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The Illinois Attorney Registration and Disciplinary Commission: Its Structure, Operation, and Limitations

Thomas R. Mulroy, Jr.
and Michael Palmer***

There is, perhaps, no profession, after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the line of strict duty and propriety; in which so many delicate and difficult questions of casuistry are continually arising.

— George Sharswood,
1854

The first thing we do, let's kill all the lawyers.

— Dick the Butcher,
Henry VI, Part 2,
Act IV, Scene 2

I. INTRODUCTION

One result of the recent Greylord investigation of judges and lawyers in Cook County, Illinois, is the increased public awareness that criminal investigations of attorney misconduct do not protect the public and the judicial system from unethical lawyers. Much more needs to be done to raise the bar's level of sensitivity to its ethical responsibilities. The problem is not new. In 1970 the American Bar Association Committee on Evaluation of Disciplinary Enforcement made the following assessment:

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

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

In Illinois, the Attorney Registration and Disciplinary Commission ("ARDC") assists the Illinois Supreme Court in enforcing the disciplinary code. Most citizens and practicing attorneys however, have, at best, a minimal understanding of the workings and purpose of the ARDC.² This article summarizes the current structure and operation of the ARDC, explores some problems with the current system, and suggests ways in which the disciplinary system in Illinois might be improved.

II. HISTORY AND STRUCTURE OF THE ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION

A. *Attorney Discipline Before 1973*

The Illinois Supreme Court has the ultimate power to discipline lawyers admitted to practice in Illinois.³ For the past forty-four

1. ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970).

2. The enforcement process in general and the work of the ARDC in particular have not been the focus of much scholarly attention or popular discussion. Although the American Bar Association published its ABA STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS (1979), these standards curiously omit the crucial aspect of sanctions. This topic was finally addressed in ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986). Even the important treatise G. HAZZARD & W. HODES, THE LAW OF LAWYERING (1985), avoids the enforcement question entirely. A good general discussion of the subject, based largely on the ABA STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS, *supra*, and published case authority, can be found in C. WOLFRAM, MODERN LEGAL ETHICS, ch. 3 (1986), which was written before the ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra*, were published. *See id.* at 119. *See also* A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 512-46 (1976); Marks & Cathcart, *Discipline Within the Legal Profession: Is it Self-Regulation?* 1974 U. ILL. L.F. 193 (1974).

Apart from a recent newspaper series, *Special Report: Judging Our Lawyers*, Wilmette Life, Jan. 15, 1987 at 22, col. 1-4; Jan. 22, 1987 at 20, col. 1-4; and Jan. 29, 1987 at 22, col. 1-4, articles concerning the Illinois disciplinary system generally have been confined to the disciplinary rules themselves or to a simple summary of the structure of the Illinois Attorney Registration and Disciplinary System. *See* J. BASSITT, *Attorney Conduct*, ILL. INST. FOR CONTINUING LEGAL EDUCATION (1985); Murphy, *A Short History of Disciplinary Procedures in Illinois*, 60 ILL. B.J. 528 (1972); Peck, *Inside the Attorney Discipline Commission*, 13 CHI. B.J. 3 (1983) (Young Lawyers Section); Swett, *Illinois Attorney Discipline*, 26 DEPAUL L. REV. 325 (1977); Vernon, *The Illinois Code of Professional Responsibility: A New Blueprint for Disciplinary Enforcement*, 30 DEPAUL L. REV. 365 (1981).

3. *E.g. In re George Anastaplo*, 3 Ill. 2d 471, 121 N.E.2d 826 (1954).

years, bar associations and the ARDC have assisted the court in exercising its power to discipline.

Although the first code of professional ethics in the United States was not formulated until 1887,⁴ basic standards for the legal profession became well established by the middle of the 19th century.⁵ In 1876 the Illinois Supreme Court issued its first rule relating to attorney discipline.⁶ The rule required disciplinary proceedings to be initiated by an information signed by the Attorney General or a state's attorney, stating the time, place, and acts of misconduct with reasonable certainty.⁷ The rule was amended in 1909 to permit the president and secretary of a regularly organized bar association as well as any person aggrieved by the misconduct of the attorney charged to sign the information.⁸ After 1909 the boards of the Chicago and Illinois State Bar Associations ("CBA" and "ISBA") largely displaced the Attorney General as the entity responsible for filing the information.⁹

In 1938 the supreme court appointed the boards of CBA and ISBA as Commissioners of the court to investigate, report on, and make recommendations concerning grievance complaints.¹⁰ Under this procedure complaints by an aggrieved person were filed with the appropriate bar association rather than in the supreme court.¹¹

4. H.S. DRINKER, *LEGAL ETHICS* 23 (1956) (Alabama State Bar Association adopted the first code in the United States). The Illinois Bar began drafting its canons of ethics between 1905 and 1908. *Id.*

5. See G. SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAWS* (1854). The ethical conduct of the legal profession in the English tradition has been regulated in some form at least since 1275 when Chapter 29 of the First of Westminster provided that "if any Serjeant, Pleader or other, do any manner of Deceit or Collusion in any King's Court or consent [unto it] in deceit of the Court [or] to beguile the Court or the Party and thereof be attainted, he shall be imprisoned for a Year and a Day and from thenceforth shall not be heard to plead (conter) in [that] Court for any Man." Cohen, *The Origins of the English Bar*, 40 *LAW Q. REV.* 464, 479 (1914); H. COHEN, *HISTORY OF THE ENGLISH BAR AND ATTORNATUS TO 1450*, 189-90 (1929).

6. Murphy, *supra* note 2, at 528-29.

7. *Id.*

8. *Id.* Notwithstanding the rule change in 1909, the Illinois Supreme Court in 1933 refused to hear a case on an information filed with the court by a private person and directed him to file a complaint with the Chicago Bar Association. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* The court amended the rule in 1952 to make use of the bar association board's fact-finding and advisory role with respect to reinstatement cases. *ILL. S. CT. R.* 259, *ILL. REV. STAT.* ch. 110, para. 259.59 (1953).

B. Creation of the Attorney Registration and Disciplinary Commission in 1973

On January 24, 1973, the Illinois Supreme Court adopted Rule 751, which established the Attorney Registration and Disciplinary Commission.¹² The ARDC then assumed the disciplinary functions previously performed by the bar associations.

The Commission currently consists of five commissioners, appointed by the supreme court for three-year terms.¹³ The Commissioners promulgate rules for disciplinary proceedings, supervise the work of the Administrator, appoint members of the Inquiry and Hearing Boards, collect and administer the disciplinary fund, submit an annual report to the court evaluating the effectiveness of the attorney registration and disciplinary system and recommend any changes they deem desirable.¹⁴ The daily work of the ARDC is performed by the Administrator and a staff currently consisting of one Deputy Administrator, one Assistant Administrator, a Commission Clerk and four Deputy Clerks, five senior counsel, eleven counsel, nine investigators, and support personnel.¹⁵

C. Structure of the Attorney Registration and Disciplinary Commission

Illinois Supreme Court Rules 751-74 and Rules promulgated by the Attorney Registration and Disciplinary Commission¹⁶, govern the structure and overall operation of the ARDC. From initial complaint to final disposition by the supreme court, a case proceeds through five phases.

1. Initial Complaint and Investigation by ARDC Staff

When a complaint is received by the ARDC,¹⁷ it is assigned to a

12. ILL. S. CT. R. 751, ILL. REV. STAT. ch. 110A, para. 751 (1973).

13. ILL. S. CT. R. 751(b), ILL. REV. STAT. ch. 110A, para. 751(b) (1985).

14. ILL. S. CT. R. 751(e), 753, ILL. REV. STAT. ch. 110A, paras. 751(e), 753 (1985).

15. In the ten years from 1976 through 1985, the ARDC docketed 22,165 investigations, of which all but 1,190 were terminated either by the Administrator or by the Inquiry Board. 1985 ARDC ANN. REP. 5 (1986). The number of matters steadily increased during the same period from a low of 1,649 in 1978 to 3,935 in 1985. *Id.* However, although the number of investigations grew by 238%, only two staff attorneys (from 5 to 7) and three staff investigators (from 3 to 6) were added to handle the increased workload. The increased burden without increased staff presumably has been a factor in some aspects of delay in the processing of cases in the past. See *infra* notes 73-82 and accompanying text. The current staff level was achieved in the latter part of 1986.

16. ILL. S. CT. R. 751-74, ILL. REV. STAT. ch. 110A, paras. 751-74 (1985).

17. The Administrator is not required to investigate any charge which is not in writing, does not identify the respondent and the person making the charge, or is not suffi-

staff attorney who reviews it. If the staff attorney decides the complaint is not frivolous, he¹⁸ requests a written response from the attorney-respondent.¹⁹ If the staff attorney's initial investigation shows that the respondent has not engaged in misconduct, the Administrator has the authority to close the investigation immediately.²⁰ In 1985, 1,730 of the 3,143 matters in which the ARDC took action were closed by the Administrator.²¹

2. The Inquiry Board Determines Probable Cause

If a staff attorney reasonably believes that the respondent has engaged in misconduct, he refers the case to the Inquiry Board. The Inquiry Board in turn assigns the case to one of the inquiry panels, each of which is composed of three members of the Illinois bar. The panels have plenary investigative powers, including the power to subpoena documents and witnesses.²² If through review of the file and other investigations the inquiry panel determines that the charge is without merit, it dismisses the complaint. If, on the other hand, the panel decides the complaint has substance, it may invite²³ or subpoena the respondent to attend a panel meeting and answer questions under oath.

Although the attorney retains his fifth amendment right not to testify before the inquiry panel,²⁴ he must appear upon request or face disciplinary action for failing to cooperate with the investigation.²⁵ As in all other phases of the disciplinary process, the attor-

ciently clear to apprise the respondent of the misconduct charged. DISC. COMM. R. 52, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

18. In this article, all masculine pronouns should be read as including the female gender.

19. See DISC. COMM. R. 53, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985) (the attorney-respondent must file his response within fourteen days).

20. *Id.* at RULE 54. If the complaining witness objects to closing the investigation, the Administrator must confer with the chairperson of the Inquiry Board and may then close the investigation only if the chairperson concurs. Otherwise, the Administrator must refer the matter to the Inquiry Board. *Id.*

21. 1985 ARDC ANN. REP. 4 (1986).

22. ILL. S. CT. R. 754, ILL. REV. STAT. ch. 110A, para 754 (1985); DISC. COMM. R. 102, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

23. DISC. COMM. R. 105, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985) (an attorney must be given the opportunity to make an oral statement to the inquiry panel before any complaint is voted).

24. See *In re Zisook*, 88 Ill. 2d 321, 333, 430 N.E.2d 1037, 1042 (1981). See also *Spevack v. Klein*, 385 U.S. 511 (1967) (fifth amendment privilege extended to prohibit disbarment of an attorney who refused to answer questions and produce documents).

25. *Zisook*, 88 Ill. 2d at 333, 430 N.E.2d at 1042. The procedure followed by the Illinois Supreme Court requires the attorney to appear and assert his fifth amendment rights. He may not refuse to appear on fifth amendment grounds. *Id.* If the Administrator does not accept the validity of the fifth amendment assertion, the Administrator may

ney may be represented by counsel before the inquiry panel.²⁶ When the inquiry panel considers a charge against an attorney, it must decide whether to continue the investigation for further action, dismiss the charges, discontinue an investigation begun on its own motion, or direct the Administrator to file a formal complaint which initiates adversarial disciplinary proceedings.²⁷ The inquiry panel does not determine the merits of the case or conduct adversary hearings.²⁸

In 1985 inquiry panels reviewed 1,239 of 3,143 matters.²⁹ During the same time period, inquiry panels voted complaints in 184 cases.³⁰ When the inquiry panel votes a complaint, the staff attorney assigned to the panel prepares a formal complaint and refers it to the Hearing Board. The Inquiry Board may reconsider its decision to file a complaint pursuant to the attorney-respondent's request.³¹ Once a complaint is referred to the Hearing Board, however, the Inquiry Board loses jurisdiction.³²

In 1984 the supreme court adopted Rule 774, whereby the court on its own motion, or on the Administrator's petition for a rule to show cause, may suspend a respondent on an interim basis if he has been "formally charged with the commission of a crime which involves moral turpitude or reflects adversely upon his fitness to practice law" and "there appears to be persuasive evidence to support the charges."³³ The ARDC may also seek interim suspension if the Inquiry Board votes a complaint which charges the respondent with a code violation involving "fraud or moral turpitude or threatening irreparable injury to the public, his or her clients, or to the orderly administration of justice" and "there appears to be per-

present the matter to the Chief Judge of the Circuit Court in which the proceeding is being held. The Chief Judge is required to appoint a judge of that circuit to determine whether the respondent is properly invoking the fifth amendment. *Id.* Because attorney discipline is not a criminal proceeding in Illinois, an attorney may not refuse to testify solely on the ground that the testimony might lead to a finding that he or she violated the disciplinary code. *In re March*, 71 Ill. 2d 382, 399, 376 N.E.2d 213, 220 (1978). Rather, the fifth amendment protection applies only to testimony which might tend to incriminate the respondent in a criminal case. *Id.* at 399-400. See also Underwood, *The Fifth Amendment and the Lawyer*, 62 NW. U.L. REV. 129 (1967).

26. DISC. COMM. R. 106, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

27. DISC. COMM. R. 103, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985). See also ILL. S. CT. R. 753(a)(3), ILL. REV. STAT. ch. 110A, para. 753(a)(3) (1985).

28. DISC. COMM. R. 102, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

29. 1985 ARDC ANN. REP. 4 (1986).

30. *Id.*

31. DISC. COMM. R. 101, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

32. *Id.*

33. ILL. S. CT. R. 774(a)(1), ILL. REV. STAT. ch. 110A, para. 774(a)(1) (1985).

suasive evidence to support the charge."³⁴ Unlike the proceedings within the ARDC itself, the interim suspension procedure is not confidential.³⁵ From the adoption of Rule 774 through July 1987,³⁶ seven attorneys had been suspended on an interim basis.

3. The Hearing Board Tries the Cases

The Hearing Board also performs its work through hearing panels; each hearing panel is composed of three volunteer members of the bar appointed by the Commission.³⁷ Two members constitute a quorum and accordingly, the hearing panel may conduct the hearing or any other business of the panel with only two members present.³⁸ The Hearing Board functions as a trial court, deciding all matters relating to pleadings and pre-hearing discovery. The Board conducts the hearing on the complaint, and prepares a report setting forth its findings of fact, conclusions of law, and recommended sanctions.³⁹

In lieu of recommending disciplinary action, the hearing panel may administer a reprimand, which must include a description of the respondent's misconduct and the reasons for the reprimand.⁴⁰ The hearing panel may alternatively recommend censure, suspension for a specified period of time, suspension for an unlimited time, or disbarment.⁴¹

4. The Review Board Exercises Intermediate Appellate Review

The Review Board consists of nine members appointed by the supreme court for three-year terms.⁴² It examines all cases in which the Hearing Board recommends action by the supreme

34. ILL. S. CT. R. 774(a)(2), ILL. REV. STAT. ch. 110A, para. 774(a)(2) (1985).

35. See *infra* notes 83-92 and accompanying text.

36. Telephone interview with Ken Jablonski, Clerk of the Illinois Supreme Court (July, 1987).

37. DISC. COMM. R. 201, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985). ILL. S. CT. R. 753(c), ILL. REV. STAT. ch. 110A, para. 753(c) (1985).

38. DISC. COMM. R. 201, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

39. ILL. S. CT. R. 753(c), ILL. REV. STAT. ch. 110A, para. 753(c) (1985); DISC. COMM. R. 281, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

40. DISC. COMM. R. 282, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

41. See ILL. S. CT. R. 771, ILL. REV. STAT. ch. 110A, para. 771 (1985). Post-trial motions may not be made to the hearing panel. Rather, any matters which would otherwise be presented in a post-trial motion must be included in any exceptions filed with the Review Board. DISC. COMM. R. 284, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

42. ILL. S. CT. R. 753(d), ILL. REV. STAT. ch. 110A, para. 753(d) (1985). Unlike the members of the Inquiry and Hearing Boards, the members of the Review Board are not required to be members of the Bar of Illinois. *Id.*

court or the Administrator files exceptions.⁴³ If no exceptions are filed by either party, the Hearing Board report must be filed with the supreme court as an agreed matter.⁴⁴ If either party contests the Hearing Board's report, the Review Board may conduct a de novo review of the record and make its own findings of fact and conclusions of law.⁴⁵ Subsequently, if it concludes that discipline is warranted, the Review Board files a report with the supreme court.⁴⁶ As a matter of right, the respondent may file exceptions to that report within twenty-one days.⁴⁷ The Administrator, on the other hand, must petition the court for leave to file exceptions.⁴⁸

5. The Illinois Supreme Court Makes the Final Decision

The supreme court may permit or require either briefs or oral argument.⁴⁹ The brief of the party filing exceptions must be filed within thirty-five days of the Court's order permitting briefs.⁵⁰ Thereafter, the matter proceeds the same as any other case before the supreme court,⁵¹ typically concluding with a written opinion.

III. THE ARDC'S WORK AT THE INQUIRY PANEL LEVEL

A. *The Inquiry Panels Dispose of Over Ninety Percent of All Complaints Against Attorneys*

The work of the Commission at the Inquiry Board level is extremely important to the community as well as the respondents. The inquiry panels have the power to dispose of a matter without voting a complaint or without any formal finding at all.⁵² If a matter is disposed of at the Inquiry Board level, not only does the at-

43. ILL. S. CT. R. 753(e), ILL. REV. STAT. ch. 110A, para. 753(e) (1985). The respondent may file exceptions to the Hearing Board report within 21 days after service of the report. *Id.*

44. ILL. S. CT. R. 753(e), ILL. REV. STAT. ch. 110A, para. 753(e) (1985). The supreme court may then approve the report, refer the case to the Review Board, or order briefs and oral argument. *Id.*

45. ILL. S. CT. R. 753(e), ILL. REV. STAT. ch. 110A, para. 753(e) (1985).

46. ILL. S. CT. R. 753(e), ILL. REV. STAT. ch. 110A, para. 753(e) (1985). If the Review Board merely affirms the findings and conclusions of the Hearing Board, the Review Board need not file an additional report with the court. *Id.*

47. ILL. S. CT. R. 753(e)(5), ILL. REV. STAT. ch. 110A, para. 753(e)(5) (1985).

48. ILL. S. CT. R. 753(e)(6), ILL. REV. STAT. ch. 110A, para. 753(e)(6) (1985). Consistent with the confidentiality of the proceedings, the clerk shall not docket the Administrator's petition for leave to file exceptions unless the court allows the petition. *Id.*

49. ILL. S. CT. R. 753(e)(7), ILL. REV. STAT. 753(e)(7) (1985).

50. *Id.*

51. "Briefs shall be prepared, filed and served in compliance with Rules 343 and 344." ILL. S. CT. R. 753(e)(7), ILL. REV. STAT. 753(e)(7) (1985).

52. *See* DISC. COMM. R. 103, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

torney-respondent avoid a complaint and the possibility of discipline, but the matter itself remains confidential unless the respondent or a private complainant publicizes it.⁵³

The vast majority of grievances against lawyers processed by the ARDC never proceed beyond the Inquiry Board level.⁵⁴ Inquiry panels voted complaints in less than six percent of the 3,143 matters on which the ARDC took action in 1985.⁵⁵ Although the number of matters processed by the Administrator has increased dramatically since 1980, the percentage relationship between matters terminated without complaint and matters on which a complaint was voted for the previous five years has remained roughly the same.⁵⁶

B. The Work of the Inquiry Panels is Critical to the Disciplinary Process

Not surprisingly, the inquiry panels set the tone for attorney discipline. They determine, on a de facto basis, how the disciplinary code will be interpreted for most cases. The panels have wide discretion to determine whether there is probable cause to vote a complaint. Apart from the Administrator's staff, the inquiry panels constitute the sole group within the disciplinary system with the necessary experience to compare fact situations, the different types of complaints brought against attorneys, and the comparative seriousness of charges.

The critical importance of the Commission's work at the Inquiry Board level and relative secrecy of that work raise questions of interest to respondents, practitioners before the Commission, and the public.⁵⁷ These questions concern the role of the Commission's staff attorneys and investigators in the inquiry panel process, the composition of the inquiry panels themselves, the standards used to guide the exercise of panels' disciplinary discretion, and whether there is any pattern to the disposition of the complaints reviewed by the inquiry panels.

C. Role of ARDC's Staff Attorneys and Investigators

The ARDC staff attorneys and investigators play a singularly

53. See ILL. S. CT. R. 766, ILL. REV. STAT. ch. 110A, para. 766 (1985).

54. See *supra* notes 22-36 and accompanying text.

55. See 1985 ARDC ANN. REP. 4 (1986).

56. See *id.* at 5 (1,885 disciplinary matters were investigated in 1980 as compared with 3,153 in 1985).

57. See, e.g., *Special Report*, *supra* note 2.

important role throughout the disciplinary process. Their work is divided roughly into three phases: receiving and screening charges from individuals outside the ARDC; presenting charges to the inquiry panels and assisting them in determining whether to vote a complaint; and preparing and prosecuting a formal complaint to a final decision. In the first two phases, the staff attorneys' own experience, expertise, and discretion have the most significant impact on the disciplinary process.

Although the Administrator has authority to investigate and bring charges against an attorney without any complaining witness, the bulk of complaints handled by the ARDC come from people—usually former clients—outside the ARDC. After reviewing the written complaint, the staff attorney makes an initial determination of whether any code provision has been violated. Given the high number of matters which are terminated by the staff attorney acting on behalf of the Administrator, the proper exercise of discretion at the initial screening phase is crucial to the enforcement of the code.

If, after reviewing the complaint, the staff attorney concludes that the respondent violated the disciplinary code, he must then present the matter to the inquiry panel. Apart from the obvious responsibility to investigate and present the matter well, the staff attorney may argue in favor of a formal complaint or take a more neutral stance. Because staff attorneys review many complaints, they can assess the comparative gravity of the alleged offense. Accordingly, inquiry panel members, especially those lacking ARDC experience, tend to rely upon the staff attorney's recommendation regarding the disposition of a complaint.

D. Composition of Inquiry Panels

Because the inquiry panels wield such decisive power in the disciplinary process, the composition of the panels is of interest to both the public and lawyers charged with misconduct. Attorneys may apply to the Commission to become members of the Inquiry Board by submitting a written request and a summary of professional experience. The Commission periodically reviews the requests on file and selects candidates to fill any available vacancies.⁵⁸

It is impossible for someone outside the ARDC to establish any correlation between the decisions rendered in individual cases and

58. See ILL. ST. CT. R. 753(a)(1), ILL. REV. STAT. ch. 110A, para. 753(a)(1) (1985). Neither the supreme court rules nor the ARDC rules establish any criterion for membership on an inquiry panel other than membership in the bar of Illinois. *Id.*

the backgrounds of the lawyers without breaching the barriers of confidentiality. It is apparent, however, that the Inquiry Board maintains a fair representation of lawyers from all types of law firms, from all kinds of legal practice, and from all parts of the state.⁵⁹ There is no indication that the composition of the inquiry panels is likely to favor or disfavor any particular type of lawyer.

E. Typical Inquiry Panel Procedures

Although procedures vary from panel to panel, most panels follow a common procedure dictated largely by the rules.⁶⁰ Most panels meet once a month to discuss complaints which have been assigned for review to the individual panel members. Each staff attorney prepares a monthly agenda⁶¹ that lists each complaint name and number, the date it was filed, and the name of the panel lawyer to whom it has been assigned. Although staff attorneys generally assign complaint files on a random basis, panel lawyers with a specific expertise or interest usually receive complaints relating to their specialty.

The assigned panel member reviews the complaint, any supporting materials, and the respondent's written reply. The panel lawyer also may investigate further before presenting his views to the panel.⁶² The reporting attorney's investigation frequently enables the panel to determine more quickly than otherwise whether to vote a formal complaint.

After hearing a panel member's report on the facts of a given complaint, the panel discusses the complaint and decides whether to investigate further, dismiss, or vote a formal complaint. Of course, if the respondent has not already appeared, the panel must afford him with "an opportunity to make an oral statement" before the panel votes to file a complaint with the Hearing Board.⁶³ Even

59. Of the 45 members of the Inquiry Board, 16 are sole practitioners. Another 16 are members of firms with 10 or fewer lawyers. One member is employed by a real estate broker. One member is an Assistant United States Attorney. One member is a public defender. Seven members are employed by firms ranging in size from 14 to 302 lawyers. Twenty-two Inquiry Board members practice in Chicago. The remaining twenty-three members practice in Champaign, Paris, Springfield, Bloomington, Danville, Granite City, Peoria, Carbondale, Crystal Lake, Freeport, Dixon, Joliet, Elgin, Park Ridge, Rock Falls, Wheaton, and Morrison. See Martindale-Hubel listings for the current list of Inquiry Board members published by the ARDC.

60. See ILL. S. CT. R. 753(a), ILL. REV. STAT. ch. 110A, para. 753(a) (1985); DISC. COMM. R. 101-105, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

61. DISC. COMM. R. 103, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

62. DISC. COMM. R. 102, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

63. DISC. COMM. R. 105, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

if the respondent has already appeared, the inquiry panels usually provide him with a second opportunity to explain the conduct in question. Although this sworn statement is not part of formal discovery in an adversary proceeding, it can be used for impeachment purposes in an eventual hearing. Respondents are well advised to retain counsel⁶⁴ and to answer the panel's questions precisely, accurately, and fully. The respondent's failure to prepare a careful response to charges can influence the panel to vote a formal complaint. Panels also take the statements of key witnesses and of the complaining witnesses in the same manner as they question respondents. As every trial lawyer knows, there is no substitute for first-hand examination of a witness or a party to a dispute.

After hearing the respondent and other witnesses, the panel discusses the charge of misconduct again before deciding by formal vote whether there is probable cause to believe the respondent violated a particular provision of the disciplinary code. If the panel finds probable cause, it directs the staff attorney to prepare a formal complaint.⁶⁵

Although the panel's function is to determine probable cause rather than the merits of the case,⁶⁶ the panels frequently will not vote a complaint unless a majority is persuaded that the respondent has violated the disciplinary code. The filing of a formal complaint has serious consequences for the attorney-respondent in terms of time, money, and the stress associated with defending a prosecution. Members of inquiry panels may instinctively shy away from imposing the burden of responding to a formal complaint unless they are clearly convinced that the attorney has engaged in serious misconduct. Thus, in some cases, a panel might close a matter with a self-contradictory letter to the respondent saying, in effect, "We find no probable cause to vote a complaint, but don't do it again."

F. Types of Misconduct Charged

In its annual report, the Commission classifies the charges received by the Administrator both by type of matter in which the alleged misconduct occurred and type of misconduct charged.⁶⁷ In 1985 forty-seven percent of the alleged misconduct occurred in cases involving torts, domestic relations, and criminal or quasi-

64. DISC. COMM. R. 106, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

65. See DISC. COMM. R. 102, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

66. See DISC. COMM. R. 102, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

67. See 1985 ARDC ANN. REP. 11 (1986).

criminal cases.⁶⁸ The remaining categories indicate that suspected violations of the disciplinary code occur in all areas of legal practice.⁶⁹

Of the complaints formally filed by the inquiry panels in 1985, over forty-five percent concerned neglect of the client's affairs in one way or another.⁷⁰ Ethical violations involving moral turpitude, while far from insignificant, did not make up the greater part of the charges brought.⁷¹

Many complaints lodged with the ARDC have little merit. Clients and opposing counsel may file complaints—whether justified or not—merely to obtain leverage over the attorney-respondent. Unwarranted charges of misconduct also may arise out of the emotional stress of litigation. Although Disciplinary Rule 1-103 requires lawyers to blow the whistle when they have unprivileged knowledge that another attorney has engaged “in illegal conduct involving moral turpitude” or “in conduct involving dishonesty, fraud, deceit, or misrepresentation,”⁷² overzealous attorneys may, and frequently do, mistake vigorous advocacy for misconduct. A neutral observer on an inquiry panel can distinguish between the two and dismiss unfounded charges.

IV. DELAY

The ARDC rules reflect an awareness that disciplinary cases should be handled expeditiously.⁷³ An attorney's fitness to practice law should not be adjudicated three to six years after the misconduct is discovered, allowing that attorney to engage in further im-

68. *Id.*

69. *Id.* (Other (401), Real Estate/including Landlord Tenant (373), No Case (302), Contract (222), Probate (213), Bankruptcy (170), Corporate Matters (87), Tax (81), Labor Relations (79), Civil Rights (72), Undeterminable (23), Immigration (19), Local Government Problems (12), Adoption (9), Patent and Trademark (9), and Mental Health (2)).

70. *See id.* (Neglect (678), Relationship with Client (Disclosing of Confidential Information/Improper Withdrawal/Abandonment/Failure to Protect Interest of Client) (663), and Failure to Communicate with Client (412)).

71. *See id.* (Improper Handling of Funds of Others (387), Conduct Involving Dishonesty or Fraud (320), Other (249), Private Communication Submitted Pursuant to Rule 2-103(e) (229), Conduct Which Tends to Bring Legal Profession Into Disrepute (189), Employment Where Interest of Another Client May Impair Judgment (147), Excessive Fee (112), Greylord Related (81), Solicitation in Person or by Telephone (69), Failure to Withdraw from Employment or Improper Withdrawal (65), Knowing Use of False Evidence (54), Misconduct Related to Subpoena (50), Failure to Treat Others with Courtesy (44), Criminal Conduct (41), Prosecutor's Initiation of Unwarranted Prosecution (33), and Improper Public Communication (27)).

72. DISC. COMM. R. 103, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

73. *Id.*

proper behavior in the meantime.⁷⁴ Long delays during the prosecution of disciplinary cases similarly weaken the general deterrent value of the disciplinary process.

A. Delay at the Investigation and Inquiry Board Levels

Under the ARDC's present structure, cases inevitably consume a considerable amount of time before the supreme court renders a final decision—even if all participants are working diligently. The investigation phase involves three separate steps, each of which is a potential bottleneck. First, the staff attorney and staff investigator must receive and evaluate the charge brought by the complaining witness. While this stage normally should not involve lengthy delays, the staff attorneys may need to interview witnesses in addition to the complaining witness. If the charge is not frivolous on its face, the staff attorney advises the respondent of the charge and requests a written response within fourteen days.⁷⁵ The staff attorney must evaluate the attorney's response, determine whether a disciplinary rule may have been violated and, if so, refer the matter to an inquiry panel.

Although the rules do not set time limits within which the Inquiry Board must complete its investigation and either close the file or vote a formal complaint, ARDC Rule 104 requires the panel to dispose of matters promptly and prohibits more than one continuance at the request of respondent or his counsel.⁷⁶ It is obvious, however, that the inquiry panel's routine work cannot be completed within a few weeks. The matter must be set on an inquiry panel agenda for one of the next regular monthly meetings. The inquiry panel must determine whether to conduct an investigation and hear witnesses other than the respondent. Two or three meetings may take place before a panel member is prepared to present

74. See, e.g., *In re Teichner*, 104 Ill. 2d 150, 470 N.E.2d 972 (1984). Marshall Teichner was the respondent in a disciplinary proceeding charging solicitation which resulted in a decision by the supreme court to impose a two-year suspension in 1979. See *Teichner*, 75 Ill.2d 88, 387 N.E.2d 265 (1979) (Teichner I). In 1977, while the first disciplinary proceeding was being handled (under the cloak of confidentiality), Teichner engaged in the misconduct for which the supreme court ultimately disbarred him in 1984. *Teichner*, 104 Ill. 2d at 160, 470 N.E.2d at 981. Thus, at least seven years elapsed before the public received the protection to which it was entitled.

75. See DISC. COMM. R. 53, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985). Notwithstanding the fourteen-day time limit, a significant amount of time can elapse before the staff attorney receives a response. Although the inquiry panel has the power to go forward without such a response, as a practical matter the inquiry panels generally wait.

76. DISC. COMM. R. 104, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

the facts to the panel. Two or three more meetings may pass before the witnesses or the respondent can be deposed. If the panel meets only once each month, the delay can stretch the case out extensively.

The rules also do not prescribe a time within which a complaint must be filed after an inquiry panel has voted. In the past, the burden of an increasing case load on an insufficient number of staff attorneys has led to delays of more than a year between the voting and filing of a complaint. Even under optimum conditions, however, at least three to four weeks will elapse before a complaint is filed. Thus, the routine case—even if handled efficiently and speedily—will consume at least three to six months before a formal complaint is on file permitting disciplinary prosecution to go forward.

B. Delay at the Hearing Board Level

Once the complaint is filed, Rule 231 requires the respondent to answer or otherwise plead within twenty-one days of personal service or twenty-eight days following the date of mailing when service is by mail.⁷⁷ The hearing on the complaint must begin no later than ninety days after service of the complaint unless extraordinary circumstances exist.⁷⁸ The rules prohibit more than one continuance “except under extraordinary circumstances.”⁷⁹

In fact, disciplinary cases are rarely heard within the prescribed time. The respondent may file a motion to dismiss or for clarification, requiring several weeks or possibly months for briefing and resolution. Both the respondent and the Administrator have the right to conduct full discovery, including depositions,⁸⁰ which may lead to further continuances. Scheduling problems occur when conflicts arise between the professional obligations of one or more of the lawyers serving on the hearing panel. In actual practice, therefore, after the complaint is filed, a case can take well in excess of six months after the complaint is filed before the hearing is completed.

Except for the interim suspension provided by Illinois Supreme Court Rule 774,⁸¹ no disciplinary action is taken until the supreme court issues a decision. Thus, unlike losing parties in civil and

77. DISC. COMM. R. 231, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

78. DISC. COMM. R. 271, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

79. DISC. COMM. R. 272, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

“Engagement of counsel shall not be deemed an extraordinary circumstance.” *Id.*

80. DISC. COMM. R. 251, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

81. ILL. S. CT. R. 774, ILL. REV. STAT. ch. 110A, para. 774 (1985).

criminal trials, an attorney found guilty of ethical misconduct following a full hearing conducted by the hearing panel cannot be disbarred or suspended immediately and continues to enjoy the advantages of confidential proceedings. Although no specific time limit is set, the panel must prepare its report as soon as practicable after completion of the hearing.

C. Delay at the Review Board and Illinois Supreme Court Levels

The rules do not require either the Review Board or the supreme court to decide a case within a specified time. Even under optimal circumstances, the process of briefing, arguing, and deciding a routine case takes a minimum of six to nine months at each level of the two-tiered appeals process. Thus, a case can continue in secret for twelve to eighteen months after a decision recommending discipline has been filed by the Hearing Board.⁸²

V. CONFIDENTIALITY

The two- to three-year minimum processing time for disciplinary cases is particularly problematic due to the requirement of confidentiality imposed upon disciplinary proceedings until an appeal is docketed in the supreme court.⁸³ It is only when a case reaches the supreme court that members of the public—including a respondent's actual and potential clients—can learn from public records about the proceeding from the ARDC or the clerk of the supreme court. Prior to that time, most clients do not know that their lawyers have been involved in disciplinary proceedings unless the attorneys notify their clients that they will not be able to represent them for a certain period of time.⁸⁴ Because such extensive secrecy is unusual in judicial proceedings in the United States, it is appropriate to ask what rationale supports it and whether there are sound reasons for modifying the confidentiality rules.

82. DISC. COMM. R. 281, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

83. Until it was repealed in 1984, Rule 769 prohibited the clerk from announcing the filing of any petition, motion, pleading or other document or the entry or issuance by the court of any order or writ in any disciplinary proceeding before the entry of a dispositive order by the court. *See* ILL. S. CT. R. 769, ILL. REV. STAT. ch. 110A, para. 769 (1981).

84. Illinois Supreme Court Rule 764 (Notification to Clients) requires only that the disbarred or suspended attorney notify all clients in writing by certified or registered mail "of the fact that he cannot continue to represent them." ILL. S. CT. R. 764, ILL. REV. STAT. ch. 110A, para. 764 (1985). There is no requirement that the disciplined attorney tell his clients why or that he disclose anything having to do with the disciplinary proceedings. It is foreseeable that some attorneys—especially the more unscrupulous—will affirmatively mislead their clients as to the reason for their temporary withdrawal by stating that they are going into another business or the like.

A. Confidentiality Protects the Innocent Attorney and the Client

There are no published opinions or other official pronouncements stating why disciplinary proceedings should remain confidential until the entry of a final order. Nevertheless, it requires no great imagination to discern that confidentiality is a means of protecting the innocent. Anything tending to cast doubt on a lawyer's ethical fitness may severely impair his ability to practice law. A fiduciary relationship exists between clients and their attorneys. Tribunals also must assume that they can trust the lawyers appearing before them. Arguably, the mere fact that the ARDC has a charge against an attorney on file—no matter how frivolous—may raise doubts regarding the attorney's ethical integrity, doubts that the attorney has no opportunity to rebut. In criminal and civil proceedings, an attorney must certify as an officer of the court that there is good cause for filing a complaint, information, or indictment. Non-attorneys bringing charges before the ARDC, however, are not held to any such standard. If these charges were routinely made public, one could expect abuse of the ARDC by spiteful litigants to increase.

Confidentiality also may be considered necessary to avoid inappropriate inferences about lawyers involved in disciplinary proceedings. Those unfamiliar with the rules and their purposes might conclude that anyone who violates a rule must be ethically suspect. This conclusion is erroneous. Some of the rules are technical safeguards designed to protect against a perceived evil or to prevent ethical problems from occurring but do not involve matters of right or wrong conduct. Indeed, this fact has led to the perceptive observation that:

[t]he problems of legal ethics are those between right and right, not between right and wrong, for genuine ethical problems always create a dilemma for the lawyer. The basic duties — loyalty, candor, and fairness — all conflict with each other if carried to their logical extremes, and the question of the right thing to do in a particular situation is a matter of degree.⁸⁵

The public might incorrectly assume that disciplinary proceedings only involve matters that reflect on the moral character of attor-

85. T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 21 (1981). Morgan and Rotunda do not, of course, deny that there are morally bad lawyers; they merely assert that such people present a practical, not a theoretical problem: "A code of conduct is not for bad lawyers but for good lawyers. Lawyers who steal a client's funds, who suborn perjury, or who commit a crime present no problem of legal ethics. The problem they pose is proof of the willingness of the profession to act decisively in removing them from the bar." *Id.*

neys and draw false or unfair inferences from the mere fact that disciplinary proceedings are pending.

A third reason for preserving the confidentiality of disciplinary proceedings is the need to preserve client confidences. Frequently, attorney-client communications and other aspects of the attorney-client relationship must be divulged in disciplinary proceedings by the Administrator or the respondent.⁸⁶ In the course of discovery and the hearing, the client's affairs that relate to a particular transaction or a series of transactions may be the subject of extensive discussion. It is unfair that a client's affairs are disclosed to the public simply to determine whether the client's lawyer has engaged in misconduct; the prospect of such disclosure might prevent some clients from bringing charges of wrongdoing to the attention of the ARDC. Certain aspects of the disciplinary proceedings can be afforded confidential protection in the same manner as in civil trade secret proceedings. Nevertheless, when a client is involved in disciplinary proceedings against his attorney it can scarcely be kept secret and, in high-profile cases, might lead to inquiries from the media.

It might also be claimed that disciplinary proceedings are peculiarly within the ambit of the court's responsibility; overseeing the professional conduct of those admitted to practice before the court may be considered a private matter until final action has been taken through disbarment or suspension.⁸⁷ This supposed reason does not withstand even cursory scrutiny. An oft-repeated purpose of disciplinary sanctions is the protection of the public.⁸⁸ If the public has a right to be protected from the misconduct of a lawyer, it follows that the public has an interest in knowing whether formal disciplinary proceedings are pending against him. Moreover, lawyers do not merely practice before the court. They represent clients in a variety of transactions, many beyond the jurisdiction of any court of law. Therefore, there is a public interest in having access to information concerning whether disciplinary actions are pending against a particular attorney.

86. The disciplinary code specifically provides an exception to the requirement that a lawyer preserve the confidences and secrets of a client—namely, when doing so is necessary “to defend himself or his employees or associates against an accusation of wrongful conduct.” CODE OF PROFESSIONAL RESPONSIBILITY Rule 4-101(d)(4), ILL. REV. STAT. ch. 110A, CANON 4 (1985).

87. The Rules contain no requirement that a lawyer inform anyone that he has been censured by the court for a code violation.

88. See *infra* notes 93-122 and accompanying text.

B. A Blanket of Confidentiality for the Duration of Disciplinary Proceedings Is Not Justified

Forceful reasons can be presented for making disciplinary proceedings public at some point before a final order is entered by the supreme court. A formal complaint charging an attorney with fraud, deceit, or criminal activity raises the question whether that attorney has sufficient integrity to be trusted with client secrets and affairs or to engage in the adversary process in the courts. Clients, judges, and opposing counsel have an interest in learning that an inquiry panel has found sufficient grounds to file a complaint against an attorney. Arguably, it is irresponsible to conceal this information from the public for the long period of time required to complete disciplinary proceedings.⁸⁹

The public has an interest in knowing whether formal disciplinary proceedings have been initiated against an attorney. Some infractions of the disciplinary code are, however, less serious than others. Nevertheless, if such violations are of a sufficiently serious nature to warrant sanctions, then they are sufficiently serious to be of interest to clients in particular and the public in general.

Publicizing the existence of disciplinary proceedings after a formal complaint is filed also would remove much of the incentive to delay the proceedings and may even encourage some attorneys to withdraw their names from the rolls voluntarily. Under the present system, an attorney can continue a lucrative practice for several years after he has engaged in conduct leading to disbarment.

Lawyers receive more due process protection at the investigatory stage than virtually any other litigants—certainly more than criminal defendants.⁹⁰ The inquiry panel reviews the charges carefully and in considerable detail before voting a complaint. The respondent has every opportunity to demonstrate to the inquiry panel that there is no basis for disciplinary action. Thus, while publication of charges having no merit might cause ill-founded damage to an attorney's reputation, notice that formal disciplinary proceedings are pending against an attorney before the Hearing Board presents no serious danger of false damage to his reputation. The

89. The ARDC does have the power to petition for interim suspension pursuant to Illinois Supreme Court Rule 774 in cases involving criminal conduct or conduct involving fraud, moral turpitude, or the threat of irreparable injury to the public. Rule 774, however, does not of itself suspend the confidentiality provisions. ILL. S. CT. R. 774, ILL. REV. STAT. ch. 110A, para. 774 (1985).

90. See *supra* notes 17-36 and accompanying text.

proper question is when, not whether, this fact should be made available to the public.

C. The Proceedings Should Be Public Upon the Filing of a Formal Complaint

The ABA Sanctions Standards have resolved the confidentiality question in the following manner:

Upon the filing and service of formal charges, lawyer discipline proceedings should be public, and disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand [which equates to censure in Illinois]. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.⁹¹

The commentary to these standards notes that public confidence in the disciplinary system will increase with public knowledge about the effectiveness of the disciplinary system.⁹² As discussed above, the interests of the public require that information concerning pending formal disciplinary proceedings be available to the public. The ARDC has the inherent authority to take whatever steps are necessary to protect client confidences in the process.

VI. SANCTIONS

The disciplinary code should serve two distinct functions. First, the code and the enforcement process should, to the extent possible, deter lawyers from engaging in acts involving moral turpitude and exclude those from the profession who are guilty of such acts. Second, the code should prevent lawyers from performing acts which, while they may not be wrong or immoral in themselves, might lead to the possibility of direct or indirect injury to clients, the public, the legal system, or the profession.⁹³ The distinction is important at the outset if one is to avoid the mistake of using moral culpability on the one hand or the presence or absence of injury on the other as the decisive criterion for deciding whether to impose a

91. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.2 (1986). Standard 8.25 of the ABA STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS (1979) also stated that "upon the filing and service of formal charges [against a lawyer] the proceeding should be public. . . ." *Id.*

92. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.2 (1986).

93. The legal profession has traditionally made an analogous distinction in terms of *character* and *fitness*—the former having to do with moral qualities, the latter concerning actual physical, mental, and educational capacity to practice law.

more lenient or a more severe sanction. It may be appropriate with respect to certain code provisions to adopt a strict liability stance and impose severe sanctions for any violation regardless of intent or injury.⁹⁴ On the other hand, clear and convincing evidence of a high degree of moral culpability or immoral character should probably result in disbarment—even though there may have been no actual or potential injury other than to the reputation of the legal profession. This distinction reveals the disciplinary code to be not a moral code but a professional code—a regulation of behavior developed specifically for the needs and characteristics of a particular profession.

A. The ABA Sanctions Standards Provide Necessary Criteria for Imposing Discipline

The Illinois Supreme Court has repeatedly stated that, while every case is unique,⁹⁵ it is important to achieve consistency in the sanctions imposed for particular types of disciplinary violations.⁹⁶ The court, however, has not attempted to assign a standard sanction to provisions of the code in a manner analogous to punishments imposed by the criminal code. Nor has the Illinois Supreme Court developed any theory for imposing sanctions.⁹⁷ In fact, the

94. Anyone practicing law has an obligation to know and comply with valid disciplinary rules—just as anyone who drives an automobile has an obligation to know and comply with the traffic laws. For purposes of enforcing the traffic laws as such, it should not matter whether a person running a red light does so intentionally or haphazardly. The danger to others is the same. Moral culpability simply adds a dimension with its own significance to violations of either code.

95. This statement can be found in virtually every recent discussion of the appropriate sanction in Illinois Supreme Court disciplinary opinions. See, e.g., *In re Freel*, 89 Ill. 2d 263, 270, 433 N.E.2d 274, 277 (1982); *In re Clayter*, 78 Ill. 2d 276, 283, 399 N.E.2d 1318, 1321 (1980).

96. E.g., *In re Hopper*, 85 Ill. 2d 318, 324, 423 N.E.2d 900, 903 (1981). Notwithstanding this laudable goal, there is still a wide range of sanctions imposed for virtually the same violation. In Illinois four different sanctions may be imposed for violations of the disciplinary code: a private reprimand, censure, suspension, and disbarment. ILL. S. CT. R. 771, ILL. REV. STAT. ch. 110A, para. 771 (1985). However, in contrast to criminal codes, the disciplinary rules do not indicate what kind of sanction shall be imposed for violating a given code provision.

97. See ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS 3 (1986). “[T]he courts [have] failed to articulate any theoretical framework for use in imposing sanctions.” *Id.* The American Bar Association’s Standards for Lawyer Discipline and Disability Proceedings likewise failed to make any recommendations about the appropriate sanctions to be imposed for specific types of lawyer misconduct. These standards merely repeat the general guideline that the sanction imposed “should depend upon the facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances.” ABA STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS 7.1 (1979).

court imposed the full range of available sanctions on lawyers who have violated the same provisions of the code.⁹⁸

Recognizing the need for a classification of sanctions and a theoretical basis for imposing them, the Standing Committee on Professional Discipline and the Judicial Administration Division of the ABA created a Joint Committee on Professional Sanctions which, after an exhaustive review of disciplinary cases in most jurisdictions,⁹⁹ published its conclusions as the Standards for Imposing Lawyer Sanctions (the "Sanctions Standards").¹⁰⁰ The publication of the Sanctions Standards is a giant step forward in the process of determining the appropriate sanctions for code violation. As the Joint Committee states:

For lawyer discipline to be truly effective, sanctions must be based on clearly developed standards. Inappropriate sanctions can undermine the goals of lawyer discipline: sanctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions which are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers. Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.¹⁰¹

The Joint Committee unanimously rejected as "theoretically simplistic and administratively cumbersome" the possibility of stating a recommended sanction or range of sanctions for each particular disciplinary rule.¹⁰² The Joint Committee also declined to focus solely on whether misconduct is intentional or malicious because of the damage which the lawyer's misconduct causes to the client, the public, the legal system, and the profession.¹⁰³ Instead, the Joint Committee developed a model in which the tribunal im-

98. See, e.g., *In re Kramer*, 92 Ill. 2d 305, 442 N.E.2d 171 (1982) (censure for commingling and failure to segregate disputed funds); *In re McLennon*, 93 Ill. 2d 215, 443 N.E.2d 553 (1982) (censure for commingling and conversion); *In re Weston*, 92 Ill. 2d 431, 442 N.E.2d 236 (1982) (disbarred for commingling, conversion, and neglect). See also J. DIXON, *DIXON'S DIGEST: ILLINOIS ATTORNEY DISCIPLINARY LAW* (1979).

99. The Sanctions Standards are based upon a thorough review of most available disciplinary decisions in the United States for 1980-1984 together with a well-reasoned effort to impose a theoretical structure on the sanctions process. *Id.* at 3.

100. These standards were approved by the American Bar Association House of Delegates in February 1986 as policy of the American Bar Association and were published in 1986 by the American Bar Association. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986).

101. *Id.* at 1.

102. *Id.* at 2-3.

103. *Id.* at 3. The Joint Committee also viewed an "approach which looked only at the extent of injury . . . as being too narrow." *Id.*

posing a sanction asks what ethical duty is involved, to whom it is owed, what the lawyer's mental state was, what injury, if any, was caused by the misconduct, and whether there were any aggravating or mitigating circumstances.¹⁰⁴

Using this general framework, the Joint Committee then classified the various disciplinary rules according to whether the duties involved are owed to clients, the public, the legal system, or the legal profession.¹⁰⁵ Mental states were divided into intent,¹⁰⁶ knowledge,¹⁰⁷ and negligence.¹⁰⁸

The Joint Committee organized the standards first by the person or entity to whom a duty is owed and within each of those sections by the type of duty involved. The Sanction Standards do not identify particular disciplinary rules within these sections. For example, in the section on violations of duties owed to clients, the Sanction Standards identify the following duties: failure to preserve the client's property, failure to preserve the client's confidences, failure to avoid conflicts of interest, lack of diligence, lack of competence, and lack of candor.¹⁰⁹ Under each division, the Sanctions Standards articulate a separate standard for disbarment, suspension, reprimand, and admonition.¹¹⁰

It is certainly helpful in understanding disciplinary rules to organize professional obligations into categories of duties divided by those to whom the duties are owed.¹¹¹ Such organization should assist in understanding and learning the rules as well as in interpreting and enforcing them. It is not clear, however, that this organization has had any noticeable effect on the content of the

104. *Id.* at 3, 5.

105. *Id.* at 5-6.

106. "'Intent' is the conscious objective or purpose to accomplish a particular result." *Id.* at 7.

107. "'Knowledge' is the conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result." *Id.*

108. "'Negligence' is the failure of a lawyer to be aware of a substantial risk that is a deviation from the standard of care that reasonable circumstances exist or that a result will follow, which failure lawyer would exercise in the situation." *Id.*

109. *Id.* In a separate category, the Joint Committee defined "potential injury" as "the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." *Id.*

110. "Reprimand" and "admonition" as used by the Sanctions Standards correspond to "censure" and "reprimand" as used in the Illinois disciplinary system. *See id.* at 8.

111. Presently, the Illinois disciplinary code displays little organizational structure; it resembles a grab bag of rules bearing little internal relationship to each other. The reorganization of the ABA Model Rules of Professional Conduct attempted to solve this problem. *See* MODEL RULES OF PROFESSIONAL CONDUCT, IV (1981).

standards promulgated by the Joint Committee and adopted by the ABA. In almost every instance, regardless of the type of duty involved or the person or entity to whom it is owed, the same structure emerges: Disbarment is warranted when the misconduct was intentional *and* caused injury. Suspension, reprimand, and admonition are then appropriate variously as the level of culpability and injury or potential injury decreases. The only exception to this scheme is found in the standards concerning "failure to maintain personal integrity," in which harm or potential harm is not mentioned.¹¹²

B. The ABA Sanction Standard Unnecessarily Couples Intent and Injury

The classification of types of code violations and criteria for sanctions achieved by the Sanctions Standards is unquestionably a major advance. In Illinois the approach has been relatively haphazard—sanctions have varied greatly for essentially the same misconduct involving roughly the same level of moral culpability. The major problem with the Sanctions Standards is that they combine intent and injury, or potential injury, as joint conditions for imposing more severe sanctions. By coupling the level of sanction with the perceived injury or potential for injury, the Sanctions Standards tend to obscure the significance both of moral culpability on the one hand and of absolute liability considerations on the other. To the extent that a particular code violation reveals serious character flaws or evidences gross abuse of the trust which admission to the bar implies, it should be unnecessary to show injury in order to remove the attorney in question from the rolls. For example, anyone who makes a false statement, submits a false document, or improperly withholds material information with the intent to deceive the court should not be permitted to practice law—an opinion held at least as early as 1275.¹¹³ The attempted subversion of the integrity of the judicial process—whether through overt bribery as in Greylord or through false statements, fraud, or deliberate misrepresentation—tends to undermine the judicial system and public confidence in it, which confidence is a necessary condition to a society based on law. Yet the Sanctions Standards would not impose disbarment in such an instance unless the misconduct "causes serious or potentially significant adverse effect on the legal

112. SANCTIONS STANDARDS at 11-12.

113. See Chapter 29 of the First of Westminster, *supra* note 6.

proceeding."¹¹⁴

Similarly, commingling of clients' funds need not involve anything more than ignorance of the rules or sloppy office practices. An attorney who knowingly commingles his clients' money with his own—whether in a bank account or in a safe in the office—may have no wrongful purpose in mind. Regardless of intent, however, it is so easy to comply with the commingling rules¹¹⁵ with respect to funds that undoubtedly belong to the client, that the court and the profession should expect one-hundred percent compliance. The potential injury to clients from commingling is great, and the damage to the reputation of the profession at large is manifest. Yet, despite the relative ease with which an attorney can set up a client's fund account at any bank, the prohibition against commingling is frequently the subject of reported decisions involving the Illinois disciplinary code. In many cases, either improper motive is being successfully concealed or a significant portion of attorneys do not have even a minimum level of familiarity with the disciplinary rules. Whichever it is, one might ask whether those who cannot abide by this rule should be practicing law.¹¹⁶

Nevertheless, the Sanctions Standards would impose disbarment only when a lawyer knowingly converts a client's property and there is actual or potential injury to the client.¹¹⁷ Suspension is appropriate when a lawyer "knows or should know that he is dealing improperly with client property" and there is actual or potential injury.¹¹⁸ A public reprimand should be given when the lawyer is negligent and there is actual or potential injury.¹¹⁹ If there is little or no actual or potential injury and the lawyer is negligent, he should receive a private admonition.¹²⁰

It would seem that there is little or no potential injury only when

114. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 6.11 (1986).

115. CODE OF PROFESSIONAL RESPONSIBILITY Rule 9-102, ILL. REV. STAT. ch. 110A, CANON 9 (1985). This is not to say, however, that it is always clear whether funds belong to the client or to the lawyer. For example, a lawyer who receives money from a client with the instruction that he resolve pending litigation either by contesting matters or paying a settlement, and with the understanding that he is to keep whatever he does not spend in disbursements or settlement as his fee, might reasonably think he is entitled to deposit that money in his office account.

116. By commingling client funds with his own, the lawyer subjects the client to the risk that in the event of the attorney's death, the client will be involved in disputes concerning ownership of the funds. Similarly, if the lawyer declares bankruptcy or becomes insolvent, the client could be treated as just one of many creditors.

117. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 4.11 (1986).

118. *Id.* at § 4.12.

119. *Id.* at § 4.13.

120. *Id.* at § 4.14.

the commingling is of extremely short duration. Thus, the severity of the recommended sanction depends largely on the level of the attorney's culpability. In this instance as with other standards, the Joint Committee apparently based its recommendations largely on what courts have done in the past rather than on a rigorous analysis of principles which might guide the disciplinary process.¹²¹ Given the acknowledged lack of a theoretical basis for the sanctions imposed by courts in the past, one might reasonably wonder if this method will achieve the best result.

C. The Illinois Supreme Court Should Nevertheless Follow the ABA Sanctions Standards

Regardless of the validity of criticism of the ABA Sanctions Standards, such criticism is relatively insignificant given the failure of the Illinois Supreme Court to devise or adopt any objective framework for imposing sanctions. This failure tends to erode public confidence not only in the profession but also in the disciplinary process, which is administered largely by practicing lawyers.¹²² Until a better system is offered, it seems appropriate for the Illinois Supreme Court to follow the ABA Sanction Standards and to direct the Hearing and Review Boards to do the same.

VII. EDUCATION AND CONSULTATION

One of the chief impediments to achieving compliance with the disciplinary code is not venality but ignorance. Too many lawyers know too little about the disciplinary code and its application to their practice. The lawyer who thinks his own sense of right and wrong will provide a satisfactory guide is likely to be greatly surprised. There are simply too many code provisions that are not intuitively obvious and too many matters addressed by the code that are not traditionally regulated. There is no substitute for knowing and understanding the disciplinary rules themselves.

Following the distressing disclosure that almost every participant in the Watergate scandal was a lawyer, law schools established mandatory courses in professional responsibility. Many states also added a multistate ethics examination to the general bar examination. Even if these courses and examinations were adequate, they would touch only the new members of the bar. The

121. The commentary to these particular standards emphasizes what most courts have done when faced with circumstances such as those summarized in each standard. See *id.* at 26.

122. See, e.g., *Special Report, supra* note 2.

organized bar has a responsibility not only to undertake reasonably effective measures of self-education but also to take steps to raise the level of sensitivity among members of the bar to ethical problems.

Even thorough education about the disciplinary rules and other programs designed to increase lawyers' awareness of their ethical responsibilities are not sufficient. The Illinois disciplinary code is poorly organized and the general language gives inadequate guidance on some of the more difficult ethical problems.¹²³ Individual practitioners should not be left to resolve such problems—many of which have no intuitively right or wrong answer—on their own.

Rather, some mechanism should be established whereby attorneys may receive advice on the proper ethical behavior in any given circumstances, no matter how routine, unusual, or difficult. In *Talking Ethics*, the blue-ribbon panel discussion chaired by Judge William J. Bauer of the Seventh Circuit,¹²⁴ some participants indicated that they consult with other partners in their firms when confronted with a particularly difficult ethical problem.¹²⁵ Such consultation opportunities should be institutionalized and made available to lawyers who have no pool of partners.

The ARDC is the repository of a wealth of knowledge about the disciplinary code and its enforcement. The Illinois Supreme Court should consider expanding the mandate of the ARDC to include not only the investigation and prosecution of violations of the disciplinary code but also educational and consultative roles designed to help prevent violations. The result might well be a more informed bar, fewer violations of the disciplinary code, and, quite possibly, an increase in respect for the legal profession among the citizenry.

VIII. CONCLUSION

The statement by Dick the Butcher from Henry VI quoted at the outset of this article is frequently cited as an illustration of public contempt for lawyers. In fact, it is the credo of an egotistic anarchist who realizes that the law and those whose profession it is to

123. See, e.g., *Talking Ethics*, in 13 LITIGATION 20-29 (Winter 1987). The Illinois Code was modeled after the ABA Code in existence at the time. The drafters understandably sought to stay as close to the form and language of the ABA Code as possible. See Preface to *Code of Professional Responsibility*, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

124. *Talking Ethics*, supra note 125, at 20-29. See also Preface to *Code of Professional Responsibility*, ILL. REV. STAT. ch. 110A, foll. para. 774 (1985).

125. See, e.g., *Talking Ethics*, supra note 125, at 23.

uphold the law are the principal obstacles to chaos and tyranny.¹²⁶ Men and women dedicated to learning, advancing, administering, and protecting the law in all its mundane nobility are indispensable to the successful operation of a democratic society.¹²⁷ It is because the practice of law is a profession with such sacred trust that members of the bar dare not relax their vigilance in protecting against unscrupulous and unethical behavior.

126. W. SHAKESPEARE, *HENRY VI*, IV, ii.

127. Roscoe Pound made much the same point in the preface to *THE LAWYER FROM ANTIQUITY TO MODERN TIMES*:

When lawyers speak of law, the word law has two meanings. One is what is called in Continental Europe the legal order: The regime of adjusting relations and ordering conduct by the systematic application of the force of a politically organized society. The other is what is commonly meant by law in the law books, namely, the body of authoritative models or patterns of decision which, because they are applied by the courts in decision of controversies, serve as guides of conduct to the conscientious citizen, as threats to the wrongdoer, as grounds of determination to the magistrate, and as bases of prediction to the counsellor. Law in this sense is experience developed by reason and reason tested by experience. From antiquity it has been found that law in the first sense can only be maintained by law in the second sense and that law in the second sense requires lawyers.

R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* xxiii (1953).