2012 – 2014 Rules Cycle Report

of the

New Jersey Supreme Court
Professional Responsibility Rules Committee

December 19, 2013

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INTRODUCTION

The Professional Responsibility Rules Committee (the "PRRC" or the "Committee") recommends the proposed amendments and new rules as contained in this report. Part I contains proposed rule amendments. Part II summarizes proposals considered but not recommended for adoption. Part III contains the Committee's "non-rule recommendations," if any. Part IV summarizes recommendations previously presented to the Court during this 2012-2014 rules cycle and, as applicable, the actions taken thereon by the Court. Part IV also includes technical rule changes that the Court made since the Committee's last cycle report.

Added text is underlined in the proposed rule amendments. Deleted text is [bracketed]. Since existing paragraph designations and captions are indicated by underscoring, proposed new paragraph designations and captions are indicated by double underscoring. No change in the text is indicated by ". . . No change."

I. PROPOSED RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. OAE referral re: proposed amendments to R. 1:20-3(g)(3) and R. 1:20-3(g)(4)

The Office of Attorney Ethics (OAE), by memorandum dated November 8, 2012, proposes amendments to Rule 1:20-3(g)(3), Rule 1:20-3(g)(4), and Rule 1:21-6(c). See Appendix A.

An attorney may be subject to immediate temporary suspension if the Supreme Court finds that the attorney poses a "substantial threat of serious harm to an attorney, a client or the public." R. 1:20-11(a). If an attorney fails to cooperate with the OAE, the OAE "may file and serve a motion for temporary suspension with the Supreme Court." R. 1:20-3(g)(4). The OAE explained that the "primary tool for securing the cooperation of uncooperative respondents is [its] ability to move for their temporary suspension pursuant to [Rule] 1:20-3(g)(4)." According to the OAE, "Where there is an absolute refusal to cooperate, the rules are clear and it is a relatively simple process for the OAE to obtain the attorney's temporary suspension." It is rare, however, "that an attorney will openly and flatly refuse to provide information and/or documentation to the OAE." "Far more difficult are the cases in which respondent's profess cooperation while they intentionally or negligently delay, obstruct and mislead the OAE investigators."

The OAE believes that the proposed changes can "improve [its] ability to deal with uncooperative conduct and to more thoroughly investigate and prosecute unethical conduct." The OAE submits that the proposed rule changes in combination with the existing rules will provide it "with meaningful tools with which [it] can compel more expeditious provision of attorney records which are necessary to complete [its] investigations in a timely fashion." The PRRC recommends adoption of the OAE's proposed amendments to Rule 1:20-3(g)(3) and Rule

1:20-3(g)(4), but does not recommend adoption of the OAE's proposed amend to Rule 1:21-6(c)(2).

a. Rule 1:20-3(g)(3)

The OAE's proposed amendment to Rule 1:20-3(g)(3), entitled "Duty to Cooperate," would change the rule to require an attorney who contends during an ethics investigation that he or she does not have records that must be maintained pursuant to Rule 1:21-6 to reconstruct those records within 45 days of the OAE's initial records request. Under the proposed amendment, the attorney's failure to provide timely reconstructed records "shall be prima facie evidence that the attorney presents a substantial threat of serious harm to other attorneys, clients or the public." The "substantial threat of serious harm" language is taken from the temporary suspension rule, Rule 1:20-11.

The Committee members unanimously agree that the Court should adopt the first part of the amendment requiring attorneys to reconstruct records that the rules require them to maintain within 45 days of the OAE's request for records. There were opposing viewpoints, however, regarding whether failure to reconstruct the records within 45 days should be "prima facie evidence" that the attorney "presents a substantial threat of serious harm" for purposes of a motion for temporary suspension. Some Committee members are concerned about how this rule will impact a cooperating attorney who is doing everything that he or she can but still cannot reconstruct the records within 45 days. One member suggests a rebuttable presumption to ensure flexibility, rather than a prima facie evidence standard, to make it clear that the attorney can rebut the finding that he or she presents a substantial threat of serious harm.

A majority of the PRRC, however, is in favor of the OAE's proposed change. The majority stresses the difference between "prima facie evidence," the language in the proposed

amendment, and a "prima facie finding." According to the majority, because "evidence" is rebuttable, the attorney under investigation will have the opportunity to answer and defend the OAE's motion for temporary suspension under the proposed amendment. The majority also notes that the OAE has discretion whether to file the motion for temporary suspension in the first place, and that it is unlikely that such a motion will be filed if an attorney is putting forth a good faith effort. If a motion is filed, the attorney may offer evidence to explain why he or she was not able to reconstruct the records in a timely fashion. Thus, the majority believes that the language of the proposed amendment builds in fairness. Therefore, a majority of the Committee recommends that the Court also adopt the second part of the OAE's amendments to R. 1:20-3(g)(3), that the attorney's failure to provide reconstructed records "shall be prima facie evidence that the attorney presents a substantial threat of serious harm to other attorneys, clients or the public."

b. Rule 1:20-3(g)(4)

Rule 1:20-3(g)(4), entitled "Failure to Cooperate," subjects an attorney to temporary suspension for failing to produce the attorney's client and/or business file or accounting records for inspection. The OAE proposed amendment provides that the attorney's failure to produce reconstructed records is also a basis for temporary suspension. The Committee recommends that if the proposed amendment to Rule 1:20-3(g)(3) is adopted, the Court also amend Rule 1:20-3(g)(4) to add "or reconstructed records" to make the rules consistent.

c. Rule 1:21-6(c)(2)

The Committee does not recommend adopting the OAE's proposed amendment to Rule 1:21-6(c). That proposal will be discussed in Part II.A. below (Amendments Considered But Not Recommended).

The PRRC recommends adopting the OAE's proposed amendments to Rule 1:20-3(g)(3) and Rule 1:20-3(g)(4), but does not recommend adopting the OAE's proposed amendment to Rule 1:21-6. The text of the PRRC's proposal, which mirror's the OAE's proposal with regard to 1:20-3(g)(3) and (4), follows.

1:20-3. District Ethics Committees; Investigations

(a) . . . No change
(b) . . . No change
(c) . . . No change
(d) . . . No change
(e) . . . No change
(f) . . . No change

(g) Investigation.

(1) . . . No change
(2) . . . No change

(3) Duty to Cooperate. Every attorney shall cooperate in a disciplinary investigation and reply in writing within ten days of receipt of a request for information. Such reply may include the assertion of any available constitutional right, together with the specific factual and legal basis therefor. Attorneys shall also produce the original of any client or other relevant law office file for inspection and review, if requested, as well as all accounting records required to be maintained in accordance with R. 1:21-6. Where an attorney is unable to provide the requested information in writing within ten days, the attorney shall, within that time, inform the investigator in writing of the reason that the information cannot be so provided and give a date certain when it will be provided. In the event that the attorney contends that he/she does not have the records required to be maintained by R. 1:21-6 for the time period being investigated, the attorney shall produce reconstructed records that fully comply with R. 1:21-6 for that time period within forty-five days of the original request. The failure by the attorney to timely produce the

actual or reconstructed records[1] in response to a request by disciplinary authorities shall be prima facie evidence that the attorney presents a substantial threat of serious harm to other attorneys, clients or the public.

(4) Failure to Cooperate. If a respondent fails to cooperate either by not replying in writing to a request for information or by not producing the attorney's client and/or business file or accounting records or reconstructed records for inspection and review, the Office of Attorney Ethics may file and serve a motion for temporary suspension with the Supreme Court, together with proof of service. The failure of a respondent to file a response in opposition to the motion may result in the entry of an order of temporary suspension without oral argument until further order of the Court. An attorney temporarily suspended under this rule may apply to the Court for reinstatement on proof of compliance with subsection (3) of this paragraph on notice to the Office of Attorney Ethics.

(5) . . . No change
(6) . . . No change

(h) . . . No change
(i) . . . No change
(j) . . . No change

B. OAE referral re: proposed amendments to R. 1:20-4(d) and R. 1:20-10(b)(1)

The OAE, by memorandum dated June 24, 2013, proposes amendments to Rule 1:20-4(d)(Hearing Panel Assignments) and Rule 1:20-10(b)(1)(Consent to Discipline). See Appendix B.

a. Rule 1:20-4(d)

The OAE believes that the investigation/prosecutorial function of district ethics committees (DEC) should be separated from their adjudicative function to ensure that the ethics

[1] The OAE's original proposal dated November 8, 2012, states "actual or reconstructed trust account records." See Appendix A. The OAE, however, subsequently informed the PRRC that the use of "trust account" was an oversight, that it did not intend to limit the language to only "trust account records," and that "trust account" should be deleted from the proposed rule.

system remains free from the appearance of partiality or bias. To that end, the DEC proposes amending Rule 1:20-4(d) to require that grievances investigated in one district that result in an ethics complaint proceed to hearing before a panel in a different district. The OAE also proposes adding a rule comment to provide guidance on the change.

In the experience of one PRRC member who previously served on a DEC, the investigative phase does not create bias in the current system because the DEC Chair, rather than the entire group that would hear the matter, decides whether probable cause exists to file a complaint. Nevertheless, the member understands how the current format could create an appearance of bias. Another former DEC member believes that the appearance of partiality in this area is an issue that should be addressed because the full committee sometimes discusses the substance of an underlying grievance at an early stage. The PRRC discussed whether the amendment would create an administrative burden on the DEC. In the view of a prior DEC member, administrative burden is not a serious concern because the amendment will only require the DEC secretary to keep two separate schedules, one for the investigation phase and one for the hearing phase, which is already done. Some PRRC members are also concerned the amendment will require grievants and witnesses to travel to far-away counties for ethics hearings. According to a former DEC member, however, many grievants already must travel for hearings under the current system. In addition, there are other means that have been used to address a grievant or witness that cannot travel to a hearing, such as the use of audio and visual media. Finally, the committee does not believe that the amendment will create forum shopping issues because the statewide coordinator, not the presenter, screens cases and determines the proper venue based on factors such as workload and location. The committee recommends that the

Court adopt the OAE's proposed change to Rule 1:20-4(d) and rule comment. The text of the PRRC's proposal, which mirror's the OAE's proposal, follows.

1:20-4. Formal Pleadings

(a) . . . No change
(b) . . . No change
(c) . . . No change

(d) Filing and Service. The original complaint shall be filed with the special ethics master appointed by the Supreme Court or with the secretary of the Ethics Committee designated by the Office of Attorney Ethics, which shall be a District Ethics Committee separate from the Ethics Committee in which the matter was investigated. In those matters referred for hearing to a separate district, an investigator from the originating Ethics Committee shall continue to serve as presenter. [or the designated special ethics master to whom the case is assigned.] If the matter will be determined by an Ethics Committee, service of the complaint shall be made by the secretary of the Ethics Committee designated by the Office of Attorney Ethics to conduct the hearing; otherwise service shall be made by the Director. A copy of the complaint shall be served on the respondent and respondent's attorney, if known, in accordance with R. 1:20-7(h), together with written notice advising the respondent of the requirements of R. 1:20-4(e) and (f), the name and address of the secretary or the Director as appropriate, as well as the address and telephone number of the vice chair of the Ethics Committee or special ethics master to whom all questions and requests for extension of time to file answers shall be directed. In appropriate circumstances, the secretary or the Director shall forward a copy of every complaint to the respondent's law firm or public agency employer in accordance with R. 1:20-9(k).

(e) . . . No change
(f) . . . No change
(g) . . . No change

Comment

The amendment to paragraph (d) is intended to effectuate a transfer from the district ethics committee that investigated a grievance to another committee for hearing, should a determination to file a formal complaint be filed. Previously, a grievance was

investigated and prosecuted, when appropriate, before a single district ethics committee. The amendment attempts to address any inherent perception of bias by ensuring that all hearings are conducted by a district committee and hearing panel that has no prior familiarity or knowledge of the grievance and investigation thereof.

b. Rule 1:20-10(b)(1)

Rule 1:20-10(b)(1) currently provides that at any time during the investigation of a disciplinary matter, or within 60 days after the time prescribed for the filing of any answer to a complaint, the respondent may agree to discipline by consent in exchange for a specific recommendation of discipline. The OAE proposes that the rule be amended to permit stipulation to discipline by consent at any time prior to issuance of the hearing report.

A PRRC member recalled that in devising the current 60-day rule, the Court was concerned with a weakening confidence in the disciplinary system and set a fixed and fairly short deadline for consent to discipline to neutralize any perception that the attorney discipline system was skewed in favor of attorneys who were the subject of grievances. Other members agree that it is important to have a rule that reduces public perception that lawyers are horse trading or entering back room deals for lesser sanctions. They also note that it would be a waste of time and resources to prosecute a complaint and prepare a hearing report only to have the respondent consent to discipline. In addition, the committee stresses that the disciplinary system relies on the efforts of private volunteers and that it would be unfair to have them prepare and hold an entire hearing and report and subsequently allow the respondent to work out a deal. The PRRC, therefore, does not recommend changing the rule to extend discipline by consent to any time "prior to the issuance of the hearing report."

Regarding whether the rule should remain as is, or whether some other cut-off for consent by discipline should be imposed, the PRRC notes that the OAE's proposed amendment

is based on the ABA Standing Committee's concern that often the respondent and his or her counsel are not aware of the 60-day rule and are unable to grasp the ramifications of their failure to consent to discipline within that time. See Appendix C. The PRRC therefore is concerned that the current rule does not provide enough time for respondent and his or her counsel to properly evaluate the validity of the ethics claims and make an informed decision regarding whether to consent to discipline. The PRRC also believes that the deadline for consent by discipline has to be made known more clearly to respondents.

Taking into account all of the concerns discussed, the committee concludes that the deadline for consent by discipline should be a specific amount of days after the initial notice of the first ethics hearing is provided to the respondent. With input from former DEC members, the PRRC determined that twenty days from the date of the initial notice to be a fair and adequate deadline. The committee's view is that such a cut-off date would address any misconception by the public as well as avoid a waste of a volunteer's time. Also, the committee believes that the proposed change provides adequate notice of the deadline to the respondent, provides ample time for the respondent to weigh the ethics claims, and allows the hearing to be set within a reasonable period of time. Therefore, the PRRC recommends that the rule be changed to make the cut-off for consent by discipline 20 days after the date of the initial notice of the first scheduled ethics hearing.

The difference between the OAE's and the PRRC's proposed amendments to Rule 1:20-10 follow.

OAE Proposed Rule	**PRRC Proposed Rule**
1:20-10. Discipline by Consent	
(a) . . . No change (b) Other Discipline by Consent.	(a) . . . No change (b) Other Discipline by Consent.

(1) Timeliness and Form of Petition. At any time during the investigation or hearing of a disciplinary matter [or within 60 days after the time prescribed for the filing of any answer to a complaint], but prior to the issuance of the hearing report, the respondent may agree with the investigator or presenter to submit an affidavit of discipline by consent in exchange for a specific recommendation for discipline. Following approval by the chair or Director, the matter shall be submitted to the Board as an agreed matter by way of a motion to impose discipline on consent in accordance with R. 1:20-15(g). A copy of the motion shall be provided to the Director. (2) . . . No change (3) . . . No change	(1) Timeliness and Form of Petition. At any time during the investigation of a disciplinary matter, but not later than 20 days after the date of the initial notice of the first scheduled hearing [or within 60 days after the time prescribed for the filing of any answer to a complaint], the respondent may agree with the investigator or presenter to submit an affidavit of discipline by consent in exchange for a specific recommendation for discipline. Following approval by the chair or Director, the matter shall be submitted to the Board as an agreed matter by way of a motion to impose discipline on consent in accordance with R. 1:20-15(g). A copy of the motion shall be provided to the Director. (2) . . . No change (3) . . . No change

The text of the PRRC's proposal follows.

1:20-10. Discipline by Consent

(a) . . . No change

(b) Other Discipline by Consent.

(1) Timeliness and Form of Petition. At any time during the investigation of a disciplinary matter, but not later than 20 days after the date of the initial notice of the first scheduled hearing [or within 60 days after the time prescribed for the filing of any answer to a complaint], the respondent may agree with the investigator or presenter to submit an affidavit of discipline by consent in exchange for a specific recommendation for discipline. Following approval by the chair or Director, the matter shall be submitted to the Board as an agreed matter by way of a motion to impose discipline on consent in accordance with R. 1:20-15(g). A copy of the motion shall be provided to the Director.

(2) . . . No change
(3) . . . No change

C. OAE referral re: proposed amendments to R. 1:20-3(b) and R. 1:20-3(c)

The OAE, by memorandum dated July 25, 2013, proposes amendments to Rules 1:20-3(b) and (c)(Appointments; Officers). See Appendix D. In particular, the OAE proposes amending paragraph (c) to expand a DEC officer's term (as Vice-Chair and then as Chair) from one year to two years. Because officers are generally selected from committee members with two years of experience, the proposed expansion of officer terms to two years would require an expansion in an officer's overall membership term from four years to six years to allow a member to serve as Vice-Chair then Chair. To that end, the OAE also proposed an amendment to paragraph (b). The OAE also proposes adding a rule comment to provide guidance on the change.

The PRRC agrees with the OAE's proposed amendment to paragraph (c) changing the designation of a Chair and Vice Chair from "annually" to "biennially," thus creating two-year officer terms. Focusing on paragraph (b), the committee does not believe that the OAE's amended language meets the OAE's stated purpose for the rule change. In the committee's view, the OAE's proposed language--"Members of the Ethics Committees shall . . . serve . . . for a term of four years, except that members who are subsequently appointed to serve as officers shall be appointed for a term of six years"--could be construed to give officers an eight-year term. In addition, the PRRC discussed a possible scenario in which a DEC member is appointed to a two-year officer term after his or her first year as a regular member. In that scenario, the member would be done with his or her two-year officer term after his or her third total year as a member. The PRRC believes that that officer should then be entitled to serve the fourth year of his or her initial appointment term as a regular member. The PRRC therefore proposes language

that it believes will both address that concern and better serve the OAE's aim of extending officer terms to six years.

The difference between the OAE's and the PRRC's proposed amendments to Rule 1:20-3 follow.

OAE Proposed Rule	**PRRC Proposed Rule**
1:20-3. District Ethics Committees; Investigations	
(a) . . . No change	(a) . . . No change
(b) Appointments. Members of Ethics Committees shall be appointed by, and shall serve at the pleasure of the Supreme Court for a term of four years[.], except that members who are subsequently appointed to serve as officers shall be appointed for a term of six years in accordance with subsection (c). With the approval of the Supreme Court, a member or officer who has served a full term may be reappointed to one successive term. A member serving in connection with an investigation pending at the time the member's term expires may continue to serve in such matter until its conclusion. In order that, as nearly as possible, the terms of one-quarter of the members shall expire each year, the Supreme Court may, when establishing a new Ethics Committee, appoint members for terms of less than four years and members so appointed shall be eligible for reappointment to a full successive term.	(b) Appointments. Members of Ethics Committees shall be appointed by, and shall serve at the pleasure of the Supreme Court for a term of four years[.], except that members who are subsequently appointed to serve as officers shall have their term extended for an additional two years or until the end of their initial appointment term, whichever is longer, in accordance with subsection (c). With the approval of the Supreme Court, a member or officer who has served a full term may be reappointed to one successive term. A member serving in connection with an investigation pending at the time the member's term expires may continue to serve in such matter until its conclusion. In order that, as nearly as possible, the terms of one-quarter of the members shall expire each year, the Supreme Court may, when establishing a new Ethics Committee, appoint members for terms of less than four years and members so appointed shall be eligible for reappointment to a full successive term.
(c) Officers; Organization. The Supreme Court shall biennially [annually] designate a member of each Ethics Committee to serve at its pleasure as chair and another member to serve as vice-chair. Whenever the chair is absent or unable to act or disqualified from acting due to a conflict, the vice-chair shall perform the duties of the chair. The chair shall be responsible for administering the Ethics Committee.	(c) Officers; Organization. The Supreme Court shall biennially [annually] designate a member of each Ethics Committee to serve at its pleasure as chair and another member to serve as vice-chair. Whenever the chair is absent or unable to act or disqualified from acting due to a conflict, the vice-chair shall perform the duties of

Under the chair's direction, the vice-chair, or another Ethics Committee member designated by the chair, shall be responsible for administering all matters where a complaint has been filed. (d) through (j) . . . No change	the chair. The chair shall be responsible for administering the Ethics Committee. Under the chair's direction, the vice-chair, or another Ethics Committee member designated by the chair, shall be responsible for administering all matters where a complaint has been filed. (d) through (j) . . . No change
Comment	
The amendment to paragraph (b) expands the current four-year membership term for the Vice-Chair and Chair of the committee to a six-year membership term. This will allow the Vice-Chair and the Chair to serve in an officer capacity for two years, as set forth in the amendment to paragraph (c). The amendment to paragraph (b) further allows an officer who has served a single full six-year term to be eligible for reappointment to a successive four-year term as a returning member. The amendment to paragraph (c) is intended to expand the term of the Vice-Chair and Chair of the Committee to two years each, instead of one year in each position.	The amendment to paragraph (b) expands the current four-year membership term for the Vice-Chair and Chair of the committee by two years if that person's term would otherwise expire in less than two years. This will allow the Vice-Chair and the Chair to serve in an officer capacity for two years, as set forth in the amendment to paragraph (c). The amendment to paragraph (b) further allows an officer who has served a single full term to be eligible for reappointment to a successive four-year term as a returning member. The amendment to paragraph (c) is intended to expand the term of the Vice-Chair and Chair of the Committee to two years each, instead of one year in each position.

The text of the PRRC's proposal follows.

1:20-3. District Ethics Committees; Investigations

(a) . . . No change

(b) Appointments. Members of Ethics Committees shall be appointed by, and shall serve at the pleasure of the Supreme Court for a term of four years[.], except that members who are subsequently appointed to serve as officers shall have their term extended for an additional two years or until the end of their initial appointment term, whichever is longer, in accordance with

subsection (c). With the approval of the Supreme Court, a member or officer who has served a full term may be reappointed to one successive term. A member serving in connection with an investigation pending at the time the member's term expires may continue to serve in such matter until its conclusion. In order that, as nearly as possible, the terms of one-quarter of the members shall expire each year, the Supreme Court may, when establishing a new Ethics Committee, appoint members for terms of less than four years and members so appointed shall be eligible for reappointment to a full successive term.

(c) Officers; Organization. The Supreme Court shall biennially [annually] designate a member of each Ethics Committee to serve at its pleasure as chair and another member to serve as vice-chair. Whenever the chair is absent or unable to act or disqualified from acting due to a conflict, the vice-chair shall perform the duties of the chair. The chair shall be responsible for administering the Ethics Committee. Under the chair's direction, the vice-chair, or another Ethics Committee member designated by the chair, shall be responsible for administering all matters where a complaint has been filed.

(d) . . . No change
(e) . . . No change
(f) . . . No change
(g) . . . No change
(h) . . . No change
(i) . . . No change
(j) . . . No change

Comment

The amendment to paragraph (b) expands the current four-year membership term for the Vice-Chair and Chair of the committee by two years if that person’s term would otherwise expire in less than two years. This will allow the Vice-Chair and the Chair to serve in an officer capacity for two years, as set forth in the amendment to paragraph (c). The amendment to paragraph (b) further allows an officer who has served a single full term to be eligible for reappointment to a successive four-year term as a returning member.

The amendment to paragraph (c) is intended to expand the term of the Vice-Chair and Chair of the Committee to two years each, instead of one year in each position.

D. NJSBA referral re: proposed amendments to RPC 7.3(b)

The New Jersey State Bar Association (NJSBA), by letter dated March 29, 2011, proposes numerous amendments to RPC 7.3, entitled "Personal Contact with Prospective Clients." See Appendix E. According to the NJSBA, the proposed amendments stem from its review of New Jersey ethics opinions on the issue of direct solicitation and of action that other states have undertaken to deal with the problem of direct solicitation. The NJSBA states that it focused on safeguarding the general public from misleading or onerous mailings in a manner that preserves that right of attorneys to engage in commercial speech. One major amendment proposed by the NJSBA is to extend the 30-day prohibition against direct solicitation after a mass-disaster to direct solicitation after a death in the family or a serious bodily injury. The NJSBA believes that a slight expansion of the 30-day moratorium will afford additional vulnerable citizens who have experienced trauma with protection from unwanted intrusion during a time of grief.

The Court referred the NJSBA proposal to the Committee on Attorney Advertising (CAA) for comments. The CAA provided comments and suggestions in a letter dated April 24, 2012. See Appendix F. Thereafter, this matter was referred to the PRRC for recommendation. The Committee considered each proposed amendment in the context of the CAA's analysis and recommendations.

a. RPC 7.3(b)

The NJSBA proposes to add "or electronic" to RPC 7.3(b) so that it reads: "send a written or electronic communication." The CAA generally agreed with the revision, noting that it previously issued a Notice to the Bar stating that all requirements applicable to written communications equally apply to electronic communications. The CAA suggests simply omitting the word "written" from the Rule so it reads: "a lawyer shall not contact, or send a [written]

communication to, a prospective client . . . ." The PRRC recommends amending the rule to state, "written, or electronic or other form of communication," so that it encompasses all potential forms of communication with a prospective client.

b. RPC 7.3(b)(4)

RPC 7.3(b)(4) currently prohibits unsolicited contact with a prospective client "within thirty days after a specific mass-disaster event." The NJSBA proposes expanding the rule to prohibit an attorney from contacting a prospective client within 30 days "of a death in the family or serious bodily injury." The CAA's view is that this provision is already subsumed by RPC 7.3(b)(1)("A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if . . . the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer."). The CAA stated that the proposed revision arguably would permit a lawyer to send a solicitation letter on day 31 after the event, while the current prohibition in subsection (b)(1) may require the lawyer to wait longer before soliciting. The CAA also noted that the Court already declined to adopt this 30-day waiting period in 2010. Thereafter, it was presented as a bill in the Legislature which passed in December 2011 but was pocket-vetoed by the Governor. The CAA concluded that although it previously supported this 30-day waiting period for personal injury matters, because it has not seen problems or violations in this area for several years, it sees no reason for an amendment at this time.

The Committee disagrees with the CAA that a waiting period after a death in the family is already subsumed by subsection (b)(1). The Committee recommends adding "death in the family" to the 30-day waiting period due to the devastating nature of the loss of a family member. The Committee, however, acknowledges the CAA's concern that the proposed

amendment may allow solicitation on the 31st day after the death of a family member, while subsection (b)(1) may require a longer waiting period. Therefore, the PRRC also recommends that a reference to subsection (b)(1) be added to the rule to alleviate that concern. Thus, the Committee recommends a rule prohibiting unsolicited communication with a prospective client within 30 days of a death in the family or after a specific mass-disaster event, or if subsection (b)(1) applies.

Some Committee members point out that the "serious bodily injury" addition would require the attorney to make a judgment call, at the time of proposed contact, whether the prospective client has suffered "serious" bodily injury triggering the 30-day solicitation ban, and later require the CAA or another committee to determine whether the attorney's action was unethical because the prospective client suffered "serious" bodily injury. Another member points out that a plaintiff's attorney may be put in the position of having to argue, for ethics purposes, that he or she was permitted to contact the prospective client within 30 days because serious bodily injury was not suffered, and separately having to argue the seriousness of his or her client's injury in a personal injury case. The Committee believes that this amendment is unworkable and burdensome; therefore, it does not recommend adding "serious bodily injury" to RPC 7.3(b)(4).

The Committee recommends that the Court amend RPC 7.3(b)(4) to prohibit unsolicited communication with a prospective client "within thirty days after a death in the family or a specific mass-disaster event, or if section (1) of this Rule applies." The Committee does not recommend the prohibition of unsolicited communication with a prospective client within 30 days of "serious bodily injury."

c. RPC 7.3(b)(5)

RPC 7.3(b)(5) currently permits unsolicited communication with a prospective client concerning a specific event not covered by subsection (b)(4) via a "letter by mail." The NJSBA proposes to permit lawyers to also send an "electronic communication" to such prospective clients. According to the CAA, this amendment would significantly broaden permissible solicitation. Lawyers for example would be permitted to send emails to a person who just received a traffic ticket or was involved in an accident. The CAA believes that there is no reason to broaden permissible solicitation of persons affected by specific events to electronic communications.

A majority of the PRRC believe that permitting solicitation through electronic communications, i.e., emails, is a significant expansion to the solicitation rules that should not be adopted. The majority explains that adding "electronic" communication to RPC 7.3(b) but not to (b)(5) is not inconsistent because 7.3(b) states a general non-solicitation rule that is broad and should cover all types of communication, including electronic communication, and (b)(5) creates a narrow exception to that rule, which should be limited to one easily regulated form of communication—regular mail. The majority's view is that because the purpose of this rule is to protect the public against unsolicited mass mailings, limiting attorney communication to regular mail makes sense. The majority also points out that if the rule is amended to allow electronic communication, the remainder of the rule would have to be revisited because the regulations currently only contemplate solicitation by hard copy letter and envelope.

A minority of the PRRC opine that RPC 7.3(b)(5) should allow electronic communication. The minority notes that the Committee agreed to amend RPC 7.3(b) to prohibit a lawyer from sending written "or electronic" communication to a client in particular circumstances, and believes that the exception to that non-solicitation rule in (b)(5) should also

include electronic communication.

A majority of the PRRC recommends not adding "or electronic communication" to RPC 7.3(b)(5). The majority also recommends that the Court clarify the rule by adding the word "regular," which would read: "a lawyer may send a letter by regular mail to a prospective client."

d. RPC 7.3(b)(5)(i)

The NJSBA proposes amending RPC 7.3(b)(5)(i) to add that the "envelope shall not indicate the nature of the legal problem that is the subject of the letter." The CAA noted that lawyers could easily circumvent this proposed amendment and hide the fact that the enclosed letter is a letter of solicitation by using a phrase designed to urge the recipient to open the letter without expressly indicating the nature of the legal problem. The CAA provided as an example, "important information about your home" could be used rather than "important—this letter could save your property by avoiding foreclosure." If the Court is inclined to amend this rule, the CAA strongly suggested that it be changed to state that the envelope shall contain no information other than the word "advertisement" prominently displayed and the lawyer's name, firm, and return address. This will ensure that the recipient knows that the letter is an advertisement and that a legal issue will not result from the failure to open it.

The PRRC agrees that the envelope should be limited to the word "advertisement" prominently displayed. The Committee recommends amending the rule to add a new sentence: "The envelope shall contain nothing other than the lawyer's name, firm, return address and 'ADVERTISMENT' prominently displayed."

e. RPC 7.3(b)(5)(ii)

The NJSBA proposes a new subsection (ii) to require that the letter "shall contain the party's name in the salutation and begin by advising the recipient that if a lawyer has already

been retained the letter is to be disregarded." The CAA agreed with this proposal, noting that it incorporates CAA Opinion 35 and a portion of Opinion 29. Based on the CAA's proposal, the PRRC recommends adopting this amendment.

f. RPC 7.3(b)(5)(iii)

The NJSBA proposes a new subsection (iii) to require that the letter "shall not resemble a legal pleading, official document or include any legal contract." The CAA stated that solicitations that resemble a pleading or official document are already prohibited as misleading under RPC 7.1(a). The CAA saw no reason to amend this rule. The PRRC agrees that no amendment is warranted, additionally noting that that the rules should not enumerate every communication that is misleading because it may lead attorneys to believe that communications not enumerated have been deemed not to be misleading.

g. RPC 7.3(b)(5)(iv)

The NJSBA proposes a new subsection (iv) to require that the letter "shall advise the recipient that his or her name, and the nature of the offense or complaint was obtained pursuant to court Rule 1:38." The CAA explained that not all information is obtained from court records under Rule 1:38. Information is often obtained from other sources, such as police reports, pursuant to the Open Public Records Act, or from private sources. The CAA provided an alternative to expand the requirement to state that the letter "shall advise the recipient how his or her name was obtained and, if the information was obtained by reviewing public records, the Rule or statute that renders such information public." Since the PRRC believes that how the recipient's information was obtained by the attorney is of no consequence, it does not recommend adopting the proposed amendment.

h. RPC 7.3(b)(5)(v)

The NJSBA proposes a new subsection (v) to require that the letter "shall not imply any

special relationship with the court, prosecutor, or police that might lead to a favorable result." The CAA noted that such misleading language is already prohibited by RPC 7.1(a). The CAA has only seen a handful of solicitations in the last several years that included this type of langue and saw no reason to amend the rule. The PRRC agrees with the CAA that no amendment is necessary.

i. RPC 7.3(b)(5)(vi)

The NJSBA proposes a new subsection (vi) to require that the letter "shall not use language that misstates the role of the judge, prosecutor, or police, overstates the lawyer's qualifications, raises unjustified expectations or is susceptible to pressuring the recipient because of purported penalties or consequences that might occur." The CAA states that this amendment is unnecessary because language that raises unjustified expectations is already prohibited by RPC 7.1(a)(2), language that overstates the lawyer's qualifications or that misrepresents likely penalties for an offense is inaccurate or misleading in violation of RPC 7.1(a), and language that may be considered to pressure the recipient is prohibited by RPC 7.3(b)(3). According to the CAA, with the exception of lawyers mentioning jail as a possible penalty for minor traffic tickets, it has not seen many solicitations in the last few years that include this type of language. Based on the CAA's representations, the PRRC does not recommend adopting the NJSBA's proposed amendment.

j. RPC 7.3(b)(5)(vii)

The NJSBA's new subsection (vii) proposes an addition to the language of the current subsection (ii), which requires that the letter include a notice to the recipient regarding the importance of choosing an attorney. The NJSBA proposes to add that a "list of county bar association lawyer referral services shall be included with the letter." The CAA stated that it is

unclear what problem this requirement is intended to address and that the requirement appears unnecessary. The PRRC agrees and does not recommend its adoption.

k. RPC 7.3(b)(5)(viii)

The NJSBA's new subsection (viii) proposes an addition to the language of the current subsection (iii), which requires that the letter include a notice to the recipient that he or she may report inaccurate or misleading letters to the CAA. The NJSBA proposes to add that the "name of the attorney responsible for the content of the letter shall be included in the notice," so as to identify the specific attorney who was sending the letter in the event that a rule is violated. The CAA and the Committee both agree with this amendment. The Committee recommends that the notice shall include the "name and address of the attorney responsible for the content of the letter."

l. RPC 7.3(b)(5)(ix)

Finally, the NJSBA proposes a new subsection (ix) to require that a "copy of any communication sent to a prospective client shall be sent to the [CAA]. The Committee's failure to comment or respond shall not amount to an endorsement of the communication in question." The CAA does not support this proposal. The CAA believes that this requirement would double the cost of lawyer solicitation by requiring that every letter sent out to prospective clients also be sent to the CAA, and would expose the CAA to a number of letters that it neither has the capacity nor need to review. The CAA also believes that attorneys might assume that filing solicitation letters with the CAA provides some kind of safe haven. The CAA states that there is no legitimate reason to impose this onerous requirement on the CAA or on the lawyers who send out solicitation letters. Based on the CAA's concerns, the PRRC does not recommend this amendment.

The PRRC in summary recommends adding "electronic or other form of communication" to RPC 7.3(b); amending RPC 7.4(b)(4) to prohibit unsolicited communication with a prospective client within thirty days after "a death in the family" or if subsection (b) (1) applies; amending RPC 7.4(b)(5) to state that a lawyer may send a letter to a prospective client by "regular" mail; adding to RPC 7.4(b)(5)(i) that the "envelope shall contain nothing other than the lawyer's name, firm, return address and 'ADVERTISMENT' prominently displayed"; adding new subsection RPC 7.4(b)(5)(ii) stating that the letter "shall contain the party's name in the salutation and begin by advising the recipient that if a lawyer has already been retained the letter is to be disregarded"; and adding to the new RPC 7.4(b)(5)(iv), currently (b)(5)(iii), that the "name and address of the attorney responsible for the content of the letter shall be included in the notice."

The difference between the NJSBA's and the PRRC's proposed amendments to RPC 7.3 follow.

NJSBA Proposed Rule	**PRRC Proposed Rule**
RPC 7.3 Personal Contact with Prospective Clients	
(a) . . . No change	(a) . . . No change
(b) A lawyer shall not contact, or send a written or electric communication to, a prospective client for the purpose of obtaining professional employment if:	(b) A lawyer shall not contact, or send a written or electronic or other form of communication to, a prospective client for the purpose of obtaining professional employment if:
(1) . . . No change (2) . . . No change (3) . . . No change	(1) . . . No change (2) . . . No change (3) . . . No change
(4) the communication involves unsolicited direct contact with a prospective client within thirty days of a death in the family or serious bodily injury, meaning bodily injury which creates a substantial risk	(4) the communication involves unsolicited direct contact with a prospective client within thirty days after a death in the family or a specific mass-

of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ or after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or (5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail or electronic communication to a prospective client in such circumstances provided the letter: (i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient. The envelope shall not indicate the nature of the legal problem that is the subject of the letter; and (ii) shall contain the party's name in the salutation and begin by advising the recipient that if a lawyer has already been retained the letter is to be disregarded; and (iii) shall not resemble a legal pleading, official document or include any legal contract; and (iv) shall advise the recipient that his or her name, and the nature of the offense or complaint was obtained pursuant to Rule 1:38; and (v) shall not imply any special relationship with the court, the prosecutor, or police that might lead to a favorable result; and	disaster event, or if section (1) of this Rule applies, when such contact concerns potential compensation arising from the event; or (5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by regular mail to a prospective client in such circumstances provided the letter: (i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient. The envelope shall contain nothing other than the lawyer's name, firm, return address and "ADVERTISEMENT" prominently displayed; and (ii) shall contain the party's name in the salutation and begin by advising the recipient that if a lawyer has already been retained the letter is to be disregarded; and [(ii)] (iii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and [(iii)] (iv) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625. The name

(vi) shall not use language that misstates the role of the judge, prosecutor or police, overstates the lawyer's qualifications, raises unjustified expectations or is susceptible to pressuring the recipient because of purported penalties or consequences that might occur; and [(ii)] (vii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision." A list of county bar association lawyer referral services shall be included with the letter; and [(iii)] (viii) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625. The name of the attorney responsible for the content of the letter shall be included in the notice; and (ix) A copy of any communication sent to a prospective client shall be sent to the Committee on Attorney Advertising. The committee's failure to comment or respond shall not amount to an endorsement of the communication in question. (c) . . . No change (d) . . . No change (e) . . . No change (f) . . . No change	and address of the attorney responsible for the content of the letter shall be included in the notice. (c) . . . No change (d) . . . No change (e) . . . No change (f) . . . No change

The text of the PRRC's proposal follows.

RPC 7.3. Personal Contact with Prospective Clients

(a) . . . No change

(b) A lawyer shall not contact, or send a written or electronic or other form of communication to, a prospective client for the purpose of obtaining professional employment if:

(1) . . . No change
(2) . . . No change
(3) . . . No change

(4) the communication involves unsolicited direct contact with a prospective client within thirty days after a death in the family or a specific mass-disaster event, or if section (1) of this Rule applies, when such contact concerns potential compensation arising from the event; or

(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by regular mail to a prospective client in such circumstances provided the letter:

(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient. The envelope shall contain nothing other than the lawyer's name, firm, return address and "ADVERTISEMENT" prominently displayed; and

(ii) shall contain the party's name in the salutation and begin by advising the recipient that if a lawyer has already been retained the letter is to be disregarded; and

[(ii)] (iii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and

[(iii)] (iv) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625. The name and address of the attorney responsible for the content of the letter shall be included in the notice.

(c) . . . No change

(d) . . . No change
(e) . . . No change
(f) . . . No change

II. PROPOSED RULE AMENDMENTS CONSIDERED BUT NOT RECOMMENDED

A. OAE referral re: proposed amendment to R. 1:21-6(c)

As noted in Part I.A. of this report, the PRRC does not recommend adoption of the OAE's proposed change to Rule 1:21-6(c). The OAE's proposed amendments to Rule 1:21-6(c) would require attorneys who discover that they do not have accounting records required to be maintained by the rule to report that occurrence to the OAE. See Appendix A. According to the OAE, because attorneys are required to reconcile their trust accounts on a monthly basis, if their records are lost or destroyed, they should discover this event within a month of the previous reconciliation. The OAE believes that requiring attorneys to report the loss of required records will protect clients whose funds are endangered by that occurrence and make it more difficult for respondent's to use the "I lost my records" excuse during disciplinary investigations.

The majority of the PRRC does not recommend that the Court adopt this amendment. First, the majority believes that this rule is too burdensome on attorneys. The majority notes that the proposed amendment is not limited to attorneys under investigation, but requires all attorneys to report the loss or destruction of any record that it must maintain under the rules. The majority also points to the large administrative burden that the proposed rule would place on the OAE to collect and maintain all of the reports. For example, in the majority's view, the ethics authorities would have been overwhelmed if the large number of records that must have been destroyed in Hurricane Sandy had to be reported to the OAE. A minority of the PRRC is of the view that the Court should adopt the proposed rule.

B. NJSBA referral re: proposed amendments to RPC 7.3(b)

As discussed in Part I.D. of this report, the NJSBA proposed numerous amendments to RPC 7.3(b) relating to the solicitation of prospective clients. The PRRC determined not to recommend adopting some of the NJSBA's proposed amendments based on the reasons provided in Part I.D. In summary, the PRRC determined not to recommend amending or adopting the following rules:

- RPC 7.3(b)(4), to prohibit an attorney from contacting a prospective client within 30 days of "serious bodily injury";
- RPC 7.3(b)(5), to extend unsolicited communication with a prospective client to "electronic communication";
- new RPC 7.3(b)(5)(iii), to prohibit solicitation letters that resemble official documents;
- new RPC 7.3(b)(5)(iv), to require solicitation letters to state that the recipient's name and offense were obtained under Rule 1:38;
- new RPC 7.3(b)(5)(v), to prohibit solicitation letters from implying a special relationship;
- new RPC 7.3(b)(5)(vi), to prohibit solicitation letters from including certain specific misstatements or misrepresentations;
- current RPC 7.3(b)(5)(ii)(proposed new RPC 7.3(b)(5)(vii)), to require that solicitation letters include a list of county bar association lawyer referral services;
- new RPC 7.3(b)(5)(ix), to require attorneys to send a copy of all solicitation letters to the CAA.

III. NON-RULE RECOMMENDATIONS

The Committee has made no non-rule recommendations in this rules cycle.

IV. OUT-OF-CYCLE ACTIVITY

A. Supreme Court referral re: residual references to "bona fide office."

The PRRC recommended in its 2010-2012 report amendments to Rule 1:21-1 relating to the bona fide office requirement. On January 15, 2013, effective February 1, 2013, the Court adopted amendments to Rule 1:21-1 removing the bona fide office requirement. As noted in a January 17, 2013 Notice to the Bar ("Supreme Court Adoption of Amendments to Rule 1:21-1 ('Bona Fide Office')"), the Supreme Court then asked the PRRC "to review any other court Rules and Rules of Professional Conduct that use 'bona fide office' terminology . . . and make appropriate recommendations to the Court." The PRRC, in response, in its May 20, 2013 out-of-cycle report, recommended amendments to Rules 1:20-1(c), 1:21-1(a), 1:21-2(a), and 1:21-9(c)(3), and to RPC 5.5(c)(5). The Court considered the PRRC's out-of-cycle report and adopted the recommended rule amendments. Those amendments were included in an omnibus rule amendment order adopted July 9, 2013, and effective September 1, 2013. The Court also approved the PRRC's recommendation that the Court "have its other rules committees, such as the Civil Practice Committee, consider the impact of the amendments to Rule 1:21-1(a) on rules within their scope of authority."

B. Technical Amendments

As noted in a February 27, 2013 Notice to the Bar ("Supreme Court Adoption of Technical Amendments to Rule 1:21-1"), the Court adopted technical amendments to Rule 1:21-1. In particular, the Court added "for the practice of law" to Rule 1:21-1(a)(1) so that it provides: "An attorney need not maintain a fixed physical location for the practice of law, but must

structure his or her practice in such a manner . . . ." The Court also added "is not domiciled in this State and" to, and removed "other" from, Rule 1:21-1(a)(2), so that it provides: "An attorney who is not domiciled in this State and does not maintain a fixed physical location for the practice of law in this State, but who meets all [other] qualifications for the practice of law set forth herein must designate the Clerk of the Supreme Court as agent . . . ." The Court also approved a revised form for designating the Clerk of the Supreme Court as agent under Rule 1:21-1(a)(2).

V. HELD MATTERS

As of the date of this report, there are no referrals pending before the Committee.

Respectfully submitted,

PROFESSIONAL RESPONSIBILITY RULES COMMITTEE

Honorable Walter R. Barisonek, A.J.S.C. (ret.), Chair of the PRRC
Honorable Alan B. Handler, Associate Justice (ret.), Chair, Advisory Comm. on Judicial Conduct
Cynthia A. Cappell, Esq., Chair, Committee on Attorney Advertising
Daniel R. Hendi, Esq., Director and Counsel, Lawyers Fund for Client Protection
Melville D. Lide, Esq., Appointed Member
Charles M. Lizza, Esq., Chair, Committee on the Unauthorized Practice of Law
Richard J. Badolato, Esq., Chair, Advisory Committee on Professional Ethics
John P. Scordo, Esq., Chair, IOLTA Fund of the Bar of New Jersey
Bonnie C. Frost, Esq., Chair, Disciplinary Review Board
Sherilyn Pastor, Esq., Appointed Member
Steven M. Richman, Esq., New Jersey State Bar Association
Committee Staff:
Steven Klutkowski, Esq., Staff Attorney, Supreme Court Clerk's Office

TABLE OF APPENDICES

APPENDIX A

OFFICE OF ATTORNEY ETHICS

OF THE

SUPREME COURT OF NEW JERSEY

CHARLES CENTINARO
DIRECTOR

PHONE: (609) 530-4008
FAX: (609) 530-5238

P.O. BOX 963
TRENTON, NEW JERSEY 08625

MEMORANDUM

TO: Steven Klutkowski, Esq.
Professional Responsibility Rules Committee

FROM: Charles Centinaro, OAE Director

SUBJECT: Proposed Rule Changes

DATE: November 8, 2012

The Office of Attorney Ethics proposes that the following New Jersey Court Rules be revised:

(1) *R.1:20-3(g)(3);*

(2) *R.1:20-3(g)(4);* and

(3) *R.1:21-6* (proposed new section) (c)(2).

These proposed revisions are being submitted by the Office of Attorney Ethics at the request of the New Jersey Supreme Court Disciplinary Oversight Committee. I enclose copies of my memoranda to the Disciplinary Oversight Committee on September 13, 2010 and December 5, 2011. As you can see from those submissions, the OAE had also proposed an additional change to *R.1:20-3* concerning the appointment of a standing special master for investigations. Please note that we are not presently seeking that proposed rule change.

I am also enclosing a summary of proposed rule revisions with the actual rule changes. The only difference between this summary and the proposed rule changes in our September 10, 2010 memorandum to the Disciplinary Oversight Committee is a one word addition to proposed *R.1:20-3(g)*, which is the addition of the word "timely" to the last sentence of the proposed rule change.

If you have any questions regarding these proposed rules changes, please do not hesitate to contact me.

CC/sra
Encls.

OFFICE OF ATTORNEY ETHICS
OF THE
SUPREME COURT OF NEW JERSEY

CHARLES CENTINARO
Director

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P.O. BOX 963
TRENTON, NEW JERSEY 08625

MEMORANDUM

TO: All Members of the Disciplinary Oversight Committee

FROM: Charles Centinaro

SUBJECT: **Proposed Rule Revisions**

DATE: December 5, 2011

I had previously provided the DOC with a memorandum dated September 13, 2010, outlining four suggested rule revisions designed to help the OAE deal with uncooperative respondents. (Attachment A). In light of the pending ABA consultation and at the request of the OAE, further consideration of those proposed rule changes was held in abeyance.

At Chairman Fury's request, the OAE has reviewed those proposed rule changes and we now resubmit three of them for further consideration by the DOC. (Attachment B). We have determined to withdraw the proposal to amend *R.1:20-3* to include a new section which would have provided for the designation of a Standing Special Ethics Master For Investigations with authority to make and enforce orders compelling the timely production of records, files and other evidence during disciplinary investigations. We believe that the other three proposed rule changes in combination with the existing rules which provide for direct petitions to the New Jersey Supreme Court for the temporary suspension of uncooperative attorneys will provide the OAE with meaningful tools with which we can compel more expeditious provision of attorney records which are necessary to complete our investigations in a timely fashion.

It is our understanding that the Professional Responsibility Rules Committee (PRRC) to which these proposed rule changes must be submitted is finalizing its report for the current two-year cycle. These proposed changes would be submitted for consideration by the PRRC in connection with the next two-year cycle.

/rjr

OFFICE OF ATTORNEY ETHICS
OF THE
SUPREME COURT OF NEW JERSEY

ATTACHMENT A

CHARLES CENTINARO
Director

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Fax: (609) 530-5238

P.O. BOX 963
TRENTON, NEW JERSEY 08625

MEMORANDUM

TO: All Members of the Disciplinary Oversight Committee

FROM: Charles Centinaro

SUBJECT: Uncooperative Respondents

DATE: September 13, 2010

At the previous June 23, 2010 DOC meeting, I was asked to compile a list of suggestions for dealing with uncooperative respondents including proposed rule revisions. I have reviewed this matter with my staff and propose four rule revisions that we believe would be helpful to the OAE in managing matters where respondents fail to cooperate in disciplinary investigations. While we believe that these changes should help us get more complete and timely information from non-cooperative respondents, we have no way of knowing for sure whether these changes will serve to increase or decrease investigation times.

The primary tool for securing the cooperation of uncooperative respondents is our ability to move for their temporary suspension pursuant to New Jersey Court Rule 1:20-3(g)(4). Some respondents cooperate on threat of such a motion or once the motion is filed. Others, however, still do not cooperate and may be suspended. It must be remembered that the temporary suspension of an attorney for failure to cooperate with disciplinary authorities does not end the case. The investigation must still be completed. Generally, attorneys who are temporarily suspended for failure to cooperate do not usually become cooperative after the suspension takes effect. It therefore should be assumed that if the rule changes result in more suspensions, the investigation times in those cases may increase. If the rule changes compel more respondents to provide more meaningful information in a timely fashion, then the changes should result in swifter resolutions of those matters.

It is rare that an attorney will openly and flatly refuse to provide information and/or documents to the OAE. Where there is an absolute refusal to cooperate, the rules are clear and it is a relatively simple process for the OAE to obtain the attorney's temporary suspension. Far more

difficult are the cases in which respondents profess cooperation while they intentionally or negligently delay, obstruct and mislead OAE investigators. Some examples:

- Respondent fails to produce requested files at an audit providing an explanation such as: "I forgot it"; "I lost it"; "I didn't think you needed it"; "it's in storage"; "the information is in a different file that you didn't ask for;" etc.

- When given time to reconstruct records, respondent does not inform the OAE of any problems during the time allotted to him to reconstruct records and then doesn't produce the reconstruction explaining: "I just paid an accountant to do it and I need more time"; "it's tax season and my accountant needs more time"; "I just changed accountants and need more time"; "I don't know how to do it and can't afford an accountant"; "I (my wife, my husband, my kids etc.) got sick and I couldn't get it done. I need more time". The excuses as to why previously requested records can't be produced (or worse yet, do not exist) are endless.

- Many attorneys freely admit that they don't know how to maintain the records required by the rules and no matter how many opportunities they are given, they cannot produce even a list of clients whose funds should be in the trust account at any given time during the audit period, much less the amount being held for each client and the dates and amounts of all deposits and withdrawals.

- Respondents intentionally provide the OAE with partial records to mislead the investigator. We may discover well into the investigation that funds of clients we were never told about and which should have remained intact in the trust account were invaded. At that point, it becomes incumbent upon the OAE to subpoena additional records, interview additional witnesses and essentially begin a new investigation.

- When specifically requested to list all accounts in which trust funds are held, respondents sometimes fail to inform the OAE of all such accounts. We may discover such an omission months into the investigation at which point we have to subpoena additional information and start the process over again for the new account.

No matter what changes are made to the rules, attorneys will still fail to cooperate with disciplinary investigations. Indeed, despite the specter of certain disbarment, attorneys continue to knowingly misappropriate trust funds. We do not know what, if any, impact these rule changes will have on the number of attorneys who will cooperate with future investigations. We hope that, if adopted, these changes will improve the OAE's ability to deal with uncooperative conduct and to more thoroughly investigate and prosecute unethical conduct.

SUMMARY OF PROPOSED RULE REVISIONS

1. *R.1:20-3(g)(3)* entitled "Duty to Cooperate" would be amended to require attorneys who contend during an investigation that he/she lost or did not maintain the required records must reconstruct those records within 45 days of the OAE's initial records request. The attorney's failure to provide the reconstructed records would constitute prima facie evidence that the attorney presents a substantial threat of serious harm to other attorneys, clients or the public. This "substantial threat of serious harm" language is taken from the temporary suspension rule, *R.1:20-11.*

2. *R.1:20-3(g)(4)* entitled "Failure to Cooperate." which subjects an attorney to temporary suspension for failing to produce the attorney's client and/or business file or accounting records for inspection, would be amended to provide that his or her failure to produce reconstructed records is a basis for temporary suspension.

3. *R.1:20-3* would be amended to include a new section (*R.1:20-3(g)(5)*), which would provide for the Supreme Court to designate a Standing Special Master For Investigations who would have authority to make and enforce orders compelling the timely production of records, files and other evidence during disciplinary investigations.

4. *R.1:21-6* – the recordkeeping rule would be amended to require attorneys who discover that they do not have the accounting records required to be maintained by the rule to report that occurrence to the OAE. Under the existing rule, attorneys are required to reconcile their trust accounts on a monthly basis. Obviously, if their records are lost or destroyed, they should discover this event within a month of the previous reconciliation. Requiring attorneys to report the loss of required records to the OAE will protect clients whose funds are endangered by that occurrence and make it more difficult for respondents to use the "I lost my records" excuse during disciplinary investigations.

RULE CHANGES

R. 1:20-3(g):

(g) Investigation.

(1) ...No change.

(2) ...No change.

(3) Duty to Cooperate. Every attorney shall cooperate in a disciplinary investigation and reply in writing within ten days of receipt of a request for information. Such reply may include the assertion of any available constitutional right, together with the specific factual and legal basis therefor. Attorneys shall also produce the original of any client or other relevant law office file for inspection and review, if requested, as well as all accounting records required to be maintained in accordance with R. 1:21-6. Where an attorney is unable to provide the requested information in

writing within ten days, the attorney shall, within that time, inform the investigator in writing of the reason that the information cannot be so provided and give a date certain when it will be provided. In the event that the attorney contends that he/she does not have the records required to be maintained by *R.1:21-6* for the time period being investigated, the attorney shall produce reconstructed records that fully comply with *R.1:21-6* for that time period within forty-five days of the original request. The failure by the attorney to produce the actual or reconstructed trust account records in response to a request by disciplinary authorities shall be prima facie evidence that the attorney presents a substantial threat of serious harm to other attorneys, clients or the public.

(4) Failure to Cooperate. If a respondent fails to cooperate either by not replying in writing to a request for information or by not producing the attorney's client and/or business file or accounting records or reconstructed records for inspection and review, the Office of Attorney Ethics may file and serve a motion for temporary suspension with the Supreme Court, together with proof of service. The failure of a respondent to file a response in opposition to the motion may result in the entry of an order of temporary suspension without oral argument until further order of the Court. An attorney temporarily suspended under this rule may apply to the Court for reinstatement on proof of compliance with subsection (3) of this paragraph on notice to the Office of Attorney Ethics.

(5) Standing Special Master(s) For Investigations. The Supreme Court may designate one or more standing special masters for investigations who shall have the authority to make and orders compelling the timely production of records, files and other evidence during disciplinary investigations. The special master shall enforce all Rules and issue orders necessary to compel compliance with this Rule and may bar defenses or bar the admissibility of any evidence in future disciplinary proceedings for substantial violations of respondents' duty to cooperate with disciplinary authorities. The special master may also recommend to the Supreme Court the immediate temporary suspension of respondents who fail to cooperate with disciplinary authorities or violate the special master's orders.

[(5)] (6) Notice to Grievant. The substance of respondent's written response shall be communicated to the grievant, who shall be afforded an opportunity to respond in writing within 14 days of receipt of the communication.

[(6)] (7) Investigative Subpoena. During the investigation of any matter, a subpoena may be issued in accordance with R. 1:20-7(i) in the name of the Supreme Court of New Jersey.

1:21-6. Recordkeeping; Sharing of Fees; Examination of Records

(a) ...No change.

(b) ...No change.

(c) Required Bookkeeping Records.

(1) ...No change.

(2) Attorneys shall report the loss or destruction of the records required to be maintained by subparagraphs (c)(1)(A), (B), (G) and (H) of this rule to the Office of Attorney Ethics within 30 days of their discovery of the occurrence.

[2] (3) ...No change.

[3] (4) ...No change.

CC/bc
c: Carol Hucks, Esq., Staff to DOC
Michael J. Sweeney, Esq.
Paula T. Granuzzo, Esq.

ATTACHMENT B

SUMMARY OF PROPOSED RULE REVISIONS

1. *R.1:20-3(g)(3)* entitled "Duty to Cooperate" would be amended to require attorneys who contend during an investigation that he/she lost or did not maintain the required records must reconstruct those records within 45 days of the OAE's initial records request. The attorney's failure to provide the reconstructed records would constitute prima facie evidence that the attorney presents a substantial threat of serious harm to other attorneys, clients or the public. This "substantial threat of serious harm" language is taken from the temporary suspension rule, *R.1:20-11*.

2. *R.1:20-3(g)(4)* entitled "Failure to Cooperate." which subjects an attorney to temporary suspension for failing to produce the attorney's client and/or business file or accounting records for inspection, would be amended to provide that his or her failure to produce reconstructed records is a basis for temporary suspension.

3. *R.1:21-6* – the recordkeeping rule would be amended to require attorneys who discover that they do not have the accounting records required to be maintained by the rule to report that occurrence to the OAE. Under the existing rule, attorneys are required to reconcile their trust accounts on a monthly basis. Obviously, if their records are lost or destroyed, they should discover this event within a month of the previous reconciliation. Requiring attorneys to report the loss of required records to the OAE will protect clients whose funds are endangered by that occurrence and make it more difficult for respondents to use the "I lost my records" excuse during disciplinary investigations.

RULE CHANGES

R. 1:20-3(g):

(g) Investigation.

(1) ...No change.

(2) ...No change.

(3) Duty to Cooperate. Every attorney shall cooperate in a disciplinary investigation and reply in writing within ten days of receipt of a request for information. Such reply may include the assertion of any available constitutional right, together with the specific factual and legal basis therefor. Attorneys shall also produce the original of any client or other relevant law office file for inspection and review, if requested, as well as all accounting records required to be maintained in accordance with R. 1:21-6. Where an attorney is unable to provide the requested information in writing within ten days, the attorney shall, within that time, inform the investigator in writing of the reason that the information cannot be so provided and give a date certain when it will be provided. In the event that the attorney contends that he/she does not have the records required to be maintained by *R.1:21-6* for the time period being investigated, the attorney shall produce

reconstructed records that fully comply with *R.1:21-6* for that time period within forty-five days of the original request. The failure by the attorney to produce the actual or reconstructed trust account records in response to a request by disciplinary authorities shall be prima facie evidence that the attorney presents a substantial threat of serious harm to other attorneys, clients or the public.

(4) Failure to Cooperate. If a respondent fails to cooperate either by not replying in writing to a request for information or by not producing the attorney's client and/or business file or accounting records or reconstructed records for inspection and review, the Office of Attorney Ethics may file and serve a motion for temporary suspension with the Supreme Court, together with proof of service. The failure of a respondent to file a response in opposition to the motion may result in the entry of an order of temporary suspension without oral argument until further order of the Court. An attorney temporarily suspended under this rule may apply to the Court for reinstatement on proof of compliance with subsection (3) of this paragraph on notice to the Office of Attorney Ethics.

(5) ...No change

(6) ...No change

1:21-6. Recordkeeping; Sharing of Fees; Examination of Records

(a) ...No change.

(b) ...No change.

(c) Required Bookkeeping Records.

(1) ...No change.

(2) Attorneys shall report the loss or destruction of the records required to be maintained by subparagraphs (c)(1)(A), (B), (G) and (H) of this rule to the Office of Attorney Ethics within 30 days of their discovery of the occurrence.

[2] (3) ...No change.

[3] (4) ...No change.

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1. *R.1:20-3(g)(3)* entitled "Duty to Cooperate" would be amended to require attorneys who contend during an investigation that he/she lost or did not maintain the required records must reconstruct those records within 45 days of the OAE's initial records request. The attorney's failure to provide the reconstructed records would constitute prima facie evidence that the attorney presents a substantial threat of serious harm to other attorneys, clients or the public. This "substantial threat of serious harm" language is taken from the temporary suspension rule, *R.1:20-11*.

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RULE CHANGES

R. 1:20-3(g):

(g) Investigation.

(1) ...No change.

(2) ...No change.

(3) Duty to Cooperate. Every attorney shall cooperate in a disciplinary investigation and reply in writing within ten days of receipt of a request for information. Such reply may include the assertion of any available constitutional right, together with the specific factual and legal basis therefor. Attorneys shall also produce the original of any client or other relevant law office file for inspection and review, if requested, as well as all accounting records required to be maintained in accordance with R. 1:21-6. Where an attorney is unable to provide the requested information in writing within ten days, the attorney shall, within that time, inform the investigator in writing of the reason that the information cannot be so provided and give a date certain when it will be provided. In the event that the attorney contends that he/she does not have the records required to be maintained by *R.1:21-6* for the time period being investigated, the attorney shall produce reconstructed records that fully comply with *R.1:21-6* for that time period within forty-

five days of the original request. The failure by the attorney to timely produce the actual or reconstructed trust account records in response to a request by disciplinary authorities shall be prima facie evidence that the attorney presents a substantial threat of serious harm to other attorneys, clients or the public.

(4) Failure to Cooperate. If a respondent fails to cooperate either by not replying in writing to a request for information or by not producing the attorney's client and/or business file or accounting records or reconstructed records for inspection and review, the Office of Attorney Ethics may file and serve a motion for temporary suspension with the Supreme Court, together with proof of service. The failure of a respondent to file a response in opposition to the motion may result in the entry of an order of temporary suspension without oral argument until further order of the Court. An attorney temporarily suspended under this rule may apply to the Court for reinstatement on proof of compliance with subsection (3) of this paragraph on notice to the Office of Attorney Ethics.

[(5)] (6) Notice to Grievant. The substance of respondent's written response shall be communicated to the grievant, who shall be afforded an opportunity to respond in writing within 14 days of receipt of the communication.

[(6)] (7) Investigative Subpoena. During the investigation of any matter, a subpoena may be issued in accordance with R. 1:20-7(i) in the name of the Supreme Court of New Jersey.

1:21-6. Recordkeeping; Sharing of Fees; Examination of Records

(a) ...No change.

(b) ...No change.

(c) Required Bookkeeping Records.

(1) ...No change.

(2) Attorneys shall report the loss or destruction of the records required to be maintained by subparagraphs (c)(1)(A), (B), (G) and (H) of this rule to the Office of Attorney Ethics within 30 days of their discovery of the occurrence.

[2] (3) ...No change.

[3] (4) ...No change.

APPENDIX B

OFFICE OF ATTORNEY ETHICS

OF THE

SUPREME COURT OF NEW JERSEY

CHARLES CENTINARO
DIRECTOR

PHONE: (609) 530-4008
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P.O. BOX 963
TRENTON, NEW JERSEY 08625

MEMORANDUM

TO: Steven Klutkowski, Esq.
Professional Responsibility Rules Committee

FROM: Charles Centinaro, OAE Director

SUBJECT: **Proposed Change to Court Rules 1:20-4(d) (Hearing Panel Assignments) and 1:20-10 (Consent to Discipline)**

DATE: June 24, 2013

The Supreme Court recently determined that the Professional Responsibility Rules Committee should consider the OAE's proposal to amend Court Rules 1:20-4(d) and 1:20-10, in light of recommendations made by the ABA's Standing Committee on Professional Responsibility Report on the New Jersey Lawyer Discipline System. This memo will briefly outline the proposed changes including the reasons behind the Standing Committee's recommendations in expectation that the Rules Committee will consider the proposals during the current rules cycle.

1. Restructure of Hearing Panel Assignments

One of the recommendations of the Standing Committee was that the Supreme Court take measures to separate the investigative/prosecutorial functions from the adjudicative function at the DEC level. Specifically, the Standing Committee recommended that the Court amend its Rules to provide that the DEC that determines probable cause should not also serve as the trier of fact for the same case.

In light of that recommendation, the OAE proposes that grievances that are investigated in one district and result in the filing of a complaint proceed to hearing before a panel from a neighboring district. Making this change will allow the attorney investigator/presenter greater freedom to discuss the investigation with members of his own committee without the concern

that some of those members may later sit as trier of fact on that matter. Such a change will provide minimal to no inconvenience to either DEC while ensuring that the ethics system remains free from partiality or the appearance of bias.

Attached as Exhibit A is a copy of Rule 1:20-4(d) with the proposed change to restructure the hearing panel assignments.

2. Consent to Discipline

The Standing Committee also recommended that the time frame for consent to discipline be expanded. Currently, Rule 1:20-10(b)(1) provides that at any time during the investigation of a disciplinary matter, or within 60 days after the time prescribed for the filing of any answer to a complaint, the respondent may agree to discipline by consent in exchange for a specific recommendation for discipline. The time limit was intended to encourage respondents to enter into discipline by consent as early as possible and before the OAE or the DECs expended substantial resources to prosecute a complaint that would not go to a hearing. However, the Standing Committee noted that the Rule sometimes has the detrimental effect of forcing cases through the system that could otherwise be easily resolved early on.

In light of that recommendation, the OAE proposes that Rule 1:20-10(b)(1) be amended to permit stipulation to discipline by consent at any point in the proceedings prior to issuance of a hearing report. Attached as Exhibit B is a copy of Rule 1:20-10(b)(1) with proposed amendatory language.

Thank you.

CC:hh
Enc.
c. Mark Neary, Clerk of the Supreme Court

1:20-4. Formal Pleadings

(a) Complaint Determination. Where the chair or Director, in his or her sole discretion, determines that there is a reasonable prospect of a finding of unethical conduct by clear and convincing evidence and where the matter is not diverted pursuant to R. 1:20-3(i)(2), a complaint shall issue.

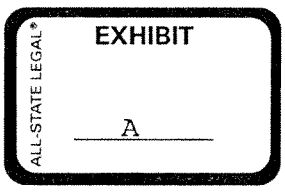
(b) Contents of Complaint. Every complaint shall be in writing, designated as such in the caption, and brought against the respondent in the name of either the District Ethics Committee or the Office of Attorney Ethics. The complaint shall be signed by the chair, secretary or any Ethics Committee member, the Director, or the Director's designee. The complaint shall state the name of the grievant, if any, and the name, year of admission, law office or other address, and county of practice of the respondent, and shall set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated. It shall also state above the caption the name, address and phone number of the presenter assigned to handle the matter.

(c) Consolidation of Charges and Respondents. A complaint may include any number of charges against a respondent. A consolidated complaint may be filed against two or more respondents if they are members of the same law firm or if the allegations are based on the same general conduct or arise out of the same transaction or series of transactions.

(d) Filing and Service. The original complaint shall be filed with the special ethics master appointed by the Supreme Court or with the secretary of the Ethics Committee designated by the Office of Attorney Ethics, which shall be a District Ethics Committee separate from the Ethics Committee in which the matter was investigated. In those matters referred for hearing to a separate district, an investigator from the originating Ethics Committee shall continue to serve as presenter. ~~or the designated special ethics master to whom the case is assigned.~~ If the matter will be determined by an Ethics Committee, service of the complaint shall be made by the secretary of the Ethics Committee designated by the Office of Attorney Ethics to conduct the hearing; otherwise service shall be made by the Director. A copy of the complaint shall be served on the respondent and respondent's attorney, if known, in accordance with R. 1:20-7(h), together with written notice advising the respondent of the requirements of R. 1:20-4(e) and (f), the name and address of the secretary or the Director as appropriate, as well as the address and telephone number of the vice chair of the Ethics Committee or special ethics master to whom all questions and requests for extension of time to file answers shall be directed. In appropriate circumstances, the secretary or the Director shall forward a copy of every complaint to the respondent's law firm or public agency employer in accordance with R. 1:20-9(k).

(e) Answer. Within twenty-one days after service of the complaint, the respondent shall file with and serve on the secretary the original and one copy of a written, verified answer designated as such in the caption. The respondent shall also file a copy with the presenter, the vice chair or special ethics master and, in cases prosecuted by the Director, two copies with that office . The verification shall be made in the following form:

"Verification of Answer



I, (insert respondent's name), am the respondent in the within disciplinary action and hereby certify as follows:

(1) I have read every paragraph of the foregoing Answer to the Complaint and verify that the statements therein are true and based on my personal knowledge.

(2) I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

An answer that has not been verified within ten days after the respondent is given notice of the defect shall be deemed a failure to answer as defined within these Rules.

For good cause shown, the vice chair or the special ethics master, if one has been appointed, may, on written application made within twenty-one days after service of the complaint, extend the time to answer. The Director shall be notified of any extension granted in cases prosecuted by that office. The secretary shall forward one copy of all answers to the Director. The respondent's answer shall set forth (1) a full, candid, and complete disclosure of all facts reasonably within the scope of the formal complaint; (2) all affirmative defenses, including any claim of mental or physical disability and whether it is alleged to be causally related to the offenses charged; (3) any mitigating circumstances; (4) a request for a hearing either on the charges or in mitigation, and (5) any constitutional challenges to the proceedings. All constitutional questions shall be held for consideration by the Supreme Court as part of its review of any final decision of the Board. Interlocutory relief may be sought only in accordance with R. 1:20-16(f)(1). Failure to request a hearing shall be deemed a waiver thereof. A respondent is required to file an answer even if the respondent does not wish to contest the complaint.

(f) Failure to Answer.

(1) Admission. The failure of a respondent to file a verified answer within the prescribed time shall be deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. No further proof hearing shall be required.

(2) Certification to Disciplinary Review Board. If a respondent has been duly served with a complaint, but has failed to file a verified answer within the prescribed time, a certification detailing that failure may be filed with the Director by the secretary or special ethics master, or, in cases prosecuted by the Director, by ethics counsel. The Director may thereafter file that certification with the Board, which shall treat the matter as a default. A copy of the certification shall be mailed to the respondent.

(g) Counsel.

(1) Presenter. All disciplinary and disability proceedings shall be prosecuted by an attorney presenter designated by the Director or chair.

(2) Respondent's Counsel; Assignment for Indigents. A respondent may be represented by counsel admitted to practice law in New Jersey or admitted pro hac vice by the Board, or may appear pro se. A respondent desiring representation but claiming inability to retain counsel by reason of indigency, shall promptly so notify the vice chair and special ethics master, if one is appointed, and shall, within 14 days after service of the complaint, make written application to the Assignment Judge of the vicinage in which respondent practices or formerly practiced, simultaneously serving the application on the vice chair and special ethics master, if one has been assigned, and on the presenter. The application shall be supported by a certification complying with R. 1:4-4(b), which shall contain a current statement of all assets and liabilities, any bankruptcy petition and orders, and copies of the respondent's state and federal income and business tax returns for the prior three-year period. For good cause shown, the Assignment Judge shall assign an attorney to represent the respondent without compensation, so notifying the respondent, the secretary, the vice chair and special ethics master, if one has been assigned, and the Office of Attorney Ethics of any decision.

(3) Grievant's Counsel. A grievant may be represented by a retained attorney. Such attorney shall be limited to consulting with the grievant and may not be designated as the presenter in the matter.

Note: Text and former R. 1:20-4 redesignated R. 1:20-15. New text to R. 1:20-4, adopted January 31, 1995 to be effective March 1, 1995; paragraph (e) amended July 5, 2000 to be effective September 5, 2000; paragraphs (e) and (f)(2) amended July 12, 2002 to be effective September 3, 2002; paragraphs (a), (b), (d), (e), (f), and (g) amended July 28, 2004 to be effective September 1, 2004; paragraph (d) amended August 1, 2006 to be effective September 1, 2006; paragraph (b) amended July 9, 2008 to be effective September 1, 2008.

Comment:

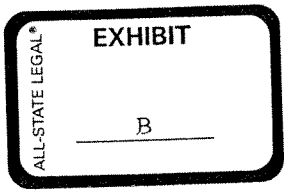
The amendment to paragraph (d) is intended to effectuate a transfer from the district ethics committee that investigated a grievance to another committee for hearing, should a determination to file a formal complaint be filed. Previously, a grievance was investigated and prosecuted, when appropriate, before a single district ethics committee. The amendment attempts to address any inherent perception of bias by ensuring that all hearings are conducted by a district committee and hearing panel that has no prior familiarity or knowledge of the grievance and investigation thereof.

1:20-10. Discipline by Consent

- **(a) Disbarment by Consent.**
  - **(1) General Procedure.** An attorney against whom a grievance has been filed may submit a consent to disbarment as a member of the bar to the Supreme Court through the Director, who shall transmit the consent in due form together with a report and recommendation. If accepted, the disbarment by consent shall be equivalent to disbarment, and the order accepting it shall be published as in cases of disbarments.
  - **(2) Affidavit of Consent.** Consents to disbarment shall be by affidavit in the form approved by the Supreme Court in which the respondent asserts:
    - **(A)** the respondent has consulted with an attorney; and
    - **(B)** the respondent's consent is freely and voluntarily given; the respondent has not been subjected to coercion or duress; the respondent is fully aware of the implications of submitting the consent; and
    - **(C)** the respondent is not under any disability, mental or physical, nor under the influence of any medication, intoxicants or other substances that would impair the respondent's ability to knowingly and voluntarily execute the disbarment by consent; and
    - **(D)** the respondent is aware that there is presently pending an investigation or proceeding involving allegations of unethical conduct, which allegations are set forth in the consent form; and
    - **(E)** an acknowledgement that the material facts so alleged are true; and
    - **(F)** an acknowledgement that the allegations of unethical conduct could not be successfully defended against; and
    - **(G)** the understanding that the disbarment by consent, if accepted by the Supreme Court, is tantamount to disbarment and constitutes an absolute bar to reinstatement to the practice of law; and
    - **(H)** the understanding that disciplinary costs will be assessed by the Supreme Court in accordance with R. 1:20-17.

    The affidavit of consent to disbarment shall not be received by the Director unless accompanied by a letter from the respondent's attorney certifying that an attorney has consulted with respondent and that, in so far as the attorney is able to determine, respondent's consent is knowingly and voluntarily given and that respondent is not under any disability affecting respondent's capacity knowingly and voluntarily to consent to disbarment.

  - **(3)** Action by Supreme Court. The Supreme Court may either reject the tendered consent or accept it and enter an order of disbarment. Otherwise, the Court shall reject the consent. If rejected, the disciplinary proceeding shall resume as if no consent had been submitted, and the consent to disbarment shall not thereafter be admitted into evidence.
- **(b) Other Discipline by Consent.**
  - **(1)** Timeliness and Form of Petition. At any time during the investigation or hearing of a disciplinary matter [or within 60 days after the time prescribed for the filing of any answer to a complaint,] ,but prior to the issuance of the hearing report, the respondent may agree with the investigator or presenter to submit an affidavit of discipline by consent in exchange for a specific recommendation for discipline. Following approval



by the chair or Director, the matter shall be submitted to the Board as an agreed matter by way of a motion to impose discipline on consent in accordance with R. 1:20-15(g). A copy of the motion shall be provided to the Director.

- **(2)** Contents of Motion. The motion, which shall be filed by the investigator or presenter shall certify the concurrence of the chair or the Director, and shall be supported by a signed stipulation setting forth in detail the admitted facts regarding the unethical conduct, the specific ethical rules violated, a specific recommendation for, or range of, discipline, together with a brief analysis of the legal precedent therefore. The stipulation shall attach the respondent's affidavit of consent in the form approved by the Supreme Court and containing the assertions set forth in paragraph (a)(2)(B), (C), (E) and (H).
- **(3)** Action by Board. Pursuant to R. 1:20-15(g), the perfected motion shall be submitted to the Board. The Board may allow the motion and accept the discipline recommended. The Board shall either deny the motion in which case the disciplinary proceeding shall resume as if no motion had been made or the Board shall grant the motion. If accepted by the Board, it shall submit the record of the proceedings to the Clerk of the Supreme Court for entry of a consent order of discipline in accordance with R. 1:20-16(e). If the motion is denied, no admissions made therein shall be admitted into evidence.

Rule 1:20-10 text deemed new text adopted January 31, 1995 to be effective March 1, 1995; paragraph (a)(2) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a)(3) and (b) amended July 9, 2004 to be effective September 1, 2004.

APPENDIX C

NEW JERSEY

Report on the Lawyer Discipline System

July 2011

Sponsored by the
American Bar Association
Standing Committee on
Professional Discipline

NEW JERSEY LAWYER DISCIPLINE SYSTEM
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I. INTRODUCTION

A. Regulation of the Legal Profession by the Judicial Branch of Government

Admission to the practice law is a judicial function. Since the thirteenth century, lawyers have been held accountable for their professional conduct by the judges before whom they practiced.[1] By the late 1800's, the courts were claiming their inherent and exclusive power to regulate the legal profession.[2] Today, in each state and the District of Columbia, the court of highest appellate jurisdiction has the inherent and/or constitutional authority to regulate the practice of law.[3]

The judicial branch of government is better suited to regulate the legal profession than the legislative and executive branches because the other two branches of government are more subject to political influence. Regulation by either the legislature or executive thus jeopardizes the independence of the legal profession. In the United States an independent judiciary is crucial to maintaining citizens' rights and freedoms, and the rule of law. As noted in the Preamble to the *ABA Model Rules of Professional Conduct*:

> ...an independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.[4]

Studies by the American Bar Association have shown that judicial regulation of the legal profession is appropriate. In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement, chaired by former U.S. Supreme Court Justice Tom Clark (the Clark Committee), issued its Report containing findings from a three-year comprehensive review of lawyer discipline in the United States.[5] The Clark Committee concluded that the state of lawyer discipline was "scandalous" and that public dissatisfaction required immediate redress or the public would take matters into its "own hands."[6] The Clark Committee strongly urged that the judiciary act promptly, including assertion/reassertion of its inherent regulatory

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[1] *See, e.g.*, Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 Geo. J. Legal Ethics 911 (Spring 1994); and *In re Shannon*, 876 P. 2d 548, 570 (Ariz. 1994) (noting that the state judiciary's authority to regulate the practice of law is accepted in all fifty states).

[2] Commission on Evaluation of Disciplinary Enforcement, Am. Bar Ass'n, *Lawyer Regulation for a New Century* (1992) at 2, http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html.

[3] *See, e.g. In re Attorney Discipline System*, 967 P. 2d 49 (Cal. 1998).

[4] Am. Bar Ass'n, Model Rules of Professional Conduct (2011) at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

[5] Special Comm. on Evaluation of Disciplinary Enforcement, Am. Bar Ass'n, *Problems and Recommendations in Disciplinary Enforcement* (1970) at http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark_Report.authcheckdam.pdf.

[6] *Id.* at 1-2.

authority, should legislatures attempt to intervene.[7] In doing so, the Clark Committee stressed that, because of its political nature, the legislative process was "a far less desirable forum" for such reform to occur.[8]

Twenty years later, the ABA Commission on Evaluation of Disciplinary Enforcement, chaired initially by Robert B. McKay (the McKay Commission), examined the implementation of the Clark Committee Report.[9] The McKay Commission also studied the pros and cons of legislative versus judicial regulation. In doing so, it examined several state agencies created by legislatures to regulate other professions in the public interest and compared them to lawyer disciplinary agencies.[10] The McKay Commission concluded that legislative regulation of other professions did not result in more public protection, and that legislative regulation of the legal profession, specifically, would not be an improvement over judicial regulation. In fact, it would jeopardize the independence of the legal profession.[11] The McKay Commission also found that where other state regulatory agencies were charged with regulating multiple professions and occupations, their resources and effectiveness were diluted.[12] In February 1992, the ABA House of Delegates adopted the McKay Commission's recommendations for improving and expanding lawyer regulation under the jurisdiction of the judicial branch of government of each state. Because of the McKay Commission and similar efforts, the United States is recognized as having the most advanced and professional system of lawyer regulation.

B. The Lawyer Discipline System Consultation Program

In 1980, the ABA Standing Committee on Professional Discipline (Discipline Committee) initiated a national program to confer with state lawyer disciplinary agencies upon invitation by the jurisdiction's highest court. In 1993, the Discipline Committee and the Joint Committee on Lawyer Regulation made significant improvements to this program, reflecting the evolving needs of the highest courts that regulate the legal profession in each jurisdiction. The Discipline Committee has conducted fifty-five consultations since the commencement of the program.

The ABA Standing Committee on Professional Discipline sends a team of individuals experienced in the field of lawyer regulation to examine the structure, operations, and procedures of the host jurisdiction's lawyer discipline system. At the conclusion of its study, the team reports its findings and recommendations for the improvement of the system, on a confidential basis, to the highest court. These studies allow the court to take advantage of model disciplinary procedures that have been adopted by the ABA. The consultations also

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[7] *Id.* at 10-18.
[8] *Id.* at 12.
[9] *Supra* note 2. Raymond R. Trombadore chaired the McKay Commission following the death of Robert McKay.
[10] *Id.* at 3.
[11] *Id.* at 4-5.
[12] *Id.*

provide a means for the Discipline Committee to learn of other effective procedural mechanisms that should be considered for incorporation into current Association legal policy models.

The team examines the state's lawyer regulation system using as a guide criteria adapted from successful programs in other jurisdictions, the Discipline Committee's experience, and the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE).[13] The MRLDE were adopted by the ABA House of Delegates in August 1989, and were most recently amended in August 2002. They incorporate the best policies and procedures drawn and tested from the collective experience of disciplinary agencies throughout the country. The team uses the Report and Recommendations of the McKay Commission as an additional resource. These recommendations reaffirm, expand, and supplement many of the policies set forth in the MRLDE.

C. The ABA Discipline System Consultation Team for New Jersey

Upon the invitation of the Supreme Court of New Jersey, the Discipline Committee sent a team to conduct the on-site portion of the consultation from October 4 - 8, 2010. The team was composed of: David S. Baker, a partner in the firm of Taylor English Duma LLP and Immediate Past Chair of the ABA Standing Committee on Professional Discipline; Mary M. Devlin, former Deputy Director and Regulation Counsel of the American Bar Association Center for Professional Responsibility; Jerome E. Larkin, Administrator of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois and Past President of the National Organization of Bar Counsel; Arnold R. Rosenfeld, Of Counsel at K & L Gates LLP., former Chief Bar (Disciplinary) Counsel of the Board of Bar Overseers of the Massachusetts Supreme Judicial Court, and past member of the Standing Committee on Professional Discipline; and Ruth A. Woodruff, Associate Regulation Counsel for the American Bar Association Center for Professional Responsibility and former National Lawyer Regulatory Data Bank Attorney. Detailed biographies of the team members are attached as Appendix A.

D. Persons Interviewed and Materials Reviewed

During the on-site portion of the consultation, the team interviewed individuals involved in all aspects of the disciplinary process. The team spoke with volunteer members of the District Ethics Committees, the Director of the Office of Attorney Ethics and members of his staff, members of the Disciplinary Review Board, respondents, respondents' counsel, complainants, and officials of the New Jersey State Bar Association. The team also met with members of the Supreme Court of New Jersey.

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[13] *See*, http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html.

The team reviewed extensive documentation relating to the lawyer regulatory system in New Jersey. These records included, but were not limited to, the New Jersey Rules of Professional Conduct, the New Jersey Supreme Court Rules, Supreme Court disciplinary opinions, rules relating to the Lawyers' Fund for Client Protection and the fee arbitration program, as well as disciplinary files, caseload statistics, and budget reports. The team also reviewed the Discipline Committee's 1982 Consultation Report described in the next section of this Report.

The team is grateful to all participants and interviewees for their time and candor. The team was impressed with the commitment of all participants in the system to make improvements that will better serve the public and the profession. The Court's desire to use its inherent regulatory authority and to continue to take an active role in the continued evolution and success of its lawyer regulatory system is laudable and, as discussed in greater detail below, necessary. The Discipline Committee hopes that the recommendations contained in this Report will assist the Court in making continued improvements to the New Jersey lawyer discipline system.

II. OVERVIEW

A. Strengths of the New Jersey Lawyer Discipline System

The New Jersey Supreme Court made its initial request for an independent review of the discipline system in 1981. At the request of New Jersey's Administrative Office of the Courts, a team from the Standing Committee of Professional Discipline conducted the on-site portion of that study of the New Jersey lawyer discipline system on October 5-8, 1981. The Committee issued its Report in 1982 (hereinafter "1982 ABA Report") and made various recommendations regarding structure and staffing, practice and procedures, and education of the bar and the public.

In response, the Court issued its own report and then implemented the vast majority of the recommended changes in the 1982 ABA Report. As a result, New Jersey's disciplinary system today is stronger and more effective. In a number of respects, as will be further discussed below, New Jersey serves as a model for other states. The New Jersey Supreme Court's request for this follow-up study evidences it's commitment to continued improvement of the system.

This Report is designed to provide constructive suggestions based upon the ABA Standing Committee on Professional Discipline's collective knowledge and experience in lawyer regulation and the MRLDE. This Report generally will exclude from discussion those areas of the system that are operating effectively. However, in order to provide a balanced assessment of the New Jersey lawyer discipline system, its strengths should be recognized. The following is not an exhaustive description of those strengths, and additional programs and initiatives of note will be described elsewhere in this Report.

The New Jersey Supreme Court's ongoing concern for the excellence of its lawyer discipline system is clear. It is manifest in the promulgation and adoption of well-written, clear rules governing the legal profession. The Court's disciplinary opinions carefully analyze fact patterns, set forth its legal reasoning, and provide reliable precedent for guidance of the bar. The Court's stewardship is also evident through its Disciplinary Oversight Committee that works to ensure that the discipline system operates effectively and efficiently. The Disciplinary Review Board is well-staffed and expends considerable effort to discharge its appellate review function in a timely manner.

The Court also takes seriously the timeliness of processing matters. Timeliness goals are carefully articulated and enforced. There is close monitoring of both volunteer and staff compliance with the time goals. As discussed below, the Committee appreciates the need for reinforcing timeliness, but also suggests that time goals should not completely drive the system. Concerns for timeliness should be balanced against the realities of handling complexities in individual cases, and should not create an unnecessary level of stress in the work environment.

The Court-appointed Director of the Office of Attorney Ethics (OAE) has significant trial and management experience. The Director and his staff continue to study ways to make the system more efficient and accessible to the public. There are significant outreach efforts to the public, including telephone book references, pamphlets describing the system, and a website. Recommendations 12 and 13 below focus on expanding and refining those efforts so that the disciplinary system is optimally advertised and accessible to the public.

The current structure of the New Jersey discipline system has many commendable elements to ensure public protection as well as fairness to respondents. The team was advised by interviewees, including complainants that the New Jersey discipline system generally functions well. The team observed excellent treatment of complainants throughout the system. Complainants are kept apprised of the status of matters at all stages of the proceedings and are generally provided with explanations of the OAE's actions. The Court has also adopted rules for the operation and continued funding of the New Jersey Lawyers' Fund for Client Protection. The Fund provides necessary compensation for victims of lawyer defalcations and helps restore public trust and confidence in the legal profession.

The Supreme Court, through its enactment of certain procedural rules, has demonstrated its commitment to protecting the public. For example, all complainants are afforded immunity. Providing complainants with absolute immunity encourages those who have some doubt about a lawyer's conduct to submit the matter to the disciplinary agency. Without such immunity, complainants may be hesitant to file grievances and some valid complaints will not be filed. Properly, there is no statute of limitations imposed upon disciplinary complaints. This affirms that it is never too late to address a lawyer's fitness to practice law. Further, complainants receive timely notice of dispositions and can appeal decisions at all levels. This provides assurance that matters are taken seriously and dealt with in a timely manner. In addition, a public member reviews all declinations of charges, which provides for transparency and another opportunity for increasing public confidence in the system.

The Court's fairness to respondents is evident also. For example, New Jersey has adopted a confidentiality rule that protects lawyers from unwarranted public disclosure of unsubstantiated allegations made by members of the public or other lawyers. [14]

New Jersey has been a national leader with its innovative statewide mandatory fee arbitration program, begun in 1978. The OAE provides outstanding leadership in administering this program through 17 Fee Arbitration Committees. The program provides excellent service to the pubic and the bar by resolving fee, cost, and disbursement disputes between lawyers and clients.

New Jersey's Random Audit Compliance Program, instituted in July 1981, protects the public and educates members of the bar about their trust accounting responsibilities. It is one of the

[14] N.J. Sup. Ct. R 1:20-9(a) and (h).

country's oldest and best-operated programs providing financial audits of private law firms. It is well-resourced both in funding and in staff. Because of the level of sophistication, innovation and professionalization of this program, other states are encouraged to look to New Jersey for guidance when considering creation of a random audit program. For example, New Jersey has implemented the innovation of using lawyer telephone numbers rather than addresses to ensure a random cross-section sampling of lawyers from both small and large firm practices.

New Jersey's Trust Overdraft Notification Program is also commendable. Under the Trust Overdraft Notification Program, all financial institutions are required to report to the OAE whenever a lawyer trust account check is presented against insufficient funds. The value of the Program can be measured by the successful imposition of discipline for lawyer misconduct detected as a direct result of the Program.

New Jersey is justifiably proud of the many volunteers who assist in the discipline system. All volunteers, public members as well as lawyers, donate innumerable, uncompensated hours of their time to the lawyer disciplinary process. The team was impressed by the ongoing commitment to include members of the public to provide transparency and accountability to the system. The public member involvement built in to all levels of the system, from the District Ethics Committees, the Disciplinary Review Board, to the Disciplinary Oversight Committee is commendable.

The team was particularly impressed by the dedication of the volunteers in the District Ethics Committee network, where some 600 lawyers and public members spend a scheduled 1.5 days per month working for the system. District Committee Secretaries contribute additional untold hours year after year. The team notes the extensive resources allocated to training volunteers. For example, the OAE has developed an extensive training manual and other training materials. It also provides mandatory orientation for all District Ethics Committee members as well as ongoing training opportunities.

In the Recommendations that follow, the Standing Committee on Professional Discipline offers suggestions as to how the volunteer resources, including both lawyer and public members, might best be leveraged to maximum advantage of the system, the public, and the bar. These Recommendations suggest changes to the structure and function of the OAE and the District Ethics Committees that the team believes will complement the efforts of the Court to make the system more efficient and effective. The Discipline Committee makes these suggestions because it believes, based upon its knowledge and experience, that delay and unfairness in disciplinary proceedings is often inherent in the manner in which a system is structured and the way in which the responsibilities of the various components of the system are delegated. These suggestions are not intended to imply that the volunteers in the District Ethics Committees have not served the public and the bar with devotion and thoughtfulness.

Though the New Jersey State Bar Association (NJSBA) is not directly involved in the

administration of the lawyer discipline system, it supports the Supreme Court's efforts to strengthen it. The NJSBA is commendably engaged in developing and administering the NJSBA Ethics Diversionary Education Course to assist lawyers who have engaged in minor misconduct become better lawyers.

B. Summary of Current Challenges Facing the New Jersey Lawyer Discipline System

As noted above, the New Jersey lawyer discipline system serves as a model for other jurisdictions in several important regards. At the same time, it faces significant challenges that must be overcome in order to achieve optimal efficiencies and to better fulfill its mission of protecting the public. These challenges have developed over an extended period of time. Most are the direct result of a decentralized and only partially professionalized system, as will be discussed at greater length below. The Court and the system also face resource allocation issues as well as fiscal challenges. The Discipline Committee is hopeful that the Supreme Court will carefully consider impediments to the effective and efficient functioning of the New Jersey discipline system noted in this Report and promptly remedy deficits. The Committee hopes that the following Recommendations can be of help in that endeavor.

C. Components of the New Jersey Lawyer Discipline System

The Supreme Court of New Jersey possesses the constitutional and inherent authority to supervise and regulate New Jersey lawyers.[15] The Court's *Rule 1:20 Discipline of Members of the Bar* sets forth the funding mechanism for the regulatory system as well as its structural components and detailed rules of procedure for processing allegations of lawyer misconduct and disability. The components of the system include the Office of Attorney Ethics, 18 District Ethics Committees, the Disciplinary Review Board, the Disciplinary Oversight Committee, and the Supreme Court of New Jersey.

1. Nature and Funding of the New Jersey Lawyer Discipline System

The New Jersey lawyer discipline system is financed exclusively by the New Jersey Supreme Court's mandatory registration assessments on the state's lawyers; taxpayer monies are not used for this purpose.[16] Funds collected annually through the Attorney Registration Program are earmarked for the lawyer discipline and fee arbitration systems.[17]

In 2009, the total annual fee assessed for the majority of lawyers (those admitted between 5 to 49 years) was $200.[18] Of that total, $140 was allocated to lawyer discipline; $50 to the New

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[15] N.J. CONST. art. IV § II, P3.
[16] N.J. Sup. Ct. R 1:20-1(b).
[17] *Id.*
[18] N.J. Office of Attorney Ethics, *2009 State of the Attorney Disciplinary System Report*, 47; *available at* http://www.judiciary.state.nj.us/oae/2009annualreport.pdf.

Jersey Lawyers' Fund for Client Protection and $20 to the Lawyers' Assistance Program (to help lawyers with problems such as alcohol and substance abuse).[19] The total annual fee for 2010 and 2011 was $204. An additional $4 was added to fund the implementation and management of the new Continuing Legal Education requirement. The allocation of the $200 remains the same. Compared with other U.S. jurisdictions, this amount represents one of the lowest mandatory annual registration fees in the country. According to a 2009 survey prepared by the OAE for the National Organization of Bar Counsel, Inc., New Jersey ranked 7th out of 51 jurisdictions in lawyer size (with 84,165 lawyers), but 44th in the amount of mandatory fees required to practice law. In the 2008 survey, the ranking of New Jersey was 8th in size and 45th in mandatory annual fees assessed.[20]

The Disciplinary Oversight Committee oversees the financial management of the discipline system, including an annual budget review.[21] The Director of the Office of Attorney Ethics prepares annually and jointly with Counsel for the Disciplinary Review Board a proposed budget for the state's lawyer discipline system.[22] The proposed budget is submitted to the Disciplinary Oversight Committee, which reviews it and makes a written recommendation to the Supreme Court concerning the proposed budget. The proposed budget is then published to the bar and public for comment. Following receipt of any comments, the Supreme Court approves the budget. The annual disciplinary budget for the calendar year 2009 was $11,150,824 with sixty percent allocated to the Office of Attorney Ethics, 19% to the Disciplinary Review Board, 7% to the District Ethics Committees, 6% to the Random Audit Program, 4% to the Attorney Registration Program, 3% to the District Fee Arbitration Committees, and 1% to the Oversight Committee.[23]

2. The Office of Attorney Ethics (OAE)

Authority

The New Jersey Supreme Court established the Office of Attorney Ethics (OAE), the investigative and prosecutorial arm of the discipline system, pursuant to its constitutional authority on October 19, 1983.

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[19] *Id.*
[20] *Id.*
[21] N.J. Sup. Ct. R. 1:20 B.
[22] N.J. Sup. Ct. R. 1:20-2(b)(11).
[23] *Supra* note 18, at 48.

Staffing

The New Jersey Supreme Court appoints the Director of the OAE.[24] Other lawyers in that office are appointed by the Supreme Court upon the Director's recommendation.[25] The OAE employs a Legal Group consisting of the Director, a First Assistant Ethics Counsel, three Assistant Ethics Counsel, and seven Deputy Ethics Counsel.[26]

To train and offer day-to-day support for the 18 volunteer District Ethics Committees, the OAE employs the District Ethics Group, consisting of an Assistant Ethics Counsel (who functions as the OAE's Statewide Ethics Coordinator), a Deputy Ethics Counsel, an administrative assistant, and a part-time secretary.[27]

The OAE's Complex Investigative Group, consisting of forensic disciplinary auditors, disciplinary investigators, and an investigative aide, conducts statewide investigations of complex, serious and emergent matters; reciprocal discipline cases; and criminal and civil charges against New Jersey lawyers.[28] For example, cases handled by this Group include misappropriation of trust funds, other financial misconduct, fraud, recidivist lawyers, and other white-collar misconduct.[29] The Group also seeks temporary suspensions of lawyers in order to protect the public and the bar from harm by a lawyer's continued misconduct.[30]

The Discipline Support Group supports the lawyers, investigators, auditors, and OAE administrative personnel, and consists of a legal assistant, secretaries, and clerical positions.[31] This Group provides secretarial and support services in addition to a variety of other activities such as transcribing interviews and demand audits, computerizing and updating all docketed disciplinary cases statewide, entering Supreme Court and Disciplinary Review Board decision results into the OAE computer system, entering lawyer registration data, handling book-keeping, handling the approved trust depositories program and the Trust Overdraft Program, coordinating the utilization of special masters, issuing Certificates of Ethical Conduct, and providing information to the public.[32]

Finally, the Administrative Group includes the OAE Administrator, a Support Staff Supervisor, and an Office Coordinator who support the OAE by managing human resources, facilities, budget and accounting services, and handling the lawyer registration program and

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[24] N.J. Sup. Ct. R. 1:20-2(a).
[25] *Id.*
[26] *Supra* note 18, at 49.
[27] *Id.* at 51.
[28] *Id.* at 50.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

dissemination of public information.[33] A manager and a network administrator provide information technology support.[34]

The OAE has broad managerial responsibility and programmatic responsibility for the 18 District Ethics Committees that are charged with investigating and prosecuting routine grievances of alleged misconduct against lawyers.[35] The District Ethics Committees (described further below) are staffed by volunteer lawyers and nonlawyers, whom the OAE trains and supervises.

In addition, the OAE manages 17 District Fee Arbitration Committees, which hear and determine through binding arbitration disputes over fees for lawyers' services.[36] It administers the Random Audit Compliance Program, which monitors recordkeeping responsibilities of private law firms undertaking random audits of lawyers' trust and business accounts.[37] The OAE also manages the Trust Overdraft Notification Program, which reviews lawyer trust account overdrafts as reported by New Jersey financial institutions.

In certain matters, the OAE has exclusive investigative and prosecutorial jurisdiction. For example, the OAE investigates and prosecutes serious and complex disciplinary cases as well as reciprocal discipline matters.[38] Matters other than these are routinely handled by the District Ethics Committees where volunteers investigate grievances, prosecute complaints, conduct hearings, and issue reports. Generally, the OAE tries matters before hearing panels, but the OAE Director may request designation of a special ethics master to try a case if a hearing may reasonably be expected to take three days or more, where the case should be heard continuously from day to day, or where the Director determines the interest of justice so requires.[39] The OAE has exclusive authority to handle all ethics cases involving a lawyer who is a defendant in any criminal proceeding.[40] In addition, the OAE has exclusive authority to seek from the New Jersey Supreme Court emergency suspensions of lawyers who pose a threat to the public. Emergent matters are any cases where the lawyer poses a substantial threat of serious harm to a lawyer, a client, or the public. Examples are where there is clear evidence of past and/or ongoing knowing misappropriation, or if the lawyer is disabled. In such situations, the OAE can make an emergent application for the lawyer's immediate

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[33] *Id.* at 49.
[34] *Id.*
[35] *Id.* at 48.
[36] *Id.*
[37] *Id.*
[38] The terms "complex" and "serious" are not defined in the New Jersey Supreme Court Rules. The New Jersey District Ethics Committee Manual, Section 20.7, p. 23, contains this definition: "Complex cases are defined by the degree of difficulty and amount of work involved. A complex case is one that requires unusual skill, time or labor-intensive investigation due to the nature of the problem(s) presented. Examples of cases that will meet this definition are financial cases involving intensive auditing or investigative resources, serial offenders involved with multiple grievances mandating intensive investigative resources, cases requiring the allocation of significant resources, cases involving significant medical or psychiatric issues."
[39] N.J. Sup. Ct. R 1:20-6(b)(3).
[40] N.J. Sup. Ct. R 1:20-2(b)(1)(B).

temporary suspension.[41] Additionally, the OAE handles any case in which a District Ethics Committee requests intervention.[42] Finally, the OAE is tasked with arguing all disciplinary cases that come before the New Jersey Supreme Court, whether the cases emerge from matters considered serious or complex, and thus investigated and prosecuted by the OAE, or from the larger pool of other cases handled by the District Ethics Committees.[43]

3. District Ethics Committees (DECs)

The 18 District Ethics Committees (DECs) are formed along geographic areas (county or multi-county lines) and consist of no fewer than 8 members who work or reside in the district or county in which the district is located.[44] Four DEC members must be lawyers; two, at least, must be nonlawyer public members.[45] All DEC members are volunteers who investigate grievances, prosecute complaints, conduct hearings and issue reports. The Supreme Court appoints DEC members for a four-year term.[46] As of September 1, 2009, there were 556 District Ethics Committee volunteers, including 467 lawyers and 89 public members.[47]

Screening and Docketing Grievances

Each DEC has a lawyer who serves as Committee Secretary and is charged with screening initial inquiries within 45 days of receipt.[48] Members of the public with complaints against lawyers are advised to telephone a central toll-free number that will transfer the caller to the appropriate DEC Secretary, sorted by zip code, to request a grievance form. All complaints must be in writing and must be filed with the Secretary of the DEC for the district in which the lawyer maintains his or her main law office. Matters may be transferred to another DEC if the Committee determines a conflict of interest exists.

The District Secretary reviews grievance forms and makes docketing decisions. If the matter involves a fee dispute, pending civil or criminal litigation, or certain other situations enumerated in the Rules, the Secretary will decline to docket the matter.[49] If the alleged facts, if proven, would not constitute misconduct, the District Secretary will decline to docket the case after consultation with a designated public member of the DEC.[50] If matters are declined, the District Secretary notifies the complainant of the reason for the declination,

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[41] N.J. Sup. Ct. R 1:20-11(a).
[42] N.J. Sup. Ct. R 1:20-2(b)(1)(C).
[43] N.J. Sup. Ct. R 1:20-2(b)(5).
[44] N.J. Sup. Ct. R. 1:20-3(a).
[45] *Id.*
[46] N.J. Sup. Ct. R. 1:20-3(b).
[47] *Supra* note 18, at 44.
[48] N.J. Sup. Ct. R. 1:20-3(e).
[49] N.J. Sup. Ct. R. 1:20-3(e)(2).
[50] N.J. Sup. Ct. R. 1:20-3(e)(3).

citing the applicable Court rule or other authority.[51] There is no right of appeal from such decisions.[52]

Investigations

If a grievance alleges facts that if proven would violate the New Jersey Rules of Professional Conduct, the Secretary dockets the case and the DEC Chair assigns it for investigation to a lawyer member of the Committee.[53] That DEC lawyer member conducts whatever investigation is required to determine whether unethical conduct has occurred, or whether the respondent is disabled or incapacitated.[54] During the investigation of any matter, the DEC may issue a subpoena pursuant to Rule 1:20-7(i).[55] Time goals provide that standard investigations should be completed within six months; investigations of complex cases should be finished within nine months of the assignment date.[56]

When the investigation is complete, the lawyer Committee member submits a written report to the DEC Chair who determines whether proof of misconduct meets the clear and convincing evidence standard.[57] If not, the Chair directs the Secretary to dismiss the matter and to send a copy of the investigation report to the complainant.[58] If sufficient proof of alleged misconduct exists, a formal complaint is prepared and served upon the lawyer.[59] Usually the formal complaint is prepared by the volunteer investigator/presenter in a matter. The complaint may be signed by the DEC Chair, Secretary or any Committee member. Once a formal complaint is served, the respondent lawyer has 21 days to file an answer in response.[60]

Hearings

If the respondent lawyer admits to the charged misconduct, which is deemed by both the DEC and the OAE to constitute minor misconduct, the matter is diverted.[61] The Diversion program diverts from the disciplinary system lawyers who have committed minor unethical conduct not likely to warrant more than an admonition.[62] The OAE Director or his designee diverts the matter and approves an agreement in lieu of discipline.[63] In addition, diversion

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[51] N.J. Sup. Ct. R. 1:20-3(e)(5).
[52] N.J. Sup. Ct. R. 1:20-3(e)(6).
[53] N.J. Sup. Ct. R. 1:20-3(g)(1).
[54] *Id.*
[55] N.J. Sup. Ct. R. 1:20-3(g)(6).
[56] N.J. Sup. Ct. R. 1:20-8.
[57] N.J. Sup. Ct. R. 1:20-3(i)(1).
[58] N.J. Sup. Ct. R. 1:20-3(e)(5).
[59] N.J. Sup. Ct. R. 1:20-4(a).
[60] N.J. Sup. Ct. R. 1:20-4(e).
[61] N.J. Sup. Ct. R. 1:20-3(i)(2)(B).
[62] N.J. Sup. Ct. R. 1:20-3(i)(2)(A).
[63] N.J. Sup. Ct. R. 1:20-3(i)(2)(A)(i).

requires the lawyer to agree to take remedial action.[64] Diversion conditions generally do not exceed a period of six months.[65] Conditions can include reimbursement of fees or costs, completion of legal work, participation in a drug or alcohol rehabilitation program, psychological counseling, or completion of a course of study.[66] The OAE Director monitors the terms of the agreement.[67]

Otherwise, after formal charges have been filed, hearings are tried before a hearing panel comprised of three DEC members, one of whom must be a public member.[68] A volunteer lawyer member of the DEC is assigned to prosecute the formal charges. Special ethics masters (such as retired judges, former members of the Disciplinary Review Board or former officers of a DEC) may be appointed to hear a case in lieu of a hearing panel when a hearing may be expected to take three days or longer, or for other enumerated reasons.[69]

The hearing is open to the public.[70] Testimony is given under oath, witnesses and records may be compelled by subpoena, and a court reporter prepares a record of the proceeding.[71] Allegations of misconduct must be proven by clear and convincing evidence.[72] After the panel deliberates, it either dismisses the charges or reaches a determination that there has been misconduct and recommends a disciplinary sanction ranging from admonition to censure, suspension, or disbarment.[73]

4. Disciplinary Review Board (DRB)

The Disciplinary Review Board (DRB) is the second of the three levels in the system. It decides disciplinary matters upon recommendations originating from the DECs, or in certain cases, directly from the OAE. Nine members comprise the DRB, including both nonlawyers and lawyers, all of whom serve on a voluntary basis. There are at least three nonlawyer members of the DRB and at least five lawyers; the composition can range between 5 lawyers and 4 nonlawyers or 6 lawyers and 3 nonlawyers.[74]

If a grievance is investigated and dismissed, the grievant has the right to appeal by requesting appeal forms in writing. The DRB hears the appeal of grievances, appealed by right after the investigative or hearing stage. The DRB reviews a matter upon the filing of an ethics appeal

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[64] N.J. Sup. Ct. R. 1:20-3(i)(2)(B)(iii).
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] N.J. Sup. Ct. R. 1:20-6(a)(1).
[69] N.J. Sup. Ct. R. 1:20-6 (b).
[70] N.J. Sup. Ct. R. 1:20-6 (c)(2)(F).
[71] N.J. Sup. Ct. R. 1:20-6 (c)(2)(A).
[72] N.J. Sup. Ct. R. 1:20-6 (c)(2)(B).
[73] N.J. Sup. Ct. R. 1:20-6 (c)(2)(E)(iii).
[74] N.J. Sup. Ct. R. 1:20-15 (a).

by the original complainant or the Director.[75] It may uphold the decision of the local DEC hearing panel and impose discipline, reverse that decision (and impose discipline if the DEC dismissed the matter) or return the matter for further proceedings.[76] In matters in which an admonition or reprimand has been recommended, the DRB reviews DEC hearing panel reports and recommendations and issues letters of admonition.[77] In matters where more serious discipline has been recommended such as reprimand, censure, suspension, or disbarment, the DRB routinely holds oral argument.[78] In such matters the review is de novo on notice to all parties.[79] Oral arguments are open to the public. The respondent lawyer may appear in person or be represented by counsel; a DEC representative appears in support of the hearing panel report.[80] The Board may impose appropriate sanctions, including monetary sanctions, as a form of discipline, in addition to cost incurred in the prosecution of the disciplinary proceeding.[81] The DRB provides a copy of its decision to the complainant and to the respondent.[82] The DRB also recommends reinstatements from suspensions and can impose disciplinary costs.[83]

5. Disciplinary Oversight Committee (DOC)

Rule 1:20B of the NJ Rules of General Application establishes an 11 member Disciplinary Oversight Committee (DOC) appointed by the Supreme Court. The DOC is charged with overseeing the administration and financial management of the disciplinary system in New Jersey. Five members are lawyers or judges, one an annual designee of the New Jersey State Bar Association, and five members are public members. In 2009, the Oversight Committee consisted of six lawyers and five public members, all of whom serve pro bono.[84]

A primary task of the DOC is to make an annual review of the discipline budget proposed by the OAE and the DRB and to make recommendations to the New Jersey Supreme Court regarding the budget.

6. Supreme Court

The Supreme Court of New Jersey is the final and highest level of the state's tri-level disciplinary system. The Supreme Court is comprised of a Chief Justice and six Associate Justices who are appointed by the Governor and confirmed by the State Senate for an initial

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[75] N.J. Sup. Ct. R. 1:20-15 (e).
[76] *Id.*
[77] N.J. Sup. Ct. R. 1:20-15 (f)(4).
[78] N.J. Sup. Ct. R. 1:20-15 (f)(1).
[79] *Id.*
[80] N.J. Sup. Ct. R. 1:20-15 (f)(1) and (2).
[81] N.J. Sup. Ct. R. 1:20-15 (f)(4)(j).
[82] N.J. Sup. Ct. R. 1:20-15 (f)(4).
[83] N.J. Sup. Ct. R. 1:20-15 (f)(3).
[84] *Supra* note 18, at 48.

seven-year term. Upon reappointment they are granted tenure until mandatory retirement at the age of 70.

The Supreme Court hears oral argument in disciplinary matters, conducts a de novo review of the record,[85] and imposes public discipline. The Supreme Court alone can order disbarment.[86] In all other matters, the DRB's recommendation in a disciplinary case becomes final upon entry of a confirming Supreme Court order.[87] The Supreme Court may, however, grant a party leave to appeal or may, on its own motion, review the DRB's determination in a matter.[88]

The Supreme Court also issues emergent suspensions when a lawyer "has been determined to be guilty ... of a serious crime."[89] In such a situation, the Supreme Court enters an order immediately suspending the lawyer from the practice of law until final disposition of a disciplinary proceeding at the conclusion of the criminal proceeding.[90]

If the New Jersey Supreme Court hears oral argument, the OAE represents the public interest in the matter. In 2009, the OAE ethics counsel appeared 29 times for oral argument in disciplinary cases.[91]

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[85] N.J. Sup. Ct. R. 1:20-16 (c).
[86] N.J. Sup. Ct. R. 1:20-16 (a).
[87] N.J. Sup. Ct. R. 1:20-16 (b).
[88] N.J. Sup. Ct. R. 1:20-16 (b).
[89] N.J. Sup. Ct. R. 1:20-13. (b)(1).
[90] *Id.*
[91] *Supra* note 18, at 47.

III. STRUCTURE

Recommendation 1: The Court Should Create a Central Intake System for Lawyer Grievances

Commentary

In 1982, the ABA Standing Committee on Professional Discipline recommended centralization of the New Jersey discipline system. In support of that recommendation the Committee explained:

> The lawyer disciplinary structure organized in 1978 in New Jersey vests too little control of the investigative and prosecutorial function in DEPS.[92] Under the present system matters are not consistently docketed by the DEC Secretaries and may be handled informally, thereby providing the potential that the volume of disciplinary matters may be understated and that some patterns of misconduct may be overlooked through turnover in the position of Secretary and membership of a DEC. Further, by allowing the DEC to maintain a role in the initial processing and disposition of complaints, the determination of a specific complaint may depend largely on the philosophical approach to discipline of the DEC and the application of its local criteria. The resulting inconsistency in sanctions undermines public confidence in the disciplinary process and provides little credibility for the profession. Centralization will provide for uniform docketing and prosecution.

1982 ABA Report, p.14.

The creation of a central intake system was a primary focus of the 1982 ABA Report on the New Jersey system for several pressing reasons. The Report noted that:

> Lawyer discipline must be fair to the individual lawyer and accepted by the bar. Centralization promotes consistency throughout the state. More importantly, however, the disciplinary mechanism must serve the public. The present structure is taxed beyond an ability to serve the public interest.

1982 ABA Report, p.16.

Three recommendations flowed from that observation:

1. The prosecutorial function should be centralized in DEPS. See Lawyer Standards 3.2 and 3.9.

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[92] The Division of Ethics and Professional Services (DEPS) was the predecessor to the OAE.

2. The docketing of complaints and investigative function should be entirely centralized in DEPS. In the alternative, the DECs should also be empowered to investigate matters delegated from and under the direction of DEPS. See Lawyer Standards 3.7 and 3.9.
3. The DEC members should continue to be selected to reflect a diversity of expertise and demographic factors. *Id.*

Nearly three decades later, New Jersey still lacks a centralized intake system for the filing and docketing of complaints. The rationales articulated in the 1982 ABA Report continue to be valid and compelling. After careful review of concerns raised by the interviewees, the Discipline Committee believes the Court should reconsider creating a central intake system where all grievances can be screened initially.

Currently, most matters come into the system when a member of the public calls the central toll-free number. The caller is transferred to the local DEC Secretary in the district where the respondent lawyer has his or her office to request a grievance form. The Secretary of the local DEC screens calls and dockets the grievances. The Secretary refers complex cases to the OAE for that office to handle. The Discipline Committee believes that extensive reliance upon DEC Secretaries in 18 different locales to handle calls from the public and to screen and docket cases is problematic.

Transformation to a centralized intake process from the current decentralized use of DECs will increase public accessibility and consistency in the treatment of complaints. It will streamline the process, avoiding delays and unnecessary duplication of effort. In order for the system to operate optimally, the intake process should be staffed with paid experienced staff who can receive written, electronic, and oral complaints and who can assist complainants in the filing process. In addition, the Court should eliminate the requirement that all complaints must be in writing. There are a number of reasons that complainants cannot submit complaints in writing. These reasons range from language barriers to physical disabilities that prohibit individuals from writing or typing.

Experienced lawyers should evaluate all grievances and determine which require further investigation, which can be dismissed outright, and which should be diverted out of the adjudicative system and onto a diversionary track. Further, the present mechanism for turning over serious complaints from the DECs to the OAE is inefficient and relies on the discretion of many volunteers. This can result in variations in treatment from volunteer to volunteer and area to area. The Committee also learned of unnecessary delays created as a result of the process. The distinction between serious or complex cases, which are handled by the OAE, and standard matters that can be decided in DECs should be eliminated. Such a distinction is artificial. What may seem like a minor complaint on its face may be a sign of something much more serious.

Recommendation 2: The OAE Should Handle All Investigations and Prosecutions for Alleged Misconduct

Commentary

The New Jersey System still uses volunteer investigators and prosecutors for matters not deemed serious or complex. As noted above, the Discipline Committee recommends eliminating the distinction between serious versus standard complaints. The team heard that approximately 50% of investigations are handled by volunteers. A number of interviewees praised the use of volunteers. They believe continuing the practice is desirable because it utilizes the varied legal experience of New Jersey lawyers to analyze allegations of misconduct and because respondent lawyers might be more responsive to a fellow practitioner. The Discipline Committee is sensitive to the concerns expressed by those favoring retention of the volunteer system. However, the Committee believes it is in the best interest of the public and the discipline system for the Court to phase out their use as investigators and prosecutors and amend its Rules accordingly to reflect national practice.

The Clark Committee Report recommended that lawyer disciplinary agencies use full-time investigators and ethics counsel and highlighted concerns about the use of volunteer lawyers to investigate complaints.[93] Among those concerns were that the use of volunteers resulted in delay.[94] Statistics provided to the team support this concern. The Clark Committee also noted that the use of volunteers instead of full-time disciplinary staff to investigate allegations of misconduct results in non-uniformity of investigative standards and practices, the inability to devote time and resources to conduct intensive investigations due to the demands of the volunteer's legal practice, and lack of public confidence in such a system.[95] This lack of confidence is due to perceptions that the volunteer lawyer will be biased in favor of his or her professional colleague.

The team learned that the current system in New Jersey places a burden on its volunteer lawyers, particularly solo and small firm practitioners, to investigate and prosecute matters. Lawyers who practice law in areas other than lawyer regulation are not trained investigators, and bear a particularly heavy burden to undertake investigations of complaints. The consultation team observed that as a result of this, there exists inconsistency among DECs in their resolution of matters where the misconduct alleged is similar. The team heard reports of "unevenness in diligence" among the DECs in addition to concerns about inconsistency in the quality of investigations and results. Increasing consistency in the investigative process would also allow respondents' counsel to better advise their clients, and possibly reduce the time and expense of disciplinary matters for the system and for the lawyer.

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[93] *Supra* note 5, at 48-56.
[94] *Id.* at 49-50.
[95] *Id.* at 50-53.

The Discipline Committee recommends that the Court amend the Rules to provide that the professional staff of the OAE is solely responsible for the investigation and prosecution of allegations of lawyer misconduct, disability cases, and reinstatement matters.[96] Trained professional investigators and prosecutors can expedite the process and also reduce the amount of time and energy invested by volunteer lawyers who often face a daunting learning curve to do this kind of work. In addition, the rotation of members within the DEC required by the current Rules, means that all the expertise developed by the volunteer is lost to the system when that person's term expires. By contrast, having professional investigative and prosecutorial staff in place provides the system with continuity, stability, and expertise in this specialized area of the law.

If a member of OAE's lawyer staff is unfamiliar with an area of law related to a complaint, it is important that the lawyer consult with an expert in that practice area and make other efforts to adequately educate himself/herself so that the matter can be appropriately handled. If this cannot be done, then the matter can be referred to a staff lawyer with the necessary knowledge.

The use of volunteer lawyers to investigate complaints will not be necessary if the OAE is adequately resourced and staffed.[97] The Discipline Committee recognizes that using only OAE investigators and disciplinary counsel might result in a need to increase staff or to reallocate resources currently dedicated to maintaining the volunteer system. The Director of the OAE should continue to ensure that his staff is qualified to investigate and prosecute allegations of misconduct. Staff positions should be adequately compensated so as to allow the Director to attract and retain experienced lawyers. The McKay Commission recommended that there should be a balance of experienced and less experienced staff lawyers in the disciplinary agency.[98] This provides continuity as well as a fresh perspective to the process.

The current volunteer driven system requires substantial resources for training and maintenance. For example, the OAE Director, other staff, and a Supreme Court Justice meet with each of the DECs at least once per year. Additionally, New Jersey allocates extensive resources specifically to support the DEC volunteers through its Statewide Ethics Coordinator's Group. That Group consists of a Statewide Ethics Coordinator, an Assistant Statewide Ethics Coordinator, and support staff. The function of this Group includes recruitment, screening and appointment of volunteers, replacement of DEC members as necessary, preparing and updating the District Ethics Committee Manual for volunteers, conducting annual meetings of all District Officers, updating lists of all pending cases for District Officers, providing ongoing legal and procedural advice to volunteers, and corresponding with complainants and respondents. The Statewide Coordinator also reassigns cases where DEC members have a conflict of interest and transfers such cases as required.

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[96] ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4(B).
[97] *Supra* note 2 at 70 and 73-74.
[98] *Id.* at 29-30.

The Coordinator and the Assistant Statewide Ethics Coordinator continually monitor volunteer compliance with Supreme Court time goals for investigations and hearings and communicate with volunteers regarding timeliness. In addition, the Statewide Ethics Coordinator compiles and reviews monthly and quarterly exception reports from various District offices and follows up with volunteer investigators and hearing panel chairs. The Coordinator also produces a quarterly DEC newsletter to educate DEC volunteers on current issues, presents Certificates of Appreciation to outgoing members, drafts press releases for incoming and outgoing DEC members, and consults with the OAE Director on an on-going basis to recommend policy regarding the volunteer program.[99]

The Discipline Committee believes that eliminating the volunteers' role in investigating and prosecuting matters and redirecting those resources to the OAE to do so within a centralized, professionally staffed system resourced with appropriate technology will better serve the public and the profession.

The 1982 ABA Report relating to the New Jersey system also found problems relating to a lack of staff investigators and ethics counsel at the DEC level. The team noted significant backlogs in case processing and stated:

> The team believes, however, that the principal reason for the growing backlog at the DEC level is delay resulting form the use of volunteer lawyer members of the DECs as investigators and presenters, rather than paid DEPS staff lawyers and investigators, whose responsibilities are solely related to lawyer discipline.

1982 ABA Report, p.8.

Though efforts have been made to increase accountability and to impose strict time limits on all participants, the backlog of cases at the DEC level continues to plague the system. The average age of backlogged Ethics Committee investigations as of December 31, 2008 was 406 days; as of December 2009 it was 348 days.[100] The Discipline Committee believes that maintaining the volunteer-based system will continue to impede the timely processing of cases. Members of the bar are assisting the system unremunerated, and often in addition to maintaining their own caseloads. As noted above, such demands are especially pronounced for solo practitioners who do not have the benefit of law firm partners to help shoulder the workload in order for them to undertake this *pro bono* activity.

The 1982 ABA Report noted probable resistance of the bar as regards necessary and recommended use of staff investigators and staff ethics counsel. It warned:

> The team recognizes that the private bar appears willing to strongly resist any changes in the disciplinary structure which would seem to diminish the control it exerts in the

[99] *Supra* note 18, at 52.
[100] *Supra* note 18, at 13.

> self regulation of the profession. The problems in the present system, as outlined below, will not permit retention of the present structure without serious effect on the credibility and effectiveness of the regulatory effort. The private bar will retain its voice in matters through the DECs and representation on the Board.

1982 ABA Report, p.8.

The Committee believes that retaining volunteers as adjudicators will continue to allow them to contribute their legal knowledge and experience to the effective and efficient disposition of disciplinary matters. Ideally, volunteers will serve on hearing committees as adjudicators where this experience and understanding of the realities of the practice of law can be most beneficial.

Recommendation 3: If DEC Volunteers Continue to Investigate and Prosecute Matters, Increased Separation from Adjudication by Other DEC Members is Needed

Commentary

As set forth in Recommendation 2 above, the Discipline Committee strongly urges the Court to amend its Rules and have the OAE investigate and prosecute all lawyer disciplinary matters. If the Court decides to retain the current decentralized system, it should further separate the DECs investigative/prosecutorial functions from the adjudicative function at that level. The Discipline Committee recommends that the Court amend the Rules to provide that the DEC that determines probable cause should not serve as trier of fact for that case. The consultation team was told that local volunteer lawyers from the district where the respondent practices investigate grievances in New Jersey largely due to lack of investigative resources at the OAE. There are inherent perceptions of bias associated with a local lawyer investigating another lawyer from the same area. There are also concerns regarding confidentiality because people in the local area learn of allegations against a particular lawyer. To eliminate perceptions of bias the Court should consider that, if use of the current system continues, the hearing on formal charges should be heard by a DEC in a different district from where the respondent practices. Further separation of the roles of investigator/prosecutor from adjudicator, if the current decentralized system is maintained, will also enhance management of cases.

Information received by the team indicates that, if the Court retains the current decentralized system, certain changes are necessary to make the roles of DEC volunteers easier and to enhance the understanding of the disciplinary process by the public and the bar. Presently, the DECs are responsible for obtaining space to conduct hearings, for arranging court reporters, and for conducting necessary legal research. Interviewees advised the team that the DECs also undertake publicizing the time, date and location of disciplinary hearings. Currently, the OAE can provide them with little assistance in these matters, although the Committee Secretaries are given an annual emolument to defray costs of their duties.

Hearings should not be held in a DEC member's office. This presents the appearance of bias. It also telegraphs to the public a lack of necessary dignity and respect for the process. All disciplinary hearings should be held in a courtroom setting. All hearing level functions should be housed in central locations with permanent staff to provide necessary support and to keep operations running smoothly.

The Discipline Committee believes that if centralization and use of the OAE staff to investigate and prosecute matters for the system are not deemed feasible at this time, the DECs should be provided support beyond that provided by the Statewide Ethics Coordinator at OAE. This will entail additional costs as decentralization presents hurdles to the feasibility of providing assistance to the 18 DECs located all across the state. Clerks are required to

assist in the scheduling of pre-hearing conferences, hearings and the drafting of opinions. Clerks can also assist in publishing the DECs reports and recommendations. This support staff could be housed in the Administrator's office and in various satellite offices around the state, but should be separate from the Administrator's staff so as to maintain the necessary separation between the prosecutorial and adjudicative functions of the disciplinary agency.

An issue that arises in any system that utilizes members of the bar as volunteer adjudicators is scheduling. The team was advised that some delay in hearings occurs due to scheduling difficulties. In order to address this issue, the team recommends that the OAE and DECs institute a practice whereby the dates for hearings are reserved sufficiently in advance. This allows the volunteers to set their schedules and the system to resolve scheduling conflicts well ahead of time. This should also allow scheduling of consecutive hearing dates. It is very important that, whenever possible, multi-day hearings be held on consecutive days so that recollections and witnesses are not overburdened.

With respect to the reports and recommendations of the DEC hearing panels or referees, the Committee believes that these opinions should contain more legal analysis, citations to existing authority, and an independent assessment of the issues. This will provide the public and the bar with guidance as to the types of acts that will be considered misconduct and the likely sanctions for such misdeeds. The panels also do not appear to cite to the ABA Standards for Imposing Lawyer Sanctions. In order to promote consistency, the Committee recommends use of the ABA Standards for Imposing Lawyer Sanctions when formulating recommendations for discipline, as will be discussed further in Recommendation 11 below.

Regular training will also assist the DEC members in making their opinions as useful as possible to the Court, the public and the bar. If the current volunteer system is retained, there must be annual training for everyone involved, not only for new participants. Mandatory meetings can provide the venue for continuing substantive training. Additional training should include an orientation session and regular updates on disciplinary law.

Recommendation 4: The Court Should Streamline the Disciplinary Review Board Process

Commentary

The Disciplinary Review Board of the Supreme Court of New Jersey (DRB) serves as the appellate level of the lawyer discipline system. The DRB reviews all recommendations for discipline from the DECs and from the OAE. The New Jersey Rules provide that the DRB determination shall be de novo on the record.[101] If the DRB determines that an admonition is warranted, it will issue a letter of admonition.[102] When the DEC hearing panel recommends a reprimand or stronger discipline, the DRB routinely schedules oral argument. If the DRB finds that an admonition, reprimand, censure, suspension, or disbarment is warranted, that DRB decision may be reviewed by the New Jersey Supreme Court. Only the New Jersey Supreme Court can impose disbarment.[103]

DRB Counsel is tasked with case processing, docketing, calendaring, distribution, and document storage. DRB Counsel serve as "in-house counsel" to the DRB and provides legal research and legal advice to it. DRB Counsel handles cost assessment and collection by assessing administrative and actual costs, collecting payments, and pursuing enforcement by filing judgments and seeking temporary suspensions for non-payment. [104]

In 2010, the Office of DRB Counsel was comprised of seven lawyers including the Chief Counsel, Deputy Chief Counsel, First Assistant Counsel, and four Assistant Counsel, one information technology analyst, one administrative supervisor, two administrative specialists, one technical assistant, and four secretaries. [105]

Since 1991, the DRB Counsel had furnished pre-hearing memoranda to the Board in serious disciplinary cases, motions for consent to discipline greater than an admonition, and those other matters (such as defaults) containing novel legal or factual issues. To provide greater assistance to the Board's case review function, this policy was modified. In mid-2003, the DRB Counsel began supplying the Board with memoranda on all matters scheduled for consideration, except motions for temporary suspension. These in-depth memoranda set out the facts relevant to the issues raised, the applicable law, and a pertinent analysis of both, ultimately arriving at a recommendation for the appropriate discipline based thereon. Interviews with the team disclosed that a great deal of time and attention is required by staff at the DRB level, in part related to the inconsistency and incomplete nature of volunteer driven

[101] N.J. CT. RULES R. 1:20-15(e)(3).
[102] N.J. CT. RULES R. 1:20-15(e)(3).
[103] N.J. CT. RULES R. 1:20-16(a).
[104] DISCIPLINARY REVIEW BOARD OF THE SUPREME COURT OF NEW JERSEY 2010 ANNUAL REPORT, p. 9.
[105] Id.

work product at other levels of the system. The team also learned from interviewees that a detailed recitation of facts is prepared by the DRB staff and provided to the board, in addition to the transcript in each case.

As noted above, professionalizing the investigation and prosecution of cases coupled with enhancement of and increased consistency in reports and recommendations (including citation to the Sanctions Standards) will increase the quality and consistency of matters generally, and that includes matters presented to the DRB. This should result in less need for DRB Counsel to expend resources on matters and increase the efficiency with which matters proceed through this level of the system. It should be sufficient for DRB counsel to provide an abstract summarizing the hearing transcript rather than a detailed recitation of the facts that are available from the transcript. Such duplication of effort might be eliminated. Streamlining the process does not, however, mean eliminating any due process.

Recommendation 5: The Court Should Encourage the Policy-Setting Role of the Disciplinary Oversight Committee

Commentary

The Rules outlining time goals, accountability, and priority of disciplinary matters are not inherently unreasonable.[106] For example, the goal is to complete investigations of standard matters within 6 months of case docketing, and complex matters within nine months.[107] Formal hearings are to be completed within six months after the expiration of the time for filing an answer to a complaint.[108] Appellate review, both by the DRB and the Supreme Court, is to be completed within six months of the docketing date.[109]

As noted at page 9 above, the Disciplinary Oversight Committee (DOC) dedicates itself to increasing the efficiency and timeliness of the disciplinary process in New Jersey. The members take seriously their management role in overseeing the administration of the system. The DOC's role in overseeing timeliness within the system is necessary and useful. The team observed that there have been significant efforts at compliance with time goals that have had a positive effect on reducing delay within the system. The Committee believes that the DOC's efforts in this respect should continue, albeit in a more limited manner so that the DOC can emphasize its policy setting role.

The Committee recommends this because the consultation team learned from many interviewees that time metrics now seem to drive the entire system. The Rules include the realistic language "shall endeavor to complete" for each time goal.[110] Yet the consultation team observed that time metrics are rigidly imposed and that compliance has become a central focus of effort across the system. Public protection must remain the paramount value served by the system. While time goals can be helpful guidelines in meeting that responsibility, they should not themselves become the main goal nor be imposed in a manner that creates undue stress within the system. The Court should encourage use of time goals as guidelines only. The flexibility built into the language of the rules should also be reflected in the practice at all levels of the system in order to accommodate variances in matters and circumstances.

General administrative oversight means that the DOC is charged with reviewing the productivity, effectiveness, and efficiency of the system. As part of its responsibility, the DOC should consider analyzing several other aspects of the system that require further attention, such as public education and outreach, and training of volunteer adjudicators. However, the OAE Director should be responsible for setting investigative and prosecutorial

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[106] N.J. CT. RULES R. 1:20-8.
[107] N.J. CT. RULES R. 1:20-8 (a).
[108] N.J. CT. RULES R. 1:20-8 (b).
[109] N.J. CT. RULES R. 1:20-8 (c) and (d).
[110] N.J. CT. RULES R. 1:20-8 (a)-(d).

priorities, conducting investigations and disciplinary prosecutions in the manner he deems appropriate, and for the day to day management and operation of the office and staff. The DOC should recognize that its responsibility is oversight of the system, not management of the OAE.

In terms of structure of the DOC itself, the Discipline Committee strongly recommends that officers of the New Jersey State Bar Association should not serve as members of the DOC.[111] Such a policy ensures necessary independence of the DOC from the bar and adds credibility to the decisions of the DOC.

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[111] ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.2 & Comment; LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992) Recommendations 5 & 6, http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html.

IV. RESOURCES

Recommendation 6: The Court and the DOC Should Ensure Adequate Funding Necessary to Centralize the System

Commentary

The importance of adequate funding and staffing for any lawyer disciplinary system cannot be overstated. If the OAE is to perform its duties effectively and efficiently and undertake the investigative and prosecutorial responsibilities described in Recommendation 2 above, it must be adequately staffed and have appropriate resources, including technology and adequate office space. If the regulation of the legal profession is to remain within the judicial branch of government, the Court must ensure that adequate resources exist.

The Discipline Committee is aware of current economic conditions and is sensitive to the trepidation and skepticism with which requests for additional funds are often met. However, in order for many of the recommendations in this Report to succeed, and for New Jersey to achieve optimal efficiencies in its lawyer discipline system, resources allocated to the system must increase. Lawyers owe it to their clients and the public to support the lawyer disciplinary system not only through their voluntary service, but financially. The Committee believes that $200 a year is not a huge price to pay for the privilege of practicing law and a number of other jurisdictions charge more. The Committee urges the Court to study increasing registration fees to provide needed revenue in the system. Further, while holding funds in reserve is commendable, the Court should also consider using that resource to make the recommended changes. Use of the reserve for this important purpose might avoid raising the current disciplinary assessment received from New Jersey lawyers.

With regard to current staffing, the Committee notes that the recommended central intake system may require additional staffing. However, it is also likely that reallocation of the extensive resources required presently to maintain the DECs will substantially offset these costs. Streamlining the intake process will likely save the system funds and time. The DOC is an excellent resource for reviewing overall staffing needs and should monitor the situation as to necessary increases in staff.

As stated above, in a centralized system the DEC volunteers can still contribute valuable services by serving as adjudicators. However, the burden of investigation and prosecution of complaints properly should be carried by trained and paid OAE lawyers and investigators. Use of OAE investigators and counsel will likely require the addition of another ethics counsel. In addition, the Director of the OAE should consider the need for increased resources for necessary technology improvements, and space and storage issues. If necessary, a financial planner or budget analyst should be used to assist in assessing the current and future needs of the system in terms of finances, technology and staffing.

V. PROCEDURES

Recommendation 7: The Court Should Expand and Promote Alternatives to Discipline Programs for Minor Misconduct

Commentary

As part of centralizing the disciplinary process, the Discipline Committee recommends that the Court consider expanding and promoting alternatives to discipline, also referred to as diversion programs. The consultation team heard from interviewees that, although some diversion programs exist, diversion as an alternative to discipline is not often used in New Jersey. As stated above, it is laudable that the New Jersey State Bar Association (NJSBA) is developing its Ethics Diversionary Education Course. Particularly useful would be the establishment of a strong law office management component to which lawyers could be referred for gaining skills in handling daily operations of a law office. While New Jersey provides extensive resources for investigating and prosecuting defalcations, as well as the excellent Random Audit Program, there also should be a greater focus on prevention of misappropriation, commingling and other issues relating to the handling of client funds through robust alternatives to discipline programming.

Nationwide, the majority of complaints made against lawyers allege instances of lesser misconduct. Single instances of minor neglect or minor incompetence, while technically violations of the rules of professional conduct, are seldom treated as such. These cases rarely justify the resources needed to conduct formal disciplinary proceedings, nor do they justify the imposition of a disciplinary sanction. These complaints are almost always dismissed by disciplinary agencies nationwide. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with disciplinary systems. While these matters should be removed from the disciplinary system, they should not be simply dismissed. These complaints should be handled administratively via referral from discipline to programs such as fee arbitration, mediation, law practice management assistance, or any other program authorized by the Court.[112]

The State of New Jersey has an excellent fee arbitration program. The State Bar also has a lawyers' assistance program to assist lawyers suffering from disabilities and addictions. The team believes that the NJSBA, the DOC, and the OAE can work together to establish other Alternatives to Discipline programs.

Participation in the program is not intended as an alternative to discipline in cases of serious misconduct or in cases that factually present little hope that participation will achieve program goals. In addition, the program should only be considered in cases where, assuming all the allegations against the lawyer are true, the presumptive sanctions would be less than disbarment, suspension or probation. The existence of one or more aggravating factors does

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[112] ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.11(G).

not necessarily preclude participation in the program. For example, a pattern of lesser misconduct may be a strong indication that office management is the real problem and that this program is the best way to address that underlying issue.

The existence of prior disciplinary offenses should not necessarily make a lawyer ineligible for referral to the Alternatives to Discipline Program. Consideration should be given to whether the lawyer's prior offenses are of the same or similar nature, whether the lawyer has previously been placed in the alternatives to discipline program for similar conduct, and whether it is reasonably foreseeable that the lawyer's participation in program will be successful. Both mitigating and aggravating factors should be considered. The presence of one or more mitigating factors may qualify an otherwise ineligible lawyer for the program.

In order to encourage voluntary participation in lawyer assistance programs, such programs should provide confidentiality. Rule 8.3(c) of the ABA *Model Rules of Professional Conduct* states: "This Rule does not require disclosure of information . . . gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege." However, participation in the alternatives to discipline program differs from voluntary participation in a lawyer assistance program. Any alternatives to discipline rule should recognize this difference and require the recovery monitor to make necessary disclosures in order to fulfill his or her duties under the contract. New Jersey Rule 1:20-3(i)(2) defines minor misconduct and provides for Agreements in Lieu of Discipline. The team encourages a greater use of this Rule and development of a broader range of programs.

VI. SANCTIONS

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

Commentary

Discipline on consent, implemented expeditiously, benefits the public and the parties. The public is protected and the respondent avoids the uncertainty and cost that accompanies going to a public hearing. The system is not required to expend valuable time and resources on formal prosecutions and can devote energies to other contested matters. Also, in addition to saving time and resources for the system and respondent, an advantage of discipline on consent, when properly used, is that it provides some certainty in exchange for a respondent lawyer's admission to misconduct.

The New Jersey Rules allow for the agreed resolution of any disciplinary matter.[113] If a petition for discipline on consent is entered into after the filing of formal charges, the respondent is required to admit or deny the allegations contained in the charging document.[114] If an agreed disposition is proposed prior to the filing of formal charges, the agreement must set forth the specific factual allegations that the respondent admits and the applicable Rule violations at issue.[115]

Currently, for matters other than disbarments on consent, the Rule provides that at any time during the investigation of a disciplinary matter, or within 60 days after the time for the filing of an answer to a complaint, the respondent may agree to discipline by consent in exchange for a specific recommendation for discipline.[116]

The team heard from many interviewees, both ethics counsel and respondents, that the "sixty-day rule" is overly rigid and impedes the process of seeking and obtaining discipline on consent. For example, often respondents and respondent's counsel are unaware of the rule or fail to understand the importance of this mechanism until it is too late for them to make use of it. Further, respondents frequently are unable to grasp the ramifications of their situation within that timeframe. This has the detrimental effect of forcing cases through the system that would otherwise be more easily resolved early on. When such cases must go forward to the decision-maker, there is a great waste of both time and money for both the respondents and the disciplinary system.

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[113] N.J. CT. RULES R. 1:20-10.
[114] *Id.*
[115] *Id.*
[116] N.J. CT. RULES R. 1:20-10 (b)(1).

Imposing a 60-day rule detracts from the usefulness of the consent process. Instead, respondents should be allowed to consent to discipline after a complaint is filed and the Court should leave open the possibility of settlement at all stages. Frequently, respondents are unable to grasp the ramifications of their rejection of discipline on consent within this period. The Court should adopt a Rule allowing for stipulation to discipline by consent at any point of the process, thus leaving open the possibility that matters can be resolved expeditiously without draining additional resources from the system. In addition, the Court should consider creating a mechanism whereby both suspensions on consent and disbarments on consent proceed directly to the New Jersey Supreme Court for disposition.

Recommendation 9: The Court Should Adopt Probation as a Sanction

Commentary

Currently in New Jersey there are six primary forms of final disciplinary sanctions: disbarment, license revocation, suspension (for a definite or indefinite term), censure, reprimand, and admonition. The New Jersey Supreme Court Rules do not provide for the imposition of probation (with a stayed suspension or by itself) as a separate disciplinary sanction, though conditions can be imposed in conjunction with other sanctions. While continued discretion to impose additional conditions is desirable, the Court should consider adopting a probation rule. This rule should set forth specific requirements for the imposition, monitoring and revocation of probation.[117]

Probation as a separate public disciplinary sanction is recommended for several reasons. Probation is useful for conduct other than minor misconduct. Probation can be imposed after the filing of formal charges.[118] Cases should only be diverted to alternatives to discipline programs prior to the filing of formal charges. Diversion or alternatives to discipline programs should only be used for matters involving lesser misconduct that do not require further involvement by the discipline system. Matters for which a respondent is placed on probation remain in the disciplinary system.

Probation is an appropriate sanction where a lawyer can perform legal services but needs supervision and monitoring. Probation should be used only in those cases where there is little likelihood that the respondent will cause harm during the period of rehabilitation and the conditions of probation can be adequately supervised. Placing a lawyer on probation under these circumstances, with or without a stayed suspension, protects the public and acts to prevent future misconduct by addressing the problem(s) that led to the filing of disciplinary charges.

A detailed probation rule should provide necessary guidance to the disciplinary agency and lawyers with respect to the types of cases for which probation is appropriate. The team recommends that a separate probation rule adopted by the Court set forth in general terms the requirements for imposition of probation. These include: (1) the respondent can perform legal services without causing the courts or legal profession to fall into disrepute; (2) the respondent is unlikely to harm the public during the period of rehabilitation; (3) necessary conditions of probation can be formulated and adequately supervised; (4) the respondent has a temporary or minor disability that does not require transfer to inactive status; and (5) the respondent has not committed misconduct warranting disbarment.

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[117] ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.10(A)(3).
[118] ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.11(C).

The rule should provide that the order placing a respondent on probation must state unambiguously each specific condition of probation. Placing the exact conditions of probation in the Court's order lets the respondent know exactly what is expected and what will constitute a lack of compliance that could lead to a revocation of probation and the imposition of suspension. The conditions should take into consideration the nature and circumstances of the misconduct and the history, character and condition of the respondent. Specific conditions may include: (1) supervision of client trust accounts as the Court may direct; (2) limitations on practice; (3) psychological counseling and treatment; (4) abstinence from drugs or alcohol; (5) random substance testing; (6) restitution; (7) successful completion of the Multi-State Professional Responsibility Examination; (8) successful completion of a course of study; (9) regular, periodic reports to the OAE; and (10) the payment of disciplinary costs and the costs associated with the imposition and enforcement of the probation. The terms of probation should specify periodic review of the order of probation and provide a means to supervise the progress of the probationer. The team also recommends that the probation rule include a provision stating that, prior to the termination of a period of probation, probationers must file an affidavit with the Court stating that they have complied with the terms of probation. Probationers should be required to bear the costs and expenses associated with imposition of the terms and conditions of the probation.

An effective means of monitoring probationers is essential to the successful use of probation as a disciplinary sanction. As a result, the rule should provide for the administration of probation under the control of the OAE. If adopted, the OAE should be provided with appropriate resources (staff and funding) to perform this new function.

In order for the probation process to be successful, probation monitors must report to the OAE regarding the probationer's progress. The monitor's only role is to supervise the monitored lawyer in accordance with the terms of the probation and to report compliance or noncompliance to the OAE. The monitor is not to be a twelve-step or recovery program sponsor for the probationer. Any probation rule adopted by the Court should provide that the probationer is required to sign a release authorizing the monitor to provide information to the OAE. Additionally, the rule should provide immunity for probation monitors.

Probation monitors should be required immediately to report to the OAE any instances of noncompliance. The Court should adopt a rule providing that, upon receipt of such a report, the OAE may, if appropriate, file a petition with the Court setting forth the probationer's failure to comply with the conditions of probation and requesting an order to show cause why probation should not be revoked and any stay of suspension vacated. The Court should provide the probationer with a short time period, fourteen to twenty-one days, in which to respond to the order to show cause. After consideration of the lawyer's response to the order to show cause, the Court may take whatever action it deems appropriate, including revocation of the probation and the imposition of the stayed suspension, or modification of the terms of the probation. This summary proceeding will save time and resources and promptly remove the risk to the public and the profession that a lawyer who is not complying with the terms of

probation poses.

The OAE should develop specific procedures for screening and selecting probation monitors. A policies and procedures manual for appointing, supervising and removing the monitors, and guidelines for the nature and contents of monitor reports to the OAE should also be created.

Adequate and regular training of probation monitors is vital to the successful use of probation. The OAE should develop training materials and curricula for probation monitors. The Director of the OAE should consult other jurisdictions that have training programs for probation monitors in place. All probation monitors should be required to attend training at least bi-annually.

Recommendation 10: The Court Should Eliminate Indeterminate Suspensions

Commentary

Currently, there are two types of suspensions: a New Jersey lawyer may have his/her license suspended for a definite or indeterminate period of time. Term suspensions prevent a lawyer from practicing for a specific term between three months to three years.[119] Indeterminate suspensions are generally imposed for a minimum of five years.[120]

It was not clear why a lawyer would be suspended for an indeterminate period of time instead of being disbarred. The Discipline Committee recognizes that the availability of indeterminate suspensions can be perceived as a deterrent to lawyers and protective of the public. However, the Committee suggests that these goals can be met without the imposition of indeterminate suspensions and recommends that the Court consider their elimination.

While an indeterminate suspension may be viewed as more severe than a fixed term suspension, and less dire than disbarment, imposing this type of sanction does not clearly indicate to the public or the profession that there is a distinction between acts of misconduct of differing severity. Affixing a specified period of time to a suspension indicates gradations of severity. Further, the uncertainty that accompanies an indeterminate suspension could be viewed as punitive. Indeterminate suspensions may also pose difficulties for other jurisdictions that do not impose these sanctions but seek to impose reciprocal discipline based upon a New Jersey case.

The Court should specify the minimum period of time that must elapse before the lawyer can petition for reinstatement. The duration of a suspension should reflect the nature and seriousness of the lawyer's misconduct. The length of time of a suspension should be fixed and based upon consideration of the nature and extent of the misconduct and any mitigating or aggravating factors.[121] The MRLDE suggest that the term of a suspension not exceed three years.[122] Some jurisdictions impose suspensions for fixed periods of five or more years. The Discipline Committee believes that if a lawyer has committed misconduct so severe that even a three-year suspension will not protect the public, that lawyer should be disbarred.

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[119] N.J. CT. RULES R. 1:20-15A(a)(2).
[120] N.J. CT. RULES R. 1:20-15A(a)(3).
[121] ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.10.
[122] *Id.*

Recommendation 11: Disciplinary Decision Makers Should Consider Using the ABA Standards for Imposing Lawyer Sanctions

Commentary

The *ABA Standards for Imposing Lawyer Sanctions* (Sanctions Standards) provide a framework for ensuring consistency in the recommendation and imposition of lawyer disciplinary sanctions. That framework requires consideration of the rule violated, the lawyer's mental state, the extent of the injury, and aggravating and mitigating circumstances. The Sanctions Standards are designed to promote thorough, rational consideration of all factors relevant to imposing a sanction in an individual case. They attempt to ensure that such factors are given appropriate weight in light of the stated goals of lawyer discipline, and that only relevant aggravating and mitigating circumstances are considered at the appropriate time.

The New Jersey Supreme Court does not cite the Sanctions Standards in its disciplinary opinions. The Sanctions Standards can be useful in providing greater consistency in sanctions as many other jurisdictions have found. Great consistency provides an increased level of fairness and predictability in the system. It puts lawyers on notice both as to what conduct will not be tolerated and what sanctions for misconduct will consistently result. Additionally, the Sanctions Standards help to create uniformity of sanctions between states, thus enhancing efforts to impose fair and efficient reciprocal discipline. Use of the Sanctions Standards helps enhance reciprocal enforcement because of use of common language and analysis of imposition of sanctions.

In order to enhance the sanction recommendations ultimately provided to the Court, the Discipline Committee recommends that the Court amend its Rules to require citation to the Sanctions Standards in the reports and recommendations of the hearing panel reports, DRB decisions, and in post-trial submissions by the parties, in addition to other authority.[123] In making this recommendation, the Committee is not being critical of the reports and recommendations submitted by the system volunteers. Rather, it is the goal of the Committee in making this recommendation to further assist the system adjudicators in providing the most complete analysis possible for the Court's ultimate consideration.

In addition to using the Sanctions Standards, making disciplinary information available electronically to the public will help hearing panels ensure consistency in sanction recommendations. A readily searchable database should be developed and updated regularly. Part of this site can also be developed to allow password protected access for hearing panel members to electronically exchange and edit draft reports and recommendations.[124] This can help expedite the report drafting process and save resources. The proposed schedule for DEC hearing panels can also be made available on a password protected part of the site, so that

[123] ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.10(C).
[124] *See, e.g.*, http://www.ladb.org/index.asp.

volunteer adjudicators may readily confirm schedules or propose changes in hearing dates, if necessary. Disciplinary Counsel should not have access to this part of the website, so as to maintain appropriate separation between the prosecutor and adjudicators. The final schedule of public hearings should also be included on the site. Proposals by the OAE to amend the Rules can be made available for public comment on this site, as well as the Court's website.

VII. PUBLIC OUTREACH AND ACCESSIBILITY

Recommendation 12: The Office of Attorney Ethics Should Be More Accessible to the Public and Should Increase Public Outreach Efforts

Commentary

The Discipline Committee found a great need for increased outreach to the public and better public accessibility to the disciplinary system. The purpose of lawyer discipline is to protect the public and the administration of justice. To accomplish these goals, the lawyer disciplinary agency must be easy to find and accessible physically and electronically. Interviewees advised the consultation team that finding out about the existence of the OAE and its functions is difficult at best. Additionally, the OAE is housed in an office complex outside of the Trenton downtown area and is difficult to find, even given the directions on the website, due to very poor signage. It is not easily accessible via public transportation.

At present, as set forth above, the volunteer lawyers who serve as DEC Committee Secretaries receive the bulk of public inquiries and are tasked with explaining to complainants how the lawyer discipline system operates. Callers with grievances are advised to write out a complaint form and then file it with the Secretary of the DEC for the district where the lawyer maintains his or her law office. Callers may or may not have face to face contact with an individual to discuss their complaint, depending on the practice of the particular Secretary who answers their initial call.

If members of the public wish to go directly to the offices of the OAE, they must overcome barriers to their welcome there as well. For example, upon entering the OAE offices, visitors find there is no public reception area where a receptionist would greet members of the public and lawyers seeking information. The OAE must be receptive to complainants who come to the office wanting to file a complaint or to talk to someone.[125] The OAE should have a receptionist dedicated to the function of greeting complainants and lawyers, answering telephones and referring callers and visitors to the appropriate legal staff. Staff should be available to assist complainants on-site in the filing of complaints when they are unable to write them. Staff should also be trained to offer bilingual services in filling out a grievance and be able to make accommodations for complainants with hearing or vision impairment or other disabilities.

The OAE should have easily understandable pamphlets readily available throughout the state. The existing pamphlets are densely written and provide what may be an overwhelming amount of detail to a member of the public seeking to file a grievance. The pamphlets need to be rewritten so as to make them more consumer-friendly. They should also be bilingual.

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[125] ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.1 and R.4.

Currently, pamphlets are provided at courthouses but they should be made available in public libraries and through consumer and civic organizations also.

In addition to written materials in pamphlets and on the website, the OAE should increase public outreach about its efforts. Lawyers from the OAE should seek invitations to speak about its functions to consumer groups in the state and should highlight how the OAE is meeting its goal of serving the public and profession. The OAE should increase efforts to make information regarding dispositions and rationales more readily available to the public. The website is good in this regard, but the search capacity is cumbersome. For example, a user must first download the correct pdf file and then use the Find function. In addition, the OAE should consider adding a MapQuest button to the website to provide visitors directions to the OAE. The Illinois Attorney Registration and Disciplinary Commission website is a possible model for the Court to consider.

It is important that both the OAE staff and members of the DRB, as well as the DOC, personally engage in public education efforts. While there is some effort made in this regard already, the system's appointed adjudicators and overseers should be more visible. In particular, they should seek invitations to speak at meetings of consumer organizations and citizens' groups.

Recommendation 13: The Court Should Increase Education of the Bar and the Public Regarding Lawyer Discipline

Commentary

The Court can better emphasize to both the public and the bar its leadership role in the disciplinary system through readily accessible information regarding disciplinary proceedings and their results. By doing so, the Court provides necessary guidance to lawyers regarding lawyer conduct and expected sanctions.

All New Jersey judges, lawyers, and the public should be able to view information about the lawyer discipline system online. Currently, basic information about the system is available on the web site for the OAE, including the OAE Annual Reports. The team recommends enhancing the website to create a consumer friendly vehicle for providing information to the bench and bar as well as members of the public.

The Court and the agency have useful websites, however, the OAE website should include an easily searchable data base consisting of the Rules of Professional Conduct, Rules for Lawyer Disciplinary Enforcement, other relevant rules, court opinions and orders, hearing panel reports and recommendations affirmed by the Court, and summaries of admonitions and letters of caution. The team heard from several interviewees that although much of this material is now available on the Rutgers's University website, the existence of this resource is not widely known. Further, those who do know of that website do not find it easy to use.

In addition to an electronic presence, the Court should continue other outreach efforts for New Jersey lawyers. Disciplinary leaders at all levels of the system should be encouraged to engage personally and continuously in efforts to educate the bar through various other means including addressing lawyers' groups and publishing articles about the lawyer disciplinary system in legal publications.

VIII. CONCLUSION

As noted throughout this Report, the consultation team was impressed by the dedication of the Court, the volunteers and the professional staff of the disciplinary agency. The determination of all those involved to make the New Jersey lawyer disciplinary system more effective and efficient is notable.

The Standing Committee on Professional Discipline Committee hopes that the recommendations contained in this Report will assist the Court in its study of the system and will expedite its implementation of desired changes. As part of the discipline system consultation program, the ABA Standing Committee on Professional Discipline is available to provide further assistance to the Court if so requested.

APPENDIX A

ABA STANDING COMMITTEE

ON PROFESSIONAL DISCIPLINE

NEW JERSEY LAWYER DISCIPLINE SYSTEM CONSULTATION

TEAM MEMBERS' BIOGRAPHIES

DAVID S. BAKER is the immediate past-Chair of the ABA Standing Committee on Professional Discipline. He was a partner with Powell Goldstein, L.L.P. in Atlanta, Georgia, where his practice was concentrated in corporate law and in the representation of health care providers until 2008. He is now a partner in the firm of Taylor English Duma LLP. He has served as Chair of the ABA General Practice Section (1986-1987) and the Standing Committee on Environmental Law (1993-1996). A former member of the ABA House of Delegates (1987-1990), Mr. Baker also formerly served on the ABA Board of Elections and the Committee on State Justice Initiatives. Mr. Baker was a member of the Board of Visitors of the Terry Sanford Institute of Public Policy at Duke University. He is a graduate of the Harvard Law School and is licensed to practice law in Georgia and formerly in New York.

JEROME E. LARKIN has served as Administrator of the Illinois Attorney Registration & Disciplinary Commission since 2007 and as Deputy Administrator since 1988. Prior Commission experience consisted of progression through staff counsel positions, culminating in appointment as Chief Counsel in 1984 and Assistant Administrator in 1986. He has investigated, litigated and appealed numerous lawyer discipline cases. He served as President of the National Organization of Bar Counsel. He received his J.D. from Loyola Law School of Chicago and served as a member of the Board of Governors of the Loyola Law Alumni Association.

MARY M. DEVLIN was Deputy Director and Regulation Counsel of the American Bar Association's Center for Professional Responsibility, where she directed the Association's efforts in improving lawyer and judicial disciplinary enforcement for twenty-two years. Previously she was with the American Medical Association for almost eighteen years. She has been involved in professional ethics and discipline for the past twenty-eight years and has written over 50 articles, including "An Overview of the Development of Lawyer Disciplinary Procedures in the U.S." 7 Georgetown J. Legal Ethics 911 (1994). Her J.D. from I.I.T. Chicago-Kent College of Law and two master's degrees were with honors, as was her LL.M. from DePaul University College of Law. She is a Life Fellow of the American Bar Foundation.

ARNOLD R. ROSENFELD is Of Counsel in the Boston Office of the international law firm of K & L Gates LLP. Mr. Rosenfeld presently focuses his law practice on complex civil and criminal litigation in state and federal courts He frequently represents lawyers in bar discipline matters and advises lawyers and law firms on legal ethical issues.

Prior to joining K & L Gates, Mr. Rosenfeld served as the Chief Bar (Disciplinary) Counsel of the Board of Bar Overseers of the Supreme Judicial Court in Massachusetts for eight years and as the first Chief Counsel of the Massachusetts Committee on Public Counsel Services, the state public defender organization. He has been lead counsel in over fifty jury trials and written briefs and argued over thirty appellate cases in the state and federal courts.

Mr. Rosenfeld is a Visiting Professor of Law at Boston University Law School. He is the author of numerous law reviews. He presently serves as a member of the Strategic Planning Committee of the ABA Center for Professional Responsibility, and was a member of the ABA Standing Committee on Professional Discipline for three years. Mr. Rosenfeld also served as a member of the Massachusetts Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct and was appointed by the Supreme Judicial Court to the Massachusetts Committee for Public Counsel Services.

Mr. Rosenfeld is an elected member of the American Law Institute. He has been selected by his peers for inclusion in the Best Lawyers in America since 2006. In 1997, Mr. Rosenfeld was named the Wasserstein Public Service Fellow in Residence at Harvard Law School and, in 2001, he was the recipient of the St. Thomas More Award from Boston College Law School. In 2005, he was selected as an Inaugural Fellow of the National

Institute for Teaching Ethics and Professionalism and, in 2008, he was honored with the Thurgood Marshall Award for Outstanding Service by the Committee for Public Counsel Services. He is a cum laude graduate of Bowdoin College and received his J.D. from Boston College Law School.

RUTH A. WOODRUFF is Senior Counsel in the American Bar Association Center for Professional Responsibility where she serves as counsel to the ABA Standing Committee on Professional Discipline and to the Alternative Litigation Finance Subcommittee of the Ethics 20/20 Commission. She earned her J.D. from Loyola University Chicago School of Law and clerked for Judge Frank J. McGarr in the United States District Court for the Northern District of Illinois. She has worked in the field of Professional Responsibility over the last twenty-five years, including managing the National Lawyer Regulatory Data Bank, serving as an editor of the *ABA/BNA Lawyers' Manual on Professional Responsibility,* teaching Professional Responsibility courses as an adjunct professor at Loyola School of Law and at Roosevelt University's Paralegal Studies Program, editing various legal textbooks, and consulting on a wide range of projects for the ABA Center for Professional Responsibility.

APPENDIX D

OFFICE OF ATTORNEY ETHICS
OF THE
SUPREME COURT OF NEW JERSEY

CHARLES CENTINARO
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TRENTON, NEW JERSEY 08625

MEMORANDUM

TO: Steven Klutkowski, Esq., Secretary
Professional Responsibility Rules Committee

FROM: Paula T. Granuzzo, Esq. ptg
Statewide Ethics Coordinator

SUBJECT: **Proposed Amendments to R. 1:20-3(c) & (c) (Appointments; Officers)**

DATE: July 25, 2013

The Disciplinary Oversight Committee (DOC) recently considered an OAE proposal to expand the District Ethics Committee (DEC) officer terms from one year to two years. After reviewing the proposed amendments and the support therefor, the DOC directed the OAE to submit them to the Professional Responsibility Rules Committee for its consideration during the current Rules Cycle. This memo will briefly outline the proposed amendments and reasons underlying the requested changes.

Currently, District Ethics Committee officers serve a one-year term as Vice-Chair and then another year term as Chair. Officer candidates are selected from the more experienced members of each committee. Ideally, those proposed for officer positions should have at least two years of experience as a committee member, so a member who is proposed for an officer position generally serves as a Vice-Chair in his third year of his membership term and as a Chair in his fourth and final year of his membership term.

While all incoming officers receive formal training on their new positions and responsibilities, the learning curve for reaching a comfort level with those new roles and responsibilities varies among the new officers. Frequently, by the point that a new officer reaches that comfort level, his term is near end and he either moves on to a new officer position or cycles off

the committee (perhaps never allowing him the opportunity to become fully engaged in his leadership role). In the meantime, case and resource management – at least to some extent – falls squarely on the shoulders of the Committee Secretary.

Although a strong and vigilant Secretary (essential to the success of every District Ethics Committee) will step in to minimize any disruption in process that might result from any lull or transition in leadership, it is both unrealistic and counterproductive to expect the Committee Secretary to take on all administrative and leadership responsibilities on a regular or even cyclical basis. Indeed, the Rule itself recognizes a discrete division of responsibilities between the Vice-Chair and the Chair and nowhere are those responsibilities allocated to the Committee Secretary (who technically is not a member of the committee).

To address the disruption that inevitably results during a learning or transition period, the amendment to subsection (c) proposes the expansion of an officer's term (as Vice-Chair and then as Chair) from one year to two years. This proposed expansion is intended to both allow an incoming officer sufficient opportunity to become familiar and comfortable with his new position/responsibilities and to then use the expertise he will have developed to the benefit of the committee on a less transient basis. Because officers are selected from experienced committee members, the proposed expansion of the officer terms to two years would require an expansion in an officer's overall membership term to six (6) years, as proposed by the amendment to subsection (b).

Finally, because continuity and experience continue to play a major role in an Ethics Committee's success, subsection (b) further proposes that officers who serve a single full six-year term also be eligible for reappointment to a successive four-year term as a returning member.

PTG
Enc.
Charles Centinaro, Esq., OAE Director
Eugene Troche, Esq., DOC Secretary
William Ziff, Esq., Deputy Statewide Ethics Coordinator

1:20-3. District Ethics Committees; Investigations

(a) Disciplinary Districts. (no change)

(b) Appointments. Members of Ethics Committees shall be appointed by, and shall serve at the pleasure of the Supreme Court for a term of four years, except that members who are subsequently appointed to serve as officers shall be appointed for a term of six years in accordance with subsection (c). With the approval of the Supreme Court, a member or officer who has served a full term, may be reappointed to one successive term. A member serving in connection with . . . . (no change)

(c) Officers; Organization. The Supreme Court shall ~~annually~~ biennially designate a member of each Ethics Committee to serve at its pleasure as Chair and another member to serve as Vice-Chair. Whenever the Chair is absent . . . (no change)

(d) Office. (no change)

(e) Screening; Docketing. (no change)

(f) Related Pending Litigation. (no change)

(g) Investigation. (no change)

(h) Dismissal and Appeal. (no change)

(i) Determination of Unethical Conduct. (no change)

(j) Incapacity. (no change)

Comment:

The amendment to paragraph (b) expands the current four-year membership term for the Vice-Chair and Chair of the committee to a six-year membership term. This will allow the Vice-Chair and the Chair to serve in an officer capacity for two years, as set forth in the amendment to paragraph (c). The amendment to paragraph (b) further allows an officer who has served a single full six-year term to be eligible for reappointment to a successive four-year term as a returning member.

The amendment to paragraph (c) is intended to expand the term of the Vice-Chair and Chair of the Committee to two years each, instead of one year in each position.

APPENDIX E

NEW JERSEY STATE BAR ASSOCIATION

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March 29, 2011

The Honorable Stuart Rabner
Chief Justice
Hughes Justice Complex
25 W. Market Street
PO Box 023
Trenton, NJ 08625-0023

RE: Proposed Amendments to R.P.C. 7.3

Dear Chief Justice Rabner:

On behalf of the New Jersey State Bar Association, I respectfully request your consideration of the attached report "Direct Mail Solicitation of Prospective Clients" and the adoption of amendments to R.P.C. 7.3 which governs personal contact with prospective clients.

The rule amendment contained in the report seeks to codify current ethics opinions on the issue of direct solicitation so that attorneys will have the benefit of a rule that clearly delineates restrictions and obligations. In addition, the NJSBA examined the regulatory activities that other state supreme courts have undertaken to deal with the problem of direct solicitation and have included some of these provisions. The focus here was on safeguarding the general public from what in many instances might be termed as misleading or onerous mailings in a manner that preserves the right of attorneys to engage in commercial speech.

In the course of our research, we also attempted to enhance the 30 day prohibition against direct solicitation to include a moratorium for contact where there has been a death in the family or a serious bodily injury. The NJSBA reasoned that the original amendment to the Rules of Professional Conduct was adopted because contact to mass disaster victims in the first 30 days following such an event might regarded as "shocking to the conscience" of reasonable people. As the New Jersey Supreme Court noted in Matter of Anis., 126 N.J. 448 (1992) at 458 "the commercial free speech guarantees of the First Amendment do not protect attorney conduct that is universally recognized as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims and their families." The U.S. Supreme Court in Florida v. Went For It, Inc., 15 U.S. 618 (1995) upheld the Florida Bar's 30 day ban on solicitations of accident and disaster victims stating in part:

The Florida Bar has argued, and the record reflects, that a principal purpose of the ban is "protecting the personal privacy and tranquility of [Florida's] citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma." The intrusion targeted by the Bar's regulation stems not from the fact that a lawyer has learned about an accident or disaster (as the Court of Appeals notes, in many instances a lawyer need only read the newspaper to glean this information), but from the lawyer's confrontation of victims or relatives with such information, while wounds are still open, in order to solicit their business. In this respect, an untargeted letter mailed to society at large is different in kind from a targeted solicitation; the untargeted letter involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession unearthed by the Florida Bar's study.

The purpose of the 30-day targeted direct-mail ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered. The Bar is concerned not with citizens' "offense" in the abstract, see post, at 4-5, but with the demonstrable detrimental effects that such "offense" has on the profession it regulates. See Brief for Petitioner 7, 14, 24, 28. 2 Moreover, the harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents. Throwing the letter away shortly after opening it may minimize the latter intrusion, but it does little to combat the former.

It is our hope that a slight expansion of the 30 day ban will accord vulnerable New Jersey citizens who have experienced similar trauma to that associated with a mass disaster victim with protection from unwanted intrusion during a time of grief.

Thank you for your consideration of this important request. Please let me know if you have any other questions or comments in this regard.

Very truly yours,

Richard H. Steen
President

c: Hon. Glenn A. Grant, J.A.D., Administrative Director of the Courts
David P. Anderson, Director of Government and Professional Services
Susan A. Feeney, President-elect
Angela C. Scheck, Executive Director

NJSBA Report on Direct Mail Solicitation of Prospective Clients/ Proposed Rule Amendments

The best method of addressing the problem of harassing and annoying solicitation letters being sent to prospective clients, particularly in municipal court matters, may be to amend the Rules of Professional Conduct (RPCs). This may be done in a manner that clarifies a lawyer's obligations by setting forth in the rule current restrictions on solicitation that have been approved by the state Supreme Court and its Committee on Attorney Advertising. Towards this end, below is a summary of current RPCs, important case law, opinions of the Committee on Attorney Advertising, and approaches taken in other states. This memo concludes with recommended amendments to RPC 7.3 containing the important points raised in all of these sources.

Background

The New Jersey Rules of Professional Conduct (RPCs) govern attorney advertising and contact with prospective clients. **RPC 7.1** is a general rule that prohibits any communication that provides false or misleading information about a lawyer or a lawyer's services. The rule defines a false or misleading communication as one that:

a) contains a material misrepresentation of fact or law,

b) creates unjustified expectations about the results a lawyer can achieve,

c) makes a comparison to another lawyer (except where a comparison is based on findings of a "comparing organization" and its basis can be substantiated),

d) relates to legal fees other than the amount of an initial consultation, or a fixed or contingent fee, a range of fees for specific services, specified hourly rates, availability of credit, or a statement of fees charges by a legal assistance organization.

RPC 7.2 permits a lawyer to advertise through a variety of public media (such as newspapers, directories, radio, tv, mail). However, there are restrictions. For instance, television advertisements may not use animation, music or lyrics, or "extreme portrayals" of lawyers that do not relate to legal competence. A lawyer must retain a copy of any advertisement for three years.

RPC 7.3 regulates direct contact with prospective clients, whether by personal contact or by written communication such as a solicitation letter. Specifically, the rule prohibits contact with a prospective client if:

a) the lawyer knows, or reasonably should know, that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment,
b) the person has told the lawyer not to send any communication
c) the communication involves harassment, coercion or duress
d) the communication was made within 30 days of a mass disaster event

RPC 7.3(b)(5) permits a lawyer to send a targeted letter regarding a "specific event", as long as the text and envelope states "advertisement" prominently displayed, and it contains a notice about the importance of selecting as lawyer and indicates where complaints might be filed if the recipient believes the letter is inaccurate or misleading.

Permissible Restrictions Despite First Amendment Protection

RPC 7.3, subject to some restrictions, clearly permits mailings to individuals because of their involvement in specific events, such as motor vehicle accidents, traffic tickets, foreclosure actions, tax appeals, and a host of other occurrences. This type of solicitation received First Amendment protection in *Shapero v. Kentucky Bar Association,* 486 *US* 466 (1998), which involved letters to persons facing property foreclosure. The U.S. Supreme Court held that targeted solicitation letters could not be completely prohibited by a state, in the absence of a showing of a substantial government interest. However, the Court did find that such letters could be regulated in a less restrictive manner, such as by prohibiting false and misleading claims.

Subsequently, the US Supreme Court allowed a state to impose a 30 day waiting period on direct solicitation letters to an accident victim or his family. *Florida Bar v. Went For It, Inc.,* 515 U.S. 618 (1995). The Florida rule in question covered personal injury and wrongful death cases.

The New Jersey Supreme Court, in *Matter of Anis,* 126 N.J. 448 (1992) determined that some restriction on direct solicitation was necessary to protect the victims, or their families, following a mass disaster. This case concerned letters sent to the families of victims of the terrorist bombing of an airliner in Scotland. The Court asked the Committee on Attorney Advertising to hold hearings and attempt to define under what circumstances it might be appropriate to restrict lawyer solicitation. The committee could not reach a consensus and instead suggested that the Court, as an initial step, require any solicitation letter to contain the word "ADVERTISEMENT." This amendment was made to the rule. Following the U.S. Supreme Court's decision in *Went For It* the New Jersey Supreme Court adopted a 30 day waiting period for solicitation letters following a mass disaster event.

In 2010 the Court amended the rule to require that "ADVERTISEMENT" be placed on the outside of the envelope. This action by the Court was in response to a recommendation by

the NJSBA that the 30 day waiting period be expanded to cover all municipal court matters, in addition to personal injury cases and criminal cases. In addition the New Jersey Association for Justice urged the Court to curtail the use of direct solicitation letters by lawyers.

Additional Restrictions – Committee on Attorney Advertising

The Supreme Court's Committee on Attorney Advertising has exclusive jurisdiction, pursuant to R. 1:19A-2, to issue advisory opinions and consider ethics grievances related to the Rules of Professional Conduct dealing with advertising. The committee has, by opinion, imposed its own requirements applicable to targeted solicitation letters:

- when a lawyer "participates in the dissemination of information that constitutes advertising, the attorney has an obligation to ensure that the information is properly identified as advertising", even though it is sent out by an organization (in this case a homeowners association). *Opinion 11* (1992).
- The term "specific event" in RPC 7.3 includes "situations, conditions and occurrences which now, or in the future will give rise to a cause of action," including an economic recession that resulted in declining property values and tax appeals. *Opinion 12* (1992).
- Lawyers who send letters to persons charged with municipal court violations must—
    - Personally verify the accuracy of all statements made in the letter
    - Advise the recipient that his/her name, and the nature of the offense, was obtained under court Rule 1:38 that governs public access to court records
    - Specifically name the party in the salutation of the letter, rather then sending a generic letter
    - Be satisfied that the recipient is over 18 years of age
    - Make no indication of a special relationship or knowledge that will lead to a favorable result
    - Not use language that raises unjustified expectations or is susceptible to pressuring as person because of possible penalties or consequences
    - Not misstate the role of the prosecutor or judge *Opinion 29 (revised 2004)*

Opinion 29 is particularly instructive because it indicates that the Committee on Attorney Advertising acted because of complaints received from persons facing municipal court charges who were outraged at the content and tone of letters received from lawyers. The opinion lists examples of letters that did not meet the requirements of RPC 7.3 because they misstated the possible consequences of the charges, grossly inflated the ability of the lawyer, inferred that the prosecutor, judge and police are "all together" and looking to obtain convictions, exerted undue pressure through exaggeration and claims of influence over the court or prosecutor.

In 2005 the Advisory Committee on Professional Ethics and the Committee on Attorney Advertising issued *Joint Opinion 698/34* again targeting direct solicitation letters to persons charged in municipal court. The opinion found a number of unethical practices including statements about defendants being misled or being "treated unfairly by cops and prosecutors", describing a town's chief revenue source as being from traffic tickets, stating that a prosecutor's job "is to find you guilty", using a form of letter titled "confidential special report" that contained exaggerated statements about the IRS.

In *Opinion 30* (2005) the committee addressed abuses in solicitation letters to persons facing bankruptcy, such as letters that played on the fear of losing a home, failed to mention other possible courses of action, made inflated claims, etc. The opinion requires a lawyer soliciting clients in a bankruptcy matter to include in the letter specific information about the potential pitfalls of bankruptcy and the need to discuss the advantages and disadvantages of bankruptcy with a lawyer or other qualified professional.

Rules in Other States

A number of states have versions of RPC 7.3 that differ in some respect from New Jersey's rule, including:

Arizona – requires a copy of any solicitation letter be filed with the Clerk of the Supreme Court and disciplinary authorities; if a contract is included in the mailing it must be marked "sample".

Arkansas – prohibits a mailing from having the appearance of a legal pleading or other official document; requires the letter begin by advising that if a lawyer has already been retained the letter is to be disregarded; contains a 30 day waiting period for death claims.

Colorado – contains a 30 day waiting period for matters involving personal injury or death; must indicate whether the case will be referred to another lawyer, or someone other than the lawyer who signed the letter will handle the case.

Connecticut – requires the letter to begin by advising that if a lawyer has already been retained the letter is to be disregarded; the envelope must not indicate the nature of the legal problem; an enclosed contract must be marked "sample", a letter must be on letter-sized paper and must indicate whether a referral will be made or if someone else will handle the case, other than the lawyer who signed the letter.

Hawaii – contains a 30 day waiting period for matters involving personal injury or death; if a contract is enclosed it must be marked "sample"; the letter must not resemble a pleading or other legal document; the envelope must not indicate the nature of the legal problem.

Indiana – a copy of every letter must be filed with the state Disciplinary Commission along with a filing fee of $50 (if distribution is to multiple parties, only one filing need be made).

Louisiana – a letter must include the name of a lawyer responsible for its content; the letter must not resemble a pleading or other legal document; contains a 30 day waiting period for personal injury and wrongful death cases.

Missouri – requires a statement telling the recipient to disregard the letter if a lawyer has already been retained; a letter must not resemble a pleading or other legal document; the envelope shall not reveal the nature of the legal problem; contains a 30 day waiting period for personal injury and wrongful death cases.

Nevada – contains a 45 day waiting period for all cases evolving from "a particular transaction or occurrence."

New York – a letter must indicate whether a referral of the matter will be made; a copy of the solicitation letter must be filed with disciplinary authorities and will be open to public inspection; contains a waiting period for personal injury and wrongful death claims; a contract enclosed with a letter must be marked "sample" and "do not sign."

Ohio – prior to sending a solicitation letter in a civil action the lawyer must ascertain whether in fact the person has been named as a defendant and has been served; in a wrongful death or personal injury matter solicitation within 30 days must include a detailed statement "Understanding Your Rights", which is set forth in the rule.

Rhode Island – a copy of a solicitation letter must be sent to disciplinary authorities.

South Carolina – a copy of a solicitation letter must be sent to disciplinary authorities, along with a filing fee; lawyers must retain a statement showing the basis by which the lawyer knew the person solicited needed legal services and the factual basis for statements made in the letter; a letter must provide the phone number of the state bar lawyer referral service; the probability of a referral must be indicated; the envelope must not reveal the nature of the legal problem

Tennessee – if a contract is included it must be marked "sample"; the letter must not resemble a legal pleading or document; it must reveal how information was obtained indicating a need for counsel; if a lawyer has already been retained the recipient must be advised to disregard the letter.

Suggested revision to New Jersey RPC 7.3

Because it is likely that few lawyers know of the existence of the Committee on Attorney Advertising, and fewer still are acquainted with the committee's opinions, it is suggested that the significant points in the opinions be codified in an amendment to RPC 7.3(b)(5). This will apprise members of the bar of the existing restrictions to direct solicitation, impress upon them the need to be careful in preparing and sending letters and hopefully

spare some lawyers from running afoul of the disciplinary authorities. Also, important features from the rules of other states should also be added to the New Jersey rule.

The current rule is set forth below, with proposed amendments underlined.

RPC 7.3 Personal Contact with Prospective Clients

(a) .... no change

(b) A lawyer shall not contact, or send a written or electronic communication to, a prospective client for the purpose of obtaining professional employment if:
(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or
(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or
(3) the communication involves coercion, duress or harassment; or
(4) the communication involves unsolicited direct contact with a prospective client within thirty days of a death in the family or serious bodily injury , meaning bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ or after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or
(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail or electronic communication to a prospective client in such circumstances provided that the letter:

(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient. The envelope shall not indicate the nature of the legal problem that is the subject of the letter; and
(ii) shall contain the party's name in the salutation and begin by advising the recipient that if a lawyer has already been retained the letter is to be disregarded; and
(iii) shall not resemble a legal pleading, official document or include any legal contract; and
(iv) shall advise the recipient that his or her name, and the nature of the offense or complaint was obtained pursuant to court Rule 1:38; and
(v) shall not imply any special relationship with the court, prosecutor, or police that might lead to a favorable result; and

(vi) shall not use language that misstates the role of the judge, prosecutor or police, overstates the lawyer's qualifications, raises unjustified expectations or is susceptible to pressuring the recipient because of purported penalties or consequences that might occur; and

(vii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give the matter careful thought. The selection of an attorney is an important decision." A list of county bar association lawyer referral services shall be included with the letter; and

(viii) contains an additional notice at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, PO Box 037, Trenton, NJ 08625. The name of the attorney responsible for the content of the letter shall be included in the notice.

(ix) A copy of any communication sent to a prospective client shall be sent to the Committee on Attorney Advertising. The committee's failure to comment or respond shall not amount to an endorsement of the communication in question.

(c) ..... no change
(d) ..... no change
(e) ..... no change
(f) ..... no change

APPENDIX F

SUPREME COURT OF NEW JERSEY
COMMITTEE ON ATTORNEY ADVERTISING

PRINCIPAL OFFICE
ADMINISTRATIVE OFFICE OF THE COURTS
RICHARD J. HUGHES JUSTICE COMPLEX
PO BOX 037
TRENTON, NJ 08625-0037
(609) 292-0694
FAX (609) 292-6848

CAROL JOHNSTON, ESQ.
SECRETARY

April 24, 2012

Chief Justice Stuart Rabner
New Jersey Supreme Court
Richard J. Hughes Justice Complex
PO Box 023
Trenton, NJ 08625

Re: NJSBA Letter to Court on Suggested Amendments to RPC 7.3

Dear Chief Justice Rabner:

By letter dated March 29, 2011, the New Jersey State Bar Association (NJSBA) suggested amendments to Rule of Professional Conduct 7.3. This letter was forwarded to the Committee on Attorney Advertising on March 9, 2012 with a request that the Committee provide comments. The Professional Responsibility Rules Committee was also asked to consider the letter.

The NJSBA proposes that Rule of Professional Conduct 7.3(b) be amended. The pertinent portion of the Rule currently provides:

RPC 7.3 Personal Contact with Prospective Clients

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress or harassment; or

(4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or

(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail to a prospective client in such circumstances provided the letter:

(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient; and

(ii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision"; and

(iii) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625.

The NJSBA suggests that paragraph (b) be amended to include "electronic" communications. The Committee generally agrees with this revision and notes that it previously issued a Notice to the Bar stating that all requirements applicable to written communications equally apply to electronic communications. However, the Committee suggests that a preferable alternative amendment would simply omit the word "written" from the Rule so it reads: "a lawyer shall not contact, or send a [written] communication to, a prospective client . . . ."

The NJSBA suggests that paragraph (b)(4) be amended to extend the thirty-day waiting period before lawyers can send solicitation letters to prospective clients where there has been a death in the family or serious bodily injury. This provision is already subsumed by (b)(1) – "the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer." The proposed revision arguably would permit a lawyer to send a solicitation letter on day 31

after the event, while the current prohibition in (b)(1) may require the lawyer to wait even longer before soliciting, depending on the condition of the family member.

The Committee notes that this 30-day waiting period was already presented to the Court in 2010 and the Court declined to adopt it. It was then presented as a bill in the Legislature which passed in December 2011 but was pocket-vetoed by the Governor. Although the Committee previously supported this 30-day waiting period for personal injury matters, it has not seen problems or violations in this area for several years and, therefore, sees no reason for an amendment at this time.

The NJSBA suggests amending paragraph (b)(5) to permit lawyers to send electronic communications in addition to mail when soliciting prospective clients for a specific event. The Committee notes that this amendment would significantly broaden permissible solicitation. Lawyers would be able to send emails to a person who just received a traffic ticket or was involved in an accident. Perhaps email addresses would not be accessible to lawyers, perhaps the email solicitation would be directed into a junk folder. But the Committee sees no reason to broaden permissible solicitation of persons affected by specific events to electronic, as well as mail, communications.

The NJSBA suggests amending paragraph (b)(5)(i) to state that "the envelope shall not indicate the nature of the legal problem that is the subject of the letter." The suggestion touches on CAA Opinion 20 but is less restrictive than the requirement set forth in the Opinion. In Opinion 20, the Committee reviewed a solicitation for foreclosure legal services sent in an envelope that stated: "important – this letter can save your property." The Committee found:

> Whenever the outside of an envelope bears more than the sender's return address, the envelope becomes a part of the advertising message. This is particularly true when the prose on the face of the envelope relates to the subject matter of the letter to be found inside. By printing or stamping a message such as the one described above on the envelope, the sender converts the envelope into a distinct communication subject to the requirements of RPC 7.3(b)(4)(i) - (iii).
>
> Consequently, we hold that if an attorney chooses to print or stamp on the face of an envelope a message relating to the subject matter of the correspondence to be found inside, the attorney must ensure that the face of the envelope also bears the word "ADVERTISEMENT" in capital letters and notices regarding the importance of one's decision concerning the selection of an attorney and the reporting of inaccurate or misleading statements to the Committee on Attorney Advertising, Hughes Justice Complex, P. O. Box 037, Trenton, New Jersey 08625.

The Committee notes that lawyers could easily circumvent the proposed amendment. Instead of stating "important – this letter could save your property by avoiding foreclosure" the lawyer need only write "important information about your home" or other phrases designed to urge the recipient to open the letter but that do not expressly indicate the nature of the legal

problem. People may be better protected by Opinion 20 than by the half-measure presented in this proposed amendment.

Were the Court inclined to amend the Rule, the Committee strongly suggests it be changed to state that the envelope shall contain NO information other than the word "advertisement" prominently displayed and the lawyer's name, firm, and return address.

The NJSBA suggests amending (b)(3)(ii) to state that the letter "shall contain the party's name in the salutation and begin by advising the recipient that if a lawyer has already been retained the letter is to be disregarded." The proposal incorporates Opinion 35 and a portion of Opinion 29. The Committee agrees with this proposal.

The NJSBA suggests amending (b)(3)(iii) to state that the letter "shall not resemble a legal pleading, official document or include any legal contract." Solicitations that resemble a pleading or official document are currently prohibited as misleading, in violation of RPC 7.1(a). The Committee saw a handful of such solicitations in 2008 and 2009, concerning mortgage modifications, but has seen none in the last few years. The Committee has seen simple retainer agreements attached to solicitations for property tax appeals, but has not received any complaints about this practice and, therefore, sees no reason to amend the Rule.

The NJSBA suggests a new (b)(3)(iv) to state that the letter "shall advise the recipient that his or her name, and the nature of the offense or complaint was obtained pursuant to Court Rule 1:38." The Committee notes that this requirement is useful if, in fact, the information is from a court record that was obtained pursuant to the Rule. Lawyers look to court records to solicit persons for traffic tickets and foreclosure cases. Oftentimes, however, the information is obtained from other public sources of information, such as police reports, which are public pursuant to the Open Public Records Act, not Rule 1:38. Lawyers solicit victims of traffic accidents by reviewing police reports. Further, some solicitation letters target an audience not by reviewing public records but from private sources, and the Committee has permitted such solicitation provided the lawyer explain how the information was obtained. An alternative is to expand the requirement to state that the letter "shall advise the recipient how his or her name was obtained and, if the information was obtained by reviewing public records, the Rule or statute that renders such information public."

The NJSBA suggests a new (b)(3)(v) to state that the letter "shall not imply any special relationship with the court, prosecutor, or police that might lead to a favorable result." The Committee notes that this misleading language is already prohibited by RPC 7.1(a). Further, the required statement would be inapplicable to solicitations for other matters, such as property tax appeals. The Committee has seen only a handful of solicitations in the last several years that include this type of language and, therefore, sees no reason to amend the Rule.

The NJSBA suggests amending (b)(3)(vi) to state that the letter "shall not use language that misstates the role of the judge, prosecutor or police, overstates the lawyer's qualifications, raises unjustified expectations or is susceptible to pressuring the recipient because of purported penalties or consequences that might occur." Language that raises unjustified expectations is already prohibited by RPC 7.1(a)(2). Language that overstates the lawyer's qualifications would

be inaccurate or misleading and prohibited by RPC 7.1(a). Language that may be considered to pressure the recipient would be prohibited by RPC 7.3(b)(3), a communication that involves coercion, duress or harassment. Language that misrepresents likely penalties for an offense, such as going to jail for a minor speeding ticket, is a misleading statement prohibited by RPC 7.1(a). With the exception of lawyers mentioning jail as a possible penalty for minor traffic tickets, the Committee has not seen many solicitations in the last few years that include this type of language.

The NJSBA suggests amending (b)(3)(vii) to require solicitation letters to include a list of county bar association lawyer referral services. It is not clear what problem this requirement is intended to address. The requirement appears to be unnecessary.

The NJSBA suggests a new (b)(3)(viii) to require that the name of the attorney responsible for the content of the letter is stated. The Committee agrees with this requirement.

The NJSBA suggests new language at (b)(3)(ix) to state that copies of all solicitation letters sent to a prospective client also be sent to the Committee, and "the committee's failure to comment or respond shall not amount to an endorsement of the communication in question." The Committee does not support this proposal. The requirement would result in a crush of paper and many of the letters would be duplicative. A lawyer who sends out fifty letters a day would send all fifty to the Committee as well. The Committee would also receive the next day's fifty identical letters. This proposal would double the cost of lawyer solicitation by requiring every single letter sent out to also be sent to the Committee and it is not clear that merely sending a copy of a solicitation letter to the Committee would address perceived problems with solicitation letters.

Lawyers who send copies of their letters to the Committee would have some expectation that the letters eventually will be read or reviewed. The disclaimer that the Committee's failure to comment or respond is not an "endorsement" does not fully counterbalance the natural assumption that official filing with the Committee provides some kind of safe haven. Lawyers are not required to pre-file other forms of advertising with the Committee, though they are required to maintain copies of all advertising for a period of three years. RPC 7.2(b). The Committee sees no justification for imposing this onerous requirement on the Committee and its staff, or on lawyers who send solicitation letters.

The NJSBA reasons that these changes are warranted because "it is likely that few lawyers know of the existence of the Committee on Attorney Advertising, and fewer still are acquainted with the committee's opinions." The Committee agrees that codification of portions of the Committee's opinions in the Rule would be beneficial to the bar and would provide guidance though, as noted above, some of the NJSBA proposals may not be necessary.

The Committee may be unknown to brand-new lawyers or lawyers at large firms with marketing departments, but it probably is not unknown to practicing lawyers who advertise. Lawyers who regularly send solicitation letters most assuredly are aware of the Committee and its rules, as they have received letters from the Committee concerning their advertising. Many heavily-advertising lawyers regularly call the Committee Secretary on the hotline before sending

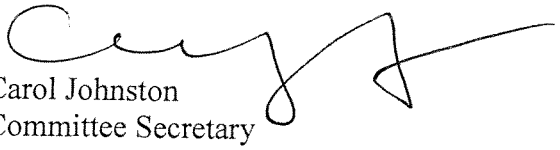
out advertising. These lawyers probably account for the vast majority of solicitation letters received by people who may have personal injury claims. The Committee and Secretary have worked with these lawyers and, while recipients of this advertising continue to send their letters to the Committee for review, the letters generally comply with the advertising rules. The Committee has succeeded in getting the attention of the core group of frequent advertisers.

Further, the Secretary often gives lectures on attorney advertising to members of the bar. For example, just in the past six months the Secretary lectured on advertising to the Middlesex County Bar Association in March 2012; to the Mercer County Inn of Court in February 2012; to the Mountain Inn of Court (Morristown) in December 2011; at the Office of Attorney Ethics Conference in October 2011; and will be on a panel discussing advertising at the Bar Association conference in May 2012 in Atlantic City. In this age of mandatory continuing legal education with required ethics credits, lectures on advertising, which qualify for ethics credits, tend to be very well-attended. This outreach to the bar will continue and should assist lawyers to better understand the advertising rules.

Thank you for requesting the view of the Committee concerning these proposals to amend Rule of Professional Conduct 7.3.

Respectfully submitted,

COMMITTEE ON
ATTORNEY ADVERTISING



Carol Johnston
Committee Secretary
For the Committee

CJ/hsr

c: Glenn A. Grant, Acting Director
Steven D. Bonville, Chief of Staff
Professional Responsibility Rules Committee
Cynthia A. Cappell, Committee on Attorney Advertising Chair (via email)
Committee on Attorney Advertising Members (via email)