SOUTH CAROLINA

Report on the Lawyer Regulation System

September 2008

Sponsored by the
American Bar Association
Standing Committee on
Professional Discipline

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SOUTH CAROLINA LAWYER DISCIPLINE SYSTEM
CONSULTATION TEAM

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I. INTRODUCTION

A. Regulation of the Legal Profession by the Judicial Branch of Government

Admission to the practice law is a judicial function. Since the thirteenth century, lawyers have been held accountable for their professional conduct by the judges before whom they practiced.[1] By the late 1800's the courts were claiming their inherent and exclusive power to regulate the legal profession.[2] Today, in each state and the District of Columbia the court of highest appellate jurisdiction has the inherent and/or constitutional authority to regulate the practice of law.[3]

While a state legislature may, under its police power, act to protect the interests of the public, with respect to the practice of law it does so in aid of the courts. Its actions cannot supersede or detract from the court's power to regulate the bar.[4] Thus, in the few states where the legislature has some involvement in the regulation of lawyers (typically funding for the lawyer disciplinary agency), the courts retain their regulatory authority. California is an example. The California Supreme Court has made it quite clear that legislative involvement does not alter nor affect its constitutional and inherent regulatory authority over the bar.[5] The California legislature, throughout the State Bar Act, has expressly recognized that the Court's ultimate power over the admission and disciplining of lawyers is vital to the constitutionality of that Act.[6]

The judicial branch of government is better suited to regulate the legal profession than the legislative and executive branches because the other two branches of government are more subject to political influence. Regulation by either the legislature or executive thus jeopardizes the independence of the legal profession. In the United States an independent judiciary is key to maintaining citizens' rights and freedoms, and the rule of law. As noted in the Preamble to the *ABA Model Rules of Professional Conduct*:

> ...an independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.[7]

Studies by the American Bar Association have shown that judicial regulation of the legal profession is appropriate. In 1970, the ABA Special Committee on Evaluation of Disciplinary

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[1] *See, e.g.*, Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 Geo. J. Legal Ethics 911 (Spring 1994); and *In re Shannon*, 876 P. 2d 548, 570 (Ariz. 1994) (noting that the state judiciary's authority to regulate the practice of law is accepted in all fifty states).
[2] Commission on Evaluation of Disciplinary Enforcement, Am. Bar Ass'n, *Lawyer Regulation for a New Century* (1992) at 2, http://www.abanet.org/cpr/reports/mckay_report.html
[3] *See, e.g. In re Attorney Discipline System*, 967 P. 2d 49 (Cal. 1998).
[4] Id.
[5] Id.
[6] *See, e.g.*, Cal. Bus. & Prof., § 6087; Supra Note 2.
[7] Am. Bar Ass'n, Model Rules of Professional Conduct (2008) at http://www.abanet.org/cpr/mrpc/preamble.html

Enforcement, chaired by former U.S Supreme Court Justice Tom Clark (the Clark Committee), issued its report containing findings from a three year comprehensive review of lawyer discipline in the United States.[8] The Clark Committee concluded that the state of lawyer discipline was "scandalous" and that public dissatisfaction required immediate redress or the public would take matters into its "own hands."[9] It strongly urged that the judiciary act promptly, including assertion/reassertion of its inherent regulatory authority, should legislatures attempt to intervene.[10] In doing so, the Clark Committee stressed that, because of its political nature, the legislative process was "a far less desirable forum" for such reform to occur.[11]

Twenty years later, the ABA Commission on Evaluation of Disciplinary Enforcement, chaired initially by Robert B. McKay (the McKay Commission), examined the implementation of the Clark Committee Report's recommendations.[12] The McKay Commission also studied the pros and cons of legislative versus judicial regulation. In doing so, it examined several state agencies created by legislatures to regulate other professions in the public interest, and compared them to lawyer disciplinary agencies.[13] The McKay Commission concluded that legislative regulation of other professions did not result in more public protection and that legislative regulation of the legal profession specifically, would not be an improvement over judicial regulation. In fact, it would jeopardize the independence of the legal profession.[14] The McKay Commission also found that where other state regulatory agencies were charged with regulating multiple professions and occupations, their resources and effectiveness were diluted.[15] In February 1992, the ABA House of Delegates adopted the McKay Report's recommendations for improving and expanding lawyer regulation under the jurisdiction of the judicial branch of government of each state. Because of the McKay Commission and similar efforts, the United States is recognized as having the most advanced and professional system of lawyer discipline.

B. The Lawyer Discipline System Consultation Program

In 1980, the ABA Standing Committee on Professional Discipline initiated a national program to confer with state lawyer disciplinary agencies upon invitation by the jurisdiction's highest court. In 1993, the Standing Committee and the Joint Committee on Lawyer Regulation made significant improvements to this program, reflecting the evolving needs of the highest courts that regulate the legal profession in each jurisdiction. The Discipline Committee has conducted fifty consultations since the commencement of the program.

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[8] Special Comm. on Evaluation of Disciplinary Enforcement, Am. Bar Ass'n, *Problems and Recommendations in Disciplinary Enforcement* (1970) at http://www.abanet.org/cpr/reports/Clark_Report.pdf
[9] Id. at 1-2.
[10] Id. at 10-18.
[11] Id. at 12.
[12] Supra Note 2. Raymond R. Trombadore chaired the McKay Commission following Robert McKay's death.
[13] Id. at 3.
[14] Id. at 4-5.
[15] Id.

The ABA Standing Committee on Professional Discipline sends a team of individuals experienced in the field of lawyer regulation to examine the structure, operations and procedures of the host jurisdiction's lawyer disciplinary system. At the conclusion of its study, the team reports its findings and recommendations for the improvement of the system, on a confidential basis, to the highest court. These studies allow the state to take advantage of model disciplinary procedures that have been adopted by the ABA. The consultations also provide a means for the Committee to learn of other effective procedural mechanisms that should be considered for incorporation into current Association models.

The team examines the state's lawyer regulation system using criteria adapted from the *ABA Model Rules for Lawyer Disciplinary Enforcement* (MRLDE) as a guide. These rules were adopted by the ABA House of Delegates in August 1989 and were most recently amended in August 2002. They incorporate the best policies and procedures drawn and tested from the collective experience of disciplinary agencies throughout the country. The team uses the report and recommendations of the McKay Commission as an additional resource. These recommendations reaffirm, expand and add to many of the policies set forth in the MRLDE.

The consultation team utilizes the MRLDE and McKay Report to identify potential problem areas and to make recommendations as to how the state's lawyer regulatory system can become more efficient and effective. Team members also carefully consider national practices and local factors in fashioning recommendations. This allows the team to craft suggestions that are tailored to meet each jurisdiction's particular needs and goals.

C. Persons Interviewed and Materials Reviewed

At the invitation of the South Carolina Supreme Court, the ABA Standing Committee on Professional Discipline sent a team to conduct the on-site portion of the consultation from March 3-7, 2008. Biographies of the team members are attached to this Report as Appendix A. Interviewees included the Chief Disciplinary Counsel and members of her staff, Attorneys to Assist, the Senior Assistant Attorney General and investigators from that Office on loan to the disciplinary agency, members of the Commission on Lawyer Conduct, including members of its Investigative and Hearing Panels, respondents, respondents' counsel, and complainants. The team met with the South Carolina State Bar Association's President, President-Elect, and Executive Director, and two members of the South Carolina General Assembly. The team also met with the members of the South Carolina Supreme Court.

In preparation for its visit, the team reviewed the South Carolina Rules of Professional Conduct, Rules for Lawyer Disciplinary Enforcement, the Financial Recordkeeping Rule, and the Rules of the Lawyers' Fund for Client Protection. The team studied caseload processing information, files, Hearing Panel reports and recommendations, and Supreme Court opinions.

The consultation team reviewed legislation pending in the South Carolina General Assembly that would, if enacted, remove the Supreme Court of South Carolina's disciplinary functions (and the ability to determine qualifications for admission to the bar) to a Commission on the

Legal Profession and the Judiciary. The Commission would be housed under the executive branch of government, with the South Carolina Department of Labor, Licensing and Regulation's Division of Professional and Occupational Licensing. The team understands that this legislation was proposed in response to a matter of concern with respect to scoring on the state bar examination. The team heard from members of the legislature who proposed this bill during the on site portion of this consultation. Others interviewed by the team unanimously disfavored passage of this legislation.

The ABA Standing Committee on Professional Discipline is grateful to all the participants in the current consultation for their time, effort and candor. The Committee is impressed with the commitment of the Court, Disciplinary Counsel's Office, the members of the Commission on Lawyer Conduct, and the South Carolina State Bar Association to serve the public and the profession through an efficient and effective lawyer regulatory system. The Discipline Committee hopes that the recommendations contained in this Report will assist the Court in making continued improvements to the South Carolina lawyer disciplinary system.

II. OVERVIEW

A. Strengths of the South Carolina Lawyer Discipline System

This Report is designed to provide constructive suggestions based upon the ABA Standing Committee on Professional Discipline's collective knowledge and experience in lawyer regulation and the *ABA Model Rules for Lawyer Disciplinary Enforcement*. This Report generally will exclude from discussion those areas of the system that are operating effectively. In order to provide a balanced assessment of South Carolina's lawyer disciplinary system, its strengths must be recognized. The following is not an exhaustive description of those strengths, and additional programs and initiatives of note will be described elsewhere in this Report.

It is important to note at the outset that the South Carolina lawyer discipline system is, as it exists today, relatively new. The Court adopted its current system under the Rules for Lawyer and Judicial Disciplinary Enforcement in 1997. The Rules for Lawyer Disciplinary Enforcement are based largely on the *ABA Model Rules for Judicial Disciplinary Enforcement*. Under those Rules, the Commission on Lawyer Conduct replaced the Board of Commissioners on Grievances and Discipline, and the Court created the position of Disciplinary Counsel. The new procedures greatly expanded the respondent lawyer's right to conduct discovery and significantly increased the public's access to disciplinary records and proceedings. The Court also eliminated the rule prohibiting the complainant and lawyer from revealing that a complaint had been filed.

Since that time the Court has taken additional steps to ensure that the lawyer discipline process in South Carolina is effective. Its request for an independent review evidences the Court's commitment to improving the system. The Court appointed a new Chief Disciplinary Counsel who has significant management experience and is well respected in the legal community. In March 2008, the Court had already taken steps to begin the process of hiring its first Commission Counsel for the Lawyer and Judicial Conduct Commissions (the adjudicative branch of each discipline system). This lawyer will help the Investigative and Hearing Panels of both Commissions in the drafting of decisions, orders and reports.[16] The team was advised that the Lawyer and Judicial Conduct Commissions have interviewed lawyers and are in the process of recommending a qualified candidate to the Court. The team believes that hiring Commission Counsel will strengthen the necessary separation between Disciplinary Counsel's Office and the adjudicative side of the system. Reliance by the Commissions on their own counsel will alleviate the risk of possible *ex parte* contacts between the two branches of the system. While all participants in the system strive to ensure that no improper *ex parte* communications occur, some interviewees expressed concern that the current structure of the agency created a perception that such contacts were unavoidable. Hiring Commission Counsel will also lessen any public confusion regarding the distinct

[16] Rule 6, South Carolina Rules for Judicial Disciplinary Enforcement; and Rule 6 South Carolina Rules for Lawyer Disciplinary Enforcement.

adjudicative roles of the Lawyer and Judicial Conduct Commissions and the investigative and prosecutorial duties of the Office of Disciplinary Counsel.

Disciplinary Counsel's office uses new, sophisticated case management software that allows it to track all aspects of pending and closed/dismissed matters, retrieve related documents, and diary cases for deadlines. The system has templates for letters, pleadings and other documents. Use of the system has positively impacted the Office's ability to manage its caseload and address deficiencies.

The team was advised by interviewees, including complainants that the South Carolina lawyer discipline system generally functions well. Complainants are kept apprised of the status of matters at all stages in the proceedings and are generally provided with explanations of the Commission's actions. Complainants cannot, however, appeal the dismissal of their grievances. The Chief Disciplinary Counsel and her staff continue to study ways to make the system more efficient and accessible to the public.

The South Carolina Bar has also taken steps to help lawyers who have become involved in the discipline process and its leadership has provided useful insights to the new Chief Disciplinary Counsel for improving the system. The Bar has a law practice management program, issues ethics advisory opinions, and its Resolution of Fee Disputes Board provides a service to the public and the bar by resolving fee, cost and disbursement disputes between lawyers and clients.

B. Components of the South Carolina Lawyer Discipline System

The Supreme Court of South Carolina possesses the inherent authority to regulate the legal profession in the State. The Court's Rules for Lawyer Disciplinary Enforcement set forth detailed procedures for resolving allegations of lawyer misconduct and disability.[17] The components of the Court's system include Disciplinary Counsel's Office, Attorneys to Assist, the Commission on Lawyer Conduct and its Investigative and Hearing Panels.

1. Nature and Funding of the South Carolina Lawyer Discipline System

The South Carolina judiciary receives the bulk of its funding from the General Assembly. In 2008, it is estimated that the court system's budget will be approximately $57,000,000, of which $36,000,000 is provided by the legislature.[18] Monies from fees, fines, and grants make up the remainder of the budget. A $50 disciplinary assessment that is part of a lawyer's dues for the State Bar of South Carolina has been in place for four years. The budgets of the lawyer and judicial discipline systems are combined because these functions operate from one agency. The budget for the discipline system for 2007-2008 was $1,130,754. The Court and the Office of Finance and Personnel of the Judicial Department oversee the discipline

[17] Rule 1, South Carolina Rules for Lawyer Disciplinary Enforcement.
[18] Honorable Jean Hofer Toal, Chief Justice, South Carolina Supreme Court, State of the Judiciary 2008 (February 13, 2008).

system's budget. The team was advised that the Office of Finance and Personnel sets the salaries for staff of Discipline Counsel's Office.

2. The Office of Disciplinary Counsel

The Chief Disciplinary Counsel is appointed by and serves at the pleasure of the Court.[19] The Chief Disciplinary Counsel is responsible for hiring his/her staff, including lawyers, investigators and support staff, and for receiving, screening, investigating, and prosecuting complaints made against both judges and lawyers. At the time of the team's visit, one full time Senior Assistant Attorney General was on loan to the Office to handle judicial discipline cases. This lawyer also conducted full investigations and prosecutions in lawyer discipline cases when Disciplinary Counsel had a conflict of interest. Additionally, the Office of the Attorney General had loaned two investigators to Disciplinary Counsel's Office. Since the time of the on-site portion of the consultation, the involvement of the Office of the Attorney General has ceased.

The staff of the Office of Disciplinary Counsel has grown from two lawyers and three support staff in 1997, to nine lawyers (including those handling judicial matters) and six support personnel at the time of the team's visit. With respect to lawyer discipline, in addition to the Chief Disciplinary Counsel, there is one Deputy Disciplinary Counsel, and one Senior Assistant Disciplinary Counsel. The Deputy Disciplinary Counsel is responsible for initial screening of complaints against South Carolina lawyers, supervising preliminary investigations, training new employees, and overseeing the system's caseload management software development and maintenance. She also investigates and prosecutes matters. The Senior Assistant Disciplinary Counsel assigns cases to and supervises three Assistant Disciplinary Counsel. These Assistant Counsel are responsible for conducting full investigations and prosecuting formal charges. The Senior Assistant Disciplinary Counsel also has a caseload of investigations and formal charges. An Assistant Disciplinary Counsel and Staff Attorney conduct preliminary investigations and, along with the other lawyers in the office, handle contempt, compliance, and reinstatement matters.

At the time of the team's visit, the Office employed one investigator, one paralegal, an official court reporter, two administrative assistants, an administrative specialist, and one administrative assistant assigned to the Chief Disciplinary Counsel and judicial matters. In addition to file maintenance and related duties, the two administrative assistants assign Attorneys to Assist to cases, and perform the administrative functions for the Commission on Lawyer Conduct. These duties include preparing agendas for the Investigative Panels, assigning Investigative and Hearing Panels, preparing certificates of good standing, and working with the Commission's Chair and Vice-Chair.

As noted above, the Deputy Disciplinary Counsel conducts the initial evaluation of complaints against lawyers. Complaints are docketed with a case number, unless the individual who is the subject of the allegations is not a lawyer. Complaints that fall outside

[19] Rule 5 (a), South Carolina Rules for Lawyer Disciplinary Enforcement.

the jurisdiction of the agency or do not allege conduct that, if true, would constitute a violation of the rules of professional conduct, are screened out and the complainant is sent a letter referring him or her to the appropriate agency and explaining why Disciplinary Counsel's Office cannot handle the matter.[20] If the Office has jurisdiction over the complaint, an electronic file is opened in the Time Matters case management system.

The respondent lawyer is sent a copy of the complaint and asked to respond within fifteen days.[21] The lawyer's response is scanned into the computer and forwarded to the Assistant Disciplinary Counsel or Staff Attorney to conduct a preliminary investigation. The complainant is not provided with a copy of the respondent lawyer's response. If the lawyer does not respond, the matter is sent directly to the Senior Assistant Disciplinary Counsel, who assigns the case and seeks the permission of an Investigative Panel to conduct a full investigation.

During the course of the preliminary investigation, Disciplinary Counsel's Office cannot issue an investigative subpoena; they must wait until an Investigative Panel of the Commission authorizes a full investigation or the Chair or Vice-Chair of the Commission finds that exigent circumstances warrant its issuance.[22] Upon the conclusion of the preliminary investigation, Disciplinary Counsel may dismiss the matter or recommend that an Investigative Panel of the Commission authorize a full investigation.[23]

During the preliminary investigation Disciplinary Counsel's Office may utilize Attorneys to Assist (ATAs). ATAs are appointed by the Court for two year terms to help Disciplinary Counsel investigate complaints against lawyers.[24] The team was advised by a number of interviewees that ATAs were initially thought to be used when the expertise of a practitioner in a particular area of law was necessary. ATAs are used more broadly now to conduct field investigations and may be assigned for other reasons, including proximity to the respondent's office. Disciplinary Counsel's Office affords ATAs the opportunity to recuse themselves in circumstances where a conflict exists. ATAs have been provided with a one-half day training session. The last training session was held in 2005.

As noted in Recommendation Five below, the team was advised by a number of sources that delays have arisen due to ATAs not issuing their reports in a timely manner. Disciplinary Counsel is responsible for following up with ATAs regarding late reports.

Disciplinary Counsel's Office can dismiss a matter upon completion of a preliminary investigation.[25] If a matter is not dismissed at this stage, Disciplinary Counsel must seek the approval of an Investigative Panel to conduct a full investigation.[26] The Investigative Panel

[20] Rule 5 (b)(1), South Carolina Rules for Lawyer Disciplinary Enforcement.
[21] Rule 19 (b), South Carolina Rules for Lawyer Disciplinary Enforcement.
[22] Id.
[23] Id.
[24] Rule 5 (c), South Carolina Rules for Lawyer Disciplinary Enforcement.
[25] Rule 19 (b), South Carolina Rules for Lawyer Disciplinary Enforcement.
[26] Id.

may approve this request, dismiss the case, issue a letter of caution without a finding of misconduct or issue a letter of caution with a finding of misconduct upon the consent of Disciplinary Counsel and the respondent.[27] When a full investigation is commenced, Disciplinary Counsel must provide the respondent lawyer with a specific statement of the allegations being investigated and the rules of professional conduct at issue.[28] At this stage of the proceedings, Disciplinary Counsel may issue investigative subpoenas without Investigative Panel approval.

Upon completion of a full investigation, Disciplinary Counsel must make a recommendation to an Investigative Panel to dismiss, approve the filing of formal charges, issue an admonition or letter of caution, approve a deferred discipline agreement, or stay the matter.[29] Prior to the Investigative Panel rendering a decision, Disciplinary Counsel or the lawyer may request an appearance before Disciplinary Counsel to answer questions under oath.[30] If an Investigative Panel determines that the lawyer has committed misconduct, but that public discipline is not warranted, it may advise the lawyer that it intends to issue a confidential admonition.[31] Unless the lawyer files objections to the issuance of this sanction, it will be imposed. If the lawyer objects, Disciplinary Counsel is required to file formal charges.

At any stage of the proceedings the respondent lawyer and Disciplinary Counsel can enter into an agreement for discipline on consent.[32] When a proposed consensual resolution is agreed upon prior to the filing of formal charges, the signed agreement and the respondent lawyer's accompanying affidavit are submitted to an Investigative Panel. Subsequent to the filing of formal charges and prior to a hearing on those allegations, Disciplinary Counsel and the respondent lawyer can agree in writing to have the matter considered by an Investigative Panel.[33] If the agreement proposes the issuance of an admonition, deferred discipline agreement or a letter of caution, the Investigative Panel has the final authority to approve or reject it. Otherwise, the Investigative Panel must accept the agreement/affidavit and file them with the Court or reject the matter.[34]

Disciplinary Counsel is responsible for preparing and filing with the Commission formal charges against a lawyer. The charging pleading must provide the lawyer with adequate notice of the alleged misconduct of incapacity.[35] The respondent lawyer is required to answer those charges within thirty days after service.[36] A Hearing Panel may extend the time for filing an answer. If a lawyer fails to answer, the Hearing Panel may deem the allegations of

[27] Id.
[28] Rule 19 (c), South Carolina Rules for Lawyer Disciplinary Enforcement.
[29] Rule 19 (d), South Carolina Rules for Lawyer Disciplinary Enforcement.
[30] Rule 19 (c)(5), South Carolina Rules for Lawyer Disciplinary Enforcement.
[31] Rule 19 (d)(3), South Carolina Rules for Lawyer Disciplinary Enforcement.
[32] Rule 21 (a), South Carolina Rules for Lawyer Disciplinary Enforcement.
[33] Rule 21 (c), South Carolina Rules for Lawyer Disciplinary Enforcement.
[34] Id.
[35] Rule 22, South Carolina Rules for Lawyer Disciplinary Enforcement.
[36] Rule 23, South Carolina Rules for Lawyer Disciplinary Enforcement.

the formal charges admitted.[37] The formal charges, answer, and all other proceedings become public thirty days after the filing of the answer.[38]

Disciplinary Counsel and the respondent lawyer are required to exchange witness lists and all other non-privileged evidence.[39] Disciplinary Counsel must also disclose all exculpatory evidence. Depositions can be taken with the permission of the Hearing Panel Chair or if the parties agree.[40]

Caseload statistics provided by the Office of Disciplinary Counsel at the time of the consultation indicate that of the 778 active cases in the Office, 307 have been pending for more than two years. Of those 307, 104 cases date from 1997-2004. Of the 235 cases pending at the preliminary investigation stage, 71 were assigned to ATAs. Statistics provided to the team show that the average time for an ATA to receive a case and complete it is 263 days.

In terms of case processing times, the system handles the screening process in an admirable two days. On average, it takes 97 days to dismiss a matter after a preliminary investigation. The average time for submission of a preliminary investigation report to an Investigative Panel is 203 days; it takes an average of 519 days to complete a full investigation and request that an Investigative Panel authorize the filing of formal charges. Hearings on formal charges are generally conducted promptly, within 184 days from the time the Investigative Panel approves the filing of that pleading.[41] However, it takes an average of 264 days from the receipt of the transcript for the Hearing Panels to issue their reports and recommendations. The Rules for Lawyer Disciplinary Enforcement provide that the Hearing Panels are to file their reports and recommendations within thirty days of receipt of the transcript.[42] Once a matter is certified to the Court, oral arguments are generally held within 178 days, with the final order issuing an average of 64 days later.

3. The Commission on Lawyer Conduct

The Commission on Lawyer Conduct consists of forty-four members appointed by the Court, with two of those members appointed to serve as chair and vice-chair.[43] Forty-two of those are active members of the South Carolina Bar. Only two of the Commission members are non-lawyer citizens.[44] The Court appoints Commission members for four year terms, and members are eligible for reappointment.

[37] Rule 24, South Carolina Rules for Lawyer Disciplinary Enforcement.
[38] Rule 12 (b), South Carolina Rules for Lawyer Disciplinary Enforcement.
[39] Rule 25, South Carolina Rules for Lawyer Disciplinary Enforcement.
[40] Id.
[41] These statistics include all cases certified to the court from 2006 to the time of the team's visit.
[42] Rule 26 (d), South Carolina Rules for Lawyer Disciplinary Enforcement.
[43] Rule 3, South Carolina Rules for Lawyer Disciplinary Enforcement.
[44] Id.

In addition to the investigatory and adjudicatory duties described below, the Commission is responsible for adopting its own procedural rules for Court approval, for maintaining statistics regarding the Commission's operations, and preparing an annual report for the Court and public.[45] The Commission is required to promote the existence of the lawyer disciplinary system to the public and to make the final disposition of cases where public discipline was imposed available.[46] Information about the Commission on Lawyer Conduct is available on the website for the South Carolina judiciary, but that entity, along with Disciplinary Counsel's Office, does not have a stand-alone website.[47]

The Rules for Lawyer Disciplinary Enforcement provide that the full Commission should meet periodically to consider administrative matters.[48] The team was advised that the full membership of the Commission on Lawyer Conduct has met only twice in the past eight years. The last meeting of the full Commission was 2005 in conjunction with ATA training. The Commission performs its investigatory and adjudicatory duties while acting as Investigatory and Hearing Panels appointed by the Chair.[49] The Chair divides the Commission into eight panels of five lawyer members. If the panel is to serve as an Investigative Panel, the Chair adds one of the two public members, and the Vice-Chair or himself/herself to the roster so that there is a total of seven members.[50] Public members cannot be assigned to serve on a Hearing Panel. Members cannot sit on an investigative and hearing panel for the same matter.[51]

The Investigative Panel is charged with reviewing the recommendations of Disciplinary Counsel after that Office completes its preliminary investigation. The Investigative Panel may dismiss a matter or authorize a full investigation.[52] The Investigative Panel also reviews Disciplinary Counsel's recommendations after the completion of a full investigation. The Investigative Panel can adopt, reject or modify Disciplinary Counsel's recommendation to: (1) dismiss a matter; (2) approve the issuance of an admonition, letter of caution or initiation of a deferred discipline agreement; (3) file formal charges; or (4) file a petition to transfer the lawyer to disability inactive status.[53]

Hearing Panels of five lawyer members of the Commission on Lawyer Conduct act as the trier of fact in lawyer disciplinary proceedings. Their duties include ruling on pre-trial motions, conducting the hearings on formal charges and making findings of fact, conclusions of law and recommendations of sanctions to the Court.[54] The standard of proof in lawyer disciplinary proceedings is clear and convincing evidence and, except as otherwise set forth in

[45] Rule 4, South Carolina Rules for Lawyer Disciplinary Enforcement.
[46] Id.
[47] http://www.sccourts.org/
[48] Rule 4 (b), South Carolina Rules for Lawyer Disciplinary Enforcement
[49] Id.
[50] Id.
[51] Id.
[52] Rule 4 (f), South Carolina Rules for Lawyer Disciplinary Enforcement.
[53] Rule 19 (d) (1) and (2), South Carolina Rules for Lawyer Disciplinary Enforcement.
[54] Rule 4 (g), South Carolina Rules for Lawyer Disciplinary Enforcement.

the Rules, the South Carolina Rules of Evidence for non-jury civil matters, and the South Carolina Rules of Civil Procedure apply.[55] Members of the Hearing Panels are required to recuse themselves in any matter in which recusal would be required under the Code of Judicial Conduct.[56]

Hearings are held at the Office of Disciplinary Counsel in a separate hearing room. Disciplinary Counsel is responsible for presenting the evidence relating to the formal charges and may call the respondent lawyer as a witness.[57] Both Disciplinary Counsel and the respondent may present proposed findings and recommendations to the Hearing Panel at the conclusion of the proceedings. The Hearing Panel is required to file its report with the Supreme Court within thirty days after the filing of the transcript of proceedings.[58] The Hearing Panel does not have the authority to dismiss formal charges once they are filed.[59] The docket of the Hearing Panels is not published.

The Court will be appointing Commission Counsel to advise the Commissions on Lawyer and Judicial Conduct, and to assist the Hearing Panels of both Commissions in the drafting of decisions, orders and reports.[60]

4. The Supreme Court

Within thirty days after the Hearing Panel report and recommendation is served, Disciplinary Counsel and /or the respondent may file exceptions to the Panel's findings, conclusions and recommendations to the Court.[61] The Court may remand the matter to the Hearing Panel for further findings if it deems necessary, order additional briefs or oral argument.[62]

The Court is not bound by the Hearing Panel's recommendation and may accept, reject or modify the findings, conclusions and range of sanctions recommendation. At the conclusion of its consideration of a matter, the Court will issue a written decision dismissing the case, issuing a letter of caution with or without a finding of misconduct, imposing a sanction or transferring the lawyer to disability inactive status. The Court may also assess costs in cases where the lawyer has been found to have committed misconduct.[63]

[55] Rules 8 and 9, South Carolina Rules for Lawyer Disciplinary Enforcement.
[56] Id.
[57] Rule 26(c), South Carolina Rules for Lawyer Disciplinary Enforcement.
[58] Id.
[59] Rule 26 (d), South Carolina Rules for Lawyer Disciplinary Enforcement.
[60] Rule 6, South Carolina Rules for Judicial Disciplinary Enforcement; Rule 6 South Carolina Rules for Lawyer Disciplinary Enforcement.
[61] Rule 27(a), South Carolina Rules for Lawyer Disciplinary Enforcement.
[62]Rule 27 (c), South Carolina Rules for Lawyer Disciplinary Enforcement.
[63] Rule 27 (e), South Carolina Rules for Lawyer Disciplinary Enforcement.

III. STRUCTURE

Recommendation 1: The Court Should Increase Public Representation on the Lawyer Conduct Commission and Streamline the Functions of the Investigative Panels

Commentary

Two of the Commission on Lawyer Conduct's forty-four members are non-lawyer citizens. They may serve on Investigative Panels, but not on Hearing Panels. Investigative Panel members are responsible for reviewing the files and reports submitted by Disciplinary Counsel for purposes of recommending a full investigation and, upon completion of a full investigation, for recommending the disposition of a matter. Investigative Panels are also responsible for approving for submission to the Court agreements for discipline on consent prior to the filing of formal charges.[64] These panels provide final approval or disapproval of agreements for admonitions, deferred discipline, and letters of caution.[65]

The consultation team recommends that the Court increase public representation on Lawyer Conduct Commission and amend Rule 4 of the Rules for Lawyer Disciplinary Enforcement to provide that the Commission be comprised of 1/3 public members.[66] Increasing public representation in the system enhances its credibility, ensures its accountability to the public, and results in a more balanced assessment of complaints.[67]

Increasing public membership of the Commission on Lawyer Conduct to one-third of the total members will also spread the work of the Investigative Panels more evenly. Currently, the two public members of the Commission serve on four Investigative Panels each and must handle the workload for those panels. In conjunction with this recommendation, the team suggests that the Court consider reducing the total required membership of the Investigative Panels. Seven Commission members on each Investigative Panel would not seem to be an optimal use of resources for a body that has the benefit of considering the work product of a professional Disciplinary Counsel's Office or respondents' or their counsels' response after an opportunity to be heard. Investigative Panels consisting of three members (two lawyers and one public member) would permit the creation of additional panels and more efficiently distribute the caseload.[68]

Public members should not be excluded from serving on Hearing Panels. The Court should amend Rule 4 of the Rules for Lawyer Disciplinary Enforcement to ensure that public members comprise one-third of each Hearing Panel.[69] The majority of state lawyer discipline

[64] Rule 21, South Carolina Rules for Lawyer Disciplinary Enforcement.
[65] Id.
[66] Rule 2(B), ABA Model Rules for Lawyer Disciplinary Enforcement.
[67] Id. See also, U.S. Conference of Chief Justices, *A National Action Plan on Lawyer Conduct and Professionalism*, January 21, 1999.
[68] Supra Note 61; Appendix A, Alternate Rule 3, ABA Model Rules for Lawyer Disciplinary Enforcement.
[69] Rule 3(A), ABA Model Rules for Lawyer Disciplinary Enforcement.

systems permit non-lawyers to serve in this adjudicative capacity. The experience of those states has been positive.

The team asked interviewees during the course of the on-site portion of the consultation for their thoughts about adding non-lawyers to the Hearing Panels. Most indicated that they thought it would help enhance public trust and confidence in the disciplinary system and the judiciary, and that qualified individuals would be selected to serve in this capacity. Some expressed concerns that non-lawyers would have difficulty grasping the complexities of litigation, evidentiary rules, and other legal issues. These concerns are not unique, but the experience of those states that have included public members in this role is to the contrary. In fact, lawyers are impressed with the perspectives that non-lawyers are able to contribute to the disciplinary system. South Carolina also permits non-lawyers to serve as magistrate judges. These non-lawyer judges hear and decide cases involving the rights and responsibilities of South Carolina citizens. Likewise, non-lawyers should be able to serve as adjudicators in lawyer disciplinary proceedings. Providing these individuals with the training and resources to ensure their meaningful participation will be necessary, and the team is confident that this can be accomplished.[70]

The manner in which public members are selected to serve on the Commission is also important. The team suggests that the Administrative Oversight Committee for the Lawyer Conduct Commission proposed in Recommendation Two be responsible for developing and implementing a screening process for the appointment of non-lawyer Commission members by the Court. The Court should amend Rule 4 of the Rules for Lawyer Disciplinary Enforcement accordingly. The process by which these public members are solicited to apply for appointment should be open and well-publicized. Press releases, postings on the Commission's web site and advertisements in state and local newspapers can be used to inform the public about these opportunities. Through appropriate selection and training, these individuals can be valued participants in the system.

[70] See Recommendation Two below regarding training for Commission on Lawyer Conduct members.

Recommendation 2: The Court Should Create an Oversight Committee of the Commission on Lawyer Conduct

Commentary

The Court has demonstrated commendable interest in seeing that the lawyer disciplinary system operates fairly and effectively. The team was apprised of delays at certain levels of the process, one of which was the issuance of reports and recommendations by Hearing Panels. The South Carolina Rules for Lawyer Disciplinary Enforcement provide that Hearing Panels are required to file their reports and recommendations within thirty days of receipt of the transcript of proceedings.[71] Statistics provided to the team indicate that it takes an average of 264 days from the receipt of the transcript for the Hearing Panels to issue their reports and recommendations. The team's review of the system also indicated that the Commission should be more active and involved in administrative matters, including planning, budgeting, and public outreach.

One way in which delays in the issuance of Hearing Panel reports can be lessened is the hiring of Commission Counsel to assist the panels in drafting those reports. As noted above, the team has been advised that the Lawyer and Judicial Conduct Commissions have interviewed lawyers and are in the process of recommending to the Court a qualified candidate for Commission Counsel.

The team believes that creating an Administrative Oversight Committee of the Commission can help address delays and enhance fulfillment of the other administrative duties of the Commission. The Oversight Committee would be responsible for general administrative oversight of the adjudicative branch of the lawyer discipline system, focusing on efficiency of caseload processing by the Investigative and Hearing Panels (including prompt transcription of the proceedings), resource planning, public education and outreach, training of system volunteers, and proposing new disciplinary rules to the Court. The team recommends that the Court amend Rule 4(b) of its Rules for Lawyer Disciplinary Enforcement to create this Commission Committee and to delineate its duties. The Oversight Committee should be comprised of at least five members, including the Chair and Vice-Chair, and two non-lawyers. If the Court determines that the Oversight Committee should be larger, one-third of its membership should consist of non-lawyers.[72]

A. Resource Planning

The new Oversight Committee should develop an annual, documented budget process and submit a proposed Commission budget to the Court. The budget should include recommendations for necessary additional Commission staff based on a true needs

[71] Rule 26 (d), South Carolina Rules for Lawyer Disciplinary Enforcement.
[72] This is consistent with the recommendations of the ABA Model Rules for Lawyer Disciplinary Enforcement favoring one-third public participation in the system.

assessment. The Oversight Committee should review relevant case load statistics and consider contacting other states with similar adjudicative staff to help assess future needs. The National Council of Lawyer Disciplinary Boards may also be a good resource.[73] The organization serves lawyer discipline system adjudicative staff and volunteers to help them effectively and efficiently handle their duties.[74]

The Administrative Oversight Committee should use the annual planning and budget process to develop a true needs assessment for the Commission, and create a proposed three to five year funding plan. The Office of Finance and Personnel of the Judicial Department can help ensure that salaries for required professional staff are competitive so as to attract and retain experienced individuals. If necessary, a financial planner or budget analyst should be used to assist in assessing the current and future needs of the system in terms of finances, technology and staffing.

Similarly, and as discussed in Recommendation Sixteen below, consistent with national practice, the Chief Disciplinary Counsel should develop a documented, annual budget planning process for the investigative/prosecutorial branch of the judicial and lawyer discipline system. The team recommends that the Lawyer Conduct Commission Oversight Committee communicate with the Chief Disciplinary Counsel during the annual budget process to address any potential conflicts regarding resource priorities. It is preferable, if such conflicts occur, that they be worked out before the presentation of budget requests to the Court, but both may be submitted for approval.

B. System Administrative Oversight

The duties of the Oversight Committee should include ensuring that the Investigative and Hearing Panels operate efficiently and that their reports and recommendations are timely filed. The Oversight Committee members should be active in addressing delay when it arises. The Chair and Vice-Chair should not hesitate to contact Investigative and Hearing Panel members directly. If a Hearing or Investigative Panel member is unable to complete his/her work in a timely fashion, the Oversight Committee should be able to rectify the situation.

A problem that arises in any system that utilizes professionals as volunteers is scheduling. The team was advised that some delay in hearings occurs due to scheduling difficulties. In order to address this issue, the team recommends that the Administrative Oversight Committee institute a practice whereby the dates for hearings and for Investigative Panel meetings are reserved at least one year in advance. The Administrator of the Louisiana Attorney Disciplinary Board resolved similar scheduling concerns in this manner and possesses a computer software program that permits this to be done with relative ease. As a result, volunteers in that jurisdiction are advised at least fifteen months in advance when they are scheduled to conduct proceedings. This allows the volunteers to set their schedules and the system to resolve scheduling conflicts well ahead of time. This should also allow

[73] http://www.ncldb.org/ .
[74] http://www.ncldb.org/members.htm .

scheduling of consecutive hearing dates. It is very important that, whenever possible, multi-day hearings be held on consecutive days so that memories and witnesses are not overburdened.

C. Training and Outreach

The team was advised that, in common with most states, Commission members mostly receive on the job training. Although efforts to enhance the training offered to Commission on Lawyer Conduct members are being made, the team recommends that the Oversight Committee, in consultation with Commission Counsel, oversee the development of training materials and programs. These materials should be made available to Commission members electronically. Commission Counsel should work with Disciplinary Counsel's Office to ensure that appropriate topics are covered and speakers obtained. Additionally, respondents' counsel can provide valuable insights to system adjudicators.

Training helps to ensure consistency and the expeditious resolution of disciplinary matters. Training should be mandatory for all new appointees to the Commission and should occur at least bi-annually for all others. Training should stress the need for the Commission members to fulfill their duties in a timely manner so as to enhance the public's perception that the system is operating efficiently. Both Investigative and Hearing Panel members should receive training and guidance with respect to substance abuse, gambling and mental health issues. These issues are raised with increasing frequency in lawyer disciplinary cases.

The consultation team also recommends that Commission Counsel and members of the Lawyer Conduct Commission be provided resources to attend the ABA National Conference on Professional Responsibility and the meetings of the National Organization of Bar Counsel and the National Council of Lawyer Disciplinary Boards. These meetings provide attendees with the opportunity to collect information and discuss current issues and problems in this area with leading experts, scholars and practitioners from across the country. The Oversight Committee can be responsible for scheduling the attendance of Commission members at these meetings and for dissemination of relevant materials provided to attendees to all Commission members.

Training will also help the Commission on Lawyer Conduct fulfill its duties to inform the public about the existence and operation of the South Carolina lawyer discipline system.[75] The Oversight Committee should be responsible for coordinating with Disciplinary Counsel outreach to the profession and the public about the lawyer discipline system. Public access to the lawyer disciplinary system is vital.[76] The Office of Disciplinary Counsel should be easily accessible and understandable to those who are seeking to file a grievance. This means that the public should be provided with the means to easily identify the agency as the appropriate office with which to file a complaint about lawyer misconduct. The team was advised that

[75] Rule 4 (e)(2)(D), South Carolina Rules for Lawyer Disciplinary Enforcement.
[76] Rules 1 and 2, ABA Model Rules for Lawyer Disciplinary Enforcement.

potential complainants have experienced difficulty identifying the office as the place to file a complaint about a lawyer.

All South Carolina judges, lawyers, and the public should be able to view information about the lawyer discipline system via the internet. Currently, basic information about the Lawyer Conduct Commission and Disciplinary Counsel's Office is available on the web site for the South Carolina judiciary. The team recommends that the Court make available resources to develop a stand-alone, consumer friendly web site for the entire lawyer and judicial discipline system. [77]

The lawyer discipline system part of the web site should include a searchable data base consisting of the Rules of Professional Conduct, Rules for Lawyer Disciplinary Enforcement, other relevant rules, court opinions and orders, Hearing Panel reports and recommendations affirmed by the Court, and summaries of admonitions and letters of caution. Making this information available electronically will also help the Hearing Panels ensure consistency in sanction recommendations. This searchable database should be updated regularly. Part of this site can also be developed to allow password protected access for Hearing Panel members and Commission Counsel to electronically exchange and edit draft reports and recommendations.[78] This can help expedite the report drafting process and save resources. The proposed schedule of Investigative Panels and Hearing Panels can also be made available to Commission members on the password protected part of the site, so that they may readily confirm schedules or propose changes in hearing dates if necessary. Disciplinary Counsel should not have access to this part of the web site, so as to maintain appropriate separation between the prosecutor and adjudicators.

The Commission's Annual Reports should be posted. The final schedule of public hearings should be included on the site. Proposals by the Commission to amend the Rules of Professional Conduct and Rules for Lawyer Disciplinary Enforcement can be made available for public comment on this site, as well as the Court's.

During the consultation team's meeting with the South Carolina Supreme Court, the justices expressed interest in having a research library for judicial and lawyer discipline precedent. The team agrees that this is an excellent idea that will help to educate new justices and enhance consistency in the imposition of sanctions. The team believes that the new web site could serve this function.

In addition to creating a consumer-friendly web site, the Oversight Committee, Disciplinary Counsel's Office and the Commission Counsel should work together to develop, publish and widely disseminate pamphlets describing the lawyer discipline system. The team was advised that currently the only sources of information about the system are the Judicial Department's web site and the correspondence that is sent to complainants acknowledging their grievances

[77] Recommendations for content for the judicial discipline portion of the new web site are set forth in the Report of the South Carolina Judicial Discipline System.
[78] *See, e.g.,* http://www.ladb.org/index.asp .

or advising them that files have been closed. Possible locations to disseminate these pamphlets include public libraries and consumer organizations.

It is also important that Lawyer Conduct Commission members and Disciplinary Counsel's Office personally engage in public education efforts. Commission members and Disciplinary Counsel already do so to some extent, but the system's appointed adjudicators should be more visible. In particular, they should seek invitations to speak at meetings of consumer organizations and citizens groups.

IV. PROCEDURAL RULES

Recommendation 3: The Court Should Amend the Rules to Provide Increased Discretion to Disciplinary Counsel

Commentary

Disciplinary Counsel can only conduct investigations and dismiss them at the preliminary investigation stage. Before Disciplinary Counsel can conduct a full investigation, the permission of an Investigative Panel is required.[79] Upon completion of a full investigation, Disciplinary Counsel cannot dismiss a matter. Only an Investigative Panel can do that.[80] When seeking the dismissal of a matter after a full investigation, Disciplinary Counsel must prepare a report for the Investigative Panel.

Disciplinary Counsel should have the discretion to conduct full investigations and dismiss those cases where appropriate. This is consistent with national practice in lawyer disciplinary agencies and the approach set forth in the *ABA Model Rules for Lawyer Disciplinary Enforcement.* [81] The justifications for requiring Investigative Panel approval to conduct full investigations in judicial discipline cases relates to judges being public officials and the need to preserve the independent manner in which they render decisions. Those concerns do not exist in the lawyer discipline context. The team recommends that the Court amend Rules 4, 5, and 19 of the Rules for Lawyer Disciplinary Enforcement to eliminate the requirement of Investigative Panel approval for the initiation of and subsequent dismissal of full investigations, and provide that authority to Disciplinary Counsel's Office. This form of oversight is not necessary and is not an efficient use of system resources. The lawyers in the Office of Disciplinary Counsel are professionals. The team heard no concerns about thoroughness of their investigations or the propriety of their dismissal of matters after screening and preliminary investigations.

The Court should also amend Rules 4, 5, and related South Carolina Rules for Lawyer Disciplinary Enforcement to limit the Investigative Panel's role to reviewing Disciplinary Counsel's recommendation that formal charges be filed against a respondent lawyer, and approving consensual admonitions, letters of caution, and deferred discipline agreements.[82] This will streamline the functions of the Investigative Panels and can result in more efficient processing of cases.

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[79] Id.
[80] Rule 19 (d), South Carolina Rules for Lawyer Disciplinary Enforcement.
[81] Rules 4(B) and 11(B), ABA Model Rules for Lawyer Disciplinary Enforcement.
[82] Appendix A, Alternate Rule 3, ABA Model Rules for Lawyer Disciplinary Enforcement. In other jurisdictions, and as recommended in Rule 3 of the ABA Model Rules for Lawyer Disciplinary Enforcement, in lieu of an Investigative Panel, a Hearing Panel Chair may approve Disciplinary Counsel's recommendation that formal charges be filed.

The Office of Disciplinary Counsel must ensure that the investigative caseload is handled more efficiently. Caseload statistics provided to the team indicate that of the 778 active cases in the Office, 307 have been pending for more than two years. Of those 307, 104 cases date from 1997-2004. Not all of these cases are pending at the investigative level. The team recommends that the Chief Disciplinary Counsel focus on these older cases, identify the reasons for their continued pendency, and develop a plan to resolve them.

The team was advised that it takes, on average, 97 days to dismiss a matter after a preliminary investigation and that the average time for submission of a preliminary investigation report to an Investigative Panel is 203 days. It takes an average of 519 days for Disciplinary Counsel's Office to complete a formal investigation and request that an Investigative Panel authorize the filing of formal charges.

The team's study identified certain factors contributing to delays at the investigative stage of proceedings. As noted above, requiring Investigative Panel approval to conduct full investigations and dismissals takes unnecessary time and resources. Disciplinary Counsel's Office must also have adequate resources with which to efficiently handle its caseload. This includes investigators, paralegals, auditors, and additional lawyers.[83] Also, the team was advised that recently there have been delays receiving transcripts of sworn statements.

Even with these factors taken into consideration, the investigative process is taking too long. The team is aware of the Chief Disciplinary Counsel's and her staff's commitment to addressing these issues, and believes that the establishment of time guidelines for the processing of investigations will help. The investigation, evaluation, dismissal or filing of formal charges in routine matters should not take more than six months.[84] With adequate staffing, the disposition of complex matters should generally not take longer than one year.[85] These internal, aspirational time standards would not act like a statute of limitations. They would be directory and not jurisdictional, conferring no rights upon the respondent.

The caseload management system used by Disciplinary Counsel's Office is very useful, with its tickler system and document templates. The team also recommends that the Office of Disciplinary purchase trust account software. This software is an investigative tool used by many lawyer disciplinary agencies to decrease the time it takes to evaluate cases involving mishandling of client funds.

[83] See Recommendation ___ below.
[84] See Comment to Rule 11, ABA Model Rules for Lawyer Disciplinary Enforcement.
[85] Id.

Recommendation 4: Complainants Should Be Provided the Respondent Lawyer's Response to Their Grievance and Should Have a Limited Appeal of Dismissals By Disciplinary Counsel

Commentary

Currently, the Office of Disciplinary Counsel does not provide complainants with a copy of the respondent's response to their grievance. The team recommends that complainants be provided with the response to their grievance submitted by the lawyer unless there is good cause not to do so, and that complainants be provided an opportunity to rebut the respondent's statements.[86] The team recommends that the Court amend the Rules for Disciplinary Enforcement to permit this. This practice is followed by many state disciplinary agencies and serves to enhance public confidence in the system without causing delay.

Complainants should be provided with the opportunity to appeal Disciplinary Counsel's dismissal to a Hearing Panel Chair.[87] This is also a practice used in many states. Disciplinary Counsel are not immune from making errors of judgment, and a limited appeal provides a useful check and balance for the system. It also helps alleviate perceptions that the profession is too protective of its own. Disciplinary Counsel should advise complainants of the availability of this appeal in dismissal letters. These dismissal letters should also set forth a concise written statement of the facts and reasons for the dismissal.[88] The consultation team observed that such explanations are provided in many instances, but not consistently. Members of the public who avail themselves of the system's services should be provided with this information. It helps decrease skepticism about the agency. In the team's experience, it also limits the number of complainant appeals that are actually pursued.

[86] Rule 4 (B) (6), ABA Model Rules for Lawyer Disciplinary Enforcement.
[87] Rules 3(E) and 31, ABA Model Rules for Lawyer Disciplinary Enforcement.
[88] Id.

Recommendation 5: The Court Should Phase Out Attorneys to Assist

Commentary

Attorneys to Assist (ATAs) are appointed by the Court for two year terms to help Disciplinary Counsel investigate complaints against lawyers.[89] The team was advised by a number of interviewees that ATAs were initially to be used when the expertise of a practitioner in a particular area of law was necessary. Currently, ATAs are used frequently and for reasons including proximity to the respondent's office, knowledge of the community, and lack of investigative resources in Disciplinary Counsel's Office. Of the 235 cases pending at the preliminary investigation stage during the time of the team's visit, 71 were assigned to ATAs.

A number of interviewees praised the use of ATAs. They believe continuing the practice is desirable because it productively utilizes the varied legal experience of South Carolina lawyers in analyzing allegations of misconduct and because respondent lawyers might be more responsive to a fellow practitioner. The team is sensitive to the concerns expressed by those who favor retaining ATAs. However, the team believes it is in the best interest of the disciplinary system for the Court to phase out their use, and to amend Rule 5 of the Rules for Lawyer Disciplinary Enforcement to reflect this.

The Report of the Clark Committee recommended that lawyer disciplinary agencies be professionalized and highlighted concerns about the use of volunteer lawyers to investigate complaints.[90] Among those concerns were that the use of volunteers resulted in delay.[91] Statistics provided to the team support this concern. They show that the average time for an ATA to receive a case and complete it is 263 days. The Clark Committee also noted that the use of volunteers instead of professional disciplinary staff to investigate allegations of misconduct results in non-uniformity of investigative standards and practices, the inability to devote time and resources to conduct intensive investigations due to the demands of the volunteer's legal practice, and lack of public confidence in such a system.[92] This lack of confidence is due to perceptions that the volunteer lawyer will be biased in favor of his or her professional colleague.

The professional staff of Disciplinary Counsel's Office should be solely responsible for the investigation and prosecution of allegations of lawyer misconduct, disability cases and reinstatement matters.[93] The use of volunteer lawyers to investigate complaints will not be necessary if the Office of Disciplinary Counsel is adequately resourced and staffed.[94] The Chief Disciplinary Counsel should ensure that his/her staff is qualified to investigate and

[89] Rule 5 (c), South Carolina Rules for Lawyer Disciplinary Enforcement.
[90] Supra Note 7 at 48-56.
[91] Id. at 49-50.
[92] Id. at 50-53.
[93] Rule 4(B), ABA Model Rules for Lawyer Disciplinary Enforcement.
[94] Supra Note 11, at 70 and 73-74.

prosecute allegations of misconduct. Staff positions should be adequately compensated so as to allow the Chief Disciplinary Counsel to attract and retain experienced lawyers. The McKay Commission recommended that there should be a balance of experienced and less experienced staff lawyers in the disciplinary agency.[95] This provides continuity as well as a fresh perspective to the process.

If a member of Disciplinary Counsel's staff is unfamiliar with an area of law related to a complaint, it is important that the staff member consult with an expert in that practice area and make other efforts to adequately educate himself/herself so that the grievance can be appropriately handled. If this cannot be done, then the matter can be referred to a staff member with the necessary knowledge.

If the Court decides to retain ATAs, the team recommends that standards be developed setting forth the circumstances under which they can be assigned. The team believes that ATAs should only be used in the rare instances when their unique practice expertise and experience are required. Issues of delay must be addressed. ATAs must be required to submit their written investigation reports to Disciplinary Counsel within a prescribed time period. If an ATA is not completing his or her duties in a timely manner, the Court should grant the Chief Disciplinary Counsel the authority to remove that individual from an assignment and report the ATA's non-compliance to the Court. If retained, ATAs must be regularly trained and provide with standards for conducting investigations. They should not be permitted to investigate lawyers in their own communities.

[95] Id. at 29-30.

Recommendation 6: The Court Should Revise the Rule for Appointment of Attorneys to Protect Client Interests to Ensure Efficient Use of Resources

Commentary

In cases where a South Carolina lawyer is disbarred, suspended, transferred to incapacity inactive status, dead or unable to be located, and that lawyer does not have a partner or designated representative able to conduct his or her affairs or wrap up the law practice, Disciplinary Counsel is required to petition the Court for the appointment of a lawyer to do so.[96] The appointed lawyer is responsible for inventorying the files and taking other appropriate action to protect the interests of the clients of the disbarred, suspended, incapacitated, dead or disappeared lawyer. This includes sending letters to clients, identifying client funds, closing accounts, and seeking continuances for clients until they can retain new counsel.[97] The appointment period is supposed to be for nine months, but the Court can extend that time period when necessary. Trustees are paid from the lawyer's accounts or the South Carolina Lawyers' Fund for Client Protection.

The team was advised that the Court appoints approximately twenty of these lawyers each year, and that there are currently sixty-five active trustees. More than one trustee may be appointed for practices that are large and/or complex. Currently, Disciplinary Counsel's Office trains and monitors the trustees. Interviewees advised the team that Disciplinary Counsel's Office spends a lot of time working with these individuals.

That the Court has adopted a rule designed to ensure that the protection of the clients of disciplined, dead, disappeared or incapacitated lawyers is laudable. It demonstrates the Court's commitment to protection of the public. However, the manner in which Rule is being implemented is problematic. The team believes that having Disciplinary Counsel involved in trustee training and monitoring is not an efficient use of that Office's resources.

The team proposes that the Court eliminate Disciplinary Counsel's role in trustee cases. The Court should amend the Rules for Lawyer Disciplinary Enforcement to provide for the appointment of a lawyer in the district in which the affected lawyer had a practice.[98] The team suggests that the South Carolina Bar be considered as a source to monitor and train these appointees.

[96] Rule 31, South Carolina Rules for Lawyer Disciplinary Enforcement.
[97] Id.
[98] See Rule 28, ABA Model Rules for Lawyer Disciplinary Enforcement.

Recommendation 7: The Court Should Amend the Discovery Rules to Permit More Liberalized Discovery and Provide for Pre-Hearing Conferences

Commentary

Within twenty days of the filing of a respondent's answer to formal charges, Disciplinary Counsel and the respondent lawyer are required to exchange witness lists and all other non-privileged evidence.[99] Each party has a duty to supplement information subject to disclosure under the Rule.[100] The names and contact information for witnesses can only be withheld for good cause shown and with permission of the Chair of a Hearing Panel[101] Disciplinary Counsel must also disclose all exculpatory evidence. Depositions can be taken with the permission of the Hearing Panel Chair or if the parties agree.[102] If a party (usually the respondent lawyer) wants to obtain transcripts of testimony taken by a court reporter pursuant to and investigatory subpoena, they must obtain it from the court reporter at their own expense.

There appears to be no provision in the Rules for Lawyer Disciplinary Enforcement relating to disclosure and discovery of information relating to expert witnesses or pre-hearing conferences as part of the pre-trial proceedings. Rule 25 does not provide for the filing of limited interrogatories or the use of requests to admit facts and genuineness of documents.

The team recommends that the Court amend Rule 25 of the Rules for Lawyer Disciplinary Enforcement to liberalize and clarify permitted discovery after the filing of formal charges.[103] The Court should fashion these amendments to ensure that these procedures are not used by respondents or their counsel to delay the proceedings or to harass the complainant. Limited interrogatories and requests to admit facts and genuineness of documents are useful tools to narrow issues and save time at trial.

The Court should also consider requiring Disciplinary Counsel's Office and respondents or their counsel to create and exchange privilege logs so that any appropriate challenges to the withholding of materials can be made. In response to such a challenge, an *in camera* inspection of the documents can be made by the Hearing Panel Chair who can rule on the challenge. Such rulings should be considered interlocutory and should not be appealable prior to the entry of a final order by the trier of fact. The creation of a privilege log should not require much effort if Disciplinary Counsel commences such a practice when the file is opened.

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[99] Rule 25, South Carolina Rules for Lawyer Disciplinary Enforcement.
[100] Id.
[101] Id.
[102] Id.
[103] Rule 15, ABA Model Rules for Lawyer Disciplinary Enforcement. Liberal exchanges of non-privileged information facilitate the efficient and fair movement of cases through the system.

The team recommends that the discovery rules be expanded to permit appropriate deposition practice without the need for the other party's consent or the approval of Hearing Panel Chair.[104] There will be cases where the determination as to whether a rule violation occurred will depend solely upon the word of a witness, including the complainant, versus the word of the respondent. Depositions must not be used to harass complainants or other witnesses. Concerns about potential abuses of witnesses during depositions can be addressed by oversight and appropriate limitations imposed by the Hearing Panel Chair. Parties who abuse discovery via deposition should be subject to sanctions that include preclusion of the presentation of evidence or testimony. Protective orders, if necessary, could also be ordered.

The Court should also consider amending the Rules to provide for pre-hearing conferences.[105] Pre-hearing conferences help streamline cases and prevent discovery abuses that could lead to unnecessary delays. Hearing Panels should utilize every available tool to limit the issues at trial and help the parties reach agreements where appropriate.

Required pre-hearing conferences are an effective case management mechanism. They reduce delay by allowing the parties and the chair of the Hearing Panel to create a case management plan early in the process that is tailored to the unique nature and complexity of each case; less complex cases require less discovery and less time to prepare for trial. This process requires the parties to plan ahead.

An initial pre-hearing conference conducted by the chair of the Hearing Panel and attended by the parties should occur as soon as possible after the matter is assigned to a Hearing Panel. Pre-hearing conferences may occur in person or by telephone. These conferences should be recorded by some means. Additional pre-hearing conferences should be scheduled as necessary to bring the case to a timely and efficient conclusion.

Issues to be considered during each pre-hearing conference include: (1) the formulation and simplification of issues; (2) the elimination of nonessential charges and defenses; (3) amendments to pleadings; (4) obtaining stipulations relating to facts and the admissibility of documents to eliminate unnecessary proof; (5) obtaining pre-trial rulings on the admissibility of evidence; (6) the limitation of occurrence, character and expert witnesses, including explanations of the subject matter of their proposed testimony; (7) limitations on discovery including the setting of deadlines and limitations on the number and length of depositions; (8) the possibility of proceeding as a stipulated matter; and (9) any other matters that will aid in the prompt disposition of a case. Subsequent to each pre-hearing conference, the Hearing Panel Chair should enter an order setting forth all action that he/she has taken and reciting any agreements between the parties. These orders should be enforceable.

The team was also advised that, during settlement negotiations before the filing of formal charges, respondents and their counsel are not permitted to review the unprivileged portion of

[104] Id.
[105] Rule 18(e), ABA Model Rules for Lawyer Disciplinary Enforcement.

Disciplinary Counsel's file. In the interest of conducting full and fair negotiations to reach agreed dispositions of matters prior to the filing of formal charges, the team believes that such disclosure is appropriate. Respondents and their counsel should not have to negotiate without benefit of this information.

Recommendation 8: Discipline On Consent Should Be Encouraged At All Stages Of The Proceedings

Commentary

Discipline on consent, implemented expeditiously, benefits the public and the parties. The public is protected and the respondent avoids the uncertainty and cost that accompanies going to a public hearing. The system is not required to expend valuable time and resources on formal prosecutions and can devote energies to other contested matters. The South Carolina Rules for Lawyer Disciplinary Enforcement allow for the agreed resolution of any disciplinary matter at any time.[106] If a petition for discipline on consent is entered into after the filing of formal charges, the responded is required to admit or deny the allegations contained in the charging document.[107] If an agreed disposition is proposed prior to the filing of formal charges, the agreement must set forth the specific factual allegations that the respondent admits, and the applicable Rules of Professional Conduct violated.[108]

The effectiveness of the Rule depends upon the manner in which it is used, and whether the Court receives the necessary information to allow it to approve petitions for discipline on consent. The team learned nothing that would indicate that Disciplinary Counsel is using the rule in anything but proper circumstances. However, it appears that the petitions can be better drafted so as to provide the Court with sufficient and well organized information about the matters. The document setting forth the agreement for discipline on consent should not only set forth the factual basis for the admitted misconduct, but should indicate the connection between those facts and the specific Rule violations at issue. In addition, the petition should provide citations to precedent supporting the recommended sanction and distinguishing any precedent that may conflict with the recommendation. Relevant documents should be appended.

The team was advised that petitions for discipline on consent often contain a proposed range of sanctions, instead of a single sanction. The team recommends that this practice cease. Providing a range of sanctions instead of recommending a sanction appropriate to the conduct at issue detracts from the usefulness of this process for the Court. Also, in addition to saving time and resources for the system and respondent, an advantage of discipline on consent, when properly used, is that it provides some certainty in exchange for a respondent lawyer's admission to misconduct. The current practice of proposing a range of sanctions eliminates this benefit of the consent process.

Currently, petitions filed prior to formal charges are submitted to an Investigative Panel; those filed after formal charges are submitted to a Hearing Panel. The panels may reject the

[106] Rule 21, South Carolina Rules for Lawyer Disciplinary Enforcement.
[107] Id.
[108] Id.

proposed agreement or approve it and file it with the Court.[109] The team believes the Court should consider limiting the review of all proposed agreements for discipline on consent to Hearing Panel Chairs, or to the Chair or Vice Chair of the Commission. This would streamline procedures.

[109] Id.

Recommendation 9: The Court Should Adopt Specific Procedures Relating to Deferred Discipline Agreements

Commentary

The Terminology section of the South Carolina Rules for Lawyer Disciplinary Enforcement provides:

> **Deferred Discipline Agreement:** a confidential agreement between the lawyer and an investigative panel of the Commission for the lawyer to undergo treatment, participate in educational programs or take other corrective action. It is only available as a response to misconduct that is minor and can be addressed through treatment or a rehabilitation program. A deferred discipline agreement can only be entered into prior to the filing and service of formal charges.[110]

Rule 7 (a) of the South Carolina Rules provides that it is grounds for discipline for a lawyer to willfully fail to comply with a Deferred Discipline Agreement, and that these agreements are among the types of sanctions that can be imposed for other misconduct. The Rules do not, however, set forth specific requirements or procedures for Deferred Discipline Agreements. The team recommends that the Court adopt a rule setting forth procedures for this alternative to discipline process, and Disciplinary Counsel's Office should use it when appropriate.[111]

Nationwide, the majority of complaints made against lawyers allege instances of lesser misconduct. Single instances of minor neglect or minor incompetence, while technically violations of the rules of professional conduct rarely justify the resources needed to conduct formal disciplinary proceedings, nor do they justify the imposition of a disciplinary sanction. These complaints are almost always dismissed by the disciplinary agency. Dismissal of these complaints is one of the chief sources of public dissatisfaction with disciplinary systems. Although these matters should be removed from the disciplinary system, they should not be simply dismissed. These complaints should be handled administratively via referral from discipline to programs such as fee arbitration, mediation, law practice management assistance, or any other program authorized by the Court.[112]

Based on the team's interviews, it appears there is a need for such a program in South Carolina. While the team was informed of past difficulties referring lawyers to such programs, both Disciplinary Counsel's Office and the South Carolina Bar agree that this mechanism should be utilized. The South Carolina Bar currently has a risk management program which uses an insurance company template to assist members with law office

[110] With the exception of substituting "lawyer" for "judge" this language mirrors that in the Terminology Section of the *ABA Model Rules for Judicial Disciplinary Enforcement*.
[111] See Rule 11 (G) ABA Model Rules for Lawyer Disciplinary Enforcement.
[112] Id.

practice management issues. This is the type of program that would be appropriate as an alternative to discipline.

Referral to an alternatives to discipline program is not a form of disciplinary sanction and should be reserved for instances of lesser misconduct that do not warrant formal proceedings, have caused little or no harm to clients or the public, and are not likely to be repeated.[113] The Office of Disciplinary Counsel should be responsible for referring a lawyer to the alternatives to discipline mechanism. The creation of the program will require cooperation between the South Carolina Bar and Disciplinary Counsel's office in order to be successful. Under the scenario presented in this recommendation each will have distinct and important roles to play in successfully implementing this initiative. The ABA Standing Committee on Professional Discipline is available to assist the Court, the South Carolina Bar, and Disciplinary Counsel's Office in creating and implementing this program. The Discipline Committee maintains resources including information about other state alternatives to discipline programs.

As noted above, participation in the program should not be used as an alternative to discipline in cases of serious misconduct or in cases that factually present little hope that participation will achieve program goals. In addition, the program should only be considered in cases where, assuming all the allegations against the lawyer are true, the presumptive sanction would be less than disbarment or suspension. The existence of one or more aggravating factors does not necessarily preclude participation in the program. For example, a pattern of lesser misconduct may be a strong indication that office management is the real problem and that this program is the best way to address that underlying issue.

The existence of prior disciplinary offenses should not necessarily make a lawyer ineligible for referral to the alternatives to discipline program. Consideration should be given to whether the lawyer's prior offenses are of the same or similar nature, whether the lawyer has previously been placed in the alternatives to discipline program for similar conduct and whether it is reasonably foreseeable that the lawyer's participation in the program will be successful. Both mitigating and aggravating factors should be considered. The presence of one or more mitigating factors may qualify an otherwise ineligible lawyer for the program.

The Court should consider adopting a rule with the following components:[114]

> a. In matters involving lesser misconduct, prior to the filing of formal charges, Disciplinary Counsel's Office may refer the lawyer to the Alternatives to Discipline Program. Lesser misconduct is conduct that does not warrant a sanction restricting the lawyer's license to practice law. Acts involving the misappropriation of funds, conduct causing, or likely to cause, substantial prejudice to clients or others, criminal conduct and conduct involving dishonesty, fraud, deceit or misrepresentation are not minor misconduct.

[113] Id.
[114] Id.

b. The complainant, if any, should be notified of the referral and should have a reasonable opportunity to submit new information about the respondent. This information should be made part of the record.

c. Disciplinary Counsel should consider the following factors in deciding whether to refer a lawyer to the program:

(1) whether the presumptive sanction under the ABA Standards for Imposing Lawyer Sanctions for the alleged misconduct is likely to be no more severe than reprimand or censure;

(2) whether participation in the program will likely benefit the lawyer and accomplish the program's goals;

(3) whether aggravating and mitigating factors exist; and

(4) whether diversion has already been tried.

d. Disciplinary Counsel and the respondent should negotiate a contract, the terms of which should be tailored to the unique circumstances of each case. The agreement should be signed by Disciplinary Counsel and the lawyer, should set forth with specificity the terms and conditions of the plan and should provide for oversight of fulfillment of the agreement, including the reporting of any alleged breach to Disciplinary Counsel. Oversight, for example, would require the practice management monitor provided by the South Carolina Bar to agree to report violations of the terms of the agreement to Disciplinary Counsel. A practice and/or recovery monitor should be identified and his/her duties set forth in the contract. If a recovery monitor is assigned, the contract should include the lawyer's waiver of confidentiality so that necessary disclosures may be made to Disciplinary Counsel. The contract should include a specific acknowledgment that a material violation of a term of the contract renders voidable the lawyer's participation in the program for the original charge(s) filed. The contract should be amendable upon agreement of the lawyer and Disciplinary Counsel. The agreement should also provide that the respondent pay all costs incurred in connection with the contract.

e. The lawyer should have the right not to participate in the program. If he or she chooses not to participate, the matter should proceed as if no referral had been made.

f. After an agreement is reached, the disciplinary complaint should be dismissed pending successful completion of the terms of the contract.

g. The contract should be terminated automatically upon successful completion of its terms. This constitutes a bar to further disciplinary proceedings based upon the same allegations.

h. A material breach of the contract terminates the lawyer's participation in the program and disciplinary proceedings may be resumed or reinstituted.

Because referral to the alternatives to discipline program occurs at the investigative stage of disciplinary proceedings, the Court should consider whether to amend the Rules for Lawyer Disciplinary Enforcement to provide that files maintained by the South Carolina Bar or the lawyers' assistance program in the context of monitoring a lawyer subject to an alternatives to discipline agreement are confidential, with exceptions for the provision of those files to Disciplinary Counsel pursuant to the contract signed by the respondent. Because participation in the alternatives to discipline program differs from voluntary participation in a lawyers' assistance program, the alternatives to discipline rule should recognize this difference and require the monitor to make necessary disclosures in order to fulfill his or her duties under the contract.

Recommendation 10: Records or Evidence of Dismissed Complaints Should be Expunged After an Appropriate Period of Time

Commentary

Once a reasonable period of time has elapsed following the dismissal of a matter, usually a period of three years, there is little reason to retain those records indefinitely. These records should be expunged. The Rules for Lawyer Disciplinary Enforcement do not contain such a provision. It appears that Disciplinary Counsel's Office maintains records of all proceedings indefinitely. The team recommends that the Court amend Rule 5 of the Rules for Lawyer Disciplinary Enforcement to provide for the expungement of dismissed complaints.[115]

The indefinite existence of such records suggests that they may have some additional significance. Many lawyers believe that dismissed complaints, no matter how old, are consulted when new complaints are received and that the new complaint is then given greater credibility. Concerns about the improper inferences that might be drawn from these records should be accommodated within reason.

In fashioning a record retention rule, the Court must balance these concerns with valid reasons for retaining records of dismissed cases. Complaints are not always dismissed because they are invalid. In some cases, there was not enough evidence available at the time to corroborate the allegations, which, if true, would constitute serious misconduct. Additional proof regarding those allegations may become available at a later date. Further, an isolated instance of lesser misconduct may warrant dismissal, but the receipt of subsequent complaints may raise concerns about a pattern of conduct that warrants reconsideration of the first complaint.

Any rule setting forth requirements for the expunction of these records should state that the Office of Disciplinary Counsel should, after three years, destroy all records or other evidence of complaints terminated by dismissals or referrals to other agencies. The Court may wish to add a provision stating that, upon good cause shown by Disciplinary Counsel, the Court will permit the retention of specified records for an additional period of time not to exceed three years. The Court might also consider adding a provision to Rule 5 calling for the expunction of admonitions and letters of caution after ten years.

A practical reason for the Court to enact a rule providing for the expungement of dismissed investigatory files is storage space. The team observed that the Office of Disciplinary Counsel had very limited file space. Boxes of files were stored in hallways. Permitting the Office of Disciplinary Counsel to expunge dismissed files should help save resources. As an alternative, should the Court decide to retain the current Rule, the Chief Disciplinary Counsel should consider electronic archiving.

[115] Rule 4(B)(12), ABA *Model Rules for Lawyer Disciplinary Enforcement*.

Investigative files relating to matters that have proceeded to the formal charges stage and the imposition of discipline should be retained indefinitely. These records can be useful in reinstatement proceedings and are relevant to whether a pattern of misconduct exists in the event of subsequent formal proceedings against a lawyer.

Lawyers should be given notice that matters have been expunged so that they may accurately respond to inquiries that require disclosure of their disciplinary history. Once a matter is expunged, a lawyer may answer any question relating to that case by stating that no complaint was made. The disciplinary agency should state that there is no record of such a matter.

Recommendation 11: The Court Should Amend the Rules to Provide That Disciplinary Counsel is Responsible for Handling Reinstatement/Readmission Cases

Commentary

In South Carolina, petitions for reinstatement to the practice of law after disbarment, an indefinite suspension or a suspension of nine months or more are referred to the Committee on Character and Fitness.[116] Ten days after such referral, the lawyer seeking reinstatement is required to publish a notice of the petition in certain publications, and provide notice of the petition to the complainant(s) in the underlying disciplinary matter.[117] The Character and Fitness Committee is required to schedule a hearing on petitions for reinstatement within one-hundred and eighty days of its receipt of the matter.[118] While Disciplinary Counsel is permitted to present evidence, the Committee conducts the hearing and can subpoena witnesses and documents. It is not clear whether the Committee appoints counsel to oppose the position or if it takes no position on the matter and simply acts as the trier of fact. There are no provisions for investigation or discovery.

The team was advised by a variety of interviewees that the current system is infused with delays that result in specific suspensions beings unfairly extended well past their term. In most jurisdictions reinstatement cases are handled by Disciplinary Counsel's Office in the same general manner as proceedings on formal charges. Disciplinary Counsel has the experience and expertise required to handle these cases efficiently. While the petitioner has the burden of proof in these cases, Disciplinary Counsel investigates the petition, determines whether to object to it, and appears on the record as counsel in the proceeding to present evidence and argument on behalf of the disciplinary agency. The team recommends that the Court amend Rule 33 to remove the Committee on Character and Fitness' responsibilities in these cases and to require that they be heard by Hearing Panels of the Commission on Lawyer Conduct.

Reinstatement cases are often labor intensive and time consuming. This is especially true when the petitioner has been suspended for a period of time in excess of a year or disbarred. The more time that has passed between the time of discipline and the filing of the petition, the greater the amount of information that needs to be examined regarding current character, fitness and competence of the petitioner.

Disciplinary Counsel should have reasonable time to investigate the petition, including taking the sworn statement of the petitioner, and determine whether to object and request a hearing or stipulate to the reinstatement.[119] Determining whether a lawyer is fit to return to the practice of law warrants reasonable additional time spent investigating a petition for

[116] Rule 33, South Carolina Rules for Lawyer Disciplinary Enforcement.
[117] Id.
[118] Id.
[119] Rule 25(F), ABA Model Rules for Lawyer Disciplinary Enforcement.

reinstatement. By doing so, the system ensures that the public is adequately protected and that the integrity of the profession does not suffer another blow from that particular lawyer. The team recommends that the Court permit Disciplinary Counsel a minimum of ninety (90) days and a maximum of one-hundred twenty days (120) to conduct such an investigation. At the end of that period of time, Disciplinary Counsel should file objections, if any, to the petition with the Court and request a hearing before a Hearing Panel. Any objections should contain the specific basis for opposing the petition for reinstatement.

The team recommends that the Court amend Rule 33 to require that petitioners provide much more detailed information to the Office of Disciplinary Counsel. Requiring petitioners to provide detailed information in the petition will help Disciplinary Counsel conduct a thorough investigation. The burden is on the petitioner to provide that data. Petitioners who apply for reinstatement should be given as much guidance as possible with respect to what is required to be in the petition and what they will bear the burden of proving by clear and convincing evidence.

Petitions should specify with particularity how the lawyer meets each of the criteria set forth in Rule 33. To assist in expediting the investigation of petitions for reinstatement, the Court may wish to require, and the team recommends, that petitioners be required to provide Disciplinary Counsel with documentary evidence supporting their claims that the criteria set forth in the Rule have been met, as well as additional information relevant to determining whether the petitioner possesses the character and fitness worthy of regaining the privilege to practice law. For example, the Court should require that petitioners provide Disciplinary Counsel with their current residence address and telephone number; addresses of each residence during the period of discipline along with the dates of each residence; and the name, address and telephone number of each employer, associate or partner of the petitioner during the period of sanction, including the dates of each employment, position(s) held, the names of all supervisors and reasons for leaving the employment, partnership or association.

The petitioner should also be required to provide to Disciplinary Counsel: (1) the case caption, general nature and disposition of every civil and criminal action pending during the period of discipline to which the petitioner was party or claimed an interest; (2) a statement of monthly earnings and other income during the period of discipline, including the source of the earnings/income; (3) a statement of assets and financial obligations during the period of the sanction, including the dates acquired or incurred and the names and addresses of all creditors; (4) a statement verifying that restitution, if appropriate, has been made and in what amount(s); (5) a statement as to whether during the period of sanction the petitioner applied for reinstatement in any other jurisdiction and the results of any such proceedings; (6) a statement identifying any other licenses or certificates for business or occupation applied for during the period of sanction; (7) the names and addresses of all financial institutions at which petitioner had, or was a signatory to, accounts, safety deposit boxes, deposits or loans during the period of sanction; (8) written authorization for Disciplinary Counsel to secure any financial records relating to those accounts, safety deposit boxes, deposits or loans; (9) and copies of petitioner's state and federal income tax returns for the three years preceding the

period of discipline and during the period of the sanction along with written authorization for Disciplinary Counsel to obtain certified copies of the originals.

Because much of this information, while relevant, contains personal and sensitive information, it should be filed only with Disciplinary Counsel's Office and not attached to the petition filed or to any other pleadings filed in the reinstatement matter. This should avoid the risk of improper use of that information by those not entitled to it.

If objections are filed, the Court should refer the matter to a Hearing Panel for trial.[120] Any appeal of the Hearing Panel's report and recommendation on reinstatement petitions should proceed before the Court in the same matter as formal charges.

[120] Rule 25 (G), ABA Model Rules for Lawyer Disciplinary Enforcement.

V. SANCTIONS AND PREVENTIVE PROGRAMS

Recommendation 12: The Court Should Eliminate Indefinite Suspensions and Provide for Automatic Reinstatement for Suspensions of Less Than Nine Months

Commentary

In South Carolina, suspensions from the practice of law may be for a specific term or indefinite. The team recognizes that the availability of indefinite suspensions can be perceived as a deterrent to lawyers and protective of the public. However, the consultation team suggests that these goals can be met without the imposition of indefinite suspensions and recommends that the Court consider their elimination.

While an indefinite suspension may be viewed as more severe than a fixed term suspension and less dire than disbarment, imposing this type of sanction does not clearly indicate to the public or the profession that there is a distinction between acts of misconduct of differing severity. Affixing a specified period of time to a suspension indicates gradations of severity. Further, the uncertainty that accompanies an indefinite suspension could be viewed as punitive. Indefinite suspensions may also pose difficulties for other jurisdictions that do not impose these sanctions and that seek to impose reciprocal discipline based upon a South Carolina case.

The length of time of a suspension should be fixed and based upon consideration of the nature and extent of the misconduct and any mitigating or aggravating factors.[121] The ABA Model Rules for Lawyer Disciplinary Enforcement suggest that the term of a suspension not exceed three years.[122] Some jurisdictions impose suspensions for fixed periods of five or more years. The consultation team believes that if misconduct is so severe that a three-year suspension is not sufficient, the lawyer should be disbarred.

The Court should also consider amending the language of Rule 32 of the Rules for Lawyer Disciplinary Enforcement to provide for automatic reinstatement to the practice of law after suspensions of less than nine months are completed.[123] Rule 32 allows for the Court to reinstate a lawyer who has filed the necessary paperwork after the expiration of that short term suspension. The Rule does not indicate what happens if the Court rejects reinstatement in those cases.

The team believes that denying reinstatement to a lawyer suspended for a short period of time, or requiring that lawyer to undergo reinstatement proceedings would unfairly prolong the period of suspension. If the Court has concerns at the sanction imposition stage of the proceedings that a lawyer may not qualify for reinstatement after the expiration of a short

[121] Rule 10, ABA Model Rules for Lawyer Disciplinary Enforcement.
[122] Id.
[123] Rule 24, ABA Model Rules for Lawyer Disciplinary Enforcement.

term suspension, perhaps a longer suspension, requiring a petition for reinstatement is appropriate.

Recommendation 13: The Court Should Consider Adopting Probation as a Sanction and a Rule Setting Forth Procedures for Its Imposition and Revocation

Commentary

Currently, the South Carolina Rules for Lawyer Disciplinary Enforcement do not provide for the imposition of probation as a disciplinary sanction. The team believes that once the Disciplinary Counsel's Office and the Commission on Lawyer Conduct are adequately staffed and have adjusted to changes that the Court makes in response to this Report, that the Court should consider adopting a probation rule. This rule should set forth specific requirements for the imposition, monitoring and revocation of probation.[124]

Probation is different than the alternatives to discipline program described in Recommendation Nine. Probation should be imposed after the filing of formal charges. Cases should only be diverted to alternatives to discipline programs prior to the filing of formal charges. Diversion or alternatives to discipline programs should only be used for matters involving lesser misconduct that do not require further involvement by the disciplinary system. Matters for which a respondent is placed on probation remain in the disciplinary system. Probation is not another form of diversion; it is a separate public disciplinary sanction. If a matter rises to the level where the filing of formal charges is warranted, diversion is inappropriate.

Probation is an appropriate sanction where a lawyer can perform legal services but needs supervision and monitoring. Probation should be used only in those cases where there is little likelihood that the respondent will cause harm during the period of rehabilitation and the conditions of probation can be adequately supervised. Placing a lawyer on probation under these circumstances, with or without a stayed suspension, protects the public and acts to prevent future misconduct by addressing the problem(s) that led to the filing of disciplinary charges.

A detailed probation rule should provide necessary guidance to the disciplinary agency and lawyers with respect to the types of cases for which probation is appropriate. The team recommends that a separate probation rule adopted by the Court set forth in general terms the requirements for imposition of probation. These include: (1) the lawyer can perform legal services without causing the courts or legal profession to fall into disrepute; (2) the lawyer is unlikely to harm the public during the period of rehabilitation; (3) necessary conditions of probation can be formulated and adequately supervised; (4) the respondent has a temporary or minor disability that does not require transfer to inactive status; and (5) the respondent has not committed misconduct warranting disbarment.

The rule should provide that the order placing a respondent on probation must state unambiguously each specific condition of probation. Placing the exact conditions of

[124] Rule 10 (A) (3), ABA Model Rules for Lawyer Disciplinary Enforcement.

probation in the Court's order lets the respondent know exactly what is expected and what will constitute a lack of compliance that could lead to a revocation of probation and the imposition of suspension. The conditions should take into consideration the nature and circumstances of the misconduct and the history, character and condition of the respondent. Specific conditions may include: (1) supervision of client trust accounts as the Court may direct; (2) limitations on practice; (3) psychological counseling and treatment; (4) abstinence from drugs or alcohol; (5) random substance testing; (6) restitution; (7) successful completion of the Multi-state Professional Responsibility Examination; (8) successful completion of a course of study; (9) regular, periodic reports to the Disciplinary Counsel's Office; and (10) the payment of disciplinary costs and the costs associated with the imposition and enforcement of the probation. The terms of probation should specify periodic review of the order of probation and provide a means to supervise the progress of the probationer. The team also recommends that the probation rule include a provision stating that, prior to the termination of a period of probation, probationers must file an affidavit with the Court stating that they have complied with the terms of probation. Probationers should be required to bear the costs and expenses associated with imposition of the terms and conditions of the probation.

An effective means of monitoring probationers is essential to the successful use of probation as a disciplinary sanction. As a result, the rule should provide for the administration of probation under the control of the Disciplinary Counsel's Office. If adopted, the Office of Disciplinary Counsel should be provided with appropriate resources (staff and funding) for this new and necessary obligation.

In order for the probation process to be successful, probation monitors must report to the Disciplinary Counsel's Office regarding the probationer's progress. The monitor's only role is to supervise the monitored lawyer in accordance with the terms of the probation and to report compliance or noncompliance to Disciplinary Counsel. The monitor is not to be a twelve-step or other recovery program sponsor for the probationer. Any probation rule adopted by the Court should provide that the probationer must be required to sign a release authorizing the monitor to provide information to Disciplinary Counsel. Additionally, the rule should provide immunity for probation monitors.

Probation monitors should be required to immediately report to Disciplinary Counsel any instances of noncompliance. The Court should adopt a rule providing that upon receipt of such a report, Disciplinary Counsel may, if appropriate, file a petition with the Court setting forth the probationer's failure to comply with the conditions of probation, and requesting an order to show cause why probation should not be revoked and any stay of suspension vacated. The Court should provide the probationer with a short time period, fourteen to twenty-one days, in which to respond to the order to show cause. After consideration of the lawyer's response to the order to show cause, the Court may take whatever action it deems appropriate, including revocation of the probation and the imposition of the stayed suspension or modification of the terms of the probation. This summary proceeding will save time and resources and promptly remove the risk to the public and the profession that a lawyer who is not complying with the terms of probation poses.

The Office of Disciplinary Counsel should develop specific procedures for screening and selecting probation monitors. Disciplinary Counsel may also wish to consult with the director of the lawyers' assistance program when developing criteria for screening and selecting other probation monitors. A policies and procedures manual for appointing, supervising and removing the monitors, and guidelines for the nature and contents of monitor reports to Disciplinary Counsel's Office should also be created.

Adequate and regular training of probation monitors is vital to the successful use of probation. Disciplinary Counsel's Office should develop training materials and curricula for probation monitors. Other jurisdictions that have training programs for probation monitors in place should be consulted. All probation monitors should be required to attend training at least bi-annually.

Recommendation 14: The Court Should Adopt A Rule for Random Audit of Trust Accounts and Approve a Curriculum Proposed by Disciplinary Counsel for a Trust Account School

Commentary

The South Carolina Supreme Court has adopted a Financial Recordkeeping Rule.[125] The consultation team believes that the adoption of a rule providing for the random audit of trust accounts would complement this Rule.[126] Random audits are a proven deterrent to the misuse of money and property in the practice of law. Programs currently exist in: Delaware, Georgia, Hawaii, Iowa, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Vermont and Washington.

The random examination of trust accounts by independent auditors, with appropriate procedural safeguards, provides practitioners with expert and practical assistance and education in maintaining necessary records and supporting books of account. These procedural safeguards include adequate prior notice before the commencement of an audit; written audit reports; the opportunity for an audited lawyer or law firm to respond to an examiner's report; the preservation of confidentiality for law firm and client records; and limitations on the frequency of audits conducted by random selection.

A random audit of a trust account should be commenced by the issuance of an investigative subpoena, from a Court designated auditor, to compel the production of records relating to a lawyer's or law firm's trust account(s).[127] The subpoena should contain a certification that it was issued in compliance with the rule; that the lawyer or law firm was selected at random; and that there exist no grounds to believe that professional misconduct has occurred with respect to the account(s) being audited. The subpoena should be served at least 10 business days before commencement of the audit.

In the course of an audit, the examiner should determine whether the lawyer's or law firm's records and account(s) are being maintained in accordance with the Supreme Court Rule 417. This is done by employing sampling techniques to examine "selected accounts," unless discrepancies are found which indicate a need for a more detailed audit. "Selected accounts" may include: money, securities and other trust assets held by the lawyer or law firm; safe deposit boxes and similar devices; deposit records; canceled checks or their equivalent; and any other records which pertain to trust transactions affecting the lawyer's or law firm's practice of law.

[125] South Carolina Supreme Court Rule 417.
[126] ABA Model Rule for Random Audit of Lawyer Trust Accounts, http://www.abanet.org/cpr/clientpro/apreface.html.
[127] The Court could use the auditor that the team suggests that the Chief Disciplinary Counsel hire in Recommendation Sixteen below.

The examiner should prepare a written report containing the audit results. A copy of that report should be provided to the audited lawyer or law firm. If the audit reveals deficiencies in the lawyer's or law firm's records or procedures, the lawyer or law firm should, within 10 business days after receipt of the report, provide evidence that the alleged deficiencies are incorrect, or that they have been corrected. If review of the alleged deficiencies or corrective action requires additional time, the lawyer or law firm should apply for a reasonable extension of time in which to respond to or correct the deficiencies cited in the audit report. A lawyer or law firm should cooperate in an audit and should answer all questions posed, unless the lawyer or law firm claims a privilege or right which is available to the lawyer or law firm under applicable state or federal law. A lawyer or law firm's failure to cooperate in the audit, including the provision of any necessary response to the auditor's report, should constitute professional misconduct.

All records produced for an audit should remain confidential. Their contents should not be disclosed in violation of the attorney-client privilege. Records produced for an audit may be disclosed to Disciplinary Counsel's Office for purposes of a disciplinary proceeding if the examination reveals evidence that misconduct may have occurred. Such records may also be disclosed to any other person, including a law enforcement agency, with the permission of the Court.

The team further suggests that the Office of Disciplinary Counsel develop and propose to the Court for its approval a curriculum for a trust account school or handbook for South Carolina lawyers. Several jurisdictions have such a program or publication, including California, Illinois, North Carolina, and Wisconsin.[128] These programs and publications are particularly useful for small firm and sole practitioners.

[128] *See, e.g.*, http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10179&id=32923 ; http://www.calbar.ca.gov/calbar/pdfs/ethics/2003_CTA_Handbook.pdf; http://www.iardc.org/clienttrusthandbook_toc.html; http://www.ncbar.com/PDFs/Trust%20Account%20Handbook.pdf; http://www.wicourts.gov/services/attorney/trust.htm.

Recommendation 15: The Court Should Adopt a Rule Providing for Written Notice to Claimants of Payment in Third Party Settlements.

Commentary

The Committee recommends that the Court adopt a payee notification rule.[129] Insurance carriers customarily deliver settlement proceeds to the lawyer of record for the claimant, usually by check made payable jointly to the claimant and the claimant's lawyer. A "payee notification rule" would require the insurance company to provide the claimant with notice that the settlement check had been delivered to the lawyer. A "payee notification rule" constitutes an effective protection device for clients. Such a rule adopted by the Court provides a low cost, independent and verifiable source of information concerning the settlement. This Rule is intended to reduce, and in the jurisdictions that have adopted it, has reduced the loss of client funds from forged endorsements of settlement proceeds. Any prophylactic measure that reduces losses to clients and third parties will reduce stress on the South Carolina Lawyers' Fund for Client Protection and increase the public's confidence in the profession.

Without such a rule, the carrier does not normally notify the claimant of the issuance of this check. This gap in the process creates an opportunity for dishonest practices in the settlement and payment of insurance claims. It is not uncommon for a dishonest lawyer to conceal an unauthorized settlement or misappropriation of client funds for several years. Such misconduct includes unauthorized settlement of the client's claim, forgery of the claimant's signature on a stipulation of settlement, forgery of the claimant's endorsement on the settlement draft, or misappropriation of the claimant's share of the proceeds. A copy of the ABA Model Rule for Payee Notification is attached as Appendix B.

[129] ABA Model Rule for Payee Notification, http://www.abanet.org/cpr/clientpro/ppreface.html

VI. RESOURCES/TRAINING FOR DISCIPLINARY COUNSEL'S OFFICE

Recommendation 16: The Court Should Oversee the Formation of a Formal Annual Budget Process for Disciplinary Counsel's Office to Ensure Adequate Staffing and Funding

Commentary

The importance of adequate funding and staffing for any lawyer disciplinary system cannot be overstated. If Disciplinary Counsel's Office is to perform its duties effectively and efficiently, it must be adequately staffed and have appropriate resources, including technology and adequate office space.[130] Lawyers owe it to their clients and the public to support the lawyer disciplinary system not only through their voluntary service, but financially. If the regulation of the legal profession is to remain within the judicial branch of government, the Court must ensure that adequate resources exist.[131]

The consultation team is aware of the size of the State of South Carolina and economic conditions. The team is sensitive to the trepidation and skepticism with which requests for additional funds are often met. However, in order for many of the recommendations in this Report to succeed and for South Carolina to achieve optimal efficiencies in its lawyer and judicial discipline systems, resources must increase. The Court should consider raising the current $50 disciplinary assessment that it receives from South Carolina lawyers. This amount is low when compared to states with comparable lawyer populations as well as nationally.[132] Raising the annual disciplinary assessment will also help the Court lessen reliance on the legislature for funding of the system.

The first step in any budgeting process is effective and careful planning. For this reason, the team recommends that, in addition to the budgeting process for the Commission on Lawyer Conduct in Recommendation One above, that the Chief Disciplinary Counsel work with the Court to develop an annual, documented budget process for the investigative/prosecutorial branch of the system. This process should be used to assess current resource and staffing needs, as well as to plan for the future. The Court should amend Rule 5 (b) of the Rules for Disciplinary Enforcement to provide for the Chief Disciplinary Counsel's budgeting duties.

Using this process, the Chief Disciplinary Counsel should prepare and submit to the Court an annual budget. With regard to current staffing, the team notes the recent elimination of the Senior Assistant Attorney General's role in judicial and lawyer discipline cases, and that of the two investigators from the Attorney General's Office in the investigation these matters. These vacancies will likely necessitate the hiring of additional disciplinary counsel and at

[130] Id. at 71.
[131] Supra Note 2 at 70.
[132] See, Chart VII., 2006 ABA Survey on Lawyer Discipline Systems at http://www.abanet.org/cpr/discipline/sold/06-ch7.pdf

least two investigators. The team also believes that the system would benefit from another paralegal and an auditor/accountant. Any paralegal hired, in addition to the current paralegal on staff, should not be used as an additional administrative assistant, but should be assigned and perform substantive duties. These include preparing the privilege logs suggested in Recommendation Seven, assisting in responding to discovery requests and organizing discovery documents provided by respondents of their counsel, conducting legal research and electronically abstracting transcripts for review by Disciplinary Counsel, and preparing exhibits for presentation to the Investigative Panels and for trial. The paralegal should also provide assistance to complainants who are unable to write their grievances. The Chief Disciplinary Counsel should consider the need for increased resources for necessary technology improvements, and space and storage issues. If necessary, a financial planner or budget analyst should be used to assist in assessing the current and future needs of the system in terms of finances, technology and staffing.

The Chief Disciplinary Counsel should conduct annual performance reviews and career paths should be developed. Every employee in Disciplinary Counsel's Office should receive written performance reviews supplemented by in person status meetings with their supervisor(s). These meetings can be used to convey expectations, increase communication, and adjust performance goals and priorities as necessary. Funds should be provided to reward performance that meets and exceeds goals. The caseload management software can be used as one tool by which performance can be reviewed and expectations related. The team was advised that in the past, such reviews did not take place. The Office of Finance and Personnel of the Judicial Department can help ensure that salaries for the professional staff are competitive so as to attract and retain experienced individuals.

Recommendation 17: Disciplinary Counsel and Staff Should Receive Formal Training

Commentary

Training helps to ensure timely and thorough investigation and prosecution of disciplinary matters, and allows the lawyers in the Office to become familiar with novel issues in disciplinary law and new investigative tools and techniques. Training allows for the efficient operation of the administrative functions of the Office. Training enhances communication and permits all employees to learn and understand the priorities and goals of the Office. Training should be mandatory for all staff in Disciplinary Counsel's Office.

With regard to administrative staff, the consultation team recommends that the senior administrative assistants work with the Deputy Disciplinary Counsel to develop a comprehensive office procedures manual. This manual should be available electronically and in paper form. It should be provided to all staff of the Office. For purposes of accommodating planned and unplanned absences, all administrative staff should be cross-trained. Cross-training ensures that if one employee is out of the office for an extended period of time work flow will continue and the efficiencies of the office need only sustain minimal, if any, disruption.

Lawyers, investigators and paralegals from the Office of Disciplinary Counsel should also receive training and be able to take advantage of continuing education opportunities. Lawyers from Disciplinary Counsel's Office should continue to attend the ABA National Conference on Professional Responsibility. The ABA National Conference on Professional Responsibility is the preeminent educational and networking opportunity in the field of ethics and professional responsibility. Attendees have the opportunity to formally and informally collect information and discuss current issues and problems in the area of professional responsibility and disciplinary enforcement with leading experts, scholars and practitioners from across the country. Conference programs address recent trends and developments in legal ethics, professional discipline for lawyers and judges, professionalism and practice issues and are intended to be informative and educational on a level appropriate to a group with considerable knowledge of and familiarity with the area. The National Conference on Professional Responsibility is held annually in conjunction with the National Forum on Client Protection.

Staff of Disciplinary Counsel's Office should also continue to attend National Organization of Bar Counsel meetings. The NOBC is an affiliated organization of the ABA. The NOBC meetings are held in conjunction with the ABA Midyear and Annual Meetings. Resources provided by the NOBC include briefs, pleadings and educational presentations at the meetings to help jurisdictions with the implementation of more efficient and effective regulatory enforcement mechanisms.

VII. CONCLUSION

As noted throughout this Report, the consultation team was impressed by the dedication of the Court, the volunteers and the professional staff of the disciplinary agency. The Standing Committee on Professional Discipline Committee hopes that the recommendations contained in this Report will assist the Court.

As part of the discipline system consultation program, the Committee is available for further consultation with the Court if so requested.

APPENDIX A

DAVID S. BAKER is Chair of the ABA Standing Committee on Professional Discipline. He was a partner with Powell Goldstein, L.L.P. in Atlanta, Georgia, where his practice was concentrated in the representation of health care providers until 2008 when he joined the firm of Taylor, Busch, Slipakoff & Duma. He has served as Chair of the ABA General Practice Section (1986-1987) and the Standing Committee on Environmental Law (1993-1996). A former member of the ABA House of Delegates (1987-1990), Mr. Baker also formerly served on the ABA Board of Elections and the Committee on State Justice Initiatives. Mr. Baker was a member of the Board of Visitors of the Terry Sanford Institute of Public Policy at Duke University. He is a graduate of the Harvard Law School and is licensed to practice law in Georgia and formerly in New York.

ANTHONY L. BUTLER is a member of the Standing Committee on Professional Discipline. He was a Disciplinary Counsel with the Washington State Bar Association Office of Disciplinary Counsel until 2004 when he started a solo practice in the areas of legal ethics and plaintiffs' personal injury litigation. Mr. Butler is on the roster of Adjunct Faculty at the Seattle University School of Law where he has taught professional responsibility. A former President of the Loren Miller Bar Association and a former Board Member of the National Bar Association, he is currently a member of the Washington State Bar Association Board of Governors. He is a graduate of the University of Washington School of Law and licensed to practice in Washington State.

HON. **BARBARA KERR HOWE** is immediate Past-Chair of the ABA Standing Committee on Professional Discipline. She was an Associate Judge of the Circuit Court for Baltimore County, Maryland, and now serves in "senior status" throughout the courts in Maryland. After her appointment in 1988, she was elected to the bench in 1990 for a fifteen-year term. She served as a director of the Attorney Grievance Commission of Maryland from 1983-1985 after having served on its Inquiry Panels for a number of years. She was a member of the Judicial Disabilities Commission of Maryland from 1991 through 1995 and its Chair during 1995. She is a graduate of the University of Maryland Law School. She was a partner in a law firm engaged in general practice.

She was President of the Maryland State Bar Association, 1996-1997, a member of the ABA Standing Committee on Professionalism from 1995-1998, chair of the Professionalism and Professional Responsibility Committee of the ABA General Practice Solo and Small Firm Section, a member and director of the American Judicature Society, and the National Association of Women Judges. She is a fellow of the Maryland Bar Foundation and of the American Bar Foundation.

LARRY RAMIREZ is of counsel to Carrillo Law, LLC in Las Cruces, New Mexico. Larry is a former District Judge with the Third Judicial District Court, State of New Mexico where he served as a Children's Court judge. Larry has served as Chair of the General Practice, Solo and Small Firm Division of the American Bar Association. He has also served on the Multijurisdictional Practice Commission of the ABA and is a Past Chair of the Disciplinary Board of the Supreme Court of the State of New Mexico. Larry has been a lawyer since 1977 and received his law degree from the University of Notre Dame.

MARY M. DEVLIN is Regulation Counsel, American Bar Association Center for Professional Responsibility, where she directs the Association's efforts in improving lawyer and judicial disciplinary enforcement for the ABA Standing Committee on Professional Discipline. She also served as counsel to the ABA Standing Committee on Amicus Curiae Briefs for eleven years. She has been involved in professional ethics and discipline for over twenty years, previously serving as counsel to the American Medical Association's Council on Ethical and Judicial Affairs. She is the author of over 50 articles. Her J.D. from I.I.T. Chicago-Kent College of Law was with honors. She received an LL.M. from DePaul University College of Law in 1996. She has a master's degree in library science from Dominican University and a master's degree in history from the University of Illinois at Chicago. She is a Life Fellow of the American Bar Foundation.

ELLYN S. ROSEN is the Associate Regulation Counsel at the American Bar Association Center for Professional Responsibility, where she serves as counsel to the ABA Standing Committee on Professional Discipline and the ABA Task Force on International Trade in Legal Services. She also serves as staff liaison to the National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers. Previously, she was a senior litigation counsel with the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, where she investigated and prosecuted allegations of lawyer misconduct for six and one-half years. Ms. Rosen co-chaired the Chicago Bar Association's Young Lawyers Section Professional Responsibility Committee, for the 1997-98 through 1999-00 bar years. Since 2000, she has served as an investigator and interviewer for the Alliance of Bar Associations for Judicial Evaluations. The Alliance of Bar Associations consists of the Illinois State Bar Association and ten special interest bar associations that evaluate candidates for election and appointment to the bench in Illinois. She received her J.D. with honors from the Indiana University School of Law in Bloomington, Indiana.

APPENDIX B

ABA MODEL RULE FOR PAYEE NOTIFICATION

PREFACE

The Model Rule for Payee Notification is based upon Regulation 64 of the Department of Insurance of the State of New York, promulgated in 1988 (11 NYCRR 216.9 (A) & (B)), which requires notice to the payee in all insurance settlements in excess of $5,000. The regulation does not apply to no-fault payments from a claimant's own insurer. As implemented in various jurisdictions the provision for payee notification has been triggered by a dollar amount which ranges from $1,000 to $5,000.

In payment of liability claims, it is the customary practice of insurance carriers to deliver the settlement proceeds to the lawyer of record for the claimant, usually by check made payable jointly to the claimant and the claimant's lawyer. As the Supreme Court of New Jersey observed in Matter of Conroy, 56 N.J. 279, 266 A.2d 279 (1970), the underlying purpose for the practice is to "protect and preserve the interests of all three parties to the transaction" the insured, the successful claimant and the claimant's lawyer. In the payment process, the insurance carrier does not typically notify the claimant when it makes payment to the claimant's lawyer or other representative. This gap in the process permits dishonest practices to interfere with the settlement and payment of insurance claims.

If the dishonest conduct involves the claimant's lawyer instances of lawyer misconduct can include the unauthorized settlement of the client's claim with the defendant's insurer, forgery of the claimant's signature on a stipulation of settlement or other legal document that may be required to complete the settlement, forgery of the claimant's endorsement on the settlement draft itself, or misappropriation of the claimant's share of the proceeds.

It is not uncommon for a dishonest lawyer to successfully conceal the unauthorized settlement and misappropriation for several years and to be unable to restore the claimant's funds when the loss is finally discovered. As few client protection funds are able to provide full reimbursement for all eligible losses it is important that the legal profession devise and support methods of reducing losses resulting from dishonest conduct in the practice of law, including the misappropriation of personal injury settlements.

Experience in New York and other states demonstrates that the payee notification rule has had a salutary effect on lawyer misconduct, has demonstrated an effective protection device for clients and has benefited the state lawyers' fund for client protection. A similar statute or regulation should have the same beneficial effect in other jurisdictions.

Written Notice to Claimants of Payment of Claims in Third Party Settlements.

Upon the payment of [insert desired dollar amount] or more in settlement of any third-party liability claim, the insurer shall provide written notice to the claimant where:
(1) the claimant is a natural person, and

(2) the payment is delivered to the claimant's lawyer or other representative by draft, check or otherwise. Such notice shall be required when payment is made to a claimant by the insurer or its representative, including the insurer's lawyer.

This rule shall not create any cause of action for any person against the insurer, other than a government agency, based upon the insurer's failure to provide notice to a claimant as required by this rule; nor shall this rule create a defense for any party to any cause of action based upon the insurer's failure to provide such notice.

Comment

This rule is intended to serve as a deterrent to the dishonest conduct of a claimant's lawyer with respect to the receipt of third-party liability claims. The intended salutary effects of including the payee in the claim payment process should obtain whether the rule is enacted as a statute or a regulation.

The written notice requirement of Paragraph A of this rule is reasonable and appropriate to advise the claimant of settlement of its liability claim by payment to its lawyer or other representative. Written notice provides the claimant with an independent and verifiable source of information concerning the facts of the settlement. It also provides the adverse party and insurer with certainty that the settlement has been concluded in a lawful manner.

The provisions of Paragraph B are intended to make clear that an insurance carrier's failure to comply with this rule does not create a new cause of action or defense for a party. The insurer, however, may be subject to appropriate action by a state regulatory or licensing agency.