AN OVERVIEW OF ATTORNEY DISCIPLINARY PROCEEDINGS IN NEW JERSEY: IS THE SYSTEM FAIR TO THE ACCUSED?

Dominic J. Aprile *

I. INTRODUCTION

New Jersey has gained "a national reputation as a state that promises swift and severe discipline" when lawyers stray beyond

* B.A., 1980 Rutgers—Newark College of Arts and Sciences; J.D., 1983 Rutgers School of Law—Newark; LL.M., 1987 New York University School of Law. Member of the New Jersey Bar in private practice with the firm of Bathgate, Wegener, Wouters & Neumann, P.C., Newark and Lakewood, New Jersey, practicing primarily in commercial litigation and attorney ethics. The author acknowledges with appreciation the research assistance of Jean-Marc Zimmerman, a third year student at Seton Hall Law School.

the bounds of propriety.[1] This reputation is particularly deserved in the area of trust account misappropriations and other financial transgressions.[2] On the occasion of announcing the adoption of rules and procedures aimed at strengthening the attorney disciplinary system in 1984, New Jersey Supreme Court Chief Justice Robert N. Wilentz proclaimed, "New Jersey's disciplinary rules are among the toughest in the country, and we are determined to have the most effective system for enforcing them."[3] New Jersey has remained in the vanguard, and the present disciplinary system is no doubt effective. The central inquiry of this article is whether that system is *fair to the accused.*

A. *Evolution of the Disciplinary System Since 1972*

The attorney disciplinary system in New Jersey has been in a state of flux during the past fifteen years,[4] and the Supreme Court of New Jersey has exercised initiative on several occasions to re-examine and reform the disciplinary system in conjunction with its exclusive constitutional authority to regulate the practice of law in New Jersey.[5]

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[1] Carter, *Jersey Proves Tough Cop on Lawyer Misconduct*, The Star-Ledger (Newark, N.J.), Jan. 31, 1988, § 1, at 44, col. 1.

[2] *See generally* Johnson, *Lawyer, Thou Shall Not Steal*, 36 RUTGERS L. REV. 454 (1984). "New Jersey is in the vanguard nationally in its efforts to immediately remove from practice those attorneys who have objectively demonstrated larcenous propensities." *Id.* at 505 & n.283. In *In re* Wilson, 81 N.J. 451, 453, 409 A.2d 1153, 1154 (1979), the New Jersey Supreme Court announced a policy that has become known as the "*Wilson* doctrine;" namely: "disbarment is the only appropriate discipline" where an attorney has "knowingly used his client's money." For an in-depth analysis of *Wilson* and its progeny, see Johnson, *supra* at 475-87.

[3] *Supreme Court Adopts New Rules for Attorney Disciplinary System*, 113 N.J.L.J. 111 (1984).

[4] Disciplinary systems nation-wide experienced a period of change and were the subject of much investigation and debate during the early to mid-1970's. In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement (Clark Committee) issued its report. ABA PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (Final Draft 1970) [hereinafter CLARK REPORT]. In February 1971, the Supreme Court of New Jersey appointed the Committee on Enforcement of Ethical Standards (Kirchner Committee) to recommend ways of improving the disciplinary framework in New Jersey. The Kirchner Committee published its report in 1972. REPORT OF THE SUPREME COURT'S COMMITTEE ON ENFORCEMENT OF ETHICAL STANDARDS, *reprinted in* 95 N.J.L.J. 253 (1972) [hereinafter KIRCHNER REPORT]. The Kirchner Committee reviewed the CLARK REPORT as well as reports by various similar committees in other states. *See id.*; *see also* Note, *Enforcement of Legal Ethics in New Jersey*, 28 RUTGERS L. REV. 707, 707 & nn.1-2 (1975). For observations by an ethics practitioner during this era of flux, see Haines, *Some Observations and Suggestions About Disciplinary Proceedings*, 98 N.J.L.J. 17 (1975).

[5] The Supreme Court of New Jersey has exclusive responsibility to regulate admission to the New Jersey Bar, the conduct of New Jersey attorneys, the attorney-

Prior to 1973, the attorney disciplinary system in New Jersey was comprised of twenty-one loosely administered county ethics committees functioning under the predecessor to current New Jersey Court Rule 1:20.[6] Responding to recommendations for greater centralization of the administration, investigation and prosecution of ethics matters, the Supreme Court of New Jersey in 1973, established an office known as Central Ethics within the Administrative Office of the Courts.[7] The Bar and the public, however, continued to voice concerns regarding perceived inequities caused by parochialism and favoritism at the county committee level.[8]

In 1978, the Supreme Court of New Jersey substantially reorganized the attorney disciplinary system by establishing a statewide mandatory fee arbitration program with District Fee Arbitration Committees,[9] by replacing the County Ethics Committees

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client relationship and the discipline of members of the New Jersey Bar. N.J. CONST. art. VI, § II, ¶ 3. All ethics proceedings, disciplinary or otherwise, are deemed filed in the Supreme Court of New Jersey and conducted before various bodies created by the supreme court to assist it in exercising its constitutional mandate. *In re* Logan, 70 N.J. 222, 225-26, 358 A.2d 787, 789 (1976). In addition to its traditional adjudicatory role, the supreme court is vested with investigatory and prosecutorial power over ethics matters.

[6] For an overview of the system as it existed circa 1972, see KIRCHNER REPORT, *supra* note 4, at 258, col. 3. For a description of the system by the Supreme Court of New Jersey in 1976, see *In re* Logan, 70 N.J. 222, 226-27, 358 A.2d 787, 789-90 (1976). For a description of the pre-1947 arrangement, see State v. Rush, 46 N.J. 399, 411, 217 A.2d 441, 447 (1966).

[7] The Kirchner Committee recommended establishment of a centralized investigating staff within the Administrative Office of the Courts to provide on-going supervision and investigation by personnel trained and experienced in ethics matters. KIRCHNER REPORT, *supra* note 4, at 262, col. 3. As an alternative, the Kirchner Committee suggested utilization of investigators on the staffs of county prosecutors as provided under the then existing court rule 1:20-2(c). *Id.* (citing N.J. CT. R. 1:20-2(c) (1972)).

[8] KIRCHNER REPORT, *supra* note 4, at 258, col. 4. *See also Supreme Court and General Council Discuss Ethics Committees*, 98 N.J.L.J. at 875, col. 2 (1975). At the first meeting between the General Council of the New Jersey State Bar Association and the New Jersey Supreme Court on October 3, 1975, the bench and bar debated whether county ethics committees should be retained and whether a centralized state-wide body should be established to supervise or supersede the existing county committees. *Id.* Disparate results are often obtained for similar ethics transgressions occurring in different counties due to a lack of centralization. *See* Haines, *supra* note 4, at 26, col. 1.

[9] This article will not deal with the fee arbitration process, under the N.J. Court Rules, or with the functions of other supreme court committees that are involved in ethics matters, *e.g.*, the Advisory Committee on Professional Ethics, N.J. CT. R. 1:19-1; the Committee on Attorney Advertising, see *id.* R. 1:19A-1; the Ethics Financial Committee, see *id.* R. 1:20B-1; Committee on the Unauthorized Practice of Law Committee, see *id.* R. 1:22-1; the Client's Security Fund see *id.* R. 1:28.

with District Ethics Committees (DEC's) and by creating the Disciplinary Review Board (DRB) empowered with state-wide jurisdiction.[10] The creation of the DRB as an intermediate forum promised greater uniformity of result. The supreme court also changed the name of its central investigatory and prosecutorial arm from Central Ethics to the Division of Ethics and Professional Services (DEPS).[11] The 1978 reorganization did not, however, redistribute authority for initial receipt, investigation and adjudication of ethics complaints from the regional committee level to more centralized control by DEPS or the DRB.[12]

On September 2, 1981, a decade after the establishment of the Kirchner Committee, Chief Justice Wilentz announced the establishment of a new committee, the Committee on Attorney Disciplinary Structure (Structure Committee) to re-evaluate the disciplinary system.[13] The Structure Committee was entrusted with responsibility to study the operations and efficiency of the existing disciplinary system and to report its analysis and recommendations for improvement to the court. In charging the Structure Committee, Chief Justice Wilentz stated:

> The Supreme Court is intensely interested and committed to the proper functioning of all aspects of our judicial system, and one of the most important Court functions is the supervision of the State's practicing lawyers. This task has become more complex and difficult with the recent increase in the number of lawyers admitted to the Bar. Therefore, we have determined that now is the time for both the Court and the organized Bar to reassess the functioning of the ethics and fee dispute process.[14]

Over the twelve month period following its establishment, the

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10 *See* S. PRESSLER, CURRENT N.J. COURT RULES R. 1:20 comment (Gann). Further innovations were incorporated into the 1979 rule revisions, including the addition of lay members to the DEC's. *Id.*

11 *Id.*

12 The 1978 rule amendments did provide the Administrative Director of the Courts with discretionary authority to supersede the investigative function of the regional committees; the Supreme Court or the DRB could also direct the Administrative Director to initiate and conduct investigations.

13 ATTORNEY DISCIPLINARY STRUCTURE COMMITTEE REPORT ON ATTORNEY DISCIPLINARY STRUCTURE, *reprinted in* 110 N.J.L.J. 464-A (1982) [hereinafter DISCIPLINARY STRUCTURE COMMITTEE REPORT]. The Structure Committee was comprised of a cross-section of members of the Bar and was chaired by then retired New Jersey Supreme Court Justice Mark A. Sullivan. *Id.* The Structure Committee's final report was published in the New Jersey Law Journal for the benefit of the entire Bar on October 21, 1982. *Id. See supra* note 4 (discussing the creation of the Kirchner Committee).

14 DISCIPLINARY STRUCTURE COMMITTEE REPORT, *supra* note 13, at 464-A, col 2.

Structure Committee ambitiously conducted nation-wide research, reviewed various reports prepared by other similar committees empaneled in other jurisdictions, solicited views from the Bar, and issued a report of its findings and recommendations. In July 1983, the Supreme Court of New Jersey announced approval of virtually all of the recommendations set forth in the Structure Committee's final report, including the establishment of a more powerful central investigatory and prosecutorial unit answerable directly to the court, denominated the Office of Attorney Ethics (OAE).[15] This reformation achieved further centralization and fostered greater uniformity of enforcement by focusing authority for administration, investigation and prosecution in one agency. Consequently, New Jersey Court Rule 1:20, governing discipline of members of the Bar, was comprehensively revised effective February 15, 1984.[16]

During the past fifteen years, the size and characteristics of the New Jersey Bar have changed significantly. The attorney population in New Jersey has doubled. When the supreme court established the Office of Central Ethics in 1973, there were less than 15,000 attorneys in the New Jersey Bar.[17] By December 1987, that total had increased to over 35,000.[18] A concomitant but more dramatic growth in disciplinary matters is reflected in the statistics for the same time period; the number of cases in which final public discipline was imposed increased from only eighteen cases in 1973,[19] to fifty-five cases in 1987.[20] Twenty private reprimands were also imposed in 1987.[21]

The innovations which have been implemented over the past fifteen years have significantly modernized and improved New Jersey's attorney disciplinary enforcement framework. The present system serves the Bar and the public with greater uniformity and efficiency. Continued evolution is both necessary and desirable, however. Future rule revisions should be aimed, among other things, at further clarifying procedures, safeguarding respondents'[22]

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15 *Supreme Court Announces New Office of Attorney Ethics*, 112 N.J.L.J. 93 (1983).

16 *Supreme Court Adopts New Rules For Attorney Disciplinary System*, 113 N.J.L.J. 111 (1984).

17 Johnson, *supra* note 2, at 461 (figure 2).

18 Office of Attorney Ethics of the Supreme Court of New Jersey, 1987 STATE OF THE ATTORNEY DISCIPLINARY SYSTEM REPORT, 1 (1988) [hereinafter 1987 OAE REPORT].

19 Johnson, *supra* note 2, at 457 (figure 1).

20 1987 OAE REPORT, *supra* note 18, at 57 (figure 20).

21 *Id.* at 65 (figure 25).

22 The term "respondent" is used to refer to an attorney accused of unethical conduct. *See* N.J. CT. R. 1:20.

rights, fostering greater efficiency and promoting the unhindered opportunity of grievants[23] to seek review and redress of alleged misconduct.[24]

B. *The Judicially Articulated Goals of the System*

In order to analyze the present disciplinary framework, it is necessary to reflect upon the stated legitimate purpose of attorney disciplinary proceedings:

> The true purpose and function of disciplinary proceedings must ever be kept uppermost in mind. Discipline is not imposed to punish the lawyer who transgresses. It is imposed in order that the public shall have continued confidence that the profession will purge itself of lawyers unable or unwilling to measure up to the high standards of honor and moral decency by which we govern our professional conduct—and that we will do so, not to enhance our own self-esteem, but solely to further the end that public respect for the purity of the administration of justice shall not waiver or diminish. That respect is a first essential of a democracy; the confidence of the people in the administration of justice is a prime requisite for free representative government. It would be tragic indeed if that confidence and respect should be lost out of public suspicion, be it ever so slight, that the profession cannot be counted upon courageously to rid its ranks of those who by their serious misconduct demonstrate their contempt for the professional ideals which earn that respect and confidence for us.[25]

Notwithstanding these lofty ideals and laudatory concerns, the disciplinary process often results in the imposition of sanctions, ranging from private reprimands to disbarment. Subjection to public sanction is often accompanied by degradation of reputation and decimation of livelihood. Analogies can be drawn to the criminal justice system and the fines and punishments there imposed.[26] The Supreme Court of New Jersey has, however, repeatedly emphasized that its goal in disciplinary matters is to protect the public rather

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[23] The term "grievant" is used to refer to the individual or entity, usually a dissatisfied client, who has filed a "grievance" alleging attorney misconduct. *See id.*

[24] For discussion of current concerns, see Jaffe, *National Bar Groups to Launch Review of Lawyers Ethics, Discipline Rules*, The Sunday Star-Ledger (Newark, N.J.), Jan. 3, 1988, § 1, at 10, col. 1.

[25] *In re* Frankel, 20 N.J. 588, 602, 120 A.2d 603, 610-11 (1956) (Brennan, J., dissenting). *See also In re* Sears, 71 N.J. 175, 201-02, 364 A.2d 777, 791 (1976) ("We have no great zeal to impose sanctions on individuals for disciplinary infractions. Our foremost concern is to guarantee that members of the bar represent the interests of their clients in keeping with the public trust.").

[26] *See infra* notes 137-67 and accompanying text.

than to punish the transgressing attorney.[27]

Commenting on its power to regulate the Bar, the Supreme Court of New Jersey has stated that, "the touchstone of [the court's] disciplinary power is to fashion a sanction which fulfills [its] trust to the public and the profession, edifies the Bar *and is fair and just to the respondent*."[28] The main thrust of this article is to explore whether the disciplinary system, in its current state, is "*fair and just*" to attorneys who are called upon to defend themselves against allegations of impropriety. In that endeavor, it is necessary to first review the applicable rules and consider their intricate interplay.

II. General Overview of the Disciplinary Framework in New Jersey

The discipline of members of the New Jersey Bar is primarily governed by New Jersey Court Rule 1:20.[29] As discussed above, exclusive constitutional responsibility over all aspects of the practice of law resides in the Supreme Court of New Jersey,[30] includ-

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[27] *See, e.g., In re* Perez, 104 N.J. 316, 327, 517 A.2d 123, 129 (1986); *In re* Robinovitz, 102 N.J. 57, 62, 505 A.2d 595, 598 (1986); *In re* McDonald, 99 N.J. 78, 84, 491 A.2d 625, 628 (1985); *In re* Goldstein, 97 N.J. 545, 548, 482 A.2d 942, 943 (1984); *In re* Infinito, 94 N.J. 50, 57, 462 A.2d 160, 162 (1983); *In re* Goldstaub, 90 N.J. 1, 5, 446 A.2d 1192, 1194 (1982); *In re* Stout, 75 N.J. 321, 325, 382 A.2d 630, 632 (1978); *In re* Logan, 70 N.J. 222, 227, 358 A.2d 787, 790 (1976). While these authorities stand for the proposition that punishment is *not* a legitimate goal of the disciplinary process, the Supreme Court of New Jersey recently stated that the purpose "*is not so much to punish a wrongdoer* as it is to protect the public." *In re* Rigolosi, 107 N.J. 192, 206, 526 A.2d 670, 679 (1987) (emphasis added). This language implies that punishment is a legitimate goal of the process, albeit not the primary goal. This semantical nuance may connote a shift toward judicial approval of the imposition of *punishment* as a proper aim of ethics proceedings in addition to the well-recognized primary goals—protection of the public and preservation of the purity of the Bar and judicial system. Punishment had been recognized as a legitimate goal in the past, however. *See In re* Ries, 131 N.J.L. 559, 562, 37 A.2d 417, 419 (Sup. Ct. 1944) ("[T]he object of disciplinary proceedings is not *alone* to punish the attorney guilty of malpractice.") (emphasis added).

[28] *In re* Vasser, 75 N.J. 357, 364, 382 A.2d 1114, 1117 (1978) (emphasis added). *See also In re* Pleva, 106 N.J. 637, 641, 525 A.2d 1104, 1106 (1987) ("[I]n making disciplinary decisions, we must consider the interests of the public as well as of the bar and the individual involved."); *In re* Templeton, 99 N.J. 365, 374, 492 A.2d 1001, 1006-07 (1985) ("An inquiry into [the] possible causes of ethical misconduct not only can be instructive and enlightening, it may also hold the promise of a resolution of the disciplinary charges in terms of personal rehabilitation, which will serve to protect the public interest without ruining a lawyer's career and life.").

[29] N.J. Ct. R. 1:20-1 to -12. For a concise summary of the disciplinary process authored by David E. Johnson, Jr., Director of the OAE, see Johnson, *What Every Lawyer Needs to Know About Ethics*, 118 N.J.L.J. 325, 343, col. 3 (1986). *See also* the synopsis set forth in the 1987 OAE Report, *supra* note 18, at 1-6.

[30] *See supra* note 5 and accompanying text.

ing original and appellate jurisdiction[31] and plenary rule-making power.[32]

The system is three-tiered;[33] the three adjudicative levels are: (1) hearing panels comprised of members of the seventeen regionalized DEC's[34] or, alternatively, special ethics masters,[35] (2) the state-wide DRB,[36] and (3) the Supreme Court of New Jersey.[37] The OAE performs various functions and roles at all

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[31] *In re* LiVolsi, 85 N.J. 576, 428 A.2d 1268 (1981). *See also In re* Hearing on Immunity for Ethics Complainants, 96 N.J. 669, 678, 477 A.2d 339, 343 (1984); *In re* Matthews, 94 N.J. 59, 73-75, 462 A.2d 165, 172 (1983); *In re* Education Law Center, Inc., 86 N.J. 124, 133, 429 A.2d 1051, 1056 (1981); *In re* Loring, 73 N.J. 282, 289, 374 A.2d 466, 470 (1977); *In re* Cipriano, 68 N.J. 398, 402, 346 A.2d 393, 395 (1975); American Trial Lawyers Ass'n v. New Jersey Supreme Court, 66 N.J. 258, 261, 330 A.2d 350, 352 (1974); State v. Rush, 46 N.J. 399, 411, 217 A.2d 441, 447 (1966) (all recognizing Supreme Court of New Jersey is vested with constitutional duty to exercise exclusive authority over attorney discipline). On applicability of the federal non-interference doctrine, see Gipson v. New Jersey Supreme Court, 416 F. Supp. 1129 (D.N.J. 1976), *aff'd*, 558 F.2d 701 (3d Cir. 1977). "That the States have broad power to regulate the practice of law is, of course, beyond question." United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967). "*United Mine* also recognizes that the 'broad power' may be exercised by the adoption of 'broad rules framed to protect the public and to preserve respect for the administration of justice.' " American Trial Lawyers Ass'n v. New Jersey Supreme Court, 126 N.J. Super. 577, 585, 316 A.2d 19, 23 (App. Div. 1974).

[32] *E.g.*, American Trial Lawyers Ass'n v. New Jersey Supreme Court, 66 N.J. 258, 262-63, 330 A.2d 350, 352 (1974). The supreme court has delegated some of its rulemaking power to the OAE and the DRB. Court rule 1:20-2(b)(14) authorizes the OAE to promulgate guidelines governing the procedures to be followed in disciplinary proceedings. *See* N.J. CT. R. 1:20-2(b)(14). The OAE has promulgated twenty-eight administrative guidelines as well as various forms for use with regard to ethics proceedings. Office of Attorney Ethics, *Administrative Guidelines of the Office of Attorney Ethics*, in RULES GOVERNING THE NEW JERSEY DISCIPLINARY AND FEE ARBITRATION SYSTEM (1987) [hereinafter OAE Guidelines]. *See* 113 N.J.L.J. 157 (1984); 1 NEW JERSEY PRACTICE 678-98 (4th ed. 1988). Court rules 1:20-4(b)(6) and (d) authorize the DRB to promulgate regulations governing proceedings and matters coming before the DRB. The DRB has promulgated five regulations together with forms. *See* N.J. Ct. R. 1:20-4(b)(6), -4(b). Office of Attorney Ethics, *Disciplinary Review Board Regulations*, in RULES GOVERNING THE NEW JERSEY DISCIPLINARY AND FEE ARBITRATION SYSTEM (1987) [hereinafter DRB Regulations]. The above pamphlet entitled, RULES GOVERNING THE NEW JERSEY DISCIPLINARY AND FEE ARBITRATION SYSTEM (1987), which contains the OAE Guidelines and the DRB Regulations, can be obtained from the OAE's offices in Trenton.

[33] *See* Johnson, *supra* note 2, at 456, n.1; *see also* Johnson, *supra* note 29, at 343, col. 3.

[34] *See* N.J. CT. R. 1:20-3.

[35] Retired jurists are recruited to act as special masters in lieu of DEC hearing panels in complex cases. OAE Guidelines, *supra* note 32, Guideline No. 17 at 11. *See also infra* note 67. While District Fee Arbitration Committees are also at this first tier, fee disputes will not be discussed in detail here. *See supra* note 9.

[36] *See* N.J. CT. R. 1:20-4.

[37] *See id.* R. 1:20-5.

three levels.[38]

The proceedings before the DEC's and special ethics masters, as well as proceedings before the DRB, are considered *ab initio* to be judicial in nature.[39] However, the function of these tribunals is in large part advisory; they have no authority to impose public discipline,[40] but can only make recommendations to the court.[41] The DEC's, special ethics masters and the DRB are agents acting on behalf of the supreme court, which is the ultimate arbiter of all ethics matters.[42] These three tiers will be examined in greater detail in the following paragraphs.

A. *Tier One—District Ethics Committees and Special Ethics Masters*

The initial tier in the disciplinary system, though not necessarily the first tier with which the respondent will interact, consists of the DEC's, which are organized primarily along county lines.[43] The DEC's ordinarily receive and take initial investigative, prosecutorial and adjudicative action upon grievances alleging unethical conduct on the part of New Jersey attorneys.[44] In matters deemed emergent by the OAE Director, initial application may be made to the DRB or directly to the court.[45]

Generally, grievances are initially directed to and received by

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38 *See id.* R. 1:20-2. *See also infra* text accompanying notes 114-30 (discussing the expanding role of the Office of Attorney Ethics). *See also* 1987 OAE REPORT, *supra* note 18, at 12-24.

39 *In re* Logan, 70 N.J. 222, 226, 358 A.2d 787, 789 (1976).

40 Private reprimands, however, can be imposed at these lower tiers. *See* N.J. CT. R. 1:20-4(f)(2) (authorizing DRB to impose private reprimands); N.J. CT. R. 1:20-4(h) (authorizing DRB to impose costs and sanctions). Private reprimands by the Director can be imposed with concurrence of the DRB at the investigative stage if the respondent consents. N.J. CT. R. 1:20-3(g); 1987 OAE REPORT, *supra* note 18, at 66.

41 *See* Gipson v. Supreme Court of New Jersey, 416 F. Supp. 1129, 1131 (D.N.J. 1976), *aff'd*, 558 F.2d 701 (3d Cir. 1977).

42 *See In re* Logan, 70 N.J. 222, 225, 358 A.2d 787, 789 (1976).

43 *See* OAE Guidelines, *supra* note 32, Guideline No. 1. Due to large lawyer populations, Essex County is divided into three district committees (V-A, V-B and V-C), and Bergen County is divided into two districts (II-A and II-B). *Id.* Less populous counties are combined within the jurisdiction of a single committee, *e.g.*, district I is comprised of the counties of Atlantic, Cape May, Cumberland and Salem. *Id.*

44 *See* N.J. CT. R. 1:20-3(e); OAE Guidelines, *supra* note 32, Guideline No. 3. Attorneys admitted *pro hac vice* under court rule 1:21-2 are subject to the disciplinary jurisdiction of New Jersey. *In re* Bailey, 57 N.J. 451, 273 A.2d 563 (1971). Such matters are assigned to committees by the Director of the OAE. N.J. CT. R. 1:20-2(b)(6), -3(e).

45 *See* N.J. CT. R. 1:20-2(b)(1)(i); *see also infra* notes 107-13 and accompanying text (discussing emergent applications).

the secretary of the appropriate DEC, who screens each case in accordance with applicable OAE Guidelines and court rules.[46] Grievances are not required to be in any particular form, and those filed by disgruntled clients may consist of nothing more than an informal letter expressing general dissatisfaction. The following types of cases are screened out at the DEC level through this process: (1) grievances involving elements of both an allegation of unethical conduct and a fee dispute;[47] (2) grievances related to advertising or similar communications;[48] (3) grievances by criminal defendants charging ineffective assistance of counsel or prosecutorial misconduct;[49] (4) grievances relating to pending civil litigation;[50] and (5) complaints against ethics committee members or secretaries arising out of the processing of a grievance.[51]

DEC secretaries are also required to screen out grievances "[w]hen the facts alleged in the initial letter of grievance would not, even if proved, constitute unethical conduct."[52] However, if the grievant insists that the grievance sets forth a viable cause of action, the secretary must accept and docket the grievance and refer it to a designated investigator for investigation and a second opinion.[53] DEC secretaries also screen out grievances in-

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46 *See* OAE Guidelines *supra* note 32, Guideline No. 3. The DEC secretaries are appointed by the Director of the OAE after consultation with the DRB Chair, and they are not members of the DEC's. N.J. CT. R. 1:20-2(b)(11), 1:20-3(c).

47 N.J. CT. R. 1:20A-4, 1:20-3(e). If a grievance involves "aspects of both a fee dispute and a charge of unethical conduct," the matter is to be first acted upon by the respective fee arbitration committee, unless (1) the Director otherwise directs, or (2) the respective fee arbitration committee refers the matter as presenting "an ethical question of a serious or emergent nature." *Id.*

48 N.J. CT. R. 1:20-3(e). Grievances that involve controverted issues of material fact or charges of unethical conduct of a non-advertising and non-communicative nature may be referred to the DEC by the Committee on Attorney Advertising. *Id.* R. 1:19A-4(e), (h).

49 OAE Guidelines, *supra* note 32, Guideline No. 8. Unless a patent violation of the rules of ethics has occurred, such grievances can only be filed after appellate remedies have been exhausted. *Id.*

50 OAE Guidelines, *supra* note 32, Guideline No. 9. Grievances relating to pending civil litigation are to be entertained only at the conclusion of such litigation unless an ethical question of obvious significance or of an emergent nature is presented. *Id.*

51 OAE Guidelines, *supra* note 32, Guideline No. 7. Grievances against DEC members or secretaries arising out of the investigation, prosecution or adjudication of a grievance are considered exclusively by the DRB and the Supreme Court. *Id.*, commentary at 4-5.

52 *Id.* Guideline No. 3.

53 *Id.* Guideline No. 6 (citing N.J. CT. R. 1:20-3(f)). In such a case, an experienced DEC member must investigate the grievance and file a written report within 45 days. *Id.*

volving attorneys whose principal offices are not within their respective DEC's geographic jurisdiction.[54]

Grievances which survive this initial screening process are assigned to lawyer-members of the committee, referred to as "preliminary investigators,"[55] who conduct investigations to determine the validity of the grievant's allegations.[56] Preliminary investigations are required to be completed within sixty days unless extraordinary circumstances exist.[57] Preliminary investigators should forward a copy of the grievance letter to the respondent for comment and may also subpoena documents and witnesses during the course of their investigations.[58] The respondent should make every effort to respond to and resolve the grievance at this initial investigative stage. Any grievance, no matter how trivial the underlying accusation may seem, should be treated as a potential blemish on the attorney's record and reputation. Prompt forwarding of exculpatory information at this early but critical juncture can mean the difference between a dismissal or the filing of formal charges. In all but the most *de minimis* matters, the respondent should expeditiously seek the assistance of experienced ethics defense counsel at the preliminary investigation stage.

Upon completion of the preliminary investigation, the investigator is required to submit a written report of the investigation to the DEC Chair.[59] The DEC Chair must then determine whether there is an indication of unethical conduct sufficient to warrant a formal hearing.[60] If the Chair determines on the information then available that a formal hearing is not warranted, the Chair directs the committee secretary to dismiss the matter.[61]

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54 *See* N.J. CT. R. 1:20-3(e). Cases are generally referred to and investigated by the DEC in the district where the attorney maintains his or her principal office for the practice of law in this state. *Id.*

55 *See id.* R. 1:20-3(f).

56 *Id.*

57 *See* OAE Guidelines, *supra* note 32, Guideline No. 10 (discussing the timetable for completing preliminary investigations).

58 *See* N.J. CT. R. 1:20-3(f), (o); OAE Guidelines, *supra* note 32, Guideline No. 14. Subpoenas issue on application of the DEC or OAE Director. At other stages of the process, presenters, ethics counsel and respondents can apply for issuance of a subpoena. *Id. See also infra* text accompanying notes 218-21 (discussing these procedures).

59 N.J. CT. R. 1:20-3(f); OAE Guidelines, *supra* note 32, Guideline No. 10.

60 *See infra* note 66 and accompanying text (discussing formal hearings).

61 If the matter is to be closed, copies of the investigative report must be furnished to the grievant, the Director and the respondent, and a letter of dismissal must be forwarded to each. OAE Guidelines, *supra* note 32, Guideline No. 18.

Once this occurs, the investigative stage of the matter is terminated.[62]

If the DEC Chair determines that the facts set forth in the investigative report demonstrate that misconduct has occurred, the Chair may then recommend to the OAE Director that a private reprimand be imposed[63] or direct the preparation of a formal complaint which will then be followed by a plenary hearing.[64] In the latter case, the complaint is served upon the respondent, who is required to file a verified answer within ten days.[65] This is the next critical stage of the process, and the respondent should treat the complaint as a serious matter. If ethics counsel has not yet been retained, the respondent should retain counsel immediately in order to timely file the necessary and crucial responsive pleadings.

Formal hearings are conducted in private before a DEC hearing panel comprised of at least three DEC members, usually two lawyer-members and one lay-member.[66] In complex or time-

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62 It is estimated that 80 percent of all grievances are disposed of at this stage. 1987 OAE REPORT, *supra* note 18, at 5.

63 N.J. CT. R. 1:20-3(f), (g). If the DEC Chair requests the Director to recommend to the DRB that a private reprimand be imposed, it is then within the discretion of the Director to so recommend or to direct the Committee to further process the matter pursuant to rule 1:20-3(f) or (h). If the Director recommends that a private reprimand be imposed by the DRB, a letter of intent to do so is served upon the respondent, who may object within 10 days, in which case a formal complaint will be filed pursuant to rule 1:20-3(h). *Id.* R. 1:20-3(g). If no timely objection is made, then the Chair of the DRB has discretion to authorize the issuance of the private reprimand in the name of the DRB, in accordance with rule 1:20-4(f)(2), or direct that formal proceedings commence, in accordance with rule 1:20-3(h). *Id.*

64 *Id.* R. 1:20-3(f), (h), (l).

65 *Id.* R. 1:20-3(i); OAE Guidelines, *supra* note 32, Guideline No. 12 (discussing the manner of service). The respondent must set forth his or her demand for discovery in the answer or respondent's right to discovery "*shall* be waived." N.J. CT. R. 1:20-3(i); OAE Guidelines, *supra* note 32, Guideline No. 15. *See infra* notes 207-24 and accompanying text (discussing discovery in further detail). Respondent may retain counsel, request assigned counsel if indigent, or appear pro se. N.J. CT. R. 1:20-3(k); OAE Guidelines, *supra* note 32, Guideline No. 13. Failure to file timely answer constitutes unethical conduct. *See infra* notes 176-83 and accompanying text.

66 N.J. CT. R. 1:20-3(l). The DEC member acting as preliminary investigator for the matter in question may not be assigned by the Chair to serve on the hearing panel for that matter. *Id.*; *see In re* Logan, 71 N.J. 583, 586, 367 A.2d 419, 421 (1976). Hearings are transcribed, and while formal, the Rules of Evidence do not strictly apply. N.J. CT. R. 1:20-3(l). In accordance with Rule 1:20-3(n) and OAE Guideline No. 11, all actions of the hearing panel are to be taken by vote of a simple majority. OAE Guidelines, *supra* note 32, Guideline No. 11. The panel's report is not to be reviewed or voted on by the committee en banc. Whenever possible, the panel is to render its report orally, immediately upon conclusion of the case, and the transcript thereof immediately ordered. *Id.* However, the OAE

consuming cases, a special ethics master may be appointed to hear the matter in lieu of a hearing panel.[67] The filing of legal briefs is not required at this stage; however, it may be advisable to file pre-hearing briefs, affidavits or stipulations.

Upon completion of the presentation of evidence and argument, and after due deliberation, the panel or special master may take one of the following three actions: (1) the complaint may be dismissed if it is determined that no unethical conduct has occurred;[68] (2) a determination may be made that a private reprimand constitutes "adequate discipline" for the conduct in question;[69] or (3) a "presentment" may be filed with the DRB determining that the matter requires discipline greater than a private reprimand, and recommending public discipline.[70]

B. *Tier Two—The Disciplinary Review Board*

If a grievant's claim of unethical conduct has been dismissed at the investigative or hearing stage by either the DEC Chair or by the hearing panel, an appeal may be filed with the DRB.[71] The DRB automatically reviews all presentments filed by DEC's or special masters recommending public discipline.[72] If ethics counsel has not been retained before reaching this stage, the respondent should seriously reconsider that decision.

The DRB is composed of nine members, at least five of

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considers no report final until reduced to final written form and duly signed. *Id.* at 8 comment. Thus, hearing panels are instructed to render oral reports in secret and the parties not made privy until the report is filed in final form with the DEC secretary. *Id.* The report must set forth findings of fact and conclusions of law. N.J. Ct. R. 1:20-3(n).

67 *See supra* note 35. Special ethics masters are empowered to act with the same power and authority as that of a hearing panel in accordance with rule 1:20-3(l), and special masters are required to submit written reports in accordance with rule 1:20-3(m) and (n). N.J. Ct. R. 1:20-3(l), 3(m)-(n).

68 N.J. Ct. R. 1:20-3(n)(1).

69 *Id.* R. 1:20-3(n)(2).

70 *Id.* R. 1:20-3(n)(3). In such a case, the hearing panel is not required to recommend the specific type or severity of public discipline to be imposed ultimately by the court, which determination is reserved to the DRB. *Id.*; *see also id.* R. 1:20-4(f)(1).

71 *Id.* R. 1:20-4(e)(1)(i)-(ii); DRB Regulations, *supra* note 32, Regulation Nos. 2-3. An appeal can be filed by the grievant, the Director or the respondent. The only first tier actions subject to appeal are pre- and post-hearing dismissals. N.J. Ct. R. 1:20-4(e)(1)(i)-(ii). Therefore the respondent's right to appeal is illusory since all presentments are automatically reviewed by the DRB, and respondents would have no reason to appeal a dismissal. Query: should the lay grievant have the right to appeal a dismissal thereby prolonging the process?

72 N.J. Ct. R. 1:20-4(f)(1).

whom must be members of the New Jersey Bar, and at least three of whom cannot be attorneys.[73] Members are appointed by the court and serve for three-year terms, subject to reappointment.[74] The court also designates the members who serve as Chair and Vice-Chair on an annual basis.[75] DRB members receive no pecuniary remuneration.[76]

When a hearing panel has found unethical conduct warranting either private or public discipline, its written report is forwarded to and considered by the DRB. On appeal from final action or a recommendation for imposition of discipline by a DEC hearing panel, review by the DRB is de novo on the full record.[77] Oral argument is discretionary on appeals from dismissals and reviews of post-hearing private reprimand recommendations, but automatic at the request of any party or the DRB on review of presentments recommending public discipline.[78] On appeals from DEC dismissals, the DRB may affirm, modify, reverse or remand the matter.[79]

Upon review of post-hearing recommendations for private reprimand, the DRB may dismiss the grievance, impose the private reprimand or treat the recommendation as a presentment for public discipline.[80] Thus, where proceedings at the first tier result in dismissal or recommendation of a private reprimand, the DRB has discretion to recommend imposition of a greater sanction following its de novo review. Therefore, the respondent and his or her counsel must remain vigilant notwithstanding success at the DEC level.

Where a DEC hearing panel or special master has recommended public discipline, oral argument is routinely scheduled before the DRB.[81] While briefs are not required to be filed under the rules governing proceedings at the second tier, they can be helpful to the respondent and are routinely filed by experienced

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73 *Id.* R. 1:20-4(a).

74 *Id.*

75 *Id.*

76 1987 OAE REPORT, *supra* note 18, at 5.

77 N.J. CT. R. 1:20-4(e)(3), (f)(1)-(2).

78 *Id.*

79 *Id.* R. 1:20-4(e)(3). Decisions must be in writing. *Id.* While the DRB may affirm recommendations, or impose and issue private reprimands and costs, the supreme court has reserved the power to impose public discipline. *See supra* note 40. Further, where a presentment is filed recommending public discipline, a downgrade by the DRB to a private reprimand must be reviewed by the supreme court. *See infra* text accompanying note 87.

80 N.J. CT. R. 1:20-4(f)(2).

81 1987 OAE REPORT, *supra* note 18, at 6.

ethics defense counsel.[82] The DRB, in its discretion, may also request the filing of briefs.[83] A hearing panel member or an OAE staff attorney will appear to prosecute the matter.[84] While the respondent may appear pro se, representation by counsel is advised.[85]

The DRB, like the DEC's, must render formal written decisions.[86] If the DRB determines that public discipline is appropriate, or that a recommendation for public discipline should be down-graded to a private reprimand or be dismissed, the DRB's written recommendation must be promptly filed with the supreme court for de novo review.[87]

C. *Tier Three—The Supreme Court of New Jersey*

The third and ultimate tier, absent a constitutional challenge cognizable in a federal forum, is the Supreme Court of New Jersey. The supreme court is obligated to independently review the record and to make its own findings.[88] The supreme court ordinarily places great weight on DRB recommendations,[89] but will not hesitate to reach a different result based upon its independent review of the record.[90]

The court may pass judgment on a disciplinary matter without oral argument where the DRB has recommended discipline of one year or less. Thus, where the DRB recommends a public reprimand, probation or a six-month suspension, the court may implement and affirm that decision without hearing respondent or counsel. It is, therefore, important that respondent timely

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82 *See* N.J. CT. R. 1:20-4(e)(2).

83 *E.g.*, *id.* R. 1:20-4(f)(2). *See also* Johnson, *supra* note 29, at 344, col. 4.

84 *See* 1987 OAE REPORT, *supra* note 18, at 6; Johnson, *supra* note 29, at 344, col. 1.

85 *See* Johnson, *supra* note 29, at 344, col. 5. Respondents should not appear pro se except where the violations charged and the conduct of the respondent (charged or uncharged) is de minimis in the aggregate. *See infra* text accompanying notes 225-30.

86 N.J. CT. R. 1:20-4(f)(1).

87 *Id.*

88 *Id.* R. 1:20-5(a). *See, e.g.*, *In re* Perez, 104 N.J. 316, 327, 517 A.2d 123, 129 (1986) (supreme court states it is "mindful of [its] obligation of independent findings of fact").

89 *In re* Kushner, 101 N.J. 397, 403, 505 A.2d 32, 35 (1986); *In re* Rosen, 88 N.J. 1, 3, 438 A.2d 316, 317 (1981); *In re* Mirabelli, 79 N.J. 597, 602, 401 A.2d 1090, 1093 (1979).

90 *See, e.g.*, *In re* Conway, 107 N.J. 168, 183, 526 A.2d 658, 665 (1987); *In re* Rigolosi, 107 N.J. 192, 207-08, 526 A.2d 670, 679-80 (1987); *In re* Kushner, 101 N.J. 397, 403, 505 A.2d 32, 35 (1986); *In re* Infinito, 94 N.J. 50, 58, 462 A.2d 160, 164 (1983); *In re* Rosen, 88 N.J. 1, 3-4, 438 A.2d 316, 317 (1981).

seek leave to file a brief with the court, particularly if additional facts or new precedents should be addressed.[91]

Where a constitutional challenge has been raised and preserved by the respondent, a notice of petition for review must be filed with the Supreme Court of New Jersey within ten days of filing and service of the DRB's report and recommendation.[92] The DRB, DEC's and special masters are precluded from acting upon constitutional challenges.[93] However, the failure of the respondent to raise and properly preserve such issues at the lower tiers may bar the raising of those issues before the supreme court.

Following the filing of a report and recommendation for discipline greater than a one-year suspension by the DRB, an order to show cause issues from the Supreme Court of New Jersey as to why the respondent should not be disbarred or otherwise disciplined.[94] Oral argument on the return date is heard in open court by the supreme court at the Hughes Justice Complex in Trenton. The respondent, as at other stages of the process, may be represented by counsel or appear pro se. The Director or an OAE staff attorney appears in opposition to the respondent[95] and routinely argues for maximum discipline.

Upon conclusion of oral argument before the Supreme Court of New Jersey, the court may in its discretion dismiss the matter, impose discipline,[96] or remand the matter for further

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91 Within 10 days after the DRB has filed and served a recommendation for discipline consisting of a one-year suspension or less severe sanction, either the respondent or the OAE may file a motion for leave to file briefs or for oral argument. N.J. Ct. R. 1:20-5(a). Note, however, that mitigating facts should be presented through testimony and evidence at the DEC hearing, and not first raised by way of affidavit or brief before the supreme court. *In re* Hynda, 38 N.J. 94, 95, 183 A.2d 41 (1962).

92 N.J. Ct. R. 1:20-5(c)(2).

93 *Id.* R. 1:20-3(i), 1:20-4(f)(3).

94 The court rules do not specifically provide for this procedure. *But see* 1987 OAE Report, *supra* note 18, at 6; Johnson, *supra* note 29, at 344, col. 1. Regardless of the severity of the discipline recommended by the DRB, such orders to show cause routinely require that respondent "show cause why [respondent] should not be disbarred or otherwise disciplined." 1987 OAE Report, *supra* note 18, at 6.

95 N.J. Ct. R. 1:20-2(b)(4). The OAE represents the public interest at oral argument. Johnson, *supra* note 29, at 344, col. 2; 1987 OAE Report, *supra* note 18, at 6.

96 Since the New Jersey Supreme Court's authority to fix appropriate sanctions in an ethics case is exclusive and tempered only by minimal constitutional constraints and stare decisis, the court can take virtually any action it deems appropriate based upon the circumstances of the matter before it. *See, e.g., In re* Loring, 73 N.J. 282, 289, 374 A.2d 466, 470 (1972).

proceedings at the lower tiers.[97] If the court decides to impose public discipline, a written opinion or an order is filed by the court.[98] Generally, where the court affirms and approves the DRB's recommendation, the court will enter an order which adopts and incorporates the DRB's recommendation.[99] Where the court finds significant legal or factual issues or disagrees with the DRB's recommendation, the court will generally file a per curiam opinion.[100] Generally, the Supreme Court of New Jersey speaks with a unanimous voice with regard to ethics matters.[101]

The decisions and orders entered by the Supreme Court of New Jersey, other than approvals of private reprimands, are matters of public record published in the New Jersey Law Journal and the New Jersey Reports. Such orders become a permanent part of the respondent's record.[102]

The DRB, at the Director's discretion may hear a matter directly when the disciplinary action is premised upon a criminal conviction.[103] In such matters the OAE Director exercises exclusive investigatory and prosecutorial authority,[104] and the criminal

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97 *See, e.g., In re* Orlando, 104 N.J. 344, 351, 517 A.2d 139, 143 (1986) (remanding case to DRB for development of adequate record and "to make recommendations to this Court on the question of respondent's fitness to practice law").

98 Forms of public discipline include probation, public reprimand, suspensions and disbarment. 1987 OAE REPORT, *supra* note 18, at 6. Conditions may also be imposed such as prohibiting an attorney from engaging in solo practice and requiring that the attorney practice only with supervision. *See, e.g., In re* Calligy, 99 N.J. 613 (1985) (order requiring supervision by a proctor approved by OAE); *In re* Milita, 99 N.J. 336, 345, 492 A.2d 380, 385 (1985) (restoration to practice conditioned on association with another practitioner for two year period).

99 *See, e.g., In re* Cosgrove, 108 N.J. 684 (1987).

100 *See, e.g., In re* Skevin, 104 N.J. 476, 477, 517 A.2d 852 (1986). The supreme court will often quote the DRB's report and recommendation at length. *See, e.g., In re* Litwin, 104 N.J. 362, 366-67, 517 A.2d 378, 380-81 (1986); *In re* Heywood, 98 N.J. 410, 412-20, 486 A.2d 1256, 1257-61 (1985).

101 Even where the supreme court has established new precedent, it has generally spoken with one voice. *E.g., In re* Wilson, 81 N.J. 451, 409 A.2d 1153 (1979) (establishing doctrine of mandated disbarment where misappropriation is shown). For examples of cases where dissenting opinions were filed, see *In re* Rigolosi, 107 N.J. 192, 211, 526 A.2d 670, 682 (1987) (O'Hern, J., dissenting); *In re* Conway, 107 N.J. 168, 184, 526 A.2d 658, 666 (1987) (O'Hern, J., dissenting); *In re* Fleischer, 102 N.J. 440, 451, 508 A.2d 1115, 1122 (1986) (O'Hern, J., dissenting); *In re* Sears, 71 N.J. 175, 202, 364 A.2d 777, 791 (1976) (Sullivan, J., concurring and dissenting); *In re* Frankel, 20 N.J. 588, 599, 120 A.2d 603, 609 (1956) (Brennan, J., and Vanderbilt, C.J., dissenting).

102 *E.g., In re* Gombar, 103 N.J. 697 (1986).

103 N.J. CT. R. 1:20-6(c)(2)(i). *See In re* Friedman, 106 N.J. 1, 11-12, 523 A.2d 1071, 1076 (1987). The Director may also proceed in the ordinary course by filing an ethics complaint. *Id.*

104 N.J. CT. R. 1:20-6(c)(2). The Director also has exclusive authority where the respondent is a defendant in a pending criminal matter. *Id.* R. 1:20-2(b)(1)(ii).

conviction is considered "conclusive evidence of . . . guilt and serve[s] to establish the essential facts that sustain the conviction[]."[105] However, underlying and collateral facts are considered in assessing the appropriate discipline to be imposed.[106]

The Supreme Court of New Jersey and the DRB may entertain applications by the OAE for temporary suspension of an attorney "where necessary to protect the interests of an attorney, a client or the public."[107] Where the application is first made to the DRB, the DRB cannot impose the temporary sanction, but may only recommend that the supreme court do so.[108] In emergent circumstances, the court will entertain the motion directly.[109] Approximately one-half of these emergent applications are made directly to the court.

The court's reputation for "swift and severe" discipline is well deserved; the court has suspended attorneys from practice on an emergent basis in as little as twenty-four hours.[110] Utilization of the emergent temporary suspension procedure by the Director is gaining in frequency. During a recent one-year period, attorneys were temporarily suspended through such emergent applications at the rate of approximately one every two weeks.[111] During calendar year 1986, twenty-two attorneys were suspended in this fashion on an interim basis,[112] and three attorneys were subjected to less severe interim license restrictions.[113]

D. *The Expanding Role of the Office of Attorney Ethics*

In July 1983, the Supreme Court of New Jersey announced the creation of the OAE.[114] The OAE is the successor to the Division of Ethics and Professional Services (DEPS) which evolved out of the 1978 reorganization and its predecessor known as

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105 *In re* Conway, 107 N.J. 168, 169-70, 526 A.2d 658 (1987) (citations omitted). *See also* N.J. Ct. R. 1:20-6(c)(2)(ii).

106 *In re* Conway, 107 N.J. 168, 526 A.2d 658 (citing N.J. Ct. R. 1:20-6(c)(1)). *See also In re* Infinito, 94 N.J. 50, 57, 462 A.2d 160, 163-64 (1983); *In re* Hughes, 90 N.J. 32, 36, 446 A.2d 1208, 1210 (1982); *In re* Rosen, 88 N.J. 1, 3, 438 A.2d 316, 317 (1981).

107 N.J. Ct. R. 1:20-4(g). The Director exercises exclusive authority to prosecute such applications. *Id.* R. 1:20-2(b)(1)(i).

108 *Id.* R. 1:20-4(g).

109 *Id.* R. 1:20-5(b).

110 Johnson, *supra* note 2, at 505 n. 283. Such applications made first to the DRB take approximately two weeks to one month. *Id.*

111 *Id.* at 505.

112 1987 OAE Report, *supra* note 18, at 14.

113 *Id.*

114 *See supra* note 15.

Central Ethics, which had been established in the Administrative Office of the Courts in 1973.[115] The OAE began operations in October 1983.[116]

The court endowed the OAE and its Director with supervisory, financial, administrative, managerial and advisory responsibilities as well as exclusive jurisdiction to investigate and prosecute complex ethics cases and matters where a lawyer is a defendant in a criminal proceeding.[117] As mentioned earlier, the OAE also has power to take emergent action as it deems necessary to protect the public by moving before the Supreme Court of New Jersey or the DRB for interim suspensions or imposition of other license restrictions.[118] Additionally, the OAE manages the fee arbitration committees,[119] the Random Audit Compliance Program[120] and the Trust Account Overdraft Notification Program.[121] The latter two programs are aimed at detecting financial transgressions.

When argument is heard by the supreme court on motions for interim sanctions, for final discipline or with regard to interlocutory matters and constitutional challenges, an OAE staff attorney or the Director appears in the role of prosecutor.[122]

The OAE is primarily viewed as the prosecutorial arm of the court, and the power delegated to the OAE is concentrated in its Director. The Director's powers and duties include: (1) employment and retention of DEC secretaries and making recommendations regarding their compensation;[123] (2) recommending members of the Bar to serve on the DEC's;[124] (3) reassigning cases from one DEC to another;[125] and (4) recommending rules and regulations governing procedures before the DEC's and with regard to ethics matters generally.[126] While administrative and

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115 *See supra* notes 7-11 and accompanying text.

116 1987 OAE REPORT, *supra* note 18, at 12.

117 N.J. CT. R. 1:20-2(b)(1)-(16).

118 *See supra* notes 107-13 and accompanying text.

119 N.J. CT. R. 1:20-2(b)(8).

120 *Id.* R. 1:20-2(b)(9), 1:21-6(c). For discussion of the Random Audit Compliance Program authorized by the Director, see Johnson, *Random Audit Compliance Program*, NEW JERSEY LAWYER, Spring 1986, at 12; 1987 OAE REPORT, *supra* note 18, at 115-29.

121 N.J. CT. R. 1:21-6(a)(2). For a discussion of the program by the Director, see 1987 OAE REPORT, *supra* note 18, at 130-37.

122 *See supra* note 95.

123 N.J. CT. R. 1:20-2(b)(11).

124 *Id.* R. 1:20-2(b)(12).

125 *Id.* R. 1:20-2(b)(6).

126 *Id.* R. 1:20-2(b)(14). While court rules governing most other areas of practice

financial support services for the OAE are derived through the Administrative Office of the Courts, the Director reports solely to the Supreme Court of New Jersey.[127]

This concentration of functions and delegation of responsibilities makes the office of the OAE Director the epicenter of ethics enforcement activities. The power wielded by the Director makes him a strong force on a statewide front, and that influence particularly permeates the lowest tier, the DEC's.

OAE staff counsel are involved in overseeing and monitoring the DEC's.[128] The Director and OAE staff attorneys consult with and advise the DEC's with regard to procedural and legal matters and attend DEC meetings.[129] This close contact and controlling influence fosters greater uniformity of enforcement and application of ethics rules and precedents. However, the legal advice given by the Director, the chief ethics prosecutor, to the DEC's, the primary adjudicative tribunals, may influence the outcome in a given case.[130] Neither the respondent nor counsel for the re-

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are recommended and drafted by committees appointed by the court consisting of jurists and practitioners, the OAE Director alone enjoys this rule-drafting function in the ethics realm. Query: whether a committee composed of the Director, the DRB Counsel *and ethics practitioners* would be better able to draft fair and even-handed rules? For an example of the prosecutorial slant with which these rules are drafted see *supra* note 181.

127 *Id.* R. 1:20-2(a); *see Supreme Court Announces New Office of Attorney Ethics*, 112 N.J.L.J. 93 (1983).

128 1987 OAE REPORT, *supra* note 18, at 17.

129 *Id.* The court rules do not specifically authorize the OAE or its Director to render legal or procedural advice to the DEC's. Rule 1:20-2(b)(8) authorizes advisement only of the "Fee Committees." N.J. CT. R. 1:20-2(b)(8).

130 Following action by the court on matters that are initiated by the OAE on applications seeking interim suspension, such matters are assigned to a DEC for plenary review. *See, e.g., In re* Fleischer, 102 N.J. 440, 442-43, 508 A.2d 1115, 1116-17 (1986) (DRB report and recommendation recounts the procedural history of the matter, which was commenced by the filing of a notice of motion for temporary suspension; in this case, the motion was denied, a complaint was filed by the OAE and the matter was subsequently heard by a DEC hearing panel). In such cases, the file compiled by the OAE is transmitted to the secretary of the DEC assigned to hear the matter. It has been the experience of the author that transmittal correspondence from the Director or his staff will state in conclusory fashion that the respondent in question has committed particular acts of misconduct. While such statements may appear in correspondence to the respective DEC secretary, such correspondence typically becomes part of the DEC file that is reviewed by the preliminary investigator and by the DEC hearing panel. Conclusory statements of guilt coming from the chief ethics enforcement officer can unfairly influence the actions and recommendations of the hearing panel. Such ex parte communications between an interested party and a judge in a civil or criminal case would ordinarily be considered inappropriate. N.J. CODE OF JUDICIAL CONDUCT Rule 3 & comment; N.J. RULES OF PROFESSIONAL CONDUCT Rules 3.5(b), 8.4(d), (f). However, under current disciplinary practice, the ethics prosecutors, the Director and OAE staff at-

spondent should lose sight of the potential impact of the OAE Director's influence, particularly in cases commenced by emergent application on the OAE's initiative.

III. The Pitfalls From The Respondent's Perspective

In a recent commentary appearing in the *New Jersey Law Journal* entitled "What Every Lawyer Needs To Know About Ethics," OAE Director David E. Johnson, Jr., analogized ethics proceedings to complaints raised with Better Business Bureaus by dissatisfied consumers.[131] The Director stated:

> The first thing that every lawyer needs to do is to realize that ethics grievances are a normal risk of doing business. . . . Grievances can be expected to occur and attorneys must be prepared to deal with them, either before they happen by anticipating the ethical issues, or after they happen by dealing effectively with them through the disciplinary process.[132]

While neither commercial retailers nor lawyers can expect to make each and every customer or client perfectly happy, the similarities end there. Ordinarily, recalcitrant retailers may be subject to a fine, required to pay damages or ordered to cease unfair business practices. Blameworthy attorneys, however, often suffer severe consequences to their reputations and careers, and may be publicly censured, suspended from practice or permanently barred from practicing their chosen profession.

The Director, in his aforementioned commentary, correctly

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torneys, regularly advise the DEC's on legal and procedural matters. 1987 OAE Report, *supra* note 18, at 17. While rule 1:20-2(b)(8) specifically authorizes the Director to render legal and administrative advice to "the Fee Committees in accordance with Rule 1:20A-1 et seq.," the court rules do not specifically authorize the Director or his staff to render such advice to the DEC's. Interaction between the DEC's and the Director or OAE is, however, required under various provisions of the rules. *See* N.J. Ct. R. 1:20-3(c). While it has been held constitutionally permissible for the court, through its agents, to act as complainant, investigator, prosecutor, judge and jury, the court has recognized the need for separation of the investigative and prosecutorial functions from the deliberative fact-finding function. *In re* Logan, 71 N.J. 583, 586, 367 A.2d 419, 421 (1976). *See also* Gipson v. New Jersey Supreme Court, 416 F. Supp. 1129, 1132 (D.N.J. 1976), *aff'd*, 558 F.2d 701 (3d Cir. 1977). Query: whether the OAE's present practice of *advising* the DEC's on particular cases is appropriate? Advisement of the DEC's on procedural and legal matters would be less suspect if provided by DRB counsel, who is responsible for providing similar advice to the DRB. *See* N.J. Ct. R. 1:20-4(b)(1). Similarly, the District Ethics Committee Manual currently prepared and distributed by the OAE should be the responsibility of the DRB Counsel.

131 Johnson, *supra* note 29, at 343, col. 3. For a recent article, see Johnson, *Understanding Ethics Grievances*, New Jersey Lawyer, Spring 1987.

132 Johnson, *supra* note 29, at 343, col. 3.

cautions that, "the first step in dealing with the concept of a grievance is to recognize one's own vulnerability."[133] Once a grievance has been filed, the respondent must be properly apprised of his or her rights and obligations under the applicable court rules, the Rules of Professional Conduct and case precedent. Important factors which respondent should consider include: (a) the nature and scope of disciplinary proceedings; (b) the standard of proof; (c) the extent to which the privilege against self-incrimination may be invoked; and (d) the extent to which discovery may be obtained. These important issues and others are discussed below.

A. Proceedings of the "Third Kind"

Over a century ago, in *Ex Parte Wall*,[134] the United States Supreme Court characterized disciplinary proceedings as "civil" in nature.[135] More recently, in *In re Ruffalo*,[136] the United States Supreme Court characterized disciplinary proceedings for disbarment as "adversary proceedings of a quasi-criminal nature."[137] The majority of lawyers exposed to the process as either respondents or ethics defense counsel would probably agree with the latter characterization, particularly in light of the potentially devastating consequences to the accused attorney. The Supreme Court of New Jersey, however, has rejected both of these characterizations, and has consistently used the term "*sui generis*"[138] to place disciplinary proceedings in a class by themselves.[139] A majority of jurisdictions agree that disciplinary pro-

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133 *Id.*

134 107 U.S. 265 (1882).

135 *Id.* at 288.

136 390 U.S. 544, *reh'g denied*, 391 U.S. 961 (1968).

137 *Id.* at 551.

138 The term "*sui generis*" means "of its own kind or class; *i.e.*, the *only one* of its kind; peculiar." BLACK'S LAW DICTIONARY 1286 (5th ed. 1979).

139 *See In re* Logan, 70 N.J. 222, 227, 358 A.2d 787, 790, *reh'g granted*, 71 N.J. 583, 367 A.2d 419 (1976); *In re* Pennica, 36 N.J. 401, 419, 177 A.2d 721, 730 (1962); Taft v. Ketchum, 18 N.J. 280, 285, 113 A.2d 671, 674 (1955); *In re* Ries, 131 N.J.L. 559, 562, 37 A.2d 417, 419 (Sup. Ct. 1944). Subsequent to the United States Supreme Court's decision in *In re Ruffalo*, one commentator suggested that the *sui generis* label was no longer valid. *See* Haines, *supra* note 4, at 26, cols. 1-2. Thereafter, however, the opinion rendered by the New Jersey Supreme Court in *In re Logan*, made no reference to *In re Ruffalo* and, relying on its earlier decision in *In re Ries*, the court stated: "The respondent contends that the disciplinary proceeding is equivalent to a criminal proceeding. But it is not. It is *sui generis*." *In re Logan*, 70 N.J. at 227, 358 A.2d at 790. *But cf. In re* Hughes, 90 N.J. 32, 42, 446 A.2d 1208, 1213-14 (1982) (Schreiber, J., dissenting) (citing *In re* Ruffalo, 390 U.S. 544, 550 *reh'g denied*, 391 U.S. 961 (1968)) ("Yet we must not forget that disbarment is a punishment and its effect can be devastating.").

ceedings are of their "own kind," being neither civil nor criminal in nature.[140]

The continued characterization of ethics proceedings as *sui generis* by the New Jersey Supreme Court, notwithstanding the contrary labelling applied by the United States Supreme Court in *Ruffalo*, has limited the procedural safeguards afforded respondents. In proceedings characterized as quasi-criminal in nature, such as enforcement proceedings involving zoning ordinance violations or health code offenses, the accused is afforded procedural safeguards ordinarily due those charged with felonious conduct.[141] Comparison of the applicable burdens of proof is illustrative in this regard. In a zoning ordinance enforcement matter, the standard is proof *beyond a reasonable doubt*, as in criminal cases.[142] In disciplinary matters, however, the burden is proof by *clear and convincing* evidence.[143] In *In re Pennica*,[144] the Supreme Court of New Jersey announced the rule, stating:

> [T]he *quantum* of proof required to warrant discipline or disbarment is different from that demanded for conviction of a criminal charge. . . . Because of the dire consequences which may flow from an adverse finding, however, we regard as necessary to sustain such a finding the production of a greater *quantum* of proof than is ordinarily required in a civil action, *i.e.*, a preponderance of the evidence, but less than that called for to sustain a criminal conviction, *i.e.*, proof of guilt beyond a reasonable doubt. Although the specific rule has not been articulated previously in this State, we declare it to be that discipline or disbarment is warranted only where the evidence of unethical conduct or unfitness to continue in practice against an attorney is clear and convincing.[145]

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140 *See* LAWYER'S MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 101:2101-2103 (1984) [hereinafter LAWYER'S MANUAL]. While a majority of jurisdictions characterize disciplinary proceedings as neither civil nor criminal, characterizations which have been applied by the minority include civil, criminal, quasi-civil, quasi-criminal and quasi-judicial. Nordby, *The Burdened Privilege: Defending Lawyers in Disciplinary Proceedings*, 30 S.C.L. REV. 363, 378-79, nn.83-89 (1979).

141 *See* Town of Belleville v. Parrillo's, Inc., 83 N.J. 309, 312, 416 A.2d 388, 389 (1980); State v. Weir, 183 N.J. Super. 237, 242, 443 A.2d 773, 776 (App. Div. 1982) (all involving zoning ordinances); *see also In re* Gault, 387 U.S. 1, 31-34 (1967) (juvenile delinquency proceeding).

142 *See supra* note 141.

143 *In re* Gross, 67 N.J. 419, 341 A.2d 336 (1975); *In re* Pennica, 36 N.J. 401, 419, 177 A.2d 721, 730 (1962).

144 36 N.J. 401, 177 A.2d 721 (1962).

145 *Id.* at 419, 177 A.2d at 730 (citations omitted); *see also In re* Shaw, 88 N.J. 433, 435, 437, 443 A.2d 670, 671 (1982) (quality of evidence must be clear and convincing). Other jurisdictions have applied other standards. *See, e.g.*, Cushway v. State

The burden of proof in proceedings seeking imposition of discipline is ordinarily on ethics counsel or the presenter.[146] However, there is no articulated presumption of innocence as afforded in criminal or quasi-criminal matters. Due to the duty of cooperation and candor placed upon respondents by the Rules of Professional Conduct,[147] the failure to adequately explain one's conduct can lead to discipline.[148]

In addition to application of a less stringent standard of proof, the characterization of disciplinary proceedings as something less burdensome than quasi-criminal has additional ramifications. While statutes of limitation generally apply in criminal and civil matters, there is no time limitation on disciplinary matters.[149] However, where transgressions are remote in time, less severe discipline has been deemed appropriate.[150]

Although the United States Supreme Court held in *Ruffalo* that a lawyer is entitled to fair notice of the charges against him,[151] the sufficiency of such notice is judged by a lower standard than that applied in criminal and quasi-criminal matters.[152]

Furthermore, in criminal and quasi-criminal matters, a defendant can be held accountable only when a specifically articulated law has been clearly violated. The New Jersey Supreme Court stated, in

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Bar of Georgia, 120 Ga. App. 371, 170 S.E.2d 732 (1969), *cert. denied*, 398 U.S. 910 (1970) (beyond a reasonable doubt); *In re* Shigon, 462 Pa. 1, 18, 329 A.2d 235, 243 (1974) (clear and satisfactory); *In re* Capoccia, 59 N.Y.2d 549, 549-50, 466 N.Y.S.2d 268, 268-69, 453 N.E.2d 497, 497-98 (1983) (preponderance of the evidence). *Cf. In re* Hecker, 109 N.J. 539 (1988) (civil verdict relied upon to establish amount of fees overcharged by respondent notwithstanding lower standard of proof). For survey of jurisdictions, see LAWYERS' MANUAL, *supra* note 140, at 101:2103-04. For discussion of other standards, see Nordby, *supra* note 140, at 391-92.

146 N.J. CT. R. 1:20-11(g). By implication, respondent has the burden of proof by clear and convincing evidence with respect to affirmative defenses, claims of mental or physical disability and as to circumstances of mitigation. *See id.* R. 1:20-3(i). In license restoration proceedings, the burden is on respondent. *Id.* R. 1:20-11(g).

147 N.J. RULES OF PROFESSIONAL CONDUCT Rule 8.1.

148 *See infra* notes 176-97 and accompanying text (for discussion of duty to cooperate and adverse effect of failure to do so).

149 N.J. CT. R. 1:20-11(f).

150 *E.g., In re* Kotok, 108 N.J. 314, 330, 528 A.2d 1307, 1315 (1987) (ten years after admission to the bar, attorney placed on probation for false or misleading statement made on bar admission application).

151 *See In re* Fleischer, 102 N.J. 440, 452, 508 A.2d 1115, 1122 (1986) (O'Hern, J., dissenting) (With regard to deletion of stipulations of fact at commencement of DEC hearing, Justice O'Hern, citing to *Ruffalo*, stated that, "Lawyers are entitled to no less fundamental procedural fairness than others facing disciplinary action."). *Id.* (citation omitted).

152 LAWYERS' MANUAL, *supra* note 140, at 101:2201-02.

In re Cipriano,[153] that absence of a specific rule of proscription is not a defense in an ethics matter: "Respondent claims that he may not be disciplined because no Disciplinary Rule proscribing the specific conduct has been violated. We have previously commented that '[t]his Court's disciplinary power is not confined to the area covered by the canons.' "[154] The supreme court, however, has not applied case precedent retrospectively where no uniform treatment had been previously given in similar circumstances.[155]

In *Ruffalo*, the United States Supreme Court held that procedural due process requires that an attorney receive fair notice of the charges and the intended reach of the proceedings.[156] In New Jersey, the court rules require that a formal complaint be filed setting forth "the facts constituting the alleged improper conduct . . . and the ethical rules asserted to have been violated."[157]

Prior to the United States Supreme Court's pronouncement in *Ruffalo*, the Supreme Court of New Jersey considered a respondent's argument that the failure to specify the canon of ethics alleged to have been violated deprived him of the opportunity to prepare a defense in *In re Kamp*.[158] The court stated that, "if at any time the facts disclosed that additional canons may have been violated, ordi-

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153 68 N.J. 398, 346 A.2d 393 (1975).

154 *Id.* at 402, 346 A.2d at 395 (citation omitted). *Cf.* State v. P.T. & L. Constr. Co., 77 N.J. 20, 31, 389 A.2d 448, 453-54 (1978) (since zoning charge is considered penal in nature, conviction cannot stand unless ordinance *clearly* prohibits complained of conduct).

155 *In re* Hollandonner, 102 N.J. 21, 28-29, 504 A.2d 1174, 1179 (1985) (case precedent not applied retrospectively where court has addressed for first time "near identity of escrow funds and trust funds"); *In re* Strickland, 87 N.J. 575, 578, 436 A.2d 1337, 1338-39 (1981) (supreme court rejected DRB recommendation based upon retrospective rather than prospective application of ethics case precedent); *In re* Smock, 86 N.J. 426, 427-28, 432 A.2d 34, 35 (1981) (supreme court noted retrospective application does not serve appropriate deterrent purpose); *In re* Cohn, 46 N.J. 202, 214-15, 216 A.2d 1, 8 (1966) (respondent acquitted where conduct in question was customary practice among the bar, but discontinued by respondent upon issuance of advisory opinion). *See also In re* Leahy, 111 N.J. 127, 128, 543 A.2d 439, 440 (1988) ("[R]espondent's conduct is measured against the Disciplinary Rules in effect at the time of the misconduct.").

156 390 U.S. 544, 550 (1968).

157 N.J. Ct. R. 1:20-3(h). Under the current rules, prior to the filing of the complaint, the respondent is ordinarily provided with a copy of the grievance, his or her comments are solicited by the investigator and a copy of the investigative report is provided. *Id.* R. 1:20-3(f). Under the rules as they existed in 1976, respondents did not participate at the investigative stage and often were not even made aware of the grievance at the preliminary stages. The New Jersey Supreme Court held that the procedure did not violate respondent's due process rights so long as access to information uncovered by the investigation was provided *after* formal proceedings were instituted. *In re* Logan, 70 N.J. 222, 229, 358 A.2d 787, 791 (1976).

158 40 N.J. 588, 598-99, 194 A.2d 236, 242 (1963).

narily the new charges should be formalized with full opportunity afforded [respondent] to meet them."[159] The court held that the complaint clearly presented the issue of a conflict of interest and the applicable canon need not have been charged.[160] Based upon respondent Kamp's own admissions during the hearing of his case, the court found that he had violated two additional canons involving issues not considered by the County Ethics Committee and not raised in the complaint.[161] The court did not consider these additional violations, however, recognizing that respondent had been afforded no notice or opportunity to meet them.[162]

While the result reached by the Supreme Court of New Jersey in *Kamp* is consistent with the subsequent decision of the United States Supreme Court in *Ruffalo*, the rationale is not. In *Ruffalo* the Court stated:

> The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.[163]

The state supreme court's statements in *Kamp* would seem to allow amendment at the discretion of the court, the DRB or DEC, although in that case the court did not remand the matter for further proceedings on the additional charges, but instead ignored them in imposing discipline. Unfortunately, the New Jersey court rules do not specifically address the issue.[164]

Paradoxically, while describing ethics proceedings as more civil

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159 *Id.* at 599, 194 A.2d at 242.

160 Then applicable court rule 1:16-4(a) did not require the recitation of the ethics rules at issue as does the current rule 1:20-3(h). For a discussion of the current rule, see *supra* note 157.

161 *Kamp*, 40 N.J. at 597-99, 194 A.2d at 241-42.

162 *Id.* at 599, 194 A.2d at 242.

163 390 U.S. 544, 551 (1968) (footnote omitted); *see also In re* Fleisher, 102 N.J 440, 452-53, 508 A.2d 1115, 1123 (1986) (O'Hern, J., dissenting) (noting respondents did not realize they were in "mortal danger" and subject to charges of "knowing misappropriation" where exculpatory stipulation of fact was unexpectedly deleted on insistence of DEC panel at opening of hearing and three respondents were subsequently found guilty of misappropriation and disbarred based principally upon their own admissions made during their DEC hearing).

164 Court rule 1:20-3(h) requires that a formal written complaint "*shall*" be filed setting forth the relevant facts and ethics rules. *See* N.J. CT. R. 1:20-3(h). Rule 1:20-3(i) mandates that respondent "*shall*" set forth affirmative defenses, including claims of mental and physical disability in his or her answer. N.J. CT. R. 1:20-3(i). Respondent "*may*" also set forth mitigating circumstances. *Id.* The rules do not address amendment of either the complaint or the answer. *See also infra* note 181 and accompanying text.

in nature than criminal,[165] the Supreme Court of New Jersey has nonetheless used the same type of approach in determining the discipline to be imposed in certain ethics proceedings as is used in criminal proceedings,[166] and the court has referred to a disciplinary sanction as a "penalty."[167] Thus, the *sui generis* label seems to engender rather than eliminate confusion for both the bar and the bench.

B. *Self-Incrimination vs. Duty of Candor and Cooperation*

The privilege against self-incrimination under the fifth amendment as applied to the several states through the fourteenth amendment does not exclude lawyers.[168] In *Spevack v. Klein*,[169] the United States Supreme Court held that an attorney cannot be disbarred solely for properly invoking the privilege against self-incrimination during a disciplinary proceeding.[170] In *Spevack*, the Supreme Court further stated:

> The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him". . . . We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words 'No person . . . shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception. . . . [L]awyers also enjoy first class citizenship.[171]

Thus, the privilege applies to lawyers no less than to other citizens. The *sui generis* labelling of ethics proceedings in New Jersey, however, and the concomitant application of lesser due process standards, result in the privilege apparently being unavailable where the

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165 *See supra* note 139 and accompanying text.

166 *E.g.*, *In re* Infinito, 94 N.J. 50, 57, 462 A.2d 160, 163 (1983). The court stated:

> Our goal in these hearings is to protect the interests of the public and the bar while giving due consideration to the interests of the individual involved. Similar to a sentencing judge in a criminal matter, we take into consideration many factors in determining the proper discipline to be imposed.

Id. (citations omitted).

167 *Id.*

168 *See* U.S. CONST. amend. V, XIV.

169 385 U.S. 511 (1967).

170 *Id.* at 514-16 (overruling Cohen v. Hurley, 366 U.S. 117 (1956)).

171 *Id.* at 516.

compelled disclosures would lead *only* to disbarment or other less severe discipline.[172]

In civil matters, an adverse inference may be drawn from a party's failure or refusal to take the stand without offending the privilege against self-incrimination. In *Duratron Corporation v. Republic Stuyvesant Corporation*,[173] the Appellate Division of the Superior Court of New Jersey distinguished *Spevack* as involving the actual consequence of disbarment, while stating that the defendant in *Duratron* risked only a money judgment.[174] The decision of the court in *Duratron*, however, does not address the extent to which adverse inferences may be drawn where the privilege is invoked in disciplinary proceedings, and the New Jersey Supreme Court has not directly addressed the question. Nevertheless, it appears that the privilege cannot be invoked when the disclosures sought can lead only to imposition of discipline in *sui generis* ethics proceedings.[175]

The Rules of Professional Conduct, as adopted by the New Jersey Supreme Court, place further burdens on respondents in ethics proceedings. Attorneys are duty-bound under the Rules of Professional Conduct to voluntarily disclose relevant information in ethics proceedings commenced against them.[176] In at least one jurisdiction, a lawyer has been found in violation of this duty by failing to report his own misconduct.[177]

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172 For an in-depth discussion of *Spevack*, see Note, *Self-Incrimination: Privilege, Immunity, and Comment in Bar Disciplinary Proceedings*, 72 MICH. L. REV. 84 (1973). *See also*, Nordby, *supra* note 140, at 386-87, nn. 132-41.

173 95 N.J. Super. 527, 231 A.2d 854 (App. Div.), *certif. denied*, 50 N.J. 404, 235 A.2d 897 (1967).

174 *Id.* at 533, 231 A.2d 854, 857.

175 Other jurisdictions have concluded that if the information sought could not subject the lawyer to criminal prosecution, the privilege is not invocable even though the information implicates the lawyer in ethics violations. *See, e.g.*, Zuckerman v. Greason, 20 N.Y.2d 430, 438-39, 231 N.E.2d 718, 721, 285 N.Y.S.2d 1, 6, *cert. denied*, 390 U.S. 925 (1967). For discussion of cases in other jurisdictions, see LAWYERS' MANUAL, *supra* note 140, at 101:2402-04.

176 Rule 8.1(b) of the Rules of Professional Conduct provides in part:

> [A] lawyer . . . in connection with a disciplinary matter, shall not:
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> . . .
>
> (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by RPC 1.6 [attorney-client privilege].

N.J. RULES OF PROFESSIONAL CONDUCT Rule 8.1(b).

177 Office of Disciplinary Counsel v. Casey, 511 Pa. 177, 512 A.2d 607 (1986). *See also* Note, *supra* note 172, at 115-17. *But see* N.J. RULES OF PROFESSIONAL CONDUCT Rule 8.3. Court rule 1:20-7(a) requires attorneys to report to the Director

In criminal and quasi-criminal proceedings, the state court rules require the accused to disclose only the existence of an alibi defense.[178] The criminal defendant need not provide any further information, and comment or inference based upon defendant's silence or nondisclosure is precluded.[179] Even where the defendant fails to comply with the alibi notice requirements, no adverse comment or inference may attach.[180] In New Jersey ethics proceedings, however, the court rules require that the respondent file an answer to an ethics complaint.[181] Failure to file an answer itself is cause for discipline, and may be considered as an aggravating factor in determining the severity of discipline to be imposed.[182] Candor and cooperation are mandatory as to both exculpatory and inculpatory information.[183] Thus, an attorney can be compelled to give testi-

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and the court any disciplinary action taken against them in other jurisdictions. N.J. CT. R. 1:20-7(a). Under rule revisions proposed by the OAE and recently adopted by the supreme court effective January 2, 1989, attorneys are now required to also report the filing of any criminal charges in any jurisdiction. *See* N.J. CT. R. 1:20-6(a); *see also* New Jersey Office of Attorney Ethics, *1988 Office of Attorney Ethics Proposed Rules Changes with Commentary, reprinted in* 112 N.J.L.J. 98, 125, col. 1 (1988) [hereinafter *1988 Proposed Rules*].

178 N.J. CT. R. 3:11-1. Failure to give notice setting forth the required particulars may result in exclusion of alibi witnesses or limitation of the use of the alibi defense. *Id.* R. 3:11-2.

179 *See e.g.*, State v. Deatore, 70 N.J. 100, 358 A.2d 163 (1976) (doctrine of "assenting silence" no longer viable as far as silence of criminal defendant is concerned).

180 *E.g.*, State v. Aceta, 223 N.J. 21, 29, 537 A.2d 1317, 1322 (App. Div. 1988).

181 N.J. CT. R. 1:20-3(i) (stating "respondent *shall* file a verified answer") (emphasis added). In *In re* Gavel, 22 N.J. 249, 125 A.2d 696 (1956), the court observed that the respondent's answer should include a "full, candid and complete disclosure of all facts reasonably within the scope of . . . the charges against him." *Id.* at 263, 125 A.2d at 704. The rules have been amended effective January 2, 1989, to include language mirroring the court's above-quoted pronouncement in *Gavel*. *See 1988 Proposed Rules*, *supra* note 177, at 124, col. 2. More troubling is the supreme court's adoption of the OAE's proposal that the respondent be required to file a "verified" answer so that the respondent can be impeached by his own responsive pleading. *Id.* at 98, col. 2. *See also In re* Kern, 68 N.J. 325, 326, 345 A.2d 321, 322 (1975); OAE Guidelines, *supra* note 32, Guideline No. 16 (extension of 10 day period to file answer may be granted by a DEC only upon showing of "extraordinary good cause"). Query: whether a respondent should be required to file a verified answer within 10 days where respondent may not have knowledge of the facts? In cases involving charges of financial transgressions, an investigation or audit by respondent's accountant may be necessary in order to determine the facts. Such endeavors often take weeks to complete even when all records are readily available. Is it fair to place such a burden on the accused attorney?

182 *E.g.*, *In re* Smith, 101 N.J. 568, 572-73, 503 A.2d 846, 848 (1986). *See also* N.J. CT. R. 1:20-3(i); N.J. RULE OF PROFESSIONAL CONDUCT Rule 8.1(b).

183 *In re* Winberry, 101 N.J. 557, 566-67, 503 A.2d 306, 311 (1986) (attorney has duty to be candid and to cooperate with courts and ethics tribunals). *See In re* Goer, 100 N.J. 529, 536, 497 A.2d 1255, 1258 (1985) (attorney's professional misconduct

mony which would demonstrate his unfitness to practice law as long as the compelled testimony will not expose the attorney to criminal prosecution.

A respondent and counsel may, thus, find themselves in a strategical quandary; *i.e.*, whether to assert the privilege against self-incrimination and risk enhanced disciplinary sanctions due to lack of candor and non-cooperation, or to risk criminal prosecution in an attempt to mitigate against harsh ethics discipline.[184]

In *State v. Stroger*,[185] the New Jersey Supreme Court considered the interplay between disclosure required under the ethics rules and the defendant-respondent's fifth amendment rights. In *Stroger*, upon the demand of DEPS, the defendant-respondent was required to produce during the course of an ethics investigation, financial records of the type required to be maintained under New Jersey Court Rule 1:21-6.[186] Following the turnover of those records to DEPS, they were disclosed to the prosecutor's office by DEPS at the request of the prosecutor. Stroger argued for suppression of the records and documents before the criminal trial court, and the motion was denied.[187]

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extended to his failure to cooperate in ethics proceedings); *In re* Haft, 98 N.J. 1, 8, 483 A.2d 393, 396 (1984) (attorney's failure to respond to inquiries as well as his lack of respect for the court "adversely reflected on his fitness to practice law"). *See also In re* Kotok, 108 N.J. 314, 329, 528 A.2d 1307, 1315 (1987) (attorney placed on probation for one year for, among other things, false statements on bar admission application ten years earlier).

184 Court rule 1:20-11 provides that ethics proceedings *may* be held in abeyance pending completion of civil or criminal litigation where the same questions of law and fact are involved. *See* N.J. Ct. R. 1:20-11. However, such a stay is at the discretion of the DEC, special master, DRB or the court, respectively. OAE Guideline No. 9 specifically provides for the stay of ethics proceedings where the respondent is a party or trial counsel in underlying *civil* proceedings. Where the respondent is the subject of an ongoing criminal matter, discretion to prosecute a related ethics violation rests with the Director. N.J. Ct. R. 1:20-6(c)(2) & 1:20-2(b)(1)(ii). County prosecutors and other chief law enforcement officials are requested to notify the Director of any indictments returned or criminal charges filed against attorneys. *See* OAE Guidelines, *supra* note 32, Guideline No. 19. Whenever temporary or final discipline has been imposed and "there is evidence of criminal conduct," the Director may refer the matter and the ethics file to the appropriate law enforcement authorities upon 10 days notice to the respondent. N.J. Ct. R. 1:20-10(d). The DRB may authorize such disclosure even in the absence of the imposition of ethics discipline. *Id. See also* State v. Stroger, 185 N.J. Super. 124, 447 A.2d 598 (Law Div. 1981), *aff'd*, 97 N.J. 391, 478 A.2d 1175 (1984), *cert. denied*, 469 U.S. 1193 (1985).

185 185 N.J. Super. 124, 447 A.2d 598 (Law Div. 1981), *aff'd*, 97 N.J. 391, 478 A.2d 1175 (1984), *cert. denied*, 469 U.S. 1193 (1985).

186 All attorneys practicing in New Jersey are required to maintain, among other things, a business account and a trust account together with records, ledgers and documents necessary for proper accounting thereof. *See* N.J. Ct. R. 1:21-6.

187 *Stroger*, 185 N.J. Super. at 136, 447 A.2d at 604. In addition to the fifth

The defendant-respondent contended that DEPS' demand for the production and turnover of his financial records based upon the mandate of New Jersey Court Rule 1:21-6[188] "was tantamount to giving him the choice between producing incriminating documents, and thereby 'waiving' his fifth-amendment rights, and being subject to disciplinary action."[189] The New Jersey Supreme Court distinguished *Spevack*[190] on the basis that the records demanded there may not have been required to be kept by the attorney.[191] The supreme court concluded that records required to be kept under the rule "are not at all of a testimonial or a compelled nature when they are prepared so as to, and in fact do, speak for themselves," without requiring the attorney to restate, repeat or affirm their contents.[192]

It is interesting to note further that testimony given under grant of immunity in a criminal matter may be used in subsequent disciplinary proceedings.[193] Moreover, while a criminal conviction is conclusive evidence of the commission of the crime in subsequent ethics proceedings,[194] an acquittal after a criminal trial is not res judicata in a subsequent disciplinary action.[195] This result is premised on the *sui generis* characterization and lower burden of proof that flows therefrom. The question of whether a civil acquittal would collaterally estop relitigation of the same issues in a subse-

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amendment argument, respondent Stroger asserted that a search and seizure had occurred in violation of his fourth amendment rights, but both the trial court and supreme court concluded that no search or seizure had occurred because respondent knew or should have known that the financial records were subject to examination. *Id.* *See also* N.J. CT. R. 1:21-6(c), (g).

188 This rule provides:

> An attorney who fails to comply with the requirements of this rule in respect of the maintenance, availability and preservation of accounts and records or who fails to produce such records as required shall be deemed to be in violation of RPC 1.15(d).

N.J. CT. R. 1:21-6(h).

189 *Stroger*, 97 N.J. at 407, 478 A.2d at 1183.

190 *See supra* notes 169-75 and accompanying text.

191 *Stroger*, at 407, 478 A.2d at 1183.

192 *Id.* at 405, 478 A.2d at 1182.

193 *See* LAWYERS' MANUAL, *supra* note 140, at 101:2403-04 (citations omitted); Nordby, *supra* note 140, at 387; Note, *supra* note 172, at 108-12.

194 N.J. CT. R. 1:20-6(c)(1) & (b)(2)(ii). *See In re* Coruzzi, 98 N.J. 77, 80, 484 A.2d 667, 668 (1984) ("conviction of an attorney conclusively established the underlying facts in disciplinary proceedings") (citations omitted).

195 *In re* Rigolosi, 107 N.J. 192, 206, 526 A.2d 670, 679 (1987) (citing *In re* Pennica, 36 N.J. 401, 418, 177 A.2d 721, 730 (1962)). In *Rigolosi*, Justice O'Hern, dissenting, stated that a jury's verdict of acquittal should not be impeached where "the central issue of ethical failure is so closely intertwined with the jury's finding of innocence on a single, crucial factual issue." *Id.* at 212, 526 A.2d at 682 (O'Hern, J., dissenting).

quent ethics proceeding has not as yet been judicially addressed.[196] The application of collateral estoppel and res judicata to such successive proceedings would be consistent with the applicable rules and guidelines.[197] Moreover, it would be unfair to disregard a civil verdict of acquittal where the questions of fact determined therein are the gravamen of the ethics charge. Requiring respondent to relitigate those facts and issues after going through the time and expense of a civil trial would be contrary to notions of fundamental fairness as well as judicial economy.

C. *Confrontation of Witnesses and Discovery*

Respondents who are unfamiliar with the rules governing disciplinary proceedings often focus their efforts toward satisfying and ameliorating the *grievant* rather than giving their full attention to responding to the *grievance*. Such attorneys labor under the misconception that "settling" the matter with the grievant will automatically dispose of the grievance. While reconciliation and client satisfaction are laudatory goals, the grievance itself must be addressed, not merely the aggrieved.

Although a grievant may decide to withdraw his or her grievance because the attorney has since satisfied the complaint or the grievant has simply lost interest in pursuing the matter, the court rules preclude the abandonment of grievances except by leave granted by the DEC "upon good cause shown."[198] Absent good cause, the OAE is substituted as the party grievant, and the matter otherwise proceeds in the ordinary course.[199] The grievant

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196 Since the clear and convincing burden of proof applicable in ethics proceedings is higher than the preponderance of evidence standard applied in civil cases, a non-suit or favorable verdict in a civil malpractice action should bar relitigation of the same issues of fact or law in a subsequent disciplinary action. *See In re* Hecker, 109 N.J. 539, 538 A.2d 354 (1988) (civil verdict relied upon by special master to establish amount of fees overcharged by respondent notwithstanding lower standard of proof in civil trial).

197 *See* N.J. CT. R. 1:20-11(d); *see also* OAE Guidelines, *supra* note 32, Guideline No. 9 (providing for deferral of ethics proceedings pending completion of criminal or civil proceedings "involving the same parties and the same questions of law and fact").

198 N.J. CT. R. 1:20-11(e). *See also In re* Stout, 75 N.J. 321, 323, 382 A.2d 630, 631 (1978) (grievant sought withdrawal upon restitution of misappropriated funds); *In re* Rosenblatt, 60 N.J. 505, 508 n.2, 291 A.2d 369, 371 n.2 (1972) (respondent's securing of written grievance withdrawal document of no effect); *In re* Rogovoy, 30 N.J. 1, 5, 152 A.2d 1, 3 (1959) (supreme court announced policy against withdrawal). Where the grievant's testimony is deemed necessary, it can be compelled by subpoena. N.J. CT. R. 1:20-3(o); OAE Guidelines, *supra* note 32, Guideline No. 14. *See also In re* Katz, 90 N.J. 272, 281 n.3, 447 A.2d 916, 920 n.3 (1982).

199 N.J. CT. R. 1:20-11(e).

need not appear at the hearing,[200] and even anonymous complaints are acted upon where sufficient documentary evidence is available to the DEC.[201] Interestingly, since jurisdiction is based upon authorized practice of law in New Jersey rather than physical presence, it would appear that a respondent's absence or disappearance does not necessarily bar the continuation of ethics proceedings.[202] Thus, unlike criminal and quasi-criminal proceedings, neither the complaining grievant nor the accused respondent need be present for an ethics matter to proceed.

Hearings conducted before DEC panels are formal and private, but the rules of evidence are not strictly applied.[203] Witnesses may be subpoenaed and called by the presenter and the respondent.[204] The grievant and the respondent, and their respective counsel, if any, have the right to be present.[205] However, contrary to prior practice, the grievant's counsel may not serve as the presenter to prosecute the matter before the DEC panel.[206]

Discovery is available to the respondent on a limited basis. First, respondent must set forth a demand for discovery in respondent's answer to the complaint.[207] Absent such a demand, discovery is deemed waived.[208] If respondent requests discovery, reciprocal discovery is automatically required.[209] If not, the DEC may request discovery within ten days of the due date of respondent's answer.[210] Once requested, discovery is governed not by a

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200 *In re* Krakauer, 81 N.J. 32, 34, 404 A.2d 1137, 1138 (1979).

201 *See In re* Heywood, 98 N.J 410, 419-20, 486 A.2d 1256, 1260 (1985).

202 *See* N.J. CT. R. 1:20-1(a); OAE Guidelines, *supra* note 32, Guideline No. 12 (service of complaint at respondent's last known address). *See also In re* Goer, 100 N.J. 529, 535, 497 A.2d 1255, 1258 (1985) (ethics matter adjudicated even though respondent did not cooperate or participate in proceedings).

203 N.J. CT. R. 1:20-3(1)(3).

204 *Id.* R. 1:20-3(o).

205 *Id.* R. 1:20-3(1)(3).

206 Prior to adoption of rule amendments on November 7, 1988, effective January 2, 1989, rule 1:20-3(j) stated that the grievant's attorney may be designated the presenter in the DEC Chair's discretion, but the supreme court in *In re* Hecker, 109 N.J. 539, 538 A.2d 354 (1988), stated that where the grievant has a financial interest in matters that are the subject of disciplinary proceedings, that party's counsel "should not be appointed to represent the interests of the public in the disciplinary proceedings." *Id.* at 554, 538 A.2d at 361. Interestingly, the court failed to mention or cite the aforesaid rule which its opinion then contradicted. The recently amended rule now conforms to the holding in *Hecker*. *See 1988 Proposed Rules, supra* note 177, at 124, col. 1.

207 N.J. CT. R. 1:20-3(i).

208 *Id.*

209 *Id.*

210 *Id.* Discovery of respondent's financial books and records, required to be

specific court rule, but under the guidelines issued by the Director.[211] Discovery generally includes information and material in the custody of the presenter or the DEC as follows: the names and addresses of all witnesses; copies of witness statements; inspection and copying of non-privileged documents and records; copies of investigative reports; identification of expert witnesses and copies of expert reports; and such other material as the DEC Chair may direct on motion and a showing of good cause.[212]

Neither the rules nor the guidelines provide for any discovery of the grievant. However, in *In re Katz*,[213] the New Jersey Supreme Court commented that ethics discovery could include the depositions of absent witnesses.[214] Thus, where the circumstances require, a motion must be made to the DEC Chair for the taking of depositions of the grievant or other witnesses. Further, in *In re Rogovoy*,[215] the court stated that respondent's counsel may interview the grievant and other witnesses in preparation of a defense.[216] However, respondent ordinarily should not communicate directly with the grievant or with adverse witnesses. Such contact can lead to charges of interference, improper pressure or witness tampering.[217]

The respondent may also subpoena witnesses and materials.[218] The guidelines provide that wide latitude be given in the issuance of subpoenas for relevant information during the investigation and hearing phases.[219] However, the issuance of subpoenas is at the discretion of the ethics authorities, and under the guidelines no interlocutory appeal is permitted from a refusal to

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maintained under rule 1:21-6, are discoverable by ethics authorities on demand pursuant to rule 1:21-6(g) and the Random Audit Compliance Program. *See supra* note 120.

211 *See* OAE Guidelines, *supra* note 32, Guideline No. 15.

212 *Id.* Discovery responses are due within 25 days from the due date of respondent's answer and extensions are not given absent "extraordinary good cause." *Id.*, Guideline No. 16. Court rule 1:3-4(a), allowing parties to consent to extensions of time, is not applicable. *See* N.J. CT. R. 1:3-4(a). If either of the parties fails to identify an expert witness or provide copies of relevant reports, the guideline specifically provides that the expert may be barred from testifying at the hearing. OAE Guidelines, *supra* note 32, Guideline No. 15. Therefore, no time should be wasted in retaining experts on behalf of the respondent.

213 90 N.J. 272, 447 A.2d 916 (1982).

214 *Id.* at 274 n.2, 447 A.2d at 917 n.2 (1982).

215 30 N.J. 1, 152 A.2d 1 (1959).

216 *Id.* at 5, 152 A.2d at 3.

217 *Id.* (supreme court recommended immediate retention of counsel, who can then interview all witnesses, including grievant).

218 N.J. CT. R. 1:20-3(o); OAE Guidelines, *supra* note 32, Guideline No. 14.

219 OAE Guidelines, *supra* note 32, Guideline No. 14.

issue a subpoena.[220] Once issued, motions to quash, limit or otherwise protect witnesses are entertained by the DEC Chair or panel chair.[221]

While there are some similarities between discovery under the guidelines in ethics matters and discovery in criminal matters, criminal defendants have broader discovery rights. For example, prosecutors upon request must specifically designate which witness may be called by the State at trial.[222] Defendants in criminal matters are also entitled to be advised of any alleged admissions or declarations against interest even if not reduced to writing.[223] In civil cases, this same type of information is usually available through interrogatories and depositions.[224]

Respondents in ethics proceedings should be entitled to discovery at least to the same extent as are criminal defendants. The result in an ethics proceeding should not be susceptible to influence by gamesmanship and surprise. Respondents should be entitled under the court rules to know which witnesses may be called to testify against them at the hearing and whether the presenter believes that admissions or declarations against interest have been made by the respondent. The respondent's counsel should request such information notwithstanding the failure of the rules and guidelines to address these important concerns.

D. *The Crucial Role of Counsel for the Accused*

As discussed in this article, respondents in ethics proceedings are not afforded the same due process as litigants in other forums. The need for experienced ethics defense counsel is, therefore, heightened.

Miranda warnings are, of course, not required to be given in ethics matters.[225] If Miranda-like warnings were required, such warnings would, in part, provide:

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220 *Id.* Unlike subpoenas issued in other types of proceedings, respondent's counsel cannot issue a subpoena over the name of the clerk or the committee. The subpoenas must be approved and issued by the ethics authorities. *See id.*

221 *Id.*

222 N.J. CT. R. 3:13-3(a)(7).

223 *Id.* R. 3:13-3(a)(2).

224 *See generally id.* R. 4:10-1 to 4:23-5.

225 *See* Miranda v. Arizona, 384 U.S. 436 (1966) (warnings required to be given prior to *custodial* interrogation). Ethics offenders are not placed in custody, though they may be no less compelled to provide information. *See* N.J. RULES OF PROFESSIONAL CONDUCT Rules 8.1, 8.3. Compulsion, for example, is an inherent aspect of the Random Audit Program, where attorneys are called upon at their offices to answer questions concerning bookkeeping discrepancies.

1. You do *not* have the right to remain silent.
2. Anything you say can be used against you, *and your refusal to say anything can also be used against you.*
3. You do *not* have the explicit right to the presence of an attorney during questioning; once a formal complaint is filed against you, you can request appointment of counsel upon proof of indigency.[226]

Under these prevailing circumstances, the respondent under investigation or against whom a formal complaint has been lodged may not be able to adequately represent himself regardless of legal acumen. Experienced ethics defense counsel may be necessary to act as a needed buffer between respondent and the ethics authorities and the grievant.

Experienced litigators, champions on familiar civil and criminal battlegrounds, might easily fall victim on the treacherous turf of the *sui generis* mine field. Even the current OAE Director cautions that once a formal complaint has been filed the accused attorney should *immediately* secure counsel.[227]

The New Jersey Supreme Court has stated that, where interviewing of the grievant and other adverse witnesses is deemed necessary in preparation of respondent's defense, counsel should be retained.[228] Once a grievance has been filed, the attorney-client relationship has, of course, deteriorated to one of adversity, and further contact between the two is ill-advised. Moreover, direct contact between the respondent and the grievant could result in the filing of additional ethics charges of undue pressure, coercion or witness tampering.

The respondent is best served by displaying candor and cooperation throughout the proceedings. The pro se respondent must walk a tightrope. It is difficult to be a zealous advocate and yet simultaneously appear candid and contrite. This is particularly true in serious cases where the respondent is exposed to suspension or disbarment. Emotions naturally run high when one's veracity and competence are questioned and one's reputation and livelihood may be at stake. Retained counsel can more easily remain dispassionate and conduct a rational, effective defense.[229] Counsel can assert

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226 *See supra* notes 65 and 85, and text accompanying notes 168-97.

227 Johnson, *supra* note 29, at 344, col. 5.

228 *In re* Rogovoy, 30 N.J. 1, 5, 152 A.2d 1, 3 (1959). *See also supra* notes 215-17, and accompanying text.

229 Nordby, *supra* note 140, at 446. The author correctly observes:

> For—irrelevant as it may seem to a lawyer's mind—an important ingredient in the final disposition of the charge will be respondent's performance in the disciplinary proceeding itself. For this reason any

rights, which, if asserted by respondent personally, might seem contrived and self-serving.[230]

Many lawyers believe that they possess the oratorical agility to explain themselves out of almost any predicament. However, pro se respondents, in attempting to explain themselves out of one ethics charge, often explain themselves into another. Just as a good criminal lawyer will rarely advise his client to take the stand, it is generally ill-advised for the respondent to espouse his own innocence.

Respondents must keep in mind that the presenters have the resources and staff of the OAE at their disposal. Furthermore, if the OAE takes an active role in the case, the respondent will be opposed by experienced, full-time OAE staff attorneys who are infinitely more familiar with the rules and precedents.

It is often said that the attorney who represents himself has a fool for a client. This timeless proverb can apply with no greater force than in ethics proceedings involving the potential for public discipline.

IV. CONFIDENTIALITY: SWORD OR SHIELD?

Ethics "records" and "proceedings" are required to remain confidential at the first and second tiers of the disciplinary framework.[231] The confidentiality requirement can be both a help and a hindrance to respondents. The policy protects respondents from unnecessary and premature publicity but prevents respondents from having access to relevant case precedents.

A. *Scope of Confidentiality*

In *State v. Stroger*,[232] the Supreme Court of New Jersey held that the "records" that are to be kept confidential are those records which are created during disciplinary proceedings rather than business and client records maintained by the respondent.[233] The court in *Stroger* stated that the confidentiality requirement was not intended to shield a respondent's unethical or criminal conduct.[234] When an attorney's records are validly obtained in the course of an ethics investigation or audit, and evi-

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respondent, any, at least charged with relatively serious misconduct, whether the charge is true or unfounded, is badly in need of informed and disinterested counsel.

230 *See id.*

231 N.J. CT. R. 1:20-10 and 1:21-6(c), (g).

232 97 N.J. 391, 478 A.2d 1175 (1984).

233 *Id.* at 401, 478 A.2d at 1179-80. *See* N.J. CT. R. 1:20-10 (formerly R. 1:21-6).

234 *Id.* at 402, 478 A.2d at 1180.

dence of possible criminal wrongdoing comes to the attention of ethics or law enforcement authorities, the relevant records may be turned over to law enforcement authorities on ten-days notice to the respondent.[235]

All ethics "proceedings" are required to be kept confidential except (1) upon scheduling of oral argument for final discipline before the supreme court, (2) where respondent has requested or consented to disclosure, or (3) upon the entry of final orders of discipline by the supreme court.[236] Where ethics proceedings are based upon criminal convictions or where allegations of impropriety are deemed by the Director to be of general public knowledge, the Director may in his discretion publicly disclose the pendency of the related ethics proceedings.[237] Where a temporary suspension has been imposed or upon entry of final discipline, the Director may refer confidential documentary information to other jurisdictions where the respondent is admitted to practice.[238]

All argument before the supreme court in ethics matters is heard in open court.[239] Thus, where a matter is initially brought before the court by the Director on an emergent application for license restricture or temporary suspension, members of the public may be present. If the court entertains a motion at any stage by either party, argument, if heard, occurs in open court, and members of the public are not excluded. In a case where the respondent's anticipated exposure is a private reprimand, the respondent's zeal to raise a constitutional issue, which issues are cognizable only by the supreme court, will be chilled by the potential for otherwise avoidable publicity.

Once a charge is proven and final public discipline imposed, the opinion and order is published in the New Jersey Law Journal and reported in the New Jersey Reports. In cases resulting in dismissals or the imposition of private reprimands, the entire record remains confidential.[240] As discussed below, a more uniform system for the anonymous reporting of all ethics decisions would

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235 *Id.* at 413, 478 A.2d at 1186. *See* N.J. CT. R. 1:20-10(d).

236 N.J. CT. R. 1:20-10(a)(1)-(3).

237 *Id.* R. 1:20-10(b).

238 *Id.* R. 1:20-10(c). Such referred information is to be kept confidential by the recipient and used only for disciplinary purposes. *Id.* Most jurisdictions impose reciprocal discipline, and New Jersey is no exception. *See generally id.* R. 1:20-7. Note also that temporary suspension orders are published in the New Jersey Law Journal and the New Jersey Reports.

239 *See* 1987 OAE REPORT, *supra* note 18, at 6.

240 *Id.* at 65-66.

continue to serve the public interest without inflicting unnecessary humiliation upon the transgressing attorney, his family and his descendants.[241]

B. *Purpose and Benefits of Confidentiality*

The purpose of the confidentiality requirement is ostensibly to protect the respondent from unfavorable inferences pending the final stages of the proceedings before the supreme court.[242] The New Jersey Supreme Court has recognized that "even an unsubstantiated charge can, if misunderstood, do irreparable damage to an attorney without any corresponding public benefit."[243] Confidentiality in disciplinary matters is also beneficial to the grievant, whose legal affairs thereby escape notoriety.

C. *Adverse Consequences of Confidentiality*

The benefits of confidentiality are not without their price, however. Grievants, clients and witnesses are afforded absolute immunity from suit by respondents for abuse of process and malicious prosecution,[244] so long as they abide by the confidentiality requirement.[245] If a participant in an ethics proceeding breaches the confidentiality rules, forfeiture of immunity will result, and sanctions may be imposed by the court.[246]

Another detrimental ramification of the confidentiality rule is inaccessibility to private reprimand decisions and dismissals. A substantial portion of ethics matters result in the imposition of

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241 *See infra* notes 250-55, and accompanying text.

242 State v. Stroger, 97 N.J. 391, 409, 478 A.2d 1175, 1184 (1984).

243 *In re* Skevin, 104 N.J. 476, 487, 517 A.2d 852, 858 (1986).

244 N.J. Ct. R. 1:20-11(b). Committee members and staff are also afforded immunity for conduct in the performance of their ethics duties. *Id.* R. 1:20-11(a). For an interesting discussion of the history of immunity in ethics proceedings, see generally *In re* Hearing on Immunity for Ethics Complainants, 96 N.J. 669, 477 A.2d 339 (1984); Toft v. Ketchum, 18 N.J. 280, 113 A.2d 671 (1955). Immunity extends to all communications to ethics authorities as well as testimony given in ethics proceedings. N.J. Ct. R. 1:20-11(b).

245 *In re* Skevin, 104 N.J. at 487-88, 517 A.2d at 857-58. In *Skevin*, the grievant deliberately breached the confidentiality rules, and the respondent moved before the special ethics master for dismissal. The master ruled dismissal inappropriate due to the public interest involved in such proceedings. The supreme court agreed. The grievant's rights were not affected because the court chose to apply the forfeiture and sanction policy prospectively. Skevin was disbarred for misappropriation of trust funds. *Id.* at 489, 517 A.2d at 859.

246 *Id.*, at 488, 517 A.2d at 858. Court rule 1:20-10(e), adopted November 7, 1988, provides for holding a person in "contempt of the Supreme Court" in addition to loss of immunity for breaching the confidentiality requirement. N.J. Ct. R. 1:20-10(e); *see also 1988 Proposed Rules*, *supra* note 177, at 126, col. 1.

private reprimands,[247] and many matters are ultimately dismissed without the imposition of discipline, thus rendering the relevant records, transcripts, recommendations and decisions perpetually inviolate. The OAE, DRB and the supreme court have at their disposal all of the recommendations and decisions in cases terminating in non-public discipline. The DEC's also have available for reference all private reprimand decisions for matters originating from their respective districts. Furthermore, the DEC's receive legal and procedural advice from the OAE[248] which may include information on the disposition of other analogous cases. The respondents, however, do not have access to this vast pool of case precedents.

Respondents have access only to the forty to sixty reported decisions rendered annually, *i.e.*, those ending in the imposition of public discipline.[249] Respondents are, therefore, unable to compare their conduct to the conduct of other attorneys who have received private reprimands or who have been ultimately vindicated. Thus, ethics defense counsel are often at a disadvantage in arguing for the imposition of private sanctions on behalf of their clients. Counsel are forced to contend in a given case that, since there are no analogous reported cases, private discipline is appropriate. While ethics matters are each decided upon their own particular facts on a case-by-case basis, it would nonetheless be extremely helpful for respondents to be able to cite analogous cases and refer the DEC panel, DRB or the supreme court to analogous circumstances where private discipline or dismissal was deemed appropriate.

D. *Proposal for Anonymous Publication of Disciplinary Decisions*

In other areas of the law, decisions are ordinarily available for review, reference and citation.[250] In cases where anonymity

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247 *See* 1987 OAE REPORT, *supra* note 18, at 65, figure 25. In 1986, 43 cases resulted in the imposition of a private reprimand, while 53 cases resulted in the imposition of public sanctions; in 1987, 20 private reprimands were issued and public discipline was imposed in 55 cases. *Id.* at 57, figure 20; *id.* at 65, figure 25.

248 *See supra* note 130.

249 Seven hundred-eighty five cases were disposed of during 1987. *See* 1987 OAE REPORT, *supra* note 18, at 47. Of that total, only 55 cases resulted in public discipline. *Id.* at 56.

250 While not all civil and criminal decisions are reported, the Bar has access to a broad cross-section of case precedent covering the gamut of possibilities of circumstances and results. Even so, the Bar has clamored for greater access to decisional law. *See* Adler, *Bar Contests Lack of Access to Unpublished Opinions*, 120 N.J.L.J. 309 (1987).

has been deemed appropriate, such as matters involving custody of juveniles, anonymity is achieved by captioning cases with the initials of the parties rather than their names.[251] There is no reason why ethics matters could not be captioned by letter or number and the parties anonymously referred to throughout as "grievant" and "respondent."[252]

One commentator has suggested that all disciplinary proceedings be captioned anonymously, *i.e.*, numerically, "to save respondents the perpetual ignominy of having their names forever imbedded in the law reports, a continuing disgrace visited upon no other profession, not even upon criminal defendants who do not appeal."[253] Another has opined, however, that all disciplinary matters beyond the investigative stage should be entirely public in nature to protect the public interest.[254]

Decisions and orders of the court identifying respondents could still be published at the time of entry in cases where public reprimands, suspensions and disbarments are imposed, but the reported decisions could then be published in the New Jersey Reports by number rather than name. The initial publication of the respondents' identities would adequately serve the public's need to know.

Decisions presently unavailable involving private reprimands or dismissals can also be made uniformly available to the Bar and the public through anonymous reporting, thereby serving the deterrent purpose of educating the Bar as to conduct deemed unethical, and additionally making available to the Bar and ethics defense counsel the full range of ethics precedents.[255]

Ethics opinions should not remain secret, thereby unfairly available only to ethics authorities. Neither the Bar nor the public should be forced to resort to guesswork where a colleague's reputation, livelihood and future may be in jeopardy. The anon-

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251 *See, e.g., In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

252 The Opinions of the Advisory Committee on Professional Ethics are rendered anonymously and designated by number. *See* N.J. Ct. R. 1:19-4.

253 Nordby, *supra* note 140, at 401. Nordby submits that anonymity would also remove a deterrent to lawyers volunteering information about their own problems, such as alcoholism, and that anonymity may enhance the profession's perception of the fairness of the system. *Id.*

254 Note, *Enforcement of Legal Ethics in New Jersey*, 28 Rutgers L. Rev. 707, 718-19 (1975). The author suggests that a bureau be established in which all disciplinary records can be maintained for public access and reference, analogous to a better business bureau. *Id.*

255 *See* Norby, *supra* note 140, at 401. *See also* Note, *supra* note 254, at 712-13, 718-19.

ymous publication of all ethics decisions rendered by the DRB and the court would serve the public interest, provide a deterrent, better educate the Bar, and avoid unnecessary perpetual embarrassment.

V. CONCLUSION

As one learned ethics practitioner, Jack S. Nordby, observed:

> [R]espondent's counsel must struggle as best he can in a constitutional wonderland where a petty criminal is vouchsafed the full panoply of constitutional protections, where the state and federal courts and juries can be mobilized to resolve a few dollars in dispute, but where a colleague threatened with ruin looks in vain for similar facilities.[256]

As discussed above, the *sui generis* label results in the accused attorney being afforded due process measured by a lower standard than that afforded petty criminals. Respondents' lack of access to a substantial portion of ethics case precedents compounds the difficulties experienced in defending against ethics charges.

The recent disbarment by the supreme court of two prominent practitioners over the contrary recommendations of the DRB, occasioned strong dissenting opinions by Justice O'Hern, and sparked debate among bar officials and lawyers throughout the State concerning the fairness of disciplinary proceedings.[257] While it is crucial that disciplinary rules and procedures be facially fair and convey the impression of evenhandedness, it is equally critical that the discipline imposed thereunder be fair in fact. The system works best when the Bar, as well as the public, places complete confidence in it.

It is time for all concerned to recognize and appreciate that, regardless of the labelling of ethics proceedings as something other than penal, the sanctions imposed can be devastating to the respondent and his or her family. Notwithstanding the jurisprudential linguistics, discipline exacts punishment. Often, the adverse ramifications of public discipline far exceed the consequences of conviction in a petty disorderly persons matter. Yet the petty criminal is cloaked in constitutional armor while the accused attorney must struggle to forge a shield from meager resources.

The Supreme Court of New Jersey is the fulcrum in the ethics movement. Over the past fifteen years, the pendulum has swung in one direction in reaction to the public's negative perception of lawyers—a perception which was engendered by well publicized and

256 Norby, *supra* note 140, at 394.

257 *See* O'Brien, *Court Disbars Conway, Rigolosi in 4-1 Vote*, 119 N.J.L.J. 1077 (1987).

scandalous cases such as the notorious *nolo contendere* plea of Spiro T. Agnew and his subsequent disbarment.[258] Certainly, many of the reforms implemented by the New Jersey Supreme Court were needed and welcome, and New Jersey can be proud to be in the vanguard of continuing efforts to improve the reputation of the Bar and the prompt punishment of deserving offenders. The number of ethics grievances filed annually has decreased dramatically since 1983.[259] Having achieved greater accountability, it is time for the pendulum to swing back toward equanimity.

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[258] *See* Manning, *If Lawyers Were Angels: A Sermon in One Canon*, 60 A.B.A.J. 821, 822 (1974). *See also supra* note 4.

[259] *See* Rosenblum, *Grievances on Ethics Plummeting*, 121 N.J.L.J. 873 (1988) ("While the number of active attorneys in New Jersey has soared almost 36 percent since 1983, the amount of ethics grievances filed over the same time span has dropped 40 percent. . . .").