

June 2015

Administrative and Interim Suspensions in the Lawyer Regulatory Process - A Preliminary Inquiry

Arthur F. Greenbaum

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Greenbaum, Arthur F. (2014) "Administrative and Interim Suspensions in the Lawyer Regulatory Process - A Preliminary Inquiry," *Akron Law Review*: Vol. 47 : Iss. 1 , Article 5.

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ADMINISTRATIVE AND INTERIM SUSPENSIONS IN THE LAWYER REGULATORY PROCESS – A PRELIMINARY INQUIRY

*Arthur F. Greenbaum**

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I. INTRODUCTION

When most authors write about the professional discipline of lawyers, they focus on ultimate outcomes and the procedures that produce them. What misconduct did the lawyer commit? What sanction was imposed? What mitigating and aggravating factors influenced the ultimate sanction? Were the proceedings sufficiently fair? Were they sufficiently open?

But much of the action, from the accused lawyer’s perspective, can happen without a final determination being reached in a formal disciplinary proceeding. Lawyers often have their right to practice curtailed in very different ways. These go by many names — administrative suspension, interim suspension, temporary suspension,

* James W. Shocknessy Professor of Law, The Ohio State University Moritz College of Law. I wish to thank Marissa Black, Ryan Boda, T. Conrad Bower, and Ingrid Mattson for their research assistance and the Moritz College of Law for its financial support through its summer research grant program. Thanks also to Andrew Perlman, Bruce Campbell, Jonathan Coughlan, John Sahl, and Katharine Van Tassel for their thoughtful comments. Finally, I wish to thank those involved with the Joseph G. Miller and William C. Becker Institute for inviting me to participate in this year’s symposium. This article was prepared for and presented at that event.

summary suspension, automatic suspension, emergency suspension — but they all share a common temporary loss of the right to practice imposed with something less than a full disciplinary hearing.

States authorize the use of administrative and interim suspensions in a variety of settings. They can be imposed to:

- Secure adherence to law-licensing requirements;¹
- Induce compliance with societal obligations imposed outside the disciplinary process;²
- Shelter the public from lawyers who have been found by others to have engaged in professional misconduct or serious criminal activity;³
- Compel cooperation in the disciplinary process;⁴ and
- Protect the public when continued practice by a lawyer poses a substantial threat of serious harm.⁵

Suspending a lawyer from practice, even for a limited period of time, however, can have substantial negative consequences for the lawyer, the lawyer's clients, third-parties, and the legal system.⁶ In this article, I explore the differing rationales underlying each of these types of suspension and whether, in each instance, suspension is the appropriate tool to protect those interests, or whether less drastic remedies would suffice. Upon balancing the legitimate interests furthered by such suspensions against the substantial costs they impose, I argue for tempering those consequences in certain settings, such as pure administrative suspensions, and for employing less disruptive sanctions wherever possible.

II. ADMINISTRATIVE SUSPENSIONS

Sometimes one's right to practice is suspended for failure to follow administrative requirements imposed by the state supreme court or the bar as conditions for maintaining one's law license.⁷ In fact, the

1. *See infra* Part II.

2. *See infra* Part III.

3. *See infra* Part IV.

4. *See infra* Part V.

5. *See infra* Part VI.

6. *See infra* text accompanying notes 20-67, 71, 93-100, 107-10, 181-84.

7. Many states recognize a distinction between administrative and disciplinary suspensions. *See, e.g.,* *Sitcov v. D.C. Bar*, 885 A.2d 289, 297-98 (D.C. 2005); *In re Holmberg*, 135 P.3d 1196, 1200 n.2 (Kan. 2006) (noting hearing panel's analysis that rule providing that violation of a suspension order constitutes grounds for disbarment applies only to disciplinary suspensions not administrative suspensions); *In re Sonnenreich*, 86 P.3d 712, 718 n.5 (Utah 2004) (collecting examples). They often are administered by different bodies. *See, e.g.,* OHIO GOV. BAR R. V, VI

imposition of administrative suspensions is quite common.⁸ This section examines the consequences of these suspensions, including how they affect the lawyer, the lawyer's clients, and the system, and discusses the nullity rule, which nullifies work done by a lawyer who continues to practice while under administrative suspension. The question in this area is whether such suspensions are justified given the substantial consequences they impose. I conclude that intentional and inadvertent violations of administrative requirements should be treated differently,

and X (noting different entities are responsible for pursuing suspensions for disciplinary offenses, failure to register, and failure to comply with CLE requirements); *In re Sonnenreich*, 86 P.3d at 718–23 (noting that the Bar was authorized to enter administrative suspensions for failure to pay bar dues, but disciplinary authorities were the body to pursue discipline for practicing while under the suspension). Further, the consequences of such a suspension may be less severe. For example, in the District of Columbia, unlike disciplinary suspensions, a lawyer under administrative suspension is under no duty to notify clients and adverse parties of the suspension. *Sitcov*, 885 A.2d at 298; *cf. In re Charges of Unprofessional Conduct in Panel Case No. 23236*, 728 N.W.2d 254, 258 (Minn. 2007) (distinguishing suspension for failure to comply with CLE requirements, for which no duty to notify clients is imposed, with other suspensions which impose the duty). *But see* PA. R. DISCIPL. ENF. 217 (requiring notice to clients and others where administrative suspensions are entered); *In re Seltzer*, No. 08-O-13227 & 09-O-12258, 2012 WL 5406495, at *6 (Cal. State Bar Ct. Review Dep't June 19, 2012) (finding a violation of the duty of communication for failing to tell clients of administrative suspension for failure to pay annual bar fees). Suspended lawyers can have the suspension automatically lifted, without more, simply by meeting the relevant requirement. *See infra* note 18. Since the suspension is only administrative, the lawyer will maintain an unblemished disciplinary record in some jurisdictions. *Sitcov*, 885 A.2d at 298. In Ohio, an administrative suspension is entered along with disciplinary sanctions on the Ohio Supreme Court's website listing of lawyers. *See Attorney Discipline and Sanction History*, THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, http://www.supremecourt.ohio.gov/AttySvc/AttyReg/Public_AttorneyDiscTrans.asp (last visited May 20, 2013). Thus the distinction may be lost on prospective clients who check that site.

8. The number of such suspensions appears staggering. For example, in a 2005 decision, counsel for the District of Columbia Board of Governors indicated that "approximately 2,200 members of the Bar are placed on administrative suspension each year." *Sitcov*, 885 A.2d at 301 n.21. In Ohio, the number of those suspended for failure to comply with the Ohio Supreme Court's registration requirements varies widely across the years. In 2009 there were 233. *In re Att'y Registration Suspension*, 915 N.E.2d 1256 (Ohio 2009). In contrast, in 2011 there were only 67. *In re Att'y Registration Suspension*, 957 N.E.2d 302 (Ohio 2011). In Illinois, the number of lawyers suspended for failure to register has been more than 1,000 a year from 2009 to 2012. ILLINOIS ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION, ANNUAL REPORT OF 2012, at 10 [hereinafter ILLINOIS, ANNUAL REPORT OF 2012]. Less dramatic numbers are seen for failure to comply with CLE requirements. In Ohio, 57 such suspensions were entered in 2011 and 74 in 2012. E-mail from Bret Crow, Ohio Supreme Court Public Information Officer, to Marissa Black (May 28, 2013, 9:21 EST) (on file with author). In Illinois, the numbers were 153 and 93. ILLINOIS, ANNUAL REPORT OF 2012, at 10. In Tennessee, 145 lawyers received such suspensions in both 2011 and 2012. *See* Order of Summary Suspension for Failure to Comply with the Rule for Mandatory Continuing Legal Education (Tenn. Aug. 31, 2012), available at http://www.tba.org/sites/default/files/clesuspend_083112.pdf; Order of Summary Suspension for Failure to Comply with the Rule for Mandatory Continuing Legal Education (Tenn., Aug. 31, 2011), available at http://www.tba.org/sites/default/files/clesuspend_083111.pdf.

that the nullity rule should only apply where the client knows of the suspension and continues to rely on the suspended lawyer's services, and that alternative remedies to secure compliance with administrative requirements should be considered.

Depending on the state, failure to comply with registration requirements,⁹ to pay bar dues in a unified-bar jurisdiction,¹⁰ to meet CLE obligations,¹¹ to provide annually required trust account information,¹² or to comply with other administrative requirements¹³ can lead to automatic license suspension until the deficiency is cured.¹⁴

9. See, e.g., COLO. ST. R.C.P. 277(4)(a); OHIO GOV. BAR R. VI § (6)(B); PA. R. DISCIPL. ENF. 219(f); R.I. SUP. CT. R., art. IV, R. 1(c).

10. See, e.g., R. GOV'G D.C. BAR II § 6; TEX. STATE BAR R. art. III § 5; cf. ARIZ. R. SUP. CT. 62(a)(2) (suspension "may" be entered); WIS. SUP. CT. R. 10.03(6) (lawyer "may be suspended"); see also *In re Montgomery*, 242 P.3d 528 (Okla. 2010) (noting that lawyer was "stricken from the roll of attorneys of the Oklahoma Bar Association for nonpayment of dues and noncompliance with Mandatory Continuing Legal Education" and therefore was not authorized to practice law).

11. See, e.g., ARIZ. R. SUP. CT. 62(a)(3) & (5) (failure to complete mandatory CLE or the new Admittee Professionalism course "may" lead to suspension); TEX. STATE BAR R. Art. XII § 8(E) (failure to complete CLE requirements results in automatic suspension from the practice of law); VA. SUP. CT. R. § IV ¶ (17)(D) (failure to certify compliance with mandatory CLE "shall cause suspension"). *In re Smith*, 939 P.2d 422 (Ariz. 1997); *In re Continuing Educ. Requirements*, 927 N.E.2d 349 (Ind. 2010); *In re McGraw*, 217 P.3d 25 (Kan. 2009); *Ky. Bar Ass'n v. Cook*, 188 S.W.3d 426, 426–27 (Ky. 2006); *Ky. Bar Ass'n v. Kammerer*, 14 S.W.3d 919 (Ky. 2000); *In re Rothenberg*, 676 N.W.2d 283 (Minn. 2004); *In re Montgomery*, 242 P.3d at 528 (noting that "Petitioner was stricken from the roll of attorneys of the Oklahoma Bar Association for nonpayment of dues and noncompliance with Mandatory Continuing Legal Education"); *In re Wyllie*, 957 P.2d 1222 (Or. 1998); *In re Hankin*, 804 P.2d 30 (Wash. 1991); *Polk v. Office of Lawyer Regulation*, 732 N.W.2d 419 (Wis. 2007). See generally Jay M. Zitter, Annotation, *Discipline of Attorney for Failure to Comply with Continuing Legal Education Requirements*, 96 A.L.R.5th 23 (2002 & Cum. Supp.). Where noncompliance is accompanied by lies or misrepresentations about one's CLE compliance, more stringent disciplinary penalties may be imposed. See, e.g., VA. SUP. CT. R. § VI ¶ (17)(D) (explicitly recognizing this distinction). Zitter, *supra*, at § 4[b].

12. See, e.g., ARIZ. SUP. CT. R. 62(a)(4); WIS. SUP. CT. R. 20:1.15(i)(4).

13. See, e.g., OR. REV. STAT. § 9.200 (2012) (providing for administrative suspension for failure to pay assessments to the state's professional liability fund). Though this law was recently amended by the Oregon legislature, the basis for administrative suspension was not altered. H.B. 2565, 77th Leg. Assemb., Reg. Sess. (Or. 2013).

14. *Mandatory Continuing Legal Education*, [Manual] LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 21:3001 (June 25, 2008).

A lawyer who does not meet compulsory continuing legal education requirements and has not received some kind of extension or exemption is ineligible to practice. Like the lawyer who neglects to file a required certificate of insurance, or who fails to pay bar dues in a unified-bar jurisdiction, the lawyer is subject to automatic administrative suspension.

Depending on the circumstances, some states also treat this conduct as a separate disciplinary offense warranting additional sanction. See, e.g., *In re Horrell*, 819 N.Y.S.2d 773, 775 (N.Y. App. Div. 2006) (imposing an interim suspension for failure to register and then later imposing an additional sanction finding the failure violated the rules of professional conduct as conduct prejudicial to the administration of justice); see also *In re McDonald*, 775 A.2d 1085 (D.C. 2001)

Although admittedly a ham-handed tool, suspensions are justified in this setting as a tool of last resort.¹⁵ Typically, the lawyer has been sent numerous notices of a need to comply with the requirement.¹⁶ A lesser penalty to induce compliance, such as charging a late fee, also has been threatened.¹⁷ Further, if an administrative suspension is entered, it usually will be lifted upon compliance with the requirement that led to the suspension in the first place.¹⁸ Anecdotal evidence suggests that officials in charge of administering these requirements, or imposing sanctions for failure to comply, often scan the list of noncomplying lawyers and make personal pleas to those they know to cure their delinquencies.¹⁹

As with any suspension from practice, however, the imposition of an administrative suspension has potential consequences for the lawyer involved, the lawyer's clients, and third parties. For the lawyer, adherence to the suspension interrupts his ability to practice. If the

(treating failure to comply with CLE requirements as a disciplinary violation for knowingly disobeying the rules of a tribunal; here warranting a public reprimand when coupled with noncooperation).

15. An immediate suspension for failure to comply with administrative requirements may also have a protection of the public rationale as the failure suggests that the lawyer's practice may be out of control. *See, e.g., Zitter, supra* note 11, at 37 (noting that "inattention to CLE requirements may presage a finding of inattention to other ethical and disciplinary rules" such as neglect and failure to communicate with clients). *But see In re Kennedy*, 542 A.2d 1225, 1229 (D.C. 1988) (noting that "nonpayment of bar dues says little about . . . fitness to practice").

16. *See, e.g., In re Seltzer*, No. 08-O-13227 & 09-O-12258, 2012 WL 5406495, *1 (noting that Ms. Seltzer had been sent notice her membership fees were due, an e-mail reminder, a delinquency notice, and a notice of suspension that could be cured, before binding suspension was entered).

17. *See, e.g., R. GOV'G D.C. BAR II § 6* (providing for notification of a late charge for failure to pay bar membership fees, with suspension available only if charges and fees due are not timely paid).

18. *Sitcov v. D.C. Bar*, 885 A.2d 289, 298 (D.C. 2005); *In re Steinbach*, 427 So. 2d 733, 734 (Fla. 1983) (under rules then in force, reinstatement was automatic even where, as here, the lawyer had not paid bar dues in Florida for years and there was a legitimate concern that he had not kept up with changes in Florida law); *see also COLO. R. CIV. P. 260.6(13)* (providing for reinstatement from suspension for failure to meet mandatory CLE requirements upon showing of compliance and payment of costs). *But see State ex rel. Robeson v. Or. State Bar*, 632 P.2d 1255, 1259-60 (Or. 1981) (noting respondent's contention that in many jurisdictions reinstatement from administrative suspensions is possible simply by coming into compliance with the obligation violated, but finding that a provision requiring more, as was the case with the Oregon provision in question, was not improper); *Pennsylvania v. Grant*, 992 A.2d 152, 160 (Pa. Super. Ct. 2010) (noting that while a suspension for failure to pay bar dues may be lifted upon payment, suspension for failure to complete required CLE requires a "formal order of our Supreme Court after a showing that [the attorney] had 'the moral qualifications, competency and learning in the law required for admission to practice in the Commonwealth'").

19. Confidential Posting, Association of Professional Responsibility Lawyers Listserv (Oct. 21, 2005) (on file with author).

suspension is treated as “a prior disciplinary offense,” it will be considered as an aggravating factor should subsequent disciplinary proceedings arise²⁰ or at least eliminate “absence of disciplinary record” as a mitigating factor.²¹

Yet, continuing to practice while under an administrative suspension is the unauthorized practice of law,²² which can have civil,²³

20. See Am. Bar Ass’n, STANDARDS FOR IMPOSING LAWYER DISCIPLINE 9.22(a) (1992). Exactly which administrative suspensions fall in that category is unclear. For example, in Ohio, failure to maintain one’s registration with the state supreme court is a disciplinary offense. See, e.g., Mahoning Cnty. Bar Ass’n v. Kish, 961 N.E. 2d 172, 177 (Ohio 2012) (treating registration suspension as a prior disciplinary offense, an aggravating factor, even though that suspension was “brief[.]”); Cleveland Metro. Bar Ass’n v. Brown, 956 N.E.2d 296, 300 n.1 (Ohio 2011) (treating prior registration suspension as an aggravating factor). Nevertheless, “[a] registration suspension may not weigh heavily against a respondent when the prior discipline consists only of a registration suspension.” Disciplinary Counsel v. Anthony, ___ N.E. 2d ___, ¶ 11 (Ohio 2014). In contrast, failure to meet compulsory CLE requirements is not. See, e.g., OHIO GOV. BAR R. X § 5(c); Trumbull Cnty. Bar Ass’n v. Ohlin, 977 N.E.2d 640, 641 n.1 (Ohio 2012) (finding that a CLE suspension “shall not be considered in the imposition of a sanction for attorney misconduct”); Disciplinary Counsel v. Murraine, 958 N.E.2d 942, 943 n.2 (Ohio 2011) (noting that the Governing Bar Rule “prohibits consideration of an attorney’s failure to comply with CLE requirements in the imposition of a [disciplinary] sanction”). Nevertheless, the Ohio Supreme Court sometimes considers the latter as well. See, e.g., Disciplinary Counsel v. Alexander, 977 N.E.2d 633, 635 (Ohio 2012) (treating as one aggravating factor both failure to pay registration fee on a timely basis and failure to pay a fine for not completing CLE requirements).

21. STANDARDS FOR IMPOSING LAWYER DISCIPLINE, *supra* note 20, at 9.32(a).

22. *In re Seltzer*, No. 08-O-13227 & 09-O-12258, 2012 WL 5406495 (Cal. State Bar Ct. Review Dep’t June 19, 2012); *In re Holmberg*, 135 P.3d 1196 (Kan. 2006); *In re Hanson*, No. 57545, 2012 WL 436740 (Nev. Feb. 9, 2012); *Disciplinary Counsel v. Meehan*, 975 N.E.2d 972, 976 (Ohio 2012); *State ex rel. Okla. Bar Ass’n v. O’Neal*, 852 P.2d 713 (Okla. 1993); *Hill v. State*, 393 S.W.2d 901, 904 (Tex. Crim. App. 1965); *In re Sonnenreich*, 86 P.3d 712, 720–23 (Utah 2004). *But cf.* *State v. Lentz*, 844 So. 2d 837, 842 (La. 2003) (deciding that continued practice while under suspension for failure to meet CLE requirements is the unauthorized practice of law but noting that “[t]he unauthorized practice of law during a period of suspension imposed by this court is a far more serious infraction than similar conduct during a period of ineligibility imposed as a result of the failure to comply with mandatory CLE,” here in the context of whether such practice constitutes the ineffective assistance of counsel).

The courts are split over whether actual notice of the suspension is required before continued practice will be seen as the unauthorized practice of law. Compare *State ex rel. Okla. Bar Ass’n v. Whitworth*, 183 P.3d 984, 992 (Okla. 2008) (dismissing charge that lawyer committed the unauthorized practice of law by practicing while under suspension because it was plausible that lawyer lacked notice of his suspension), and *In re Sonnenreich*, 86 P.3d at 726 n.13 (“[W]hen seeking disciplinary sanctions against an attorney for practicing law while administratively suspended, it is the Bar’s burden to establish that the respondent attorney received actual notice of the suspension and continued to practice law with knowledge of that suspension.”), with *Seltzer*, 2012 WL 5406495, at *4-5 (concluding that the lawyer engaged in the unauthorized practice of law for practicing while under suspension for failure to pay bar dues even though lawyer was unaware of failure to pay), and *Meehan*, 975 N.E.2d at 976 (imposing a two year stayed suspension for continuing to practice while under administrative suspension for failure to renew his registration even though he immediately ceased practice upon learning of his suspension). *Cf.* *Jones v. Jones*, 635 S.E.2d 694, 696 (Va. Ct. App. 2006) (treating as a nullity filing of an appeal where it was filed

criminal²⁴ and disciplinary consequences.²⁵ Arguably, clients could contest fees “earned” for services while under administrative suspension as against public policy.²⁶ It might also lead to a contempt of court finding for violating the terms of the suspension.²⁷

A case that well illustrates the collateral impact an administrative suspension may have is *In re Seltzer*.²⁸ In this case, Ms. Seltzer alleged she failed to receive four notices sent to her by the California State Bar concerning the non-payment of her annual bar membership fees.²⁹

by a lawyer under administrative suspension even though the lawyer was unaware of the suspension).

23. Much of the enforcement of unauthorized practice of law provisions is through civil injunction or civil fine. See AM. BAR ASS'N, STANDING COMMITTEE ON CLIENT PROTECTION, 2012 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES, chart II (Apr. 2012), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_upl_report_charts.authcheckdam.pdf (noting that thirty-two jurisdictions provide for civil injunctions, twenty-two provide for civil contempt and thirteen provide for civil fines) [hereinafter 2012 UPL SURVEY]. Some states allow civil actions for those harmed by lawyers violating unauthorized practice of law standards. See, e.g., *Fogarty v. Parker, Poe, Adams, & Bernstein, L.L.P.*, 961 So. 2d 784 (Ala. 2006). See generally Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 733–34 (2007) (identifying five states and the District of Columbia as recognizing some form of private action for harm caused by unauthorized practice of law).

24. *Satterwhite v. State*, 979 S.W.2d 626 (Tex. Crim. App. 1998) (en banc with four judges dissenting) (upholding criminal conviction for the unauthorized practice of law of lawyer who intentionally practiced while under suspension for failure to pay bar dues, even though the lawyer subsequently paid those dues and was retroactively reinstated).

25. For example, in Texas, “[a]ny practice of law during such suspension shall constitute professional misconduct and subject the member to discipline.” TEX. STATE BAR R. Art. III § 5. This point is reiterated under the Texas disciplinary rules, which state that a lawyer shall not “engage in the practice of law when the lawyer’s right to practice has been suspended or terminated including situations where a lawyer’s right to practice has been administratively suspended for failure to timely pay required fees.” TEX. DISCIPL. R. PROF. COND. 8.04(a)(11). Continued practice while under administrative suspension implicates not only the unauthorized practice prohibition in the disciplinary rules, but also provisions requiring a lawyer to withdraw from representation when the representation will result in violation of the disciplinary rules, prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer’s fitness to practice law. See, e.g., *Disciplinary Counsel v. Meyer*, 980 N.E.2d 1029, 1031 (Ohio 2012); *In re Holmberg*, 135 P.3d 1196 (Kan. 2006).

26. See, e.g., *Seltzer*, 2012 WL 5406495, at *6; cf. *Birbower, Montalbano, Condon & Frank, PC v. Super. Ct.*, 949 P.2d 1 (Cal. 1998).

27. *In re Wolfe*, 961 N.E.2d 994 (Ind. 2011) (finding that practicing while under interim suspension for failure to pay bar dues and for a guilty finding in a criminal matter is contempt of court). See generally 2012 UPL SURVEY, *supra* note 23, at chart II (reporting that 22 jurisdictions provide for civil contempt as a remedy for the unauthorized practice of law).

28. *Seltzer*, 2012 WL 5406495.

29. She claimed that the letters came to her secretary who routed them to the firm bookkeeper, who failed to pay them, rather than to Ms. Seltzer. *Id.* at *5.

Given her lack of response, Ms. Seltzer was suspended from practice. Two weeks later she became aware of her suspension, immediately paid her fees, and her license was reactivated. During the two weeks in which she was suspended, but did not know it, she continued to practice law, and even after she learned of her suspension, billed clients for work she performed while under the administrative suspension.

One might think that this mix-up would not lead to further discipline.³⁰ After all, Ms. Seltzer had practiced for twenty-eight years without discipline.³¹ By her account, she did not receive the notices that she had dues to pay,³² and she cured the problem the minute it came to her attention. There was no question about the quality of her work performed during her brief suspension. But that thought would be wrong.

In continuing to practice while under administrative suspension, she was found to have engaged in the unauthorized practice of law.³³ By billing for the work she did while under suspension, she was found to have charged an illegal fee.³⁴ By failing to tell her clients about her suspension once she learned of it, which would have alerted them that they did not have to pay the fee, she was found to have violated the duty of communication.³⁵ Add to that failure to cooperate in the investigation,³⁶ and failure to release a file to a client in a timely matter,³⁷ and you get “a two-year probationary period, conditioned on a

30. The decision to prosecute may have been influenced by other factors such as skepticism about whether Ms. Seltzer really failed to receive four notices that her bar fees were due, her similar claim that she failed to receive notices about the grievance filed against her, and her failure to acknowledge the wrongfulness of her acts. At the sanctioning stage, the court found the latter factor to be of “substantial weight.” *Id.* at *9.

31. *Id.* at *1. While this did not forestall prosecution, it was considered as a mitigating factor. *Id.* at *8.

32. Ms. Seltzer argued that given her lack of knowledge of the suspension she lacked the requisite intent to violate the disciplinary rules; *i.e.*, her conduct did not constitute a “willful” violation of the rules. Seltzer, 2012 WL 5406495, at *4. The court found that willfulness speaks to the act itself, here holding herself out as a lawyer and practicing law while under suspension, not to an intent to engage in conduct she knew to be wrong. *Id.* See generally Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. OF LEGAL ETHICS 1 (2010). Other courts have excused continued practice where the lawyer did not know of the suspension. See *discussion supra* note 22.

33. Seltzer, 2012 WL 5406495, at *4. While finding that Ms. Seltzer engaged in the unauthorized practice of law, the actual charge raised required that such action also constitute an act of moral turpitude. Finding that Ms. Seltzer’s conduct did not rise to this level, since her unauthorized practice was inadvertent, this charge was dismissed. *Id.* at *5.

34. *Id.* at *7.

35. *Id.* at *6.

36. *Id.*

37. *Id.* at *7.

60-day actual suspension and a duty to repay the fee that she improperly charged her client, plus interest.”³⁸

While severe, these consequences may be tempered. In some jurisdictions, the administrative suspension may not support reciprocal discipline, so a lawyer may continue to practice in another state if licensed there.³⁹ Further, reinstatement may be automatic once the deficiency is cleared,⁴⁰ so the lawyer who acts promptly may avoid many of these consequences. In some jurisdictions, once the impediment is removed the reinstatement is retroactive to the time of its imposition.⁴¹ In addition, officials retain prosecutorial discretion in deciding whether to pursue disciplinary actions against those practicing while under administrative suspension. Missing a technical licensing requirement by a few days while continuing practice may well be overlooked, whereas long-continuing failures, coupled with continued practice, may not.⁴²

Of even more concern than the impact of suspension on lawyers, however, is the impact an administrative suspension could have on

38. *Id.*

39. *Sitcov v. D.C. Bar*, 885 A.2d 289, 299 n.16 (D.C. 2005) (citing an earlier case that dismissed a reciprocal discipline proceeding because “an administrative suspension imposed by the court of another jurisdiction, based on the member’s failure to participate in Continuing Legal Education, did not warrant reciprocal discipline here”). *But see In re Gross*, 77 A.D.3d 10 (N.Y. App. Div. 2010) (imposing reciprocal discipline based on interim suspension entered in Ohio for noncompliance with registration and CLE requirements); *cf. In re Arthur*, 732 S.E.2d 86 (Ga. 2012) (imposing reciprocal discipline where lawyer was sanctioned in another state for engaging in practice while under an administrative suspension); *Disciplinary Counsel v. Gee*, 971 N.E.2d 952 (Ohio 2012) (same).

40. *See supra* text accompanying note 18.

41. *See, e.g., MO. SUP. CT. R. 6.01(f)* (providing for “retroactive” reinstatement upon payment of delinquent registration fee); *Tex. ST. B.R., art. 3, § 7* (providing that upon curing a delinquency in paying bar dues “the suspension shall automatically be lifted and the member restored to former status . . . retroactive to inception of suspension, but [that] shall not affect any proceeding for discipline of the member for professional misconduct”). Even with retroactive reinstatement, however, a lawyer will still be liable for unauthorized practice of law for continued practice while the suspension was in effect. *See, e.g., MO. SUP. CT. R. 6.05; Satterwhite v. State*, 979 S.W.2d 626, 629 (Tex. Crim. App. 1998); *Comm’n for Lawyer Discipline v. Sherman*, 945 S.W.2d 227 (Tex. App. 1997). Other states do not make reinstatement from administrative suspensions retroactive in the usual case. *See, e.g., In re Hartwig*, 515 N.W.2d 265, 266-68 (Wis. 1994) (allowing for retroactive reinstatement for failure to report CLE compliance only upon showing of “sufficiently compelling circumstances” usually involving the fault of another involved in CLE administration); *Sitcov*, 885 A.2d, at 301-02 (finding reinstatement after curing failure to pay bar dues retroactive only if the suspension resulted from error or omission by the Bar).

42. Interview with Jonathan E. Coughlan, Disciplinary Counsel, Supreme Court of Ohio, in Columbus, Ohio (Mar. 11, 2013). *See, e.g., People v. Carpenter*, 922 P.2d 939 (Colo. 1996) (imposing three-year suspension where lawyer handled more than 150 cases over a five-year period while under administrative suspension for failure to meet mandatory CLE requirements).

clients. If the lawyer honors the suspension and ceases work on client matters, the client is left in the lurch, scrambling to find other representation. If the lawyer continues representing the client, the work done on the client's behalf may be considered a nullity.

In many jurisdictions, actions taken on behalf of clients by individuals who are not authorized to practice law there are considered invalid under the so-called "nullity rule."⁴³ For example, the filing of a complaint by one unauthorized to practice is treated as though the complaint was never filed, which might result in the running of the statute of limitations before the problem is cured. Lawyers who have been suspended from practice for any reason are not, during that period, authorized to practice law. Even if the suspension arises from failure to meet one's CLE requirements, or failure to pay required registration fees to the court or the bar, actions taken on a client's behalf during that period fall prey to this rule.⁴⁴ This may be true even where the lawyer has no actual notice of the suspension.⁴⁵

This seems a harsh result.⁴⁶ The client is punished for the sins of its lawyer whom the client thought was authorized to practice, but was not.⁴⁷

43. States vary as to whether they recognize the nullity rule, and if they do, what exceptions, if any, they allow. *See, e.g.*, *Downtown Disposal Serv., Inc. v. City of Chicago*, 979 N.E.2d 50, 54–55 (Ill. 2012) (collecting cases); *see generally* Vitauts M. Gulbis, Annotation, *Right of Party Litigant to Defend or Counterclaim on Ground that Opposing Party or His Attorney Is Engaged in Unauthorized Practice of Law*, 7 A.L.R. 4th 1146 (1981 & Cum. Supp.). I do not address here whether or not the nullity rule should exist in some form in some circumstances. Rather, I simply recognize that the rule exists in some jurisdictions and address whether it makes sense for actions taken by a lawyer under administrative suspensions.

44. *See, e.g.*, *Nerri v. Adu-Gyamfi*, 613 S.E.2d 429 (Va. 2005) (complaint held a nullity where filed by a lawyer on administrative suspension for non-compliance with CLE requirements, failure to pay membership dues, and failure to file an insurance certification). The dissent was "compelled to acknowledge that the majority's holding . . . is consistent with the view held by the majority of other jurisdictions." *Id.* at 431 (Koontz, J., dissenting). For a contrary opinion, see *Owens v. Bank of Brewton*, 302 So. 2d 114 (Ala. Civ. App. 1974) (holding that the nullity rule should not be invoked to void an appeal filed by a lawyer who had been admitted to the bar but had ceased to practice and failed to secure a required lawyer's occupational license at the time the appeal was filed).

45. *See, e.g.*, *Jones v. Jones*, 635 S.E.2d 694, 696 (Va. Ct. App. 2006) (appeal of action treated as a nullity where it was filed by a lawyer under administrative suspension, even though the lawyer was unaware of the suspension).

46. *Cf.* Geri L. Dreiling, *Bright-Line Blunder*, A.B.A.J. E-REPORT, Dec. 8, 2006, at 2 (quoting Hasting's law professor, Rory Little, describing the application of the nullity rule in a situation in which the suspension is administrative and unknown to the lawyer or the client as "just outrageous").

47. In rejecting the application of the nullity rule in an instance where out-of-state counsel filed a complaint for a client in Florida but was not authorized under state law to do so, the Florida Supreme Court instead allowed the pleading to be amended to be signed by a lawyer licensed in the

Depending on the jurisdiction, however, exceptions may be recognized to the nullity rule. The question becomes whether suspensions for administrative failures should fall within these exceptions. Opinions from Illinois, which has a particularly rich and evolving case law on the nullity rule, provide a template upon which to explore this issue.

For example, in *Ford Motor Credit Co. v. Sperry*,⁴⁸ a circuit court granted a motion to vacate an attorney fee award on the grounds that the underlying activity which justified the award was conducted by attorneys who were not authorized to practice since they had failed to register their corporate form with this Illinois Supreme Court, as required.⁴⁹ The lower court reasoned that, because of this, the activity was a nullity so no award could flow from it.⁵⁰ The Illinois Supreme Court reversed, noting that the nullity rule applies when representation is undertaken by those not licensed to practice law. Here, the lawyers were licensed; they simply had failed to register their corporate form. While that would have consequences if the lawyers attempted to claim their corporate form for some purpose, such as to limit liability, it did not undercut their work undertaken for clients. The nullity rule, as the court explained, protects clients, other parties, and the courts from the dangers of representation by those unlicensed to do so, but the mere act of failure to register a corporate form does not raise those concerns.⁵¹

The implications of *Sperry* are unclear. At its broadest, it suggests that mere administrative failures are insufficient to trigger the nullity rule. Failure to pay registration fees or to fulfill CLE requirements may be seen to fall here. In this regard, it should be noted that the court supported its argument, in part, on a case finding no Sixth Amendment right to counsel violation where the lawyer representing the defendant had failed to pay his annual registration dues with the court.⁵²

state. It did so because of the concern that “the nullity rule places the burden on the unwary litigant, not the offending attorney” and that is “too harsh a penalty.” *Torrey v. Leesburg Reg’l Med. Ctr.*, 769 So. 2d 1040, 1045 (Fla. 2000). *But see Dreiling, supra* note 46, at 1 (quoting Washburn law professor, Shelia Reynolds, to the effect that while one might naturally feel sympathy for the client, agency principles bind the client to the acts of its agent).

48. *Ford Motor Credit Co. v. Sperry*, 827 N.E.2d 422 (Ill. 2005).

49. Illinois requires those practicing in various corporate forms, such as an LLP or LLC, to obtain a certificate of registration from the Illinois Supreme Court. *See* ILL. SUP. CT. R. 721(c).

50. *Sperry*, 827 N.E.2d at 423.

51. *Id.* at 430–33. An oft-quoted description of the purpose the nullity rule is “to protect litigants against the mistakes of the ignorant and the schemes of the unscrupulous and to protect the court itself in the administration of its proceedings from those lacking requisite skills.” *Janiczek v. Dover Mgmt. Co.*, 481 N.E.2d 25, 26 (Ill. App. Ct. 1985).

52. *Sperry*, 827 N.E.2d at 432. For further discussion of the impact practicing while under

Read more narrowly, *Sperry* simply says that defects unrelated to active licensure (here failure to register the firm's corporate form) do not trigger the rule. Suspensions for any reason, in contrast, compromise licensure itself, and the rule should be in play absent other limitations upon it.

A similar result was reached in *Applebaum v. Rush University Medical Center*,⁵³ in which the Illinois Supreme Court refused to apply the nullity rule where representation was undertaken by an attorney who was on voluntary inactive status. The court stressed that the attorney remained licensed to practice law. That he was not "entitled" to do so because he had chosen to be on inactive status did not change this fact. In reaching this conclusion, the court stressed the difference between representation by those not licensed to practice law in the jurisdiction and those who, although licensed, were otherwise ineligible to do so.⁵⁴

The *Applebaum* court also emphasized that the nullity rule should only be invoked when its concerns, protection of clients and the court from the harms that might arise from unlicensed representation, are implicated.⁵⁵ Representation by unlicensed individuals raises those concerns, whereas representation by a licensed attorney on inactive status does not. In passing, the court recognized that because of the harsh result the nullity rule imposes on clients, "it should be invoked only where it fulfills its purposes of protecting both the public and the integrity of the court system from the action of the unlicensed, and where no alternative remedy is possible."⁵⁶

As in *Sperry*, the implications of the *Applebaum* decision for administrative suspensions are mixed. The *Applebaum* court characterized practicing while on voluntary inactive status as violation of a "technical or administrative rule."⁵⁷ Like *Sperry*, the court relied on a case finding no Sixth Amendment right to counsel violation where the lawyer representing the defendant had failed to pay his annual registration dues with the court.⁵⁸ Failure to pay registration fees or to complete the required CLE hours would seem to fall here.

The court set forth a multi-part test, limiting application of the nullity rule to instances "where it fulfills its purposes of protecting both

administrative suspension has on the sixth amendment rights of defendants *see infra* text accompanying note 67.

53. *Applebaum v. Rush Univ. Med. Ctr.*, 899 N.E.2d 262 (Ill. 2008).

54. *Id.* at 270.

55. *Id.* at 272.

56. *Id.* at 266.

57. *Id.* at 270.

58. *Id.*

the public and the integrity of the court system from the action of the unlicensed, and where no alternative remedy is possible.”⁵⁹ This test also argues against the imposition of the nullity rule for administrative suspensions. It suggests that there are three factors to consider, all of which must be implicated – (1) the need for protection of the public, (2) the need for protection of the integrity of the court system, and (3) a lack of an alternative remedy. Does failure to pay registration fees or to fulfill CLE requirements harm both the public and the court? Arguably, failure to pay a registration fee harms the court system, but not the public if the latter is defined as those being represented.⁶⁰ Failure to fulfill CLE requirements may harm both, as under-educated lawyers threaten clients and courts alike. But in either case, there are alternative remedies – fines, discipline, and other remedies recognized for the unauthorized practice of law.⁶¹

On the other hand, the *Applebaum* case arose out of a single representation by the lawyer of the estate of his father to which the lawyer was the sole beneficiary. The court minimized the misconduct on these facts finding that although there was a failure to “comply with the technical provisions of the rule [forbidding practice by those on inactive status], it [was] less certain whether he violated its spirit”⁶² Perhaps the court would have proceeded differently if the lawyer had engaged in multiple representations of truly distinct clients.

In its most recent decision on this topic, the Illinois Supreme Court, over a strenuous dissent, seemed to change its focus. In *Downtown Disposal Services, Inc. v. City of Chicago*, a corporation’s president filed a complaint for administrative review when, in fact, the complaint had to be filed by an attorney.⁶³ The court concluded that the nullity rule need not be invoked on the facts before it and articulated a new test to determine whether it should be applied. Under this test the court is to consider:

59. *Applebaum v. Rush Univ. Med. Ctr.*, 899 N.E.2d at 266.

60. To the extent registration fees are used to pay for the disciplinary process, client security funds, or access to justice programs, the public is harmed, but that does not appear to be the thrust of the court’s test.

61. *See, e.g., Torrey v. Leesburg Reg’l Med. Ctr.*, 769 So. 2d 1040, 1045 (Fla. 2000) (rejecting the nullity rule and noting the availability of unauthorized practice of law remedies and disciplinary actions where a complaint was filed by a lawyer neither licensed in the state nor admitted pro hac vice); *cf. In re Seltzer*, No. 08-O-13227 & 09-O-12258, 2012 WL 5406495 (Cal. State Bar Ct. Review Dep’t June 19, 2012) (imposing discipline for continued practice while under an administrative suspension).

62. *Applebaum*, 899 N.E.2d at 273.

63. *Downtown Disposal Services, Inc. v. City of Chicago*, 979 N.E.2d 50 (Ill. 2012).

whether the nonattorney's conduct is done without knowledge that the action was improper, whether the corporation acted diligently in correcting the mistake by obtaining counsel, whether the nonattorney's participation is minimal, and whether the participation results in prejudice to the opposing party. The circuit court may properly dismiss an action where the nonlawyer's participation on behalf of the corporation is substantial, or the corporation does not take prompt action to correct the defect.⁶⁴

If this is the test, how should we treat representation by a lawyer under suspension when that fact is unknown to the client?⁶⁵ Assuming the lawyer's status is unknown to the client, the issue then would seem to turn on whether the suspended lawyer knew of the suspension, the degree of the suspended lawyer's participation while under suspension, and whether true prejudice to the opposing party can be shown. Even then, the court merely listed the factors to be considered rather than the outcome if some, but not all, are implicated.

As for my recommendation, I think the rule drafters should spell out clearly the implications of practicing while under an administrative suspension. I believe the nullity rule should apply where the client knows the lawyer is suspended but hires the lawyer anyway, unless the lawyer misleads the client about his authority to act while under suspension. Here, the client lacks clean hands and is not punished unfairly by the rule. If the lawyer knows of the suspension, but the client does not, penalties should be enforced against the lawyer, not the client.⁶⁶

Concern also arises about the impact of administrative suspensions

64. *Id.* at 57.

65. One interesting appellate level case in Illinois seems to treat reasonable reliance that the representative is a licensed attorney as sufficient to avoid imposition of the nullity rule. *Janiczek v. Dover Mgmt. Co.*, 481 N.E.2d 25, 26–27 (Ill. App. Ct. 1985). There the court refused to apply the nullity rule in an instance where the lawyer was in active practice when originally hired, but was disbarred before he filed the complaint on the client's behalf, and the client lacked knowledge of the disbarment.

66. This seems analogous to the way we treat the attorney-client privilege where the communication involves a suspended lawyer. As a general matter, the attorney-client privilege applies to communication between a lawyer and a client involving legal services. An individual who, although admitted to the bar, is not on active status or is under a suspension, should not be treated as a lawyer for this purpose. *See, e.g.*, 24 CHARLES ALAN WRIGHT, ET AL., *FEDERAL PRACTICE & PROCEDURE, EVIDENCE* § 5480 (1st ed. 1986). *But see* *Gucci America, Inc. v. Guess?*, Inc., No. 09 Civ. 4373(SAS), 2011 WL 9375, at *4 (S.D.N.Y. Jan. 3, 2011). In most jurisdictions, however, an exception lies where the client reasonably believes that its confidant is a lawyer with the authority to practice. *See, e.g.*, EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 6.9.2 (2010); *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* §72(1) reporter's note to cmt (e) (2000).

on the system. Substituting counsel for those suspended will lead to delay in pending actions. In criminal proceedings, practice undertaken by lawyers while suspended may lead clients to challenge their convictions on ineffective-assistance-of-counsel grounds.⁶⁷ While often unsuccessful, they still occupy the court's time.

What then is the solution? Is there a better way to assure bar dues are paid, or CLE credits earned, without requiring the cessation of practice and the attendant costs that imposes on clients, other parties, and other lawyers, as well as the offending lawyer? Fines⁶⁸ coupled with a requirement to cure the administrative delinquency or face contempt charges, disciplinary actions,⁶⁹ even criminal penalties might

67. While jurisdictions vary, the vast majority of cases hold that representation by a lawyer on administrative suspension is not the ineffective assistance of counsel. *See, e.g.*, *People v. Ngo*, 924 P.2d 97, 102 (Cal. 1996) (holding "that representation of a criminal defendant by an attorney who has been involuntarily enrolled on inactive status for MCLE noncompliance does not, in itself, amount to [ineffective assistance of counsel]"); *People v. Brigham*, 600 N.E.2d 1178, 1181 (Ill. 1992) (noting that "[a]lthough the present issue is one of first impression for this court, other jurisdictions have dealt with it on numerous occasions, almost unanimously concluding that an attorney whose license has been suspended for failure to pay his dues still may be 'counsel' for sixth amendment purposes"); *Henson v. State*, 915 S.W.2d 186, 194–195 (Tex. App. 1996) (same). *But see* *People v. Brewer*, 279 N.W.2d 307, 309 (Mich. Ct. App. 1979) (noting "that the failure of an attorney to remit his state bar dues is strong evidence that such attorney is no longer sufficiently interested in the practice of law to adequately defend his client's interests. For this reason, we remand the instant matter for an evidentiary hearing in order that the following may be established: first, whether defendant's allegations with respect to his attorney's suspension from practice are accurate; second, whether the defendant received inadequate assistance of counsel"); *Pennsylvania v. Grant*, 992 A.2d 152, 160–61 (Pa. Super. Ct. 2010) (finding that failure to fulfill CLE requirements over extended period of time reflects a lack of competence implicating ineffective assistance of counsel).

68. *See, e.g.*, *Ky. Bar Ass'n, CLE Comm'n v. Clendenin*, 941 S.W.2d 477, 478 (Ky. 1997) (imposing a fine rather than suspension for "habitual violation of the CLE rules [because] [w]hile imposition of such punishment would not be too severe, the effect would be to punish others such as clients and courts who are not to blame for respondent's violations"). This is not to suggest that such a remedy is foolproof. Mr. Clendenin was subject to a later suit for similar misconduct in intervening years, and again was fined rather than suspended, on the same rationale. *Ky. Bar Ass'n, CLE Comm'n v. Clendenin*, 11 S.W.3d 24 (Ky. 2000). *But cf.* *Ky. Bar Ass'n v. Burnside*, 50 S.W.3d 147, 148 (Ky. 2001) (imposing fine for failure to complete CLE with the caveat that "[f]ailure to either pay the fine or complete the CLE requirements in the future will result in suspension"). *See generally* Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 78 (1998) (noting that "fines may . . . provide more effective discipline in cases where enforcers may prefer expressive sanctions because incapacitating sanctions are viewed as too harsh, but where expressive sanctions alone may prove too mild and ineffective from a deterrence perspective"). By this logic, a fine coupled with public reporting of the default might be preferable to interim suspension.

69. *See, e.g.*, *Ky. Bar Ass'n v. Keese*, 892 S.W.2d 578 (Ky. 1995) (imposing a public reprimand for failing to comply with CLE requirements and ignoring notices of CLE deficiencies lawyer admitted receiving); *cf. In re McDonald*, 775 A.2d 1085 (D.C. 2001) (applying reciprocal discipline to a Delaware judgment imposing public reprimand for CLE noncompliance and failure to respond to disciplinary authority inquires).

be better devices to forestall the collateral consequences of administrative suspension.

Ultimately, an assessment must be made about the effectiveness of these alternatives. Is the threat of suspension a necessary inducement to secure compliance with administrative requirements, or would other approaches work as well?⁷⁰ Cost implications also must be considered both in terms of the direct cost of pursuing each remedy and indirect costs the remedies impose.⁷¹

Whether the penalty invoked is an administrative suspension or some other device, its imposition should be influenced by the culpability of the lawyer.⁷² I would treat flagrant disregard of a known obligation and inadvertent failure to follow it differently. In the former situation, I agree that some sort of sanction is warranted. In the latter, however, I would suggest a different approach. Where it is clear that the lawyer has not received notice, additional and different types of notice should be tried.⁷³ Where it is unclear, as was the case in *Seltzer*,⁷⁴ I would still

70. See generally Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 *FORDHAM L. REV.* 775 (2011) (arguing, in the context of Foreign Corrupt Practices Act enforcement, that the threat of a suspension or debarment remedy would achieve greater compliance than the threat of fine).

71. For example, to the extent the administrative misconduct involves failure to pay a fee which, in turn, is used to support other endeavors, like a client security fund, and if the threat of suspension spurs greater compliance, then substituting other remedies may have unintended financial consequences. Alternatively, if a fine approach is used and it secures payment of not only the fee but of the fine as well, the revenues collected might, in fact, increase. *But cf.* Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 *YALE L. & POL'Y REV.* 453, 456 (2011) (noting that “[a]dministrative agencies never collect the vast brunt of [the fines they impose]”).

72. A difficult issue arises if the failure to receive notice stems from the lawyer's failure to inform authorities when the lawyer's address has changed, the most common cause for lack of notice, which in turn results in a lack of compliance. See, e.g., John F. Harkness, *The Aftermath of Dues*, *FLA. B.J.*, Dec. 1988, at 5. Since the lawyer has a duty to keep a current address on file with the authorities, the lawyer is ultimately responsible for the lack of notice and any administrative defaults that result. See, e.g., Joyce E. Peters, *Dues and Don'ts*, *WASH. LAW.*, July/Aug. 2002, at 16. Further, repeated failures to timely comply with administrative requirements may provide constructive notice as to when the obligations fall. See, e.g., *People v. Harris*, 915 N.E.2d 103, 110 (Ill. App. Ct. 2009) (finding chronic late payment of Michigan attorney registration fees “supports a conclusion that he knew he would be suspended from the Michigan bar for his non-payment” and hence when the time for payment passed he knew he was practicing under suspension despite his insistence that he had not received notice of his suspension). Nevertheless, if many of these cases, at their core, are really about lawyers failing to keep up current addresses, one wonders how severe a sanction that mistake should justify. *Cf. In re Owusu*, 886 A.2d 536, 540-41 (D.C. 2005) (recognizing that absent some showing that failure to keep a current address is a deliberate act to thwart a disciplinary proceeding, that act, and the failure to cooperate in a disciplinary proceeding of which he received no notice because disciplinary authorities lacked a current address, is not a disciplinary violation but only a violation of an administrative Bar rule).

73. See, e.g., *In re Sonnenreich*, 86 P.3d 712, 720-23 (Utah 2004) (refusing to allow

impose a penalty, but it would be rescinded retroactively upon a successful showing that notice of the required administrative action had not been received.

Prosecutorial discretion also plays a role. Where the failure is inadvertent, short lived, and quickly remedied once the lawyer learned of the dues or CLE delinquency, disciplinary counsel should seldom pursue ethics violations for limited practice undertaken while under administrative suspension. While the lawyer may still suffer other consequences for this unauthorized practice of law, such as possible fee forfeiture,⁷⁵ if the time is short, few fees will be compromised and many clients will still pay for the service, even if they have the right to challenge those fees.

There also may be some need to assess whether all administrative suspensions should be treated equally. For example, in the District of Columbia, failure to file a registration statement with the bar results in a mandatory summary suspension, whereas failure to pay dues does not.⁷⁶ Suspension is allowed in the latter case, but not required. In Ohio, a suspension for failure to follow the state's attorney registration requirements is a disciplinary offense, whereas a suspension for failure to meet compulsory CLE requirements is not.⁷⁷ In contrast, at least one court has held that representing a criminal defendant while failing to pay a registration fee should not be treated as ineffective assistance of counsel, whereas such representation while under suspension for failure to earn CLE credits, at least over an extended period, might be.⁷⁸

If a state decides to vary the consequences for different forms of administrative suspension, it may be difficult to rank the violations. Presumably failure to register should be treated most seriously as it interferes with the state's attempt to contact lawyers should questions about their conduct be raised. This goes to the heart of the disciplinary system. Filings pertaining to trust account activities might fall in this category as well since the information is necessary to help track possible trust account violations which can harm clients. In contrast, while failure to comply with CLE requirements may harm the public if, by this

discipline for practicing under suspension where the lawyer did not receive actual notice of the suspension and requiring mail service signed for by the attorney or personal service upon her). *See generally In re Kennedy*, 542 A.2d 1225, 1229 (D.C. 1988) (providing that "reasonable claims to a lack of knowledge of the suspension for failure to pay bar dues should be taken into account").

74. *See supra* text accompanying note 29.

75. *See supra* note 26.

76. *Compare* R. GOV'G D.C. BAR II § 2(3) (registration), *with id.* § 6 (dues payment).

77. *See supra* note 20.

78. *Commonwealth v. Grant*, 992 A.2d 152, 159–61 (Pa. Super. Ct. 2010).

failure, the lawyer fails to keep up with developments in the law, the harm to the disciplinary system is less direct.

III. OUTSIDE CONDUCT SUSPENSIONS

Another set of suspensions flow from failure to comply with other requirements not directly related to law licensure. For example, in a number of states, failure to pay taxes,⁷⁹ student loan debt,⁸⁰ or to be found in default in making court-ordered child-support payments⁸¹ can

79. IOWA CT. R. 35.22 (authorizing license suspension where an attorney owes at least \$1,000 in debt being collected by the Central Collections Unit (CCU) of the Iowa Department of Revenue for delinquent court fines, unpaid taxes, or debt owed to the Department of Natural Resources); *see, e.g.*, Iowa Sup. Ct. Att’y Disciplinary Bd. v. Hearity, 812 N.W.2d 614, 617 (Iowa 2012) (noting earlier suspension under this provision). In Iowa, such suspensions are treated as prior discipline, an aggravating factor in subsequent disciplinary actions. *See* Iowa Sup. Ct. Att’y Disciplinary Bd. v. McCuskey, 814 N.W.2d 250, 258 (Iowa 2012). In 2012, forty-two lawyers were referred for suspension under this provision, and nine failed to resolve their defaults and were suspended). E-mail from Wayne Cooper, Executive Officer, Iowa Department of Revenue, to Arthur F. Greenbaum, Professor of Law, Moritz College of Law (April 2, 2013 14:04 CST) (on file with author).

In some states the automatic suspension flows from failure to pay an occupational tax applicable to attorneys. *See, e.g.*, TENN. SUP. CT. R. 9 § 32 (requiring suspension of lawyers who fail to pay occupational tax for two or more consecutive years); TEX. TAX CODE ANN. § 191.1441(a) (West 2008) (suspension required for failure to pay occupational tax or related penalty within 90 days after its due date). Unlike the Iowa provision, these are directly related to law practice and are therefore more closely akin to administrative suspensions, but still differ as they are intended as a revenue source for the state itself rather than part of the lawyer regulatory process. *See* TEX. TAX CODE ANN. § 191.145 (West 2008); E-mail from Garrett Guillory, Assistant Attorney Gen., Tenn. Dep’t of Rev., to Ingrid Mattson, Reference Librarian, Moritz College of Law (June 14, 2013, 09:33 EST) (on file with author).

80. IOWA CT. R. 35.21 (authorizing automatic suspension of license to practice law in Iowa for attorney who “defaults on an obligation owed to or collected by the College Student Aid Commission”); HAW. REV. STAT. § 605-1 (2008) (authorizing suspension for default or breach of any obligation under any student loan, repayment contract, or scholarship without further review or hearing); N.J. CT. R. 1:20-11B (authorizing temporary suspension where student loan entity certifies that a lawyer is in default on payment of a student loan guaranteed by a state or the federal government); OKLA. STAT. tit. 70, § 623.1 (2008 & Supp. 2013) (authorizing, but not requiring, suspension for student loan default); Tex. Sup. Ct. Order, Misc. Docket No. 96-9155 (June 18, 1996), available at <http://www.supreme.courts.state.tx.us/miscdoCKET/96/96-9155.pdf>; *see generally* Terri Harris, *Student Loan Default Could Result in License Revocation*, TENN. B.J., Aug. 2010, at 14. The degree to which suspensions are entered for student loan defaults appears to vary widely. For example, in Iowa, only one suspension has ever been entered under the rule. E-mail from Paul H. Wieck II, Director, Iowa Office of Professional Regulation to Marissa Black (June 11, 2013, 14:32 EST) (on file with author). In contrast, in Texas, there are presently 309 attorneys whose licenses are suspended due to student loan defaults. Telephone Interview by Marissa Black with Sandy Garvin, Office Administrator of the State Bar of Texas Membership Department (June 28, 2013). To the extent the failure to repay student loans is done in bad faith, this may constitute a standard disciplinary violation subject to full hearing and the range of disciplinary sanctions. *See, e.g.*, ILL. R. PROF’L COND. 8.4(i).

81. *See, e.g.*, COLO. R. CIV. P. 251.8.5; OHIO GOV. BAR R. V § 5(A)(1)(b); MD. R. ON CTS.,

trigger a suspension until payment is received or a payment plan is entered into.⁸² Provisions concerning license suspension for failure to pay child support are, in fact, a requirement of federal law.⁸³ Similar concerns are sometimes treated under the general protections authorizing interim suspensions to prevent a threat of public harm.⁸⁴ This section considers the efficacy of using the threat of suspension to secure compliance with financial obligations unrelated to the practice of law. I conclude that suspensions for default under such provisions should be authorized only where a strong correlation between the default and a threat of harm to the public or fitness to practice concerns can be shown. In assessing whether to impose such suspensions, the circumstances surrounding the default should be considered.

The justification for suspensions in this area is twofold. The first

JUDGES, & ATTYS. 16-778(d); MINN. R. LAWYERS PROF. RESP. 30(a); N.J. CT. R. 5:7-5(e)(4); N.Y. JUD. LAW § 90 (2-a.a). The failure to make such payments, in the face of a court order to do so, may also give rise to a full disciplinary action as conduct prejudicial to the administration of justice and conduct that reflects adversely on the lawyer's fitness to practice. *See, e.g.*, *Disciplinary Counsel v. Redfield*, 878 N.E.2d 10, 12-13 (Ohio 2007) (finding these violations where the lawyer was in substantial arrears in his child support over a multi-year period). Depending on the circumstances, credit for the time served on the interim suspension may be given toward a permanent suspension order. *Id.* at 14-15 (contrasting cases where credit has and has not been given).

82. *See, e.g.*, OHIO GOV. BAR R. V § 5(D)(1)(c) (predicating reinstatement from a suspension for failure to pay child support on receipt of "[a] notice from a court or child support enforcement agency that the . . . attorney is no longer in default under a child support order or is subject to a withholding or deduction notice or a new or modified child support order to collect current support or any arrearage due under the child support order that was in default and is complying with that notice or order"); Tex. Sup. Ct. Order, Misc. Docket No. 96-9155 (June 18, 1996), *available at* <http://www.supreme.courts.state.tx.us/miscdocket/96/96-9155.pdf> (providing for reinstatement from a suspension for student loan default upon the lawyer entering into a repayment agreement). Sometimes applicable penalties, interest and fees will also need to be satisfied. *See, e.g.*, TENN. SUP. CT. R. 9 § 32.7 (conditioning reinstatement for suspension for occupational tax delinquency on both curing the delinquency and satisfying these collateral obligations as well); TEX. TAX CODE ANN. § 191.1441(b) (West 2008).

83. 42 U.S.C. § 666(a)(16) (2011) (codifying the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193)).

In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of . . . [p]rocedures under which the State has (and uses in appropriate cases) authority to withhold or suspend, or to restrict the use of driver's licenses, professional and occupational licenses, and recreational and sporting licenses of individuals owing overdue support or failing, after receiving appropriate notice, to comply with subpoenas or warrants relating to paternity or child support proceedings.

Id.

84. *See, e.g.*, N.Y. CT. R. 603.4(e)(iv) (allowing interim suspension on a harm to the public rationale based on "the attorney's willful failure or refusal to pay money owed to a client, which debt is demonstrated by an admission, a judgment, or other clear and convincing evidence"). For an application of this rule see *In re Stewart*, 934 N.Y.S.2d 133, 134 (N.Y. App. Div. 2011) (entering an interim suspension for failure to pay a \$50,345.21 judgment).

reflects a public policy that these are obligations with which we want all citizens to comply.⁸⁵ The law-licensure system is simply a vehicle to achieve these goals when the violator happens to be a lawyer.⁸⁶ Second, is a fear that certain kinds of acts raise such serious fitness to practice concerns that immediate license suspension is appropriate.⁸⁷ Exactly what conduct is sufficiently reprehensible or predictive of broader misbehavior in carrying out one's practice, however, is an open question.

For example, suspensions for failure to pay student loans have been justified on the ground that such conduct calls into question "the integrity of lawyers who either selfishly refuse to pay back their student loans or have so mismanaged their finances that they are unable to pay them back" and who may accordingly mismanage or convert client funds.⁸⁸ The data, however, suggest otherwise.

85. In fact, license revocation is imposed for failure to pay child support or student loan obligations across occupational categories. See, e.g., WESTLAW, *50 State Survey – Revocation of Professional Licenses for Failure to Pay Support*, 0080 SURVEYS 6 (2012) (listing state statutes mandating the revocation of a wide range of professional and occupational licenses for failure to pay child support); Student Loan Borrower Assistance, *License Revocations*, <http://www.studentloanborrowerassistance.org/collections/government-collection-tools/license-revocations> (last visited June 4, 2013) (noting that a number of states impose license revocation for student loan defaults covering a variety of professions and vocations that require licensing). In this article I only explore the propriety of such suspensions in the lawyer regulatory context, although similar concerns may apply in other settings as well. Alternatively, if one embraces the general proposition that license suspension is an appropriate collections tool, there may be no reason to treat lawyers differently than those in other occupations.

86. See, e.g., Margaret Graham Tebo, *When Dad Won't Pay*, 86 A.B.A. J. 54, 56–57 (2000) (quoting Teresa Kaiser, executive director of Maryland's child support enforcement agency, stating "Maryland, like many other states using license revocation as an enforcement tool, doesn't limit suspensions to driver's licenses. Anyone who needs a Maryland license or certificate to pursue an occupation—for example, a doctor, lawyer, architect or teacher—is subject to losing it for failure to pay child support 'The aim is not to suspend anybody's license to practice their livelihood The aim is to collect money that is legally due to support their own children.'").

87. Cf. George L. Blum, Annotation, *Failure to Pay Creditors as Affecting Moral Character for Purposes of Admission to the Bar*, 108 A.L.R.5th 289, 289 (2003) (noting that, at the bar admission stage, failure to pay creditors in a variety of contexts is seen both as a disregard for the law and a possible inability to properly handle client funds in the future).

88. Harris, *supra* note 80, at 16; cf. *In re Steffen*, 261 P.3d 1254, 1255–56 (Or. 2011) (noting, as part of the character and fitness inquiry, that "because lawyers frequently hold client funds in trust, an applicant's problems handling money (either the applicant's own or funds belonging to others) raises concern about the applicant's ability to handle client funds with 'scrupulous probity'"). Even large debt loads that are being handled short of default may promote unethical conduct. Based on anecdotal evidence, an Illinois state bar commission noted that "debt may place additional pressure on lawyers to commit ethical violations" relating to competence, diligence, fees, conflict of interest, safekeeping of client property, withdrawal, expediting litigation, professional independence, and advertising. ILL. STATE BAR ASS'N, SPECIAL COMM. ON THE IMPACT OF LAW SCHOOL DEBT ON THE DELIVERY OF LEGAL SERVICES, FINAL REPORT AND RECOMMENDATIONS 30 (March 8, 2013) [hereinafter *IMPACT OF LAW SCHOOL DEBT*]. Further, failure to enroll in income-

A recent Illinois report on the impact of law school debt on lawyer conduct identified nine ethical rules that *might* be compromised by lawyers with high student debt loads, but conceded that the state disciplinary authority “has not noticed a significant number of debt-related complaints against attorneys in the last several years, nor has it noticed a disproportionate number of complaints against young attorneys (those with the heaviest debt loads).”⁸⁹ Another recent study explored the predictive effects of factors considered at the character and fitness stage on the chance of later discipline in practice and found that “the probability of subsequent discipline for someone with a student loan default is . . . only 5%.”⁹⁰ The authors conclude that given this, student loan default is a “very poor predictor[] of subsequent misconduct” and thus probably should not be “sufficient to justify some kind of corrective or preventive action.”⁹¹ Whether this conclusion applies to law school loan defaults while in practice is not clear,⁹² but it certainly suggests caution before concluding that such defaults pose a real threat to clients or the public that must be curbed.

The impact of imposing suspensions for student loan defaults also should be considered. Looking at law school debt alone, the ABA Section of Legal Education and Admissions reports that for 2010-2011, the latest year for which information is available, the average law school loan debt for graduates who took out at least one law school loan was \$75,728 for public law schools, and \$124,950 for private law schools.⁹³ Nearly 90 percent of all law students took out loans.⁹⁴ When

based repayment plans might itself suggest competence issues. *See generally infra* note 99.

89. IMPACT OF LAW SCHOOL DEBT, *supra* note 88, at 30.

90. Leslie Levin, et al. *A Study of the Relationship Between Bar Admissions Data and Subsequent Lawyer Discipline*. ___ LAW & SOC. INQUIRY ___ (2014).

91. *Id.*

92. Arguably defaults while in practice may pose a greater risk than earlier occurring defaults. First, the default has occurred when the individual is older, thus minimizing the argument that the default resulted from immaturity and might be overlooked. Second, pre-admission defaults pose no direct threat to clients. Assuring that the applicant has a reasonable plan to handle the problem in the future, before admission is allowed, may give regulators sufficient confidence that future clients will not be harmed. In contrast, defaults by those already in practice, who thus have access to clients, may create a temptation to take on representations that should be declined, charge excessive fees, or steal client funds to help make ends meet. On the other hand, one might expect such improper behavior to stave off defaults, and the Illinois study cited above did not find that to date.

93. *Average Amount Borrowed for Law School 2001-2010*, A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE Bar, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/avg_amnt_brwd.authcheckdam.pdf.

94. *Almanac of Higher Education: Trends in Student-Loan Debt for Graduate and Professional Students*, THE CHRONICLE OF HIGHER EDUC. (Aug. 24, 2009),

undergraduate debt and other law-school related costs are included, “debt burdens of upwards of \$150,000 or even \$200,000 [are] common.”⁹⁵

While debt loads are on the rise, the job prospects for lawyers remain weak. The National Association of Law Placement reported that the employment rate for the Class of 2011 was the lowest since 1994 and reflected “a job market that continued to have underlying structural weakness.”⁹⁶ The data for the Class of 2012 show slight improvement on some measures, but those reported as “unemployed/seeking” rose to more than 10% of the graduates.⁹⁷ Even those with jobs often have salaries far too low to make their requisite loan payments.⁹⁸

In a world of diminished job prospects and rising debt, student loan defaults are likely to rise.⁹⁹ The threat of suspension, in this context,

<http://chronicle.com/article/Trends-in-Student-Loan-Debt/48056/>.

95. IMPACT OF LAW SCHOOL DEBT, *supra* note 88, at 13.

96. *Class of 2011 Has Lowest Employment Rate Since Class of 1994*, NALP BULLETIN (July 2012), <http://www.nalp.org/0712research>.

97. *ABA Releases Class of 2012 Law Graduate Employment Data*, ABA DIVISION FOR COMM. & MEDIA REL. (Mar. 29, 2013), <http://www.abanow.org/2013/03/aba-releases-class-of-2012-law-graduate-employment-data/>.

98. *See, e.g.*, IMPACT OF LAW SCHOOL DEBT, *supra* note 88, at 14 (noting that the median starting salary of the law school Class of 2011 was \$60,000, which given their average debt, constituted “an unsustainable level of debt” which for an “increasing number of young attorneys is staggering”).

99. *See* Issac Bowers, *Explore the Role of Underemployment in the Student Debt Crisis*, U.S. NEWS & WORLD REPORT (Mar. 13, 2013) <http://www.usnews.com/education/blogs/student-loan-ranger/2013/03/13/explore-the-role-of-underemployment-in-the-student-debt-crisis> (noting that the “inevitable result” of the rise in law school graduate indebtedness “has been a spike in . . . defaults”); *cf.* Jonathan Noble Edell, *The Phyrriic Victory of American Higher Education: Bubbles, Lemons, and Revolutions*, 88 NOTRE DAME L. REV. 1543, 1560 (2013) (predicting increased default rate on federal student loans when the gap between salary earned and debt owed rises). The extent to which this will occur, however, remains in doubt.

Unraveling the degree to which there will be a default crisis is a difficult task. First, student loans may come from both public, typically the federal government, and private lenders. *Financial Aid: An Overview*, LAW SCHOOL ADMISSION COUNCIL, <http://www.lsac.org/jd/financing-law-school/financial-aid-overview> (last visited June 5, 2013). For federal loans, a variety of vehicles are available to accommodate an individual who cannot meet the loan payment, including pay as you earn programs, income-based repayment, and hardship accommodations, among others. *See Repay Your Loans*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/repay-loans> (last visited June 5, 2013). Further, federal borrowers are assigned to federal loan servicers, who arguably could help student-loan debtors enter into affordable payment schemes, or forbearance if that is not possible, to avoid defaults. *See Understanding Repayment: Loan Servicers*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/repay-loans/understand/servicers> (last visited June 5, 2013). These sorts of protections, if available at all, typically are not as robust with private loans. *Federal Versus Private Loans*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/types/loans/federal-vs-private> (last visited June 5, 2013). The license suspension provisions for failure to meet student loan obligations vary in terms of their coverage. *See* IOWA CT. R. 35.21 (authorizing automatic suspension of license to practice law in Iowa for attorney who “defaults on an obligation owed to or collected by

seems an undue burden absent greater proof of a tie between default and fitness to practice.¹⁰⁰

the College Student Aid Commission” which guarantees federal loans); HAW. REV. STATS. §§ 436 C-1, 605-1 (2008) (authorizing suspensions for defaults on or breaches of Hawaii or United States-based student loans); N.J. CT. R. 1-20-11B (authorizing temporary suspensions for nonpayment or default of a state or federal direct or guaranteed educational loan); OKLA. STAT. tit. 70, § 623.1 (2005 & Supp. 2013) (authorizing attorney suspension after notification of default on federal loans guaranteed by State Regents); Tex. Sup. Ct. Order, Misc. Docket No. 96-9155 (June 18, 1996) (authorizing attorney suspension after notice of default on federal loans guaranteed by Texas Guaranteed Student Loan Corporation).

To the extent the license revocation provisions focus on federal loans, which afford an array of options to match monthly payments to ability to pay, one might assume that the chance of default, absent neglect or willful avoidance, would be small. Peter Coy, *The Needless Tragedy of Student Loan Defaults* (Nov. 28, 2012), BLOOMBERG BUSINESSWEEK: MARKETS & FINANCE, <http://www.businessweek.com/articles/2012-11-28/the-needless-tragedy-of-student-loan-defaults> (last visited June 11, 2013). Nevertheless, learning about and accessing these loan modification programs is not an easy task. Rachel M. Zahorsky, *Loan Moans*, A.B.A. J., March 2013, at 32 (describing hurdles lawyers face in securing federal student loan modifications). In fact, loan servicers who might facilitate this task often fail to do so. As one prominent expert on student loan debt wrote to me, “federal loan servicing is NOT part of the reason federal default should be uncommon, but indeed is part of the reason that federal default is higher than it ought to be.” E-mail from Heather Jarvis to Arthur Greenbaum, Professor of Law, Moritz College of Law (June 17, 2013) (on file with author); see also Ann Carns, *Keeping a Closer Eye on Student Loan Servicing Firms*, N.Y. TIMES (Mar. 14, 2013), <http://bucks.blogs.nytimes.com/2013/03/14/keeping-a-closer-eye-on-student-loan-servicing-firms/> (last visited June 11, 2013, 12:06 EST) (noting that loan servicers sometimes fail to keep in timely communication with the debtor, or give inaccurate advice which leads to default). To the extent there are identification or administrative errors resulting in defaults, statutes vary over whether they can be considered by the state supreme court or its delegee before suspension is entered. Compare HAW. REV. STAT. § 605-1 (2008) (upon certification of student loan default, suspension “shall be entered without further review or hearing”), with IOWA CT. R 35.21(d) (limiting the scope of review of a lawyer student loan default suspension “to determining if there has been a mistake of fact relating to the attorney’s delinquency”). These choices may well be a consequence of the rigor of the procedures required before the default is referred.

100. Cf. Dennis P. Harwick, “Don’t Shoot the Messenger” *The Story of the Student Loan Default/License Suspension Rule*, WASH. ST. B. NEWS, 15 (March 1997) (noting the vehement objections to such a rule by the Washington Bar Association and lawyers around the state because the rule was unnecessary, given that substantial remedies were already available for defaults, “illogical,” and improper in the face of a difficult job market). For these and other reasons, local bar associations, practice-specific bars, affinity-group bars, and individuals were unanimous in their opposition to a proposed lawyer-suspension rule for student loan defaults in Tennessee. Christopher D. Markel, et al., Comments on the Proposed Amendment to Tennessee Supreme Court Rule 9 Section 34 (Proposed May 18, 2009), Admin. Office of the Courts (Dec. 7, 2009-Aug. 2, 2010), <http://www.tncourts.gov/rules/proposed/comments-proposed-amendments-sc-rule-9> (unanimously opposing adoption of the proposed rule).

A similar critique could be made about child support and tax defaults as well. The correlation to fitness to practice remains strained. However, failure to meet child support obligations may constitute violation of a court order and we may see that as more egregious conduct than mere failure to live up to a financial obligation. Failure to pay income tax may show a serious disregard for the law, but that depends on the nature of the underlying conduct. If it is criminal in nature, and conviction or a guilty plea results, an interim suspension is likely to be granted on a

This is not to say that failures to pay taxes, defaults on student loans, or violations of child-support orders always are irrelevant, but perhaps they should lead to temporary suspension only when a clear threat to the public from continued practice can be shown.¹⁰¹ Even if not, at least the surrounding circumstances should be considered before a suspension is entered.¹⁰² For example, one might want to know the circumstances which led to the default and the attorney's plans to cure it.¹⁰³

prior finding of misconduct grounds. *See generally infra* Part IV.

101. *See generally infra* Part VI.

102. States vary in terms of whether lawyers are given a chance to explain and avoid suspension in this area. For example, states vary in terms of whether being in arrears in child-support payments requires a suspension or whether other factors can be considered that might undercut the propriety of suspension. Several states provide that being in arrears on child-support payments requires suspension without mentioning that consideration of other factors would be appropriate. OHIO GOV. BAR R. V § 5(A)(1)(b) (authorizing suspension upon a "final and enforceable determination" of default under a child support order); MINN. R. LAWYERS PROF. RESP. R. 30(a) (authorizing suspension upon "receipt of a district court order or a report from an Administrative Law Judge or public authority" that lawyer "is in arrears in payment of maintenance or child support and has not entered into or is not in compliance with an approved payment agreement for such support"); N.Y. JUD. LAW § 90 (2-a.b) (providing that "[t]he only issue to be determined as a result of the hearing [for failure to pay child-support] is whether the arrears have been paid. No evidence with respect to the appropriateness of the court order or ability of the respondent party in arrears to comply with such order shall be received or considered by the disciplinary committee"). In contrast, while Colorado allows for an administrative suspension for failure to pay child support, its imposition is not automatic. COLO. R. CIV. P. 251.8.5. Suspension may be avoided by showing that:

- (1) there is a mistake in the identity of the attorney;
- (2) there is a bona fide disagreement currently before a court or an agency concerning the amount of the child support debt, arrearage balance, retroactive support due, or the amount of the past-due child support when combined with maintenance;
- (3) all child support payments were made when due;
- (4) the attorney has complied with the subpoena or warrant;
- (5) the attorney was not served with the subpoena or warrant; or
- (6) there was a technical defect with the subpoena or warrant."

Id.; accord MD. R. ON CTS., JUDGES, & ATTYS. 16-778(d) ("A referral from the Child Support Enforcement Administration to the Attorney Grievance Commission is presumptive evidence that the attorney falls within the criteria specified in Code, Family Law Article, § 10-119.3 (e)(1), but the introduction of such evidence does not preclude Bar Counsel or the attorney from introducing additional evidence or otherwise showing cause why no suspension should be imposed."). The different approaches chosen may be a function of the comparative richness of the procedures preceding the suspension request.

103. For example, at the admissions stage, jurisdictions explore financial issues as part of the character and fitness inquiry, but they take a holistic approach to the question. *See, e.g., In re Pillette*, 829 So. 2d 1011 (La. 2012) (conditionally admitting applicant to practice law upon sufficient explanation of the details surrounding financial delinquencies and future good faith efforts to satisfy the obligations during one year probationary period).

Similarly, an isolated failure to pay taxes, in the right circumstances, will not lead to a denial of admission. *See, e.g., In re Scallon*, 956 P.2d 982, 986-87 (Or. 1998). In deciding to allow a Wisconsin lawyer's admission to the Oregon bar, despite an isolated failure to pay taxes, the court

Admittedly, the referring entity may have explored these circumstances when attempting to reach an accommodation before referral,¹⁰⁴ but they do so for a different purpose than to assess the fitness of the lawyer to continue to practice law while the debt remains.¹⁰⁵ It is ultimately for the state supreme courts or their delegates

extensively explained its reasoning:

Applicant always has filed income tax returns and acknowledged the taxes that he owed. For the most part, he has paid them. He himself has acknowledged that, when he failed to pay his taxes, his failures were his own doing and responsibility. Applicant has made at least small inroads on his tax obligations during even financially limiting circumstances and has held out the hope that he could satisfy all the obligations in full when he received his share of the attorney fee for the case in which he had been involved in Wisconsin. As we have noted, supplemental information shows that he has fulfilled that hope.

We think that the following statement — also by the opposing half [of the state Board of Bar Examiners] — better sums up this case and the factors that we find most pertinent:

“This is a close case and a difficult decision. Several practitioners and judges have attested to Applicant’s good moral character, and have lauded Applicant’s skill and integrity in the practice of law. There is no evidence that Applicant has committed fraud, deceit, or any crimes of moral turpitude. There is no evidence that Applicant has ever cheated a client nor that Applicant’s handling of his financial affairs has ever left a client shortchanged.”

We agree with that description of the record. We understand it to mean that the opposing half accepts as a general proposition that applicant is a person of good moral character, subject only to a lingering doubt as to whether he was wholly committed to satisfying his tax obligation. As noted, applicant’s actions now have laid that issue to rest. The opposing half’s surviving concern consists of doubts that applicant has demonstrated his fitness to practice law.

For our part, we are satisfied on that score, as well. Applicant appears always to have had his clients’ best interests in mind, so much so that he stopped practicing law at a time when he no longer felt fit to represent those clients adequately. No issues have been raised concerning his competence. That demonstrates to us that applicant has had, and continues to have, the fitness to appreciate and to engage in the practice of law.

It also appears to us that applicant understands and appreciates the reasons that led to his past financial difficulties, is determined to avoid their repetition, and is capable of carrying out that determination. In that regard, applicant is willing to accept the recommendation of the favoring half that he be admitted conditionally.

In re Scallon, 956 P.2d at 986-87.

104. *See, e.g.*, HAW. REV. STAT. § 605-1 (2008) (incorporating by reference section 436C-3 which predicates suspension for student loan default on prior district court finding of default and ability to pay without hardship); OKLA. STAT. tit. 70, § 623.1(B) (2005 & Supp. 2013) (allowing State Regents to consider “hardship circumstances” before referring student loan default to licensing authority for possible license suspension).

105. Process concerns also may arise. The nature of the hearing provided, the qualifications of the fact finder, and the standard of proof required may make the decisions some entities reach subject to question. *See, e.g.*, Letter from Russell W. Savory to Michael W. Catalano, Clerk of the Tennessee Supreme Court (Feb. 22, 2010), <http://www.tncourts.gov/rules/proposed/comments-proposed-amendments-sc-rule-9> (bankruptcy and debtor-creditor attorney commenting on a proposed lawyer student loan default suspension rule in Tennessee on the need for appropriate

to reach this decision.¹⁰⁶

Requiring the state courts to determine in each case whether a default should lead to suspension, rather than simply ordering suspension upon notification of default, admittedly has resource implications, but they may be overstated. To the extent a jurisdiction determines that default on certain obligations most often requires suspension, I would make the issuance of suspension presumptive upon notice of the default being given by the appropriate entity to the court, or its designated agent. The burden would then fall on the lawyer to show cause why the suspension should not go into effect. Those without a colorable excuse often would not contest the suspension's entrance.

Finally, the costs of these suspensions need to be considered. As noted previously, any suspension has costs for the lawyer involved, his clients, his family, other lawyers and their clients, and the system.¹⁰⁷ A suspension for failure to pay a financial obligation has additional costs beyond the suspension itself. If failure to pay is a function of present inability to do so, suspension, which may take away one's sole livelihood, is likely to exacerbate the non-payment problem, not improve it, as it only makes satisfying the obligation more difficult.¹⁰⁸ Further, while the threat of suspension upon default may promote compliance with this obligation, it may force lawyers to forgo other obligations in prioritizing their debt. To the extent the threat of suspension is for default on a student loan, which typically is not dischargeable in bankruptcy, lawyers may be forced into bankruptcy to get relief from their other debts so that they can pay their student loans and keep their licenses.¹⁰⁹ Finally, such a provision is likely to have a disproportionate

administrative procedures before referral and meaningful opportunity to appear before the state supreme court before entrance of a suspension); Rickey E. Wilkins, on behalf of the Memphis Bar Association, to Mike Catalano, Appellate Court Clerk, at 2 (March 1, 2010), <http://www.tncourts.gov/rules/proposed/comments-proposed-amendments-sc-rule-9> (complaining about the lack of procedural protections in proposed lawyer student loan default suspension rule in Tennessee).

106. See, e.g., Rickey E. Wilkins, on behalf of the Memphis Bar Association, to Mike Catalano, Appellate Court Clerk, at 2 (March 1, 2010), <http://www.tncourts.gov/rules/proposed/comments-proposed-amendments-sc-rule-9> (raising this concern in opposition to a proposed student loan default suspension rule in Tennessee).

107. See *supra* text accompanying note 6.

108. John Jurco, Comment, *Ohio's Government Bar Rule V: Innovation or Derogation?*, 30 OHIO N.U. L. REV. 119, 136 (2004); cf. *Disciplinary Counsel v. Redfield*, 878 N.E.2d 10, 14 (Ohio 2007) (noting the difficulty loss of a law license had on respondent's ability to pay child support arrearage and have the suspension lifted). That said, I do not want to overstate this point. The deterrent effect the threat of suspension has on defaults might outweigh the costs imposed in individual cases where the default becomes more difficult to cure.

109. See, e.g., Wilkins, *supra* note 105 (raising this concern in opposition to a proposed

impact on law students from low-income families, often minorities, who often leave school with larger debt¹¹⁰ and those with debt in private practice who serve low-income clients.¹¹¹ These are unintended consequences that should be avoided.

Absent a clear correlation between these defaults and potential harm to clients, using suspension in this way seems suspect. Unless carefully cabined, the lawyer-disciplinary process may be hijacked by such requirements to meet concerns insufficiently related to fitness to practice and protection of the public from unethical lawyer conduct, the proper focus of the disciplinary process.¹¹² But even if one concludes that such conduct raises a red flag about a lawyer's fitness to practice, the lawyer should at least be given the opportunity to rebut those concerns before suspension is entered.

IV. SUSPENSIONS PREMISED ON A PRIOR FINDING OF MISCONDUCT¹¹³

Yet another set of interim suspensions is authorized for lawyer misconduct discovered in another setting. Both discipline in another jurisdiction¹¹⁴ and conviction of or a finding of guilt for a serious criminal offense¹¹⁵ may trigger disciplinary actions.¹¹⁶ In either case,

lawyer student loan default suspension rule in Tennessee).

110. See, e.g., CREOLA JOHNSON, IS A LAW DEGREE STILL WORTH THE PRICE?: IT DEPENDS ON WHAT THE LAW SCHOOL HAS TO OFFER YOU 254-57 (2013); IMPACT OF LAW SCHOOL DEBT, *supra* note 88, at 25-26 (noting that "blacks and Hispanics are significantly more likely to leave law school with debt than whites, and their debt loads tend to be larger").

111. See, e.g., Letter from Brent Heilig, an attorney, to Michael W. Catalano, Appellate Court Clerk (Feb. 26, 2010), <http://www.tncourts.gov/rules/proposed/comments-proposed-amendments-sc-rule-9> (noting, in a comment filed in opposition to a proposed student loan default suspension rule in Tennessee, that lawyers representing poor clients may have difficulty getting paid which might lead to an increased chance of student loan default).

112. Cf. Harris, *supra* note 80, at 16 (worrying that providing for license suspensions for student loan defaults may just be "bowing to public pressure" and providing "a powerful collection tool" for student loan agencies which is not the focus of the lawyer disciplinary process).

113. The preceding section also involved prior findings of misconduct, there default on specified financial obligations. I nevertheless have chosen to treat these sections differently. The former is driven in large part by a collections rationale without a clear link to fitness to practice. The suspensions treated here, for disciplinary sanctions imposed by another jurisdiction, or for a conviction of or guilty plea to a serious crime, are more clearly associated with fitness concerns. The proceedings underlying the prior finding of misconduct also may create more confidence in the prior determination reached than with financial default suspensions.

114. See *infra* text accompanying notes 117-33.

115. See *infra* text accompanying notes 134-43.

116. For a discussion of the duty to report these matters to disciplinary counsel, as well as some suggestions on how to draft appropriate language to implement them, see Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap*, 73 OHIO ST. L.J. 437, 486-99 (2012). Portions of this section are adapted from that

interim suspensions are sometimes used while the court determines what final disciplinary sanction to impose. My focus, here, is on the role, if any, interim suspensions should play in this process. I conclude that interim suspensions for reciprocal discipline often are not necessary since the reciprocal discipline process is itself quite streamlined, making an interim protective act (interim suspension) largely superfluous. As to interim suspensions for criminal misconduct, I conclude that the use of interim suspensions seems well justified in the usual case and flexibility remains to forgo interim suspensions when they are not.

The first situation is captured in the concept of reciprocal discipline.¹¹⁷ Under this concept, the discipline of a lawyer in one jurisdiction will be looked to by other jurisdictions in which the lawyer is licensed or otherwise permitted to practice.¹¹⁸ The second jurisdiction automatically imposes the same sanction as the first, unless the lawyer can show cause why that should not be the case. For example, suppose Lawyer A is licensed to practice in Ohio and Michigan. If Michigan found A to have violated his ethical responsibilities in a situation that warranted disbarment, Ohio would, in the usual case, follow suit.¹¹⁹ Only in that way could the true impact of the initial punishment be felt — the lawyer would not be able to practice. Carrying over the sanction from another jurisdiction, in the usual case, protects potential clients from “a lawyer who has been judicially determined to be unfit.”¹²⁰ It also avoids the unseemly situation of a lawyer found unfit in one jurisdiction being deemed good enough in another, which may undermine the public’s confidence in the profession and the administration of justice.¹²¹ Most states allow exceptions under certain

article.

117. The ABA promoted the idea of reciprocal discipline more than forty years ago. *See* SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS’N, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 116–21 (June 1970) [hereinafter CLARK REPORT], available at http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark_Report.authcheckdam.pdf. It called again for its adoption in a major report in the early 1990s on lawyer discipline. *See* AM. BAR ASS’N, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT 56 (1992) [hereinafter MCKAY REPORT]. Reciprocal discipline remains a recommended disciplinary procedure. *See* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 22 [hereinafter MRLDE]. It has been adopted in some form in most, if not all, jurisdictions.

118. The rule may also include giving reciprocal effect to a transfer of a lawyer to inactive status due to a disability. *See, e.g.*, MRLDE R. 22(A). Resignations in the face of disciplinary charges may be given reciprocal effect as well. *See, e.g.*, MD. R. ON CTS., JUDGES & ATTYS. 16-773(d).

119. OHIO GOV. BAR R. V § (11)(F).

120. *See* MRLDE R. 22 cmt.; *see also* CLARK REPORT, *supra* note 117, at 117.

121. *See* MRLDE R. 22 cmt.; *see also* CLARK REPORT, *supra* note 117, at 117.

circumstances, however, such as where the underlying conduct warrants substantially different discipline in the second state than the first,¹²² the original proceedings were so deficient as to constitute a denial of due process,¹²³ or the proof in the original action was so insufficient that reciprocal discipline would be inappropriate.¹²⁴

While the general concept of reciprocal discipline is well established and widely adopted in some form in the states, there appears to be some divergence over whether interim suspensions play a role in this process. In the MRLDE¹²⁵ and in many states,¹²⁶ interim suspension is not provided for in their reciprocal discipline rules,¹²⁷ presumably because it is not needed. The disciplinary process for reciprocal discipline is already a stream-lined one.¹²⁸ The finding of misconduct

122. *See, e.g.*, ALA. R. DISCIPL. PROC. 25(d)(3); ALASKA BAR R. 27(c)(4); CAL. BUS. & PROF. CODE § 6049.1(b)(1) (West 2003); COLO. R. CIV. P. 251.21(d)(4); HAW. SUP. CT. R. 2.15(c)(4); ILL. SUP. CT. R. 763; IND. ADM. & DISCIPL. R. 23 § 28(c)(4); IOWA CT. R. 35.19(3)(c); R. DISCIPL. MISS. STATE BAR 13; NEV. SUP. CT. R. 114(4)(c); N.H. SUP. CT. R. 37(12)(d)(3); N.J. CT. R. 1:20-14(a)(4)(E); N.M. R. GOV'G DISCIPL. 17-210(D)(4); OHIO GOV. BAR R. V § 11(F)(4)(a)(ii); S.C. APP. CT. R. 413(29)(d)(4); S.D. CODIFIED LAWS § 16-19-74(3) (2011); TENN. SUP. CT. R. 9 § 17.4(c); TEX. R. DISCIPL. PROC. 9.04(D); UTAH R. JUD. ADMIN. 14-522(d)(3); WASH. R. ENF. LAWYER COND. 9.2(e)(1)(D).

123. *See, e.g.*, ALA. R. DISCIPL. PROC. 25(d)(1); ALASKA BAR R. 27(c)(1); CAL. BUS. & PROF. CODE § 6049.1(b)(3); COLO. R. CIV. P. 251.21(d)(1); HAW. SUP. CT. R. 2.15(c)(1); ILL. SUP. CT. R. 763; IND. ADM. & DISCIPL. R. 23 § 28(c)(1); IOWA CT. R. 35.19(3)(a); NEV. SUP. CT. R. 114(4)(a); N.H. SUP. CT. R. 37(12)(d)(1); N.J. CT. R. 1:20-14(a)(4)(D); N.M. R. GOV'G DISCIPL. 17-210(D)(1); S.C. APP. CT. R. 413(29)(d)(1); S.D. CODIFIED LAWS § 16-19-74(1); TENN. SUP. CT. R. 9 § 17.4(a); TEX. R. DISCIPL. PROC. 9.04(A); UTAH R. JUD. ADMIN. 14-522(d)(1); WASH. R. ENF. LAWYER COND. 9.2(e)(1)(A).

124. *See, e.g.*, ALA. R. DISCIPL. PROC. 25(d)(2); ALASKA BAR R. 27(c)(2); CAL. BUS. & PROF. CODE § 6049.1(b)(2); COLO. R. CIV. P. 251.21(d)(2); HAW. SUP. CT. R. 2.15(c)(2); IND. ADM. & DISCIPL. R. 23 § 28(c)(2); IOWA CT. R. 35.19(3)(b); NEV. SUP. CT. R. 114(4)(b); N.M. R. GOV'G DISCIPL. 17-210(D)(2); S.C. APP. CT. R. 413(29)(d)(2); S.D. CODIFIED LAWS § 16-19-74(2); TENN. SUP. CT. R. 9 § 17.4; TEX. R. DISCIPL. PROC. 9.04(B); WASH. R. ENF. LAWYER COND. 9.2(e)(1)(B).

125. MRLDE R. 22.

126. *See, e.g.*, COLO. R. CIV. P. 251.21; ILL. SUP. CT. R. 763; N.J. CT. R. 1:20-14(a); OHIO GOV. BAR R. V § 11(F); PA. R. DISCIPL. ENF. 216; TEX. R. DISCIPL. PROC. 9.01; WIS. SUP. CT. R. 22.22.

127. This does not mean that the underlying conduct will not trigger interim suspensions in those states under another theory, such as threat of harm, but only that it is not expressly integrated into their reciprocal discipline schemes.

128. This is implicit in the reciprocal discipline system, as reflected in this comment to Rule 22 of the MRLDE:

If a lawyer suspended or disbarred in one jurisdiction is also admitted in another jurisdiction and no action can be taken against the lawyer until a new disciplinary proceeding is instituted, tried, and concluded, the public in the second jurisdiction is left unprotected against a lawyer who has been judicially determined to be unfit. Any procedure which so exposes innocent clients to harm cannot be justified. The spectacle of a lawyer disbarred in one jurisdiction yet permitted to practice elsewhere exposes the profession to

has already been found in the other state's disciplinary proceeding and is treated as conclusive,¹²⁹ unless one of the limited exceptions applies.¹³⁰ Often the jurisdiction is able to impose identical discipline without challenge by the respondent. While these rules give respondents a limited ability to attack the underlying finding of discipline,¹³¹ I suspect this happens rarely. In short, with a swift and easy process already in place, little time is saved, and public protection provided, by adding interim suspensions to the process.

Other jurisdictions do provide for the possibility of imposing an interim suspension in the reciprocal discipline context while the proceedings to impose final discipline are pending.¹³² Given the analysis above, this remedy may be seldom sought, but it remains available in special cases where the underlying conduct poses such a threat that immediate action is warranted.¹³³

Conviction of, or a finding of guilt¹³⁴ to a criminal offense¹³⁵ also

criticism and undermines public confidence in the administration of justice.

MRLDE R. 22 cmt. It is in response to this concern that the stream-lined procedure was adopted.

129. *See, e.g.*, MRLDE R. 22(E) ("a final adjudication in another jurisdiction that a lawyer, whether or not admitted in that jurisdiction, has been guilty of misconduct or should be transferred to disability inactive status shall establish conclusively the misconduct or the disability for purposes of a disciplinary or disability proceeding in this jurisdiction").

130. *See supra* text accompanying notes 122-24.

131. *Id.*

132. *See, e.g.*, R. GOV. D.C. BAR XI § 11(d) (authorizing interim suspension of lawyers suspended or disbarred in another jurisdiction pending imposition of reciprocal discipline); MD. R. ON CTS., JUDGES, & ATTYS. 16-773(d) (allowing interim suspension pending further order of a court in another jurisdiction where lawyer has been "disbarred or is currently suspended from practice by final order"); U.S. DIST. CT. R. N.D. CAL., CIVIL LOCAL R. 11-7.

133. Even without authority directly in the reciprocal discipline rule, disciplinary authorities may reach the same result by seeking a threat of public harm suspension. *See generally infra* Part VI.

134. While the original MRLDE provision based suspension on a lawyer's "conviction" of a serious crime. The rule was amended in 1999 substituting the phrase a "finding of guilt." The change arose from a recognition that "there can be significant delay between a finding of guilt and the entry of a judgment of conviction, often attributable to presentence investigations and the sentencing process. The rule change [was] designed 'to protect the public and to uphold the honor of the profession' when a lawyer has been found guilty but has not yet been convicted. . . ." *ABA Delegates Tackle Lawyer Discipline, Defer Action on Law Firm and MDP Issues*, LAWS. MAN. ON PROF. CONDUCT ONLINE (ABA/BNA), 1999 WL 94186 (Feb. 17, 1999).

States vary on the terms of the disposition required before an order of interim suspension will be entered. For example, some states require "conviction" of a crime. *See, e.g.*, CONN. R. SUPER. CT. § 2-41(e); IDAHO BAR COMM'N R. 510(a); ILL. SUP. CT. R. 761(b); ME. BAR R. 7.3(d)(1); MICH. CT. R. 9.120(B)(1); W. VA. R. LAWYER DISCIPL. PROC.3:18(d). Other states require that an attorney have been "found guilty" before imposing an interim suspension. *See, e.g.*, IND. ADM. & DISCIPL. R. 23 § 11.1(a). Others call for an interim suspension when either conviction or a finding of guilt occurs. *See, e.g.*, VA. SUP. CT. R. Pt. 6, § IV, ¶ 13-22(A); WIS. SUP. CT. R. 22.20(1). That said, the dichotomy between "conviction" and a finding of "guilt" may not be as

strong as it appears. For example, Nevada provides for interim suspension upon conviction, but defines that term quite broadly to include “a plea of guilty or nolo contendere, a plea under *North Carolina v. Alford*, or a guilty verdict following either a bench or a jury trial.” See NEV. SUP. CT. R. 111(1). Nevertheless, disputes still arise over whether a particular act constitutes a finding of guilt or a conviction. See, e.g., *Miss. Bar v. Shelton*, 855 So. 2d 444 (Miss. 2003) (majority holding, over strong dissent, that a conditional guilty plea is a guilty plea or conviction triggering suspension). Finally, certain states explicitly state that interim suspensions are to be imposed on conviction regardless of whether an appeal or other challenge to the conviction is pending. See, e.g., ME. BAR R. 7.3(d)(1); NEV. SUP. CT. R. 111(7); W. VA. R. LAWYER DISCIPL. PROC. 3:18(d). See generally E.W.H., *What Amounts to Conviction or Satisfies Requirement as to Showing of Conviction, within Statute Making Conviction a Ground for Refusing to Grant or for Canceling License or Special Privilege*, 113 A.L.R. 1179 (1938 & Cum. Supp.).

135. There is generally more uniformity in the types of offenses that trigger an automatic interim suspension. Most often, states require that an attorney be convicted or found guilty of a “serious crime.” See, e.g., CONN. R. SUPER. CT. § 2-41(e); IDAHO BAR COMM’N R. 510(a)(1); MD. R. ON CTS., JUDGES, & ATTYS. 16-771(c); NEB. SUP. CT. R. § 3-312(A); NEV. SUP. CT. R. 111(7); WIS. SUP. CT. R. 22.20(5). A typical definition of “serious crime” includes:

any felony or any lesser crime that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, or any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy or solicitation of another to commit a “serious crime.”

MRLDE R. 19(C); see also CONN. R. SUPER. CT. § 2-41(c) (“The term ‘serious crime’ . . . [includes] any felony or any larceny as defined in the jurisdiction in which the attorney was convicted or any crime for which the attorney was sentenced to a term of incarceration or for which a suspended period of incarceration or a period of probation was imposed.”). Even states whose interim suspension provision is triggered by an offense other than a “serious crime” often track the concepts within the MRLDE’s definition. For example, Virginia’s interim suspension provision is triggered by conviction of a “crime,” which it defines as including a felony conviction, any “offense involving theft, fraud, forgery, extortion, bribery, or perjury,” or any “attempt, solicitation or conspiracy to commit” such offenses. VA. SUP. CT. R. Pt. 6, § IV, ¶ 13-1. Similarly, California mandates the suspension of an attorney until the time for appeal has elapsed if “the crime of which the attorney was convicted involved . . . moral turpitude or is a felony under the laws of California, the United States, or any state or territory thereof.” CAL. BUS. & PROF. CODE § 6102(a) (West 2003 & Supp. 2012).

Interestingly, some states require an attorney to report a conviction of any crime, regardless of how minor, while reserving an interim suspension for more serious criminal convictions. Compare IND. ADM. & DISCIPL. R. 23 § 11.1(a)(2) (requiring an attorney to report a finding of guilt of any crime under the laws of Indiana or the United States), with IND. ADM. & DISCIPL. R. 23 § 11.1(a) (authorizing an interim suspension upon a finding that the attorney has been “found guilty of a crime punishable as a felony”); see also ME. BAR R. 7.3(d)(1), (d)(6) (requiring an attorney to report a conviction of any crime, but reserving automatic suspension for a crime demonstrating “unfitness to engage in the practice of law”); MICH. CT. R. 9.120(A)(1), (B)(1) (requiring an attorney to report a conviction of any crime, but automatically suspending an attorney only upon proof of conviction of a felony). The apparent justification for this divergence is twofold. First, an “any crime” reporting rule simplifies the reporting duty. The lawyer need not make the sometimes difficult determination of whether the nature of his crime makes it a “serious” one. Cf. Greenbaum, *supra* note 116, at 496–97. That determination is left to those in the disciplinary system. Second, the divergence is a recognition that, while in the usual case, the damage to the lawyer’s reputation and the inconvenience to the lawyer’s clients accompanying an interim suspension can only be justified when the underlying criminal offense is serious, nevertheless,

can lead to an interim suspension pending a final determination of whether the criminal activity warrants disciplinary sanction as well.¹³⁶ The idea behind interim suspensions, in this context, is that conviction of a crime of sufficient magnitude calls into question whether the lawyer has the character to deal honestly with clients and to serve them loyally in their representations.¹³⁷ It also is a nod to the reality that the punishment associated with these crimes may, as a practical matter, impede the lawyer's ability to handle matters competently and diligently.¹³⁸ Maintaining public confidence in lawyers and the disciplinary system also is served by taking immediate action against lawyer/criminals.¹³⁹ While the interim suspension is in place, authorities then determine what, if any, final disciplinary action is appropriate.¹⁴⁰

That said, the interim suspension usually is not automatic and may, at times, be stayed for good cause.¹⁴¹ In *In re Downey*, for example, an

knowledge of the commission of the lesser crime, when coupled with other factors, might still justify a public harm suspension or the imposition of a final disciplinary sanction.

136. The ABA began promoting the idea of interim suspensions for criminal convictions of serious crimes more than forty years ago. See CLARK REPORT, *supra* note 117, at 122–30. It called again for the adoption of such interim suspension rules in a major report in the early 1990s on lawyer discipline. See MCKAY REPORT, *supra* note 117, at 56. Interim suspensions for criminal convictions of serious crimes remain a recommended disciplinary procedure. See MRLDE R. 19(D). For examples of such suspensions see *In re Schwartz*, 931 N.E.2d 127 (Ohio 2010) (interim suspension based on felony conviction) and *In re Minor*, 958 So. 2d 675 (La. 2007) (interim suspension based upon his conviction of a serious crime). For an interesting discussion of whether these provisions should be applied to convictions from a foreign country, see *In re Wilde*, 68 A.3d 749 (D.C. 2013).

137. Fear also has been expressed that lawyers knowing they face imprisonment and probable loss of license will be more likely to exploit current clients for their own gain. See CLARK REPORT, *supra* note 117, at 125. Even if they would not, other lawyers who know of the criminal conduct may be reluctant to deal with the convicted lawyer, which, in turn, will undercut that lawyer's ability to represent existing clients. *Id.*

138. *Id.*

139. As the Clark Report found, “[n]o single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline.” *Id.* at 124; accord MRLDE R. 19(D) cmt. For a spirited debate among the judges on whether the maintenance of public confidence is properly considered in deciding whether to impose an interim suspension for a guilty plea or conviction of a serious crime see *Att’y Grievance Comm’n v. Protokowicz*, 607 A.2d 33 (Md. 1992).

140. The conduct underlying a criminal conviction also may warrant disciplinary sanction in its own right. This is seen most clearly in Rule 8.4(b) of the *Model Rules of Professional Conduct*, which prohibits “commit[ing] a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” It should be recognized that this rule does not speak to all criminal acts of a lawyer, but only those that reflect adversely on the lawyer’s honesty, trustworthiness, or fitness to practice. Mere crimes of moral turpitude that do not implicate these factors are not covered by this rule. MODEL RULES OF PROF’L CONDUCT R. 8.4(b) cmt. [2].

141. The rules authorizing interim suspensions in this context, while phrased differently, almost always leave the court or its delegate some discretion in terms of whether an interim

interim suspension of a lawyer who had been convicted of engaging in the business of money transmission without a license, a serious crime, was stayed. The court reasoned:

Applying these considerations, we conclude that respondent has shown good cause for the court to stay the interim suspension. His prior unblemished record as an attorney; his plea of guilty to what amounts to a strict liability offense involving no *scienter* or moral turpitude; and the fact that his violation arose from conduct outside of his normal legal practice all suggest a very low degree of risk that permitting him to practice in the interim will harm the public. For the same reasons, but subject of course to development of a factual record in the disciplinary process, we think that the likelihood that respondent will receive a significant sanction, *i.e.*, a suspension (if at all) of more than brief duration, is very small. Stated differently, there is a reasonable possibility on this record that interim suspension might exceed the sanction that will eventually be imposed on respondent. Considering, finally, the harm to respondent's livelihood and ability to support his family that interim suspension may entail, we conclude that respondent has met his burden to show good cause for why the court should stay its hand.¹⁴²

suspension should be entered. The MRLDE is among the more stringent, requiring that the lawyer "shall" be suspended, but that the suspension may be terminated "in the interest of justice . . . upon a showing of extraordinary circumstances." MRLDE 19(D)(2). Others are more generous, simply noting that the court or its delegee "may" enter an interim suspension on these grounds. *See, e.g.*, CONN. R. SUPER. CT. § 2-41(e); IDAHO BAR. COMM'N R. 510(a)(1); ILL. SUP. CT. R. 761(b). In contrast, a few seem to make imposition of the interim suspension mandatory. *See, e.g.*, MISS. ST. BAR R. OF DISCIP. 6(a). For a discussion of the factors to be considered in exercising this discretion, see Chief Disciplinary Counselor v. Briggs, No. HHDCV 1360400635, 2013 WL 3970785 (Conn. Super. Ct., July 18, 2013).

142. *In re Downey*, 960 A.2d 1135, 1137 (D.C. 2008), *opinion amended on reh'g*, 975 A.2d 152 (D.C. 2009). Maryland reached the same conclusion. *Att'y Grievance Comm. v. Downey*, 990 A.2d 1070 (Md. 2010); *see also In re Respondent M*, 2 Cal. State Bar Ct. Rptr. 465 (Review Dep't 1993) (finding good cause not to impose an interim suspension for driving under the influence causing an injury, a felony, in part because the ultimate disciplinary sanction, if entered, would be less severe than the interim suspension given the time it would take to reach a final disposition); *In re Grillo*, 960 N.Y.S.2d 689 (N.Y. App. Div. 2013) (setting aside interim suspension for criminal conviction for good cause, applying N.Y. Jud. Law § 90(4)(f)); *Att'y Grievance Comm'n v. Protokowicz*, 607 A.2d 33, 35 (Md. 1992) (noting that rule, then in force, permitted but did not require the imposition of an interim suspension for criminal conviction); *cf. State v. Kirsch*, No. CR 980178336, 2000 Conn. Super. LEXIS 2567 (Conn. Super. Ct. Sept. 11, 2000) (upholding interim suspension pending appeal for felony convictions resulting from a fatal automobile collision which the defendant caused while driving drunk, but modifying it to allow non-court practice by respondent if clients are notified about the criminal convictions, acknowledge notification in writing, and waive conflicts, if any, associated with the conviction); *see also Order of Temporary Suspension and Referral to Disciplinary Board at 38, In re Whittemore*, No. 64154 (Nev. Oct. 8, 2013) (Hardesty, J. concurring in part and dissenting) (arguing that lawyer, presently under an

As to the collateral effects of such a suspension, at least in Ohio, an interim suspension for a felony does not constitute a prior disciplinary offense, and thus does not serve as an aggravating factor in other disciplinary matters.¹⁴³ Depending on the circumstances, credit may be given for the time served on interim suspension if a final suspension for the underlying conduct is ordered.¹⁴⁴

A more difficult question is how to respond where a lawyer has simply been indicted for a serious crime. Should interim suspensions be entered there as well?¹⁴⁵ Several states have a specific rule dealing with this situation, although they vary on whether the imposition of an interim suspension is mandatory or permissive.¹⁴⁶ Others find indictment a factor which, when coupled with the nature of the underlying charges, might warrant a public harm suspension.¹⁴⁷ Note that, in the latter case, the mere fact of indictment is not enough, a threat

interim suspension pending appeal of a felony conviction, should be allowed, under all the circumstances, to continue to represent his current clients outside of state court proceedings).

143. *Disciplinary Counsel v. Peterson*, 984 N.E.2d 1035, 1038 (Ohio 2012) (“Our precedent indicates that a prior interim felony suspension has not heretofore been considered as a prior disciplinary offense.”); *see also In re Maxwell*, 44 So. 3d 668, 675 n.12 (La. 2010) (noting that an interim felony conviction does not constitute prior discipline when considering mitigating and aggravating factors).

144. *See, e.g., Disciplinary Counsel v. Gittinger*, 929 N.E.2d 410, 415 (Ohio 2010) (comparing and contrasting cases differing on whether to give credit for an interim suspension when imposing final discipline based on the commission of a crime by the lawyers involved); *Disciplinary Counsel v. Margolis*, 870 N.E.2d 1158, 1163 (Ohio 2007) (discussing the differing approaches taken and concluding that where the magnitude of the misconduct is large and compelling evidence of contrition is lacking, credit for an interim suspension is inappropriate).

145. The focus here is on whether the state should impose interim suspensions premised on indictment of a crime. It should be noted that where the facts underlying the crime also implicate an ongoing disciplinary proceeding, the lawyer may desire that the disciplinary proceeding be delayed until the criminal case concludes in order to best preserve constitutional rights. At times, the lawyer may request an interim suspension be imposed, presumably to procure agreement to postpone the disciplinary proceeding. *See, e.g., In re Galette*, 737 S.E.2d 691 (Ga. 2013).

146. *Compare* OKLA. R. GOV’G DISCIPL. PROC. 7.3 (providing that “[u]pon receipt of the certified copies of . . . indictment . . . the Supreme Court *shall* by order immediately suspend the lawyer from the practice of law until further order of the Court”) (emphasis added), *with* ILL. SUP. CT. R. 774(a) (providing that court “*may* suspend” lawyer “during the pendency of a criminal indictment”) (emphasis added), *and* N.H. SUP. CT. R. 37(9)(i) (allowing but not requiring suspension upon indictment), *and* S.C. APP. CT. R. 413(17) (providing that court “*may* place a lawyer on interim suspension upon notice of the filing of an indictment, information, or complaint charging the lawyer with a serious crime.”) (emphasis added).

147. *See, e.g., In re Perkins*, 807 N.E.2d 44, 45 (Ind. 2004) (finding public harm suspension appropriate where lawyer was charged with insurance fraud and drug dealing and could not make bail, leaving approximately 100 pending client matters unattended); *see also* N.M. R. GOV’G DISCIPL. 17-207A(5)(c) (providing for interim suspension upon indictment where “continued practice of law by an attorney will result in a substantial probability of harm, loss or damage to the public”). *See generally infra* text accompanying notes 232-34.

of public harm must be established as well.¹⁴⁸

Thus, it appears that most jurisdictions do not require automatic interim suspension upon indictment. This is appropriate. Unlike the situation involving conviction or a finding of guilt, where misconduct is established by the criminal proceeding, no final determination that the lawyer, in fact, engaged in the criminal conduct has been made. Therefore, an investigation into that matter should be required to determine if the suspension is warranted.¹⁴⁹

As for the costs interim suspensions impose, they seem justified, at least in situations involving a former finding of serious discipline or conviction of a serious crime. In these instances the likelihood of final discipline for the underlying conduct is strong. If a disciplinary suspension or disbarment is the likely end result of the disciplinary process in any event, the imposition of an interim suspension will have only a marginally larger impact, moving the suspension up in time, than the ultimate sanction itself.

V. DISCIPLINARY PROCESS SUSPENSIONS

Several types of interim suspensions arise out of the disciplinary process itself. Some flow from a lawyer's failure to respond to requests made in the disciplinary process.¹⁵⁰ For example, failure to respond to a

148. See, e.g., *In re Ellis*, 680 N.E.2d 1154, 1161 (Mass. 1997) (noting that "indictment does not alone justify [an interim suspension]" but that taken with other evidence may justify a threat of harm suspension).

149. See, e.g., *In re Monteiro*, 684 P.2d 506, 507 (Nev. 1984) (invoking the presumption of innocence and finding that indictment for a serious crime, without more, does not show a sufficient threat of harm to warrant interim suspension). That does not mean that a pre-suspension hearing need be had if the suspension is of delayed effect and the lawyer has a right to request a hearing during that time. See, e.g., *Burleigh v. State Bar of Nev.*, 643 P.2d 1201, 1204 (Nev. 1982).

Further, continued practice by a lawyer who is under indictment, but has not yet been allowed to put on a defense, may not have the same negative effect on public confidence as continued practice by an attorney who is convicted of or pleads guilty to a serious crime, one of the traditional justifications for suspensions in this area. See *supra* note 139; cf. Jeremy S. David, Case Comment, *Constitutional Law—Presumed Innocent Until Proven Guilty?: Extending the Grounds for Temporary Suspension of Attorneys* — *In Re Ellis*, 425 Mass. 332, 680 N.E.2d 1154 (1997), 32 SUFFOLK U. L. REV. 349, 358 (1998) (asserting this basic position). Nevertheless if the charges themselves are sufficiently serious, public confidence might indeed be eroded. See, e.g., *Burleigh*, 643 P.2d at 1204 (determining that "continued practice with serious charges [here attempted murder and arson] leveled against [the indicted lawyer] would erode public confidence in the legal profession").

150. See, e.g., S.C. APP. CT. R. 502(17)(c) (lawyer who has failed "to fully respond to a notice of investigation, has failed to fully comply with a proper subpoena issued in connection with an investigation or formal charges, has failed to appear at and fully respond to inquiries at an appearance required . . . or has failed to respond to inquiries or directives of the Commission or the Supreme Court," is subject to interim suspension). TENN. SUP. CT. R. 9 § 4.3 (allowing for the

grievance,¹⁵¹ provide requested documentation,¹⁵² file responsive pleadings, or attend a scheduled proceeding,¹⁵³ all can lead to an immediate suspension. So, too, can failure to follow orders issued by the adjudicatory authority.¹⁵⁴ Noncooperation in a proceeding concerning the mental and physical capacity of a lawyer to remain in active practice also can lead to an interim suspension.¹⁵⁵ Some states do not treat disciplinary process suspensions separately, but make them another basis for proving a public harm suspension is warranted.¹⁵⁶ My

entrance of a temporary suspension when a lawyer fails to respond to disciplinary officials “concerning a complaint of misconduct”); VA. STATE BAR PROF’L GUIDELINES 13-6 G.3 (authorizing imposition of interim suspension for failure to respond to a summons or subpoena); WASH. R. ENF. LAWYER COND. 7.2(a)(3) (permitting entrance of an interim suspension for failure to provide requested information or documents, or failure to respond to a subpoena, or failure to comply with disability proceedings).

151. See, e.g., GA. R. PROF’L COND. 4-204.3 (d) (providing that “[i]n cases where the maximum sanction is disbarment or suspension, failure to respond by the respondent may authorize the Investigative Panel or subcommittee of the Panel to suspend the respondent until a response is filed”); see also *In re* Wathen, 721 S.E.2d 899, 900 (Ga. 2012) (ordering interim suspension for failing to respond to notice of investigation which respondent had received); *In re* Stewart, 934 N.Y.S.2d 133, 134 (N.Y. App. Div. 2011) (entering interim suspension, inter alia, for failure to answer or contact the disciplinary body); *In re* Kern, 722 S.E.2d 520, 521 (S.C. 2012) (describing earlier action in which an interim suspension was entered, inter alia, for “failure to provide a written response to the investigation”).

152. See, e.g., VA. STATE BAR PROF’L GUIDELINES 13-6 G.3; *In re* Lyons, 599 N.Y.S.2d 643 (N.Y. App. Div. 1993) (imposing interim suspension for lawyer’s failure to produce requested records).

153. *In re* Kern, 722 S.E.2d at 521 (describing earlier action in which an interim suspension was entered, inter alia, for failure to appear as required); *In re* Way, 952 N.Y.S.2d 170 (N.Y. App. Div. 2012) (ordering interim suspension in case involving repeated delays in answering disciplinary complaint, failure to attend deposition in the matter, and failure to respond to requests to cure this, although only the failure to attend the deposition was cited as the noncooperation supporting interim suspension); *In re* Stewart, 934 N.Y.S.2d at 134 (interim suspension imposed for a number of reasons including failure to appear at deposition scheduled in the disciplinary process).

154. VA. STATE BAR PROF’L GUIDELINES 13-6 G.1.

155. WYO. ST. BAR BYLAWS art. 1 § 3(i)(6) (authorizing interim suspension where lawyer in such an investigation fails to provide authorization for release of relevant medical records); see also *In re* Stern, 946 N.Y.S.2d 910 (N.Y. App. Div. 2013) (interim suspension imposed, in part, for failure to submit to psychiatric examination to evaluate lawyer’s mental capacity).

156. For example, in New York an attorney may be suspended

from the practice of law pending consideration of charges of professional misconduct, upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest. Such finding may be based upon: . . . (i) the attorney’s default in responding to the petition or notice, or the attorney’s failure . . . to comply with any lawful demand of this court or the Departmental Disciplinary Committee made in connection with any investigation.

N.Y. CT. R. 603.4(e)(1). For application of this standard see, e.g., *In re* Reis, 942 N.Y.S.2d 101, 103 (N.Y. App. Div. 2012) (entering immediate suspension for lawyers failure “to comply with the Committee’s lawful request for documentation, to respond to its subpoenas and to answer multiple complaints”); *In re* Bloodsaw, 926 N.Y.S.2d 490, 491 (N.Y. App. Div. 2011) (ordering immediate

view is that suspensions for noncooperation are an important, justifiable tool to secure participation in the disciplinary process despite the costs such suspensions impose. Disciplinary proceedings are at the heart of lawyer regulation which noncooperation impedes. That said, they are but one of an array of tools available to police this area and a sensitive consideration of when these various tools should be utilized is required.

To the extent the noncooperation is the result of the invocation of the Fifth Amendment right against self-incrimination, it should not lead to an interim suspension for noncooperation.¹⁵⁷ It may, however, if it is determined that the privilege does not lie.¹⁵⁸ And, in any event, in some jurisdictions the tribunal may draw an adverse inference about the underlying conduct if the privilege is invoked.¹⁵⁹

Lack of cooperation need not automatically lead to an interim suspension. Thus, in one case, the court refused to order an interim suspension for threat of harm to the public based on lack of cooperation where the failure to cooperate was intermittent and often was caused by scheduling conflicts resulting from the representation of the lawyer's clients.¹⁶⁰

suspension where “[r]espondent has disregarded a judicial subpoena and, in the words of the Committee, has ‘demonstrated a strategy of silent entrenchment, a calculated refusal to acknowledge repeated Committee inquiries, or even submit an answer to the complaint of [the] Court Examiner[] . . . in the face of serious allegations, allegations implicating *inter alia*, tens of thousands of dollars intended for the care of a mentally incompetent person for whom Respondent was guardian”).

157. See, e.g., *Spevack v. Klein*, 385 U.S. 511, 514 (1967) (plurality opinion) (finding disbarment for invocation of Fifth Amendment rights in a disciplinary proceeding unconstitutional); *In re Kapchan*, 924 N.Y.S.2d 338, 340 (N.Y. App. Div. 2011) (holding that “merely invoking one’s Fifth Amendment right against self-incrimination should not serve as a separate ground for an interim suspension”); cf. MODEL RULES OF PROF’L CONDUCT R. 8.1 cmt. [2].

158. Cf. *In re Reis*, 942 N.Y.S.2d at 103-04 (finding that “[a]lthough an attorney cannot be suspended on an interim basis solely for asserting his Fifth Amendment right against self-incrimination . . . he cannot assert such a right merely to avoid production of records or documents which an attorney is required to maintain” and ordering an interim suspension, in part, for noncooperation from improper raising of the Fifth Amendment privilege.) See generally *Disciplinary Counsel v. Snaider*, No. NNHCV116024179S, 2012 WL 1221482 (Conn. Super. Ct. Mar. 21, 2012) (finding that IOLTA records fall within the required records exception to the Fifth Amendment and ordering their disclosure).

159. Compare *In re Redding*, 269 Ga. 537, 537 (Ga. 1998) (noting that an adverse inference may be drawn from a respondent’s invocation of the Fifth Amendment privilege against self-incrimination in a disciplinary matter), and *In re Reis*, 942 N.Y.S.2d at 101 (same), and *State ex rel. Okla. Bar Ass’n v. Gasaway*, 863 P.2d 1189, 1197 (Okla. 1993) (same), with *Att’y Grievance Comm’n of Md. v. Unnamed Att’y*, 467 A.2d 517, 521 (Md. 1983) (noting that no adverse inference may be drawn from an attorney’s refusal to testify against himself in a disciplinary proceeding), and *In re Woll*, 194 N.W.2d 835, 840 (Mich. 1972) (same).

160. *In re Martin*, 90 So. 3d 392, 393 (La. 2012). In declining to enter an interim suspension based on a need to protect against public harm, the court noted that

As a general matter, the threat of immediate suspension is a useful tool to encourage cooperation by those charged in the disciplinary process and to avoid the cost and delays occasioned by respondent neglect.¹⁶¹ Because this suspension flows from a failure to cooperate in the proceeding itself, rather than from the underlying misconduct being prosecuted in the disciplinary proceeding, and because the interim suspension can be lifted by mere compliance, if a final sanction of suspension is ordered,¹⁶² credit will not be given for the time the lawyer was under default suspension.¹⁶³ Because the default suspension is premised on the need to exact cooperation in the underlying proceeding, it expires when a sanction for the underlying misconduct is reached.¹⁶⁴

failure to appear before the ODC was due to scheduling conflicts resulting from her need to appear in court on behalf of her clients. While respondent could have made a more diligent effort to balance her client's interests with her duty to cooperate with the ODC, we cannot say her actions were contumacious in nature, nor do they demonstrate a potential for harm to the orderly administration of the disciplinary investigation. Therefore, without passing on whether respondent's failure to cooperate rises to the level of a disciplinary offense, we conclude it does not constitute grounds for immediate interim suspension.

In re Martin, 90 So. 3d 392, 393 (La. 2012).

161. See, e.g., Iowa Sup. Ct. Att'y Disciplinary Bd. v. Cunningham, 812 N.W.2d 541, 551 (Iowa 2012); Jerry Cohen, *Appropriate Dispositions in Cases of Lawyer Misconduct*, 82 MASS. L. REV. 295, 308 (1997) (describing such conduct by lawyers as "a great obstacle to efficient oversight with limited resources"). Nevertheless, the author also identifies "a need for restraint in exercise of those remedies to avoid tragic escalation arising out of misunderstanding or disability." Cohen, *supra*, at 308.

162. See, e.g., R. GOV'G D.C. BAR XI § 3(d) ("An attorney temporarily suspended or placed on probation for failure to file a response to a Board order . . . shall be reinstated and the temporary suspension . . . dissolved when (1) Bar Counsel notifies the Court that the attorney has responded to the Board's order or (2) the Court determines that an adequate response has been filed by the attorney"); GA. ST. CT. R. 4-204.3(d)(3) (authorizing reinstatement where lawyer suspended for failure to respond in a disciplinary proceeding makes an appropriate response); see also *In re Warnock*, 525 S.E.2d 81, 82 (Ga. 2000) (lifting interim suspension for failure to file a timely answer when answer filed); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Lickiss, 786 N.W.2d 860, 870 n.3 (Iowa 2010) (noting that a temporary suspension for non-response in a disciplinary proceeding is cured upon response and requires that the court, after appropriate notice of that fact, must "immediately reinstate the attorney's license to practice law"). However, if the default is treated as a separate disciplinary offense, see *infra* text accompanying notes 168-69, mere compliance may be insufficient to forestall the imposition of additional discipline for noncooperation. See, e.g., *In re Lilly*, 699 A.2d 1135 (D.C. 1997) (finding noncooperation to violate both the D.C. Rules of Professional Conduct and a Bar rule and imposing a 30-day suspension conditioned upon full compliance with Bar Counsel's information request).

163. *Cunningham*, 812 N.W.2d at 553. *But cf. In re Coleman*, 607 S.E.2d 556 (Ga. 2005) (giving credit, in the context of a petition for voluntary suspension, for time spent under noncooperation suspension).

164. See, e.g., N.Y. CT. R. § 603.4(e)(2) (if not cured, noncooperation suspension continues "until such time as the disciplinary matters before the Committee have been concluded, and until further order of the court"); *In re Burke*, 861 N.Y.S.2d 35, 38 (N.Y. App. Div. 2008) (suspending attorney until pending disciplinary matters have concluded); *Cunningham*, 812 N.W.2d at 554

While under suspension, the usual duties of notification and cessation of practice apply.¹⁶⁵ Reciprocal discipline in another jurisdiction might also be entered,¹⁶⁶ and the failure to cooperate may be treated as a prior disciplinary offense in a subsequent disciplinary proceeding.¹⁶⁷

That said, failure to cooperate in the disciplinary process is punished in many other ways than immediate suspension. For example, it can be treated as another disciplinary violation to be added to those already being prosecuted.¹⁶⁸ As one court commented in justifying this approach:

[Noncooperation in the disciplinary process] not only show[s] blatant disregard for this Court's authority, but reveal[s] how little they value their license to practice law. . . . Lawyers who fail to discharge these minimal burdens to protect their own interests cannot be expected or trusted to act to protect the interests of clients, the public and the legal profession.¹⁶⁹

It may also be treated as an aggravating factor when establishing the sanction for the underlying disciplinary charges.¹⁷⁰ To the extent the

(noting that "since this opinion concludes the present disciplinary action, there is no longer a need to 'prompt a response to the board's inquiries,' and the temporary suspensions [for noncooperation] are accordingly dismissed"). That of course is not true if the state decides to treat noncooperation as a separate disciplinary offense, rather than as an interim suspension in a proceeding evaluating other misconduct. *See generally infra* text accompanying notes 168-69.

165. IOWA STATE CT. R. 34.7(3)(g)-(h) (detailing client notification requirements upon noncooperation suspension); VA. STATE BAR PROF'L GUIDELINES 13-6 G.3 (requiring notification of clients, opposing counsel and courts, as well as making "appropriate arrangements for the disposition of matters then in his or her care in conformity with the wishes of his or her clients" where interim suspension for failure to comply with a summons or subpoena is imposed).

166. *See, e.g., Jones v. Jones*, 635 S.E.2d 694, 695 n.4 (Va. Ct. App. 2006) (noting reciprocal discipline had been entered for noncooperation suspension in another state).

167. *See, e.g., In re Hammock*, 602 S.E.2d 658, 659 (Ga. 2004) (treating suspension for noncooperation in a previous disciplinary proceeding as prior discipline and thus an aggravating factor); *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Marks*, 759 N.W.2d 328, 332 (Iowa 2009) (same).

168. *See, e.g., MODEL RULES OF PROF'L CONDUCT* R. 3.4(c) (knowing disobedience of the rules of a tribunal) & 8.1(b) (knowing failure to respond to a lawful demand from a disciplinary authority); IOWA STATE CT. R. 32:8.1(b); WIS. SUP. CT. R. 20:8.4 (h); *see also In re Edwards*, 990 A.2d 501, 524-26 (D.C. 2010) (finding noncooperation in a disciplinary proceeding to violate rules requiring response to a lawful demand from disciplinary authorities [8.1] and prohibiting conduct that seriously interferes with the administration of justice [8.4(d)]); *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Hearity*, 812 N.W.2d 614, 620 (Iowa 2012) (sanctioning lawyer for violating Iowa's "cooperation" disciplinary rule); *State v. Crawford*, 827 N.W.2d 214, 235 (Neb. 2013) (imposing discipline, finding noncooperation to be prejudicial to the administration of justice and a violation of the lawyer's oath of office). *See generally* Debra T. Landis, Annotation, *Failure to Co-operate with or Obey Disciplinary Authorities as Ground for Disciplining Attorney — Modern Cases*, 37 A.L.R.4th 646, § 3[a] (1985 & Cum. Supp.).

169. *State ex rel. Okla. Bar Ass'n v. Haave*, 290 P.3d 747, 752 (Okla. 2012).

170. *See, e.g., AM. B. ASS'N, STANDARDS FOR IMPOSING LAWYER SANCTIONS* STD. 9.22(e)

lack of cooperation involves a failure to answer or appear, it might be treated as an admission of the facts not responded to¹⁷¹ or as grounds for entering discipline by default.¹⁷²

This potential array of multiple remedies could be implemented in a variety of ways. It might be left to prosecutorial discretion to determine which remedy or remedies best fit the situation. Alternatively, a state might arrange them in an order of increasing severity, placing additional pressure on the respondent to cooperate in the process. For example, in Ohio, the first step is notifying the respondent that, absent response to the complaint, the default will be certified to the Ohio Supreme Court.¹⁷³ If the failure to respond continues, the next step is interim suspension.¹⁷⁴ If a response is still not forthcoming, the interim suspension may be converted into an indefinite suspension¹⁷⁵ or possibly disbarment.¹⁷⁶

As to the collateral consequences that flow from the imposition of

(1992) (treating as an aggravating factor “bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency”); Iowa Sup. Ct. Att’y Disciplinary Bd. v. Cunningham, 812 N.W.2d 541, 551 (Iowa 2012) (treating failure to respond to and cooperate with the Board’s investigation as an aggravating factor); *In re Gustafson*, 986 N.E.2d 377, 379 (Mass. 2013) (noting that “failure to cooperate in the disciplinary process may be considered as a factor in aggravation of other misconduct”).

171. See, e.g., IOWA CT. R. 36.7 (providing that “[i]f the respondent fails or refuses to file such answer within the time specified, the allegations of the complaint shall be considered admitted, and the matter shall proceed to a hearing on the issue of the appropriate sanction”); LA. SUP. CT. R. XIX, § 11(E)(3) (providing that upon failure to answer a disciplinary complaint “the factual allegations contained within the formal charges shall be deemed admitted and proven by clear and convincing evidence”); MASS. R. SUP. JUD. COUNCIL 4:01 § 8(3)(a); S.C. APP. CT. R. 413(24)(a) (“Failure to answer the formal charges shall constitute an admission of the factual allegations.”); S.C. APP. CT. R. 213(24)(b) (“If the respondent should fail to appear when specifically so ordered by the hearing panel or the Supreme Court, the respondent shall be deemed to have admitted the factual allegations which were to be the subject of such appearance and to have conceded the merits of any motion or recommendations to be considered at such appearance.”); S.C. APP. CT. R. 213(27)(a) (“The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.”). For cases applying these standards see *Hearity*, 812 N.W.2d at 616–17 (applying Iowa’s “admission” provision); *In re Pittman*, 76 So. 3d 425, 431 (La. 2011) (noting that if a “lawyer does not answer the formal charges, the factual allegations of those charges are deemed admitted.”); *In re Hursey*, 719 S.E.2d 670, 673 (S.C. 2011) (treating failure to answer formal charges and appear at a proceeding as an admission of the factual allegations contained in the formal charges). See generally Landis, *supra* note 168, at § 4.

172. See, e.g., OHIO GOV. BAR R. V § 6a(D)–(F).

173. OHIO GOV. BAR R. V § 6a(A).

174. *Id.* at § 6a(B).

175. *Id.* at § 6a(E)(1).

176. *Id.* at § 6a(F)(2)(a)(iii). A system is employed in New York in which if an interim suspension, including one for noncooperation, has been entered, and the suspended lawyer does not appear or apply in writing for a hearing or reinstatement for more than six months after its entrance, the lawyer may be disbarred without further notice. N.Y. CT. R. § 603.4(g); see also *In re Reis*, 960 N.Y.S.2d 639 (N.Y. App. Div. 2013) (disbarring lawyer under this provision).

an interim suspension for obstructing the disciplinary process, this situation might appear analogous to administrative suspensions. In both, the interim suspension is provided as leverage to compel compliance with a duty to the system. In the administrative suspension area, I worried that the costs may be too great and that alternative approaches should be explored.¹⁷⁷ Nevertheless, the situations differ significantly. In contrast to administrative suspension, failure to cooperate in the disciplinary process is itself a disciplinary offense.¹⁷⁸ Further, noncooperation undercuts the core functioning of the disciplinary process.¹⁷⁹ As such, the failures here are more than ministerial and thus justify the more intrusive sanction.

VI. INTERIM SUSPENSIONS FOR PUBLIC HARM

Several competing policies are at work when thinking about whether and when to impose an interim suspension pending final disposition on a lawyer whose conduct is the subject of a disciplinary or capacity inquiry. On the one hand, the lawyer regulatory system owes a duty to protect the public from lawyer misconduct, misconduct that may well continue throughout the often lengthy disciplinary process.¹⁸⁰ On the other hand, even an interim suspension is a drastic remedy.¹⁸¹ For many lawyers, their sole means of livelihood is halted.¹⁸² The inability of these lawyers to continue to serve their clients also can have negative

177. See *supra* text accompanying notes 68-71.

178. See *supra* text accompanying note 168.

179. See, e.g., *State v. Crawford*, 827 N.W.2d 214, 238 (Neb. 2013).

180. AM. BAR ASS'N CENTER FOR PROF'L RESPONSIBILITY, STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE, 2010 SURVEY ON LAWYER DISCIPLINE SYSTEMS, chart V, item 21b, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart52010_solid.authcheckdam.pdf (reporting for many states average times from receipt of a complaint to imposition of a public sanction of well over a year, with several states reporting a two-year period) (The full report is available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2010_solid_finalreport.authcheckdam.pdf). See generally *State ex rel. Okla. Bar Ass'n v. Haave*, 290 P.3d 747, 758 (Okla. 2012) (lamenting that failure to seek interim suspension in a disciplinary action that took two years to conclude left "the lawyer and the public dangling like participles in suspension for years at a time").

181. Cf. *In re Johnson*, 48 P.3d 881 (Utah 2001) (recognizing the difficulties imposed by even a temporary suspension of a law practice).

182. That is not always the case, however. In one instance, where an interim suspension was entered because the lawyer was acting as a lawyer in thousands of debt collection matters across the United States, thereby engaging in unauthorized practice, while being subject to numerous consumer complaints and state attorney general challenges in the process, the court noted that the lawyer could still engage in some debt collection as a non-lawyer, mitigating the harm he would suffer from the interim suspension. *In re Boyajian*, No. 06-TE-15159 (Cal. State Bar Ct. Review Dep't Apr. 15, 2008), available at <http://members.calbar.ca.gov/courtDocs/06-TE-15159.pdf>.

impacts on clients and those dealing with them, such as the courts, regulators, and third parties. These consequences argue for caution.¹⁸³ As one court put it:

The harm to a lawyer that will come from the suspension of his right to practice law is obviously substantial. Not only will the lawyer lose his clients (at least during the period of suspension), but his reputation will probably be damaged in a way that cannot be repaired even if the lawyer later receives total vindication in the disciplinary process. The lawyer who loses his practice may well be adversely affected in the defense of criminal and disciplinary charges arising from the alleged misconduct, at least in his ability to afford counsel. Moreover, a temporary suspension can burden the lawyer's clients who must seek representation elsewhere at the risk of delay and greater expense. Because of the substantial and likely harm that would arise from a temporary suspension that later proves to have been entered improvidently, [the Massachusetts rule] requires that there be a showing of a threat of future harm that in the public interest must be guarded against by a temporary suspension.¹⁸⁴

Nevertheless, at some point, the need to protect the public is so compelling that the power to impose an interim suspension in this context may lie in the inherent authority of the state supreme court, even in the absence of a rule on point.¹⁸⁵

In balancing the need for public protection against the costs suspensions entail, each state must determine the severity of the threat and the certainty of its occurrence necessary to support interim relief. The current ABA model has two points of emphasis: (1) the threat of harm must be "substantial," and (2) the potential harm must be "serious."¹⁸⁶ States vary in how they treat each of these factors.

For example, as to the likelihood of occurrence, Pennsylvania's rule, at least on its face, tightens the "substantial threat" standard by limiting the interim suspension to instances in which the lawyer's

183. See, e.g., *In re Malvin*, 466 A.2d 1220, 1223 (D.C. 1983) (emphasizing "that a temporary suspension is an extreme measure, reserved for exceptional cases, and that the Board must therefore make a strong showing of 'great public harm' as required by the rule. A temporary suspension should not be sought, and will not be granted, in a routine disciplinary case."); *Office of Disciplinary Counsel v. Battistelli*, 457 S.E.2d 652, 659 (W. Va. 1995) (recognizing that temporary suspensions of this kind should only be entered in the most extreme cases of lawyer misconduct).

184. *In re Ellis*, 680 N.E.2d 1154, 1161-62 (Mass. 1997).

185. *W. Va. State Bar Comm. on Legal Ethics v. Ikner*, 438 S.E.2d 613, 617-18 (W. Va. 1994).

186. MRLDE R. 20(A) (premising interim suspensions on a showing that the lawyer "poses a substantial threat of serious harm to the public").

continued practice “*is causing* immediate or substantial public or private harm.”¹⁸⁷ New Mexico tempers this somewhat, requiring a finding that the lawyer’s conduct “*will result* in a *substantial probability* of harm, loss or damage to the public.”¹⁸⁸ Similarly, Oregon provides for interim suspension when disciplinary authorities can show that the lawyer’s continued practice “*will, or is likely to, result* in substantial harm to any person or the public at large.”¹⁸⁹ New York seems to fall somewhere in between. That state’s rule focuses on situations where continued practice by the lawyer is “*immediately threatening* the public interest.”¹⁹⁰

As to the degree of harm that must be threatened, the ABA shifted its stance over time on this issue. At one point, the ABA required a showing that the lawyer “poses a substantial threat of irreparable harm to the public.”¹⁹¹ That standard was criticized for being unduly restrictive, as the “irreparable harm” language suggested the need to meet the standards for the issuance of a preliminary injunction,¹⁹² and was replaced by a need to show only “substantial threat of *serious harm*.”¹⁹³ Nevertheless, some states retain a version of the older model.¹⁹⁴

Another approach some states employ in describing the harm necessary to justify interim suspension, is to identify particular conduct

187. PA. DISCIPL. BD. R. & PROC. § 91.151(a)(1) (emphasis added).

188. N.M. R. GOV’G DISCIPL. 17-207(A)(5) (emphasis added).

189. OR. BAR R. PROC. 3.1(a) (emphasis added).

190. N.Y. CT. R. 603.4(e)(1) (1997) (emphasis added). Wyoming’s rule is similar. WYO. DISCIPL. CODE § 17(a) (interim suspension triggered by a showing of “imminent threat of substantial harm to the public” from continued practice).

191. MRLDE R. 20(A) (1989).

192. MCKAY REPORT, *supra* note 117, at 55 (finding that the “irreparable harm” standard imported requirements for the granting of temporary restraining orders that were inappropriate in the disciplinary context). *But cf.* TEX. R. DISCIPL. PROC. 14.01 (providing for the entrance of an interim suspension through a preliminary injunction).

193. MRLDE R. 20(A) (emphasis added). This is the standard in many states. *See, e.g.*, N.J. CT. R. 1:20-11(a); OHIO GOV. BAR R. V § 5a(A)(1); S.C. APP. CT. R. 502(17)(b); VT. SUP. CT. ADMIN. ORDER NO.9, R.18A; WASH. R. ENF. LAWYER COND. 7.2(a)(1)(A).

194. Some states still employ the “irreparable harm” standard. *See, e.g.*, N.D. R. LAWYER DISCIPL. 3.4(A)(2) (interim suspension authorized where lawyer “poses a substantial threat of irreparable harm to the public”); OKLA. DISCIPL. PROC. R. 6.2A (interim suspension allowed where the lawyer’s conduct “poses an immediate threat of substantial and irreparable public harm”); TEX. R. DISCIPL. PROC. 14.02 (interim suspension authorized for conduct that “poses a substantial threat of irreparable harm”); R. GOV’G UTAH STATE BAR 14-518(a) (interim suspension predicated upon “substantial threat of irreparable harm to the public”); W. VA. R. LAWYER DISCIPL. PROC. 3.27(a) (interim suspension authorized where lawyer poses “substantial threat of irreparable harm to the public”); *In re* Trujillo, 24 P.3d 972, 979 (Utah 2001); *cf. In re* Ellis, 680 N.E.2d 1154, 1160 (Mass. 1997) (noting that although the state’s interim suspension rule “does not announce that principles applicable to the issuance of a preliminary injunction should guide the temporary suspension issues, those principles are instructive”).

that poses a sufficient threat for future misconduct, as well as a catch-all category to capture substantial harms not otherwise listed. This approach gives some additional guidance to lawyers about the consequences of their actions and to disciplinary authorities as to the kinds of matters worthy of special attention. For example, Arkansas permits interim suspensions when the attorney has engaged in misappropriation, abandoned an active law practice, or poses a substantial threat to the public or clients.¹⁹⁵ Pennsylvania's rule focuses on situations where the lawyer "is causing immediate and substantial public or private harm because of the misappropriation of funds . . . or because of other egregious conduct, in manifest violation of the Disciplinary Rules or the Enforcement Rules."¹⁹⁶ Tennessee also specifically mentions misappropriation as one ground for a temporary suspension.¹⁹⁷ In addition, it identifies failure to respond to a disciplinary complaint¹⁹⁸ and failure to substantially comply with a lawyer assistance program contract, along with the catchall for any other conduct that "poses a threat of substantial harm to the public."¹⁹⁹ The Texas rule identifies three conditions that can satisfy its "substantial threat of irreparable harm" standard: (1) conduct that meets all the elements of a "Serious Crime," (2) three or more acts of professional misconduct, or (3) "any other conduct . . . that, if continued, will probably cause harm to clients or prospective clients."²⁰⁰

While most states require a significantly likely threat of a substantial harm, others seem to have more permissive interim suspension provisions. Rhode Island, for example, authorizes its disciplinary counsel to seek an immediate suspension "when it is necessary for the public's protection."²⁰¹ Wisconsin has an even less demanding standard – suspension may be entered where "it appears that the attorney's continued practice of law poses a threat to the interests of the public and the administration of justice."²⁰² Note that neither the likelihood of the occurrence, nor the gravity of the harm is spelled out.

Interrelated to the overall standard is the burden of proof the state

195. ARK. SUP. CT. PROC. REGULATING PROF'L CONDUCT OF ATTORNEYS AT LAW § 17(E)(3)(c)(i)-(iii). This rule also allows for the imposition of interim suspensions "[a]t the moment the Committee decides to initiate disbarment proceedings." *Id.* at § 17(E)(3)(a).

196. PA. DISCIPL. BD. R. & PROC. § 91.151(a)(1).

197. TENN. SUP. CT. R. 9 § 4.3.

198. Others treat this under a separate noncooperation provision. *See supra* Part V.

199. TENN. SUP. CT. R. 9 § 4.3.

200. TEX. R. DISCIPL. PROC. 14.02.

201. R.I. R. SUP. CT. art. III, R. 5(b)(6).

202. WIS. SUP. CT. R. 22.21(1).

must meet to justify an interim suspension. The higher the burden, the less likely it is that interim sanctions for threat of harm will be imposed. Choosing that evidentiary standard again requires a balancing of the need for public protection with the costs associated with imposing interim suspensions. Here again we see variation across the states. Some states require a showing of probable cause.²⁰³ Others employ a preponderance of the evidence standard,²⁰⁴ while others insist upon clear and convincing evidence.²⁰⁵

It is unclear whether these variations across the states make a difference in fact. Perhaps the states really are trying to finely hone the balance between the need for public protection and the significant burden suspensions cause. The language chosen and the burden of proof applied set the mood point for how regular or rare interim suspensions should be. Nevertheless, the reality of when to seek and when to impose interim suspensions may be far more visceral. The case law seldom reflects a close parsing of the language of the standards or the burden of proof involved.

The power to impose interim suspensions for threat of harm, at whatever likelihood of harm and seriousness of harm standards are chosen, is not unbounded. Two limitations attach, although one may be largely semantic.

First, the device is not a blanket authorization to seek out and curtail lawyer misconduct. Rather it is but an interim step available in the context of an ongoing disciplinary investigation or proceeding,²⁰⁶ or

203. ARIZ. SUP. CT. R. 61(a); WYO. DISCIPL. CODE § 17(b). While disciplinary authorities in Wyoming need only show there is probable cause to believe the lawyer poses a sufficient threat, the lawyer when seeking to dissolve the interim suspension must show by clear and convincing evidence that she no longer poses such a threat. WYO. DISCIPL. CODE § 17(d).

204. TEX. R. DISCIPL. PROC. 14.02; *cf. In re Ellis*, 680 N.E.2d 1154, 1157 (Mass. 1997) (requiring for an interim suspension a preponderance of the evidence standard showing of a violation of a disciplinary rule and that “on a balance of the harms and consideration of the public interest, the lawyer poses a threat of substantial harm to present or future clients or in other respects”).

205. R. GOV’G UTAH STATE BAR 14-517(b) (providing that unlike most disciplinary matters in Utah in which violations must be established by a preponderance of the evidence, motions for interim suspension must be established by clear and convincing evidence); *In re Trujillo*, 24 P.3d 972, 979 (Utah 2001) (applying the Utah rule then in force); David, *supra* note 149, at 356-57 (arguing for a clear and convincing evidence standard given the severe nature of the sanction and a desire to minimize erroneous determinations of fault). *But see In re Ellis*, 680 N.E.2d at 1157 (rejecting the clear and convincing evidence requirement).

206. *See* MRLDE R. 20 (allowing interim suspension predicated upon sufficient evidence that the lawyer has violated a disciplinary rule and poses a substantial threat to the public “pending final disposition of a disciplinary proceeding predicated upon the conduct causing the harm”); *accord* IOWA CT. R. 35.4; MO. SUP. CT. R. 5.24; N.J. CT. R. 1:20-11; N.D. R. LAWYER DISCIPL. 3.4(A)(1); OHIO GOV. BAR R. V § 5a(A)(1); R. GOV’G UTAH STATE BAR 14-518; W. VA. R. LAWYER DISCIPL.

other event.²⁰⁷ It is because of this that the interim suspension typically ceases when the full disciplinary proceeding is concluded²⁰⁸ and the time served may be credited toward any final suspension imposed.²⁰⁹

The second limitation is the object of the threat. While it may be largely semantic, state rules vary as to who or what must be threatened with the requisite harm to warrant an interim suspension. Concerns are variously expressed for threat of harm to prospective clients,²¹⁰ clients,²¹¹ an attorney,²¹² any person,²¹³ the public,²¹⁴ the public

PROC. 3.27; *In re Ellis*, 680 N.E.2d 1154, 1157 (Mass. 1997); see also N.Y. Ct. R. 603.4(e)(1) (allowing interim suspension for public harm with respect to “an attorney who is the subject of an investigation, or of charges by the Departmental Disciplinary Committee of professional misconduct, or who is the subject of a disciplinary proceeding pending in this court against whom a petition has been filed pursuant to this section, or upon whom a notice has been served pursuant to section 603.3(b) of this Part”).

207. While most states tie interim suspensions to disciplinary investigations or proceedings, some are more expansive. New Mexico, for example, requires that the lawyer be under investigation by disciplinary counsel “for an alleged violation of the Rules of Professional Conduct or a violation of a court rule, statute or other law,” have filed against him “formal disciplinary charges,” or a “criminal complaint, information or indictment”). N.M. R. GOV’G BAR DISCIPL. 17-207(A)(5); see also CONN. PRACTICE BOOK § 2-42 (providing that either a pending disciplinary proceeding or an overdraft notification suffices as the context in which an interim suspension may be sought).

208. *In re Trujillo*, 24 P.3d 972, 973 n.1 (Utah 2001) (noting that interim suspension is a temporary suspension “pending a final determination of whether permanent discipline is necessary”); see, e.g., IOWA CT. R. 35.4(2) (providing that court may enter order immediately suspending attorney pending final disposition of a disciplinary proceeding predicated upon the conduct posing a substantial threat of serious harm to the public); N.D. ST. CT. R. 3.4(B) (attorney may be suspended “pending final disposition of the proceeding predicated upon the conduct causing the harm”); S.C. APP. CT. R. 413 § 17(b) (“Upon receipt of sufficient evidence demonstrating that a lawyer poses a substantial threat of serious harm to the public or to the administration of justice, the Supreme Court may suspend the lawyer . . . pending a final determination in any proceeding under these rules.”); R. GOV’G UTAH ST. B. R. 14-518(b) (“the district court may enter an order immediately suspending the respondent pending final disposition of a disciplinary proceeding predicated upon the conduct causing the harm”).

209. See, e.g., *In re Pittman*, 76 So. 3d 425, 432 n.3 (La. 2011) (noting that the court has “historically chosen to exercise [its] discretion to make suspensions run retroactive to the date of prior interim suspensions” and applying that practice here); *In re Durante*, 926 N.Y.S.2d 642, 646 (N.Y. App. Div. 2011) (giving credit for time served on interim suspension toward full disciplinary suspension in a case involving multiple violations in handling client funds); *In re Edin*, 697 N.W.2d 727, 731 (N.D. 2005) (concluding that term of suspension for underlying misconduct should begin date interim suspension ordered); *In re Bentley*, 714 S.E.2d 279, 279 (S.C. 2011) (ordering that definite suspension of two years for misconduct be treated as retroactive to the date of respondent’s interim suspension).

210. TEX. R. DISCIPL. PROC. 2.14(B).

211. MRLDE R. 20 cmt.; N.J. CT. R. 1:20-11(a); TEXAS R. DISCIPL. PROC. 2.14(B).

212. N.J. CT. R. 1:20-11(a).

213. OR. BAR R. 3.1(a).

214. MRLDE R. 20 cmt.; ARIZ. SUP. CT. R. 61(a); N.J. CT. R. 1:20-11(a); OHIO GOV. BAR R. V § 5a(A)(1); OR. BAR R. 3.1(a); TENN. SUP. CT. R. 9 § 4.3; WASH. R. ENF. LAWYER COND.

interest,²¹⁵ the legal profession,²¹⁶ or the administration of justice.²¹⁷ States often string several of these together.²¹⁸

While the choice may signify a difference in the scope of the interim suspension rule,²¹⁹ the larger the group included, the greater the instances in which interim suspensions are warranted, that is not readily apparent from a review of the case law. One exception to that general statement is *In re Reiner's Case*.²²⁰ In that case, the Supreme Court of New Hampshire construed a New Hampshire rule that allows for the imposition of interim suspensions pending the resolution of criminal charges when “it is both necessary for the protection of the public and for the preservation of the integrity of the legal profession.”²²¹ Insisting that both prongs must be met, the court denied an interim suspension of a lawyer indicted for promoting prostitution and money laundering.²²² The court agreed that an interim suspension might be necessary to preserve the integrity of the profession, but determined that it was not needed to protect the public given that the alleged criminal actions did not involve misconduct directed toward clients.²²³

Regardless of the exact standard employed, the statutes and case law provide guidance on the types of misconduct that have been found to warrant interim suspension.²²⁴ Some forms of conduct, in and of themselves, seem particularly likely to be repeated and hence often raise a substantial risk of public harm.²²⁵ High among them is misappropriation²²⁶ or admitted failure to pay money owed to a client,²²⁷

7.2(a)(1)(A); W. VA. R. LAWYER DISCIPL. PROC. 3.27(a).

215. N.Y. CT. R. § 603.4(e)(1).

216. ARIZ. SUP. CT. R. 61(a).

217. MRLDE R. 20 cmt.; ARIZ. SUP. CT. R. 61(a); S.C. APP. CT. R. 502(17)(b).

218. See generally *supra* notes 210-17 and the rules cited therein in multiple footnotes.

219. For example, the comment to Rule 20 of the MRLDE indicates that interim suspensions are appropriate for misconduct that “poses such an immediate threat to the public and the administration of justice that the lawyer should be suspended immediately,” but is “also appropriate when the lawyer’s continuing conduct is causing or is likely to cause serious injury to a client or the public” MRLDE R. 20 cmt. It is unclear what conduct falls in one category, but not the other.

220. *In re Reiner's Case*, 883 A.2d 315 (N.H. 2005).

221. *Id.* at 318 (citing N.H. SUP. CT. R. 37(16)(f)).

222. *Id.* at 319.

223. *Id.*

224. Some states treat conviction of a serious crime under the threat of public harm provision. Others treat it as a separate category. I have chosen to treat it as a separate category. See *supra* text accompanying notes 134-44.

225. Even here, however, a pattern of misconduct is more likely to be pursued than an isolated incident, as the latter may not suggest a future threat.

226. MRLDE R. 20 cmt. (conversion of trust funds warrants interim suspension); accord ARK. SUP. CT. PROC. REGULATING PROF'L CONDUCT OF ATT'Y AT LAW § 17(E)(3)(c)(i); PA. DISCIPL. BD. R. & PROC. § 91.151(a)(1); TENN. SUP. CT. R. 9 § 4.3; see, e.g., *In re Schachter*, 952 N.Y.S.2d

such as failure to pay fee arbitration awards.²²⁸ Disappearance and/or abandonment of law practice also pose an obvious threat.²²⁹

Capacity issues also deserve a close look. Most states have provisions to suspend, or transfer to inactive status, a lawyer suffering from a disability that significantly impairs the lawyer's capacity to practice.²³⁰ Even with these provisions in place, however, swifter action may be necessary if the lawyer's continued practice poses a substantial and immediate threat to the public. Where this is the case, an interim suspension may be warranted.²³¹

Arrest or indictment for criminal conduct also is a common trigger for interim suspensions. In some states, a separate rule governs this situation.²³² In others, the conduct underlying the arrest or indictment may trigger a public harm suspension.²³³ The suspension is not

168, 169 (N.Y. App. Div. 2012); *In re Reis*, 942 N.Y.S.2d 101, 103 (N.Y. App. Div. 2012); *In re Myers*, No. 59866, 2012 WL 652756 (Nev. Feb. 24, 2012). At least in New York such conduct appears to automatically constitute an immediate threat to the public. *See, e.g., In re Riley*, 957 N.Y.S.2d 290 (N.Y. App. Div. 2012) (imposing public harm suspension despite argument there was no threat of public harm where only a single act of misappropriation, which was repaid by the attorney, was involved); *cf. In re Gibson*, 960 N.Y.S.2d 368 (N.Y. App. Div. 2013) (rejecting claim of no immediate threat of public harm despite argument that the misappropriations had been repaid, no client complaints had been made, and the misconduct was two-years old and had not recurred). Other states differ. *See, e.g., Statewide Grievance Comm. Reviewing Comm. v. Hillman*, 2000 Conn. Super. LEXIS 2541 (Conn. Super. Ct. Sept. 18, 2000) (denying interim public harm suspension where respondent admitted to three instances of misconduct involving the same client, including two involving misappropriation); *cf. Iowa Sup. Ct. Att'y Discipl. Bd. v. Powell*, 830 N.W.2d 355, 356 (Iowa 2013) (terminating interim suspension for trust account errors upon a showing that the errors were the result of "sloppy procedures and oversight," substantial measures had been adopted to avoid these problems, and the trust account shortage had been rectified).

227. The New York rule specifically identifies this conduct as immediately threatening the public interest thus warranting an interim suspension. N.Y. CT. R. 603.4(e)(iv); *see In re Bloodsaw*, 926 N.Y.S.2d 490, 491 (N.Y. App. Div. 2011) (applying this standard).

228. 2010 NEW JERSEY STATE OF THE ATTORNEY DISCIPLINE SYSTEM REPORT 17 (noting that 21 percent of the cases warranting "emergent discipline" (interim suspension or conditions) involved non-payment of fee arbitration awards).

229. MRLDE R. 20 cmt. (abandonment of practice warrants interim suspension); *accord* ARK. SUP. CT. PROC. REGULATING PROF'L CONDUCT OF ATTORNEYS AT LAW § 17(E)(3)(c)(ii); W. Va. State Bar Comm. on Legal Ethics v. Ikner, 438 S.E.2d 613 (W. Va. 1994).

230. *See, e.g., MRLDE R. 23* (providing for transfer to inactive disability status in these circumstances).

231. *See, e.g., MRLDE R. 20(A); OKLA. R. GOV'G DISCIPL. PROC. 6.2(A); R. GOV'G UTAH STATE BAR 14-518(a); VT. R. SUP. CT. ADMIN. ORDER NO. 9, R. 18A; W. VA. R. LAWYER DISCIPL. PROC. 3.27(a)*. In Washington, if a hearing to determine whether a transfer to inactive disability status has been ordered, disciplinary authorities "must petition the Supreme Court" for an interim suspension. WASH. R. ENF. LAWYER COND. 8.2(d).

232. *See supra* text accompanying notes 146.

233. *See, e.g., Disciplinary Counsel v. Hanson*, No. CV054017144, 2006 WL 2349162 (Conn. Super. Ct. July 28, 2006); *In re Shepherd*, 990 So. 2d 734, 735 (La. 2008) (Johnson, J., dissenting) (noting two cases, *In re Dillon*, 918 So. 2d 466 (La. 2006), and *In re Hammond*, 917 So. 2d 433

automatic, however; the requisite threat of harm to the public must be shown.²³⁴

In other instances, it is the repeated nature of the misconduct or the extent of the misconduct in question that justifies the interim suspension.²³⁵ For example, in one case, substantial misconduct in the litigation process, such as violating confidentiality orders and suggesting that a subordinate alter documents to create claims of work product, was so extensive as to warrant interim suspension.²³⁶ Another court found wide-spread unauthorized practice of law in a nationwide debt collection practice sufficiently repeated and substantial to justify an interim

(La. 2005) — both involving sexual misconduct — where each attorney received an interim suspension following an indictment because of the threat of public harm in continuing to allow the attorney to practice); *In re Ellis*, 680 N.E.2d 1154 (Mass. 1997); *Burleigh v. State Bar of Nev.*, 643 P.2d 1201 (Nev. 1982); ; *In re Wolff*, 767 N.W.2d 170, 170–71 (N.D. 2009).

234. See, e.g., *Hanson*, No. CV054017144, 2006 WL 2349162, at *4 (“The problem with creating a per se rule that an arrest and pending charges against a criminal defense lawyer should result in an automatic interim suspension is that it simply sweeps too broadly and ignores the risk faced by lawyers of unfounded arrests and charges by disgruntled and/or vindictive clients or opponents, notwithstanding the probable cause requirement for an arrest. That is why a case by case rather than a per se rule makes sense.”); cf. *In re Clark*, 25 So. 3d 728, 730 (La. 2009) (lawyer “arrested and charged with possession with intent to distribute marijuana, distribution of marijuana, possession of cocaine, and possession of drug paraphernalia,” although all in small amounts, was placed on interim suspension for his threat of harm; based on subsequent evaluation of his ability to handle the practice, interim suspension was dissolved).

235. See, e.g., MRLDE R. 20 cmt. (noting that a pattern of misconduct may warrant interim suspension); TEX. R. DISCIPL. PROC. 14.02 (providing that a lawyer who has committed three or more acts of professional misconduct conclusively establishes that the attorney poses a substantial threat of irreparable harm warranting interim suspension); see also *In re Cyrus*, 241 P.3d 890 (Alaska 2010) (repeated failure to communicate with clients and attend court hearings prompting numerous complaints from judges before whom he was appearing, coupled with failure to respond to the disciplinary charges, warranted interim suspension on harm to the public grounds); *In re Saghir*, 632 F. Supp. 2d 328 (S.D.N.Y. 2009) (receipt of additional complaints while interim suspension proceeding was pending helped reinforce concern of danger to others); *In re Romano*, 660 N.Y.S.2d 426 (N.Y. App. Div. 1997) (repeatedly giving female clients inappropriate intimate physical examinations in cases where they alleged physical injury warranted interim suspension); *Office of Lawyer Disciplinary Counsel v. Nichols*, 570 S.E.2d 577 (W. Va. 2002) (finding that multiple allegations that lawyer agreed to file lawsuits for clients, failed to do so, and then lied to clients that the suits had been filed warranted interim suspension); *Office of Disciplinary Counsel v. Battistelli*, 457 S.E.2d 652, 660 (W. Va. 1995) (finding pattern of deceitful conduct and repeated negotiation of inappropriate loans from clients in violation of Rule 1.8(a) justified interim suspension); *In re Woodruff*, 2013 MP 1, 16 (N. Mar. I. Feb. 1, 2013) (premising interim suspension on the fact that eleven complaints had been filed against Woodruff “ranging from lying about filing a criminal appeal to having several cases dismissed with prejudice due to lack of diligence . . . suggest[ing] that Woodruff routinely fails to follow through regarding cases he takes” and “declin[ing] to risk a similar fate for current and future clients”).

236. *In re Peters*, 543 F. Supp. 2d 326 (S.D.N.Y. 2008) (relying on 109-page district court sanction order imposing more than 24 separate reprimands or sanctions to justify interim suspension), *final suspension order rev'd and remanded*, 642 F.3d 381 (2d Cir. 2011).

suspension.²³⁷

Special concern also arises when particularly vulnerable clients have been harmed by the lawyer.²³⁸ Both the predatory aspect of the conduct and fear for other vulnerable clients seem to drive interim suspensions here.

It is important to note that interim suspension is warranted regardless of whether the lawyer appreciates the wrongfulness of his actions.²³⁹ The focus is on protecting the public from harm, not the motivation of the lawyer in engaging in the conduct.²⁴⁰ In fact, failure to appreciate the wrongfulness of the conduct may suggest that the misconduct is likely to be repeated absent an interim suspension.²⁴¹

At first look, there appear to be substantial reasons to allow for interim suspensions to protect against public harm, but that does not end the inquiry. An interim suspension regime, in this context, is more justified if disciplinary counsel and the courts are given sufficient discretion in determining whether to seek interim suspensions and sufficient latitude to consider other remedies to protect the public from harm.

The first question is how much discretion should be accorded to disciplinary authorities in deciding whether to seek interim suspension and the adjudicatory body in whether to impose it. Some statutes appear

237. *In re Boyajian*, No. 06-TE-15159 (Cal. State Bar Ct. Review Dep't Apr. 15, 2008), available at <http://members.calbar.ca.gov/courtDocs/06-TE-15159.pdf> (finding that lawyer's use of California law license and California law firms as leverage in conducting nationwide debt-collection activities probably constituted unauthorized practice, thereby warranting interim suspension pending completion of the disciplinary process).

238. *See, e.g., In re Saghir*, 632 F. Supp. 2d 328 (S.D.N.Y. 2009) (imposing interim suspension on lawyer who used a runner to obtain clients in prison whose cases she then neglected and with whom she failed to communicate, in part because "Respondent's misconduct is aimed at particularly vulnerable clients in the form of inmates who are not sophisticated about the legal system, and who may maintain unrealistic hopes about post-conviction relief").

239. *In re Romano*, 660 N.Y.S.2d 426 (N.Y. App. Div. 1997) (finding that continued practice of performing improper physical examinations of female clients after already having been temporarily suspended for the practice, and having testified that he had given up that practice, warranted an additional temporary suspension; noting that "even if respondent's motives were entirely sincere, his admitted inability to comprehend the problem with his actions establishes that he poses an immediate threat to the public interest"); *Office of Disciplinary Counsel v. Battistelli*, 457 S.E.2d 652, 661 (W. Va. 1995) (noting, in imposing interim suspension, that lawyer refused to recognize the wrongfulness of engaging in unfair loan transactions with his clients and continued to do so even after being warned by disciplinary counsel that his conduct violated Rule 1.8(a)).

240. At least one court has held that the intent of the lawyer to violate the disciplinary rules is not necessary to be shown, unless that is an element of the underlying offense. *In re Trujillo*, 24 P.3d 972 (Utah 2001).

241. *In re Peters*, 543 F. Supp. 2d at 329 (predicating interim suspension on extensive litigation misconduct and "the danger of recurrence demonstrated by respondent's lack of appreciation of the wrongfulness of her misconduct").

to limit the discretion of disciplinary counsel in determining whether to seek interim suspension.²⁴² At least one judge has excoriated the bar for working out other accommodations, rather than following the interim suspension rule, where the provision for interim suspension for conviction of a crime was involved.²⁴³ The concern was that such acts deprived the court of its rightful authority to determine the suspension issue.²⁴⁴ To my mind, this criticism goes too far, at least if it applies to public harm suspensions. Given the limited resources available to disciplinary counsel, pursuing possible interim suspension for public harm must be balanced against other resource needs. Proving misconduct twice, first for an interim suspension and then for a final disposition, may not be warranted if the need for a suspension is not clear cut. One's stance on this issue may explain some of the divergence across the states in terms of how often interim suspensions for public harm are imposed.²⁴⁵

To the extent the decision to seek an interim suspension is discretionary,²⁴⁶ disciplinary counsel weigh many factors in deciding whether or not to pursue an interim suspension. Certainly an appraisal of the true likelihood of future public harm is at the top, but disciplinary counsel also may consider seeking an interim suspension for the indirect leverage it provides. For example, it may spur cooperation. Disciplinary counsel may make it known that cooperation in the investigation of the underlying grievance and voluntary acceptance of certain conditions on practice, such as agreeing to be supervised by a

242. MRLDE R. 20(A) (providing that upon receipt of sufficient evidence to meet the interim suspension standard, disciplinary counsel "shall" file for an interim suspension); *accord* CONN. PRACTICE BOOK § 2-42; R. GOV'G UTAH STATE BAR 14-518(a); W. VA. R. LAWYER DISCIPL. PROC. 3.27(a); *see also* Donald R. Lundberg, *Two Case Studies in the Exercise of Discretion in Lawyer Discipline Systems*, 2009 J. PROF. LAW. 107, 117 (noting that under the MRLDE the disciplinary counsel "is seemingly required . . . to seek emergency interim suspension" when the applicable standard is met, whereas in some states this is a discretionary call).

243. *State ex rel. Okla. Bar Ass'n v. Conrady*, 275 P.3d 133, 140 (Okla. 2012) (Kauger, J., concurring).

244. *Id.* at 143.

245. In 2010, 541 suspensions for risk of harm or criminal conviction were imposed nationwide, with an average of eleven and a mean of four. AM. BAR ASS'N, 2010 SURVEY ON LAWYER DISCIPLINARY SYSTEMS, chart II, clm. 10d., http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart22010sold.authcheckdam.pdf (Lawyers Interimly Suspended (for Risk of Harm or Criminal Conviction)) (The full report is available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2010_sold_finalreport.authcheckdam.pdf). California led the jurisdictions with 161. *Id.* Next highest was the District of Columbia with 58. *Id.* Thirty-three states had fewer than ten, with eight reporting zero. *Id.* The following reported "n/a.": Georgia, New Mexico, and Virginia. *Id.*

246. *See supra* text accompanying notes 242-45.

monitor, might get disciplinary counsel to forgo pushing for a public harm suspension on the theory that such cooperation lessens the likelihood of the lawyer engaging in further misconduct during the investigation and hence reduces the risk of harm to the public.²⁴⁷ For others, the threat of an interim suspension may lessen the desire of the lawyer to prolong the disciplinary process in order to continue to practice law for as long as possible. The potential swift entrance of an interim suspension may spur resignations or acquiescence in disbarment where the lawyer's misconduct is serious and clear.²⁴⁸

As for the court considering imposing an interim suspension for public harm, discretion is likely to lie.²⁴⁹ The court has the ultimate authority to regulate the bar²⁵⁰ and needs some freedom in doing so, consistent with an even-handed approach to the application of the standards. This is reinforced by the idea that the court may decide, in a particular case, to pursue alternative measures to limit harm, rather than use interim suspension as the sole vehicle for doing so.²⁵¹

In exercising this discretion, the courts have to balance the harms that accrue from imposing interim suspensions with the public interest in preventing future harm.²⁵² While most opinions do not unpack the factors considered in this weighing, a few do. The Utah Supreme Court's opinion, in *In re Trujillo*, provides as example. The court

247. Alternatively, it may frighten some respondents into obtaining counsel in the disciplinary matter who may, in turn, help restrain the lawyer from causing additional harm.

248. *Tips for Bar Counsel*, 10 LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 11, at D15 (Current Reports, June 29, 1994) (reporting the comments of an Illinois disciplinary official noting this fact and that it is less expensive than going through a full disciplinary proceeding).

Even if the lawyer is unwilling to give up her license, the threat of interim suspension may lead to increased consents to discipline. In this regard, interim suspensions may be seen as analogous to pre-trial detention; the individual is subject to restraint (loss of a right to practice; loss of freedom) pending a final resolution of the underlying violation alleged. It has been widely recognized, in the criminal law context, that this gives substantial leverage for prosecutors to secure plea bargains in exchange for release from restraint. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2493 n.116 (2004). The same may be true in the interim suspension context. A lawyer may be more likely to enter into a consent to discipline arrangement to dissipate the effect of the interim suspension, particularly if no credit will be given the time under interim suspension when imposing a final disciplinary sanction. Agreeing to discipline now may lessen the total time a suspension will be in place.

249. See, e.g., CONN. PRACTICE BOOK § 2-42 (court "may" order interim suspension if it finds lawyer poses substantial threat of irreparable harm); WIS. SUP. CT. R. 22.21(1) (court "may" suspend where it "appears" lawyer may pose a threat to the public or the administration of justice).

250. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c (2000) (noting that in most states the courts have the inherent power to regulate lawyers and that in many states that power is exclusive).

251. See *infra* text accompanying notes 259-64.

252. *In re Ellis*, 680 N.E.2d 1154, 1161 (Mass. 1997).

articulated the following factors to consider in the weighing:

(1) whether the public will suffer irreparable harm unless the order of interim suspension issues, (2) whether the threatened injury to the public outweighs whatever damage the proposed order may cause the attorney temporarily suspended from the practice of law,²⁵³ (3) whether the proposed order, if issued, would be adverse to the public interest, and (4) whether there is a substantial likelihood, based on all the available evidence, that a significant sanction will be imposed on the attorney at the conclusion of any pending disciplinary proceedings.²⁵⁴

When weighing these factors, the costs interim suspensions pose must be kept in mind. As stated before, a suspension requires the lawyer

253. Applying this factor, where the lawyer has alternative means of financial support, the weight given the lawyer's interest will lessen. *See, e.g., In re Boyajian*, No. 06-TE-15159, ¶ 106 (Cal. State Bar Ct. Review Dep't Apr. 15, 2008), *available at* <http://members.calbar.ca.gov/courtDocs/06-TE-15159.pdf>. The potential length of the interim period of suspension before a final determination is reached might also be considered. Some states require that if an interim suspension is entered, the state must prosecute the underlying grievance in a timely or expedited manner. *See, e.g., OR. BAR R. PROC. 3.1(h)(i)* (requiring accelerated proceedings following temporary suspension); *WIS. SUP. CT. R. 22.21(3)*, (4) (setting expedited time limits for filing a disciplinary complaint and the referee's report on it where lawyer is under temporary suspension for threat of harm); *see also In re Ellis*, 680 N.E.2d at 1160 (noting that formal disciplinary hearings "must be instituted within a reasonable time" after temporary suspension entered); *Office of Disciplinary Counsel v. Battistelli*, 457 S.E.2d 652, 659 (W. Va. 1995) (requiring disciplinary counsel to expedite the resolution of the charges against the lawyer and move to conclude the matter within 90 days after the interim suspension becomes effective); *In re Woodruff*, 2013 MP 1, 18 (N. Mar. I. Feb. 1, 2013) (requiring expedited resolution of disciplinary action since interim suspension entered). If the respondent fails to cooperate or interferes with the formal proceeding, however, the amount of time that will be deemed "reasonable" may increase. *Cf. In re Abrams*, 767 N.E.2d 15, 19–20 (Mass. 2002) (finding six-month delay in the institution of proceedings reasonable given respondents failure to turn over relevant documents or to follow the requirements of the interim suspension order). Other states place a burden on the respondent to request expedited treatment. *See, e.g., OKLA. STATE DISCIPL. PROC. R. 6.2A (4); PA. DISCIPL. BD. R. & PROC. § 91.151(f)(1)*.

254. *In re Trujillo*, 24 P.3d 972, 979 (Utah 2001); *cf. Order of Temporary Suspension and Referral to Disciplinary Board at 38, In re Whittemore*, No. 64154 (Nev. Oct. 8, 2013) (order denying petition for reinstatement) (majority and dissent applying Trujillo factors in considering petition for reinstatement from an interim felony suspension, but disagreeing on how the factors should be applied). The District of Columbia Court of Appeals articulated a similar standard in *In re Malvin*, taking into account:

(1) whether the attorney is causing irreparable public harm by misappropriating client funds to his own use, or by other means, (2) whether there is a substantial likelihood, based on all the available evidence, including affidavits, that a significant sanction will be imposed on the attorney at the conclusion of any pending disciplinary proceedings, (3) whether the balance of injuries, as between attorney and clients, favors a temporary suspension, and (4) whether the public interest would be served by a temporary suspension."

In re Malvin, 466 A.2d 1220, 1223 (D.C. 1983); *accord In re Woodruff*, 2013 MP 1, 16 (N. Mar. I. Feb. 1, 2013) (articulating a similar standard citing, inter alia, *Trujillo* and *Malvin*).

to cease practice. This not only threatens a lawyer's livelihood, but imposes costs upon the lawyer's clients to find new counsel, and on courts and other parties who must suffer the delay this shift in counsel entails. Indirect consequences are imposed upon the lawyer, as well, to the extent the interim suspension triggers reciprocal suspensions in other jurisdictions,²⁵⁵ is treated as a prior disciplinary offense in a subsequent disciplinary proceeding,²⁵⁶ or has a negative effect on the lawyer's malpractice insurance.²⁵⁷ There are also consequences on a personal level. The suspension stigmatizes the lawyer, affecting reputation and relationships, as well as the well-being of the lawyer's family members who have to cope with the situation.

Those factors must be balanced against the court's appraisal of the degree to which an interim suspension is necessary to protect the public. In addition, the court also may consider whether imposition of an interim suspension is necessary to send a message to the public and the profession that certain misconduct will have immediate negative consequences for those who commit it.²⁵⁸

The availability of alternatives that may adequately protect the public while minimizing the social costs that flow from entrance of an interim suspension also should be considered.²⁵⁹ Given the

255. See, e.g., HAW. R. SUP. CT. 2.15(a)(4) (applying reciprocal discipline to interim suspensions); *In re Nalick*, 50 So. 3d 149 (La. 2010) (imposing reciprocal discipline for a public harm based interim suspension); *In re Pesante*, 930 N.Y.S.2d 917 (N.Y. App. Div. 2011) (same).

256. Even if a jurisdiction decides to treat a public harm interim suspension as a prior disciplinary offense, an aggravating factor, in subsequent disciplinary cases, such suspensions should not be treated as a prior disciplinary offense when deciding the ultimate sanction in the very proceeding in which it was entered. See, e.g., *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Powell*, 830 N.W.2d 355, 359 (Iowa 2013) (noting that "prior discipline is not an aggravating factor when it is intertwined in the current case. . . . Moreover, an interim suspension for conduct involved in a case can be considered as a mitigating factor in determining the length and adequacy of a suspension as a sanction in the case."). But see *In re R.A.H.*, 684 S.E.2d 631, 632 (Ga. 2009) (treating as prior discipline an interim suspension entered in the case being considered).

257. In Texas, for example, if after an interim suspension the respondent is found not to have committed any professional misconduct, the interim suspension "may not be deemed a sanction for purposes of insurance applications or any other purpose." TEX. R. DISCIPL. PROC. 14.01. The implication is that if professional misconduct is ultimately found, the interim suspension could be deemed a sanction for insurance purposes.

258. The ability to send such a message turns, in part, on how much detail is provided in the court decision and order imposing the suspension. In many states that amounts to little more than a pro forma statement that the standard for interim suspension has been met and it is therefore so ordered. See, e.g., *Fla. Bar v. Rohe*, 86 So. 3d 1115 (Fla. 2012), as modified (Apr. 2, 2012); *In re Gilmore, Jr.*, 88 So. 3d 441 (La. 2012); *In re Iler*, 210 N.J. 121 (2012); *Cleveland Metro. Bar Ass'n Certified Grievance Comm. v. Lemieux*, 958 N.E.2d 962 (Ohio 2011); *In re Newton*, 722 S.E.2d 800 (S.C. 2012); *Bd. of Prof'l Responsibility, Wyo. State Bar v. Shreve*, 269 P.3d 431 (Wyo. 2012).

259. See, e.g., *Statewide Grievance Comm. v. Macneill*, No. CV 980585852, 1999 Conn. Super. LEXIS 1219, at *8-9 (Conn. Super. Ct. May 11, 1999) (finding that respondent did pose "a

consequences of interim suspensions, courts often are provided the option of employing other sanctions to protect the public.²⁶⁰ If the misconduct being investigated involves mismanagement of a trust account, for example, a financial monitor might be ordered in lieu of the temporary suspension.²⁶¹ If the lawyer's misconduct stems from poor law office management, a trustee might be appointed to oversee the office.²⁶² If concerns flow from substance abuse issues, deferral to the state's lawyers assistance program and a monitored course of treatment might be sufficient.²⁶³

In considering these options, two principal considerations lie. The first is attempting to accurately assess whether the alternative control is likely to be successful. This will turn on such factors as the severity of the alleged disciplinary violation, the attitude shown by the respondent during the investigation and related proceedings, and the success rate of

substantial threat of irreparable harm to his clients or to prospective clients," but that "less draconian measures" were called for since an interim suspension "would severely and indeterminately punish him before a full hearing is had on the merits"). That said, since this is an exercise of discretion, there is no requirement to impose the "least restrictive sanction available." *See, e.g., In re Abrams*, 767 N.E.2d 15, 20 (Mass. 2002) (rejecting that as a limitation in upholding the imposition of an interim suspension as an exercise of discretion).

260. MRLDE R. 20(B) (providing that the court may impose an interim suspension or "order such other action as it deems appropriate"); *accord* MASS. PRACTICE BOOK § 2-42(b); N.J. CT. R. 1:20-11(c); OHIO GOV. BAR R. V § 5a(B); W. VA. R. LAWYER DISCIPL. PROC. 3.27(c). South Dakota provides a non-exclusive list of optional restrictions or conditions that include: "requiring the attorney to provide proof of professional negligence insurance or the posting of a fidelity bond." S.D. CODIFIED LAWS § 16-19-35.1 (2011). I have found only sporadic figures on how often these alternatives are implemented. *See, e.g., 2010 NEW JERSEY STATE OF THE ATTORNEY DISCIPLINE SYSTEM REPORT 17* (noting that license restrictions in lieu of interim suspension were employed in a few cases most years).

261. *See, e.g., TENN. SUP. CT. R. 9 § 4.3* (recognizing temporary probation as an alternative to temporary suspension, and that restrictions of trust account access may be part of a temporary probation); 2010 NEW JERSEY STATE OF THE ATTORNEY DISCIPLINE SYSTEM REPORT 16 (noting the option to impose conditions rather than ordering an interim suspension and that that might include "oversight by a proctor of the attorney and/or the trust account"); *Actions from the Board of Professional Responsibility*, TENN. B. J., Dec. 2000, at 9 (describing a Tennessee case in which a temporary suspension was dissolved subject to conditions, including the appointment of a financial monitor to review and report to disciplinary authorities on a monthly basis).

262. *Cf. Macneill*, No. CV 980585852, 1999 Conn. Super. LEXIS 1219, at *9 (denying request for interim suspension and imposing other requirements including the filing of quarterly reports of the lawyer's caseload status and working under the supervision of a court-appointed monitor); *In re Hirschfeld*, 960 P.2d 640, 641-42 (Ariz. 1998) (faced with the situation in which a lawyer, subject to sizeable monetary sanction for misconduct in a domestic relations proceeding, subsequently failed to appear at various show cause hearings and fled the jurisdiction leaving some clients unrepresented, the Arizona Supreme Court denied interim suspension but placed the lawyer on probation under the supervision of a practice monitor pending the bar's final determination of the charges; probation subsequently lifted and an interim suspension imposed).

263. *In re O'Brien*, No. 59215, 2012 WL 988056 (Nev. Mar. 21, 2012) (ordering counseling, in lieu of an interim suspension, of lawyer who self-reported two DUI convictions).

the option when used in the past.

The second is a resource consideration.²⁶⁴ Are there lawyers in the jurisdiction willing to play the monitor function? Are they trained to do so? Will they have the time to provide the oversight needed? If there are not, should the court create a cadre of officials within the disciplinary process who are trained in these roles?

VII. CONCLUSION

In this article, I have attempted to describe and analyze the world of administrative and interim suspensions. That overview reveals that suspensions are used in a variety of settings, with different justifications and somewhat different consequences depending on the context involved. Given the substantial costs such suspensions impose, I argue for tempering those consequences in certain settings, such as pure administrative suspensions, and for employing less disruptive sanctions wherever possible.

What remains, and is the next step for this project, is to explore how the authorities make decisions about when to use these devices where they have discretion as to how to proceed. Take, for example, public harm suspensions. Is the low frequency of interim suspension for public harm a product of their being few cases where the public is at risk, or a conscious decision to forgo this remedy? If disciplinary authorities are reluctant to seek interim suspensions, even though there is a sufficient threat of public harm, what are the reasons behind that choice? Are there structural improvements one could make in the mechanics of seeking interim suspensions, the consequences of them, or the range of alternatives that might alter current choices? These and other questions await further exploration.

264. The resource issue seems substantial on first blush, but may well be overstated. If an interim suspension is ordered, a court may appoint another to handle the practice of the suspended lawyer for a period of time. *See, e.g., In re Jones*, 739 S.E.2d 218 (S.C. 2013) (appointing lawyer to assume duties with respect to intermily suspended lawyer's practice, applying S.C. APP. CT. R. 413(31)). Appointing some sort of practice monitor, in lieu of an interim suspension, might actually place fewer burdens on the system and the appointed lawyer.