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Negligence or Neglect--Mistake or Grievance: Lawyer Conduct and the Limits of the Grievance Process

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NEGLIGENCE OR NEGLECT—MISTAKE OR GRIEVANCE: LAWYER CONDUCT AND THE LIMITS OF THE GRIEVANCE PROCESS

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I. INTRODUCTION

The spectrum of lawyer conduct runs from excellent to negligent to criminal conduct. Mistakes that traditionally are referred to as "neglect of a legal matter entrusted" can be mild or severe. Neglect may result from a simple mistake or a criminal act. It can form the basis for a grievance, the grounds for a civil lawsuit or fee dispute, or a combination of these. A wide array of remedies is available to clients claiming to have been injured by their attorneys' neglect.

One of the purposes of this Article is to distinguish mistakes falling within the jurisdiction of the Board of Commissioners on Grievances and Discipline (Grievance Board) from errors that do not constitute legitimate grievances. Also, this Article urges that the grievance mechanism cannot solve every problem that arises between the lawyer and the client. Finally, the Article suggests ways in which the most appropriate problem-solving mechanism can be applied to solve different lawyer-client problems.

II. PERSPECTIVE—THE ROLE OF LAWYERS IN SOCIETY

Lawyer bashing has become a popular sport in recent years, particularly among those unfamiliar with the legal system. Unfortunately, lawyers sometimes choose to join in the jest instead of defending their profession. The preamble of the new Rules of Professional Conduct[1] (Rules) affirms, however, that "[l]awyers play a vital role in the preservation of society."[2] Attorneys should keep this profound declaration foremost in their professional outlook.

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1. S.C. APP. CT. R. 407. The new Rules became effective on September 1, 1990.
2. *Id.*

How often has Shakespeare's famous quote, "The first thing we do, let's kill all the lawyers,"[3] been recited? Yet the context of Shakespeare's observation is rarely explained. The proposal to eliminate attorneys is made by one who would overthrow the structure of a society of free people. Shakespeare recognized the value of a nation of laws and the desirability of educating professionals to help society uphold the laws.

At a time when doctors still were leeching their patients, lawyers in this country were creating the first democratic republic with a written constitution and the greatest government yet known to civilization. Fifty-five delegates were present at the Constitutional Convention; of these, thirty-four were lawyers.[4] We can trace landmarks of American history by simply reciting the names of members of the legal profession. The names "Jefferson," "Marshall," "Madison," "Webster," and "Lincoln" evoke memories of the eminence of our nation and the legal profession. Although there is a less savory side to the practice of law, attorneys often are not appreciated for their contributions to society. Therefore, lawyers, of all people, should not engage in the sport of their detractors without good reason. Rather, attorneys should seek to uphold the dignity and propriety of the legal profession.

With this in mind, lawyers also should recognize that self-policing requires reasonableness and common sense, not ostracism. Discipline is not punitive. In this regard, the scope of the Rules presents the limits of the grievance process and the boundaries for application of the Rules:

> Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.[5]

These words are a modern reiteration of the notion that the purpose of disciplinary action is not to punish, but to protect the courts and public from contamination by one who has proved himself unworthy to be an attorney.[6]

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3. W. SHAKESPEARE, HENRY VI, PART II, act 4, scene 2, line 86.
4. J. WILSON, AMERICAN GOVERNMENT 24 (4th ed. 1989).
5. S.C. APP. CT. R. 407.
6. State v. Jennings, 161 S.C. 263, 266, 159 S.E. 627, 629 (1931).

III. NEGLECT—COMPETENCE AND DILIGENCE

Rule 1.1, "Competence," provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[7]

Rule 1.3, "Diligence," requires that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[8] The obligation to act diligently encompasses providing services within a reasonable time, attending promptly to legal matters with which one is entrusted, and committing to achieving clients' lawful objectives.[9]

South Carolina's recently adopted Rules establish the confines of jurisdiction for grievance matters. Because the Grievance Board is the exclusive forum for bringing grievances, it would be enlightening to undertake a comprehensive survey of complaints filed with the Grievance Board. However, it is virtually impossible to conduct empirical research that sheds meaningful light on a topic of this nature. The disciplinary process by its nature is, and should be, private.[10] The facts and law underlying dismissed complaints are unavailable for research. Further, cases disposing of misconduct through private sanctions are unavailable for study. Similarly, complaints which are referred to fee dispute resolution proceedings, claims that are settled prior to litigation, and allegations resolved by lawyers without formal complaint cannot readily be investigated. One available source of information is anecdotal experience by those involved in the process. Many of the views and observations expressed in this Article are the result of the author's three-year term on the Grievance Board,[11] including a one-year term on the Executive Committee,[12] and several years of service on the South Carolina Bar Resolution of Fee Disputes Board (Fee Disputes Board) for Richland County.[13] These observations may very well be biased not only by the author's predispositions, but they also may be skewed by the author's particular experiences. Having said that, an at-

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7. S.C. APP. CT. R. 407, Rule 1.1. Both Rule 1.1 and 1.3 were included as part of prior DR 6-101.

8. *Id.*, Rule 1.3.

9. *See* [Manual] Law. Man. on Prof. Conduct (ABA/BNA) 31:401 (1984).

10. S.C. APP. CT. R. 413(20), Disciplinary Procedure. Rule 413(20) mandates strict confidentiality.

11. The Board is comprised of members of the Bar appointed by the supreme court. S.C. APP. CT. R. 413(3).

12. The Executive Committee is comprised of the Chairman of the Grievance Board, four other members of the Board who are appointed by the court, and two lay persons who are also appointed by the court. S.C. APP. CT. R. 413(4).

13. The Fee Disputes Board is comprised of members of the Bar appointed by the President of the South Carolina Bar.

tempt will be made to objectively describe the structure and purpose of the Grievance Board as they pertain to diligence and competence. An attempt will also be made to describe the structure and purpose of other sources available to resolve problems between lawyers and clients.

IV. The Board of Commissioners on Grievances and Discipline

The purpose of the Grievance Board is to investigate allegations of unethical conduct.[14] The Grievance Board is charged with taking complaints, investigating the facts, attempting to determine whether or not in any instance the attorney violated any Rules and, if so, making recommendations to the South Carolina Supreme Court for appropriate sanctions. The overriding goal of the Grievance Board and the Rules is " 'to protect the public and those charged with the administration of justice.' "[15]

Why do many clients file grievances? The Grievance Board is not a fee dispute resolution body. The Grievance Board is not a forum for the resolution of civil liability issues nor does it investigate or administer criminal matters. The Grievance Board does not superintend law school education or bar examination. The Grievance Board does not enforce continuing legal education, either generally or with respect to ethics. Nevertheless, many clients perceive the Grievance Board as undertaking all these duties, something akin to the Better Business Bureau or the Department of Consumer Affairs, an entity where one may express general dissatisfaction with poor service or complain about the bill.

Many complaints lodged with the Grievance Board reveal that clients desire the same kind of satisfaction from lawyers that they receive from other professionals. For example, clients may want a refund of the fee because they feel they did not get the service to which they were entitled. A client may wish to have a mistake corrected or prob-

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14. The powers and duties of the Grievance Board are set forth in S.C. App. Ct. R. 413(3)(E):

> The Board shall exercise the powers and perform the duties conferred and imposed upon it by this Rule, including the power and duty:
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> (1) To receive, consider, and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take action with respect thereto as shall be appropriate to effect the purposes of this Rule.
>
> (2) To adopt rules and regulations not inconsistent with this Rule.
>
> (3) To conduct investigations in accordance with the Rules on Trust Accounts of Attorneys.

15. *In re* Hanna, 301 S.C. 310, 313, 391 S.E.2d 728, 729 (1990) (quoting *In re* Galloway, 278 S.C. 615, 617, 300 S.E.2d 479, 480 (1983)).

lem solved. Most clients want some action that will improve the outcome of their cases. However, the grievance proceeding is not the appropriate remedy for these kinds of complaints. The Grievance Board has the power to sanction attorneys, but it cannot resolve fee disputes[16] or basic liability claims. Many of these types of problems can be resolved through alternative mechanisms, however. Some of these alternatives are discussed below.

V. Other Dispute Resolution Mechanisms

A. Ensuring Lawyer Competence

Law schools accredited by the American Bar Association (ABA) are charged with the duty to train attorneys to practice competently.[17] The Committee on Character and Fitness determines the qualifications of candidates for admission to the bar.[18] Bar examiners test prospective lawyers to discern whether they are sufficiently prepared to enter the profession.[19] In South Carolina, the Bridge the Gap mandatory education program is designed to provide some practical education linkage between law school and beginning practice.[20] The mandatory trial experience requirement assures the new lawyer some direct exposure to the judicial system prior to the lawyer's appearing in court unattended by an experienced colleague.[21] Mandatory continuing legal education requirements endeavor to maintain a high degree of compe-

16. The Grievance Board may recommend disgorgement of a fee when retention of the fee would be unconscionable, inequitable, or inconsistent with findings of misconduct. S.C. App. Ct. R. 413(7)(A). This remedy does not affect the client's ability to pursue civil remedies. *Id.*; *see In re* Hanna, 301 S.C. 310, 313 n.4, 391 S.E.2d 728, 729 n.4 (1990) (court declined to order disgorgement, but noted recovery of fee could be pursued through civil courts); *In re* Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982).

17. *See* S.C. App. Ct. R. 402(c)(3). As a prerequisite to admission to the bar, an applicant must receive a degree from a law school approved by the ABA or the South Carolina Supreme Court.

18. S.C. App. Ct. R. 402(b)(2) provides: "It shall be the duty of the Committee on Character and Fitness to investigate and determine whether an applicant for admission to the Bar possesses the qualifications prescribed by this Rule as to age, legal education and character."

19. S.C. App. Ct. R. 402(a)(2) provides: "It shall be the duty of the Board of Law Examiners to determine whether applicants for admission to the practice of law in South Carolina possess the necessary legal knowledge for admission."

20. S.C. App. Ct. R. 402(c)(9). An applicant must complete Bridge the Gap, a one week induction program sponsored by the Bar, prior to admission to practice law.

21. S.C. App. Ct. R. 403 provides: "An attorney, although admitted to practice, may not appear alone in the actual conduct and trial of a case until a certificate has been filed with the Clerk of the Supreme Court showing the attorney has had eleven (11) trial experiences."

tence of members of the bar after law school.[22] In addition, South Carolina recently adopted a continuing legal education program designed to regularly educate attorneys in ethics and professional responsibility.[23]

These seven requisites addressing lawyer competence through education properly are beyond the purview of the grievance process. Ensuring attorney competence should be handled in a positive way by sources that have the means and resources to handle the task adequately. A sanctioning body cannot effectively accomplish this job with punitive power alone. The limited use of the grievance process to remedy legal malpractice does not ignore the threshold issues of competence and diligence. However, courts recognize that affirmative steps to improve proficiency better serve the public and the profession.

B. Fee Dispute Resolution

If a matter is not handled diligently or competently by a South Carolina lawyer and the impact on the client relates only to the fee, the client has a readily available mechanism for resolving fee problems within the profession. The South Carolina Bar established the Resolution of Fee Disputes Board (Fee Disputes Board) as a mechanism for adjudicating conflicts between lawyers and clients regarding fees for services.[24] The Fee Disputes Board has established procedures whereby a client who has a fee dispute with a South Carolina attorney, or who is disputing a shared fee with several attorneys, may have the conflict resolved expeditiously, fairly, and professionally. The Fee Disputes Board is charged expressly with "furthering the administration of justice, implementing the policy of the South Carolina Bar, encouraging the highest standards of ethical and professional conduct, assisting in upholding the integrity and honor of the legal profession, and applying the knowledge, experience and ability of the legal profession to the promotion of the public good."[25] The Fee Disputes Board is organized by circuit panels comprised of Board members from each judicial circuit. The Fee Disputes Board does not have jurisdiction over fees that

22. S.C. APP. CT. R. 408(a) provides: "All persons admitted to the South Carolina Bar shall be required to attend at least twelve (12) hours of approved continuing legal education (CLE) courses annually . . . ."

23. Members of the Bar are required to attend "at least six (6) hours of courses directed to the topics of legal ethics and professional responsibility every three (3) years." *Id.*

24. RULES OF THE RESOLUTION OF FEE DISPUTES BOARD (on file at offices of South Carolina Bar).

25. *Id.* (1).

are set by a court or fees that violate ethical rules.[26]

Clients may voluntarily avail themselves of the process provided by the Fee Disputes Board, but once they apply to the Board for relief, clients must consent to being bound by the Fee Disputes Board's decision.[27] Decisions rendered by the Fee Disputes Board automatically bind the lawyer.[28]

The fee dispute process provides for an initial investigation of a fee complaint by a member of an appropriate circuit panel.[29] The panel member's report and recommendation are tendered to the chairperson of the circuit panel. If the assigned panel member and the circuit chairperson find no merit in the client's contentions, the findings are reported in writing to the complaining client.[30] If the amount in dispute is $300 or less, and the chairman concurs with the recommendation of the panel member, the decision is final.[31]

A dissatisfied client may appeal the decision to a hearing panel comprised of three members of the circuit panel.[32] At this hearing retained counsel may represent the parties.[33] The parties are allowed to present witnesses and documentation, and the rules of evidence generally are followed.[34]

The process determines whether the fee was appropriate, agreed to, and earned. The mechanism is an inexpensive and reasonably expeditious remedy for a client to solve conflicts regarding fees charged by his lawyer. Few professions furnish this kind of check and balance or fee advocacy for consumers of services.

C. Civil Action

A client can commence a civil action in state or federal court against a lawyer in the same manner that the client can sue any other citizen.[35] Courthouses, juries, judges, bailiffs, and all other resources needed for this kind of dispute resolution are provided without cost, or

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26. *Id.* (4).
27. *Id.* (9).
28. *Id.*
29. *Id.* (11).
30. *Id.*
31. *Id.* If the chairperson does not concur, a hearing panel is appointed. *Id.*
32. *Id.* (12), (13).
33. *Id.* (13). Recent practice in Richland County has been to provide appointed counsel. This practice makes the fee disputes resolution mechanism even more attractive to the client.
34. *Id.*
35. *See* S.C. CONST. art. I, § 9 ("[E]very person shall have speedy remedy . . . for wrongs sustained."); *see also* U.S. CONST. art. III, § 2 (setting forth the jurisdiction of federal courts).

at a very minimal cost, to the client.

Civil litigation provides a client with a public forum that can resolve issues regarding negligence, breach of contract, fraud, and other tort and contract issues arising out of the attorney-client relationship.

D. Liability Insurance

A majority of attorneys carry professional liability insurance to protect themselves from civil damages awards. Liability insurance provides a source of compensation for a client who has been injured by a lawyer's lack of due care.[36]

The system of professional liability insurance provides yet another forum for resolution of attorney-client controversies. A client may lodge a complaint with an insurer, have it investigated, and if the liability carrier agrees, negotiate a financial resolution to problems created by an attorney's negligent performance.

E. Public Alternative Dispute Resolution

The South Carolina Law Institute has sponsored a court-annexed arbitration project.[37] The goal of this project is to study court-annexed arbitration programs in other states and to evaluate how a similar arrangement might be incorporated into the South Carolina judicial system.

The project committee anticipates presenting its report in 1991. The committee will recommend that court-annexed arbitration be implemented in South Carolina. Certain categories of cases involving simple money damages below a certain valuation automatically will be diverted to an arbitrator for a hearing and resolution. The arbitrator's decision is nonbinding, however, and the litigants may request placement on the trial docket for a formal proceeding. Court-annexed arbitration may be an attractive alternative for some clients who do not have time or resources to pursue a complaint through to trial.

F. Clients' Security Fund of the South Carolina Bar[38]

The South Carolina Supreme Court and attorneys in this state

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36. *See generally* R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 28.1 (3d ed. 1989).

37. Clients and attorneys additionally may utilize private alternative dispute resolution. Private alternative dispute resolution provides a less expensive, more efficient, private forum for resolving attorney-client disagreements. The range of developments in alternative dispute resolution, however, is beyond the scope of this Article.

38. S.C. APP. CT. R. 411.

shoulder a duty to protect, to the extent reasonably possible, clients injured by the dishonest conduct of members of the bar.[39] The South Carolina Supreme Court established the Clients' Security Fund Committee "to receive, hold, manage and disburse funds appropriated to it by the House of Delegates of the . . . Bar"[40] with the court's approval, or funds that are received from other sources.[41] The Fund can provide up to $20,000 to reimburse clients injured by certain types of lawyer misconduct.[42] This fund may be only a partial resource, but it does provide an additional means of compensating clients for losses caused by incompetent or dilatory lawyers.

G. Criminal Justice System

The criminal justice system enables state and federal authorities to prosecute those who commit statutory or common-law crimes, including lawyers. Neglect or incompetence that rises to the level of a criminal violation can bring the full authority of the law to bear on the offending attorney.

The criminal justice system endeavors to deter others from engaging in similar criminal conduct, provide for societal revenge or punishment, rehabilitate, and prevent the offender from engaging in more of the same misconduct.[43]

VI. GRIEVANCE MATTERS REVISITED

What remedy should result when a lawyer has made a mistake, missed a deadline, or not attended to a matter promptly? Because specific disciplinary rules incorporate some of these phrases, we tend immediately to think of bringing a grievance. Yet few of the mistakes that occur in the practice of law are such that an attorney should be sanctioned through the grievance process.

When we examine the improper conduct of other professionals, we think in terms of medical malpractice, accounting malpractice, engi-

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39. *Id.* 411(a).

40. *Id.*

41. *Id.*

42. *Id.* 411(c)(1). The fund covers losses not otherwise covered if the attorney has died; been adjudicated bankrupt; been adjudicated mentally incompetent; been disbarred, suspended, or has voluntarily resigned from the practice of law; left the jurisdiction of South Carolina or cannot be found; become a judgment debtor of the client based upon his dishonest conduct as a lawyer; or for other reasons as authorized by the Grievance Board or Board of Governors of the South Carolina Bar. *Id.*

43. O.W. HOLMES, *The Criminal Law*, in THE COMMON LAW AND OTHER WRITINGS 42 (1982).

neering malpractice, architectural malpractice. We expect liability insurance or money damages to compensate for the negligent mistakes these types of professionals make. Rarely do we envision eradicating other professionals' right to earn a livelihood and depriving them of the career they spent years developing.

Even when considering judicial malpractice, we do not contemplate sanctions and liability. Strong policy reasons exist for providing public officials who exercise discretion the right to be wrong.[44] Appellate courts recognize that mistakes are made in the trial courts.[45] No regulations impose civil liability or sanctions for errors made by the judiciary during the course of a trial. Rather, appellate courts employ judicial review to correct errors made at the trial level.[46]

What should be done about problems caused by neglect of an entrusted legal matter? When does mere negligence become disciplinable neglect? Neglect of a legal matter entrusted, or failure to act in a timely, diligent, and competent manner, can manifest itself in a variety of forms. It may mean abandoning a contract for services, missing a deadline, or negligently failing to assert a claim. Neglect also encompasses the failure to appear at a proceeding, failure to prepare a necessary document, or failure to carry out administrative duties in probate or bankruptcy proceedings. Neglect may be willful or it may be mere inadvertence. It may be part of a pattern or it may be an isolated event.

Often the lawyer who has neglected a client can take positive action by refunding a fee or compensating the client for damages. But how much of this is permissible? Certainly attorneys should not view reimbursement of a fee to a client as a satisfactory substitute for efficiency and competence. Yet if we insist on legal perfection, how does the person of small financial means pay for the kind of superior legal services that only the wealthy client can afford? Should there be a lower standard of competence for the large volume lawyer who can charge lower fees? Should there be a recognition that many general practitioners who are available to the person of modest means may be without resources or time to pursue a claim in a sophisticated manner? What about the client who comes to an attorney at the eleventh hour and forces the attorney to choose between shooting from the hip or abandoning the client? Should that attorney be held to a lower standard for making a wrong decision under time constraints?

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44. McCall v. Batson, 285 S.C. 243, 246, 329 S.E.2d 741, 742 (1985) (abrogation of sovereign immunity not extended to legislative, judicial, and administrative acts of discretion in official capacity).

45. *See* S.C. CONST. art. V.

46. *Id.*

Some reasonable manner must exist which allows lawyers to provide services to many people in an economical way, and also allows the legal profession to prevent the kind of shoddy service that should not be tolerated in the marketplace. This balance is sought in other professions. For example, society desires reasonable costs in medical care, but does not want physicians performing inept, albeit inexpensive, surgery as a consequence. By the same token, governmental authorities allow a certain amount of medical over-the-counter home remedy. One way to resolve this quandary is to focus on the purpose and function of the grievance process as distinguished from other forums and procedures available to clients to resolve different kinds of problems with their lawyers.

As a general proposition, the severity of discipline and sanctions depends on the circumstances surrounding the rule violations. The Grievance Board considers the willfulness and seriousness of the offense, whether the lawyer has previous rule violations, and other extenuating factors.[47]

VII. SOUTH CAROLINA AUTHORITIES

Past cases that have resulted in the imposition of public sanctions by the South Carolina Supreme Court have not involved mere negligence. All lawyers make mistakes, but these mistakes are seldom the sole basis for grievance proceedings. The court sanctions patterns of continued neglect and incompetence or neglect plus additional misconduct.

These cases demonstrate that the court is very aware of the distinctive purpose of the grievance process. Normal acts of negligence and normal mistakes do not result in disciplinary sanctions. Only when they are combined with fraudulent or unethical conduct or a continued and repeated pattern will the court invoke its sanctioning authority. Representative cases exemplify the notion that more grievous instances of neglect, especially when coupled with other misconduct, warrant at least a public reprimand.

For example, in *Norris v. Alexander*[48] an attorney was charged with not properly performing a service in addition to accepting a fee for services he never rendered. The lawyer received a public reprimand for engaging in professional misconduct which tended to bring the courts and legal profession into disrepute. The *Norris* court reiterated the standard for neglect cases by observing that disbarment "is not

47. McChrystal, *The Place of the New Model Rules in the Law of the Legal Profession*, WIS. BAR BULL., Mar. 1988, at 11.

48. 246 S.C. 14, 142 S.E.2d 214 (1965).

required by mere negligence in the performance of [one's] duties, by mere laziness or inattention to duty, in the absence of any moral delinquency or dishonorable or corrupt motive."[49]

In *In re Gaines*[50] the court issued a public reprimand to a lawyer who not only neglected to accomplish necessary tasks in a timely manner, but also failed to prepare adequately for representation of his clients. The court felt that the attorney demonstrated an intolerable degree of ineptitude and indifference.[51]

In *In re Kitts*[52] the court found that the lawyer violated DR 6-101(A)(2) and (3) by neglecting a legal matter entrusted to him and inadequately preparing for another. Moreover, the attorney was unwilling to cooperate in the investigation and resolution of the proceeding. For these actions, the court publicly reprimanded the attorney.[53]

Similarly, in *In re Bruner*[54] the initial complaint was aggravated by the lawyer's failure to cooperate with the grievance process. The initial complaint was based on the attorney's failure to notify the client of the recording of a mortgage and his further failure to respond to his client's repeated inquiries. Throughout the investigation, the attorney failed to provide accurate information in a timely manner. Clearly, had the attorney responded to his client's inquiries, a complaint may never have been filed with the Grievance Board. More importantly, had the lawyer cooperated with the investigation, he may have received only a private reprimand, as recommended by the Grievance Board. The court criticized the attorney's "overall lackadaisical attitude toward his duties as an attorney and officer of this Court."[55]

Another pattern of continued neglect was the subject of *In re Moore*.[56] The Executive Committee of the Grievance Board viewed the attorney's handling of real estate title work as more than simple negligence but recommended a private reprimand. However, the court found that several instances in the record of the respondent's neglect of clients justified a public reprimand.

In *In re Hodge*[57] the attorney allowed three cases to go into default. The attorney failed to confirm the date of service in one case. In the other cases, he ignored the warnings of opposing counsel about his

49. *Id.* at 19, 142 S.E.2d at 218.
50. 279 S.C. 531, 309 S.E.2d 5 (1983).
51. *Id.* at 532, 309 S.E.2d at 5.
52. 276 S.C. 243, 277 S.E.2d 602 (1981).
53. *See* S.C. APP. CT. R. 407, Rule 8.1. This case was decided under prior DR 1-103(B).
54. 283 S.C. 114, 321 S.E.2d 600 (1984).
55. *Id.* at 116, 321 S.E.2d at 601.
56. 275 S.C. 280, 269 S.E.2d 771 (1980).
57. 277 S.C. 507, 290 S.E.2d 237 (1982).

failure to answer by the default date. The lawyer contended that his actions were not intentional and that mere negligence did not warrant a public reprimand. The court observed that negligence could warrant not only a public reprimand, but indefinite suspension.[58] As did the court in *In re Bruner*,[59] the *Hodge* court took "a dim view of respondent's lack of familiarity with a legal matter entrusted to him and his unprofessional manner and lackadaisical attitude toward the practice of law."[60]

Similarly, in *In re Leppard*[61] the court found that two instances of severe neglect in accepting cases and then refusing to proceed, and additional misconduct of advancing funds to a client, merited a public reprimand. The court noted that the failure of attorneys to keep their clients advised probably results in more complaints being filed with the Grievance Board than any other error. The court stated than once an attorney accepts employment, the attorney must communicate the progress of the case to the client. The court observed that the duty to keep clients advised is different from the duty of diligently pursuing the matter entrusted to the attorney.[62]

In *In re Harvey*[63] the attorney was retained to handle an uncontested divorce. The client repeatedly inquired about the status of the divorce and informed the lawyer of her intentions to remarry.[64] The attorney advised the client to proceed with her wedding plans. The client testified that the attorney told her to conceal the fact that she was married in order to procure a marriage license, and that he would perform a second marriage ceremony after the divorce to make the marriage legal.[65] The court rejected mitigating circumstances offered by the attorney and issued a public reprimand for his neglect of duty.[66]

In *In re Treacy*[67] the attorney failed attempt to recover a disputed sum in a foreclosure proceeding after first accepting remuneration from the client. The lawyer failed to cooperate with the Grievance Board and neglected to appear at the time and place designated by the court for his hearing on misconduct. The court stated that failure to respond to inquiries from the Grievance Board constituted refusal to respond to the court, and demonstrated an intolerable lack of respect for author-

58. *Id.* at 509, 290 S.E.2d at 237.
59. 283 S.C. 114, 321 S.E.2d 600 (1984).
60. 277 S.C. at 508, 290 S.E.2d at 237.
61. 272 S.C. 414, 252 S.E.2d 143 (1979).
62. *Id.* at 419, 252 S.E.2d at 145.
63. 278 S.C. 101, 292 S.E.2d 595 (1982).
64. *Id.* at 102, 292 S.E.2d at 595-96.
65. *Id.*, 292 S.E.2d at 596.
66. *Id.*
67. 277 S.C. 514, 290 S.E.2d 240 (1982).

ity as well as misconduct unbecoming an attorney. The attorney was indefinitely suspended from the practice of law.[68]

In *In re Wood*[69] the attorney missed a deadline. His mistake was aggravated by the facts that he had been given notice of the need to file a claim, and he failed to keep in touch with his client. The lawyer also notarized his client's forged signature on a verification. In a separate matter, the attorney surreptitiously altered the grantee clause of a deed so that the mortgage did not secure the debt. The lawyer then asserted the altered deed as a defense to the subsequent foreclosure action.[70] The court imposed an indefinite suspension for neglect of a legal matter entrusted to the attorney combined with dishonest and fraudulent conduct.[71]

In *In re Baldwin*[72] the court also imposed an indefinite suspension for a continuous pattern of misconduct. The attorney omitted to perfect an appeal in a criminal case. He also had a history of failing to appear in court. The opinion recites that on one occasion, the attorney not only neglected to appear as scheduled but failed to respond to a telephone call from the court. Deputies finally escorted him before the judge where he was held in contempt. In a separate instance, the attorney was held in contempt for failing to appear in probate court on three scheduled occasions. On a third occasion, a judge issued a warrant to compel the lawyer's presence in court.

In *State v. Jennings*[73] several charges of misconduct warranted the sanction of disbarment. The charges included misappropriation and commingling of client funds along with breach of the attorney's fiduciary duties arising from his guardianship of a minor. The attorney allegedly acted in such a manner that the ward's estate was completely depleted. The court took into consideration the attorney's sincere desire to make good, and suspended judgment for disbarment upon the attorney's complying with certain terms and conditions structured to reimburse the minor.[74]

In *In re DuPre*[75] an attorney was disbarred for accepting fees from clients and then neglecting to represent clients on three separate occasions, for receiving goods in exchange for checks he wrote on a closed checking account on two occasions, and for failing to appear in court to represent several criminal defendants.

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68. *Id.* at 516-18, 290 S.E.2d at 241-42.
69. 278 S.C. 431, 298 S.E.2d 89 (1982).
70. *Id.* at 432, 298 S.E.2d at 89-90.
71. *Id.* at 433, 298 S.E.2d at 90.
72. 278 S.C. 292, 294 S.E.2d 790 (1982).
73. 161 S.C. 263, 159 S.E. 627 (1931).
74. *Id.* at 273-74, 159 S.E.2d at 631.
75. 270 S.C. 266, 241 S.E.2d 896 (1978).

In *In re Foster*[76] an attorney accepted fees from clients and neglected to represent clients on three occasions. The lawyer accepted fees for a variety of services ranging from patent applications to divorce, but abandoned the clients, failing to inform them or return the fees. The supreme court found the attorney's inattendance to his duties and retention of fees justified disbarment.[77]

VIII. RECOMMENDATIONS FOR THE GRIEVANCE PROCESS

Decisions of the South Carolina Supreme Court reveal that sanctions are appropriate when ordinary negligence combines with other more egregious offenses or is repeated and accumulated in a particular way that reflects not a simple mistake but rather that the lawyer is not competent to practice.

When complaints are filed, two issues can arise that need to be avoided. First, the bar and the court face problems if the grievance process is overused, even with good intentions, to try to cure disputes that may be better resolved by the Fee Disputes Board, insurance claims, civil court proceedings, or other alternatives. The court and Grievance Board can become overburdened by the inappropriate use of the grievance process, and lawyers may be unfairly and unnecessarily subjected to investigation.

The second set of problems involves the client's goals which may be frustrated by attempting to use the grievance process to resolve complaints having nothing to do with neglect of a legal matter entrusted. It may be better for a dissatisfied client to seek a remedy by pursuing a fee dispute, an insurance claim, or civil litigation. However, if every initial complaint automatically is processed as a grievance, which is the current overwhelming practice, then the consuming public frequently is diverted from seeking the relief it desires.

The inaccurate use of the grievance process inefficiently channels the energy of the consumer, the bar, and the court. Solutions should seek to bring about a more correct use of the grievance process and, at the same time, a more effective use of some of the other mechanisms that are available to resolve disputes that are not grievances.

One answer is for members of the Grievance Board to have solid training not only in the nature and workings of grievance proceedings but also in the alternative mechanisms for resolving problems between clients and lawyers. The recognition by those who serve on the Grievance Board that their purpose is as limited as their jurisdiction will help avoid inappropriate attempts to solve problems in the wrong

76. 265 S.C. 578, 220 S.E.2d 431 (1975).
77. *Id.*

forum.

Consumers of legal services need to be educated about the limited purpose and jurisdiction of the grievance process as well as the availability of other mechanisms for resolving other problems. It may be difficult to educate the general public on a subject about which even members of the bar lack knowledge. Informing and directing clients who have been injured by their attorneys' mistakes to appropriate dispute mechanisms may be feasible.

Rather than simply processing a complaint as a grievance, the Grievance Board could take some intermediate steps to help both the Grievance Board and the client. For example, when a claim is filed initially, the Grievance Board, after reviewing the allegations of the complaint, could provide a standard letter or interview to the client under certain circumstances. An appropriate person could explain the jurisdiction and purposes of the Grievance Board to injured clients. Clients could be informed about the Fee Disputes Board, or the nature of professional liability insurance and the manner of initiating a claim. Clients could be told about the availability of civil courts and other attorneys who might represent them in civil disputes. Clients could discuss arbitration or other alternatives to dispute resolution. Clients also could learn about the jurisdiction of small claims or magistrate's court.

After this information is provided, clients could elect to continue to pursue a grievance or to choose a more appropriate mechanism for resolving their problem. In this manner, clients often simultaneously could relieve the grievance process of inappropriate claims and better pursue their own ends in another forum. At the same time, the Grievance Board could continue to superintend complaints against members of the legal profession by evaluating claims as they are filed.

IX. CONCLUSION

We have mechanisms for civil recovery. We have mechanisms for resolving fee disputes. We have mechanisms for sanctioning criminal conduct. A mistake in not getting a task competently accomplished, however, often warrants civil liability and fee resolution. Mere errors should not be subject to disciplinary sanctions.

The practice of law is both a privilege and a right. It is a profession widely used in more democratic political systems and most narrowly used in totalitarian systems. Attorneys need to police themselves, but, at the same time, must realize that they are neither magicians nor superhuman. Clients also need to be able to make informed decisions regarding pursuing claims against their lawyers. Certainly the process for sanctioning unethical conduct should be that and no less. But it also should be no more. The pursuit of excellence and not the flight from punishment should be the method of choice.