

Comments from the Commission on Judicial Conduct *

Report submitted by the Discipline System Consultation Team of the ABA Standing Committee on Professional Discipline on the South Carolina Judicial Regulation System

* These recommendations are being made by a sub-committee of the Commission on Judicial Conduct. These recommendations were presented to the full Commission. However, the full Commission has not officially approved these recommendations. The Chairman of the Commission has encouraged Commission members to submit their individual comments to the Court in addition to this report.

The Commission agrees with the following recommendations made by the ABA Committee, in whole or in part:

Recommendation 2

Members of the Judicial Conduct Commission Should receive More Intensive and Mandatory Formal Training

The Commission agrees that improved training for commission members should be made a priority of the Commission, but the Commission does not believe an oversight committee is necessary to accomplish this objective. The Supreme Court appointed the first Commission Counsel to the Commission on Judicial Conduct in July 2008. Commission Counsel's responsibilities include the implementation of training materials and programs for the commission members. Commission Counsel, in conjunction with Disciplinary Counsel, intends to have a yearly mandatory training program for all commission members. Additionally, Commission Counsel plans to develop a training video and comprehensive written materials for new commission members. The Commission agrees with the ABA Committee's recommendation that Commission Counsel and commission members participate more actively in national professional responsibility organizations and programs, if funding is available.

Recommendation 6

The Court Should Amend the Rules for Judicial Disciplinary Enforcement to Eliminate Investigative Panel Approval to Conduct Full Investigations, and eliminate the Use of Attorneys to Assist

The Commission agrees with the ABA Committee that Disciplinary Counsel should have the authority to dismiss cases in full investigation without the approval of the Commission. The Commission also agrees that Disciplinary

Counsel should be able to conduct full investigations without seeking the permission of an investigative panel. However, the Commission does not agree that Disciplinary Counsel should have complete discretion to conduct full investigations and issue subpoenas with no Commission oversight. The Commission is not concerned that Disciplinary Counsel would abuse this authority, but the Commission believes that it could cause public concern about the fairness of the system, given that Disciplinary Counsel has subpoena power during a full investigation not shared by the judge under investigation. The Commission recommends that Disciplinary Counsel be required to present requests for full investigation and/or subpoenas to either the Chair or Vice-Chair of the Commission on an as-needed basis. This would alleviate delays within the current system because Disciplinary Counsel does not have to wait until an investigative panel meets to make this request, but it does require Disciplinary Counsel to prove to the Chair or Vice-chair of the Commission that full investigation and/or subpoena authority is necessary. This procedure also eliminates the possibility of conflicts between hearing panels and investigative panels since only the Chair or Vice-Chair is involved in the initial review of the cases.

Although Attorneys to Assist Disciplinary Counsel are rarely used in judicial cases, they are an invaluable resource for the timely investigation and completion of lawyer grievance cases. Attorneys to Assist are also a valuable resource for Disciplinary Counsel if Disciplinary Counsel is unfamiliar with an area of law and needs to consult with an expert in a particular practice area. The Commission does not recommend a rule that eliminates the use of Attorneys to Assist in judicial cases altogether. It would be more appropriate for Disciplinary Counsel to have the discretion to assign an Attorney to Assist in a judicial matter if the need arises.

Recommendation 3

The Judicial Conduct Commission Should Increase Outreach to the Public and the Judiciary

The Commission agrees with the ABA Committee that more public outreach is necessary. The Commission recognizes that public confidence in the judicial disciplinary system is vital, and that the Commission should be as accessible as possible to the public. The development of a stand-alone, consumer-friendly website for the disciplinary system would improve public knowledge of the existence and operation of the disciplinary system and would help with the dissemination of information to the commission members and to the public. The Commission agrees that a password-protected access system would be a valuable and efficient tool for commission members and Commission Counsel to exchange information, post schedules, and edit reports. Disciplinary Counsel has advised the Commission that they are in the process of developing a library of judicial and lawyer precedent for purposes of education and consistency.

Recommendation 4:
**The Court Should Increase the Public Representation on the Judicial
Conduct Commission ***

The Commission agrees that increasing public representation on the Commission will enhance public trust and confidence in the fairness of the disciplinary process. The Commission recommends that laymembers comprise one-third of the Commission.

The Commission also agrees that the laymembers of the Commission should be eligible to serve on hearing panels, rather than limiting laymember participation only to service on investigative panels. The Commission, however, does not recommend that a laymember's presence on a hearing panel be required for a hearing to go forward. In the event that a laymember is selected to serve on a hearing panel but cannot attend, the Commission does not recommend that the hearing be postponed if a quorum is otherwise present. Additionally, laymembers should not be eligible to serve as hearing panel chairs. The Commission recommends that statistics be maintained regarding laymember participation on investigative panels and hearing panels, and that this statistical information be published in the annual report.

The Commission does not recommend that the size of investigative panels be reduced from 7 members to 3 members. Disciplinary Counsel presents a number of cases to the investigative panels for review, and the investigative panel members must review all documentation related to those cases. Seven member investigative panels allows for a reasonable workload. Additionally, the perspective gained from having a greater number of panel members present for the discussion of the cases is beneficial for the decision-making process. The Commission is satisfied with the current size of the hearing panels and does not recommend that the number of hearing panel members be increased.

The Commission is satisfied with the current selection process for laymembers. The Commission does not recommend that the selection process be made public as suggested by the ABA Committee. The current selection process has resulted in the selection of qualified laymembers who are dedicated to the improvement of the disciplinary process.

*** Some commission members have recommended that the Court also consider increasing attorney representation on the Commission. Rule 3(c), RJDE, provides that 4 members shall be active members of the South Carolina Bar who have never held judicial office.**

The Commission disagrees with the following recommendations made by the ABA Committee:

Recommendation 1

The Court should Oversee Creation of a Formal Annual Budget

The Commission does not agree that the creation of an oversight committee is necessary for resource planning. It is the Commission's understanding that the current budget process includes preparation of a proposed budget for all divisions of the Judicial Department by the Judicial Department's Director of Finance and Personnel. Directors within the Judicial Department, including Disciplinary Counsel, provide input to the Finance and Personnel Director before the budget is sent to the Supreme Court for approval. It does not seem necessary to separate the Commission and Disciplinary Counsel from the budgetary process set in place for the entire judicial department. The Finance and Personnel Director is certainly qualified to perform this function with input from the Judicial Department Directors. Disciplinary Counsel oversees the budgetary process for both the Office of Disciplinary Counsel and the Commission, and the Commission is satisfied that Disciplinary Counsel can adequately and fairly assess the budgetary needs for both. If the Chair of the Commission determines that there is a need for additional resources, the Chair can provide this information to Disciplinary Counsel for consideration during the budgetary process. The Commission agrees with the ABA Committee that the budgetary process should assess current needs, account for future growth, and assure the retention of qualified professional staff. As stated above, the Commission is satisfied that Disciplinary Counsel and the Finance and Personnel Director are qualified to achieve these goals.

The Commission agrees with the ABA Committee's recommendation that the Commission should be more actively involved with administrative matters. In July 2008, the Supreme Court appointed the first Commission Counsel to the Commission on Judicial Conduct. Since that time, Commission Counsel and the Chairman of the Commission have worked diligently to implement policies and procedures relating to administrative oversight. General administrative oversight can be more efficient when addressed by the Chairman of the Commission and Commission Counsel as needed, rather than at a meeting of an administrative oversight committee.

Recommendation 5

The Court Should Adopt a Rule Creating a Separate Procedure for Handling Complaints Against Its Own Members

The Commission believes that further study on this issue may be necessary. Certainly, the Commission agrees that a member of the Supreme Court should

be recused from any grievance proceedings involving that particular justice. The Commission is not convinced that the appointment of a “special supreme court” is necessary in discipline proceedings involving a member of the Supreme Court.

The Commission appreciates the concern underlying this recommendation. However, it believes that this recommendation is not the appropriate or best solution to address that concern. First, the Commission believes that the risk of improper influence or bias is least likely at the final, most public stage of any disciplinary hearing involving a Justice of the Supreme Court. At this stage, the actions of the Court are open to full public scrutiny, and the Commission believes that the public will serve as an adequate check on any possible abuse of process in a disciplinary matter involving a member of the Supreme Court.

Second, in a state with a relatively small judiciary, a “special supreme court” consisting of judges from inferior state courts who are subject to Supreme Court administration would be no less vulnerable to outside pressure or to the perception of such pressure than the members of the Supreme Court. Thus, while perhaps superficially addressing the appearance issue, a “special court” would not likely provide any actual additional protection of the public’s interest in having an impartial determination. Finally, having a rule that requires recusal of the full Court would not be without cost. Its existence might be perceived as recognition that the Supreme Court is, in fact, unable to act with impartiality in certain matters. Such an institutionalized perception of the inability of the Court to act impartially in all matters may undercut the public’s overall confidence, as well, in the integrity of our Supreme Court in other matters that come before it.

Of more concern to the Commission is the handling of a grievance against a member of the Supreme Court at its earliest stages, when a matter could be dismissed in an action that is not subject to full public scrutiny. The Commission recommends that a laymember’s presence be required on any investigative panel or hearing panel in disciplinary matters involving a member of the Supreme Court. The Commission also recommends that the Court consider implementing a rule that assigns the prosecution of such cases to another agency, such as the Office of the Attorney General (or a special prosecutor). The Office of Disciplinary Counsel, which currently is charged with the prosecution of grievances against members of the Supreme Court, is an arm of the Supreme Court, and Disciplinary Counsel is appointed and serves at the pleasure of the Supreme Court. Public perception of the impartiality of the process would be enhanced by the handling of these grievances through an office independent of direct Court oversight.

Recommendation 7

The Court Should Adopt Procedures Relating to the Handling of Funds by Magistrates

The Commission disagrees with a rule requiring random audits of magistrate court accounts as this would be burdensome and costly. The Commission is satisfied that the financial accounting order issued in March 2007 and the implementation of the CMS system provides adequate safeguards. Additionally, lack of resources at this time restricts the implementation of such a program.