

Comments from the Commission on Lawyer Conduct *

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

* These recommendations are being made by a sub-committee of the Commission on Lawyer 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 1

**Increase Public Representation on the Lawyer Conduct Commission and
Streamline the Functions of the Investigative Panels**

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 the number of laymembers on the Commission be increased from 2 members to 8 members. This would increase public representation on the Commission from 5% to 20%.

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 does not recommend that the size of investigative panels be reduced from 7 members to 3 members. Disciplinary Counsel presents a number of cases every month 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 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.

Recommendation 3

Amend the Rules to Provide Increased Discretion to Disciplinary Counsel

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 lawyer 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.

Recommendation 4

Complainants Should Be Provided the Respondent Lawyer's Response to Their Grievances and Should Have a Limited Appeal of Dismissals By Disciplinary Counsel

The Commission agrees with the ABA Committee's recommendation that a complainant should be allowed to appeal a dismissal by Disciplinary Counsel to an investigative panel of the Commission. The Commission agrees that this provides a useful check and balance for the system. The Commission also agrees that Disciplinary Counsel should advise complainants of their right to appeal in the dismissal letters, and that the dismissal letters should provide a concise, written statement of the reasons for the dismissal.

The Commission does not, however, agree with the recommendation that the complainant be provided with a copy of the responding lawyer's response to the complaint. In some cases, it may be appropriate to release a lawyer's response to the complainant. However, a grievance can be initiated by an opposing party or opposing counsel. In those cases, it would be inappropriate to release the lawyer's response to the complainant because it would involve the possible release of confidential information about the case to the opposing side. Thus, Disciplinary Counsel would be faced with a case-by-case determination on whether a response should be released or not. It is the Commission's position that such a requirement would be too burdensome on Disciplinary Counsel.

Additionally, if a complainant were allowed to "rebut" the responding lawyer's statements, it could significantly delay the progress of the investigation. Disciplinary Counsel is staffed with qualified attorneys who are fully capable of reviewing the complaint and the response, and that attorney can request additional information from the complainant or the responding lawyer if there are any conflicts to be resolved.

Recommendation 12

Eliminate Indefinite Suspensions and Provide for Automatic Reinstatement for Suspensions of Less Than Nine Months

The Commission is not opposed to the elimination of indefinite suspensions. The Commission recommends that a rule be adopted which provides for the imposition of a "definite suspension for that period of time deemed appropriate by the Court." (rather than limiting the term to 3 years as recommended by the ABA Committee) The Commission recommends that the Court require the lawyer to re-take the bar exam if a definite suspension of 3 or more years is imposed. The Commission also recommends that if the conduct is serious enough that disbarment is warranted, that the disbarment should be permanent without an opportunity to petition for reinstatement.

The Commission does not believe a rule change is necessary in regard to suspensions of less than nine months. Such reinstatements are automatic under the current rule as long as the lawyer seeking reinstatement submits the required paperwork. The Commission is unaware of any occasion where the Court rejected the petition for reinstatement in one of these cases.

Recommendation 13

Adopt Probation as a Sanction and a Rule Setting Forth Procedures for Its Imposition and Revocation

The Commission is supportive of this recommendation. However, sufficient funding may not be available to implement a probation monitoring program. If the Court adopts this recommendation, the Commission recommends that the ability to impose probation be

available at any stage of the disciplinary proceedings, rather than only after the filing of formal charges. This would allow for the imposition of probation to remain confidential under some circumstances.

Recommendation 17

Disciplinary Counsel and Staff Should Receive Formal Training

The Commission agrees that the professional staff of both Disciplinary Counsel and the Commission should take advantage of national training and networking opportunities as resources allow.

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

Recommendation 2

Create an Oversight Committee of the Commission on Lawyer Conduct

A. Resource Planning. 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. 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.

B. System Administrative Oversight. The Commission does not believe that the creation of an oversight committee is necessary for system administrative oversight. The Commission acknowledges that there have been delays at the hearing stage of lawyer discipline proceedings, both with the delivery of transcripts and with the filing of hearing panel reports. 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 Lawyer Conduct. Since that time, Commission Counsel and the Chairman of the Commission have worked diligently to implement policies and procedures to resolve any delays and inefficiencies within the system. Commission Counsel intends to keep the Chairman of the Commission fully informed of any delays by the Commission court reporter, by investigative panels, and by hearing panels. Both Commission Counsel and the Chair of the Commission are committed to promptly addressing any delays in this regard. Commission Counsel is also available to assist hearing panels with the drafting of panel reports, which the Commission believes will resolve delays in the filing of hearing panel reports. 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. As to scheduling matters, investigative panel meetings are set for a full year at the beginning of each year. Hearing panels should not be set a year in advance as this would cause significant delays.

C. Training and Outreach. The Commission agrees that training for commission members and public outreach should be made priorities of the Commission, but the Commission does not believe an oversight committee is necessary to accomplish these objectives. As stated above, the Supreme Court appointed the first Commission Counsel to the Commission on Lawyer Conduct in July 2008. Commission Counsel's responsibilities include the implementation of training materials and programs for the 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. The Commission also agrees that more public outreach is necessary. The development of a stand-alone, consumer-friendly website for the disciplinary system would improve public knowledge of the existence and operation of disciplinary system and would help with the dissemination of information to the Commission and to the public.

Recommendation 5 **Phase Out Attorneys to Assist**

The Attorneys to Assist Disciplinary Counsel, who serve on a pro bono and voluntary basis, are an invaluable resource for the timely investigation and completion of grievance cases. The Attorneys to Assist allow complainants and responding lawyers an opportunity to meet with an attorney who is experienced in the particular area of the law at issue in the grievance and who is familiar with the local legal community. Additionally, Disciplinary Counsel does not have sufficient funding to hire the number of investigators necessary to make up for the elimination of the Attorney to Assist program. The Commission is concerned about the delays in Attorneys to Assist submitting their reports to Disciplinary Counsel. However, the Commission does not believe the elimination of Attorneys to Assist is the solution. Rather, Disciplinary Counsel should

focus their efforts on additional training for Attorneys to Assist as well as instituting policies and procedures to address any delays. The Commission believes that Disciplinary Counsel should have the authority to relieve an Attorney to Assist if they are not complying with reporting deadlines. The Commission is not concerned that the Attorneys to Assist will be biased in favor of the responding lawyer. 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.

Recommendation 6

Revise the Rule for Appointment of Attorneys to Protect Client Interests to Ensure Efficient Use of Resources

The Commission does not agree with the ABA Committee's recommendation that the South Carolina Bar monitor and train the trustees. In July 2008, Disciplinary Counsel re-assigned the responsibility of monitoring and providing advice to trustees to Commission Counsel. The Commission agrees that the monitoring of trustees is very time-consuming under the current system. The Commission recommends that the Court consider the appointment of designated trustees if funds are available. The Commission would also request that the South Carolina Bar provide a list of qualified attorneys by circuit and area of practice and make this list available to the Court for the selection of qualified trustees.

Recommendation 7

Amend the Discovery Rules to Permit More Liberalized Discovery and Provide for Pre-Hearing Conferences

The Commission does not believe that pre-hearing conferences should be mandatory. Pre-hearing conferences are not prohibited by the disciplinary rules, and the hearing panel chair has the authority to hold pre-hearing conferences in appropriate cases. The ABA Committee recommends nine issues to be addressed at pre-hearing conferences, and these issues would certainly serve as beneficial guidelines for the hearing panel chair to follow. The Commission is satisfied with the current discovery rules and does not believe wide-open discovery should be allowed. Depositions are allowed in appropriate, but limited, circumstances. Allowing unlimited depositions of witnesses would unnecessarily burden the resources of Disciplinary Counsel and could potentially be used to delay proceedings or to harass witnesses. The use of "limited" interrogatories and requests for genuineness of documents could make the process more efficient and save time at trial.

Recommendation 8

Discipline On Consent Should Be Encouraged at All Stages of the Proceedings

Agreements for discipline should certainly be encouraged. It is the Commission's understanding that a majority of discipline cases that result in sanction are concluded by agreements for discipline. The Commission does not agree with eliminating the range of sanctions from agreements. Providing a sanction range to the Supreme Court reduces the likelihood that the agreement will be rejected by the Court. Additionally, eliminating the range of sanctions from agreements will impede settlement negotiations between Disciplinary Counsel and the lawyer. A lawyer who is initially reluctant to settle a case may agree to settle if Disciplinary Counsel consents to the inclusion of a lower sanction in the agreement, in addition to the higher sanction that Disciplinary Counsel finds appropriate for the alleged misconduct. Even though Disciplinary Counsel's position is that the higher sanction is more appropriate, it gives the lawyer an opportunity to providing mitigating evidence and the possibility of receiving the lower sanction from the Court. The Commission does not agree with the ABA Committee's recommendation that agreements for discipline be presented to the hearing panel chair (after formal charges have been filed) or to the Chair or Vice-Chair of the Commission (prior to formal charges being filed) for approval. The approval of a hearing panel or an investigative panel should be required as agreements for discipline generally involve more serious misconduct and input from more than one commission member should be required.

Recommendation 9

Adopt Specific Procedures Relating to Deferred Discipline Agreements

While the Commission encourages the use of deferred discipline when minor misconduct is involved, the Commission does not believe it is necessary to adopt specific procedures and requirements relating to deferred discipline. It is the Commission's understanding that the procedures currently used by Disciplinary Counsel regarding deferred discipline already include most of the procedures recommended by the ABA Committee. Determinations of whether deferred discipline is appropriate should be made on a case by case basis. Disciplinary Counsel has reported that their office, in conjunction with the Professional Responsibility Committee at the South Carolina Bar, has developed an ethics school to be launched in 2009. Disciplinary Counsel has indicated that they expect to make a number of referrals to this program through the deferred discipline agreement process.

Recommendation 10

Records or Evidence of Dismissed Complaints Should Be Expunged After an Appropriate Period of Time

Records of dismissals should not be expunged. The Commission has seen no evidence that Disciplinary Counsel gives greater credibility to a complaint if the lawyer has a prior record of dismissals. It is the Commission's understanding that, in some cases, the record of prior dismissals can be beneficial to the lawyer. For example, if a complainant continues to file grievances against a lawyer alleging the same misconduct, Disciplinary Counsel can refer back to the prior dismissal and dismiss the new grievance without requesting a response from the lawyer. If the previous dismissal was expunged and Disciplinary Counsel was unable to determine that the same grievance had already been filed and disposed of, an additional response would be requested from the lawyer and this would result in the unnecessary re-investigation of the grievance. The Commission is not opposed to the destruction of the physical file after a certain period of time. Disciplinary Counsel reports that she is currently working with the SC Department of Archives and History to develop a retention schedule for Disciplinary Counsel and Commission records.

Recommendation 11

Amend the Rules to Provide that Disciplinary Counsel is Responsible for Handling Reinstatement/Readmission Cases

The Commission believes that to assign reinstatement and readmission cases to Disciplinary Counsel and the Commission would be too burdensome. The ABA Committee acknowledges that these cases are labor intensive and time consuming. Additionally, the Commission believes that it is better for a body independent of the disciplinary process to determine whether the lawyer is fit to return to the practice of law. The Commission recognizes that there are currently significant delays in the reinstatement/readmission process which should be addressed. These delays are resulting in lawyers remaining on suspension well after the term of their suspension has expired. The Commission recommends that the Court consider expanding the Committee on Character and Fitness, and that the Committee on Character and Fitness consider meeting more than once per quarter. Additionally, it has been reported to the Commission that transcripts are not being delivered to the Committee on Character and Fitness in a timely manner. The Committee on Character and Fitness utilizes the Commission's court reporter, and the Commission intends to address this delay with the court reporter. The Commission also agrees that more detail should be required from the petitioner who is seeking reinstatement to expedite the investigation and to allow the Committee on Character and Fitness to make an informed decision.

Recommendation 14

Adopt a Rule for Random Audit of Trust Accounts and Approve a Curriculum Proposed By Disciplinary Counsel for a Trust Account School

The Commission disagrees with a rule requiring the random audit of trust accounts as this would be burdensome and costly. Additionally, the Commission is not convinced that random audits would act as a deterrent to a dishonest lawyer. The Commission is satisfied that the NSF reporting requirement is sufficient to alert disciplinary authorities of potential misconduct.

Disciplinary Counsel has reported that their office, in conjunction with the Professional Responsibility Committee at the South Carolina Bar, has developed an ethics school to be launched in 2009. The ethics school curriculum will have a significant focus on trust account issues.

Recommendation 15

Adopt a Rule Providing for Written Notice to Claimants for Payment in Third Party Settlements

The Commission disagrees with this recommendation. The Commission does not believe that such a requirement can be imposed on insurance carriers through the adoption of a disciplinary rule. Additionally, there are practical concerns associated with this rule.

Recommendation 16

Oversee the Formation of a Formal Annual Budget Process for Disciplinary Counsel's Office to Ensure Adequate Staffing and Funding

The Commission agrees that adequate funding and staffing for the disciplinary process is important. However, the Commission believes that the current budgetary process is sufficient (See Recommendation 2A). The Commission also agrees that performance reviews are appropriate for all employees of the disciplinary system. Disciplinary Counsel and Commission Counsel are both working with the Office of Finance and Personnel to develop career paths for all employees. The Commission agrees that salaries of employees within the disciplinary system should remain competitive to attract and retain competitive staff. The Commission is not opposed to the Court increasing the disciplinary assessment from \$50 per year to \$100 per year.