



# The Supreme Court of South Carolina

## **ACTION PLANS FOR IMPLEMENTATION OF RECOMMENDATIONS REGARDING THE LAWYER DISCIPLINE PROCESS**

At the request of the Supreme Court of South Carolina, a Consultation Team sponsored by the American Bar Association Standing Committee on Professional Discipline conducted an in-depth review of the lawyer disciplinary system in South Carolina. The Consultation Team prepared a detailed report setting forth its recommendations. Subsequently, this Court referred this matter to the Chief Justice's Commission on the Profession for its review. A special subcommittee of the Commission (the Committee) prepared its own recommendations and comments to the ABA report that the Commission has approved.

This document sets forth this Court's determination regarding each of the recommendations made by the ABA Consultation Team. For each recommendation, there is discussion and an action plan. The appendix to this document shows the provisions of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules that will be amended, along with commentary regarding these amendments.

**Recommendation 1: Increase the Public Representation on the Lawyer Conduct Commission and Streamline the Functions of the Investigative Panels.**

Based on the Committee's recommendation, the Court will implement the portions of the ABA Consultation Team's recommendation that would increase public representation on the Commission on Lawyer Conduct and that would require adequate training for public members. Public membership in the lawyer discipline process enhances the effectiveness of the Commission by providing a lay perspective, often a client-oriented one. In addition, participation by non-lawyers provides assurance to the public that the process is not closed or self-serving. The use of only two public members, however, does create a burden on them that is greater than the burden on the attorney members as the public members serve on four panels each and attorney members only serve on one panel each.

The Court agrees with the Committee's recommendation to increase the number of public members from two to 16 and increase the total Commission membership to 50 (including the chair and vice-chair). Each panel will now consist of four attorney members and two public members. Implementation of this structure will be phased in, beginning with the addition of six public members (one to each panel) in the first year and then adding the second public member to each panel in the second year or as attorney member attrition allows. Public members of hearing panels may not serve as administrative or hearing panel chairs. Participation of at least one public member to make a hearing panel quorum will not be required.

The Commission has already implemented a plan for annual training for all Commission members. This training will be further enhanced by adding individual orientation sessions for newly-appointed members, developing a written procedure manual, and preparing a training video.

The Court agrees with the Committee that the remaining portions of the ABA team's recommendation should not be implemented, including decreasing the size of the investigative panels and creating an Administrative Oversight Committee to develop a screening process for public members.

**Action Plan:**

- (a) Supreme Court: Amend Rule 3 to increase the size of the Commission to 50 members by adding 14 additional public members and reducing the number of attorney members by 8.
- (b) Supreme Court: Appoint six additional public members immediately; appoint eight additional public members as attorney member attrition allows.
- (c) Supreme Court: Amend Rule 4 to allow public members to serve on hearing panels.
- (d) Commission Chair: Reassign panels to distribute public members evenly as the terms of the attorney members end.

- (e) Commission Counsel: Prepare and disseminate a Court-approved application form for members of the public interested in serving on the Commission; screen applications and make recommendations to the Court.
- (f) Commission Counsel: Schedule a training/orientation session for new members prior to any scheduled hearings or panel meetings.
- (g) Commission Counsel: Include a special session for public members at the annual full Commission meeting to address those members' unique training needs.
- (h) Commission Counsel: Develop a training video for use in the orientation session for new members.

## **Recommendation 2: Create an Oversight Committee of the Commission on Lawyer Conduct.**

The Court declines to create a separate oversight committee. However, the Court does expect a concerted and cooperative effort on the part of the Disciplinary Counsel, Commission Chair and Vice-Chair, and Commission Counsel to identify and address both actual and perceived delays in the discipline process.

The Court agrees that the budgeting process for the disciplinary systems should assure that current needs are met, account for future growth, and foster the recruitment and retention of highly qualified professional staff. However, there is no need to establish a separate budgetary process for those systems apart from the process already established by the Judicial Department. The above goals can be accomplished through the existing budgetary process and programs operated through the Office of the Chief Justice. These include the classification program (a/k/a career path program) which is designed to attract and retain qualified personnel; and the Court's "Director Program," which consists of the department heads in the Judicial Branch (including disciplinary counsel) who, among other things, consider matters of funding and make recommendations to the Chief Justice.

The Court also supports continuing efforts for training Commission members and dissemination of public information about the process.

### Action Plan:

- (a) Supreme Court: Formally implement the classification program and the Director Program.
- (b) Commission Chair & Counsel: Identify systemic causes for delays in the hearing panel process and develop written policies and procedures that will allow for a more direct and active role of the chair in moving matters pending with hearing panels toward resolution.
- (c) Commission Chair & Commission Counsel: Work with the Bar to develop training videos and comprehensive written materials for new Commission members.
- (d) Commission Chair, Vice-Chair, and Commission Counsel: Join and participate in national organizations for discipline adjudicators. Encourage Commission members to join and participate as well.
- (e) Disciplinary Counsel and Commission Counsel: Work with the Department's Information Technology Division to develop an effective web-based communication strategy.
- (f) Commission Chair: Encourage Commission members to participate in the SC Bar Speakers Bureau.
- (g) Disciplinary Counsel: Work with the Bar to develop training videos and comprehensive written materials for Attorneys to Assist (ATAs).

### **Recommendation 3: Amend the Rules to Provide Increased Discretion to Disciplinary Counsel.**

The Court agrees with the Committee that increased discretion to disciplinary counsel will improve case processing efficiency and significantly reduce the time it takes to conclude lawyer discipline investigations. The most effective method of accomplishing this is to remove the requirement that disciplinary counsel seek authority from an investigative panel to conduct full investigations. Disciplinary counsel and her staff are trained and experienced professionals. The extra procedural step of going to the investigative panel for a second level of investigative authority is cumbersome and unnecessary.

The Court further agrees with the Committee that it should be within the discretion of disciplinary counsel to issue letters of caution with no finding of misconduct in cases in which there is no evidence of misconduct but disciplinary counsel believes that the lawyer should heed a warning about a particular ethical concern. Allowing disciplinary counsel to conclude matters in this way will expedite disposition of minor cases and allow the panels and ODC to focus attention on more serious matters. The Court shares the concerns of the ABA team about the number of older cases as well as delays that appear to be related to a lack of adequate resources.

#### Action Plan:

- (a) Supreme Court: Amend Rule 19 to combine preliminary investigation and full investigation.
- (b) Supreme Court: Amend Rules 2(o), 2(p), 4(f)(1), 4(f)(2), 5(b)(1), 11, 14(b), 17(c), and 20 to eliminate reference to full investigation and to conform to changes made to Rule 19.
- (c) Supreme Court: Amend Rules 11, 15(a), and 15(b) to clarify disciplinary counsel's authority to conduct investigations and issue subpoenas.
- (d) Supreme Court: Amend Rules 2(h), 2(r), 4(e), 5(b)(1), and 5(b)(11), to clarify respective roles of Commission, Commission counsel, and disciplinary counsel and to give authority to disciplinary counsel to issue letters of caution with no finding of misconduct in appropriate cases.
- (e) Disciplinary Counsel: Amend form documents to reflect changes in rules and procedures for investigation.
- (f) Disciplinary Counsel: Restructure case assignments and staff/attorney job descriptions.
- (g) Disciplinary Counsel: Draft and implement plan for transition to new rules and procedures.
- (h) Disciplinary Counsel: Schedule a voluntary meeting of defense counsel to review changes in rules and procedures.
- (i) Disciplinary Counsel: Establish internal, aspirational time standards for completion of investigations; update case management system to implement standards and deadlines.
- (j) Commission Chair: Schedule full Commission meeting to review new rules.

- (k) Disciplinary Counsel: Develop a plan to address old cases and move them toward resolution.
- (l) Commission Counsel: Take immediate action to address the delays in matters pending with hearing panels.
- (m) Supreme Court: Include funds in budget, as available, for disciplinary counsel to purchase trust account software.

**Recommendation 4, Part 1: Complainants Should Be Provided the Respondent Lawyer's Response to Their Grievances.**

The Court believes that there are already in place several provisions in RLDE to ensure that the complainant is given an opportunity to address contested issues, including general investigative procedures and certain provisions of the rules of permissive disclosure.

However, there are some steps that can be taken to alleviate the concerns of the ABA team in this regard.

Action Plan:

- (a) Disciplinary Counsel: Update the initial letter to the complainant to better explain the process and the complainant's role.
- (b) Disciplinary Counsel: Ensure that ODC attorneys who conduct investigations give the complainant the opportunity to respond to assertions by lawyers that contradict the allegations in the complaint in appropriate circumstances.

**Recommendation 4, Part 2: Complainants Should Have a Limited Appeal of Dismissals by Disciplinary Counsel.**

The Court agrees that complainants should have an opportunity to seek a limited review of dismissals by disciplinary counsel.

Action Plan:

- (a) Supreme Court: Amend Rule 18 to allow for limited right of complainant to seek review of disciplinary counsel dismissal.
- (b) Disciplinary Counsel: Amend form document for dismissal by disciplinary counsel to give notice of limited right to review.
- (c) Commission Counsel: Include discussion of right of review in full Commission meeting.

### **Recommendation 5: Phase Out Attorneys to Assist.**

Although the Court agrees that the need for Attorneys to Assist (ATAs) could be eliminated or reduced with funding for additional attorneys and investigators to staff ODC, the Court does not agree with eliminating ATAs. Even if unlimited funding were available, ATAs are valuable because they bring expertise in specialized areas of law and they provide a local perspective and contact. In addition, use of attorney volunteers to assist in investigations provides an investment in the process and instills a sense of fairness among the Bar at large. ATAs also provide an opportunity for complainants to have a face-to-face meeting with a Bar member willing to listen to their concerns without having to travel to the Office of Disciplinary Counsel in Columbia to meet with a nonlawyer investigator.

The Committee has identified several steps that can be taken to alleviate the ABA team's concerns about the delays and perceptions of unfairness resulting from the use of ATAs. The Court agrees to take these steps.

#### **Action Plan:**

- (a) Supreme Court: Consider increasing funding, as available, to allow for hiring additional investigators in the short term and additional investigators and attorneys in the long term.
- (b) Disciplinary Counsel: Become more pro-active in ensuring that ATA reports are timely and complete, including setting and enforcing deadlines and recommending removal of delinquent ATAs mid-term.
- (c) Disciplinary Counsel: Enhance ATA training to include a video and manual for new ATAs and annual continuing legal education for existing ATAs; include emphasis on issues of bias, recusal, and potential perceptions of partiality.

**Recommendation 6: Revise the Rule for Appointment of Attorneys to Protect Client Interests to Ensure Efficient Use of Resources.**

Under current practice, upon the death, incapacity or suspension of an attorney, a member of the Bar is appointed to protect client interests (ATPCI). The Court and the Committee are aware of the burden caused by ATPCI appointments on members of the Bar. Moreover, beyond the commitment imposed on Bar members, current ODC staff devotes substantial time to providing assistance to appointed attorneys, thus detracting from accomplishment of assigned duties for the Commission on Lawyer Conduct. The Court recognizes the request of the ODC for the establishment of the position of a full-time receiver and one support staff person (paralegal or administrative assistant) to be primarily responsible for performing the tasks necessary to protect client interests.

Funding for such positions within ODC is a threshold issue. At the time of this Report, the economic realities preclude additional funding for these positions in the normal budgeting process. One suggestion from the Committee is to increase the current annual discipline assessment from \$50 to \$70. It has also been suggested that the range of sanctions for misconduct include the imposition of a fine.<sup>1</sup> Other states impose fines, which are retained by the disciplinary authority. Provided that ODC through “proviso” or otherwise retains any fine, such funds could be considered in the future for, among other uses, the receiver position noted above. The Court believes the creation of a receiver position within ODC is worthy of consideration.

The Court notes that for the two-year period covering June 1, 2007, through May 31, 2009, the Court appointed 39 attorneys to protect client interests. Thirteen of these were due to the death of the lawyer, twenty were based on interim suspensions, four were for definite suspensions, and two were for incapacity. It is undisputed that an appointment to protect client interests is disruptive on every level, especially to the legal matters of the affected clients. The Court desires to eliminate or mitigate that disruption. In this regard, although a small number, the Court believes it appropriate to reduce the number of short suspensions. In those circumstances where a lengthy suspension is not warranted, the imposition of a fine as part of the sanction may be the better course in terms of serving the public generally and the affected clients specifically. Where a suspension is required, the Court and the Committee observe that ethical rules impose a duty on attorneys to cooperate with the trustee or other person appointed to protect client interests. Finally, the need to appoint attorneys to protect client interests could be greatly reduced if lawyers would have a succession plan in place in the event they have to discontinue their practice. The Court will refer this matter to the Professional Responsibility Committee of the South Carolina Bar to make recommendations to this Court as to whether the Rules of Professional Responsibility should be amended to affirmatively require lawyers to engage in such planning to protect their clients in the event of a discontinuance of their practice.

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<sup>1</sup> The Court is of the opinion that the range of sanctions for misconduct should specifically include the option of imposing a fine.

Action Plan:

- (a) Supreme Court: Include consideration of hiring a receiver and support staff in long-range plan for the discipline process.
- (b) Disciplinary Counsel and Commission Counsel: Work with the Professional Responsibility Committee and the Law Practice Management Counsel to promote succession planning through CLE presentations and other Bar programs.
- (c) Commission Counsel: Expand on training manual for ATPCIs to include, for example, a video, frequently asked questions, or a designated web page for resources and communication for new and experienced ATPCIs.
- (d) Supreme Court: Refer the issue of requiring lawyers to engage in succession planning to the Professional Responsibility Committee of the South Carolina Bar for its recommendations.

**Recommendation 7: Amend the Discovery Rules to Permit More Liberalized Discovery and Provide for Pre-Hearing Conferences.**

The Committee disagrees with the ABA team's premise that appropriately broad discovery is not already in place and its recommendation to expand the discovery process in disciplinary cases. The current rules require an exchange of all documents and names of all potential witnesses. These rules also allow for depositions under certain circumstances. Opening the process to unlimited depositions and interrogatories would unnecessarily delay the process and burden the parties. As for prehearing conferences, the individual hearing panels are free to schedule prehearing conferences if they determine that a matter is unusually complex or that issues need to be narrowed. In addition, if one or both of the parties have matters to be raised with the panel prior to the hearing, a prehearing conference may be requested. There does not appear to be any evidence that the process has been burdened or hampered by particularly complex cases or irrelevant or uncontested issues. However, some clarity regarding the authority of the hearing panel to order, or the parties to request, a prehearing conference would be helpful.

The Court has reviewed Rule 25 and agrees that it lacks clarity and precision. Respondents and their counsel who are inexperienced in defending disciplinary matters might be confused by this rule. In addition, individual prosecutors and hearing panel members might interpret the requirements of the rule differently. This lack of clarity may explain the ABA team's position regarding the current discovery process. The rule will be amended to make the disclosure and discovery requirements clearer.

**Action Plan:**

- (a) Supreme Court: Amend Rule 25 to clarify the discovery process and provide for prehearing conferences.
- (b) Disciplinary Counsel: Develop a voluntary open file policy that includes provision for protection of privileged information and other information that, for good cause, should not be disclosed prior to filing formal charges.
- (c) Commission Chair: Include review of new discovery rules at next full commission meeting.
- (d) Commission Chair and Commission Counsel: Encourage the use of prehearing conferences to seek stipulations, narrow issues, make appropriate scheduling decisions, etc.
- (e) Disciplinary Counsel: Review new discovery rules at voluntary meeting of defense counsel.

**Recommendation 8: Discipline On Consent Should Be Encouraged at All Stages of the Proceedings.**

Ninety to ninety-five percent of discipline is administered by agreement. Agreements are entered into at all stages in the process. It is unclear how the ABA team envisions increasing the use of agreements. However, they did make some specific suggestions. The Court agrees with the Committee that use of a range of sanctions in a proposed agreement should not be eliminated. This practice encourages both parties to enter into agreements and allows the Court flexibility to consider aggravating and mitigating factors without the need for a formal hearing. The ABA team also suggested that agreements for discipline by consent be drafted to clarify which rules are related to the respondent's admitted conduct and to provide precedent for the Court's consideration. These measures would translate to disciplinary opinions that are more useful and instructive to Bar members.

The Center on Professionalism has offered to assist the Court in conducting research on discipline precedent for the benefit of the Commission and the Court in issuing consistent discipline by providing a law clerk to the disciplinary counsel for this project.

The ABA team recommended that agreements for discipline should be submitted for approval to the chair or vice-chair of the Commission or the hearing panel chair, rather than the full investigative or hearing panel in order to streamline the process. The Court receives detailed information about a panel's recommendations regarding agreements for discipline, including the number of panel members who support adopting or rejecting the agreement and the panel members' recommendations as to sanction and retroactivity in cases of interim suspension. The Court's experience has been that the panels devote serious consideration and debate to the agreements, thus enhancing rather than detracting from the process. There is no indication that there is any delay as a result of submitting proposed agreements to full panels for consideration; therefore, the Court declines to adopt this part of the Recommendation.

Action Plan:

- (a) Disciplinary Counsel: Encourage ODC attorneys to spell out the nexus between the lawyer's admissions and the rules cited in agreements for discipline by consent and to include citations to relevant case law and Comments.
- (b) Disciplinary Counsel: Update form documents to restructure how admissions and rule citations are presented in agreements for discipline by consent.
- (c) Disciplinary Counsel: Work with the Center on Professionalism to hire a part-time student law clerk to research and compile a compendium of disciplinary cases to be provided to ODC attorneys, Commission members, and the Court.

**Recommendation 9: Adopt Specific Procedures Relating to Deferred Discipline Agreements.**

The life experiences and personal difficulties faced by each lawyer are different. Deferred discipline is a tool that the Commission on Lawyer Conduct can use to support and help lawyers who face grievances as a result of conditions that can be remedied. The appropriate remedy is different in every case. The Court is satisfied that the current status of deferred discipline agreements affords respondents and disciplinary counsel the options and flexibility necessary to tailor agreements to the specific circumstances of each case. However, the Court does agree with the ABA team that deferred discipline should not be considered a sanction.

**Action Plan:**

(a) Supreme Court: Amend Rule 7(b)(6) to eliminate deferred discipline agreements from the list of sanctions.

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

The Committee does not support this recommendation, and the Court concurs. There is no evidence that dismissed complaints are used for any improper purpose. In fact, the availability of information about dismissed complaints helps ODC avoid unnecessary investigations and protects responding lawyers from being subject to subsequent requests for a response to repeat complaints. In addition, ODC is not incurring any significant cost in retaining this information. Records of prior investigations are scanned and maintained electronically. Paper copies of files related to dismissed complaints are shredded and discarded on ODC's approved retention schedule. However, the Court emphasizes that ODC and the Commission may not use a dismissed case for any purpose other than to review subsequent complaints from the same source to avoid re-investigation of the same complaint, except as provided for in Rule 20, RLDE.

**Recommendation 11: Amend the Rules to Provide that Disciplinary Counsel is Responsible for Handling Reinstatement/Readmission Cases.**

The Court disagrees that reinstatement and readmission cases should be handled by ODC and the Commission, rather than by the Committee on Character and Fitness. The Committee on Character and Fitness is independent of the discipline process and, therefore, better suited to consider the remediation and rehabilitation of the lawyer-applicant. In addition, the change recommended by the ABA team would unnecessarily burden ODC and Commission resources.

The Court is very concerned about the length of time a suspended lawyer must wait on a reinstatement decision. The reinstatement process unfairly extends the initial period of suspension. This creates a hardship on the lawyer seeking readmission. The Court will adopt the recent recommendation from the SC Bar Professional Responsibility Committee to expand the Committee on Character and Fitness to accommodate an ever-increasing caseload, and amend the rules to permit the Committee on Character and Fitness to sit in panels. The number of members on the Committee on Character and Fitness will be increased to allow for monthly proceedings, rather than quarterly.

Action Plan:

- (a) Supreme Court: Expand membership on the Committee on Character and Fitness.
- (b) Supreme Court: Consider amending Rule 33, RLDE, and 402(b), SCACR, to further improve the efficiencies of the process once the new structure is in place.
- (c) Supreme Court: Implement a system of panels on the Committee on Character and Fitness that meet once per month.

**Recommendation 12: Eliminate Indefinite Suspensions and Provide for Automatic Reinstatement for Suspensions of Less Than Nine Months.**

The Court agrees with the ABA team that indefinite suspensions should be eliminated. Although reinstatement after a suspension of less than nine months is already an automatic procedure, it is understandable why someone reading the rules might conclude otherwise. A clarification to reflect the actual procedure, but not impair the Court's ability to require more from such a lawyer, is appropriate.

The Court has determined that definite suspensions of less than nine months should result in automatic reinstatement, unless the lawyer was suspended for conduct resulting in a criminal conviction and sentence. In that case, the lawyer will not be reinstated unless the lawyer has successfully completed all conditions of the sentence including, but not limited to, any period of probation or parole.

The Court believes discretion should be allowed to impose definite suspensions up to three years. The Court adheres to the view that a disbarred lawyer may seek readmission as rules currently allow.

Action Plan:

- (a) Supreme Court: Amend Rules 7(b) and 33 to eliminate indefinite suspensions and to increase the maximum time for definite suspensions to three years.
- (b) Supreme Court: Amend Rule 32 to clarify procedure for reinstatement following a definite suspension of less than nine months.
- (c) Disciplinary Counsel: Update case management system to reflect rule changes.

**Recommendation 13: Adopt Probation as a Sanction and a Rule Setting Forth Procedures for Its Imposition and Revocation.**

The Court and a majority of the Committee believe that probation is not necessary or appropriate in the lawyer discipline process. The Court and the Commission already have a number of options to monitor a sanctioned or at-risk lawyer while that lawyer engages in the practice of law, including deferred discipline, conditional discipline, and conditional reinstatement. Allowing lawyers to practice on “probation” creates two potential problems. First, it places a stigma on the lawyer. Second, there is likely to be a negative public perception of a profession that allows members to practice on probation.

**Recommendation 14: Adopt a Rule for Random Audit of Trust Accounts and Approve a Curriculum Proposed By Disciplinary Counsel for a Trust Account School.**

The Court and the Committee do not support the recommendation of random audits for trust accounts. Although imposition of a random trust account audit procedure might be a deterrent to trust account mismanagement, there is insufficient information to be confident that the cost of implementing such a program would be justified by effective results.

The Court and the Committee do agree with the concept of a trust account school. We support the efforts of the Bar and ODC in developing an ethics school with a trust account component. The program should be expanded from one day to one and one-half days to provide more emphasis on practical instruction on trust account management. Particular attention should be given to the causes of overdrafts on and misappropriation from lawyer trust accounts.

**Action Plan:**

- (a) Disciplinary Counsel: Work with SC Bar Professional Responsibility Committee and CLE Division to expand the Legal Ethics and Practice Program (LEAPP) to a two-part session, one of which will focus solely on trust accounting.
- (b) Supreme Court: Include participation in LEAPP as a condition of discipline, a condition of admission, or a condition of reinstatement in appropriate cases.

**Recommendation 15: Adopt a Rule Providing for Written Notice to Claimants for Payment in Third Party Settlements.**

The risk of misappropriation by lawyers using third party settlement checks is serious. However, neither the Court nor the Committee believes that adopting the ABA model rule is the appropriate way to address the problem. If there is to be a notice requirement imposed on insurance carriers (or anyone other than lawyers), the appropriate mechanism for imposition of such a requirement would be legislative action and not adoption of a lawyer conduct rule.

Action Plan:

- (a) Supreme Court: Refer this recommendation to the state legislature.

**Recommendation 16: Oversee the Formation of a Formal Annual Budget Process for Disciplinary Counsel’s Office to Ensure Adequate Staffing and Funding.**

The Court agrees that there should be a formal annual budget process for ODC and the Commission; however, there already is such a process in place as part of the Judicial Department’s overall budgeting process, as reflected in the comments to **Recommendation 2** above. The Court continues to support consideration of long-range planning in addition to the annual budgeting process.

Action Plan:

- (a) Supreme Court: formally implement the classification program (a/k/a career path program) and the Court’s Director Program.

**Recommendation 17: Disciplinary Counsel and Staff Should Receive Formal Training.**

The Court agrees that more formal training, including participation in national programs, would both enhance the efficiency and effectiveness of ODC and provide a benefit that would help attract and retain qualified professional staff. The Court favorably notes that ODC has devoted increased attention to more formal training under the current Disciplinary Counsel.

Action Plan:

- (a) Supreme Court: Provide for funding, as available, to allow for ODC attorneys to participate in national training and conferences.
- (b) Disciplinary Counsel: Require completion of National Institute for Trial Advocacy program for disciplinary prosecutors by all current ODC attorneys who have not yet completed the program and require completion of the program within the first two years of employment for new ODC attorneys, as funding is available.
- (c) Disciplinary Counsel: Arrange for ODC attorneys to attend one full national conference or program on ethics, professionalism, and/or lawyer or judicial discipline each year.
- (d) Disciplinary Counsel: Review and evaluate CLE credits earned by ODC attorneys on an annual basis to ensure relevant courses are included.
- (e) Disciplinary Counsel: Complete work with the Office of Finance and Personnel to develop career paths for the ODC attorneys and staff.

**REVISIONS TO THE RULES FOR LAWYER DISCIPLINARY ENFORCEMENT  
(RLDE, RULE 413, SCACR)  
(with comments)**

## RULE 2. TERMINOLOGY

The following terminology is used throughout these rules:

...

**(b) Closed, But Not Dismissed:** a manner of disposing of a matter where a panel of the Commission makes a finding that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the lawyer is deceased, disappeared, incarcerated, physically or mentally incapacitated, disbarred, or suspended from the practice of law, or for other good cause. ~~If the lawyer files a written objection with the Commission and serves a copy of that objection on disciplinary counsel within 10 days of service of notice that the matter was closed, but not dismissed, the matter shall be deemed reopened and in the full investigation phase. Any objection need not contain any grounds for objecting. Before a matter can be reopened after being closed, but not dismissed, an investigative panel of the Commission must make a finding that there has been a change in the circumstances that were the basis for the matter to be closed, but not dismissed, or that there is other good cause for it to be reopened. Before a motion can be considered by an investigative panel of the Commission to reopen a matter that has been previously closed, but not dismissed, disciplinary counsel shall serve a copy of the motion to do so containing the grounds to reopen on the lawyer and then the lawyer shall have 10 days to respond thereto. Disciplinary counsel shall notify both the lawyer and the complainant when a matter is closed, but not dismissed and when a closed, but not dismissed matter is reopened. If the panel declines to reopen the matter, disciplinary counsel shall so advise the lawyer.~~

**[COMMENT: This revision is not directly related to any of the ABA Recommendations. The deleted language has been moved to Rule 19(d)(4)(C) because it describes procedures and rules in the event a matter is closed but not dismissed. This language is more appropriately located in the procedural portion of the Rules than in the Terminology portion.]**

...

**(h) Disciplinary Counsel:** the lawyer in charge of screening and investigating complaints, prosecuting formal charges and performing other duties assigned by the Commission Supreme Court. See Rule 5.

**[COMMENT: This revision helps to clarify the separate roles and functions of the Commission and ODC.]**

...

**(o) Investigation:** an inquiry into allegations of misconduct, including a search for and examination of evidence concerning the allegations, ~~divided into two stages: a preliminary investigation conducted by disciplinary counsel after the receipt of a~~

complaint and a full investigation conducted after approval by an investigative panel of the Commission. See Rule 19.

**[COMMENT: This revision eliminates reference to the full investigation/preliminary investigation dichotomy in order to implement ABA Recommendation #3.]**

...

**(p) Investigative Panel:** the panel of the Commission that considers the recommendations of disciplinary counsel with regard to the disposition of cases and acceptance of agreements for resolution of disciplinary matters. The investigative panel also determines whether full investigations will be conducted and whether formal charges will be filed. See Rule 4.

**[COMMENT: This revision reflects the shift of investigative discretion from the investigative panel to the disciplinary counsel and eliminates reference to the full investigation/preliminary investigation dichotomy in order to implement ABA Recommendation #3. This revision also more accurately describes the role of the investigative panel.]**

...

**(r) Letter of Caution:** a written caution or warning about past or future conduct issued when it is determined that no misconduct has been committed or that only minor misconduct not warranting the imposition of a sanction has been committed. A letter of caution may be issued by disciplinary counsel, an investigative panel or the Supreme Court. The issuance of a letter of caution is not a form of discipline under these rules and does not constitute a finding of misconduct unless the letter of caution specifically states that misconduct has been committed. The fact that a letter of caution has been issued shall not be considered in a subsequent disciplinary proceeding against the lawyer unless the caution or warning contained in the letter of caution is relevant to the misconduct alleged in the proceedings.

**[COMMENT: This revision grants discretion to the disciplinary counsel to issue letters of caution. Although this change was not specifically recommended by the ABA Consultation Team, this change will further enhance ABA Recommendation #3.]**

### **RULE 3. THE COMMISSION ON LAWYER CONDUCT**

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**(c) Appointment of Members.** The Commission shall be composed of ~~44~~ 50 members appointed by the Supreme Court. ~~42~~ 34 members shall be active members of the South Carolina Bar. ~~2~~ 16 members shall be public members.

**(d) Terms.** ~~Commission Attorney~~ members shall serve for a term of 4 years and public members shall serve for a term of 2 years. Commission members shall be eligible for reappointment. ~~The initial appointments shall be as follows:~~

~~(1) The terms of the 42 attorney members shall be staggered to have 10 terms expiring in one year, 11 terms expiring in 2 years, 10 terms expiring in 3 years, and 11 terms expiring in 4 years.~~

~~(2) The terms of the 2 public members shall be staggered to have 1 term expiring every 2 years.~~

A member assigned to a hearing panel may continue to participate in the hearing and decision of a matter despite the expiration of the member's term if the hearing began before the expiration of the term.

**[COMMENT: These revisions would increase the number of public or lay members on the Commission on Lawyer Conduct to implement ABA Recommendation #1. This revision would also eliminate the provisions for the initial appointments of Commission members, as they are no longer necessary.]**

## **RULE 4. ORGANIZATION AND AUTHORITY OF THE COMMISSION**

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**(b) Panels and Meetings.** The attorney members of the Commission, other than the chair and vice-chair, shall be divided by the chair into 8 panels of 5 ~~4~~ attorney members and 2 public members. The panels shall be assigned to serve as an investigative panel or a hearing panel as designated by the chair. If the panel is assigned to serve as an investigative panel, the chair shall add either the chair or the vice-chair ~~and one public member~~ to the panel to increase its membership to 7. The chair may rotate the assignments of the panels as investigative or hearing panels, and may rotate membership on the panels; provided, however, that no member shall sit on both the investigative and hearing panel for the same proceeding. Panels shall meet when scheduled by the Commission. The full Commission shall meet periodically as determined by the Commission to consider administrative matters. Meetings of the Commission other than periodic meetings may be called by the chair upon the chair's own motion and shall be called by the chair upon the written request of three members of the Commission.

**[COMMENT: This revision is necessary to implement the portion of ABA Recommendation #1 that would increase the number of public members of the Commission on investigative panels and allow for participation by public members on hearing panels.]**

...

### **(e) Powers and Duties of the Commission.**

...

**(2)** In addition to the duties assigned to ~~disciplinary counsel~~ and Commission counsel in Rules ~~5~~ and 6, the Commission may delegate to ~~either the disciplinary counsel or the Commission counsel~~ the duty and authority to:

- (A)** maintain the Commission's records;
- (B)** maintain statistics concerning the operation of the Commission and make them available to the Commission and the Supreme Court;
- (C)** prepare an annual report of the Commission's activities for presentation to the Supreme Court and the public; ~~and~~
- (D)** inform the public of the existence and operation of the lawyer discipline system, including the Commission's address and telephone number and the disposition of each matter in which public discipline is imposed;

(E) monitor lawyers for compliance with conditions of reinstatement, readmission, discipline and deferred discipline, and refer lawyers who fail to comply to disciplinary counsel for contempt proceedings;

(F) provide advice and assistance to attorneys appointed to protect clients' interests; and,

(G) supervise attorneys, court reporters, and other staff as the Supreme Court may provide to the Commission.

**[COMMENT: These revisions reflect the changes that have already been implemented by the Commission with the hiring of Commission counsel. These revisions also eliminate the authority of the Commission to delegate responsibilities to the disciplinary counsel. The purpose of these changes is to further delineate the separate roles and functions of the Commission and ODC.]**

**(f) Powers and Duties of Investigative Panel.** An investigative panel shall have the duty and authority to:

~~(1)~~ review the recommendations of the disciplinary counsel after preliminary investigation and either ~~authorize a full investigation~~ issue a letter of caution with or without a finding of misconduct, issue notice of intent to impose a confidential admonition, enter into a deferred discipline agreement, consider an agreement for discipline by consent, authorize formal charges, refer the matter to another agency, or dismiss the complaint;

~~(2)~~ review the recommendations of disciplinary counsel after full investigation and approve, disapprove or modify the recommendations as provided in Rule 19(d)(2), to include dismissal of the complaint;

~~(3)~~ (2) designate a member of the panel to preside over the investigative panel in the absence of the chair or vice-chair of the Commission; ~~and~~

~~(4)~~ (3) declare a matter closed, but not dismissed prior to the filing of formal charges;

(4) issue orders pursuant to Rule 31(b)(1); and,

(5) after proper notice, ~~to~~ re-open a matter that has been previously dismissed or closed but not dismissed.

**[COMMENT: These revisions are necessary to reflect the proposed changes to Rule 19. They eliminate the full investigation/preliminary investigation dichotomy and clarify the role of the investigative panel. These changes help implement ABA Recommendation #3.]**

## RULE 5. DISCIPLINARY COUNSEL

...

**(b) Powers and Duties.** Disciplinary counsel shall have the authority and duty to:

**(1)** receive and screen complaints, dismiss complaints, issue letters of caution with no finding of misconduct, refer complaints to other agencies when appropriate, conduct preliminary investigations, ~~recommend to an investigative panel of the Commission and upon authorization conduct full investigations,~~ notify complainants about the status and disposition of their complaints, make recommendations to an investigative panel on the disposition of complaints after full investigation, file formal charges when directed to do so by an investigative panel, prosecute formal charges, and file briefs and other appropriate petitions with the Supreme Court;

**[COMMENT: This revision eliminates the full investigation/preliminary investigation dichotomy.]**

...

**(11)** perform other duties at the direction of the Commission or the Supreme Court.

**[COMMENT: This revision is a clarification necessary to reflect the current status of disciplinary counsel's duties.]**

...

**(c) Appointment of ~~Members of Bar~~ Attorneys to Assist Disciplinary Counsel.** The Supreme Court may appoint such additional active members of the South Carolina Bar as it deems appropriate to assist the disciplinary counsel in performing disciplinary counsel's duties under this rule. Subject to such policies as the Office of Finance and Personnel of the Judicial Department may establish, these attorneys shall be reimbursed for reasonable and necessary expenses incurred pursuant to their duties.

**RULE 7. GROUNDS FOR DISCIPLINE; SANCTIONS IMPOSED; ~~DEFERRED DISCIPLINE AGREEMENT~~**

...

**(b) Sanctions.** Misconduct shall be grounds for one or more of the following sanctions:

(1) disbarment;

~~(2) suspension for an indefinite period from the office of attorney at law;~~

~~(3)~~ **(2)** suspension for a definite period from the office of attorney at law. The period of the suspension shall not exceed 2 3 years and shall be set by the Supreme Court;

~~(4)~~ **(3)** public reprimand;

~~(5)~~ **(4)** admonition, provided that an admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of sanction to be imposed;

~~(6) deferred discipline agreement;~~

~~(7)~~ **(5)** restitution to persons financially injured, repayment of unearned or inequitable attorney's fees or costs advanced by the client, and reimbursement to the Lawyers Fund for Client Protection;

~~(8)~~ **(6)** assessment of the costs of the proceedings, including the cost of hearings, investigations, prosecution, service of process and court reporter services;

**(7)** assessment of a fine;

~~(9)~~ **(8)** limitations on the nature and extent of the lawyer's future practice;

~~(10)~~ **(9)** any other sanction or requirement as the Supreme Court may determine is appropriate.

**[COMMENT: These revisions eliminate indefinite suspension in order to implement Recommendation #12. This allows for a definite suspension of up to three years, rather than two years. Further, this revision takes deferred discipline agreements out of the category of sanction to implement Recommendation #9]**

## **RULE 11. EX PARTE CONTACTS**

Members of the Commission, ~~hearing officers,~~ and Commission counsel shall not engage in *ex parte* communications regarding a case, except that before making a determination to file formal charges in a case pursuant to Rule 19(d)(~~2~~ 4), members of the investigative panel assigned to that case may communicate with disciplinary counsel as required to perform their duties in accordance with these rules, and the chair and vice-chair may entertain requests for permissive disclosure pursuant to Rule 12(c) and ~~requests for subpoenas for investigation pursuant to Rule 15(b)(1)~~ made by disciplinary counsel without notice to the lawyer. Where disciplinary counsel makes a request to the chair or vice-chair pursuant to either Rule 12(c) or 19(b)(~~1~~) without notice to the lawyer, the request shall so state and set forth the reason that notice is not being given. *Ex parte* communications shall include any communication which would be prohibited by Section 3B(7) of the Code of Judicial Conduct, Rule 501, SCACR, if engaged in by a judge.

**[COMMENT: This change eliminates reference to the requirement that disciplinary counsel seek permission of the chair or vice-chair for subpoena authority in order to conform this rule to the changes in Rules 15 and 19.]**

## RULE 12. ACCESS TO DISCIPLINARY INFORMATION

...

**(a) General Rule.** Except as otherwise provided in these rules or ordered by the Supreme Court, ~~all complaints, proceedings, records, information or orders relating to an allegation of misconduct or incapacity shall be confidential and shall not be disclosed to the public. While the matter remains confidential,~~ the members of the Commission, the staff of the Commission, the disciplinary counsel, the staff of the disciplinary counsel, the members of the Supreme Court and the staff of the Supreme Court shall not in any way reveal the existence of the complaint, while the matter remains confidential, except to persons directly involved in the matter and then only to the extent necessary for a proper disposition of the matter. A violation of this provision may be punished as a contempt of the Supreme Court.

...

**(d) Disclosure Necessary for Withdrawal as Counsel.** When it is necessary to obtain the permission of a tribunal to withdraw from representation, a lawyer may reveal the fact that the client filed a complaint with the Commission to help establish good cause for withdrawal. If the motion to be relieved includes a reference to the existence of a complaint which is confidential under this rule, the lawyer ~~shall serve a copy of the motion on the client, but shall~~ may elect to give opposing counsel ~~only~~ notice of the motion only, without revealing the existence of the complaint. ~~The~~ If the lawyer's motion to be relieved ~~shall be~~ is accompanied by a request that the records relating to the motion be sealed, the ~~—~~The tribunal shall take steps to prevent disclosure of the existence of the complaint to any other person. After deciding the motion to be relieved, the tribunal shall insure that either the record is sealed or that all references to the complaint are deleted from the record available to the public. No members of the tribunal or its staff who learn of the existence of the complaint shall reveal that fact to any other person.

**[COMMENT: Although these revisions do not specifically address any of the ABA Recommendations, it clarifies the extent to which the existence of a complaint may be revealed. Although the “gag rule” was eliminated with the passage of the Rules for Disciplinary Enforcement in January 1997, the provisions of Rule 12 continue to cause confusion among members of the Bar, judges, and complainants. Although ODC, the Commission, and the Court and its staff must keep investigations confidential, the lawyer and the complainant are not subject to contempt for revealing them. In addition, under this rule, the lawyer may seek to have the existence of a complaint kept from the public record while at the same time using that complaint as a basis for withdrawal from representation.]**

## RULE 14. TIME, SERVICE AND FILING

...

### **(b) Extending and Diminishing Time Prescribed by These Rules.**

...

**(2) By Disciplinary Counsel.** Disciplinary counsel may extend the time for responses due from a lawyer under Rules ~~19(b)(1), 19(e)(3), and 23(a)~~ for one or more periods not to exceed 30 days in the aggregate for each.

**(3) By the Parties.** Disciplinary counsel and the lawyer may, by written agreement, extend the time to respond under Rule 19(b)(1), 19(e), or 23(a) after the execution and delivery by both parties of an agreement for discipline by consent or deferred disciplinary agreement for the duration of the period the agreement is awaiting a final disposition and for a period of 30 days thereafter if the Agreement is not accepted.

**(4) By the Supreme Court.** Except for those periods of time that may be extended by the Commission under (1) above, the Supreme Court or any justice thereof may grant an extension of time to perform any act required by these Rules. The Supreme Court or any justice thereof may shorten any time period prescribed by these rules.

**(c) Service.** Service upon the lawyer of formal charges in any disciplinary or incapacity proceedings ~~or of the notice required by Rule 19(e)(1)~~ shall be made by personal service upon the lawyer or the lawyer's counsel by any person authorized by the chair of the Commission or by registered or certified mail to the lawyer's last known address. Service of all other documents shall be made in the manner provided by Rule 262(b), SCACR.

**[COMMENT: These revisions eliminate reference to Rule 19(b)(1) to conform to the changes made to Rule 19. These revisions also eliminate disciplinary counsel's authority to grant extensions of time to respond to formal charges as that decision should be made by the hearing panel chair. This reflects the current practice.]**

## **RULE 15. OATHS; SUBPOENA POWER**

**(a) Oaths.** Oaths and affirmations may be administered by any member of the Commission, disciplinary counsel in ~~matters under full investigation~~, or any other person authorized by law to administer oaths and affirmations.

### **(b) Subpoenas for Investigation.**

~~(1) Prior to a full investigation being authorized, Disciplinary counsel may compel by subpoena the attendance of the lawyer or witnesses and the production of pertinent books, papers, documents (whether in typed, printed, written, digital, electronic, or other format), and other tangible evidence for the purposes of investigation with the approval of the chair or vice chair of the Commission upon a showing of exigent circumstances. Exigent circumstances may include, but are not limited to, instances where there is reason to believe that evidence may be destroyed or altered if a subpoena is not issued; or where it appears the lawyer may pose a substantial threat of serious harm to the public or to the administration of justice and the subpoena is necessary to ascertain whether it is appropriate to seek an interim suspension under Rule 17.~~

~~(2) After a full investigation is authorized pursuant to Rule 19(b)(3), disciplinary counsel may compel by subpoena the attendance of the lawyer or witnesses and the production of pertinent books, papers, documents (whether in typed, printed, written, digital, electronic, or other format), and other tangible evidence for purposes of investigation. The investigative panel Commission chair, vice-chair, or Commission counsel may issue subpoenas for specific witnesses or documents at the request of the lawyer under investigation after a full investigation has been authorized or direct disciplinary counsel to subpoena witnesses or documents and provide the subpoenaed information to the investigative panel Commission chair, vice-chair, or Commission counsel.~~

....

**[COMMENT: In order to eliminate the preliminary investigation/full investigation dichotomy, it is necessary to grant disciplinary counsel authority to issue oaths and subpoenas without consulting the Commission.]**

## **RULE 17. INTERIM SUSPENSION**

...

**(c) Failure to Respond to Notice of Full Investigation, Subpoena, or Notice of Appearance.** Upon receipt of sufficient evidence demonstrating that a lawyer has failed to fully respond to a notice of full investigation, has failed to fully comply with a proper subpoena issued in connection with an investigation or formal charges, has failed to appear at and fully respond to inquiries at an appearance required pursuant to Rule 19(c) ~~(5) or (6)~~(3), or has failed to respond to inquiries or directives of the Commission or the Supreme Court, the Supreme Court may place that lawyer on interim suspension.

...

**[COMMENT: These revisions remove references to full investigation.]**

## **RULE 18. NOTIFICATION TO COMPLAINANT; NO LIMITED RIGHT TO REVIEW**

(a) Notification to Complainant. Disciplinary counsel shall provide written acknowledgment of every complaint, if the complainant is known, and notify the complainant in writing of the final disposition of a proceeding under these rules. Notification in writing shall be mailed within 20 days of the decision disposing of the proceeding. ~~Although entitled to notice, a complainant is not a party to the proceeding and is not entitled to appeal or otherwise seek review of the dismissal or other disposition of a proceeding.~~

(b) Limited Right to Review. ~~Although entitled to notice, a complainant is not a party to the proceeding. However, upon notice of a dismissal by disciplinary counsel pursuant to Rule 19(d)(1), a complainant may seek review by the investigative panel. Disciplinary counsel shall inform the complainant of the following review process in the notice of dismissal. The complainant may seek review by submitting a request to the disciplinary counsel in writing within 30 days of the date of the notice of dismissal. Upon receipt of the request for review, disciplinary counsel shall provide the lawyer with a copy of the request. The lawyer may submit a written response within 15 days. Disciplinary counsel shall submit the complainant's request and the lawyer's response, if any, for consideration at the next meeting of the investigative panel. Notification in writing shall be mailed to the complainant and the lawyer within 20 days of the investigative panel's decision. The complainant is not entitled to appeal or otherwise seek review of a dismissal or referral by disciplinary counsel pursuant to Rule 19(a) or of any decision, action, or disposition by the investigative panel, the hearing panel, the Commission chair or vice-chair, or the Supreme Court.~~

**[COMMENT: These revisions implement the portion of ABA Recommendation #4 that recommends an opportunity for a complainant to seek review of dismissal of a complaint. The consultation team recommended that appeals be heard by hearing panels. Because no hearing panel is assigned a matter that is dismissed and because hearing panels do not regularly meet, it would be more efficient to have the investigative panel review a complainant's objection to a dismissal of a complaint. Because it would not be appropriate for one investigative panel to review the determination made by another investigative panel, the review process is limited to dismissals by disciplinary counsel. This rule does not provide for review of confidential dispositions or public sanctions. These revisions do not implement the portion of the ABA Recommendation that recommends providing a copy of the lawyer's response to the complaint.]**

## RULE 19. SCREENING AND INVESTIGATION

**(a) Screening.** Disciplinary counsel shall evaluate all information coming to disciplinary counsel's attention by complaint or from other sources that alleges lawyer misconduct or incapacity. If the information would not constitute misconduct or incapacity if it were true, disciplinary counsel shall dismiss the complaint or, if appropriate, refer the matter to another agency. If the information raises allegations that would constitute lawyer misconduct or incapacity if true, disciplinary counsel shall conduct a preliminary an investigation.

### **(b) Preliminary Investigation.**

~~(1) Disciplinary counsel shall conduct all investigations. Disciplinary counsel may issue subpoenas pursuant to Rule 15(b), conduct interviews and examine evidence to determine whether grounds exist to believe the allegations of complaints, provided that no subpoena shall issue to obtain testimony or evidence until an investigative panel of the Commission authorizes a full investigation pursuant to Rule 19(c) or the chair or vice-chair of the Commission authorizes the issuance of a subpoena pursuant to Rule 15(b)(1). Disciplinary counsel shall issue a notice of investigation to the lawyer with a copy of the complaint or information received requesting that the lawyer to file a response to the allegations in the complaint notice; provided, however, that disciplinary counsel may seek permission of the chair or vice-chair to dispense with the requirement to make this request or to dispense with the requirement to provide the lawyer with a copy of the complaint or information received. The lawyer shall file a written response within 15 days of notice to do so from disciplinary counsel. The written response must include the lawyer's verification that it is complete and accurate to the best of the lawyer's knowledge and belief.~~

~~(2) When disciplinary counsel believes there is evidence supporting the allegations against a lawyer, disciplinary counsel shall recommend to the investigative panel of the Commission assigned to the case that the panel authorize a full investigation. Disciplinary counsel may recommend a full investigation when there are grounds to believe that evidence supporting the allegations could be obtained by subpoena or further investigation. In all other cases, disciplinary counsel shall dismiss the matter or refer the matter to another agency.~~

~~(3) The investigative panel shall review disciplinary counsel's recommendation for a full investigation and either dismiss the complaint, refer the matter to another agency, issue a letter of caution without a finding of misconduct, issue a letter of caution with a finding of minor misconduct, if both the lawyer and disciplinary counsel consent, or authorize a full investigation.~~

~~(4) If the matter is dismissed or referred to another agency, disciplinary counsel shall notify the lawyer of the action and shall provide the lawyer with a copy of the complaint if the lawyer has not already received a copy of the complaint.~~

**(c) Full Investigation Requirements of Notice of Investigation.**

~~(1) Within 30 days after the investigative panel authorizes a full investigation, When issuing notice of investigation pursuant to Rule 19(b), disciplinary counsel shall give the following notice to the lawyer:~~

~~(A) a specific statement of the allegations being investigated and the rules or other ethical standards allegedly violated, with the provision that the investigation can be expanded if deemed appropriate by disciplinary counsel;~~

~~(B) the lawyer's duty to respond pursuant to Rule 19(c)(3) (b);~~

~~(C) the lawyer's opportunity to meet with disciplinary counsel pursuant to Rule 19(c)(5) (3); and,~~

~~(D) the name of the complainant unless the investigative panel determines that there is good cause to withhold that information.~~

~~(2) The investigative panel may defer the giving of notice but, when notice is deferred, disciplinary counsel must give notice to the lawyer before making a recommendation as to a disposition.~~

~~(3) Disciplinary counsel may request that the lawyer file a written response within 30 days after service of the notice under Rule 19(c)(1).~~

~~(4) Upon issuance of an order of interim suspension by the Supreme Court, disciplinary counsel may dispense with the usual requirement in Rule 19(b)(1) of requesting an initial response from the lawyer so suspended and the matters referenced in the petition for interim suspension shall be deemed in full investigation and a notice of that investigation shall be served and a response thereto made in accordance with the provisions of Rule 19(c).~~

~~(5) (3) Before the disciplinary counsel or the investigative panel determines its disposition of the complaint under Rule 19(d), either disciplinary counsel or the lawyer may request that the lawyer appear before disciplinary counsel to respond to questions. The appearance shall be on the record and the testimony shall be under oath or affirmation. If disciplinary counsel requests the lawyer's appearance, disciplinary counsel must give the lawyer 20 days' notice.~~

~~(6) Disciplinary counsel is authorized to issue subpoenas pursuant to Rule 15(b) once a full investigation has been approved. Disciplinary counsel shall conduct all investigations.~~

~~(7) (4) Any person giving testimony pursuant to either rule 19(c)(5) or 19(c)(6) Rule 19 shall be entitled to obtain a transcript of his or her testimony from the transcribing court reporter upon paying the subscribed charges unless otherwise directed by an investigative panel for good cause shown.~~

**[COMMENT: These revisions eliminate the full investigation/preliminary investigation dichotomy and implement procedures for streamlining the functions of disciplinary counsel. These changes help implement ABA Recommendation #3. These revisions also include a requirement that the lawyer verify the response to the notice of investigation.]**

**(d) Disposition After Full Investigation.**

~~(1) Upon the conclusion of a full investigation, disciplinary counsel may recommend to the investigative panel:~~

~~(A) dismissal;~~

~~(B) admonition, letter of caution or deferred discipline agreement;~~

~~(C) the filing of formal charges;~~

~~(D) the filing of a petition for transfer to incapacity inactive status;~~

~~(E) referral to an appropriate agency; or~~

~~(F) a stay.~~

(1) Upon completion of the investigation, if disciplinary counsel believes that no misconduct has been committed, and a written caution is not appropriate to conclude the matter, disciplinary counsel may dismiss the complaint.

(2) If disciplinary counsel believes that no misconduct has been committed, but a written caution or warning is appropriate to conclude the matter, disciplinary counsel may issue a letter of caution with no finding of misconduct.

(3) If disciplinary counsel believes there is evidence supporting the allegations against a lawyer, disciplinary counsel may:

(A) propose an agreement for discipline by consent to the lawyer pursuant to Rule 21;

(B) recommend to an investigative panel that the matter be concluded with a letter of caution or a confidential admonition; or,

(C) recommend to an investigative panel that formal charges be filed.

~~(2)~~(4) The investigative panel may adopt, reject or modify the recommendations of disciplinary counsel.

**(A)** If the investigative panel finds no violation or a violation pursuant to Rule 7 for which the imposition of a sanction is not warranted, it may dismiss or issue a letter of caution.

**(B)** If the investigative panel finds that there is reasonable cause to believe the lawyer committed misconduct for which the imposition of a sanction is warranted, it may accept an agreement for discipline by consent pursuant to Rule 21; it may execute a deferred discipline agreement; it may admonish the lawyer pursuant to the provisions of Rule 19(d)~~(3)~~(5); or, it may direct disciplinary counsel to file formal charges.

**(C)** If the investigative panel finds that the matter should not be dismissed, but it is either impossible or impractical to proceed with the matter because it appears that the lawyer is deceased, disappeared, incarcerated, physically or mentally incapacitated, disbarred, or suspended from the practice of law, or for other good cause, the panel may designate the matter closed but not dismissed. If the lawyer files a written objection with the Commission and serves a copy of that objection on disciplinary counsel within 10 days of service of notice that the matter was closed, but not dismissed, the matter shall be deemed re-opened and in the investigation phase. Any objection need not contain any grounds for objecting. Before a matter can be re-opened after being closed, but not dismissed, an investigative panel of the Commission must make a finding that there has been a change in the circumstances that were the basis for the matter to be closed, but not dismissed, or that there is other good cause for it to be re-opened. Before a motion can be considered by an investigative panel of the Commission to re-open a matter that has been previously closed, but not dismissed, disciplinary counsel shall serve a copy of the motion to do so containing the grounds to re-open on the lawyer and then the lawyer shall have 10 days to respond thereto. Disciplinary counsel shall notify both the lawyer and the complainant when a matter is closed, but not dismissed, and when the matter is re-opened. If the panel declines to re-open the matter, disciplinary counsel shall so advise the lawyer.

~~(3)~~(5) When the investigative panel finds reasonable cause to conclude that the lawyer has committed misconduct, but finds that public discipline is not

warranted, it may issue notice to the lawyer that it intends to impose a confidential admonition as a final disposition of the matter(s). Notice to the lawyer shall include a copy of the confidential admonition and shall be served on the lawyer in accordance with Rule 14(c). The notice of intent shall state the lawyer's right to object and that any such objection need not include any grounds therefor. The confidential admonition shall thereafter be imposed unless the lawyer both files with the Commission and serves on disciplinary counsel a written objection within ~~thirty~~ 30 days of mailing of the notice. If the lawyer objects to the imposition of the confidential admonition in conformity with the requirements of this rule, disciplinary counsel shall file formal charges.

**(e) ~~Subsequent Complaints.~~** ~~Provided, notwithstanding the other provisions of this Rule 19, where a lawyer is already subject to a pending full investigation, disciplinary counsel may include information received related to additional misconduct in a subsequent complaint or revealed in an investigation in a notice of full investigation, an amended notice of full investigation or a supplemental notice of full investigation without leave of the Commission and disciplinary counsel may dispense with seeking an initial response regarding such new information from the lawyer as would otherwise be required by Rule 19(b)(1).~~

**[COMMENT: These revisions create a procedure for disposition of cases under the new system. They eliminate the full investigation/preliminary investigation dichotomy and implement disciplinary counsel's authority to issue letters of caution with no finding of misconduct. These revisions also include language removed from Rule 2(b) setting forth the procedures for the closed but not dismissed disposition.]**

**RULE 20. USE OF ALLEGATIONS FROM DISMISSED CASES MOTION BY DISCIPLINARY COUNSEL TO RE-OPEN DISMISSED COMPLAINTS**

If a complaint has been dismissed, the allegations made in that complaint shall not be used for any purpose unless the complaint is re-opened by the Commission. A complaint dismissed prior to the filing of formal charges may be re-opened by an investigative panel upon motion of disciplinary counsel upon a finding by the investigative panel that there is new information concerning the matter dismissed, an additional complaint has been filed against the same lawyer involving related or similar allegations, or other good cause. Prior to a motion to re-open being decided, a copy of the motion to re-open containing the grounds therefor shall be served on the lawyer by disciplinary counsel, and the lawyer shall then have 10 days thereafter to file a written response with the Commission. The lawyer and the complainant shall be notified by disciplinary counsel as to the panel's decision on the motion to re-open. ~~A matter reopened shall be deemed in the stage of investigation it was in when dismissed except as the investigative panel might otherwise direct.~~

**[COMMENT: This revision deletes language rendered unnecessary by the elimination of the preliminary investigation/full investigation dichotomy.]**

## RULE 25. DISCOVERY

**(a) Exchange of Witness Lists. Initial Disclosure.** Within 20 days of the filing of an answer, disciplinary counsel and respondent shall exchange:

- (1) the names and addresses of all persons known to have knowledge of the relevant facts;
- (2) non-privileged evidence relevant to the formal charges;
- (3) the names of expert witnesses expected to testify at the hearing and affidavits setting forth their opinions and the bases therefor; and,
- (4) other material only upon good cause shown to the chair of the hearing panel.

Disciplinary counsel or the respondent may withhold such information only with permission of the chair of the hearing panel or the chair's designee, who shall authorize withholding of the information only for good cause shown, taking into consideration the materiality of the information possessed by the witness and the position the witness occupies in relation to the lawyer. The chair's review of the withholding request is to be in camera, but the party making the request must advise the opposing party of the request without disclosing the subject of the request. ~~The hearing panel shall set a date for the exchange of the names and addresses of all witnesses the parties intend to call at the hearing.~~

**(b) Other Evidence Pre-Hearing Disclosure.** Within 20 days of the date of the filing of an answer, the chair of the hearing panel shall set a date for the exchange of witness lists and exhibits no later than 30 days prior to the scheduled hearing. Disciplinary counsel and respondent shall exchange:

- ~~(1) non-privileged evidence relevant to the formal charges, documents exhibits to be presented at the hearing, names and addresses of witnesses to be called at the hearing, witness statements, and summaries of interviews with witnesses who will be called at the hearing (for purposes of this paragraph, a witness statement is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded).~~
- ~~(2) other material only upon good cause shown to the chair of the hearing panel.~~
- ~~(3) Provided, Copies of transcripts of testimony taken by a court reporter pursuant to Rule 15(b) or Rule 19(c) may be obtained by the parties from the court reporter at the expense of the requesting party and need not be made~~

available to the requesting party by the opposing party unless not otherwise available or otherwise directed by the Commission under Rule 25(h).

**(c) Depositions.** Depositions shall only be allowed if agreed upon by the disciplinary counsel and the respondent, or if the chair of the hearing panel or the chair's designee grants permission to do so based on a showing of good cause. The chair or the chair's designee may place restrictions or conditions on the manner, time and place of any authorized deposition.

**(d) Exculpatory Evidence.** Notwithstanding any other provision of this rule, disciplinary counsel shall provide respondent with exculpatory evidence relevant to the formal charges.

**(e) Duty of Supplementation.** Both parties have a continuing duty to supplement information required to be exchanged under this rule.

**(f) Completion of Discovery.** All discovery shall be completed within 60 days of the filing of the answer.

**(g) Failure to Disclose.** If a party fails to timely disclose a witness's name and address, any statements by the witness, summaries of witness interviews, or other evidence required to be disclosed or exchanged under this rule, the hearing panel may grant a continuance of the hearing, preclude the party from calling the witness or introducing the document, or take such other action as may be appropriate. In the event disciplinary counsel has not timely disclosed exculpatory material, the hearing panel may require the matter to be disclosed and grant a continuance, or take such other action as may be appropriate.

**(h) Resolution of Disputes.** Disputes concerning discovery shall be determined by the hearing panel. Review of these decisions shall not be subject to an interlocutory appeal; instead these decisions must be challenged by filing objections or a brief pursuant to Rule 27(a).

**(i) Pre-Hearing Conferences.** The hearing panel may require the respondent and disciplinary counsel to participate in a pre-hearing conference in person or by telephone. Either party may request a pre-hearing conference. Scheduling of a pre-hearing conference is at the sole discretion of the chair of the hearing panel.

**[COMMENT: These revisions clarify the requirements for discovery and address concerns about fairness and timeliness of the discovery process. They divide the discovery process into two phases: initial disclosure and pre-hearing disclosure. For example, the current rules require the exchange of two lists of names: those who are known to have knowledge of the relevant facts under Rule 25(a) and witnesses who will be called at the hearing under Rule 25(b)(1). The current heading for 25(a) "Exchange of Witness Lists" is a misnomer that causes some**

**confusion during the discovery period. These revisions clarify the difference between the two required lists. This revision also requires the parties to exchange all evidence within twenty days of the filing of the answer and adds a specific requirement for exchange of names of experts and their opinions. A provision for optional pre-hearing conferences is also included.]**

## **RULE 32. REINSTATEMENT FOLLOWING A DEFINITE SUSPENSION OF LESS THAN NINE MONTHS**

Unless otherwise provided for in the Supreme Court's suspension order, A a lawyer who has been suspended for a definite period of less than 9 months may shall be reinstated to the practice of law at the end of the period of suspension by filing with the Supreme Court, and serving upon disciplinary counsel and the Commission on Lawyer Conduct, an affidavit stating that the lawyer is currently in good standing with the Commission on Continuing Legal Education and Specialization and the South Carolina Bar, has fully complied with the requirements of the suspension order, and has paid any required fees and costs, including payment of necessary expenses and compensation approved by the Supreme Court to the attorney appointed pursuant to Rule 31, RLDE, to protect the interests of the lawyer's clients for necessary expenses, or to the Lawyers' Fund for Client Protection if the Fund has paid the appointed attorney under Rule 31(f), RLDE. If suspended for conduct resulting in a criminal conviction and sentence, the lawyer must also successfully complete all conditions of the sentence, including, but not limited to, any period of probation or parole. In such a case, the lawyer must attach to the affidavit documentation demonstrating compliance with this provision. The affidavit filed with the Supreme Court shall be accompanied by proof of service showing service on disciplinary counsel and the Commission on Lawyer Conduct, and a filing fee of \$200. ~~If reinstated~~ When all preconditions set out in this rule are met, the Court shall issue an order of reinstatement. The order shall be public.

**[COMMENT: This revision to Rule 32 implements the part of ABA Recommendation #12 that would make reinstatement after a suspension of less than nine months automatic. It is already the practice of the Court to automatically reinstate any lawyer who meets the requirements of this rule; however, reading the rule without knowing that practice, one could easily interpret the provisions as discretionary. On the other hand, there might be instances where the Court believes that reinstatement after even a short suspension should be conditional upon review and recommendation of the Committee on Character and Fitness. (See e.g., In the Matter of Robert E. Lee, Opinion #26211, filed October 9, 2006, in which the respondent was suspended for 180 days, but subject to a determination by the Committee on Character and Fitness prior to being eligible for reinstatement.) The addition of the limiting language at the beginning of this revised rule would give the Court the flexibility to make reinstatement after a short suspension conditional, rather than automatic, in circumstances in which it deems appropriate. Requiring service on both disciplinary counsel and the Commission ensures that the petition is maintained in the records of both offices. This revision also closes a loophole in the existing rules in which a lawyer convicted of a crime, but suspended for less than nine months, does not have to complete the terms of a criminal sentence prior to reinstatement unless specifically ordered by the Court. It is an unacceptable, and unintended, result to allow lawyers to return to practice who**

remain on probation or have otherwise not fulfilled the requirements of a criminal sentence.]

**RULE 33. REINSTATEMENT FOLLOWING A DEFINITE SUSPENSION FOR NINE MONTHS OR MORE, ~~AND INDEFINITE SUSPENSION OR DISBARMENT~~**

**(a) Generally.** A lawyer who has been suspended for a definite period of 9 months or more, ~~has been suspended for an indefinite period,~~ or has been disbarred shall be reinstated to the practice of law only upon order of the Supreme Court. A petition for reinstatement shall not be filed earlier than 5 years from the date of entry of the order of disbarment ~~or 2 years from the date of entry of the order of indefinite suspension.~~ A lawyer who has received a definite suspension for 9 months or more may file the petition for reinstatement no earlier than 270 days prior to the expiration of the period of suspension. All records and proceedings relating to reinstatement shall be open to the public.

...

**(c) Service and Filing of Petition.** The lawyer shall serve a copy of the petition on disciplinary counsel and on the Commission on Lawyer Conduct and shall file 10 copies of the petition with the Supreme Court. The copies filed with the Supreme Court shall be accompanied by a filing fee of \$1,500 and proof of service showing service on disciplinary counsel and the Commission on Lawyer Conduct.

...

**(f) Criteria for Reinstatement and Readmission.** A lawyer may be reinstated or readmitted only if the lawyer meets each of the following criteria:

...

**(8)** If disbarred ~~or indefinitely suspended,~~ the lawyer has successfully completed the examinations and training required by Rule 402(c)(5), (6) and (8), SCACR. The lawyer may take the examinations and begin this training no earlier than 9 months prior to the earliest date on which the lawyer may apply for ~~reinstatement~~ readmission. The lawyer shall attach proof of completion of these examinations and training to the petition for ~~reinstatement~~ readmission.

**(g) Action by Committee on Character and Fitness.** Within 180 days of the matter being referred to the Committee on Character and Fitness, a panel of the Committee shall conduct a hearing. If the petition for reinstatement is withdrawn after the start of the hearing, the lawyer must wait two years from the date the petition is withdrawn to reapply for reinstatement.

At the hearing before the panel ~~Committee~~, the lawyer shall have the burden of demonstrating by clear and convincing evidence that the lawyer has met each of the criteria in paragraph (f) above. ~~The chair of the Committee, or any other~~ Any member of the Committee ~~as the chair may designate~~, may issue subpoenas to compel the attendance of witnesses and the production of pertinent books, papers and documents. The willful failure to comply with a subpoena issued under this rule may be punished as contempt of the Supreme Court. Upon proper application, the Supreme Court may enforce the attendance and testimony of any witness and the production of any documents subpoenaed. The hearing shall be open to the public. Disciplinary Counsel and the Commission shall be allowed to present evidence and make arguments to the ~~Committee panel~~. The ~~Committee panel~~ shall file a report with the Supreme Court containing its findings and recommendations.

The Committee on Character and Fitness may promulgate rules and regulations governing practice and procedure before the Committee. These rules and regulations shall become effective when approved by the Supreme Court.

**(h) Decision as to Reinstatement.** The Supreme Court shall review the report filed by the panel of the Committee on Character and Fitness. The Supreme Court may require the parties to file briefs or may schedule oral argument on the matter. If the Supreme Court finds that the lawyer has complied with each of the criteria of paragraph (f), it may reinstate the lawyer. The decision to grant or deny reinstatement rests in the discretion of the Court. In making this determination, the seriousness of the prior misconduct will be considered and the petition for reinstatement may be denied based solely on the seriousness of the prior misconduct. Unless otherwise ordered by the Supreme Court in the order denying reinstatement, no lawyer shall be permitted to reapply for reinstatement within 2 years following an adverse ruling upon a petition for reinstatement or readmission. Orders granting or denying petitions for reinstatement shall be public.

**[COMMENT: These revisions eliminate references to indefinite suspension in order to implement ABA Recommendation #12. They also allow for notice to the Commission of the petition for reinstatement/readmission and for the participation of Commission counsel in Committee proceedings as necessary.]**