

SPECIAL COMMISSION ON LAWYER REGULATION

REPORT AND RECOMMENDATIONS

**A REPORT CONCERNING THE SURVEY OF PARTICIPANTS IN THE FLORIDA
BAR'S LAWYER REGULATION SYSTEM; AN ANALYSIS OF CURRENT RULES OF
PROCEDURE, POLICIES AND PROCESSES; AND RECOMMENDATIONS FOR
CHANGE**

**Henry M. Coxe III, Chair
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*In Memory of Our Friend and Example
Henry Latimer*

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INTRODUCTION

In July of 2003 Florida Bar President Miles A. McGrane III appointed the Special Commission on Lawyer Regulation and charged the Commission with studying the Rules Regulating The Florida Bar and evaluating the efficacy of the current Florida lawyer regulation system that implements those rules. He also requested the Commission to report recommended changes that will increase the efficiency of lawyer regulation while balancing the expectation of the public and the rights and needs of Florida's lawyers as individuals and as a profession. The cost of the lawyer disciplinary system was approaching \$10 million in annual expenses and no full systemic review had been conducted since 1989 and 1990. This cost and the passage of time since the last review of the disciplinary process sparked the suggestion for appointment of a Commission and resulted in the action by President McGrane.

The goals of the Commission were to increase the speed with which matters are evaluated and conclusions are reached within the lawyer discipline system, yet preserve the fairness of the system where existing levels of fairness are appropriate and enhance the levels of fairness to all participants where possible. The Commission also set a goal to reduce the expense of the system of lawyer regulation where appropriate.

The Commission began its work on September 5, 2003 and concluded its deliberations September 8, 2005. The Commission drafted this report in a series of conferences culminating April 18, 2006.

This report is formatted to present: 1) issues raised and debated by the Commission; 2) an analysis of current processes and procedures, if any, that address those issues; 3) recommendations by the Commission to address those issues; 4) a statement of the status of implementation of recommendations; and 5) reference to information considered by the Commission and minutes of the Commission's meetings. Issues are ordered as they may arise in the processing of a disciplinary case, with general application issues last.

Materials considered by and minutes of Commission meetings may be obtained on the Bar's web site at:

<http://www.floridabar.org/tfb/TFBComm.nsf/840090c16eedaf0085256b61000928dc/4e0e98ad164db87385256eb600744b16?OpenDocument> or by writing to the Special Commission on Lawyer Regulation, Legal Division, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300.

Special Commission on Lawyer Regulation

| | |
|---------------------------------------|--|
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| William Pierce White III | (Public Defender, 4 th Judicial Circuit) |
| Kathleen Williams | (Federal Public Defender) |

Mission Statement

TO: Special Commission on Lawyer Regulation

Henry M. Coxe III, Chair
Hon. Major Best Harding
Hon. Barry Joel Stone
Hon. Lynn Tepper
Anita Michalina Cream
Leo Giovoni
Evan Robert Marks
John Andrew Noland
David Bill Rothman
Timon V. Sullivan

Henry Latimer, Vice Chair
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Steven Michael Everhart
Don L. Horn
Richard C. McFarlain
Edith G. Osman
Paul Jonathan Scheck
William C. Vose

Kelly Overstreet Johnson, Ex Officio

RE: Commission Mission Statement and Charge

I hereby charge the Special Commission on Lawyer Regulation to study the Rules Regulating The Florida Bar, as adopted by the Supreme Court of Florida, and to evaluate the efficacy of the current system of lawyer regulation as those rules are implemented by The Florida Bar. After appropriate study and investigation, the Commission is requested to report to the board of governors at or before its May 28, 2004 meeting and recommend all changes that will increase the efficiency of lawyer regulation while balancing the expectations of the public and the rights and needs of Florida's lawyers as individuals and as a profession.

The goals of the Commission are to increase the speed with which matters are evaluated and conclusions reached; preserve the fairness of the system of lawyer regulation where existing levels are appropriate and enhance the level of fairness where possible; and reduce the expense associated with lawyer regulation.

Very Truly Yours,

Miles A. McGrane III

Chronological Listing of Commission Meetings

| | |
|---------------------|--------------------------------------|
| September 5, 2003 | Tampa Airport Marriott Hotel |
| October 23, 2003 | Tampa Airport Marriott Hotel |
| June 24, 2004 | Boca Raton Resort & Club |
| January 20-21, 2005 | Miami Hyatt Hotel at the Miami River |
| June 23, 2005 | Marriott World Resort, Orlando, FL |
| September 8, 2005 | Tampa Airport Marriott Hotel |

LIST OF ISSUES CONSIDERED

- 1. Complaint Intake Process**
- 2. Alternatives to Discipline**
- 3. Standing to File Complaints**
- 4. Deferral to Other Authority**
- 5. Expediting Proper Resolutions**
- 6. Grievance Committee Hearings**
- 7. Selection of Referees**
- 8. Preparation of the Record Before the Referee**
- 9. Supreme Court -role of**
- 10. Designated Reviewer (DR) -
role of and access to the DR**
- 11. Access to Discipline Records**
- 12. Administration of Reprimands and Admonishments**
- 13. Clients' Security Fund, interrelationship with**
- 14. Florida Board of Bar Examiners, interaction with**
- 15. Judicial Concerns -
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- 16. Diversity in the Disciplinary Process**
- 17. Disciplinary Resignations vs. Disbarments**
- 18. Probation**
- 19. Procedures Upon Criminal Charges and Convictions -
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- 20. Education of the Membership**
- 21. Consistency in Discipline**
- 22. Maintenance of Fairness**
- 23. Preserving the Independence of the Legal System**
- 24. Special Practice Areas**
- 25. Supremacy Clause -
Department of Justice Issues**

REPORT AND RECOMMENDATIONS

1. Complaint Intake Process

Current Processes Addressing the Issue:

The bar currently operates an Attorneys and Consumers Assistance Program (ACAP) that screens telephone inquiries and determines whether alternative means of resolution are available and proper. The bar does not currently apply a similar screening to written inquiries or complaints.

Issue:

Should the bar recommend additional review or screening of disciplinary inquiries before the disciplinary process is engaged?

Recommendation:

The Commission recommends that the ACAP style screening functions be applied to written inquiries and complaints so that all questions concerning the conduct of members of the bar are addressed in a similar fashion. The Commission recommends that any intake process adopted should have a prompt method of forwarding appropriate cases to the disciplinary offices when it becomes clear that those cases should be addressed expeditiously within the grievance system.

Issue:

If an intake process should be adopted, should the process be a central effort or should resources be placed in each branch office for intake analysis?

Recommendation:

The Commission recommends a central intake system utilizing existing ACAP resources and augmenting same as needed. A central intake system will require fewer resources to implement and can use existing ACAP resources, whereas an intake system in each branch office would require a larger fiscal commitment.

Issue:

Should the intake process be mandatory before a disciplinary file is opened?

Recommendation:

The Commission further recommends that analysis by the intake system should be a prerequisite to the opening of a disciplinary investigation. All inquiries concerning the conduct of members of the bar should be screened to determine which cannot be handled within the disciplinary process; which can be handled within the disciplinary process, but may also be appropriately resolved in other venues; and those which must be handled within the disciplinary process. Requiring screening and intake analysis of all inquiries allows the disciplinary process to apply its finite resources where most needed, yet provides for opportunities to resolve complaints in programs not associated with discipline.

Issue:

What existing resources are available for the intake process and what new resources are needed to effectively implement that process?

Recommendation:

Some resources exist within the ACAP office. However, those resources are insufficient to handle the volume of written inquiries (8500 - 9000 annually) that will be screened. The Commission recommends three additional senior attorneys and a single program assistant position to be created to handle this new screening effort.

Status of Implementation of Recommendations:

The proposed budget of the department of lawyer regulation for fiscal year 2006-2007 includes funds for three new attorney positions and one support position and related expenses to conduct an intake analysis of the written inquiries received and processed within the disciplinary offices. These funds, if approved in the final budget, provide funding effective July 1, 2006.

Reference to Materials:

September 5, 2003; January 20- 21, 2005; April 28-29, 2005 minutes

2. Alternatives to Discipline

Current Processes Addressing the Issue:

The Practice and Professionalism Enhancement Program (PPEP) was adopted in 1994 and operates as a remedial process for addressing shortcomings in a lawyer's practice or personal conduct to which the appropriate inquiries and disciplinary complaints may be referred. This process is outside of and is a replacement for, the disciplinary process.

Current PPEP alternatives to discipline are:

- ethics school
- professionalism workshop
- anger management workshop

advertising rules workshop
fee arbitration
grievance mediation
continuing legal education courses
Florida Lawyers Assistance referral and monitoring.

Issue:

What alternative processes and systems exist that might be appropriate for resolution of issues outside the disciplinary system?

Recommendation:

The Commission recommends continued focus on providing alternatives to discipline that protect the public interest and provide remedial opportunities to bar members. Providing alternatives to discipline for cases that lack harm and most likely would not result in a sanction is appealing to the public and to the membership. Alternative resolutions also provide a means through which individuals may participate in resolving their problems rather than having resolutions determined by others without their participation.

The Commission recommends that the intake process be adopted as it provides an alternative means for review and resolution of inquiries and complaints that have little or no harm.

Issue:

What inquiries into the conduct of members of the bar are appropriate for referral to alternative processes?

Recommendation:

The Commission recommends that inquiries that involve circumstances in which little or no harm exists and that most likely would not result in a disciplinary sanction are matters that are appropriate for referral to alternative processes.

Status of Implementation of Recommendations:

Funds for the intake process are included in the budget requested for fiscal year 2006-2007 and as of the date of this report have been recommended by the budget committee.

Reference to Materials:

January 20-21, 2005 minutes

3. Standing to File Complaints

Current Processes Addressing the Issue:

Existing rules do not provide a requirement of standing to file a complaint. The rationale for no standing requirement is that anyone with knowledge of improper actions by a member of the bar should be able to present them for independent analysis as to whether sanctions should be imposed.

Issue:

Should there be a requirement of a relationship to the lawyer against whom a complaint is made?

If so, should standing be an issue for all complaints or should it be limited to certain areas of the practice of law? Specifically, should standing be a requirement in family law or criminal law-related complaints?

Recommendation:

The Commission recommends no changes at this time.

The Commission recognizes that some adversaries and individuals not in privity with a lawyer file complaints concerning the lawyer's conduct with the intent to gain an advantage in the dispute. Using the disciplinary process in such a manner is clearly improper and repugnant to the concept of fairness. However, imposing strict standing requirements could result in impairing the flow of appropriate information to disciplinary authorities where an impartial analysis may be made.

Imposing a standing requirement would result in prohibiting consideration of some valid complaints concerning conduct of members of the bar. While some persons will file a complaint in an attempt to inappropriately utilize the disciplinary system to gain an advantage in unrelated proceedings, the disciplinary system is able to efficiently identify proper inquiries and pursue them. The Commission recommends no changes in order to preserve the broadest opportunity for presentation of issues for evaluation.

The Commission recommends that other procedures and processes be implemented to increase fairness and to expedite the process so that improperly motivated and unsubstantiated allegations are dealt with in a timely and appropriate manner.

Status of Implementation of Recommendations:

No changes are recommended so no implementation issues exist.

Reference to Materials:

June 23, 2005 minutes; see also "Deferral to Other Authority," below

4. Deferral to Other Authority

Current Processes Addressing the Issue:

No processes addressed this issue at the time discussion began before the Commission. Subsequent to the discussion by the Commission, the board of governors adopted and approved a standing board bar policy providing guidance as to when the bar will defer disciplinary investigation to other appropriate authorities.

Issue:

Should the bar defer to other authorities (such as civil or criminal trial court's) in appropriate cases?

Recommendation:

Other tribunals and authorities such as civil courts, criminal courts, and administrative tribunals have both the interest and the authority over certain matters in the conduct of individuals appearing before them. Involvement by the disciplinary process in those matters gives rise to the potential for inappropriate interference in those proceedings and creates an opportunity for inconsistent action between findings by those authorities and findings by the disciplinary process.

The Commission recommends adoption of a board policy of deferring disciplinary investigation in favor of exercise of authority by courts and tribunals. The Commission recommends adoption in order to allow those authorities to exercise the full scope of their powers without intrusion into their processes of the discipline system and without an opportunity for inconsistent conclusions.

The Commission recommends that application of any policy should be closely monitored to determine its effectiveness and whether it should be altered or continued.

Issue:

Should the bar craft a deferral rule related to federal prosecutions?

Recommendation:

The Commission does not recommend specific deferral rules or policies for specific types of cases on the basis that deferral should be uniformly applied in order to be most effective.

Status of Implementation of Recommendations:

During the Commission's debate, the disciplinary procedure committee of the board of governors independently debated this issue and recommended a policy for board adoption. The board of governors adopted that policy (Standing Board Policy 15.55) in January of 2005.

This policy codifies instances in which the disciplinary process will defer to civil and criminal tribunals for resolution of issues presented in a disciplinary inquiry. The policy calls for closure of the bar's investigative file and does not contemplate reopening the file until the civil or criminal authorities have concluded their proceedings and the issues have been resubmitted by an interested person.

Reference to Materials:

September 5, 2003 minutes; see also "Standing to File Complaints," above; Standing Board Policy 15.55

5. Expediting Proper Resolutions

Current Processes Addressing the Issue:

Internal time guidelines adopted by staff processing disciplinary investigations have been in existence for a substantial number of years. Those guidelines are set forth below in the Commission's recommendations.

Issue:

How much time does it take for cases to be processed through the various stages of the disciplinary system?

Recommendation:

Recent average case processing times (number of days open to close) are:

| | |
|----------------------------------|----------|
| closed as inquiry | 31 days |
| closed as unsworn | 42 days |
| closed after staff investigation | 78 days |
| referred for mediation | 93 days |
| referred to diversion | 163 days |
| grievance committee NPC | 142 days |
| closed after discipline imposed | 248 days |

Issue:

Are there time requirements or guidelines for processing cases?

Recommendation:

Time guidelines for case processing exist and should continue.

The Commission recommends these time guidelines:

| Investigative Stage | Current Guideline | Proposed Guideline |
|---------------------------|----------------------|------------------------------|
| Staff Level | 120 days | 90 days |
| GC | 180 days | 120 days |
| Filing Formal Complaints | 120 days | 30 days-after probable cause |
| Filing Report of Referee* | 180 days | no change |
| Supreme Court* | no current guideline | no change |

* These times are not internal bar guidelines.

Issue:

Can those processing times be accelerated and still maintain fairness to all persons involved?

Recommendation:

The Commission recommends any guidelines should be specifically adopted as aspirational policies in that failure to comply should never give rise to the basis for dismissal of a disciplinary investigation.

The commission recommends shortening the time guidelines as proposed in the chart above.

Status of Implementation of Recommendations:

Elevation of these staff time guidelines to board policy will require promulgation and adoption of a standing board policy. No such policy is under consideration at this time. If the board adopts this portion of the Commission's report, the matter should be referred to the disciplinary procedure committee for drafting a board policy.

Reference to Materials:

September 5, 2003; May 23, 2005 minutes

6. Grievance Committee Hearings

Current Processes Addressing the Issue:

Current rules provide that, before a grievance committee may make a finding of minor misconduct or probable cause the respondent must be given all materials to be considered by the grievance committee and provided with an opportunity to make a response to those materials. The grievance committee is authorized to hold a full hearing, a modified hearing, or conduct a review of the materials and respondent's response.

If the grievance committee provides the opportunity for the respondent to be present before the committee, the rules also require that the complainant be given a like opportunity, unless otherwise impractical or disruptive.

Issue:

Should grievance committees be required to hold hearings at which the respondent and complainant will be allowed to appear before a finding of minor misconduct or probable cause may be entered?

Recommendation:

The Commission recommends creation of policies or standards in order to increase consistency throughout the state, but does not recommend a right to a hearing before the grievance committee.

Issue:

Is the procedure that allows for a paper review, as opposed to a full hearing, fair to all concerned?

Recommendation:

Until 1990 the rules required a grievance committee hearing in which the respondent was allowed the opportunity to be present before the committee could make a finding of minor misconduct or probable cause for further disciplinary proceedings. The rules did not, however, require an opportunity for the complainant to be present before the committee, if the respondent made an appearance. This previous requirement was one of the major changes recommended by the last commission (the Loucks Commission) to review the rules. That commission recommended elimination of the mandatory hearing as it caused inappropriate delay and effectively required two trials of the same issues. The supreme court agreed, eliminated the rule effective March 16, 1990, and added the reciprocal opportunity for the complainant to appear.

The current Commission recommends no change mandating a grievance committee hearing as the number of cases presented to grievance committees is such that a mandatory hearing will result in significant delay without substantial improvement in the quality of grievance committee decisions.

The current Commission also recommends that some policies or standards be adopted as a guide for how the complainant and respondent are advised of the ability to request an appearance before the grievance committee and how any requests would be evaluated.

Status of Implementation of Recommendations:

This recommendation has not been implemented at this time. If the board of governors approves this portion of the Commission's report this matter should be referred to the disciplinary procedure committee for drafting proposed standards or policies to guide notice and action on requests for hearings. In addition, the disciplinary procedure committee should determine whether a rule amendment is also appropriate on the subject.

Reference to Materials:

September 5, 2003; April 28-29, 2005 minutes; Survey of Respondents; Survey of Respondent's Counsel; Survey of Bar Counsel; and Survey of Grievance Committee Members

7. Selection of Referees

Current Processes Addressing the Issue:

Current rules allow the supreme court to delegate to the chief judge of a judicial circuit the authority to appoint a sitting or retired county or circuit court judge to serve as a referee in disciplinary proceedings. There are no standards or requirements in the rules or any policies or procedures that serve as guidelines for appointment of referees.

By decision of the local chief circuit judge some judicial circuits will appoint only circuit court judges (second and thirteenth judicial circuits).

Issue:

Should service as disciplinary referees be limited to circuit court judges?

Recommendation:

The Commission appointed a committee to study the issue of limitation of service to circuit court judges and the committee recommended no change in this respect. The committee considered statistics regarding the number of appeals by the bar and respondent. The statistics revealed a slightly higher instance of successful appeals from reports issued by county court judges as opposed to those issued by circuit court judges, but the numbers were not statistically significant enough to warrant a recommendation of change.

The Commission recommends more education of judges as to the requirements of service as a referee and the applicable law of disciplinary proceedings as a more appropriate way of assuring quality reports of referees. The commission recommends that the education be accomplished primarily through distribution of CD-ROM educational materials currently under development by the office of the state courts administrator.

In addition, the Commission recommends that:

- before a referee may serve as such the referee should certify that the CD-ROM has been reviewed;
- the CD-ROM should be developed into an interactive judicial education course;
- the new judges' college should include a training component regarding being a referee in bar cases;
- attendance at these training components should be mandatory;

ongoing training courses should be presented at the conferences of circuit and county court judges; and ongoing training at the circuit and county court conferences should be mandatory, but that the mandatory requirement should not create an out for a judge who does not want to be appointed as a referee.

The Commission recommends that the bar coordinate with the chief judges to create and implement training of referees. Specifically, the Commission recommends contact with the executive committees of the judges' conferences to obtain their suggestions on the type of training needed and how to solve the problem of providing the training.

Status of Implementation of Recommendations:

This recommendation has not been implemented. If the board of governors approves this portion of the Commission's report it should refer this matter to the disciplinary procedure committee for consultation with appropriate judges groups and coordination with the office of the state courts administrator.

Reference to Materials:

June 23, 2005 and September 8, 2005 minutes; Survey of Respondent's Counsel; Survey of Bar Counsel

8. Preparation of the Record Before the Referee

Current Processes Addressing the Issue:

Existing bar rules place the obligation on the referee to prepare a report of referee and file the report along with the record in the Supreme Court of Florida.

Disciplinary files maintained by referees are not maintained by the office of the clerk of the court in which the referee is assigned. Many times referees and their judicial assistants are not familiar with or able to maintain an orderly record and forward a poorly organized record to the clerk of the supreme court. In such instances, the supreme court clerk is required to reorganize the record to the extent the clerk is able.

Issue:

What processes and procedures may be implemented to improve the quality of the record filed by the referees with clerk of the Supreme Court of Florida?

Recommendation:

The Commission recommends that bar counsel be required to assist the referee's staff in preparation of the record, that the file and record should not leave the custody of the referee during this process, and that the referee retains the responsibility to certify and file the record with the supreme court. The Commission also recommends that the bar and the respondent

should have a chance to request supplementation of the record or to seek removal of items from the record.

Status of Implementation of Recommendations:

Collateral review of this recommendation was undertaken by the disciplinary procedure committee and a rule amendment was drafted, approved by the committee, submitted to the board of governors, and approved by the board on February 17, 2006. The approved, proposed amendment was filed with the Supreme Court of Florida on April 26, 2006.

Reference to Materials:

Excerpts of September 23, 2005 disciplinary procedure committee minutes.

9. Supreme Court - role of

Current Processes Addressing the Issue:

Existing rules provide an absolute right for The Florida Bar and the respondent to invoke appellate review by the Supreme Court of Florida. The review process authorizes a petition and briefs and provides for a discretionary oral argument. The rules do not allow for the court to consider matters in panels and do not allow for discretionary review.

Issue:

Should the court continue in the role and with the same procedures as currently in place?

Should the court hear discipline cases in panels?

Should the court accept appeals in disciplinary cases as a matter of discretion such as with a petition for writ of certiorari?

Recommendation:

The Commission recommends that no change be made to the court's role. The right to appeal by parties to a disciplinary proceeding is substantial and should not be altered unless significant reasons for doing so exist. No such reasons have been brought to the Commission's attention.

Status of Implementation of Recommendations:

Not applicable.

Reference to Materials:

April 28-29, 2005 and September 8, 2005 minutes

10. Designated Reviewer (DR) - role of and access to the DR

Current Processes Addressing the Issue:

“Designated reviewer” is partially defined in the rules as a member of the board of governors assigned to review the actions in a particular case or of a particular grievance committee. Various other rules or policies provide responsibility and authority to a designated reviewer in the areas of:

- review and approval of grievance committee recommendations;
- review and approval of consent judgments;
- recommendations to the board of governors concerning appeals;
- nomination of grievance committee members.

These rules do not provide authority for a designated reviewer to unilaterally take action and dispose of cases, but provides authority for referral to the board. An exception to the lack of unilateral authority is in the area of consent judgments (guilty pleas). A designated reviewer has the authority to reject the consent judgment without requiring the concurrence of anyone or any group.

Issue:

What is the role, responsibility, and authority of the designated reviewer?

Are there any guidelines available to assist the designated reviewer in the exercise of the designated reviewer's authority?

What educational efforts are needed?

Should guidelines be adopted concerning contact with the designated reviewers by respondents and their counsel?

Recommendation:

The Commission recommends adoption of a policy that provides guidance to a designated reviewer in conducting review and exercising responsibility and authority provided by rules and other policies.

Status of Implementation of Recommendations:

On April 7, 2006, the board of governors adopted standing bar policy 15.76 wherein guidance is offered to designated reviewers as to how to conduct a review authorized under the rules. This policy becomes effective May 8, 2006.

Reference to Materials:

September 5, 2003 minutes; Standing Board Policy 15.76

11. Access to Discipline Records

Current Processes Addressing the Issue:

With few exceptions all closed disciplinary files are public information and substantial portions are public records available to anyone. In addition, pending cases that have processed beyond the grievance committee level of investigation were also public information and portions thereof are public records. Currently, no disciplinary information is posted on the bar's web site and access to public records is by specific inquiry addressed individually by bar staff. Providing the public records requires analysis of the request, location of the file, photocopying or scanning the requested documents, and providing those documents to the inquirer in the format requested.

Issue:

What records are available to the public?

How are those records made available?

Should those records be published on the bar's web site?

How do we balance the public's right to know with the obligation of fairness to persons who are the subject of those public records?

What are the relative costs of providing access to public records by requests handled by staff and formatting records for posting on the internet?

Recommendation:

The Commission recommends that the bar post information about cases in which discipline was imposed on the web site and disclose the fact that there may be other public information available and how to get that information.

The Commission referred this issue to the Citizens' Forum for review and input. The forum recommended not posting closed-case information on the basis that it was unfair to the respondent to publish the allegations without publishing the full response and investigative conclusions.

Posting information about cases in which discipline is imposed provides public record information concerning proved allegations. Not posting information about other cases balances fairness considerations involved with what is, in essence, publishing the allegations without the full benefit of responses. In providing information that other public records may exist and instructions on how to obtain that information, the public interest in obtaining public records is satisfied. Publishing information about sanctions on the website will allow individuals to access

records without initial involvement of bar staff and should reduce some costs associated with the current process that involves staff throughout the records production process.

Status of Implementation of Recommendations:

Publication of disciplinary records on the web site is not currently under discussion. The communications committee and the disciplinary procedure committee have previously, and independently, discussed this issue but no decision regarding publication has been reached by the board.

A decision to publish public record information about discipline cases on the web site will require adoption of an editorial policy by the board of governors. If this portion of the Commission's report is adopted, the board should refer the issue of how publication may be accomplished to the communications committee and the issue of exactly what information should be published on the web site to the disciplinary procedure committee.

Reference to Materials:

May 17, 2005; June 23, 2005; September 8, 2005 minutes

12. Administration of Reprimands and Admonishments

Current Processes Addressing the Issue:

Admonishments may be administered by letter from the grievance committee serving the report of minor misconduct, by appearance before the grievance committee, or by appearance before the board of governors, if the admonishment results from a grievance committee recommendation. Admonishments imposed by order of the court may be administered by appearance before the board of governors, appearance before the referee, appearance before the court, appearance before the grievance committee, or by publication of the order imposing the admonishment. Current preferences are to administer admonishments by service of the report of the grievance committee or as stated in the referee report. Current unwritten policy of the board is that admonishments should not be administered by personal appearance before the board of governors.

Public reprimands may be administered by publication of the court order, by appearance before the court, by appearance before the referee, by appearance before the board of governors, or by appearance before any judge designated in the court order. Current unwritten policy of the board is that public reprimands should not be administered by personal appearance before the board of governors.

In addition, public reprimands are the subject of media releases prepared by the bar, are published in the Southern Reporter and are published in The Florida Bar News. Admonishments are not published and are not the subject of media releases.

There are no current standards or guidelines for when an appearance should be required.

Issue:

How are public reprimands and admonishment being administered?

How many public reprimands and admonishments are imposed on an average yearly basis?

Should public reprimands be administered differently from admonishments?

Who should administer public reprimands and admonishments?

Where should public reprimands and admonishments be administered?

What alternative methods of administration are appropriate?

What criteria exists for determining when a personal appearance is appropriate?

Recommendation:

The Commission recommends that all public reprimands be administered by the president or president-elect at a personal appearance before the board of governors.

Consideration was given to alternative sites for administration of public reprimands such as before local bar groups, at local courthouses, before the local chief circuit judge, and by appearance before the Supreme Court of Florida. The Commission also considered whether all public reprimands should be videotaped and published on the bar's web site. The Commission discussed whether public reprimands should be administered only by the president or president-elect or whether the designated reviewer should administer public reprimands at alternative sites. These considerations were rejected as being less appropriate than administration by the president or president-elect at appearances before the board of governors as a representative body of the legal profession.

In reaching this recommendation the Commission considered the policy of the Supreme Court of Florida that requires administration of reprimands for judicial misconduct by personal appearance before the court.

This recommendation will require an average of fifty-three personal appearances each year (averaging the last eight fiscal years' statistics) or approximately nine reprimands per board meeting if reprimands are administered at all board meetings or eleven reprimands per board meeting, if remote and out of state board meetings are not utilized.

Status of Implementation of Recommendations:

Implementation of this recommendation should be by adoption of board policy after referral to the disciplinary procedure committee.

Reference to Materials:

September 5, 2005; January 20-20 1, 2005 minutes; rule 3-5.1 (a) and (d).

13. Clients' Security Fund, interrelationship with

Current Processes Addressing the Issue:

The "Rice rule" requires the devotion of disciplinary resources in the conducting of audits after a member has surrendered the license to practice law in Florida in order to identify information sufficient for referral to prosecutorial authorities, where appropriate, and in order to identify the scope of potential claims against the Clients' Security Fund.

Issue:

Should resources of the disciplinary department be engaged in activities that resolve issues that would be addressed by the Client's Security Fund committee and enhance the processing of claims in a manner that provides alternatives to relief other than from the fund?

Should the "Rice rule" be implemented using disciplinary resources or resources of the fund?

Recommendation:

The Commission recommends that the board explore the availability of resources for satisfying the needs of the CSF, including whether to use disciplinary resources or to budget specifically within the fund's budget for this purpose.

Policies of the fund generally require that a grievance investigation has been undertaken and concluded with findings of theft or sanctions that affect the privilege to practice of law before the claim against the fund will be paid. Additionally, board policy requires an agreement between a respondent and the bar before the bar will support consent to disbarment (formerly disciplinary resignations) in what is known as the "Rice rule." That rule requires a respondent to agree to an audit of appropriate accounts after surrender of the license to practice law, maintenance of a current address for a stated period of time, and providing a current financial affidavit. The purposes of the agreement are to assist the fund in ascertaining whether alternative sources of recovery are available, to develop information appropriate for referral to prosecutorial authorities, and to protect clients' identification and the extent of liabilities not being met by respondents.

Status of Implementation of Recommendations:

The disciplinary procedure committee of the board of governors is reviewing a proposed rule amendment specifically authorizing audits in limited circumstances in post-disbarment proceedings. The committee is also examining requirement for provision of financial affidavits and maintenance of current mailing addresses in those same cases.

Reference to Materials:

June 23, 2005; September 8, 2005 minutes.

14. Florida Board of Bar Examiners, role of/interaction with

Current Processes Addressing the Issue:

The rules governing admissions to the bar provide that the bar shall have access to some information contained in the bar examiners' files. Specifically, rule 1-63.3 provides the bar examiners may disclose to the bar the following information, in the following manner:

Upon written request from The Florida Bar for information relating to disciplinary proceedings, reinstatement proceedings or unlicensed practice of law investigations, provided, however, that information received by the board under the specific agreement of confidentiality or otherwise restricted by law shall not be disclosed.

The board of bar examiners does not have a role in reinstatement proceedings as currently structured by the court. Reinstatement procedures found in rule 3-7.10 include elements of rehabilitation and other provisions that were modeled after similar rules governing admission to the bar.

Issue:

What type of access, if any, does the bar have to information contained in the files of the Florida Board of Bar Examiners?

What type of access should the bar have to those files?

Should the board of bar examiners have any role in reinstatement proceedings?

Recommendation:

The Commission recommends that no rule changes be adopted at this time.

The level of access provided by the current rules is sufficient to provide the bar with information necessary for investigations.

Adding bar examiner involvement in reinstatement cases, while appealing on some levels, inappropriately delegates authority in disciplinary matters and would only complicate that process without significantly improving results.

Status of Implementation of Recommendations:

Not applicable.

Reference to Materials:

September 5, 2003; June 23, 2005 minutes.

15. Judicial Concerns - feedback to the judiciary re: status of disciplinary cases

Current Processes Addressing the Issue:

Rules regarding confidentiality affect what information may be given to the general public concerning nonpublic cases. If a judge makes a referral without filing a formal complaint, confidentiality rules may restrict when the judge may be provided information while the case is not public. However, when the case becomes public those restrictions are mostly lifted.

Issue:

Does the method by which the judiciary brings matters to the bar's attention have any bearing on what information the bar provides concerning case processing developments?

Recommendation:

The Commission recommends enhanced communications between the bar and judicial officers concerning case processing developments. The rules allow communication with the complaining witness and allow communication with judges who have a judicial interest in a particular matter. Under either situation communications should be undertaken to provide status information to the judicial officer. Communications should be at regular intervals and upon the occurrence of events related to the case.

Status of Implementation of Recommendations:

Not applicable.

Reference to Materials:

April 28-29, 2005 minutes.

16. Diversity in the Disciplinary Process

Current Processes Addressing the Issue:

Periodic study by bar administrators as to the composition of staff and grievance committees has been undertaken and recruitment efforts are ongoing directed toward attracting and maintaining appropriate diverse staff and grievance committees. Current efforts are undertaken to obtain

grievance committee membership that is diverse in area of practice, types of practice, and personal characteristics of the members.

Issue:

Is the staff of The Florida Bar reflective of the population of the state and of the membership in The Florida Bar?

Is the membership of the circuit grievance committees reflective of the population of the state and of the membership and The Florida Bar?

Recommendation:

The Commission recommends continued reasonable efforts to attract and maintain a staff that reflects the diversity of the population. To assist in this respect the bar should place recruitment notices in local and statewide bar association publications soliciting diverse applications and should contact officers and those associations to enlist their cooperation in obtaining diverse applications.

The Commission also recommends a diverse membership be sought for the circuit grievance committees. Appropriate local bar associations should be contacted when vacancies exist for grievance committee service and their assistance in getting word to the membership of those associations as to vacancies and the need for their participation in the disciplinary system.

Status of Implementation of Recommendations:

The officers and administrators of the disciplinary system currently contact local and minority bar groups soliciting involvement of their membership in the disciplinary process both as employees and as grievance committee members.

Reference to Materials:

September 5, 2003 minutes.

17. Disciplinary Resignations vs. Disbarments

Current Processes Addressing the Issue:

At the time the Commission began discussing this matter "disciplinary resignation" was authorized by the Rules Regulating the Florida Bar as well as "disbarment." The effect of both is revocation of bar membership. All other features of both are the same, except for the length of time of the minimum sanction. "Disciplinary resignations" are for a minimum period of time of three years and "disbarments" are for a minimum period of five years.

Because of their similarities confusion continued concerning the difference between the two. In an attempt to address this confusion the court added language to orders allowing disciplinary resignation stating:

Disciplinary resignation is tantamount to disbarment. Florida Bar v. Hale, 762 So.2d 515 (Fla. 2000).

In addition, the court added the following language to former rule 3-7.12:

Disciplinary resignation is the functional equivalent of disbarment in that both sanctions terminate the license and privilege to practice law and both require admission to practice under the Rules of the Supreme Court Relating to Admissions to the Bar.

Despite these efforts, confusion continued.

Issue:

Should the term "disciplinary resignation" be converted to "disbarment on consent?"

Does the public understand the difference between the two terms?

Recommendation:

The Commission recommended abolition of "disciplinary resignation" and replacement thereof with "disbarment on consent" or some equivalent.

The Commission was advised that the board of governors previously approved a rule amendment changing the name from disciplinary resignation to disbarment on consent and that this rule amendment was approved by opinion of the court entered on October 6, 2005. The Commission endorsed this amendment.

Status of Implementation of Recommendations:

By opinion effective January 1, 2006 the court abolished disciplinary resignation and created disbarment on consent. (916 So.2d 655 (Fla. 2005)).

Reference to Materials:

January 20-21, 2005; April 28-29, 2005 minutes.

18. Probation

Current Processes Addressing the Issue:

By court rule probation may be imposed or agreed to for a stated period of time not to exceed three years. In addition, the rule allows probation to be for an indefinite period (3-5.1(c)).

Issue:

What is the current maximum term of probation?

Should the maximum term be extended to five years?

Recommendation:

The Commission recommends that probation rules be amended to allow for consistency between probation length in bar cases and conditional admission cases (five years maximum term of probation).

Current medical opinion is that mental health and some other impairments or impediments to practice require evaluation for a minimum of five years.

Status of Implementation of Recommendation:

Implementation of this recommendation will require approval by the board and referral to the disciplinary procedure committee to draft an amendment to rule 3-5.1 (c).

Reference to Materials:

January 20-21, 2003; April 28-29, 2003; September 8, 2005 minutes.

19. Procedures Upon Criminal Charges and Convictions - notification of criminal charges and convictions.

Current Processes Addressing the Issue:

Current rules allow a suspension upon the entry of an adjudication or determination (defined in 3-7.2) of guilt, but not upon the filing of a plea or upon a finding of guilt. In a few instances the bar has sought emergency suspension pursuant to rule 3-5.2 in such circumstances.

Issue:

Current rules (3-7.2) do not require notice, from any source, when a lawyer's charged with felony crimes and do not require notice from prosecutorial authorities when conditions occur.

What notice should be required when criminal charges are brought against members of the bar and what notice should be required when a bar member is convicted of a crime? Should different notice be required for misdemeanors and felonies?

Current rules allow a lawyer to continue to practice law from the time a plea of guilt to felony charges is entered or from the time of a finding of guilt is entered to the imposition of a judgment

and sentence of the court. Is it appropriate to allow a lawyer to continue to practice law under such circumstances or should the rules be amended to allow for suspension upon the entry of a plea acknowledging the criminal conduct or upon a finding of guilt as to a criminal conduct? Should misdemeanor criminal conduct be treated differently than felony conduct?

Recommendation:

The Commission recommends all notices required under this rule should be given within 30 days; that respondent, trial judge, and court clerk should give notice and also the state attorney should give notice of the imposition of felony charges and of the entry of a conviction on felony charges, if the defendant is known to be a member of the bar. It is the Commission's recommendation that notice be required from many sources so that reasonable assurance is available that the bar will be aware of criminal conduct by its members. Further, the Commission recommends rule amendments that accelerate the imposition of suspensions because the public interest requires suspension for felony criminal conduct as soon as the lawyer enters a plea admitting to such conduct or the jury enters a finding of such conduct.

Status of Implementation of Recommendation:

The Commission acknowledges that the disciplinary procedure committee (DPC) presented recommendations to the Commission and that the DPC received input from the Commission and made recommendations to the board of governors concerning amendments to rule 3-7.2. The recommended amendments have been approved by the board of governors and filed with the court on September 15, 2005.

Reference to Materials:

September 5, 2003; October 23, 2003; and January 20-21, 2005 minutes.

20. Education of the Membership

Current Processes Addressing the Issue:

Current continuing legal education requirements obligate members to obtain a specified number hours of educational credits in the area of ethics and professionalism every three years, but do not mandate that any such credits involve courses on the disciplinary process. Bar staff routinely participate in local bar seminars providing educational opportunities in this area.

Issue:

What is the level of understanding that the membership has concerning the disciplinary system?

How can the bar improve this level of understanding?

Recommendation:

The Commission recommends enhanced communications between the bar and the members concerning the disciplinary process. In addition, the Commission recommends that the bar engage in regular public communications designed to provide educational opportunities to the membership so that they have a better understanding of the disciplinary rules and procedural requirements.

The majority of bar members have little or no involvement with the disciplinary system and have very limited understanding as to its processes. The Florida Bar News may be used as a vehicle to provide some educational information, but alone will be insufficient to accomplish educational goals. Effective educational efforts will require systematic and continued efforts on a broad-based scale.

Status of Implementation of Recommendations:

In conjunction with establishment of a case management system and document imaging process, staff of the department of lawyer regulation have begun to revise form correspondence to be more instructive and to provide more information concerning the disciplinary process.

Reference to Materials:

September 5, 2003 minutes; Respondent's Survey; Respondent's Counsel Survey.

21. Consistency in Discipline

Current Processes Addressing the Issue:

The bar adopted modified versions of the ABA's Standards for Imposing Lawyer Sanctions as guides to bar counsel in making recommendations for disposition of cases. These standards provide a framework for analysis of the duty owed, violations, the harm, and other relevant data before a recommendation of the sanction or disposition is made.

Rule 3-7.9 addresses the authority of the bar to engage in settlement negotiations. Therein, all conditional guilty pleas must be approved by staff counsel (legal division director). Reposing such approval authority in one individual promotes consistency.

The bar has produced a "bar counsel manual" which provides routine procedures and processes to guide the actions of bar counsel.

Issue:

What routines and procedures are in place that are directed toward providing consistent results in disciplinary cases?

How can the bar be more consistent in grievance committee actions; recommendations to judicial referees; referee recommended sanctions; and the board of governors' action on review?

Recommendation:

The Commission recommends that the best way to improve consistency and thereby promote fairness is to increase the level of knowledge of relevant topics of those involved in the disciplinary process, specifically bar counsel, grievance committee members, disciplinary referees, and the board.

Status of Implementation of Recommendation:

Implementation of this recommendation requires development and implementation of training programs for:

- new bar counsel;
- continued training of existing bar counsel;
- orientation of grievance committee members;
- training grievance committee members in investigative techniques and developments in case law and disciplinary rules;
- judicial education as to the role and requirements of a disciplinary referee; and
- orientation of bar governors members and training concerning relevant case law and disciplinary rules.

Reference to Materials:

September 5, 2003; October 23, 2003; September 8, 2005 minutes; Respondent's Survey; Respondent's Counsel Survey; Bar Counsel Survey; Rule 3-7.9.

22. Maintenance of Fairness

Current Processes Addressing the Issue:

The rules provide for notice and opportunity to be heard to a respondent charged with disciplinary violations. During the investigation of those allegations procedures call for notice to the complaining witness and an opportunity to make comments in rebuttal. Similarly, the rules require the complaining witness be given a reasonable opportunity to be present before a grievance committee when the respondent is also present. Otherwise, the only party to a disciplinary proceeding whose rights are at issue is the respondent.

Issue:

Is the current disciplinary system fair in most respects to all concerned?

How do we improve fairness to all concerned and increase consistency at the same time?

What are the comparative rights of the participants in the disciplinary process?

Recommendation:

The Commission recommends enhanced educational activities directed toward grievance committee members, bar staff, judicial referees, and the board of governors. By enhancing educational levels, more fairness will result from more knowledge and better application of rules, laws, and standards.

The Commission recommends that more information be given to participants and more standard procedures be adopted for discipline cases.

Status of Implementation of Recommendation:

The office of the state courts administrator is developing a training program for judicial referees. Implementation of this recommendation will require participation in that development and referral to other appropriate entities, as well as the development of additional training materials and standard procedures.

Reference to Materials:

September 5, 2003 minutes; Respondent Survey; Respondent's Counsel Survey; Bar Counsel Survey.

23. Preserving the Independence of the Legal System

Current Processes Addressing the Issue:

The bar funds and operates a discipline system in a manner that far exceeds other regulatory systems for other Florida professionals. In addition, millions of dollars of volunteer lawyer and public member time are annually devoted to the process of regulation of Florida lawyers.

Issue:

In what ways may a strong discipline system assist in preserving the independence of the legal system?

Recommendation:

The Commission recommends maintenance of a strong disciplinary system through funding, training, and accessibility as an example of how an independent legal system serves the state well.

The Commission recommends regular education and training of all participants in the disciplinary process (See, Consistency in Discipline; Education of the Membership; Maintenance of Fairness; and Selection of Referees).

The Commission recommends a study of the funding of the disciplinary process.

The Commission recommends providing accessibility to public records concerning discipline activities, including publication of disciplinary information on the bar's web site (see, Access to Discipline Records, above).

Status of Implementation of Recommendation:

Implementation of training recommendations is discussed in the items above. Implementation of accessibility is also addressed, above. A separate review of funding has not been recommended elsewhere in this report and will require separate review by the program evaluation committee and budget committee under current board fiscal policies.

Reference to Materials:

September 5, 2003; and June 24, 2004 minutes

24. Special Practice Areas

Current Processes Addressing the Issue:

The rules as currently written are general in application, with limited exceptions. Specifically, special rules concerning fees in personal injury and wrongful death cases have been implemented and special rules concerning fees in criminal proceedings and marital actions have also been promulgated. There is also a rule specifically devoted to the special duties of a prosecutor.

Issue:

Are there any special areas of practice that require singular attention in the disciplinary rules?

Are there any area of practice in which complaints may be more frequently raised?

Recommendation:

The Commission recommends that disciplinary rules and rules of professional conduct should be general in application and, absent specific compelling circumstances, no rules should be adopted concerning special areas of practice.

The areas of criminal practice and family law practice are areas that historically generate complaints of professional misconduct because of the issues and rights at risk. The Commission acknowledges this information, but has not been presented with specific compelling circumstances for any changes at this time.

Status of Implementation of Recommendations:

Not applicable.

Reference to Materials:

June 23, 2005 minutes

25. Supremacy Clause-Department Of Justice Issues

Current Processes Addressing the Issue:

Application of rules regarding contacting represented parties and trial publicity currently are applied in a general fashion to all areas of practice. Special duties of a prosecutor are outlined in rule 4-3.8 and provide:

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) not seek to obtain from an unrepresented accused a waiver of important pre-trial rights such as a right to a preliminary hearing;

(c) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Issue:

Do federal prosecutors have specific concerns sufficient to warrant exceptions from rules of general application as they relate to gathering of evidence and other information from counsel for represented parties (rule 4-4.2), trial publicity (rule 4-6.1); and other special duties of a prosecutor (rule 4-3.8)?

Recommendation:

The Commission recommends that no further changes be proposed at this time.

Status of Implementation of Recommendation:

On December 1, 2004, the bar filed a petition to amend various portions of the rules. The petition was assigned supreme court case number 04-2246 and an amended order was entered March 23, 2006 implementing some amendments. However, the proposed amendments to rules 4-3.6 and 4-3.8 were not adopted. Rule 4-3.6 was not amended upon recommendation of the bar and rule 4-3.8 amendments proposed by the bar were rejected by the court.

The court amended comment the rule 4-4.2 and rule 4-6.1 was not subject of a proposed amendment in that case.

Reference to Materials:

June 23, 2005 minutes.