compiled by the court below.\textsuperscript{20} The referee made findings about the credibility of certain witnesses. The court rejected those findings without explanation. The respondents in the disciplinary actions argued that the court's repudiation of the referee's findings denied them a fair hearing because only the referee had taken into account the demeanor of the witnesses. The respondents also argued that the procedure violated their due process rights because they had no right to oral argument before the court.\textsuperscript{21}

The majority recognized that disciplinary hearings are judicial, not administrative, in nature,\textsuperscript{22} but rejected the notion that disciplinary proceedings are either criminal or civil. Rather, the court noted that disciplinary proceedings are investigative.\textsuperscript{23} Thus, the importance of witness credibility diminishes when the conduct of the attorney himself is the court's true inquiry. The court further noted that use of referees is well established, and rejected outright the assertion that

\textsuperscript{17} A right to a fair hearing is elementary and not unique to disciplinary cases. See, \textit{e.g.}, Brown \textit{v. South Carolina State Bd. of Educ.}, 301 S.C. 326, 391 S.E.2d 866 (1990). Moreover, the South Carolina Supreme Court has held that the civil concepts of default and waiver apply to disciplinary actions. \textit{In re Davis}, 279 S.C. 532, 309 S.E.2d 5 (1983) (default by reason of failure to answer); S.C. App. Cr. R. 413(27), (28) (allowing disbarment and discipline by consent).


\textsuperscript{19} \textit{Id.} at 192.

\textsuperscript{20} \textit{Id.} at 188-89 n.4.

\textsuperscript{21} \textit{Id.} at 194. The respondents also alleged they were denied due process because they had no right to appeal. The court decided that if denial of appellate review does not offend due process in criminal cases, clearly denial does not offend due process in cases of less than a criminal nature. \textit{Id.} at 195.

\textsuperscript{22} \textit{Id.} at 191.

\textsuperscript{23} \textit{Id.} at 191-92 (quoting \textit{In re Ming}, 469 F.2d 1352, 1353 (7th Cir. 1972)).
oral argument should be allowed in disbarment proceedings. Thus, the
court concluded that the respondents had not been denied a funda-
mentally fair hearing.24

South Carolina, like most states, follows a procedure similar to
that in Mildner in which the deciding court does not actually hear the
testimony, but reserves to itself the final decision-making authority.25
The South Carolina Supreme Court has affirmed that it alone has the
power to regulate and discipline attorneys.26 On a number of occasions,
the court has imposed sanctions different from those recommended by
the Board of Commissioners on Grievances and Discipline (Board).27
Nevertheless, the court gives great weight to the recommendations of
the Board.28

B. The Right to Separate Legal Functions Within Disciplinary
Proceedings

Many courts have held that the combination of investigative,
prosecutorial, and judicial functions in one entity, without more, does
not violate due process.29 However, the ABA has recognized the poten-
tial for collusion. The Model Rules for Lawyer Disciplinary Enforce-
ment (Enforcement Rules)30 provide that the prosecutor and adjudi-

24. Id. at 194. Judge Weinstein, in an extended dissent, however, examined the con-
cept of due process in disciplinary cases and concluded that the procedures did not pass
constitutional muster. Judge Weinstein's arguments viewed the due process require-
ments in a context more closely akin to criminal procedure, but he also pointed out the
potential for a court's abuse of its inherent and plenary power when the rules are not
well defined. Id. at 201-29.

F.2d 644 (4th Cir. 1987).

316, 177 S.E.2d 300 (1960)

27. See In re Rowland, 293 S.C. 17, 358 S.E.2d 387 (1987); In re Gaines, 293 S.C.
314, 360 S.E.2d 313 (1987); In re King, 279 S.C. 48, 301 S.E.2d 752 (1983); In re Brooks,

28. See supra note 27.

29. In re Crooks, 51 Cal. 3d 1090, 800 P.2d 898, 275 Cal. Rptr. 420 (1990); In re
Duncan, 541 S.W.2d 54 (Mo. 1976); In re Cunningham, 517 Pa. 417, 532 A.2d 473, ap-
In re Beattie, 275 S.C. 305, 270 S.E.2d 624 (1980) (the court rejected summarily the
argument that it was unconstitutional for the executive committee to make different
findings from the hearing panel); In re Lynch, 114 Wash. 2d 598, 789 P.2d 752 (1990).
See also In re Schlesinger, 404 Pa. 584, 172 A.2d 835 (1961) (attorney deprived of due
process when functions of prosecutor, judge, and jury were combined and charges were
adjudicated without hearing of witnesses).

30. Promulgated by the American Bar Association, the ABA first adopted the En-
fforcement Rules in 1979 and subsequently revised the rules several times. The ABA
adopted the current version in August 1989.
cative functions "shall be separated within the agency insofar as practicable in order to avoid unfairness." \(^{31}\) Under the Enforcement Rules, the prosecutorial function is performed by an attorney employed by the disciplinary board. The prosecuting attorney has substantial discretion to determine whether to prosecute under formal charges or to recommend action other than prosecution. \(^{32}\)

The Enforcement Rules are similar in many respects to the South Carolina Disciplinary Procedure. \(^{33}\) Both regulations involve different people in the investigative and adjudicative process by providing that persons who have investigated a matter shall not sit on the hearing panel. \(^{34}\) South Carolina's Disciplinary Procedure also requires that the Office of the Attorney General must provide the prosecuting attorney. \(^{35}\) However, the Disciplinary Procedure does not vest the Attorney General with any of the discretionary authority historically accorded to prosecutors. In practice, prosecutors believe they act as investigators and trial attorneys. The delegation of duties to the Attorney General, therefore, does little to avoid the potential inequity of a unitary system.

C. The Right to an Impartial Tribunal

Disciplinary hearings have evolved from summary dispositions \(^{36}\) into proceedings that more closely resemble modern civil trials regulated by rules borrowed from criminal process. \(^{37}\) However, the right to a fair hearing in a disciplinary proceeding does not include the right to a jury trial. \(^{38}\) Opponents of this rule criticize it because they believe a lay jury would give respondents a fairer trial on professional competence questions than a hearing panel composed of the respondent's

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32. Id.
34. Id. 413(12)(F).
35. Id. 413(12)(D).
36. See, e.g., Ex parte Wall, 107 U.S. 265 (1883).
37. In South Carolina, for example, the disciplinary procedure provides that the Board should dispose of disciplinary actions in a reasonably expeditious manner, and that nonprejudicial irregularities will not invalidate any proceeding. S.C. App. Ct. R. 410(24)(A), (C) (the rule should be liberally construed to protect the public, courts, and legal profession). Amendment to pleadings or other documents is allowed at any time prior to the final order of the South Carolina Supreme Court. The right to a fair hearing also generally includes the right, at some stage, to confrontation and cross-examination of witnesses, although, as noted earlier, the ultimate decision maker need not view the witnesses or hear the evidence firsthand. See supra text accompanying notes 25-28.
38. Ex parte Wall, 107 U.S. 265 (1883).
peers and a court comprised of judges who also are lawyers.39 In contrast, proponents of the rule argue with equal force that justice is served better in a trial before lawyers who appreciate the issues concerning professional competence and adherence to standards. In any event, attorneys facing disciplinary actions have a right to an impartial tribunal.40 South Carolina's Disciplinary Procedure provides that Board members may be disqualified on the same bases as other similarly-situated members of the judiciary.41

The Enforcement Rules and South Carolina's Disciplinary Procedure both provide for the appointment of public, or nonlawyer, members.42 The notion of including lay persons in the disciplinary process reflects populist thinking that the public at large should assist in the regulation of lawyers in order to increase confidence in the system and temper elitism that may result from self-policing. Moreover, one of the weaknesses of the traditional disciplinary system has been that the plenary power assumed by the courts receives judicial restraint. From the respondent's standpoint, the presence of the nonlawyers in the process may enhance judicial restraint. As "outsiders," lay persons need not defer to the court in the same manner that is expected from members of the bar. Furthermore, the addition of lay persons to the process bolsters public confidence and grants the respondent the best of jury and nonjury review. The legal profession also benefits when the practical and unfettered view of the lay person is combined with the expertise of attorneys to review possible misconduct.

D. The Right to Discovery

Lawyers subject to disciplinary action have a general right to present exculpatory evidence.43 They also may have a right to disclosure.44 The right of discovery is subject to continued debate, however, especially among those who have been involved in the disciplinary process. Those who insist on the need for discovery assert that the safeguards of criminal procedure should apply. Nevertheless, a lawyer has no right to discovery in disciplinary proceedings, at least not as that term is

39. See Nordby, supra note 9.
44. See Netterville v. Mississippi State Bar, 397 So. 2d 878 (Miss. 1981) (due process requires that the accused be given names and addresses of adverse witnesses).
understood in criminal actions.

The right of discovery has been widely abused in civil litigation. Therefore, courts are understandably reluctant to extend to disciplinary actions discovery methods which can be used not only to cause delay and confusion but also to intimidate aggrieved persons involved in the process. Nevertheless, although no general right to discovery exists, a court may order discovery pursuant to its supervisory power or court rules, or legislatures may allow discovery by statute.

The Enforcement Rules provide for limited discovery, including depositions and disclosure pursuant to requests. Full discovery is not allowed, but the Enforcement Rules allow depositions. Under South Carolina's Disciplinary Procedure, a party must show good cause to obtain discovery.

The Attorney General of South Carolina typically volunteers to exchange information, such as witness lists and documents, before trial. However, the Attorney General could suspend this practice at any time for any reason, which makes it an unacceptable substitute for an adequate disclosure rule.

An informal procedure that minimally conforms to due process is not as desirable as an express discovery procedure. Fairness requires disclosure of at least the names and addresses of witnesses and the existence of documents upon which the prosecution is based. Although the failure to divulge these facts might pass constitutional muster when the basis of the complaint is well known to the respondent, lack of disclosure materially impairs the preparation of the defense in other cases. In South Carolina, a dilemma arises: If the respondent is not aware of the evidence, how can he show good cause to discover it?

E. The Right Against Self-Incrimination

The scope of the Fifth Amendment privilege against self-incrimination is limited to disclosures made in any proceeding, criminal, civil, or other, that could be used to support criminal prosecution or establish a link in a chain of evidence leading to other evidence useable in a

criminal prosecution.\textsuperscript{49} In \textit{Spevak v. Klein}\textsuperscript{50} the United States Supreme Court held that a lawyer in a disciplinary case could neither be forced to choose between his Fifth Amendment right against self-incrimination and disbarment, nor be disbarred solely because he refused to testify in a disciplinary proceeding. If the conduct involved is not criminal, however, and would not lead to criminal prosecution, then \textit{Spevak} does not apply. In that situation, a court can compel an attorney to produce self-incriminating evidence.\textsuperscript{51} Thus, when the Fifth Amendment does not apply, a lawyer has an obligation to respond and cooperate.\textsuperscript{52} A number of South Carolina cases have held that a lawyer's failure to cooperate is an aggravating factor to be taken into consideration.\textsuperscript{53}

Testimony given in a prior investigation under a grant of immunity from criminal prosecution also may be admissible.\textsuperscript{54} Furthermore, if the attorney is granted immunity from later criminal proceedings, the court can compel him to testify.\textsuperscript{55} Thus, the right against self-incrimination does not protect a respondent who has waived the right in exchange for immunity in separate litigation.

\textbf{F. The Right to Notice}

Disciplinary cases often give rise to the issue of proper notice. The

\begin{enumerate}
\item[49.] United States v. Sharp, 920 F.2d 1169 (4th Cir. 1990); In re Kave, 760 F.2d 343 (1st Cir. 1985).
\item[50.] 385 U.S. 511 (1967).
\item[55.] In re March, 71 Ill. 2d 382, 399, 376 N.E.2d 213, 220 (1978).
\end{enumerate}
problem is not merely one of sufficiency of the complaint, but arises in large part from the vagueness of the standards of the profession. For instance, to engage in actions that prejudice the administration of justice violates the Rules of Professional Conduct. What does this mean? The hypothetical case at the beginning of this Article about the attorney being charged as a bad fellow is not that much of an exaggeration.

In *Burns v. Clayton* the South Carolina Supreme Court addressed the problem of characterizing misconduct. The respondents allegedly paid an accomplice to procure false statements from prospective witnesses. The complaint characterized their activities as conspiracy but the Board’s report erroneously defined the respondents’ actions as subornation of perjury. The South Carolina Supreme Court held that a formality of allegation, as in an indictment, is not required in proceedings such as the present. All that is required to their validity is that respondent be clearly apprised of the charges, i.e., the facts upon which the claim of misconduct is founded, and that he be afforded reasonable opportunity for explanation and defense.

The court’s statement implies that due process is not offended as long as reasonable attorneys could infer misconduct from the allegations of the complaint.

In *In re Ruffalo* Justice White implied that legal professional standards are self-evident. He asserted that members of the bar should know that conduct that all responsible attorneys recognize as improper for members of the profession is undesirable. Thus, a general charge of fraud and dishonesty, with supporting factual allegations, is sufficient, because responsible attorneys undeniably condemn such acts. When responsible attorneys differ about the impropriety of certain acts, however, prior notice is a prerequisite to disbarment.

Courts are not able to fashion many rules regarding prohibited conduct. Often the facts of each case must be measured against maxims of professional responsibility found in the law and in moral tenets

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58. Id. at 332, 117 S.E.2d at 308.
59. Id. at 333, 117 S.E.2d at 308.
60. 390 U.S. 544 (1968) (White, J., concurring).
62. Ruffalo, 390 U.S. at 556.
governing society in general and attorneys in particular. For example, in Committee on Professional Ethics v. Durham\textsuperscript{63} the Iowa Supreme Court held that although due process applies, courts hearing disciplinary matters use a vagueness criterion less stringent than that employed in criminal cases. The court noted that guidelines for members of the bar cannot and need not match the clarity required of rules of conduct for the accused in a criminal case because of a lawyer’s specialized training.\textsuperscript{64} Moreover, it “would be virtually impossible to develop a set of rules to specifically cover all professional activity which could merit discipline, thus necessitating broader standards.”\textsuperscript{65} The Durham court imposed a higher standard of care on attorneys based on the “unique and learned nature of the profession.”\textsuperscript{66}

In Durham the court examined the constitutionality of standards such as failing to behave in a “temperate and dignified”\textsuperscript{67} manner, engaging in conduct that creates the appearance of impropriety, and engaging in conduct that reflects adversely on the attorney’s ability to practice. These vague standards are sufficiently distinct when measured against specific conduct, such as sexual contact with a client in a professional context.\textsuperscript{68}

In In re Bithoney\textsuperscript{69} the attorney was charged with violating his oath as a member of the bar because he did not “‘demean [him]self . . . uprightly and according to law.’”\textsuperscript{70} In addition, he was charged with conduct “unbecoming a member of the Bar of the Court.”\textsuperscript{71} The respondent challenged these allegations as unconstitutionally vague.\textsuperscript{72} The court noted that in the abstract this was a colorable argument.

\textsuperscript{63} 279 N.W.2d 280 (Iowa 1979).
\textsuperscript{64} Id. at 284. South Carolina approved this reasoning in Toussaint v. State Bd. of Medical Examiners, — S.C. —, 400 S.E.2d 488 (1991). The respondent physician in Toussaint contended that an unacceptably vague standard of misconduct set forth in S.C. CODE ANN. § 40-47-200 (Law. Co-op. 1976) violated his due process rights. The court noted that “[w]hen persons affected by the law constitute a select group with a specialized understanding of the subject being regulated, the degree of definiteness required to satisfy due process is measured by the common understanding and knowledge of the group.” Toussaint, — S.C. at —, 400 S.E.2d at 491. See also Zaman v. State Bd. of Medical Examiners, — S.C. —, 408 S.E.2d 213 (1991); Burdge v. State Bd. of Medical Examiners, — S.C. —, 403 S.E.2d 114 (1991).
\textsuperscript{66} Durham, 279 N.W.2d at 284.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 284-85.
\textsuperscript{69} 486 F.2d 319 (1st Cir. 1973).
\textsuperscript{70} Id. at 321 (quoting Fed. R. App. P. 46(a)).
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 322.
However, when placed in context with the respondent's specific conduct, filing and then abandoning frivolous multiple appeals, the terms "[took] on definiteness and clarity." The court stated: "Under these circumstances a member of the bar, like respondent, cannot complain that there is not at least a core area of clearly prohibited conduct which the words 'uprightly and according to law' and 'conduct unbecoming to a member of the bar' mean to him." 74

In In re Snyder 75 an attorney was charged with contempt and rebellious conduct because of a letter he wrote to the court. The letter expressed his disgust with the handling of a claim for attorneys' fees under the Criminal Justice Act and asked the court to remove his name from the list of appointed attorneys. After verbally jousting with the chief judge of the circuit court, the respondent was suspended for refusing to apologize. 76 The United States Supreme Court held that under the circumstances a single incident of rudeness was not sufficient to warrant suspension. 77 With this ruling, the Court avoided the issue of whether a charge of "conduct unbecoming a member of the bar" 78 satisfies constitutional due process. Rather, the court offered the "lore of the profession" as a guide to define vague charges:

Read in light of the traditional duties imposed on an attorney, it is clear that 'conduct unbecoming a member of the bar' is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and 'the lore of the profession' as embodied in codes of professional conduct. 79

In re Finkelstein 80 exemplifies the difficulty of applying the principles expressed in Durham, Bithoney, and Snyder. In Finkelstein a plaintiff's attorney in a civil rights case wrote a letter directly to the defendant's general counsel and bypassed the defendant's retained trial counsel. The letter discussed settlement, attorneys' fees, and racial issues. The district court found that the letter was an improper communication with a client. More importantly, the court found that the letter contained representations and overt threats that interjected pressure group politics that amounted to extortion and disruption into

73. Id. at 324.
74. Id.
76. Id. at 645.
77. Id. at 647.
78. Id.
79. Id. at 645.
80. 901 F.2d 1560 (11th Cir. 1990).
the judicial process. The district court relied on Snyder to suspend the attorney. 81

The court of appeals reversed because it felt that the lower court should not have suspended the lawyer simply because the letter improperly introduced politics into the settlement process. 82 The court commented that the lower court relied on a "transcendental code of conduct [which] existed only in the subjective opinion of the court . . .." 83 The court of appeals determined that the attorney's acts did not involve clearly proscribed behavior and that responsible attorneys could, and indeed did, differ about the propriety of the conduct. Thus, Finkelstein could not have been on notice that the court would condemn his conduct. 84

The problem of an unclear pleading often can be resolved by a motion to make more definite and certain. 85 When the issue is whether the conduct is actually proscribed by the standard, however, substantive issues are raised that only a judicial decision can answer.

When the South Carolina Supreme Court encounters the question of whether an ethical standard actually proscribes particular conduct, on occasion it has avoided the issue by simply mitigating punishment. The court has issued a warning 86 or an anonymous opinion 87 to inform the bar of conduct that will be subject to discipline in the future. Because the objective of attorney disciplinary actions is not to punish but to protect the public and the system, this procedure is a commendable effort to define the undefinable.

G. The Right to Confidentiality

Most states provide for some type of confidentiality. 88 Most disciplinary cases result in private reprimands. Some actions simply are dismissed. Courts generally do not issue opinions for private reprimands and dismissals. Consequently, it is difficult to research grievance matters or to make a judgment about possible sanctions. The disciplinary

81. Id. at 1563.
82. Id. The court also noted that hostility between opposing trial lawyers motivated the respondent to initiate direct contact with general counsel. Id.
83. Id. at 1565.
84. Id.
87. See, e.g., In re Anonymous Member of the South Carolina Bar, 297 S.C. 527, 377 S.E.2d 572 (1989); In re Anonymous Member of the South Carolina Bar, 297 S.C. 517, 377 S.E.2d 567 (1989).
88. MODEL RULES FOR LAW. DISCIPLINARY ENFORCEMENT Rule 16 (1989); S.C. APP. CT. R. 413(20).
board and the court are aware of these cases, which puts the respondent at a definite disadvantage. Writers on the subject have argued that procedural fairness requires that all such opinions should be reported anonymously.\(^9\)

A publication of all disciplinary opinions, including anonymous opinions regarding private reprimands and dismissals, not only would serve as precedential guidance, but would also instill confidence in a system of inherent court powers by opening the system to public scrutiny. Public examination encourages the necessary judicial self-restraint and ensures that the system operates fairly.\(^9\)

H. Other Considerations

The concept of collateral estoppel often is employed in disciplinary cases. When an attorney has been convicted of a crime that is also the subject of a disciplinary charge, he generally is precluded from re-litigating the criminal charge, although there may be a right to a hearing concerning the effect of the conviction upon the disciplinary process.\(^9\)

On the other hand, the acquittal of an attorney on a criminal charge does not preclude prosecution of a disciplinary action, because a disciplinary proceeding is noncriminal and the quantum of proof is different.\(^9\)

Collateral estoppel also comes into play when the respondent has been disbarred in one state and that proceeding is used as a basis for disbarment in another state, or when the federal court is considering the impact of a state court disciplinary order. Generally, the inquiry is limited to whether the attorney had a fair hearing in the other forum.\(^9\)

In addition, collateral attack in federal court against state court proceedings in federal court is restricted by the abstention doctrine as well as federal procedural rules.\(^9\)

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89. Apriile, supra note 9, at 593-94; Nordby, supra note 9, at 363.

90. See supra text accompanying note 42.


94. Middlesex County Ethics Comm. v. Garden State Ass'n, 457 U.S. 423 (1982);
Attorneys subject to disciplinary actions do not appear to have a right to appointed counsel. Moreover, the burden of proof standard varies according to the court's viewpoint of whether the proceedings are civil or criminal or something else. The Enforcement Rules use a standard of clear and convincing evidence. This is also the standard in South Carolina.

IV. CONCLUSION

Courts have a great deal of discretion and flexibility in managing disciplinary matters. The potential for abuse and the need for judicial restraint are manifest. Although courts have long recognized that attorneys have a right to fair treatment, the question of what is fair treatment remains unanswered. The modern trend includes lay persons in the disciplinary process to encourage judicial restraint and provide a different perspective on possible misconduct.

The underlying goal of disciplinary proceedings is to protect the public from unfit lawyers and maintain the integrity of the entire legal system. Lawyers are not subjected to disciplinary proceedings in order to be punished. Their licenses to practice cannot be withdrawn capriciously. Thus, they are entitled to some measure of procedural due process.

Current disciplinary procedures are constitutional. Nevertheless, they could be reformed to ensure equity and justice. Rules that promote equity, such as those that deal with discovery, should be clarified and enlarged. Publication of private or dismissed reprimand cases in some anonymous form would inform the bar about condemned conduct and would assure the public that these matters are being handled properly. When possible, vague standards should be refined.

Due process is one of the most effective shields to protect attorneys from arbitrary reprisals in disciplinary actions. Such protection is essential when courts have sole authority over lawyer's careers and reputations.
