without any legal assistance. Meanwhile, the rising cost of legal education leaves many students with large loans that require substantial salaries to repay. And substantial salaries cannot be paid without charging substantial attorneys' fees.

Furthermore, while legal education continues to provide a general legal education, legal practice is increasingly specialized. A three-year one-size-fits-all Juris Doctorate may not be the best way to meet the future legal needs of the population. However, the inherent power of the judiciary to regulate the practice of law has created a systemic barrier to a public discourse about other options. Despite this, the scope of the legal profession's monopoly is being challenged by the private marketplace and by some limited authorization of nonlawyer legal activity, particularly in administrative proceedings. These areas demonstrate both the need for more options and the possibility that nonlawyers could be competent providers of some services. However, there has not been a robust public debate about the stratification of the legal profession.

As a regulated profession, the legal profession is not subject to the usual efficiencies of the marketplace; that is one of the effects of having a monopoly. However, this should not excuse the legal profession from having the scope of its monopoly reassessed by the public. After all, the privilege of the profession's monopoly largely flows from its responsibility to be public servants. As we can learn from the medical profession, a public debate is an important component to challenge the scope of a monopoly and to assess whether the current parameters of a monopoly continue to best serve the public interest. Innovation benefits from more voices. The legal profession should be at the lead of seeking out such innovation.

"Philadelphia Lawyers": Policing the Law in Pennsylvania

Brian K. Pinaire,* Milton Heumann,** and Christian Scarlett***

Abstract

Unlike other professions within the Commonwealth, Pennsylvania attorneys generally "police" themselves, meaning that ethical infractions and ramifications of criminal convictions are addressed not by a state administrative agency, but rather by peers working in a disciplinary capacity under the authority of the state supreme court. Recent socio-legal and social science research has addressed the various *statutory* "collateral consequences" that attach to criminal convictions, but we know comparatively little about consequential discipline instituted by the profession itself. Based on an examination of 419 disciplinary dispositions from 2005-2009, as well as interviews with elites, this study provides the first-ever examination of the process and legal-political implications of peer-policing of the legal profession in Pennsylvania. Specifically, we set forth four primary findings.

First, despite global perceptions to the contrary, Pennsylvania attorneys are punished rather harshly by their peers, at least with respect to *publicized* discipline (certain disciplinary actions are not publicized and hence not open to examination). *Second*, our study reveals a trend we are calling "disciplinary amplification," or the tendency for sentences to *increase* in severity as cases proceed on appeal. *Third*, we highlight the prevalence of discipline reached "on consent" and explore the implications of this increasingly popular mode of disposition. *Finally*, our data illustrate a counter-intuitive phenomenon we

* Associate Professor, Department of Political Science, Lehigh University; B.A., Whitman College, 1997; Ph.D., Rutgers University, 2003. The authors would like to acknowledge Lehigh University (Faculty Research Grant) and Rutgers University (Kneller Fund) for financial support of this research; Lisa Regan, for procuring important documents; and Alec Ewald, Vesla Weaver, Amy Lerman, Michelle Phelps, Holona Ochs, Rick Abel, and the members of the peer review board of the *Journal of the Professional Lawyer* for their very helpful comments as this article came together. Earlier versions of this research were presented at the 2011 Annual Meeting of the Southern Political Science Association and the Lehigh University Department of Political Science Research Symposium. Please direct all correspondence to bkp2@lehigh.edu/.

** Professor, Department of Political Science, Rutgers University; B.A., Brooklyn College, 1968; M.Phil., Yale University, 1970; Ph.D., Yale University, 1976.

*** Law student, UCLA; B.A., Rutgers University, 2010.

are calling "*self*-discipline," or the tendency for certain suspended or disbarred attorneys to deliberately prolong their banishment as a tactic to eventually secure reinstatement.

Table of Contents

"I can't imagine why clients would not run like crazy away from that [suspended] lawyer."[1]

I. Introduction

To refer to an attorney as a "Philadelphia lawyer" was, in the colonial era, a sign of great respect: that is, a moniker signifying an individual who was learned, worthy, noble and adeptly attuned to the details and technicalities of the law.[2] With the passage of time, however, the designation has devolved to characterize a practitioner of a different hue—still shrewd and skilled, but inclined more toward exploitation than grandeur.[3] Indeed, in its modern contemplation, a reference to a

1. Interview with Pennsylvania disciplinary official (Feb. 22, 2010) [hereinafter Interview #10].

2. *See* Allen Ecker, *Andrew Hamilton, Philadelphia Lawyer*, 13 THE GREEN BAG 127, 128 (Winter 2010) (referring to noted Scotland-born attorney Andrew Hamilton, who while living in Pennsylvania served as Attorney General, was in the General Assembly, helped design Independence Hall, and ultimately represented the printer John Peter Zenger in the famous 1735 trial that ultimately helped to recognize truth as a defense against claims of libel).

3. *See* http://legal-dictionary.thefreedictionary.com/Philadelphia+Lawyer (last accessed October 22, 2010) ("Philadelphia lawyer" is a "colloquial term that was initially a compliment to the legal expertise and competence of an attorney due to the outstanding reputation of the Philadelphia bar during colonial times. More recently the term has become a disparaging label for an attorney who is skillful in the manipulation of the technicalities and intricacies of the law to the advantage of his or her client, although the spirit of the law might be violated.").

"Philadelphia lawyer" is more likely to underscore the presumptively disreputable and disingenuous qualities of those within the Bar, such as an inclination toward improprieties,[4] as opposed to the unimpeachable integrity imagined by those with the highest of aspirations for the profession.[5]

And yet, while we have lawyer jokes at the ready,[6] we are focused less on the historical trajectory of the profession or the ethical failings of some of its members,[7] and more on the institutions, policies, and actors that profess to regulate the practice of law in the public interest. Indeed, the stated "goals" of the Disciplinary Board of the Supreme Court of Pennsylvania are to "protect the public, maintain the integrity of the legal profession and to safeguard the reputation of the courts."[8] However, what is distinctive about the supervision of lawyers within the Commonwealth is that other professions—e.g. medicine, accounting, dentistry, real estate—are supervised by the Bureau of Professional and Occupational Affairs, a traditional administrative agency composed of state employees who are charged with overseeing most aspects pertaining to quality control, public safety, and so on.[9] By contrast, while the Pennsylvania Supreme Court reserves inherent

4. Consider Woody Guthrie's famous ballad, "Philadelphia Lawyer," depicting one attorney's demise at the hands of a cowboy in Reno, Nevada. As Guthrie told the story, "A 'Philadelphia lawyer' was makin' love to a Hollywood maid," with a pledge to help her win a divorce from her husband, until "Bill"—a "gun totin' cowboy"—caught the two in the act and then there was "one less Philadelphia lawyer in old Philadelphia tonight." *See* http://www.lyricsbay.com/philadelphia_lawyer_lyrics-unknown.html (last accessed July 30, 2010).

5. *See, e.g.*, Maryland State Bar Assn., Inc. v. Agnew, 318 A.2d 811 (Md. 1974) ("an attorney's character must be beyond reproach"); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 510 (1985) (quoting a former Executive Secretary of Manhattan's Character Committee) ("A lawyer should be like Caesar's wife [i.e. beyond even the *suspicion* of wrongdoing].").

6. We considered titling the paper "When Lawyers Go Bad," but then realized that this implied that lawyers were at some point *good*. Ka-ching! Thanks very much. Try the veal. The more general phenomenon of lawyer jokes is well-portrayed in MARC GALANTER, LOWERING THE BAR (Wisconsin, 2006).

7. On this, *see, e.g.*, Richard Abel, *The Transformation of the American Legal Profession*, 20 LAW & SOC. REV 7, 17 (1986) (reviewing the development of the legal profession in the United States, but ultimately questioning whether or not it is "useful to continue viewing lawyers as members of a profession when they no longer control their market, when they are divided by demographic characteristics, rewards, structures, functions, and voluntary associations, and when they are losing the privileges of self-regulation").

8. "History," *The Disciplinary Board of the Supreme Court of Pennsylvania*, http://www.padisciplinaryboard.org/aboutus/history_general.php (accessed February 23, 2011). *See also In re* Berlant, 328 A.2d 471, 473 (Pa. 1974) ("[T]he sanctions arising from such proceedings-censure, suspension, or disbarment-are not primarily designed for their punitive effects, but for their positive effect of protecting the public and the integrity of the courts from unfit lawyers.").

9. Within the Commonwealth, the Bureau of Professional and Occupation Affairs (a part of the Department of State) provides administrative, legal, and support services to twenty-nine professional and occupational boards and commissions, each with a statutory definition of their powers and each charged with promulgating their own regulations within the profession. Boards and commissions

and exclusive powers over the conduct of attorneys who are its officers,[10] the actual administration of discipline is not carried out by state employees, but rather disciplinary officials who work *within* and are paid by the profession itself,[11] as opposed to working *for* the state per se. While this by no means implies that the profession is separate from the state—again, the state supreme court has authority over its officers—attorneys in Pennsylvania are policed by their peers in kind and in degree more so than is allowed for practitioners in any other profession within the Commonwealth.[12]

What's more, attorneys in Pennsylvania are accountable to the profession not only for professional infractions, but also for criminal convictions. That is, when an attorney commits a professional offense (e.g. failure to respond to a client in a "timely manner"), then s/he can face discipline coming from within the profession; but, when an attorney is convicted of a criminal offense (e.g. possession of cocaine), s/he will encounter punishment from the criminal court *and* discipline from the profession. It is this linkage, between criminal convictions and consequent professional discipline, which piqued our interest in this topic and encouraged us to examine these disciplinary implications as variations on the familiar notion of "collateral consequences" within the socio-legal and social science literatures.

Such "consequences," while often lumped together in media renditions or other generic contemplations, are actually more accurately conceived of in at least three distinct manifestations. First, the term is occasionally used to refer to what are more appropriately construed as "collateral *sanctions*," that is, legal penalties, disabilities, or disadvantages that are imposed on a person *automatically* upon conviction for felony, misdemeanor, or other offense—even without being formally a function of the sentence itself.[13] Restrictions on voting rights are probably the best-

are comprised of between seven and seventeen members, including members of the profession and lay-representatives, and all are appointed by the Governor and confirmed by the Senate. The Department of State, among other things, receives and investigates public complaints and also prosecutes, adjudicates, fines, and sanctions violators. "History of the Bureau," *Bureau of Professional and Occupational Affairs, Pennsylvania Department of State*, http://www.dos.state.pa.us/portal/server.pt/community/general_information/12501 (accessed February 23, 2011).

10. Pennsylvania Constitution, Art. V, § 10(c).

11. The Disciplinary Board, for example, receives no taxpayer support and is instead funded exclusively by the annual registration fees each attorney is required to pay when licensed to practice in the Commonwealth. "History," *Disciplinary Board, supra* note 8.

12. The Disciplinary Board of the Supreme Court of Pennsylvania is composed of thirteen members, only two of whom are nonlawyers. "About Us," *The Disciplinary Board of the Supreme Court of Pennsylvania*, http://www.padisciplinaryboard.org/aboutus/boardmembers_general.php.

13. This distinction is featured in the federal Court Security Improvement Act of 2007, defining collateral "sanctions" as restrictions imposed *automatically* upon conviction, while "disqualifications" are those penalties a court, agency, or official is authorized but not required to impose. H.R. 660, the Court Security Improvement Act of 2007, P.L. 110-177, 121 Stat. 2534 (Jan. 6, 2008), Section 503(b)(1)-(3). This distinction was initially put forward by former U.S. Pardon Attorney Margaret Colgate Love and the American Bar Association. *See* Margaret Colgate Love, *Starting Over With a Clean Slate*, 30 FORDHAM URB. L.J. 1705, 1737 (2003); *Black Letter, in* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS BL-1, R-7-8 (3d ed. 2003b).

known form of collateral sanction,[14] although restrictions on the right to serve in the military or on a jury,[15] and per se firearms restrictions[16] would fit here as well.

At other times, "collateral consequences" is the generic term for "discretionary disqualifications," which are—by contrast with collateral sanctions—penalties, disabilities, or disadvantages that a civil court, administrative agency, or official is authorized *but not required* to impose following a conviction for an offense related to the conviction.[17] Matters pertaining to insurance, public benefits, and employment and licensing restrictions are usually categorized here as well. Deportation of non-citizen legal residents convicted of criminal offenses was until recently another such penalty; however, in its ruling in *Padilla v. Kentucky*, the U.S. Supreme Court found that because statutory changes have rendered deportation "virtually inevitable" for broad classes of crimes, deportation-as-consequence is now an "integral part" of the penalty faced by non-citizen offenders, and is therefore no longer properly conceived of as discretionary.[18] In finding so, the Court for the first time extended the Sixth Amendment right to counsel to a conviction consequence outside the court-imposed punishment and, as commentators have suggested, took an "important first step toward imposing constitutional discipline on the plea-bargaining process."[19]

Finally, "collateral consequences" can also end up being the catch-all term used to refer to the general psychological, sociological, and even economic consequences of a criminal conviction—including things such as the stigma felt by former offenders,[20] the impact on the family and/or community when vast segments of

14. *See, e.g.*, Brian Pinaire, Milton Heumann, and Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB L.J. 1519 (2003). State laws differ substantially on this issue. For the most up-to-date information, see The Sentencing Project's section on "Voting Rights", *available at* http://www.sentencingproject.org/template/page.cfm?id=133 (last accessed March 13, 2011).

15. *See, e.g.*, Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 AMER. UNIV. L.R. 67 (2003).

16. *See, e.g.*, Kathleen Olivares et al., *The Collateral Consequences of a Felony Conviction*, 60 FED. PROBATION 10 (1996).

17. Love, *Starting Over, supra* note 13, at 1737; ABA, *Black Letter, supra* note 13.

18. Jose Padilla v. Kentucky, 130 S.Ct. 1473, 1480 (2010).

19. Gabriel Chin and Margaret Colgate Love, "Status as Punishment: A Critical Guide to *Padilla v. Kentucky*," Arizona Legal Studies Discussion Paper No. 10-21 (November 2010): 1. *See also* Margaret Colgate Love and Gabriel J. Chin, "Padilla v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction," Arizona Legal Studies Discussion Paper No. 10-16 (May 2010) and for more general contemplations of the inherent constitutional concerns, *see* Gabriel Chin & Richard Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L.REV. 697 (2002).

20. *See* Webb Hubbell, *The Mark of Cain*, SAN FRANCISCO CHRON., June 10, 2001; Devah Pager, *The Mark of a Criminal Record*, 108 AMER. J. SOCIO. 937 (2003); DEVAH PAGER, MARKED (Princeton, 2009).

the population are incarcerated or are reentering society,[21] and the implications of a conviction on employment prospects even for those working outside the professions and/or not requiring licensure or certification—such as entry-level service, retail, or custodial positions, to suggest just a few examples.[22] Importantly, the first two categories (where the state is the actor instituting the consequence) are typically construed as *civil* regulations rather than *criminal* punishments,[23] meaning they do not amount to double jeopardy, but meaning as well that—even though they have a profound and potentially permanent effect on those within and those who have *previously* passed through the criminal justice system[24]—they are generally scattered throughout the criminal code,[25] and with the recent exception of deportation as a consequence,[26] they may not be specified during a trial or surfaced in plea negotiations.[27]

Certain varieties of collateral consequences, such as the relationship between a felony conviction and the voting rights of felons have properly received extensive academic attention;[28] yet, discretionary, *non*-state consequences such as the suspension or removal of a professional license have generated little scrutiny. This is especially

21. JOAN PETERSILIA, WHEN PRISONERS COME HOME (Oxford, 2003); JEREMY TRAVIS, BUT THEY ALL COME BACK (Urban Institute 2005); Milton Heumann, Brian Pinaire, and Thomas Clark, *Beyond the Sentence: Public Perceptions of Collateral Consequences for Felony Offenders*, 41(1) CRIM. L. BULL. 24 (2005).

22. *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (Sage, 2007); Harry Holzer et al., *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and their Determinants*, in Mary Pattillo, et al., eds., IMPRISONING AMERICA 205 (2004).

23. *See e.g.* Trop v. Dulles, 356 U.S. 86, 96 (1958) ("But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose."). For an excellent assessment of the dilemmas presented by such definitional distinctions, *see* Alec Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, in AUSTIN SARAT, et al., ed, LAW AS PUNISHMENT / LAW AS REGULATION, 79 (observing that collateral sanctions "do not fit clearly" into either punitive or regulatory categories and concluding that confusion over the "character and purpose" of collateral sanctions "keeps us from knowing *how* to judge them in the first place").

24. By one estimate, as many as 16 million Americans have a felony conviction on their record. *See* Christopher Uggen, Jeff Manza, and Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANN. AMER. ACAD. POLITICAL AND SOC SCIENCES 281, 290 (May 2006).

25. Love, *Starting Over, supra* note 13, at 1737.

26. *See* Padilla v. Kentucky, *supra* note 18 (finding that defense counsel who fail to apprise non-citizen clients of the deportation consequences of a conviction have failed to meet the Sixth Amendment standards for effective counsel and thus subsequent plea deals are subject to revocation).

27. *See* Chin & Holmes, *Effective Assistance, supra* note 19; Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067 (2004); Alec Ewald & Marnie Smith, Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench, 29 JUST. SYS. J. 145 (2008).

28. *See, e.g.*, Alec Ewald, *Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045 (2002); Pinaire, *Barred from the Vote, supra* note 14; MARC MAUER & TUSHAR KANSAL, BARRED FOR LIFE (The Sentencing Project 2005); CHRISTOPHER UGGEN & JEFF MANZ, LOCKED OUT (Oxford 2006).

intriguing when we consider that within the Commonwealth of Pennsylvania (and most other states) private actors within the profession enjoy the prerogative under the Supreme Court to privately discipline their own for the ostensible purpose of preserving the integrity of the Bar and protecting the interests of the public at large. But it is also curious given what we might charitably call a collective ambivalence toward the legal profession.[29] Put simply, people need lawyers—basic governance and certainly private disputes and criminal matters require legal counsel—even while they likely do not understand the law and may not trust its practitioners. This suggests that there is a compelling case for evaluating and explicating exactly how the profession goes about the process of internal quality control.[30] In few states is this more true than in the Commonwealth, because with 59,527 active members of the profession, and another 10,367 in inactive status,[31] Pennsylvania's attorney population has seen a more than 500% increase in its ranks over the last few decades,[32] while serving a state with the sixth largest population in the United States.[33]

As with our previous case studies of disciplinary mechanics within the professions in various states,[34] we have confined our investigation to one jurisdiction

29. *See* PUBLIC PERCEPTIONS OF LAWYERS, prepared by Leo Shapiro and Associates (on behalf of the American Bar Ass'n) (2002), *available at* http://www.abanet.org/litigation/lawyers/publicperceptions.pdf (last accessed July 30, 2010).

30. For previous studies of other jurisdictions, *see* JEROME CARLIN, LAWYERS ON THEIR OWN 170 (1962) (finding that only 2% of lawyers who violated generally accepted ethical norms were processed and fewer than two-tenths of 1% of these cases were officially sanctioned by the Bar of the City of New York Association.); S. Arthurs, *Discipline in the Legal Profession in Ontario*, 7 OSGOODE HALL L.J. 235 (March 1970) (finding that of the 93 Ontario lawyers disbarred between 1945-65, only six had been reinstated); David Johnson, *Lawyer, Thou Shall Not Steal*, 36 RUTGERS L. REV. 456 (1984), (finding that 53% of all public discipline in New Jersey from 1948-82 involved lawyers who stole or had other financial improprieties); Jack Guttenberg, *The Ohio Attorney Disciplinary Process, 1982-91: An Empirical Study, Critique, and Recommendations for Change*, 62 U. CINCINNATI L. REV. 947, 949 (finding that the Ohio disciplinary system is "overly complex, inefficient, and, at times, ineffective"); RICHARD ABEL, LAWYERS IN THE DOCK (2008) (offering nuanced and insightful profiles of several disciplined attorneys in New York state, as well as the larger theoretical implications of their dispositions).

31. *See* 2010 ANNUAL REPORT OF THE DISCIPLINARY BOARD OF PENNSYLVANIA, http://www.padisciplinaryboard.org/documents/2010AnnualReport.pdf (last accessed November 4, 2011) (providing totals as of December 31, 2009).

32. During the 1972-73 Fiscal Year there were 13,057 active attorneys within Pennsylvania. *See* 2010 ANNUAL REPORT.

33. As of the end of 2010, the population of Pennsylvania was 12,734,905. *See* "World Atlas—United States," http://www.worldatlas.com/aatlas/populations/usapoptable.htm (last accessed January 1, 2011).

34. *See* Brian Pinaire, Milton Heumann, and Jennifer Lerman, *Barred from the Bar: The Process, Politics, and Policy Implications of Discipline for Attorney Felony Offenders*, 13 VA. J. SOC. & LAW 290-330 (Winter 2006). Milton Heumann, Brian Pinaire, and Jennifer Lerman, *Prescribing Justice: The Law and Politics of Discipline for Physician Felony Offenders*, 17 B.U. PUB. INTEREST LAW J. 1-38 (Dec 2007); Milton Heumann, Brian Pinaire, and Peter Geller, *Bad Medicine: On Disciplining Physician Felons*, 11 CARD. J. CONFLICT RES. 133-80 (Fall 2009).

in order to probe deeply the inner workings of the institutions and the perspectives of practitioners within the venue. While aggregate disciplinary statistics are available through the website of the Disciplinary Board of the Supreme Court of Pennsylvania (for limited years and with sparse context), our work represents the first-ever academic exploration of the instances and implications of peer policing of the legal profession within the Commonwealth. To explore the nuances of this disciplinary framework, we conducted interviews with elites (disciplinary officials and attorneys who represent defendants within the process); we carried out a quantitative analysis of the 419 public disciplinary dispositions reached during a five-year stretch of time (2005-2009); we employed content analysis of court opinions and Disciplinary Board materials; and, we enjoyed the opportunity to sit in on reinstatement hearings.

With the above introduction to the thrust of this study, we present the following findings. First, despite evident cynicism[35] and criticisms from advocates[36] that suggest that the profession is unlikely (or unable) to self-police,[37] we find that attorneys in Pennsylvania are actually disciplined relatively harshly. We must stress that this conclusion factors in only instances of *public* discipline because, as we will explain in more detail below, the majority of disciplinary actions within the Commonwealth are of the "private" variety. What this means is that there is no public record of the sanction (other than an official account of aggregate totals) and correspondingly no way of gauging the relationship between the prescribed discipline and the underlying offense, no way to compare disciplinary dispositions between similarly-situated offenders, over time, no way to track rates of recidivism, and so on.

Second, we are introducing the term "disciplinary amplification" to describe a phenomenon that surprised us and that runs counter to trends in criminal courts, for example, and only for purposes of providing some kind of frame of reference for this process. "Amplification" in this context refers to the tendency for sentences to become increasingly *harsher* (i.e. "amplified") as individual cases move through the process, specifically progressing from the first body to review the case

35. In one recent assessment, a mere 26% of survey respondents agreed with the statement "the legal profession does a good job of disciplining lawyers." PUBLIC PERCEPTIONS OF LAWYERS, *supra* note 29, at 15-16.

36. *See, e.g.*, MARTIN GARBUS & JOEL SELIGMAN, *Sanctions and Disbarment: They Sit in Judgment*, in VERDICTS ON LAWYERS, RALPH NADER & MARK GREEN eds., (1976), 48-49 ("Self-regulation has collapsed" and "is a nearly complete failure—an embarrassment for a profession which brags that the integrity of its practitioners is the very breath of justice.").

37. *See* Mark Hoffman, *Convicted Attorneys are Still Practicing*, MILWAUKEE JOURNAL-SENTINEL; *available at* www.jsonline.com/watchdog/114879194.html (accessed March 7, 2011) (finding that at least 135 attorneys with criminal convictions are presently practicing law, including offenders who maintained their licenses while incarcerated or who won them back prior to completing probation; in about 40% of cases reviewed by disciplinary officials, lawyers given minor sanctions went on to reoffend; and, about 60% of reinstatement petitions over a nine year period were granted by the Wisconsin Supreme Court).

(the Hearing Committee) to the final body to rule on the matter (the Pennsylvania Supreme Court). We stress that this is merely an emerging pattern, rather than a predetermination, and the universe of cases is comparatively small. That said, this trend is intriguing because, while the two domains are certainly different, sentencing (re)appraisals in a *criminal* setting, for example, would tend toward the opposite result—i.e. *diminishing* in severity as cases moved through pipeline.

Third, our research illuminates the increasing significance of disciplinary sanctions arrived at by "consent." Such dispositions, especially those involving disbarments, have become quite prevalent since their introduction in Pennsylvania in 2005.[38] Our research reveals that this option has become especially appealing to defendants because it starts the "clock" running earlier in the process, meaning that those who are particularly likely to be *eventually* disbarred by conventional means can surrender their license earlier and immediately begin serving their mandatory five-year term outside the profession, as opposed to undergoing the traditional process, which could be drawn out over a year or more. What's more, our interviews with disciplinary officials revealed a developing sense of mutual benefit under such terms, since a disposition can be reached without expending as many resources, without engaging in potentially rancorous hearings, and without exposure to the uncertainty that can arise in any arena of adjudication. As one disciplinary official put it, consent discipline is a "win-win option."[39]

Finally, we have located what might be considered a "hidden" element, a phenomenon we refer to as "*self*-discipline." Flowing from our third conclusion, but consistent with our first one, we find that a significant number of those seeking reinstatement to the profession (following disbarment, in particular) appear to effectively and strategically "discipline" *themselves* by waiting more than the minimum amount of time required before seeking reentry. Put differently, interviews with practitioners, as well as our own inferences from the data, suggest a surprising and (we think) counter-intuitive tendency: while attorneys who have been suspended for more than twelve months can apply for reinstatement at the end of this period, and while disbarred attorneys can do the same at the end of five years, we find that—of those who *do* reapply at all (and, we must stress, most do not)—the majority do *not* seek reentry at the earliest possible instance, but rather wait an additional period of time before seeking readmission to the Bar. To flesh this out in numerical terms, while a disbarred attorney would have to wait sixty months before instituting the process of reinstatement, which is likely to take at least a year itself, the average amount of time spent outside the practice of law for those who *were* eventually reinstated was over 126 months—or more than *twice* the length of

38. *See* Pa.R.D.E. 215(a)(1-4). As disciplinary officials explained, the introduction of the option in Pennsylvania was likely the product of conversations and interactions with sister state officials at the annual meeting of the National Organization of Bar Counsel. Interviews #7 and 10.

39. Interview #10. What's more, as this individual explained, "I have never had responsible counsel not think it's [discipline on consent] a good idea." Interview #10.

the required banishment.[40] In the Discussion section below we elaborate on these data and offer some explanations for this phenomenon.

The next section of this paper will provide an overview of the history of attorney discipline, with particular attention to the organization and operations of the system within the Commonwealth of Pennsylvania. Following that, Section III sets forth our quantitative data in the form of seven tables and two figures, as well as color and context gleaned from interviews with those who animate this process. Section IV elaborates on those data and discusses them in the context of the above-mentioned findings. Finally, in Section V, we offer some concluding thoughts and a forecast for future research.

II. Attorney Discipline

A. Origins

In a broad sense, individuals who are members of a "profession" are held to certain expectations regarding training, character, behavior, and comportment.[41] On account of their degree of specialization and technical capacity, they often enjoy the opportunity to generally police their own practitioners,[42] and, perhaps more controversially, to devise the terms of membership.[43] This assumed authority extends to cover the requirements of admission,[44] as well as retention[45]—conditions

40. To be sure, these numbers should be construed with some caution: a disbarred attorney must wait sixty months before reapplying, and the process itself could take between one and one and a half years, meaning that the total time out of the profession under the best circumstances is likely to be about seventy-five months. On the other end, our finding of an average "time out" of 126.4 months does not account for when the unlicensed *begin* the reinstatement process—but rather when they are finally readmitted, meaning that they could have initiated the effort at about the 100th or 110th months. Still though, there is a sizable gap of time between the earliest possible point of readmission (approximately the 75th month) and the actual average amount of time spent away from the practice of law (126.4 months).

41. *See e.g.* DAN ARIELLY, PREDICTABLY IRRATIONAL 209-10 (New York, 2008) (the word "profession" comes from the Latin *professus*, meaning "affirmed publicly," and members were individuals who had mastered esoteric knowledge and "had an obligation to use their power wisely and honestly.").

42. *See e.g.* William Goode, *Community within a Community*, 22 AM. SOC. REV. 194 (1957); Bernard Barber, *Regulation and the Professions*, 10 THE HASTINGS CENTER REPORT: 34 (February 1980); E. Haavi Morreim, *Am I My Brother's Warden? Responding to the Unethical or Incompetent Colleague*, 23 THE HASTINGS CENTER REPORT 20 (May-June 1993).

43. *See* GARBUS & SELIGMAN, *supra* note 36, at 48-49.

44. *See, e.g.*, Kimberly Lacey, *Second Chances: The Procedure, Principles, and Problems with Reinstatement of Attorneys After Disbarment*, 14 GEO. J. LEGAL ETHICS 1117, 1124 (Summer 2001) ("Good moral character is a prerequisite to admission to the bar in every state and is used in the evaluation of reinstatement petitions.").

45. *See, e.g., In re* Davies (1880) ("The power of a court to admit as an attorney to its bar a person possessing the requisite qualifications, and to remove him there from when found unworthy, has always been recognised and cannot be questioned. The power of removal for just cause is as necessary as that of admission for a due administration of law."); Joseph Bugliari, *Note, Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice*, 43 CORNELL L. Q. 489, 495 (1958) ("The Bar and the courts have a duty to the public and to themselves to remove from practice those who are unfit for membership. Such unfitness can be shown by misconduct in either professional or non-professional capacity. The emphasis should be primarily on the quality of character demonstrated by the act. A person who demonstrates unfit character in his private life or in non-professional ventures presents a risk that the next improper act will be in his professional capacity.")

that may not be the same.[46] To draw toward the focus of this paper, we should stress that attorney self-regulation has often garnered considerable public suspicion,[47] and has frequently been construed as a mechanism for maintaining market control,[48] as a means of obscuring discriminatory exclusions of women and minorities,[49] as politically motivated,[50] as a cabal of chumminess where practitioners protect their own,[51] and so on. Such criticisms are in many cases deserved, particularly when higher profile offenders evade sanctions,[52] when the "procedural excesses" of the lawyer-designed system are exploited,[53] and when studies suggest that disciplinary actions have often been disproportionately pursued against sole practitioners rather than larger firm lawyers, for example.[54]

46. *See* Rhode, *Moral Character, supra* note 5, at 549 ("Offenses for which applicants are delayed or denied admission—traffic violations, bankruptcy, non-payment of debts, failure to answer questions regarding radical political involvement, personality disorders, consensual sexual activity, and petty drug violations—almost never have comparable repercussions for practitioners.").

47. *See* PUBLIC PERCEPTIONS, *supra* note 29, at 15-16.

48. *See* RICHARD ABEL, *Lawyers* in LAW AND THE SOCIAL SCIENCES, L. LIPSON & S. WHEELER, eds. (1986), 369, 371, 404 (employing the framework of "critical legal theory" and questioning "functionalist" assumptions about the regulation and operations of the legal profession).

49. Rhode, *Moral Character, supra* note 5, at 501.

50. James Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725, 730 (2005) (tracing the history of 20th century misuse of the bar machinery to "punish government dissenters, maintain homogeneity of thought, and preserve the social and political status quo, particularly in times of national crisis").

51. *See* GARBUS & SELIGMAN, *supra* note 36, at 50 ("lawyers have proven utterly incapable of disciplining each other," essentially because the "general impulse is to protect a brother at the bar—even a knavish one—rather than protect the public."); Elizabeth Graddy & Michael B. Nichol, *Public Members on Occupational Licensing Boards: Effects on Legislative Regulatory Reforms*, 55 SOUTHERN ECON. J. 610 (January 1989) ("Those concerned with the effects of occupational regulation have long argued the need for greater protection of consumer interests. One area of concern is the domination of occupational licensing boards by practitioners of the licensed profession. . . . This practice could encourage capture of the regulatory process by the regulated profession."); Bernard Barber, *Control and Responsibility in the Power Professions*, 93 POL. SCI. Q. 609 (Winter 1978-79); (citing *The New York Times*, July 18, 1977).

52. *See* PHILIP STERN, LAWYERS ON TRIAL 86 (1980) (discussing former Attorney General Richard Kleindienst who pleaded guilty to having lied under oath to a Senate Committee and who subsequently received a recommended sentenced of only one year—shortened by the court to a mere thirty days—and who was only censured by his home state bar association).

53. SHARON TISHER, LYNN BERNABEI, & MARK GREEN, BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS 100 (1977) ("When lawyers get together to design proceedings to investigate and discipline lawyers, their natural proclivity to procedural excesses increases exponentially.").

54. *See* RICHARD ABEL, AMERICAN LAWYERS 145 (1989) (Over 80% of those disciplined in California, Illinois, and Washington, D.C. in 1981-82 were sole practitioners and *none* was from a

With these and other concerns in mind, in 1968 the American Bar Association charged a Commission to study the disciplinary systems in place in the various states.[55] The final product, known as the "Clark Report" (for its Chair, former Supreme Court Justice Tom Clark), described a "scandalous situation that requires the immediate attention of the profession."[56] "With few exceptions," the Report stressed, "the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility."[57] What's more, acts of discipline were "practically nonexistent in many jurisdictions," practices and procedures were "antiquated," and many disciplinary agencies lacked the power to move against malefactors. Over the course of its 200-plus pages, the Clark Report identified thirty-six distinct "problems" with state-level attorney discipline and offered corresponding "recommendations," particularly involving issues of central coordination, changes in practices involving funding, record-keeping, reciprocal punishments, reinstatements, reporting, and evidence gathering, and treatment of witnesses.[58]

The impact of the Clark Report was "immediate" as one analyst put it, with at least twenty-four jurisdictions employing lawyers in their disciplinary agencies within five years.[59] Indeed, by 1992, according to the McKay Report (the next major ABA stock-taking effort), "revolutionary" changes had occurred.[60] As it stands today, there are disciplinary agencies within every state and they annually receive more than 125,000 complaints (generally from citizens) against the over 1.3 million attorneys presently active in the United States,[61] although only a small

firm with more than seven lawyers, even though sole practitioners were less than half of all those practicing nationwide.); Johnson, *Lawyers, Thou Shall Not Steal, supra* note 30, at 490 (finding that between 1948-82 in New Jersey 84.2% of financial violators were sole practitioners); ABEL, LAWYERS IN THE DOCK, 54; Bruce Arnold and John Hagan, *Self-Regulatory Responses to Professional Misconduct within the Legal Profession*, 31 CANADIAN R. OF SOC. AND ANTHRO 168, 179 (May 1994):; Bruce Arnold and John Hagan, *Careers of Misconduct: The Structure of Prosecuted Professional Deviance Among Lawyers*, 57AMER. SOCIO. REV. 771, 772 (1992; CARLIN, LAWYERS, *supra* note 30, *passim;* Leslie Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 6 (2007).

55. *See* AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970) (CLARK REPORT); *available at* http://www.abanet.org/cpr/reports/Clark_Report.pdf (last accessed August 2, 2010).

56. *Id.*.

57. *Id.* at 1.

58. *Id. passim.*

59. Mary Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, GEO. J. LEGAL ETHICS 911 (1994).

60. *See* AMERICAN BAR ASSOCIATION COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT 5 (Feb. 1992) ("It is no exaggeration to say that revolutionary changes have occurred.").

61. *See* DIRECTORY OF LAWYER DISCIPLINARY AGENCIES, AMERICAN BAR ASS'N (2010); *available at:* http://www.abanet.org/cpr/regulation/directory.pdf (last accessed July 30, 2010); Levin, *Less Secrecy, supra* note 54, at 1.

percentage of these complaints result in disciplinary actions and consequences can vary considerably between states.[62]

B. Organization

While sanctions against legal practitioners date as far back as the 13th century in England,[63] and the colonial era in the U.S.,[64] we direct our attention in this paper to attorney discipline in its "modern" form, which was instituted in Pennsylvania on March 21, 1972,[65] in response to a study and series of recommendations made by the Pennsylvania Bar's Special Committee on Disciplinary Procedures. Relying on these findings, the Board of Governance of the state Bar made recommendations to the State Supreme Court and thus hastened the transformation—as was the case in most states—from a "loose hodgepodge of numerous agencies with overlapping jurisdictions"[66] to a more centralized and streamlined organization overseen by the

62. *Compare, e.g.*, Michael S. Kelton, *Collateral Consequences of Criminal Convictions of Physicians*, 19 ATTICUS 3, 3-4 (2006) (observing that attorneys in New York *automatically* lose their licenses once their conviction is a matter of public record) with Pinaire, *Barred from the Bar, supra* note 34, at 319 (New Jersey uniformly and permanently disbars only *specific* offenders—i.e. those found guilty of knowing misappropriation).

63. *See* Devlin, *supra* note 59, at 912 (1994) ("From at least the time of the Statute of Westminster in 1275, attorneys have been subject to the summary jurisdiction of the courts in which they practiced for their professional conduct."); Jonathan Rose, *The Legal Profession in Medieval England*, 48 SYR. L. REV. 1 (1998); John Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 CAL. L. REV. 9 (1935) ("In England, the legal profession arose in the twelfth and thirteenth centuries. One of the early glimpses we have of it is in 1292 when the King, representing the public interest, placed the control of the bar in the hands of the justices."). In fact, the term "disbarment" dates to a period centuries ago when English lawyers who had misbehaved were subject to censure in the form of a public ceremony wherein the barrister would be physically thrown over the wooden railing—the "bar"—that separate the judges and the lawyers in the courtroom from the spectators. GARBUS AND SELIGMAN, *supra* note 36, at 49.

64. Pinaire, et al., *Barred from the Bar, supra* note 34, at 310. With respect to Pennsylvania, *see* 1 Sm. Laws, 131 ("An Act for Establishing Courts of Judicature in this Province," section 28 of which provided "that there may be a competent number of persons of an honest disposition and learned in the law admitted by the justices of the said respective courts to practice as attorneys there, who shall behave themselves justly and faithfully in their practice." Moreover, "if they misbehave themselves therein, they shall suffer such penalties and suspensions as attorneys at law in Great Britain are liable to in such cases."); *In re* Gates (1885), referring to Section 73 of the Act of 1834 ("If any attorney at law *shall misbehave himself in his office of attorney*, he shall be liable to suspension, removal from office, or to such other penalties as have hitherto been allowed in such cases by the laws of this commonwealth.") (emphasis added); In re Forman (1936), referring to Section 74 of the 1834 Act ("courts are charged with the duty of disbarring attorneys who retain a client's money after demand therefor. The inherent power of courts to maintain the integrity of the bar and to see that courts and its members do not fall into disrepute with the general public through such unprofessional or fraudulent conduct, unquestionably charges us with a similar duty.").

65. *See* Comment, *The Objectives of Attorney Discipline: A Pennsylvania View*, 79 DICK. L. REV. 558, 575 (1975).

66. *Id.* at 575, n.110.

state Supreme Court and managed by the newly-instituted Disciplinary Board for the State of Pennsylvania.[67]

In its modern form, the State Constitution[68] and the Pennsylvania Rules of Disciplinary Enforcement[69] accord the Pennsylvania Supreme Court (hereinafter: "Court") inherent and exclusive jurisdiction over matters of attorney discipline.[70] To facilitate the disciplinary process in the Commonwealth, the Court has the power to appoint members of the Disciplinary Board (hereinafter: "Board"),[71] an independent agency established in 1972 with the authority to discipline lawyers whose actions violate the Rules of Professional Conduct.[72] The Office of Disciplinary Counsel (hereinafter: "ODC") maintains offices in the four districts that divide the state,[73] initiates and conducts investigations,[74] and pursues cases.[75] Of the nearly 5,000 complaints received in 2009, only a small percentage resulted in disciplinary actions,[76] typically because the issues did not amount to an actual rule violation, because the grievance really involved something like a fee dispute or a claim of ineffectiveness of defense counsel, or because the matter was "stale."[77]

Beyond the lodging of complaints, the disciplinary process can begin in response to a criminal conviction. Specifically, lawyers who are "convicted"[78] of "serious"[79] crimes are obligated to report their convictions within twenty days *after* the date of *sentencing*[80]—and failure to do *itself* constitutes an "aggravating" condition.[81] What's more, the clerk of any court within the Commonwealth is obliged to transmit a certificate attesting to a conviction or conviction reversed.[82] Additionally, attorneys who are suspended or disbarred outside the state of Pennsylvania or by a federal agency

67. *See* Jack Hartman, *1972 Pennsylvania Supreme Court Rules of Disciplinary Enforcement: Relieving the Uncertainties of Marginal Attorney Crimes*, 79 DICK. L. REV 588, 592 (1975) ("The revisions proposed by the Board of Governance of the Pennsylvania Bar incorporated most of the recommendations of the Clark Committee, including the creation of a central agency to be known as the Disciplinary Board of the Pennsylvania Supreme Court. . . . In achieving this degree of centralization, the legal profession of Pennsylvania has succeeded in becoming completely self-regulated."). Prior to this disciplinary authority rested generally with local and state bar associations rather than external agencies organized exclusively for disciplinary purposes. *See* David Rockwell, *Controlling Lawyers by Bar Associations and Courts*, HARVARD CIVIL RIGHTS-CIVIL LIBERTIES L. REV. (1970) at 301, 308.

68. *See* Art. V, Sec. 10 (c).

69. *See* Pennsylvania Rules of Disciplinary Enforcement (hereinafter, Pa.R.D.E., as per Rule 101) (January 6, 2010).

70. *See In re* Melograne, 812 A.2d 1164, 1169 (Pa. 2002) ("[T]his power, being exclusive, is not one that is subject to begin shared with other entities [and] 'no other component of our state government may admit to practice or discipline an attorney'.") (citing Maunus v. Com. State Ethics Comm'n, 544 A.2d 1324, 1326 (Pa. 1988)). The exclusive jurisdiction extends to any attorney admitted to practice within the Commonwealth; any attorney of another jurisdiction specially admitted by a court of this Commonwealth for a particular proceedings; any formerly admitted attorney, with respect to acts prior to suspension, disbarment, administrative suspension, or transfer to retire or inactive status, or with respect to acts subsequent thereto which amount to the practice of law or constitute the violation of the Disciplinary Rules, these rules or rules of the Board adopted pursuant hereto; any attorney who is a justice, judge or district justice, with respect to acts prior to taking office as a justice, judge or district justice, if the Judicial Conduct Board declines jurisdiction with respect to such acts; any attorney who resumes the practice of law, with respect to nonjudicial acts while in office as a justice, judge or district justice; and, any attorney not admitted in this Commonwealth who practices law or renders or offers to render any legal services in this Commonwealth. *See* Pa.R.D.E. 201 (a) (1-6).

71. Pa.R.D.E. 205 (a).

72. *See* http://www.padisciplinaryboard.org/aboutus/history_consumer.php (last accessed August 2, 2010). The Board is comprised of fourteen volunteer members, twelve of whom are attorneys and two who are non-attorneys. Funding for the Board comes from annual registration fees that attorneys are required to pay when licensed (by the Supreme Court) and within the Commonwealth. The Board receives no tax revenues for its operations. Rather, all attorneys admitted to practice within the state pay an annual fee which, in conjunction with the costs that disciplined attorneys must pay subsidizes the entire disciplinary process and goes to funding the Client Security Fund. *See* Pa.R.D.E. 208(g)(1) ("The Supreme Court in its discretion may direct that the necessary expenses incurred in the investigation and prosecution of a proceeding which results in the imposition of discipline shall be paid by the respondent-attorney.") *See* Pa.R.D.E. 219 (a); 401 (salaries paid by periodic assessments); 502 (a-b) (Pennsylvania Lawyers Fund for Client Security and additional assessment paid by active attorneys to maintain the fund).

73. *See* Pa.R.D.E. 202. Offices are located in Philadelphia (#1); Trooper (#2); Lemoyne (#3); and Pittsburgh (#4). The district where the individual under investigation maintains an office or where the conduct under investigation occurred reserves jurisdiction in the matter. Pa.R.D.E. 202(b).

74. Pa.R.D.E. 208(a)(1).

75. *See* Pa.R.D.E. 207(a-c)

76. During 2009, 4,755 new complaints came in to the ODC, 4,695 were disposed of, and 218 of those resulted in discipline. *See* 2009 ANNUAL REPORT, 1.

77. If there is an investigation, Disciplinary Counsel can still ultimately recommend dismissing the complaint; but if there is a recommendation for discipline, then Counsel must set forth in writing the allegations, the evident, and the respondent's position on the matter—and this document must be approved by Counsel-in-Charge, Chief Disciplinary Counsel, and a Reviewing Member. Disciplinary Counsel and the Board will not entertain complaints arising from acts or omissions occurring more than four years prior to the date of the complaint, except involving alleged theft or misappropriation, conviction of a crime or knowing concealment and when there has been litigation pending that has resulted in a finding of civil fraud, ineffective assistance of counsel, or prosecutorial misconduct.

78. For purposes of activating the involvement of the Board, "convicted" presently means that an individual has been *sentenced*, although our research suggests that the Board is in the process of changing "convicted" to mean instead *when the trier of fact has found the individual "guilty"* or upon entrance of a plea in that direction. Interview with Pennsylvania disciplinary official (Jan. 5, 2010) [hereinafter Interview #1].

79. "Serious" crimes are those punishable by one year or more of incarceration within the Commonwealth. Pa.R.D.E. 214(i).

80. *See* Pa.R.D.E. 214(a). The Board will usually wait for the criminal phase to end before taking action; and if the crime is not "serious" of if the trial ends in an acquittal it is "very unlikely" that there will be disciplinary implications with respect to the license—mostly because the ODC has limited resources and is not likely to go there. Pa.R.D.E. 214(g).

81. The certificate of conviction of an attorney for a serious crime is itself "conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the attorney based upon the conviction" and thus Disciplinary Counsel moves directly to the Petition for Discipline. Only in "egregious" cases would the Board move in *while* the criminal case was ongoing. *See* Pa.R.D.E. 214(e).

82. *See* Pa.R.D.E. 214(b). Even so, the reporting process is still, in the words of one state disciplinary official, rather "haphazard." Interview #1.

or military tribunal are required to report such disciplinary actions to the Secretary of the Board within twenty days after the date of the order imposing the sanction.[83]

At this point the Pennsylvania Court issues an order calling for the respondent to explain why the imposition of identical or comparable discipline would be unwarranted. The Court can then impose discipline on par with that already doled out, unless it appears that the procedures of the sister state were so lacking in notice or protocol as to constitute a violation of the respondent's due process; there was such an infirmity of proof that the Court cannot accept the conclusion; or, if the imposition of the same sort of discipline would result in grave injustice or be offensive to the public policy of the Commonwealth.[84] In practice, according to one disciplinary official, reciprocal punishments "almost always" match those imposed by the sister state.[85] Indeed, for this interviewee, about 99% of cases are "decided on the paperwork,"[86] meaning that if the already-imposed sanction from the other state seems generally on par with what the Commonwealth may impose in its own right, then the disciplinary actions nearly always match. A less grandiose explanation for this high rate of congruence, according to a former disciplinary official, is that "it's easy"—that is, if discipline has already been imposed, then the impulse is to coordinate rather than complicate the sanction already facing the offender.[87]

C. Operations

Disciplinary cases are heard by panels of lawyers who comprise the Hearing Committee (hereinafter: Committee), who act as the Reviewing Members (hereinafter: Members), and who work on a volunteer-basis although they are appointed for three-year terms[88] by the Board.[89] Members must review every recommendation of discipline made by the ODC.[90] Recommendations for informal admonitions (see subsection "D" below) are communicated to the respondent by the ODC, at which point the respondent may either accept the admonition or demand a formal adversarial hearing where the ODC must prove that there has been a violation of the Rules of Professional Conduct.[91] Recommendations for private reprimands (see subsection "D" below) are assigned to a three-member panel of the Board, which reviews the matter and determines whether or not to impose the reprimand.[92] Again, the respondent has the option of receiving the sanction or of demanding formal proceedings, at which point the ODC files a Petition for Discipline.[93]

83. *See* Pa.R.D.E. 216(e).
84. *See* Pa.R.D.E. 216(c).
85. Interview with Pennsylvania disciplinary official (Jan. 25, 2010) [hereinafter Interview #8].
86. Interview #8.
87. Interview with defense attorney (Jan. 5, 2010) [hereinafter Interview #2].
88. *See* Pa.R.D.E. 206(a).
89. *See* Pa.R.D.E. 205(c)(3).
90. *See* Pa.R.D.E. 208(a)(3).
91. *See* Pa.R.D.E. 208(a)(6).
92. *See* Pa.R.D.E. 208(a)(5).
93. *See* Pa.R.D.E. 208(b)(1).

The Petition is sets forth allegations and conclusions and the respondent has twenty days to respond or the allegation is "deemed admitted."[94] At this point the Committee is assigned and one of the assigned members conducts a prehearing conference with the defendant. The hearing itself is an adversarial proceeding and thus the ODC must show that the evidence "establishes the charged violation and the proof is clear and satisfactory."[95] Because the attorney discipline process is not a function of the state's criminal justice system, and only initiates upon sentencing or other disposition of the criminal matter, disciplinary proceedings do *not* amount to double jeopardy and attorneys who are sanctioned in one (or both) venues have not been deprived of due process.[96] What's more, whereas criminal courts require that guilt be indicated "beyond a reasonable doubt," in disciplinary proceedings a mere "preponderance of the evidence" is sufficient to demonstrate unprofessional conduct.[97] The proceedings are transcribed, witnesses testify under oath, and the "admissibility of evidence is governed by the rules of evidence observed by the courts of common pleas in this Commonwealth in nonjury civil matters at the time of the hearing."[98]

Following the hearing, the parties receive the transcript of the proceedings and have the right to file briefs with the Committee, whereupon the Committee has sixty days to file its Report and Recommendation[99]—after which the parties have twenty days to file a Brief of Exceptions and the respondent has the right to present oral argument to a three-member panel of the Board,[100] which is akin to an "appellate court"[101] and either affirms or changes in writing the recommendation of the Committee or special master.[102] Finally, excluding cases of Board-recommended

94. *See* Pa.R.D.E. 208(b)(3).
95. Office of Disciplinary Counsel v. Keller, 506 A.2d 872, 875 (Pa. 1986).
96. *See* Office of Disciplinary Counsel v. Campbell (1975) (finding that the fact that an attorney has been acquitted of a crime "does not, under double jeopardy clause, bar suspension of attorney's right to practice or disbarment for conduct involving transaction out of which the criminal prosecution arose, that attorney disciplinary actions do not, for constitutional purposes, place an individual in jeopardy, that rules providing that a lawyer shall not engage in conduct prejudicial to administration of justice or engage in conduct adversely reflecting on his fitness to practice law were not unconstitutionally vague as applied to particular proceeding, that mere fact that six charges are considered in a single disciplinary proceeding does not deny due process and that conduct consisting of, *inter alia*, fraudulent receipt of money to supposedly arrange illegal destruction of nonexistent evidence allegedly crucial to outcome of pending criminal matter and false assertion that disposition of criminal proceeding can be manipulated warrants disbarment' ") *See also* Pa.R.D.E. 211(b).
97. Office of Disciplinary Counsel v. Grigsby, 425 A.2d 730, 732 (Pa. 1981) ("Evidence is sufficient to prove unprofessional conduct if a preponderance of the evidence establishes the conduct and the proof of such conduct is clear and satisfactory.").
98. D.Bd. Rules §89.141(a).
99. *See* Pa.R.D.E. 208(d)(2).
100. *See* Pa.R.D.E. 208(d)(1).
101. Interview with defense attorney and former Pennsylvania disciplinary official (Jan. 6, 2010) [hereinafter Interview #4].
102. *See* Pa.R.D.E. 208(d)(2)(i-iii).

private discipline (accepted by the respondent-attorney), the Court receives the case, allows for oral argument (in certain cases), and enters an order.[103]

D. Options

Pennsylvania's attorney disciplinary system does not utilize formal written guidelines and so decision-makers must look to case law, common law, and prior experience for guidance in imposing discipline. The framework allows for the consideration of aggravating and mitigating factors: the former including a prior disciplinary record, failure to participate in the disciplinary system, and taking advantage of a vulnerable client; and, the latter including acceptance of responsibility, expressions of remorse, and the existence of a psychological or physical condition that contributed to the misconduct as long as there is also an indication that treatment is underway and the prognosis for recovery is encouraging.

Pennsylvania allows for both private and public disciplinary options. Private discipline can take one of two forms: an informal admonition, imposed by the Chief Disciplinary Counsel;[104] or a private reprimand, imposed by the Board.[105] According to the Board's own "Glossary of Terms," an informal admonition is "the lowest form of private discipline usually administered for first time minor offenses," while a private reprimand is "usually for minor misconduct or the next level of discipline for an attorney who previously received an informal admonition."[106] Beyond this, our interviews suggest that private discipline is in essence something like an "intervention," particularly for first-time offenders and/or individuals with offenses that, while serious, do not generally rise above misdemeanor criminal matters or especially grave professional infractions. As one disciplinary official explained, when referring to the decision to impose an informal admonition or private reprimand for something like a drunk driving offense, the thinking here is that "We don't want to see this happen again" and thus the lawyer would sit down with the relevant officials and discuss the seriousness of the offense, but that if it were private discipline there would be no public record of the event.[107] And thus this variety of sanction does not generally influence an attorney's ability to practice law—nor, one would expect, one's reputation, given that the information

103. *See* Pa.R.D.E. 208(e)(5). However, one interviewee estimated that there have only been six Pennsylvania Supreme Court oral arguments since 1989. Interview #5. While the Committees have been accorded "substantial deference," and the Court tends to review the matter and issue a *per curiam* order, it is important to stress that the Court is **not** bound by the Committee's Recommendations and can proceed to set a briefing schedule, hear new oral arguments, and issue a written opinion. Office of Disciplinary Counsel v. Chung, 695 A.2d 405, 407 (Pa. 1997). *See* the "Data" and "Discussion" sections of this Article for rates of consensus between the different layers of discipline within the Commonwealth.

104. *See* Pa.R.D.E. 204(a)(6).

105. *See* Pa.R.D.E. 204(a)(5).

106. Disciplinary Board of the Supreme Court of Pennsylvania, *Glossary of Terms; available at* http://www.padisciplinaryboard.org/media/PDFs/GlossaryOfTerms.pdf (accessed March 8, 2011).

107. Interview #1.

is not accessible by the general public and need not be transmitted to potential clients, etc.[108] For such reasons, private discipline has been subject to scholarly criticism, especially because such admonitions "have little sting and convey a weak message about the unacceptability of a lawyer's conduct" and likely "breed public suspicion" with "limited deterrent effect."[109]

Public discipline takes one of four forms—none of which is expunged: censure, imposed by the Court but not impacting the right to practice law;[110] suspension, imposed by the Court for a period not to exceed five years;[111] revocation of Bar admission or license;[112] and, disbarment, imposed by the Court.[113] The discipline is "public" in at least the following capacities: notice is sent to various periodicals, clients are to be advised, and the information is presented on the website of the Disciplinary Board.[114] According to the Rules of Disciplinary Enforcement, upon suspension, disbarment, administrative suspension, or transfer to inactive status, the Board shall cause notice to be "published in the legal journal and a newspaper of general circulation in the county in which the formerly admitted attorney practiced."[115] What's more, the Board provides "Standard Guidance" to lawyers who have been disbarred, suspended, and so on, explaining that they must advise clients by certified mail, that they may not unilaterally transfer clients, that clients must be "promptly" advised, that they must take down signs, avoid stationery which implies that they are currently eligible to practice, etc.[116] Additionally, probation may accompany a private reprimand, censure, or suspension.[117]

108. So long as there is no intervening discipline, private sanctions are expunged after six years. Interview #1.

109. Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U.L. REV. 1 (1998).

110. *See* Pa.R.D.E. 204(a)(3). When an attorney is censured s/he must appear before the Pennsylvania Supreme Court on a Monday morning and be upbraided by the Chief Justice for "about twenty minutes." Interview #1. One interviewee proffered the notion that the public censure is a "progressive" response to discipline that stops short of actually removing an attorney's license. Interview #1.

111. *See* Pa.R.D.E. 204(a)(2).

112. *See* Pa.R.D.E. 204(a)(7). One former disciplinary official equated this to an "annulment" of a marriage within the Catholic Church, whereby it is as the attorney had never been admitted in the first place. In one respect, this quality renders the sanction the *most* serious because for an individual to be readmitted s/he must take the Bar Exam all over again, rather than simply petitioning for reinstatement. Interview #4.

113. *See* Pa.R.D.E. 204(a)(1).

114. *See* "Recent Supreme Court Actions," Disciplinary Board of the State of Pennsylvania, http://www.padisciplinaryboard.org/discipline/index.php/ (last visited January 1, 2011).

115. *See* Pa.R.D.E. 216(f).

116. *See* Pa R.D.E.217, 218.

117. According to the rules of the Disciplinary Board, probation is only appropriate in cases where the Respondent has demonstrated that he or she can continue to practice without bringing the courts into disrepute; where there is not likely to be any harm to the public and where the conditions of the probation can be supervised; and, where the individual is not guilty of acts warranting disbarment. *See* D. Bd. Rules §89.291 (a). Probation is seemingly forgotten in all of our data. However,

But the most serious form of punishment is of course disbarment, although as in most states this is not necessarily a permanent status.[118] While Pennsylvania has declined to adopt a *per se* disbarment requirement for serious misconduct,[119] a wide range of transgressions can lead to a recommendation of disbarment,[120] including egregious deceit,[121] bribery of a witness,[122] engineering of a criminal conviction of one client in order to benefit another,[123] being dishonest with the ODC during an investigation, possessing an underlying record of disciplinary actions in the past,[124] mismanaging the money of a client later deemed incompetent or lying to clients or the trial court,[125] counseling clients to be dishonest during proceedings

that is because probation is as a matter of practice always attached to another penalty. Therefore an attorney could be suspended for 12 months with 24 months probation following the suspension period. In this case the probation is publicly known (just as the suspension is); however, in the case of probation as a rider to a private punishment we have no way of discerning these statistics because the probation is kept private with the private reprimand for example.

118. *See* David Johnson, *The Case For Permanent Disbarment*, 5 THE PROFESSIONAL LAWYER 22 (Feb. 1994) ("Disbarment in America today is in truth a myth. It is what I call the great white lie of disciplinary sanctions. Very simply, disbarment in 20th century America does not mean permanent disbarment in the majority of states."). Even so, a petition for reinstatement seeming can be *denied* "forever," meaning that in certain cases an individual is, for all practical purposes, permanently precluded from ever again practicing law in the Commonwealth. *See In re* Romaine Phillips, 801 A.2d 1208 (Pa. 2002) (citing Office of Disciplinary Counsel v. Keller, 506 A.2d 872 (Pa. 1986)).

119. *See* Office of Disciplinary Counsel v. Chung, 695 A.2d 405, 407 (Pa. 1997). However, at least one disciplinary official we interviewed belies that the state is "moving" in that direction and will "soon" construe at least two offenses—misappropriation, conversion or theft of client funds and deceiving of a court or court official—as *per se* grounds for disbarment. Interview #1.

120. *See In re* Alker, 157 A.2d 749 (Pa. 1960) ("The true test in a disbarment proceeding is whether the attorney's character, as shown by his conduct, makes him unfit to practice law from the standpoint of protecting the public and the courts. The disbarment of an attorney is, like his admission, a judicial act, based upon due inquiry into his fitness for the office.").

121. *See* Office of Disciplinary Counsel v. Czmus, 889 A.2d 1197 (Pa. 2005) (The quantity and quality of [r]espondent's lies over such a long period of time is unlike anything witnessed by this Board in previous cases." . . . "Despite the mitigation evidence presented, [r]espondent's actions are too egregious to permit a recommendation of less than disbarment.").

122. *See Matter of* Renfroe, 695 A.2d 401 (Pa. 1997) (holding that federal bribery conviction required disbarment).

123. *See* Office of Disciplinary Counsel v. Raiford, 687 A.2d 1118 (Pa. 1997) (holding that disbarment was warranted when attorney, through use of impersonator, engineered criminal conviction of one client in order to benefit another client).

124. *See* Office of Disciplinary Counsel v. Duffield, 644 A.2d 1186 (Pa. 1994) (holding that ODC was not collaterally estopped from litigating the issue of whether the attorney informed his client of the Superior Court's order denying client's appeal; that evidence was sufficient to sustain finding that attorney misrepresented to ODC that he had informed his client of denial of client's appeal to Superior Court within time to file petition for allowance of appeal; and that being dishonest in representations to ODC during investigation of client complaint while having substantial disciplinary record warranted disbarment).

125. *See* Office of Disciplinary Counsel v. Passyn, 644 A.2d 699 (Pa. 1994) (holding that "disbarment from practice of law is warranted by misconduct that includes mismanaging money of client subsequently adjudged incompetent, mismanaging real estate investment of another client, lying to clients and trial court, failing to maintain records, and failing to return client property upon request").

or deceitfully using an affidavit,[126] engaging in criminal conspiracy,[127] converting or commingling entrusted funds,[128] "laundering" money,[129] forging a client's name on checks and utilizing intimidating collection methods,[130] neglecting and intentionally failing to properly represent a client,[131] filing a sworn pleading known to be false,[132] participating in the interstate transportation of stolen securities,[133] failing to provide and preserve the identity of clients' funds,[134] and just generally being dishonest in one's professional conduct.[135]

Attorneys are prohibited from resuming practice until reinstated by order of the Supreme Court after petition if they were suspended for *more* than one year; retired or on inactive status for more than three years; transferred to inactive status as a result of the sale of a practice; or, disbarred.[136] Again, those who are disbarred

126. *See* Office of Disciplinary Counsel v. Davis, 614 A.2d 1116 (Pa. 1992) (holding that "pattern of misconduct including neglect of legal matters, counseling clients to undertake dishonest acts in court proceedings, deceitful use of affidavit, and commingling of entrusted funds warrants disbarment").

127. *See* Office of Disciplinary Counsel v. Costigan, 584 A.2d 296 (Pa. 1990) (holding that convictions for theft by deception, theft by failure to make required disposition of funds received, criminal conspiracy, and aiding in the consummation of crime warrants disbarment).

128. *See* Office of Disciplinary Counsel v. Keller, 506 A.2d 872 (Pa. 1986) (holding that forgery, conversion and commingling of entrusted funds and use of misrepresentation to avoid detection, warrants disbarment).

129. *See* Office of Disciplinary Counsel v. Tumini, 453 A.2d 310 (Pa. 1982) (holding that holding that "laundering" checks, delivery of cash payment known to constitute a bribe of a public official, false swearing before grand jury, failure to cooperate with a criminal investigation while an immunized witness, and failure to recant false testimony until faced with possibility of an indictment for perjury warrants disbarment).

130. *See* Office of Disciplinary Counsel v. Kissel, 442 A.2d 217 (Pa. 1982) (holding that forging client's name on settlement check and converting proceeds to personal use, utilizing intimidating collection methods in an attempt to collect money allegedly owed from client, and taking steps to implement plan to drive client's tenants from property warrant disbarment).

131. *See* Office of Disciplinary Counsel v. Lewis, 426 A.2d 1138 (Pa. 1981) (holding that the commingling and converting of client funds, misrepresenting that certain medical expenses incurred on behalf of the client had been paid and neglecting and intentionally failing to properly represent client warrants disbarment).

132. *See* Office of Disciplinary Counsel v. Grigsby, 425 A.2d 730 (Pa. 1981) (holding that the evidence was sufficient to prove charge of filing a sworn pleading known to be false, and that filing a sworn pleading known to be false warrants disbarment).

133. *See* Office of Disciplinary Counsel v. Troback, 383 A.2d 952 (Pa. 1978) (holding that a conviction for interstate transportation of stolen securities warrants disbarment).

134. *See Matter of* Green, 368 A.2d 245 (Pa. 1977) (holding that the failure to immediately account for funds received on behalf of clients, failure to turn over funds to the client, and failure to preserve the identity of funds and property of clients warrants disbarment).

135. *See* Montgomery County Bar Association v. Hecht, 317 A.2d 597 (Pa. 1974) ("In choosing an appropriate punishment, this is no doubt that dishonesty on the part of an attorney establishes his unfitness to continue practicing law. Truth is the cornerstone of the judicial system; a license to practice law requires allegiance and fidelity to truth. Respondent's false swearing and dishonest conduct are the antithesis of these requirements. We deem disbarment to be the appropriate remedy for false swearing. . . . Whenever an attorney is dishonest, that purpose is served by disbarment.").

136. *See* Pa.R.D.E. 218(a)(1-4).

may not reapply for at least five years from the effective date of the disbarment, except that those who have been disbarred via reciprocal discipline "may apply for reinstatement at any earlier date on which reinstatement may be sought in the jurisdiction of initial discipline."[137] To be considered for reinstatement an individual must complete and file the petition for reinstatement;[138] complete 36 hours of accredited PA CLE courses with a minimum of 12 of the hours in Ethics; attach proof of attendance at the courses; appear for a hearing and prove that one has the "moral qualifications, competency and learning in the law required for admission to practice in the Commonwealth";[139] and, complete (depending on the length of time "out") a special reinstatement questionnaire.

On paper, and as opposed to New Jersey,[140] Pennsylvania does not have a *per se* rule against reinstatement, although one important ruling from the state Supreme Court deemed an individual incapable of ever being reinstated.[141] Those who have been suspended or disbarred and who seek reinstatement are obliged to demonstrate that they have earned the opportunity to be brought back in.[142] Within the Commonwealth, *Office of Disciplinary Counsel v. Keller* fleshes out the general parameters for reentry.[143] As the Pennsylvania Court announced in this case, "Our threshold inquiry in a reinstatement matter is whether the petitioner has demonstrated that his breach of trust was not so egregious that it precludes us from even considering his petition for reinstatement."[144] What's more, this opinion stressed, when a disbarred attorney seeks to be reinstated, "the threshold question must be

137. *See* Pa.R.D.E. 218(b).

138. The Reinstatement Questionnaire (Form DB-36) is twenty pages long and asks for things such as: schools attended, date of initial admission, where employed before sanction, and information on the finding of misconduct—including certified copies of orders, findings, and reports from disciplinary officials, materials from the criminal phase (indictment copies, docket entries, judgment, orders, opinions), proof of financial restitution, and information on any prior complaints.

139. *See* Pa.R.D.E. 218(c)(3). *See also* Philadelphia Newspapers, Inc., v. Disciplinary Board, 363 A.2d 779 (Pa. 1976) (In determining whether the Petitioner demonstrated his present fitness, the Board must consider the nature of his misconduct, his present competence and legal abilities, his character, his rehabilitation and the degree of remorse expressed.).

140. *See In re* Wilson, 409 A.2d 1153 (N.J. 1979) (concluding that the protection of the integrity of the profession requires that disbarment for knowing misappropriation be "almost invariable").

141. *See In the Matter of* Romaine Phillips, 801 A.2d 1208 (Pa. 2002) ("Petitioner is forever barred from the practice of law in the Commonwealth of Pennsylvania.").

142. The Court's ruling in one recent reinstatement effort is instructive in this regard. *See In the Matter of* Jonathan M. Levin, Petition for Reinstatement: No. 883, Disciplinary Docket No. 3 (November 7, 2007): 10. ("Taken as a whole, the Board is persuaded that Petitioner lacks the requisite moral qualifications for reinstatement. In presenting himself as a candidate for readmission, at the very least he should have been prepared to answer all questions in a full and honest manner, and to be helpful and forthcoming in the investigation of his reinstatement request. *Petitioner's period of suspension should have been a phase of his life when he approached issues with candor. The record does not support such a finding.*") (emphasis added).

143. *See* Pa.R.D.E. 218(c)(3)(Note).

144. *Keller, supra* note 95.

whether the magnitude of the breach of trust would permit the resumption of practice without a detrimental effect upon 'the integrity and standing of the bar or the administration of justice nor subversive of the public interest,'" because the focus is properly "directed to the impact of his conduct upon the system and its effect on the perception of that system by the society it serves."[145]

A final consideration within this subsection is the option of discipline on consent. On May 24, 2005 the Court adopted changes to Rule 215 to allow for the imposition of discipline by consent. An attorney who is the subject of an investigation may voluntarily resign, but must produce to the Board a statement asserting that the resignation is not coerced, that s/he is aware of the ongoing investigation, that the material facts in the complaint are true, and that the charges are nondefensible.[146] Following the receipt of the statement, the Board files it with the Court, which then enters and order disbarring the attorney on consent.[147] At any point in the process, the ODC and the respondent attorney can file with the Board a Joint Petition in Support of Discipline on Consent, for other forms of discipline on consent—including private and public (non-disbarment) options. In these cases too, the respondent-attorney must provide an affidavit attesting that the statement has not been coerced, that there is an investigation going on, and so on.[148] One former disciplinary official observed that consent discipline is "more and more" common now, primarily because the respondent does not have to explain *why*, which is an implication that we attend to more in the Discussion section below.

III. Data

As mentioned above, data collected for this examination took four forms. First, we carried out a quantitative analysis of all *public* disciplinary actions imposed by the Board from January 2005-December 2009. (Recall that individual cases of private discipline are not publicized, although aggregate numbers for dispositions are available.) Second, we reviewed landmark cases of discipline extending back to 1972, meaning essentially those cases repeatedly referred to by interviewees and those cases that we determined to be juridical reference points of sorts due to their frequent citations within the larger body of cases. Third, we conducted twelve comprehensive interviews with elites involved in the disciplinary process, including attorneys who represent other attorneys facing sanctions and those who work, or have previously worked in some capacity as disciplinary officials (e.g. O.D.C., hearing committees).[149] Finally, we attended a four-hour reinstatement hearing for an attorney who had been suspended and who had already once been denied

145. *Id.*

146. *See* Pa.R.D.E. 215(a)(1-4).

147. *See* Pa.R.D.E. 215(b).

148. *See* Pa.R.D.E. 215(d).

149. Interviews were in-person, with one exception; were conducted by either one or two of the authors; were not recorded; and ranged between thirty minutes and two hours in length.

reinstatement.[150] In the remainder of this section, we offer some context for these data and position our findings within the larger framework of research on professional discipline.

Table I reports on aggregate disciplinary actions, distinguishing between "Conventional" cases (i.e. those that move along standard procedural lines), "Consent" cases (i.e. those that are resolved by consent agreements between the defendant and the ODC)," and "Reciprocal" cases (i.e. those cases where Pennsylvania mirrors the punishment(s) meted out by other states).[151] All told, our investigation covers 419 disciplinary actions from 2005-2009.[152] Several findings warrant mention here.

First, we note 165 disbarments during this five-year span of time—an amount that is strikingly high when compared with an earlier, three-year, stretch of time two generations ago (1958-1960), when there were only *eight* disbarments.[153] Second, we should highlight the distinction between Pennsylvania-imposed and reciprocal-arranged punishments. Indeed, if we compare the third and fourth columns (where the license is either not lost or is automatically reinstituted) with the fifth and sixth columns (where the license is lost and can only be replaced by going through the reapplication process), we see stark differences evident between Pennsylvania cases and those that originate in other states. More specifically, what these data reveal is that, as compared to the "conventional" and "consent" modes of discipline, a significantly *smaller* percentage of reciprocal dispositions were severe enough to require petitioning for reinstatement (e.g. a suspension for more than a year or disbarment). Expressing the same notion in a different way, over 38% of reciprocal dispositions allowed the offender to maintain or automatically re-obtain the license, versus only about 20% of conventional dispositions and about 17% of dispositions reached on consent.

However, we caution that this may be a misleading conclusion since the data simply do not include individualized case information on informal admonitions or

150. Not every state allows the public to attend disciplinary hearings. *See* Michael Spake, Public Access to Physician and Attorney Disciplinary Proceedings, 21 J. NAALJ 289, 310 (2001) ("Unlike physician disciplinary hearings, many State Bar Associations continue to close their disciplinary proceedings to the public. In 1992, a report of the National State Bar Association reported twenty-eight states allowed public access; however, access is only allowed after the disciplinary board finds probable cause to believe misconduct occurred. Other states allow public access only after a final judgment is made public. Oregon allows public access from the initial filing of the complaint, whereas West Virginia and Florida permit access to initial complaints once probable cause is found. In Virginia most proceedings are closed leaving only a small number of hearings open.").

151. Tables II and III do not include the category of Reciprocal actions because the cases considered in these tables do not detail the underlying offenses perpetrated in sister states.

152. Our dataset accounts for 437 total instances of punishment, although Table I reflects only 419 distinct actions, due to the fact that sanctions specified in the remaining eighteen cases were unspecified or ambiguous.

153. *See* R. Smith, *Disbarments and Disciplinary Actions*, 47 A.B.A. J. 363 (1961).

Table I: Aggregate Disciplinary Actions (2005-2009)

	PRIVATE DISCIPLINE		PUBLIC DISCIPLINE				
Mode of Disposition	**Private Reprimand**	**Informal Admonition**	**Censure**	**Suspension under 12 months**	**Suspension over 12 months**	**Disbarment**	**TOTAL**
Conventional	NA	NA	6 (4.11%)	23 (15.75%)	95 (65.07%)	22 (13.33%)	146 (34.84% of all public / 15.3 of combined
Consent	NA	NA	12 (6.82%)	19 (10.80%)	53 (30.11%)	92 (55.75%)	176 (42% of all public / 18.44% of combined)
Reciprocal	NA	NA	0 (0.00%)	37 (38.14%)	9 (9.28%)	51 (30.9%)	97 (23.15% of all public / 10.16% of combined)
TOTAL	112[154] (20.9% of all private / 11.74% of combined)	423[155] (79.1% of all private / 44.33% of combined)	18 (4.30% of all public / 1.89% of combined)	79 (18.85% of all public / 8.28% of combined)	157 (37.47% of all public / 16.46% of combined)	165 (39.38% of all public / 17.3% of combined)	419 (public) (44%) 535 (private) (56%) 954 (combined) (100%)

private reprimands—and, as columns one and two demonstrate, there are a substantial number of private disciplinary dispositions each year. Indeed, for the five-year period of our study, there were 535 cases resolved privately, or 56% of the aggregate of all disciplinary matters. As we have stressed at other points in this paper, we are unable to compare private to public outcomes in any meaningful way, although we have included aggregate totals for each private option in Table I because we think they provide an important frame of reference for understanding the more serious, public disciplinary alternatives.

154. *See* The Disciplinary Board of the Supreme Court of Pennsylvania, "Calendar Years," accessed January 3, 2011, *available at*: http://www.padisciplinaryboard.org/newsroom/statistics/.

155. *See* Disciplinary Board, "Calendar Years."

Table II: Discipline for Criminal Offenses[156]

	Public Censure	Suspension under 12	Suspension over 12	Disbarment	TOTAL
Conventional	1 (2.78%)	8 (22.22%)	18 (50.00%)	9 (25.00%)	36 (100%)
Consent	3 (9.68%)	3 (9.68%)	15 (48.39%)	10 (32.26%)	31 (100%)
TOTAL	4 (5.97%)	11 (16.42%)	33 (49.25%)	19 (28.36%)	67 (100%)

Table III: Discipline for Professional Offenses

	Public Censure	Suspension under 12	Suspension over 12	Disbarment	TOTAL
Conventional	5 (4.55%)	15 (13.64%)	77 (70.00%)	13 (11.82%)	110 (100%)
Consent	9 (6.21%)	16 (11.03%)	38 (26.21%)	82 (56.55%)	145 (100%)
TOTAL	14 (5.49%)	31 (12.16%)	115 (45.10%)	95 (37.25%)	255 (100%)

In Tables II and III we present statistics on sanctions associated with "criminal" offenses (i.e. discipline was imposed because of the commission of a crime) and "professional" violations (i.e. discipline was imposed for ethical violations not involving the commission of a crime per se). One thing worth stressing here is that the universe of criminal offenses is rather low as opposed to the total number of professional violations. In the five years of the study period—and, again, *without* considering reciprocal cases (where we are unable to know whether the offense was criminal or professional)—there were only sixty-seven cases that resulted in *public* disciplinary action, as opposed to 255 cases involving a professional offense that resulted in *public* disciplinary action.

What's more, of the sixty-seven offenders, fifteen of them (22.39%) were able to either immediately resume the practice of law or were required to wait a specified suspension period of under twelve months before they could resume their practice. By contrast, nineteen of the sixty-seven (28.36%) had been disbarred and were thus required to wait a minimum of *five* years before applying for reinstatement, while thirty-three of the sixty-seven (49.25%) lost their licenses for one year or more and were required to apply for readmission—a process that takes approximately eighteen months to complete. Finally, in what we think may be a symptom of the increasing popularity of consent discipline, we note that while the consent option accounts for 46% of criminal offense dispositions, this option accounts for nearly 57% of professional offense dispositions.

156. Moving from Table I to Tables II and III all reciprocal punishments are omitted. This is because Pennsylvania's public records provide no data about the origins of the infraction which has led to punishment and therefore we found it impossible to distinguish between Criminal and Professional Offenders for these attorneys.

Table IV: Classification of Criminal Offenses and Disciplinary Severity[157]

	Public Censure	Suspension under 12	Suspension over 12	Disbarment	TOTAL
Alcohol	0 (0.00%)	3 (30.00%)	7 (70.00%)	0 (0.00%)	10 (100%)
Drugs	0 (0.00%)	1 (11.11%)	7 (77.78%)	1 (11.11%)	9 (100%)
Fraud Crimes	0 (0.00%)	2 (10.00%)	11 (55.00%)	7 (35.00%)	20 (100%)
Misdemeanor Non-Alcohol	2 (40.00%)	2 (40.00%)	1 (20.00%)	0 (0.00%)	5 100%)
Sexual Crimes	0 (0.00%)	0 (0.00%)	2 (3.33%)	4 (66.67%)	6 (100%)
Tax Crimes	1 (14.29%)	3 (42.86%)	3 (42.86%)	0 (0.00%)	7 (100%)
Violent Crimes	0 (0.00%)	0 (0.00%)	1 (50.00%)	1 (50.00%)	2 (100%)
TOTAL	3 (5.08%)	11 (18.64%)	32 (54.24%)	13 (22.03%)	59 (100%)

Table IV distinguishes between different varieties of criminal offense, to the degree we were able to discern this information from the case disposition. Of the fifty-nine cases recorded here, we note that the modal offense was "fraud" and over one-half (54.24%) of offenses resulted in the more severe of the possible suspension options, requiring the offender to reapply at the completion of the term. More generally, and as one would expect, the findings in this table show that the more serious the criminal offense, the more severe the disciplinary sanction. For example, of the twenty cases of fraud (including mail fraud, wire fraud, etc.) within this period, eighteen resulted in either suspensions over twelve months or disbarments. In the same vein, offenses involving illicit drugs totaled nine cases, with eight leading to more severe disciplinary outcomes. Meanwhile, four of the five misdemeanor offenses (not involving alcohol) resulted in either a public censure or a suspension of less than twelve months.

Figures I and II attend to the relationship between outcomes reached at various points in the disciplinary process. For both, we evaluated 138 cases, which was the total number of matters decided by conventional means that also included a full opinion

157. The "total" number of criminals has dropped from Table II to Table IV due to a couple of unique crimes, like one acquittal and one conviction in Military Court, as well as on consent criminals who were "Temporarily Suspended Due to a Criminal Conviction" and no final opinion was issued in which the specific crimes were explained.

specifying the record from the preceding review while also delineating the recommendations offered by the Committee, the Board, and the Court. In Figure I we see the rate of agreement between the Committee and the Board, while Figure II attends to agreement between the Board and the Court. As we explain more in the Discussion Section, the actual agreement rates for each phase were below that which was predicted by elites. But, more to the point, during each phase of the appellate process the data portray a notable increase in the severity of the sentence for a sizable minority of offenders.

Table V addresses reinstatements, meaning cases whereby the individual was subject to a suspension of over one year or disbarment and is now seeking to be readmitted to the profession. Since only five years elapsed in our study period, it is difficult for us to proffer definitive conclusions here, and so we looked at *only* those suspensions of **twelve months and one day** (the minimum punishment requiring a reinstatement hearing) from the first and second years of our study period (2005 and 2006) and examined what happened in the time until the end of 2009. We expected a much higher rate of reinstatement than the data in Table V portray.

Figure I: Instances of Disciplinary Amplification from the Committee to the Board

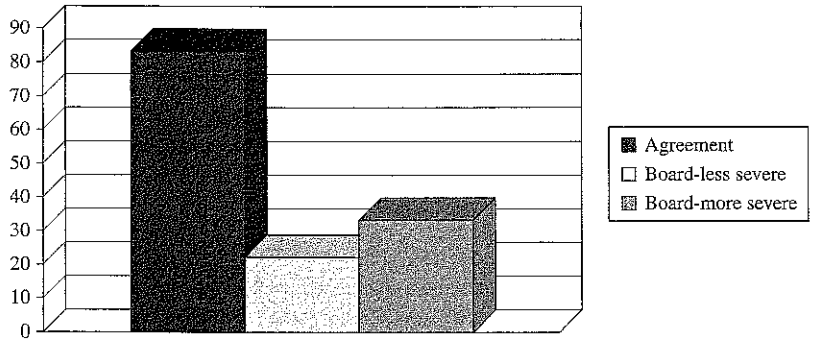


Figure II: Instances of Disciplinary Amplification from the Board to the Court

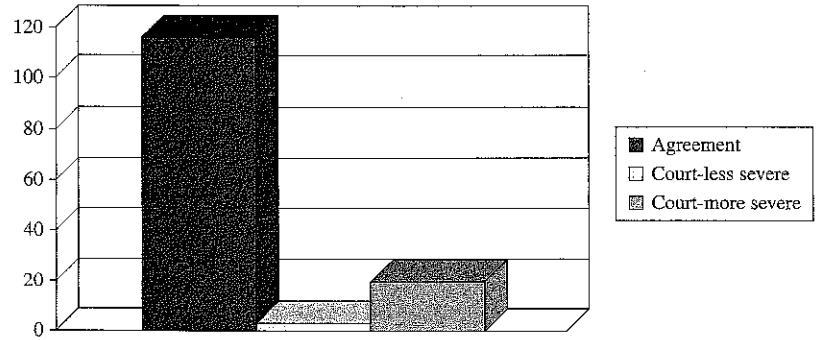


Table V: Reapplication Dispositions (2005-2006)

	Suspensions of 12 Months and 1 day	Applications Granted	Applications Denied
2005	10	3	0
2006	18	3	2

Table VI: Rates of Reinstatement by Sanction (2005-2009)

Year	Suspension	Disbarment	TOTAL
2005	5/5 (100%)	6/6 130 months (100%)	11/11 (100%)
2006	3/4 (75.00%)	6/6 (100%)	9/10 (90.00%)
2007	5/6 (83.33%)	5/6 (80%)	10/12 (83.33%)
2008	2/3 (66.67%)	2/2 (100%)	4/5 (80.00%)
2009	8/10 (80.00%)	2/3 (66.67%)	10/13 (76.92%)
TOTAL	23/28 (82.14%)	21/23 (91.30%)	44/51 (86.27%)

As we show, in 2005 there were ten instances of a suspension of one year and one day, which is the minimum amount of suspension time that still requires an individual to reapply for his/her license. Of these ten individuals, only three had reapplied by the last day of the calendar year 2009 (and all three applications were granted), even though all ten were eligible to have done so as early as 2006. Meanwhile, of the eighteen individuals who received a suspension of one year and one day in 2006, only five had reapplied by the last day of the calendar year 2009 (with three applications granted and two denied)—leaving fifteen individuals *still* without a law license at least three years *after* their suspension-period ended (thirteen of whom did not even try to get it back).

Another way of looking at the issue of reinstatement, as we do in Table VI, would be to consider every application for reinstatement that arose during our study period. Though there is no way to know the true denominator (i.e. the total number of individuals who had, for whatever reason, had their license suspended, revoked, lapsed, etc. at some point in the past), what is striking is that in absolute numbers there are a relatively small number of applications overall (only fifty-one during five years). At the same time, the success rate for those who *do* reapply is quite high (forty-four of fifty-one, or 86%), leading us to conclude that the process is significantly self-selecting in that those with better odds of reinstatement are more likely to apply.

Table VII: Rates of Reinstatement by Nature of Offense (2005-2009)

Reciprocal	3/3 (5.88%)
Criminal	24/25 (49.02%)
Professional	16/22 (43.14%)
Unknown	1/1 (1.96%)
TOTAL	51 (100%)

Table VII further fleshes out the reinstatement picture. Here we can see that of all successful reinstatements during this period, 49% were associated with a criminal as opposed to a professional offender. This is significant because, as you will recall from Table II above, there were only fifty-two disciplinary actions stemming from a criminal offense that resulted in a sanction calling for the loss of license and necessitating an application for reentry. Meanwhile, there were 210—over four times as many—disciplinary actions stemming from a professional offense that resulted in a sanction calling for the loss of license and necessitating an application for reentry.

Of course we are not able to resolve this discrepancy, because we cannot know why various individuals opted *not* to apply for readmission to the profession, or, more specifically, why individuals with criminal offenses would be so much more inclined to do so than those with professional offenses. It could be that those with professional violations accrued, or felt that they would be *perceived* as having accrued, such substantial records of malfeasance that a reinstatement seemed unlikely. By contrast, while most of those who lose their license still do not apply for readmission, it could be that this class of offenders by and large believes that they can make a better case for readmission because they have already been punished, separately, by the criminal justice system and can perhaps point toward empirical evidence of rehabilitation or, minimally, make the claim to have already been "punished enough".

Figures III and IV present our findings from an admittedly imperfect examination of the prior disciplinary records of the attorneys in our sample (2003-2009), as well as reinstatement efforts (if applicable), in order to determine whether offenders had a previous "record" of any disciplinary sanctions and to discern what prescribed periods of detachment from the profession work out to in practice. To do this, we read every available transcript for the cases in our general sample (138 cases, or about 1/3 overall included a transcript), but we also cross-checked our findings from the transcripts and looked up the histories of the remaining attorneys in the on-line database of the Disciplinary Board.[158]

158. We found that the transcripts sometimes gave us a more complete picture than the database, primarily because the transcripts occasionally alluded to an attorney's previous *private* punishment—information that is not generally available from the Disciplinary Board.

Figure III: Number of Months Outside the Profession

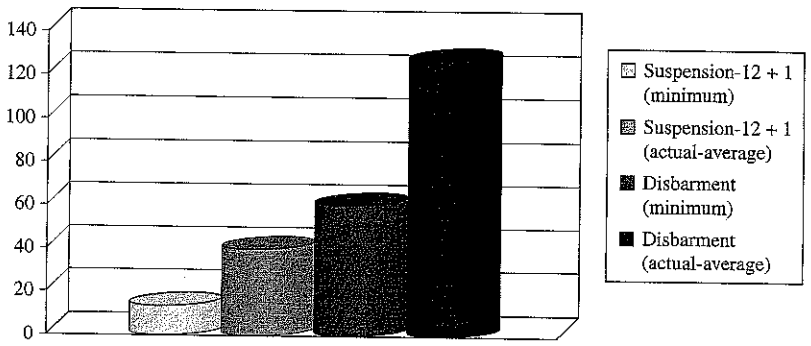
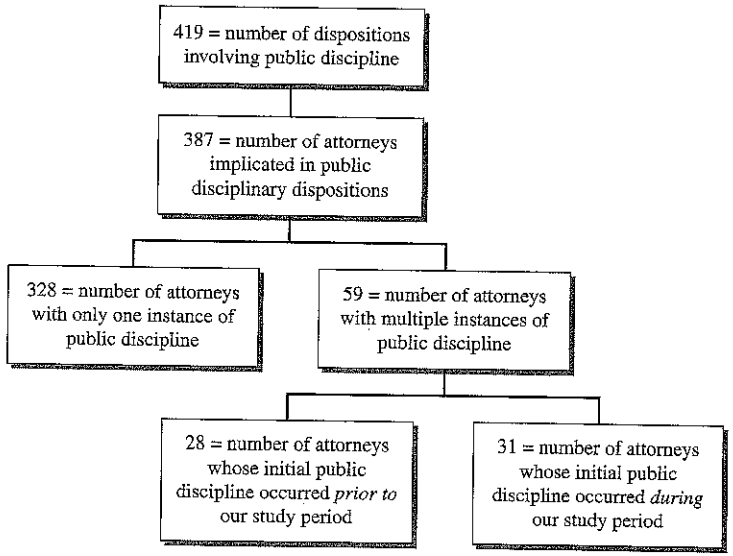


Figure IV: Recidivism and Public Discipline



The "Self-*Discipline*" subsection of the Discussion below delves more deeply into the meaning of these data, but in sum we have determined that suspensions of twelve months and one day, as well as disbarments, often lead to *actual* periods of disengagement from the profession that are substantially longer than the amounts prescribed by disciplinary officials. Specifically, considering the six instances of

suspensions of twelve months and one day in this study,[159] we note that the actual average time outside the profession was 39.3 months. More significantly, we have observed that, considering the twenty-three cases of disbarment (again, where the individual sought and attained reinstatement), while the minimum amount of banishment would be sixty months, the actual average period is more than *twice* that length of time (126.43 months).

Finally, Figure IV portrays our findings with regard to rates of recidivism for those receiving *public* discipline during our study period. Several observations about the defendants in this sample period are worth noting. First, in our examination of the complete transcripts of the final Court decisions we found mention of nine "private" punishments received by the 387 defendants. Of these, six constituted the *only* prior punishment the defendant had while the remaining three attorneys had received both prior private and public sanctions. While we have no way of knowing how many other "private" settlements defendants had in the study period, it is nonetheless intriguing that these dispositions were not always as private as the nomenclature would suggest. This notwithstanding, we were able to examine the full public record for every defendant in our study, allowing us to discern that fifty-nine (15.4%) of the 387 defendants had received prior public discipline—thirty-one during our study period and twenty-eight before our study period.

IV. Discussion

As the Commonwealth's judicial institutions have repeatedly stressed, courts are charged with maintaining the integrity of their officers (i.e. attorneys),[160] promoting the pursuit of truth,[161] maintaining the purity of the Bar,[162] and excluding or ejecting those members who lack sufficient moral or ethical perception.[163] Disciplinary procedures are thus a catharsis for the profession and a prophylactic for the public;[164] working to promote the objectives of the Bar, but also in place to appease

159. In order to provide a more accurate account of the significance of these findings, we have removed the one notable outlier (231 months), which obviously skewed the average. The other cases are all within comparably confined parameters.

160. *See* Stone v. Board of Governance of Pennsylvania Bar, 168 A. 473 (Pa. 1933) ("The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them.").

161. *See* Office of Disciplinary Counsel v. Surrick, 749 A.2d 441, 449 (Pa. 2000) ("Truth is the cornerstone of the judicial system; a license to practice law requires allegiance and fidelity to truth.").

162. *See In re* Chernoff, 26 A.2d 335 (Pa. 1942) ("The purpose of disbarment is not the punishment of the attorney, but the maintenance of the purity of the Bar. Disbarment is for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them.").

163. *See In re* Cross, 1951 WL 3606 (Pa. 1951) (referring to an attorney who had been "treated with an indulgence" he did not deserve and had "displayed such a lack of moral perception as to demonstrate his unfitness for the practice of law."); *In re* Law Association of Philadelphia, 167 A. 579 (Pa. 1933) ("These facts demonstrate that Moyermann is not a fit person to be a member of the bar. Not only does he lack the ethical perception which is essential in an attorney, but he is deficient in that sense of fairness and just dealing which every person should have, whatever his walk in life.").

164. *See* Maryland State Bar Assn., Inc. v. Agnew, 318 A.2d 811 (Md. 1974).

the concerns of the public at-large whether real or perceived.[165] With this in mind, and in light of the above data, we offer themes for discussion encapsulated by four primary categories: discipline and *punish?*; disciplinary amplification; discipline on consent; and, *self*-discipline.

A. Discipline & Punish?

Those who supervise the legal profession within the Commonwealth have at their disposal a menu of options, each of which is—in theory at least—oriented toward *disciplining* (i.e. correcting) offending attorneys rather than *punishing* them per se. What's more, "[c]onsistent with the posture and scope adopted by most states,"[166] Pennsylvania stresses that the "primary purpose of our system of lawyer discipline is to protect the public from unfit attorneys and to maintain the integrity of the legal system."[167] As the Court has stressed in multiple cases, the disciplinary process "serves to protect the courts and the public from unfit lawyers." This is not to say that the system does not "possess a set of sanctions or that these sanctions are not punitive," but only that the system is "designed to determine whether misconduct has occurred and to what extent that misconduct indicates unfitness to practice law."

In this spirit, sanctions such as disbarment are not intended to be punitive in nature[168] (although they might seem to be so in the mind of the offending attorney) and are essential because "the disciplinary system could not fulfill its dual functions of determining fitness to practice and protecting the courts and the public if it could find an attorney to be so unfit that he should be suspended or disbarred and yet lack the power to effect the appropriate response."[169] But, one of the points we seek to convey here is that, while "punishment" as such may not be the purported

165. *In re* Serfass, 9 A. 674 (Pa. 1887) (stressing that an offense "need not be such as to subject the attorney to indictment," because "if it shows such a lack of professional honesty as to make him unworthy of public confidence, it is sufficient cause for striking his name from the roll").

166. Pinaire, et al., *Barred from the Bar, supra* note 34, at 312 ("The traditional rationale for disciplinary proceedings is the protection of the public (in the exposure and excommunication of those unfit to manage the legal affairs of others) and the preservation of the confidence, integrity, and stature of the professional bar. To wit, disciplinary actions are typically instituted in response to professional or public failings, but personal activities that might subject the profession to public derision and distrust are appropriate grounds for disciplinary intervention.").

167. Office of Disciplinary Counsel v. Braun, 506 A.2d 872, 875 (Pa. 1986). *See also In re* Iulo, 766 A.2d 335 (Pa. 2001) (the primary purpose of our lawyer discipline system in Pennsylvania is to protect the public, preserve the integrity of the courts, and deter unethical conduct).

168. Lacey, *Second Chances, supra* note 44, at 1121 ("The concept of using disbarment or denial of reinstatement as punishment has been rejected by the ABA and most states.").

169. Office of Disciplinary Counsel v. Lucarini, 472 A.2d 186 (Pa. 1983). *See also In re* Oxman, 437 A.2d 1169, 1172 (Pa. 1981) ("It ought to be made clear . . . that the primary purpose of professional disciplinary proceedings is to protect the public. The punishment of an offending member of the profession is indeed a serious matter, but it is incidental to the protection of the public. If the conduct of a member of the Bar disqualifies him from the practice of law, it would not be in the public interest to dismiss the disciplinary proceedings for no reason other than the Bar's failure to prosecute them with proper dispatch." (quoting *In re* Weinstein, 459 P.2d 548, 549 (1969)).

purpose or intention of disciplinary measures, in practice certain options can have punitive *implications* that almost certainly exceed what might be expected "on paper." This is not necessarily to find fault with the disciplinary outcomes reached, but rather to urge a broader understanding of what "counts," if you will, as "punishment"—particularly when contrasted with the putatively more public-interested notion of "discipline."

In considering the relationship between discipline and punishment, we suggest that the Commonwealth's scheme can be best understood as a tri-partite framework. First, we have forms of discipline in which the attorney is admonished or reprimanded in some way, albeit in a private setting and not as a matter of public record. Second, and on the other end of spectrum of severity, we have disbarment and suspensions of greater than one year. It may seem that the harshness of these sanctions is somewhat muted, given that most of those who reapply are eventually reinstated (recall Table VI), but these numbers are somewhat misleading, given that such a small number of individuals even bother to *seek* reentry.

While our data do not reflect the total number of all attorneys who have ever been disbarred or suspended for more than one year in Pennsylvania (individuals who could, theoretically, seek reinstatement after five years), we can demonstrate that during the five-year period of our study 322 lawyers were suspended for more than one year or were disbarred—with only fifty-one individuals seeking readmission (forty-four of whom were successful). To be clear, given the five years that one must be out of the profession and the five-year span of time for our study, the individuals who sought reinstatement within our data are generally not the same individuals who were disciplined within our data. But having said that, we have no reason to believe that this period is any different from previous five-year periods where the number of attorneys ushered out of the profession is substantially greater than the number of attorneys enjoying the privilege of having their license(s) restored.

Recall too those data within Table V. There, we looked at those offenders in the first two years of our sample who received a suspension of **only** one year and one day. Our assumption was that in the following 3-4 years of our study period, these twenty-eight attorneys would re-obtain their licenses. In fact, when they applied, 75% did succeed. *However*, of those twenty-eight individuals, only eight applied at all—which means that, even if only by default and for practical purposes, both disbarments *and* suspensions of greater than one year result in many—and even *most*—attorneys no longer being a part of the profession. Certainly there are myriad possible explanations for such a low rate of even *attempted* reinstatement (the high cost of securing counsel; shame or psychological scarring?;[170] prohibitively high malpractice insurance rates; an already-underway successful transition into a new profession), but for whatever the precise reasons within each individual case, the "discipline" took on a "punitive" form that is definitely not well-understood, probably was not expected, and may not even be desirable.

Third, in the disciplinary space between private punishments (i.e. informal admonitions and private reprimands) and public punishments of the more severe variety (i.e. suspensions over a year and disbarments) there exists a middle-level type of discipline, including censure and suspensions of *one year or less*. As noted in Section II, censures require attorneys to publicly appear before the Supreme Court and endure what one interviewee called a "humiliating experience," where the offender is "reamed out" in a crowded courtroom full of his/her peers on a Monday morning as the day's session is about to begin.[171] With respect to the other variety of sanction within this space, suspensions of less than a year are certainly shaming endeavors in their own regard, but most importantly the disciplined attorney has his/her license *automatically* restored upon the completion of the sentence. That said, even with suspensions of one year or less, the attorney must notify all of his clients that he can no longer represent them during this time—although, as we learned, in order to avoid this embarrassing consequence, attorneys will often divest themselves of their clients *prior* to their formal suspension. Discipline within this middle range thus involves reputational and financial costs substantially greater than those resulting from private punishments, even while taking a less "punitive" form—on paper or in practice—than disbarments or suspensions greater than one year.

B. Disciplinary Amplification

Those interviewed for this research suggested that the Committee, Board, and Court agree in their dispositions "about 90%"[172] of the time, while another respondent was sure that the Board "almost always" went along with the Committee's recommendation.[173] In fact, this individual could only remember two instances during his/her tenure when the Board departed from the Committee's judgment on the matter.[174] And yet, our data paint a different picture and portray what we are calling "disciplinary amplification," or the manner in which (at least during our period of review) disciplinary recommendations—when they change at all—tend to *increase* (i.e. are amplified) in the way of severity rather than leniency. As this would imply, the Committee, Board, and Court are not in agreement anywhere near the conjectured 90%, given the number of cases where the discipline becomes harsher as the case moves up through the process.

170. As one former official, now in private practice, explained, lawyers in smaller town settings have an especially hard time with public discipline. This individual observed that in such settings it is "harder to restart" once an attorney has been publicly disciplined. Indeed, it may be the case that "the practice is dead" because one cannot even be a paralegal and thus the costs and inertia of getting reestablished are *effectively* a permanent not temporary prohibition on practicing. Interview #2.

171. Interview #1.

172. Interview #4; interview with defense attorney and former Pennsylvania disciplinary official (Jan. 6, 2010) [hereinafter Interview #5].

173. Interview #7.

174. Interview #7.

In fact, as we saw in Figure I above, there was agreement between the three bodies in eighty-three of the 138 cases, making the level of synchronicity 60%, not 90%. Furthermore, when the recommendations diverged, the Board went less severe in twenty-two cases (16%) but went more severe in thirty-three instances (24%). Again, the universe of cases is small, but we believe the trend is significant. With respect to Figure II, we saw the same thing at work: *where there is disagreement*, the trend toward *increasing* the recommended sanction continued at the next stage in the process. While the rate of agreement between *these* bodies is actually much closer to the imagined 90% (we found agreement in 116 of 138 cases, or 84%), as we saw above, when there was divergence, the Court tended to amplify the sanction—rendering a more severe disposition in nineteen cases (13.8%) and reaching a less severe outcome in only three cases (2.2%). While the overall number of cases contemplated here is only about one-third of the total number of actions considered in this study (419), we believe the trend is compelling at both junctures. Put simply, when there is change, the shift is toward greater not lesser severity.[175]

Because we are, as far as we can tell, the first to note this pattern, we are in the position of developing rather than testing existing theories for why this might be the case. It could be the fact that, as one interviewee suggested,[176] the Court has become increasingly more politically conservative of late—which makes sense if one assumes the usual relationship between a more conservative ideology and an inclination to be "tougher" in terms of punishment.[177] To this end, this official also offered her own conjecture, sensing that the increasingly harsher discipline was due at least in part to the vast number of attorneys within the Commonwealth. "If you are going to be a nuisance," she asked rhetorically, "why bother with you?"[178]

In a related sense, but coming from the other direction, if the Committee is like the court of first instances for these purposes, and is consequently the body to receive testimony, find facts, and effectively "try" the case, then it could be that the individuals who comprise the Committees (all volunteer lawyers) are at least slightly more inclined to approach a case with a "there but for the grace of G-d go I"-type of mentality.[179] To this point, one interview respondent, who

175. It is also worth noting that, when the Committee and Board **agree,** then the Court will accept their "joint" recommendation 86.75% of the time. In those cases where the Court did not accept the joint recommendation, it imposed a more severe sanction in 91% of cases (10 of 11).

In a different vein, when the Committee and Board **disagree,** then the Court adopts the *Board's* recommendation (rather than that of the Committee) over 78% of the time, while adopting the Committee's recommendation about 9% of the time, and proposing its own sanction about 13% of the time.

176. Interview #1.

177. As is the case in most states, Pennsylvania's State Supreme Court justices are elected individuals.

178. Interview #1.

179. Interview with defense attorney (Feb. 24, 2010) [hereinafter Interview #11]; Interview with disciplinary official (Feb. 24, 2010) [hereinafter Interview #12].

was previously a Hearing Committee member, offered some insight on the various complications within the profession that might lead an attorney to exercise poor judgment. As you hear a case, this interviewee observed, you "can't help but think about how they [the defendant] got there," especially "because we all know how a case can go down the shitter."[180]

C. Discipline on Consent

One of the most striking findings in this study involves the increasing use of what is known as discipline "on consent." This option, formally added to the Pennsylvania Rules of Disciplinary Enforcement in 2005, allows the parties in a disciplinary proceeding to mutually reach a disciplinary outcome without going through the traditional process. While there is a surface-level similarity between discipline reached on consent in this domain and dispositions reached by way of plea bargains in the criminal courts, disciplinary officials we spoke with were careful to distinguish their process from this apparently analogous mode of resolution.[181] Indeed, "disciplinary Counsel does **not** plea bargain," we were told pointedly by one respondent; rather, disciplinary officials "make an *offer*," based on "what a case is worth," and then the defendant "either accepts it or does not."[182]

Regarding what cases are "worth," this official discussed the sort of situation where there would be a conviction for mail fraud coming in from federal court and where prior case law would seem to suggest a suspension between two and three years. In such a case, where both ODC and the respondent's attorney would be aware of the normal range—albeit one urging the higher end and one pressing for the lower end—the parties would have been required to go through with a formal hearing prior to the rule change; but now, they are able to reach non-"bargained" but still somewhat "negotiated" dispositions outside the adjudicatory setting.

To facilitate its end of this new mode of doing business, we wondered whether ODC maintains any formal or informal rubrics resembling the sentencing guidelines employed by state criminal court systems, where in the interest of consistency and relative predictability sanctions are pegged to infractions (accounting for the degree of severity and prior offense scores) in a systematic fashion that putatively diminishes judicial discretion and resulting disparities. While we were told that there is "not a chart per se," the approach is still "intellectually the same."[183] That said, of course each case is different, each offense has its context, and each offender has his story. And so, motivations matter greatly—even in cases dealing with misappropriation of client funds (the death-knell in other jurisdictions[184])—which

180. Interview with defense attorney and former Pennsylvania disciplinary official (Jan. 25. 2010) [hereinafter Interview #8].

181. Interview #7; Interview #9; Interview #10.

182. Interview #8.

183. Interview #7.

184. *See* Pinaire, *Barred from the Bar, supra* note 34.

means that even in "money cases," as one official put it, "we look to intent" and wonder, in essence, "Is this somebody who is just a flat-out thief?"[185]

Whatever it is called, the implications have been evident and immediate: as Table III revealed above, since the inception of this option in 2005, there have been over four times as many "consent" disbarments as "conventional" disbarments, as well as two times as many censures on consent. It seems that one reason for this is the opportunity for apparent mutual gain. Indeed, one disciplinary official asserted that she "had never seen responsible counsel not think it's [consent discipline] a good idea," and specified, as to more direct benefits, that "In the old days, even mail fraud needed a hearing, technically, and the respondent has to pay all the costs—so to find a way to discipline without that benefits all parties involved."[186] Additionally, especially for cases involving the most serious offenses (e.g. misappropriation of client funds), a "wise lawyer," we were told on more than one occasion, would almost certainly move his/her client in this direction if for no other reason than to start the "clock" running on the five-year period outside the profession.[187]

On another level, we think these data suggest a broader phenomenon developing from the institution of this new disciplinary mechanism—specifically that when it seems the writing is on the wall (i.e. where the underlying infraction is either especially serious or markedly mundane and where, as a result, the probable sanction is predictable for the initiated who are close followers of the process), the parties are all moving *themselves* to the "consent" option, while trying cases where the ultimate disposition could end up anywhere within the wide range of points on the spectrum of sanction.

D. Self-Discipline

As we considered above, in subsection "A" of this Discussion, when an attorney is suspended more than twelve months or disbarred, s/he must apply to be reinstated rather than automatically being reinstated as is the case for suspensions of less than twelve months. As an organizing assumption for this study, we expected to find that even a severely disciplined attorney would almost certainly want to return to the profession—and would seek to do so as soon as possible. But the findings in Figure IV above suggest otherwise. Because these data struck us as counter-intuitive, we inquired of our interviewees why this might be. Without exception we were told, by those on the defense and discipline sides of the fence, that there is a *perception* that those who opt to wait *longer* than necessary will fare better at their reinstatement hearing because their *self*-imposed supplement to their "official" time is likely to be construed as both an additional opportunity for rehabilitation *and* additional evidence of contrition.[188]

185. Interview #7; Interview #9; Interview #10.
186. Interview #7.
187. Interview #1.
188. Interview #4; Interview #5; Interview #6; Interview #11.

What this means is that offenders coming off their imposed periods of separation from the profession conclude for strategic reasons that they will present a more compelling case during a reinstatement hearing if they prolong their period of professional banishment. In real terms, this *self*-discipline means that, during our period of study, for example, those who were disciplined for twelve months and one day (and who sought and attained reinstatement) were actually out of the profession for over thirty-nine months, or three times as long as the period imposed.[189] Meanwhile, as Table VIII shows, of those disbarred from the profession (who sought and attained reinstatement during our study-period), the average time outside the profession was over 126 months, or more than two-times the amount required of those who have lost their licenses (sixty months).

Interviews with attorneys who defend those seeking reinstatement indicated several elements that bear on this discrepancy. Not only were the odds of success greater, with greater-than-the-minimum periods of time being barred from the Bar, but so too were the financial implications more favorable, given that lawyer's fees for a reinstatement effort could run to approximately $20,000)[190] and considering that an *unsuccessful* reinstatement effort obliges the offender to wait an *additional* year before trying again,[191] thereby drawing out the process even longer, requiring additional costs of representation, and further delaying the applicant from resuming his/her profession. Indeed, a suspension of one year and one day works out in practice to two and a half years (or more) outside the legal profession, given the time it takes to go through the reinstatement process; but being denied reinstatement requires one to wait another year before trying again.[192] How far this logic extends (Is one extra year of self-imposed sanction sufficient?) is unclear; but what is interesting is the way it runs completely counter to, for example, what we see in the realm of state-run criminal justice, whereby one serves the time and may even have the sentence *reduced* upon demonstration of fitness for reentry (i.e. parole).

Conceiving of strategy in a different way, we were apprised of an approach an attorney might take in order to procure a more favorable disposition. Though we did not attempt to develop a systematic handbook for attorneys charged by the ODC, two of the insights about attorney tactics in this process stand out. In the cases that include criminal charges, there may be a relationship between the criminal conviction and disciplinary proceedings. A sophisticated attorney, we were told, might attempt to argue for mitigation of a sentence in *criminal* court, given the reality of resulting implications (effectively "collateral consequences" for attorneys) in the form of professional discipline.

Having said that, counsel for defendant-attorneys must proceed with caution when taking such an approach and should resist making any kind of explicit

189. *See* Figure IV, *supra* page 167.
190. Interview #5.
191. PA. RULES OF THE DISCIPLINARY BOARD, §89.272 (c), *available at* http://www.padisciplinaryboard.org/documents/DBoardRules.pdf.
192. Interview #5.

forecast about disciplinary outcome-to be (e.g. "Your Honor, please bear in mind that my client is going to be disbarred for this offense") because then—with the transcript from the criminal proceedings available and the presumption that the mitigation plea (or ploy) encouraged at least some softening of the sentence—the Supreme Court could well feel *obliged* to find for disbarment just because the die was cast in an earlier proceeding.[193] Instead, a somewhat more coy approach is advised, where counsel teases the issue without seeming to commit those downstream to any particular course of action (e.g. "Your honor, please note that the sentence coming from this court will have *disciplinary consequences* for my client, which we hope you will take into consideration . . .").[194]

V. Conclusion

We conclude by again focusing on the subset of attorneys who were disciplined professionally after a criminal conviction. Some of our respondents reported that prosecutors invoke the likely professional implications for defendants "often,"[195] "a lot,"[196] and "all the time,"[197] although strictly speaking such consequences need not be surfaced, let alone explained in detail, during plea negotiations or during trial.[198] The degree to which this takes place is the subject of future research; but preliminarily we suggest a few matters that would appear to inhibit the parties from engaging in consistent, comprehensive, and robust discussions of the relationship between criminal convictions and potential downstream licensing implications.

From the state's perspective, the potential discipline coming from the *profession* is not technically "imposed" by the sentencing court, and is therefore not part of the sentence; but more to the point, to expect prosecutors to advise defendants of all imaginable implications could render negotiations significantly less efficient and cumbersome.[199] Because various jurisdictions have "scores or hundreds of collateral consequences, each applicable to different crimes under different circumstances," one might contend that it would also be "unreasonable to expect any lawyer to be aware of the precise details of all of them" in order to immunize plea deals against accusations of ineffective counsel.[200] On the other hand, as Chin and Love put it well, if the legal consequences of a criminal conviction are so unclear that one cannot be expected to know what they are, "then perhaps the law is at fault for being disorganized and diffuse."[201] What's more, if judges, defense attorneys, and prosecutors are unable to realize the actual scope of collateral consequences, then the same goes for legislators, and likely "the administrative and executive agencies that are supposed to enforce them."[202]

In this vein, we conclude that the genuine "costs" of the conviction and the genuine scope of the sentence must be disclosed in much more detail.[203] It is true that many disciplinary actions pertain to professional rather than criminal infractions (meaning that this concern does not apply), but for those involving convictions we need to know much more about whether—and, if so, *how*—licensing implications are handled in criminal court proceedings. It could be that defendants are apprised of the likely impact on their professional standing and they proceed with relatively complete information; and, for that matter, it could also be the case that such an impact actually mitigates their criminal court sentence (because the corresponding damage to their reputation is punishment enough, for example). All we really know is that we do not know and thus future research should explore the relationship between "punishment" and "discipline" in this—and related—contexts.

A second matter clearly in need of additional systematic research is the relationship between the type and severity of the disposition and the defendant's *status* within the hierarchy of the profession. As earlier case studies have demonstrated,[204] and as our own interviewees repeatedly implied,[205] there is a disparity—perhaps not intended, but still evident—in terms of the type of attorney who tends

193. Interview #5; Interview #6.

194. Interview #5.

195. Interview #2.

196. Interview #6.

197. Interview #5.

198. *See* Ewald, *Collateral Consequences, supra* note 23, at 92 ("Since the numerous other collateral consequences faced by people with criminal convictions are not punishments, lawyers do not need to apprise defendants of the collateral consequences they face prior to a guilty plea, judges do not need to articulate them at sentencing . . . and appellate courts need not inquire into their compatibility with core punitive requirements of 'proportionality and desert' [citing Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework* 56 CAMBRIDGE L.J. 599, 600 (1997)]).

199. Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexual Violent Predators,"* 93 MINN. L.REV. 672-73 (Dec. 2008) (with only a limited number of consequences deemed to be "direct," courts "promote finality and efficiency in the plea bargain process" and also diminish the opportunities for a post-conviction challenge to the plea based on a lack of awareness).

200. Chin and Love, *Status as Punishment, supra* note 19, at 8.

201. *Id.*

202. *Id.*

203. *See* National Conference of Commissioners of Uniform State Laws, *Amendments to Uniform Collateral Consequences of Conviction Act*, Amend. 2, § 5(a); *available at* http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010am_approved.pdf (accessed March 7, 2011) ("When an individual receives formal notice that the individual is charged with an offense [a designated official] shall cause information substantially similar to the following to be communicated to the individual: If you plead guilty or are convicted of an offense you may suffer additional legal consequences beyond jail or prison . . . [that may include] being unable to get or keep some licenses, permits, or jobs; being unable to get or keep benefits such as public housing or education; receiving a harsher sentence if you are convicted of another offense in the future; having the government take your property; and being unable to vote or possess a firearm").

204. See the above discussion in Section II.A., especially note 56.

205. Interview #2; Interview #5; Interview #6.

to get disciplined. While we offer a few preliminary thoughts based on our own findings to this point, it is clear that what is needed is a much more thorough and systematic investigation of the relationship between attorney discipline and the size/status of practitioners.[206]

Third, while the authors are divided on the normative question of whether or not wholly "private" punishments (i.e. those not a matter of public record) *should* be an option for disciplinary officials, clearly we need more research on the usage of these outcomes, within selected states and nationally. One perspective on this question is that, if the disciplinary process is going to enjoy the legitimacy that often flows from transparency, then the public should be made aware of even the sorts of infractions and violations that currently garner only private discipline. In other words, if it warrants discipline at all, then it warrants being available as a matter of public record—at least for some period of time (i.e. it could be expunged after some probationary period). But another view contends that, perhaps in the spirit of "second chances," disciplinary officials should reserve the discretion to sanction offending attorneys in such a way that it does not necessarily taint the individual or stigmatize his or her career going forward. Whichever view, or combination of views, one adopts, certainly the discussion of the matter would benefit from a more precise sense of the scope of the problem.

Finally, an examination of the sort we have provided in this paper would generally only be strengthened by formally incorporating interviews with previously disciplined individuals. Certainly the researcher would have to be wary of individuals bearing grudges against "the system," but that notwithstanding we believe that the yield of this information would be tremendous. Our suspicions and developing theories need to be tested by speaking with respondents to determine whether or not they were aware of the direct and/or default consequences of criminal convictions or professional discipline. In particular, one subset of respondents who should be interviewed are those who received the punishment of a suspension of just one year and one day in the first two years of our study yet have *not* sought reinstatement during the three or four years since the point when they first

206. One thought that might account for what appears to some to be a discrepancy in the disciplinary attention paid to small firms and especially solo practitioners is the sorts of infractions perhaps more often committed by such attorneys are more amenable to relatively expeditious disciplinary investigations and proceedings. Perhaps pursuing attorneys for commingling funds, for example, is simply easier—which would mean that those who handle cases involving such funds are by definition more likely to be a target of disciplinary action. A second reason could be that larger firms are well-heeled, have greater cachet, and consequently may have more political capital to insulate them from all but the most serious of investigations. What's more, big firms are notorious for their ability—even eagerness—to bury their opposition in paperwork, which could circle back to the notion that other targets of discipline (all other things being equal) are easier to pursue. A third reason that disciplinary actions may seem to disproportionately include solo and small firm practitioners could be that large firms may be more effective at expeditiously responding to client complaints, thus obviating the need for the formal complaint.

became eligible. Knowing why designated short-term "discipline" became default long-term or lifetime "punishment" would significantly inform our understanding of the (in)consistencies between intentions and impact in this domain. What's more, it would provide additional information, from the perspectives of "Philadelphia Lawyers" themselves, with which to evaluate the implications of professional self-regulation—in Pennsylvania and beyond.

Appendix

1. Disciplinary official (January 5, 2010). In-person.
2. Defense counsel (former Disciplinary official) (January 5, 2010). In-person.
3. State official (January 5, 2010). In-person.
4. Defense counsel (former Disciplinary official) (January 6, 2010). In-person.
5. Defense counsel (former Disciplinary official) (January 6, 2010). In-person.
6. Defense counsel (former Disciplinary official) (January 15, 2010). In-person.
7. Defense counsel (former Disciplinary official) (January 22, 2010). In-person.
8. Disciplinary official (January 25, 2010). In-person.
9. Disciplinary official (February 4, 2010). Telephone.
10. Disciplinary official (February 22, 2010). In-person. (Same individual as interview #9.)
11. Defense counsel (February 24, 2010). In-person.
12. Disciplinary official (February 24, 2010). In-person.
13. Reinstatement hearing: Disciplinary officials and Defense counselors (February 24, 2010). In-person.