1998

The Revised Lawyer Discipline Process in Arkansas: A Primer and Analysis

Lawrence H. Averill Jr.

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THE REVISED LAWYER DISCIPLINE PROCESS IN ARKANSAS: A PRIMER AND ANALYSIS

Lawrence H. Averill, Jr.

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* The writing of this article was made possible by a 1998 Summer Research Grant from the UALR Law School. The author also expresses his sincere appreciation to James Neal, Executive Director, Committee on Professional Conduct. His insight and first-hand knowledge of the discipline procedures and ethical rules were extremely helpful in the interpretation of the relevant documents. Opinions expressed are the authors and do not necessarily coincide with the opinions of the Executive Director or the Committee on Professional Conduct. Also I want to express my appreciation for the assistance of Kim Allison, a third year law student at the UALR Law School. She gathered the data for some of the statistical charts and assisted in general in the preparation of this article.

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I. INTRODUCTION

Concern about wrongful and unethical conduct by lawyers has reached the point where most Arkansas lawyers are aware that there is a comprehensive and complex set of substantive rules propounded by the Arkansas Supreme Court regulating lawyer conduct called the ARKANSAS MODEL RULES OF PROFESSIONAL CONDUCT. Although these rules are enforced in a variety of ways, the principal enforcement method is through a specific discipline process designed for that purpose. In 1990 the Arkansas Supreme Court promulgated a set of procedures called the "PROCEDURES OF THE ARKANSAS SUPREME COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW." This is the procedural system within the substantive system. Its primary adminis-

1. One cannot assume in this world that every attorney knows about the ethical standards although it seems incredulous that any attorney would admit that he or she does not know.

2. ARKANSAS MODEL RULES OF PROFESSIONAL CONDUCT. [Hereinafter referred to as the MODEL RULES].

3. From the reports of Discipline Committee actions published in the Arkansas Lawyer, the four most cited MODEL RULES violated by lawyers are, in declining number, Rule 1:3 (Diligence), Rule 1.4(a) (Communication), Rule 1.1 (Competence), and Rule 8.4 (Nonclient lawyer misconduct). See Appendix A, infra at p. 72, for a chart indicating the MODEL RULES most frequently cited in discipline actions.

4. See In the Matter of Procedures of the Arkansas Supreme Court Committee Regulating Professional Conduct of Attorneys at Law, 792 S.W.2d 323 (Ark. 1990), amended by In re Procedures Regulating Professional Conduct of Attorneys at Law and Bd. of Law Examiners, 852 S.W.2d 316 (Ark. 1993). These rules were proposed by the Supreme Court Committee on Professional Conduct because they "are more easily understood and administered and cover some matters which were omitted from the existing rules." The Court reviewed the proposed rules and approved them on a trial basis effective immediately on July 16, 1990.

In 1998, the Supreme Court adopted a substantially revised version of the 1990 Procedures, apparently on a permanent basis. See In re Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, 963 S.W.2d 562 (Ark. 1998) [Hereinafter referred to as the Procedures]. These discipline procedures are issued by the Supreme Court as "a prerogative of the judicial department as one of the divisions of government" "to regulate and define the practice of law." Neal v. Wilson, 316 Ark. 588, 596, 873 S.W.2d 552, 557 (1994). The Court is given direct responsibility over regulation of the bar by Amendment 28 of the Arkansas Constitution: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." ARK CONST. amend. XXVIII.

5. For the national history of lawyer discipline procedures see Mary M. Devlin, The
trative feature is the Supreme Court Committee on Professional Conduct which serves as the enforcer of the MODEL RULES. These Procedures were substantially revised in 1998.

If there is common knowledge of the Rules of Professional Conduct, there is common ignorance about the procedural system that enwraps the MODEL RULES. Of even less cognizance is that the Arkansas Supreme Court significantly amended these procedural rules effective January 15, 1998. Although an adage states "ignorance is bliss," when ethical matters are involved, ignorance of the rules and the procedures may result in reprimands, suspensions or even disbarments.

Two phenomena deserve mention. First, an increasing number of complaints alleging lawyer misconduct are being filed with the Committee. Second, although some of the 1998 revisions were designed to clarify matters, a primary purpose of the revision was to tighten the procedures, restrict certain defense techniques, and strengthen the Committee’s authority to determine and sanction attorney misconduct. These stricter procedures were the result of the experience that the Discipline Committee had with discipline proceedings in the past.

_Devolution of Lawyer Disciplinary Procedures in The United States_, 7 GEO. J. LEGAL ETHICS 911 (1994). Ms. Devlin notes a common phenomenon of these procedures today:

Lawyer disciplinary agencies are directly or indirectly part of the judicial branch of government. The practice of law is regulated by the highest court of every state and the District of Columbia. This is in contrast to other professions and occupations which are typically regulated by agencies within the executive branch of state government.

_Id._ at 933 (footnotes omitted).

6. _See Procedures_, 963 S.W.2d at 564, § 1E(2). [Hereinafter referred to as the Committee].

7. _See supra_ note 4.

8. Its effective date is January 15, 1998, and it applies to all complaints against attorneys after that date which are within the purview of the Supreme Court Committee on Professional Conduct’s jurisdiction and authority. _See Procedures_, 963 S.W.2d at 563, § 1A. From this date it is said to apply to transfers to inactive status, and as appropriate to attorneys who have been suspended, disbarred or who surrendered their licenses.

9. _See Appendix B, infra_ at p. 73-74, for a chart of statistics of complaints and their resolution.

10. In the Committee’s petition to the Supreme Court, the Committee partially explained its purposes. It stated that the “experience in administering the lawyer regulatory system strongly suggested the need for substantial revision of the existing Procedures, both from a practical and a philosophical perspective.” Its stated goal under the revised procedures is to permit the Committee “to discharge its duties and responsibilities to the public and the legal profession in a fair, efficient and economic manner.” _Procedures_, 963 S.W.2d at 563. This article shows that the primary consequences of the revision will be to toughen the procedural process and increase sanctions meted out for misconduct. The revision also “regenderized” the rules by adding the reference to the feminine pronoun wherever the masculine pronoun is used.
Because “a word to the wise is sufficient,” the current situation commands that attorneys not only understand the Model Rules but also the Procedures that are set up to enforce them. They may become mandatorily exposed to them either as a respondent attorney or as a lawyer representing that attorney.

This article will present an overview which will describe how the most important discipline processes function under the Procedures followed by a comprehensive analysis which will examine the content of each of its sections.

II. OVERVIEW OF THE DISCIPLINE PROCEDURES IN ARKANSAS

A. Review of Ethical Regulation

Most lawyers operate with dual personalities about legal ethics: In the first persona, they want lawyers to act ethically and believe the Bar has an obligation to maintain strong ethical standards. The opposite persona loathes the thought of the discipline process. No lawyer, with good reason, wants to personally be confronted with a question of her or his ethics. Not only is fear of losing clients involved, but so are pride and self-respect. For the lawyer who sincerely thinks of her or himself as being an ethical lawyer, the mere citation, aside from any sanction, by the Committee is a traumatic event.

A sobering realization is that there is sometimes a wide gap between practice and the literal rules. Thus, the most careful lawyer might get caught-up in a discipline proceeding. Many lawyers, when they read about lawyers being disciplined, think “There but for the grace of God, go I.” The shock of the experience often causes lawyers to contest a sanction, such as a warning or a reprimand, to the ultimate extent even though the sanction only chastises the lawyer and does not directly affect the lawyer’s work as a suspension or disbarment would. Thus, the proceedings tend to be highly tense and contestive.

11. “‘RESPONDENT’ or ‘RESPONDENT ATTORNEY’ means an attorney against whom a formal complaint has been initiated notwithstanding the attorney’s failure to file a written response.” Id. at 564, § 1D(7).

12. The costs of being cited for ethical misconduct are significant: money to produce response; pay attorney fees if attorney is hired; the time of preparation; participation in the hearing and appeals; loss of reputation; maybe loss of license for a time or forever. These burdens should motivate all lawyers to strive very hard to avoid them. With some of the cases that go through the process, it is not clear that all lawyers are so careful.

13. The intensity of the matters is revealed by remarks of James Neal, Executive Director of the Committee, who lamented that his responsibility to “cite” lawyers for ethical violations would be similar to the police if everyone they arrested were lawyers. See Interview with James Neal, Executive Director of the Committee (July 13, 1998).
Generally, lawyers have obligations to clients, the general public, the legal system, and the legal profession.\footnote{See Model Standards for Imposing Lawyer Sanctions, Pt. II., Theoretical Framework (1992). The text of this work contains helpful discussions of the many diverse factors that must be weighed.} The ethical standards for meeting these obligations are found in the codes of ethics which attorneys are required to obey.\footnote{Judges are guided by a separate set of ethical rules and procedural system. \textit{See 1990 Ark. Code Jud. Conduct} (1990).} As previously mentioned, in Arkansas the relevant codes include the \textit{MODEL RULES OF PROFESSIONAL CONDUCT} and the \textit{Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law}. To enforce the \textit{MODEL RULES} the Courts established the Committee on Professional Conduct.\footnote{See \textit{Procedures}, 963 S.W.2d at 564, § 2A.} This committee is composed\footnote{All members of the Committee are selected by the Arkansas Supreme Court and serve for seven year terms. \textit{See id. at} 564, § 2A.} of seven members, of which five are lawyers\footnote{See \textit{id. at} 564, § 2A (One from each of the four Congressional Districts and one from the state at large). \textit{See id. at} 564, § 2A.} and two are laypersons.\footnote{See \textit{id. at} 564, § 2A. The nonlawyers are selected from the State at large. \textit{See id. at} 564, § 2A.} The Committee has authority to investigate all complaints against all licensed lawyers subject to the \textit{MODEL RULES}.\footnote{See \textit{Procedures}, 963 S.W.2d at 564, § 2C.} The Committee is served by an Executive Director and other staff persons. The Executive Director serves a crucial role in the administration of the \textit{Procedures}.

Although attorney ethics are enforced in many ways,\footnote{The ethical behavior of attorneys is scrutinized and regulated in several forums. Other forums and forms of lawyer regulation, in addition to the professional discipline processes, include malpractice actions, evidence issues concerning privilege, contempt of court, other court conditions such as loss of fees and fines, disqualification or removal of the attorney from the case, and litigation concerning agency and criminal law.} the principal direct enforcement method is through the Committee which serves as a quasi administrative/judicial organization. The Committee’s specific purpose is to evaluate allegations of attorney misconduct and decide what action, if any, should be taken concerning that conduct.\footnote{The proceeding before a discipline board has been described as a “relatively formal version of administrative law procedure.” Geoffrey C. Hazard, Jr. & Cameron Beard, Comment, \textit{A Lawyer’s Privilege Against Self-incrimination in Professional Disciplinary Proceedings}, 96 \textit{Yale L.J.} 1060, 1066 (1987).} The modern attorney disciplinary proceeding is neither wholly civil, criminal, nor administrative in nature, but is a hybrid, sharing aspects of each type of proceeding.\footnote{The United States Supreme Court propounded a few minimal constitutional requirements for administrative agency matters when there is a right to a hearing. There is a right to notice, to a statement of the charges, to submit evidence and argument, to appear in
nature of the attorney disciplinary proceeding: quasi-criminal, special civil, and *sui generis*. Arkansas has specifically adopted the *sui generis* approach.

The basic steps in the discipline process under the Procedures include:

1. Pre-formal complaint screening by the Executive Director;
2. Interim suspension is imposed immediately if an attorney is convicted of a felony or there is sufficient evidence the attorney misappropriated funds, or abandoned her or his active practice or poses a substantial threat of serious harm to the public or her or his clients;
3. Pre-formal complaint settlement by the Executive Director;
4. Notice and a statement of the formal complaint;
5. Informal settlement of formal complaints between attorney and the Executive Director;
6. The attorney’s right to use some discovery methods;
7. The right to have legal representation at personal expense;
8. The right to subpoena witnesses, present evidence, cross-examine adverse witnesses, and exclude evidence inadmissible under the rules of evidence.

person, to refuse to give self-incriminating testimony, and to sanctioning only if there is a modicum of believable evidence against the accused. See id. at 1063. See, e.g., *In re Ruffalo*, 390 U.S. 544 (1968) ("Disbarment, though designed to protect the public, is a punishment or penalty imposed on the lawyer"); thus the challenged attorney must be provided at least notice of charges against him); See Spevack v. Klein, 385 U.S. 511, 512-14 (1967) (concluding that a state cannot disbar an attorney for invoking the privilege to avoid producing financial records and testifying at a disciplinary hearing).


26. *See Procedures*, 963 S.W.2d at 566, § 3B(3), (4). *See* discussion notes 161-166, infra and accompanying text.

27. *See* id. at 574, § 7D(3); and *id.* at 578-79, § 8B. *See* discussion notes 294, 375-380, infra and accompanying text.

28. *See* id. at 566, § 3B(3). *See* discussion notes 165-166, infra and accompanying text.

29. *See* id. at 569, § 5E(1). *See* discussion notes 191-204, infra and accompanying text.

30. *See* id. at 579, § 8C. This procedure requires some admission of misconduct on the part of the lawyer. *See* id. at 579, § 8C. *See* discussion notes 381-387, infra and accompanying text.

31. *See* id. at 568, § 4B(1). Full discovery is allowed only for disbarment proceedings. For other proceedings before the Committee discovery is limited to depositions and subpoenas. *See Procedures*, 963 S.W.2d at 568, § 4B(1).

32. Not specifically mentioned but not prohibited and in practice clearly allowed.

33. The Committee has the power to summon witnesses and will assist the respondent attorney in requiring the presence of a witness if requested. Cross examination is permitted
(9) The requirement of proof by a preponderance of the evidence;\textsuperscript{34}

(10) In disbarment cases, a right to a full trial with all civil procedural safeguards;\textsuperscript{35} and,

(11) The right to judicial review of Committee and Circuit Court decisions.\textsuperscript{36}

B. Evaluating Attorney Misconduct

Evaluating attorney misconduct is not an easy task. Many variables are involved in each case. The first issue is whether the alleged conduct is unethical. Considering the vagaries of the MODEL RULES, generalities are impossible. Even if conduct is determined to be unethical, the decision concerning what sanction to impose is just as difficult. Generally,\textsuperscript{37} there is no specific sanction for any particular fact pattern. In a particular situation, the ultimate sanction often depends on the presence of aggravating or mitigating factors. In reviewing conduct, the mental state of the respondent lawyer is important. Another important issue is the extent of the injury, as defined by the type of duty violated and the extent of actual or potential harm. Finally, the likelihood or unlikelihood of future unethical behavior is relevant. Clearly, lawyer misconduct is not always easily categorized.

One court summarized the process as follows:

When an attorney is subject to disciplinary measures, five factors will be considered in determining the severity of the sanctions, although the list is not all-inclusive. The factors are:

(A) Nature of the misconduct involved;
(B) Need to deter similar misconduct;
(C) Preservation of dignity and reputation of the legal profession;
(D) Protection of the public; and
(E) Sanctions imposed in similar cases.\textsuperscript{38}

\textsuperscript{34} For formal discipline charges, reinstatements and transfers to and from inactive status, the standard of proof is by a "preponderance of the evidence." See Procedures, 963 S.W.2d at 568, § 5B.

\textsuperscript{35} See id. at 572, § 5K(1). See discussion notes 254-255, infra and accompanying text.

\textsuperscript{36} See id. at 572, § 5L. See discussion notes 258-269, infra and accompanying text.

\textsuperscript{37} There is the requirement of a disbarment proceeding if the attorney is convicted of a crime that offends Rule 8.4. See id. at 573, § 6B.

\textsuperscript{38} See, e.g., Culpepper v. Mississippi State Bar, 588 So. 2d 413 (Miss. 1991).
C. Complaint Process

Anyone can file a complaint or merely submit information raising attorney ethical misconduct. Generally, complaints are filed by aggrieved citizens and other interested persons. Most are filed by nonattorneys. A fill-in-the-blanks form is provided to assist in filing a proper complaint. The Executive Director is responsible for assisting persons in preparing a sufficient complaint.

The responsibility of reporting attorney misconduct goes beyond the concerns of injured person. The very rules of ethics which set the standards mandate that attorneys and judges report unethical conduct. Under MODEL RULE 8.3, an attorney has a duty to report another lawyer's misconduct. The MODEL RULE states:

39. In the definitions a "complainant" means the person(s) initiating a complaint, or the Committee when acting at its own instance or on behalf of another in initiating a complaint. See Procedures, 963 S.W.2d at 564, § 1E(3). Two kinds of complaints are contemplated under the Procedures. The generic "complaint" which is defined as "an inquiry, allegation, or information of whatever nature and in whatever form received by or coming to the attention of the Committee and concerning the conduct of a person subject to the jurisdiction of the Committee." See id. at 564 § 1E(4). This complaint is filed by the aggrieved citizen or other interested person. The other is the "formal complaint" which is defined as "a complaint directed to an attorney by the Committee, setting forth the alleged violation(s) of the MODEL RULES and informing the attorney of the right to file a written response." Id. at 564, § 1E(5). This is the Committee's initiation of proceedings and official charge against the attorney.

40. The only available data concerns written communications "from individual complainants which may be organizations, businesses, agencies and other entities, private and public." See Letter from James A. Neal, Executive Director, Committee on Professional Conduct, (April 6, 1998) (on file with author). See Appendix B, infra at p. 73-74. Other complaints, such as those for judicial officers, per curiam, and referrals from other jurisdictions, are not included in the data. Per curiam are orders filed with the Clerk by the Supreme Court which cite attorneys for having failed to file appeals in the proper or timely manner. The Committee treats per curiam as a written statement by a judge and thus equal to a formal complaint. See Procedures, 963 S.W.2d at 568, § 5A.

41. See Appendix C, infra at p. 75.
42. See Procedures, 963 S.W.2d at 566, § 3B(2).
43. MODEL RULES 8.3(a). Comment [1] states:

Self-regulation of the legal profession requires that members of the profession initiate a disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

In addition, as the Comment notes, the attorney who has knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office must inform the appropriate authority which in Arkansas is the Judicial Discipline and Disability Commission.
(a) A lawyer having knowledge that another lawyer has committed a violation of the Model Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

Although the MODEL RULES only require reporting offenses which raise a "substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer," they anticipate that there will be real enforcement. The meaning and scope of this Rule and its predecessor is one of controversy.

The judges’ ethical misconduct reporting requirement in the Arkansas Code of Judicial Conduct is similar in coverage to MODEL RULE 8.3(a) but significantly different in application. If a judge receives information

44. The rationale for the Rule is set out in Model Rule 8.3, Comment [3]: If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

45. A great deal of controversy sprang from the decision of the Illinois Supreme Court in In re Himmel, 533 N.E.2d 790 (Ill. 1988). The Court suspended a lawyer who possessed unprivileged information that his client’s first lawyer converted the client’s funds and who, instead of reporting this to disciplinary authorities, settled with the first lawyer and agreed not to initiate any criminal, civil, or disciplinary action against him. Several law journal articles analyzed and criticized this decision. See, e.g., Burwick, You Dirty Rat! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct, 8 GEO. J. LEGAL ETHICS 137 (1994); Marcotte, The Duty to Inform, 75 A.B.A. J. 17 (1989); Rotunda, The Lawyer’s Duty to Report Another Lawyer’s Unethical Violations in the Wake of Himmel, 1988 U. ILL. L. REV. 977.


46. See ARK. CODE JUD. CONDUCT § 3D(2). The provision states:

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall either communicate directly with respect to the violation with the lawyer who has committed the violation or report the violation to the Arkansas Supreme Court Committee on Professional Responsibility.
indicating "a substantial likelihood" that an attorney committed a violation of the MODEL RULES, the judge "should take appropriate action." In addition, if a judge has knowledge that an attorney committed an unethical act which raises a substantial question as to the attorney's honesty, trustworthiness, or fitness, the judge has a choice of either communicating directly with the attorney about his or her misconduct or reporting the violation to the Arkansas Supreme Court Committee on Professional Conduct.

Judges could play a crucial role in the discipline process of attorneys. They are clearly in a position to observe attorney conduct, compare it to general standards, and evaluate what constitutes incompetence or other unethical behavior. Unfortunately, not all judges have used their informed position to aggressively supervise ethical behavior by attorneys practicing before them. In a state like Arkansas where judges are elected, there is pressure to "get along." The nonmandatory reporting requirement of the Arkansas Code of Judicial Conduct might be either an example or a facilitator of this phenomenon.

Other reporting requirements are contained in the Procedures. The Procedures include a special provision requiring both prosecutors and judges to report to the Executive Director attorneys who in their cases are convicted, plead guilty or nolo contendere to a felony or class A misdemeanor or federal crime of equivalent seriousness. In addition, all trial judges must report to the

47. Judges have a similar responsibility in dealing with unethical judges:

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall either communicate directly with respect to the violation with the judge who has committed the violation or report the violation to the Judicial Discipline and Disability Commission.

48. One of the disconcerting aspects of Canon 3D(2) is the option for the judge to personally communicate with the unethical attorney rather than to report the conduct to the Committee. This option may make sense for unethical behavior that transpires in the course of litigation, e.g., the attorney who harasses a witness or overzealously seeks discovery. It would be inappropriate, however, in the situation where the unethical behavior directly affects clients or other third persons or is hidden from public view. Here the judge should report such conduct to the Committee. To do less is to circumvent the whole purpose of the Procedures. There is a story of the judge who discovered an attorney had misappropriated funds of a client and merely reprimanded the attorney and told him or her to return the money. This is not the action that should have been taken. Such conduct should have been reported to the Committee. Many an attorney has been disbarred for misappropriation of client funds. Certainly, an attorney should be publicly sanctioned for such conduct. A private reprimand is not sufficient.

49. See Procedures, 963 S.W.2d at 573, § 6A.
Committee any attorney who appeared in court under the influence of alcohol or drug.\textsuperscript{50}

D. Basic Discipline Processes

There are five separate and consecutive stages in the process. The case can end at the conclusion of any one of them. The first, called the informal review and resolution process, is controlled by the Executive Director. The second, called the formal discipline process, concerns complaints that are submitted to the Committee for review. The third, called the public hearing process, concerns a de novo hearing of the case before the Committee, with the Executive Director as prosecutor. The fourth, called the judicial process, concerns the Committee’s disbarment litigation that must take place in the Circuit Court. The fifth stage is the appellate processes which concerns appeals to the Arkansas Supreme Court from the decisions of the Committee or the Circuit Court in disbarment cases.

1. Informal Review and Resolution Process

Not all complaints concerning attorneys become disciplinary actions. The Executive Director is empowered to reject, reconcile and mediate complaints filed against an attorney or attorneys.\textsuperscript{51} The Executive Director may unilaterally terminate the proceeding if the director determines that the allegations of the complaint are beyond the Committee’s purview or they are inadequately supported by sufficient evidence.\textsuperscript{52} Although this decision is appealable to the Alternate Committee,\textsuperscript{53} there is no review or appeal from the Alternate Committee’s final decision.\textsuperscript{54}

The Executive Director is also able to informally try to reconcile the controversy.\textsuperscript{55} If the Executive Director believes a complaint indicates that only a mere misunderstanding or minor controversy exists between an attorney and the complainant, the Executive Director, in his or her discretion, may

\textsuperscript{50} See id. at 578, § 7N(2).
\textsuperscript{51} See id. at 566-67, § 3B(2)-(4).
\textsuperscript{52} See id. at 566, § 3B(4)(a).
\textsuperscript{53} See id. at 566-67, § 3B(4)(i)-(v). The appeal process is described in detail in this section. If by written ballot a majority of the Alternate Committee disapproves of the Executive Director’s determination, it may direct the Director to prepare a formal complaint. See id. at 567, § 3B(4)(iv). Whatever decision is made, the Executive Director is required to notify, in writing, the complainant of the results.
\textsuperscript{54} See id. at 567, § 3B(4)(b)(v).
\textsuperscript{55} See Procedures, 963 S.W.2d at 566, § 3B(3). See notes 165-166, infra, and accompanying text.
contact the attorney by telephone or letter advising the latter of the complaint.\textsuperscript{56} If the dispute is resolved in a manner that is mutually satisfactory, there are significant benefits to this procedure for the attorney and the complainant. For the attorney, resolution by this method frees the attorney from further scrutiny concerning the dispute, prevents the dispute from becoming a formal complaint,\textsuperscript{57} and secures confidentiality for the representation and the misconduct dispute. For the complainant, a satisfactory resolution diminishes the harm, eliminates the dispute, and avoids public exposure of the complaint and information about the representation.

The termination of proceedings for insufficiency and the reconciliation of minor disputes by the Executive Director constitute the resolution for the vast majority of complaints filed with the Committee.\textsuperscript{58}

2. \textit{Formal Discipline Process}

The formal discipline process begins with a "formal complaint." Formal complaints have various sources. Most formal complaints concern the decision by the Executive Director that the complaints set out substantively proper allegations, and the allegations are supported by sufficient evidence.\textsuperscript{59} Other formal complaints are issued automatically when a judge of a court of record submits to the Committee a signed written complaint concerning an attorney.\textsuperscript{60} Per curiam orders of the Supreme Court are treated similarly.\textsuperscript{61}

The formal complaint is directed to an attorney by the Committee, and it sets forth the alleged violation(s) of the \textit{MODEL RULES} and informs the attorney of the right to file a written response. Service of the complaint may be accomplished by personal service, or by "certified, restricted delivery, return receipt mail,"\textsuperscript{62} or if the previous two methods failed, by the Committee issuing a "warning order" and publishing it weekly for two consecutive weeks in a newspaper of general circulation.\textsuperscript{63} Failure to maintain an accurate and current address with the Clerk of the Supreme Court may cause the "warning order" to be issued which means that the existence of the complaint becomes public information.

\textsuperscript{56} See \textit{id.} at 566, § 3B(3). The complainant may request the Executive Director to contact the attorney. See \textit{id.} at 566, § 3B(3).
\textsuperscript{57} See \textit{id.} at 566, § 3B(3).
\textsuperscript{58} See Appendix B, \textit{infra}, at p. 73-74.
\textsuperscript{59} See \textit{Procedures}, 963 S.W.2d at 566, § 3B(2).
\textsuperscript{60} See \textit{id.} at 568, § 5A.
\textsuperscript{61} These are issued when exceptions to the Rules of Appellate Procedure are granted because of attorney error.
\textsuperscript{62} See \textit{Procedures}, 963 S.W.2d at 569, § 5E(2)(a).
\textsuperscript{63} See \textit{id.} at 569, § 5E(2)(c).
Generally, subsequent communications by the Committee to the attorney will be accomplished by regular mail to the address of record, the address of service, or the address furnished by the attorney.\textsuperscript{64} Notice of hearings and Committee sanctions must be sent by certified, return receipt mail, however.\textsuperscript{65}

The respondent attorney has twenty days to file a written response from the date of service of the formal complaint or the date of first publication of the warning order as the date of reference.\textsuperscript{66} If an attorney fails to respond within the time limitation, the Executive Director must circulate ballots to the Committee.\textsuperscript{67}

When an attorney receives a formal complaint from the committee, he or she should treat the matter with significant concern and immediate attention. Because the response that the attorney makes to the Committee is very important, an attorney should take great care in her or his response. The response should directly address the complaint made. Direct rebuttals are best if accurate but complete explanations of the situation are important if rebuttal is not appropriate. Combinations of rebuttal and explanation are useful also. In terms of documentation, the attorney should take great care that all relevant materials are filed with the response. Evidence issues of admissibility may arise at the hearing concerning documents if the document was not properly and timely filed.

The risks and burdens of failure to cooperate with a discipline proceeding have been increased under the 1998 Procedures. If a lawyer fails to respond to a formal complaint, the complaint is automatically forwarded to the Committee for a vote, all allegations in the complaint are treated as having been admitted by the lawyer, and the failure constitutes a separate and distinct ground for sanction, justifies enhancement of the sanction otherwise applicable, and extinguishes the right to a de novo hearing.\textsuperscript{68} These penalties are too great to pay. The clear proper course of action is to respond in a timely and complete manner.

The complainant is provided a copy of the respondent attorney’s response and may file a rebuttal, if wanted.\textsuperscript{69} Unless complainant’s rebuttal to the attorney’s response includes a verified allegation of one or more new violations of the MODEL RULES, no surrebuttal by the respondent attorney is necessary.

\textsuperscript{64} See id. at 569, § 5E(5).
\textsuperscript{65} See id. at 569, § 5E(5).
\textsuperscript{66} See id. at 569, § 5F(1). See note 205 infra., and accompanying text.
\textsuperscript{67} See Procedures, 963 S.W.2d at 569, § 5F(1). See notes 211-213, infra and accompanying text for a discussion of the internal operations of the Committee when dealing with formal complaints.
\textsuperscript{68} See Procedures, 963 S.W.2d at 571, § 51(1)-(4).
\textsuperscript{69} See id. at 570, § 5F(3). The rebuttal must be filed within seven days of the notice.
If new allegations are made, the respondent attorney has ten days from the date of service to file a written response.\textsuperscript{70}

After all complaints, responses, and surrebuttals are received the actual discipline review process begins.

3. \textit{Formal Settlement Procedure}

In each formal complaint the respondent attorney is informed that the attorney may seek a negotiated settlement of the dispute with the Executive Director.\textsuperscript{71} This settlement agreement requires at least some admission of misconduct. Any settlement agreement must set out the necessary factual circumstances, the admitted \textsc{model rules} violations, and the proposed sanction.\textsuperscript{72} All settlement agreements must then be submitted to and approved by vote of the Alternate Committee.\textsuperscript{73} Rejection causes the proceeding to continue; acceptance requires the chair of the primary Committee to file a letter of sanction with the Clerk.\textsuperscript{74}

Settlement of this nature can be negotiated at any time up to the announcement of the decision following a public hearing before the Committee.\textsuperscript{75}

4. \textit{Vote By Ballot}

If the Executive Director believes that the complaint is meritorious\textsuperscript{76} and informal procedures and settlement attempts have failed, the Director prepares a packet of all the relevant materials and sends a copy of it to each member of the Committee with a ballot.\textsuperscript{77} Each member of the Committee individually completes the ballot for each complaint submitted. By majority vote, the members of the Committee may —

1. Take no discipline action;\textsuperscript{78}
2. Issue a letter of warning;\textsuperscript{79}

\textsuperscript{70} See id. at 570, § 5F(3).
\textsuperscript{71} See id. at 579, § 8C(1)(a).
\textsuperscript{72} See id. at 579, § 8C(1)(a).
\textsuperscript{73} See \textit{notes} 149, 384 \textit{infra}, and accompanying text.
\textsuperscript{74} \textit{See Procedures}, 963 S.W.2d at 579, § 8C(1)(b).
\textsuperscript{75} See id. at 579, § 8C(1).
\textsuperscript{76} See id. at 579, § 8C(1).
\textsuperscript{77} See id. at 566, § 3B(2).
\textsuperscript{78} See \textit{id.} at 570, § 5G(1). \textit{See sample ballot, Appendix C, infra} at p. 75.
\textsuperscript{79} A "warning" letter is a nonpublic censure of the lawyer. \textit{See Procedures}, 963 S.W.2d at 570, § H1.
(3) Issue a letter of caution;\textsuperscript{80}
(4) Issue a letter of reprimand;\textsuperscript{81}
(5) Order of suspension for up to two years;\textsuperscript{82}
(6) Issue disbarment proceedings;\textsuperscript{83} or
(7) Order that a non-public hearing be held.\textsuperscript{84}

If the Committee does not reach a consensus by ballot, it will meet in executive session to resolve the matter or hold a nonpublic hearing to gather additional information.\textsuperscript{85}

5. Hearing Processes

One of the subtle procedural intricacies\textsuperscript{86} of the Procedures concerns the procedures for a public hearing after the Committee finds that the attorney violated the MODEL RULES and announces its initial sanction. When an attorney has been sanctioned with a letter of caution, reprimand, or an order of suspension, a public hearing to dispute the determination or sanctions, or both, is not automatic.\textsuperscript{87} From the attorney’s standpoint a hearing is essential if the attorney desires to (1) contest the Committee’s determination or sanctions, or both, or (2) preserve the right to appeal the Committee’s decision, if necessary, or (3) both. In order to receive a hearing, the respondent attorney must request a hearing, in writing, within twenty days of the service of the letter or order.\textsuperscript{88}

If properly requested, a hearing is automatic, de novo and public.\textsuperscript{89} The complainant and the respondent attorney are given notice of the hearing date.\textsuperscript{90}

\textsuperscript{80} A letter of “caution” is a public censure of the lawyer. \textit{See Procedures}, 963 S.W.2d at 574, \S 7D(4). \textit{See} notes 295, 305-306 \textit{infra}, and accompanying text.
\textsuperscript{81} A letter of reprimand is a public censure of the lawyer. \textit{See Procedures}, 963 S.W.2d at 574, \S 7D(4). \textit{See} notes 295, 302-304 \textit{infra}, and accompanying text.
\textsuperscript{82} Suspension is an order by the Committee restricting the attorney from the practice of law for a fixed period of time. \textit{See Procedures}, 963 S.W.2d at 573, \S 7D(2). \textit{See} notes 293, 300-301 \textit{infra}, and accompanying text.
\textsuperscript{83} Disbarment is the termination of the lawyer’s privilege to practice law and removal of the lawyer’s name from the list of licensed attorneys. \textit{See Procedures}, 963 S.W.2d at 573, \S 7D(1). \textit{See} notes 98-114, 292, 298-299 \textit{infra}, and accompanying text.
\textsuperscript{84} \textit{See Procedures}, 963 S.W.2d at 570, \S 5H(4). \textit{See} note 227 \textit{infra}.
\textsuperscript{85} \textit{See} notes 226-227 \textit{infra}, and accompanying text.
\textsuperscript{86} \textit{See} notes 236-244 \textit{infra}, and accompanying text.
\textsuperscript{87} \textit{See Procedures}, 963 S.W.2d at 570, \S 5H(3).
\textsuperscript{88} \textit{See} id. at 570, \S 5H(3).
\textsuperscript{89} \textit{See Procedures}, 963 S.W.2d at 571, \S 5J(1). The Procedures require that the ballots be destroyed and that the Committee is to hear the complaint de novo.
\textsuperscript{90} \textit{See Procedures}, 963 S.W.2d at 571, \S 5J(2). Requests of changes in a set hearing date are to be made in the discretion of the Committee Chairperson. \textit{See Procedures}, 963 S.W.2d at 571, \S 5 J(3). Pleadings are given a title and the case is called “In re (Attorney’s Name).”
The Executive Director may attend, and at the request of the Committee, present witnesses and evidence concerning the allegations of unethical conduct. The Committee has the authority to subpoena witnesses and even grant immunity if necessary. The respondent attorney may present evidence and call witnesses. There may be rebuttal and surrebuttal.

After the hearing, the Committee meets in executive session to deliberate its decision in the case and announces its collective decision immediately. The complainant and attorney are informed of the decision and the specific action taken.

E. Confidentiality

Under the Procedures and subject to specific exceptions, all matters, materials, and proceedings before the Committee which relate to complaints against attorneys based on a violation of the Rules are “absolutely privileged.”

Certain matters are not confidential and permit disclosure of information in discipline proceedings. The records of “public hearings” are public information. The respondent attorney may require or “waive, in writing,” the confidentiality of any information that the Committee received or that it receives concerning the complaint about the attorney. The complainant is also entitled to receive respondent attorney's affidavit of response and to reply to it if desired.

Complaints that are rejected by the Executive Director, informal settlement arrangements, and warning letters from the committee, as well as dismissed formal complaints by the Committee, remain confidential. On the other hand, the Committee’s letter of caution, reprimand and suspension are filed in the Clerk of the Arkansas Supreme Court office and are public records. Decisions to initiate disbarment proceedings are also filed with the Clerk and become public records. In disbarment proceedings the Committee may release

91. See Procedures, 963 S.W.2d at 567, § 3B(5). The Court Reporter administers oaths. See id. at 567, § 3B(6).
92. See id. at 565, § 2C(6), (7).
93. See id. at 572, § 5J(5).
94. See id. at 572, § 5J(5).
95. See id. at 567-68, § 4A(1)-(2).
96. See Procedures, 963 S.W.2d at 568, § 4B(4)(a)-(h). The Procedures provide, however, “Except as necessary to the Committee’s discharge of its responsibilities, terms and conditions of probation and reports related thereto which involve the lawyer's mental, physical or psychological condition shall be confidential.” Procedures, 963 S.W.2d at 574-75 § 7E(7).
97. See Procedures, 963 S.W.2d at 571-72, § 5J.
98. See Procedures, 963 S.W.2d at 568, § 4B(2).
99. See Procedures, 963 S.W.2d at 568, § 4B(6).
any information deemed necessary for the purpose of prosecuting the disbarment. Basically, disbarment proceedings are full litigation and the normal nonconfidentiality rules concerning litigation are applicable.

F. Nature of the Disbarment Procedure

Disbarment is the termination of the lawyer’s privilege to practice law and removal of the lawyer’s name from the list of licensed attorneys. Thus, disbarment is the most serious sanction that can come out of a discipline case. It has the greatest consequences to the attorney. The attorney’s license is removed and it probably will never be reinstated. The attorney is effectively being permanently barred from a line of employment.

1. Due Process

The significance of a disbarment proceeding was noted one hundred and thirty years ago in *Randall v. Brigham*, when the United States Supreme Court stated:

"Due process of law," in the case of attorneys-at-law, is held to require, whatever may be the form of process or mode of procedure, and for whatever cause (invariably limited to causes involving moral or professional delinquency), that there shall be a sufficient charge or allegation in writing, duly filed of record in court, specifying the particular offence or matter complained of (usually supported by the oath of the party preferring the accusation); and, unless waived of record, written notice served on the attorney to show cause why he should not be removed from his office, or his name stricken from the roll of attorneys, for the offence or matter complained of; and which notice should specify the time when, the place where, and the tribunal before which he is to appear and answer. The attorney is entitled to a day in court, on which to make defense, and the trial is to be conducted like all other trials in summary proceedings at the common law, and the attorney convicted only if the proofs shall establish or conform to the allegations.

Thirty-five years ago, the Arkansas Supreme Court explained the relationship between a lawyer’s responsibility and the lawyer’s rights to due process. The Court in *Whisitt v. Bar Rules Committee*, stated:

100. See Procedures, 963 S.W.2d at 568, § 4B(3).
101. See Procedures, 963 S.W.2d at 573, § 7D(1).
102. 74 U.S. (7 Wall.) 523 (1868) (Mere).
103. Id.
104. 223 Ark. 860, 269 S.W.2d 699 (1954).
The privilege of practicing law is a lofty and valuable one that should be terminated only after a cautious and sedulous study of the facts. Courts are properly reluctant to disbar or suspend a practicing attorney. On the other hand, the Judiciary and members of the legal profession are duty bound to see that the honor and integrity of the Bench and Bar are maintained free from tarnish and condemnation. When one is accorded the high honor of being admitted to the bar, he is thereby dedicated to the all important task of maintaining the time honored ethics of the profession and failing in this, he should expect to make recompense for his transgressions.

Again, the court stated in *Ex Parte Marion Burton*: “A lawyer's right to practice his profession is a valuable privilege, conferred in the first instance by this court and not to be taken from him without notice and a hearing as provided by law.”

Initiation of disbarment proceedings is appropriate when it is found that a lesser sanction would be inappropriate considering the "serious misconduct" by the attorney. Thus, the drastic remedy of disbarment or other significant sanctions should result only after a thorough and meaningful hearing on a multiplicity of issues. Throughout this process the allegedly unethical attorney must have a meaningful opportunity to present substantial mitigating factors that might negate or reasonably explain the serious misconduct or criminal aspect of his or her conduct.

2. *Distinct Disbarment Procedure*

Initiation of disbarment proceedings is appropriate when it is found that a lesser sanction would be inappropriate considering the "serious misconduct" by the attorney. The Committee may impose immediate suspension of the lawyer from practice upon institution of the disbarment action. The attorney is given the right to request a hearing over the justification for the interim suspension. Interim suspensions are new to the procedures and are powerful

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105. 237 Ark. 441, 373 S.W.2d 409 (1963).

106. *See Procedures*, 963 S.W.2d at 574, § 7E(1).

107. *See Procedures*, 963 S.W.2d at 574, § 7E(1). The written notice to institute a disbarment proceeding does not need to state specific findings as to the misconduct or Model Rule violated. *See id.* at 574, § 7E(1).


sanctions. Actions for disbarment are said to confront the overall fitness of a lawyer to hold a license to practice law.\textsuperscript{110}

When the complaint against the attorney is based on a conviction of a felony or a crime which also violates \textit{MODEL RULE} 8.4(b), institution of disbarment proceedings is mandatory.\textsuperscript{111} In this situation the Committee may also suspend an attorney from the privilege of law practice pending completion of the discipline process.\textsuperscript{112}

Under the \textit{Procedures}, when disbarment is the recommended or mandatory sanction, the proceeding instantly changes from an administrative adjudication to full-fledged judicial litigation.\textsuperscript{113} The Executive Director or surrogate\textsuperscript{114} acts as plaintiff and the respondent attorney the defendant.\textsuperscript{115} The Arkansas Rules of Civil Procedure are applicable and the case is tried without a jury.\textsuperscript{116}

The disbarment proceeding is a full judicial type trial subject to discovery, etc. At the trial's conclusion, the judge decides the merits of the complaint and orders the appropriate sanction, if any. The judge may find the evidence fails to sustain the complaint and dismiss the case, or mete out a caution, reprimand, suspension, or disbarment.\textsuperscript{117}

G. Appeals Processes

The \textit{Procedures} include two separate appeals procedures. One from a decision of the Committee to sanction the attorney; the other from a decision of the Circuit Court concerning a disbarment case. In both situations, the Arkansas Supreme Court determines the result.

1. \textit{Committee Decisions and Sanctions}

The respondent attorney may appeal the findings by the Committee that the attorney violated the \textit{MODEL RULES} and the sanction therefor.\textsuperscript{118} The

\textsuperscript{110} \textit{See Procedures}, 963 S.W.2d at 574, § 7E(1).
\textsuperscript{111} \textit{See Procedures}, 963 S.W.2d at 573, § 6B(1).
\textsuperscript{112} \textit{See Procedures}, 963 S.W.2d at 573, § 7D(3), E(3).
\textsuperscript{113} The written notice to institute a disbarment proceeding does not need to state specific findings as to the misconduct or the Model Rule violated. \textit{See Procedures}, 963 S.W.2d at 574, § 7E(1).
\textsuperscript{114} The Committee may retain independent counsel for the case. \textit{See Procedures}, 963 S.W.2d at 572, § 5J(7).
\textsuperscript{115} \textit{See Procedures}, 963 S.W.2d at 572, § 5K(1).
\textsuperscript{116} \textit{See id.}, 572, § 5K(1).
\textsuperscript{117} \textit{See Procedures}, 963 S.W.2d at 572, § 5K(2).
\textsuperscript{118} \textit{See Procedures}, 963 S.W.2d at 572, § 5L(1). Neither the complainant nor the Executive Director may appeal any part of the Committee's decision whether for or against their
appeal is directly to the Arkansas Supreme Court. The respondent attorney is the appellant and the Executive Director is the appellee and represents the Committee. The Supreme Court reviews decisions of the Committee "de novo on the record." The Court held that Committee action must be affirmed unless it is clearly against the preponderance of the evidence. In addition, the Committee's factual determinations must be sustained unless clearly erroneous.

2. Appeals from Circuit Court Decisions and Sanctions

If adverse to their interests, both the respondent attorney and the Committee may appeal a decision of the Circuit Court in disbarment actions. The normal rules governing appellate procedure in civil cases apply in appeals from a Circuit Court.

III. ANALYSIS OF THE REVISED PROCEDURES

A. Section 1. Scope

The Procedures apply to every attorney who is now or hereafter licensed to practice law in the State of Arkansas. The Committee's jurisdiction extends to all lawyers in active, inactive or suspended status. Any attorney who violates any provision of the MODEL RULES, or of these Procedures, is subject to the Committee's authority.

contentions.

119. See id. at 572, § 5L(1).
120. See Procedures, 963 S.W.2d at 572, § 5L(3). No new evidence or testimony is permitted to be introduced, however. See id. at 572, § 5L(3).
122. See id. at 448.
123. See Procedures, 963 S.W.2d at 572, § 5L(2).
124. See Procedures, 963 S.W.2d at 572, § 5L(4).
125. See Procedures, 963 S.W.2d at 563, § 1A.
126. See id. at 563, § 1A.
127. See Procedures, 963 S.W.2d at 564, § 2C(1). If requested by a federal judge under the Uniform Federal Rules of Disciplinary Enforcement, the Committee may act as the discipline agency in federal disciplinary actions. See Procedures, 963 S.W.2d at 565, § 2C(10). The Executive Director acts as counsel in such proceedings.

In Section 7, concerned with the scope and meaning of the applicable sanctions the procedures say that it is grounds for discipline to violate or attempt to violate not only the MODEL RULES but also "any other rules of this jurisdiction regarding professional conduct of lawyers." Procedures, 963 S.W.2d at 573, § 7A(1). We know that "other rules" include the Procedures. It is not clear whether this expands the subject matter jurisdiction of the Committee beyond the MODEL RULES and the Procedures. There is also no explanation of what other laws
1. **Purpose**

The purpose of the *Procedures* is to provide a forum and procedure in order to regulate the professional conduct of attorneys at law.¹²⁸

2. **Rules of Professional Conduct Adopted.**

The substantive jurisdiction of the Committee covers all violations by any attorney of the Arkansas version of the *MODEL RULES*.¹²⁹

In a new provision, the *Procedures* state that discipline proceedings are neither civil or criminal but are *sui generis*. The *sui generis* characterization emphasizes the unique nature of the proceeding and inferentially disassociates itself with either the civil or criminal model.¹³⁰

Courts using the term *sui generis* usually distinguish the disciplinary proceeding from both the civil and criminal action. As to the civil, these courts recognize that the disciplinary proceeding is not maintained by a private individual and does not involve two parties, "one seeking damages or equitable relief from another." As to the criminal, these courts note that punishment is not the goal of disciplinary proceeding, nor is the action "commenced by the state to redress criminal wrongs by imposing sentences of imprisonment."¹³¹

3. **Definitions**

In addition to the original definitions including "clerk,"¹³² "committee,"¹³³ "complainant,"¹³⁴ "complaint,"¹³⁵ "formal complaint,"¹³⁶ and "MODEL..."
the amended Procedures include definitions of "serious crime," "substantial," and "unavoidable circumstances." These new definitions have significant importance because they attempt to give meaning to several concepts that have plagued the Committee in its discipline determinations in the past.

B. Section 2. Committee

1. Authority and Powers

Under the revised Procedures, the Committee is granted rule making authority. Any rules adopted must concern the internal operating rules and policies of the Committee. They should facilitate the performance of the Committee's "duties, responsibilities, and administrative functions." Because there are some unanswered issues in the Procedures, regulations could be informative and helpful to those who are involved in a discipline case.

963 S.W.2d at 564, § 1E(3).

135. "Complaint' means an inquiry, allegation, or information of whatever nature and in whatever form received by or coming to the attention of the Committee and concerning the conduct of a person subject to the jurisdiction of the Committee..." See Procedures, 963 S.W.2d at 564, § 1E(4).

136. "Formal complaint' means a complaint directed to an attorney by the Committee, setting forth the alleged violation(s) of the MODEL RULES and informing the attorney of the right to file a written response..." See Procedures, 963 S.W.2d at 564, § 1E(5). It also includes signed written complaint concerning an attorney from a judge of a court of record. See Procedures, 963 S.W.2d at 568, § 5A.

137. "MODEL RULES' means the MODEL RULES of Professional Conduct of the American Bar Association, as amended, and any statutory provisions, or rules adopted by the Arkansas Supreme Court regulating the professional conduct of attorneys at law..." See Procedures, 963 S.W.2d at 564, § 1E(5).

138. "Serious crime' means any felony or any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a 'serious crime..." See Procedures, 963 S.W.2d at 564, § 1E(8).

139. "Substantial' when used for the purposes of these procedures in reference to degree or extent, means beyond mere suspicion or conjecture and of sufficient force and character to compel a conclusion one way or another with reasonable and material certainty and precision..." See Procedures, 963 S.W.2d at 564, § 1E(9).

140. "Unavoidable circumstances' means circumstances not attributable to negligence, carelessness, fault, or the lack of diligence on the part of the respondent attorney..." See Procedures, 963 S.W.2d at 564, § 1E(10).

141. See Procedures, 963 S.W.2d at 564, § 2A.

142. See id. at 564, § 2A.

143. Areas that merit regulation include an explanation of what should be included in an
How the Committee is going to go about adopting rules is not explained. A model for administrative rulemaking can be found in the Arkansas Administrative Procedure Act\(^\text{144}\) but the Committee will probably use a less formal procedure.

In regard to the discipline process, the Committee is given broad court-like authority to carry out its responsibilities.\(^\text{145}\) Of particular importance is the authority under the seal of the Committee to issue summonses and subpoenas "in the same manner as is provided for civil process pursuant to the Arkansas Rules of Civil Procedure."\(^\text{146}\) These issuances may command the presence or attendance of parties and witnesses for both investigative and testimonial purposes. In addition, the Committee may require "the production of documents, books, records, or other evidence."\(^\text{147}\)

The investigative and testimonial processes are in the nature of a grand jury investigation. Subpoenas issued under the Procedures must "clearly indicate that the subpoenas are issued in connection with a confidential investigation."\(^\text{148}\) Persons and witnesses who appear before the Committee for the purpose of testimony, or in furtherance of an investigation must keep the investigation confidential. A breach of confidentiality is "regarded as contempt of the Supreme Court." Contempt may bring incarceration, fines, or both. If a lawyer is in contempt, it constitutes grounds for discipline under the Procedures. Consulting with legal counsel in regard to the subpoena is not a breach of confidentiality. Once the proceeding concerns a public hearing, the confidentiality does not apply to applicable subpoenas.

Finally, the Committee may seek immunity from criminal prosecution for a reluctant witness, using current Arkansas Code procedures.\(^\text{149}\)

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\(^{144}\) See ARK. CODE ANN. §§ 25-15-203 to -215 (1987). The Court and its "agencies" have not had a tendency to use the AAPA.

\(^{145}\) To protect the members, officers, employees and agents of the Committee and to facilitate their service, absolute immunity from suit or action is granted to them, to the fullest extent of judicial immunity in Arkansas, for their activities in discharge of their duties. See Procedures, 963 S.W.2d at 565, § 2D. Similarly, but excepting perjury and false swearing, complainants, respondents and witnesses are immune from suit for all communications with the Committee and made during the disciplinary proceeding. See Procedures, 963 S.W.2d at 572-73, § 5N.

\(^{146}\) See Procedures, 963 S.W.2d at 565, § 2C(6).

\(^{147}\) See id. at 565, § 2C(6).

\(^{148}\) See Procedures, 963 S.W.2d at 565, § 2C(6).

The Alternate Committee

Under the revised Procedures an Alternative Committee is established for various purposes including providing (1) alternative members to the primary Committee when one or more of the latter are unable or disqualified from participating in a matter;\textsuperscript{150} (2) a forum for a complainant who wants to appeal a decision by the Executive Director “that the allegations of the complaint fall outside the purview of the Committee or that the allegations are not supported by sufficient evidence to file a formal complaint”\textsuperscript{151} and (3) a forum for reviewing, i.e., approving or rejecting, any negotiated settlement between the respondent attorney and the Executive Director.\textsuperscript{152} The Alternate Committee must have the same composition as the Committee, geographically and lawyer/nonlawyer wise.\textsuperscript{153} While serving as an alternate member of the Committee, Alternate Committee members have all the authority, powers, immunities and entitlements as the Committee members possess.\textsuperscript{154}

C. Section 3. Executive Director

Under the Procedures, the Executive Director serves in several capacities. The Director performs the following functions:

(1) Receives all complaints against any member of the Bar;\textsuperscript{155}

(2) Assists complainants, who have supportable allegations of attorney misconduct, with preparing and completing formal complaints;\textsuperscript{156}

(3) Assigns docket numbers to formal complaints;\textsuperscript{157}

(4) Serves as a filter of complaints with authority to reject or reconcile complaints prior to submission to the Committee;\textsuperscript{158}

(5) Prepares complaints that have “allegations supported by sufficient evidence” for submission to the Committee;\textsuperscript{159}

(6) By request of the Committee, acts as counsel in presenting testimony and other evidence at Committee hearings.\textsuperscript{160}

\textsuperscript{150} See Procedures, 963 S.W.2d at 566, § 2F(2).
\textsuperscript{151} See Procedures, 963 S.W.2d at 566, § 3B(4).
\textsuperscript{152} See Procedures, 963 S.W.2d at 579, § 8C.
\textsuperscript{153} See Procedures, 963 S.W.2d at 566, § 2F(1) and (2).
\textsuperscript{154} See Procedures, 963 S.W.2d at 566, § 2F(2).
\textsuperscript{155} See Procedures, 963 S.W.2d at 566, § 3B(1).
\textsuperscript{156} See Procedures, 963 S.W.2d at 566, § 3B(2).
\textsuperscript{157} See id. at 566, § 3B(2).
\textsuperscript{158} See Procedures, 963 S.W.2d at 566, § 3B(2)-(3).
\textsuperscript{159} See Procedures, 963 S.W.2d at 566, § 3B(2).
\textsuperscript{160} See Procedures, 963 S.W.2d at 567, § 3B(5).
(7) May attend Committee hearings;\textsuperscript{161}

(8) Administers oaths;\textsuperscript{162} and,

(9) Manages the administrative officer for the office and the Committee.\textsuperscript{163}

One of the most significant functions of the Executive Director is her or his authority to reject, reconcile and mediate complaints filed against the attorney.\textsuperscript{164} If the Executive Director determines that the allegations of the complaint "fall outside the purview of the Committee" or they are "not supported by sufficient evidence to file a formal complaint," the director may unilaterally terminate the proceeding.\textsuperscript{165} Although this decision is appealable to the Alternate Committee,\textsuperscript{166} there is no further review or appeal from the Alternate Committee's final decision.\textsuperscript{167}

The Executive Director is also able to informally try to reconcile the controversy.\textsuperscript{168} If the following detailed conditions are met, the Executive Director may contact the attorney by telephone or letter advising the attorney of the nature of the complaint. The conditions are met if the Executive Director believes:

(1) The complaint "contains information indicative of a misunderstanding or controversy between an attorney" and the complainant, and

(2) "The best interests of the integrity of the profession and the valid concerns of the complainant would be served by reconciliation or communication between the parties."\textsuperscript{169}

Most complaints filed with the Executive Director are either rejected as insufficient, etc., or are reconciled.\textsuperscript{170}

\textsuperscript{161} See id. at 567, § 3B(5).
\textsuperscript{162} See Procedures, 963 S.W.2d at 567, § 3B(6).
\textsuperscript{163} See Procedures, 963 S.W.2d at 567, § 3B(7).
\textsuperscript{164} See Procedures, 963 S.W.2d at 566, § 3B(2)-(4).
\textsuperscript{165} See id. at 566, § 3B(4)(a).
\textsuperscript{166} See id. at 566, § 3B(4)(a). The appeal process is described in detail in this section. If by written ballot a majority of the Alternate Committee disapproves of the Executive Director's determination, it may direct the Director to prepare a formal complaint. \textit{See id.} at 567, § 3B(4)(b)(iii). Whatever decision is made, the Executive Director is required to notify, in writing, the complainant of the results.
\textsuperscript{167} See Procedures, 963 S.W.2d at 567, § 3B(4)(b)(v).
\textsuperscript{168} See Procedures, 963 S.W.2d at 567, § 3B(3).
\textsuperscript{169} See id. at 566, § 3B(3).
\textsuperscript{170} See Appendix B, \textit{infra} at p. 73-74.
D. Section 4. Confidentiality and Records

1. Communications Confidential

The Procedures take great care concerning the confidentiality of the proceedings and the accourtermental record. The Procedures establish the rule that, subject to specific exceptions, all matters, materials, and proceedings before the Committee, which relate to complaints against attorneys based on a violation of the Rules, are "absolutely privileged."\textsuperscript{171} The revision did not alter these provisions.

Confidentiality of attorney discipline proceedings is a much debated, but often not fully understood, issue. Generally, attorneys argue in favor of confidentiality. Two justifications are typically given: Confidentiality not only protects the lawyer from the disclosure of unfounded and unsubstantiated charges;\textsuperscript{172} but also the complaining client from public disclosure of confidences revealed in the client-attorney relationship.\textsuperscript{173} Media entities and some

\begin{itemize}
\item \textsuperscript{171} The provision states:
\begin{enumerate}
\item All communications, complaints, formal complaints, testimony, and evidence filed with, given to or given before the Committee, or filed with or given to any of its employees and agents during the performance of their duties, that are based upon a complaint charging an attorney with violation of the MODEL RULES, shall be absolutely privileged; and
\item All actions and activities arising from or in connection with an alleged violation of the MODEL RULES by an attorney licensed to practice law in this State are absolutely privileged.
\end{enumerate}
\end{itemize}

\begin{itemize}
\item Procedures, 963 S.W.2d at 567-68, § 4A(1)-(2).
\item Cardozo might have said it best:
\begin{quote}
\[\text{In conceding to the court a power of inquisition we put into its hands a weapon whereby the fair fame of a lawyer, however innocent of wrong, is at the mercy of the tongue of ignorance and malice. Reputation in such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored . . . . Dangers are indeed here, but not without remedy. The remedy is to make the inquisition a secret one in its preliminary stages.}\]
\end{quote}
\item People ex rel. Karlin v. Culkin, 162 N.E. 487, 492 (N.Y. 1928).
\item An objective evaluation of the arguments in the debate is difficult because it depends on information not available and falls in great respect into the category of opinion. The arguments for each side have a counter argument that is just as reasonable. Whereas proponents of nonconfidentiality argue that openness will improve the public's confidence in the Bar, opponents contend that greater exposure for mere and frivolous allegations of unethical conduct will increase the public's distrust in the bar and the legal system. Clearly both contentions have some merit and some sincere advocates. There are other more technical problems with both systems. Whereas openness may put more ethical grievances before the public eye, it eliminates the benefit of the private reprimand that had the potential for resolving less significant ethical violations more efficiently and to all parties satisfaction. In addition, because openness is not global and has its own limitations (e.g., may depend on the filing of a formal complaint), confidentiality may creep back into the process by manipulation of the limitations. See Mark E. Hopkins, Note, Open Attorney Discipline: New Jersey Supreme Court's Decision to Make
public interest groups argue for openness. They contend that since criminal prosecutions and civil actions are public, lawyer discipline proceedings also should be public matters.

In recent years most state supreme courts have rejected the bar's arguments and have succumbed to the media pressure for openness. A majority of states restrict confidentiality more than in the past. Arkansas remains one of the minority that have retained confidentiality for formal complaints prior to sanction by the committee notwithstanding the media attention against it.

2. Exceptions

The exceptions are a curious combination of restrictions on information gathering by the respondent attorney and permissible information dissemination.

Whereas in the 1990 version, discovery under the Arkansas Rules of Civil Procedure was available to both the Committee and the respondent attorney after a formal complaint was designated for public hearing, under the revised Procedures, full discovery is allowed only for disbarment proceedings. For other proceedings, discovery is limited to depositions and subpoenas. This change is intended to limit the procedural activities of the respondent attorney. The fear is that the respondent attorney might try to use discovery to excess in order to intimidate the complainant, harass the Committee and generally bog


174. As indicated in note 170, supra, openness is a matter of degree and interpretation.

175. Prior to 1970, confidentiality was the rule for attorney disciplinary processes in almost every state prior to 1970. See American Bar Association Center for Professional Responsibility Table on Public Status of Disciplinary Proceedings. By recent times the majority has shifted and most states open discipline proceedings at an earlier stage than under prior law with most states opening up proceedings at the formal complaint stage or when probable cause is found. See Mark E. Hopkins, Note, Open Attorney Discipline: New Jersey Supreme Court's Decision to Make Attorney Disciplinary Procedures Public — What it Means to Attorneys And to The Public, 27 RUTGERS L.J. 757, 758 (1996).

176. With no public comment period for the new Procedures, the Supreme Court avoided a major media blast about the retention of confidentiality.


179. See id. at 568, § 4B(1).
down the proceedings. It has little effect on the Committee because its investigative powers are granted specifically in the Procedures and thus the Committee does not rely on the Rules of Civil Procedure.\textsuperscript{180}

The Procedures then itemize certain circumstances that permit disclosure of information concerning the discipline proceeding.\textsuperscript{181} The records of "public hearings"\textsuperscript{182} are public information.\textsuperscript{183} Only the record of the proceeding is covered and thus other information and documents not introduced at the hearing are not public and remain confidential. By contrast, in disbarment proceedings the Committee may release any information deemed necessary for the purpose of prosecuting the disbarment.\textsuperscript{184} Whereas nondisbarment proceedings are internal with the Committee and thus carry an aura of confidentiality, disbarment proceedings are full litigation and the normal nonconfidentiality rules concerning litigation are applicable.

The respondent attorney may require the Committee to disclose all information in the Committee's possession concerning the present or earlier complaint against the attorney.\textsuperscript{185} Alternatively, the alleged unethical attorney may "waive, in writing," the confidentiality of any information that the Committee received or that it receives concerning the complaint about the attorney.\textsuperscript{186} These two provisions emphasize that the confidentiality rule is primarily for the benefit of the respondent attorney and has no other systemic justification. Any argument that confidentiality is necessary in order to protect

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{180} See Procedures, 963 S.W.2d at 564-65, § 2C.
\item \textsuperscript{181} A litany of situations are listed explaining when and what the Committee can reveal as a matter of course. This includes the release of information for statistical purposes, communications with discipline agencies in other jurisdictions, State Board of Law Examiners, the Committee on the Unauthorized Practice of Law; the Arkansas Client Security Fund Committee, the Commission on Judicial Discipline and Disability, any other committee, commission, agency or body within Arkansas empowered to investigate, regulate or adjudicate matters incident to the legal profession when such information will assist in the performance of those duties; any agency, body, or office of the federal government or Arkansas charged with responsibility for investigation and evaluation of a lawyer's qualifications for appointment to a governmental position of trust and responsibility; pursuant to giving notice to the respondent attorney, and to report to the appropriate prosecutorial authority information received of substantial evidence of criminal conduct by any party which would constitute a felony or Class A misdemeanor under Arkansas law, or the federal equivalent if the conduct is not within Arkansas' jurisdiction. See Procedures, 963 S.W.2d at 568, § 4B(4)(a)-(h). The Procedures provide, however, "Except as necessary to the Committee's discharge of its responsibilities, terms and conditions of probation and reports related thereto which involve the lawyer's mental, physical or psychological condition shall be confidential." Procedures, 963 S.W.2d at 574, § 7E(7).
\item \textsuperscript{182} See Procedures, 963 S.W.2d at 571, § 5J.
\item \textsuperscript{183} See Procedures, 963 S.W.2d at 568, § 4B(2).
\item \textsuperscript{184} See Procedures, 963 S.W.2d at 568, § 4B(3). These rules are the same under the 1990 Procedures. See id. at 568, § 4B(1) & (2).
\item \textsuperscript{185} See Procedures, 963 S.W.2d at 568, § 4B(5).
\item \textsuperscript{186} See Procedures, 963 S.W.2d at 568, § 4B(6).
\end{enumerate}
\end{footnotesize}
the complainant is rebutted by this power of the respondent attorney to allow information before the Committee to be made public without the consent of the complainant.

Complainant is also entitled to receive respondent attorney’s affidavit of response and to reply to it if desired.

3. Sanctions Made Public

The Committee’s letter of caution, reprimand and suspension are filed in the office of the Clerk of the Arkansas Supreme Court and are public records. Decisions to initiate disbarment proceedings are also filed with the Clerk and become public records.

E. Section 5. Procedure

1. Generally

The basic process is for the Committee to receive, investigate, and adjudicate complaints alleging violations of the Rules. A complaint constitutes any inquiry, allegation, or information received by or coming to the attention of the Committee and concerning the conduct of a person subject to the jurisdiction of the Committee. It may be of any nature and form.

2. Procedural Standards

In a set of new provisions, the 1998 Procedures set out the rules concerning standard of proof, burden of proof and limitations on actions. For formal discipline charges, reinstatements and transfers to and from inactive status, the standard of proof is by a “preponderance of the evidence.” The burden of proof shifts between the parties depending on the nature of the proceeding. If the proceeding concerns the imposition of discipline or the involuntary transfer to inactive status, the burden is on the Executive Director. This burden includes proof that the particular discipline sought is justified. If it concerns a request for reinstatement or for transfer from inactive to active status the burden is on the attorney.

187. See Procedures, 963 S.W.2d at 568, § 5A.
188. See Procedures, 963 S.W.2d at 563, § 1B(4).
189. See id. at 563, § 1E(4).
190. See Procedures, 963 S.W.2d at 568, § 5B.
191. See Procedures, 963 S.W.2d at 568, § 5C.
192. See id. at 568-569, § 5C.
Under the 1998 revised Procedures, discipline actions are exempt from statutes of limitation.\textsuperscript{193} This means that discipline proceedings could theoretically be instituted against an attorney for unethical conduct whenever it occurred. Although a long-term and continual trail of unethical conduct should be considered by the Committee in meting out discipline, it is hard to see the relevance of stale and historically unethical acts justifying discipline. In addition, an alternative, and what I think is a preferred approach, would have been to have adopted a rule providing that limitations do not begin to run until the unethical act is, or reasonably should have been, "discovered." This discovery test eliminates the theoretical absurdity of disciplining an attorney for unethical conduct that occurred in the distant past although the attorney’s recent conduct has been proper. It seems to me that the Committee should have a mandatory obligation to exercise its discipline authority with contemporaneous conduct, not historical conduct. Notwithstanding this concern, it is doubtful that the Committee would ever discipline an attorney for non-contemporaneous unethical conduct that was not part of some pattern of repeated contemporaneous misconduct. An example of an exception to this policy might concern misrepresentations made on the bar application that does not come to light for many years after admission. If the misrepresentation concerned a serious unethical infraction such as a conviction of a serious crime, stern discipline might still be in order despite the delay and good behavior. Still a "discovered" rule would cover this example.

3. Notice to Attorney

Because of problems under the old procedures regarding service of notice to the attorney,\textsuperscript{194} an expanded provision attempts to clarify and resolve the problems. The basic change is to specifically prevent an attorney from

\textsuperscript{193} See Procedures, 963 S.W.2d at 569, § 5D. It is not clear to what statutes of limitation the Procedures are referring. This proceeding is set by the Supreme Court and by the terms of the documents the Court has set no limitation period. Thus there probably are none, except as constitutional concepts of due process might infer. It might be that the equitable concept of latches is more likely the doctrine to which the rule is directed. The apparent source of the issue is Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994), where it was argued that "disbarment proceedings are civil in nature and are subject to the rules of civil procedure, which entail application of a five-year statute of limitations. . . ." The Court failed to rule on this issue because it found the discipline proceeding had been timely instituted under the circumstances. Thus the issue was left undecided and the rule was changed to clarify the situation.

\textsuperscript{194} See McCullough v. Neal, 314 Ark. 372, 862 S.W.2d 279 (1993) where the Court inferred that notice by certified mail might not be constitutionally adequate. If the attorney did not get the mail even though the notice was sent by certified mail to the address on file with the Clerk. The revised rule adds the notice by publication requirement when the personal service and mail techniques do not succeed.
avoiding notice of a formal complaint by refusing to accept it when served or by disappearing.

When a formal complaint is issued either by the Executive Director or by direction of the Committee, the Executive Director must (1) furnish the respondent attorney with a copy of the formal complaint and (2) advise the attorney that the attorney may file a written response in the form of an affidavit. Service of the complaint may be accomplished in several ways. First, personal service as provided by the Arkansas Rules of Civil Procedure.

Second and alternatively, service may be accomplished by “certified, restricted delivery, return receipt mail.” Third, but only after “reasonable attempts” to use the first two methods fail, the Committee may issue a “warning order” and publish it weekly for two consecutive weeks in either a state-wide or an appropriate local newspaper of general circulation. In addition to the publication of the warning, a copy of the complaint and warning are sent to the attorney by regular mail. Nonresident attorneys may be served in the same manners or in any manner prescribed by the law of the jurisdiction to which the service is directed.

The Procedures take a hard-line concerning the attorney who fails to maintain a current address with the Clerk or who attempts to avoid process by failing or refusing to “receipt” the certified mailing of the formal complaint. The inaccurate address or the refusal of service constitutes a waiver of confidentiality regarding the issuance of the warning order. In addition, unless the refusal to accept service is for “good cause,” the attorney “shall” pay the actual cost and expenses for the service or the attempted service of the formal complaint. No explanation is provided on how these costs are to be calculated. They must be paid, however, before a response from the attorney to the formal complaint will be received by the Committee.

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195. See Procedures, 963 S.W.2d at 569, § 5E(1).
196. See Procedures, 963 S.W.2d at 569, § 5E(2)(a).
197. See Procedures, 963 S.W.2d at 569, § 5E(2)(b). The address for the attorney recorded in the Clerk’s office is the official address for mailing of notice. See Procedures, 963 S.W.2d at 569, § 5E(1). Attorneys must keep their addresses with the Clerk accurate. See id. at 569, § 5E(1).
198. This means any generally circulated newspaper in the relative geographical area of the attorney’s address.
199. See Procedures, 963 S.W.2d at 569, § 5E(2)(c). A certified mailing under Procedures, 963 S.W.2d at 569, § 5E(2)(a) “shall be deemed a waiver of confidentiality” for purposes of this section. Procedures, 963 S.W.2d at 569, § 5E(1).
200. See id. at 569, § 5E(2)(c).
201. See Procedures, 963 S.W.2d at 569, § 5E(6).
202. See Procedures, 963 S.W.2d at 569, § 5E(3).
203. See id. at 569, § 5E(3).
204. See Procedures, 963 S.W.2d at 569, § 5E(4).
205. See id. at 569, § 5E(4).
With certain exceptions, subsequent communications by the Committee to the attorney will be accomplished by regular mail to the address of record, the address of service, or the address furnished by the attorney. The exceptions are notices of hearings and letters of caution, reprimand, suspension or initiation of disbarment proceedings and these mailings must be sent by certified, return receipt mail.

4. Time and Manner of Response

The Procedures set response limitation periods. The respondent attorney has twenty days to file a written response from the date of service of the formal complaint or from the date of first publication of the warning order, if applicable. The Executive Director has the authority to grant one extension of reasonable duration. Any subsequent extension must be submitted in writing to the Chair of the Committee who is given complete discretion to deny or grant it and to set its duration. Failure to respond is significant. If an attorney fails to respond within the time limitation, the Executive Director must circulate ballots to the Committee.

If the respondent attorney files a response, the Executive Director must notify the complainant, provide her or him a copy of the response, and advise that any rebuttal to the response must be filed within seven days of the notice. If a rebuttal is submitted, a copy of it must be provided to the respondent attorney for information purposes and may be included with the materials submitted to the Committee. No surrebuttal by the respondent attorney is necessary except that if complainant’s rebuttal is in the form of an

206. See Procedures, 963 S.W.2d at 569, § 5E(5).
207. See id. at 569, § 5E(5).
208. See Procedures, 963 S.W.2d at 569, § 5F(1). Nonresident respondent attorney’s have thirty days. See id. at 569, § 5F(1). The Procedures state that the calculation of the time limitations commences on the day following service upon the respondent attorney [or publication of the warning order where no actual service]. See Procedures, 963 S.W.2d at 570, § 5F(4). Due dates for all responses and rebuttals are extended to the next regular business day if the due date falls on a Saturday, Sunday, or legal holiday. See id. at 570, § 5F(4).
209. See Procedures, 963 S.W.2d at 570.
210. See id. at 570, § 5F(2). No guidelines are given to the Chairperson or the attorney as to what are justifying conditions or circumstances for an additional extension or what length of time will be allowed. It is reasonable to assume that these extensions will be granted only in the extraordinary case, e.g., substantiated serious health problems, and for only short periods, e.g., ten days.
211. See Procedures, 963 S.W.2d at 569, § 5F(1). See notes 228-235, infra and accompanying text for a discussion of the internal operations of the Committee when dealing with formal complaints.
212. See Procedures, 963 S.W.2d at 570, § 5F(3).
affidavit and alleges new violations of the Rules, the respondent attorney has
ten days from the date of service, etc., to file a written response.\footnote{213}

After all complaints, responses and surrebuttals are received the actual
discipline review process begins.

5. \textit{Vote by Ballot}

As soon as the respondent attorney responds, or the time period for such
response expires, and if the Executive Director believes that the complaint is
meritorious and informal procedures are not feasible, the Director must prepare
a packet of materials and send it to each member of the Committee.\footnote{214} This
packet shall contain the complainant's affidavit, the attorney's response, any
rebuttal, relevant exhibits, and information containing prior sanctions imposed
on the attorney, if any.\footnote{215} In addition, the Executive Director may include
relevant recommendations and any other relevant information or memoranda.
Finally, it must include the ballot that Committee members use to determine
how the case will be handled.\footnote{216}

6. \textit{Results of the Ballot}

Each member of the Committee individually completes the ballot for each
complaint submitted. The tally of the ballot of all the members of the
Committee determines the next course. The result of the balloting may
produce varying results. By majority vote of the members of the Committee,
the range of results are as follows:

(1) Take no discipline action: attorney is notified and the case is
dismissed without right of appeal by the complainant or the Execu-
tive Director;\footnote{217}

(2) Issue a letter of warning\footnote{218} which is not made public and remains
confidential: there is no right to ask for a hearing or appeal from this

\footnotesize{
\textit{\footnotesize{213. See id. at 570, § 5F(3).}}
\textit{\footnotesize{214. See Procedures, 963 S.W.2d at 570, § 5G(1).}}
\textit{\footnotesize{215. See id. at 570, § 5G(1).}}
\textit{\footnotesize{216. See Procedures, 963 S.W.2d at 570, § 5G(2). The ballot must include spaces for the
Committee member's signature, a date, set out the vote on the action to be taken, and for an
indication of the MODEL RULES violated if any.}}
\textit{\footnotesize{217. See Procedures, 963 S.W.2d at 570, § 5H(1).}}
\textit{\footnotesize{218. A "warning" letter is a nonpublic censure of the lawyer. See Procedures, 963 S.W.2d
at 574, § 7D(4).}}
}
decision either by the attorney, the complainant or the Executive Director;\textsuperscript{219} 

(3) Issue a letter of caution:\textsuperscript{220} the letter is sent to the attorney and the complainant and is filed with the Clerk as a public record: the attorney has a right to request a hearing;\textsuperscript{221} 

(4) Issue a letter of reprimand:\textsuperscript{222} the letter is sent to the attorney and the complainant and is filed with the Clerk as a public record: the attorney has a right to request a hearing;\textsuperscript{223} 

(5) Order of suspension from the practice of law for up to two years:\textsuperscript{224} notice of the suspension is sent to the attorney and the complainant and is filed with the Clerk as a public record: the attorney has a right to request a hearing;\textsuperscript{225}

\textsuperscript{219} See Procedures, 963 S.W.2d at 570, § 5H(2). Although the attorney may not request a hearing to reconsider a letter of warning, even if an appeal were available the risk in doing so would be great. First, a letter of warning is not made public and remains confidential. Second, further proceeding may bring more severe sanctions because once the issue is reconsidered, it is de novo and the result may be different, including more severe sanctions that are made public. 

\textsuperscript{220} A letter of "caution" is a public censure of the lawyer. See Procedures, 963 S.W.2d at 574, § 7D(4). A caution is for "lesser misconduct" by the attorney that does not warrant a reprimand. See Procedures, 963 S.W.2d at 574, § 7E(5). 

\textsuperscript{221} See Procedures, 963 S.W.2d at 570, § 5H(3). 

\textsuperscript{222} A letter of reprimand is a public censure of the lawyer. See Procedures, 963 S.W.2d at 574, § 7D(4). A reprimand is for "lesser misconduct" by the attorney that warrants a more severe sanction than a caution. See Procedures, 963 S.W.2d at 574, § 7E(4). At the other end of the spectrum, it may also be issued in limited circumstances although "serious misconduct" by the attorney is involved when, because of substantially demonstrated clear and compelling grounds, the sanction should be less than suspension or disbarment. See id. at 574, § 7E(4). 

\textsuperscript{223} See Procedures, 963 S.W.2d at 570, § 5H(3). 

\textsuperscript{224} Suspension is an order by the Committee restricting the attorney from the practice of law for a fixed period of time. See Procedures, 963 S.W.2d at 573, § 7D(2). A suspension is appropriate for "serious misconduct" consonant with the pertinent factors to be considered in imposing sanctions but the nature and degree of which do not warrant disbarment. See Procedures, 963 S.W.2d at 574, § 7E(2). 

\textsuperscript{225} See Procedures, 963 S.W.2d at 570, § 5H(3).
(6) Issue disbarment proceedings: notice of the decision is sent to the attorney and the complainant: the proceeding in the Committee ends and the proceeding is initiated in the appropriate circuit court; or,

(7) Order that a non-public hearing be held at which the testimony of the complainant, the attorney and others may be heard as well as other information gathered for consideration: by subsequent vote or ballot the Committee determines which of the previous listed actions are warranted.

If the result on the returned ballots do not indicate a majority opinion as to the course of action the Committee wants to take, the matter is discussed in executive session at the next regular Committee meeting at which time the Committee will try to come to a consensus and make its decision. If no consensus can be reached at this session, the Committee might request that a non-public hearing under Section 5H(4) be held to permit additional information to be gathered and considered.

7. Failure to Respond

Under the 1990 version of the Procedures, a more than incidental problem concerned the attorney who failed to respond to a formal complaint. The 1998 revised Procedures attempt to make such conduct prohibitive. Accordingly, a failure to respond constitutes a per se ground for sanctions regardless of the

226. Disbarment is the termination of the lawyer's privilege to practice law and removal of the lawyer's name from the list of licensed attorneys. See Procedures, 963 S.W.2d at 573, § 7D(1). Initiation of disbarment proceedings is appropriate when it is found that a lesser sanction would be inappropriate considering the "serious misconduct" by the attorney. Procedures, 963 S.W.2d at 574, § 7E(1). The written notice to institute a disbarment proceeding does not need to state specific findings as to the misconduct or Model Rule violations. See id. at 574, § 7E(1). In addition, initiating disbarment proceeding is mandatory when the complaint against the attorney is based on a conviction of a felony or a crime which also violates Model Rule 8.4(b) of the Rules. See Procedures, 963 S.W.2d at 573, § 6B(1). Actions for disbarment are said to confront the overall fitness of a lawyer to hold a license to practice law. See Procedures, 963 S.W.2d at 574, § 7E(1).

227. See Procedures, 963 S.W.2d at 571, § 5H(5).

228. See Procedures, 963 S.W.2d at 570-71, § 5H(4). This procedure is usually used when there are allegations of serious misconduct but the record is incomplete. Author's Interview with James Neal, Executive Director, Committee on Professional Conduct, July 14, 1998. Thus the non-public hearing is used primarily as an investigative tool to fully develop the facts or to assist the Committee in coming to a decision if members are unsure of what decision they should make.

229. Author's Interview with James Neal, Executive Director, Committee on Professional Conduct, July 14, 1998.

230. See id.
merits of the allegations in the complaint that initiated the proceedings.\textsuperscript{231} In addition, it is cause for enhanced sanctions upon a finding of \textsc{model \ rules} violation.\textsuperscript{232} Sanction imposition or enhancement may be accomplished merely by notation of the failure to respond on the sanction document without separate or additional notice to the attorney.\textsuperscript{233} Finally, a failure to respond constitutes an admission of the factual allegations of the complaint and extinguishes the attorney's right to a de novo hearing.\textsuperscript{234}

An exception to the harsh consequences due to a failure to timely respond permits a plea for reconsideration. This plea must be filed within twenty days of the Committee's letter or order, and state, under oath, "compelling and cogent evidence of unavoidable circumstances sufficient to excuse or justify the failure to respond."\textsuperscript{235} This plea is submitted with a ballot to the members of the Committee for determination. The reconsideration will be granted if a majority of the Committee finds "clear and convincing evidence" substantiating the excuse or justification for the failure to respond. If granted, the letter or order is set aside, the attorney will be allowed to file the belated affidavit of response, and the proceeding will continue in a normal timely manner.\textsuperscript{236} If the plea is denied, the letter or order becomes final subject to timely but limited appeal.\textsuperscript{237} The appeal, however, cannot attack the substantive allegations of the complaint and is limited to a consideration of the denial of the plea for reconsideration.\textsuperscript{238}

8. \textit{Public Hearing}

When an attorney has been sanctioned with a letter of caution, reprimand, or an order of suspension, a public hearing to dispute the determination or sanctions, or both, is not automatic.\textsuperscript{239} A hearing is necessary if the attorney desires to contest the Committee's determination and sanction and to preserve the right to appeal the Committee's decision, if necessary. Under the

\begin{itemize}
\item \textsuperscript{231} \textit{See Procedures}, 963 S.W.2d at 571, § 51(1).
\item \textsuperscript{232} \textit{See Procedures}, 963 S.W.2d at 571, § 51(2).
\item \textsuperscript{233} \textit{See Procedures}, 963 S.W.2d at 571, § 51(3).
\item \textsuperscript{234} \textit{See Procedures}, 963 S.W.2d at 571, § 51(4).
\item \textsuperscript{235} \textit{See Procedures}, 963 S.W.2d at 571, § 51(4)(a).
\item \textsuperscript{236} \textit{See Procedures}, 963 S.W.2d at 571, § 51(4)(c).
\item \textsuperscript{237} \textit{See Procedures}, 963 S.W.2d at 571, § 51(d).
\item \textsuperscript{238} \textit{See id. at} 571, § 51(4)(d).
\item \textsuperscript{239} \textit{See Procedures}, 963 S.W.2d at 570, § 5H(3). The location of the request for a hearing is poorly placed. It is found in the section entitled "Results of Ballot Vote." \textit{See Procedures}, 963 S.W.2d at 570, § 5H(3). It might be more prominent if it were included in the subdivision entitled "Public Hearing." \textit{See Procedures}, 963 S.W.2d at 571, § 5J.
Procedures, the respondent attorney must request one, in writing, within twenty days of the service of the letter or order. 240

Once a timely request is made, the hearing is automatic, de novo, and public. 241 The Executive Director sets the date and notifies the complainant and the respondent attorney. 242 The hearing proceeds in a manner similar to any administrative agency hearing. The "plaintiff" as such is ordinarily the Executive Director who in a sense represents the complainant's position in presenting witnesses and evidence concerning the allegations of unethical conduct. 243 Although not spelled out in the Procedures, the respondent attorney is also given an opportunity to present evidence and call witnesses. 244 There may be rebuttal and surrebuttal.

When the hearing ends, the Committee meets in executive session to deliberate its decision in the case. 245 Once the decision and findings are made, they must be announced immediately. 246 The actual vote of each member of the Committee is announced if the decision is not unanimous. 247

Decisions to issue cautions, reprimands and suspensions are filed in their proper form in the Clerk's office. 248 The complainant and attorney are informed of the decision and the specific action taken. Decisions to disbar require institution of the proceeding in the proper Circuit Court in the state. 249

240. See id.

241. See Procedures, 963 S.W.2d at 571, § 5J(1). The Procedures require that the ballots be destroyed and that the Committee is to hear the complaint de novo.

242. See Procedures, 963 S.W.2d at 571, § 5J(2). Requests of changes in a set hearing date are to be made in the discretion of the Committee Chairperson. See Procedures, 963 S.W.2d at 571, § 5J(3). Pleadings are given a title and the case is called "In re (Attorney's Name)."

243. See Procedures, 963 S.W.2d at 567, §3B(5). Although under the Procedures, the Executive Director is authorized to administer oaths, at hearings it is usually done by the court reporter. See id. at 567, § 3B(5).

244. One specific evidence provision provides that if the respondent attorney raises the defense of mental or physical disability, the attorney waives the doctor-patient privilege for the duration of the proceeding. See Procedures, 963 S.W.2d at 572, § 5M.

245. See Procedures, 963 S.W.2d at 572, § 5J(5).

246. See id. at 572, § 5J(5).

247. See id. at 572, § 5J(5).

248. See Procedures, 963 S.W.2d at 572, § 5J(6).

249. See Procedures, 963 S.W.2d at 572, § 5J(7). The proper venue for a disbarment is in the Circuit Court in the county either where the respondent attorney resides, where the attorney maintains an office, individually or in association, or where any part of the alleged violation occurred. See Procedures, 963 S.W.2d at 572, § 5K(1). Disbarments against nonresidents must be filed in Pulaski County. See id. at 572, § 5K(1).
9. **Actions for Disbarment**

Disbarment is the termination of the lawyer's privilege to practice law and removal of the lawyer's name from the list of licensed attorneys.\(^{250}\) Initiation of disbarment proceedings is appropriate when it is found that a lesser sanction would be inappropriate considering the "serious misconduct" by the attorney.\(^{251}\)

In addition, initiating disbarment proceeding is mandatory when the complaint against the attorney is based on a conviction of a felony or a crime which also violates MODEL RULE 8.4(b).\(^{252}\) Actions for disbarment are said to confront the overall fitness of a lawyer to hold a license to practice law.\(^{253}\) The written notice to institute a disbarment proceeding does not need to state specific findings as to the misconduct or MODEL RULES violations.\(^{254}\)

When disbarment is the recommended or mandatory sanction, the nature of the proceeding changes from what might be characterized as an administrative adjudication to full-fledged judicial litigation. In this case, the Executive Director or surrogate\(^ {255}\) is the plaintiff and the respondent attorney is the defendant.\(^ {256}\) The Arkansas Rules of Civil Procedure are used and the case is tried without a jury.\(^ {257}\)

The case is a full trial subject to the Rules of Civil Procedure including full discovery. At the conclusion of the trial, the judge has full authority to decide the merits of the complaint and to order the appropriate sanction, if any. If the judge finds the evidence fails to sustain the complaint, then the case is dismissed.\(^ {258}\) The judge may find the evidence sufficient and may mete out the full range of sanctions including caution, reprimand, suspension\(^ {259}\) and disbarment.\(^ {260}\)

\(^{250}\) See Procedures, 963 S.W.2d at 573, § 7D(1).
\(^{251}\) See Procedures, 963 S.W.2d at 574, § 7E(1).
\(^{252}\) See Procedures, 963 S.W.2d at 574, § 6B(1).
\(^{253}\) See Procedures, 963 S.W.2d at 574, § 7E(1).
\(^{254}\) See id. at 574, § 7E(1).
\(^{255}\) The Committee may retain independent counsel for the case. See Procedures, 963 S.W.2d at 572, § 5J(7); see also id. at 567, § 3B(7).
\(^{256}\) See Procedures, 963 S.W.2d at 572, § 5K(1).
\(^{257}\) See id. at 572, § 5K(1).
\(^{258}\) See Procedures, 963 S.W.2d at 572, § 5K(2).
\(^{259}\) The judge is not bound by the two year limit on suspension that the Committee is. See Procedures, 963 S.W.2d at 570, § 5H(3).
\(^{260}\) See Procedures, 963 S.W.2d at 572, § 5K(2).
10. Appeal

The Procedures set up two appeals procedures. The first is the appeal from a sanction meted out by the Committee. The second is the appeal from a decision of the Circuit Court concerning a disbarment case.

a. Committee Decisions and Sanctions

The respondent attorney and only the respondent attorney may appeal the finding by the Committee that the attorney violated of the MODEL RULES and the sanction therefor.\(^{261}\) The appeal is directly to the Arkansas Supreme Court. Notice of appeal must be filed within thirty days after the Committee action is filed with the Clerk.\(^{262}\) The parties in the appeal are the respondent attorney as appellant and the Executive Director as appellee, representing the Committee.\(^{263}\) Actions of the Committee in the case may, but need not, be stayed pending the appeal.\(^{264}\)

Appeals to the Supreme Court by attorneys who are aggrieved by decisions of the Committee are "de novo on the record."\(^{265}\) The Court defined this review responsibility as follows:

We review the Committee's action de novo and affirm unless it is clearly against the preponderance of the evidence.\(^*\*\)\(^*\) Further, the Committee's factual determinations are sustained on appeal unless clearly erroneous because the Committee is in the superior position to determine the credibility of witnesses and weigh the preponderance of the evidence.\(^*\*\)\(^*\)\(^{266}\) Except as the review standards create presumptions of Committee correctness, the burdens of proof in the Supreme Court proceeding are the same as they are in the proceeding below.\(^{267}\)

\(^{261}\) See Procedures, 963 S.W.2d at 572, § 5L(1). Neither the complainant nor the Executive Director may appeal any part of the Committee's decision whether for or against their contentions.

\(^{262}\) See id. at 572, § 5L(1). Notice of appeal and perfection of appeal are to be accomplished exactly as appeals in civil cases. See Procedures, 963 S.W.2d at 572, § 5L(5). Failure to comply with these procedures causes the decisions below to be final and binding. See id. at 572, § 5L(5).

\(^{263}\) See id. at 572, § 5L(1).

\(^{264}\) See id. at 572, § 5L(2).

\(^{265}\) See Procedures, 963 S.W.2d at 572, § 5L(3). No new evidence or testimony is permitted to be introduced, however. See id. at 572, § 5L(3).

\(^{266}\) Clark v. Supreme Court Committee on Professional Conduct, 320 Ark. 597, 898 S.W.2d 446 (1995).

\(^{267}\) See notes 187-189, supra, and accompanying text.
b. Appeals from Circuit Court Decisions and Sanctions

Both the respondent attorney and the Committee may appeal a decision of the Circuit Court in disbarment actions.\textsuperscript{268} The decision by the Circuit Court may be stayed by the judge pending appeal.\textsuperscript{269} Appeals from judgments of the Circuit Court in disbarment cases are handled according to the rules governing appeals from a Circuit Court in civil cases.\textsuperscript{270} Notice and perfection of appeals must conform to the Arkansas Code and the Supreme Court Rules on civil appeals.\textsuperscript{271} If appeals are not filed properly or in a timely manner, the Circuit Court order is binding and final.\textsuperscript{272}

F. Section 6. Criminal Activity

The Procedures heighten the scrutiny, formalize the procedure, and sharpen the consequences when an attorney is convicted of criminal activity.\textsuperscript{273} Under the Procedures, prosecutors and judges, in cases in which they participate or preside, must report to the Executive Director the convictions, guilty pleas, and pleas nolo contendere entered against attorneys.\textsuperscript{274} The conviction or pleas must constitute a felony or class A misdemeanor or federal crime of equivalent seriousness. If the report is in writing and by a judge, it constitutes an automatic formal complaint.\textsuperscript{275}

A special procedure applies if the complaint against a respondent attorney is based on a conviction of a particularly defined crime.\textsuperscript{276} In this situation the Discipline Committee must "institute an action of disbarment" if it determines that the crime committed violates MODEL RULE 8.4(b). This means that once the Discipline Committee decides the conviction is of a crime under the standard, the administrative proceeding before the Committee ends and the case instantly moves to the Circuit Court under the disbarment procedure. In a case

\begin{itemize}
\item \textsuperscript{268} See Procedures, 963 S.W.2d at 572, § 5L(2).
\item \textsuperscript{269} See id. at 572, § 5L(1).
\item \textsuperscript{270} See Procedures, 963 S.W.2d at 572, § 5L(4).
\item \textsuperscript{271} See id. at 572, § 5L(5).
\item \textsuperscript{272} See Procedures, 963 S.W.2d at 572, § 5L(5).
\item \textsuperscript{274} See Procedures, 963 S.W.2d at 573, § 6A. The Committee has a corresponding obligation to report "any substantial evidence of criminal conduct" by any party to proper prosecutorial authority. See Procedures, 963 S.W.2d at 573, § 6C.
\item \textsuperscript{275} See Procedures, 963 S.W.2d at 568, § 5A: "The Committee shall accept and treat as a formal complaint any writing signed by a judge of a court of record in this State regardless of whether such signature is verified."
\item \textsuperscript{276} See Procedures, 963 S.W.2d at 573, § 6B.
\end{itemize}
concerning an attorney convicted of a felony, there is no fact gathering, no hearing, and no response is permitted. In other cases concerning any nonfelony conviction, the proceeding before the Committee will proceed as usual until the Committee decides to institute a disbarment action, then it ends.

Notwithstanding this procedural requirement, an attorney’s conviction of a crime does not constitute an automatic reason for disbarment in Arkansas. The Arkansas Supreme Court stated in the recent case, *Wilson v. Neal*:

It is clear from this provision [§ 6B] that the trial court was not required to disbar Wilson, but was entitled to select any one of the four listed sanctions. Accordingly, we hold that the trial court erred when it concluded that disbarment was required as a matter of law.277

The Committee still must prove its case.

The placing of the disbarment proceeding for conviction of a crime in the Circuit Court was not to summarily shorten the proceedings in the Circuit Court but was to accord both the Discipline Committee, which acts as a prosecutor through its Executive Director or appointed counsel, and the accused lawyer, an opportunity to fully explore the issues in a publicly open court and according to procedurally fair procedures.278

The substance of Section 6B is that the Discipline Committee must start a disbarment proceeding if it determines that Rule 8.4(b) has been violated by the conviction of the crime in question. It merely triggers the mandatory disbarment action against an respondent attorney.279 Thus, this procedural requirement does not alter the substantive requirements of the MODEL RULES: it merely identifies the forum and the nature of the proceedings. The proceeding in the Circuit Court is that mandated by Section 5 which includes a full review of the nature of the conviction, consideration of mitigating factors, and the selection of any one of the possible resolutions including dismissal of the proceeding and the four sanctions: caution, reprimand, suspend, or disbar such respondent attorney.280

278. *See id. at 206.*
279. *See id. at 206.*
280. *See id. at 206.* Although *Wilson* concerned the 1990 Procedures, the 1998 Procedures are substantively the same. *See Procedures of the Arkansas Supreme Court Committee Regulating Professional Conduct of Attorneys at Law*, 792 S.W.2d 323, 328-29, § 5G(1) (1990).
On the other hand, the respondent attorney cannot relitigate "the elements of the crimes during the disbarment proceeding." Section 6B of the Procedures states that a certified copy of the judgment of conviction "shall be conclusive evidence of the attorney's guilt" of the underlying crime, and that the attorney may not "offer evidence inconsistent with the essential elements of the crime for which he or she was convicted." This rule means that the respondent attorney cannot contend, for example, the facts do not justify the conviction or that the attorney did not have the necessary criminal intent. The conviction is final: no collateral attack should be allowed.

The reverse issue is whether, because a 6B proceeding is a special proceeding and its applicability is based solely on the conviction, the Discipline Committee is also limited to the particular conviction as its sole grounds for disbarment. This would mean the Committee must prove that the respondent attorney is guilty of "a crime which also violates [Model] Rule 8.4(b)" and that conclusion merits disbarment. In other words, the Discipline Committee could not argue that additional crimes and other ethical misconduct were committed. Thus it would mean the conviction at issue encompasses the wrongdoing: no collateral expansion of the crime or case. The Committee disagrees with this argument and contends that under Section 7E, the Committee's written notice to institute a disbarment proceeding does not need to state specific findings as to the misconduct or as to the Model Rule violations. This provision means that the proceeding begins anew in the Circuit Court and thus the Committee can present its entire case against the attorney. It is argued, then, that Section 6B proceedings are no different from proceedings brought against any other attorney for disbarment. The absence of a proceeding and hearing before the Committee is of no legal consequence. It is probable that this issue will be litigated and decided by the Supreme Court.

Despite these limitations, in the process of determining whether the crime committed violates Model Rule 8.4(b) both sides may offer evidence concerning (1) the nature or character of the particular conduct that is necessary to prove the crime of which the respondent attorney was convicted, (2) whether that illegal conduct reflects adversely on the respondent attorney's "fitness to practice law"; and (3) whether the crime involves "violence, dishonesty, or
breach of trust, or serious interference with the administration of justice . . .

These matters must be explored in order to satisfy the conditions of a Section 6B proceeding.

G. Section 7. Sanctions

1. **Grounds for Discipline**

The revised Procedures elaborate the scope of the substantive rules as well as the standards for the various sanctions. Generally, grounds for discipline include violations or attempted violations of the MODEL RULES and the Procedures. In addition, discipline is applicable to violations of the professional conduct rules of other jurisdictions where the attorney is licensed or practices.

2. **Degrees of Misconduct**

The revised Procedures attempt to give some meaning to evaluative words used in applications of the sanctions. The difficulty of this process is to determine what sanction is appropriate for the misconduct involved in any particular case. Defining degrees of misconduct assists the dispenser of discipline in assigning the sanction to be imposed and the reviewer on appeal in evaluating the fairness and consistency of the sanction imposed. But if the definitions are unclear or misleading, they may make it more difficult to apply. The circular nature of the definitions are certainly not clarifying.

a. **Serious Misconduct**

Serious misconduct by an attorney justifies suspension or disbarment. The Procedures list specific categories of misconduct by an attorney considered to be of a serious nature:

1. Misappropriation of funds;
2. Substantial prejudice to client or other person;
3. Dishonesty, deceit, fraud or misrepresentation;

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286. ARKANSAS RULES OF PROFESSIONAL CONDUCT, Rule 8.4, Cmt.
287. See Procedures, 963 S.W.2d at 573-74, § 7.
288. See Procedures, 963 S.W.2d at 573, § 7A(1).
289. See Procedures, 963 S.W.2d at 573, § 7A(2).
290. See Procedures, 963 S.W.2d at 573, § 7B-C.
291. See Procedures, 963 S.W.2d at 574, § 7E(1), (2).
292. See Procedures, 963 S.W.2d at 573, § 7B.
(4) A pattern or series of acts of similar misconduct;
(5) A substantial disregard of attorney’s professional duties and responsibilities; and,
(6) Commission of a “serious crime.”

b. Lesser Misconduct

Lesser misconduct is merely defined as conduct that violates the MODEL RULES but which does not warrant suspension or disbarment. This is hardly a definition. It must include all ethical misconduct not considered “serious.”

3. Types of Sanctions

The Procedures list six types of sanctions: disbarment,295 suspension,296 interim suspension,297 reprimand or caution,298 warning,299 and probation.300 Each has its place in the discipline process.

4. Imposition of Sanctions

When an attorney is found to have violated the Rules, the Committee is authorized to impose the named sanctions under defined circumstances.

The Committee can seek an action for disbarment when the attorney’s conduct satisfies the description of “serious misconduct” and a lesser sanction is inappropriate or when an attorney is convicted of, pleads guilty to, or pleads no contest to a crime which violates MODEL RULE 8.4(b).301 The Procedures state: “Actions for disbarment address the overall fitness of a

293. See Procedures, 963 S.W.2d at 564, § 1E(6).
294. See Procedures, 963 S.W.2d at 573, § 7C.
295. See Procedures, 963 S.W.2d at 573 § 7D(1) (“The termination of the lawyer’s privilege to practice law and removal of the lawyer’s name from the list of licensed attorneys.”).
296. See Procedures, 963 S.W.2d at 573, § 7D(2) (“A limitation for a fixed period of time on the lawyer’s privilege to engage in the practice of law.”).
297. See Procedures, 963 S.W.2d at 573, § 7D(3) (“A temporary suspension for an indeterminate period of time of the lawyer’s privilege to engage in the practice of law pending the final adjudication of a disciplinary matter.”).
298. See Procedures, 963 S.W.2d at 574, § 7D(4) (“A public censure issued against the lawyer.”).
299. See Procedures, 963 S.W.2d at 574, § 7D(5) (“A non-public censure issued against the lawyer.”).
300. See Procedures, 963 S.W.2d at 574, § 7D(6) (“Written conditions imposed for a fixed period of time, and with the lawyer’s consent, permitting the lawyer to engage in the practice of law under the supervision of another lawyer.”).
301. See Procedures, 963 S.W.2d at 574, § 7E(1). See Procedures, 963 S.W.2d at 573, § 6B.
lawyer to hold a license to practice law." This statement emphasizes the significance of a disbarment action and the need to exercise care in its application.

The Committee may suspend a lawyer from the practice of law for a fixed period of time. A suspension is for "serious misconduct" consonant with the pertinent factors to be considered in imposing sanctions but the nature and degree of which do not warrant disbarment.

The Committee may issue a letter of reprimand which is a public censure of the lawyer. A reprimand is for "lesser misconduct" by the attorney that warrants a more severe sanction than a caution. At the other end of the spectrum, a reprimand may also be issued in limited circumstances although "serious misconduct" by the attorney is involved when, because of substantially demonstrated clear and compelling grounds, the sanction should be less than suspension or disbarment.

The Committee may issue a "warning" letter of caution which is also a public censure of the lawyer. A letter of caution is for "lesser misconduct" by the attorney that does not warrant a reprimand.

The revised Procedures adds the powerful new sanction, i.e., the interim suspension. This sanction permits the Committee to suspend an attorney from the privilege of law practice pending completion of the discipline process. Three specific situations are listed that justify an interim suspension. They include:

1. At the moment the Committee decides to initiate disbarment proceeding,
2. Immediately upon conviction of a felony;
3. Upon the Committee's receipt of sufficient evidence demonstrating the attorney engaged or engages in conduct involving:
   a. Misappropriation of funds or property;
   b. Abandonment of active law practice; or,
   c. Substantial threat of harm to the public or clients.

302. See id. at 574, § 7E(1).
303. See Procedures, 963 S.W.2d at 574, § 7D(2).
304. See Procedures, 963 S.W.2d at 574, § 7D(2).
305. See Procedures, 963 S.W.2d at 574, § 7D(4).
306. See Procedures, 963 S.W.2d at 574, § 7E(4).
307. See id. at 574, § 7E(4).
308. See Procedures, 963 S.W.2d at 574, § 7D(4).
309. See Procedures, 963 S.W.2d at 574, § 7E(5).
310. See Procedures, 963 S.W.2d at 574, § 7E(3).
311. See Procedures, 963 S.W.2d at 574, § 7E(3)(a).
312. See Procedures, 963 S.W.2d at 574, § 7E(3)(b).
313. See Procedures, 963 S.W.2d at 574, § 7E(3)(c).
The imposition of probationary conditions loosely falls within the realm of informal resolution of discipline disputes. Probation is a consensual arrangement between the Committee and the attorney. It may be used prior to or after a formal complaint is filed. By written consent, the attorney may be put on probation for no more than two years. The probation agreement must be in writing and may set conditions on conduct while the probation exist. The probation attorney must find another attorney who is acceptable to the committee and who will supervise, monitor the attorney and assist her or him to fulfill the conditions of the probations. The assent of the supervising attorney must be acknowledged in writing to the Committee.

Probation may terminate because of rehabilitation or non-compliance. Probation terminates when the attorney under probation files an affidavit showing compliance with the conditions and an affidavit of the supervising attorney stating that probation is no longer necessary and a summary of reasons why it is not.

Noncompliance will also cause termination but will bring additional sanctions from the Committee. If the noncompliance is willful or unjustified, the attorney is subject to more severe sanctions. Unsuccessful or incomplete probation periods subject the attorney to further disciplinary proceedings.

5. Factors to be Considered in Imposing Sanctions

In an attempt to assist in the sanctioning process, the Procedures offer a list of factual factors to consider before imposing sanctions. No instructions are given as to how each factor should be qualitatively weighted in any particular case. No guidance is given as to how they are to be coordinated with the tests provided for imposing sanctions. The list of factors are as follows:

(1) The nature and degree of the misconduct for which the lawyer is being sanctioned;
(2) The seriousness and circumstances surrounding the misconduct;
(3) The loss or damage to clients;
(4) The damage to the profession;

314. See Procedures, 963 S.W.2d at 574-75, § 7E(7).
315. See id. at 575, § 7E(7).
316. See id. at 575, § 7E(7).
317. See id. at 575, § 7E(7). In this post probation proceeding, the attorney "may only offer evidence or argument relating to the willful or unjustified nature of the non-compliance." See id. at 575, § 7E(7).
318. See Procedures, 963 S.W.2d at 575, § 7F.
319. See Procedures, 963 S.W.2d at 574-75, § 7E.
(5) The assurance that those who seek legal services in the future will be protected from the type of misconduct found;

(6) The profit to the lawyer;

(7) The avoidance of repetition of the misconduct;

(8) Whether the misconduct was deliberate, intentional or negligent;

(9) The deterrent effect on others;

(10) The maintenance of respect for the legal profession;

(11) The conduct of the lawyer during the course of the Committee action;

(12) The lawyer's prior disciplinary record, including warnings; and,

(13) Matters offered by the lawyer in mitigation or extenuation except that a claim of disability or impairment resulting from the use of alcohol or drugs may not be considered unless the lawyer demonstrates that he or she is successfully pursuing in good faith a program of recovery.

The last factor mentions mitigation of the attorney's misconduct. Recently the Arkansas Supreme Court expressed support for the technique employed in the document entitled "Standards for Imposing Lawyer Sanctions," prepared and published by the American Bar Association. These Standards require that the court imposing sanctions consider three questions:

(1) What ethical duty did the lawyer violate?;

(2) What was the lawyer's mental state?; and

(3) What was the extent of the actual or potential injury caused by the lawyer's misconduct?

In addition, the court must consider any relevant aggravating or mitigating factors presented. These questions appropriately mirror the approach of the

323. "Aggravation or aggravating circumstances are any considerations, or factors that may justify an increase in the degree of discipline to be imposed." MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.21 (1992).
324. "Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.31 (1992).
325. See MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.1 (1992): STANDARD 9.1 GENERALLY. After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what
MODEL RULES, that courts should consider the nature of the misconduct and the respondent attorney’s individual case before imposing any permanent sanctions, and that the focus should be on disciplining serious crimes rather than morality. The relevant factors listed that aggravate or mitigate the relevant sanction are extensive:

9.22 Factors which may be considered in aggravation. Aggravating factors include:

(1) prior disciplinary offenses;
(2) dishonest or selfish motive;
(3) a pattern of misconduct;
(4) multiple offenses;
(5) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(6) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(7) refusal to acknowledge wrongful nature of conduct;
(8) vulnerability of victim;
(9) substantial experience in the practice of law;
(10) indifference to making restitution.
(11) illegal conduct, including that involving the use of controlled substances.

9.32 Factors which may be considered in mitigation. Mitigating factors include:

(1) absence of a prior disciplinary record;
(2) absence of a dishonest or selfish motive;

sanction to impose.

326. The Standards also list a set of factors not in aggravation or mitigation.

STANDARD 9.4 FACTORS WHICH ARE NEITHER AGGRAVATING NOR MITIGATING.
The following factors should not be considered as either aggravating or mitigating:
(a) forced or compelled restitution;
(b) agreeing to the client’s demand for certain improper behavior or result;
(c) withdrawal of complaint against the lawyer;
(d) resignation prior to completion of disciplinary proceedings;
(e) complainant’s recommendation as to sanction;
(f) failure of injured client to complain.

(3) personal or emotional problems;
(4) timely good faith effort to make restitution or to rectify consequences of misconduct;
(5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
(6) inexperience in the practice of law;
(7) character or reputation;
(8) physical disability;
(9) mental disability or chemical dependency including alcoholism or drug abuse when:
   (a) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
   (b) the chemical dependency or mental disability caused the misconduct;
   (c) the respondent’s recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
   (d) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.
(10) delay in disciplinary proceedings;
(11) imposition of other penalties or sanctions;
(12) remorse;
(13) remoteness of prior offenses. 328

The importance of one or more factors in any particular situation is impossible to predict. Each case will be different. The Committee or the Court will have to receive information concerning the situation and make findings of fact and law regarding them. The Committee or Court should not take a quantitative approach and merely count pros and cons. Though qualitative analysis is necessary, it is subjective and it is not easy to apply.

6. Contempt

In regard to discipline processes, specific conduct is regarded as contempt of the Arkansas Supreme Court. The power of contempt is significant in getting attorneys to conform to the requirements of the Procedures. 329 It also

329. See Procedures, 963 S.W.2d at 565, § 2C(6) which provides: "If found to be in contempt of the Supreme Court under these Procedures, a person may be punished by incarceration, imposition of a fine, or both. In addition, it shall be grounds for discipline under these Procedures for a subpoenaed attorney to breach the confidentiality of the investigation."
applies to others who are involved in a disciplinary proceeding. The list of contemptible conduct includes:

(1) Willfully disobeying any Committee order, summons or subpoena;
(2) Refusing to testify on matters not privileged by law;
(3) Knowingly giving false testimony before the Committee;
(4) Engaging in the practice of law during a period of suspension;
(5) Engaging in the practice of law after a disbarment or surrender of license; or,
(6) Violating any of these Procedures.

7. Voluntary Surrender of License

An attorney who realizes that disbarment is inevitable because, for example, he or she has been convicted of a felony, may intentionally petition the Arkansas Supreme Court that the attorney consents to the surrender of the attorney's license. Before the petition is approved by the Arkansas Supreme Court, the Court must have received the Committee's recommendations concerning the petition. Petitions for surrender of licenses are only going to be approved under conditions agreed to by the Committee and the petitioning attorneys.

8. Duty of Sanctioned Attorney

Within twenty days of disbarment, suspension, or license surrender, the attorney must complete the following specific responsibilities:

(1) Notify in writing all clients and counsel in pending cases that license termination has occurred;
(2) Notify all clients that other legal representations must be obtained and explain the degree of its urgency under the circumstances;

See id. at 565, § 2C(6).

330. See Procedures, 963 S.W.2d at 575-76, § 7G(1)-(6).
331. See Procedures, 963 S.W.2d at 575-76, § 7H(1).
332. See Procedures, 963 S.W.2d at 576, § 7H(2).
333. See Procedures, 963 S.W.2d at 575-76, § 7H(1).
334. See Procedures, 963 S.W.2d at 575-76, § 7I.
335. See Procedures, 963 S.W.2d at 576, § 7I(1).
336. See Procedures, 963 S.W.2d at 576, § 7I(2).
(3) Return papers and property to clients or co-counsel, or notify where these materials may be obtained and explain the degree of urgency in obtaining these materials under the circumstances;\(^{337}\)

(4) Refund fees paid in advance and not earned;\(^{338}\)

(5) File with any tribunal where litigation is pending, copies of the notice to opposing counsel;\(^{339}\)

(6) Keep records of all the above actions;\(^{340}\) and,

(7) File a list of all jurisdictions in which the attorney held a license with the Clerk and the Committee.\(^ {341}\)

Within thirty days of the license removal, the attorney must file an affidavit that all of the above requirements have been completed or give reasons why any has not been completed.\(^ {342}\) If the attorney fails to comply with these requirements, the attorney must be held in contempt.\(^ {343}\)

9. **Employment of Certain Disciplined Attorneys**

The Procedures state the obvious consequence of practice limiting sanctions and thus prohibits any attorney placed on inactive status, suspended, disbarred or who has surrendered the license from practicing law in Arkansas until readmitted of reinstated.\(^ {344}\) A more difficult issue is whether the defrocked attorney can perform work, which is not considered the practice of law, for other attorneys. The answer to this issue depends upon the type of sanction imposed. In what appears at first glance to be improperly reversed, an attorney who is suspended or who is placed in inactive status cannot work for another attorney, law firm, or any other attorney organization\(^ {345}\) whereas an attorney who is disbarred or who surrendered the license, can work for such so long as the work is not considered the practice of law.\(^ {346}\) Even in the latter case, the former attorney's job description must be filed with the Executive Director before work begins, and verified semi-annual reports must be

\(^{337}\) See Procedures, 963 S.W.2d at 576, § 7I(3).

\(^{338}\) See Procedures, 963 S.W.2d at 576, § 7I(4).

\(^{339}\) See Procedures, 963 S.W.2d at 576, § 7I(5).

\(^{340}\) See Procedures, 963 S.W.2d at 576, § 7I(6).

\(^{341}\) See Procedures, 963 S.W.2d at 576, § 7I(7). The Clerk has a duty to notify these jurisdictions of the license removal.

\(^{342}\) See Procedures, 963 S.W.2d at 576, § 7I(8).

\(^{343}\) See Procedures, 963 S.W.2d at 577, § 7I(9).

\(^{344}\) See Procedures, 963 S.W.2d at 576, § 7J(1).

\(^{345}\) See Procedures, 963 S.W.2d at 576, § 7J(2).

\(^{346}\) See Procedures, 963 S.W.2d at 576, § 7J(3). Employment is broadly defined to mean any work that is “for the benefit of the law practice” of the employing attorneys and prohibits this work regardless whether it is compensated or not. See id. at 576, § 7J(2).
submitted by the employing attorney stating that the work done was not the practice of law. In addition, the former attorney may have no contact with clients and cannot receive, disburse or handle trust funds or property of clients.\textsuperscript{347}

In a backward way the distinctions make sense. The disbarred attorney has less chance to be readmitted or reinstated. Thus the livelihood of the person is more at risk. There may be constitutional questions of due process. Certainly the conditions of continued work with attorneys is a moderate compromise that has less apparent constitutional implications. With suspension or inactive service, return to the practice is expected and likely. Here, there is a greater threat that the sanctioned attorney will not "drop a stitch" in her or his practice activities and that only a change in form will occur, not in substance. If a suspensions or inactive status is to have its intended effect, the sanctioned attorney must feel the bite of the sanction. Suspension and inactive status are intended to separate the attorney from his or her former clients. Only global restrictions on working as or around attorneys will assure the sanction is carried out and the deterrent effect on future conduct will be effective.

10. Reinstatement

At the conclusion of a period of suspension, the attorney may file a verified petition with the Executive Director requesting reinstatement.\textsuperscript{348} The petition must state:

(1) The attorney has promptly filed this petition and paid the application fee;\textsuperscript{349}
(2) The attorney did not practice law during the period of suspension;\textsuperscript{350}
(3) The attorney's license fee is current or has been tendered to the Clerk;\textsuperscript{351} and,
(4) The attorney fully complied with all conditions imposed by the Committee for reinstatement.\textsuperscript{352}

Any knowing misstatement in this petition may be a ground for contempt, denial of reinstatement, or revocation of reinstatement.\textsuperscript{353} Failure to file a list

\textsuperscript{347} See Procedures, 963 S.W.2d at 576-77, § 7J(3)(a)-(c).
\textsuperscript{348} See Procedures, 963 S.W.2d at 577, § 7K(1). The attorney must show proof that he or she has paid to the Clerk a $100.00 application fee. See id. at 577, § 7K(2).
\textsuperscript{349} See Procedures, 963 S.W.2d at 577, § 7K(3)(a).
\textsuperscript{350} See Procedures, 963 S.W.2d at 577, § 7K(3)(b).
\textsuperscript{351} See Procedures, 963 S.W.2d at 577, § 7K(3)(c).
\textsuperscript{352} See Procedures, 963 S.W.2d at 577, § 7K(3)(d).
\textsuperscript{353} See Procedures, 963 S.W.2d at 577, § 7K(4).
of all jurisdictions in which the attorney held a license with the Clerk and the Committee\textsuperscript{354} and an affidavit within thirty days of the license removal, that all of the above requirements for suspension were completed,\textsuperscript{355} precludes reinstatement.\textsuperscript{356}

In a curious limitation on its own authority, the Procedures state that the Supreme Court cannot reinstate an attorney until a majority of the Committee approves.\textsuperscript{357} It would not be binding because the Supreme Court could merely change the rule if it wanted to override the Committee.

11. Readmission to the Bar

Attorneys who have been disbarred or who have surrendered their licenses have significant, often impossible, barriers to readmission despite the provision in the Procedures for it.\textsuperscript{358} First, there is no readmission unless five years have passed since the day of expulsion from the bar.\textsuperscript{359} In addition, there is no readmission at any time if the attorney's expulsion was the result of either:

(1) A felony conviction that was not based on negligence or recklessness;\textsuperscript{360} or,

(2) Any ground that concerned conduct which reflects adversely on the attorney's honesty or trustworthiness regardless whether the attorney was convicted of a crime.\textsuperscript{361}

If the attorney avoids these limitations, then readmission is feasible through the State Board of Law Examiners according to the Rules Governing Admission to the Bar\textsuperscript{362} and with the approval of the Arkansas Supreme Court.\textsuperscript{363} Thus reinstatements must be approved by both a majority of the State Board of Law Examiners and the Arkansas Supreme Court.\textsuperscript{364}

\textsuperscript{354}. See Procedures, 963 S.W.2d at 576, § 7l(7) and (8).
\textsuperscript{355}. See Procedures, 963 S.W.2d at 576, § 7l(8).
\textsuperscript{356}. See Procedures, 963 S.W.2d at 577, § 7K(5).
\textsuperscript{357}. See Procedures, 963 S.W.2d at 577, § 7K(6).
\textsuperscript{358}. See Procedures, 963 S.W.2d at 577, § 7L.
\textsuperscript{359}. See Procedures, 963 S.W.2d at 577, § 7L(2)(a).
\textsuperscript{360}. See Procedures, 963 S.W.2d at 577, § 7L(2)(b).
\textsuperscript{361}. See Procedures, 963 S.W.2d at 577, § 7L(2)(c).
\textsuperscript{362}. Arkansas Rules Governing Admission to the Bar.
\textsuperscript{363}. See Procedures, 963 S.W.2d at 577, § 7L(1).
\textsuperscript{364}. See In re Petition of Butcher For Reinstatement to The Bar of Arkansas, 322 Ark. 24, 907 S.W.2d 715 (1995), where the Arkansas Supreme Court reversed a six-to-five vote by the Board of Law Examiners for reinstatement to the Bar because proof of moral fitness to practice law fell short of overcoming the presumption against readmission and the public trust would not be satisfied by readmission of attorney.
12. **Disbarment Reciprocal**

Attorneys disbarred or suspended in other states are similarly removed from the rolls of the bar in Arkansas. The Committee is empowered to summarily suspend or disbar the attorney upon receipt of a certified order or other proper document of a tribunal or corresponding disciplinary authority in the other state. The Committee mails a notice of the action to the attorney’s mailing address recorded with the Clerk.

13. **Inactive Status**

Inactive status is a special arrangement intended to resolve discipline problems caused by an attorney’s disability. The typical cause or condition that raises the application of inactive status is alcoholism and drug abuse. The status is also applicable to attorneys who have been declared judicially incompetent, or involuntarily committed to a mental institution, and who voluntarily request transfer to inactive status. The Committee has authority to determine that an attorney is unfit to practice law due to mental infirmities notwithstanding the attorney has not been declared incompetent by a court or tribunal. In addition, if an attorney alleges incapacity during a discipline proceeding, the attorney may be transferred to inactive status, even prior to the conclusion of the proceeding. The attorney who is transferred to inactive status cannot practice law and must comply with the procedures for an attorney suspended or disbarred.

The procedure for determining inactive status depends on the cause for transfer. The Committee may vote by ballot on issues of transfers and reinstatements of attorneys when the grounds for active status are related to the

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365. *Procedures*, 963 S.W.2d at 577, § 7M(1).
366. See *Procedures*, 963 S.W.2d at 577, § 7M(2).
367. See *id.* at 577, § 7M(2).
368. See *Procedures*, 963 S.W.2d at 578, § 7N.
369. See *Procedures*, 963 S.W.2d at 578, § 7N(1)(d)-(e). These circumstances require findings by the committee that the attorney is guilty of habitual drunkenness or drug use affecting fitness to practice law or has appeared in court while under the influence of alcohol or drugs. See *id.* at 578, § 7N(1)(d)-(e). All trial judges must report to the Committee any attorney who appeared in court under the influence of alcohol or drug. See *Procedures*, 963 S.W.2d at 578, § 7N(2).
370. See *Procedures*, 963 S.W.2d at 577-78, § 7N(1)(a)-(c).
371. See *Procedures*, 963 S.W.2d at 578, § 7N(1)(f).
372. See *Procedures*, 963 S.W.2d at 578, § 7N(6). See notes 331-340, supra, and accompanying text. If the attorney put on inactive status is unable to complete these procedures, the attorney’s counsel is to complete the tasks. See *id.* at 578, § 7N(6).
attorney’s incapacity or voluntary request. In all other circumstances, there must be a hearing initiated by the Executive Director. In the discretion of the Committee, the hearing may be closed and the record sealed. For good cause shown, the Committee can order an attorney to have a medical, psychiatric or psychological examination with a Committee appointed expert. The attorney who files for reinstatement waives doctor-client privilege concerning the disability.

Reinstatement may be granted by the Committee upon proof that the disability is removed and the attorney is fit to practice law.

H. Section 8. Special Provisions

1. Costs, Fines, and Restitution

The revised Procedures includes a provision which has broadly extended the Committee’s authority concerning penalties other than the typical discipline sanctions. These penalties include the discretionary power to assess costs of the discipline proceeding to the respondent attorney, impose fines up to $1,000.00, and order restitution to persons financially injured by the attorney’s conduct. Although these additions might appear to be normal extensions of the discipline process, they have significant consequences if aggressively exercised. The cost assessment authority needs elaboration. Similarly, the authority to fine the attorney and possibly other persons involved in the discipline proceeding raises some questions of standards of exercisability. Should all attorneys involved in a discipline proceeding expect to have to pay the costs of the proceeding? If it is not every respondent attorney, is it every attorney against whom discipline is imposed? Or, are fines and costs only going to be used in cases where attorneys have aggressively defended their position? Similarly, are they mere punishment techniques for lack of cooperation?

The restitution issue also raises the question of the right to jury trials and normal judicial processes. Is the Committee going to hear evidence of fault, comparative negligence, damages, etc.?

373. See Procedures, 963 S.W.2d at 578, § 7N(3). The section refers to Procedures, 963 S.W.2d at 570, § 5G., which dealt with the voting procedure on formal complaints filed with the Committee. This vote is without a hearing at this point in the proceeding.

374. See Procedures, 963 S.W.2d at 578, § 7N(4). The hearing is the same as judicial hearings in other types of discipline cases. See Procedures, 963 S.W.2d at 571, § 5J.; see notes 86-87, 90, 94, & 179, supra, and accompanying text.

375. See Procedures, 963 S.W.2d at 578, § 7N(9).

376. See Procedures, 963 S.W.2d at 578, § 7N(7).

377. See Procedures, 963 S.W.2d at 578, § 8A(1)-(3).
Without rules of definition and application, the full scope of these powers is unknown. One might guess that they will be exercised conservatively and when exercised, will be challenged in court, possibly on federal due process grounds. Some definition of the scope of these powers needs to be provided either through written rules of the Committee or of the Supreme Court.

2. Procedure for Interim Suspension

As previously discussed, the revised Procedures permit the Committee to order interim suspensions under specified circumstances. Although the applications of interim suspension are “automatic” depending on the occurrence of certain events, the suspended attorney may seek a hearing. Upon issuance of an interim suspension order, the attorney must be given immediate notice of the suspension and of the right to submit, by written affidavit, a rebuttal to the evidence supporting the suspension and to request modification or dissolution of the suspension. The Executive Director must expeditiously transmit the affidavit to Committee members for their decision. The attorney must be notified of the Committee’s decisions by mail or by personal service.

An attorney subject to an interim suspension must stop practicing law and carry out the disengagement procedures for other suspensions. Interim suspensions are dissolved automatically if the Committee decides the attorney’s misconduct did not result in the initiation of a disbarment proceeding, ninety days has past since a denial of a request to modify or dissolve an interim suspension, and the attorney complied with the law practice disengagement procedures under section 71. Although it appears to be “automatic,” the Executive Director provides the documentation indicating the end of the suspension in a letter to the attorney that is filed with the Clerk.

378. See Procedures, 963 S.W.2d at 569, 578, §§ 5E(3), 8B.; notes 307-310, supra, and accompanying text.
379. See Procedures, 963 S.W.2d at 579, § 8B(2). Eight copies of the affidavit must be filed with the Executive Director.
380. See id. at 579, § 8B(2). See notes 191-204, supra, and accompanying text for a description of the notice procedure.
381. See Procedures, 963 S.W.2d at 579, § 8B(3). See notes 331-340, supra, and accompanying text for a description of the procedure which the attorney must follow under Procedures, 963 S.W.2d at 576, § 71.
382. See Procedures, 963 S.W.2d at 579, § 8B(4). Although literally the Procedures state a suspension could continue until ninety days pass although the Committee determines in the interim that it was unnecessary, it is unlikely the Committee would let that happen and would order the suspension dissolved immediately in its reinstatement decision concerning the attorney.
383. Telephone Interview with James Neal, Executive Director, Committee on Professional Conduct (July 24, 1998).
3. **Discipline by Consent**

The revised *Procedures* creates a whole new subsection to deal with negotiated settlements to discipline proceedings that have reached formal status. At any time during the course of a discipline proceeding, a respondent attorney may admit particular unethical conduct in exchange for an agreed disciplinary sanction. This agreement is the product of a negotiated settlement procedure. When a formal complaint is served, the notice of the complaint must contain information informing the attorney that the attorney may seek a negotiated settlement of the dispute with the Executive Director. This process is separate and distinct from the procedure for the voluntary surrender of a license.

A mutually agreed upon settlement agreement must set out the necessary factual circumstances, the admitted MODEL RULES violations, and the proposed sanction. The agreement must then be submitted to and approved by vote of the Alternate Committee. Rejection causes the proceeding to continue; acceptance requires the chair of the primary Committee to file a letter of sanction with the Clerk.

The attorney may seek settlement after the initial decision of the Committee and after a request for a de novo hearing. A negotiated consent between the attorney and the Executive Director made at that late date must be submitted to the Committee either prior to or at the beginning of the hearing. The approval or disapproval of the agreement must be conveyed to the attorney immediately. Upon approval, the chair of the Committee must duly record the sanction meted out.

Neither the attorney nor the Executive Director may appeal a sanction entered by consent.

**IV. CONCLUSION**

The 1998 version of the "*PROCEDURES OF THE ARKANSAS SUPREME COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW*" is an impressive and complex document. Lawyers who find themselves enmeshed in a ethical misconduct dispute must peruse it carefully.

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384. *See Procedures*, 963 S.W.2d at 579, § 8C(1)(a).
385. *See Procedures*, 963 S.W.2d at 579, § 8C(3).
386. *See Procedures*, 963 S.W.2d at 579, § 8C(1)(a).
387. *See notes 72-74, 149, supra, and accompanying text.
388. *See Procedures*, 963 S.W.2d at 579, § 8C(1)(b).
389. *See Procedures*, 963 S.W.2d at 579, § 8C(1)(c).
390. *See Procedures*, 963 S.W.2d at 579, § 8C(2).
The most significant major changes in the *Procedures* are the express powers of the Committee to issue interim suspensions of lawyers and to fine them for their misconduct. The interim suspension power is probably long overdue, but it will have startling effects on some lawyers who find themselves suspended from practice prior to the decision of the court. The fining power will require scrutiny after it is exercised. Fining for costs due to misconduct during the discipline processes is not surprising. Every institution needs the power to make participants properly behave during the conduct of proceedings. Fining the lawyer to recompense harmed persons seems more speculative. There are no juries in discipline proceedings. Are not the *Procedures* infringing on other forums established to resolve these issues?

The real proof of *Procedures*’ merit will lie in the Committee’s application of the substantive *MODEL RULES*. The *Procedures* might be strict, but how are the *MODEL RULES* going to be applied? As indicated previously, evaluating lawyer conduct is not easy. It is even more difficult when applying that conduct to the *MODEL RULES* which suffer from omission, inconsistency, and indecisiveness.
### Model Rules Most Often Cited in Sanctions
(Data from The Arkansas Lawyer)

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1. This chart only includes Model Rules that were referred to in sanction four or more times each year.
NOTE: Listed below by calendar year are the numbers of grievance forms and inquiry letters received in the calendar year indicated. This listing does not include communications received from the Courts nor complaints by telephone which may be resolved or disposed of at the time the call is received. Following the listing of grievance forms received is a summary of the action taken by the staff of the Executive Director's office as to those grievance forms. The final action taken may not have occurred necessarily in the year that the grievance form was received.

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<td>DISPOSITION</td>
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<td>Determined to be without sufficient basis (NSF)</td>
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<td>Closed After Investigation Begun Due to Complainant's Unresponsiveness</td>
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1. The following data was provided by Executive Director James Neal of the Supreme Court Committee on Professional Conduct.

2. Referrals mainly to Judicial Discipline & Disability Commission, Unauthorized Practice of Law Committee, Client Security Fund and other States' regulatory agencies.
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3. The numbers below indicate the numbers, by category, of the final disciplinary actions that became final in the years 1993-97. A final action is one in which the Committee’s decision has been filed of record with the Supreme Court Clerk and no appeal is taken or the case has been disposed of on appeal. At the close of any calendar year there are numerous formal actions pending in various stages.

4. Some disbarment/surrenders may have resulted from multiple formal complaints. In 1993, one pending disbarment action was terminated by death of the attorney and is not counted.

5. Warnings are not public documents: the identity of the attorney remains confidential.
APENDIX C

SUPREME COURT OF ARKANSAS
Committee on Professional Conduct

Justice Building
625 Marshall Street, Room 2200
Little Rock, Arkansas 72201
(501) 376-0313

PLEASE READ CAREFULLY

The Committee on Professional Conduct has the authority to discipline attorneys for violation of the Model Rules of Professional Conduct adopted by the Supreme Court. The Committee can issue letters of warning, caution or reprimand, suspend the attorney's license or file in court seeking permanent disbarment. The Committee's authority is limited to matters addressed by the Model Rules and to the sanctions set out above. It does not have the authority to compel an attorney to take any particular course of action nor does the Committee become involved in litigation of legal matters.

If you feel that an attorney has acted in a manner that violates the standards of professional conduct, fill out, as completely as possible, the attached grievance form and return it to this office. Include photocopies of any documents, letters, agreements, or other papers that are relevant and material to your complaint. Please do not mark, write, underline, make notations, or comments on any records, transcripts, letters, documents or other written material that you attach to your grievance form as supporting documentation. If sufficient cause is found to file a formal complaint, some or all of your supporting documentation may be included as exhibits. Exhibits should not contain unnecessary and extraneous markings or notations. If you wish to specifically point out some part of a particular document, you may refer to it in the narrative portion of your grievance form. Please insure that the narrative account of the lawyer's actions of which you complain is FACTUAL. Conclusory statements such as "He's a liar", "He didn't do me right", "He's incompetent", etc., provide no evidentiary value and do not assist in the evaluation of your complaint.

Upon receipt of the completed form, we will review the information, conduct any necessary investigation and advise you whether your concerns fall within the Committee's limited authority. If it appears that a formal complaint is warranted, we will assist you in the preparation of an affidavit of complaint.

If a formal complaint is processed, a copy of your affidavit will be sent to the attorney and he/she will be given an opportunity to submit a response. You will be provided a copy of the response and the opportunity for rebuttal, if appropriate. Your complaint, the response, any rebuttal and other pertinent information will then be forwarded to the Committee for its review and action. You will be advised in writing of the Committee's action when the action becomes final. In rare instances, the Committee will conduct a public hearing on a complaint. If that should occur, you will have to appear and testify at the hearing.

As stated previously, it is important that the grievance form be filled out as completely as possible. Complete and accurate information will assist this office in evaluating your complaint. For a formal complaint to be processed, there must be adequate evidence to support allegations that the ethics rules have been violated.
SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
GRIEVANCE FORM

PART A: INFORMATION ABOUT YOU (please keep current)

Full Name: ____________________________________________
Home Address: _________________________________________
City: ____________________________ County: ___________ State: ____________
Zip: _______ Home Telephone: __________________ Work Telephone: ___________
Employer: ____________________________________________
Address: _____________________________________________

PART B: INFORMATION ABOUT ATTORNEY
Attorney's Full Name: __________________________________
Address: _____________________________________________

Does (or did) the attorney represent you? _____________ If yes, please give the following:
(1) When was the attorney hired? __________________________
(2) What did you hire the attorney to do for you? ____________

(3) What was the fee arrangement? ________________________

PART C: INFORMATION ABOUT YOUR GRIEVANCE
1. If a lawsuit is involved, give court and case number (e.g.: Pulaski County Circuit, C-89-001)

2. If a lawsuit is involved, state the parties involved (e.g.: John Doe v. William Roe)

3. State in detail and in chronological order the circumstances involved. Include dates or approximate dates. Attach additional sheets of paper if you do not have room below to fully explain your grievance. Also, attach photocopies of any documents (this office charges .25 cents per page to provide copies of any documents you may later need) you feel are relevant to your grievance:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

RETURN COMPLETED FORM TO: COMMITTEE ON PROFESSIONAL CONDUCT, Justice Building, Room 2200, 625 MARSHALL STREET, LITTLE ROCK, AR 72201.
Appendix D

SAMPLE BALLOT

COMMITTEE ON PROFESSIONAL CONDUCT

DATE: 
CASE: 
ATTORNEY:

COMPLAINT BEFORE THE COMMITTEE

Please circle appropriate Model Rule number(s) of the below listed Model Rules you find to be violated, if any, and the paragraph number(s) indicating the factual basis(es) upon which the Model Rule violation is found. Please mark appropriate committee action based on your determination of any Model Rules violation(s).

APPLICABLE MODEL RULES AND FACTUAL BASES

(1) MR ______
   A1
   A2

(2) MR ______
   B1
   B2
   B3

(3) MR ______
   C1
   C2
   C3
   C4

COMMITTEE ACTION

(1) No Action ( ) (2) Warning ( )

(3) Caution ( ) (4) Reprimand ( )

(5) Suspension: 3 mos. ( ) 6 mos. ( ) 9 mos. ( ) 1 yr. ( ) Other ( )

(6) Initiate Disbarment ( ) (7) Hearing ( ) (8) Recuse ( )

SEPARATE SANCTION FOR FAILURE TO RESPOND ________________________________

SANCTION IMPOSED ON COMPLAINT ENHANCED FOR FAILURE TO RESPOND ______

______________________________
COMMITTEE MEMBER