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Recommended Citation
Valerie Swett, Illinois Attorney Discipline, 26 DePaul L. Rev. 325 (1977)
Available at: https://via.library.depaul.edu/law-review/vol26/iss2/7

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ILLINOIS ATTORNEY DISCIPLINE

Valerie Swett*

In 1973 the Illinois Supreme Court adopted new disciplinary procedures for attorneys charged with unethical conduct. This Article explores this new system, comparing it to criminal procedures. The author suggests that the significant similarities between the two models may justify adoption of criminal safeguards in attorney discipline proceedings.

I. INTRODUCTION

Recently, the Illinois Supreme Court adopted new procedures for supervising attorney discipline1 which closely correspond with recommendations set forth by the American Bar Association.2 Although attorney discipline traditionally has been considered civil in nature,3 these new procedures have some significant similarities to the criminal justice system. The supreme court did not, however, fully adopt a criminal law model. This Article will analyze the operation of these new procedures, their similarity to criminal procedures, and the potential improvement of the attorney discipline system by adopting a criminal procedure rationale.

II. CONSTITUTIONAL LIMITATIONS ON STATE REGULATION OF THE BAR

Illinois, like a number of states,4 treats attorney discipline as

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1. ILL. SUP. CT. R. 751-70.

2. AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE, AN EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT XVI (1970) [hereinafter cited as CLARK COMMISSION REPORT].

3. See In re Melin, 410 Ill. 332, 102 N.E.2d 119 (1952); In re Needham, 364 Ill. 65, 4 N.E.2d 19 (1936). Disciplinary proceedings were not considered criminal prosecutions. In re Cohn, 10 Ill.2d 186, 139 N.E.2d 301 (1957); In re Hamilton, 388 Ill. 589, 58 N.E.2d 449 (1945).

4. In an informal interview, James Bradner, Assistant Director of the American Bar Association Center for Professional Discipline, 1155 E. 60th Street, Chicago, Illinois 60637, indicated that attorney discipline is controlled independently by the judiciary in some 13
an exclusively judicial function. The rationale behind this attitude is that lawyers are considered officers of the court and, hence, the judiciary is responsible for supervising attorneys' actions. The United States Supreme Court also has recognized this theory in the regulation of the federal bar. Because the state and federal judiciaries are the independent creatures of their respective constitutions, each has independent jurisdiction in controlling its respective bar. As a result, state and federal criteria and procedures for admission to practice and disbarment are not dependent on each other, except insofar as the courts exercise discretion in favor of interdependence.

However, there are a few federal limitations on state judicial discretion to regulate the legal community.

One procedure limiting states in regulating the practice of law is a Supreme Court review of state proceedings before disbarring an attorney from federal practice based on a state disbarment. The Court has held that state disbarment would not result in Supreme Court disbarment if 1) the state proceeding denied due process because it lacked notice or hearing, 2) the factual findings were of insufficient strength to justify reliance, or 3) following the state ruling would conflict with a sense of "right and justice."

A second limitation on state regulation of the bar is the appli-

5. See In re Wyatt, 53 Ill.2d 44, 289 N.E.2d 630 (1972); People ex rel. Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937); People v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); In re Day, 181 Ill. 73, 54 N.E.2d 646 (1899). For a discussion of attorney discipline as the exclusive province of the courts in other jurisdictions, see CLARK COMMISSION REPORT at 10-18.

6. See In re Day, 181 Ill. 73, 54 N.E.2d 646 (1899). The Illinois Supreme Court overturned a state statute setting criteria for the admission of attorneys to practice. The court examined the nature of judicial power reserved to the courts by the state constitution's separation of powers clause. It pointed out that in England, admission to the bar had been controlled by the courts whereas disbarment was a parliamentary function. The court observed that in this country, control over both the admission and disbarment functions has been considered judicial. The court reasoned that judicial authority over both functions arises logically from the attorney's role as an officer of the court and from the judicial responsibility to maintain and supervise the courts.


8. See U.S. Const. art. III, §§1, 2; U.S. Const. art. IV; Theard v. United States, 354 U.S. 278, 281 (1957).


cation of First Amendment rights of free speech and association to the admission and disbarment procedures. The first two cases dealing with First Amendment rights in attorney licensing procedures were *Konigsberg v. State Bar of California* and *Schware v. Board of Bar Examiners of New Mexico*. Applicants, in both cases, were denied admission to practice because, due to possible communist affiliation, they were unable to establish that they were of good moral character. In each of these cases the Supreme Court found that the state authority was used arbitrarily and violated rights of political belief and association.

Though it appeared that *Konigsberg* and *Schware* indicated that the state could not require, as a condition to membership in the state bar, responses to questions related to political beliefs,

13. Both decisions assessed the evidence used to deny an applicant admission to the bar in order to determine whether the inferences drawn satisfied due process by bearing a rational relationship to the applicant's fitness to practice law. *Id.* at 238-39; *Konigsberg v. State Bar of Calif.*, 353 U.S. 252 (1957). *Konigsberg* involved an applicant to the bar in California. After he passed the bar exam and satisfied all other technical conditions for admission, the State Committee of Bar Examiners denied him admission on the grounds that he had failed to prove that he was of good moral character and did not advocate violent overthrow of the government. 353 U.S. at 253. *Konigsberg* presented character evidence in the form of testimony by friends and associates and information about his background. The evidence against him was the testimony of an ex-Communist who had seen him at party meetings more than ten years before and a series of editorials he had written which were critical of some public officials and policies, and his refusal throughout the fitness hearings to answer questions relating to his political beliefs and associations on the grounds that the questions violated the First Amendment. *Id.* at 266.
14. 353 U.S. at 240-47. The Supreme Court held that the board was not justified in inferring a lack of moral character from the use of aliases, which *Schware* had adopted to avoid anti-Semitic prejudice from fellow employees; from the arrests, which had resulted from political and union activities and had not led to convictions; or from his membership in the Communist party, which did not necessarily require advocacy of illegal or immoral activities. The Supreme Court found that the state bar examiners' reliance on the evidence to deny *Konigsberg* admission to the bar was an arbitrary exercise of their authority violating his freedom of political belief and association. Therefore the Court returned the application to the bar examiners for reconsideration. 353 U.S. at 273-74.
15. For instance, in *Konigsberg*, the Court indicated that membership in the Communist party was insufficient as a sole ground for denying admission to the bar. 353 U.S. at
this impression was negated in *In re Anastaplo.*\(^{16}\) The Illinois Committee on Character and Fitness refused to certify Anastaplo for admission to practice because, by failing to answer questions about membership in the Communist Party, he had obstructed the committee's investigation. The committee had no extrinsic evidence upon which to base its suspicion about Anastaplo's political affiliations.\(^{17}\) Nevertheless, the Court held that this did not alter the validity of examining the applicant's political associations since the state interest in ascertaining an applicant's attitude toward the nation's political institutions exists regardless of the availability of extrinsic evidence on the issue.\(^{18}\)

The Supreme Court's focus\(^{19}\) shifted back to First Amendment rights in 1971 when it decided *Application of Stolar.*\(^{20}\) Stolar was

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253 (1957). In addition, the Court stated:

> We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such a way as to impinge on the freedom of political expression or association. . . . It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak and act as members of an Independent Bar.

*Id.*

16. 366 U.S. 82 (1961). *Accord, Konigsberg,* 366 U.S. 36 (1961). In reviewing the California bar examiners' second denial of admission to Konigsberg, the Court held questions relating to membership in the Communist party to be relevant to the committee's investigation and cross-examination of the applicant's veracity in responses to general questions about violent overthrow of the government. 366 U.S. at 44-49. Konigsberg's refusal to answer was not privileged because the Court considered it necessary to limit First Amendment freedoms in situations where the informed exercise of the state power to license requires disclosure. The Court held that in attorney licensure the state's interest in ascertaining the applicant's attitude toward the political and legal system within which he must work justifies a requirement that political beliefs and associations be disclosed. 366 U.S. at 49-56.


18. Since the record indicated that Anastaplo had received adequate warning of the consequences of his refusal to answer and that no arbitrary state action had been shown, the denial of admission was affirmed. *Id.* at 90-97.

19. The Court's shift in analysis of the permissibility of questions about applicants' political associations and beliefs reflected a shift in focus. In the 1957 *Schware* and *Konigsberg* decisions the Court focused on the impact forced response to questions about political associations and beliefs would have on the applicant's First Amendment rights. *See notes 11-15 supra.* The 1961 *Konigsberg* and *In re Anastaplo* decisions, on the other hand, gave priority to the state's interest in obtaining all relevant information about an applicant even though some limitation of First Amendment rights could result. *See notes 16-18 supra.*

20. 401 U.S. 23 (1971). *See also* Baird v. State Bar of Arizona, 401 U.S. 1 (1971). In applying for admission to the Arizona Bar, Baird satisfied all formal requirements, including disclosure of all organizations to which she had belonged since age sixteen, except that
a member in good standing of the New York bar who sought admission to practice in Ohio. He answered all of the Ohio bar admissions committee's questions except one asking if he belonged to any organizations advocating the violent overthrow of the government and two asking for the names and addresses of organizations to which he had belonged. The Supreme Court's plurality opinion ruled that the responses to those questions were privileged under the First Amendment because conditioning admission to the bar on them would have a chilling effect on an applicant's freedom of association. In the Court's estimation, the investigation of an applicant's qualifications to practice law was served adequately by Stolar's responses to other questions giving the committee detailed biographical information, indicating that he subscribed to the ABA Canons of Ethics, and stating that he was loyal to the American government.

In addition to applying the First Amendment, the Supreme Court also examines state regulation of the bar by other constitutional criteria. The Fourteenth Amendment requires that due process safeguards, notice of charges and a hearing, be afforded

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she refused to answer a question asking if she had ever been a member of the Communist party or of any organization advocating the violent overthrow of the government. Her refusal to answer the question was the basis upon which she was denied admission to the bar. The Supreme Court reasoned that Baird's disclosure of prior associations was sufficient for the committee to ascertain her fitness to practice law so that the sole purpose the question she refused to answer could serve was determination of her political beliefs. From this the Court concluded that the Arizona procedure contemplated denial of admission to the bar on the basis of an applicant's political beliefs or associations. It held that the First Amendment prohibits denial of admission on these grounds because it penalizes the mere possession of political views.

22. Id. at 30.
23. Id. at 30-31. Thus, the Court shifted back to giving First Amendment rights priority over the state interest in investigating an applicant's political beliefs without much explanation. Rather than reconcile the 1961 decisions with the 1957 and 1971 decisions, the Court merely pointed out that the issue of First Amendment rights in state bar admissions proceedings had been a source of conflict for the Court. Baird v. State Bar of Arizona, 401 U.S. 1, 2-4 (1971); In re Stolar, 401 U.S. 23, 24-25 (1971). In 1971 the Court indicated an intent to clarify the state of the law on this issue. Thus, the tension between First Amendment rights and the state investigatory power apparently has been resolved in favor of the First Amendment. 401 U.S. at 3-4. For further discussion of the shifts in the Court's focus and the reasons therefore, see Note, Constitutional Law—Bar Admission Procedures: Inquiry into Political Beliefs and Associations, 22 DePaul L. Rev. 524 (1972); Note, Constitutional Law—Bar Admissions—New Standards for Inquiry into Applicants' Associations and Beliefs, 50 N.C. L. Rev. 360 (1972); 85 Harv. L. Rev. 212 (1971).
to those denied admission\textsuperscript{24} and to those undergoing disbarment proceedings.\textsuperscript{25} Also, the assertion of the Fifth Amendment self-incrimination privilege by an attorney facing a criminal penalty is not grounds for disbarment.\textsuperscript{26} Disciplinary action is inappropriate for claiming specific constitutional rights.\textsuperscript{27}

III. ILLINOIS ATTORNEY DISCIPLINE

Because constitutional limitations on state regulation of its bar are minimal, states have great flexibility in creating procedures and forums through which to impose attorney discipline. Partially as a result of this flexibility, the structures used in the different states vary broadly, ranging from disciplinary proceedings initiated and carried out solely by the local bar associations\textsuperscript{28} to a centralized structure run by an independent commission.\textsuperscript{29}

\textsuperscript{24} Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963).
\textsuperscript{25} In re Ruffalo, 390 U.S. 544, 550 (1968).
\textsuperscript{27} Spevack v. Klein, 385 U.S. at 514-16. There remain many questions relating to application and scope of these constitutional principles. For instance, it is not clear from the facts of Spevack v. Klein, 385 U.S. 511 (1967), whether the decision merely prohibits disbarment for assertion of the privilege against self-incrimination when the penalty risked is criminal prosecution or whether the privilege also exists where the only penalty risked is disbarment. A corollary to this is the question of whether a grant of immunity protects against criminal prosecution only or against both prosecution and professional disciplinary proceedings. The Spevack Court expressly refused to deal with the question of whether the privilege extends to an attorney’s records as well as his testimony. Attorney’s records may be outside the scope of the privilege if they are considered to be in the nature of public records. Another issue which the Supreme Court has not met is whether the interests at stake in disbarment proceedings are of the magnitude involved in criminal trials, making the due process rights of a criminal defendant available to the responding attorney.


\textsuperscript{28} For example, in New Jersey, attorney discipline is not controlled by any central entity. A lack of centralized information in the ethics area makes an exhaustive listing impossible without a state-by-state search. The American Bar Association Center for Professional Discipline, 1155 E. 60th Street, Chicago, Illinois 60637, is working on a national compilation of such information.

\textsuperscript{29} The Illinois Attorney Registration and Disciplinary System is an example of such a structure. States which have a structure similar to Illinois’ are Arkansas, Ark. Stat. Ann. title 25 (1947); Colorado, Colo. Rev. Stat. title 12, art. 5 (1973); Delaware, Del. Law Canons DR 1-9 (1975); Hawaii, Hawaii Rev. Stat. ch. 605 (1968); Indiana, Ind. Stat. Ann.
Illinois has created the Illinois Attorney Registration and Disciplinary System (ARDS), which first became effective in 1973, and which closely resembles the American Bar Association's model. As such, study of the Illinois system should make apparent the strengths and weaknesses not only of the Illinois system but also of the Clark Commission's guidelines.

Attorney discipline in Illinois is supervised by the Illinois Supreme Court. Practical considerations, however, have required that the court appoint an outside body, ARDS, to screen complaints and gather evidence. This type of judicial authority delegation, though challenged several times, consistently has been held constitutional. The court in In re Czachorski explained that it does not delegate judicial power but rather appoints agents of the court whose findings and recommendations are reviewed by the court before it renders a decision.

The disciplinary proceedings conducted by the court's commissioners are considered to be judicial in character, yet are neither criminal nor civil in nature. As such, the proceedings are conducted in a manner similar to other judicial trials of fact and yet are unique to the disbarment proceedings. While some of the formalities of a trial such as the law of evidence and notice are mirrored by the relevant rules, the procedures are unique to the disbarment proceedings.

30. ILL. SUP. CT. R. 751-70.

31. The similarity is apparent from a comparison of the diagramatic representation of the Clark Commission model with the structure of the ARDS. The reader may find it of interest to compare the Clark Commission's model with ARDS. See notes 63-100 and accompanying text infra.

The similarity is also apparent from a comparison of the 36 recommendations made by the Clark Commission, CLARK COMMISSION REPORT 19-191, with the rules and regulations governing the ARDS.

32. In re Sherman, 60 Ill.2d 590, 328 N.E.2d 553 (1975).

33. In re Donaghy, 402 Ill. 120, 83 N.E.2d 560 (1949); In re McCallum, 391 Ill. 400, 418, 64 N.E.2d 310, 317 (1945), appeal dismissed, 326 U.S. 689 (1945).

34. 41 Ill.2d 549, 554, 244 N.E.2d 164, 167 (1969); accord, In re Donaghy, 393 Ill. 621, 623, 66 N.E.2d 856, 857 (1946); In re McCallum, 391 Ill. 400, 418, 64 N.E.2d 310, 317 (1945).

35. In re Mitgang, 385 Ill. 311, 324, 52 N.E.2d 807, 813 (1944).

36. In re Czachorski, 41 Ill.2d 549, 554, 244 N.E.2d 164, 167 (1969); In re Damisch, 38 Ill.2d 195, 206, 230 N.E.2d 254, 260 (1967); In re Yablunky, 407 Ill. 111, 120, 94 N.E.2d 841, 846 (1950). See also Murphy, A Short History of Disciplinary Procedures in Illinois, 60 Ill. B.J. 528, 532 (1972).

37. People ex rel. Chicago Bar Ass'n v. Amos, 264 Ill. 299, 302, 92 N.E. 857, 859 (1910). The taking of evidence on disciplinary charges is governed by the common law rules of
requirements are followed, the Illinois Supreme Court has ruled that the procedures are to be applied more flexibly than in a civil or criminal trial, making technical objections to evidence of no avail or strict adherence to rules of pleading unnecessary. For example, the ARDS prosecutor must present clear and convincing proof. This burden of proof is the same whether or not the conduct charged also alleges a crime. In addition to normal methods of rebutting the allegations of the complaint, the responding attorney can present evidence of his personal character and circumstances. At most, however, this evidence may be used to raise an inference against discipline if the evidence on the merits of the charge is uncertain. At the least, it is considered evidence. *In re Mitgang*, 386 Ill. 311, 324, 52 N.E.2d 807, 813 (1944); People v. Amos, 246 Ill. 299, 302, 92 N.E. 857, 859 (1910). The stringency with which the rules of evidence are applied has been observed to be higher when a jury hears the disciplinary proceeding. Comment, *Evidence—Rules of Evidence in Disbarment, Habeas Corpus, and Grand Jury Proceedings*, 58 Mich. L. Rev. 1218, 1219-20 (1960). This pattern is well-founded in the historical purpose for which the rules were developed: to prevent unskilled juries from reaching conclusions based on unreliable or false evidence. Forkosch, *The Nature of Legal Evidence*, 59 Calif. L. Rev. 1356, 1360 (1971). Forkosch points out that the passing of the uneducated, unsophisticated jury may call into question the bulk of the evidentiary rules as we know them. *Id.* at 1380-81. Most cases indicate that when there is a difference between the rules applicable to criminal or civil proceedings the civil rule is used in an attorney disciplinary proceeding. *In re Malmin*, 364 Ill. 164, 4 N.E.2d 111 (1936) (rule stated generally); *In re Needham*, 364 Ill. 65, 4 N.E.2d 19 (1936) (rule stated generally); People ex rel. Lucey v. Stonecipher, 271 Ill. 506, 111 N.E. 496 (1916) (responding attorney does not have criminal defendant’s right to confront witnesses). There is at least one case, however, where the criminal rule was chosen. People ex rel. Chicago Bar Ass’n v. Bither, 334 Ill. 264, 165 N.E. 798 (1929) (confession of a co-conspirator held inadmissible because it was not made in furtherance of the conspiracy. If the civil rule had been applied, the confession would have been admissible.)

38. ARDC Rules 2.2, 4.4, 10.6.
40. *In re Czachorski*, 41 Ill.2d 549, 554, 244 N.E.2d 164, 167 (1969); *In re Yablunky*, 407 Ill. 111, 120, 94 N.E.2d 841, 846 (1950).
41. Ill. Sup. Ct. R. 753(c).
42. The early cases demonstrate uncertainty about the possibility of applying a beyond a reasonable doubt standard. *In re Harris*, 383 Ill. 336, 50 N.E.2d 441 (1943) (criminal charge, beyond reasonable doubt burden of proof); *In re Malmin*, 364 Ill. 164, 4 N.E.2d 111 (1936) (criminal charge, clear and convincing burden of proof); People ex rel. Chicago Bar Ass’n v. Bither, 334 Ill. 264, 165 N.E. 798 (1920) (criminal charge, beyond reasonable doubt burden of proof); People ex rel. Cline v. Kerker, 315 Ill. 572, 146 N.E. 439 (1925) (criminal charge, beyond reasonable doubt burden of proof); People v. Ader, 263 Ill. 319, 104 N.E. 1060 (1914) (non-criminal charge, beyond reasonable doubt burden of proof).
43. See note 117 infra.
44. *In re Heirich*, 10 Ill.2d 357, 389, 140 N.E.2d 825, 841 (1956).
in mitigation when the board or court determines which discipline to recommend or impose.

The substantive rules of Illinois attorney discipline are less precise than in other areas of the law and have developed on a case-by-case basis, creating a common law of ethics. The Supreme Court Rules focus primarily on the structure of the ARDS rather than on the substantive bases for discipline.\textsuperscript{45} Also, though charges are often based on the Code of Professional Responsibility,\textsuperscript{46} the Code is merely a guideline for professional conduct\textsuperscript{47} which is not mandatorily applied nor adopted as a Supreme Court Rule.\textsuperscript{48} Therefore, a complaint may charge either violations of specific Code provisions\textsuperscript{49} or conduct which violates only the spirit of the Code.\textsuperscript{50}

Since there is no specific code of substantive rules for attorney discipline, a wide variety of vague rules has been developed. This problem is intensified by the Illinois Supreme Court's refusal to utilize the doctrine of stare decisis\textsuperscript{51} strictly in disciplinary proceedings. A look at the case law, however, may provide

\textsuperscript{45} This is apparent from a perusal of the ARDS Rules. Little has been published on the common law of ethics in Illinois. Note, \textit{An Illinois Disbarment Proceeding}, 26 ILL. L. REV. 457 (1932), collects a number of disciplinary decisions made prior to 1932 and appears to be the most recent collection.

\textsuperscript{46} The American Bar Association Code of Professional Responsibility was adopted in 1970 by the Chicago Bar Association and by the Illinois State Bar Association in 1970. It replaced the American Bar Association Canons of Ethics, which had been in effect for at least 50 years. Pitts, \textit{The New Code of Professional Responsibility}, 58 ILL. B.J. 323 (1970); 1970-71 \textit{ANNUAL REPORT OF THE ISBA SPECIAL COMMITTEE ON THE CODE OF PROFESSIONAL RESPONSIBILITY}, 1971 ISBA BLUE BOOK 78 (bound with 59 ILL. B.J. (1971)). The binding force and effect of the Code of Professional Responsibility varies from jurisdiction to jurisdiction, according to the manner of its adoption. Where adopted by rule of court, or by the state legislature, the Code receives the force and effect of statute. DRINKER, \textit{LEGAL ETHICS} 27 (1953).

\textsuperscript{47} \textit{In re Krasner}, 32 Ill.2d 121, 129, 204 N.E.2d 10, 14 (1965); \textit{In re Heirich}, 10 Ill.2d 357, 386-87, 140 N.E.2d 825, 839-40 (1957); \textit{In re Moore}, 8 Ill.2d 373, 378, 134 N.E.2d 324, 326 (1956); \textit{In re Mitgang}, 385 Ill. 311, 324, 52 N.E.2d 807, 813 (1944).

\textsuperscript{48} \textit{In re Krasner}, 32 Ill.2d 121, 129, 204 N.E.2d 10, 14 (1965); \textit{In re Heirich}, 10 Ill.2d 357, 386-87, 140 N.E.2d 825, 839-40 (1957); \textit{In re Moore}, 8 Ill.2d 373, 378, 134 N.E.2d 324, 326 (1956); \textit{In re Mitgang}, 385 Ill. 311, 324, 52 N.E.2d 807, 813 (1944).

\textsuperscript{49} An example of this is conversion of a client's funds which violates \textit{AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE 9-102} ("Preserving Identity of Funds and Property of a Client").

\textsuperscript{50} Although there is no authority for this in the \textit{AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 9-102}, "Preserving Identity of Funds and Property of a Client", is often used to bring this kind of action.

\textsuperscript{51} \textit{In re Nesselson}, 35 Ill.2d 454, 220 N.E.2d 409 (1968).
valuable insight into the types of charges the court will hear. One of the most common complaints is that an attorney has or is engaged in an unprofessional course of dealing. This somewhat superficial charge may allege a series of similar incidents of misconduct, such as repeated solicitation of personal injury cases, or allege a collection of dissimilar acts of misconduct which would be unlikely to be brought as separate complaints. Since disciplinary charges are subject to no statute of limitations, the period over which the alleged offenses occur theoretically could be of indefinite length.

A disciplinary complaint also can charge that the attorney conducted himself or herself in a manner which has the appearance of impropriety. Because the misconduct alleged is the appearance of impropriety, only the appearance of conduct breaching professional duty, rather than actual breaches of duty, need be shown. Although the Code of Professional Responsibility and language of the Illinois Supreme Court imply that discipline could be based on this type of charge alone, no case has been found where this has occurred. The charge appears to be used as a companion to charges of actual breach of professional duty. Another form of charge is the type based on or related to a criminal charge. Conviction of a crime involving moral turpitude is grounds for disciplinary action against the convicted attorney.

52. In re Nesselson, 35 Ill.2d 454, 220 N.E.2d 409 (1966); In re Heirich, 10 Ill.2d 257, 140 N.E.2d 825 (1957); In re Cohn, 10 Ill.2d 156, 139 N.E.2d 301 (1956); In re Veach, 1 Ill.2d 264, 115 N.E.2d 257 (1953); In re Mitgang, 385 Ill. 311, 52 N.E.2d 807 (1944). Other examples of unprofessional course of dealing are In re Harris, 383 Ill. 336, 50 N.E.2d 441 (1943) (attorney scheme to extort large fees); cases involving misuse of clients' funds: In re Czachorski, 41 Ill.2d 549, 244 N.E.2d 164 (1969); In re Royal, 29 Ill.2d 458, 194 N.E.2d 242 (1963); In re Power, 407 Ill. 525, 96 N.E.2d 460 (1950).

53. See, e.g., In re Lingle, 27 Ill.2d 459, 189 N.E.2d 342 (1963) (charges of commingling clients' funds, failing to carry out a court order, delaying action on a suit, and failure to return clients' records).

54. See In re Lingle, 27 Ill.2d 459, 189 N.E.2d 342 (1963) (five incidents charged took place during an eighteen-month period). See also In re Power, 407 Ill. 525, 96 N.E.2d 460 (1950) (four incidents charged took place during a seven-year period).

55. AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE 9-101.


57. For instance, in People v. Sherwin, 364 Ill. 350, 358-59, 4 N.E.2d 477, 480-81 (1936) the court censured the attorney for the appearance of impropriety only after deciding that the alleged substantive misconduct had not been proved adequately.

58. ILL. SUP. CT. R. 761 (amend. 1975). This has been the rule throughout the history of Illinois attorney discipline except for a brief departure between 1973 and 1975 when the
The Illinois Supreme Court has defined "moral turpitude" to mean "anything done knowingly contrary to justice, honesty, or good morals." An acquittal of the criminal charge, however, is not proof of innocence for disciplinary purposes because the burdens of proof and standards for conduct applied in attorney discipline are different from those applicable in criminal cases.

A final form of complaint is based on the failure of an attorney to cooperate in a disciplinary investigation involving himself or another attorney. An attorney has the duty to assist in an investigation of his own professional conduct or that of another attorney. This duty is limited only by the attorney's right to claim his Fifth Amendment privilege against self-incrimination.

IV. STRUCTURE OF THE ATTORNEY REGISTRY AND DISCIPLINE SYSTEM

The basic structure of the ARDS, which deals with complaints such as these, is delineated by Illinois Supreme Court Rules 751-70. The specific details of the system are determined by the ARDS Rules, which are regulations promulgated by the ARDS and the various boards within the system. The normal procedure involves a three-level structure of boards, the Inquiry, Hearing, and Review Boards, which hear cases before they are reviewed by the Illinois Supreme Court, which retains ultimate authority over attorney discipline.

The Illinois Supreme Court appoints an Attorney Registration
and Disciplinary Commission, which consists of five volunteer members of the bar, and an Administrator. The duties of the commission involve the management of financial and business aspects of the ARDS and the establishment of policy for the system. The Commission's central policy in administration of the system is the expeditious handling of charges. The Administrator's obligation is to seek discipline of attorneys whose conduct tends "to defeat the administration of justice or to bring the courts or the legal profession into disrepute." To be pursued by the Administrator, a charge should be clear as to the attorney and conduct in question, but the Administrator is given a great deal of flexibility in assisting complainants.

Inquiry into possible ethical misconduct is carried out by the Administrator through investigators. Investigatory tools include the power to subpoena witnesses and to request written information from the charged attorney or any other attorney in a position to have knowledge of facts pertinent to a case. After investigation the Administrator may refer a complaint to an Inquiry Board. Referral will be made if the Administrator believes that the attorney "may have engaged" in prohibited conduct. If he does not so believe, the Administrator may close a file only with the concurrence of the Chairman of the Inquiry Board. If the Chairman does not agree, the complaint must proceed to the full Inquiry Board.

The Inquiry Board decides on the basis of the evidence before it whether a charge should be dismissed or a formal complaint filed with a Hearing Board. Any such decision is subject to reconsideration by the same panel prior to the filing of a formal com-

65. ILL. SUP. CT. R. 751, 752.
66. ILL. SUP. CT. R. 751.
67. ARDC RULES PREAMBLE.
68. ARDC RULES 1.2.
69. ILL. SUP. CT. R. 752; ARDC RULES 1.1.
70. ARDC RULES 1.2.
71. ARDC RULES 1.1.
72. ILL. SUP. CT. R. 754.
73. ILL. SUP. CT. R. 769. There are two exceptions: 1) the Clerk of the Supreme Court may confirm to the public that a complaint has been filed after an attorney has been convicted of a crime, and 2) the Administrator may communicate with the Secretary of the Clients' Security Fund about proceedings arising from attorney conduct which also has produced claims against the fund.
74. ARDC RULES 1.5.
plaint, but it is not reviewable by appeal to another body.\textsuperscript{75} The hearing conducted by the board is not adversary in nature and proceeds informally.\textsuperscript{76} Consequently, the Inquiry Board, in addition to assessing the adequacy of evidence supporting each charge, serves as an arbitrator in misunderstandings or disputes between attorneys and their clients. This aspect of the Inquiry Board's activities provides a means of dealing with the "communication gap" which can develop because of public misconceptions about the role of a lawyer or because of a specific attorney-client communication problem.\textsuperscript{77}

If an Inquiry Board votes for issuance of a complaint, the disciplinary matter then moves to the Hearing Board.\textsuperscript{78} It has been observed that this Board serves the functions of a trial court.\textsuperscript{79} Proceedings conducted by the Hearing Board are adversarial in nature, and the Supreme Court Rules provide that except where the court or ARDS rules create special procedures,\textsuperscript{80} attorney discipline is to be conducted in accord with the general practice in civil cases.\textsuperscript{81} Special procedures have been created for pleadings, service of process, discovery, conduct of hearings, motions, and default judgments.\textsuperscript{82}

A record of Hearing Board proceedings is kept and transmitted to the Review Board along with the Hearing Board report, which contains the board's findings and recommendations.\textsuperscript{83} All matters decided against the responding attorney proceed from the Hearing Board to the Review Board unless the Administrator and respondent agree that the Hearing Board should administer a reprimand. A reprimand terminates action on the charge to which it pertains, but it can be used as evidence against the attorney.

\textsuperscript{75} ILL. SUP. CT. R. 753(a); ARDC RULES 2.1, 2.2.
\textsuperscript{76} ARDC RULES 2.2.
\textsuperscript{77} The role of attorney discipline in airing attorney-client squabbles is illustrated by In re Sherman, 60 Ill.2d 590, 328 N.E.2d 553 (1975), where the Illinois Supreme Court acknowledged that the charge under consideration had been filed after an entirely separate disagreement between the attorney and his client. Id. at 591, 328 N.E.2d at 554.
\textsuperscript{78} ILL. SUP. CT. R. 753(c).
\textsuperscript{79} Murphy, A Short History of Disciplinary Procedures in Illinois, 60 ILL. B.J. 528, 531-32 (1972).
\textsuperscript{80} ILL. SUP. CT. R. 753(c).
\textsuperscript{81} Id. Civil cases are conducted according to the Civil Practice Act, ILL. REV. STAT. ch. 110, §1-94 (1975).
\textsuperscript{82} ARDC RULES art. IV, V, VII, VIII, IX.
\textsuperscript{83} ARDC RULES 9.2.
in subsequent proceedings on differing charges. Since both the Hearing Board proceeding and the Administrator's records are confidential, a reprimand at the Hearing Board level ensures the responding attorney that the entire disciplinary proceeding will not be a matter of public record. As such, it constitutes the last opportunity for guaranteed confidential disposition of a disciplinary proceeding.

The Review Board considers every Hearing Board report which recommends disciplinary action and any other report on which the Administrator requests review. It can reject or modify any of the findings and/or remand to the Hearing Board for further findings. Like the Hearing Board, the Review Board may terminate the proceedings with a reprimand if the respondent and Administrator are in agreement. Unlike the Hearing Board reprimand, however, the Review Board may choose to administer its reprimand either privately or publicly.

When the Review Board recommends discipline rather than administering a reprimand or dismissing the charge, it files a report with the supreme court which reviews the complete record of the case. Although very few cases have moved to the supreme court level under the new rules, the court has given no indication of changing its prior approach of de novo review of the record. The Illinois attorney discipline procedure is complete when the supreme court acts. If the court decides to discipline the attorney, it will do so by censure, suspension or disbarment of the attorney. Any such disposition is a matter of public record, as are all proceedings before the court.

There is much flexibility in handling attorney discipline under

84. ARDC Rules 9.4.
88. ARDC Rules 10.4.
89. Ill. Sup. Ct. R. 753(d), (e).
90. Among the first cases to be prosecuted under the new system were In re Washington, 62 Ill.2d 23, 338 N.E.2d 177 (1975) and In re Beil, 61 Ill.2d 378, 335 N.E.2d 485 (1975). There were other cases which did not result in published opinions. The ARDC 1975 ANNUAL REPORT chart 11 indicates that the supreme court disposed of nine disciplinary cases during the period from February 1, 1973 through June 30, 1975.
91. See, e.g., In re Sherman, 60 Ill.2d 590, 328 N.E.2d 553 (1975), where the supreme court censured an attorney rather than suspend him as recommended by the Review Board.
the ARDS rules. The only exceptions to this are mandatory procedures where an attorney has been convicted of a crime involving fraud or moral turpitude,\textsuperscript{92} or has been subjected to attorney discipline in another state.\textsuperscript{93} This flexibility is evidenced by two ARDS procedures which permit an attorney to by-pass any or all of the hearing and review procedures.\textsuperscript{94} These are disbarment on consent\textsuperscript{95} and voluntary transfer to inactive status.\textsuperscript{96} Both involve a voluntary petition to the supreme court which, if accepted, terminates an attorney’s right to practice. The court’s acceptance of a petition for disbarment on consent terminates the disciplinary proceeding out of which it arose. A voluntary transfer to inactive status, on the other hand, results only in a suspension of the disciplinary proceedings pending against the attorney.\textsuperscript{97}

After suspension, disbarment, disbarment on consent, or voluntary or involuntary transfer to inactive status, an attorney can obtain reinstatement to the bar by filing a petition with the ARDS Administrator.\textsuperscript{98} The Hearing and Review Boards hear evidence and argument on the petition and make recommendations to the supreme court, following basically the same procedure used in disciplinary proceedings.\textsuperscript{99} After reinstatement from inactive

\textsuperscript{92} ILL. SUP. CT. R. 761.
\textsuperscript{93} ILL. SUP. CT. R. 763.
\textsuperscript{94} Some indication of the frequency with which attorneys use the procedures is given by chart 3 of the ARDC 1975 ANNUAL REPORT. It shows that of 41 cases dealt with by the Hearing Boards during the year, 20 resulted in voluntary motions to strike the respondent’s name from the roll of attorneys.
\textsuperscript{95} ILL. SUP. CT. R. 762.
\textsuperscript{96} ILL. SUP. CT. R. 770.
\textsuperscript{97} The language of Illinois Supreme Court Rule 770 regarding the disposition of pending disciplinary proceedings is in discretionary terms, so it may be that a transfer to inactive status also can terminate a disciplinary proceeding.

The rules establishing the ARDS also provide for removal of attorneys for non-disciplinary reasons. When an attorney is adjudicated mentally incompetent or is involuntarily committed to a mental institution, transfer to inactive status is virtually automatic. ILL. SUP. CT. R. 757. If the Hearing and Review Boards find an attorney unfit to practice because of mental disorder or addiction to alcohol or drugs, he or she is transferred to inactive status. ILL. SUP. CT. R. 758.

\textsuperscript{98} ARDC RULES 11.1. In addition to supplying a great deal of financial and biographical data, the applicant for reinstatement must show “that he is fit to resume the practice of law and that his resumption of the practice would not be adverse to the public interest,” ARDC RULES 11.1, para. 17. The rule sets out specific requirements for a petition under Rule 767 for reinstatement after suspension or disbarment. There are no specifically stated requirements for a petition under Rule 759 for reinstatement after transfer to inactive status.

\textsuperscript{99} ILL. SUP. CT. R. 759 (reinstatement after transfer to inactive status); 767 (rein-
status, any disciplinary proceedings which were suspended at the time the attorney became inactive may be resumed.100

V. ASSESSMENT OF THE ILLINOIS ATTORNEY DISCIPLINARY SYSTEM IN LIGHT OF ITS PURPOSES

The purpose of Illinois attorney discipline is the protection of the public by the maintenance of the integrity of the bar.101 The ARDS procedures, while sharing this purpose, evidence additional objectives: guaranteeing that the responding attorney be given a fair hearing102 and disciplining conduct which brings the profession or the courts into disrepute. The underlying goal of the trio of ARDS purposes is the maintenance of a particular public image. This image may be enhanced simply by the public being aware that the profession is concerned with enforcing ethical standards.103 Conversely, the secrecy in which the ARDS works

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100. ILL. SUP. CT. R. 757, 758, 759.
101. In re Nowak, 62 Ill.2d 279, 342 N.E.2d 25 (1976). The United States Supreme Court has stated a parallel purpose for federal disciplinary proceedings. Theard v. United States, 354 U.S. 278, 281 (1957); Ex parte Burr, 22 U.S. (9 Wheat.) 529, 530 (1824). This purpose is pursued by enforcement against several types of attorney activity. First, the proceedings impose discipline for attorney conduct which directly hampers or destroys protection of legal rights or public access to remedies. An example of this type of conduct is the failure of an attorney to pursue his client's claim so that the client loses his remedy when the statute of limitations period expires. In re Lingle, 27 Ill.2d 459, 189 N.E.2d 342 (1963) (attorney charged, among other things, with causing his client to lose a cause of action by his failure to proceed expeditiously). Second, the proceedings discipline conduct which, although not directly related to professional activities, indicates a general lack of fitness to practice law. One such activity is income tax evasion. In re Lacob, 50 Ill.2d 277, 278 N.E.2d 795 (1972) (respondent attorney disciplined after having been convicted of tax evasion). Third, the disciplinary system censures attorney actions which tend to bring either the courts or the legal profession into disrepute, that is, actions which without justification damage the public image or perception of the courts or profession. In re Phelps, 55 Ill.2d 319, 322-23, 303 N.E.2d 13, 15 (1973) (attorney suspended as a result of having made a series of allegations and charges against judges and attorneys involved in case she had handled).

102. This intent is manifested by the detailed procedures for hearings, discovery, responsive pleading, and review of findings which go far beyond the minimal notice and hearing which satisfied due process in Randall v. Brigham, 74 U.S. (7 Wall.) 523, 540 (1869). Although In re Ruffalo, 390 U.S. 544 (1968), was decided more recently than Randall, it added nothing to the notice and hearing requirements articulated in Randall. This is so because Ruffalo involved a situation where the attorney was given no notice of a charge against him, whereas the respondent in Randall was given a week's notice. There is no indication of whether more recent decisions defining Fourteenth Amendment due process requirements in other judicial contexts are also applicable to attorney discipline.

103. The press has given some coverage to the ARDS in general. See, e.g., Court Disci-
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may create the impression that the profession protects its own.\footnote{104}

Theoretically, maintenance of the integrity of the bar is served by a "halo" effect among attorneys; attorneys who might otherwise engage in prohibited conduct may be prevented from doing so by fear of discipline. However, a lack of knowledge about the activities of the ARDS combined with the flexibility of the common law of ethics\footnote{105} and with the relative unlikelihood that a particular act of misconduct will be reported makes the required standards of conduct very unclear to the practitioner. The average attorney probably will not feel compelled to comply with a vague standard that is unlikely to be enforced.\footnote{106} The problems resulting from vague standards of conduct are not the only obstacles to attaining the ARDS goals. The ARDS Administrator must receive information about the conduct.

The goals of protecting the public and guaranteeing a fair trial, however, share an important similarity; the conduct disciplined most frequently occurs in private activities of the attorney as he conducts his personal or professional affairs. Therefore, in a particular case the ARDS is dependent on a small group of witnesses or a single witness to give information as a complainant. Though

\footnotesize{plines 13 Attorneys, Chicago Tribune, Sept. 28, 1974, §1B, at 24, col. 1; New Punitive Rules for Lawyers Told, Chicago Tribune, May 25, 1973, §3, at 15, col. 5; High Court to Discipline Lawyers, Chicago Tribune, Jan. 26, 1973, §1A, at 11, col. 5. The public is unlikely to be aware of specific cases unless the attorney involved is well-known and the proceeding against him or her advances to a non-confidential stage such as supreme court disposition.

104. One means of assessing whether the public and the courts consider the ARDS to be policing the conduct of the profession adequately would be to study trends in the use of contempt and attorney malpractice. It may be that they are used as a compensation for the failings of the ARDS. It may also be that they are used because of the advantages they have for speed of enforcement and for recouping the damages resulting from the attorney's misdeeds, respectively.


106. Production of a halo effect is one means by which the ARDS can influence the general competence of the bar. The fault approach to attorney discipline has severe limitations for influencing competence, in the sense of expertise, in particular specialties or for maintaining a minimum level of knowledge about current developments in the law. A complete discussion of the assets and liabilities of the fault approach would require a paper in itself. The issue has been addressed by others. See Marks & Cathcart, Discipline within the Legal Profession: Is it Self-Regulation?, 1974 U. ILL. L.F. 193 (1974); Lyman, State Bar Discipline and the Activist Lawyer, 8 HARV. CIV. RIGHTS & CIV. LIB. L. REV. 235, 237-38 (1973).}
the ARDS has the subpoena power, the filing of a complaint is completely voluntary. A person who may have information justifying a complaint to the ARDS will either be a lay person or a professional. The professionals, judges and attorneys, are in the best position to assess an attorney's professional conduct or the implications of his or her non-professional conduct on the attorney's fitness to practice law. Yet the ARDS receives very few complaints from legal professionals. The bulk of the complaints are received from lay people. Although they can observe and report attorney misbehavior, reliance on lay people as the primary source of complaints probably is misplaced because they may fail to recognize, or may benefit from, their attorney's misconduct.

Disciplining conduct which brings the profession or the courts into disrepute, like disciplining other types of conduct, depends on complaints being made to the ARDS. However, the dependence may be relatively less in this case. Conduct that brings the courts or profession into disrepute is likely to be conduct which damages the public image of the legal institutions. Therefore, the attorney's actions probably will be public knowledge. When this is the case, the ARDS Administrator or an Inquiry Board can initiate charges without depending on a complaint from outside the system.

In addition to the problem of obtaining information, the ARDS goal of granting the attorney a fair trial is hindered by several

109. 1) Usually the lay person is not involved in the "behind the scenes" activities where misdeeds frequently occur and when involved he or she is unlikely to have sufficient knowledge to distinguish ethical from unethical activity; 2) The non-attorney client who feels that his own interests are served by his attorney's unethical behavior, indeed, who considers it part of the service for which he pays, is not inclined to report the attorney; and 3) The lay person is most likely to observe offenses by his own attorney and is usually unwilling to disrupt the attorney-client relationship by making a report to the ARDS, regardless of whether the client feels the attorney's actions serve the client's interests.

The result is that most complaints which the ARDS Administrator receives can be handled by arbitration between attorneys and disgruntled clients, people for whom at least the last two factors do not apply. Since these disincentives undoubtedly operate to prevent many lay people who are aware of attorney misconduct from filing complaints, a great deal of objectionable conduct is never brought to the ARDS Administrator's attention. As with the failure of professionals to report misconduct, the failure of lay people to make reports probably results in a reduction of the standards for attorney conduct which actually are enforced.
aspects of the system's procedure. Although many rights are granted to the responding attorney, the standards set for attorney conduct may be unrealistic or unjustly administered. For instance, attorney disciplinary cases have been the occasion for expression of high ideals for the profession. Though lofty language may call the professional to aspirational goals, it also carries the seeds of unfairness resulting from prosecution of disciplinary charges for the wrong reasons. In addition to potential unfairness arising from politically or socially motivated charges, unfairness to the responding attorney can be caused by the potential for bias of the boards which conduct investigations and hearings. At all levels of the disciplinary system, an accused attorney is judged by other attorneys. The danger of bias arises from the fact that many cases involve not only a specific act of misconduct but also an implied challenge to the social mores of the legal profession. Those members of the ARDS who hold conventional values may find it hard to be objective when judging unorthodox members. Although attorneys are trained in objectivity, it may be difficult to remain objective when a personal standard is at stake.

Another aspect of the ARDS which calls into question the fairness of treatment received by the responding attorney is the uncertainty produced by some aspects of the common law of ethics. The Illinois Supreme Court has emphasized repeatedly that


It is the duty of a lawyer to so conduct and guard his activities as a member of a most honorable profession that he will not be repeatedly open to assaults upon his honor. It is, of course, true that a lawyer of the highest integrity may be undeservedly assailed in good faith or under corrupt motives. In either case it is his duty to safeguard his reputation, and a failure to do so in repeated instances raises a suspicion of unfitness and tends to discredit the profession.

111. The terms "integrity" and "honor" generally describe an ethical stance, but their breadth makes them susceptible to reinterpretation to include a particular political or social stance. The flexibility and confidentiality of the disciplinary procedures can be valuable tools in the hands of those who seek to use them to enforce such social and political standards. Confidentiality can protect the accuser as well as the accused from public observation, making politically or socially motivated attacks possible without any danger of publicity to the accuser. The absence of a statute of limitations combined with the course of conduct type of charge and appearance of impropriety standard give opportunity for manufacturing substantial charges from a group of minor or technical offenses over a long period of time.


113. It has been argued that the vagueness of attorney discipline standards and proce-
each disciplinary case is unique and therefore that decisions about discipline to be administered must be made independently of decisions in earlier cases.\textsuperscript{114} Even in crimes involving moral turpitude, in which the Administrator is required to seek suspension,\textsuperscript{115} stare decisis is not applied in defining moral turpitude.\textsuperscript{116} Therefore attorneys are subject to an unclear set of ethical rules.

The introduction of mitigating evidence, while sometimes helpful to the accused attorney, may actually lead to discipline of an attorney for irrelevant reasons. Frequently, mitigation reaches the full scope of the respondent's professional and personal life, including whether he passed the bar examination the first time he took it, family status, and whether he pays his bill on time.\textsuperscript{117} The habitual use of mitigating evidence creates a bias against the unorthodox practitioner who may not be able to present the expected types of evidence or refuses to place his whole identity on trial by presenting evidence in mitigation.

The final factor introducing the potential for unfairness into the ARDS is the duty imposed on an attorney to provide information in support of the case against him unless he can claim his Fifth Amendment privilege against self-incrimination.\textsuperscript{118} This duty is based on the understanding that the practice of law is a privilege which carries duties as conditions for retention of the privilege.\textsuperscript{119} While prosecution is impossible without evidence and


\textsuperscript{115} In re Nesselson, 35 Ill.2d 454, 461, 220 N.E.2d 409, 412 (1966).

\textsuperscript{116} Ill. Sup. Ct. R. 761.

\textsuperscript{117} Ill. Sup. Ct. R. 754.

\textsuperscript{118} In re Sherman, 60 Ill.2d 590, 593, 328 N.E.2d 553, 555 (1975) (length of respondent's practice); In re Fumo, 52 Ill.2d 307, 309, 288 N.E.2d 9, 11 (1972) (respondent's financial position at time of offense); In re Agin, 45 Ill.2d 126, 130, 256 N.E.2d 810, 813 (1970) (youthfulness of respondent); In re Gavin, 21 Ill.2d 237, 245, 171 N.E.2d 588, 592 (1961) (personality of complaining client); In re Eaton, 14 Ill.2d 338, 343-44, 152 N.E.2d 850, 853 (1958) (respondent's false testimony at the disciplinary proceeding); In re Fisher, 15 Ill.2d 139, 150, 153 N.E.2d 832, 838, 39 (1958) (respondent's ethics record); In re Cohn, 10 Ill.2d 186, 191, 139 N.E.2d 301, 303-04 (1956) (respondent's remorse); In re Serritella, 5 Ill.2d 392, 396, 125 N.E.2d 531, 533 (1955) (reputation and character witnesses); In re Power, 407 Ill. 525, 530-31, 96 N.E.2d 460, 463 (1950) (respondent's restitution).

\textsuperscript{119} Spevack v. Klein, 385 U.S. 511 (1967).

\textsuperscript{118} In re Royal, 29 Ill.2d 458, 194 N.E.2d 242; People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).
the accused attorney frequently is in a unique position to supply the pertinent facts about the case, it remains that this rule makes it possible for a completely innocent person to be put to the choice of supplying all information he has on a topic or being prosecuted for failure to cooperate in an investigation. This fact makes the disciplinary system a potential tool for harassment.

VI. SIMILARITIES BETWEEN ILLINOIS ATTORNEY DISCIPLINE AND CRIMINAL LAW AND PROCEDURE

It has been seen that the ARDS as it now exists has flaws which inhibit the attainment of its primary purposes. The existence of these flaws raises the question of whether they can be corrected while maintaining the strengths of the present system. The similarity of the ARDS procedural rules to those used in other judicial proceedings suggests that a useful avenue of inquiry may be an examination of the procedures used in other types of proceedings. Historically, the procedures used in disciplinary proceedings have been modeled on the civil trial. However, upon closer examination, it can be seen that attorney discipline, as it exists in Illinois, has the same basic elements as a criminal proceeding. When the ARDS Administrator files a complaint and prosecutes the case, the attorney and the people of the state are the real parties to the disciplinary proceeding. This is highlighted by the supreme court's statement of the general purpose for attorney discipline as the protection of the public by maintenance of the integrity of the bar. In a criminal proceeding the parties also are the defendant

120. See notes 101 & 102 and accompanying text supra.


and the state, and the general purpose for the criminal justice
system is the protection of the public from the harm wrought by
criminal offenders.

In addition to the similarity between the parties to attorney
discipline and those to criminal cases, there is a similarity in the
ends sought. Although historically it has been argued that attor-
ney discipline involves a dispute over a property right and is
therefore civil in nature, attorney discipline also can be seen as
the imposition of a penalty for misbehavior. In fact, the Illinois
Supreme Court has spoken of disbarment as a "penalty" to be
meted out "where the punishment is fully deserved." The
United States Supreme Court concurred in this opinion by refer-
ring to disbarment proceedings as "quasi-criminal" and to dis-
barment itself as a "punishment or penalty imposed on the law-
ner." The practice of fitting discipline to the circumstances of
a particular case has the appearance of making "the punishment
fit the crime." Indeed, if the sole issue in attorney disciplinary
cases were a dispute over the property right to practice law, the
only possible result of attorney discipline would be preservation
or denial of that right, that is, disbarment or no disbarment.
Therefore, the fact that intermediate types of discipline are used
indicates the penalty nature of the discipline.

Where there is a possibility of penalties criminal in nature, the
responding attorney should be entitled to due process rights af-
forded criminal defendants. The supreme court has catalogued
the various tests which have been used singularly or in combina-
tion to determine whether a penalty is criminal in character:

Whether the sanction involved an affirmative disability or re-
straint, whether it has historically been regarded as a punish-
ment, whether it comes into play only on a finding of scienter,
whether its operation will promote the traditional aims of pun-
ishment—retribution and deterrence, whether the behavior to
which it applies is already a crime, whether an alternative pur-

126. 390 U.S. 544, 550 (1968). At least one author has inferred from Ruffalo that the
Supreme Court is ready to apply more stringent due process requirements to attorney
discipline. Note, Self-Incrimination: Privilege, Immunity, and Comment in Bar Discipli-
nary Proceedings, 72 MicH. L. Rev. 84, 89-90 (1975).
pose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.\textsuperscript{127}

A number of these factors are applicable in the attorney discipline context. The ultimate penalty of disbarment involves an affirmative restraint from the practice of law and is considered by the courts as a punishment. Whether attorney discipline is imposed only when \textit{sciente} is found is not clear from the cases, although it is clear that a showing of intent often has been required.\textsuperscript{128} Attorney discipline sometimes also applies to criminal behavior. For instance, an attorney's taking of a client's money may be subject both to criminal prosecution for theft and to professional discipline.

Despite these factors indicating attorney discipline is criminal in nature, it could be argued that the traditional purpose of attorney discipline, judicial supervision of those who practice before the courts, makes a disciplinary action civil in nature. If this were the genuine purpose of attorney discipline, however, one would expect the goal of the proceedings to be improvement of the quality of legal services available to the public. It is debatable whether this end is served well or at all by the spectrum of penalties currently used in attorney discipline. The choice to impose reprimand or censure, rather than to require improvement through refresher courses or apprenticeship with a more competent attorney, indicates that the system as it now exists fits the punitive purpose much more closely than the quality of the profession purpose. Surely disbarment is necessary to maintenance of quality of the bar when a practitioner shows signs of being unable or unwilling to improve. But a system focused on competence would not choose to punish in intermediate cases. Instead, it would make findings of incompetence and then seek to restore competence. Other indications of the punitive purpose are the fault basis for imposition of penalties and the use of language such as "attorney discipline."

The similarity of attorney disciplinary proceedings to criminal proceedings is further evidenced by the similarity of the social goals served by the two systems.\textsuperscript{129} Most cases seek future compli-

\textsuperscript{128} See note 42 supra.
\textsuperscript{129} The existence of both structures provides reassurance to the public that protection
ance with group standards. Toward this end the criminal system imposes prison sentences and fines whereas the attorney disciplinary system imposes censure and suspension. In a few cases, both systems discard the incorrigible either by committing them to life imprisonment, or removing them from the professional community by disbarment.

Finally, the observed similarities between attorney discipline and the criminal justice system have been acknowledged implicitly by the structure which the supreme court has chosen for the ARDS. The inquiry phase of attorney discipline is very similar to a grand jury hearing or preliminary hearing in the criminal context. Both the Inquiry Board hearing and the grand jury or preliminary hearing seek to establish whether there is sufficient evidence to justify prosecution of a charge. Both are characterized by a weeding-out process which separates the most provable charges from the rest. In one, this takes the form of plea bargaining and in the other, of arbitration between complainant and responding attorney. The Hearing Board proceeding, much like a criminal trial, is the trial in which the responding attorney and the ARDS prosecutor present their cases to the tribunal.\textsuperscript{130} After the Hearing Board proceeding, disciplinary matters decided against the accused attorney proceed to the Review Board as a matter of course. This is similar to the criminal defendant's right to appeal.\textsuperscript{131} The format used in Review Board proceedings is very similar to that used in the appellate courts with both sides presenting briefs and oral arguments.\textsuperscript{132} The final state forum for either the disciplinary case or the criminal case is the Illinois Supreme Court. Although the ARDS theoretically contemplates a de novo review of the record of a case when it is considered at each level of the system, in practice the Hearing Board's assessment of the weight of the evidence and credibility of the witnesses later

\textsuperscript{130} Murphy, \textit{A Short History of Disciplinary Procedures in Illinois}, 60 ILL. B.J. 528, 531-32 (1972).

\textsuperscript{131} A United States district court recently has decided in a challenge of the New York legislature-created attorney disciplinary system that due process does not require an appeal as of right for the disciplined attorney, who under that system initially is tried by a court. Mildner v. Gulotta, 405 F. Supp. 182, 194 (E.D. N.Y. 1975).

\textsuperscript{132} Murphy, \textit{A Short History of Disciplinary Procedures in Illinois}, 60 ILL. B.J. 528, 533 (1972).
is relied on much as appellate courts rely on the factual determinations of a criminal trial court. Although attorney discipline is an exercise of the supreme court's inherent judicial power and each disciplinary decision is said to be reviewable by the court, the only cases which the court actually considers are those which have not been disposed of within the ARDS, just as the criminal cases which reach the court are those which have not been resolved at a lower level in the criminal court system.

VII. ASSESSMENT OF THE DIFFERENCES BETWEEN ATTORNEY DISCIPLINE AND THE CRIMINAL MODEL

Though there are many similarities between the criminal and the attorney discipline systems, there also are some significant variances. An examination of these dissimilarities will demonstrate how adoption of the criminal model may be applied productively to the attorney discipline procedure.

A. Requirements for Statutory Clarity

The Federal Constitution requires that statutes upon which criminal prosecutions are based comply with a high standard of clarity. This standard is applied in order to ensure that no criminal defendant is denied due process by being prosecuted for activity which he had no notice was illegal or by being the object of arbitrary or discriminatory enforcement. Under the ARDS,

133. In re Bossov, 60 Ill.2d 439, 441, 328 N.E.2d 309, 311 (1975), cert. denied, 423 U.S. 928 (1975), expresses the Illinois Supreme Court's reliance on the findings of the Hearing Board.

134. The only exceptions to this are the several types of petitions which must be presented directly to the court. Ill. Sup. Ct. R. 761, 763.

135. This discussion of the variances between criminal and attorney cases is not exhaustive. Other areas of substantial differences include: whether a constitutional right to counsel should be carried over into attorney discipline; whether the attorney-client privilege should have the same scope and effect in attorney discipline cases as it does elsewhere; whether there should be a statute of limitations applicable to attorney discipline; whether standards for sufficiency of charges applicable in criminal trials should apply in attorney discipline; and whether a criminal defendant's Sixth Amendment confrontation rights vary significantly from an accused attorney's.


however, only a conviction of a crime involving moral turpitude and imposition of professional discipline in another jurisdiction necessarily will result in disciplinary action. All prosecutions by the ARDS Administrator not fitting within one of these categories are conducted under the general mandate to prosecute "conduct of attorneys which tends to defeat the administration of justice or to bring the courts or legal profession into disrepute. . . ."139 This statement does little to put the attorney on notice concerning which particular actions will result in prosecution.

Some clarity may be introduced by the enforcement of the Code of Professional Responsibility in attorney disciplinary proceedings. However, the Illinois Supreme Court consistently has held that codes of ethics are merely "safe guides" for professional conduct and that their application is discretionary.140 Even if the Code were applied mandatorily, there is doubt as to whether it provides enough clarity to meet due process standards.141

In addition to the tenuous position of the Code of Professional Responsibility, there are other barriers to clarity in the Illinois attorney disciplinary system. First, the liberal use of any arguably relevant evidence in mitigation may create the impression among attorneys that avoiding professional discipline depends as much upon one's general compliance with the professional

138. It is interesting to note that "moral turpitude" has been held to have a sufficiently clear common law meaning to satisfy due process requirements when used in a criminal statute. Jordan v. DeGeorge, 341 U.S. 223, 232 (1951).
139. ILL. SUP. CT. R. 752.
140. The discretionary nature of a criminal prosecutor's choices about which cases to pursue is not being overlooked. That discretion is necessitated by the practical impossibility of prosecuting all cases when police, prosecution and judicial manpower is limited. It does not negate the fact that every criminal statute theoretically creates a mandatory duty of enforcement in the prosecutor.
142. See note 117 and accompanying text supra.
group's norms as it does on one's actions in particular circumstances. Second, the use of the course of dealing form of complaint is a vague standard and does not make explicit what constitutes a disbarable offense. Finally, an action which does not transgress the bounds described by the ethical code may still be grounds for discipline if it renders the attorney's reputation assailable.

As the United States Supreme Court has pointed out, the anti-vagueness standard for criminal statutes is based on a sense of fair treatment for the criminal defendant. Therefore, application of the standard in the attorney discipline context would be consistent with the concern for fair treatment of the responding attorney demonstrated by the ARDS. In addition, increased clarity in the standards for conduct actually being enforced could increase the deterrent impact of the attorney disciplinary system by making minimum standards for professional conduct more visible to the average attorney.

B. Self-Incrimination Privilege

Another crucial variance between the criminal and disciplinary systems is in the application of the Fifth Amendment self-incrimination privilege. This privilege is actually two related privileges: (1) the witness privilege which protects a witness in any type of proceeding from being required to give testimony which may subject him to a penalty, and (2) the defendant privilege which protects a criminal defendant from being forced to take the stand in a trial against himself.

The United States Supreme Court, in a case involving the witness privilege, held that an attorney cannot be disbarred for asserting his constitutional privilege in a criminal proceeding against him. The Fifth Amendment was intended to protect people from losing their liberty on their own testimony. The proposed purposes and bases for the privileges against self-incrimination are numerous. The primary ones are protecting people from being forced to give testimony

143. See notes 52 & 53 and accompanying text supra.
144. In re Krasner, 32 Ill.2d 121, 204 N.E.2d 10 (1965).
146. B. George, Jr., Constitutional Limitations on Evidence in Criminal Cases 232-34 (1973 ed.).
148. The proposed purposes and bases for the privileges against self-incrimination are numerous. The primary ones are protecting people from being forced to give testimony
Supreme Court did not address the issue whether this privilege also protects attorneys when, instead of being subject to imprisonment, they are subject only to professional discipline. The Illinois Supreme Court, in *In re Schwartz*,149 has made its opinion clear on this issue. In *Schwartz* the court held that when an attorney has been granted immunity from prosecution, testimony given under such immunity can be used in disciplinary proceedings. Therefore, the privilege under the Fifth Amendment does not protect the attorney from discipline when there is no threat of loss of liberty. The Illinois Supreme Court also has held that the defendant privilege against self-incrimination does not apply in attorney disciplinary proceedings.150

A determination that Illinois attorney disciplinary proceedings are criminal in nature would require application of both the witness and defendant privileges. In the absence of such a holding, there is, nevertheless, strong argument for requiring the self-incrimination privilege to be expanded to protect against a penalty of professional discipline.151 Such an expansion would be in accordance with both the purpose of the self-incrimination protection as well as that of the ARDS. The purpose of the privilege, to maintain a balance between the government and the individual, would be served because expansion of the privilege would prevent the problems created when an individual is forced to give evidence against himself that leads to his punishment.152

Expansion of the self-incrimination privilege, while serving the ARDS purpose of providing fair treatment of the attorney, may

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149. 51 Ill.2d 334, 337-38, 282 N.E.2d 689, 691 (1962), *cert. denied*, 409 U.S. 1047 (1962). When a witness is entitled to claim the privilege against self-incrimination, he can be forced to testify if given a grant of immunity from prosecution on the basis of his testimony. The grant of immunity is a substitute for the denied privilege against self-incrimination. Therefore, it must take in the full scope of the privilege; it must immunize the witness against all penalties which would have justified the use of the privilege. Thus, a holding that an attorney disciplinary proceeding may be based on evidence obtained under a grant of immunity is an implicit holding that the attorney-witness could not have based a claim of the privilege solely on fear of professional discipline resulting from his testimony.


reduce to some extent the effectiveness of the ARDS in attaining its other goals. This danger lies primarily in the fact that the expanded privilege would make it more difficult to obtain evidence relating to attorney misconduct. The losses of evidence obtained by forced self-incrimination may be partially recouped by improved investigative techniques and resources. The remaining losses must be weighed against the advantage of an improved balance between the individual lawyer and the government.

C. Burden of Proof

In addition to differences in degree of clarity in statutes and application of Fifth Amendment privileges, the criminal and disciplinary systems also differ on evidentiary issues. The first area of evidentiary dissimilarity is the standard of burden of proof. The standard in criminal cases is "beyond a reasonable doubt" while the civil court requirement is a "preponderance of evidence." The Supreme Court Rules governing the ARDS expressly require that the burden of proof in attorney disciplinary hearings be "clear and convincing." Adopting this in-between standard reflects the position of the court that the importance of the issues at stake in attorney disciplinary proceedings lies between civil and criminal proceedings.

Application of the beyond a reasonable doubt standard in the attorney disciplinary context would require the conclusion that the rights involved are of comparable magnitude to those involved in a criminal trial. The supreme court has at least considered this position, and in certain circumstances applied this heavier burden. However, while disbarment is a heavy penalty which should not be administered cavalierly, it does not entail a denial of physical liberty, which is frequently at stake in criminal trials. Combining this consideration with the difficulties

156. It is interesting to note that in the past the Illinois Supreme Court has chosen to apply the beyond a reasonable doubt standard to attorney discipline cases: People v. Ader, 263 Ill. 319, 104 N.E. 1060 (1914). See note 42 supra.

Burden of proof may be another aspect of the proceedings which has become clouded by the free introduction of mitigating evidence at the hearing on the merits. In re Moore, 8 Ill.2d 373, 134 N.E.2d 324 (1956).
157. See notes 107 & 108 and accompanying text supra.
of investigation peculiar to attorney discipline, it may be unreasonable to require that the ARDS Administrator prove cases beyond a reasonable doubt. Danger of unfairness to the responding attorney can be minimized by expansion of the Fifth Amendment privilege, which incidentally would increase the burden on the Administrator by effectively requiring that charges be proved with independently obtained evidence.

D. Character Evidence and Mitigation

The second area of evidentiary dissimilarity is in the use of character and mitigation evidence. As is commonly true in other states, Illinois attorney disciplinary proceedings use common law evidentiary rules as tools for sifting the facts relevant to a case. It has been the practice in Illinois criminal trials to follow the standard rule that, except where relevant to the charge or used for impeachment, the prosecutor is not permitted to open the issue of the accused's character. Character, however, is always relevant to the question of what sentence a criminal defendant will be given if convicted. Thus, character evidence is generally introduced in a criminal case at a post-conviction sentencing hearing.

In disciplinary proceedings, on the other hand, evidence on the merits of the charge and on the proper penalty to be imposed are taken at the same hearing. The mitigation evidence theoretically is considered only on the issue of the discipline to be recommended and is not to influence the Board's judgment on the

158. See notes 146-50 and accompanying text supra.
160. See, e.g., In re Serritella, 5 Ill.2d 392, 125 N.E.2d 531 (1955); In re Mitgang, 385 Ill. 311, 52 N.E.2d 807 (1944).
163. See, e.g., In re Harris, 383 Ill. 336, 344, 50 N.E.2d 441, 444 (1943).
merits of the charge. However, it appears that in some of the Illinois Supreme Court’s opinions the court has confused the issues. This may indicate a high probability that the issues sometimes are confused by the Hearing and Review Boards. Failure to keep the issues clearly defined makes it treacherously easy for the disciplinary body to make its decision on its opinion of the responding attorney’s character rather than on the merits of the case. This danger is exacerbated by the broad range of evidence admitted in mitigation. Adoption of a pre-sentencing hearing, similar to that used in a criminal trial, would help to insure that the ARDS members rendered their verdict on the facts.

E. Exclusionary Rule

The exclusionary rule, probably the best known of the evidentiary rules, is another significant variance between criminal and attorney disciplinary cases. This rule bars the use in criminal cases of evidence obtained as a result of an illegal search. Broadly stated, the purpose of the rule is to prevent the government from benefiting by the illegal actions of any government employee. Narrowly stated, the purpose of the rule is to deter only illegal police activity. The latter reading appears to be closest to the current United States Supreme Court’s approach. Hence, the usefulness of applying the exclusionary rule in attorney discipline proceedings depends on whether the application of the rule in that context would serve to prevent the police from engaging in illegal activity.

164. For instance, in one case the court looked at reputation evidence to help it decide between conflicting evidence on the merits. In re Heirich, 10 Ill.2d 357, 389, 140 N.E.2d 825, 841 (1957). The court’s vacillation on the question whether to require proof of specific intent to act unethically indicates an uncertainty about whether to apply mitigation evidence to the merits or to the penalty. In re Mitgang, 385 Ill. 311, 333, 52 N.E.2d 807, 817 (1944) (intent not necessary); In re Lasecki, 358 Ill. 69, 72, 192 N.E. 655, 657 (1934) (intent required); People v. Lotterman, 353 Ill. 399, 409, 187 N.E. 424, 428 (1933) (intent required); In re Information to Discipline Certain Attorneys of the Sanitary District, 351 Ill. 206, 219-23, 184 N.E. 332, 340 (1932) (no intent necessary).

165. See note 117 supra.

166. The rule was introduced by Weeks v. United States, 232 U.S. 383 (1914), and made applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

167. B. George, Jr., Constitutional Limitations on Evidence in Criminal Cases 112 (1973 ed.).


The California Supreme Court has addressed this issue and held that the exclusionary rule is inapplicable to California attorney disciplinary proceedings. This conclusion was reached by balancing the purposes of attorney discipline against the purposes of the exclusionary rule. The court observed that although the state is a party to attorney disciplinary cases, the police are not charged with enforcing attorney discipline. Consequently, they are unlikely to be concerned with or aware of the impact of their work on those proceedings. Therefore, any regulatory effect produced by excluding illegally-obtained evidence from an attorney disciplinary proceeding would be minimal. In balancing this minimal effect against the purpose of attorney discipline to protect the public against attorney misconduct, the court concluded that public protection through attorney discipline was more important.

This rationale is very persuasive against barring the use of evidence illegally obtained by police, since the interest of the police in attorney discipline is likely to be minimal or non-existent. A parallel rule, however, may be of use in attorney disciplinary proceedings. Such a rule would exclude from attorney disciplinary proceedings evidence illegally obtained by those charged with investigating attorney disciplinary charges, the ARDS investigators and members of the Inquiry Boards. These people have a concern for and involvement with attorney discipline which is similar to the concern of the police for criminal prosecution. Therefore, the application of an exclusionary rule would deter illegal activity in the course of their investigations.

**F. Juries**

A final distinction between the criminal and disciplinary procedures, which indicates the present philosophical differences between the two systems, is in the utilization of a jury. The Clark

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170. *Id.* at 226-30, 520 P.2d at 1000-02, 113 Cal. Rptr. at 184-86.
171. This discussion assumes that barring the use of illegally-obtained evidence from a judicial proceeding inhibits the person who obtained it illegally from repeating the illegal act. The existence of such a regulatory effect is an assumption underlying the exclusionary rule. The assumption is taken as a given here, although it has been challenged. F. INBAU, *CASES AND COMMENTS ON CRIMINAL PROCEDURE* 161 (1974).
172. *Clark Commission Report*, supra note 2, at 136-37. At the time of the report a jury trial was permitted in attorney disciplinary proceedings only in Texas, Georgia, and North Carolina and in practice was rarely used.
Commission criticized the use of juries in attorney discipline cases on the ground that a lay jury would not understand the practice of law or the concepts underlying the ethical code and that a jury may apply a different standard than it was instructed to follow. Both of these criticisms, however, can be directed at the use of juries in other situations. Probably the root fear preventing the use of juries in attorney discipline cases is the feeling that a lay jury consistently would rule against the accused because of a general dislike for lawyers.

Assuming for the sake of argument that this is true, a jury still remains a powerful mechanism for injecting impartiality into a controversy. A jury composed of individuals who are not personally involved with a case is better suited than either of the parties to draw conclusions about the facts of a case. Therefore, the introduction of an impartial party to the proceedings would help reduce the danger of bias and ensure the responding attorney a fair result. A means of achieving the impartiality provided by a jury, may be to add non-lawyers to the boards within the ARDS. An advantage of this plan is that a lay person can to some extent represent the views of the public which the ARDS ostensibly exists to protect. To prevent the lay person from losing impartiality, a procedure could be established to appoint lay people for relatively short terms and not permit them to serve more than one term with any board during their lives.

Thus, although the impartiality introduced by a jury into a criminal trial is needed in attorney discipline, it is unclear whether a jury would be the best means to that end. Alternatives to the standard jury may be more effective in serving the purpose.

VIII. Conclusion

Assuming that neither the Illinois nor United States Supreme Court soon will conclude that disciplinary proceedings are crimi-
nal in nature, the current differences between criminal and attorney disciplinary proceedings may persist. However, the fundamental similarities between the elements, functions, and structures of the systems suggest that the criminal procedures, which were developed over a much longer history than were the Supreme Court Rules for disciplinary action, may be responsive to needs or failings which characterize the relatively new ARDS. Adopting the criminal model would greatly increase the capability of the ARDS to attain its purposes of maintaining the integrity of the bar and of ensuring that responding attorneys receive fair treatment.