WASHINGTON STATE

Report on the Lawyer Regulation System

August 2006

Sponsored by the
American Bar Association
Standing Committee on
Professional Discipline

WASHINGTON LAWYER DISCIPLINE SYSTEM
CONSULTATION TEAM

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IN MEMORIAM

Prior to and during the on-site portion of the consultation, the consultation team had the privilege of speaking with the Director of Lawyer Discipline, Joy McLean, about the Washington discipline system. It was obvious that she cared deeply about the system and the people who work in it. Her attention to detail and her insights into how to make the system better for all participants were of great value to the team. We were saddened to learn that Ms. McLean and her partner tragically died in an automobile accident two days after we last met with her. We express our deepest condolences to their families, friends and colleagues.

I. INTRODUCTION

A. 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 over forty-seven consultations since the commencement of the program. The Committee submitted a consultation Report to the Washington Supreme Court in 1993.

The ABA Standing Committee on Professional Discipline's consultation program 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 ABA Commission on Evaluation of Disciplinary Enforcement (the McKay Commission), as adopted by the ABA House of Delegates in February 1992, 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.

B. Persons Interviewed and Materials Reviewed

At the invitation of the Washington Supreme Court, the ABA Standing Committee on Professional Discipline sent a team to conduct the on-site portion of the consultation from February 28 through March 3, 2006. Biographies of the team members are attached to this Report as Appendix A. Interviewees included the Director of Lawyer Discipline and members of her staff, Special Disciplinary Counsel, the General Counsel for the Washington State Bar Association and members of his staff, members of the Disciplinary Board and Review Committees, Hearing Officers, including the Chief Hearing Officer, respondents, respondents' counsel, complainants and lawyers who have had no involvement with the disciplinary system. The team also met with the Washington State Bar Association's President, President-Elect, and Executive Director. On its final day in Washington, the team met with members of the Court.

The team reviewed documentation relating to the lawyer regulatory system in Washington. This included, but was not limited to, the Rules for Enforcement of Lawyer Conduct, Washington Rules of Professional Conduct, Rules of the Lawyers' Fund for Client Protection, and the rules and guidelines relating to the voluntary fee arbitration program. The team examined caseload processing information, files and training materials for the system's volunteers and professional staff, pamphlets for the public about the disciplinary system, and descriptions of related Washington State Bar Association programs.

In preparation for its visit, the team also reviewed the 1993 Consultation Report of the Standing Committee on Professional Discipline. As noted below, it is clear that the Court has implemented a great many of the recommendations contained in that Report to the benefit of the public and of Washington lawyers. Change is not always easy, and the team commends the Court, the Washington State Bar Association and all participants in the disciplinary system for their careful consideration and study of those 1993 recommendations and the steps taken to improve the system since then.

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 and the discipline system volunteers, and the Washington 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 Washington lawyer disciplinary system.

II. OVERVIEW

A. Strengths of the Washington 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 Washington's lawyer disciplinary system, its strengths must be recognized. The following is not an exhaustive description of those strengths. Additional programs and initiatives of note will be described elsewhere in this Report.

The changes to the discipline system since the issuance of the 1993 Report are the result of the Court's leadership and concern for the public and the legal profession. The Court's concern for improving the system is evident from the range of changes that have been implemented, including the 2002 adoption of new procedural rules entitled "Rules for Enforcement of Lawyer Conduct." The development of these comprehensive Rules was the result of the work of the Discipline 2000 Task Force—a joint effort of the Washington State Bar Association and the Court. The team was advised that the Discipline 2000 Task Force was to develop proposals for the procedural rules that would improve the system within the existing structure. The Court should also be commended for the openness of the Washington lawyer discipline system.

In addition to its support of the Discipline 2000 Task Force, the role of the Washington State Bar Association in implementing the law office management and mediation programs is laudable. Subsequent to the issuance of the 1993 ABA Report, the Board of Governors of the Association commendably authorized increased resources for the system so that it could be adequately staffed.

The staff of Disciplinary Counsel's Office eliminated a longstanding backlog of investigations. This, of course, resulted in an increase in the number of cases pending before the Hearing Officers and Disciplinary Board. Through the use of Special Disciplinary Counsel and the implementation of a Special Settlement Project, the agency was able to significantly reduce and then eliminate that inventory of cases. The system's caseload at the time of the team's visit was current. The hard work of Disciplinary Counsel, the Special Disciplinary Counsel and all of the system's other volunteers in achieving this goal is notable.

The volunteer members of the Disciplinary Board, who also serve on the Review Committees, and the Hearing Officers contribute their experience and time to the process. The inclusion of non-lawyers on the Disciplinary Board is laudable. In particular, when serving in their capacity as Review Committee members, these volunteers are required to transport and review huge volumes of materials before rendering a decision that formal disciplinary charges are warranted. Their commitment to fulfilling the demands of their duties as Review

Committee members is particularly deserving of recognition. The system's volunteers strive to ensure that the process is fair and efficient.

The Standing Committee's 1993 Report called for the creation of a central intake system. Such a program was launched with the addition of the Consumer Affairs team of the Office of Disciplinary Counsel. This program has been an important addition to the lawyer regulation system in Washington. The Consumer Affairs lawyers and staff provide a friendly and professional complaint screening process for written and telephone inquiries. The use of the telephone to receive and address grievances provides complainants and lawyers with a simple and direct manner by which to quickly and informally resolve matters that generally do not rise to the level of disciplinary grievances. The staff also assists grievants in the completion of complaint forms. In order to assist non-English speaking people, the Office has translated its complaint forms and information sheet into Spanish, Russian and Vietnamese. They are posted on the Washington State Bar Association's web site. The team suggests that Disciplinary Counsel's Office place these pamphlets in public libraries too.

The Consumer Affairs program has helped significantly to reduce the number of written grievances filed with Disciplinary Counsel's Office by resolving minor matters without the need for the filing of a grievance or initiation of a formal investigation. In 2004, it responded to nearly 13,000 inquiries. The team was advised that most of those contacts are resolved informally. The lawyers and other staff are responsive and accessible to the public. They respond to inquiries quickly. If a matter should be referred for investigation, such action is promptly taken.

Another important addition to the regulatory structure that was recommended in 1993 is the diversion program. The Court adopted the diversion rules in 2001, and procedures to implement the rules were completed by the fall of 2002. The information provided to the team indicates that the program is working well and serving its purpose of protecting the public and helping lawyers.

B. Components of the Washington Lawyer Discipline System

The Supreme Court of Washington possesses the exclusive and inherent authority to regulate the legal profession in the State. Pursuant to Rule 2.1 of the Rules for Enforcement of Lawyer Conduct, individuals and entities carrying out the duties set forth in the remainder of those Rules act under the Court's authority. This includes the Board of Governors of the Washington State Bar Association. Rule 2.2 provides that the Board of Governors is responsible for supervising the general functioning of the components of the discipline system. These components include the Disciplinary Board, Review Committees, Hearing Officers and Disciplinary Counsel's Office.

1. Nature and Funding of the Washington Lawyer Discipline System

According to statistics provided to the team, as of December 31, 2005, there were 29,746 lawyers admitted to practice in Washington and 25,967 engaged in active practice. Washington is a unified bar state. Lawyers pay their annual dues/licensing fees to the Washington State Bar Association pursuant to the requirements of the Bylaws of that organization. A portion of those monies is used to defray the costs of the operation of the discipline system. In addition, each lawyer on active status in Washington is assessed $13.00 annually to fund the Lawyers' Fund for Client Protection. No taxpayer monies are used to fund the disciplinary agency. Additional funding of the system comes from interest, reimbursement of costs of disciplinary proceedings from respondents and late registration fee penalties. The system is diligent in cost recovery efforts.

In 2004, the annual budget for the lawyer discipline system, as reported to the team in the consultation materials, was $3,169,273. This amount excluded salaries for Disciplinary Board staff. For 2005, the annual budget figure provided to the team was $3,455,916.

2. The Washington State Bar Association

The Court, pursuant to Rule 2.2 of the Rules for Enforcement of Lawyer Conduct, has delegated supervision of the general functioning of the discipline system to the Board of Governors of the Washington State Bar Association. This includes oversight of the Office of Disciplinary Counsel and the system's adjudicators. Article I (B) (6) of the Bylaws of the Washington State Bar Association states that one of the specific authorized activities of the Bar is to administer "an effective system of discipline on its members, including the receiving and investigating of complaints of lawyer misconduct, taking and recommending appropriate punitive and remedial measures, and diverting less serious misconduct to alternatives outside the formal discipline system…"

Rules 2.3 and 2.5 provide for the appointment of Disciplinary Board members, Hearing Officers and the Chief Hearing Officer by the Board of Governors. The Board of Governors designates one lawyer member to serve as Chair of the Disciplinary Board and another to serve as Vice Chair. In order to assist with the appointment of Hearing Officers, the Board of Governors appoints a hearing officer selection panel. Rule 2.5(d) provides that, in

considering whom to appoint as a Hearing Officer, the Board of Governors should consider diversity in gender, ethnicity, geography and practice experience. Rule 2.10 provides that the power to appoint these individuals includes the power to remove them and to fill any resulting vacancies.

Rule 2.8 states that the Executive Director of the Washington State Bar Association, under the direction of the Board of Governors, employs Disciplinary Counsel. The Chief Disciplinary Counsel (Director of Lawyer Discipline) reports to the Executive Director. The Executive Director conducts the performance evaluation for that person.

Rule 3.4(b) provides that the Washington State Bar Association may disclose information as necessary to conduct an investigation or to keep the complainant apprised of the status of proceedings, except when prohibited by other rules or applicable law. Rule 3.4(d) permits the President of the Association, the Board of Governors, the Executive Director or Chief Disciplinary Counsel to release otherwise confidential information under certain circumstances if that information is not subject to a protective order under Rule 3.2(e). Rule 3.4(e) provides for discretionary release of confidential information by the Executive Director or the Chief Disciplinary Counsel. The Executive Director may also authorize the Lawyers' Fund for Client Protection to release otherwise confidential information pursuant to Rule 3.4(i).

Rule 3.4(k) of the Rules for Enforcement of Lawyer Conduct states that the Board of Governors, in furtherance of its supervisory duties, has access to all confidential disciplinary information but must keep it confidential. Rule 2.2(b) further provides that the Board of Governors has no right to review the Hearing Officer, Hearing Panel or Disciplinary Board decisions or recommendations in specific cases. Although not specifically stated, the team assumes that this includes the decisions of the Review Committees. There does not seem to be any specific provision limiting the right of the Board of Governors to intervene in or review any investigative or prosecutorial decisions by the Chief Disciplinary Counsel. The team was advised that Board of Governors members can and have asked Disciplinary Counsel about individual cases, despite being discouraged from doing so.

3. The Office of Disciplinary Counsel

The Chief Disciplinary Counsel (Director of Lawyer Discipline) serves at the pleasure of the Executive Director and the Board of Governors of the Washington State Bar Association. The Chief Disciplinary Counsel is responsible for hiring his/her staff, including attorneys, investigators and support staff. Disciplinary Counsel's Office, while housed in the Washington State Bar Association's headquarters, is, to a large extent, physically separated from the rest of the Bar offices. The Office of Disciplinary Counsel recognizes the need to maintain appropriate separation between disciplinary and Bar functions. However, the team was provided with information from a variety of sources clearly indicating that the current structure of the system and oversight authority of Disciplinary Counsel's Office by the Bar complicates the ability of that Office to maintain an appropriate distance. For example, the

Human Resources department is located within the Office of Disciplinary Counsel's space and other departments enter that space to use its copiers and library.

The Director of Lawyer Discipline conducts annual performance evaluations for her staff and makes recommendations for salary increases to the Executive Director. She prepares the budget for Discipline Counsel's Office and submits it to the Executive Director for submission to the Budget Committee of the Board of Governors where that budget competes with other Bar entities for funding. The team was advised that the Board of Governors has increased funding to adequate levels for the discipline system since the Standing Committee's 1993 Report.

Rule 5.3(a) of the Rules for Enforcement of Lawyer Conduct provides that Disciplinary Counsel's Office must review and may investigate all allegations of lawyer misconduct or incapacity whether that Office learns of such misconduct or incapacity by grievance or otherwise. At the time of the team's visit, the Director of Lawyer Discipline's staff included one Associate Director, the full-time equivalent of fifteen Disciplinary Counsel, the Consumer Affairs Program Coordinator and two Consumer Affairs Assistants. In addition, the Office is staffed by three full time equivalent investigators, three paralegals, and support staff. The Office also shares technology and auditor staff with the Bar.

The Consumer Affairs program was launched in 1995. Consumer Affairs staff works under the supervision of the Director of Lawyer Discipline. The program provides a consumer friendly complaint screening process. In order to ensure that the Consumer Affairs staff is able to capably handle the informal resolution part of their duties, training is provided. This includes training by the Director of the Seattle Crisis Clinic. When requested, staff assists grievants in the filling out of grievance forms. The Consumer Affairs program has significantly reduced the number of written grievances that must be investigated by Disciplinary Counsel's Office.

Files not dismissed or resolved by the intake process are assigned to Disciplinary Counsel for Investigation. Disciplinary Counsel's Office is structured vertically. This means that the Disciplinary Counsel assigned to conduct the investigation is also responsible for prosecuting formal charges that result from that investigation. The lawyers in Disciplinary Counsel's Office are assisted by professional investigators/paralegals. The team was advised that each investigator is assigned to work with five to six Disciplinary Counsel. Disciplinary Counsel's Office has investigatory subpoena power pursuant to Rule 5.5(b).

Rule 5.3(f)(1) and (3) provides that respondents can be subject to discipline and interim suspension under Rule 7.2 for failing to respond to requests for information from Disciplinary Counsel's Office. The Rules require that grievants receive notice acknowledging their grievance and that they be kept apprised of the status of the proceedings. Additional "grievant rights" are set forth in Rule 5.1(c). Pursuant to Rule 5.4, a respondent's duty to cooperate is subject, where appropriate, to a claim of privilege against self-incrimination. The respondent may not, however, assert the attorney-client privilege (unless it is his or her own privilege as a client) to avoid providing requested information to Disciplinary Counsel.

At the conclusion of an investigation Disciplinary Counsel may dismiss the grievance. The Office must notify the grievant of the dismissal and of the procedure to have the dismissal reviewed by a Review Committee. Rule 5.6, Rules for Enforcement of Lawyer Conduct. Disciplinary Counsel may also refer a respondent lawyer to the diversion program pursuant to Rule 6.1. Any other recommended disposition, including recommendations for the filing of formal charges must be referred to a Review Committee. The team was advised that if Disciplinary Counsel refers a matter to a Review Committee with a recommendation for filing formal charges, an analysis letter is prepared and sent to the grievant and respondent and/or respondent's counsel regarding that referral. If a Review Committee recommends that formal charges be filed, Disciplinary Counsel's Office prepares the formal complaint, files it with the Clerk of the Disciplinary Board and prosecutes the matter. Rule 10.3(a), Rules for Enforcement of Lawyer Conduct. In addition to directing that formal charges be filed, a Review Committee may dismiss a matter, order further investigation, issue an advisory letter pursuant to Rule 5.7or an admonition pursuant to Rule 13.5.

Caseload statistics for the disciplinary agency indicate that the agency's caseload is current and most matters are handled within the aspirational timelines adopted by the Board of Governors. Under those guidelines, matters are not to remain with the intake staff for more than sixty days and most files referred for investigation should be resolved within one-hundred and twenty to two-hundred and fifty day depending on certain factors. In 2004, the Office of Disciplinary Counsel met these goals an average of 71% of the time according to the Annual Report filed for that year. That percentage increased to 90% or above by the end of 2005. According to the Statistical Supplement posted on the Bar's web site for 2005, the Office received 1,935 written grievances and resolved 1,862. 74 cases were diverted under the diversion program. Other data provided to the team show that 132 cases were referred for hearings on formal charges.

4. The Review Committees

Rule 2.4(b) provides that each Review Committee consists of two Disciplinary Board members who are lawyers and one non-lawyer Disciplinary Board member. Review Committees meet in accordance with the schedule determined by their Chairs. As noted above, the Review Committees are responsible for determining whether formal charges should be filed. The Rules for Enforcement of Lawyer Conduct do not set forth a specific standard for determining probable cause.

Review Committees may also issue advisory letters pursuant to Rule 5.7. Advisory letters are issued when it does not appear that formal charges are required, but it is appropriate to caution a respondent about his/her conduct. These letters are not disciplinary sanctions/action, do not constitute findings of misconduct and are private.

Review Committees can issue admonitions. Admonitions issued by Review Committees pursuant to Rule 13.5 indicate a finding of misconduct and are admissible in subsequent disciplinary proceedings as prior discipline. Admonitions are public.

5. The Hearing Officers/Panels

There are sixty-six volunteer Hearing Officers whose responsibility it is to conduct hearings on formal disciplinary charges. Rule 2.5(c) provides that the Board of Governors selects the Hearing Officers upon the recommendation of the Hearing Officer Selection Panel. The Rule provides that the Selection Panel is chosen by the Board of Governors, although the team was advised that, sometimes in the past, the President of the Association has appointed these individuals. All Hearing Officers must be lawyers who have been active lawyer or judicial members of the Washington State Bar Association for at least seven years, have no record of public discipline and have prior adjudicative or trial experience. The team is unaware of any other standards or criteria that are utilized in the selection of Hearing Officers. Concerns about the qualifications of Hearing Officers, the manner in which they conduct themselves at trial and the quality of their opinions were expressed to the team by participants interviewed at all levels of the system. These issues will be addressed in further detail in this Report.

Hearing Officers are appointed for an initial term of one year, followed by periods of five years. The Board of Governors retains the discretion to reappoint Hearing Officers. The Board of Governors also appoints the Chief Hearing Officer. This position, provided for in Rule 2.5(f), was new as of the adoption of the Rules for Enforcement of Lawyer Conduct. The Chief Hearing Officer is compensated for his services and is responsible for assigning cases to the Hearing Officers, monitoring their performance, training and performing other administrative duties relating to this part of the process. Rule 2.5(i) provides that Hearing Officers must comply with the Chief Hearing Officer's training requirements. The team received information that, in practice, the mandatory training is not enforced.

Hearing Officers and Hearing Panels act as the trier of fact. Cases are typically heard by one Hearing Officer, although on the motion of either party a Hearing Panel may be assigned by the Chief Hearing Officer. Disciplinary Counsel has the burden of proving misconduct by a clear preponderance of the evidence. Rule 10.14(d) sets forth the rules of evidence that are applicable in disciplinary proceedings. That Rule further provides that, when not inconsistent with the standards set forth in subparagraph (d), the rules of evidence set forth in the Washington Administrative Procedures Act should serve as guidance to Hearing Officers. Rule 10.16 provides that Hearing Officers and Panels are required to issue written findings of fact, conclusions of law and recommendations for sanctions. Unlike the Disciplinary Board, a lawyer from the General Counsel's Office is not assigned to assist Hearing Officers in the drafting of reports and recommendations.

6. The Disciplinary Board

There are fourteen members of the Disciplinary Board. At least three of those members must be non-lawyers according to Rule 2.3 of the Rules for Enforcement of Lawyer Conduct. The Board of Governors selects the lawyer members and the Court chooses the non-lawyer members. The lawyer members of the Disciplinary Board must have been active members of the Washington State Bar Association for at least seven years. The team was advised that the

Board of Governors makes suggestions to the Court regarding the appointment of the non-lawyer members.

Disciplinary Board members serve three-year terms and may not serve more than one term unless otherwise provided for in the Rules. The Board of Governors designates one lawyer member of the Disciplinary Board as the Chair and another as Vice-Chair. When acting as a whole, the Disciplinary Board may do so only with the concurrence of a majority of its members who are present and voting. A quorum must be present.

Rule 2.3(h) sets forth the conditions under which a Disciplinary Board member should disqualify himself/herself from a matter. The inclusion of these provisions is laudable. However, Disciplinary Board members who served on a Review Committee for a matter that resulted in the filing of formal charges do not disqualify themselves from deciding that case on appeal. The Rules for Enforcement of Lawyer Conduct contain no specific provision requiring such recusal, although they participated in finding that the evidence supported the filing of formal charges. Rule 2.3(h)(1)(E) only requires Review Committee members to disqualify themselves when they served on a Review Committee that issued an admonition to the lawyer regarding the case before the Disciplinary Board.

The Executive Director is responsible for appointing the Clerk to the Disciplinary Board. The Disciplinary Board, through the Clerk, maintains the official records in matters that proceed before it and the Hearing Officers.

In addition to serving as members of Review Committees as described above, Title 11 of the Rules for Enforcement of Lawyer Conduct sets forth the Disciplinary Board's appellate functions. Rule 11.2 provides that the Disciplinary Board reviews the decisions of Hearing Officers that recommend suspension or disbarment, matters where no two members of a Hearing Panel are able to agree on a disposition, and all other decisions upon the filing of a notice of appeal by the respondent or Disciplinary Counsel. The Disciplinary Board hears appeals *en banc*. The Chair of the Disciplinary Board may also file a notice of referral for *sua sponte* consideration by the full Disciplinary Board. Pursuant to Rules 11.5 and 11.12(b), the Disciplinary Board is not to consider any evidence that was not presented to the Hearing Officer or Panel.

Rule 11.12 sets forth the standard for Disciplinary Board review. The Disciplinary Board reviews findings of fact to determine if they are supported by substantial evidence. It reviews conclusions of law *de novo*. Either party can request oral argument. The Disciplinary Board may adopt, modify or reverse the findings and conclusions of the Hearing Officers. It is required to issue written opinions. There is currently one Assistant General Counsel who spends approximately one-half of her time assisting the Disciplinary Board with the drafting of reports and recommendations and the Review Committees with their review of materials. This individual also attends Disciplinary Board and Review Committee meetings.

7. The Supreme Court

Article 12 of the Rules for Enforcement of Lawyer Conduct provides for two types of review of Disciplinary Board decisions by the Washington Supreme Court. The first type of review is called an "appeal" which can be taken as a matter of right only by a respondent in cases where the Board has recommended suspension or disbarment. Rule 12.3, Rules for Enforcement of Lawyer Conduct.

The second type is "discretionary review," which occurs with the Court's permission. Either the respondent or Disciplinary Counsel may seek discretionary review by the Court pursuant to Rule 12.4. The Court accepts requests for discretionary review pursuant to Rule 12.4 only in certain circumstances. These are: (1) the Board's decision conflicts with Supreme Court case law; (2) the case involves a significant question of law; (3) the Board's decision on a material finding of fact is not supported by substantial evidence; or (4) the petition for review raises an issue of substantial public interest that the Court should decide.

The Court, in *In Re Poole*, 125 P. 3d 954 (2006), recently clarified its standard of review for the factual findings of the Hearing Officers. In that opinion, the majority stated that the court gives "…considerable weight to the hearing officer's findings of fact, especially with regard to the credibility of witnesses, and we will uphold those findings so long as they are supported by 'substantial evidence.'" Substantial evidence exists if the record contains "evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise." *Poole*, at 959.

III. STRUCTURE

Recommendation 1: The Supreme Court's Oversight Of The Washington Discipline System Should Be Emphasized

Commentary

As recommended in its 1993 Report, the Standing Committee on Professional Discipline believes that that the Supreme Court should exercise more direct control over the discipline system. This includes taking steps to distance the system from involvement and oversight by the Washington State Bar Association. Although the rules of the Supreme Court of Washington provide for the creation of the lawyer disciplinary system and state that it operates pursuant to the Court's authority, in reality it functions as a component of the Washington State Bar Association. The disciplinary agency is physically located in the State Bar Association's headquarters and bears the Association's name (as does its letterhead). The system is funded by the Bar Association from lawyers' annual dues and its budget competes with the requests of other Bar Association programs.

Rule 2.2 of the Rules for Enforcement of Lawyer Conduct provides that the Board of Governors is responsible for supervising the general functioning of the components of the discipline system. The Board of Governors appoints and can remove the Disciplinary Board members, Hearing Officers and the Chief Hearing Officer.

The Executive Director of the Washington State Bar Association hires the Chief Disciplinary Counsel, who reports to the Executive Director. The Rules provide that the Chief Disciplinary Counsel acts on the Washington State Bar Association's behalf for all disciplinary matters, and further performs other duties as required by the Executive Director and the Board of Governors. Rule 2.8(a), Rules for Enforcement of Lawyer Conduct.

Rule 3.4(d) permits the President of the Association, the Board of Governors, the Executive Director or Chief Disciplinary Counsel to release otherwise confidential information under certain circumstances if that information is not subject to a protective order. Rule 3.4(k) of the Rules for Enforcement of Lawyer Conduct states that the Board of Governors, in furtherance of its supervisory duties, has access to all confidential disciplinary information but must keep it confidential. As noted above, there does not seem to be any specific provision limiting members of the Board of Governors or Executive Director from involving themselves in investigative or prosecutorial decisions by the Chief Disciplinary Counsel.

The Court, the professionals and volunteers of the disciplinary agency and the Washington State Bar Association are all dedicated to having an effective and efficient lawyer discipline system. They have demonstrated a commendable interest in seeing that the system operates in a manner that is protective of the public and fair to the profession. One of the hallmarks of such a system is independence. An independent lawyer discipline system, operated under the direct oversight of the Court, promotes the integrity of our judicially regulated profession. It

enhances the public's perception of the system as being fair, accessible and free from appearance that the internal politics of bar associations may somehow influence disciplinary proceedings. Rule 2 and Comment, *ABA Model Rules for Lawyer Disciplinary Enforcement*. For these reasons, the Standing Committee on Professional Discipline's 1993 Report focused on the importance of distancing the discipline system from the Washington State Bar Association.

The problems identified in the 1993 Report that stem from the structure of the system continue to exist, despite all of the improvements that have been implemented by the Court and the Bar Association. The current consultation team's interviews and research led it to believe that the ability of Disciplinary Counsel's Office and the adjudicative part of the system to function with requisite independence is still at risk due to the manner in which the system operates and is controlled.

Optimally, the disciplinary agency should not be housed within the Washington State Bar Association. The Committee is aware of the gravity of the suggestion that the Court act to separate its disciplinary agency from the Washington State Bar Association. The Committee is aware that making such a recommendation in a unified bar state is particularly sensitive. However, when elected bar officials control all or parts of the disciplinary process, the appearance of impropriety or conflicts of interest is created, regardless of the actual fairness of the system. This is true whether the bar is unified or not. Implementing this recommendation will assure the public that the disciplinary agency is an independent agency functioning directly under the Supreme Court. This alleviates the risk of any public misperception that the agency is overly protective of lawyers and gives proper credit to the Court for the efforts of its agency.

Consultation teams have made similar recommendations in other unified bar states, such as California, Louisiana, Nebraska and Rhode Island. While some disciplinary agencies remain under the purview of the state bar association in unified bar states, the majority are physically separate and governed more directly by the highest court of appellate jurisdiction. Examples of unified bar states where the disciplinary function is more separate from the other bar functions for the Court to consider include Wisconsin, the District of Columbia, Michigan, Missouri, New Mexico, Montana, South Carolina and North Dakota.

Given the realities of the situation in Washington, the team recommends that even if the Court does not physically separate the disciplinary agency from the Washington State Bar Association, the Court should administratively separate it. In doing so, the Court should change the agency's name to the Office of Disciplinary Counsel of the Supreme Court of Washington. A similar change should be made for the Disciplinary Board. The Court should also amend all relevant Rules for Enforcement of Lawyer Conduct to repeal any provisions providing specifically or implicitly that the Chief Disciplinary Counsel acts on behalf of the Washington State Bar Association, that matters may be opened and pursued in the name of the Association and that the captions of pleadings in disciplinary matters include the name of the Bar Association.

In addition, the team recommends cessation of the Association's role in funding the disciplinary system from its budget. The Court should fund the disciplinary agency via a direct annual assessment on lawyers for the discipline system. The Court, as part of its exclusive authority to regulate the practice of law, may impose such an assessment. This fee would be separate and distinct from Bar Association dues and the annual registration statement could be modified to delineate between the two amounts. If the Court thinks it appropriate and more expedient, it may continue to allow the Washington State Bar Association to collect this separate fee along with the annual dues. The Bar should be required to deposit all these licensing fees into a separate, designated account for the system. Such an assessment by the Court will eliminate any perceived or actual conflicts during the State Bar Association's budgeting process when it must necessarily weigh competing interests and programs. It is important to note that since 1993, the Board of Governors has taken steps to ensure appropriate funding for the discipline system.

A separate fee for discipline will reflect a budget developed by the Chief Disciplinary Counsel and approved by the oversight body proposed below for submission to the Court. It will not have to compete with other Bar Association programs. The amount of the annual assessment should ultimately be determined by the Court after consultation with the Chief Disciplinary Counsel and that Administrative Oversight Committee. It should take into consideration existing and future needs in terms of space, caseload, staffing and technology. In this way, subsequent increases, if necessary, will not be required for a period of years.

A. The Court Should Appoint An Independent Administrative Oversight Committee For The Discipline System

Regardless of whether the Court decides to physically separate the discipline system from the Washington State Bar Association, it should create an independent administrative oversight mechanism for the system. This Administrative Oversight Committee would interact directly with the Court through a liaison justice to ensure that the Court's system operates as effectively and efficiently as possible. The team recommends that the Court amend the Rules for Enforcement of Lawyer Conduct and provide for the creation and operation of this Administrative Oversight Committee. At the same time, the Court should amend all related Rules for Enforcement of Lawyer Conduct to eliminate any supervisory authority over the system by the Washington State Bar Association's Board of Governors and Executive Director. The Court should also eliminate the role of the President of the Association in the signing of reprimands as described in Recommendation Twenty-Two.

The Court should repeal the provisions of the Rules for Enforcement of Lawyer Conduct that provide the President of the Association, Board of Governors and Executive Director access to and authority to disseminate confidential disciplinary information. These individuals should no longer have the ability to access and release such information. Rule 16, *ABA Model Rules for Lawyer Disciplinary Enforcement*. The Rules should prohibit *ex parte* communications by the officers of the Association or the Executive Director with disciplinary adjudicators or Disciplinary Counsel regarding pending matters. Similarly, individual

members of the Court should not engage in any *ex parte* communications. Rule 4(D), *ABA Model Rules for Lawyer Disciplinary Enforcement*.

The Administrative Oversight Committee should be responsible for general administrative oversight of the entire disciplinary system, focusing on the efficiency of processing cases at the investigative, hearing and appeal levels, resource planning for the agency, public education and outreach, training of system volunteers, and, in addition to the Chief Disciplinary Counsel, proposing new disciplinary rules to the Court.

The team recommends that the Court appoint the members of the new Administrative Oversight Committee. The members of this Committee should have no role in adjudicating matters. The team recommends that the Chief Justice appoint a liaison justice to this entity and may rotate that liaison every few years so that all members of the Court have an opportunity to serve in that capacity.

The Administrative Oversight Committee should consist of seven to nine members. One-third of the members should be non-lawyers. If the Court solicits recommendations from the Washington State Bar Association for the lawyer positions, it should also solicit input from the public. The Court should consider appointing members of the Oversight Committee for three-year terms, with no member serving more than two consecutive terms. Rule 2(B), *ABA Model Rules for Lawyer Disciplinary Enforcement*.

1. Appointment and Supervision Of System Adjudicators

The Administrative Oversight Committee should be responsible for developing and implementing a screening process for the appointment of Hearing Officers and Disciplinary Board members by the Court. It should seek lawyer and public volunteers through an open, well-publicized nomination process. Those members should no longer be appointed by the Board of Governors. However, the Bar Association may submit candidate names to the Oversight Committee for consideration. Utilizing this protocol, the Oversight Committee should provide its recommendations for appointment to the Court.

The duties of the Oversight Committee would include ensuring that the Hearing Officers and the Disciplinary Board/Review Committee members perform their adjudicative functions efficiently and that their reports and recommendations are filed on time. This includes oversight of the scheduling process for hearings and oral arguments. If a Hearing Officer is unable to complete his/her work in a timely fashion, the Oversight Committee should be able to rectify the situation.

The Oversight Committee should work with the Hearing Officers, Disciplinary Board and Review Committee members and their counsel to ensure the appropriate prioritization of cases awaiting the drafting of reports and recommendations. Reports and recommendations for cases that involve less complex fact scenarios, more stipulated facts and less serious sanctions should not take as long to draft as those matters that are complex or highly contested. As addressed in detail in Recommendations One, Three, Five, Six and Eight, the

Administrative Oversight Committee should also ensure that adjudicative component of the system is adequately staffed, resourced and trained. While the Chief Hearing Officer's recent efforts to train the system's volunteers are laudable and the time that he has devoted to doing so is admirable, the team believes that such responsibility is better placed with the Oversight Committee.

2. Outreach

The Oversight Committee should coordinate outreach to the profession and the public about the discipline system. Public access to and understanding of the lawyer disciplinary system is vital. 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 system has done an excellent job thus far, and the addition of the Consumer Affairs program has been beneficial in this respect. Pamphlets describing the system exist in several languages, but could be more widely disseminated to locations frequented by the public such as libraries and the offices of consumer organizations. Lawyers from Disciplinary Counsel's Office regularly speak to the bar about the system. They and members of the Oversight Committee should engage in a more concerted effort to address the public. In particular, they should seek invitations to speak at meetings of consumer organizations and citizens groups, as well as bar associations.

B. Appointment of Disciplinary Counsel and Oversight Of That Office

The Court, utilizing the Administrative Oversight Committee to screen candidates, should appoint the Chief Disciplinary Counsel. The Chief Disciplinary Counsel should serve at the pleasure of the Court and should no longer report to the Executive Director of the Washington State Bar Association. The team recommends that the Court amend the Rules for Enforcement of Lawyer Conduct accordingly. The Chief Disciplinary Counsel should remain responsible for hiring, evaluating and firing his/her staff.

The team recommends that the Chief Disciplinary Counsel develop his/her budget for submission to the Oversight Committee and ultimately to the Court. Rule 4(B)(14), *ABA Model Rules for Lawyer Disciplinary Enforcement*. In the unlikely event there is a disagreement between the Oversight Committee and the Chief Disciplinary Counsel regarding the budget, Disciplinary Counsel should be permitted to submit his/her budget directly to the Court. These instances should be rare, and all efforts should be made to resolve budget issues without the need for the Court to do so.

The team was not advised of any current concerns relating to the financial stability of the disciplinary system. However, in order to determine adequate financing for the system well into the future, the new Oversight Committee should work with the Chief Disciplinary Counsel and prepare a true needs assessment setting forth a proposed three to five year funding plan for the system. This includes ensuring that salaries for the professional staff are competitive enough 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.

Based on national experience, the team recommends that financial planning for the discipline system should ensure that regulatory fees remain stable for a period of time such as a three to five year or longer cycle. Once provided with a long-range financial plan for the future funding of the system, the Court can determine how to phase in necessary increases to the regulatory fee. It is appropriate for a disciplinary agency to maintain a reserve.

The Oversight Committee should receive caseload management reports from the Chief Disciplinary Counsel and review them monthly. The caseload reports should indicate the type of misconduct alleged, whether the facts and evidence are complex in nature, the work already completed, the nature and extent of the investigation that needs to be performed and an estimate of how long that will take given the existing time standards. Similar reports should be prepared for cases pending before the Hearing Officers and Disciplinary Board.

The Chief Disciplinary Counsel should remain responsible for the day-to-day operations of his/her office, including management of staff and the setting of investigative and prosecutorial priorities. If the Oversight Committee has concerns about Disciplinary Counsel's priorities, those concerns should be addressed appropriately and without any *ex parte* communications. Any caseload oversight should not impinge upon Disciplinary Counsel's decision to investigate, prosecute or appeal individual matters. For this reason, the Oversight Committee's general administrative duties relating to efficient caseload management must not allow inquiry into the investigation or prosecution of any specific matters.

Recommendation 2: The Number Of Review Committee Members Should Be Increased

Commentary

The system needs more Review Committee members. Current Review Committee members are members of the Disciplinary Board. In their role as Review Committee members they determine whether there is a sufficient evidence to warrant the filing of formal charges. In order to fulfill this duty, they are provided with volumes of materials, including confidential information and records. They must not only read and assimilate all of this information but bring it with them to meetings at the Washington State Bar Association's offices.

The information presented to the team indicates that these members are overworked. The team suggests that, in order to increase the number of Review Committee members, the Administrative Oversight Committee utilize those former Hearing Officers who will be removed from the pool of adjudicators pursuant to Recommendation Three. Using these individuals as Review Committee members in conjunction with current Disciplinary Board members will also help train them for possible future appointment as Hearing Officers. The Administrative Oversight Committee can screen and recommend additional non-lawyers for appointment to Review Committees by the Court. For those Review Committee members who are also Disciplinary Board members, the Court should amend Rule 2.3(h) to provide that they must recuse themselves from consideration of that case if the matter goes before the Disciplinary Board.

Disciplinary Counsel's Office should also find a way to minimize the amount of materials that are sent to these individuals. The team believes this can be done without sacrificing appropriate due process to respondents. The manner in which these records are currently provided to Review Committee members cannot be the most cost efficient way to proceed. Not only must the system pay to copy these voluminous materials, but it expends resources to send them to the Review Committee members and retrieve and destroy them at the end of the process. Further, these records are confidential and this method of dissemination poses risks to that confidentiality. In stating this, the team is not indicating that Review Committee members breach confidentiality. However, the team is concerned about the risk inherent in the process.

In other jurisdictions, the entity responsible for determining probable cause to file formal charges is provided with a draft charging document, the exhibits that support the allegations, the respondent's response(s) to the allegations and any exculpatory evidence. These individuals are not provided with the entire file. Individual Review Committee members may request additional information if they feel that it is needed to help them fulfill their duties.

Recommendation 3: Quality Issues At The Hearing Officer Level Of The System Should Be Addressed

Commentary

During the course of the on-site portion of the consultation, the team queried those interviewed about the effectiveness of all levels of the system. A primary concern identified almost universally and repeatedly related to the quality of the Hearing Officers' work "on the bench" and in their reports and recommendations. One problem that was repeatedly related to the team was the difficulty that Hearing Officers appear to have relinquishing the role of advocate and acting as a judge. The team believes that the protocol developed by the proposed Administrative Oversight Committee for the appointment of Hearing Officers by the Court and the use of former Hearing Officers as Review Committee members will help improve the system at this level.

The team also recommends decreasing the current pool of approximately sixty-six Hearing Officers. Currently, despite their long tenure, according to statistics and interviews each Hearing Officer presides over very few matters. The pool should be reduced so that these individuals gain more experience. The team understands that this suggestion is consistent with the recommendation of the Discipline 2000 Commission. Consistent with national practice, Hearing Officers should not be compensated for their services, but expenses should continue to be reimbursed.

In order to increase the quality of the Hearing Officers' reports and recommendations and enhance consistency in their sanctions recommendation, they must be provided with in-depth mandatory training. Failure to comply with training requirements should result in removal from the pool of Hearing Officers. Suggestions for training are set forth in Recommendation Five.

Hearing Officers, like the Disciplinary Board, should be provided with staff counsel to assist with legal research and drafting opinions, and with appropriate technology resources to conduct their business effectively and efficiently. See Recommendations Six and Eight, regarding these staffing suggestions and the creation of an electronically accessible, searchable data base of previous opinions and a secure web site.

The team suggests that the Administrative Oversight Committee, as part of its duties to provide training for the system's adjudicators, formulate written guidelines that the Hearing Officers and Disciplinary Board can use in developing sanction recommendations. The development of written guidelines, coupled with the electronic data base of opinions, will assist the Disciplinary Board in achieving more consistency in its sanction recommendations and conducting appropriate proportionality analyses. Counsel to the Hearing Officers and Disciplinary Board should also assist by preparing a proportionality analysis after trial for use by the adjudicators. Such an analysis would be particularly helpful in cases where the

suggested term of a suspension is at issue. The team was pleased to note that the Hearing Officers and Disciplinary Board use the *ABA Standards for Imposing Lawyer Sanctions* in addition to case law in developing their recommendations. Attached as Appendix B is a form that the Michigan Attorney Discipline Board uses to assist its adjudicators with the task of recommending a sanction.

Recommendation 4: The Appellate Process Before The Disciplinary Board Should Be Streamlined

Commentary

Pursuant to Rule 11.2 of the Rules for Enforcement of Lawyer Conduct, the Disciplinary Board must review all cases where the Hearing Officer recommends suspension or disbarment, in matters where two members of a Hearing Panel cannot agree, and all other cases upon the filing of a notice of appeal by the respondent or Disciplinary Counsel. Currently, the Disciplinary Board hears all appeals *en banc*.

In order to increase the efficiency of the appellate process, the team first recommends that the Court amend Rule 11.2 (b) to eliminate mandatory review by the Disciplinary Board of all suspension or disbarment recommendations. Disciplinary Board review should be upon the appeal of either or both parties. Rule 11 (E), *ABA Model Rules for Lawyer Disciplinary Enforcement*. If neither party appeals, the matter should proceed to the Court for the imposition of the appropriate sanction, or the Disciplinary Board should impose the sanction if permitted by the Rules.

The team also believes that appeals will proceed through the system more efficiently if the Disciplinary Board acts in panels consisting of three members, rather than having to hear and decide each matter *en banc*. The panels should be comprised of two lawyers and one non-lawyer. Requiring the Disciplinary Board to hear appeals *en banc* is not the best use of the volunteers' time and resources. Further, inherent in requiring the fourteen Disciplinary Board members to consider the record and briefs, attend oral argument and complete a report and recommendation is the danger of unnecessary delay.

Recommendation 5: Volunteers In The Disciplinary System Should Receive More Intensive And Mandatory Formal Training

Commentary

The team was advised of the Chief Hearing Officer's efforts to enhance the training offered to Hearing Officers. The team was also advised that Hearing Officers are supposed to attend training sessions unless the Chief Hearing Officer excuses their attendance. Despite these efforts, the current amount of training provided to Hearing Officers is insufficient, and those training sessions that are conducted are not fully attended. The team was advised that training for Disciplinary Board members is not currently available.

The proposed new Oversight Committee for the system should oversee the development of training materials and programs for all system volunteers. The Oversight Committee should work with Disciplinary Counsel's Office and the Chief Hearing Officer 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 in and the expeditious resolution of disciplinary matters. Training should be mandatory for all new volunteers in the system and should occur at least bi-annually for all other volunteers. Training should stress the need for the volunteers to fulfill their duties in a timely manner so as to enhance the public's perception that the system is operating efficiently. This should include training for Hearing Officers and Disciplinary Board members about their obligations to grant continuances judiciously so that the proceedings are not delayed and to control any discovery abuses. Disciplinary Board members and Hearing Officers should also receive training regarding how to fulfill their roles as adjudicators versus advocates. They should receive training and guidance with respect to substance abuse, gambling and mental health issues. These issues are raised with increasing frequency in disciplinary cases.

The Oversight Committee should consider sending representation to the meetings of the National Council of Lawyer Disciplinary Boards. This relatively new organization was formed to assist disciplinary system adjudicators and provide them with a forum to share and exchange information relating to the deciding of formal disciplinary cases. The Disciplinary Board is a member of this organization.

The training of the professional staff of Disciplinary Counsel's Office should continue to include attendance at National Organization of Bar Counsel (NOBC) meetings and at the ABA National Conference on Professional Responsibility. 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.

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.

Recommendation 6: The Discipline System Should Have Adequate Technology Resources

Commentary

The disciplinary system must have adequate technology resources if it is to operate as effectively and efficiently as possible. As addressed above, there is need for improvement in the quality of Hearing Officer and Disciplinary Board reports and recommendations. In particular, the Hearing Officers and Disciplinary Board members need to work to increase the consistency of their sanction recommendations. An important tool in helping the system's adjudicators achieve these improvements is the development of an electronic compendium of all previously filed Hearing Officer/Panel, Disciplinary Board and Court reports, recommendations and opinions. Counsel for the Hearing Officers and the Disciplinary Board should also have access to this on-line data base. Disciplinary Counsel should have access to this information too, although in a separate data base from that used by the system's adjudicators.

The team was advised that creating such a data base for the system has been considered, but not yet implemented. The team recommends that implementation commence as soon as possible. However, in order for that to happen, there must be adequate technology resources provided. At the most basic level, this includes providing the disciplinary agency with a high quality scanner to commence building the data base for the adjudicators and Disciplinary Counsel's office. The team was advised that the older reports and recommendations will have to be scanned and the current scanner is insufficient for those purposes.

The counsel hired to work for the Disciplinary Board and Hearing Officers should consider creating a password protected area on a web-accessible site so that the adjudicators may circulate, edit and discuss draft opinions electronically with the requisite confidentiality. This site would also enable them to conduct research on the data base of cases. A system like this currently exists in Louisiana and the team recommends that contact with the Administrator of the Disciplinary Board of the Supreme Court of Louisiana be made. Additionally, the Illinois Attorney Registration and Disciplinary Commission constructed a very useful web site containing information that can be used as a reference for creating a data base in Washington.

Disciplinary Counsel's office should also be provided with software that allows it to derive a greater variety of statistical reports and that assists in conducting forensic investigations in complex cases such as those involving financial matters. The Office of Disciplinary Counsel should be provided with the resources to retain the services of a qualified information systems and software expert. That individual could consult with other lawyer disciplinary agencies and help the Office purchase and maintain a modern caseload management system. Currently the Office must use the Bar Association's staff, which has other priorities to consider. The team recommends that the Chief Disciplinary Counsel consult with the disciplinary agencies

in Illinois, Louisiana and Colorado regarding their data systems. Those jurisdictions have developed or purchased programs that are well suited to the functions of a disciplinary agency and have staff specifically dedicated to their needs.

Recommendation 7: Improved Scheduling Practices Will Lessen Delay At The Hearing Level

Commentary

A problem that arises in any system that utilizes professionals as volunteers is scheduling. Washington is no different. The team was advised that some delay in hearings and proceedings before the full Disciplinary Board 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 appellate oral arguments 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 do 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 these proceedings. This allows the volunteers to set their schedules and the system to resolve scheduling conflicts well ahead of time. This should also allow scheduling of consecutive hearing dates. It is very important that whenever possible, multi-day hearings are held on consecutive days so that memories and witnesses are not overburdened. Scheduling consecutive hearing dates should also eliminate additional delay caused by having to relearn the case every time the hearing is scheduled to continue.

The team was pleased to learn that pre-hearing conferences are used routinely to help narrow issues before trial, reach stipulations on evidence and further coordinate the proceedings so that they occur efficiently. However, the team was also advised that multiple continuances due to scheduling issues are granted too often. The team recognizes that the staff and volunteers in the system, as well as respondents and their counsel, are busy and that conflicts will arise. The team understands that Hearing Officers are sympathetic to the other obligations of their colleagues and the parties. Hearing Officers need to be more judicious about granting multiple continuances, and the proposed Administrative Oversight Committee should ensure that the practice is used appropriately. Frequent continuances reduce the effectiveness of the disciplinary system and are not protective of the public.

Recommendation 8: The Administrative Oversight Committee and Director Of Lawyer Discipline Should Consider Staffing Needs

Commentary

The Administrative Oversight Committee should determine how many lawyers are needed to assist the Hearing Officers and Disciplinary Board members in researching, writing and issuing their opinions. Currently there is one Assistant General Counsel for the Washington State Bar Association who assists the Disciplinary Board with this work, and who also helps the Review Committees. This lawyer spends one-half of her time performing these functions, and has other duties as well. The Hearing Officers do not have the benefit of such assistance from counsel. In light of the recommendations in this Report that the discipline system should be separated from the Washington State Bar Association, the Discipline Committee recommends that the Oversight Committee consider whether to recommend to the Court that counsel needed to assist the Hearing Officers and Disciplinary Board should work for it.

The Director of Lawyer Discipline should also consider whether there is a need for an additional investigator and an auditor whose job is solely to work on disciplinary cases. Currently, the office shares an auditor with the State Bar and must wait for that employee's availability. The team was advised that this has resulted in delay on investigations relating to financial misconduct. Allegations of misconduct relating to mishandling of monies are among the most serious investigated by any discipline system, and they often pose the risk of immediate, serious harm to clients and the public. Disciplinary Counsel's Office should have an auditor on staff that can promptly work on these cases and coordinate with the system's lawyers and investigators. The team's interviews and review of materials indicated that an additional investigator may be needed. Currently, each investigator is assigned to work with five to six Disciplinary Counsel.

V. PROCEDURAL RULES

The work of the Discipline 2000 Task Force to provide the Court with its proposal for the new Rules for Enforcement of Lawyer Conduct was highly commendable. The Rules adopted by the Court, based upon the hard work of the Task Force, are comprehensive and serve the profession well. The following recommendations relating to specific procedural rules are intended not only to ensure that the Court's oversight of the system is emphasized, consistent with Recommendation One above, but to help further improve the efficiency, effectiveness and consumer friendliness of the system. Because the work of the Court and the Discipline 2000 Task Force was very thorough, in many respects the following suggestions will necessitate only minimal changes to the existing rules.

Recommendation 9: The Court Should Repeal Rule 5.1(d) Of The Rules For Enforcement Of Lawyer Conduct, Entitled "Grievant Duties"

Commentary

The Committee recommends that the Court repeal Rule 5.1(d) of the Rules for Enforcement of Lawyer Conduct. That Rule, entitled "grievant duties" sets forth various requirements that a grievant must abide by or risk having his/her grievance dismissed.

Grievant/complainant cooperation is highly desirable. However, a grievance should be dismissed based upon evidence obtained by Disciplinary Counsel from all available sources, not upon the complainant's fulfilling the "duties" set forth in Rule 5.1(d). For many complainants, coming forward and filing a complaint against a lawyer is intimidating, let alone the entire disciplinary process. The team believes that the requirements of this Rule could have the undesirable effect of heightening trepidation about what ought to be a consumer friendly process.

Disciplinary Counsel is charged with conducting a thorough and complete investigation. That burden should not be placed on the complainant, nor should the dictates of Rule 5.1(d) be used to secure cooperation from a less than willing grievant. While the team received no indication that the latter has occurred, the manner in which the Rule is phrased raises the risk, albeit remote, of such use. Rule 5.1(d) also can be used by an unscrupulous lawyer to prevent the filing of a complaint against him/her. The team believes that subparagraph (d)(2) of the Rule, which requires the complainant to assist in securing relevant evidence is vague.

The requirements set forth in Rule 5.1(d) also seem inconsistent with the provisions of Rule 5.3(d). Rule 5.3(d) states that a grievant's unwillingness to continue the grievance or his/her withdrawal of the grievance does not, alone, require dismissal. Yet that unwillingness to proceed or withdrawal of the grievance alone could be interpreted as a violation of Rule 5.1(d) that, in the discretion of Disciplinary Counsel, could result in dismissal. Such inconsistencies would be resolved by repealing Rule 5.1(d).

Recommendation 10: The Court Should Amend Rule 5.3(a) Of The Rules For Enforcement Of Lawyer Conduct To Eliminate The Washington State Bar Association's Role in Opening Grievances

Commentary

Rule 5.3(a) of the Rules for Enforcement of Lawyer Conduct requires Disciplinary Counsel to review and investigate all complaints about lawyer misconduct. The Rule further states that if there is no grievant, the Washington State Bar Association may open a grievance in the Association's name. Consistent with practice across the country, the Committee recommends that the Court should amend Rule 5.3(a) to provide that, in cases where there is no complainant, Disciplinary Counsel can open an investigation. Rule 11(A), *ABA Model Rules for Lawyer Disciplinary Enforcement*.

For the reasons discussed above, the disciplinary system should be independent from the Washington State Bar Association. In instances where there is no grievant, it is appropriate for Disciplinary Counsel, not the Bar Association, to determine whether to open a grievance. This may in fact be the current practice. However, Rule 5.3(a) should be clear on this point. The Bar's role should be limited to that of any other complainant—it may refer matters to Disciplinary Counsel for consideration. Bar associations do have a role in the regulatory process, such as law practice management and diversion programs and administrative services, but not in determining whether a grievance should be initiated absent a complainant or in the processing of cases.

The practice of having a grievance opened in the name of the Washington State Bar Association should also cease. The Bar should not be viewed as a party to disciplinary proceedings, and the public and the profession should not have the impression that it has any influence in these matters. The process must be free from the appearance of politics or impropriety. This recommendation is consistent with the suggestions in Recommendation One relating to the deletion of the Bar's name from the caption of all formal disciplinary pleadings.

Recommendation 11: Diversion Contracts Should Be Limited To Terms Agreed To By Disciplinary Counsel And The Respondent

Commentary

As noted in Section II. A. of this Report, the creation and implementation of the Diversion Program is praiseworthy. The Washington program has been successful, and those interviewed by the team were very complimentary of it.

One matter that the team learned about that should be addressed relates to what interviewees referred to as "self help" contracts. These contracts appear to be created at the instance of the assigned practice/recovery monitor. Respondents are asked to enter into these agreements as part of the diversion process. The team understands that these "self help" contracts are not formally incorporated into the diversion contract that is executed by Disciplinary Counsel's Office, nor does Disciplinary Counsel sign them. However, reports of the diversion practice/recovery monitor regarding compliance have referenced them.

The team believes that the use of these separate "self help" contracts should cease. Pursuant to Rule 6.5 of the Rules for Enforcement of Lawyer Conduct, the only enforceable terms are those agreed to by Disciplinary Counsel and the respondent. If necessary, the Court might consider amending Rule 6.5(c) to provide that the practice/recovery monitor has no authority to amend, supplement or alter the terms of the contract. It is unfair to respondents to enter into a diversion contract with the expectation that the contract contains all obligations that must be complied with to successfully complete the program only to have additional duties placed upon them by the practice/recovery monitor responsible for reporting their compliance.

Recommendation 12: The Court Should Amend Rule 7.1 Of The Rules For Enforcement Of Lawyer Conduct To Eliminate Disciplinary Board Involvement In Terminations Of Interim Suspensions Based On Criminal Convictions

Commentary

Rule 7.1 of the Rules for Enforcement of Lawyer Conduct sets forth the procedures for the imposition of an interim suspension for lawyers convicted of a crime. The Rule provides for the immediate interim suspension by the Court of a lawyer convicted of a "serious" crime. The Committee has several suggestions relating to this Rule to help expedite the processing of petitions for this type of interim suspension and petitions for the termination of interim suspension orders.

First, the team suggests that the Court amend Rule 7.1(b) to require the clerk of the court to notify and provide Disciplinary Counsel's Office, not the Washington State Bar Association, with the information showing that a lawyer has been convicted of a crime as defined in Rule 7.1(a). The information provided must include a certified copy of the order evidencing the conviction.

The team also believes that Disciplinary Counsel should not have to refer a matter not involving a felony conviction to a Review Committee to determine whether the crime at issue is a serious crime. This adds unnecessary time to a process that is intended to promptly and efficiently protect the public and the profession. Disciplinary Counsel's Office is capable of making this decision and should be trusted to do so appropriately. The definition of a serious crime in Rule 7.1 is clear. Subparagraphs (c) and (d) of Rule 7.1 should be amended accordingly.

The Court may also wish to add language to Rule 7.1(c) allowing a respondent the opportunity to assert in writing, within a very short period of time after the filing of Disciplinary Counsel's petition, any jurisdictional deficiencies that establish that an immediate interim suspension is not appropriate. Such deficiencies include that the crime is not a "serious" crime, or the respondent is not the individual found guilty. Rule 19(B), *ABA Model Rules for Lawyer Disciplinary Enforcement*. Amending Rule 7.1(c) in this manner also eliminates the time currently needed in non-felony cases for a show cause hearing before the Court pursuant to Rule 7.2(b). The team believes that such hearings in non-felony cases are not a good use of the Court's resources given the clear definition of a serious crime set forth in the Rule. The Court can render its decision based upon the pleadings.

It is also important that procedures by which interim suspensions are terminated occur quickly. Lawyers suspended pursuant to this Rule should be reinstated automatically upon proof of reversal of the finding of guilt/conviction. The vacating of the interim suspension order will not terminate any formal disciplinary proceedings pending against the lawyer based upon the conduct underlying the conviction.

The Court should consider amending Rule 7.1(g) to eliminate the necessity for proceedings, including oral argument, before the Disciplinary Board when a respondent seeks termination of an interim suspension. Petitions for termination should be filed directly with the Court and the Court may terminate that suspension at any time upon a showing of extraordinary circumstances, after affording Disciplinary Counsel notice and an opportunity to respond. Rule 19(D), *ABA Model Rules for Lawyer Disciplinary Enforcement*.

Recommendation 13: The Court Should Amend Rule 7.2 Of The Rules For Enforcement Of Lawyer Conduct To Streamline Other Interim Suspension Procedures

Commentary

The Court's inclusion of procedures for the interim suspension of a lawyer whose continued practice of law poses a substantial threat of serious harm to the public is laudable. The team believes that Rule 7.2, which addresses the circumstances under which these types of interim suspensions may be ordered, can be enhanced through amendments designed to increase the speed with which the Court considers these important matters.

Disciplinary Counsel should be able to file directly with the Court a petition seeking an interim suspension for threat of harm upon receipt of sufficient evidence demonstrating that a lawyer has committed a violation of the rules of professional conduct and poses a substantial threat of serious harm to the public. To have a Review Committee review the matter and allow Disciplinary Counsel to proceed if and when the Review Committee recommends an interim suspension defeats the purpose of this type of emergency process to protect the public. Submission to and review by a Review Committee takes unnecessary time. As with interim suspensions for criminal convictions, the lawyers of Disciplinary Counsel's Office should be trusted to exercise appropriate discretion in seeking a suspension of a lawyer posing a substantial threat of serious harm pursuant to Rule 7.2. Rule 20, *ABA Model Rules for Lawyer Disciplinary Enforcement*.

Further, while Disciplinary Counsel should be required to make reasonable efforts to serve the respondent with the petition for interim suspension, personal service should not be required. Notice by telephone should be considered a reasonable effort to provide the lawyer with notice. Rule 20(A), *ABA Model Rules for Lawyer Disciplinary Enforcement.* These proceedings are analogous to civil temporary restraining orders in that an order of suspension may be entered *ex parte* due to the immediacy of the threat of harm to the public. For this reason as well, the team recommends that the Court amend Rule 7.2(b) to streamline the process by which such an order is entered.

The Court should repeal the provisions for show cause proceedings that are currently set forth in Rule 7.2(b). Upon receipt of the petition, the Court should examine the evidence submitted by Disciplinary Counsel, consider any written rebuttal by the respondent submitted prior to the Court's ruling, and, if appropriate, enter an order immediately suspending the respondent. Because such an order can be entered *ex parte*, Rule 7.2 should provide that, on two days notice, a respondent may appear before the Court and move for dissolution of the suspension order. The Court should hear that motion on an expedited basis.

Recommendation 14: The Court Should Amend The Rules For Enforcement Of Lawyer Conduct Relating To Disability Inactive Status

Commentary

Title 8 of the Rules for Enforcement of Lawyer Conduct sets forth the procedures for placing a lawyer suffering from mental or physical incapacity on disability inactive status. The Court has adopted a variety of rules relating to the situations in which such a claim of incapacity arises. The delineation of these circumstances into separate Rules provides guidance to the profession that is laudable. The Committee believes that certain amendments to these Rules will help emphasize the Court's oversight of the discipline system and enhance the efficiency of these types of proceedings.

The Committee first recommends that the Court amend Rule 8.1 of the Rules for Enforcement of Lawyer Conduct to provide that, upon receipt of a certified copy of a judgment finding that a lawyer is mentally incompetent, the Court, not the Washington State Bar Association, should immediately place that lawyer on disability inactive status. Rule 23(A), *ABA Model Rules for Lawyer Disciplinary Enforcement*. A judgment holding that a lawyer is mentally incompetent should be filed with the Court and acted upon promptly to ensure protection of the public. Similarly, the Court should amend Rule 8.8(g) to state that, upon the granting of a petition for reinstatement to active status by the Court it should notify the Washington State Bar Association of such action so that the lawyer may be returned to active status on its membership roll. While an order of disability inactive status is not considered to be a form of disciplinary sanction, it impacts a lawyer's license and ability to practice law and currently requires a Disciplinary Board or Court order to reverse. The license is granted by the Court. Thus, the Court should act first and then notify the Bar of its order so that the Bar may make appropriate adjustments to its annual registration information, not vice versa.

In its 1993 Report, the Standing Committee on Professional Discipline recommended that the Court adopt a rule providing that if, during the course of disciplinary proceedings a respondent alleges an inability to defend due to mental or physical incapacity, the Court should immediately place that lawyer on disability inactive status pending determination of the incapacity. Rule 23(B), *ABA Model Rules for Lawyer Disciplinary Enforcement*. The team was pleased to note that this suggestion was incorporated into Rules 7.3 and 8.3(e). Subparagraph (e) of Rule 8.3 requires Disciplinary Counsel to petition the Court for an interim suspension for threat of harm pursuant to Rule 7.2(a)(1) or seek automatic suspension pursuant to Rule 7.3, entitled Automatic Suspension When Respondent Asserting Incapacity. The team suggests that the Court amend Rule 8.3(e) to eliminate the need for the petition pursuant to Rule 7.2(a)(1). The requirement of an automatic suspension pursuant to Rule 7.3 is the better and more appropriate action and eliminates the need for proceeding under Rule 7.2(a)(1).

The Court should also consider whether the Disciplinary Board should retain the ability to issue orders placing a lawyer on disability inactive status or restoring a lawyer to active status

in these cases. Currently, Rules 8.2 and 8.8 provide the Disciplinary Board with this authority. It is better to have that power reside solely with the Court.

Recommendation 15: The Administrative Oversight Committee And Disciplinary Counsel's Office Should Develop For Court Approval, Standards For The Appointment Of Counsel For Respondents In Disability Proceedings And A Roster Of Volunteer Counsel To Serve In That Capacity

Commentary

The team was advised that problems exist with the current process for appointing counsel for lawyers subject to disability inactive status proceedings pursuant to Rules 8.2(c)(2) and 8.3 (d)(3) and (d)(7)(B). The team was told that there has been an increase in the instances where it is necessary under the Rules to appoint counsel for a respondent and that the number of qualified lawyers willing to serve in this capacity is no longer sufficient to meet this need. According to information provided to the team, the lack of a sufficient pool of qualified candidates to serve in this capacity results in delay that poses risks of harm to the public as well as to lawyers subject to disability proceedings.

As a result, the Committee suggests that the new Administrative Oversight Committee develop for Court approval, with the assistance of the Bar Association, a roster of lawyers who are qualified to serve as counsel to respondents in disability proceedings. The existence of a sufficient number of lawyers for these cases will assist the Disciplinary Board and Hearing Officers whose job it is to appoint these attorneys. The availability of a larger pool of lawyers for appointment will help reduce the delays that the team was told about.

In developing criteria for selecting lawyers to volunteer to serve in this capacity, the Administrative Oversight Committee may wish to consult with lawyers who serve similar roles in the justice system, including guardians for individuals adjudicated incompetent. Consultation with the Lawyers' Assistance Program and appropriate health care professionals may also be desirable.

Recommendation 16: Discipline On Consent Should Be Encouraged At All Stages Of Proceedings

Commentary

Discipline on consent, implemented expeditiously, benefits the public and the parties. The public is promptly protected from an unethical lawyer 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. Rule 9.1 of the Rules for Enforcement of Lawyer Conduct, entitled Stipulations, allows for the agreed resolution of any disciplinary matter at any time.

The effectiveness of Rule 9.1 depends upon the manner in which it is used. Information provided to the team indicates that Disciplinary Counsel's Office may be using the discipline on consent process in a manner that is more restrictive than intended. As discussed below, the team perceived that, once formal charges are filed, there is reluctance by Disciplinary Counsel's Office to negotiate an agreed disposition.

The team was advised that several years ago, in an effort to address an increase in matters pending before the Hearing Officers, Disciplinary Counsel's Office commenced an early settlement effort designed to increase agreed disposition of matters. This effort proved successful. The team was advised that, at the time of its visit, the process consisted of a group of senior Disciplinary Counsel determining whether settlement would be appropriate and then referring the case to a "stipulation" lawyer in the Office to conduct settlement negotiations. This lawyer is not necessarily the Disciplinary Counsel assigned to the case. Having a group of senior counsel engage in this practice helps ensure consistency in the decision making process. However, the team believes that the Office may be better served by having counsel assigned to the case conduct the negotiations.

The team was advised that these settlement negotiations are offered early on in the process, either before formal charges are filed or sometimes shortly after. The team received additional information indicating that offers of settlement are made to respondents in a manner indicating that if Disciplinary Counsel's offer is not accepted, additional alleged violations may be added to any formal charges filed, or that further offers will not be forthcoming. This information was imparted from various sources.

The team believes that a "take it or leave it" approach to discipline on consent is not appropriate or productive and enhances distrust of the process by the profession. The option of discipline on consent via stipulations should available throughout the proceedings. It may be that while a respondent or Disciplinary Counsel's Office finds it unacceptable to enter into an agreement early in the proceedings, the results of the discovery process may warrant reconsideration of settlement options by either party.

The Committee believes that sufficient care must be taken to avoid any perception that Disciplinary Counsel's Office may be conditioning the nature and extent of alleged violations to be included in the formal charging document upon whether a respondent accepts its settlement offer. Disciplinary Counsel's Office should be careful in tendering the conditions of a settlement offer, and should not preclude discussions about settlement if the initial offer is rejected. Similarly, respondents should be realistic about the settlement process. The team does recognize that there are cases where it is appropriate for Disciplinary Counsel to exclude from a stipulation allegations of misconduct that were already included in the charging document, or that would have properly been set forth in that pleading once filed.

Recommendation 17: The Court Should Repeal Rule 9.3 Of The Rules For Enforcement Of Lawyer Conduct Relating To Resignations In Lieu Of Disbarment

Commentary

The Committee recommends that the Court repeal Rule 9.3 of the Rules for Enforcement of Lawyer Conduct relating to resignations in lieu of disbarment. Discipline by consent that results in the lawyer withdrawing from the practice of law should be recorded and treated as disbarment, not as resignation. Interestingly, resignations under Rule 9.3 are permanent while disbarment is not. Rule 9.3 does not set forth specific criteria indicating when this sanction is appropriate versus disbarment, nor does the commentary to the Rule contain any guidance. Jurisdictions that have permanent disbarment tend to reserve it for the most serious offenses. Because of this, the Committee is concerned that the addition of permanence to a sanction imposed after voluntary admission of misconduct may be viewed as punitive, rather than more protective of the public than disbarment.

A lawyer who commits misconduct serious enough to warrant disbarment should not be allowed to claim later that he or she voluntarily resigned his or her license to practice law, regardless of the permanency of that action. To allow a lawyer to claim that he/she "resigned" risks leaving the public with the impression that, lawyers can avoid facing the consequences of their misconduct. Such an option also creates problems in reciprocal disciplinary enforcement with the vast majority of jurisdictions that have eliminated the option of resigning with charges pending in favor of adopting rules for disbarment on consent. Most jurisdictions do not have permanent disbarment, nor is it a sanction recommended by the ABA.

Other than permanency, resignations currently appear to be tantamount to disbarment. Lawyers who are permitted to resign are required to comply with the same requirements as disbarred lawyers. They are subject to all other strictures that apply to disbarred attorneys. Other courts in Washington also appear to consider resignation tantamount to disbarment. *See, e.g., In re Corporate Dissolution of Ocean Shores Park, Inc. et al. v. Rawson-Sweet*, 134 P. 3d 1188 (Wash. Ct. App. 2006).

The process for resignations is similar to that set forth in Rule 9.1 relating to stipulations for discipline in other cases. As a result, if the Court determines that a separate rule for disbarment on consent is necessary, the Committee suggests that the Court amend Rule 9.3 to rename it "Disbarment on Consent," consider eliminating the permanency of the sanction and clarify situations when use of the Rule would be appropriate.

Recommendation 18: Prior Discipline Should Be Considered Only After A Finding Of Misconduct

Commentary

Rules 10.3(a)(4) of the Rules for Enforcement of Lawyer Conduct allow for lawyers' records of prior discipline to be disclosed to Hearing Officers in a separate count of the formal complaint if that pleading charges a lawyer with "conduct demonstrating unfitness to practice law." Rule 10.13(f) requires that a lawyer's record of prior discipline, or lack thereof, be made a part of the hearing record before the Hearing Officer files a decision.

The team believes that the Court should amend Rules 10.3(a)(4) and 10.13(f) and related Rules to clarify the appropriate uses of prior discipline. Hearing Officers should not be advised of a lawyer's disciplinary history prior to making a finding of misconduct, because the introduction of evidence of prior discipline before there is a finding that present charges have been proven can be prejudicial. Because prior discipline is relevant and material to the issue of the appropriate sanction, the Hearing Officers, only after making a finding of misconduct, should be advised of any prior sanctions imposed upon the respondent. This includes disclosure of any private sanctions. This can be accomplished simply by having the Hearing Officers advise their counsel that they have concluded that a respondent committed misconduct and, before arriving at a sanction recommendation, require a report from Disciplinary Counsel as to whether the lawyer has previously been disciplined. This information can be supplied quickly to the Hearing Officers and the respondent via electronic format. These changes also eliminate the need for bifurcated proceedings pursuant to Rule 10.15

There are, however, circumstances when it may be appropriate to introduce evidence of prior discipline before a determination is made that a respondent has committed misconduct. Such evidence may be probative of issues in the case at hand. For example, the introduction of evidence of prior discipline is necessary to prove that a respondent continued to practice law during disbarment or suspension. This evidence may also be used to impeach false testimony initiated by a respondent as to a lack of prior discipline.

Disciplinary Counsel's Office should take care to ensure that the Review Committees are not informed of a respondent's prior discipline. The job of the Review Committees is to determine whether there is sufficient evidence of misconduct in the allegations submitted by the complainant to warrant the filing of formal charges in the current matter. Prior discipline is not relevant as to whether the misconduct alleged in the complaint occurred, unless the allegations consist of practicing law while suspended or disbarred.

Recommendation 19: Respondents Held In Default Should Continue To Receive Notices

Commentary

Rule 10.6 (b) of the Rules for Enforcement of Lawyer Conduct should be amended to provide that, upon the entry of an order of default for failure to file an answer to formal charges, the respondent should continue to receive notices of further proceedings. In light of subparagraph (c) of that Rule, which permits motions to vacate a default, providing such additional notices makes sense. If such notices are provided, a respondent who legitimately did not answer due to mistake or inadvertence will have the opportunity to file a motion to vacate at the earliest possible moment in the proceedings. The team believes that due process requires that the sending of such notices not be discontinued. The cost to the system of continuation should be minimal.

Recommendation 20: Review of Disciplinary Board Reports And Recommendations By The Court Should Be Discretionary In All Disciplinary Cases

Commentary

Currently, Article 12 of the Rules for Enforcement of Lawyer Conduct provides for two types of review of Disciplinary Board decisions by the Washington Supreme Court. The first type of review is called an "appeal" which can be taken as a matter of right. The second type is "discretionary review," which occurs with the Court's permission.

Pursuant to Rule 12.3 of the Rules for Enforcement of Lawyer Conduct, only the respondent has the right to appeal a Disciplinary Board decision recommending suspension or disbarment. Disciplinary Counsel does not have the right to appeal such a decision.

Either the respondent or Disciplinary Counsel may seek discretionary review by the Court pursuant to Rule 12.4. The team was advised that most respondents choose to exercise their right of appeal under Rule 12.3 instead of seeking discretionary review of a suspension or disbarment recommendation under Rule 12.4. The Court accepts requests for discretionary review pursuant to Rule 12.4 only in certain circumstances. These occur when: (1) the Disciplinary Board's decision conflicts with Supreme Court case law; (2) the case involves a significant question of law; (3) the Disciplinary Board's decision on a material finding of fact is not supported by substantial evidence; or (4) the petition for review raises an issue of substantial public interest that the Court should decide.

Given the context of Rule 12.3, the team found that is not clear from the language of Rule 12.4 whether Disciplinary Counsel can request discretionary review of Disciplinary Board recommendations of suspension or disbarment. Upon seeking clarification, the team was advised that Rule 12.4 does appear to allow Disciplinary Counsel to make such requests for discretionary review. *See, e.g., In re Whitt*, 72 P. 3d 173 (2003). While the request for review in *Whitt* was made pursuant to former RLD 7.3, the language of Rule 12.4 is identical to that prior rule.

The Committee recommends that the Court repeal Rule 12.3 and amend 12.4 so that there is only one type of appeal from the Disciplinary Board to the Court. That appeal should be discretionary. In lieu of the right of appeal for only respondents in suspension or disbarment cases, the team believes that either party should be able to object to the Disciplinary Board's findings and sanction recommendation and request consideration by the Court. If the Court does not review the matter, and the sanction recommended by the Disciplinary Board is suspension, disbarment or probation with a stayed suspension, the Court should issue an order imposing the recommended sanction. If the recommended sanction is a reprimand, the Disciplinary Board or the Court should impose the reprimand as described in Recommendation Twenty-Two. Rule 11, *ABA Model Rules for Lawyer Disciplinary Enforcement*.

The Court should be able to rely on the adjudicators below to dispose of matters in accordance with established disciplinary law. Deference should be given by the Court to the findings of fact made by the Hearing Officers and the conclusions of law and sanction recommendations of the Disciplinary Board. The team was advised that such is the Court's current practice. Review by the Court should occur only in cases where circumstances like those set forth in the current version of Rule 12.4 exist. Adoption of this recommendation should expedite the appeals process and reduce the burden on the Court by eliminating the cases that it must hear when respondents exercise their current right of appeal.

VI. SANCTIONS

Recommendation 21: The Court's Role In Enhancing Consistency in Sanction Recommendations

Commentary

This Report makes a number of recommendations that are designed to help the Hearing Officers and the members of the Disciplinary Board improve their reports and recommendations by enhancing their sanctions analysis and assuring consistency of their recommendations. The reports and recommendations of the Hearing Officers and the Disciplinary Board members, in addition to the parties' briefs, help to inform the Court about the case at issue. This is particularly important given the increased complexity of the issues presented during disciplinary hearings and the sophistication of the defenses offered to rebut or mitigate charges of misconduct.

The Court also has an important role in educating the discipline system's volunteer adjudicators and in assuring the consistency of those volunteers' sanction recommendations. In large part, the Court fulfills this role through the issuance of published opinions in disciplinary cases. The team was advised that Hearing Officers and Disciplinary Board members could benefit from an increase in the number of written opinions published by the Court in disciplinary cases. The Discipline Committee encourages the Court to consider doing so. The public and the profession also benefit from published opinions in disciplinary cases that explain the why conduct violates the applicable rules of professional conduct and why a particular sanction is warranted for that conduct.

The team notes that Rule 13.1 of the Rules for Enforcement of Lawyer Conduct refers to sanctions, remedies and admonitions. The comment to the Rule indicates that the distinction between sanctions, admonitions and remedies is based upon the *ABA Standards for Imposing Lawyer Sanctions* (hereinafter, Sanctions Standards). While this is laudable, the distinctions drawn in Rule 13.1 are not consistent with the language of the Sanctions Standards. For example, probation and admonition are clearly sanctions under Sections 2.6 and 2.7 of the Sanctions Standards. Further, Rule 10 of the *ABA Model Rules for Lawyer Disciplinary Enforcement* refers to admonition and probation as disciplinary sanctions.

Section 2.8 of the Sanctions Standards is entitled "Other Sanctions and Remedies." Under Rule 13.1(c), these factors are listed only as remedies. Restitution, assessment of costs and the imposition of limitations on a lawyer's practice do serve a remedial function, but they are also a form of sanction. This aspect of an order for these conditions should not be lost by characterizing them only as remedies.

The team believes that Rule 13.1 as currently written has the potential to cause confusion for Hearing Officers, Disciplinary Board members and respondents and that clarification should be made. For example, the team envisions the possibility of a respondent trying to claim in a

subsequent disciplinary proceeding or in a *pro hac vice* application in another state that he/she was not sanctioned for violating the Washington Rules of Professional Conduct because an order of probation was issued. As a result, the Committee recommends that the Court amend Rule 13.1 so that admonitions and probation are included under the types of sanctions that can be imposed for misconduct. It further recommends that "Remedies" be re-captioned "Other Sanctions and Remedies." This would be consistent with the ABA Sanctions Standards and with the *Model Rules for Lawyer Disciplinary Enforcement*.

Recommendation 22: The Disciplinary Board and the Court Should Administer Reprimands

Commentary

Currently, Rule 13.4 (a) of the Rules for Enforcement of Lawyer Conduct provides that reprimands are administered by the Washington State Bar Association via a written statement signed by the President of the Association. If a respondent requests a review of the proposed reprimand served upon him/her by the Association, the Disciplinary Board is charged with conducting that review. The Disciplinary Board's decision upon review is final.

Consistent with related recommendations in this Report, the Committee recommends that the Court amend Rule 13.4 to eliminate the role of the Washington State Bar Association in the imposition of reprimands. Rule 13.4 should be amended to provide the Court appointed Disciplinary Board with the authority to administer reprimands. Of course the Court also retains the authority to issue this sanction. Rule 10 (A)(4), *ABA Model Rules for Lawyer Disciplinary Enforcement*. As noted in Recommendation One and in the Committee's 1993 Report, the Supreme Court of Washington's oversight of the disciplinary process must be emphasized and the Washington State Bar Association removed from direct involvement in the process. Eliminating the Bar Association's role in administering sanctions furthers this goal. The Court has the exclusive responsibility for the lawyer disciplinary system in Washington. It is vitally important that the manner in which sanctions are issued as a result of a finding of misconduct reflect structural impartiality. Eliminating the role of the Washington State Bar Association in the administration of reprimands frees the process from any perceptions of unfairness, bias or influence by internal bar politics.

Recommendation 23: The Court Should Eliminate The Imposition of Admonition After Hearings on Formal Charges

Commentary

Pursuant to Rule 13.5 (b) of the Rules for Enforcement of Lawyer Conduct, admonitions may be imposed after hearings based upon filing of formal charges. Admonitions may also be imposed by a Review Committee prior to the filing of formal charges when investigation of a grievance leads to a finding that misconduct occurred.

The Committee suggests that the Court amend Rule 13.5(b) and all related Rules to eliminate the imposition of admonition after the filing and service of formal charges. If a lesser sanction is to be imposed after the filing of formal charges, the Committee suggests that a public reprimand is that sanction.

Admonitions should be reserved for instances of very minor misconduct that do not warrant diversion or the filing of formal charges and where there is little or no harm to the client, the public or the legal profession. Unlike the advisory letter, the admonition indicates evidence of a rule violation. Another factor to be considered in imposing an admonition in these instances is whether there is little likelihood that the lawyer will repeat the misconduct. The Court's adoption of Rule 13.6, which provides for disciplinary proceedings resulting in the possible imposition of a more serious disciplinary sanction after receipt of cumulative admonitions is laudable.

Admonitions are and should be deemed to be disciplinary actions for purposes of admission in subsequent discipline or disability proceedings involving a respondent. This differs from the advisory letter pursuant to Rule 5.7. An advisory letter does not constitute a finding of misconduct and is not a disciplinary action.

Recommendation 24: The Court Should Consider Amending Rule 14:2 Of The Rules For Enforcement Of Lawyer Conduct To Clarify That A Lawyer Disbarred, Suspended Or On Disability Inactive Status Cannot Work In A Law Office Or As A Paralegal

Commentary

Allowing a disbarred or suspended lawyer to be employed in a law office in any capacity does not protect existing clients and the public and defeats the purpose of discipline. Rule 27(G), *ABA Model Rules for Lawyer Disciplinary Enforcement*. Currently, Rule 14.2 of the Rules for Enforcement of Lawyer Conduct states that a disbarred or suspended lawyer, or one who has been placed on disability inactive status, cannot practice law after the effective date of the sanction order. The Rule also requires such an individual to take whatever steps necessary to avoid "any reasonable likelihood that anyone will rely on him or her as a lawyer authorized to practice law." A prohibition on the employment of such a person in a law office or on the ability of that individual to work as a paralegal in any context should be one of those steps that the Court requires. The lack of specificity about this issue in Rule 14.2 increases the risk of harm to clients and the public. As a result, the team suggests that the Court amend Rule 14.2 to set forth such a prohibition.

The team has been advised by other jurisdictions that permit such a practice of instances where disbarred or suspended lawyers committed additional serious misconduct, thereby causing harm to clients and to the lawyers/law firms that hired these individuals. The Committee believes that the risks posed by permitting a disbarred or suspended lawyer, or a lawyer placed on disability inactive status to be employed in a law office or as a paralegal far outweigh any benefit of permitting this practice. There are other equally effective ways in which a such an individual can seek to demonstrate that he or she has maintained the necessary level of currency and competency in the law to warrant reinstatement that do not pose a risk to the public or to clients.

Recommendation 25: The Court Should Amend 13.8 To Provide Greater Detail Regarding the Imposition Of Probation And To Set Forth Specific Requirements For The Monitoring and Revocation of Probation

Commentary

Rule 13.8 of the Rules for Enforcement of Lawyer sets forth the conditions of probation and indicates that failure to comply with a condition of probation may be grounds for discipline. Currently, it appears that if Disciplinary Counsel determines that a lawyer placed on probation has violated the terms of that sanction, he/she must initiate a separate formal disciplinary proceeding to prosecute the probation violation. The Rules do not contain a summary procedure by which to prosecute such matters. Therefore, the Committee recommends that the Court consider amending Rule 13.8 to provide further detail regarding the imposition of probation as a sanction and to set forth specific procedures for the monitoring and revocation of probation. The enhancement of Rule 13.8 will provide better guidance to Disciplinary Counsel, lawyers and the public.

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 prevents 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 Committee recommends that Rule 13.8 be amended to set forth in general terms the requirements for imposition of probation. These include situations where: (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. Rule 13.8 already provides examples of general types of conditions. Placing the specific conditions of 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 or other sanction. The conditions should take into consideration the nature and circumstances of the misconduct and the history, character and condition of the respondent. 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 Committee 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. Rule 13.8 currently provides that the Chair of the Disciplinary Board may appoint a "suitable person" to supervise the probation upon Disciplinary Counsel's request. Instead, Rule 13.8 should provide for the administration of probation under the Office of Disciplinary Counsel. This includes the selection by Disciplinary Counsel of a qualified individual (e.g., supervising attorney, accountant and mental health care professional) to monitor the probationer and ensure that the terms of probation are met. The administration of the probation program should be conducted in such a way that it does not impinge upon the work of Disciplinary Counsel's staff to achieve and maintain efficiency in the processing of cases. This may necessitate provision of additional resources to the Office of Disciplinary Counsel.

In order for the probation process to be successful, probation monitors must report regularly to the Office of Disciplinary Counsel regarding the probationer's progress. The monitor's only role is to supervise the monitored lawyer in accordance with the specific terms of the probation and to report compliance or noncompliance to the Office of Disciplinary Counsel. The monitor is not to be a recovery program sponsor for the probationer. Additional provisions to Rule 13.8 should provide that the probationer must be required to sign a release authorizing the monitor to provide information to the Office of Disciplinary Counsel. Additionally, the Rule should provide immunity for probation monitors.

Probation monitors should be required to immediately report any instances of noncompliance to the Office of Disciplinary Counsel. Rule 13.8 should provide that, upon receipt of such a report, Disciplinary Counsel's office 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 or other sanction vacated. The Court should provide the probationer with a short time period, e.g., 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 sanction 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 work with the proposed Administrative Oversight Committee to develop specific procedures for screening and selecting probation monitors. Promulgating a policy for the screening and selection of a roster of qualified probation monitors by the Office of Disciplinary Counsel will better serve the system, the public and respondents. The Office of Disciplinary Counsel may also wish to consult with the Director of

the Lawyers' Assistance Program to assist in the development of criteria for screening and selecting probation monitors. The Office of Disciplinary Counsel should also develop a policies and procedures manual for appointing, supervising and removing the monitors, and guidelines for the nature and contents of monitors' reports to the Disciplinary Counsel's Office. A copy of the Supreme Court of Louisiana's Procedural Rules for Probation Monitors is attached to this Report as Appendix C.

Adequate and regular training of probation monitors is vital to the successful use of probation as an alternative disciplinary sanction. The Office of Disciplinary Counsel and the Administrative Oversight Committee should develop training materials and curricula for probation monitors. Other jurisdictions that have training programs for probation monitors in place, including Louisiana, should be consulted. All probation monitors should be required to attend training at least bi-annually.

VII. PREVENTION MECHANISMS

Recommendation 26: The Court Should Institute Mandatory Arbitration of Lawyer/Client Fee Disputes

Commentary

The Discipline Committee recommends that the Court replace the current voluntary fee arbitration program with one that is mandatory for lawyers. The team understands that the creation of a mandatory fee arbitration program was last considered in 1997-98.

The Committee suggests that the Court appoint a Fee Arbitration Commission to administer the program and adopt rules and procedures like those contained in *The ABA Model Rules for Fee Arbitration* that are attached to this Report as Appendix D. A chart setting forth the states with mandatory fee arbitration programs can be found at www.abanet.org/cpr/clientpro/fee_arb_chart.pdf. The ABA Standing Committee on Client Protection, currently chaired by Robert Welden, is available to provide the Court with additional information regarding these mandatory fee arbitration programs.

The Committee suggests that the Fee Arbitration Commission be composed of nine members, at least one-third of whom should be non-lawyers. Commission members should be appointed for terms of three years, with no member appointed for more than two consecutive terms. One of the duties of the Commission would be to maintain a roster of approved arbitrators. The Commission would also be responsible for ensuring that the program operates according to the rules adopted by the Court and to educate the public and the bar about its operation and availability. The duties of the Executive Director of the Washington State Bar Association, as described below, should be borne by the Commission, the arbitration panel or the appropriate court.

The Washington State Bar Association operates the existing voluntary fee dispute program, which is voluntary for both lawyers and clients. For claims of less than $10,000, both parties must pay a $75 filing fee. That fee increases to $125 for claims of $10,000 or more. The individual who initiates the arbitration procedure is the petitioner, and the other party is referred to as the respondent.

Currently, fee arbitration can only occur if the respondent: (1) answers the petition requesting arbitration within thirty (30) days of its being mailed to him/her; (2) agrees to arbitration and the amount in dispute; and (3) submits the required filing fee. Fee arbitration is binding and the prevailing party is entitled to seek enforcement of the award with the Washington Supreme Court. A party to the arbitration may not appeal the award unless there have been violations of the procedural rules. Such appeals must be filed with the Executive Director of the Washington State Bar Association. The Executive Director determines whether procedural rules have been violated and whether any such violations substantially affected the rights of

the parties. The Executive Director can only order a rehearing in such instances. He/she cannot alter the award.

A fee dispute arbitration system that is commenced at the option of the client and is then mandatory for the lawyer eliminates the advantage lawyers have over the majority of clients who are of modest means and have only the most rudimentary knowledge of the law. Such a system also provides the lawyer with due process in consideration of the matter. It eliminates one of the primary impediments to the effectiveness of voluntary programs---the ability of the lawyer to dictate whether or not arbitration occurs by refusing to participate. When a legitimate fee dispute arises and the lawyer enters arbitration in good faith, the client's opinion of both the lawyer and the profession can be improved. The experience of those states that provide mandatory fee arbitration demonstrates that these programs can work without being unduly burdensome on the profession. For example, mandatory fee arbitration programs have been in effect in California and New Jersey for twenty-five years.

As in disciplinary matters, complaints that do not state legitimate grounds for dispute should be screened out. In cases of valid disputes, mandated fee adjustments can provide the incentive to reform for those lawyers who do substandard work. Fee dispute arbitrators should therefore consider the competence and promptness of the lawyer's services in determining whether the fee was appropriate. In many cases involving substandard services, fee adjustments are sufficient to compensate injured clients.

As noted earlier in this Report, the Consumer Affairs program of the Office of Disciplinary Counsel is an excellent addition to the lawyer regulatory system in Washington. One of the services that the consumer affairs staff provides is to refer the public to other programs that can assist them with complaints about lawyers that do not fall under the jurisdiction of the disciplinary agency. One type of complaint that results in such a referral is fee disputes. The adoption of a mandatory fee arbitration program would enhance the effectiveness of the intake part of the system and further encourage the informal resolution of fee disputes.

Recommendation 27: 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 supplement Washington's client protection programs by adopting a payee notification rule. 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 Washington Lawyers' Fund for Client Protection and increase the public's confidence in the profession.

Insurance carriers usually deliver settlement proceeds in payment of liability claims to the lawyer of record via a check made payable jointly to the claimant and the claimant's lawyer. 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 E. Descriptions of existing payee notification rules are at http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf .

VIII. 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 desire of these individuals to eliminate delay from the system and achieve other improvements is highly commendable. The Standing Committee on Professional Discipline Committee hopes that the recommendations contained in this Report will assist the Court in the implementation of any desired changes.

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

APPENDIX A

BARBARA KERR HOWE is 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 that 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, having been 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,1996-97, 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, the National Association of Women Judges. She is a fellow of the Maryland Bar Foundation and of the American Bar Foundation.

DAVID S. BAKER is a member of the ABA Standing Committee on Professional Discipline. He is a partner with Powell Goldstein, L.L.P. in Atlanta, Georgia, where his practice is concentrated in corporate law and finance, health care provider and environmental law. 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 currently serves on the ABA Board of Elections and the Committee on State Justice Initiatives. Mr. Baker is also 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 University School of Law and is licensed to practice in Georgia and New York.

WILLIAM P. SMITH, III, is a member of the ABA Standing Committee on Professional Discipline. He became General Counsel for the State Bar of Georgia in December 1984. The General Counsel heads a staff of nineteen, including nine other attorneys and one investigator. The department's main function is to work with the State Disciplinary Board of the State Bar in its handling of grievances against lawyers and recommendations for disciplinary action.

Mr. Smith is a DeKalb County, Georgia, native. A graduate of Emory University Law School, he practiced general and trial law in Decatur, GA from the time of his admission to the bar in 1965 until he accepted his present position. He has served as a member of the Board of Governors and the Executive Committee of the State Bar of Georgia. He is a Past President of the Decatur-DeKalb Bar Association; a past member of the Board of Directors of the DeKalb Volunteer Lawyers Foundation; a member of the Lawyers Club of Atlanta; a Fellow of the Georgia Bar Foundation; and past President of the National Organization of Bar Counsel.

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 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 and also serves as counsel to the ABA Standing Committee on Amicus Curiae Briefs.

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 Joint Committee on Lawyer Regulation. 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. She is 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

WORKSHEET - ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS

NAME OF CASE: _____

ADB CASE NO.: _____

DATE: _____

A. INITIAL INQUIRY [ABA Standard 3.0].

a. The ethical duty violated? (Duty to a client, the public, the legal system, or the profession?): _____

b. The lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?): _____

c. What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?): _____

B. DETERMINATION OF THE RECOMMENDED SANCTION [ABA Standards 4.0 through 8.0]. (The Michigan Rules of Professional Conduct correspond generally to the ABA Model Rules of Professional Conduct. Appendix 1 in the ABA Standards is a cross reference table matching provisions of the Rules of Professional Conduct to the suggested standard.)

- ☐ Disbarment - Standard: _____
- ☐ Suspension - Standard: _____
- ☐ Reprimand - Standard: _____

C. RELEVANT AGGRAVATING AND MITIGATING FACTORS. [ABA Standard 9.0.]

9.22 - Factors which may be considered in aggravation:

a. ☐ Prior disciplinary offenses.
b. ☐ Dishonest or selfish motive.
c. ☐ A pattern of misconduct.
d. ☐ Multiple offenses.
e. ☐ Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency.
f. ☐ Submission of false evidence, false statements or other deceptive practices during the disciplinary process.
g. ☐ Refusal to acknowledge wrongful nature of conduct.
h. ☐ Vulnerability of victim.
i. ☐ Substantial experience of law.
j. ☐ Indifference to making restitution.

9.32 - Factors which may be considered in mitigation:

a. ☐ Absence of a prior disciplinary record.
b. ☐ Absence of a dishonest motive.
c. ☐ Personal or emotional problems.
d. ☐ Timely good faith effort to make restitution or to rectify consequences of misconduct.
e. ☐ Full and free disclosure to disciplinary board or cooperative attitude towards proceedings.
f. ☐ Inexperience in the practice of law.
g. ☐ Character or reputation.
h. ☐ Physical disability.
i. ☐ Mental disability or chemical dependency including alcoholism or drug abuse when:
   1. ☐ There is medical evidence that the respondent is affected by a chemical dependency or mental disability;
   2. ☐ The chemical dependency or mental disability caused misconduct;
   3. ☐ The respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
   4. ☐ The recovery arrested in the misconduct and recurrence of that misconduct is unlikely.
j. ☐ Delay in disciplinary proceedings.
k. ☐ Imposition of other penalties or sanctions.
l. ☐ Remorse.
m. ☐ Remoteness of prior offenses.

D. OTHER FACTORS.

1. Precedent of the Michigan Supreme Court: _____

2. Precedent of the Attorney Discipline Board: _____

3. Other: _____

E. RECOMMENDED DISCIPLINE: _____

F. RESTITUTION (?): _____

G. OTHER CONDITIONS (?): _____

APPENDIX C

APPENDIX C. PROCEDURAL RULES FOR PROBATION MONITORS

Rule 1. Selection

a) The Disciplinary Board shall establish a pool of attorneys licensed to practice in the State who would agree to serve as probation monitors. All actions of probation monitors shall be pursuant to Rule XIX. Probation monitors shall be considered as members of the Disciplinary system.

b) Selection of the probation monitor shall be made by the Disciplinary Board or its designee. Under no circumstance shall the probation monitor be engaged in any representation of the respondent or be related to respondent by blood or marriage to the third degree nor be engaged in legal or professional practice, business or social concerns with the respondent.

c) The probation monitor shall be a resident of the State of Louisiana.

d) While respondent's input into the selection of the probation monitor may be considered, the respondent shall have no right to approve or veto of the probation monitor.

e) All terms of probation shall be written and agreed to by the probation monitor and the respondent prior to the commencement of the probation period.

Rule 2. Duties of Probation Monitor

Probation monitors shall perform all aspects of the probation monitoring as set forth in the specific sanction. A probation monitor's obligation is to ascertain that respondent is in compliance with the probation conditions and promptly report any such compliance or noncompliance to Disciplinary Counsel. The probation monitor shall submit reports to the Disciplinary Counsel not less than quarterly. It shall be the obligation of the Disciplinary Counsel to investigate the noncompliance as reported by the probation monitor. If a probation monitor is unable to serve or does not perform his/her duties, the Disciplinary Board, or its designee who selected the monitor, shall replace said monitor.

Rule 3. Standards of Review

a) The probation monitor shall review the files and accounts of the respondent insofar as probation is required, i.e. if the respondent is on probation as a result of commingling, the probation monitor shall review the financial records of the respondent to ascertain that no commingling continues. Similarly, if the respondent is on probation for neglect of legal matters, the probation monitor shall review the substance of the respondent's files.

b) The probation monitor shall have the right to review any of respondent's files which it deems necessary in order to complete his/her obligations.

c) Such review shall take place regularly as deemed necessary by the probation monitor. Respondent shall make himself, members of his staff, both full time, part time, and independent contractors reasonably available for a conference with the probation monitor. Any expenses incurred by way of such conferences shall be paid directly by the respondent.

d) In connection with the reviews, respondent, without written or oral request, shall furnish to probation monitor a written update of the respondent's activities which fall within the ambit of the probation requirements.

e) The failure to furnish such written reports shall constitute a basis for revocation of probation.

f) Respondents shall timely provide appropriate waivers of confidentiality to probation monitors insofar as physicians, banking relations, accountants, and any other confidential relationships which may exist between respondent and other parties to the extent such information is necessary for the probation monitor to perform his/her services.

g) In cases where the respondent is a recovering drug or alcohol addict, the probation monitor shall have the right to demand appropriate laboratory tests, if required. Failure of the respondent to provide the opportunity for such lab tests should be considered as a violation.

Rule 4. Compensation

Probation monitors shall be reimbursed for their reasonable expenses incurred in performing probation services. All such costs shall be paid directly by the respondent. Failure of the respondent to promptly pay costs shall be grounds for revocation of probation.

Rule 5. Revocation

A. Non-Compliance or Other Rules of Professional Conduct Violation.

When a probation monitor reports that a respondent is not complying with the terms of probation, or when Disciplinary Counsel otherwise becomes aware of respondent's noncompliance or further violations of the Rules of Professional Conduct, Disciplinary Counsel shall investigate and, if appropriate, file a request for revocation of the probation.

B. Emergency.

Upon receipt of sufficient evidence demonstrating that respondent has violated his/her probation and/or committed a violation of the Rules of Professional Conduct and poses a substantial threat of harm to the public, Disciplinary Counsel shall submit the evidence to the Court with a request for an interim suspension and revocation of probation. Disciplinary Counsel shall follow the procedure outlined in Section 19B, Interim Suspension for Threat of Harm.

C. Hearing in Non-Emergency Situations.

Upon receipt of sufficient evidence demonstrating that respondent has violated his/her probation and/or committed a violation of the Rules of Professional Conduct, Disciplinary Counsel shall submit the evidence to the Adjudicative Committee with a request for a revocation of probation.

A hearing with notice as provided in Rule XIX shall be held by the Adjudicative Committee panel within thirty days of Disciplinary Counsel's request for revocation. The panel shall immediately make a recommendation and submit it to the Adjudicative Committee for a vote. The opinion shall be issued to the Court within ten days of the hearing.

CREDIT(S) Approved by Supreme Court Feb. 14, 1995. Amended and effective Oct. 10, 1996; amended and effective March 16, 1998.

<General Materials (GM) - References, Annotations, or Tables>

Sup. Ct. Rules, Rule 19, App. C, Lawyer Disciplinary Enforcement Rules, LA ST S CT DISC Rule 19, App. C
Current with amendments received through August 1, 2005

APPENDIX D

ABA *MODEL RULES FOR FEE ARBITRATION*

Adopted by the American Bar Association
House of Delegates on February 23, 1995.

PREFACE

The Model Rules for Fee Arbitration implement Recommendation 3 of the Report of the Commission on Evaluation of Disciplinary Enforcement (the "McKay Commission,"February 1992) in which the American Bar Association called for states to expand their systems of lawyer regulation by establishing mechanisms to resolve disputes between lawyers and clients and to handle non-disciplinary complaints about lawyers. The McKay Commission included a mandatory fee arbitration program its court-established dispute resolution mechanisms.

Rule 1. GENERAL PRINCIPLES AND JURISDICTION

A. Definitions. The following definitions shall apply in all fee arbitration proceedings.

(1) "Client" means a person or entity who directly or through an authorized representative consults, retains or secures legal service or advice from a lawyer in the lawyer's professional capacity.

(2) "Commission" means the Fee Arbitration Commission.

(3) "Decision" means the determination made by the panel in a fee arbitration proceeding.

(4) "Lawyer" means a person admitted to the practice of law in [name of jurisdiction], or any other person who appears, participates or otherwise engages in the practice of law in this state, regardless of the status of his or her license. In these rules, the term "lawyer" includes a lawyer's assignee.

(5) "Panel" means the arbitrator(s) assigned to hear a fee dispute and to issue a decision.

(6) "Party" means the client, lawyer, the lawyer's assignee and any third person or entity who has been joined by the client or lawyer in the proceeding.

(7) "Petition" means a written request for fee arbitration in a form approved by the Commission.

(8) "Petitioner" means the party requesting fee arbitration.

(9) "Respondent" means the party with whom the petitioner has a fee dispute.

B. Establishment; Purpose. It is the policy of the [state's highest court] to encourage the informal resolution of fee disputes between lawyers who practice law in [name of jurisdiction] and their clients and, in the event such informal resolution cannot be achieved, to provide for the arbitration of such disputes. To that end, the [state's highest court] hereby establishes through adoption of these rules, a program and procedures for the arbitration of disputes concerning any and all fees and/or costs paid, charged, or claimed for professional services by lawyers.

C. Arbitration Mandatory for Lawyers. Fee arbitration pursuant to these rules is voluntary for clients and mandatory for lawyers if commenced by a client.

D. Effect of Arbitration.

(1) The Fee Arbitration is binding where all parties have agreed in writing that it will be binding.

(2) In the absence of a written agreement to be bound by the arbitration, the decision automatically becomes binding, unless, as permitted under Rule 7.B., any party seeks a trial de novo pursuant to the [jurisdiction's rules of civil procedure] within 30 days after service of the decision. This 30 day time period shall not be extended by an application for modification under these rules.

(3) After all parties have agreed in writing to be bound by an arbitration award, a party may not withdraw from that agreement unless all parties agree to the withdrawal in writing. At any time during the proceedings, the parties may agree in writing to be bound by the decision.

E. Jurisdiction. Any lawyer, as defined in Rule 1.A(4), is subject to these rules for fee arbitration.

F. Disputes not Subject to Arbitration. These rules do not apply to the following:

(1) Disputes where the lawyer is also admitted to practice in another jurisdiction, the lawyer maintains no office in [name of jurisdiction], and no portion of the legal services was rendered in [name of jurisdiction];

(2) Disputes where the client seeks affirmative relief for damages against the lawyer based upon alleged malpractice or professional misconduct;

(3) Disputes where entitlement to and the amount of the fees and/or costs charged or paid to a lawyer by the client or on the client's behalf have been determined by court order, rule, or decision;

(4) Disputes where a third person is responsible for payment of the fees and the client fails to join in the request for arbitration; and

(5) Disputes where the request for arbitration is filed more than [four] year(s) after the lawyer-client relationship has been terminated or more than [four] year(s) after the final billing has been received by the client, whichever is later, unless a civil action concerning the disputed amount is not barred by the statute of limitations.

G. Notice of Right to Arbitration; Stay of Proceedings; Waiver by Client.

(1) Prior to or at the time of service of a summons in a civil action against his or her client for the recovery of fees, costs, or both for professional services rendered, a lawyer shall serve upon the client [by certified mail return receipt requested] a written notice of the client's right to arbitrate. The notice, in a form approved by the Commission, shall include a provision advising the client that failure to file a Petition for Fee Arbitration within 30 days of service of notice of the right to arbitrate shall constitute a waiver of the right to arbitrate. Failure to give this notice shall be grounds for dismissal of the civil action.

(2) If a lawyer commences a fee collection action in any court, the court shall issue an order of stay upon the client giving notice to the court and the lawyer that a Petition for Arbitration was filed with the commission within [thirty] days of service of the notice of the right to arbitrate.

(3) After a client files a Petition, the lawyer shall refrain from any non-judicial collection activities related to the fees and/or costs in dispute pending the outcome of the arbitration.

(4) Unless all parties agree in writing to the arbitration, the right of the client to petition or maintain an arbitration is waived if:

(a) the client fails to file a Petition for Arbitration within [thirty] days of service of the notice of right to arbitrate pursuant to these rules; or

(b) the client commences or maintains a civil action or files any pleading seeking judicial resolution of the fee dispute, or seeking affirmative relief against the lawyer for damages based upon alleged malpractice.

Comment

A fee arbitration system provides lawyers and clients with an out-of-court method of resolving fee disputes that is expeditious, confidential, inexpensive, and impartial. The court should ensure adequate funding for an effective program.

Although these rules only address fee arbitration, consideration should be given to the development of mediation as a component of the program as a prerequisite or alternative to fee arbitration.

A client who believes he or she may have been overcharged by a lawyer may have the lawyer's fee reviewed without incurring the expense of formal litigation. Participation in the Fee Arbitration Program is mandatory for lawyers if the request for arbitration is commenced by a client. The decision is binding only upon written agreement of the parties. In the absence of a written agreement to be bound by the arbitration decision, any party may seek a trial de novo within 30 days after service of the decision. The decision becomes binding if no party seeks a trial de novo within the 30 day period. The program is voluntary for the client since the lawyer regulatory system has no power to regulate the consumer of legal services. However, nothing in these rules precludes a lawyer and a client from entering into a contract to participate in binding arbitration under these rules as permitted by law.

A lawyer must notify a client of the availability of the Fee Arbitration Program prior to or at the time of service of a summons in a civil action against the client to recover fee and/or costs for professional services. The rule provides that notice be sent by certified mail return receipt requested. However, a jurisdiction may substitute such other means of service as will reasonably establish receipt. The client must file a Petition for Fee Arbitration within [thirty] days of service of such notice or the client waives the right to petition or maintain an arbitration proceeding under these rules. If all parties agree, the fee arbitration can proceed even if the client did not file the Petition for Fee Arbitration within the [thirty] day period. The client also waives the right to petition or maintain an arbitration if the client commences or maintains a civil action or files any pleading seeking judicial resolution of the fee dispute or seeking affirmative relief against the lawyer for damages based on alleged malpractice. This prevents the same facts from being the subject matter of the arbitration and a civil action. Nothing herein precludes a client from filing a complaint with the disciplinary authority. Nothing in these rules prevents the filing of a malpractice action after a decision is rendered in the fee arbitration proceeding. In accordance with Rule 7.B.(4), a decision under these rules is not admissible in a subsequent malpractice action.

The scope of these rules includes costs as well as fees. In many cases, fees and costs are inextricably linked. The fee arbitration process should be able to resolve both issues in one process.

The Fee Arbitration Program can be expanded to handle disputes between lawyers if all parties agree to be bound by the decision of the panel.

An alternative approach, which currently works effectively in those jurisdictions where it has been adopted, is to provide for arbitration which is both mandatory and binding in all cases. Under such a system, the arbitration decision is binding on the parties subject to appeal only in cases of demonstrable and fundamental unfairness in the procedures utilized in deciding the matter.

Rule 2. FEE ARBITRATION COMMISSION

A. Appointment of Commission. The [state's highest court] shall appoint a Fee Arbitration Commission to administer the Fee Arbitration Program. The [state's highest court] shall designate one member to serve as Chair of the Commission.

B. Composition. The Commission shall consist of [nine] members of whom one-third shall be nonlawyers. Members shall be appointed for terms of three years or until a successor has been appointed. Appointments shall be on a staggered basis so that the number of terms expiring shall be approximately the same each year. No members shall be appointed for more than two consecutive full terms, but members appointed for less than a full term (either originally or to fill a vacancy) may serve two full terms in addition to such part of a term.

C. Duties of the Commission. The Commission shall have the following powers and duties.

(1) to appoint, remove and provide appropriate training for lawyer and nonlawyer arbitrators and arbitration panels;

(2) to interpret these rules;

(3) to approve forms;

(4) to establish written procedures that afford a full and equal opportunity to all parties to present relevant evidence;

(5) to issue an annual report and periodic policy recommendations, as needed, to the [state's highest court] regarding the program;

(6) to maintain all records of the Fee Arbitration Program;

(7) to determine challenges for cause where an arbitrator has not voluntarily acceded to a challenge;

(8) to educate the public and the bar about the Fee Arbitration Program; and

(9) to perform all acts necessary for the effective operation of the program.

Comment

Overall authority to administer the Fee Arbitration Program is delegated by the state's highest court to the Commission. Both lawyers and nonlawyer members serve on the Commission. Members are appointed by the court for three year terms. The court should ensure diversity in the membership of the Commission.

Members may be appointed for a period not to exceed two consecutive full terms and a portion of an additional term, if appointed originally to less than a full term. A rotation system is employed in the appointment of members so that, generally, the terms of one-third of the members expire annually. This procedure preserves continuity while inviting the fresh ideas which new personnel inevitably bring to a task.

The Commission has the duty to inform the bar and the public about the Fee Arbitration Program through such means as brochures, public service announcements, and any other means available. There should be a central place where the public can call with questions

about lawyers and which can refer appropriate matters to the Fee Arbitration Program. Members of the bar should be encouraged to inform any member of the public known to have a fee dispute with a lawyer about the right to seek fee arbitration or to pursue other available means to resolve the dispute, such as mediation.

Depending on funding, pro bono requirements, and other considerations, the Commission may authorize the reimbursement of reasonable costs and expenses to its members and to arbitrators. In larger jurisdictions, the Commission may employ staff to perform functions delegated by the Commission. The Commission can authorize local bar associations to sponsor and conduct fee arbitration programs. However, a client who believes he or she may not be able to obtain a fair resolution at the local level should be permitted to utilize the statewide program.

Rule 3. ARBITRATORS

A. List of Approved Arbitrators. The Commission shall maintain a list of approved arbitrators and shall adopt written standards for the appointment of the arbitrators. Such standards should ensure appropriate training and experience for arbitrators as well as diversity in the background and experience of the arbitrators. Arbitrators shall be appointed for terms of [three] years and may be reappointed. For good cause, the Commission may remove an arbitrator from the list of approved arbitrators, and may appoint a replacement member to serve the balance of the term of the removed member.

B. Panels. The Commission shall appoint panels from the list of approved arbitrators. For disputes involving [$7,500] or more, the panel shall consist of three arbitrators of whom one shall be a nonlawyer member For disputes involving less than [$7,500], or in any case if the parties so stipulate, the panel shall consist of a sole arbitrator who shall be a lawyer. If the panel consists of three members, the Commission shall designate one member to act as Chair of the panel and to preside at the arbitration hearing.

C. Conflicts of Interest. Within [five] days of the notification of appointment to a panel, an arbitrator shall notify the Commission of any conflict of interest with a party to the arbitration as defined in the ABA Code of Judicial Conduct with respect to part-time judges. Upon notification of the conflict, the Commission shall appoint a replacement from the list of approved arbitrators.

D. Challenges for Cause. A party may challenge any arbitrator for cause. A challenge for cause naming the arbitrator and the reason for the challenge shall be filed within [fifteen] days after service of the notice of appointment. An arbitrator shall accede to a reasonable challenge and the Commission shall appoint a replacement. If an arbitrator does not voluntarily accede, the Commission shall decide whether to appoint a replacement. The decision of the Commission on challenges shall be final.

E. Duties. The panel shall have the following powers and duties.

(1) to take and hear evidence pertaining to the proceeding;

(2) to administer oaths and affirmations;

(3) to compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding, and consider challenges to the validity of subpoenas;

(4) to issue decisions; and

(5) to perform all acts necessary to conduct an effective arbitration hearing.

Comment

The Commission appoints both lawyers and nonlawyers to serve as arbitrators for [three] year renewable terms, and maintains a list of approved arbitrators. When a Petition is received, the Commission appoints from the list of approved arbitrators a panel of one or three arbitrators to hear the matter, depending on the amount in dispute. For larger jurisdictions, the Commission may hire staff or designate a presiding arbitrator to handle the appointment of panels or other administrative tasks as delegated by the Commission. The number of people on the list of approved arbitrators should not be so large as to prevent the participating arbitrators from obtaining sufficient experience in the program.

Appointments to the list of approved arbitrators should represent all segments of the profession and the general population, including diversity on the basis of race, gender and practice setting. Arbitrators should also be dispersed throughout the state to increase access to the fee arbitration process.

The Commission should adopt written standards for appointment of arbitrators which may include compliance with training requirements, ability to meet minimum time and case commitments, years in practice and experience. All panels of more than one arbitrator should include one nonlawyer member.

Members of panels exercise a quasi-judicial role and should, therefore, be disqualified upon the same grounds and conditions applicable to judges. The Commission may wish to provide that within [fifteen] days after service of the notice of appointment, any party may file one peremptory challenge. In the event of such a challenge, the Commission should relieve the challenged arbitrator and appoint a replacement.

Panels do not render advisory opinions but, rather, adjudicate fee controversies between lawyers and clients.

In jurisdictions with a high volume of arbitration cases, consideration should be given to having pre-set arbitration panels which meet at specified times to simplify the scheduling of hearings.

Rule 4. COMMENCEMENT OF PROCEEDINGS

A. Petition to Arbitrate. A fee arbitration proceeding shall commence with the filing of a Petition for Arbitration on a form approved by the Commission [and paying the appropriate filing fee as established by the {state's highest court}]. Any person who is not the client of the lawyer but who has paid or may be liable for the lawyer's fees may consent to be joined by the client as a party to the arbitration. The Petition for Arbitration must be signed by the client and any other party included by the client.

B. Commission Review. The Commission will review the Petition to determine if it is properly completed and if the Commission has jurisdiction. If the Petition is not properly completed, the Commission will return it to the petitioner and specify what clarification or additional information is required. If the Commission does not have jurisdiction, the petitioner shall be so advised.

C. Service of Petition; Response. Within [five] days of the receipt of a properly completed Petition, the Commission shall serve a copy of the Petition, along with a Fee Arbitration Response Form on the respondent. Within [twenty] days after service, the respondent shall file the completed Fee Arbitration Response Form with the Commission which shall forward a copy to all other parties. The Commission shall serve a copy of the Petition for Arbitration and a Fee Arbitration Response Form upon the law firm, if any, with which a lawyer-party is associated. If the respondent is a lawyer, the respondent shall set forth in the response the name of any other lawyer or law firm who the lawyer claims is responsible for all or part of the client's claim. Within [five] days of receipt of the response, the Commission shall serve on the lawyer(s) or law firm(s) named in the Response a copy of the Petition for Arbitration and a Fee Arbitration Response Form for completion. Within [twenty] days after service, the lawyer(s) or law firm(s) may file the completed Fee Arbitration Response Form with the Commission which shall forward a copy to all other parties.

D. Failure of a Lawyer Respondent to Respond. Failure of a lawyer respondent to file the Fee Arbitration Response Form shall not delay the scheduling of a hearing; however, in any such case the panel may, in its discretion, refuse to consider evidence offered by the lawyer which would reasonably be expected to have been disclosed in the response.

E. Client Consent Required. If a lawyer files a Petition for Arbitration, the arbitration shall proceed only if the client files a written consent within [thirty] days of service of the Petition.

F. Settlement of Disputes. If the dispute giving rise to the Petition for Arbitration has been settled, upon reasonable confirmation of that settlement, the matter shall be dismissed by the Commission or by the panel if one has been assigned.

G. Appointment of Panel. The Commission shall, within [ten] days after receipt of the Petition for Arbitration, appoint a panel and mail to the parties written notification of the name(s) of the panel member(s) assigned to hear the matter.

Comment

The fee arbitration process begins with the filing of a Petition for Arbitration on a form approved by the Commission. The respondent has twenty days after service to return the Fee Arbitration Response Form. The process is commenced either unilaterally by a client or by the lawyer with the client's consent. If it is initiated by the client, participation is mandatory on the part of the lawyer.

The Fee Arbitration Program is designed to be simple and fast. Consequently, most cases should be concluded in an average of six months.

If a lawyer fails to timely file a Fee Arbitration Response Form, the hearing will nonetheless be held in the normal course and the panel may, in its discretion, refuse to consider evidence offered by the lawyer which would reasonably be expected to have been disclosed in the Response. This is not intended as a default procedure. It will still be necessary for the panel to determine the reasonableness of the fee.

The Commission must serve a copy of the Petition and the Fee Response Form on the law firm, if any, of which a lawyer is a member. The purpose of this rule is to assure that where a law firm is due a fee, or is obligated therefor, the law firm will have notice of the arbitration and an opportunity to participate.

Rule 5. HEARING

A. Notice of Hearing. The panel shall set the date, time and place for the hearing. The panel shall send notice of the hearing to the parties not less than [thirty] but no more than [sixty] days in advance of the hearing date, unless otherwise agreed by the parties.

B. Representation by Counsel. Any party may be represented by counsel.

C. Recording of Proceedings. A party to the proceedings may make arrangements to have the hearing reported at the party's own expense, provided notice is given to the other parties and the panel at least [five] days prior to the scheduled hearing. If a party orders a transcript, that party shall provide a copy of the transcript to the panel free of charge. Any other party is entitled at his or her own expense to acquire a copy of the transcript by making arrangements directly with the reporter. A panel, in its discretion, may make arrangements to have a hearing recorded and the parties may obtain a copy at their own expense.

D. Continuances. For good cause shown, a panel may continue a hearing upon the request of a party or upon the panel's own motion.

E. Oaths and Affirmations. The testimony of witnesses shall be by oath or affirmation.

F. Panel Quorums. All three arbitrators shall be required for a quorum where the panel consists of three members. A panel of three arbitrators shall act with the concurrence of at least two arbitrators.

G. Appearance; Failure of a Party to Appear. Appearance by a party at a scheduled hearing shall constitute waiver by said party of any deficiency with respect to the giving of notice of hearing. The panel may proceed in the absence of any party or representative who, after due notice, fails either to be present or to obtain a continuance. A decision shall not be made solely on the default of a party. The panel shall require parties who are present to submit such evidence as the panel may require to issue a decision.

H. Waiver of Personal Appearance. Any party may waive personal appearance and submit testimony and exhibits by written declaration under oath to the panel. Such declarations shall be filed with the panel at least [ten] days prior to the hearing. If all parties, in writing, waive appearances at a hearing, the matter may be decided on the basis of written submissions. If the panel concludes that oral presentations are necessary, the panel may schedule a hearing.

I. Telephonic Hearings. In its discretion, a panel may permit a party to appear or present witness testimony at the hearing by telephonic conference call. The costs of the telephone call shall be paid by the party.

J. Stipulations. Agreements between the parties as to issues not in dispute and the voluntary exchange of documents prior to the hearing are encouraged.

K. Evidence. The panel shall accept such evidence as is relevant and material to the dispute and request additional evidence as necessary to understand and resolve the dispute. The rules of evidence [of the jurisdiction] need not be strictly followed. The parties shall be entitled to be heard, to present evidence and to cross-examine parties and witnesses. The panel shall judge the relevance and materiality of the evidence.

L. Subpoenas. Upon request of a party and for good cause shown, or on its own initiative, the panel may issue subpoenas for witnesses or documents necessary to a resolution of the dispute. The requesting party shall be responsible for service of the subpoenas.

M. Reopening of Hearing. For good cause shown, the panel may reopen the hearing at any time before a decision is issued.

N. Death or Incompetency of a Party. In the event of death or incompetency of a party, the personal representative of the deceased party or the guardian or conservator of the incompetent may be substituted.

O. Burden of Proof. The burden of proof shall be on the lawyer to prove the reasonableness of the fee by a preponderance of the evidence.

Comment

The goal of these rules is to provide a setting for hearings that is informal yet fair. To that end, the panel has discretion to grant postponements but need not permit the process to be subverted by unexcused absences. The panel will receive the evidence and testimony offered and judge its relevance and materiality. While the hearing may be conducted informally, witnesses should be required to testify under oath.

There is no provision for formal discovery; however, the panel has the power of subpoena, subject to rules of relevancy and materiality.

The burden of proof in fee arbitration is on the lawyer to prove the reasonableness of the fee by a preponderance of the evidence. This is consistent with the ABA Model Rules of Professional Conduct Rule 1.5 which provides that a lawyer's fee shall be reasonable.

The panel may consider evidence relating to claims of malpractice and professional misconduct, but only to the extent that those claims bear upon the fees, costs, or both to which the lawyer is entitled. The panel may not award affirmative relief in the form of damages for injuries underlying any such claim.

Rule 6. DECISION

A. Form of Decision. The panel's decision shall be in writing and shall include a clear statement of the amount in dispute, whether and to whom monies are due, and a brief explanation of the decision.

B. Issuance of Decision. The decision should be rendered within [thirty] days of the close of the hearing or from the end of any time period permitted by the panel for the filing of supplemental briefs or other materials. The arbitrator or panel chair shall forward the decision to the Commission which shall serve a copy of the decision on each party to the arbitration.

C. Modification of Decision.

(1) On application to the panel by a party to a fee dispute, the panel may modify or correct a decision if:

(a) there was an error in the computation of figures or a mistake in the description of a person, thing, or property referred to in the decision;

(b) the decision is imperfect in a matter of form not affecting the merits of the proceeding; or

(c) the decision needs clarification.

(2) Any party may file an application for modification with the panel within [twenty] days after service of the decision and shall serve a copy of the application on all other parties. An objection to the application must be filed with the panel within [ten] days after service of the application for modification.

(3) An application for modification shall not extend the thirty day time period to seek trial de novo under these rules.

D. Retention of Files. The Commission shall maintain all fee arbitration files for a period of [three] years from the date a decision is issued.

Comment

In order to bring a final and speedy conclusion to fee disputes, the decision of the panel is required to be in writing and should be rendered within thirty days. Discretion to extend the time period for unusually complicated or difficult matters should be provided.

Rule 7. EFFECT OF DECISION; ENFORCEMENT.

A. Compliance with Decision.

(1) Where the parties have agreed to be bound by the arbitration or have settled the dispute, the parties shall have [thirty] days from service of the written decision or the date the stipulation of settlement is signed by the parties to comply with the decision or settlement.

(2) Where there is no agreement to be bound by the arbitration, any party is entitled to a trial de novo if sought within thirty days from service of the written decision, except that if a party willfully fails to appear at the arbitration hearing, that party shall not be entitled to a trial de novo. The determination of willfulness shall be made by the court. The party who failed to appear at the arbitration shall have the burden of proving that the failure to appear was not willful. In making its determination, the court may consider any findings made by the arbitrators on the subject of a party's failure to appear. If a trial de novo is not sought within 30 days, the decision becomes binding.

B. Trial De Novo.

(1) If there is an action pending, the trial de novo shall be initiated by filing a rejection of arbitration award and request for trial in that action within 30 days from service of the written decision.

(2) If no action is pending, the trial de novo shall be initiated by the commencement of an action in the court having jurisdiction over the amount in controversy within thirty days from the service of the written decision.

(3) The party seeking a trial de novo shall be the prevailing party if that party obtains a judgment more favorable than that provided by the arbitration award, and in all other cases the other party shall be the prevailing party. The prevailing party may, in the discretion of the court, be entitled to an allowance for reasonable attorney's fees and costs incurred in the trial de novo, which allowance shall be fixed by the court. In fixing the attorney's fees, the court shall consider the decision and determinations of the arbitrators, in addition to any other relevant evidence.

(4) Except as provided in this rule, the decision and determinations of the arbitrators shall not be admissible in any action or proceeding and shall not operate as collateral estoppel or res judicata.

C. Petition to Confirm, Correct, or Vacate the Decision.

(1) If a civil action has been stayed pursuant to these rules, any petition to confirm, correct, or vacate the decision shall be filed with the court in which the action is pending, and shall be served in accordance with the [jurisdiction's statutes or rules of civil procedure.]

(2) If no action is pending in any court, the decision may be confirmed, corrected, or vacated by petition to the court having jurisdiction over the amount of the decision, in accordance with the [jurisdiction's statutes or rules of civil procedure.]

(3) A court confirming, correcting or vacating a decision under these rules may award to the prevailing party reasonable fees and costs including, if applicable, fees or costs on appeal, incurred in obtaining confirmation, correction or vacation of the award. The party obtaining judgment confirming, correcting, or vacating the decision shall be the prevailing party except that, without regard or consideration of who the prevailing party may be, if a party did not appear at the arbitration hearing in the matter provided by these rules, that party shall not be entitled to attorney's fees or costs upon confirmation, correction, or vacation of the award.

Comment

Thirty days is considered a reasonable time period in which to expect the parties to comply with the decision. The thirty days begins to run when the decision in the fee arbitration process is served on the parties or when a settlement agreement is signed.

The Commission itself has no authority to enforce a decision. Either party may use the summary action mechanisms which are provided by the jurisdiction to obtain a judgment consistent with the panel's decision as expeditiously as possible.

Reasonable fees and costs may be awarded to the prevailing party in an action to confirm, correct or vacate a panel decision, unless the prevailing party failed to appear at the arbitration hearing in the manner provided in the rules. This exception should encourage full participation of the parties in the arbitration proceeding.

Every jurisdiction is encouraged to consider developing means of assisting clients in enforcing decisions. Some jurisdictions use a panel of pro bono lawyers to assist the clients in obtaining civil judgments. Some jurisdictions refer lawyers who fail to comply with a decision or judgment to an appropriate agency for administrative, non-disciplinary action such as that used in the jurisdiction for failure to comply with mandatory continuing legal education requirements or failure to pay registration fees.

Rule 8. CONFIDENTIALITY

A. Confidentiality of Proceedings. Except as may be otherwise necessary for compliance with these rules or to take ancillary legal action with respect thereto, all records, documents, files, proceedings and hearings pertaining to the arbitration of any dispute under these rules shall be confidential and will be closed to the public, unless ordered open by a [court of general jurisdiction] upon good cause shown, except that a summary of the facts, without reference to the parties by name, may be publicized in all cases once the proceeding has been formally closed.

B. Confidentiality of Information. A lawyer may reveal information relating to the representation of the client to the extent necessary to establish his or her fee claim. In no event shall such disclosure be deemed a waiver of the confidential character of such matters for any other purpose.

Comment

Rule 8.B is consistent with ABA Model Rule of Professional Conduct Rule 1.6 or its equivalent, which permits limited disclosure of otherwise confidential information only "to the extent reasonably . . . necessary to establish a claim or defense . . . in a controversy between the lawyer and the client . . .."

Rule 9. IMMUNITY

A. Parties and Witnesses. Parties and witnesses shall have such immunity as is applicable in a civil action in the jurisdiction.

B. Commissioners; Arbitrators; Staff. Members of the Commission, panels and staff shall be immune from suit for any conduct in the course and scope of their official duties.

Rule 10. SERVICE

A. Method. Service on any party other than a lawyer or law firm shall be by personal delivery, by any person authorized by the Chair of the Commission, or by deposit in the United States mail, postage paid, addressed to the person on whom it is to be served at his or her office or home address as last given to the Commission.

B. Official Address of Lawyer. Service on an individual lawyer shall be at the latest address shown on the official membership records of the [highest court or state bar association.] Service on a law firm shall be at the address as shown in the Petition for Arbitration Form unless the law firm designates a lawyer to be responsible for the arbitration, in which case, service shall be at the designee's latest address shown on the official membership records of the [highest court or state bar association.] Service shall be in accordance with section 10.A. above.

C. Service on Represented Parties. If either party is represented by counsel, service shall be on the party as indicated in Rules 10.A. and 10.B. , and on the counsel at the latest address shown on the official membership records of the [highest court or state bar association.]

D. Completion of Service. The service is complete at the time of deposit. The time for performing any act shall commence on the date service is complete and shall not be extended by reason of service by mail.

APPENDIX E

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. 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 benefitted 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.

A. 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.

B. 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

[1] 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.

[2] 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.

[3] 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.