

Disciplinary Counsel's Comments Regarding the Recommendations of the South Carolina Report on the Lawyer Regulation System from the Discipline System Consultation Team of the ABA Standing Committee on Professional Discipline

Recommendation 1: Increase the Public Representation on the Lawyer Conduct Commission and Streamline the Functions of the Investigative Panels.

Comment: ODC agrees with the Committee that public participation in the lawyer discipline process enhances the effectiveness of the Commission on Lawyer Conduct, which has included public members since its inception. The lay members of the Commission add unique and useful perspective and insight to the deliberations of the Investigative Panels. ODC also 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 RLDE Rule 4 that would add six lay members for a total of eight. Each lay member would serve on two Investigative Panels, allowing for two lay members for each Investigative Panel instead of one. Although not the 1/3 representation recommended by the Committee, this change would increase public representation from 5% to 20%. ODC does not agree with the suggestion that the size of the Investigative Panels be reduced from seven to three. ODC submits between forty and eighty cases per month to the Investigative Panels for consideration. Panel members must review large volumes of documentation submitted by the complainants and the responding lawyers in order to prepare to discuss Disciplinary Counsel's recommendations. Panels of seven adequately spread that workload among the panel members. However, if other changes implemented as a result of the Committee's recommendations reduce the volume of cases presented to the Investigative Panels, this portion of Recommendation 1 should be revisited. ODC supports allowing 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 lawyer members and attempting to schedule around such a requirement could cause unreasonable delays in the hearing process. ODC is satisfied with the current method for selecting lay members.

Recommendation 2: Create an Oversight Committee of the Commission on Lawyer Conduct.

Comment:

Resource Planning. ODC does not believe that the size and operation of the lawyer discipline system in South Carolina currently warrants an oversight committee. As for the proposed budgetary function of an oversight committee, ODC 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 the Court already 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.

System Administrative Oversight. ODC is satisfied that the new Commission Counsel can work with the chair and vice chair of the Commission on Lawyer Conduct and the Chief Justice to implement policies and procedures to improve the efficiency of the Hearing Panels. ODC is not convinced that adding an additional layer of bureaucracy will enhance the effectiveness of the system. ODC acknowledges that there have been some delays at the hearing stage of lawyer discipline proceedings and pledges to work diligently with the Commission Counsel and Commission Chair to overcome any systemic causes for those delays. ODC agrees with the Committee that the Chair of the Commission should be informed of and should directly address delays by the Hearing Panels. As for the scheduling of Investigative Panels one year in advance, Investigative Panels meet on the third Friday of every month. Although the panel members are aware of this schedule, the actual dates are provided to them prior to the beginning of each year. As for scheduling hearings one year to fifteen months in advance, Disciplinary Counsel reports that hearings are generally scheduled at the time Formal Charges are answered for 120 to 150 days out. Requiring one year or more advance notice to a Hearing Panel would cause unnecessary delay in the proceedings.

Training and Outreach. The new Commission Counsel has made training of Commission members a priority. This year, she worked with the Commission Chairs and the 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. Disciplinary Counsel and Commission Counsel plan 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. ODC agrees with most of the Committee's other recommendations regarding public outreach; however, we do not believe that a formal oversight committee is required to accomplish those objectives.

Recommendation 3: Amend the Rules to Provide Increased Discretion to Disciplinary Counsel.

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. Disciplinary Counsel will draft a proposed rule that would streamline the investigative process by combining the preliminary and full investigation stages. ODC envisions a rule that would provide both a copy of the complaint and a written notice of the issues being investigated at the same time. ODC disagreed with the recommendation of the Commission on Lawyer Conduct to require that the chair or vice chair authorize full investigations on a case by case basis. ODC seeks authority for full investigation in about twenty-five cases each month. These requests are documented and tracked using the investigative panel agendas. A one-at-a-time approach, such as is suggested by the Commission on Lawyer Conduct, would require a cumbersome tracking system and would likely result in further delays. If the Court does not believe that it would be prudent to give Disciplinary Counsel authority to conduct investigations as she sees fit, then the current system should remain in place.

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 also propose 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 requires a minimum of seventy-five days. The respondent lawyer has fifteen days to respond to the initial complaint. Even if no further preliminary investigation is required, the investigative panel meets only once a month. If the investigative panel approves the issuance of a letter of caution without full investigation, the letter is not actually issued until the following month because it has to be prepared for signature after the meeting and then submitted for signature at the following meeting. 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 panel meeting. In addition, this would allow Investigative Panel members to focus on more serious cases. If a responding lawyer believes that the letter of caution was not an appropriate resolution, the rule would include an opportunity for the lawyer to submit a written request for reconsideration by the Investigative Panel.

Recommendation 4: Complaints Should Be Provided the Respondent Lawyer's Response to Their Grievances and Should Have a Limited Appeal of Dismissals by Disciplinary Counsel.

Comment: ODC is concerned that providing the Complainant with a copy of the responding lawyer's response to the complaint would impair the lawyer's ability to candidly respond to the allegations. A complaint can come from any source. Often, it comes from an opposing party or opposing counsel. It would not be appropriate in most circumstances to reveal potentially confidential information about a responding lawyer's client or case to the complainant. Although Disciplinary Counsel could make case-by-case determinations, such a procedure would require a significant time commitment and could prove detrimental to the client's interests if the wrong determination is made.

ODC is open to a proposed rule change that would allow a complainant to submit a written request for reconsideration by an Investigative Panel of Disciplinary Counsel's dismissal of a complaint. This should be done on a temporary, trial basis to determine whether or not such requests significantly overburdened the Investigative Panels.

Recommendation 5: Phase Out Attorneys to Assist.

Comment: Prior to the adoption of the Rules for Disciplinary Enforcement, members of the Board of Commissioners on Grievances and Discipline were charged with investigating and concluding complaints against lawyers. When the adjudicative and prosecutorial functions of the discipline process were separated in 1997 by the adoption of RLDE, the investigative responsibilities fell on the shoulders of the Disciplinary Counsel and his small staff. The Attorney General was generous in allowing Disciplinary Counsel to utilize a number of his lawyers and investigators to assist in disciplinary matters. However, the volume of work required additional efforts that were not afforded by the resources available. The pro bono work of the Attorneys to Assist Disciplinary Counsel has been an invaluable asset in completing grievance investigations. ATAs provide complainants and responding lawyers the opportunity to meet face-to-face with a neutral party who is knowledgeable in the law and familiar with the local legal environment. The ODC professional staff does not currently have the resources to perform this function. However, ODC is aware of the delays the ATA assignments sometimes cause. Further study should be done to determine the most efficient and effective ways to conduct field investigations.

Recommendation 6: Revise the Rule for Appointment of Attorneys to Protect Client Interests to Ensure Efficient Use of Resources.

Comment: Three actions have been taken in recent years to assist Attorneys to Protect (ATPs) in carrying out their duties. First, the Disciplinary Counsel approved a written manual for ATPs prepared by the SC Bar Professional

Responsibility Committee and posted on the Bar website. Second, the Court adopted a rule that allowed for payment of some of the expenses incurred by the ATPs from funds available in the lawyer's accounts or from the Lawyers' Fund for Client Protection. Third, the Court assigned the new Commission Counsel with the responsibility of providing advice and support to ATPs. ODC is interested in exploring additional ways to improve this important process, including consideration of the recommendations of the Committee.

Recommendation 7: Amend the Discovery Rules to Permit More Liberalized Discovery and Provide for Pre-Hearing Conferences.

Comment: ODC is satisfied that the current disclosure rules adequately notify respondents of the evidence and witnesses related to the formal charges and also sufficiently protect the work product of the disciplinary counsel. Currently, both parties are required to share all documents and the names and addresses of all individuals with information relating to the formal charges within 20 days of the filing of the answer. In addition, within the 60-day disclosure period, the parties must exchange exhibits, witness statements, exculpatory evidence, and names of witnesses to testify at the hearing. Depositions are allowed in appropriate, but limited, circumstances. Opening up the process to depositions of all witnesses would unnecessarily burden the resources of the ODC and of the responding lawyers. As for pre-hearing conferences, ODC is satisfied with the efforts of the prosecuting attorneys and responding attorneys to stipulate to facts and documents in advance to narrow the contested issues. In addition, pre-hearing conferences are not prohibited by the rules and the Hearing Panel chair would have discretion to conduct such in appropriate cases. Requiring pre-hearing conferences, particularly with the requirements recommended by the Committee would add unnecessary procedural delays.

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

Comment: The vast majority of discipline cases that result in sanction are concluded by way of agreements for discipline by consent. Disciplinary Counsel engages in negotiations for such agreements at all stages of the proceedings. As for the substance of those agreements, the Court does reject submissions that do not have sufficient facts or rules cited to allow a proper sanction determination to be made. In addition, inclusion of a range of sanctions in conjunction with the considered recommendation of an Investigative Panel allows the Court to resolve cases with the sanction it deems appropriate without the delays that result from the rejection of an agreement. In addition, cases are more easily and expeditiously settled if the option of a range of sanctions is available to the responding lawyer and the prosecutor.

Recommendation 9: Adopt Specific Procedures Relating to Deferred Discipline Agreements.

Comment: ODC is satisfied with the procedures currently used for deferred discipline agreements, which already include most of the procedures recommended by the Committee. This process should be flexible and responsive to particular cases. ODC is appropriately referring lawyers to programs at the Bar such as Lawyers Helping Lawyers. ODC has indicated difficulty in obtaining reports and status updates from the Lawyers Helping Lawyers office as a result of insufficient staffing. ODC encourages the SC Bar to explore ways to expand the support staff for this important program. ODC has also been working with the Professional Responsibility Committee at the SC Bar to develop an ethics school to be launched in 2009. It is expected that there will be a number of referrals to this program through the deferred discipline agreement process.

The Committee is concerned that resources are being used to conduct formal disciplinary proceedings in “single instances of minor neglect or minor incompetence” and that dismissals of such cases are a source of public dissatisfaction with discipline systems. It has not been our experience that formal disciplinary proceedings have been pursued in such cases. Those cases are being appropriately resolved with letters of caution and do not appear to be a tap on ODC or Commission resources. In cases where the allegations do not warrant a letter of caution, ODC is appropriately referring the complainants to the Fee Dispute Resolution Board, the Client Assistance Program, or other appropriate agency.

Recommendation 10: Records or Evidence of Dismissed Complaints Should Be Expunged After an Appropriate Period of Time.

Comment: Disciplinary Counsel is currently working with the SC Department of Archives and History to develop a retention schedule for ODC and Commission records. She will consider this recommendation as part of the process and will report back to the Court.

Recommendation 11: Amend the Rules to Provide that Disciplinary Counsel is Responsible for Handling Reinstatement/Readmission Cases.

Comment: The Committee recommends handling reinstatement and readmission cases by the ODC and the Commission, rather than by the Committee on Character and Fitness. ODC believes that such a change would further burden ODC and Commission resources. Further, as a body independent of the discipline process, the Committee on Character and Fitness is better suited to consider the remediation and rehabilitation of the lawyer-applicant. On the other hand, ODC recognizes the hardship incurred when there are significant delays in the reinstatement/readmission process. ODC supports the recent recommendation from the SC Bar Professional Responsibility Committee to

expand the Committee on Character and Fitness to accommodate an ever-increasing caseload.

Recommendation 12: Eliminate Indefinite Suspensions and Provide for Automatic Reinstatement for Suspensions of Less Than Nine Months.

Comment: ODC has no objection to a rule change that would eliminate indefinite suspensions and change the term of a definite suspension to up to three years. Alternatively, the Court should considered expanding the term of a definite suspension to up to five years and making disbarment permanent.

As for the recommendation that reinstatement following a suspension of less than nine months be automatic, ODC does not believe that a rule change is necessary. Currently, such reinstatements are automatic as long as the lawyer-applicant has submitted the required paperwork.

Recommendation 13: Adopt Probation as a Sanction and a Rule Setting Forth Procedures for Its Imposition and Revocation.

Comment: ODC does not believe that the current system funding is sufficient to support the resources that would be required to implement a probation monitoring procedure. ODC would be open to revisiting this concept if future funding levels allow for it.

Recommendation 14: Adopt a Rule for Random Audit of Trust Accounts and Approve a Curriculum Proposed By Disciplinary Counsel for a Trust Account School.

Comment: ODC supports the recommendation regarding random trust account audits. However, the office funding is not currently sufficient to implement such a program.

As for the approval of a trust account school, ODC believes this is an excellent recommendation. The ethics school program (LEAPP) which begins in February 2009 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.

Comment: ODC agrees that the risk of misappropriation by lawyers using third party settlement checks is serious. However, we do not believe that adopting the ABA model rule is the appropriate way to address the problem. If there is to be a notice requirement imposed on insurance carriers (or anyone other than lawyers), the appropriate mechanism for imposition of such a requirement would be legislative action and not adoption of a lawyer conduct rule.

Recommendation 16: Oversee the Formation of a Formal Annual Budget Process for Disciplinary Counsel's Office to Ensure Adequate Staffing and Funding.

Comment: 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. However, forming the annual budget process recommended by the Committee would not be consistent with other state agencies. (See Comment to Recommendation 2.)

Recommendation 17: Disciplinary Counsel and Staff Should Receive 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.