Recommendation I: Increased public representation

Considering the obvious negative perception of the legal profession, there is no doubt that recommending more public participation in all parts of the system belongs near the top of this list. It's almost embarrassing to see the Court and the Bar Association cling to the notion that "self-regulation" somehow increases the integrity of the profession, when, in fact, it does just the opposite. The public believes, perhaps somewhat rightly, that "self-regulation" is just a way for lawyers and judges to look after their own without any accountability. And the Court should look in the mirror when reflecting on the reasons the integrity of the profession is questioned, as no doubt some of the actions of the Supreme Court and its members have done nothing to refute that perception. In any event, having only two non-lawyer citizens of the forty-four member Commission on Lawyer Conduct is absurd, and it shouldn't take an ABA evaluation to bring that to light.

Recommendation 2: Oversight Committee

The idea of an Oversight Committee is a good one, provided that it is actually permitted to have authority on relevant issues. Presently, the ODC manages and operates the Commission on Lawyer Conduct pursuant to SCACR 413, Rule 4. There has not even been the appearance of separation of these entities.

If, on the other hand, the Oversight Committee is to become another group organized, operated and controlled by the ODC as is the present Commission on Lawyer Conduct and Commission on Judicial Conduct, then it is a waste of resources. If this committee is to be yet another group to sustain the appearance of an honest, fair and just system as opposed to the present discretionary and arbitrary nature of the South Carolina lawyer discipline system, then do not dissipate resources by creating this committee.

A curious statement in this recommendation is as follows: The Office of Disciplinary Counsel should be easily accessible and understandable to those who are seeking to file a grievance.

The same courtesy should be extended to respondent attorneys. The present rules set forth in SCACR 413, are contradictory, discretionary, ambiguous and self serving for the ODC.

The ABA report recommends that the Lawyer Conduct Commission and ODC should "engage in public education efforts." There has never been a public forum, legal education seminar or published treatise on SCACR 413. More input from the public, as suggested above, and from the attorneys of the state, should be a priority of the Court.

Thankfully the ABA team also recognizes that the delays in the current system are unacceptable. The ABA 2007 Survey on Lawyer Discipline Systems indicates that in South Carolina, on average, a disciplinary case lasts 1435 days from the receipt of a complaint to the imposition of discipline, over five months longer than the one other state that even approaches such a lengthy period. For a lawyer on interim suspension, that is particularly punitive and unconscionable.

Recommendation 3: The Court should amend the Rules to provide increased discretion to Disciplinary Counsel.

This recommendation should not be considered without amending SCACR 413. The system is already a discretionary system and any more discretion given ·disciplinary counsel without accountability only increases the importance of political maneuvering and increases the use of abuse of process by disciplinary counsel.

Recommendation 6: Appointment of Attorneys to Protect Client Interests

The appointment of an Attorney to Protect Client Interests would be improved by allowing a suspended lawyer, if available, more involvement in the process of inventorying files and wrapping up a practice. Some states allow 30 days for the suspended lawyer to assist in doing that, and many actually consider letting a lawyer in the same office handle it, which would certainly make things less confusing for the clients the Court allegedly wants to protect. I believe that second option can be considered in South Carolina under the current Rules, but it's rarely, if ever, used. But I do know that having an unfamiliar lawyer who knows nothing about your clients hand out files without keeping copies and avoiding a suspended lawyer until weeks later when he realizes he doesn't know what he's doing protects no one.

Recommendation 7: Amending discovery rules.

The present discovery process is completely proscribed to the advantage of the ODC and to the Commissions. There is no element of fundamental fairness for a respondent attorney. The investigation process is completely at the discretion of the ODC and is used as a weapon to extort "agreements." It is noted this is the strongest recommendation of the overly solicitous report written in such a manner as to avoid any perceived insult to the South Carolina Supreme Court. The report recognizes in this recommendation there is no environment for a "full and fair negotiation to reach agreed dispositions of matters prior to the filing of formal charges" with the present system.

Recommendation 8: Agreements by Consent

Presently, the procedure regarding Discipline by Consent is that the respondent attorney must accept what is presented to him or her exactly as it is presented or the process can and will continue as long as the OCD desires. There is no negotiation between the parties.

The present form cover letter sent with proposed agreements has the following statement: Keep in mind that any proposed attachments that contradict the admissions in the agreement will be rejected by this office and will not be submitted with the agreement.

Even with those agreements that are signed off, it is generally because of promises made by the ODC which may or may not be carried out. There is no precedent on which a respondent attorney can rely to feel confident there is any fairness involved in this discretionary system. The idea of creating a research library for judicial and lawyer discipline cases sounds interesting, but only if precedent and consistency of sanctions were seriously considered in disciplinary cases, and they are not.

Recommendation 9: Deferred Disciplinary Agreements:

This recommendation by the ABA team is critical to the resurrection of respect of the lawyer discipline system. This element of the system is a perfect example of the ambiguous, discretionary and arbitrary perception the present system enjoys. There is no definition of what is a minor misconduct and what is major, permitting the ODC, Commission and the Court wide latitude to declare alleged misconduct minor or major at it's whim.

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Recommendation 11 and 12: Re-instatement

Adopting the rudiments of this recommendation would help relieve some of the delay presently existing in re-instatement cases. The present system takes months and months of maneuvering, meetings, making connections and posturing to bring about a re-instatement. The present system permits the ODC to re-try old cases against respondent attorneys who have not paid what the ODC may perceive as insufficient homage to their office and the system.

Recommendation 17: Training

With the present system of ambiguous, discretionary and contradictory rules which are the basis of the present attorney disciplinary system, no amount of training will help the attorneys and staff do a better, more efficient job until there is a system in which all parties believe there will be a fair and just result at the end of the day. Presently, when on interacts with the ODC, it is with trepidation as one never knows what rule will be invoked with new and creative interpretations to gain another advantage by the ODC. There has never been a public program on the procedures and rules utilized in the litigation of a lawyer discipline case. The ODC remains confident that regardless of the outcome of any formal charges "trial," there is no appeal procedure and any case that goes up to the Court is de novo. The Court is not obligated to show any deference to=2 Oany recommendations, facts, or activity in a lawyer discipline case which takes place prior to "the record" being presented to the Court. There is no explanation or rule or published procedure regarding what is a "record" and exactly what the Court receives in lawyer discipline cases.

The Court should also consider that South Carolina is one of only eight states that continue to prohibit suspended lawyers from working as paralegals under the supervision of a practicing attorney, even though that position is still recommended by the ABA. The reasons given by the Court and the ABA cite the possibility of confusion by the clients of the employing attorney as to the status on the paralegal. Most states now recognize that as a spurious argument, including those bordering South Carolina. Appropriate safeguards that may be taken to prevent confusion are suggested, and Florida case law even expresses the benefits employment of suspended lawyers as paralegals might have to keep that suspended attorney current in matters of the law. Considering that South Carolina state does not even require licensing of paralegals and also permits non-lawyers to act a Magistrates, the denial of the right of a suspended lawyer to act as a paralegal is ill-considered and punitive.

I suspect that the request for responses to the ABA report is simply a facade to give the perception that the Supreme Court actually wants public input before they make as few changes as possible to what Justice Toal has referred to as a "good system." Unfortunately, it is not a good system, and several lawyers who wanted to meet with the ABA team were denied that opportunity, most likely because the Court wanted to control the possibility of negative comments giving the ABA even more reason to criticize South Carolina's pathetic disciplinary system. The ABA team did recognize many of the system's weaknesses, now it will be interesting to see if the Court acts on the recommendations in an attempt to improve it. I won't hold my breath.

Respectfully Submitted,

Garry D. Conway

GDC/sa