

COMMENTS

Attorney Fee Disgorgement As A Disciplinary Action

Disciplinary action against attorneys is aimed primarily at preserving public confidence in the legal system and preventing misconduct within the system.¹ However, conventional efforts by disciplinary agencies not only are inadequate and ineffective² but also fail to generate public confidence and esteem for the legal profession.³ Furthermore, the imposition of current disciplinary sanctions does little or nothing to compensate an aggrieved client.⁴

1. *In re Steinberg*, 44 Wash. 2d 707, 715, 269 P.2d 970, 974 (1954). See also *In re Rice*, 99 Wash. 2d 275, 661 P.2d 591 (1983). “[P]rotection of the public and preservation of the public’s confidence in the legal profession are the primary purposes of attorney discipline.” *Id.* at 277-78, 661 P.2d at 593. Several factors considered by the court in determining the appropriate disciplinary actions are: (1) the seriousness and circumstances of the offense; (2) avoidance of repetition; (3) deterrent effect upon others; (4) maintenance of respect for the honor and dignity of the legal profession; and, (5) assurance that those who seek legal services will be insulated from unprofessional conduct. *In re Smith*, 83 Wash. 2d 659, 663, 521 P.2d 212, 215 (1974); *In re Yamagiwa*, 97 Wash. 2d 773, 782, 650 P.2d 203, 208 (1982).

2. The Clark Report, published in 1970, reviewed the disciplinary systems in each state. The ABA Special Committee on Evaluation of Disciplinary Enforcement reported the existence of a “scandalous situation With few exceptions the prevailing attitude of lawyers towards disciplinary enforcement ranges from apathy to outright hostility. Disciplinary actions are practically nonexistent in many jurisdictions.” SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, ABA PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970) [hereinafter cited as CLARK REPORT]. “The committee emphasizes that the public dissatisfaction with the bar and the courts is much more intense than is generally believed within the profession.” *Id.* at 2.

3. Although empirical proof of current public dissatisfaction with the legal profession is limited, surveys of public attitudes indicate that lawyers repeatedly finish poorly in the standing of various business and professional groups. For example, in a recent Gallup Poll, only 24% of those surveyed rated lawyers high or very high for honesty and ethics. *Honesty and Ethical Standards of Lawyers*, 214 THE GALLUP REP. 17 (1983). Similarly, a recent survey by pollster, Louis Harris, on Americans’ “confidence in institutions” revealed that only 12% of those polled expressed a “great deal of confidence” in law firms—down from 24% a decade earlier. *Confidence in Institutions*, 92 THE HARRIS SURVEY 2-3 (1983).

4. Only recently have the Washington Rules for Lawyer Discipline included restitu-

Under the Washington Rules for Lawyer Discipline,⁵ an attorney who commits an act of misconduct is subject to the following sanctions: disbarment, suspension from the practice of law for an appropriate fixed period of time not exceeding two years, reprimand, censure, or cumulative disciplinary suspension pursuant to the rules for lawyer discipline.⁶ The disciplinary rules do not specifically authorize fee forfeiture as a sanction for attorney misconduct, and courts generally are reluctant to invoke this sanction.⁷ The Washington rules do provide that a lawyer sanctioned for misconduct may be ordered to make restitution to persons financially injured by the lawyer's conduct.⁸ They do not, however, explain whether restitution is limited to a return of money held for a client or whether restitution includes a full or partial forfeiture of fees.⁹ The language of the Washing-

tion as a sanction. *See infra* notes 5 & 8. *Cf.* Washington Discipline Rules for Attorneys [officially cited as WASH. D.R.A.]. WASH. D.R.A. (adopted 1975), *reprinted in* WASHINGTON COURT RULES (1982); WASH. D.R.A. (adopted 1969), *reprinted in* WASHINGTON COURT RULES (1974). Prior to January 1, 1983, the Discipline Rules for Attorneys made no mention of restitution as a sanction.

5. On December 22, 1982, the Washington Supreme Court adopted the Rules for Lawyer Discipline, effective Jan. 21, 1983, [officially cited as WASH. R.L.D.] to supersede the Discipline Rules for Attorneys, WASH. D.R.A. (adopted 1975), *reprinted in* WASHINGTON COURT RULES (1982). 98 Wash. 2d 1106 (1983). WASH. R.L.D. 1.1 enumerates sixteen grounds for lawyer discipline. The grounds listed include the commission of any act involving moral turpitude, dishonesty, or corruption; willful violation of a court order; violation of the oath or duties of a lawyer; violation of the Code of Professional Responsibility of the profession adopted by the Supreme Court of the State of Washington; and conduct demonstrating unfitness to practice law. *Id.* 1.1(a)-(c), (i), (p). *See also* WASH. REV. CODE § 2.48.220 (1983), which enumerates the grounds for disbarment or suspension.

6. Upon a finding that a lawyer committed an act of misconduct, one or more of these sanctions may be imposed. WASH. R.L.D. 5.1.

7. No Washington cases were found in which fee forfeiture was authorized as part of a disciplinary hearing, but such forfeiture was recognized in *Ross v. Scannell*, 97 Wash. 2d 598, 610, 647 P.2d 1004, 1011 (1982), an action to recover attorney's fees discussed *infra* text accompanying notes 70-74. Few cases are reported in other jurisdictions. *See, e.g., infra* notes 9, 25, 111-16; *cf. infra* text accompanying notes 97-102 (fee forfeiture authorized in other civil actions in Washington).

8. WASH. R.L.D. 5.3(a) provides: "A lawyer who has been found to have committed an act of misconduct and who has been sanctioned pursuant to rule 5.1 may in addition be ordered to make restitution to persons financially injured by the lawyer's conduct."

9. Although few courts have imposed fee disgorgement as a part of disciplinary actions, two cases from other jurisdictions illustrate different approaches. In one case, the court ordered a complete refund of executors' fees and attorneys' fees as well as a one year suspension from the practice of law for a "gross abuse" of knowledge and position. *Office of Disciplinary Counsel v. Walker*, 366 A.2d 563, 568 (Pa. 1976). An Arizona case involved a similar one year suspension of an attorney for improperly placing trust funds in his own account. *In re Couser*, 596 P.2d 26 (Ariz. 1979). In the latter case, the court did not require a return of attorneys' fees, but allowed them as a deduction to the

ton rules indicates that no restitution should be made to an uninjured client.¹⁰

Generally, the principles of restitution attempt to restore the aggrieved party to his former position, "either by the return of something which he formerly had or by the receipt of its equivalent in money."¹¹ Thus, restitution is primarily a tool for restoration rather than punishment. For purposes of this Comment, however, the terms "fee disgorgement" and "fee forfeiture" encompass both a restorational purpose and a punitive one.¹²

To further deter attorney misconduct, fee disgorgement should be encouraged as a disciplinary sanction and should not be limited to, or dependent on, client injury. Such forfeiture complies with contract¹³ and agency¹⁴ principles involving fiduciary relationships. Denial of compensation is also consistent with the principle that a person should not profit from his own misconduct.¹⁵ Moreover, by including disgorgement as part of the disciplinary action, the aggrieved client receives restitution without a separate legal action. Thus, this inclusion promotes judicial economy and compensates the client who has no reasonable recourse in law because of the high cost of litigation and limita-

attorney in calculating the amount of interest accrued and owed to the client from the trust account. *Id.* at 28, n.4. However, the attorney had already made restitution and had returned his \$350 fee to the client. *Id.* at 27, n.3. Comments to the ABA Standards reveal few occasions when restitution is appropriate, such as return of a client's money wrongfully withheld. See *infra* notes 32-36 and accompanying text.

10. See *supra* note 8.

11. RESTATEMENT OF RESTITUTION § 1 comment a (1937) [hereinafter cited as RESTITUTION]. Restitution falls under the remedial heading of unjust enrichment. Such enrichment occurs when one party receives a benefit to which he is not entitled at the expense of the other party. *Id.* Although the goal is restoration of the injured party to his former position, "restitution may be more or less than the loss suffered or more or less than the enrichment." *Id.*

12. Although disciplinary actions eschew punishment, see *infra* notes 38-42 and accompanying text, their effects are inevitably punitive. Discipline serves a recognized deterrent purpose. See *infra* notes 44-45 and accompanying text. Despite the restorational purpose of restitution, an element of punishment may be present: "[t]he subordinate goal of punishment (the sanction element) is served in cases where the defendant is compelled to disgorge benefits in excess of the harm caused the plaintiff." K. YORK & J. BAUMAN, CASES AND MATERIALS ON REMEDIES 7 (3d ed. 1979).

13. See generally *infra* text accompanying notes 78-88.

14. See *infra* text accompanying notes 89-92.

15. Justice Cardozo wrote that "no one shall be permitted to take advantage of his own wrong. . . ." *Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 164-65, 133 N.E. 432, 433 (1921). See also RESTITUTION *supra* note 11, § 3.

tions on malpractice suits.¹⁶ For these reasons, the Washington Bar Association,¹⁷ in conjunction with its authority to recommend disciplinary sanctions,¹⁸ should devise a system, subject to Washington Supreme Court approval,¹⁹ authorizing fee disgorgement as a sanction for unethical conduct.²⁰

This Comment will first explore existing reasons for the rare application of fee disgorgement as a disciplinary measure. It will then examine the contexts under which courts currently deprive attorneys of their fees in both nondisciplinary and disciplinary proceedings. This Comment will conclude that, in many cases, disgorgement of fees as a disciplinary action for attorney mis-

16. See *infra* notes 60-65 and accompanying text.

17. Lawyer disciplinary systems vary from state to state. Although this Comment specifically refers to Washington's disciplinary proceedings, the discussion is not limited to Washington law. Fee disgorgement, as a sanction, arguably could be incorporated into the disciplinary system of any jurisdiction.

18. In Washington, alleged attorney misconduct is investigated by the State Bar Counsel. WASH. R.L.D. 2.6. A special District Counsel may assist in investigating allegations of attorney misconduct. WASH. R.L.D. 2.6-2.7. Investigation Reports are reviewed by a Review Committee, which may order a disciplinary hearing. WASH. R.L.D. 2.4. Following a decision that a hearing should be held, the State Bar Counsel prepares a formal complaint. WASH. R.L.D. 4.3(a). A disciplinary proceeding is deemed commenced when the formal complaint is prepared and filed by the State Bar Counsel. WASH. R.L.D. 4.3(e). The Disciplinary Hearing is conducted by a Hearing Officer or Panel. WASH. R.L.D. 2.5, 4.10. After the proceedings are concluded, the Hearing Officer or Panel Chairperson submits findings, conclusions, and recommendations to the State Bar Association. WASH. R.L.D. 4.13(b). If a recommendation of disbarment or suspension is made, the Disciplinary Board reviews the proceedings, WASH. R.L.D. 6.1(a), as it will also do if the respondent lawyer or State Bar Counsel files a notice of appeal with the Association. WASH. R.L.D. 6.1(b). Decisions of the Disciplinary Board may be subject to review by the Washington Supreme Court. A respondent lawyer may appeal as a matter of right a decision imposing suspension or disbarment. WASH. R.L.D. 7.1-7.2. Other decisions are subject to review by the Washington Supreme Court only through discretionary review. WASH. R.L.D. 7.3.

19. Disciplinary proceedings are conducted through the Washington State Bar Association in accordance with the State Bar Act. WASH. REV. CODE ch. 2.48 (1983). See generally *supra* note 18. However, the Washington Supreme Court alone retains the duty and responsibility of adjudging whether or not there has been professional misconduct, and of taking appropriate disciplinary action. *In re Sherman*, 58 Wash. 2d 1, 8, 363 P.2d 390, 391 (1961); see also WASH. R.L.D. 2.1. "The Supreme Court of Washington has exclusive responsibility within the state for the administration of the lawyer discipline and disability system and has inherent power to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline and disability."

20. Under the proposed sanction, a lawyer found guilty of misconduct and sanctioned pursuant to WASH. R.L.D. 5.1 may additionally be required to disgorge attorneys' fees, if the court so orders. Although the Bar and the court might find fee disgorgement an appropriate sanction for many types of misconduct, it would be a particularly well-suited sanction for cases involving conflicts of interest. See *infra* notes 91-92 and accompanying text. It would also be an appropriate sanction for misconduct involving concerted action between attorney and client. See *infra* text accompanying notes 128-130.

conduct would most effectively protect the public, deter unethical conduct, and restore confidence in the legal profession.

The judiciary has the inherent power²¹ to regulate the practice of law,²² and that regulation is within the sole province of the judiciary.²³ However, even though the inherent power of the court enables it to make independent determinations,²⁴ only a few courts appear to have exercised their power to order restitution or the return of attorneys' fees in a disciplinary hearing.²⁵

The rare application of fee forfeiture as a disciplinary measure can be explained in part by the position of the complaining client. A citizen filing a complaint with a state bar association is not considered a party to any action taken against an attorney.²⁶

21. The "inherent powers" of a court include the "power to do all things that are reasonably necessary for the administration of justice within the scope of the court's jurisdiction." *Patterson v. Pollock*, 84 Ohio App. 489, 497, 84 N.E.2d 606, 611 (1948) (citing 14 AM. JUR. COURTS § 171 (1938)).

22. *Hagan & Van Camp, P.S. v. Kassler Escrow*, 96 Wash. 2d 443, 452, 635 P.2d 730, 736 (1981) (holding that WASH. REV. CODE ch. 19.62 (1979), which permitted nonattorneys to prepare documents involved in property transactions, unconstitutionally infringed upon the supreme court's power to regulate the practice of law).

23. *Kassler*, 96 Wash. 2d at 453, 635 P.2d at 736. See also WASH. R.L.D. 2.1, partially quoted *supra* note 19.

24. *Dodd v. Bannister*, 86 Wash. 2d 176, 543 P.2d 237 (1975). "If the power is inherent, as we hold it is, there is no necessity for the rules of the court to expressly affirm the existence of such power." *Id.* at 188, 543 P.2d at 244.

25. In the following cases, the courts expressly ruled that ordering restitution to a wronged client is within their power in a disciplinary action against an attorney: *In re Cornelius*, 521 P.2d 497, 498-99 (Alaska 1974) (approval of disciplinary order providing that before a suspended respondent is eligible for reinstatement, he must have made full restitution to any person owed as a result of the misconduct for which respondent was suspended); *In re Tyler*, 78 Cal. 307, 309-10, 20 P. 674, 675 (1889) (court has the power in a disciplinary proceeding to condition reinstatement of suspended lawyer upon the return of money collected from client).

The following cases illustrate attorney discipline cases in which the courts ordered restitution without expressly stating that it was within their power to do so: *Yokozeki v. State Bar of Cal.*, 11 Cal. 3d 436, 451, 521 P.2d 858, 868, 113 Cal. Rptr. 602, 612 *cert. denied* 419 U.S. 900 (1974) (attorney ordered to make restitution to his former client and to be suspended from the practice of law for five years or until he had made full restitution, whichever was the greater period, where he was found guilty of misappropriating client's property); *People v. McCleary*, 181 Colo. 261, 263-64, 508 P.2d 783, 784 (1973), (attorney publicly reprimanded and ordered to return money paid for title abstract which attorney failed to order, and to return a retainer paid to institute divorce proceedings which attorney failed to complete); *State ex rel. Fla. Bar v. Hogsten*, 127 So. 2d 668, 670-71 (Fla. 1961), (attorney who was found guilty and suspended for not carrying divorce proceedings to finalization and falsely telling client that final decree had been filed was ordered to reimburse client for fee of second attorney needed to complete divorce proceedings). See also *infra* notes 111-16 and accompanying text for disciplinary proceedings involving court-ordered fee disgorgement.

26. WASH. R.L.D. 4.1(b)(2) defines "parties" to mean the respondent lawyer and the

The Washington State Bar essentially serves to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline.²⁷ Washington State Bar officials institute disciplinary proceedings upon a determination that the client complaint has merit.²⁸ Although, under the procedural rules,²⁹ the client may be present during the proceeding, he attends and testifies only as a witness.³⁰ Because the client is not a party to the proceeding and because the Bar's purpose is disciplinary, the client's interest in restitution may not be adequately argued.

Although the client is not technically a party to a disciplinary proceeding, both the Washington Rules for Lawyer Discipline³¹ and the ABA Standards of Lawyer Discipline³² recognize that a court may direct restitution as part of a disciplinary order.³³ One provision of the ABA Standards refers to "persons financially injured" by the attorney's willful misconduct.³⁴ Because a court may structure its order to ultimately benefit the client, arguably it may include fees already paid to an attorney

State Bar Counsel. *See also* Slotnick v. Pike, 374 Mass. 822, 370 N.E.2d 1006 (1977), wherein the Massachusetts Supreme Judicial Court stated that it is the Board of Bar Overseers and not private individuals, which is ordinarily responsible for prosecuting complaints against attorneys. "A citizen filing a complaint . . . is not a party to any action taken against the attorney, nor are the citizen's rights jeopardized." *Id.* at 822, 370 N.E.2d at 1007 (quoting Binns v. Board of Bar Overseers, 369 Mass. 975, 976, 343 N.E.2d 868, 869 (1974)).

27. WASH. R.L.D. 2.1.

28. WASH. R.L.D. 2.4(d)(1).

29. *See generally supra* note 18 for a discussion of how the disciplinary process operates in Washington State.

30. WASH. R.L.D. 2.9(a)(6). *See generally* WASH. R.L.D. 2.9 for other rights and duties of a person filing a complaint with the Bar Association.

31. *See supra* note 5.

32. ABA Joint Comm. on Professional Discipline, *Standards for Lawyer Discipline and Disability Proceedings*, in 1 DISCIPLINARY LAW AND PROCEDURE RESEARCH SYSTEM (6th ed. 1983) [hereinafter cited as *ABA Standards*]. The *ABA Standards*, which were approved in February 1979, were developed for courts to use in establishing a structure for judicial and lawyer disciplinary proceedings. *Id.* at Preface. The *ABA Standards* will be referred to in this article because they contain guidance and commentary indicative of the American Bar Association's stance on various issues regarding attorney discipline. The Washington Rules for Lawyer Discipline, *supra* note 5, while setting forth the grounds and procedural requirements for attorney disciplinary action, do not contain the extensive discussion of the policy considerations of attorney discipline that is found in the *ABA Standards*.

33. WASH. R.L.D. 5.3; *ABA Standards, supra* note 32, at 6.12.

34. *ABA Standards, supra* note 32, at 6.12 provides: "The court may require a respondent to make restitution to persons financially injured by his willful conduct and to reimburse the client security fund." *See supra* note 8 for the WASH. R.L.D. rule regarding restitution.

in the restitution order. This argument is strengthened by the commentary to this provision: "Whenever possible, the disciplinary process should facilitate restitution to the victims of the respondent's misconduct without requiring victims to institute separate proceedings at their own expense."³⁵ However, a review of the cases cited in the commentary to the ABA Standards indicates that the commentators view restitution as proper only in very limited circumstances.³⁶ Although restitution is recommended in the commentary when an attorney has wrongfully withheld or misused funds entrusted to him by the client,³⁷ the denial of attorneys' fees for professional misconduct does not appear to be encompassed within this provision. Moreover, the ABA Standards also provide that "[f]ines should not be imposed upon respondents."³⁸ If fee disgorgement for attorney misconduct were characterized as a fine, the ABA Standards would expressly disapprove of such an order.

Disapproval of fines in disciplinary proceedings is based on the rationale that "[f]ines are punitive and criminal in nature

35. *ABA Standards, supra* note 32, at 6.12 commentary, (citing Grievance Commission v. Garcia, 243 N.W.2d 383 (N.D. 1976), where the court ordered that a negligent attorney be suspended until he repaid the money that his client forfeited).

36. See *In re Andreani*, 14 Cal. 2d 736, 97 P.2d 456 (1939) (attorney appropriated corporate money); *In re Marine*, 82 Wis. 2d 602, 264 N.W.2d 285 (1978) (attorney removed funds from client's trust account without client's consent).

37. *ABA Standards, supra* note 32, at 6.12 commentary.

38. *Id.* at 6.14. The commentators view fines as punitive. *Id.* at 6.14 commentary. The use of the word "punitive" is worthy of examination. BLACK'S LAW DICTIONARY 1110 (5th ed. 1979) defines "punitive" as "[r]elating to punishment; having the character of punishment or penalty; inflicting punishment or a penalty." One court characterized punitive as "punishment for past wrongdoing, as well as to deter the defendant and others in a similar business from repeating such wrongdoing in the future." *Wilemon v. Brown*, 51 F. Supp. 978, 981, (N.D. Tex. 1943), *rev'd on other grounds*, 139 F.2d 730 (5th Cir.), *cert. denied*, *Wilemon v. Bowles*, 322 U.S. 748 (1944).

There is no consensus among the courts as to the proper role of punishment in the disciplinary system. Compare, e.g., *In re Case*, 59 Wash. 2d 181, 184, 367 P.2d 121, 122-23 (1961), which states that disciplinary proceedings are not prosecuted primarily to punish the offender, with *In re Simmons*, 59 Wash. 2d 689, 706, 369 P.2d 947, 956-57 (1962), which lists standards for the consideration of discipline. The *Simmons* court included the following in its considerations of discipline:

- (1) *Punishment* of the offender, which should be sufficient to prevent reoccurrence;
- (2) a *penalty* sufficient to deter other practitioners from engaging in such conduct; and,
- (3) *punishment* sufficient to restore and maintain respect for the honor and dignity of the profession and to assure those who seek the services of attorneys at law that the *penalties* for unprofessional conduct will be strictly enforced.

Id. at 706, 369 P.2d at 956-57 (emphasis added).

and should be avoided."³⁹ This view comports with the position that disciplinary proceedings are not properly characterized as criminal, but are instead *sui generis*.⁴⁰ Although there is authority to the contrary,⁴¹ there is general agreement among the Bar and the courts that disciplinary proceedings are not for the purpose of punishment.⁴²

Courts have articulated several proper justifications for disciplinary proceedings in the legal profession. For example, the Washington Supreme Court has stated that disciplinary proceedings are prosecuted to "curb disrespect for the profession, maintain its honor and dignity, and to assure to those who seek the services of an attorney that dishonesty and unlawful conduct will not be tolerated."⁴³ Another state's supreme court determined that "[t]he primary purpose of discipline is not punishment but purification of the Bar and protection of the courts and the public generally. However, this is not the sole purpose. Discipline also serves to deter a respondent from committing similar acts in the future and acts as a restraining influence

39. *ABA Standards, supra* note 32, at 6.14 commentary. "The use of fines in discipline or disability matters might be deemed to imply that the proceedings are criminal and require proof beyond a reasonable doubt, trial by jury, and other standards of criminal due process." *Id. See generally supra* note 38.

40. BLACK'S LAW DICTIONARY, 1286 (5th ed. 1979) defines "sui generis" as "[o]f its own kind or class." "[D]isciplinary proceedings are not criminal actions; they are *sui generis*, or peculiar to themselves." *In re Allper*, 94 Wash. 2d 456, 467, 617 P.2d 982, 987 (1980). *See also* WASH. R.L.D. 4.11(a) ("[D]isciplinary proceedings are neither civil nor criminal but are *sui generis* hearings intended to determine whether a lawyer's conduct should have an impact upon his or her license to practice law.") Disciplinary proceedings have also been characterized as both civil and quasi-criminal. *See, e.g., In re Little*, 40 Wash. 2d 421, 244 P.2d 255 (1952), where the court stated that disciplinary proceedings are civil, not criminal in nature. "Yet we consider the proceeding to be quasi-criminal, in that it is for the protection of the public and is brought for the misconduct of the lawyer involved." *Id.* at 430, 244 P.2d at 259. *See also In re Ruffalo*, 390 U.S. 544, 551 (1968). ("These are adversary proceedings of a quasi-criminal nature.")

41. The Supreme Court, in *Ruffalo*, 390 U.S. at 550, stated that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer."

42. The *ABA Standards, supra* note 32, at 1.1 states:

The purpose of lawyer discipline and disability proceedings is to maintain appropriate standards of professional conduct in order to protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are unable or are likely to be unable to properly discharge their professional duties.

The commentators quote at length from two cases, *In re Echeles*, 430 F.2d 347, 349 (7th Cir. 1970), and *Maryland State Bar Ass'n v. Agnew*, 271 Md. 543, 318 A.2d 811, 814 (1974). Both cases emphasize that disciplinary proceedings are not for the purpose of punishment. *See also In re Brown*, 97 Wash. 2d 273, 275, 644 P.2d 669, 670 (1982) ("Punishment is not a proper basis for discipline").

43. *In re English*, 64 Wash. 2d 129, 132, 390 P.2d 999, 1001 (1964).

upon others."⁴⁴

Despite the fact that disciplinary proceedings are not designed to punish, the consequences of most of these actions are unavoidably punitive.⁴⁵ Thus, an attorney is entitled to procedural due process in any proceeding relating to discipline.⁴⁶ Although the due process requirements of disciplinary proceedings may differ from those in the criminal context,⁴⁷ many of the mandates are identical. These due process rights include fair notice of the charges,⁴⁸ right to counsel,⁴⁹ right to discovery⁵⁰ and subpoena,⁵¹ right to cross-examine witnesses,⁵² right to present arguments to the adjudicators,⁵³ and right of appeal.⁵⁴ All of these due process rights are included in the ABA Standards and the Washington Rules for Lawyer Discipline.⁵⁵ Nevertheless, the specific safeguards afforded lawyers in disciplinary proceedings vary greatly from state to state.⁵⁶

One reason courts generally do not consider fee forfeiture as a desirable disciplinary measure is the belief that if the attorney's conduct has damaged the client, the client's recourse to civil suit will amply protect his rights.⁵⁷ An aggrieved client may

44. *State ex rel. Okla. Bar Ass'n v. Hall*, 567 P.2d 975, 978 (Okla. 1977) (citations omitted).

45. *In re Little*, 40 Wash. 2d 421, 430, 244 P.2d 255, 259 (1962).

46. *In re Ruffalo*, 390 U.S. 544, 550 (1968) (lawyer in disbarment proceeding is entitled to procedural due process, which includes fair notice of the charge). See also *ABA Standards*, *supra* note 32, at 1.2 commentary (the holder of a license to practice law is entitled to procedural due process in any proceeding relating to discipline for breaches of the standards of professional conduct).

47. *In re Allper*, 94 Wash. 2d 456, 467, 617 P.2d 982, 987 (1980).

48. *ABA Standards*, *supra* note 32, at 8.21. WASH. R.L.D. 4.3.

49. *ABA Standards*, *supra* note 32, at 8.34. WASH. R.L.D. 2.8(e).

50. *ABA Standards*, *supra* note 32, at 8.29. WASH. R.L.D. 4.7.

51. *ABA Standards*, *supra* note 32, at 8.35. WASH. R.L.D. 4.7(a)(4), 4.10(j).

52. *ABA Standards*, *supra* note 32, at 8.36. WASH. R.L.D. 4.11(c)(3).

53. *ABA Standards*, *supra* note 32, at 8.43, 8.51. WASH. R.L.D. 6.7(c), 7.7.

54. *ABA Standards*, *supra* note 32, at 8.47. WASH. R.L.D. 6.1, 7.1-7.3.

55. See *supra* notes 48-54.

56. For a state-by-state survey of disciplinary enforcement structures see NATIONAL CENTER FOR PROFESSIONAL RESPONSIBILITY, A.B.A., STATE DISCIPLINARY ENFORCEMENT SYSTEMS STRUCTURAL SURVEY (1980) [hereinafter cited as DISCIPLINARY STRUCTURAL SURVEY]. In addition to the procedural safeguards indicated *supra* text accompanying notes 48-54, the WASH. R.L.D. also provide that the respondent lawyer has the right to present evidence. WASH. R.L.D. 4.11(c). Additionally, a lawyer has the right to properly exercise his or her privilege against self-incrimination, where applicable. WASH. R.L.D. 2.8(c). The respondent lawyer may not, however, assert the attorney-client privilege as a ground for refusing to provide information during the course of an investigation. WASH. R.L.D. 2.8(d).

57. *Slotnick v. Pike*, 374 Mass. 822, 822-23, 370 N.E.2d 1006, 1007 (1977). "The

institute an action under breach of contract⁵⁸ or restitution theories.⁵⁹ Malpractice suits, however, represent the usual setting in which fee disgorgement is litigated. The usual objective of a legal malpractice action⁶⁰ is the recovery of damages. Moreover, proof of damages⁶¹ is fundamental to a cause of action.⁶² Unless the client has sustained a pecuniary loss as a result of some negligent act⁶³ on the part of the lawyer, the client has no basis for

plaintiff's rights are amply protected by the disciplinary proceedings . . . and by recourse to civil suit." *Id.* (emphasis added).

58. See, e.g., *Coon v. Ginsberg*, 32 Colo. App. 206, 509 P.2d 1293 (1973).

59. *Johnson v. Mann*, 72 Wash. 651, 131 P. 213 (1913); see also *Perez v. Pappas*, 98 Wash. 2d 835, 649 P.2d 475 (1983). For a discussion of these cases see *infra* note 102.

60. Most client actions against attorneys are for negligence, breach of contract, or fraud, with negligence being the most common form of a legal malpractice suit. R. MALLEEN & V. LEVIT, *LEGAL MALPRACTICE*, § 100, at 169, § 111, at 204 (2d ed. 1981). A negligence cause of action is composed of the same elements of any other negligence action: duty, negligent breach of duty, proximate cause, and damage. *Id.* § 111, at 204.

61. The court may classify recoverable damages as either direct, which are the immediate, natural and anticipated consequences of the wrong, or as consequential, which flow as a consequence of the direct damages. In a legal malpractice suit, direct damages are the loss of the expected benefits from the attorney's services and any expenses which the client incurred because of the attorney's failure to achieve that benefit. *Id.* § 300, at 349. Fees paid to an attorney may be the only damages sustained by a client. For example, if a client paid fees to an attorney for services that were performed incompetently, or not at all, this expense will provide a measure of damages. See *Coon v. Ginsberg*, 32 Colo. App. 206, 212, 509 P.2d 1293, 1296 (1973) (measure of damages should be amount client paid alternate counsel in order to obtain the same legal services for which client contracted with and paid original attorney). Consequential damages are those additional injuries that are a proximate result of the attorney's negligence but which do not flow directly from or concern the objective of the retention. R. MALLEEN & V. LEVIT, *supra* note 60, § 300, at 350. See generally *id.* § 308-13, at 360-65.

62. R. MALLEEN & V. LEVIT, *supra* note 60, § 300, at 348. The prevailing view is that actual, measurable injury is essential to a malpractice suit, and that a plaintiff is not entitled to nominal damages. The rationale is that an attorney should only be liable for actual harm caused, and that to permit vindication of a technical wrong without injury is to promote litigation which is unnecessary, expensive, and lengthy. *Id.* at § 301, at 351-52.

63. Some commentators argue that violations of the Code of Professional Responsibility should constitute negligence per se. See Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 281, 286-95 (1979); Commentary, *Violation of the Code of Professional Responsibility As Stating a Cause of Action in Legal Malpractice*, 6 OHIO N.U.L. REV. 692, 696-700 (1979). However, such an approach was not supported by the language of the code, which stated that the code does not "undertake to define standards for civil liability of lawyers for professional conduct." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1981). The courts have generally accepted code violations as evidence of negligence, rather than as negligence per se. See, e.g., *In re Kuzman*, 335 N.E.2d 210, 212 (Ind. 1975). The recent adoption of the MODEL RULES OF PROFESSIONAL CONDUCT (1983), which replaced the MODEL CODE OF PROFESSIONAL RESPONSIBILITY as ABA policy, reveals an unequivocal stand by the ABA on this issue. "Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal

a malpractice action.⁶⁴ On the other hand, a disciplinary proceeding does not require allegations that a client actually suffered a monetary loss as a result of the attorney's conduct.⁶⁵

The proposition that a client's rights are adequately protected by his resort to civil suit is at first glance persuasive, if one considers the sharp rise in malpractice litigation in recent years. In the 1970's, there were nearly as many reported legal malpractice decisions as there were reported decisions in the previous history of American jurisprudence.⁶⁶ However, the client who does not show monetary loss is without this remedy, as is the client whose losses do not justify the cost of litigation.

Usually, a legal malpractice action is brought only when a client suffers a large loss.⁶⁷ Law suits are both time-consuming and costly. The bringing of a malpractice suit necessitates the hiring of a second attorney and a court proceeding, unless the parties agree to a settlement. Even if the client prevails, the attorney may argue successfully that the court should consider the amount the attorney would have received for a previously

duty has been breached." *Id.* at scope.

64. *Chicago Red Top Cab Ass'n v. Gaines*, 49 Ill. App. 3d 332, 364 N.E.2d 328 (1977). "A malpractice action by a client against his attorney is an action for damages and has no basis unless the client has sustained a monetary loss as the result of some negligent act on the part of the lawyer." *Id.* at 333, 364 N.E.2d at 329. Courts however, have been willing to deny fees absent proof of direct damages when an attorney simultaneously represents clients with conflicting interests. Some courts have relieved clients from paying fees for any services rendered after the lawyer began to represent an adverse party. *See, e.g., Jeffry v. Pounds*, 67 Cal. App. 3d 6, 9, 136 Cal. Rptr. 373, 375 (1977) (fees disallowed after simultaneous representation although adverse parties were represented in unrelated matters). *See also Note, Sanctions for Attorney's Representation of Conflicting Interests*, 57 COLUM. L. REV. 994, 1001 (1957). Other courts have imposed even harsher penalties, denying compensation for services performed before the violations. *See, e.g., Bryant v. Lewis*, 27 S.W.2d 604 (Tex. Civ. App. 1930). However, both *Jeffry* and *Bryant* were attorneys' actions brought against clients for alleged compensation due, not malpractice actions initiated by the clients. Although adverse representation can be a basis for legal malpractice claims, the client must not only prove that there were conflicting interests that prevented the attorney from providing competent representation, but also that such representation was a proximate cause of the client's injury. *See Brosie v. Stockton*, 105 Ariz. 574, 577, 468 P.2d 933, 936 (1970); *Lange v. Marshall*, 622 S.W.2d 237, 238 (Mo. App. 1981).

65. *See, e.g., Mendicino v. Magana*, 572 P.2d 21, 23 (Wyo. 1977) (extreme delay in closing a number of estates over a period of many years justified attorney's suspension from the practice of law, even though there were no allegations that any client actually suffered a pecuniary loss as a result of the respondent's conduct).

66. R. MALLEN & V. LEVIT, *supra* note 60, § 6, at 18.

67. For example, a 1981 publication estimated that the average award in an attorney malpractice case was \$10,000. T. BROWN, HOW TO AVOID BEING SUED BY YOUR CLIENT: PREVENTIONS AND CURES FOR LEGAL MALPRACTICE 6 (1981).

agreed upon fee,⁶⁸ in reducing the amount of the client's damages. Thus, a client is likely to bring an action against an attorney only when the client's loss greatly exceeds his cost of bringing the malpractice suit. Because of the disincentives to litigation, a client who has suffered financial damages may remain uncompensated even though an attorney is found guilty of misconduct in a separate proceeding. Under the proposed disgorgement sanction, a client with damages in excess of the fee would not be foreclosed from instituting a malpractice suit for the excess amount.⁶⁹

In addition to initiating an action, a client may be brought into court as a defendant for nonpayment of fees. An attorney may bring an action against the client for compensation owed to him, and the client may assert attorney misconduct as a defense. The client also may counterclaim for damages that are the result of the alleged unethical conduct. This was the setting in which the recent case of *Ross v. Scannell*⁷⁰ arose. In *Ross*, the Washington Supreme Court stated that "[p]rofessional misconduct may be grounds for denying an attorney his fees."⁷¹ *Ross*, the attorney, sued Scannell to collect Ross' contingency fees and to foreclose an attorney's lien. Scannell counterclaimed for damages resulting from loss of sale of real estate and for slander of title.⁷² The court withheld judgment on the allegations of unethical conduct,⁷³ and remanded the action to the trial court for

68. There has been a great deal of discussion as to whether the court should reduce damages by the amount that the attorney's fees would have been in the underlying action. See generally R. MALLIN & V. LEVIT *supra* note 60, § 317, at 368.

69. See *infra* note 133 and accompanying text.

70. 97 Wash. 2d 598, 647 P.2d 1004 (1982).

71. *Id.* at 610, 647 P.2d at 1011.

72. The trial court found in favor of Ross' attaching a lien and clouding the title to real property and awarded a portion of the fees claimed. The court denied the counterclaim, and both Ross and Scannell appealed. The supreme court held, in a case of first impression, that WASH. REV. CODE § 60.40.010 (1981) does not allow an attorney to file a lien on the real property of a client as proceeds of a judgment. Because Ross had ceased to render required legal services before substantially completing the agreed services, the court held that he could not recover on the contract but had to seek recovery of fees on a quantum meruit theory. 97 Wash. 2d at 610, 647 P.2d at 1001.

73. The asserted violations of the Washington Code of Professional Responsibility include Disciplinary Rule 2-106 [Disciplinary Rules officially cited as WASH. D.R.], prohibiting an attorney from collecting an illegal or clearly excessive fee; WASH. D.R. 5-103 prohibiting an attorney from acquiring a proprietary interest in the client's cause of action; WASH. D.R. 5-102(a) requiring an attorney to withdraw from the conduct of the trial if the lawyer learns or it is obvious that he ought to be called as a witness on behalf of his client unless such testimony falls within the exceptions listed in WASH. D.R. 5-101(b); WASH. D.R. 5-105 restricting an attorney from representing multiple clients if his

consideration of the charges. The court relied upon an earlier Washington case, *Yount v. Zarbell*,⁷⁴ to support the principle that professional misconduct may be grounds for denying an attorney his fees.

A review of *Yount v. Zarbell*⁷⁵ reveals that the court offered no case law to support its conclusion. At the time the case was decided,⁷⁶ there were no Washington cases to support the proposition that, as a matter of law, professional misconduct precludes an attorney from recovering any fee whatsoever.⁷⁷ However, the conclusion is consistent with traditional contractual principles.

The law of contracts generally controls attorney-client contracts, with special emphasis on the fiduciary nature of the relationship.⁷⁸ A contract of some nature, express or implied, is fundamental to an attorney's right to recover for his services.⁷⁹ An attorney is bound to discharge his duties to his client with strict fidelity and to observe the utmost and highest good faith.⁸⁰ Williston, in his treatise on contracts, describes the attorney-client relationship as exacting and confidential, and as requiring a higher degree of responsibility than that demanded of other

independent professional judgment is impaired; and WASH. D.R. 5-107 requiring an attorney to avoid influence by others than his client. *Ross*, 97 Wash. 2d at 609, 647 P.2d at 1010.

74. 17 Wash. 2d 278, 135 P.2d 309 (1943). *Yount* also involved suit for recovery of attorneys' fees. The Washington Supreme Court held that the attorney was not entitled to recovery by reason of professional misconduct in instituting actions and taking judgments for amounts in excess of the amount due from the debtor and in practicing law with a person who is not a licensed attorney. (THE RULES FOR DISCIPLINE OF ATTORNEYS (in effect August 1, 1938), Rule XI, § 5, forbid an attorney from lending his or her name for use as attorney by another person who is not authorized to practice law in the state). *Yount*, 17 Wash. 2d at 282, 135 P.2d at 311.

75. 17 Wash. 2d 278, 135 P.2d 309 (1943).

76. The case was decided on March 22, 1943. *Yount*, 17 Wash. 2d at 278, 135 P.2d at 309.

77. This was the contention of appellant Zarbell. No Washington case was cited in Zarbell's appellate brief to support this principle. Instead, Zarbell cited only out-of-state authority: *Ingersoll v. Coal Creek Co.*, 117 Tenn. 263, 98 S.W. 178 (1906); *Hoboken Trust Co. v. Norton*, 90 N.J. Eq. 314, 107 A. 67 (1919). Brief of Appellants at 12-13, *Yount v. Zarbell*, 17 Wash. 2d 278, 135 P.2d 309 (1943).

78. *Healy v. Gray*, 184 Iowa 111, 168 N.W. 222 (1918).

79. 10 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1285, at 909 (3d ed. 1967).

80. *Talbot v. Schroeder*, 13 Ariz. App. 230, 475 P.2d 520 (1970). *In re Greer*, 52 Ariz. 385, 81 P.2d 96 (1938). One court characterized the relationship of an attorney to his client as fiduciary in nature, "binding the attorney to the highest degree of fidelity and good faith to his client on account of the trust and confidence imposed." *Ford v. Guarantee Abstract & Title Co.*, 220 Kan. 244, 261, 553 P.2d 254, 267 (1976).

fiduciaries.⁸¹

As a general rule, an attorney who has fully performed his contract of employment is entitled to recover compensation for his services.⁸² But courts have repeatedly recognized that a lawyer who does not at all times represent his client with undivided fidelity is not entitled to compensation.⁸³ The California Supreme Court noted that "[f]raud or unfairness on the part of an attorney will prevent him from recovering for services rendered; as will . . . acts of impropriety, inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties."⁸⁴ The California Court of Appeals has also stated that an attorney may not recover for services rendered if those services are in contradiction of the requirements of professional responsibility.⁸⁵ The New Jersey Court of Chancery, in *Hoboken Trust Co. v. Norton*,⁸⁶ cited several cases to support the proposition that counsel fees only are earned by fidelity to, and activity for, a client and his interests.⁸⁷ These courts take the view that a breach of the fiduciary responsibility goes to the crux of the attorney-client relationship, and thus warrants the court's denial of the attorney's right to compensation.⁸⁸

81. 10 S. WILLISTON, *supra* note 79, at 909.

82. 1 S. SPISER, ATTORNEY FEES § 4:2 (1973).

83. *See, e.g., In re Thomasson's Estate*, 196 S.W.2d 155, 162 (Mo. 1946). *See also Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982). "This court has repeatedly stated that an attorney (or any fiduciary) who breaches his duty to his client forfeits his right to compensation." *Id.* at 411. In *Rice*, the Minnesota Supreme Court held that a defendant law firm and attorney forfeited attorneys' fees by failing to disclose the law firm's professional relationship with the insurance claims adjuster responsible for settling the plaintiff/client's case. The court in *Rice* noted that

[i]t is . . . well settled that an attorney at law who is unfaithful in the performance of his duties forfeits his right to compensation. . . . Unquestioned fidelity to their real interests is the duty of every attorney to his clients. When a breach of faith occurs, the attorney's right to compensation is gone.

Id. at 411 (quoting *In re Estate of Lee*, 214 Minn. 448, 460, 9 N.W.2d 245, 251 (1943)).

84. *Clark v. Millsap*, 197 Cal. 765, 785, 242 P. 918, 926 (1926).

85. *Goldstein v. Lees*, 46 Cal. App. 3d 614, 618, 120 Cal. Rptr. 253, 255 (1975). This was an action brought by the attorney to recover money due for legal services. The court held that former counsel to a corporation could not recover for legal services on behalf of a minority shareholder-director in a proxy fight designed to gain control of the same corporation, where former counsel held corporation secrets which were relevant to the proxy fight.

86. 90 N.J. Eq. 314, 107 A. 67 (1919).

87. *Id.* at 319, 107 A. at 69.

88. *See also Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982), where the court recognized that

the law has traditionally been unyielding in its assessment of penalties when a

Agency principles further support the argument that denial of attorneys' fees is based in law. If an agent is guilty of a breach of his duties to the principal, the principal may properly refuse to pay compensation.⁸⁹ The courts have held that an agent, particularly an attorney, who has been unfaithful to his principal, earns nothing; his right to compensation is lost.⁹⁰ Indeed, the courts show a particular willingness to deny fees to an attorney when he represents clients with conflicting interests, even where no loss or damage to the client has occurred.⁹¹ Courts have relieved clients from paying for services rendered both before and after the conflict violations.⁹²

Similarly, in other agency relationships, the courts apply the general rule that the faithful discharge of duties is a condition precedent to any recovery on the part of an agent. For example, the Fifth Circuit Court of Appeals denied an architect's right to compensation and commission because of his breach of duty of good faith, not only on the ground of actual damage or prejudice to the principal, but also on grounds of public policy.⁹³ The Kansas Supreme Court characterized the relationship between a principal and agent as a fiduciary one, requiring the same obligation of service and loyalty as that imposed upon a trustee in favor of his beneficiary.⁹⁴ The court recognized, however, that a

fiduciary, or trustee, or agent has breached any of his obligations. The underlying policy is a strong one. It recognizes that insuring absolute fidelity to the principal's (or beneficiary's) interests is fundamental to establishing the trust necessary to the proper functioning of these relationships.

Id. at 411. For additional discussion of *Rice*, see *supra* note 83 and *infra* note 91.

89. *Allied Sec. v. Clocker*, 185 Neb. 524, 527, 176 N.W.2d 914, 917 (1970).

90. *Blackey v. Alexander*, 156 Minn. 478, 482-83, 195 N.W. 455, 456 (1923).

91. See *Frank v. Bloom*, 634 F.2d 1245, 1258 (10th Cir. 1980) (recognizing that attorneys' fees may be denied even where no damages are shown, when an attorney is representing clients with actual conflicts of interest). See also *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982) (attorney who breaches his duty to his client forfeits his right to compensation even though the principal is ignorant of the duplicitous agency and cannot prove actual injury to himself or that the agent committed an intentional fraud). For additional discussion of *Rice*, see *supra* notes 83, 88. For additional cases and commentary regarding conflicts of interest, see *supra* note 64.

92. See *supra* note 64.

93. *Audubon Bldg. Co. v. F. M. Andrews & Co.*, 187 F. 254, 258 (5th Cir. 1911).

94. *Bessman v. Bessman*, 214 Kan. 510, 520-21, 520 P.2d 1210, 1218 (1974). The court cited the RESTATEMENT (SECOND) OF TRUSTS § 243 (1959) to support the proposition that the court may in its discretion, (a) deny a trustee who commits a breach of trust all compensation; (b) allow him a reduced compensation; or (c) allow him full compensation. *Bessman*, 214 Kan. at 521, 520 P.2d at 1219. The court also cited the RESTATEMENT (SECOND) OF AGENCY § 469 comment a (1958), which states: "An agent is entitled to no compensation for a service which constitutes a violation of his duties of

minor breach of duty, affecting only a single transaction, would not result in loss of compensation attributable to other transactions properly carried out.⁹⁵ Other authorities have reiterated the view that it is immaterial whether the agent's breach of duty actually harms the principal.⁹⁶

Washington case law also supports the principle that courts may withhold an attorney's compensation when an attorney is found guilty of fraudulent acts or gross misconduct in violation of a statute or against public policy.⁹⁷ *Delbridge v. Beach*,⁹⁸ an attorney's action to recover compensation for services rendered, involved a contract which the court characterized as an agreement to procure evidence for a contemplated divorce action. The Washington Supreme Court concluded that the agreement violated public policy and sound morals; in refusing to enforce the contract, the court denied the attorney his fees.⁹⁹ In another Washington case, *Callahan v. Jones*,¹⁰⁰ the court held that a prosecuting attorney's contract of employment for private practice was in contravention of a statute restricting such activities, and concluded that there could be no recovery under the contract or in quantum meruit.¹⁰¹ The court recognized the distinc-

obedience. . . This is true even though the disobedience results in no substantial harm to the principal's interests and even though the agent believes he is justified in so acting." 214 Kan. at 522, 520 P.2d at 1219.

95. *Bessman*, 214 Kan. at 522, 520 P.2d at 1219.

96. See generally H. REUSCHLEIN & W. GREGORY, *HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP* § 90, at 149-50 (1979).

97. The *Ross* court adopted the view that a client may have a complete defense to an attorney's actions for fees upon proof that an attorney is guilty of fraudulent acts or gross misconduct in violation of a statute or against public policy. 97 Wash. 2d at 610, 647 P.2d at 1011 (quoting *Dailey v. Testone*, 72 Wash. 2d 662, 664, 435 P.2d 24, 25 (1967)).

98. 66 Wash. 416, 119 P. 856 (1912).

99. *Id.* at 420-21, 119 P. at 858.

100. 200 Wash. 241, 93 P.2d 326 (1939).

101. *Id.* at 256, 93 P.2d at 332. This case is in line with a number of decisions which have denied recovery in quantum meruit for services rendered by an attorney under a contract regarded as void because it called for services that are regarded as intrinsically illegal, improper, or against public policy. See e.g., *Brown v. Gesellschaft Fur Drahtlose Tel.*, 78 F.2d 410 (D.C. Cir.), cert. denied, 296 U.S. 618 (1935), which held that a contract calling for the attorney to secure passage of favorable legislation was void as against public policy. The court observed that honesty would seem to dictate that the attorney should be paid a reasonable compensation for services rendered. Nevertheless, the court concluded that the rule of corporate conscience is satisfied by pleading public policy, and that it was restrained by the rule from granting any compensation to the attorney. *Id.* at 415. For a collection of cases related to an attorney's recovery in quantum meruit for legal services rendered under a contract that is illegal or void as against public policy, see generally Annot., 100 A.L.R. 2d 1378 (1965).

tion between a contract for services that are illegal, and a contract for services which are not intrinsically illegal, but are improper and contrary to public policy because of the circumstances under which they are rendered. Nevertheless, the court adopted the view that every objection to permitting a recovery upon a contract applies with equal force to a recovery upon quantum meruit.¹⁰²

In another jurisdiction, a similar situation that involved bad faith conduct toward the court prompted a court to withhold attorneys' fees. In *Duffy v. Colonial Trust Company*,¹⁰³ an attorney sued to recover a bulk charge for his services, which included his suggestion that a witness feign illness in order to secure postponement of a trial. The Pennsylvania Supreme Court ruled that the attorney could not recover any portion of his requested \$10,000 compensation. The court stated that such conduct was not only bad faith toward the court, but also professional bad faith toward the client.¹⁰⁴ The court was concerned that the incident might come to the attention of the judge or jury, and prejudice them against the client because of the belief that a client who would permit such conduct must have a weak or dishonest cause.¹⁰⁵ Thus, although the court was concerned with the potential prejudicial effects of attorney misconduct on the client, the court also stressed the duty of good faith and honorable dealing owed to the court.

The principles of contract equity and agency law support the conclusion that professional misconduct that affects the attorney-client relationship constitutes grounds for denying an attorney his fees. The same reasoning applied by courts in civil

102. 200 Wash. at 255, 93 P.2d at 332 (1939) (citation omitted). *But see* *Johnson v. Mann*, 72 Wash. 651, 131 P. 213 (1913), an action to recover money paid to an attorney who misrepresented the seriousness of the criminal charges levied against client. The court declared that even if the attorney did so misrepresent, he was entitled to the reasonable value of his services. *Id.* at 656, 131 P. at 215. *See also* *Perez v. Pappas*, 98 Wash. 2d 835, 659 P.2d 475 (1983), which involves an action seeking recovery of fees paid to an attorney. The attorney had renegotiated his fee upward at the time of settlement and had failed to properly account to the client. The Washington Supreme Court concluded that these actions breached the attorney's fiduciary duties. However, the court held that the attorney's repayment of a portion of the fee, which the client accepted, constituted an effective accord and satisfaction. *Id.* at 840, 659 P.2d at 478. Therefore, the court refused to apply the principle that the attorney's breach must result in complete forfeiture of fees. The court did state, however, that this principle may be sound in the appropriate case. *Id.* at 843, 659 P.2d at 480.

103. 287 Pa. 348, 135 A. 204 (1926).

104. *Id.* at 352, 135 A. at 205.

105. *Id.*

cases that involve collection of attorneys' fees should be applied in attorney disciplinary proceedings. An aggrieved client with or without monetary losses is in the same position in either case. Yet the client is foreclosed from instituting a malpractice action, which could reclaim his payment, unless he has suffered economic damage.¹⁰⁶ Such an uninjured client has recourse to the courts under a breach of contract¹⁰⁷ or restitution¹⁰⁸ theory, but the unearned fee may not be large enough to justify the cost of litigation. Even in those cases in which the client alleges damages, the cost of litigation and the need for judicial efficiency argue for a single proceeding. Both contract principles and ethical considerations demand that an attorney should not profit from his own misconduct.¹⁰⁹

Although fee forfeiture is not a recognized sanction under Washington's Discipline Rules for Attorneys,¹¹⁰ courts in other jurisdictions have indicated their willingness to deprive an attorney of his fees for professional misconduct, notwithstanding the absence of a specific court rule.¹¹¹ In *Office of Disciplinary Counsel v. Walker*,¹¹² the Pennsylvania Supreme Court, on direct review of the recommendation of the Disciplinary Board, ordered suspension and required the attorney to return all attorneys' fees, in the amount of \$22,000, and all executor's fees, in the amount of \$65,500, to the estate that he had represented.¹¹³ The decision indicated that the inherent power of the court enabled it to make rules governing disciplinary matters, but that these rules did not limit the court.¹¹⁴ The court held that it could impose whatever sanction it deemed appropriate.¹¹⁵

Not all courts, however, have recognized this sanction.

106. See *supra* notes 61-64 and accompanying text.

107. See *supra* notes 78-88 and accompanying text.

108. See *supra* note 59.

109. See *supra* note 15.

110. See *supra* text accompanying notes 7-10.

111. See *infra* notes 112-16 and accompanying text. See also *In re Hanson*, 586 P.2d 413, 417 (Utah 1978), where an attorney representing a client in a civil action also represented the client's opponent in an unrelated criminal proceeding, without taking all necessary steps to ensure that the client had no objections. The Supreme Court of Utah rejected a bar commission's recommendation for a one-year disbarment, and ordered the return of all fees, which were allegedly excessive, paid to the attorney by the client.

112. 469 Pa. 432, 366 A.2d 563 (1976).

113. *Id.* at 442-43 n.8, 366 A.2d at 568 n.8.

114. *Id.* at 442 n.7, 366 A.2d at 568 n.7 (citing *In re Disbarment Proceedings*, 321 Pa. 81, 101, 184 A. 59, 68 (1936)).

115. *Id.* at 442, 366 A.2d at 568.

Courts disagree as to the appropriateness of ordering any type of restitution as a disciplinary sanction. Indiana case law offers an excellent example of the dichotomous positions taken by courts. In a 1974 case,¹¹⁶ the Supreme Court of Indiana approved the findings of fact and recommendations of the Disciplinary Commission and held that failure to complete service for clients warranted disbarment. The attorney was required to return unearned fees to his former clients as a condition to reinstatement, even though the applicable admission and discipline rule conferred no jurisdiction that would permit the court to order such restitution. A year later, however, in a different case, *In re Ackerman*,¹¹⁷ the same court held that it was not appropriate to order restitution to a wronged client in a disciplinary proceeding against an attorney.¹¹⁸ The court this time rejected the Hearing Officer's recommendation that the attorney be required to make restitution to the client of monies that he took and failed to return. The court expressed the view that the main purpose of disciplinary proceedings is to determine when an ethical violation has occurred, and that the proceeding should not move to the "lesser" purpose of making the aggrieved client whole.¹¹⁹

It is true that an essential purpose of disciplinary proceedings is the determination of whether an ethical violation has occurred.¹²⁰ It does not necessarily follow, however, that the aim of making an aggrieved client whole deserves no place in the disciplinary proceeding. Hence, the vigorous dissent in *Ackerman*¹²¹ articulated the view that

it appears ridiculous that we have a hearing to determine the wrong done and to determine the punishment to follow the wrong and then say that we do not go into the question of the damage done and whether or not any reparation has been made. . . . The wrong in this case, if one has occurred, should be completely adjusted as far as possible in one proceeding.¹²²

116. *In re Case*, 262 Ind. 118, 311 N.E.2d 797 (1974).

117. *In re Ackerman*, 263 Ind. 309, 330 N.E.2d 322 (1975).

118. *Id.* at 312, 330 N.E.2d 324.

119. *Id.* at 311-12, 330 N.E.2d at 323 (quoting *In re Case*, 262 Ind. 118, 123, 311 N.E.2d 797, 799 (1974) (DeBruler, J., dissenting)).

120. A determination of whether an ethical violation has occurred is necessarily one of the preliminary steps in a disciplinary proceeding. For a discussion of the disciplinary process in Washington see generally *supra* note 18. For a state-by-state survey of disciplinary structures, see DISCIPLINARY STRUCTURAL SURVEY, *supra* note 56.

121. 263 Ind. 309, 313, 330 N.E.2d 322, 324 (1975) (Arterburn, J., dissenting).

122. *Id.* at 314, 330 N.E.2d at 324.

The view espoused in the *Ackerman* dissent, however, has not received widespread acceptance by the courts. Indeed, only a few courts have addressed the issue of the appropriateness of restitution or fee disgorgement in the context of a disciplinary proceeding.¹²³ It remains to be seen whether the ABA's disciplinary standard supporting restitution as part of a disciplinary order¹²⁴ will encourage courts to adopt a similar stance. At present the issue of fee denial for attorney misconduct continues to arise primarily within the context of civil litigation.¹²⁵

Currently, there is no uniform system or predictable procedure under which an attorney may be subject to fee disgorgement for professional misconduct. Although some complaints filed with disciplinary agencies may result in attorney discipline,¹²⁶ the traditional disciplinary process has been an unsatisfactory deterrent to certain types of unethical behavior.¹²⁷ Fee disgorgement would serve as an additional deterrent by extracting a financial penalty.

Although disgorgement of fees may serve as a disincentive to attorney misconduct, a unique problem occurs in cases involving collusion between attorney and client. This unethical conduct usually involves a profit motive.

Conspiratorial misconduct frequently takes place in the personal injury field in which attorney and client may file exaggerated personal injury claims, or in the immigration field in which attorney and client may arrange fraudulent marriages for the sole purpose of admitting an alien to the United States, or in the criminal law field in which an attorney may make

123. See *supra* note 25 and accompanying text.

124. See *supra* notes 32-35 and accompanying text.

125. See *supra* text accompanying notes 57-74.

126. In one well-administered New York disciplinary system, approximately 12% of all complaints resulted in admonition, resignation, or recommendation of suspension or disbarment. Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L. F. No. 2 at 214, reprinted in RESEARCH CONTRIBUTIONS OF THE AMERICAN BAR FOUNDATION No. 5 at 214 (1974). Nationwide, the percentage varies. For a recent state-by-state survey reflecting the number of complaints and sanctions handled by the lawyer disciplinary agencies, see ABA Standing Comm. on Professional Discipline and the National Center for Professional Responsibility, *Expense, Case Volume and Staffing of Lawyer Disciplinary Enforcement in State Jurisdictions During 1981* (Chart I), in 1 DISCIPLINARY LAW AND PROCEDURE RESEARCH SYSTEM (6th ed. 1983). For a numerical breakdown of the type of sanctions imposed in the various jurisdictions, see ABA Standing Comm. on Professional Discipline and the National Center for Professional Responsibility, *Public Discipline of Lawyers by Disciplinary Agencies, 1978-1982* (Chart I, Part I), in 1 DISCIPLINARY LAW AND PROCEDURE RESEARCH SYSTEM (6th ed. 1983).

127. See CLARK REPORT, *supra* note 2, at 1-9.

arrangements with a bail bondsman to have cases referred and the legal fee divided between them.¹²⁸

In such instances, the client is equally as culpable as the attorney and should not benefit from a return of fees. Rather, the disgorged fee should be contributed to a client security fund that is implemented by the state supreme court and administered by the state bar to reimburse clients who are victimized by their attorneys.¹²⁹ Similarly, when an attorney's misconduct does not constitute a breach of his fiduciary duty owed to a client, or has not adversely affected the client, the disgorged fee should not be returned to the client but should instead be contributed to a client security fund.

The current disciplinary system does not effectively discourage unethical conduct based on a profit motive. For example, an attorney may be willing to file a frivolous lawsuit at the request of a large corporation, in return for a very large fee. An unethical attorney may be willing to risk the current disciplinary sanctions, even disbarment, if he knows he may make a million dollars in fees. If, on the other hand, an attorney realizes that the Bar and the court likely will require him to forfeit an unethically earned fee, this threat may deter him from the conduct.¹³⁰

CONCLUSION

Attorneys' fees have been withheld under a variety of circumstances. Some situations have involved breach of good faith and harm to a client, while fees in other circumstances have been denied on grounds of public policy. It is within the Washington courts' discretionary power to determine whether to deny

128. *Id.* at 64.

129. For a discussion on client security funds, see Bryan, *The Client's Security Fund Ten Years Later*, 55 A.B.A. J. 757 (1969); Comment, *Attorney Misappropriation of Clients' Funds: A Study in Professional Responsibility*, 10 U. MICH. J.L. REF. 415 (1977). For a recent survey of the administration of client security funds in various jurisdictions, see ABA Standing Comm. on Clients' Security Fund, *Results of 1981 Survey of State and Local Bars and Bar Associations*, in 1 DISCIPLINARY LAW AND PROCEDURE RESEARCH SYSTEM (6th ed. 1983).

130. Another problem with misconduct involving concerted action by the attorney and client is that such misconduct is not likely to result in specific complaints to the bar. In many jurisdictions, disciplinary agencies act only when a specific complaint is submitted. Thus, unless these agencies initiate investigations without awaiting specific complaints, a great deal of systematic misconduct eludes any disciplinary action. For extensive discussion and recommendations for fundamental changes in this situation, see CLARK REPORT, *supra* note 2, at 60-66.

an attorney all or part of his fees for professional misconduct. While the issue of fee denial may arise most frequently in the types of civil litigation previously discussed, only a few courts appear to have asserted their power to order the return of attorneys' fees in a disciplinary hearing.

Fee disgorgement should be approved, implemented, and enforced as a disciplinary sanction by the Washington State Bar Association.¹³¹ The Washington Supreme Court recognized the

131. See *supra* text accompanying notes 45-56 for a discussion of due process protections found in the current disciplinary system. If fee disgorgement were adopted as a disciplinary sanction, it is possible that the court would determine that additional procedural safeguards are necessary. As discussed *supra* text accompanying note 47, due process requirements in disciplinary proceedings may differ from those in the criminal context. At least one court has indicated that a jury trial would be necessary before the court could order the return of attorneys' fees or restitution to a client. *In re Ackerman*, 263 Ind. 309, 312, 330 N.E.2d 322, 324 (1975) (quoting *In re Case*, 262 Ind. 118, 311 N.E.2d 797, 800 (1974) (Debruler, J., dissenting)). However, WASH. R.L.D. 5.3, set forth in *supra* note 8, makes no provision for a jury trial on the issue of restitution. Although the rule was approved and adopted by the Washington Supreme Court, see *supra* note 5, the court has not yet been faced with a constitutional challenge to the rules. Perhaps this is true because the restitution provision has only been effective since January 1, 1983. See *supra* note 5.

A review of existing law in Washington in the context of criminal restitution supports the conclusion that a jury trial is not constitutionally required on the issue of restitution or fee disgorgement. Upon conviction of a crime, a person who has gained money or property through the commission of the crime may be ordered to pay restitution to a victim. "If the court orders restitution, the court shall make a finding as to the amount of the defendant's gain or the victim's loss from the crime, and if the record does not contain sufficient evidence to support such findings the court may conduct a hearing upon the issue." WASH. REV. CODE § 9A.20.030 (1983). The restitution is limited, however, to double the amount of the gain of defendant or loss of the victim from the crime for which defendant was convicted. *Id.* § 9A.20.030(1); *In re Gardner*, 94 Wash. 2d 504, 507, 617 P.2d 1001, 1003 (1980). Although the issue of a jury trial was not directly addressed by the *Gardner* court, the statute was interpreted and approved by the Washington Supreme Court. *Id.* Hence, even in a criminal action in Washington, a trial by jury is not required on the issue of restitution.

Additionally, courts in Washington have uniformly rejected the claim that attorneys are entitled to trial by jury in disciplinary proceedings. See, e.g., *In re Beakley*, 6 Wash. 2d 410, 411, 107 P.2d 1097, 1098 (1940), where the court rejected an attorney's assertion that he was entitled to a jury trial on the issue of discipline, and disbarred the attorney. "The questions raised . . . have long been settled adversely to respondent's contention in all jurisdictions whose systems of judicial administration are based upon the common law of England." *Id.* See also *In re Campbell*, 74 Wash. 2d 276, 280, 444 P.2d 784, 786 (1968), cert. denied, 394 U.S. 323 (1969) (no right to jury trial on issue of whether attorney was mentally competent to practice law). These decisions are based on the theory that courts have the inherent power to control the practice of law. See *id.* Cf. *In re LiVolsi*, 85 N.J. 576, 428 A.2d 1268 (1981), where the Supreme Court of New Jersey discusses at length the courts' constitutional authority to regulate the bar. The court rejected a constitutional challenge to a rule establishing compulsory binding fee arbitration for attorneys upon request of the client. *Id.* at 587, 428 A.2d at 1273. The rule, which was also opposed by the New Jersey State Bar Association as *amicus curiae*, *id.* at

validity of fee forfeiture for attorney misconduct in *Ross v. Scannell*.¹³² It should extend that reasoning to disciplinary proceedings. The court could rely on its inherent power to regulate the law to order fee disgorgement in a disciplinary proceeding notwithstanding the absence of a current court rule providing for such a sanction. If fee disgorgement is ordered as a disciplinary sanction, the client generally should be precluded from litigating the issue of attorneys' fees in a subsequent action. However, if fee disgorgement is not ordered or if it is inadequate to cover damages, the client still should be entitled to pursue the civil remedies available to him.¹³³ A disciplinary system provid-

581, 428 A.2d at 1270, provided for neither trial by jury nor the right of appeal. *Id.* In upholding the rule, the court discussed at length the policy considerations for the arbitration scheme, including the fact that forcing clients to go to court to resolve attorney fee disputes places a heavy burden on the client. *Id.* at 598-605, 428 A.2d at 1279-83.

Based on existing case law in Washington, and upon the policy reasons well articulated by courts in other jurisdictions, it appears that trial by jury would not be constitutionally required before the court could order restitution or fee disgorgement.

132. 97 Wash. 2d 598, 647 P.2d 1004 (1982).

133. Because the client is not a party to the disciplinary proceeding and has not had the same opportunity for hearing on all the issues as in a civil action, the client should not be precluded from litigating the issue of attorneys' fees in a subsequent civil action under the collateral estoppel doctrine. Courts addressing the issue of collateral estoppel in criminal and civil cases have applied the rule that a difference in the degree of the burden of proof in the two proceedings precludes application of collateral estoppel. *Beckett v. Department of Social and Health Serv.*, 87 Wash. 2d 184, 187, 550 P.2d 529, 532 (1976) (quoting *Standlee v. Smith*, 83 Wash. 2d 405, 407, 518 P.2d 721, 722 (1974)). Hence, in *Beckett*, the appellant's prior acquittal in a criminal proceeding did not bar the respondent from assessing a fraudulent overpayment against appellant based on the same factual circumstances. 87 Wash. 2d at 190, 550 P.2d at 533. Moreover, the burden of proof in a Washington disciplinary proceeding is a "clear preponderance of the evidence," WASH. R.L.D. 4.11 (b), which appears to be a more stringent evidence standard than the "preponderance of the evidence" standard which is usually sufficient to establish liability in civil proceedings. The civil "preponderance of the evidence" standard is defined by Washington Pattern Jury Instruction 21.01 in terms of what is "more probably true than not true." 6 WASHINGTON PRACTICE 127 (West 2d ed. 1980). *See also Cook v. Cook*, 80 Wash. 2d 642, 646, 497 P.2d 584, 588 (1972) ("In ordinary civil cases, the trier of fact must be convinced that it is more probable than not that the fact in issue is true"). Although the inclusion of the adjective "clear" to the preponderance of the evidence standard found in the Washington Rules for Lawyer Discipline is not necessarily inconsistent with the traditional civil standard, its presence can be interpreted as an effort to present a heavier burden than the "preponderance of the evidence" standard. For a critical examination of the different standards utilized by the Washington Supreme Court to measure and describe the burden of proof in civil cases, see generally Wiehl, *Our Burden of Burdens*, 41 WASH. L. REV. 109 (1966). A review of the previously adopted Washington Discipline Rules for Attorneys reveals that the burden of proof necessary to establish an act of attorney misconduct was not specifically set forth in the Rules. WASH. D.R.A. tit. III (adopted 1975), reprinted in WASHINGTON COURT RULES (1982) D.R.A. tit. III (adopted 1969), reprinted in WASHINGTON COURT RULES (1974). Earlier Washington disciplinary cases discussing weight and sufficiency of evidence gen-

ing for fee disgorgement would help dispel the notion that bar associations are uninterested, ineffective, or biased in favor of attorneys.¹³⁴ If clients perceive the Bar as willing to investigate complaints and to impose sanctions such as fee disgorgement, they may be less inclined to bring legal malpractice suits. Furthermore, inclusion of fee disgorgement in a disciplinary proceeding would promote judicial economy and would compensate the client who could not afford to litigate. Fee disgorgement likely would deter profit-motivated misconduct involving a concerted action by the attorney and client.

Disgorgement of fees as a disciplinary action would properly serve the objectives and purposes of disciplinary proceedings.¹³⁵ It would penalize the offending attorney, deter others, and indicate to laymen and members of the Bar that the legal profession is enforcing proper discipline and maintaining the standards of the profession.

Lynn P. Barker

erally address whether the record supports the findings of the Bar Association. *See, e.g., In re Delaney*, 83 Wash. 2d 415, 421, 518 P.2d 713, 717 (1974); *In re Simmons*, 59 Wash. 2d 689, 704, 369 P.2d 947, 956 (1962). On review to the Washington Supreme Court, the attorney had to show that the adverse findings were not supported by the evidence in the record. *See id.* However, with the recent adoption of WASH. R.L.D. 4.1, an attorney on review will likely be required to show that the findings are not supported by a "clear preponderance of the evidence." For a discussion of the confusion raised by various standards and burdens of proof, see generally Wiehl, *supra*. It is possible that although the evidence may not be sufficient to establish guilt in a disciplinary action, it will be adequate to establish civil liability. Hence, a client should not be deprived of any civil remedies to which he may be entitled.

134. *See* J. SMITH, PREVENTING LEGAL MALPRACTICE 30 (1981).

135. *See supra* note 1 and text accompanying notes 43-44.