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The Arkansas Supreme Court Committee on Professional Conduct 1969-1979: A Call for Reform*

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In most states the legal profession and the general public have been forced to endure a fragmented and non-uniform mechanism for disciplining attorneys who are guilty of professional misconduct.¹ This has not been the case in Arkansas. Although it lacks an integrated bar, the state for four decades has enjoyed a unified disciplinary system under the control of the Arkansas Supreme Court.² Arkansas’ centralized approach to regulating the legal profession has been justifiably praised, but significant weaknesses hamper its continued effectiveness. This article reviews the development of the disciplinary system in Arkansas, evaluates the existing structure and criticizes, in some instances, the application of the rules and procedures governing the discipline of attorneys. The purpose of this review is to demonstrate that problems exist and to suggest reforms that should help correct them.

I. EVOLUTION, COMPOSITION AND STRUCTURE OF THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

The Arkansas Supreme Court recognized as early as 1860 an inherent power in the state’s courts to discipline attorneys in order to protect the public and maintain the honor of the legal profession.³ No formal

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** Associate Professor, University of Arkansas, School of Law (Fayetteville).

1. ABA Special Committee on Evaluation of Disciplinary Enforcement: Problems and Recommendations of Disciplinary Enforcement 24-30 (1970) (This Committee was chaired by Justice Tom C. Clark and hereinafter will be cited as the Clark Report).

2. See the references in Lathrop v. Donohue, 367 U.S. 820, 848 n.1 (Harlan, J., concurring).

3. Beene v. The State, 22 Ark. 149 (1860). The trial court disbarred the attorney “on account of a most unwarrantable, unprovoked and infamous personal attack upon the honorable judge.” Id. at 150. Although reversing the judgment for lack of notice and a hearing,
disciplinary procedure existed until 1939, a year after amendment 28 was added to the state constitution. Pursuant to the express authority conferred upon it by amendment 28, the Arkansas Supreme Court promulgated "Rules Regulating Professional Conduct of Attorneys at Law." Those Rules adopted "the canons of ethics of the American Bar Association as the standard of professional conduct of attorneys at law" and established a procedure for disciplining lawyers who violated them. Central to this procedure was a committee, eventually known as the Bar Rules Committee, charged with the responsibilities of investigating complaints of professional misconduct and initiating disciplinary actions either at the committee or trial court level when the committee believed reasonable grounds existed for doing so.

The Court in 1969 made several important changes in the Rules. It adopted the American Bar Association's (ABA) newly promulgated Code of Professional Responsibility (Code) as the standard of professional conduct for Arkansas lawyers. The Court thereby became the first in the nation to embrace the Code as the embodiment of ethical principles for attorneys in its jurisdiction to follow. At the same time, another impor-

the Court emphasized that though the charges against the attorney may not have come within the statute, the Court had the inherent power to disbar an attorney for causes not included within the statute. See also Hurst v. Bar Rules Committee of the State of Arkansas, 202 Ark. 1101, 1109, 155 S.W.2d 697, 700 (1941).

The actions brought under this inherent power and under Ark. Stat. Ann. § 25-401 (Repl. 1962), see text accompanying notes 77-96 infra, were initiated by both Bar Associations, e.g., State ex rel. Greene County Bar v. Huddleston, 173 Ark. 686, 293 S.W. 353 (1927), and state officials, e.g., McGehee v. State, 182 Ark. 603, 32 S.W.2d 308 (1930).

4. Ark. Const. amend. 28 provides "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys of law."

5. The early rules may be found at 207 Ark. xxxiv-xxxvii (1944). Appendix A contains the citations for the rules and subsequent amendments. Subsequent changes to these rules are not always published in the official and unofficial reporters.

6. See Hurst v. Bar Rules Comm., 202 Ark. 1101, 1109, 155 S.W.2d 697, 701 (1941). Although the new procedure removes the power of a trial judge to hold an attorney in contempt and remove his license to practice, see Ex Parte Burton, 237 Ark. 454, 373 S.W.2d 409 (1963), the trial court does retain the power to punish contempt by an attorney with an appropriate fine or sentence. See Davis v. Merritt, 252 Ark. 659, 480 S.W.2d 924 (1972). From the adoption of the rules in 1939 through 1969 only five disciplinary opinions were issued by the Supreme Court: Ex parte Barton, 237 Ark. 454, 373 S.W.2d 409 (1963) (Attorney suspended for 3 years; petition for reinstatement granted after one year); Whitsett v. Bar Rules Comm., 223 Ark. 860, 269 S.W.2d 699 (1954) (Attorney disbarred for several violations); Armitage v. Bar Rules Comm., 223 Ark. 465, 266 S.W.2d 818 (1954) (Attorney disbarred); Hurst v. Bar Rules Comm., 202 Ark. 1101, 155 S.W.2d 697 (1941) (Attorney suspended for one year because he attempted to bribe jurors at $5.00 a person); Bar Rules Committee of the State of Arkansas v. Richardson, 202 Ark. 417, 150 S.W.2d 953 (1941) (attorney suspended for one year because he attempted to bribe jurors at $5.00 a person). The limited number of appellate opinions and the lack of statistical information during this 30 year period makes evaluation impossible.

tant change was made in the Rules. The Bar Rules Committee was reconstituted, renamed the "Supreme Court Committee on Professional Conduct" (The Committee), and rejuvenated by being given the authority to hire an executive secretary.\textsuperscript{8} The Rules have been further amended by the Court since 1969, but the name and principal functions of the Committee have remained unchanged.

Under the present Rules, the Supreme Court appoints the Committee which has seven members, one from each congressional district and three from the state at large, each of whom serves a seven-year term.\textsuperscript{9} The Rules specify that the Committee shall be composed of "seven lawyers."\textsuperscript{10} If a proposal to add laypersons was made, the ensuing arguments would be familiar ones. Those favoring the idea would emphasize (1) the enhanced social perspective that results from having non-lawyers on the Committee; (2) the danger of unbalanced or disproportionate regulation if the matter is controlled totally by lawyers; and (3) the fact that because the legal profession owes a duty to the public as well as to its own members, the non-lawyer public should be represented.\textsuperscript{11} Those opposing any such proposal would argue (1) that charges of misconduct sometimes hinge on the handling of complex legal issues that non-lawyers are unable to understand; (2) that the confidentially of the Committee's deliberations cannot be insured if laypersons are included in its membership; and (3) that for a variety of reasons only attorneys can fairly regulate and judge their colleagues.

The Court has considered the notion of employing non-lawyers on


\textsuperscript{9} Rule II, \textit{Rules of the Court Regulating Professional Conduct of Attorneys at Law} (as amended Feb. 19, 1979) (hereinafter cited as Rule \textendash{}). The references throughout this article are to the current rule numbers, not to the numbers prior to the 1976 reorganization. \textit{See} Appendix A.

\textsuperscript{10} \textit{Id.} Editor's note: Since this article was written, the composition of the Committee has been changed to include non-lawyers. \textit{See} Appendix A. The first non-lawyer appointed to the committee is Susan Miller, Chairperson Science Department, Henderson Junior High School, Little Rock, Arkansas.

\textsuperscript{11} The recently proposed ABA \textit{Joint Comm. on Professional Discipline, Standards for Lawyer Discipline and Disability Proceedings} (Proposed Draft, Dec. 1978) (hereinafter Standards) call for one-third of the disciplinary board members to be nonlawyers. \textit{Id.} at 8-9. The Standards, drafted by the Joint Committee on Professional Discipline, were approved by the American Bar Association House of Delegates in February, 1979.

other committees associated with regulating the legal profession. The
recently the Court created a Committee on Unauthorized Practice and pro-
vided that three of the seven members would be non-lawyers. The first
appointees to this committee are representatives of the banking, real es-
tate and title insurance professions. Thus, it is conceivable that non-law-
yers may eventually become members of the Committee.

The administrative structure of the Committee on Professional Con-
duct is fairly simple. The Rules authorize the Committee to elect a chair-
man and a secretary from among its membership and to formulate its
own procedural rules. The Committee is also permitted to hire an ex-
ecutive secretary. This person cannot be a member of the Committee and
cannot vote on matters presented to it, but he is the principal coordinator
of its work. Among other responsibilities, the executive secretary receives
complaints of professional misconduct, assists complainants in preparing
required affidavits, circulates complaints among the Committee, and con-
ducts investigations. His salary is paid from the license fee imposed by
the Court on practicing attorneys in the state. This fee is the only source
of revenue for the Committee, whose entire budget is small in relation to
those of comparable entities throughout the nation.

The budgetary problem brought former United States Supreme
Court Justice Tom Clark to Arkansas in June, 1970, on a "sad mission." While
praising the centralized disciplinary structure symbolized by the
Committee on Professional Conduct, he emphasized certain shortcomings
of the 1969 procedure: inadequate funding for effective enforcement, the
lack of staffing, and the need for reciprocal enforcement. The Arkansas
Supreme Court concluded in 1971 that the employment of a full time
executive secretary required an increased Committee budget. Following
discussions, the Court increased the Supreme Court license fee from $2.00
per year to $17.00 per year effective January 1, 1972 to fulfill this need.

A member of the Arkansas Bar contested the validity of the fee in-

12. The Arkansas Bar Association has recommended that three non-lawyers be added
to the Committee. Arkansas Gazette, September 16, 1979, at 1, col. 5.

A 1977 statute provided that every state board or commission "whose membership con-
sists solely of persons actively engaged in the occupation or profession regulated" shall be
enlarged by the addition of one member who is not a member of the profession. Ark. Stat.
Ann. § 6-617 (Supp. 1977). The Supreme Court Committee, as an arm of a separate branch
of the government, is not subject to this provision. But see Editor's note, note 10 supra.


14. Rule II, note 9 supra. The Committee has adopted internal rules governing such
matters as regular meeting times and places, the quorum requirement, and communications
within the Committee.

15. Rule III, note 9 supra.

1970).

17. Id. at 85-87.

18. In the Matter of Supreme Court License Fees, 251 Ark. 800, 483 S.W.2d 174
(1972); Huie, Juris Dictum, 6 Ark. Law. 15 (1972); Huie, Juris Dictum, 6 Ark. Law. 64
crease. He argued that 1) the Supreme Court did not have the authority to make the order; 2) the increase violated both the federal and state constitutions; and 3) the change could not become effective until approved in a mail ballot by a majority of licensed Arkansas attorneys. Emphasizing its constitutional duty to make and enforce rules governing the practice of law, the Supreme Court easily rejected all three grounds for challenging the Court's action. Effective enforcement of the Rules requires a full time secretary. In addition, under the Arkansas Constitution, the Supreme Court possesses general supervisory powers over the judicial branch of the government. This supervisory responsibility and the regulation and control of attorneys cannot depend on a vote by attorneys. Since the Court has been given the duty to supervise the practice of law it must, by necessary implication, have the power required to carry out that duty.

The petitioner contended, however, that a $17.00 per year fee was too high. Reviewing the work load of the Committee and the proposed initial budget of $28,000.00 per year, the Court found the figure to be appropriate. But the Court did concede that the license fee should be adjusted annually to ensure that income and expenses are balanced.

The National Center for Professional Responsibility recommends that for effective discipline, the appropriate agencies should have a budget based on $22.00 to $23.00 per year per attorney. While some states have devoted as much as $70.00 per year per attorney, Arkansas, with an average expenditure of $10.00 per year per attorney, is far be-

(1972). Justice Clark subsequently praised these developments. See Clark, The Challenges are Being Met in Arkansas, 6 ARK. LAW. 64 (1972).

19. In the Matter of Supreme Court License Fees, 251 Ark. 800, 483 S.W.2d 174 (1972).

20. ARK. CONST. art. 7, § 4.

21. The annual fee was subsequently reduced to $15. See Per Curiam Order of November 13, 1973, at 499 S.W.2d (Arkansas Cases) xxii (1973) (This order does not appear in either the Arkansas Reports or the full Southwest Reports).

22. Interview with Marcia L. Proctor, National Center for Professional Responsibility, in Chicago, Illinois (Apr. 23, 1979). The disciplinary expenditure for the 35 states reporting in 1976 was $19 per licensed attorney within the state, ABA CENTER FOR PROFESSIONAL DISCIPLINE, DISCIPLINARY LAW AND PROCEDURE RESEARCH SYSTEM, DISCIPLINARY LAW AND PROCEDURE INDEX (Grievance Referral List of Lawyer Disciplinary Agencies) 4, Chart II (1978).

23. With an annual cost of $70.12 per attorney in 1978, in addition to $15 per year for the Clients' Security Fund, Florida may be devoting the largest amount to discipline. Florida Bar News, September 15, 1978, at 3, col. 4.

24. For 1977 the Committee had a budget of $45,000.00 and actual expenditures of $33,133.00 or $9.00 per attorney. ABA CENTER FOR PROFESSIONAL DISCIPLINE, DISCIPLINARY LAW AND PROCEDURE RESEARCH SYSTEM, DISCIPLINARY LAW AND PROCEDURE INDEX (Grievance Referral List of Lawyer Disciplinary Agencies) 13 (1978). The Committee's 1978 budget was $48,107.00 and actual 1978 expenditures were $39,166.33, which included the purchase of copying equipment for the Committee. The budget annually includes several thousand dollars for attorneys' fees in disbarment proceedings, and this amount is usually not expended. Letter from Taylor R. Roberts to Howard W. Brill (Sept. 7, 1979).
low the recommended level. Though the Supreme Court currently collects license fees of $15.00 per year, the resulting total is used to finance three committees in addition to the Committee on Professional Conduct. The existing shortage of disciplinary funds is particularly manifested in the Committee’s need for a full time office secretary and the need for an additional investigator. In view of a decade of rising costs, the increased number of attorneys in the state, the partial distribution of income derived from the annual license fee to other groups and a present inability to acquire needed personnel, disciplinary enforcement in Arkansas is hampered by the apparent reluctance of the Court to devote more resources to this task.²⁵

II. FUNCTIONS OF THE COMMITTEE

A. Investigations

Nothing in the Rules expressly permits the executive secretary to act in a manner similar to a prosecutor or foreman of a grand jury and to investigate suspected cases of possible misconduct without a formal accusation. Rule III authorizes investigations by him only when a complaint has been filed. Rule IV, however, gives the Committee the authority to investigate not only “complaints of misconduct that may be brought to its attention in the form of an affidavit,” but also those “in respect of which any member of the Committee may have information.” In actual practice, inquiries are made into cases of suspected misconduct without formal complaints having been filed.²⁶

This process of making independent inquiries has apparently been approved by the Supreme Court. In Weems v. Supreme Court Committee on Professional Misconduct,²⁷ an attorney who had been found guilty of unpro-

²⁵. Concluding that funds for disciplinary purposes were needed beyond the $50 already annually required, the Mississippi Supreme Court recently ordered: a) a special assessment of $25; b) an investigation fee, payable by the attorney disciplined; and c) expenses of litigation to be awarded to the disciplinary agency. Matter of Miss. State Bar, 361 So.2d 503 (Miss. 1978). An innovative source of additional funds would be income generated from the investment of trust funds held for clients. See Matter of Interest on Trust Accounts: A Petition of the Florida Bar to Amend the Code of Professional Responsibility and the Rules Governing the Practice of Law, 356 So. 2d 799 (Fla. 1978), modified, 372 So. 2d 67 (1979). The Arkansas Bar Foundation is considering such a program, though the income would not be devoted to disciplinary purposes. See Kieffer, Arkansas Bar Foundation, 13 Ark. Law. 51 (1979); Love, Arkansas Bar Foundation, 14 Ark. Law. 3 (1980).

²⁶. Interview with Taylor Roberts, Executive Secretary, Supreme Court Committee on Professional Conduct, in Little Rock (June 15, 1979). One specific problem highlighted by the Clark Committee was that few investigations are initiated without a specific complaint being made. Clark Report, note 1 supra, at 60-66. The Standards provide that a proceeding may be initiated upon the complaint of a person or entity or upon the Committee’s own motion “in light of information received or acquired from any source.” Standards, note 11 supra, at 46.

²⁷. 257 Ark. 673, 523 S.W.2d 900 (1975).
fessional conduct challenged the validity of the proceedings against him. He argued that Rule IV required "an affidavit of complaint or a statement that a member of the committee had information." The Court disagreed:

[T]he rules permit investigation from any source. Investigation by the Committee may be commenced without an affidavit being signed by the client. The nature or the form of the information which causes the committee to commence the investigation is not jurisdictional and a statement of the source is not required.

The Court reasoned that this interpretation of the Rules was necessary to insure the Committee "free and easy access of information regarding the activities of the members of the bar." The authority to conduct independent investigations is clearly essential to the Committee's purpose of maintaining "the highest standards of ethical conduct in the practice of law." The Court's recognition of this authority in Weems should be spelled out in the Rules.

Newspaper reports about the activities of some attorneys suggest that ethical violations frequently occur but result in no disciplinary action because the clients involved fail to complain. The classic situation involves a conflict of interest between two present clients or a present and former client. For example, a city attorney with a private practice may represent a client in the client's dealings with the city. Or, a lawyer who formerly worked for the Public Service Commission may represent a utility who must appear before the Commission. Who will formally complain of possible ethical violations in such cases? Perhaps the press could file complaints with the Committee. It is not clear whether a member of the press or another "public citizen" has ever initiated disciplinary proceedings. An opposing attorney might lodge a complaint. The Committee should invite reports of suspected ethical violations by members of the bar, particularly since the Code of Professional Responsibility imposes a

28. Id. at 684, 523 S.W.2d at 906.
29. Id.
30. Id.
31. Id.
32. An increased awareness of conflict of interest problems may be indicated by Mann v. Britt, 266 Ark. 100, 583 S.W.2d 21 (1979) (attorney barred from representing accused because he formerly represented co-defendants), noted Recent Developments, 33 Ark. L. Rev. 435 (1979). See also Holloway v. Arkansas, 435 U.S. 475 (1978) (the failure to provide separate counsel for three defendants constituted ineffective assistance of counsel in violation of the sixth amendment), reversing Holloway v. State, 260 Ark. 250, 539 S.W.2d 435 (1976).
33. Other instances in which misconduct by the attorney may benefit the client include fraudulent marriages for immigration purposes, exaggerated personal injury claims and fee referrals with bail bondsmen. See Clark Report, note 1 supra, at 64.
34. Interview with Taylor Roberts, Executive Secretary, Supreme Court Committee on Professional Conduct, in Little Rock (June 15, 1979).
duty on lawyers to take such action. Trial judges will often have the most intimate knowledge of misconduct in some cases. Yet judges have apparently been reluctant to report lawyers to the Committee. This may change. A recent Supreme Court order to notify the Committee of specific infractions of the Appellate Rules implies an increased awareness and recognition of the judiciary's role in this regard. A standing policy requiring both trial and appellate judges to identify lawyers who are suspected of ethical misbehavior and to report them to the Committee is needed. Such a procedure would enhance the possibility of dealing with misconduct at an early stage and help to mitigate the resulting harm to clients and the public.

After receiving an allegation of misconduct and conducting an initial inquiry, the executive secretary forwards the accused attorney a copy of the formal complaint and allows him ten days to file a written answer. Copies of the complaint and the answer are then distributed to the Committee members who also receive any exhibits, memoranda, or recommendations prepared by the executive secretary, and a printed ballot. If a majority of the Committee votes to take no action, the matter is closed, and the executive secretary notifies the attorney and the complainant of the Committee's decision. If the Committee votes to take some action,

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35. Disciplinary Rule 1-103(A): "A lawyer possessing unprivileged knowledge of a violation of these rules shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." See footnote 13 to Preliminary Note accompanying The Arkansas Code of Professional Responsibility, pages 606-608, this issue.

36. Over the past decade some trial judges have been increasingly more willing to report attorneys to the Committee. The vast majority of complaints, however, still come from clients. Interview with Ben Core, Member, Supreme Court Committee on Professional Conduct, in Fort Smith, (Aug. 9, 1979). See footnote 13 to Preliminary Note accompanying The Arkansas Code of Professional Responsibility, pages 606-608, this issue.

See also Solomon, Trials and Tribulations of a Member of the Supreme Court Committee on Professional Conduct, 12 Ark. Law 76, 77 (1978): "One of the most serious problems is the failure of lawyers and sometimes judges to bring to the attention of the committee . . . situations that need investigation." Id.

37. The Supreme Court ordered, with two justices dissenting, that when a belated appeal is taken in a criminal case, with no good cause shown, the Court will publish an order allowing the appeal and giving the name of the lawyer who was at fault. A copy of that order will be forwarded to the Committee on Professional Conduct, to be available to the Committee "if any complaint of any kind should later be filed against that lawyer." Per Curiam Order 265 Ark. __, 574 S.W.2d (Arkansas Cases) xxx (1979) (265 Ark. Sup. Ct. Adv. Rptrs., Feb. 5, 1979, No. 1, Appendix).

38. Rule III, note 9 supra. Concerned that the verification requirement and other formalities might discourage valid complaints against attorneys, the Clark Committee recommended that verification be eliminated and other formalities be minimized. See Clark Report, note 1 supra, at 71-73. See also Standards, note 11 supra, at 46-47. Procedural due process requires an attorney receive fair notice of the disciplinary charges made against him. In Re Ruffalo, 390 U.S. 544, 550 (1968). But see Dorf, Disbarment in the United States, 12 Colum. J. of L. & Soc. Prob. 1, 25 (1975): "[W]herever rule Ruffalo was meant to set down has been largely ignored." Id.

its options include cautioning or reprimanding the attorney \textit{ex parte}. An attorney disciplined in this manner may request a formal hearing before the Committee. If no hearing is requested, the order is made permanent and may be a factor considered by the Committee in any future proceedings against the attorney. If a hearing is requested, however, it is conducted \textit{de novo} and the initial vote to take action is ignored. In some cases involving allegations of serious or repeated offenses, the Committee may not decide what action to take, if any, until it has conducted a formal hearing.

\section*{B. Formal Hearings}

The Rules do not specify the exact format of a formal hearing, but in practice the hearing proceeds like a civil trial. The executive secretary may attend and act as counsel for the Committee in the presentation of testimony and evidence.

Under the Rules, the Committee has authority to issue subpoenas to compel the production of documents or the appearance of a witness. The subpoena may be served on any person by any sheriff within the state. This type of statewide subpoena authority, which can force an individual to travel to another part of the state for a hearing, was objected to by one Arkansas Supreme Court Justice when the Supreme Court Committee on Unauthorized Practice of Law was created. Potential unfairness could be avoided if the formal hearing is held in the county where the attorney resides or practices. Such a procedure would be consistent with Rule IV which states that venue for a disbarment suit lies in the county where the attorney resides or where the offenses were committed. Changing the sites of the disciplinary hearing, however, would require the Committee to travel rather than the attorney and the witnesses. It may be that when seven committee members, who serve without pay, meet on perhaps six to

40. Until February, 1979, the Committee also had the power to issue letters of reproof.
41. Interview with Ben Core, Member, Supreme Court Committee on Professional Conduct, in Fort Smith (August 9, 1979). A better practice would be a specific rule authorizing increased discipline for repeated offenses. See, e.g., \textit{In the Matter of Yates}, 91 Wash. 2d 482, 588 P.2d 1164, 91 Wash. 2d 482 (1978). The \textit{Standards} recommend a specific rule that disciplinary proceedings should not be subject to any statute of limitations. \textit{Standards}, note 11 supra, at 28.
42. The internal rules of the Committee provide that “there shall be no formal requirements as to the proceedings . . . but order shall be preserved and the Committee shall attempt to develop the facts.” \textit{Amended Rules of the Supreme Court Committee on Professional Conduct}, adopted June 14, 1969 and amended August 20, 1977. Since it sits as a fact-finding body and not as an adversary tribunal, the Committee does not strictly adhere to the rules of evidence.
43. Rule III, note 9 supra.
44. Rule II, note 9 supra.
ten Saturdays a year, the meetings are best held in a single central location. In actuality all formal hearings but one have been held in Little Rock.\textsuperscript{46}

If the Committee can compel attendance, may the accused attorney be forced to testify or produce documents in his possession? Usually in a proceeding against an attorney, the Committee can acquire any necessary evidence from a client, court records, or other sources. Occasionally, however, the most crucial information can only be obtained from the attorney. Although the last sentence of Rule II provides that "disobedience of any summons or subpoena or a refusal to testify shall be regarded as constructive contempt of the Supreme Court," it is not clear that this regulation means the attorney loses his protection against self-incrimination. Under the subpoena duces tecum power of Rule II, a defendant is obligated to respond to requests for testimony or documents.\textsuperscript{47} In addition, cases from other jurisdictions have ruled that an attorney may be compelled to testify in disciplinary hearings because the procedure is not criminal in nature.\textsuperscript{48} No Arkansas case has dealt with this problem.

The United States Supreme Court, however, has held that the constitutional privilege against self-incrimination is available to a witness or a party defendant at any proceeding, civil or criminal, formal or informal, if the answer to a question might subject him to criminal liability.\textsuperscript{49} In addition, the United States Supreme Court has specifically held that an attorney has the right to invoke a fifth amendment privilege at disciplinary hearings if he reasonably believes the state may use testimony against him in a future criminal prosecution.\textsuperscript{50}

A grant of immunity to the affected lawyer presents one means of dealing with this problem. If the Committee finds (1) the testimony of the attorney or the documents in his possession to be crucial to the case against him, and (2) the Committee believes disciplinary action against the attorney is more important than possible criminal sanctions, the Committee should compel testimony by giving the accused immunity from

\textsuperscript{46} Interview with Taylor Roberts, Executive Secretary, Supreme Court Committee on Professional Conduct, in Little Rock (Jun. 15, 1979). A major administrative problem of the present Committee setup is the task of arranging suitable times when the members can meet. Although not yet utilized, conference telephone calls are a possibility.

\textsuperscript{47} Rule II, note 9 supra. Interview with Ben Core, Member, Supreme Court Committee on Professional Conduct, in Fort Smith (Aug. 9, 1979).


Possessing elements of both civil and criminal procedure, disciplinary proceedings are best characterized as \textit{sui generis}. See STANDARDS, note 11 supra at 2-3.


subsequent criminal prosecution. Although the United States Supreme Court has not specifically ruled on this point, other courts generally hold that an attorney can be forced to testify in a disciplinary hearing by granting him immunity from criminal prosecution. The Illinois Supreme Court recently reached this conclusion because it found disciplinary hearings to be remedial and not criminal in nature. Although the attorney may cite the privilege against self-incrimination, the important common interests in protecting the public, administering justice, and maintaining the integrity of the legal profession outweigh individual concerns once immunity is granted.

Since the disciplinary hearing is not criminal, however, the immunity granted does not apply to a hearing under the Rules. Likewise, if a lawyer testifies in a criminal prosecution under a grant of immunity, his testimony may be used against him in a subsequent civil disciplinary hearing. The Committee has never found it necessary to consider a grant of immunity. Indeed, the Committee’s authority to grant immunity is unclear since it is questionable whether the Supreme Court, which created the Committee, has the inherent power to authorize immunity. But, without either a legislative statute or a Court rule, it is certain the Committee has no existing internal power to create such an immunity. Assuming creation of an appropriate mechanism, and the grant of immunity from criminal prosecution, if the attorney still continues to refuse to testify, the Rules could allow him to be held in contempt. But what would be an appropriate penalty: Indefinite imprisonment? Fine? Disbarment?

51. The Clark Committee recommended such a procedure. See Clark Report, note 1 supra, at 89-91. See also STANDARD, note 11 supra, at 50.
55. E.g., In Re Schwartz, 51 Ill. 2d 334, 282 N.E.2d 688 (1972). See also In Re Daley, 549 F.2d 469 (7th Cir. 1977), cert. denied, 434 U.S. 829 (1978).
56. Interview with Taylor Roberts, Executive Secretary, Supreme Court Committee on Professional Conduct, in Little Rock (Jun. 15, 1979).
57. See Ciravolo v. The Fla. Bar, 361 So. 2d 121 (Fla. 1978) (legislation necessary to authorize the granting of immunity from criminal prosecution; only the Florida Supreme Court can authorize disciplinary immunity).
58. ARK. STAT. ANN. § 28-332 (Repl. 1979) authorizes a prosecuting attorney to seek a court order to compel a witness to testify and in return to grant immunity. It does not authorize the Executive Secretary or the Committee to seek a court order to compel the accused to testify in a disciplinary hearing or trial and be immunized from criminal prosecution. See generally Hammers v. State, 261 Ark. 585, 550 S.W.2d 432 (1977).
C. Confidentiality of Committee Investigation and Action

Rule XII, which was added in 1976, grants an absolute privilege to "[a]ll communication, complaints, testimony and evidence filed with, given to or given before the . . . [Committee] or to any of its employees." The new rule also bars any action from being instituted against the complainants or Committee members or employees acting within the scope of their duties. Such regulations, which are commonly included in disciplinary procedures, are designed to encourage citizens and clients to come forward with information without risk of retaliatory civil or criminal lawsuits. The Rule has not been completely successful, since many persons are unaware of it and because other kinds of threats may intimidate some witnesses. An additional problem grows out of the question of whether the Arkansas Supreme Court or only the legislature has the power to give the privilege. This issue is currently being considered in a federal court suit brought by a disbarred attorney against the members of the Committee.

While Rule XII protects potential witnesses and complainants, the Rules also guard the interests of the accused attorney. Rule III requires the Committee to "keep confidential the activities and files of the commit-

59. The case law analyzing the validity of such a privilege is contained in Annot., Libel and Slander: Privilege in Connection with Proceedings to Disable or Discipline an Attorney, 77 A.L.R.2d 493 (1977). The Clark Committee recommended a rule providing for absolute immunity. See Clark Report, note 1 supra, at 74-76. The Standards call for absolute immunity from civil liability for disciplinary officials and complainants as to all acts or communications within the scope of the agency's official functions and duties. Standards, note 11 supra, at 15, 47.

60. In at least one instance the Committee has brought charges against an attorney who threatened witnesses at Committee hearings with physical violence. The Supreme Court held the attorney in contempt, fined him $1,000 and publicly reprimanded him. Supreme Court Comm. on Professional Conduct v. Montgomery, Supreme Court of Arkansas 77-301 (original action under Supreme Court Rule 17) (this case has not been published in any reporter). Witnesses and complainants may be deterred by the risk of litigation against them or other forms of harassment. Interview with Ben Core, Member, Supreme Court Committee on Professional Conduct, in Fort Smith (Aug. 9, 1979).


62. Dodrill v. Moorhead (E.D. Ark. LR-C-77-234) (This case is presently pending) (a libel suit by a suspended attorney against the members of the Committee). The attorney's libel suit against the newspapers was allowed to proceed in Dodrill v. Arkansas Democrat Publishing Committee, 265 Ark. 626, 590 S.W.2d 940 (1979) (ruling that the attorney was not a public figure).
tee.” Until recently, the only exceptions to this principle arose when it was necessary to divulge information for disbarment suit purposes, to notify complainants and accused lawyers of Committee action, or to use the information as statistical data. The attorney also could grant access to Committee records involving him by waiving his right to confidentiality. The only data on Committee activities available to the public and this author come from these exceptions, court actions brought by the Committee, or suits by lawyers who seek readmission following voluntary surrender of their licenses.

If the Committee votes to take no action against an accused attorney, the public rightly is not informed that changes were made and dismissed. If the Committee cautions or reprimands a lawyer, either with or without a formal hearing, the Rules formerly provided that the complainant could be informed that some type of disciplinary action had been taken. This provision was recently questioned by a complainant who demanded to know what particular action had been taken. Apparently bowing to the persistence of the inquiry, the Arkansas Supreme Court on February 19, 1979 amended the Rules to direct the Committee to notify the complaining party of any specific sanction imposed.

If a charge against an attorney is substantial enough to merit a formal hearing, he may be tried under a procedure changed by the Supreme Court in an unpublicized but potentially far-reaching amendment. Prior to October 15, 1979, the public was not informed of any formal disciplinary hearing and was certainly not invited to observe. By its per curiam order of that date, however, the Court provided another exception to the confidentiality requirement: “Nevertheless, any proceeding at which the testimony of witnesses is being taken under oath shall be open to the public.” This action, which was taken without the enthusiastic support of the Committee, leaves numerous questions unanswered. Will the Committee

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63. The waiver provision was added in 1977. See Appendix A. The concern with confidentiality is further indicated by an internal Committee rule that requires communications within the Committee to be clearly marked “Personal.” Amended Rules of the Supreme Court Committee on Professional Conduct, adopted June 14, 1969, Rule 7. See generally Annot., Discovery of Inspection of State Bar Records of Complaints Against or Investigations of Attorneys, 83 A.L.R.3d 777 (1978); Annot., Restricting Access to Records of Disciplinary Proceedings Against Attorneys, 83 A.L.R.3d 749 (1978). See also note 70 infra.

64. Smith, Dr. Wagh is Fighting to the Finish, Arkansas Gazette, Mar. 30, 1979, at 1B, col. 2.

65. Rule IV, note 9 supra. Under the Court’s per curiam order of February 19, 1980, Records of Committee Sanctions resulting from formal or informal proceedings will be maintained by the Clerk of the Supreme Court. 267 Ark. ___, 574 S.W.2d (Arkansas Cases) xxxi (1979). See also note 70 infra.


67. Interview with Taylor Roberts, Executive Secretary, Supreme Court Committee on Professional Conduct, in Little Rock (Jun. 15, 1979). One modification allowed by some states is to allow the attorney to request a public hearing. See Clark Report, note 1 supra, at
committee now publicize its formal hearings? Will depositions taken for disciplinary purposes be open to the public? Will the format of the hearings be altered to reflect public access? If the hearing is open to the public, must any private sanction that results be revealed to the public? While the Supreme Court deserves praise for its attempt to focus public attention on the profession's self-discipline, a more comprehensive amendment of the Rules would have dealt with other situations where the goal of confidentiality must be balanced against the need of the courts and the community to know about the Committee's activities.

One situation involving the rule of confidentiality arises when an attorney resigns under disciplinary pressure. From 1972 through 1978 only seven disciplinary actions were brought in a court against Arkansas attorneys.\(^68\) During the same period fifteen lawyers gave up their licenses to practice law, usually as a result of pending or threatened charges of misconduct.\(^69\) The names of resigning attorneys are technically a part of the public record, but they can only be obtained from the Clerk of the Supreme Court and are not in any published material. Although the identity of these attorneys is in the public domain, the fact that the names generally are not known to the legal community or the public may allow resigned attorneys to continue to practice. At a minimum, the Committee should notify local judges and bar associations when a lawyer is un-

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138-142. The Standards call for public hearings in disciplinary matters once formal charges have been made. Stand. note 11 supra, at 59. Those standards also call for the elimination of a role by the trial court; disciplinary proceedings would go directly from disciplinary boards and committees to the Supreme Court. For states in which disciplinary hearings are open to the public, see Guidelines, note 11 supra, at n.24.

68. Supreme Court Comm. on Professional Conduct v. Sam Montgomery, 77-301 (original action in Supreme Court under Supreme Court Rule 17); Weems v. Supreme Court Comm. on Professional Conduct, 257 Ark. 673, 523 S.W.2d 900 (1975); Comm. on Professional Conduct v. Guy H. Jones, Sr., 256 Ark. 1106, 509 S.W.2d 294 (1974); Supreme Court Comm. on Professional Conduct v. John Norman Warnock, Ouachita County, Arkansas, Civ. 77-70; Supreme Court Comm. on Professional Conduct v. Bobbie Jean Barton, Pulaski County, Arkansas, Civ. 76-963; Supreme Court Comm. on Professional Conduct v. Louis Art Dodrill, Pulaski County, Arkansas, 74-1512. (See also In re Dodrill, 260 Ark. 223, 538 S.W.2d 549 (1976)); Supreme Court Comm. on Professional Conduct v. William I. Purifoy, Ouachita County, Arkansas, Civ. 74-22. (Several of these cases have never been published in any official or unofficial reports.)

In those seven actions the Committee has retained outside counsel to represent it at the trial court level or on appeal. Unfortunately, because of the unpleasant nature of disciplinary actions and the lower than customary hourly fees that the Committee has paid, it has been unable to use the same outside attorneys in subsequent cases. The Committee has publicly requested attorneys to make their services available to the Committee. Addenda, 12 Ark. L. 104 (1978).

69. The author acknowledges the assistance of Jimmy H. Hawkins, Clerk of the Supreme Court of Arkansas, in his examination of the "black book" of attorneys who have lost their licenses. Because all the circumstances of their resignation are not known and because of the limited access to the records, in this article attorneys who have surrendered their licenses will be referred to only by initials. In contrast, names will be used if (1) an action were brought in trial court, or (2) the Supreme Court issued a formal opinion, either on the disciplinary matter or on a subsequent petition for reinstatement.
able to practice because of suspension, disbarment, or resignation. In addition, the names of those resigning should be published in the official Supreme Court Reports. Such publication would indicate to the Bar and the public the activities and presence of the Committee.

A more difficult confidentiality problem arises when a lawyer has been privately censured by the Committee. The type of violation, the frequency of misconduct and the name of offenders who have received sanctions directly from the Committee are known only to the Committee and, in theory, to the Arkansas Supreme Court. A threshold policy consideration involves the question whether this information should be revealed. Should the community be acquainted with the fact that an attorney has been disciplined? Should some intermediate form of public reprimand be available? Publicizing the Committee's activities would help educate clients about the resources available to protect them from unethical practice.\textsuperscript{70} At the same time, attorneys would be reminded that violations of the Code do result in disciplinary actions.

Even without any significant rule changes, the data related to Committee action could be used more efficiently. For example, over the past eight years, 89 letters of reprimand, reproval, or caution were issued.\textsuperscript{71} With one exception, all of these letters are confidential, the access limited to the Committee and the Arkansas Supreme Court.\textsuperscript{72} Yet the Court apparently has not used the information, since it has failed to check with its own Committee on Professional Conduct before making Supreme Court appointments.\textsuperscript{73} It would be ironic if the Court were appointing attorneys disciplined for ethical violations to the Board of Bar Examiners, the Client Security Fund, or other Court committees.

One aspect of confidentiality relates directly to protection of clients. On occasion, the executive secretary has sought and obtained court permission to notify all clients of a disbarred attorney of the status of that attorney and to inform those clients that their personal files and records

\textsuperscript{70} The \textit{Standards} recommend that the Committee inform the public about "the disposition of each matter in which public discipline has been imposed, a lawyer has been transferred to or from disability inactive status, or a lawyer has been reinstated or readmitted." \textit{Standards}, note 11 \textit{supra}, at 21. Editor's Note: On February 19, 1980, the Supreme Court made several modifications to Rule III. Where the Committee votes to caution, reprove, or reprimand the attorney without a hearing and the attorney does not elect to have a hearing, the Committee's findings and order will be entered in the public files of the Clerk of the Supreme Court. A similar filing is authorized if the Committee acts following a formal hearing. The Court, however, has specified that no public record need be made concerning informal complaints upon which no action is taken. 267 Ark. __, 574 S.W.2d (Arkansas Cases) xxxi (1979).

\textsuperscript{71} See Appendix B.

\textsuperscript{72} See note 64 \textit{supra} and the case there cited.

\textsuperscript{73} Interview with Taylor Roberts, Executive Secretary, Supreme Court Committee on Professional Conduct, in Little Rock (Jun. 15, 1979).
are available. As a general rule, however, clients have not been informed of disciplinary action against their attorney. A helpful amendment to the Rules would give the executive secretary authority to contact affected clients and, perhaps, even require the secretary to undertake such notification as a means of protecting the public.

Another aspect of confidentiality is presented by the issue of publicity by the Committee. Although nothing in the Rules authorizes the Committee to publicize its activities, the community must be aware of the Committee’s existence and powers if it is to carry out its duty to protect the public. The Committee, however, has made virtually no attempt to inform the public of its activities. After assisting the Arkansas Bar Foundation in publication of a pamphlet entitled “Complaints About Lawyers,” the Committee failed to become involved in the distribution of the booklet to attorneys. It may have reasoned that the type of person likely to have ethical problems probably would not work to publicize the Committee. Brochures could be distributed to public tract racks such as those in courthouses, post offices, and banks. Publicity related to the Committee could be carried on by the Client’s Security Funds Committee. Another approach might be to include a copy of the pamphlet, along with a summary of the Committee’s activity over the previous year in the annual license fee mailing from the Clerk of the Supreme Court to all attorneys. This would remind practitioners of the existence, duties, and powers of the Committee. The Committee could avoid reliance on individual attorneys for publicity, however, by undertaking public service advertising by radio, newspaper, or other media.

The Committee has not considered any broad attempt to reach the public. The primary reason is that the Committee feels that clients with valid complaints against lawyers do find their way to the Committee, after receiving directions from the Governor’s Office, the Attorney General’s staff, prosecuting attorneys, legal service offices, or other attorneys. At present, however, no way exists of knowing whether all valid complaints are being handled properly. If a person initially seeks help from one or two sources and is not referred to the Committee, does

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74. The Committee followed this practice in Supreme Court Comm. on Professional Conduct v. Barton, Pulaski County, Arkansas, Circuit Court, Civ. 76-983. However, generally no attempt has been made to notify clients of suspension or disbarment of an attorney. Interview with Taylor Roberts, Executive Secretary, Supreme Court Committee on Professional Conduct, in Little Rock (Jun. 15, 1979).

75. For a comprehensive summary of the actions that a court should order a disbarred or suspended attorney to take to protect his clients, see STANDARDS, note 11 supra, at 40-41. See also Clerk Report, note 1 supra, at 147-149.

76. Interview with Taylor Roberts, Executive Secretary, Supreme Court Committee on Professional Conduct, in Little Rock (June 15, 1979). The Clark Committee recommended intensive efforts to educate the public and the profession concerning the work of disciplinary agencies. See Clark Report, note 1 supra, at 143-146. See STANDARDS, note 11 supra, at 21.
he give up? If the client has not lost money because of the attorney's actions, but has been treated improperly in some other fashion, does he seek assistance? In addition, in many instances the client may either benefit from the improper activities of the attorney or not be aware of any misconduct.

The Committee has failed to make any concentrated efforts to conduct an advertising campaign within a certain geographical region to determine if publicity would affect the number of inquiries or complaints. As a pilot project, the Committee might consider picking a specific area and undertaking an extensive publicity operation over a two or three month period. This effort might include media advertisement, speeches to bar associations, talks with civic groups, and press reports concerning the general functions of the Committee. Care must be taken not to suggest that the pilot region is somehow populated by a greater number of unscrupulous attorneys than other portions of the state. Such a test program would allow the Committee to confirm its conception that existing levels of publicity are adequate.

III. GROUNDS AND SANCTIONS

A. Grounds

Since 1837 the Arkansas Statutes have set out five grounds on which an attorney can be removed or suspended from the practice of law: 77

1. Conviction of any felony or infamous crime;
2. Improper retention of a client's money;
3. Any malpractice, deceit or misdemeanor committed in a professional capacity;
4. Suffering from habitual drunkenness; and
5. Any ungentlemanly conduct in the practice of his profession.

In 1939 Rule I incorporated the canons of ethics of the ABA "as the standard of professional conduct of attorneys at law." Under Rule IX of the 1939 version, however, the Court recognized that "the rules adopted shall not be deemed exclusive of, but as supplemental to, the statutes of . . . Arkansas." The Committee was explicitly given the option of proceeding under either the Rules or existing legislation. Thus, both the canons and the statutes delineate what constituted unprofessional and unethical conduct. The Rules as adopted in 1969 retained the apparent option suggested by Rule IX but amended Rule I to list four of the historic statutory grounds in addition to retaining the referenced ABA canons. Only "ungentlemanly conduct" was not specifically included. The 1976 version of the Rules made two significant changes that further complicate the problem of determining what conduct warrants disciplinary action.

As amended in 1976 Rule I deletes any explicit reference to the statutory grounds enumerated in the 1969 Rules. Rule I “adopts the Code of Professional Responsibility . . . as the standard of professional conduct of attorneys at law.” One defect exists in the present wording of Rule I. The Code is not adopted as of a specific date nor is any account taken of continual revision of the Code by the ABA. If the Arkansas Supreme Court fails to accept or further modifies changes made in the national Code, a problem may develop as to which “Code” controls under the Rules.78 A simple solution would be to amend Rule I so that it refers to the “Code of Professional Responsibility as proposed by the American Bar Association and as adopted by the Arkansas Supreme Court.”

Rule IX was also altered in 1976. Although the statement that the Rules are supplemental to the statutes was retained, the section explicitly authorizing the Committee to proceed under either the statutes or the Rules was stricken. The intended effect of this change may have been to ensure that the Committee follow the procedures set out in the Rules rather than rely on the statutes. It should be noted, however, that prior to 1976 the Committee based its charges on both the ABA Code and the Arkansas statutory grounds.79 Similarly, in affirming a three year suspension of a lawyer’s right to practice, the Supreme Court cited both the statutes and the Code.80

The relationship between statutes governing various areas of the practice of law and the overlapping Court Rules is an issue which the Court addressed in two recent cases. In discussing the right of a non-resident attorney to practice law in a state court, the Supreme Court emphasized that amendment 28 eliminates “for all time any possible question about the power of the Court to regulate the practice of law.”81 The adoption of the amendment does not, however, invalidate every legislative act dealing with the same subject, particularly where the statute was passed before 1938 and is not in “irreconcilable conflict” with Court rules. The Court appears willing to recognize and apply statutes that are not necessarily inconsistent with the Court Rules and do not hinder or interfere with judicial powers. In a matter involving admission to practice, the Supreme Court reaffirmed that where a direct conflict exists between a

78. For instance, in its adoption of rules regulating advertising, the Arkansas Supreme Court went further than the ABA’s recommendation. Per Curiam Order, 263 Ark. 948, 569 S.W.2d (Arkansas Cases) xviii (1979). See footnote 13 to Preliminary Note accompanying THE ARKANSAS CODE OF PROFESSIONAL RESPONSIBILITY, pages 606-608, this issue.
79. See, e.g., Comm. on Professional Conduct v. Dodrill, Circuit Court Pulaski County, Civ. 74-1512 (complaint).
court rule and a legislative statute, the rule controls. Although that case involved the requirement of a law school education as a prerequisite for the practice of law in Arkansas, the Court previously had reached a similar conclusion in a disciplinary matter. Based on this conclusion, the Court should consider a modification to specify that the Rules are the exclusive source of disciplinary procedures in Arkansas. Such a simple step would avoid unnecessary confusion.

Absent such a change, the possibility presently exists that an action might be brought under the statute for habitual drunkenness or ungentlemanly conduct. These are two primary situations covered by statute but which are not explicitly dealt with by the Code or the Rules. Rule XI provides that an attorney who is found mentally deficient by a court of competent jurisdiction may lose his license to practice law. Such a regulation could be expanded to deal with a person having problems with alcohol who is unable to carry on his professional work. The "ungentlemanly conduct" standard may be unconstitutionally vague, but that ground has never been invoked and the catch-all provisions of the Code make the statutory ground unnecessary.

The basic workload of the Committee does not usually involve such charges, for the majority of the complaints pursued concern misuse of the client’s funds. Yet in the past decade the Committee has proceeded against attorneys for public drunkenness, shoplifting in a supermarket, mental incompetency, professional incompetency, bribery of a
A final area of possible conflict between the Rules and the statutes exists with respect to conduct of an attorney unrelated to the practice of law. Must an attorney be acting in his professional capacity to be punished for unethical conduct? The Court has concluded that misconduct of an attorney that is neither connected with professional activities nor impairs his ability to represent a client will nevertheless afford a basis for disciplinary action. Such a result might not be justified just by looking at the statutes, but is certainly supported by an examination of the Code.

In addition to the ethical standards of the Code incorporated in Rule I, Rule X sets out three specific situations that can lead to disciplinary action: 1) disbarment from the practice of law in any other state; 2) disbarment or suspension by any court of record outside of Arkansas or any federal court within Arkansas; and 3) conviction of a felony or infamous crime under the laws of any state or the United States. For historical and occasionally incomprehensible reasons these three cases are treated differently.

Rule X states that “[t]he disbarment of any person from the practice of law in any other state shall operate as a disbarment of any person from the practice of law in this state.” Under the wording of this section, a showing of disbarment in any state leads to disbarment in Arkansas. The real difficulty comes in determining which of the 3826 attorneys admitted in Arkansas may have been disbarred elsewhere. The National Center for Professional Responsibility, an arm of the American Bar Association, does maintain a data bank that includes the names of all lawyers who

| 91 | threats against a witness, solicitation, and tax violations. |
| 92 | Petition of Wayne R. Williams, 265 Ark. 480 (1979). |
| 93 | Interview with Taylor Roberts, Executive Secretary of the Supreme Court Committee on Professional Conduct, in Little Rock (Jun. 15, 1979). In one instance the Committee was on the verge of filing solicitation charges against a legal aid attorney, but at the last minute the action was dropped when the decision in In Re Primus, 436 U.S. 412 (1978) was announced. Interview with Ben Core, Member, Supreme Court Committee on Professional Conduct, in Fort Smith, August 9, 1979. |
| 94 | Petition of Wayne R. Williams, 265 Ark. 480 (1979). |
| 95 | id. at 1107, 509 S.W.2d at 295. |
| 96 | Interview with Taylor Roberts, Executive Secretary of the Supreme Court Committee on Professional Conduct, in Little Rock (Jun. 15, 1979). In one instance the Committee was on the verge of filing solicitation charges against a legal aid attorney, but at the last minute the action was dropped when the decision in In Re Primus, 436 U.S. 412 (1978) was announced. Interview with Ben Core, Member, Supreme Court Committee on Professional Conduct, in Fort Smith, August 9, 1979. |
| 97 | id. at 1107, 509 S.W.2d at 295. |
| 98 | Of those admitted to practice in Arkansas, 650 were non-residents of Arkansas as of December 31, 1978. Letter from Jimmy H. Hawkins, Clerk, Supreme Court of Arkansas, to Howard W. Brill (Sep. 7, 1979). |
have been publicly disciplined in the fifty states, the territories, the federal court system, or by administrative agencies. That list is distributed quarterly to the State Board of Bar Examiners, the Arkansas Supreme Court and the Supreme Court Committee on Professional Conduct. Yet no mechanism exists for checking the list of disciplined attorneys against the list of licensed attorneys in Arkansas. Thus it is conceivable that there are lawyers who have been disbarred elsewhere but who are still practicing in Arkansas. Staffing should be provided to the Committee to make this cross check.

Another section of Rule X provides that if an Arkansas attorney is disbarred or suspended by any court of record outside of Arkansas or any federal court in Arkansas, that judgment shall be prima facie ground for disbarment or suspension in Arkansas. The differences between this section and the one discussed in the preceding paragraph are significant. Disbarment or suspension by a court of record, as distinguished from disbarment in an entire state, simply establishes a prima facie case for similar action in Arkansas. The actual question of punishment, however, is still an issue. By establishing just cause for his activities, the affected attorney can argue that some milder form of discipline should be applied in Arkansas. Several other observations about this part of Rule X should be noted. This part covers both disbarment and suspension and appears to have a broader range than the first portion of Rule X. But why should the scope of the second provision be limited to disbarment and suspension? It might be profitable to the profession if any disciplinary action, either publicly or privately administered, taken by a court of record against an Arkansas attorney, were made a part of that individual's Arkansas record to be considered by the Committee. In addition, the possibility exists that an attorney threatened with discipline by another court might simply resign from that bar, return his license, and then, without any formal disciplinary record, be able to continue practice in Arkansas. Considering the relative frequency with which voluntary resignation occurs in Arkansas, some system should be created to identify cases where a license is given up as a result of official pressure. With one exception, no official action has ever been taken based upon reciprocal enforcement.

The third portion of Rule X was added in 1976, two years after the Committee's most prominent case. Former State Senator Guy H.

100. Indeed the Committee has not even received the list. Letter from Taylor Roberts to Howard W. Brill (November 16, 1979).
101. Interview with Ben Core, Member, Supreme Court Committee on Professional Conduct, in Fort Smith (Aug. 9, 1979).
("Mutt") Jones, Sr.\textsuperscript{102} was convicted by a federal district court in the Eastern District of Arkansas of four counts of income tax evasion in December 1972. In April, 1973, he was sentenced to three years probation and fined $5,000. Pursuant to a local federal rule, his name was struck from the list of attorneys admitted to federal practice in that district. Twelve months later, the federal trial court refused to reinstate him to federal practice. The Court of Appeals for the Eighth Circuit, however, remanded the case, finding that the local rule violated due process because no opportunity was allowed to present mitigating evidence on the petition for reinstatement.\textsuperscript{103}

Following the federal conviction for income tax evasion and the federal disbarment, the Arkansas Supreme Court Committee on Professional Conduct moved against Senator Jones in June, 1973, in an original Supreme Court action.\textsuperscript{104} The Committee proceeded under the section of Rule X that provided that the federal disbarment constituted \textit{prima facie} grounds for disbarment or suspension in Arkansas. Senator Jones did argue that unique and extenuating circumstances existed and that he should be allowed to present evidence to support a sanction other than disbarment. The Court refused to let him offer any facts relating to matters adjudicated in the income tax evasion case. He was free, however, to offer evidence relevant to the issue of mitigation.\textsuperscript{105} The Court named a Batesville attorney as master to take testimony in a public hearing in which both sides would be represented by counsel and would have full rights of examination.

In May, 1974, seventeen months after his conviction for tax evasion, the Arkansas Supreme Court ruled on the merits in the case of Senator Jones.\textsuperscript{106} The Court reaffirmed its unwillingness to review the evidence upon which the defendant was found guilty of tax evasion or his contention that the convictions were politically motivated. It concluded that the crime of willfully and knowingly evading taxes by filing false or fraudulent tax returns involves moral turpitude. In addition, the Court found that disciplinary action may be based upon misconduct that is not connected with the professional activities of an attorney and results in no harm to his clients.\textsuperscript{107}

Although disciplinary action was justified against Senator Jones, the


\textsuperscript{103} Jones v. United States, 506 F.2d 527 (8th Cir. 1974).

\textsuperscript{104} Supreme Court Comm. on Professional Conduct v. Jones, 255 Ark. 1069, 499 S.W.2d 619 (1973).

\textsuperscript{105} Id.

\textsuperscript{106} Supreme Court Comm. on Professional Conduct v. Jones, 256 Ark. 1106, 509 S.W.2d 294 (1974). This opinion was issued three weeks after the federal trial court refused to reinstate Jones, but six months prior to the decision of the Eighth Circuit.

\textsuperscript{107} Id. at 1107, 509 S.W.2d at 295.
Arkansas Supreme Court refused to disbar him. His age, prior professional conduct without substantial blemish, service as a legislator, able representation of his clients, and “high regard for the law” constituted good cause for invoking a lesser punishment. The Court held that he should be suspended for one year and then automatically be reinstated. “[W]e believe the interest of the public in the legal profession would be adequately served by a temporary revocation of his license to practice law.”108 The decision is noteworthy for four reasons. The Committee on Professional Conduct was ordered to pay the cost of its own brief, rather than having the losing party pay. Second, in contrast with other attorneys disciplined,109 Senator Jones was to be fully and automatically reinstated upon the expiration of the one year period. Third, during the seventeen month period between his federal conviction and his Arkansas revocation, Senator Jones apparently continued to practice.110 Certain commentators have criticized a disciplinary system that allows a felon to practice even for a time and have called for a rule that provides an immediate interim suspension pending a final determination by the Committee or a court. Fourth, and most significant, the degree of the penalty was mild in light of the sanctions imposed on other attorneys in Arkansas111 and throughout the nation who have been convicted of income tax evasion.112 This opinion marks the low point in the Court’s handling of disciplinary matters.

Following Jones the Supreme Court added a third provision to Rule X: “If an attorney has been convicted of a felony or infamous crime under the laws of any State or the United States, a charge may be made . . . by the Committee.”113 The judgment of conviction shall be conclu-

108. Id.
109. See the material accompanying notes 151-157 infra.
110. Supreme Court Comm. on Professional Conduct v. Jones, 256 Ark. 1106, 1107, 509 S.W.2d 294, 295 (1974): “[T]he license of . . . Jones . . . to practice law in the State of Arkansas is . . . revoked for a period of one year, during which he shall not, in any way, directly or indirectly, engage in the practice of law, in any respect, form or fashion. Respondent shall have 30 days from this date within to arrange for the handling of all pending legal business in which he has been employed.” Id. (emphasis added). For comments, see note 113 infra.
111. See the material accompanying notes 130-134 infra.
112. See In re Lacob, 50 Ill. 2d 277, 278 N.E.2d 795 (1972) (two year suspension); In re Shavin, 40 Ill. 2d 254, 239 N.E.2d 790 (1968), cert. denied, 393 U.S. 1019 (1969) (two year suspension); Comm. on Professional Ethics and Conduct of Iowa State Bar Ass’n v. Pieters, 241 N.W.2d 1 (Iowa 1976) (indefinite suspension); Maryland State Ass’n v. Agnew, 318 A.2d 811 (Md. 1974) (disbarment); In re Kuetter, 501 S.W.2d 486 (Mo. 1973) (indefinite suspension); In re Kline, 156 Mont. 177, 477 P.2d 881 (1970) (indefinite suspension); In re Turco, 66 N.J. 50, 327 A.2d 668 (1974) (disbarment); Stark County Bar Ass’n v. Bernabei, 46 Ohio St. 2d 455, 349 N.E.2d 300 (1976) (indefinite suspension); Dayton Bar Ass’n v. Kern, 46 Ohio St. 2d 342, 348 N.E.2d 707 (1976) (indefinite suspension); State Bd. of Law Examiners v. Holland, 494 P.2d 196 (Wyo. 1972) (one year suspension; four years’ probation).
113. Rule X, note 9 supra. The Clark Report recommended immediate suspension, pending the appeal of an attorney convicted of a serious crime, until final disposition of a discipli-
sive evidence of his guilt in the disciplinary proceeding. The only issue to be decided is the extent of the disciplinary action warranted by the misconduct. Consistent with the principles of collateral estoppel and the higher standard of proof required in criminal proceedings as opposed to disciplinary proceedings, the attorney is barred from offering any evidence inconsistent with the essential elements of the crime for which he was convicted. To some extent, this is the method followed in the Jones case: The underlying judgment cannot be challenged. Only an opportunity to question the extent of the discipline is provided.

The new section, however, appears to modify the procedure used in Jones. While the Committee proceeded against Jones in the Arkansas Supreme Court, this new provision suggests the action must be brought in a state trial court with an appeal to the Supreme Court. It is unclear why this proceeding must be commenced in the trial court when a suit brought under Rule X and based upon disbarment or suspension by a court of record is instituted at the Supreme Court level. Both parts of Rule X allow the attorney to show good cause justifying a lesser punishment. The possibility of testimony exists under either provision. Logically both actions should be brought at the same level. Regardless of whether an attorney has been disbarred, suspended or convicted, the best protection for the public and the fairest approach to the attorney will be a speedy conclusion of the matter. Such a result is more likely to be achieved by having the case originate with the Supreme Court. Requiring the Supreme Court to deal with these situations establishes a uniform approach and focuses public attention on the disciplinary system.

See Clark Report, note 1 supra, at 122-130. "No single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline." Id at 124.


114. See generally R. CASAD, RES JUDICATA 255-258 (1976). Nothing in the Rules requires the Committee to delay an investigation, a hearing or a court proceeding because the attorney is involved in a criminal defense on basically the same charges. The Committee has apparently adopted a policy of waiting until criminal charges are resolved. Such an approach is generally consistent with the recommendation of the Clark Report, note 1 supra, at 82-85. Even though an attorney is acquitted of criminal charges, the different standard of proof in a disciplinary hearing still permits charges to be brought in that tribunal.

115. See The Fla. Bar v. Craig, 238 So. 2d 78 (Fla. 1970); STANDARDS, note 11 supra, at 71-72.
B. Sanctions

Once grounds for discipline are established, a sanction must be imposed. A lack of flexibility in the type of possible penalties, however, makes the Rules weak in this area. The Committee may (1) dismiss an action, (2) caution or reprimand an attorney, and (3) seek action by a court.116 Under Rule V, a court is explicitly authorized to "reprove, reprimand, suspend, or disbar" a defendant attorney.117 In practice judges and chancellors have shown a willingness to expand the scope of specified sanctions. One trial court suspended an attorney for three years and then required him to submit an application to the State Board of Examiners for readmission.118 Another lawyer was ordered to pay court reporter fees when evidence was presented at a judicial hearing.119 The holding in a recent case also indicates that the trial judge may approve variations of the penalties listed in the Rules. The trial judge not only suspended the attorney for 12 months, as he was entitled to do, but also conditioned the offender's reinstatement upon the taking and passing of the bar exam.120 In another case, the Supreme Court pointed out with apparent approval that the attorney had reimbursed his clients for funds that had been misused.121 A specific power of restitution should be granted to the Committee and the courts.122 The Rules should be modified to reflect the flexibility trial courts are exhibiting in fitting the punishment to the circumstances of the particular case.

One desirable sanction has recently been added to the Rules. Under

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116. Rule IV, note 9 supra.
117. Rule V, note 9 supra. Since February, 1979, the Committee has not had the power to reprove an attorney, but the trial judge retains that power. It is uncertain whether this distinction is intentional or indicates less than careful draftsmanship in the February, 1979 amendment.
118. Supreme Court Comm. on Professional Conduct v. Weems, 257 Ark. 673, 523 S.W.2d 900 (1975).
119. Supreme Court Comm. on Professional Conduct v. Jones, 256 Ark. 1106, 509 S.W.2d 294 (1974). The Court did direct each side to pay the costs of its own briefs. The Committee has not made a practice of attempting to recover court costs from attorneys. Interview with Taylor Roberts, Executive Secretary, Supreme Court Committee on Professional Conduct, in Little Rock (Jun. 15, 1979). In contrast, the disciplinary rules of the Florida Supreme Court provide that costs assessed against a disciplined attorney "shall include court reporters' fees, copy costs, witness fees and traveling expenses, and reasonable traveling and out-of-pocket expenses of the referee and bar counsel, if any." Integration Rule of the Florida Bar, Article XI, Rule 11.06(9)(a), Fla. B.J. 35 (Sept. 1979). The Standards would allow a court to require the respondent to pay the costs of the proceedings. Standards, note 11 supra, at 42. They would not, however, authorize the Committee to require the disciplined attorney to pay a portion of the hearing costs. Since so few cases are taken to court, the question of the hearing costs is more significant in Arkansas.
120. In Re Dodrill, 260 Ark. 223, 538 S.W.2d 549 (1976).
Rule IV the attorney may, with the consent of the Supreme Court, voluntarily surrender his license upon conditions agreed to by the Committee and by the attorney. The requirement of Supreme Court approval may dissuade a lawyer who has given up his license from seeking readmission because his case was not heard by a court or the Committee. A Committee investigation must precede any Supreme Court action on the lawyer's petition for voluntary surrender. Before agreeing to the voluntary surrender of a license, the Committee has in recent years demanded that the attorney sign a statement containing the facts of the case and admitting his involvement.

Other disciplinary options should be considered for inclusion in the Rules. Presently the Committee must choose between unpublicized Committee action and commencing a suit in court. An alternative would be to grant the Committee the power to issue public reprimands. Such a sanction would be appropriate for violations which, though serious, still do not merit suspension or disbarment. Recently the Supreme Court adopted a form of public reprimand with its order regarding attorneys who are tardy in filing notices of appeal in criminal cases. Other sanctions that may be imposed less frequently, but which still should be available to the Committee and the courts, include the following: 1) the imposition of court costs upon a disciplined attorney, 2) an imposition of a probationary period, and 3) immediate suspension following a criminal conviction pending a hearing on an appropriate sanction.

The suggestion has been made that the Committee should be authorized to issue advisory opinions, either upon request of an attorney or in the form of a general warning to the Bar. Presently, with the exception of the limited efforts of the Ethics and Grievance Section of the Arkansas Bar Association, no agency or office exists to provide ethical guidance to Arkansas attorneys. Although such a service is needed, the Committee cannot reasonably provide such a service without a change in staffing. Although such a unified approach would have certain benefits, it may not be advisable to have the agency responsible for discipline issuing advisory

123. Rule XI, note 9 supra.
124. The rapid voluntary surrender of a license with a possible subsequent readmission petition to the Court, as a means of avoiding Committee investigation, was used in at least one instance in the early 1970's and led to this change in the rules. Interview with Ben Core, Member, Supreme Court Committee on Professional Conduct, in Fort Smith (Aug. 9, 1979). See also Clark Report, note 1 supra, at 101-10 (recommending that the resignation of an attorney be accepted only if the attorney acknowledges in writing that the material facts on which the pending misconduct complaint is predicated are true).
126. See note 119 supra.
127. See note 84 supra.
128. See note 113 supra.
opinions.129

One final concern with sanctions involves the leniency and inconsistency the Supreme Court has occasionally displayed in its handling of disciplinary cases.130 In addition to three cases decided by 4-3 decision,131 the problem is best illustrated by a comparison of the Jones132 and Weems133 cases. Senator Jones was convicted of four counts of federal income tax evasion, and the Supreme Court suspended him for one year and ruled that his license would be automatically reinstated. Weems, on the other hand, was not convicted of any crime, but he had violated the Code by misusing the funds of three clients before repaying them. He was suspended for three years and required to establish his fitness to practice law before he could be reinstated. Unless there are other factors that do not appear in the opinions, it seems that the Court may have altered its standards after the Jones decision. Is Senator Jones entitled to lighter sanctions because his activities did not involve clients, because he is a former state senator as opposed to a prosecuting attorney, or because he is older? Are these the type of factors that the Court is going to consider? In fairness, however, the Jones case was the first formal opinion by the Court on disciplinary matters in a decade. Developments since that decision suggest that the Court has become slightly less generous toward erring attorneys and more concerned with protecting the public and the system of justice. The danger of potentially arbitrary and inconsistent sanctions would be reduced if the Rules included a provision directing the Committee and the courts to consider aggravating and mitigating circumstances in the determination of proper discipline.134

129. The newly created Supreme Court Committee on Unauthorized Practice does have the authority to issue advisory opinions as well as initiate lawsuits. Per Curiam Order, 264 Ark. 960 (1978).

130. "[T]he problem the Committee, at the time I was a member, felt the strongest about [was] the failure of the courts to show strength and firmness in determining the punishment and discipline in disbarment cases." Solomon, Trials and Tribulations of a Member of the Supreme Court on Professional Conduct, 12 Ark. Law. 76-77 (1978).

131. In Re Wayne R. Williams, 265 Ark. 480, (1979); In Re Richard H. Mays, Per Curiam Order of October 16, 1978 (This order was filed on Oct. 16, 1978 with the Arkansas Supreme Court. The order, however, does not appear in any of the published official or unofficial reports.); Ex Parte Barton, 237 Ark. 454, 373 S.W.2d 411 (1963). Dissenting justices in these cases demanded harsher penalties.


134. In imposing discipline, the STANDARDS suggests that the Court or the Committee consider aggravating facts, such as the lack of remorse, the failure to acknowledge the seriousness of the violation, the failure to cooperate with the investigation, the failure to voluntarily make restitution the extent of the ethical violations, and the attorney's prior disciplinary record. As examples of possible mitigating circumstances, the STANDARDS mention inexperience, contrition, restitution without Committee pressure, a willingness to rectify damage and mental difficulties. STANDARDS, note 11 supra, at 44-45. See also Weems v.
C. Trial Court Action and Appellate Review

When a disciplinary action is taken to a court, the Rules provide for a non-jury trial before either a circuit judge or chancellor. The possibility of a jury trial still exists nonetheless because of ARK. STAT. ANN. § 25-411. In 1954, however, when an attorney did request a jury, the trial court refused, and the Supreme Court affirmed, holding that the older legislative act was superseded by the Rules. Although such a result is consistent with the approach taken in other jurisdictions, the Supreme Court again faced Rule IX which provides that the Rules are supplemental to the statutes. This is another example of the less than ideal drafting of the Rules. In a number of cases, the Supreme Court has emphasized that the statutes are merely supplemental to the Rules. The solution to this problem is simple. Either the legislature should repeal all of chapter 25 or the Supreme Court should overrule those laws in light of amendment 28.

If a case is brought before the Committee, Rule IV provides that a sanction cannot be imposed unless "there is reasonable ground to believe that the attorney has been guilty of professional misconduct." If a complaint reaches a state court, the standard of proof differs from the one applied by the Committee in its deliberations. The Supreme Court had previously established the burden of proof for disciplinary suits:

[It] has been held by this court that proceedings for disbarment of an attorney are not criminal but civil in their nature, and as such are governed by the rules applicable to all civil actions, and hence it is required that the material allegations in such cases be established only by a preponderance of the evidence, and not beyond a reasonable doubt.

In accord with a minority of jurisdictions, the Court recently reaf-
firmed that this civil burden of proof is applicable to actions arising from the Rules.\textsuperscript{143}

Either the Committee or the defendant attorney is free to appeal from a trial court decision to the Supreme Court.\textsuperscript{144} Rule V specifically states that the matter shall be heard \textit{de novo}. This hearing is based on the record compiled by the trial judge. The notice of appeal and the perfection of appeal follow the standard rules for civil appeals,\textsuperscript{145} with one significant deviation. Rule VI indicates that the order of the circuit judge or chancellor shall remain effective until there is a judgment from the Supreme Court. Where attorneys have been prohibited from practice by the trial court, it is unclear whether those attorneys have actually ceased practice during the period of appeal. The Committee has appealed, in some cases, asking for a harsher penalty, but it has never appealed from an adverse trial decision.\textsuperscript{146}

The question of how broad the \textit{de novo} review should be was raised in \textit{Weems}.\textsuperscript{147} There the attorney argued that Rule V required the Supreme Court to “make independent findings of fact, drawing its own conclusions from the evidence.”\textsuperscript{148} The defendant argued that the findings of the lower court would only be important where a conflict in the facts existed which could only be resolved by reference to the “demeanor and credibility”\textsuperscript{149} of the witnesses. Rejecting this contention the Supreme Court relied on the rationale in \textit{Hurst v. Bar Rules Committee of the State of Arkansas}.\textsuperscript{150} In that case the Court approved the admission of the record of the Committee proceedings as evidence in the Supreme Court review. The hearsay objection to this Committee material was overruled. The Court treated the disciplinary hearing as an action brought before an administrative agency where factual issues are sifted by a body of experienced

\begin{itemize}
\item P.2d 1100 (1972) (clear and undoubted preponderance of evidence); State v. Stumpf, 53 Wis. 2d 690, 193 N.W.2d 842 (1972) (clear and satisfactory evidence). The \textsc{Standards} call for clear and convincing evidence. \textit{See Standards}, note 11 supra, at 65. For a partial list of the jurisdictions, \textit{see Guidelines}, note 11 \textit{supra}, at 12.
\item 143. \textit{Weems} v. \textit{Supreme Court Comm. on Professional Conduct}, 257 Ark. 673, 680, 523 S.W.2d 900, 904 (1975).
\item 144. Rules V and VI, note 9 \textit{supra}. With the creation of the Arkansas Court of Appeals, disciplinary matters will continue to be appealed directly to the Supreme Court. Arkansas Supreme Court Rule 29.
\item 145. Arkansas Rules of Appellate Procedure 1-8. The failure to appeal an order of suspension bars the attorney from subsequently asserting that the trial judge lacked the power to place conditions on the suspension. In \textit{Re Dodrill}, 260 Ark. 223, 538 S.W.2d 549 (1976).
\item 146. Interview with Taylor Roberts, Executive Secretary, Supreme Court Committee on Professional Conduct, in Little Rock (Jun. 15, 1979).
\item 147. \textit{Weems} v. \textit{Supreme Court Comm. on Professional Conduct}, 257 Ark. 673, 523 S.W.2d 900 (1975).
\item 148. \textit{Id.} at 680, 523 S.W.2d at 904.
\item 149. \textit{Id.}
\item 150. 202 Ark. 1101, 155 S.W.2d 697 (1941).
\end{itemize}
highly qualified professionals. After considering all evidence the Supreme Court adopted the trial judge’s findings of fact. The decision to use the lower court’s factual findings was based on 1) the civil burden of proof standard applicable to disciplinary hearings, and 2) on a feeling that “in view of the present Rules of procedures relating to disbarment, this court on appeal should give even greater weight to the findings of the lower tribunal.” Hurst and Weems raise some doubt concerning the scope of de novo review in disciplinary matters before the Arkansas Supreme Court.

D. Reinstatement

The Rules do not cover reinstatement, except where an attorney is suspended for failure to pay the annual license fee. In Ex Parte Barton an attorney petitioned the Court for readmission fourteen months after she had been suspended for three years. Although the Bar Rules Committee opposed reinstatement, the Court concluded that her repayment of money combined with the fact that further punishment appeared to serve no useful purpose, justified reinstatement. The dissent argued that “the right to practice law should be considered on the same basis as that of paroles and pardons,” and that three reasons dictated a refusal of the petition: 1) the Bar Rules Committee still opposed reinstatement, 2) the trial judge had said nothing about reinstatement, and 3) no members of the Bar had supported any recommendations of the affidavit. The dissenters suggested that the majority was simply saying that a three year sentence was too harsh.

In In Re Dodrill, decided in 1976, the Supreme Court affirmed by implication the power of the trial judge to suspend an attorney and require that the Bar exam be taken again before reinstatement. In contrast, Sam Weems apparently did not have to take the exam, and Senator Jones was reinstated automatically without having to take the exam or show any type of fitness. The chronology of these cases suggests that in the last few years, the Court has been more reluctant to automatically reinstate a suspended attorney.

Another case involving reinstatement is that of Wayne Williams, who voluntarily surrendered his license in 1976 after admitting that he

153. Rule X serves as an example of the need for reorganization of the rules. This particular rule covers everything from the necessity of being a member of the bar and paying annual license fees, through the procedure for disbarment, to the three instances of automatic discipline. Rule X, note 9 supra.  
155. Id. at 456, 373 S.W.2d at 412.  
156. 260 Ark. 223, 538 S.W.2d 549 (1976).
had tried to obtain a higher legal fee on the pretense of having to bribe a prosecuting attorney. The voluntary surrender of his license was accepted by the Court, with the provision that he could reapply for admission after two years and a satisfactory showing to the Board of Bar Examiners that his character and integrity were such that he deserved readmission. Following the two year suspension the board certified that he had shown the required improved character. The Supreme Court in a 4-3 decision agreed. The dissent questioned why the Board of Bar Examiners only considered his conduct during the last two years, rather than his behavior over a longer period of time.

The same three justices also dissented in the Matter of Richard H. Mays. The Supreme Court Committee had investigated charges that he converted client funds. After he offered to surrender his license for six months the Committee made a favorable recommendation to the Supreme Court, which accepted the license. This case is interesting because three justices thought the penalty was too light. In addition to surrendering his license the attorney was required to apply for reinstatement through the office of the Board of Bar Examiners, but the Court did not specify that the Bar examination be retaken. Unlike other jurisdictions, the Arkansas Bar Examination does not contain a separate ethics section that must be passed. Retaking and passing such a portion might be another appropriate means of determining the fitness of a suspended attorney to practice law.

The Court gradually appears to be clarifying the terms under which an attorney may surrender his license to practice and seek readmission some time in the future. Although the Rules should not spell out every possible variation of a disciplinary sanction, rewording of the Rules to suggest the possibilities available to the Committee and trial judges would be helpful. A formal rule on reinstatement might also eliminate some of the problems associated with conditions of readmission. Such a rule might provide that a petition for reinstatement be permitted only after the passage of a minimum period of time and only with the recommendations of the disciplinary committee. Since the attorney is not entitled to reinstatement as a matter of right, the attorney should affirmatively show evidence of present good character and legal knowledge. Finally, the nature of the affirmative proof required might vary with the gravity of the initial offense.

159. See e.g., Illinois Supreme Court Rule 767; Illinois Attorney Registration and Disciplinary Commission Rule 11. The STANDARDS recommend that a disbarred attorney be permitted to seek reinstatement only “at least five years after the effective date of disbarment and should not be readmitted unless he can show by clear and convincing evidence:
IV. SUGGESTIONS AND CONCLUSION

The improvements in disciplinary enforcement made over the past decade by the Arkansas Supreme Court and the Committee on Professional Conduct have been significant. But the case law development in the law of disciplinary enforcement needs to be codified and expanded. Of the following suggestions, some could be implemented immediately by the Arkansas Supreme Court or by the Committee, while controversial measures might best be initiated by the Arkansas legal community.\(^\text{160}\)

1) The Committee should receive increased financial support and expanded staffing.
2) The types of sanctions available to the Committee and courts should be expanded with possible alternatives including public reprimands, interim suspensions, probation, restitution and court costs.
3) A clear indication should be given that courts may suspend or disbar an attorney conditionally.
4) Standards for reinstatement should be created.
5) Notice to and protection of the clients of attorneys who are no longer qualified to practice should be provided.
6) Attorneys who have voluntarily surrendered their licenses or have been publicly disciplined should have their names publicized.
7) The public should be informed of the functions of the committee.
8) Lay persons should sit on the Committee.*
9) The Committee should be authorized to grant immunity against criminal prosecution to possible wrongdoers.
10) A clarification of the privilege protecting Committee members, complainants, and witnesses should be provided.
11) Reorganizing and rewriting the rules in their entirety should be considered.

The Arkansas Supreme Court Committee on Professional Conduct need not be ashamed of its activities over the past decade. Lacking proper resources and support, hampered by inadequate rules, and applying inconsistent judicial decisions; the Committee has nevertheless carried out its difficult task creditably. Its primary failing has been in a distinct lack of aggressiveness in dealing with the Arkansas Supreme Court, in seeking out and investigating non-pecuniary forms of misconduct, in pursuing effective deterrent sanctions, in promoting its existence and activities, and in publicizing its own accomplishments.


* Editor's Note: Since this article was written, the composition of the Committee has been changed to include non-lawyers. See note 10 supra. The Court also modified Rule 3 by a per curiam order dated February 19, 1980 which requires certain Committee actions to be filed with the Clerk of the Supreme Court. See note 70 supra.
APPENDIX A: EVOLUTION OF THE RULES OF THE COURT REGULATING PROFESSIONAL CONDUCT*

<table>
<thead>
<tr>
<th>ORDER</th>
<th>CITATION</th>
<th>DESCRIPTION</th>
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<tr>
<td>April 24, 1939</td>
<td>207 Ark. xxxiv-xxxvii (1939)</td>
<td>The Rules are adopted.</td>
</tr>
<tr>
<td>September 17, 1962</td>
<td>4 Ark. Law. 17 (Mar. 1970) indicates that the rules were changed on this date. This author has been unable to locate any official or unofficial copy of the amendments.</td>
<td>The Rules are amended.</td>
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<tr>
<td>June 15, 1969</td>
<td>4 Ark. Law. 17 (Mar. 1970)</td>
<td>The Bar Rules Committee is converted into the present Supreme Court Committee on Professional Conduct. In addition the position of Executive Secretary is created.</td>
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<tr>
<td>November 15, 1971</td>
<td>6 Ark. Law. 15 (1972)</td>
<td>Rules I &amp; II are amended, a full time Executive Secretary is appointed and funding for the Committee is provided.</td>
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<tr>
<td>June 21, 1976</td>
<td>280 Ark. 910, 534 S.W.2d (Arkansas Cases) xx (1976)</td>
<td>Rule I is revised and the Rules are renumbered.</td>
</tr>
<tr>
<td>February 19, 1980</td>
<td>267 Ark. 574 S.W.2d (Arkansas Cases) xxxi (1979)</td>
<td>Letters of caution and reprimand shall be filed with the Supreme Court.</td>
</tr>
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### APPENDIX B: ACTIVITIES OF THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT, 1972-1978

<table>
<thead>
<tr>
<th>Year</th>
<th>General Inquiries</th>
<th>Complaints</th>
<th>Formal Affidavits</th>
<th>Referred to Committee</th>
<th>Formal Hearings</th>
<th>Letters of Reprimand</th>
<th>Letters of Reproval</th>
<th>Letters of Caution</th>
<th>Charges filed:</th>
<th>Voluntary Surrender</th>
<th>Voluntary Suspension</th>
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Source: Annual Reports Supreme Court Committee on Professional Conduct