

Disciplinary Counsel's comments regarding the Recommendations of the South Carolina Report on the Judicial Regulation System from the Discipline System Consultation Team of the ABA Standing Committee on Professional Discipline

Recommendation 1: The Court should Oversee Creation of a Formal Annual Budget

Comment: The Committee recommends the formation of a subcommittee of the Judicial Discipline Commission to help determine adequate financing for the discipline system. This subcommittee would develop an annual documented budget process and submit its proposed budget to the Court. ODC agrees with the Committee that adequate funding needs to be secured to ensure that the discipline process is supported by the resources necessary to meet the objectives of the discipline system. As for the proposed budgetary function of an oversight committee, ODCI is satisfied with the current budget process which includes preparation of a proposed budget by the Director of the Judicial Department Office of Finance and Personnel for review by the division directors (one of whom is Disciplinary Counsel) and for approval by the Court. Currently, the budgets for all divisions of the Judicial Department, including the Court itself, are prepared in this way. ODC sees no reason to burden the Disciplinary Counsel or an oversight committee with the responsibility of budget proposal preparation when it employs an independent and highly qualified individual to do so for all its divisions. ODC agrees with the Committee that a funding plan that assesses current needs, accounts for future growth, and assures retention of qualified professional staff is important. As with all the Department divisions, the Office of Disciplinary Counsel has been working closely over the past year with the Office of Finance and Personnel to develop career paths for the ODC attorneys and staff. ODC recognizes that the Court also takes into serious consideration the developing needs of ODC when additional funds are made available.

Recommendation 2: Members of the Judicial Conduct Commission Should receive More Intensive and Mandatory Formal Training.

Comment: ODC agrees with the Committee's assessment of the value of professional training and networking. In the past two years, representatives of ODC have attended conferences of the National Organization of Bar Counsel and the Association of Judicial Disciplinary Counsel. ODC will also be represented at upcoming meetings of the National College on Judicial Conduct and Ethics and the National Conference on Professional Responsibility. Three attorneys have completed a week-long course for disciplinary prosecutors at the National Institute for Trial Advocacy. All attorney members of the staff participate in the NOBC list serve. The new investigators will be participating in the National Organization of Bar Investigators. Disciplinary Counsel

encourages her professional staff to take advantage of national training and networking opportunities as funds and time permit. ODC also encourages the chair, vice chair, and all members of the Commission to join national associations relevant to their roles in the process.

The new Commission Counsel has made training of Commission members a priority. This year, she worked with the Commission Chairs and Disciplinary Counsel to plan and implement a yearly training program. Disciplinary Counsel incorporated training for the Attorneys to Assist in conjunction with this program. We plan to develop a training video and comprehensive written materials for both new Commission members and new ATAs. We also agree with the Committee's recommendation that Commission Counsel and Commission members participate more actively in national professional responsibility organizations and programs as funding allows.

Recommendation 3: The Judicial Conduct Commission Should Increase Outreach to the Public and the Judiciary

Comment: ODC recognizes that public confidence in the judicial disciplinary system is vital and that the public needs to have access to the existence and operation of the system. The Court has asked the Disciplinary Counsel and Commission Counsel to begin working with the Department's Information Technology Division to develop a stand-alone website for the discipline system to improve public dissemination of information. Additionally, the Court has asked Commission Counsel to look into the implementation of a password-protected access system for Commission members to exchange and edit reports and recommendations. ODC agrees with these recommendations.

Additionally, ODC has plans to conduct research for 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.

Comment: ODC agrees with the Committee that public participation in the judicial discipline process enhances the effectiveness of the Commission on Judicial Conduct and has included public members on the Commission since its inception. ODC believes that the lay members of the Commission add unique and useful perspective and insight to the deliberations of the Investigative Panels and agrees that broadening the participation of the public in the disciplinary process would be beneficial. Disciplinary Counsel is willing to prepare a proposed amendment to RJDE Rule 4 that would add six lay members for a total of eight to insure that public members comprise 1/3 of the Commission. ODC agrees with the

Committee's observation and recommendation that the appointments of all Commission members continue to reflect the diversity of the state's population. ODC agrees with the recommendation to allow lay members to serve on Hearing Panels; however, attendance of the lay member at the hearing should not be a requirement for a quorum. Our experience has been that the schedules and availability of the lay members are not as flexible as the judicial members and attempting to schedule around such a requirement could cause unreasonable delays in the hearing process. Additionally, lay members should not serve as Panel Chair. ODC is satisfied with the current method for selecting lay members.

Recommendation 5: The Court Should Adopt a Rule Creating a Separate Procedure for Handling Complaints Against Its Own Members.

Comment: ODC agrees with the recommendation of the Commission as follows:

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. 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 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.

Comment: ODC agrees with the Committee that Disciplinary Counsel should have the discretion to conduct full investigations and dismiss those cases without Investigative Panel approval. The preliminary/full investigation procedure creates unnecessary procedural delays. This change would include a procedure allowing Disciplinary Counsel to issue a subpoena during preliminary investigation without authority of the Investigative Panel. Disciplinary Counsel is willing to draft a proposed rule that would streamline the investigative process by combining the preliminary and full investigation stages. This rule would provide both a copy of the complaint and a written notice of the issues being investigated at the same time. ODC also agrees with the recommendation of aspirational time standards for completion of investigations. Through its recent adoption of an operations and procedures manual, ODC has already implemented some time standards and plans to incorporate more as the manual is developed.

Although not included in the Committee's recommendations, ODC would suggest a rule change that would grant authority for Disciplinary Counsel to issue letters of caution with no finding of misconduct. Procedurally, the issuance of a letter of caution can take up to one hundred and twenty days. The respondent judge has fifteen days to respond to the initial complaint. Even if no further preliminary investigation is required, the investigative panel meets only once a quarter. If the investigative panel approves the issuance of a letter of caution without full investigation, the letter is prepared for signature after the meeting and then submitted by mail to the Chair for signature. If Disciplinary Counsel had the authority to issue letters of caution where there is no finding of misconduct and no disputed facts, cases in which that disposition is appropriate could be resolved without the necessity of waiting for the next Investigative Panel meeting. In addition, this would allow Investigative Panel members to

focus on more serious cases. If a responding judge believes that the letter of caution was not an appropriate resolution, the rule could include an opportunity for the judge to submit a written request for reconsideration by the Investigative Panel

The Committee recommends eliminating the use of Attorneys to Assist (ATAs) in judicial disciplinary matters. Though rarely used in judicial cases, the Attorneys to Assist Disciplinary Counsel have been an invaluable asset in completing grievance investigations. ATAs provide complainants and respondents the opportunity to meet face-to-face with a neutral party who is knowledgeable in the law and familiar with the local legal environment. With the current caseload, the ODC professional staff does not currently have the resources to perform this function. However, Disciplinary Counsel is aware of the delays the ATA assignments sometimes cause. Further study will be done to determine the most efficient and effective ways to conduct field investigations.

Recommendation 7: The Court Should Adopt Procedures Relating to the Handling of Funds by Magistrates.

Comments: The Committee notes the proactive approach the Court has taken to the handling of monies by the magistrates and recommends that the Court enhance the safeguards by instituting a random audit program as a deterrent and educational incentive. Additionally, the Committee recommends the Court consider steps to limit the circumstances in which the magistrates may accept cash. ODC agrees that the Committee's suggestions are valuable but resources available to the judicial discipline system at this time would restrict the implementation of such a program.