

Notice to the Bar

New Jersey Lawyer Discipline System – Report by the American Bar Association Standing Committee on Professional Discipline

The Supreme Court is publishing the attached July 2011 report by the American Bar Association Standing Committee on Professional Discipline on the New Jersey lawyer discipline system. Anyone wishing to comment on this report should do so by **Friday, September 30, 2011** to:

Mark Neary, Clerk of the Supreme Court
Comments (ABA Report on NJ Lawyer Discipline System)
Hughes Justice Complex, P.O. Box 970
Trenton, New Jersey 08625-0970

Comments on this report also may be submitted by Internet e-mail to
Comments.Mailbox@judiciary.state.nj.us.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address (and those submitting comments by e-mail should include their name and e-mail address). Comments submitted in response to this notice are subject to public disclosure.

/s/ Mark Neary

Mark Neary, Esq.
Supreme Court Clerk

Dated: August 3, 2011

NEW JERSEY

Report on the Lawyer Discipline System

July 2011

Sponsored by the
American Bar Association
Standing Committee on
Professional Discipline



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I. INTRODUCTION

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

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

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

...an independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.⁴

Studies by the American Bar Association have shown that judicial regulation of the legal profession is appropriate. In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement, chaired by former U.S. Supreme Court Justice Tom Clark (the Clark Committee), issued its Report containing findings from a three-year comprehensive review of lawyer discipline in the United States.⁵ The Clark Committee concluded that the state of lawyer discipline was "scandalous" and that public dissatisfaction required immediate redress or the public would take matters into its "own hands."⁶ The Clark Committee strongly urged that the judiciary act promptly, including assertion/reassertion of its inherent regulatory

¹ See, e.g., Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 *Geo. J. Legal Ethics* 911 (Spring 1994); and *In re Shannon*, 876 P. 2d 548, 570 (Ariz. 1994) (noting that the state judiciary's authority to regulate the practice of law is accepted in all fifty states).

² Commission on Evaluation of Disciplinary Enforcement, Am. Bar Ass'n, *Lawyer Regulation for a New Century* (1992) at 2,

http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html.

³ See, e.g. *In re Attorney Discipline System*, 967 P. 2d 49 (Cal. 1998).

⁴ Am. Bar Ass'n, *Model Rules of Professional Conduct* (2011) at

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

⁵ Special Comm. on Evaluation of Disciplinary Enforcement, Am. Bar Ass'n, *Problems and Recommendations in Disciplinary Enforcement* (1970) at

http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark_Report.authcheckdam.pdf.

⁶ *Id.* at 1-2.

authority, should legislatures attempt to intervene.⁷ In doing so, the Clark Committee stressed that, because of its political nature, the legislative process was “a far less desirable forum” for such reform to occur.⁸

Twenty years later, the ABA Commission on Evaluation of Disciplinary Enforcement, chaired initially by Robert B. McKay (the McKay Commission), examined the implementation of the Clark Committee Report.⁹ The McKay Commission also studied the pros and cons of legislative versus judicial regulation. In doing so, it examined several state agencies created by legislatures to regulate other professions in the public interest and compared them to lawyer disciplinary agencies.¹⁰ The McKay Commission concluded that legislative regulation of other professions did not result in more public protection, and that legislative regulation of the legal profession, specifically, would not be an improvement over judicial regulation. In fact, it would jeopardize the independence of the legal profession.¹¹ The McKay Commission also found that where other state regulatory agencies were charged with regulating multiple professions and occupations, their resources and effectiveness were diluted.¹² In February 1992, the ABA House of Delegates adopted the McKay Commission’s recommendations for improving and expanding lawyer regulation under the jurisdiction of the judicial branch of government of each state. Because of the McKay Commission and similar efforts, the United States is recognized as having the most advanced and professional system of lawyer regulation.

B. The Lawyer Discipline System Consultation Program

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

The ABA Standing Committee on Professional Discipline sends a team of individuals experienced in the field of lawyer regulation to examine the structure, operations, and procedures of the host jurisdiction’s lawyer discipline 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 court to take advantage of model disciplinary procedures that have been adopted by the ABA. The consultations also

⁷ *Id.* at 10-18.

⁸ *Id.* at 12.

⁹ *Supra* note 2. Raymond R. Trombadore chaired the McKay Commission following the death of Robert McKay.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 4-5.

¹² *Id.*

provide a means for the Discipline Committee to learn of other effective procedural mechanisms that should be considered for incorporation into current Association legal policy models.

The team examines the state's lawyer regulation system using as a guide criteria adapted from successful programs in other jurisdictions, the Discipline Committee's experience, and the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE).¹³ The MRLDE were adopted by the ABA House of Delegates in August 1989, and were most recently amended in August 2002. They incorporate the best policies and procedures drawn and tested from the collective experience of disciplinary agencies throughout the country. The team uses the Report and Recommendations of the McKay Commission as an additional resource. These recommendations reaffirm, expand, and supplement many of the policies set forth in the MRLDE.

C. The ABA Discipline System Consultation Team for New Jersey

Upon the invitation of the Supreme Court of New Jersey, the Discipline Committee sent a team to conduct the on-site portion of the consultation from October 4 - 8, 2010. The team was composed of: David S. Baker, a partner in the firm of Taylor English Duma LLP and Immediate Past Chair of the ABA Standing Committee on Professional Discipline; Mary M. Devlin, former Deputy Director and Regulation Counsel of the American Bar Association Center for Professional Responsibility; Jerome E. Larkin, Administrator of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois and Past President of the National Organization of Bar Counsel; Arnold R. Rosenfeld, Of Counsel at K & L Gates LLP., former Chief Bar (Disciplinary) Counsel of the Board of Bar Overseers of the Massachusetts Supreme Judicial Court, and past member of the Standing Committee on Professional Discipline; and Ruth A. Woodruff, Associate Regulation Counsel for the American Bar Association Center for Professional Responsibility and former National Lawyer Regulatory Data Bank Attorney. Detailed biographies of the team members are attached as Appendix A.

D. Persons Interviewed and Materials Reviewed

During the on-site portion of the consultation, the team interviewed individuals involved in all aspects of the disciplinary process. The team spoke with volunteer members of the District Ethics Committees, the Director of the Office of Attorney Ethics and members of his staff, members of the Disciplinary Review Board, respondents, respondents' counsel, complainants, and officials of the New Jersey State Bar Association. The team also met with members of the Supreme Court of New Jersey.

¹³See,

http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html.

The team reviewed extensive documentation relating to the lawyer regulatory system in New Jersey. These records included, but were not limited to, the New Jersey Rules of Professional Conduct, the New Jersey Supreme Court Rules, Supreme Court disciplinary opinions, rules relating to the Lawyers' Fund for Client Protection and the fee arbitration program, as well as disciplinary files, caseload statistics, and budget reports. The team also reviewed the Discipline Committee's 1982 Consultation Report described in the next section of this Report.

The team is grateful to all participants and interviewees for their time and candor. The team was impressed with the commitment of all participants in the system to make improvements that will better serve the public and the profession. The Court's desire to use its inherent regulatory authority and to continue to take an active role in the continued evolution and success of its lawyer regulatory system is laudable and, as discussed in greater detail below, necessary. The Discipline Committee hopes that the recommendations contained in this Report will assist the Court in making continued improvements to the New Jersey lawyer discipline system.

II. OVERVIEW

A. Strengths of the New Jersey Lawyer Discipline System

The New Jersey Supreme Court made its initial request for an independent review of the discipline system in 1981. At the request of New Jersey's Administrative Office of the Courts, a team from the Standing Committee of Professional Discipline conducted the on-site portion of that study of the New Jersey lawyer discipline system on October 5-8, 1981. The Committee issued its Report in 1982 (hereinafter "1982 ABA Report") and made various recommendations regarding structure and staffing, practice and procedures, and education of the bar and the public.

In response, the Court issued its own report and then implemented the vast majority of the recommended changes in the 1982 ABA Report. As a result, New Jersey's disciplinary system today is stronger and more effective. In a number of respects, as will be further discussed below, New Jersey serves as a model for other states. The New Jersey Supreme Court's request for this follow-up study evidences its commitment to continued improvement of the 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 MRLDE. This Report generally will exclude from discussion those areas of the system that are operating effectively. However, in order to provide a balanced assessment of the New Jersey lawyer discipline system, its strengths should be recognized. The following is not an exhaustive description of those strengths, and additional programs and initiatives of note will be described elsewhere in this Report.

The New Jersey Supreme Court's ongoing concern for the excellence of its lawyer discipline system is clear. It is manifest in the promulgation and adoption of well-written, clear rules governing the legal profession. The Court's disciplinary opinions carefully analyze fact patterns, set forth its legal reasoning, and provide reliable precedent for guidance of the bar. The Court's stewardship is also evident through its Disciplinary Oversight Committee that works to ensure that the discipline system operates effectively and efficiently. The Disciplinary Review Board is well-staffed and expends considerable effort to discharge its appellate review function in a timely manner.

The Court also takes seriously the timeliness of processing matters. Timeliness goals are carefully articulated and enforced. There is close monitoring of both volunteer and staff compliance with the time goals. As discussed below, the Committee appreciates the need for reinforcing timeliness, but also suggests that time goals should not completely drive the system. Concerns for timeliness should be balanced against the realities of handling complexities in individual cases, and should not create an unnecessary level of stress in the work environment.

The Court-appointed Director of the Office of Attorney Ethics (OAE) has significant trial and management experience. The Director and his staff continue to study ways to make the system more efficient and accessible to the public. There are significant outreach efforts to the public, including telephone book references, pamphlets describing the system, and a website. Recommendations 12 and 13 below focus on expanding and refining those efforts so that the disciplinary system is optimally advertised and accessible to the public.

The current structure of the New Jersey discipline system has many commendable elements to ensure public protection as well as fairness to respondents. The team was advised by interviewees, including complainants that the New Jersey discipline system generally functions well. The team observed excellent treatment of complainants throughout the system. Complainants are kept apprised of the status of matters at all stages of the proceedings and are generally provided with explanations of the OAE's actions. The Court has also adopted rules for the operation and continued funding of the New Jersey Lawyers' Fund for Client Protection. The Fund provides necessary compensation for victims of lawyer defalcations and helps restore public trust and confidence in the legal profession.

The Supreme Court, through its enactment of certain procedural rules, has demonstrated its commitment to protecting the public. For example, all complainants are afforded immunity. Providing complainants with absolute immunity encourages those who have some doubt about a lawyer's conduct to submit the matter to the disciplinary agency. Without such immunity, complainants may be hesitant to file grievances and some valid complaints will not be filed. Properly, there is no statute of limitations imposed upon disciplinary complaints. This affirms that it is never too late to address a lawyer's fitness to practice law. Further, complainants receive timely notice of dispositions and can appeal decisions at all levels. This provides assurance that matters are taken seriously and dealt with in a timely manner. In addition, a public member reviews all declinations of charges, which provides for transparency and another opportunity for increasing public confidence in the system.

The Court's fairness to respondents is evident also. For example, New Jersey has adopted a confidentiality rule that protects lawyers from unwarranted public disclosure of unsubstantiated allegations made by members of the public or other lawyers.¹⁴

New Jersey has been a national leader with its innovative statewide mandatory fee arbitration program, begun in 1978. The OAE provides outstanding leadership in administering this program through 17 Fee Arbitration Committees. The program provides excellent service to the public and the bar by resolving fee, cost, and disbursement disputes between lawyers and clients.

New Jersey's Random Audit Compliance Program, instituted in July 1981, protects the public and educates members of the bar about their trust accounting responsibilities. It is one of the

¹⁴ N.J. Sup. Ct. R 1:20-9(a) and (h).

country's oldest and best-operated programs providing financial audits of private law firms. It is well-resourced both in funding and in staff. Because of the level of sophistication, innovation and professionalization of this program, other states are encouraged to look to New Jersey for guidance when considering creation of a random audit program. For example, New Jersey has implemented the innovation of using lawyer telephone numbers rather than addresses to ensure a random cross-section sampling of lawyers from both small and large firm practices.

New Jersey's Trust Overdraft Notification Program is also commendable. Under the Trust Overdraft Notification Program, all financial institutions are required to report to the OAE whenever a lawyer trust account check is presented against insufficient funds. The value of the Program can be measured by the successful imposition of discipline for lawyer misconduct detected as a direct result of the Program.

New Jersey is justifiably proud of the many volunteers who assist in the discipline system. All volunteers, public members as well as lawyers, donate innumerable, uncompensated hours of their time to the lawyer disciplinary process. The team was impressed by the ongoing commitment to include members of the public to provide transparency and accountability to the system. The public member involvement built in to all levels of the system, from the District Ethics Committees, the Disciplinary Review Board, to the Disciplinary Oversight Committee is commendable.

The team was particularly impressed by the dedication of the volunteers in the District Ethics Committee network, where some 600 lawyers and public members spend a scheduled 1.5 days per month working for the system. District Committee Secretaries contribute additional untold hours year after year. The team notes the extensive resources allocated to training volunteers. For example, the OAE has developed an extensive training manual and other training materials. It also provides mandatory orientation for all District Ethics Committee members as well as ongoing training opportunities.

In the Recommendations that follow, the Standing Committee on Professional Discipline offers suggestions as to how the volunteer resources, including both lawyer and public members, might best be leveraged to maximum advantage of the system, the public, and the bar. These Recommendations suggest changes to the structure and function of the OAE and the District Ethics Committees that the team believes will complement the efforts of the Court to make the system more efficient and effective. The Discipline Committee makes these suggestions because it believes, based upon its knowledge and experience, that delay and unfairness in disciplinary proceedings is often inherent in the manner in which a system is structured and the way in which the responsibilities of the various components of the system are delegated. These suggestions are not intended to imply that the volunteers in the District Ethics Committees have not served the public and the bar with devotion and thoughtfulness.

Though the New Jersey State Bar Association (NJSBA) is not directly involved in the

administration of the lawyer discipline system, it supports the Supreme Court's efforts to strengthen it. The NJSBA is commendably engaged in developing and administering the NJSBA Ethics Diversionary Education Course to assist lawyers who have engaged in minor misconduct become better lawyers.

B. Summary of Current Challenges Facing the New Jersey Lawyer Discipline System

As noted above, the New Jersey lawyer discipline system serves as a model for other jurisdictions in several important regards. At the same time, it faces significant challenges that must be overcome in order to achieve optimal efficiencies and to better fulfill its mission of protecting the public. These challenges have developed over an extended period of time. Most are the direct result of a decentralized and only partially professionalized system, as will be discussed at greater length below. The Court and the system also face resource allocation issues as well as fiscal challenges. The Discipline Committee is hopeful that the Supreme Court will carefully consider impediments to the effective and efficient functioning of the New Jersey discipline system noted in this Report and promptly remedy deficits. The Committee hopes that the following Recommendations can be of help in that endeavor.

C. Components of the New Jersey Lawyer Discipline System

The Supreme Court of New Jersey possesses the constitutional and inherent authority to supervise and regulate New Jersey lawyers.¹⁵ The Court's *Rule 1:20 Discipline of Members of the Bar* sets forth the funding mechanism for the regulatory system as well as its structural components and detailed rules of procedure for processing allegations of lawyer misconduct and disability. The components of the system include the Office of Attorney Ethics, 18 District Ethics Committees, the Disciplinary Review Board, the Disciplinary Oversight Committee, and the Supreme Court of New Jersey.

1. Nature and Funding of the New Jersey Lawyer Discipline System

The New Jersey lawyer discipline system is financed exclusively by the New Jersey Supreme Court's mandatory registration assessments on the state's lawyers; taxpayer monies are not used for this purpose.¹⁶ Funds collected annually through the Attorney Registration Program are earmarked for the lawyer discipline and fee arbitration systems.¹⁷

In 2009, the total annual fee assessed for the majority of lawyers (those admitted between 5 to 49 years) was \$200.¹⁸ Of that total, \$140 was allocated to lawyer discipline; \$50 to the New

¹⁵ N.J. CONST. art. IV § II, P3.

¹⁶ N.J. Sup. Ct. R 1:20-1(b).

¹⁷ *Id.*

¹⁸ N.J. Office of Attorney Ethics, *2009 State of the Attorney Disciplinary System Report*, 47; available at <http://www.judiciary.state.nj.us/oe/2009annualreport.pdf>.

Jersey Lawyers' Fund for Client Protection and \$20 to the Lawyers' Assistance Program (to help lawyers with problems such as alcohol and substance abuse).¹⁹ The total annual fee for 2010 and 2011 was \$204. An additional \$4 was added to fund the implementation and management of the new Continuing Legal Education requirement. The allocation of the \$200 remains the same. Compared with other U.S. jurisdictions, this amount represents one of the lowest mandatory annual registration fees in the country. According to a 2009 survey prepared by the OAE for the National Organization of Bar Counsel, Inc., New Jersey ranked 7th out of 51 jurisdictions in lawyer size (with 84,165 lawyers), but 44th in the amount of mandatory fees required to practice law. In the 2008 survey, the ranking of New Jersey was 8th in size and 45th in mandatory annual fees assessed.²⁰

The Disciplinary Oversight Committee oversees the financial management of the discipline system, including an annual budget review.²¹ The Director of the Office of Attorney Ethics prepares annually and jointly with Counsel for the Disciplinary Review Board a proposed budget for the state's lawyer discipline system.²² The proposed budget is submitted to the Disciplinary Oversight Committee, which reviews it and makes a written recommendation to the Supreme Court concerning the proposed budget. The proposed budget is then published to the bar and public for comment. Following receipt of any comments, the Supreme Court approves the budget. The annual disciplinary budget for the calendar year 2009 was \$11,150,824 with sixty percent allocated to the Office of Attorney Ethics, 19% to the Disciplinary Review Board, 7% to the District Ethics Committees, 6% to the Random Audit Program, 4% to the Attorney Registration Program, 3% to the District Fee Arbitration Committees, and 1% to the Oversight Committee.²³

2. The Office of Attorney Ethics (OAE)

Authority

The New Jersey Supreme Court established the Office of Attorney Ethics (OAE), the investigative and prosecutorial arm of the discipline system, pursuant to its constitutional authority on October 19, 1983.

¹⁹ *Id.*

²⁰ *Id.*

²¹ N.J. Sup. Ct. R. 1:20 B.

²² N.J. Sup. Ct. R. 1:20-2(b)(11).

²³ *Supra* note 18, at 48.

Staffing

The New Jersey Supreme Court appoints the Director of the OAE.²⁴ Other lawyers in that office are appointed by the Supreme Court upon the Director's recommendation.²⁵ The OAE employs a Legal Group consisting of the Director, a First Assistant Ethics Counsel, three Assistant Ethics Counsel, and seven Deputy Ethics Counsel.²⁶

To train and offer day-to-day support for the 18 volunteer District Ethics Committees, the OAE employs the District Ethics Group, consisting of an Assistant Ethics Counsel (who functions as the OAE's Statewide Ethics Coordinator), a Deputy Ethics Counsel, an administrative assistant, and a part-time secretary.²⁷

The OAE's Complex Investigative Group, consisting of forensic disciplinary auditors, disciplinary investigators, and an investigative aide, conducts statewide investigations of complex, serious and emergent matters; reciprocal discipline cases; and criminal and civil charges against New Jersey lawyers.²⁸ For example, cases handled by this Group include misappropriation of trust funds, other financial misconduct, fraud, recidivist lawyers, and other white-collar misconduct.²⁹ The Group also seeks temporary suspensions of lawyers in order to protect the public and the bar from harm by a lawyer's continued misconduct.³⁰

The Discipline Support Group supports the lawyers, investigators, auditors, and OAE administrative personnel, and consists of a legal assistant, secretaries, and clerical positions.³¹ This Group provides secretarial and support services in addition to a variety of other activities such as transcribing interviews and demand audits, computerizing and updating all docketed disciplinary cases statewide, entering Supreme Court and Disciplinary Review Board decision results into the OAE computer system, entering lawyer registration data, handling book-keeping, handling the approved trust depositories program and the Trust Overdraft Program, coordinating the utilization of special masters, issuing Certificates of Ethical Conduct, and providing information to the public.³²

Finally, the Administrative Group includes the OAE Administrator, a Support Staff Supervisor, and an Office Coordinator who support the OAE by managing human resources, facilities, budget and accounting services, and handling the lawyer registration program and

²⁴ N.J. Sup. Ct. R. 1:20-2(a).

²⁵ *Id.*

²⁶ *Supra* note 18, at 49.

²⁷ *Id.* at 51.

²⁸ *Id.* at 50.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

dissemination of public information.³³ A manager and a network administrator provide information technology support.³⁴

The OAE has broad managerial responsibility and programmatic responsibility for the 18 District Ethics Committees that are charged with investigating and prosecuting routine grievances of alleged misconduct against lawyers.³⁵ The District Ethics Committees (described further below) are staffed by volunteer lawyers and nonlawyers, whom the OAE trains and supervises.

In addition, the OAE manages 17 District Fee Arbitration Committees, which hear and determine through binding arbitration disputes over fees for lawyers' services.³⁶ It administers the Random Audit Compliance Program, which monitors recordkeeping responsibilities of private law firms undertaking random audits of lawyers' trust and business accounts.³⁷ The OAE also manages the Trust Overdraft Notification Program, which reviews lawyer trust account overdrafts as reported by New Jersey financial institutions.

In certain matters, the OAE has exclusive investigative and prosecutorial jurisdiction. For example, the OAE investigates and prosecutes serious and complex disciplinary cases as well as reciprocal discipline matters.³⁸ Matters other than these are routinely handled by the District Ethics Committees where volunteers investigate grievances, prosecute complaints, conduct hearings, and issue reports. Generally, the OAE tries matters before hearing panels, but the OAE Director may request designation of a special ethics master to try a case if a hearing may reasonably be expected to take three days or more, where the case should be heard continuously from day to day, or where the Director determines the interest of justice so requires.³⁹ The OAE has exclusive authority to handle all ethics cases involving a lawyer who is a defendant in any criminal proceeding.⁴⁰ In addition, the OAE has exclusive authority to seek from the New Jersey Supreme Court emergency suspensions of lawyers who pose a threat to the public. Emergent matters are any cases where the lawyer poses a substantial threat of serious harm to a lawyer, a client, or the public. Examples are where there is clear evidence of past and/or ongoing knowing misappropriation, or if the lawyer is disabled. In such situations, the OAE can make an emergent application for the lawyer's immediate

³³ *Id.* at 49.

³⁴ *Id.*

³⁵ *Id.* at 48.

³⁶ *Id.*

³⁷ *Id.*

³⁸ The terms "complex" and "serious" are not defined in the New Jersey Supreme Court Rules. The New Jersey District Ethics Committee Manual, Section 20.7, p. 23, contains this definition: "Complex cases are defined by the degree of difficulty and amount of work involved. A complex case is one that requires unusual skill, time or labor-intensive investigation due to the nature of the problem(s) presented. Examples of cases that will meet this definition are financial cases involving intensive auditing or investigative resources, serial offenders involved with multiple grievances mandating intensive investigative resources, cases requiring the allocation of significant resources, cases involving significant medical or psychiatric issues."

³⁹ N.J. Sup. Ct. R 1:20-6(b)(3).

⁴⁰ N.J. Sup. Ct. R 1:20-2(b)(1)(B).

temporary suspension.⁴¹ Additionally, the OAE handles any case in which a District Ethics Committee requests intervention.⁴² Finally, the OAE is tasked with arguing all disciplinary cases that come before the New Jersey Supreme Court, whether the cases emerge from matters considered serious or complex, and thus investigated and prosecuted by the OAE, or from the larger pool of other cases handled by the District Ethics Committees.⁴³

3. District Ethics Committees (DECs)

The 18 District Ethics Committees (DECs) are formed along geographic areas (county or multi-county lines) and consist of no fewer than 8 members who work or reside in the district or county in which the district is located.⁴⁴ Four DEC members must be lawyers; two, at least, must be nonlawyer public members.⁴⁵ All DEC members are volunteers who investigate grievances, prosecute complaints, conduct hearings and issue reports. The Supreme Court appoints DEC members for a four-year term.⁴⁶ As of September 1, 2009, there were 556 District Ethics Committee volunteers, including 467 lawyers and 89 public members.⁴⁷

Screening and Docketing Grievances

Each DEC has a lawyer who serves as Committee Secretary and is charged with screening initial inquiries within 45 days of receipt.⁴⁸ Members of the public with complaints against lawyers are advised to telephone a central toll-free number that will transfer the caller to the appropriate DEC Secretary, sorted by zip code, to request a grievance form. All complaints must be in writing and must be filed with the Secretary of the DEC for the district in which the lawyer maintains his or her main law office. Matters may be transferred to another DEC if the Committee determines a conflict of interest exists.

The District Secretary reviews grievance forms and makes docketing decisions. If the matter involves a fee dispute, pending civil or criminal litigation, or certain other situations enumerated in the Rules, the Secretary will decline to docket the matter.⁴⁹ If the alleged facts, if proven, would not constitute misconduct, the District Secretary will decline to docket the case after consultation with a designated public member of the DEC.⁵⁰ If matters are declined, the District Secretary notifies the complainant of the reason for the declination,

⁴¹ N.J. Sup. Ct. R. 1:20-11(a).

⁴² N.J. Sup. Ct. R. 1:20-2(b)(1)(C).

⁴³ N.J. Sup. Ct. R. 1:20-2(b)(5).

⁴⁴ N.J. Sup. Ct. R. 1:20-3(a).

⁴⁵ *Id.*

⁴⁶ N.J. Sup. Ct. R. 1:20-3(b).

⁴⁷ *Supra* note 18, at 44.

⁴⁸ N.J. Sup. Ct. R. 1:20-3(e).

⁴⁹ N.J. Sup. Ct. R. 1:20-3(e)(2).

⁵⁰ N.J. Sup. Ct. R. 1:20-3(e)(3).

citing the applicable Court rule or other authority.⁵¹ There is no right of appeal from such decisions.⁵²

Investigations

If a grievance alleges facts that if proven would violate the New Jersey Rules of Professional Conduct, the Secretary docket the case and the DEC Chair assigns it for investigation to a lawyer member of the Committee.⁵³ That DEC lawyer member conducts whatever investigation is required to determine whether unethical conduct has occurred, or whether the respondent is disabled or incapacitated.⁵⁴ During the investigation of any matter, the DEC may issue a subpoena pursuant to Rule 1:20-7(i).⁵⁵ Time goals provide that standard investigations should be completed within six months; investigations of complex cases should be finished within nine months of the assignment date.⁵⁶

When the investigation is complete, the lawyer Committee member submits a written report to the DEC Chair who determines whether proof of misconduct meets the clear and convincing evidence standard.⁵⁷ If not, the Chair directs the Secretary to dismiss the matter and to send a copy of the investigation report to the complainant.⁵⁸ If sufficient proof of alleged misconduct exists, a formal complaint is prepared and served upon the lawyer.⁵⁹ Usually the formal complaint is prepared by the volunteer investigator/presenter in a matter. The complaint may be signed by the DEC Chair, Secretary or any Committee member. Once a formal complaint is served, the respondent lawyer has 21 days to file an answer in response.⁶⁰

Hearings

If the respondent lawyer admits to the charged misconduct, which is deemed by both the DEC and the OAE to constitute minor misconduct, the matter is diverted.⁶¹ The Diversion program diverts from the disciplinary system lawyers who have committed minor unethical conduct not likely to warrant more than an admonition.⁶² The OAE Director or his designee diverts the matter and approves an agreement in lieu of discipline.⁶³ In addition, diversion

⁵¹ N.J. Sup. Ct. R. 1:20-3(e)(5).

⁵² N.J. Sup. Ct. R. 1:20-3(e)(6).

⁵³ N.J. Sup. Ct. R. 1:20-3(g)(1).

⁵⁴ *Id.*

⁵⁵ N.J. Sup. Ct. R. 1:20-3(g)(6).

⁵⁶ N.J. Sup. Ct. R. 1:20-8.

⁵⁷ N.J. Sup. Ct. R. 1:20-3(i)(1).

⁵⁸ N.J. Sup. Ct. R. 1:20-3(e)(5).

⁵⁹ N.J. Sup. Ct. R. 1:20-4(a).

⁶⁰ N.J. Sup. Ct. R. 1:20-4(e).

⁶¹ N.J. Sup. Ct. R. 1:20-3(i)(2)(B).

⁶² N.J. Sup. Ct. R. 1:20-3(i)(2)(A).

⁶³ N.J. Sup. Ct. R. 1:20-3(i)(2)(A)(i).

requires the lawyer to agree to take remedial action.⁶⁴ Diversion conditions generally do not exceed a period of six months.⁶⁵ Conditions can include reimbursement of fees or costs, completion of legal work, participation in a drug or alcohol rehabilitation program, psychological counseling, or completion of a course of study.⁶⁶ The OAE Director monitors the terms of the agreement.⁶⁷

Otherwise, after formal charges have been filed, hearings are tried before a hearing panel comprised of three DEC members, one of whom must be a public member.⁶⁸ A volunteer lawyer member of the DEC is assigned to prosecute the formal charges. Special ethics masters (such as retired judges, former members of the Disciplinary Review Board or former officers of a DEC) may be appointed to hear a case in lieu of a hearing panel when a hearing may be expected to take three days or longer, or for other enumerated reasons.⁶⁹

The hearing is open to the public.⁷⁰ Testimony is given under oath, witnesses and records may be compelled by subpoena, and a court reporter prepares a record of the proceeding.⁷¹ Allegations of misconduct must be proven by clear and convincing evidence.⁷² After the panel deliberates, it either dismisses the charges or reaches a determination that there has been misconduct and recommends a disciplinary sanction ranging from admonition to censure, suspension, or disbarment.⁷³

4. Disciplinary Review Board (DRB)

The Disciplinary Review Board (DRB) is the second of the three levels in the system. It decides disciplinary matters upon recommendations originating from the DEC's, or in certain cases, directly from the OAE. Nine members comprise the DRB, including both nonlawyers and lawyers, all of whom serve on a voluntary basis. There are at least three nonlawyer members of the DRB and at least five lawyers; the composition can range between 5 lawyers and 4 nonlawyers or 6 lawyers and 3 nonlawyers.⁷⁴

If a grievance is investigated and dismissed, the grievant has the right to appeal by requesting appeal forms in writing. The DRB hears the appeal of grievances, appealed by right after the investigative or hearing stage. The DRB reviews a matter upon the filing of an ethics appeal

⁶⁴ N.J. Sup. Ct. R. 1:20-3(i)(2)(B)(iii).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ N.J. Sup. Ct. R. 1:20-6(a)(1).

⁶⁹ N.J. Sup. Ct. R. 1:20-6 (b).

⁷⁰ N.J. Sup. Ct. R. 1:20-6 (c)(2)(F).

⁷¹ N.J. Sup. Ct. R. 1:20-6 (c)(2)(A).

⁷² N.J. Sup. Ct. R. 1:20-6 (c)(2)(B).

⁷³ N.J. Sup. Ct. R. 1:20-6 (c)(2)(E)(iii).

⁷⁴ N.J. Sup. Ct. R. 1:20-15 (a).

by the original complainant or the Director.⁷⁵ It may uphold the decision of the local DEC hearing panel and impose discipline, reverse that decision (and impose discipline if the DEC dismissed the matter) or return the matter for further proceedings.⁷⁶ In matters in which an admonition or reprimand has been recommended, the DRB reviews DEC hearing panel reports and recommendations and issues letters of admonition.⁷⁷ In matters where more serious discipline has been recommended such as reprimand, censure, suspension, or disbarment, the DRB routinely holds oral argument.⁷⁸ In such matters the review is de novo on notice to all parties.⁷⁹ Oral arguments are open to the public. The respondent lawyer may appear in person or be represented by counsel; a DEC representative appears in support of the hearing panel report.⁸⁰ The Board may impose appropriate sanctions, including monetary sanctions, as a form of discipline, in addition to cost incurred in the prosecution of the disciplinary proceeding.⁸¹ The DRB provides a copy of its decision to the complainant and to the respondent.⁸² The DRB also recommends reinstatements from suspensions and can impose disciplinary costs.⁸³

5. Disciplinary Oversight Committee (DOC)

Rule 1:20B of the NJ Rules of General Application establishes an 11 member Disciplinary Oversight Committee (DOC) appointed by the Supreme Court. The DOC is charged with overseeing the administration and financial management of the disciplinary system in New Jersey. Five members are lawyers or judges, one an annual designee of the New Jersey State Bar Association, and five members are public members. In 2009, the Oversight Committee consisted of six lawyers and five public members, all of whom serve pro bono.⁸⁴

A primary task of the DOC is to make an annual review of the discipline budget proposed by the OAE and the DRB and to make recommendations to the New Jersey Supreme Court regarding the budget.

6. Supreme Court

The Supreme Court of New Jersey is the final and highest level of the state's tri-level disciplinary system. The Supreme Court is comprised of a Chief Justice and six Associate Justices who are appointed by the Governor and confirmed by the State Senate for an initial

⁷⁵ N.J. Sup. Ct. R. 1:20-15 (e).

⁷⁶ *Id.*

⁷⁷ N.J. Sup. Ct. R. 1:20-15 (f)(4).

⁷⁸ N.J. Sup. Ct. R. 1:20-15 (f)(1).

⁷⁹ *Id.*

⁸⁰ N.J. Sup. Ct. R. 1:20-15 (f)(1) and (2).

⁸¹ N.J. Sup. Ct. R. 1:20-15 (f)(4)(j).

⁸² N.J. Sup. Ct. R. 1:20-15 (f)(4).

⁸³ N.J. Sup. Ct. R. 1:20-15 (f)(3).

⁸⁴ *Supra* note 18, at 48.

seven-year term. Upon reappointment they are granted tenure until mandatory retirement at the age of 70.

The Supreme Court hears oral argument in disciplinary matters, conducts a de novo review of the record,⁸⁵ and imposes public discipline. The Supreme Court alone can order disbarment.⁸⁶ In all other matters, the DRB's recommendation in a disciplinary case becomes final upon entry of a confirming Supreme Court order.⁸⁷ The Supreme Court may, however, grant a party leave to appeal or may, on its own motion, review the DRB's determination in a matter.⁸⁸

The Supreme Court also issues emergent suspensions when a lawyer "has been determined to be guilty ... of a serious crime."⁸⁹ In such a situation, the Supreme Court enters an order immediately suspending the lawyer from the practice of law until final disposition of a disciplinary proceeding at the conclusion of the criminal proceeding.⁹⁰

If the New Jersey Supreme Court hears oral argument, the OAE represents the public interest in the matter. In 2009, the OAE ethics counsel appeared 29 times for oral argument in disciplinary cases.⁹¹

⁸⁵ N.J. Sup. Ct. R. 1:20-16 (c).

⁸⁶ N.J. Sup. Ct. R. 1:20-16 (a).

⁸⁷ N.J. Sup. Ct. R. 1:20-16 (b).

⁸⁸ N.J. Sup. Ct. R. 1:20-16 (b).

⁸⁹ N.J. Sup. Ct. R. 1:20-13. (b)(1).

⁹⁰ *Id.*

⁹¹ *Supra* note 18, at 47.

III. STRUCTURE

Recommendation 1: The Court Should Create a Central Intake System for Lawyer Grievances

Commentary

In 1982, the ABA Standing Committee on Professional Discipline recommended centralization of the New Jersey discipline system. In support of that recommendation the Committee explained:

The lawyer disciplinary structure organized in 1978 in New Jersey vests too little control of the investigative and prosecutorial function in DEPS.⁹² Under the present system matters are not consistently docketed by the DEC Secretaries and may be handled informally, thereby providing the potential that the volume of disciplinary matters may be understated and that some patterns of misconduct may be overlooked through turnover in the position of Secretary and membership of a DEC. Further, by allowing the DEC to maintain a role in the initial processing and disposition of complaints, the determination of a specific complaint may depend largely on the philosophical approach to discipline of the DEC and the application of its local criteria. The resulting inconsistency in sanctions undermines public confidence in the disciplinary process and provides little credibility for the profession. Centralization will provide for uniform docketing and prosecution.

1982 ABA Report, p.14.

The creation of a central intake system was a primary focus of the 1982 ABA Report on the New Jersey system for several pressing reasons. The Report noted that:

Lawyer discipline must be fair to the individual lawyer and accepted by the bar. Centralization promotes consistency throughout the state. More importantly, however, the disciplinary mechanism must serve the public. The present structure is taxed beyond an ability to serve the public interest.

1982 ABA Report, p.16.

Three recommendations flowed from that observation:

1. The prosecutorial function should be centralized in DEPS. See Lawyer Standards 3.2 and 3.9.

⁹² The Division of Ethics and Professional Services (DEPS) was the predecessor to the OAE.

2. The docketing of complaints and investigative function should be entirely centralized in DEPS. In the alternative, the DEC members should also be empowered to investigate matters delegated from and under the direction of DEPS. See Lawyer Standards 3.7 and 3.9.
3. The DEC members should continue to be selected to reflect a diversity of expertise and demographic factors. *Id.*

Nearly three decades later, New Jersey still lacks a centralized intake system for the filing and docketing of complaints. The rationales articulated in the 1982 ABA Report continue to be valid and compelling. After careful review of concerns raised by the interviewees, the Discipline Committee believes the Court should reconsider creating a central intake system where all grievances can be screened initially.

Currently, most matters come into the system when a member of the public calls the central toll-free number. The caller is transferred to the local DEC Secretary in the district where the respondent lawyer has his or her office to request a grievance form. The Secretary of the local DEC screens calls and docket the grievances. The Secretary refers complex cases to the OAE for that office to handle. The Discipline Committee believes that extensive reliance upon DEC Secretaries in 18 different locales to handle calls from the public and to screen and docket cases is problematic.

Transformation to a centralized intake process from the current decentralized use of DEC members will increase public accessibility and consistency in the treatment of complaints. It will streamline the process, avoiding delays and unnecessary duplication of effort. In order for the system to operate optimally, the intake process should be staffed with paid experienced staff who can receive written, electronic, and oral complaints and who can assist complainants in the filing process. In addition, the Court should eliminate the requirement that all complaints must be in writing. There are a number of reasons that complainants cannot submit complaints in writing. These reasons range from language barriers to physical disabilities that prohibit individuals from writing or typing.

Experienced lawyers should evaluate all grievances and determine which require further investigation, which can be dismissed outright, and which should be diverted out of the adjudicative system and onto a diversionary track. Further, the present mechanism for turning over serious complaints from the DEC members to the OAE is inefficient and relies on the discretion of many volunteers. This can result in variations in treatment from volunteer to volunteer and area to area. The Committee also learned of unnecessary delays created as a result of the process. The distinction between serious or complex cases, which are handled by the OAE, and standard matters that can be decided in DEC members should be eliminated. Such a distinction is artificial. What may seem like a minor complaint on its face may be a sign of something much more serious.

Recommendation 2: The OAE Should Handle All Investigations and Prosecutions for Alleged Misconduct

Commentary

The New Jersey System still uses volunteer investigators and prosecutors for matters not deemed serious or complex. As noted above, the Discipline Committee recommends eliminating the distinction between serious versus standard complaints. The team heard that approximately 50% of investigations are handled by volunteers. A number of interviewees praised the use of volunteers. They believe continuing the practice is desirable because it utilizes the varied legal experience of New Jersey lawyers to analyze allegations of misconduct and because respondent lawyers might be more responsive to a fellow practitioner. The Discipline Committee is sensitive to the concerns expressed by those favoring retention of the volunteer system. However, the Committee believes it is in the best interest of the public and the discipline system for the Court to phase out their use as investigators and prosecutors and amend its Rules accordingly to reflect national practice.

The Clark Committee Report recommended that lawyer disciplinary agencies use full-time investigators and ethics counsel and highlighted concerns about the use of volunteer lawyers to investigate complaints.⁹³ Among those concerns were that the use of volunteers resulted in delay.⁹⁴ Statistics provided to the team support this concern. The Clark Committee also noted that the use of volunteers instead of full-time disciplinary staff to investigate allegations of misconduct results in non-uniformity of investigative standards and practices, the inability to devote time and resources to conduct intensive investigations due to the demands of the volunteer's legal practice, and lack of public confidence in such a system.⁹⁵ This lack of confidence is due to perceptions that the volunteer lawyer will be biased in favor of his or her professional colleague.

The team learned that the current system in New Jersey places a burden on its volunteer lawyers, particularly solo and small firm practitioners, to investigate and prosecute matters. Lawyers who practice law in areas other than lawyer regulation are not trained investigators, and bear a particularly heavy burden to undertake investigations of complaints. The consultation team observed that as a result of this, there exists inconsistency among DEC's in their resolution of matters where the misconduct alleged is similar. The team heard reports of "unevenness in diligence" among the DEC's in addition to concerns about inconsistency in the quality of investigations and results. Increasing consistency in the investigative process would also allow respondents' counsel to better advise their clients, and possibly reduce the time and expense of disciplinary matters for the system and for the lawyer.

⁹³ *Supra* note 5, at 48-56.

⁹⁴ *Id.* at 49-50.

⁹⁵ *Id.* at 50-53.

The Discipline Committee recommends that the Court amend the Rules to provide that the professional staff of the OAE is solely responsible for the investigation and prosecution of allegations of lawyer misconduct, disability cases, and reinstatement matters.⁹⁶ Trained professional investigators and prosecutors can expedite the process and also reduce the amount of time and energy invested by volunteer lawyers who often face a daunting learning curve to do this kind of work. In addition, the rotation of members within the DEC required by the current Rules, means that all the expertise developed by the volunteer is lost to the system when that person's term expires. By contrast, having professional investigative and prosecutorial staff in place provides the system with continuity, stability, and expertise in this specialized area of the law.

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

The use of volunteer lawyers to investigate complaints will not be necessary if the OAE is adequately resourced and staffed.⁹⁷ The Discipline Committee recognizes that using only OAE investigators and disciplinary counsel might result in a need to increase staff or to reallocate resources currently dedicated to maintaining the volunteer system. The Director of the OAE should continue to ensure that his staff is qualified to investigate and prosecute allegations of misconduct. Staff positions should be adequately compensated so as to allow the Director to attract and retain experienced lawyers. The McKay Commission recommended that there should be a balance of experienced and less experienced staff lawyers in the disciplinary agency.⁹⁸ This provides continuity as well as a fresh perspective to the process.

The current volunteer driven system requires substantial resources for training and maintenance. For example, the OAE Director, other staff, and a Supreme Court Justice meet with each of the DEC's at least once per year. Additionally, New Jersey allocates extensive resources specifically to support the DEC volunteers through its Statewide Ethics Coordinator's Group. That Group consists of a Statewide Ethics Coordinator, an Assistant Statewide Ethics Coordinator, and support staff. The function of this Group includes recruitment, screening and appointment of volunteers, replacement of DEC members as necessary, preparing and updating the District Ethics Committee Manual for volunteers, conducting annual meetings of all District Officers, updating lists of all pending cases for District Officers, providing ongoing legal and procedural advice to volunteers, and corresponding with complainants and respondents. The Statewide Coordinator also reassigns cases where DEC members have a conflict of interest and transfers such cases as required.

⁹⁶ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(B).

⁹⁷ *Supra* note 2 at 70 and 73-74.

⁹⁸ *Id.* at 29-30.

The Coordinator and the Assistant Statewide Ethics Coordinator continually monitor volunteer compliance with Supreme Court time goals for investigations and hearings and communicate with volunteers regarding timeliness. In addition, the Statewide Ethics Coordinator compiles and reviews monthly and quarterly exception reports from various District offices and follows up with volunteer investigators and hearing panel chairs. The Coordinator also produces a quarterly DEC newsletter to educate DEC volunteers on current issues, presents Certificates of Appreciation to outgoing members, drafts press releases for incoming and outgoing DEC members, and consults with the OAE Director on an on-going basis to recommend policy regarding the volunteer program.⁹⁹

The Discipline Committee believes that eliminating the volunteers' role in investigating and prosecuting matters and redirecting those resources to the OAE to do so within a centralized, professionally staffed system resourced with appropriate technology will better serve the public and the profession.

The 1982 ABA Report relating to the New Jersey system also found problems relating to a lack of staff investigators and ethics counsel at the DEC level. The team noted significant backlogs in case processing and stated:

The team believes, however, that the principal reason for the growing backlog at the DEC level is delay resulting from the use of volunteer lawyer members of the DEC's as investigators and presenters, rather than paid DEPS staff lawyers and investigators, whose responsibilities are solely related to lawyer discipline.

1982 ABA Report, p.8.

Though efforts have been made to increase accountability and to impose strict time limits on all participants, the backlog of cases at the DEC level continues to plague the system. The average age of backlogged Ethics Committee investigations as of December 31, 2008 was 406 days; as of December 2009 it was 348 days.¹⁰⁰ The Discipline Committee believes that maintaining the volunteer-based system will continue to impede the timely processing of cases. Members of the bar are assisting the system unremunerated, and often in addition to maintaining their own caseloads. As noted above, such demands are especially pronounced for solo practitioners who do not have the benefit of law firm partners to help shoulder the workload in order for them to undertake this *pro bono* activity.

The 1982 ABA Report noted probable resistance of the bar as regards necessary and recommended use of staff investigators and staff ethics counsel. It warned:

The team recognizes that the private bar appears willing to strongly resist any changes in the disciplinary structure which would seem to diminish the control it exerts in the

⁹⁹ *Supra* note 18, at 52.

¹⁰⁰ *Supra* note 18, at 13.

self regulation of the profession. The problems in the present system, as outlined below, will not permit retention of the present structure without serious effect on the credibility and effectiveness of the regulatory effort. The private bar will retain its voice in matters through the DEC's and representation on the Board.

1982 ABA Report, p.8.

The Committee believes that retaining volunteers as adjudicators will continue to allow them to contribute their legal knowledge and experience to the effective and efficient disposition of disciplinary matters. Ideally, volunteers will serve on hearing committees as adjudicators where this experience and understanding of the realities of the practice of law can be most beneficial.

Recommendation 3: If DEC Volunteers Continue to Investigate and Prosecute Matters, Increased Separation from Adjudication by Other DEC Members is Needed

Commentary

As set forth in Recommendation 2 above, the Discipline Committee strongly urges the Court to amend its Rules and have the OAE investigate and prosecute all lawyer disciplinary matters. If the Court decides to retain the current decentralized system, it should further separate the DEC's investigative/prosecutorial functions from the adjudicative function at that level. The Discipline Committee recommends that the Court amend the Rules to provide that the DEC that determines probable cause should not serve as trier of fact for that case. The consultation team was told that local volunteer lawyers from the district where the respondent practices investigate grievances in New Jersey largely due to lack of investigative resources at the OAE. There are inherent perceptions of bias associated with a local lawyer investigating another lawyer from the same area. There are also concerns regarding confidentiality because people in the local area learn of allegations against a particular lawyer. To eliminate perceptions of bias the Court should consider that, if use of the current system continues, the hearing on formal charges should be heard by a DEC in a different district from where the respondent practices. Further separation of the roles of investigator/prosecutor from adjudicator, if the current decentralized system is maintained, will also enhance management of cases.

Information received by the team indicates that, if the Court retains the current decentralized system, certain changes are necessary to make the roles of DEC volunteers easier and to enhance the understanding of the disciplinary process by the public and the bar. Presently, the DEC's are responsible for obtaining space to conduct hearings, for arranging court reporters, and for conducting necessary legal research. Interviewees advised the team that the DEC's also undertake publicizing the time, date and location of disciplinary hearings. Currently, the OAE can provide them with little assistance in these matters, although the Committee Secretaries are given an annual emolument to defray costs of their duties.

Hearings should not be held in a DEC member's office. This presents the appearance of bias. It also telegraphs to the public a lack of necessary dignity and respect for the process. All disciplinary hearings should be held in a courtroom setting. All hearing level functions should be housed in central locations with permanent staff to provide necessary support and to keep operations running smoothly.

The Discipline Committee believes that if centralization and use of the OAE staff to investigate and prosecute matters for the system are not deemed feasible at this time, the DEC's should be provided support beyond that provided by the Statewide Ethics Coordinator at OAE. This will entail additional costs as decentralization presents hurdles to the feasibility of providing assistance to the 18 DEC's located all across the state. Clerks are required to

assist in the scheduling of pre-hearing conferences, hearings and the drafting of opinions. Clerks can also assist in publishing the DEC's reports and recommendations. This support staff could be housed in the Administrator's office and in various satellite offices around the state, but should be separate from the Administrator's staff so as to maintain the necessary separation between the prosecutorial and adjudicative functions of the disciplinary agency.

An issue that arises in any system that utilizes members of the bar as volunteer adjudicators is scheduling. The team was advised that some delay in hearings occurs due to scheduling difficulties. In order to address this issue, the team recommends that the OAE and DEC's institute a practice whereby the dates for hearings are reserved sufficiently in advance. 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 be held on consecutive days so that recollections and witnesses are not overburdened.

With respect to the reports and recommendations of the DEC hearing panels or referees, the Committee believes that these opinions should contain more legal analysis, citations to existing authority, and an independent assessment of the issues. This will provide the public and the bar with guidance as to the types of acts that will be considered misconduct and the likely sanctions for such misdeeds. The panels also do not appear to cite to the ABA Standards for Imposing Lawyer Sanctions. In order to promote consistency, the Committee recommends use of the ABA Standards for Imposing Lawyer Sanctions when formulating recommendations for discipline, as will be discussed further in Recommendation 11 below.

Regular training will also assist the DEC members in making their opinions as useful as possible to the Court, the public and the bar. If the current volunteer system is retained, there must be annual training for everyone involved, not only for new participants. Mandatory meetings can provide the venue for continuing substantive training. Additional training should include an orientation session and regular updates on disciplinary law.

Recommendation 4: The Court Should Streamline the Disciplinary Review Board Process

Commentary

The Disciplinary Review Board of the Supreme Court of New Jersey (DRB) serves as the appellate level of the lawyer discipline system. The DRB reviews all recommendations for discipline from the DEC's and from the OAE. The New Jersey Rules provide that the DRB determination shall be de novo on the record.¹⁰¹ If the DRB determines that an admonition is warranted, it will issue a letter of admonition.¹⁰² When the DEC hearing panel recommends a reprimand or stronger discipline, the DRB routinely schedules oral argument. If the DRB finds that an admonition, reprimand, censure, suspension, or disbarment is warranted, that DRB decision may be reviewed by the New Jersey Supreme Court. Only the New Jersey Supreme Court can impose disbarment.¹⁰³

DRB Counsel is tasked with case processing, docketing, calendaring, distribution, and document storage. DRB Counsel serve as “in-house counsel” to the DRB and provides legal research and legal advice to it. DRB Counsel handles cost assessment and collection by assessing administrative and actual costs, collecting payments, and pursuing enforcement by filing judgments and seeking temporary suspensions for non-payment.¹⁰⁴

In 2010, the Office of DRB Counsel was comprised of seven lawyers including the Chief Counsel, Deputy Chief Counsel, First Assistant Counsel, and four Assistant Counsel, one information technology analyst, one administrative supervisor, two administrative specialists, one technical assistant, and four secretaries.¹⁰⁵

Since 1991, the DRB Counsel had furnished pre-hearing memoranda to the Board in serious disciplinary cases, motions for consent to discipline greater than an admonition, and those other matters (such as defaults) containing novel legal or factual issues. To provide greater assistance to the Board's case review function, this policy was modified. In mid-2003, the DRB Counsel began supplying the Board with memoranda on all matters scheduled for consideration, except motions for temporary suspension. These in-depth memoranda set out the facts relevant to the issues raised, the applicable law, and a pertinent analysis of both, ultimately arriving at a recommendation for the appropriate discipline based thereon. Interviews with the team disclosed that a great deal of time and attention is required by staff at the DRB level, in part related to the inconsistency and incomplete nature of volunteer driven

¹⁰¹ N.J. CT. RULES R. 1:20-15(e)(3).

¹⁰² N.J. CT. RULES R. 1:20-15(e)(3).

¹⁰³ N.J. CT. RULES R. 1:20-16(a).

¹⁰⁴ DISCIPLINARY REVIEW BOARD OF THE SUPREME COURT OF NEW JERSEY 2010 ANNUAL REPORT, p. 9.

¹⁰⁵ Id.

work product at other levels of the system. The team also learned from interviewees that a detailed recitation of facts is prepared by the DRB staff and provided to the board, in addition to the transcript in each case.

As noted above, professionalizing the investigation and prosecution of cases coupled with enhancement of and increased consistency in reports and recommendations (including citation to the Sanctions Standards) will increase the quality and consistency of matters generally, and that includes matters presented to the DRB. This should result in less need for DRB Counsel to expend resources on matters and increase the efficiency with which matters proceed through this level of the system. It should be sufficient for DRB counsel to provide an abstract summarizing the hearing transcript rather than a detailed recitation of the facts that are available from the transcript. Such duplication of effort might be eliminated. Streamlining the process does not, however, mean eliminating any due process.

Recommendation 5: The Court Should Encourage the Policy-Setting Role of the Disciplinary Oversight Committee

Commentary

The Rules outlining time goals, accountability, and priority of disciplinary matters are not inherently unreasonable.¹⁰⁶ For example, the goal is to complete investigations of standard matters within 6 months of case docketing, and complex matters within nine months.¹⁰⁷ Formal hearings are to be completed within six months after the expiration of the time for filing an answer to a complaint.¹⁰⁸ Appellate review, both by the DRB and the Supreme Court, is to be completed within six months of the docketing date.¹⁰⁹

As noted at page 9 above, the Disciplinary Oversight Committee (DOC) dedicates itself to increasing the efficiency and timeliness of the disciplinary process in New Jersey. The members take seriously their management role in overseeing the administration of the system. The DOC's role in overseeing timeliness within the system is necessary and useful. The team observed that there have been significant efforts at compliance with time goals that have had a positive effect on reducing delay within the system. The Committee believes that the DOC's efforts in this respect should continue, albeit in a more limited manner so that the DOC can emphasize its policy setting role.

The Committee recommends this because the consultation team learned from many interviewees that time metrics now seem to drive the entire system. The Rules include the realistic language "shall endeavor to complete" for each time goal.¹¹⁰ Yet the consultation team observed that time metrics are rigidly imposed and that compliance has become a central focus of effort across the system. Public protection must remain the paramount value served by the system. While time goals can be helpful guidelines in meeting that responsibility, they should not themselves become the main goal nor be imposed in a manner that creates undue stress within the system. The Court should encourage use of time goals as guidelines only. The flexibility built into the language of the rules should also be reflected in the practice at all levels of the system in order to accommodate variances in matters and circumstances.

General administrative oversight means that the DOC is charged with reviewing the productivity, effectiveness, and efficiency of the system. As part of its responsibility, the DOC should consider analyzing several other aspects of the system that require further attention, such as public education and outreach, and training of volunteer adjudicators. However, the OAE Director should be responsible for setting investigative and prosecutorial

¹⁰⁶ N.J. CT. RULES R. 1:20-8.

¹⁰⁷ N.J. CT. RULES R. 1:20-8 (a).

¹⁰⁸ N.J. CT. RULES R. 1:20-8 (b).

¹⁰⁹ N.J. CT. RULES R. 1:20-8 (c) and (d).

¹¹⁰ N.J. CT. RULES R. 1:20-8 (a)-(d).

priorities, conducting investigations and disciplinary prosecutions in the manner he deems appropriate, and for the day to day management and operation of the office and staff. The DOC should recognize that its responsibility is oversight of the system, not management of the OAE.

In terms of structure of the DOC itself, the Discipline Committee strongly recommends that officers of the New Jersey State Bar Association should not serve as members of the DOC.¹¹¹ Such a policy ensures necessary independence of the DOC from the bar and adds credibility to the decisions of the DOC.

¹¹¹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.2 & Comment; LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992) Recommendations 5 & 6, http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html.

IV. RESOURCES

Recommendation 6: The Court and the DOC Should Ensure Adequate Funding Necessary to Centralize the System

Commentary

The importance of adequate funding and staffing for any lawyer disciplinary system cannot be overstated. If the OAE is to perform its duties effectively and efficiently and undertake the investigative and prosecutorial responsibilities described in Recommendation 2 above, it must be adequately staffed and have appropriate resources, including technology and adequate office space. If the regulation of the legal profession is to remain within the judicial branch of government, the Court must ensure that adequate resources exist.

The Discipline Committee is aware of current economic conditions and is sensitive to the trepidation and skepticism with which requests for additional funds are often met. However, in order for many of the recommendations in this Report to succeed, and for New Jersey to achieve optimal efficiencies in its lawyer discipline system, resources allocated to the system must increase. Lawyers owe it to their clients and the public to support the lawyer disciplinary system not only through their voluntary service, but financially. The Committee believes that \$200 a year is not a huge price to pay for the privilege of practicing law and a number of other jurisdictions charge more. The Committee urges the Court to study increasing registration fees to provide needed revenue in the system. Further, while holding funds in reserve is commendable, the Court should also consider using that resource to make the recommended changes. Use of the reserve for this important purpose might avoid raising the current disciplinary assessment received from New Jersey lawyers.

With regard to current staffing, the Committee notes that the recommended central intake system may require additional staffing. However, it is also likely that reallocation of the extensive resources required presently to maintain the DEC's will substantially offset these costs. Streamlining the intake process will likely save the system funds and time. The DOC is an excellent resource for reviewing overall staffing needs and should monitor the situation as to necessary increases in staff.

As stated above, in a centralized system the DEC volunteers can still contribute valuable services by serving as adjudicators. However, the burden of investigation and prosecution of complaints properly should be carried by trained and paid OAE lawyers and investigators. Use of OAE investigators and counsel will likely require the addition of another ethics counsel. In addition, the Director of the OAE should consider the need for increased resources for necessary technology improvements, and space and storage issues. If necessary, a financial planner or budget analyst should be used to assist in assessing the current and future needs of the system in terms of finances, technology and staffing.

V. PROCEDURES

Recommendation 7: The Court Should Expand and Promote Alternatives to Discipline Programs for Minor Misconduct

Commentary

As part of centralizing the disciplinary process, the Discipline Committee recommends that the Court consider expanding and promoting alternatives to discipline, also referred to as diversion programs. The consultation team heard from interviewees that, although some diversion programs exist, diversion as an alternative to discipline is not often used in New Jersey. As stated above, it is laudable that the New Jersey State Bar Association (NJSBA) is developing its Ethics Diversionary Education Course. Particularly useful would be the establishment of a strong law office management component to which lawyers could be referred for gaining skills in handling daily operations of a law office. While New Jersey provides extensive resources for investigating and prosecuting defalcations, as well as the excellent Random Audit Program, there also should be a greater focus on prevention of misappropriation, commingling and other issues relating to the handling of client funds through robust alternatives to discipline programming.

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

The State of New Jersey has an excellent fee arbitration program. The State Bar also has a lawyers' assistance program to assist lawyers suffering from disabilities and addictions. The team believes that the NJSBA, the DOC, and the OAE can work together to establish other Alternatives to Discipline programs.

Participation in the program is not intended as an alternative to discipline in cases of serious misconduct or in cases that factually present little hope that participation will achieve program goals. In addition, the program should only be considered in cases where, assuming all the allegations against the lawyer are true, the presumptive sanctions would be less than disbarment, suspension or probation. The existence of one or more aggravating factors does

¹¹² ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.11(G).

not necessarily preclude participation in the program. For example, a pattern of lesser misconduct may be a strong indication that office management is the real problem and that this program is the best way to address that underlying issue.

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

In order to encourage voluntary participation in lawyer assistance programs, such programs should provide confidentiality. Rule 8.3(c) of the ABA *Model Rules of Professional Conduct* states: "This Rule does not require disclosure of information . . . gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege." However, participation in the alternatives to discipline program differs from voluntary participation in a lawyer assistance program. Any alternatives to discipline rule should recognize this difference and require the recovery monitor to make necessary disclosures in order to fulfill his or her duties under the contract. New Jersey Rule 1:20-3(i)(2) defines minor misconduct and provides for Agreements in Lieu of Discipline. The team encourages a greater use of this Rule and development of a broader range of programs.

VI. SANCTIONS

Recommendation 8: Discipline on Consent Should Be Encouraged at All Stages of the Proceedings

Commentary

Discipline on consent, implemented expeditiously, benefits the public and the parties. The public is protected and the respondent avoids the uncertainty and cost that accompanies going to a public hearing. The system is not required to expend valuable time and resources on formal prosecutions and can devote energies to other contested matters. Also, in addition to saving time and resources for the system and respondent, an advantage of discipline on consent, when properly used, is that it provides some certainty in exchange for a respondent lawyer's admission to misconduct.

The New Jersey Rules allow for the agreed resolution of any disciplinary matter.¹¹³ If a petition for discipline on consent is entered into after the filing of formal charges, the respondent is required to admit or deny the allegations contained in the charging document.¹¹⁴ If an agreed disposition is proposed prior to the filing of formal charges, the agreement must set forth the specific factual allegations that the respondent admits and the applicable Rule violations at issue.¹¹⁵

Currently, for matters other than disbarments on consent, the Rule provides that at any time during the investigation of a disciplinary matter, or within 60 days after the time for the filing of an answer to a complaint, the respondent may agree to discipline by consent in exchange for a specific recommendation for discipline.¹¹⁶

The team heard from many interviewees, both ethics counsel and respondents, that the "sixty-day rule" is overly rigid and impedes the process of seeking and obtaining discipline on consent. For example, often respondents and respondent's counsel are unaware of the rule or fail to understand the importance of this mechanism until it is too late for them to make use of it. Further, respondents frequently are unable to grasp the ramifications of their situation within that timeframe. This has the detrimental effect of forcing cases through the system that would otherwise be more easily resolved early on. When such cases must go forward to the decision-maker, there is a great waste of both time and money for both the respondents and the disciplinary system.

¹¹³ N.J. CT. RULES R. 1:20-10.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ N.J. CT. RULES R. 1:20-10 (b)(1).

Imposing a 60-day rule detracts from the usefulness of the consent process. Instead, respondents should be allowed to consent to discipline after a complaint is filed and the Court should leave open the possibility of settlement at all stages. Frequently, respondents are unable to grasp the ramifications of their rejection of discipline on consent within this period. The Court should adopt a Rule allowing for stipulation to discipline by consent at any point of the process, thus leaving open the possibility that matters can be resolved expeditiously without draining additional resources from the system. In addition, the Court should consider creating a mechanism whereby both suspensions on consent and disbarments on consent proceed directly to the New Jersey Supreme Court for disposition.

Recommendation 9: The Court Should Adopt Probation as a Sanction

Commentary

Currently in New Jersey there are six primary forms of final disciplinary sanctions: disbarment, license revocation, suspension (for a definite or indefinite term), censure, reprimand, and admonition. The New Jersey Supreme Court Rules do not provide for the imposition of probation (with a stayed suspension or by itself) as a separate disciplinary sanction, though conditions can be imposed in conjunction with other sanctions. While continued discretion to impose additional conditions is desirable, the Court should consider adopting a probation rule. This rule should set forth specific requirements for the imposition, monitoring and revocation of probation.¹¹⁷

Probation as a separate public disciplinary sanction is recommended for several reasons. Probation is useful for conduct other than minor misconduct. Probation can be imposed after the filing of formal charges.¹¹⁸ Cases should only be diverted to alternatives to discipline programs prior to the filing of formal charges. Diversion or alternatives to discipline programs should only be used for matters involving lesser misconduct that do not require further involvement by the discipline system. Matters for which a respondent is placed on probation remain in the disciplinary system.

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

A detailed probation rule should provide necessary guidance to the disciplinary agency and lawyers with respect to the types of cases for which probation is appropriate. The team recommends that a separate probation rule adopted by the Court set forth in general terms the requirements for imposition of probation. These include: (1) the respondent can perform legal services without causing the courts or legal profession to fall into disrepute; (2) the respondent 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.

¹¹⁷ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.10(A)(3).

¹¹⁸ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.11(C).

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

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

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

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

probation poses.

The OAE should develop specific procedures for screening and selecting probation monitors. A policies and procedures manual for appointing, supervising and removing the monitors, and guidelines for the nature and contents of monitor reports to the OAE should also be created.

Adequate and regular training of probation monitors is vital to the successful use of probation. The OAE should develop training materials and curricula for probation monitors. The Director of the OAE should consult other jurisdictions that have training programs for probation monitors in place. All probation monitors should be required to attend training at least bi-annually.

Recommendation 10: The Court Should Eliminate Indeterminate Suspensions

Commentary

Currently, there are two types of suspensions: a New Jersey lawyer may have his/her license suspended for a definite or indeterminate period of time. Term suspensions prevent a lawyer from practicing for a specific term between three months to three years.¹¹⁹ Indeterminate suspensions are generally imposed for a minimum of five years.¹²⁰

It was not clear why a lawyer would be suspended for an indeterminate period of time instead of being disbarred. The Discipline Committee recognizes that the availability of indeterminate suspensions can be perceived as a deterrent to lawyers and protective of the public. However, the Committee suggests that these goals can be met without the imposition of indeterminate suspensions and recommends that the Court consider their elimination.

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

The Court should specify the minimum period of time that must elapse before the lawyer can petition for reinstatement. The duration of a suspension should reflect the nature and seriousness of the lawyer's misconduct. The length of time of a suspension should be fixed and based upon consideration of the nature and extent of the misconduct and any mitigating or aggravating factors.¹²¹ The MRLDE suggest that the term of a suspension not exceed three years.¹²² Some jurisdictions impose suspensions for fixed periods of five or more years. The Discipline Committee believes that if a lawyer has committed misconduct so severe that even a three-year suspension will not protect the public, that lawyer should be disbarred.

¹¹⁹ N.J. CT. RULES R. 1:20-15A(a)(2).

¹²⁰ N.J. CT. RULES R. 1:20-15A(a)(3).

¹²¹ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.10.

¹²² *Id.*

Recommendation 11: Disciplinary Decision Makers Should Consider Using the ABA Standards for Imposing Lawyer Sanctions

Commentary

The *ABA Standards for Imposing Lawyer Sanctions* (Sanctions Standards) provide a framework for ensuring consistency in the recommendation and imposition of lawyer disciplinary sanctions. That framework requires consideration of the rule violated, the lawyer's mental state, the extent of the injury, and aggravating and mitigating circumstances. The Sanctions Standards are designed to promote thorough, rational consideration of all factors relevant to imposing a sanction in an individual case. They attempt to ensure that such factors are given appropriate weight in light of the stated goals of lawyer discipline, and that only relevant aggravating and mitigating circumstances are considered at the appropriate time.

The New Jersey Supreme Court does not cite the Sanctions Standards in its disciplinary opinions. The Sanctions Standards can be useful in providing greater consistency in sanctions as many other jurisdictions have found. Great consistency provides an increased level of fairness and predictability in the system. It puts lawyers on notice both as to what conduct will not be tolerated and what sanctions for misconduct will consistently result. Additionally, the Sanctions Standards help to create uniformity of sanctions between states, thus enhancing efforts to impose fair and efficient reciprocal discipline. Use of the Sanctions Standards helps enhance reciprocal enforcement because of use of common language and analysis of imposition of sanctions.

In order to enhance the sanction recommendations ultimately provided to the Court, the Discipline Committee recommends that the Court amend its Rules to require citation to the Sanctions Standards in the reports and recommendations of the hearing panel reports, DRB decisions, and in post-trial submissions by the parties, in addition to other authority.¹²³ In making this recommendation, the Committee is not being critical of the reports and recommendations submitted by the system volunteers. Rather, it is the goal of the Committee in making this recommendation to further assist the system adjudicators in providing the most complete analysis possible for the Court's ultimate consideration.

In addition to using the Sanctions Standards, making disciplinary information available electronically to the public will help hearing panels ensure consistency in sanction recommendations. A readily searchable database should be developed and updated regularly. Part of this site can also be developed to allow password protected access for hearing panel members to electronically exchange and edit draft reports and recommendations.¹²⁴ This can help expedite the report drafting process and save resources. The proposed schedule for DEC hearing panels can also be made available on a password protected part of the site, so that

¹²³ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.10(C).

¹²⁴ See, e.g., <http://www.ladb.org/index.asp>.

volunteer adjudicators may readily confirm schedules or propose changes in hearing dates, if necessary. Disciplinary Counsel should not have access to this part of the website, so as to maintain appropriate separation between the prosecutor and adjudicators. The final schedule of public hearings should also be included on the site. Proposals by the OAE to amend the Rules can be made available for public comment on this site, as well as the Court's website.

VII. PUBLIC OUTREACH AND ACCESSIBILITY

Recommendation 12: The Office of Attorney Ethics Should Be More Accessible to the Public and Should Increase Public Outreach Efforts

Commentary

The Discipline Committee found a great need for increased outreach to the public and better public accessibility to the disciplinary system. The purpose of lawyer discipline is to protect the public and the administration of justice. To accomplish these goals, the lawyer disciplinary agency must be easy to find and accessible physically and electronically. Interviewees advised the consultation team that finding out about the existence of the OAE and its functions is difficult at best. Additionally, the OAE is housed in an office complex outside of the Trenton downtown area and is difficult to find, even given the directions on the website, due to very poor signage. It is not easily accessible via public transportation.

At present, as set forth above, the volunteer lawyers who serve as DEC Committee Secretaries receive the bulk of public inquiries and are tasked with explaining to complainants how the lawyer discipline system operates. Callers with grievances are advised to write out a complaint form and then file it with the Secretary of the DEC for the district where the lawyer maintains his or her law office. Callers may or may not have face to face contact with an individual to discuss their complaint, depending on the practice of the particular Secretary who answers their initial call.

If members of the public wish to go directly to the offices of the OAE, they must overcome barriers to their welcome there as well. For example, upon entering the OAE offices, visitors find there is no public reception area where a receptionist would greet members of the public and lawyers seeking information. The OAE must be receptive to complainants who come to the office wanting to file a complaint or to talk to someone.¹²⁵ The OAE should have a receptionist dedicated to the function of greeting complainants and lawyers, answering telephones and referring callers and visitors to the appropriate legal staff. Staff should be available to assist complainants on-site in the filing of complaints when they are unable to write them. Staff should also be trained to offer bilingual services in filling out a grievance and be able to make accommodations for complainants with hearing or vision impairment or other disabilities.

The OAE should have easily understandable pamphlets readily available throughout the state. The existing pamphlets are densely written and provide what may be an overwhelming amount of detail to a member of the public seeking to file a grievance. The pamphlets need to be rewritten so as to make them more consumer-friendly. They should also be bilingual.

¹²⁵ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.1 and R.4.

Currently, pamphlets are provided at courthouses but they should be made available in public libraries and through consumer and civic organizations also.

In addition to written materials in pamphlets and on the website, the OAE should increase public outreach about its efforts. Lawyers from the OAE should seek invitations to speak about its functions to consumer groups in the state and should highlight how the OAE is meeting its goal of serving the public and profession. The OAE should increase efforts to make information regarding dispositions and rationales more readily available to the public. The website is good in this regard, but the search capacity is cumbersome. For example, a user must first download the correct pdf file and then use the Find function. In addition, the OAE should consider adding a MapQuest button to the website to provide visitors directions to the OAE. The Illinois Attorney Registration and Disciplinary Commission website is a possible model for the Court to consider.

It is important that both the OAE staff and members of the DRB, as well as the DOC, personally engage in public education efforts. While there is some effort made in this regard already, the system's appointed adjudicators and overseers should be more visible. In particular, they should seek invitations to speak at meetings of consumer organizations and citizens' groups.

Recommendation 13: The Court Should Increase Education of the Bar and the Public Regarding Lawyer Discipline

Commentary

The Court can better emphasize to both the public and the bar its leadership role in the disciplinary system through readily accessible information regarding disciplinary proceedings and their results. By doing so, the Court provides necessary guidance to lawyers regarding lawyer conduct and expected sanctions.

All New Jersey judges, lawyers, and the public should be able to view information about the lawyer discipline system online. Currently, basic information about the system is available on the web site for the OAE, including the OAE Annual Reports. The team recommends enhancing the website to create a consumer friendly vehicle for providing information to the bench and bar as well as members of the public.

The Court and the agency have useful websites, however, the OAE website should include an easily searchable data base consisting of the Rules of Professional Conduct, Rules for Lawyer Disciplinary Enforcement, other relevant rules, court opinions and orders, hearing panel reports and recommendations affirmed by the Court, and summaries of admonitions and letters of caution. The team heard from several interviewees that although much of this material is now available on the Rutgers's University website, the existence of this resource is not widely known. Further, those who do know of that website do not find it easy to use.

In addition to an electronic presence, the Court should continue other outreach efforts for New Jersey lawyers. Disciplinary leaders at all levels of the system should be encouraged to engage personally and continuously in efforts to educate the bar through various other means including addressing lawyers' groups and publishing articles about the lawyer disciplinary system in legal publications.

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 determination of all those involved to make the New Jersey lawyer disciplinary system more effective and efficient is notable.

The Standing Committee on Professional Discipline Committee hopes that the recommendations contained in this Report will assist the Court in its study of the system and will expedite its implementation of desired changes. As part of the discipline system consultation program, the ABA Standing Committee on Professional Discipline is available to provide further assistance to the Court if so requested.

APPENDIX A

**ABA STANDING COMMITTEE
ON PROFESSIONAL DISCIPLINE
NEW JERSEY LAWYER DISCIPLINE SYSTEM CONSULTATION
TEAM MEMBERS' BIOGRAPHIES**

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

JEROME E. LARKIN has served as Administrator of the Illinois Attorney Registration & Disciplinary Commission since 2007 and as Deputy Administrator since 1988. Prior Commission experience consisted of progression through staff counsel positions, culminating in appointment as Chief Counsel in 1984 and Assistant Administrator in 1986. He has investigated, litigated and appealed numerous lawyer discipline cases. He served as President of the National Organization of Bar Counsel. He received his J.D. from Loyola Law School of Chicago and served as a member of the Board of Governors of the Loyola Law Alumni Association.

MARY M. DEVLIN was Deputy Director and Regulation Counsel of the American Bar Association's Center for Professional Responsibility, where she directed the Association's efforts in improving lawyer and judicial disciplinary enforcement for twenty-two years. Previously she was with the American Medical Association for almost eighteen years. She has been involved in professional ethics and discipline for the past twenty-eight years and has written over 50 articles, including "An Overview of the Development of Lawyer Disciplinary Procedures in the U.S." 7 Georgetown J. Legal Ethics 911 (1994). Her J.D. from I.I.T. Chicago-Kent College of Law and two master's degrees were with honors, as was her LL.M. from DePaul University College of Law. She is a Life Fellow of the American Bar Foundation.

ARNOLD R. ROSENFELD is Of Counsel in the Boston Office of the international law firm of K & L Gates LLP. Mr. Rosenfeld presently focuses his law practice on complex civil and criminal litigation in state and federal courts. He frequently represents lawyers in bar discipline matters and advises lawyers and law firms on legal ethical issues.

Prior to joining K & L Gates, Mr. Rosenfeld served as the Chief Bar (Disciplinary) Counsel of the Board of Bar Overseers of the Supreme Judicial Court in Massachusetts for eight years and as the first Chief Counsel of the Massachusetts Committee on Public Counsel Services, the state public defender organization. He has been lead counsel in over fifty jury trials and written briefs and argued over thirty appellate cases in the state and federal courts.

Mr. Rosenfeld is a Visiting Professor of Law at Boston University Law School. He is the author of numerous law reviews. He presently serves as a member of the Strategic Planning Committee of the ABA Center for Professional Responsibility, and was a member of the ABA Standing Committee on Professional Discipline for three years. Mr. Rosenfeld also served as a member of the Massachusetts Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct and was appointed by the Supreme Judicial Court to the Massachusetts Committee for Public Counsel Services.

Mr. Rosenfeld is an elected member of the American Law Institute. He has been selected by his peers for inclusion in the Best Lawyers in America since 2006. In 1997, Mr. Rosenfeld was named the Wasserstein Public Service Fellow in Residence at Harvard Law School and, in 2001, he was the recipient of the St. Thomas More Award from Boston College Law School. In 2005, he was selected as an Inaugural Fellow of the National

Institute for Teaching Ethics and Professionalism and, in 2008, he was honored with the Thurgood Marshall Award for Outstanding Service by the Committee for Public Counsel Services. He is a cum laude graduate of Bowdoin College and received his J.D. from Boston College Law School.

RUTH A. WOODRUFF is Senior Counsel in the American Bar Association Center for Professional Responsibility where she serves as counsel to the ABA Standing Committee on Professional Discipline and to the Alternative Litigation Finance Subcommittee of the Ethics 20/20 Commission. She earned her J.D. from Loyola University Chicago School of Law and clerked for Judge Frank J. McGarr in the United States District Court for the Northern District of Illinois. She has worked in the field of Professional Responsibility over the last twenty-five years, including managing the National Lawyer Regulatory Data Bank, serving as an editor of the *ABA/BNA Lawyers' Manual on Professional Responsibility*, teaching Professional Responsibility courses as an adjunct professor at Loyola School of Law and at Roosevelt University's Paralegal Studies Program, editing various legal textbooks, and consulting on a wide range of projects for the ABA Center for Professional Responsibility.