WISCONSIN

Report on the Lawyer Regulation System

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LAWYER DISCIPLINE SYSTEM ASSISTANCE TEAM

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INTRODUCTION

The Lawyer Discipline System Assistance Program

In 1980 the ABA Standing Committee on Professional Discipline initiated a national project to confer with state lawyer disciplinary agencies upon invitation by the jurisdiction's highest court. In 1993, the Standing Committee and the Joint Subcommittee 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 Committee has conducted over forty consultations since the commencement of the program.

The Committee's discipline system assistance program sends a team of individuals experienced in the field of lawyer regulation to examine the structure, operations and procedures of the host's disciplinary 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 state to take advantage of model disciplinary procedures that have been adopted by the ABA, as well as disciplinary mechanisms in use nationally. The consultations also provide a means for the Committee to learn of other effective procedural mechanisms that should be considered for incorporation into current Association models.

The team examines the state's lawyer regulation system in reference to criteria adapted from the ABA's *Model Rules for Lawyer Disciplinary Enforcement* (MRLDE). These rules were adopted by the ABA House of Delegates in August 1989 and most recently amended in February 1999. They incorporate the best policies and procedures drawn and tested from the collective experience of disciplinary agencies throughout the country. The team also uses the report and recommendations of the ABA Commission on the Evaluation of Disciplinary Enforcement (the McKay Commission), as adopted by the ABA House of Delegates in February 1992. These recommendations reaffirmed, expanded and added to many of the principles set forth in the 1989 MRLDE. The McKay recommendations also discussed policy and other aspects of the lawyer regulatory structure that were not addressed in the MRLDE. The consultation team utilizes the MRLDE and McKay Report as guidelines to identify potential problem areas and to make recommendations as to how the state's lawyer regulatory system can become more efficient and effective. Team members also carefully consider national practices and local factors in fashioning recommendations. This allows the team to craft suggestions that are tailored to meet each jurisdiction's particular needs and goals.

The ABA Discipline System Assistance Team for Wisconsin

Upon the invitation of the Supreme Court of Wisconsin, the ABA sent a team to conduct the on-site portion of the consultation from July 6 through July 9, 1999. The team was composed of: Linda D. Donnelly, former Disciplinary Counsel for the Colorado Supreme Court, past president of the National Organization of Bar Counsel and a member of the ABA Standing Committee on Professional Discipline and Publications Board for the ABA Center for Professional Responsibility; the Honorable Barbara Kerr Howe,

Associate Judge of the Circuit Court for Baltimore County, Maryland, past President of the Maryland State Bar Association, former Director of the Attorney Grievance Commission in Maryland, past Chair of the Maryland Judicial Disabilities Commission and a member of the ABA Standing Committee on Professional Discipline; Professor Ronald D. Rotunda, the Albert E. Jenner, Jr. Professor of Law at the University of Illinois, former Assistant Counsel to the U.S. Senate Select Committee on Presidential Campaign Activities (Senate Watergate Committee), the author of numerous publications, including treatises on legal ethics and constitutional law, and a former member of the ABA Standing Committee on Professional Discipline; and Ellyn S. Rosen, Associate Regulation Counsel of the ABA Center for Professional Responsibility, former Senior Counsel for the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois and Co-Chair of the Chicago Bar Association's Young Lawyers Section Professional Responsibility Committee. Biographies of the team members are contained in Appendix A to this Report.

Persons Interviewed and Materials Reviewed by the Team

During the on-site portion of the consultation, the team conducted interviews with persons involved in all aspects of the disciplinary process. The team spoke with the members of the Board of Attorneys Professional Responsibility, members of the Professional Responsibility Committees, the Interim Administrator and his staff, respondents, respondents' counsel, complainants and officials of the State Bar of Wisconsin. The team also met with members of the Supreme Court of Wisconsin to discuss issues and preliminary recommendations.

The team reviewed documentation relating to the lawyer regulatory system in Wisconsin. These records included, but were not limited to, the Supreme Court Rules, the Court's February 27, 1998 Statement of Principles, Policies and Procedures for the Lawyer Discipline System, the January 28, 1998 Policies of the Board of Attorneys Professional Responsibility and proposed internal operating procedures for the Board of Attorneys Professional Responsibility, prepared and submitted to the Supreme Court by the Board and the Administrator's Office. The team also reviewed rules relating to the Clients' Security Fund and the State Bar of Wisconsin's fee arbitration program, proposals for the creation of central intake/consumer assistance and alternatives to discipline programs, as well as disciplinary files, caseload statistics and budgetary reports.

After September 14, 1999, the team received correspondence setting forth what the authors felt were "errors and misunderstandings" contained in the preliminary draft Report provided by the team to the Court. The Court made that preliminary draft public prior to its September 14, 1999 public hearing. The team carefully reviewed these letters, and where appropriate, made factual corrections to its Report. The team did not alter its Report in response to portions of those letters that articulated differences of opinion regarding the operation and efficacy of the Wisconsin lawyer disciplinary system, or the appropriateness of the team's recommendations.

The team is grateful to all the participants in this discipline system assistance visit 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 take a more active role in the continued evolution and success of its lawyer regulatory system is laudable and, as discussed in greater detail below, necessary. The team hopes that the recommendations contained in this Report will assist the Court with this task.

OVERVIEW
Components of the Wisconsin Lawyer Discipline System

The Supreme Court of Wisconsin possesses the constitutional authority to regulate the practice of law in the State. At the time of the team's visit, there were approximately 19,581 lawyers admitted to practice law in Wisconsin. Every lawyer admitted to practice in Wisconsin is subject to the Court's disciplinary jurisdiction. While the Supreme Court of Wisconsin possesses the ultimate authority to regulate lawyers in the State, it has, as described below, delegated much of its control over the system to the Board of Attorneys Professional Responsibility and the Wisconsin State Bar Association. In 1978, the Court created the Board of Attorneys Professional Responsibility to assist it in the discharge of its regulatory authority over the profession.

Lawyer disciplinary procedures in Wisconsin are governed by Chapters 21 and 22 of the Supreme Court Rules (hereinafter cited as SCR). These Rules provide for the creation, operation and administration of the various components of Wisconsin's lawyer regulatory system: the Board of Attorneys Professional Responsibility (Board), the Professional Responsibility Administrator (Administrator), the Professional Responsibility Committees and the referees. The Board, as discussed below, has promulgated internal policies to assist in the implementation of the Supreme Court Rules.

The State Bar of Wisconsin is a unified bar. In addition to State Bar dues, each lawyer pays to the Wisconsin State Bar Association an amount determined by the Supreme Court to fund the disciplinary system. That amount varies annually depending on the proposed budget for the disciplinary system. The State Bar Association's Finance Committee is provided with a copy of the proposed disciplinary system budget for comment, prior to the Board's approval and submission of the budget to the Court. SCR 21.01(4)(f). According to statistics provided to the team, in 1998 the Court allotted approximately $78.25 per lawyer to fund the disciplinary system. For Fiscal Year 1999-2000 that amount will increase to $89.82. According to the FY 1999-2000 budget proposal submitted to the Court in May 1999, the Board considers anticipated revenues from the State Bar Association in proposing the budget to the Court.

A. The Board of Attorneys Professional Responsibility

The Supreme Court of Wisconsin established the Board of Attorneys Professional Responsibility in 1978. Pursuant to Supreme Court Rule (SCR) 21.01, the Court appoints the twelve Board members. Eight Board members are lawyers, and four are nonlawyers. The State Bar of Wisconsin may suggest candidates for appointment to the Board to the Court. Board members serve three-year terms. They may not serve more than one consecutive three-year term. The Board meets in open session on policy matters and closed session on disciplinary matters. The President Elect of the State Bar of Wisconsin serves as a non-voting member of the Board and is present during open as well as closed sessions of Board meetings, when individual cases and respondents are discussed. SCR

22.02 states that Board members are to disqualify themselves in proceedings in which a judge, similarly situated, would be disqualified.

On August 21, 1998, the Court appointed the Honorable Mark Farnum, reserve circuit judge, to serve as the Court's liaison to the Board. Prior to his appointment as liaison, Judge Farnum had not served as a Board or Professional Responsibility Committee member. He may attend Committee and Board meetings, if he desires, and is to serve as a conciliator to attempt to resolve concerns about the system expressed to him by the Board, Administrator and the Administrator's staff. Judge Farnum, in keeping with the provisions of the Court's Order, only reports about matters to the Court if he believes it is appropriate to do so. As liaison, he may not report to the Court on specific lawyer discipline cases. He is bound by the rules of confidentiality relating to lawyer discipline matters.

Pursuant to SCR 21.01(4)(a), the Board, with the approval of the Court, appoints the Administrator. The State Bar of Wisconsin may recommend individuals for appointment to this position. SCR 21.02 also grants the Board the power to approve, together with the Court, the hiring of the Administrator's staff. The Board, not the Court, supervises the Administrator in the performance of the duties of that position. The Supreme Court Rules are silent as to supervision of the Administrator's staff. The January 28, 1998 Policies of the Board of Attorneys Professional Responsibility, promulgated and adopted by the Board, but not approved by the Court, contain provisions setting forth directives for staff performance. These provisions appear to evidence not only the Board's laudable efforts, over time, to achieve efficiency in the operation of the system, but its efforts to supervise staff's work. For example, Policy No. 7.3 (5) provides, in part that: "[S]taff will prioritize work in the following order: (a) Preparation of reports to the Board by the requisite deadlines; (b) investigation of the most serious grievances; …(h) maintaining good accountability with respect of correspondence and telephone calls… ."

In its February 27, 1998 Statement of Principles, Policies and Procedures, the Court stated that: "[T]he Administrator is a Supreme Court employee over whom the Supreme Court has the ultimate personnel authority." The Court also stated that the Administrator's "staff are permanent court employees answerable in the first instance to the administrator and, ultimately, to the Director of State Courts…. As volunteers having limited time and a serious responsibility to fulfill, the members of the Board need not and should not become involved with the direct management of the court's staff."

As noted above, the Board, over time, has created its own internal operating procedures. These policies and procedures have not, as required by SCR 21.01(4)(c), been adopted by the Court. These policies, at times, seem to conflict with the Court's Rules. For example, SCR 22.07 and its Comment provide that the Administrator shall investigate all matters coming under the Board's jurisdiction, regardless of the manner in which they are brought and whether or not the complainant signs the grievance. Further, the Administrator may investigate information received from persons not wanting to be publicly identified. Board Policy No. 12.5, however, provides that a grievance must be filed by a complainant in writing in order for it to be considered by the Board. Policy No.

12.2 directs the Administrator to notify the respondent of the identity of the complainant unless, consistent with the Comment to SCR 22.07, there is good cause not to do so. The policy further provides that the Board must be notified when the Administrator withholds the identity of a complainant, so that the Board may determine whether to overrule the Administrator's decision.

The Court's Rules allow the Board in some instances to create a policy altering the provisions of those Rules. For example, SCR 22.04(b) provides for the retention of certain records for three years, and states that the Board may order otherwise. The Board has ordered in Policy No. 5.3 that all records regarding dismissed grievances, including dismissals with caution, be expunged one year after their dismissal date.

In addition to its administrative duties, the Board has an adjudicative role in the system. The Board, after receiving investigative reports from the Administrator's office and the Professional Responsibility Committees, is solely responsible for determining whether to proceed to formal charges. This can be viewed as an adjudicative function. The Supreme Court Rules do not provide a standard (probable cause, or reasonable cause to believe misconduct has occurred) by which the Board is to make this determination.

The Board may dismiss investigations, with or without caution, or issue, with a respondent's consent, a private or public reprimand. Before issuing reprimands or cautions, the Board must make a determination/adjudication that a respondent has violated the rules of professional conduct. For example, Board Policy 10.3 states that the Board may issue a dismissal with caution "only when it has found that the facts presented constitute clear and convincing evidence that a respondent has violated a disciplinary rule, but that the violation does not warrant discipline." Similarly, Board Policy 10.1 notes that the Board approves the use of the ABA Standards for Imposing Lawyer Sanctions "as an aid to assist the Board in seeking appropriate discipline in instances where lawyer misconduct is found." Board Policy 10.6 makes reference to the Board determining that a public reprimand is the "appropriate sanction for a respondent's misconduct." The Board also makes recommendations to the Court in reinstatement cases.

In cases involving formal charges, the Board may, and does, pursuant to SCR 22.10, hire outside counsel to prosecute cases. There is one full time litigation counsel in the Administrator's office to prosecute formal charges. In accordance with the Comment to SCR 22.10, the Board adopted Policy No. 13. That Policy provides that the Board must approve of the prosecutor adding or dismissing counts to formal charges. It also provides that any substantial evidentiary developments bearing on the merits of a case must be brought to the Board's attention. The Board, not the Administrator, determines whether to appeal from the results of the hearing on formal charges before a Court appointed referee.

Under Policy 12.9, the Board also retains for itself the authority to discuss, prior to the dismissal or investigation of a complaint, "novel legal questions" regarding the applicable disciplinary rules. It is not clear from the text of Policy No. 12.9 what, if any, action the

Board may take or direct the Administrator to take, as a result of its discussion of a "novel legal question."

Finally, the Board serves an investigative role in the system. Pursuant to SCR 21.01(e), the Board, at the request of the Supreme Court or the Board of Bar Examiners, investigates the character of those seeking admission to the Wisconsin Bar. It appears that under SCR 22.29, the Board refers these matter to the Administrator's office for investigation.

B. The Office of the Administrator

The Administrator has offices in Madison and Milwaukee. The Administrator's primary staff consists of two Deputy Administrators, nine investigators (lawyer and nonlawyer), one full time litigation counsel and two contract litigation lawyers. One of the contract counsel works half-time, the other works one-quarter time. The team was advised that additional outside counsel is used as well for a few cases. The Administrator's office also has an office manager and eight program assistants who serve as support staff.

The Administrator's office is responsible for investigating allegations of misconduct and reporting the results of its investigation to the Board for disposition. SCR's 21.02, 21.09 and 22.07(5) and 22.08 provide that the Administrator must submit the result of each investigation, along with a recommendation for disposition, to the Board for its review. The Board, or the Administrator, may dismiss a grievance after investigation. The team was advised that Administrator may also dismiss complaints after screening, without Board approval, if they do not fall under the purview of the disciplinary agency. Board Policy No. 10.4 states that the Administrator must provide the Board with a list of these complaints that "fall outside the Rules of Professional Conduct" for its review. It is not clear from the Board policy whether the Board can overrule the Administrator's screening decision. Policy No. 3.2 provides that the Administrator's office must obtain Board approval to reopen any dismissed file after the receipt of a complainant's request for reconsideration.

As noted above, Board policy requires that all complaints to the Administrator's office be submitted in writing and that the respondent be informed of the complainant's identity. The team learned that the Administrator's staff follows this policy, although it would seem to contradict SCR 22.07 and its Comment. Complainants are also told to sign their grievances, although a signature is not required by the Supreme Court Rules, or any formal Board policy.

The Administrator's staff does not help complainants complete and submit the grievance form. Staff investigators will speak with potential and actual complainants on the telephone to describe the jurisdiction of the disciplinary agency, answer questions and provide the status of a pending matter. Investigators only rarely, as part of their investigation, interview complainants or respondents. Board Policy No. 7.3 (2), which is intended to expedite investigations, may be interpreted as discouraging such interviews, at least during the initial stages of an investigation. That Policy provides that "[E]xcept

where there is a need by staff to direct specific questions to a party, preliminary **correspondence** (emphasis added) concerning the grievance will be limited to the grievance, response, comments thereto, and the rebuttal or second response by the lawyer."

If the Administrator decides to dismiss a complaint after screening, the complainant and respondent are notified, in writing, that the matter did not fall under the agency's jurisdiction. While complainants may request reconsideration of a screening dismissal, dismissal letters do not inform them of this right. Pursuant to Policy No. 10.4, these screening dismissals are not to be reported as a dismissed grievance to "other lawyer disciplinary agencies and agencies investigating the lawyer's qualification, pursuant to the exceptions set forth in SCR 22:24(1)," the Court's confidentiality rule.

If a complaint sets forth allegations, which if true, would constitute a violation of the Rules of Professional Conduct, the matter is fully investigated. Investigations are assigned in a manner that ensures that recidivists are investigated by the same staff member. The Administrator's staff may conduct the inquiry or refer the case to a Professional Responsibility Committee for investigation. That Committee will conduct a detailed investigation, as described below, and file its report and recommendations for disposition with the Administrator's office. Pursuant to SCR 21.09, the Administrator may request the assistance of a district attorney in completing an investigation. Wisconsin lawyers who are the subject of disciplinary investigations are required to cooperate with the Administrator's office and the Professional Responsibility Committees. SCR 22.07(2) and (3) provide that a lawyer's failure to provide information, or the provision of false information, constitutes misconduct.

The Administrator, and the Professional Responsibility Committees, possess subpoena power to compel the production of testimony and records. A respondent, however, may not be subpoenaed to appear. Instead, respondents are served with a "notice to attend." SCR 22.07(4) provides that a respondent's duty to cooperate does not affect that lawyer's privilege against self-incrimination. A respondent, however, may only claim that privilege as to matters for which he/she may be subject to criminal liability.

SCR 22.07 (5) provides that at the conclusion of an investigation, if the Administrator recommends a disposition other than dismissal, the Administrator's office shall:

> … first prepare an investigative report and provide a copy to the grievant and to the respondent. The grievant and the respondent may submit a written response to the report no later than 10 days following receipt of the report. The administrator shall then report the result of the investigation to the board, including any response submitted by the grievant or the respondent.

The team's review of disciplinary files indicates that staff spends a significant amount of time preparing these reports. These reports contain a recitation of the facts, analysis, conclusions of law and a disposition/sanction recommendation. Board Policy No. 12.3 provides that the Professional Responsibility Committee's reports must also be submitted to complainants and respondents, without the recommendations for sanction. The team

noted that staff prepares cover memos to accompany the Committee reports, and that these memos can sometimes be extensive. The team was advised that in other instances, staff has rewritten the Committees' reports.

The Administrator's litigation counsel, and the two contract counsel, are responsible for prosecuting formal charges. They are also responsible for handling appeals from the decisions of the referees and for pursuing petitions for recouping costs against disciplined lawyers.

C. The Professional Responsibility Committees

Pursuant to SCR 21.08, the State Bar has divided the state into sixteen districts, each with a Professional Responsibility Committee composed of lawyers and at least one nonlawyer. SCR 21.02 refers to these entities as the Professional Responsibility Committees "of the state bar." The President of the State Bar of Wisconsin appoints the lawyer and nonlawyer members of the Professional Responsibility Committees to three year terms. No member may serve more than three consecutive terms.

The size of the Committees depends upon the size of the district. The Supreme Court Rules provide that only one nonlawyer need be appointed to any Committee, no matter what its size, and in some districts this has been the case. In others, there are more nonlawyer members. For example, according to the Fiscal Year 1997-98 Report of the Wisconsin Supreme Court Board of Attorneys Professional Responsibility, the Professional Responsibility Committee for District One (Jefferson, Kenosha, Walworth Counties) has nine lawyer and four nonlawyer members. District Two (Milwaukee County) has 40 members, including five nonlawyers. The Committee from District Four (Door, Kewaunee, Manitowoc, Calumet, Sheboygen Counties) has eleven lawyer members and one nonlawyer. The Committee from District Fourteen (Brown County) has eleven lawyer and three nonlawyer members.

While the Committees act under the supervision of the Administrator, the team was advised that staff investigators rarely attend Committee meetings. Staff attendance varied between the Madison and Milwaukee offices of the Administrator. Board Policy No. 11.5(G) states that "[s]taff will attend committee investigative meetings to provide the most effective liaison." The Administrator may not replace dilatory Committee members. Only the President of the State Bar can remove and replace Committee members. The Committees conduct investigations into allegations of misconduct that are referred to them by the Administrator's office. According to SCR 21.08(3)(a), the Committees may initiate their own investigations. The team was not told of any instance where they have done so. The Committees investigate the conduct of lawyers in their own district. Respondents may, as a matter of right, make a request for substitution of a Committee investigator. The Committees are also empowered, pursuant to SCR 21.08(c), to conduct informal dispute resolution between the complainant and respondent. The team was advised that this rarely occurs.

Staff frequently refers cases to the Committees when there is difficulty getting a response from a respondent, or a credibility determination is necessary. Board Policy No. 12.6 (A) directs staff to have Committee members call respondents who have failed to respond to inquiries from the Administrator's office. If the respondent continues to fail to cooperate, the investigation is referred to the full Committee. In fiscal year 1998-99, 152 cases were referred to the Professional Responsibility Committees.

The team was advised that some Professional Responsibility Committees conduct their investigative meetings like hearings. Testimony is taken and documentary evidence submitted. The rules of evidence are not followed. Each Committee's practices vary, and matters may pend there for up to six months. According to a September 1998 survey conducted by the State Bar of Wisconsin Board of Attorneys Professional Responsibility Study Committee, several Committees reported holding these meetings/hearings in almost every case, while other Committees rarely held them. In those districts where Committee hearings were held, six Committees permitted cross-examination by the parties and five did not.

The Committees also conduct hearings on reinstatement petitions. Again, the rules of evidence are not followed. The Administrator is, according to SCR 22.28(5), supposed to investigate a petition for reinstatement and make a recommendation to the Board prior to the Committee hearing. These proceedings are not true adversarial hearings. The Administrator does not present the case against reinstatement, and the Committee members act as prosecutor and adjudicator. The team was advised that often the only witnesses called in reinstatement hearings are those testifying on the petitioner's behalf. In one instance the complainant from the original disciplinary case did not receive notice of the hearing until the day before it was to occur, and could not testify despite a desire to do so. The Committee's reports and recommendations for reinstatement are provided to the Board for disposition.

D. The Referees

Hearings on formal charges are held before a referee designated from a permanent panel appointed by the Court. The team was advised that referees receive no formal training.

SCR 22.15 provides that hearings on formal charges should take place in the county where the respondent maintains his/her principal office. The rules do not provide that the referee appointed to hear a matter be from the respondent's home county. SCR 22.14 states that disciplinary hearings are to be conducted in the same manner as trials of civil actions. The Supreme Court Rules do not specify that the rules of evidence apply to disciplinary hearings. Hearings before referees are public, as are all documents filed in proceedings on formal charges. The referee is responsible for obtaining a courtroom and a court reporter for the proceedings.

Referees file their reports and recommendations for discipline with the Supreme Court. The Supreme Court Rules do not direct referees to reference the ABA Standards for Imposing Lawyer Sanctions, although the team was advised that referees do consult the

Sanction Standards. While they receive annual summaries of disciplinary decisions, the referees are provided with few other substantive reference and research materials to assist them in preparing their reports.

Either party may appeal the decision of the referee. If no appeal is filed, the Supreme Court will review the referee's report and recommendation and rule on the case.

STRENGTHS OF THE WISCONSIN LAWYER DISCIPLINARY SYSTEM

This Report is designed to provide constructive suggestions based upon the team's collective knowledge and experience in lawyer regulation. As a result, the Report generally excludes from discussion those areas of the system that are operating effectively. In order to provide a balanced assessment of Wisconsin's lawyer disciplinary system, it is important to recognize its strengths.

The team was struck by the depth of the commitment to the system demonstrated at all levels. The Supreme Court, through its enactment of certain procedural rules, has demonstrated its commitment to protecting the public. For example, the team was impressed with the inclusion of Rules such as SCR 22.26, which sets forth the requirements imposed upon disciplined lawyers, and SCR 22.271, which provides for the appointment of a trustee to protect client interests in the event a sole practitioner dies or disappears. The Court has also adopted rules for the operation and continued funding of the Wisconsin Clients' Security Fund. In June 1998, the Court enacted amendments to SCR 20:1.15 to provide for trust account overdraft notification.

As noted above, in the past the Supreme Court of Wisconsin, which possesses the ultimate authority to regulate lawyers in the State, has delegated much of its control over the system to the Board of Attorneys Professional Responsibility and to the State Bar Association. Evidence of the Court's renewed dedication to effective lawyer regulation in Wisconsin includes the issuance of its February 27, 1998 Statement of Principles, Policies and Procedures for the Lawyer Discipline System and its April 28, 1999 Order initiating a comprehensive study of the system. It is particularly laudable that the Court has opened the disciplinary system review process to the public, in keeping with Wisconsin's history of open government. The September 14, 1999 public hearing provided members of the public and the bar with the opportunity to voice their concerns about the system, and comment on why it should, or should not, be changed. The hearing demonstrated the Court's accessibility to the public and members of the bar.

The dedication of the staff of the Administrator's office was readily apparent to the team. Their interest in increasing efficiency and ensuring that the process is fair to all involved is laudable. The staff has undertaken an active role in proposing to the Court and the Board new and amended policies aimed to further improve the operation of the system.

The team was impressed by the dedication of the volunteers in the system. Members of the Board and the Professional Responsibility Committees donate innumerable, uncompensated hours of their time to the lawyer disciplinary process. As noted in the body of this Report, the members of the Board, over time, have striven to improve the efficiency of the system. Through their efforts, there has been progress toward expediting investigations. In addition to the Board, this progress would not have been possible without the efforts of the Administrator's staff.

The recommendations that follow suggest changes to the structure and function of the Administrator's office and the Professional Responsibility Committees that the team

believes will compliment the efforts of the Board to make the system more efficient. The team has made these suggestions because it believes, based upon its knowledge and experience, that delay 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 on the Board and the Committees have not served the public and the bar with devotion and thoughtfulness.

The current Board's recent proposal for the creation of a central intake/consumer assistance program, as well as an alternatives to discipline program, further demonstrates the commitment of the volunteers to expanding the lawyer regulatory system to help the public and lawyers. The Board has also undertaken efforts to ensure that the disciplinary agency possesses the appropriate technology. This will assist the Administrator's office not only in processing grievances, but in caseload management.

Information provided to the team showed that the leadership of the State Bar of Wisconsin is equally invested in improving the lawyer regulatory system and in maintaining a good relationship with the disciplinary agency and the Court. The team found particularly noteworthy the initiative demonstrated by the State Bar in creating and implementing a training program for the Court appointed referees. This was the first such program offered to the referees, and the team received extremely positive feedback regarding that program. In this respect, the State Bar's joint effort, with the Board and the Administrator's staff, to complete a disciplinary case compendium deserves praise. Such a volume will be an invaluable tool in training system volunteers and in educating the bar and the public about the system. The recent efforts of the State Bar's BAPR Study Committee to improve the efficiency of the Committees are also laudable.

The State Bar's BAPR Study Committee has conducted various surveys aimed at improving the effectiveness of the system. That Committee has also studied the perceptions that members of the bar have about the disciplinary system. Leadership of the State Bar exhibited great sensitivity to the manner in which its members and the public perceive the disciplinary process and the profession as a whole. The BAPR Study Committee developed guidelines to assist the State Bar President in making the most effective appointments to the Professional Responsibility Committees and in making nominations to the Court for the appointment of Board members and referees.

STRUCTURE AND RESOURCES

Recommendation 1: The Supreme Court's Control and Oversight of the Wisconsin Lawyer Discipline System Should Be Emphasized.

Commentary

The rules of the Supreme Court of Wisconsin and the Court's February 1998 Statement of Principles, Policies and Procedures stress the Court's responsibility to regulate the practice of law and oversee the operation of the Wisconsin lawyer disciplinary system. However, as set forth above, the Court has delegated much of its control over the system to the Board of Attorneys Professional Responsibility and the Wisconsin State Bar Association. As a result, as the team was advised by interviewees and those who submitted additional materials, the Board of Attorneys Professional Responsibility is frequently perceived as possessing the majority of authority over lawyer disciplinary proceedings.

The Board possesses broad administrative, prosecutorial, investigative and adjudicative powers contained in the Court's Rules and in the internal operating policies adopted by the Board over time. The manner in which some of the existing Board policies appear to contradict and expand upon the Court's Rules is described above. The Court has not adopted these policies, and the Board, as the Court's agent, should not adopt policies or procedures that conflict with the Court's pronouncements. The Court is reviewing several proposed internal operating procedures submitted by the current Board, the Administrator and his staff. This Report will not address the specifics of those proposals. Some of the team's recommendations are likely to be similar to various suggestions contained in those submissions; some will differ. To the extent that such is the case, the team does not intend these similarities to constitute an endorsement or criticism of a particular entity's submission.

The team must note, however, as a result of its review of these proposals, that the Board appears unclear as to whether it is required to obtain Court approval for the enactment of its internal operating policies. On June 1, 1998, as requested by the Court, the Board tendered its proposed revisions and supplements to the existing Board Policies, noting that a majority of the Board had not approved the proposals contained in that submission. In its discussion of the history of current Board policies, the Board's submission to the Court stated,

> …(The present Board does not know of consideration ever having been given to the applicability of SCR 21.01(c) to these resolutions. Perhaps, as to some of the resolutions, this should have been done. However, we believe that SCR 21.01 (c) relates to the Board's duty to seek modifications to the Supreme Court Rules, as issues arise with respect to lawyer discipline.)

SCR 21.01(c) provides that the Board shall "propose for adoption by the supreme court procedures for the implementation of these rules." On its face, SCR 21.01(c) does not

limit itself to "modifications" to the Rules. The Rule specifically refers to procedures for implementation of the Court's Rules, and that is clearly what the Board's policies are. Further, the team believes that the Court's February 27, 1998 Statement of Principles, Policies and Procedures should have eliminated any confusion as to this issue. In that pronouncement, the Court specifically asked the Board, by June 1, 1998, to submit proposed internal operating procedures for the Court's review and **approval** (emphasis added).

The disciplinary agency is also viewed some interviewed by the team as being a component of the State Bar of Wisconsin. This view is perpetuated by reference to the Professional Responsibility Committees as entities "of the state bar." SCR 21.02(3) In addition to having the power to appoint and remove members of the Professional Responsibility Committees, whose primary duty is to investigate allegations of misconduct against lawyers from the same district, the President of the State Bar of Wisconsin may recommend individuals for appointment to the position of Administrator. The Court's current role in that appointment process appears to be minimal. The State Bar Finance Committee must also be consulted by the Board with respect to the budgeting process for the disciplinary agency. It was not clear to the team what weight, if any, the Board attaches to any comments or criticisms made by the State Bar regarding the proposed disciplinary system budget. Similarly, the team was unclear as to what extent, if any, the Board considers the State Bar's budgetary priorities in recommending a disciplinary assessment to the Court.

Through its interviews and review of materials, the team found that the perceptions that the disciplinary agency operates under the aegis of the Board and the State Bar exist despite the fact that the agency is physically located separate from the State Bar's facilities and that it bears the Supreme Court's name. The current oversight of the disciplinary agency by the Board, coupled with the involvement of the State Bar of Wisconsin, may be perceived by the public as protective of lawyers and may interfere with the necessary independence of the Administrator's office. Those working for the disciplinary system, as well as State Bar officials, exhibited sensitivity to these concerns. Further, it was clear to the team that participants in the system at all levels, as well as leadership of the State Bar, would like the Court to take a more active role in the oversight and administration of the disciplinary system. They desire more guidance from the Court regarding their roles and responsibilities as well as greater communication with members of the Court. The Court has begun to take these steps. It appointed a liaison to the Board, issued an April 28, 1999 Order initiating a comprehensive review of the system and held a public hearing about the disciplinary system on September 14, 1999, at which a preliminary draft of the team's Report was made available.

The team believes that the Court's role in the disciplinary process should be emphasized and strengthened. The first way in which the team recommends highlighting the Court's authority over the disciplinary system relates to the manner in which rules and policies are enacted and adopted. The Court should promulgate <u>all</u> rules, policies and procedures for operation of the disciplinary system in a formal, published format. Amendments to existing regulations or new policies, procedures and rules may be suggested to the Court

by the Board or the State Bar, but they must be enacted by the Court. The Board should not have the power to modify any of the Court's rules and procedures via its own policy pronouncements. The Court may wish to amend SCR 21.01 (c) to clarify this issue and to avoid any future confusion as to the nature of the Board's authority in this respect, although, as stated above, the Court seems to have done so in its February 28, 1998 statement.

Next, the team recommends that the Court eliminate the State Bar's role in funding the disciplinary system. The Court should directly fund the disciplinary agency via a separate annual assessment on lawyers payable directly to the Court. Currently, the disciplinary assessment is paid to the State Bar along with a lawyer's State Bar dues. The team was advised that State Bar then pays to the Court, on a monthly basis, an amount equal to one-twelfth of the disciplinary assessment. An assessment imposed by and paid directly to the Court will eliminate any perceived or actual conflicts of interest.

The amount of the assessment should be determined by the Court after consultation with the Administrator and should take into consideration existing and future needs in terms of space, caseload, staffing and technology. In this way, subsequent increases, if necessary, will not be required for a period of years. The team cannot predict the impact on resources that implementation of its recommendations would have. However, implementation of the central intake system and alternatives to discipline program might warrant the addition of staff members to the Administrator's office. The Court should obtain data on lawyer disciplinary system assessments for jurisdictions with lawyer populations similar to Wisconsin, as well as those with the types of programs that the Court plans to implement. Further, the Court should ensure that the Administrator and his/her staff are adequately compensated for the important work that they do, or will do under the proposals set forth in this Report. Each year the Administrator should prepare a budget for the Court's approval which reflects a true needs assessment.

While lawyer discipline should be directly and exclusively controlled by the Court, it is appropriate for the State Bar of Wisconsin to fund and administer other important components of the system. The State Bar should create and implement, as described in Recommendation Twenty below, some form of an alternatives to discipline program to help lawyers who have been diverted from the discipline system and to further enhance the public's perception of the profession. The team was impressed by the interest of the Board and the Bar in creating such a program, as was recently proposed by the current Board Chair.

The Court should be responsible for appointing the Administrator, Board members, referees and members of the Professional Responsibility Committees. During its on-site visit, the Court asked the team to recommend a process for making these appointments. After careful consideration of concerns raised by the interviewees, the team believes that the Court should make these appointments by using an open, well publicized nomination process. The Court should appoint a nominating committee to screen the candidates. The nominating committee should consist of judges, lawyers and public members. Public members should comprise at least one-third of the membership of the nominating

committee. The team believes that using this process will assure the public that the disciplinary agency is an independent agency functioning directly under the Supreme Court. The use of such a nominating committee alleviates the risk of any public misperception that the agency is overly protective of lawyers and gives proper credit to the Court for the efforts of its own agency.

The nominating committee should develop specific criteria, approved by the Court, by which to screen candidates for each position it is looking to fill. The BAPR Study Committee of the State Bar of Wisconsin has developed a list of criteria to be used by the President in making appointments to the current Professional Responsibility Committees and in making recommendations to the Court for appointments to the Board and panel of referees. According to documents provided to the team, these guidelines were developed after consultation with previous State Bar leadership, staff from the Administrator's office and Professional Responsibility Committee chairs. The Court and its nominating committee might wish to consult with the BAPR Study Committee to assist in formulating its own guidelines.

The team recommends that the Court further enhance its involvement with the disciplinary system by assigning a justice, or justices, to serve on a rotating basis as liaison to the Board. While appointment of the Judge Farnum was an important first step, the team believes that the Court should have a closer liaison relationship with its Board by having one or more of its own members serve, as other courts do. Additionally, the current liaison only reports to the Board when he feels it is necessary, as provided for in the Court's April 21, 1998 order. The team urges the liaison(s) to attend Board meetings. The assignment of a justice, or justices, to serve as liaison will broaden the avenues of communication with the Court and ensure continued clear definition of the Board's role and responsibilities. Such involvement increases public confidence and ensures prompt redress of problems that may have a negative impact on the system and the profession.

The Court can better emphasize its leadership role in the disciplinary system by providing increased public awareness of disciplinary proceedings and their results. The Court and the agency have excellent websites, However, they might also include publication of the Court's disciplinary opinions and referees' reports on these websites and in other media. The Court and referees should provide written opinions in disciplinary cases with citations to appropriate authority, including the ABA *Standards for Imposing Lawyer Sanctions*. By doing so the Court and referees provide necessary guidance to lawyers and the public regarding lawyer conduct and expected sanctions.

Recommendation 2: The Structure and Duties of the Board of Attorneys Professional Responsibility Should Be Revised.

Commentary

The Board of Attorneys Professional Responsibility possesses broad administrative, prosecutorial, adjudicative and investigative authority. Its powers are set forth not only in the Court's Rules, but in its own internal operating policies. It was clear to the team that the members of the Board take their duties very seriously and they are dedicated to providing a fair and effective lawyer disciplinary system. However, the manner in which the Board currently operates, and certain of its internal policies, unduly impinge upon the necessary independence of the Administrator's office and create the perception that it, and not the Court, controls the disciplinary process. Further, oversight of the prosecutorial branch of the system by the branch that possesses investigative, prosecutorial, adjudicative and administrative authority creates an appearance of improper influence. As explained in the Report of the Commission on Evaluation of Disciplinary Enforcement (McKay Commission Report), the disciplinary counsel should possess prosecutiorial independence and discretion, and not be subject to any potential pressure from adjudicative officials.

Currently the Board appoints and supervises the Administrator. The Board, and not the Administrator, ultimately controls how formal complaints proceed at trial if there is an issue as to whether to add or dismiss counts, change the sanction recommendation or handle evidentiary developments that bear on the merits of a case. The Board decides whether to appeal the referee's decision. *See, e.g.*, Board Policy Nos. 3.3 and 13.1. The Board, through some of its internal policies and procedures, and through infrequent personal contacts, also seeks to manage the Administrator's staff. For example, Board Policy No. 7.3 (5) dictates to staff the priority they are to assign to different tasks. Notably, the timely preparation of reports to the Board precedes the investigation of the most serious grievances and of files where the complainant/respondent claim delay will result in specific economic harm. In pointing this out, the team does not intend to criticize the Board's laudable efforts to expedite the disciplinary process.

The team believes that the office of the Administrator, the chief disciplinary investigator and prosecutor, should be independent. In order to ensure such independence the team recommends that the Court eliminate the Board's responsibility for appointing and supervising the Administrator. The Court should ultimately be responsible for the appointment, supervision, and if required, removal of the Administrator. As noted at page 29 of the McKay Report, under the provisions Rule 4A of the 1989 version of the ABA *Model Rules for Lawyer Disciplinary Enforcement* (MRLDE),

> …disciplinary counsel is appointed by the state discipline board. However, the Commission has received evidence that this arrangement can inhibit disciplinary counsel from appealing board decisions or otherwise disputing disciplinary policy set by the board. The National Organization of Bar Counsel has reported to the Commission several instances where control by state bar officials and state

> discipline board officials over disciplinary counsel's budgets, personnel, and decisions to prosecute have muzzled experienced disciplinary counsel, and in some instances, caused them to resign.

For these reasons, Rule 4A was amended. The MRLDE now provide for the appointment of disciplinary counsel by the state's supreme court. Appointment by the court of the lead investigator/prosecutor of its own agency is wholly appropriate. The Court may wish to change the Administrator's title to Chief Disciplinary Counsel for the Supreme Court of Wisconsin to further emphasize that position's role and the Court's direct and exclusive control of the disciplinary system.

The team recommends that the Court revise the structure and duties of the Board. Given the reduction of the Board's responsibilities in the system, as recommended below, the team suggests that the Court decrease the size of the Board to nine members (six lawyers and three nonlawyers). These members would be appointed via the nomination process described above. The team recommends that only experienced members serve as chair or vice-chair of this entity. The president-elect of the State Bar should no longer serve as an *ex-officio* member of the Board, but as a liaison. MRLDE 2(A). Eliminating the president-elect's membership on the Board should not result in any decrease in communications between the disciplinary agency and the State Bar. The team encourages such communications.

As noted above, the Board has dedicated itself to increasing the efficiency and timeliness of the disciplinary process in Wisconsin. The team believes that the Board's efforts in this respect should continue, albeit in a more limited manner. The Court should limit the Board's responsibilities and duties to general administrative oversight of the disciplinary system. The Board's other duties should be eliminated. As with all volunteers in the disciplinary system, Board members should be adequately trained so that they are knowledgeable about the entire system. The terms of Board members should remain staggered so that there are always experienced members present. This helps to ensure continuity.

General administrative oversight means that the Board is charged with reviewing the productivity, effectiveness and efficiency of the system. However, the Administrator should be responsible for setting investigative and prosecutorial priorities, conducting investigations and disciplinary prosecutions in the manner he/she deems appropriate, and for the day to day management and operation of the office and staff. The Board should not engage in micromanagement and should not be involved in personnel matters regarding the Administrator or staff, other than making recommendations to the Court regarding administrative issues about the system. For example, the Board may advise the Administrator that it wishes to see a certain percentage decrease in the number of investigations that are more than six months old within a certain period of time. It is the Administrator's responsibility to ensure that the Board's goal is met, and to determine the manner in which the percentage decrease will be accomplished. If the Administrator fails to accomplish the Board's directive, and lacks an appropriate reason for not doing so, the

Board may advise the Court that it perceives the Administrator is not meeting his/her responsibilities.

Caseload oversight by the Board should not impinge upon the Administrator's decision to investigate, prosecute or appeal individual matters. For this reason, the Board should not be privy to the specific factual allegations of any matter. Caseload status reports submitted to the Board by the Administrator should simply identify the type of misconduct alleged, whether the facts and evidence are complex in nature, the work already completed, the nature and extent of the investigation that needs to be performed and an estimate of how long it will take staff to complete the investigation. Similar reports should be prepared for the formal charges caseload. Any questions by the Board members about the status of investigations or prosecutions should be directed to the Administrator, not staff.

Given its oversight role, the Board should be responsible for evaluating the timeliness and efficiency of the Professional Responsibility Committees and for reporting to the Court if a Committee member is not fulfilling his/her duties. The Board should continue to be charged with recommending procedural and administrative rules to the Court for its adoption. MRLDE 2(G). This is standard practice for disciplinary boards throughout the nation. The Board should work with the Administrator and the State Bar with respect to crafting substantive and procedural rule submissions for the Court's adoption. Additional duties should include reviewing the budget prepared by the Administrator for submission to the Court. If the Board disagrees with the Administrator's budget, it may submit its own proposed budget to the Court.

The Board and the Administrator should share responsibility for the adequate training of all volunteer participants in the system. Additionally, to further engender trust and knowledge about the system, the Board should become more proactive in efforts to educate the public and the bar about the system. The team received very favorable comments about the Board's current outreach efforts to members of the bar, and believes a similar effort should be made with respect to the public. One way for this to be done would be for the Board to embark on a broader public speaking campaign to educate consumers about the existence and workings of the system. The creation of additional pamphlets and information posted on the Board's website and made available in public libraries would also be helpful. The Board may also wish to consider conducting surveys, similar to those done by the BAPR Study Committee, to ascertain the opinions of the bar and the public about the system.

Another role that the Board may serve, if the Court deems it appropriate and desirable, is that of an intermediate appellate tribunal. MRLDE 2(G)(4). As such, the Board could review the reports and recommendations of the referees at the request of the respondent or Administrator. Any such review would not be a *de novo* review. Instead, the team recommends that the Court utilize the "clearly erroneous" standard for review by the Board. Adoption of this standard is appropriate, will increase the efficiency of any such appellate panel and enhance the clarity of its decisions. Utilizing this standard, the Board may dismiss a matter, uphold or modify the findings, conclusions or sanction

recommendation of a referee. The Court may also wish to amend its Rules to provide for strict time limitations for the consideration of matters by the Board in this capacity, including times for briefing, oral argument, if any, and the preparation of the Board's opinions. The team recommends that the Board's opinions contain a sanction recommendation in addition to a statement of facts and conclusions of law. The respondent or the Administrator could file exceptions with the Court to the appellate opinions of the Board.

Should the Court decide to expand the role of the Board in this manner, it may wish to increase its size so that some members would serve only in an administrative oversight capacity, while others act as adjudicators. This will ensure the necessary independence of the Administrator's office. Further, the team believes that the Court should seriously consider the desirability of adding another layer to the disciplinary process in Wisconsin. The current rules do not provide for an intermediate appellate review, and the team heard no indication that one was desired or needed.

Recommendation 3: The Role and Responsibilities of the Administrator's Office Should Be Revised and Clarified.

Commentary

In fiscal year 1997-98, the Administrator's office received and processed 1,396 complaints. The disciplinary agency disposed of 1342 complaints, of which 1,182 were dismissed after screening or investigation. There were 502 grievances pending at the end of the year. Investigators conduct the screening as well as investigations that are not assigned to Professional Responsibility Committees. Twenty matters were referred for formal charges. Twenty-six formal actions were pending at the end of fiscal year 1997-98. The full time litigation counsel maintains a variable caseload of approximately 12 cases. At the time of the team's visit, the half-time and quarter-time contract litigators had 10 cases and 4 cases respectively. Additional outside counsel is responsible for prosecuting approximately 4 matters.

In order to allow the Administrator's office to operate as independently, efficiently and effectively as possible, the team first recommends that the role of the Administrator be enhanced. The Court should appoint an Administrator who is qualified for this unique position and adequately compensate that individual. The team urges the Court to amend its Rules to provide that the Administrator possesses the authority to hire and fire the office's staff. In this respect, the team recommends that the contract and outside counsel positions be eliminated and that the Administrator hire another in-house, full time litigator. The agency's legal staff should consist of professionals completely devoted to the business of the agency, free from the duties, obligations and potential conflicts of private practice.

Continuing to professionalize litigation counsel in this manner also makes sense economically. According to the agency's fiscal year 1999-2000 budget, it spent $72,700 for the two contract litigation counsel ($54,500 for the one-half time lawyer and $18,200 for the one-fourth time counsel) in 1998-99. Information provided to the team indicates that if the half time lawyer were working full time, he would be paid significantly more than the existing full time, in-house litigation lawyer. For fiscal year 1999-2000, the agency has budgeted $78,500 for the two contract counsel positions ($54,000 for the one-half time position and $24,500 for the one-fourth time lawyer) and another $28,000 for the other counsel paid at an hourly rate. Given these amounts, and in light of the existing litigation caseload, the team believes it makes significantly more sense to use these funds to hire another adequately compensated, full time, experienced litigation lawyer for the Administrator's office. The team also suggests that the Court consider using the remainder of these funds to ensure that the Administrator's position itself is sufficiently compensated.

The Court should define the role of the Administrator so that it is clear that he/she is responsible for managing the office's expenditures. The Administrator should formulate

the agency's budget for submission to the Court (Recommendation Two addresses Board action if it disagrees with the Administrator's budget proposal).

Next, the team recommends that the Court adopt changes to practices and procedures currently utilized with respect to the screening and investigation of complaints, the investigation of reinstatement cases and the prosecution of formal charges. The Administrator and staff should be solely responsible for the investigation and prosecution of allegations of lawyer misconduct, disability cases and reinstatement matters. MRLDE 4(B). With very few exceptions, such as states like Montana that have no disciplinary counsel, this is a national practice that is not dependent upon the size of a state. In order to ensure the efficient and expeditious processing of complaints, many jurisdictions hire former law enforcement personnel on a full-time or as needed basis to assist in investigations.

Many of those interviewed by the team expressed concern about eliminating the investigative role of the volunteers on the Professional Responsibility Committees, as described in Recommendation Four below. Interviewees indicated that the use of practicing lawyers to investigate allegations of misconduct was vital because of their knowledge and experience in different practice areas. As set forth above, the Court should hire an Administrator that is qualified for this unique position. The Administrator should ensure that his/her staff is also qualified to investigate and prosecute allegations of misconduct. Staff positions should be adequately compensated so as to allow the Administrator 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. This provides continuity as well as a fresh perspective to the process. Further, if a member of the Administrator's staff is unfamiliar with an area of law related to a grievance, it is important that the staff member consult with an expert in that practice area and make other efforts to adequately educate himself/herself so that the grievance can be appropriately handled. If this cannot be done, then the matter can be referred to a staff member with the necessary knowledge. This is consistent with SCR 20:1.1 and its Comment.

The team also believes that the Court should eliminate that portion of SCR 21.09(1) that provides that, upon request, a district attorney shall assist the Administrator with investigations. The team sees no reason for this investigative method. If the Administrator's office lacks the staffing capacity to handle its caseload, the appropriate solution is to hire necessary staff for the disciplinary agency. This is not to say, however, that the Administrator's office and the District Attorney's office should not exchange information where necessary and permitted. Cooperation between the two agencies is important.

The Administrator should set the investigative and prosecutorial priorities for the office. In this respect, the Court should amend its current rules to provide that the Administrator has the sole authority to dismiss complaints, whether after screening or full investigation. The Administrator should not have to report to the Board about these dismissed matters. Complainants should have a limited right to appeal the Administrator's dismissals to a

chair of a Professional Responsibility Committee. The Court's rules should provide that complainants must be notified of their limited right to appeal in writing, together with an explanation as to why the complaint was dismissed. If a chair of a Professional Responsibility Committee agrees with the Administrator's decision to dismiss, the complainant should be notified of this decision by the Administrator in writing. If a Professional Responsibility Committee chair overrules a dismissal, both the respondent and the complainant should be notified that the case has been reopened for further investigation. The Court should also provide the Administrator with the authority to reopen closed investigations, if warranted, upon the receipt of new evidence. Currently, Board approval is required.

All staff investigators participate in the initial screening of complaints. Complaints must be submitted in writing and signed. Grievances are not accepted over the telephone or in person. Staff will not complete grievance forms for complainants who cannot do so or are uncomfortable doing so. The team was advised that staff does not provide this assistance because of a fear that their doing so will somehow be perceived as their representing the complainants' interests to the detriment of the respondent, or that they will taint the complainants' versions of events with their own perceptions of the alleged misconduct. Staff investigators will speak with potential and actual complainants on the telephone to describe the jurisdiction of the disciplinary agency, answer questions and provide the status of a pending matter.

Investigators only rarely, as part of the screening process or investigation, interview complainants, respondents or other witnesses. As noted above, Board Policy No. 7.3 (2), which is intended to expedite investigations, may be interpreted as discouraging such interviews, at least during the initial stages of an investigation. The use of correspondence as the sole means of gathering information fosters delay that is unfair both to complainants and respondents. The Administrator's staff consists of professionals who can and should be trusted to interview witnesses and accurately recount what was said.

One of the primary purposes of a lawyer disciplinary agency is to protect the public. As such, it should be readily accessible and easy to use. As a result of existing policies and procedures, not staff unwillingness, the Wisconsin complaint filing process is less consumer friendly than it might be. In order to improve this, and increase the amount of time that the staff has to devote to serious allegations of misconduct, the team recommends that the Court consider establishing a central intake system. In some jurisdictions central intake is referred to as a consumer assistance program. A proposal for the creation of such a program was recently submitted to the Court, and contains a description of other such programs from around the country. Any such program that the Court creates should be under the supervision of the Administrator.

The creation of a central intake mechanism will increase personal contact between the agency and the public, thus improving the public's perception of the system. The staff of the intake division should process all inquiries, regardless of how they are received. The office should have a well publicized 800 number. Complainants should not have to

submit their grievances in writing, and the office should accept complaints over the telephone and via drop ins. Jurisdictions regularly interact orally with complainants with no adverse effects. If complainants require assistance trying to express their concerns in writing, staff should not be prohibited from acting as a scribe or translator. However, the team does believe that because of their positions of authority in the system, Board and Professional Responsibility Committee members should have to submit any complaints in writing.

Intake staff would be responsible for screening complaints, referring complainants to the appropriate agencies or programs, such as fee arbitration, over the telephone and engaging in the informal resolution of matters. This system will result in the quicker disposition of complaints that do not rise to the level of misconduct warranting investigation. Where, after screening, there is a determination that a complaint provides grounds to believe that misconduct occurred, the matter should be forwarded to appropriate staff in the Administrator's office for full investigation. If intake staff dismisses a matter, the complainant should be notified in writing of the reasons for the dismissal and of the limited right to appeal. If a case is referred for full investigation, both the complainant and respondent should be notified of that action in writing, and, the respondent provided with a written recitation of the alleged misconduct and the facts surrounding those allegations so that he/she may respond appropriately.

The creation of an intake mechanism in Wisconsin would require an evaluation by the Administrator as to whether additional staff would be needed, or whether current staff could undertake those responsibilities without sacrificing efficiency in the investigation and prosecution of matters. Intake staff should possess the expertise necessary to determine where valid complaints should be directed and should have excellent "people" skills. These staff members should be adequately trained in alternative dispute resolution techniques.

Given the proposed revised role of the Professional Responsibility Committees, as described in Recommendation Four, the Administrator's staff would be responsible for conducting full and complete investigations of all complaints and petitions for reinstatement. This includes, at a minimum, interviewing the complainants and respondents. These interviews could be conducted over the telephone, or if circumstances dictate, in person and under oath. The Administrator currently has subpoena power, although respondents can only be summoned via a notice to appear. The team recommends that the Court amend its rules to provide specifically that the Administrator may subpoena a respondent to appear at the Administrator's office and provide testimony during the course of an investigation (see also, Recommendation Fifteen below regarding enforcement proceedings). It is not unusual for respondents to be required to travel to the offices of the disciplinary counsel to provide testimony when necessary. The Administrator will have to evaluate how best to allocate staff resources to ensure that investigations are completed in a competent and expeditious manner. With adequate staffing, resources and technology this should not result in any additional delays. All staff should be adequately trained in investigative techniques.

If, at the conclusion of an investigation not relating to a petition for reinstatement, a case is to be forwarded to the newly constituted Professional Responsibility Committees for a probable cause determination (see Recommendation Four below), staff should prepare a complete and concise report for review by the Committees. Staff may wish to consult with litigation counsel about these reports to see if trial counsel has any concerns about the evidence or theory of the case. These reports, at a minimum, should contain a recitation of the facts and evidence supporting the allegations of misconduct, all exculpatory evidence and the alleged rule violations. Staff should attach, where necessary, exhibits to the report. The team urges the Court to amend SCR 22.07(5) to eliminate the requirement of providing the complainant and respondent an opportunity to respond to the investigative report before it is submitted for a probable cause determination. By the time such a report is prepared, the respondent and complainant should have had an adequate opportunity to provide information to the Administrator's office. Staff from the Administrator's office should attend all Professional Responsibility Committee meetings to present the results of their investigations and to answer questions. Attendance can be via telephone. Proposed procedures for reinstatement proceedings following completion of the investigation by the Administrator are contained in Recommendation Fourteen below.

With respect to formal disciplinary proceedings, litigation counsel should be responsible for drafting and filing the formal charges. Litigation counsel should also be responsible for trying reinstatement cases. The Court should grant the Administrator, through his/her litigation counsel, the authority to amend or dismiss counts of the formal charges when he/she deems appropriate, or to conform to the proof of the case. The Administrator's office should have the exclusive authority to determine the recommendations for sanctions presented to the referee. Providing the Administrator with this authority conforms to national practice and preserves the independence of the prosecutor's office.

Effective communication between the Board and the Administrator's office is vital, as is a clear understanding of each entity's role in the system. The Administrator should attend all Board meetings. The Administrator should work closely with the Board to ensure that all staff and volunteers in the system are adequately trained and to address concerns raised by the public and the bar.

Recommendation 4: The Structure and Duties of the Professional Responsibility Committees Should Be Revised

Commentary

The Professional Responsibility Committees currently act as investigators. The size, membership and procedures of the Committees vary significantly from one district to another. Some Committees regularly hold investigative meetings that are conducted like hearings; others do so rarely or not at all. Some Committees allow the respondent to cross-examine witnesses at these proceedings. Some Committees complete their work in a timely manner, while other Committees do not. Certain Committees write complete investigation reports, while others provide incomplete ones that require staff to send reports back to Committees for completion. The team was told that in some instances staff has rewritten Committee reports. As described in the Overview Section of this Report, the Committees consider allegations of misconduct against lawyers from their same district. The team was advised that on occasion Committees inappropriately consider information about a respondent from outside of the investigative record in formulating a recommended disposition for the Board's consideration. The team received information demonstrating that the resolution of cases at the Committee level lacks consistency. The team concluded that this is likely due, in part, to a lack of adequate training and consistently enforced, clearly prescribed uniform guidelines for Committee proceedings.

The Committees are also involved in the processing of petitions for reinstatement. SCR 21.11 states that the Court may refer such petitions to a referee for hearing, but SCR 22.28 refers to a hearing on the reinstatement petition before the Professional Responsibility Committees. Interviewees advised the team that hearings before the Committees are more prevalent. At these hearings, members of the Committees act as both adjudicators and advocates. The Administrator is apparently not allowed to present a case against reinstatement. The team was advised that the rules of evidence are not used during these proceedings. Committee members, along with the petitioner, conduct the examination of witnesses. At the conclusion of these informal hearings, the Committee makes a recommendation to the Board in favor of, or against reinstatement.

In order to further streamline the disciplinary process, reduce delay and foster consistency, the team suggests two ways in which the Court might revise the structure of the Professional Responsibility Committees. For both scenarios the team strongly recommends reducing the size of this component of the system. This will make the appointment process more manageable for the Court. It also reflects the team's proposed reduction in the Committee members' duties. As described in Recommendation One above, the Court should amend its Rules to eliminate the State Bar President's role in appointing Committee members. The Court should appoint members of the Professional Responsibility Committees.

The first scenario involves keeping multiple Professional Responsibility Committees. Interviewees unanimously advised the team that elimination of these local Committees would not be favored. Those who spoke with the team praised the use of these Committees because they believed they fostered public involvement in the system and productively utilized the varied legal experience of Wisconsin lawyers in analyzing allegations of misconduct. The team is sensitive to these concerns, and should the Court decide to keep multiple Committees, the team recommends that the Court eliminate the existing sixteen disciplinary districts created by the State Bar and utilize the existing ten judicial districts. It could appoint one Professional Responsibility Committee per district. The Committees would vary in size depending on the population of the judicial district in which they are situated, but should not exceed nine members. One third of the members of each Committee should be nonlawyers. Where a Committee consists of more than three members, it should act in panels of three, always with one public member per panel. A member should be elected or appointed by the Court to serve as chair. Committees should not consider allegations of misconduct against lawyers from the same district as the Committee. The team suggests that the Court appoint Committee members for three year terms and that they not be able to serve more than two consecutive terms. The team believes that the Court should strive to achieve diversity in its appointment of all Committee members.

Each Committee, or panel of a Committee, would only determine whether there is probable cause to file formal charges. The probable cause determination would be based upon the documentary review of the full and complete investigation conducted by the Administrator's office. Any exculpatory evidence should be provided to the Committees for their consideration. Respondents and witnesses would not appear before the Committees. Hearings before the Committees to determine probable cause should be entirely eliminated. Respondents should have an opportunity to submit a written explanation of why formal charges are not warranted within a short period of time after receiving notice that a matter has been sent to a Professional Responsibility Committee.

The Committees should meet regularly, on a fixed basis, and by telephone if necessary, to efficiently and expeditiously perform their duties. If members cannot do so, the Board should promptly recommend their removal by the Court. The Committees, or panels, may, by majority, vote to dismiss cases for lack of probable cause, file formal charges, refer a case to the alternatives to discipline program, or issue a private admonition. The majority vote of the Committee in favor of a particular disposition would be final. The Court should amend SCR 22.05 (4) to eliminate the respondent's right to make one challenge to the composition of a Committee or panel. Having the Committees review allegations against respondent's from different districts should eliminate the need for such a challenge as a matter of right. If a Committee member has a conflict of interest, he/she should recuse himself/herself. Committees should not prepare reports; they should simply convey decisions to the Administrator for the preparation of a dismissal letter, private admonition or formal charges. Complainant appeals from dismissals by the Administrator should be randomly assigned to one Committee chair for review.

Restructuring the Committees in this manner and limiting their role as described above, would eliminate local bias and promote fairness and increased consistency. However, this proposal for maintaining multiple Committees still poses problems that would be greatly lessened by the creation of one statewide Professional Responsibility Committee. In many states the probable cause determination is made by one individual, and such is ABA policy as set forth in the *Model Rules for Lawyer Disciplinary Enforcement*. The appointment of one statewide panel consisting of fifteen to eighteen members, one-third of whom are nonlawyers, would further reduce the number of appointments that the Court is required to make, while maintaining the lawyer and public participation favored by those interviewed. It would reduce the vast amounts of paperwork that would need to be processed and mailed in order for multiple Committees to do their work. The use of one statewide Committee would reduce staff travel and expenses. Administration of this component of the system, which would be conducted by the Administrator's office, would be eased. It is much easier to coordinate the schedules of one smaller entity.

The statewide Professional Responsibility Committee would, like the multiple Committees suggested above, be responsible only for making probable cause determinations and resolving complainant appeals. To increase efficiency, the Committee should act in panels of three, with one nonlawyer per panel. As with the multiple Committees, this statewide entity should meet on a pre-established rotating schedule, and by telephone, unless otherwise necessary. The remainder of the probable cause finding process would be the same as described above for the multiple Committee option.

Consistency in either scenario will also be achieved through appropriate training of the Committee members. The Court should require all Committee members to attend all training sessions offered by the Board and the Administrator.

Recommendation 5: Referees Should Be Provided Appropriate Resources and Should Enhance Their Reports and Recommendations

Commentary

Information received by the team indicated that this part of the system works efficiently. The team does, however, suggest certain changes to make the jobs of these volunteers easier and to enhance the understanding of the disciplinary process by the public and the bar.

The referees are responsible for obtaining space to conduct hearings, for arranging court reporters and for conducting necessary legal research. Interviewees advised the team that the referees also undertake publicizing the time, date and location of disciplinary hearings. The Administrator's office provides them with no assistance in these matters. The team believes that the referees should be provided with some support staff. If economically feasible, one clerk should be hired to assist in the scheduling of pre-hearing conferences, hearings and the drafting of referees' opinions. The clerk should also assist in publishing the referees' reports and recommendations. This support staff could be housed in the Administrator's office, 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.

With respect to the reports and recommendations of the referees, the team believes that these opinions should contain more legal analysis, citations to existing authority and an independent assessments 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. To promote consistency, the referees should use the ABA Standards for Imposing Lawyer Sanctions in formulating recommendations for discipline.

Regular training will also assist the referees in making their opinions as useful as possible to the Court, the public and the bar. The team was advised that there has been only one training session for referees. That session was planned and conducted by the State Bar, not the disciplinary agency. The State Bar's initiative in providing this valuable training is laudable. Referees should meet annually for substantive training. Additional training should include an orientation session and regular updates on disciplinary law.

Recommendation 6: The Court Should Enact a Rule Setting Forth The Manner in Which Complaints Against Board Members, the Administrator and Staff Will Be Processed

Commentary

Board Policy No. 7.2, adopted by the Board on January 19, 1981, sets forth procedures for handling complaints against Board members, the Administrator and staff. In its February 27, 1998 Statement of Principles, Policies and Procedures, the Court specifically asked the Board, by June 1, 1998, to submit, for the Court's review and approval, proposed internal operating procedures. Specifically, the Court asked the Board to propound in that proposal "…a procedure for processing a grievance filed against a Board member."

On June 1, 1998, the Board tendered to the Court its proposed revisions and supplements to the existing Board Policies, noting that a majority of the Board had not approved the proposals contained in that submission. The Board's submission contained proposed revisions to Board Policy No. 7.2. On June 2, 1998, the Administrator and his staff submitted their own proposed internal operating procedures, also containing suggestions for the handling of complaints against the Board, Administrator and staff. On June 26, 1998, the staff submitted a revised and abridged version of the June 2, 1998 proposal to the Court. The Court has taken all three proposals, and any subsequent ones, under advisement.

To aid in its consideration of how complaints against Board members, the Administrator and staff should be processed, the Court specifically asked the team to address this issue in its Report. In response to this request the team believes that the Administrator should handle allegations made against staff members as personnel matters. If there is evidence of a violation of the Rules of Professional Conduct, the Administrator should refer the matter to a Court approved independent prosecutor, and terminate employment if appropriate.

Allegations of misconduct against the Administrator should be referred to the Director of State Courts to assign to a Court approved independent counsel. That counsel would screen the complaint and investigate if necessary, and report his/her findings to the Director of State Courts and the Board. If the independent prosecutor believes there is probable cause to proceed with formal disciplinary proceedings, he/she should present the results of the investigation to a Professional Responsibility Committee. If the Committee determines that there is probable cause, the matter should proceed to a hearing before a referee. The independent investigator should present the case. The Court would make the ultimate decision regarding whether to discipline and/or terminate the Administrator.

Allegations against Board members should be assigned to a lawyer investigator, or panel of three investigators, including one non-lawyer, appointed by the Court on an ad hoc basis. The results of any investigation would be reported directly to the Court for it to

take appropriate action as to any Board member's tenure with the disciplinary agency. The team recommends that, if the independent investigator believes that there is probable cause for formal disciplinary charges, the matter proceed in accordance with the Supreme Court Rules.

Recommendation 7: All Volunteers and Staff in the Disciplinary System Should be Adequately Trained

Commentary

Interviewees unanimously advised the team that all disciplinary agency participants need training, whether it be in the form of an orientation session or more formal instruction. Training materials do exist, including the Board of Attorneys Professional Responsibility Handbook, updated in 1996, and a January 1999 training manual for members of the Professional Responsibility Committees. According to the Board's Fiscal Year 1997-98 Report, steps are being taken to publish a bench book for referees and a second training session was to have been held in June 1999. The Board and the State Bar are in the process of completing a disciplinary case compendium.

Appropriate training is vital to the success of any disciplinary agency. Training helps to ensure consistency and the expeditious resolution of disciplinary matters. The Administrator should be responsible for the training of his staff, and as described in Recommendation Two above, the Board should coordinate training of the referees and Professional Responsibility Committee members. The Board and the Administrator should work together to ensure that all training needs for the staff and volunteers are met. The team recommends that both entities develop additional training programs and materials. These training programs should include orientation sessions as well as the annual presentations. The Board might wish to consider semi-annual sessions. A manual of all Court approved rules, policies and procedures should be provided to all volunteers and staff members.

In order to assist jurisdictions with the training of its volunteers, the ABA Standing Committee on Professional Discipline published its *Guide to Training Lawyer Disciplinary System Volunteers*. The Committee will be happy to provide copies of this Guide to the Court and the Board.

Continued attendance at the ABA=s annual National Conference on Professional Responsibility is recommended by the team. The National Conference, presented by the ABA Center for Professional Responsibility, is a yearly gathering of leading experts, practitioners, scholars, judges and disciplinary counsel, who are interested in the broad spectrum of professional responsibility law. Attendees have the opportunity to collect and exchange information about current issues and problems in professional responsibility law. Given the broad scope of the National Conference, volunteer members, in particular, would benefit from attending these programs. The National Conference is also held in conjunction with the National Forum on Client Protection Funds, which offers programs on fee arbitration and other client protection mechanisms.

Another invaluable source of training for volunteers, the Administrator and staff are the semi-annual meetings of the National Organization of Bar Counsel (NOBC). These meetings are held in conjunction with the ABA Midyear and Annual Meetings.

Resources provided by the NOBC include surveys, briefs, pleadings and educational presentations at the meetings to help jurisdictions with the implementation of more efficient and effective regulatory enforcement mechanisms. The NOBC is an affiliated organization of the ABA. The consultation team strongly urges the Court to expand the financial resources for sending the Administrator, staff lawyers and Board members to at least one NOBC meeting each year.

PROCEDURES

Recommendation 8: The Court Should Enact A Separate Rule Providing That Records or Evidence of Complaints Terminated by Dismissal Should Be Expunged After Three Years

Commentary

SCR 22.04(2)(b) currently provides that unless otherwise ordered by the Board, records of cases resulting in formal charges or a private/public reprimand should be maintained for ten years, while all other matters should be kept for three years. The Board, via Policy No. 5.3, has directed the destruction of dismissed files after a period of one year. The team believes, and national practice demonstrates, that a one year expungement period for files that are dismissed at the investigative level is too premature. As a result, the team recommends not only that the Court eliminate the Board's authority to modify the three year time period, but that it specifically overrule the one year time period and enact a separate rule relating to the expungement of records.

Once a reasonable period of time has elapsed following the dismissal of a matter, usually a period of three years, there are few reasons to retain those records indefinitely. These records should be expunged. Their existence suggests that they may have some additional significance. Many lawyers believe that dismissed complaints are consulted when new complaints are received and that the new complaint is then given greater credibility.

In fashioning an expungement rule, the Court must balance these concerns with valid reasons for retaining records of dismissed cases. Complaints are not always dismissed because they are invalid. In some cases there was not enough evidence available at the time to corroborate the allegations, which, if true, would constitute serious misconduct. Sometimes, additional proof regarding those allegations becomes available at a later date. Further, an isolated instance of lesser misconduct may warrant dismissal, but the receipt of subsequent complaints may raise concerns about a pattern of conduct that warrants reconsideration of the first complaint. The Court may wish to add a provision to this rule providing that upon good cause shown by the Administrator, the Court will permit him/her to retain specified records for an additional period of time not to exceed three years.

The Court may also wish to consider amending its Rules to provide for the indefinite retention of all investigatory files relating to matters that have proceeded to formal charges and the imposition of discipline. Board Policy No. 5.5 contains such a provision, but has not been adopted by the Court. These records can be useful in reinstatement proceedings.

Lawyers should be given notice that matters have been expunged so that they may accurately respond to inquiries that require disclosure of their disciplinary history. Once a matter is expunged, a lawyer may answer any question relating to that case by stating that no complaint was made. The disciplinary agency should, if asked, state that there is no record of such matter. Copies of expungement rules from other jurisdictions are attached to this Report as Appendix B.

Recommendation 9: The Court Should Enact Specific Procedural Rules Providing For The Applicability of the Rules of Evidence, the Appropriate Standards of Proof and That Hearings All Be Held in Madison or Milwaukee

Commentary

SCR 22.14 and 22.23 provide that hearings before referees are to proceed in the same manner as trials of civil actions and that the Rules of Civil Procedure apply in disciplinary proceedings. These Rules do not specifically refer to the use of rules of evidence. Interviewees advised the team that as a result, the rules of evidence are not necessarily employed during these hearings. The team was told that some referees follow those rules while others do not. The Court should require adherence to the evidentiary rules and should promulgate a specific rule to that effect. MRLDE 18 (B). This will ensure a level playing field for all parties, and foster consistency and the efficient conduct of hearings.

Similarly, the Court's rules do not refer to the applicable standards of proof in disciplinary proceedings, whether before the Professional Responsibility Committees or during formal hearings. The team urges the Court to enact such rules. With respect to proceedings before the Professional Responsibility Committees, the team recommends that the Court enact a rule providing that they have the duty to determine whether there is probable cause to warrant the filing of formal charges. For purposes of the Rule, the Court should define probable cause and specifically provide that the Committees are not supposed to determine the merits of the charge.

With respect to hearings before referees, the Court should enact a rule providing that the applicable standard of proof in those proceedings and reinstatement and disability matters is clear and convincing evidence. This is the standard employed by the vast majority of other disciplinary agencies.

Hearings are currently held in the county where the respondent maintains his/her principal office. This practice should be eliminated. The team believes that a central location, like Madison, Milwaukee or both, would be more appropriate. Holding these hearings in the county where the respondent practices creates the risk that the public will perceive these proceedings to be protectionist. It is not unusual for respondents and their counsel to have to travel to the locale of the offices of the disciplinary agency to attend hearings on formal charges. The Court can reimburse the referees and complainants for travel expenses associated with these hearings. This will be less expensive that having to pay for the travel expenses of litigation counsel and any necessary support staff.

Recommendation 10: The Court Should Amend SCR's 21.07 and 22.27 to Provide for Disability Inactive Status Instead of Indefinite Suspension Due to Medical Incapacity

Commentary

Pursuant to SCR 21.07, a court finding that a lawyer is disabled by reason of mental illness, addiction to drugs or alcohol, incompetence or for being a spendthrift must report that finding to the Clerk of the Supreme Court and the Board. The Court then issues to the lawyer a rule to show cause why that lawyer should not be indefinitely suspended because of the disability. SCR 22.27 also provides that a lawyer may be indefinitely suspended if, after completion of an investigation by the Administrator and the filing of a petition by the Board, the Court finds that the lawyer is incapacitated. Both SCR 21.07 and SCR 22.27 provide that, as an alternative to indefinite suspension, the Court may impose conditions on a lawyer's license to practice if that lawyer is found to suffer from a disability.

Lawyers found to be unable to practice law due to a disability or substance abuse problem should not be subject to discipline. Rather, they should be placed on disability inactive status pending removal of the disability or addiction. MRLDE 23. While the Court must protect the public from disabled lawyers who endanger the interests of clients, it is important that incapacity not be treated as misconduct where none has occurred. Distinguishing willful conduct from conduct beyond the control of the lawyer is another reason to place disabled lawyers on inactive status instead of subjecting them to discipline. For these reasons the team believes that the Court should amend SCR's 21.07 and 22.27 to eliminate the indefinite suspension and replace it with disability inactive status.

Lower courts should still be required to file orders finding that a lawyer suffers from a disability with the Clerk of the Supreme Court. The Administrator should also be provided with a copy. Upon the receipt of such judicial declaration of incompetence, the Court should immediately enter an order placing that lawyer on disability inactive status until further order of the Court. A copy of that order should be served upon the lawyer or his/her guardian.

The Administrator should continue to be responsible for investigating allegations that a lawyer is unable to continue to practice law due to a mental or physical disability. The Court should amend SCR 22.27 to provide that where warranted, the Administrator shall initiate formal proceedings to determine whether a lawyer should be placed on disability inactive status. The hearing should be conducted in the same manner as other formal disciplinary proceedings, with the Administrator acting as prosecutor. The Board's involvement should be eliminated.

Disability proceedings should remain confidential until final order of the Court, because medical evidence and other personal information relating to the lawyer is often involved.

Such is not the case in Wisconsin, where SCR 22.24 provides that after the service of a complaint or petition, all papers filed are public. The team recommends that the Court create an exception for disability proceedings up to the issuance of the Court's order. The public order transferring the lawyer to disability inactive status should clearly state the conditions that must be met for the lawyer to successfully obtain restoration to active status. A lawyer placed on disability inactive status should be required to file a petition for transfer to active status. Upon the filing of such a petition with the Court, the Court should direct whatever action necessary to determine if the disability has been removed, including the examination of the petitioner by a qualified medical expert. SCR 22.27 currently provides for such an examination.

Recommendation 11: The Court Should Enact a Rule to Clarify the Appropriate use of Prior Discipline

Commentary

A review of the Supreme Court Rules and Board Policies revealed no provisions setting forth the appropriate use of prior discipline. It was not clear to the team under what circumstances the Professional Responsibility Committees, the Board or the Court appointed referees are provided with a respondent's prior disciplinary history.

The Court should amend its Rules to clarify when it is appropriate for prior discipline to be disclosed. The team believes that because prior discipline is relevant and material to the issue of which sanction is appropriate, the referees, only after making a finding of misconduct, should be advised of any prior sanctions imposed upon the respondent. This includes disclosure of private reprimands. Members of the Professional Responsibility Committees should not be advised of a lawyer's disciplinary history. Prior discipline is not relevant as to whether probable cause exists to believe that the respondent committed the misconduct of which he or she is accused.

The introduction of evidence of prior discipline before there is a finding that present charges have been proven is prejudicial. However, there are circumstances when it may be appropriate to introduce evidence of prior discipline before a determination is made that a respondent has committed misconduct. For example, the introduction of evidence of prior discipline is necessary to prove that a respondent continued to practice law during disbarment or a period of suspension. This evidence may also be used to impeach false testimony by a respondent as to a lack of prior discipline.

Recommendation 12: Procedures for Discipline on Consent Should Be Consolidated and Modified

Commentary

SCR 21.10 permits a lawyer subject to investigation or formal charges to petition the Court for the consensual revocation of his/her license. Lawyers subject to investigation or formal charges for possible medical incapacity may petition for the revocation or suspension of their licenses. The Rule requires, that before the commencement of formal charges, a petition for revocation on consent must be filed with the Board. After the filing of formal charges the petition is filed before a referee for a hearing pursuant to SCR 21.09(4) and (5).

SCR 21.09(3m) provides for the resolution of formal charges via stipulation. The Court may consider such stipulations without referring a matter to a referee, in which case if the Court adopts the stipulation, the agreed upon discipline is imposed. If the Court rejects the stipulation the matter is assigned to a referee for hearing. Rejected stipulations have no evidentiary value in subsequent disciplinary proceedings. It is not clear, given the existence of SCR 21.10, whether stipulations pursuant to SCR 21.09(3m) are limited to sanctions less than revocation. Nothing in the plain language of the Rules would seem to indicate that such is true.

The team recommends that the Court merge the provisions of SCR 21.09(3m) into SCR 21.10 so that the procedures for consensual discipline are contained in one Rule. The team also recommends that the Court use the term disbarment, instead of revocation. As set forth in SCR 21.06, revocation is disbarment. The use of two terms can cause confusion.

Next, consistent with Recommendation Ten above, the team suggests that the Court amend SCR 21.10 to eliminate the provisions relating to consensual revocation or suspension for medical incapacity. The new Rule should expand the concept of discipline on consent for misconduct to include the full range of available sanctions. Discipline based upon admitted misconduct should be encouraged. Discipline on consent, implemented expeditiously, protects the public and conserves time and resources. Unethical lawyers are removed from the system in a timely manner; time-consuming and costly public hearings are avoided and disciplinary officials can devote their time and resources more efficiently.

The Board's role in approving petitions for discipline on consent should be eliminated. Any such petitions filed before the commencement of formal charges could be assigned to a Court appointed referee for a recommendation that the petition, if it calls for suspension, probation or disbarment, be approved or rejected by the Court. Referees should have the final authority to approve reprimands. Referees should make similar recommendations on petitions filed after the initiation of formal charges. Referees

should not hold full evidentiary hearings into petitions for discipline on consent. This defeats the purpose of consensual resolution of cases.

In order to assist the referees in expeditiously making their recommendations to the Court on petitions for discipline on consent, the petitions should be as complete as possible. The Administrator should prepare the petition for joint submission with the respondent to ensure the prompt and complete preparation of this pleading. The respondent should be required to submit an affidavit together with the petition that states that: 1) the lawyer consents to the suggested discipline; 2) the consent is freely and voluntarily rendered; 3) the lawyer is aware of the ramifications of submitting the petition; 4) the lawyer acknowledges that the material facts alleged in the petition are true; 5) and the lawyer consents because if the matter proceeded to trial, he/she could not successfully defend against the allegations.

As with other settlement agreements, the referee should defer to these agreements unless there has been a clear abuse of discretion or an arbitrary and capricious decision to settle by the Administrator. If formal charges are pending before a referee at the time an agreement is rejected, the matter should be assigned to a new referee. Any admissions made by the respondent in the petition and affidavit should still be considered withdrawn and cannot be used in any subsequent proceeding.

Recommendation 13: Lawyers Who Pose a Substantial Threat of Serious Harm to the Public, or Who Have Been Found Guilty of a Serious Crime, Should Be Placed on Immediate Interim Suspension

Commentary

SCR 22.30 provides for the temporary suspension of a lawyer where it appears to the Court that the lawyer's continued practice of law during the pendancy of disciplinary proceedings poses a threat to the public. Before such a suspension is issued, the Court issues a rule to show cause why the lawyer should not be suspended and the lawyer is permitted an opportunity to respond. It is not clear from the Rule when the lawyer's response is due. Chapters 21 and 22 of the SCR's do not contain a provision for the immediate interim suspension of a lawyer found guilty of a serious crime. Instead, that Rule, SCR 11.03, can be found in Chapter 11 of the Supreme Court Rules, entitled "Regulation of Members of the State Bar."

To provide appropriate protection of the public and promote consistent procedures and practices, the Court should consider amending SCR 22.30 to provide for the immediate interim suspension of a lawyer who poses a substantial threat of serious harm to the public. Certain misconduct, such as the ongoing conversion of client funds, poses such a serious threat to the public and the administration of justice that the **immediate** suspension of a lawyer's license pending final resolution of disciplinary proceedings is warranted. Most states provide for immediate interim suspension in these circumstances.

Any immediate interim suspension rule adopted by the Court should provide that, upon receipt of sufficient evidence demonstrating that a lawyer poses a substantial threat of serious harm to the public, the Administrator should transmit that evidence to the Court in a petition seeking that lawyer's immediate interim suspension. MRLDE 20. The evidence should be accompanied by a proposed order for immediate interim suspension. The Administrator should contemporaneously make a reasonable attempt to provide the lawyer with notice, by telephone if necessary, that the proposed order for interim suspension has been sent to the Court. Personal service of the documents submitted to the Court should not be required. These proceedings should be public. The requirement that the petition be accompanied by evidence clearly indicating that the interim suspension is necessary sufficiently protects a lawyer against publicity predicated upon unfounded allegations.

After reviewing the evidence, including any rebuttal proof submitted by the lawyer, the Court may enter an order immediately suspending the lawyer and provide for any other action it deems appropriate. A lawyer subject to immediate interim suspension should be required to notify his or her clients of the Court's action, and the Court may wish to consider providing for the appointment of a trustee to protect client interests. If the suspension occurs without consideration of rebuttal evidence submitted on the lawyer's behalf, then on two days' notice to the Administrator, a lawyer subject to this type of

interim suspension should be able to move for modification of dissolution of the order. That motion should be heard as expeditiously as possible.

The Court should consider moving SCR 11.03 to Chapter 22, preferably preceding or following SCR 22.30. The team also recommends that the Court amend that Rule to provide for the immediate interim suspension of a lawyer who has been found guilty, as opposed to having been convicted, of committing a serious crime. A "serious crime", as defined in Rule 19 of the ABA *Model Rules for Lawyer Disciplinary Enforcement*, is "any felony or any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, or any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy or solicitation of another to commit a 'serious crime'." Immediate suspension of a lawyer who commits such a crime is essential to protect the public and preserve its confidence in the legal profession.

The team also believes that lawyers should be required to notify the Administrator's office when they are found guilty of such crimes. Upon receipt of such notice, the Administrator should file a petition for immediate temporary suspension with the Court. The ABA believes that protection of the public warrants taking this action prior to the entry of a judgment of conviction. A judgment of conviction is not entered until a criminal defendant has been sentenced. There is often a delay, which can be significant, between the time that a defendant has been found guilty and the time that sentencing is imposed and a judgment of conviction entered. Such delays are often attributable to several factors, including time spent on completing presentence investigations or the postponement of sentencing pending a defendant's cooperation with the government pursuant to a plea agreement.

Permitting the Administrator to proceed with a petition for interim suspension prior to the entry of a judgment of conviction does not deprive a lawyer found guilty of committing a serious crime of due process. The lawyer may challenge the petition or may ask to Court to vacate the temporary suspension. The Court should provide that these petitions are public upon filing. Since a finding of guilt in a criminal proceeding is public, there is no need for confidentiality.

Recommendation 14: The Court Should Amend SCR 21.11 and SCR 22.28 Relating to Reinstatement Proceedings

Commentary

SCR 21.11 provides that reinstatement petitions are to be filed with the Court and referred to the Board for investigation. The Board has the Administrator's office conduct the investigation. Then, the Board refers the petitions, pursuant to SCR 22.28(5), for a hearing before a Professional Responsibility Committee, or, pursuant to SCR 21.11, the Court may refer a petition to a referee. The hearings before the Committees are not true adversary hearings. The Administrator's staff does not appear and present a case against reinstatement. The Committee members act as adjudicator and advocate. The team was informed that often the only witnesses who testify are those called by the petitioner. Upon the conclusion of the hearing, the Committee prepares a report recommending to the Board that the petition be granted or rejected. The Board reviews the matter and makes a recommendation to the Court.

One disturbing matter recalled by the team was the recommendation by a Professional Responsibility Committee in a reinstatement case that a lawyer's license be reinstated so long as the lawyer agreed not to practice law in Wisconsin. The team notes that there is Wisconsin Supreme Court precedent for not imposing certain discipline upon a lawyer based upon that lawyer's promise that he would not practice law in Wisconsin again. In *In re Jacobs*, 467 N.W. 2d 783 (1991), a lawyer was found to have entered into a business transaction with a client and to have engaged in dishonest acts with respect to the handling of client funds. In determining that a public reprimand, and not a suspension, was an appropriate sanction, the Court considered as one mitigating factor, Jacob's testimony and sworn statement that he would never practice law in Wisconsin again. *Jacobs*, 467 N. W. 2d at 792. The Court stated that consequently, "…a suspension of his license to practice law is unnecessary, either as an appropriate response to the seriousness of the misconduct or to protect the **Wisconsin** (emphasis added) public and **its** (emphasis added) legal system from his further misconduct." *Id*., at 792. If it is determined that lawyer is not fit to practice in Wisconsin, then the lawyer should appropriately disciplined, or in reinstatement cases, not be given his/her license back at all. An order returning a lawyer's license on the condition that a disciplined lawyer practice only in another jurisdiction is dangerous to the public. The primary purpose of lawyer discipline in Wisconsin is to protect the public, not just Wisconsin residents. Further, such recommendations are not in the best interest of the profession.

The team recommends that the Court amend these rules to provide that upon the receipt of reinstatement petitions by the Court, the Court may deny the request for reinstatement without an investigation or hearing. If the petition is not summarily dismissed by the Court, the matter should be referred to the Administrator for a full and complete investigation. In order to expedite the Administrator's investigation, the Court should require petitioners to include documentary evidence supporting their claim that the criteria set forth in SCR 22.28 (4) have been met, as well as additional information

relevant to determining whether they possess the character and fitness worthy of regaining the privilege to practice law. For example, in addition to the information that petitioners must already provide pursuant to SCR 22.28, the Court should require that petitioners provide the Administrator with their current residence address and telephone number; addresses of each residence during the period of discipline along with the dates of each residence; and the name, address and telephone number of each employer, associate or partner of the petitioner during the period of sanction, including the dates of each employment, position(s) held, the names of all supervisors and reasons for leaving the employment, partnership or association.

The petition should also include a statement setting forth: (1) the case caption, general nature and disposition of every civil and criminal action pending during the period of discipline to which the petitioner was party or claimed an interest; (2) a statement of monthly earnings and other income during the period of discipline, including the source of the earnings/income; (3) a statement of assets and financial obligations during the period of the sanction, including the dates acquired or incurred and the names and addresses of all creditors; (4) a statement verifying that restitution, if appropriate, has been made and in what amount(s); (5) a statement as to whether during the period of sanction the petitioner applied for reinstatement in any other jurisdiction and the results of any such proceedings; (6) a statement identifying any other licenses or certificates for business or occupation applied for during the period of sanction; (7) the names and addresses of all financial institutions at which petitioner had, or was a signatory to, accounts, safety deposit boxes, deposits or loans during the period of sanction; (8) written authorization for the Administrator to secure any financial records relating to those accounts, safety deposit boxes, deposits or loans; (9) and copies of state and federal income tax returns for the three years preceding the period of discipline and during the period of the sanction along with written authorization for the Administrator to obtain certified copies of the originals.

Within sixty days after receiving the petition for reinstatement for investigation, the Administrator should advise the Court and the petitioner in writing that the office will stipulate to reinstatement or oppose it. If the Administrator opposes reinstatement, the written notice to the Court should contain specific objections to the petition. These written objections should contain a request that the Court assign the matter to a referee for hearing. If the Administrator requires additional time in which to conduct the investigation prior to determining whether to object or stipulate to the reinstatement petition, he/she should file a motion requesting an extension and setting forth specific reasons for the request. The Court may, for good cause shown, extend the time in which the Administrator has to stipulate or object to the petition so that any necessary additional investigation may be conducted.

If the Administrator objects to the petition, the Court should promptly assign the matter to a referee for trial. The trial should occur within ninety days after the matter is referred to the referee. This hearing should be conducted in the same manner as hearings on formal charges. The rules of civil procedure, discovery and evidence should apply. The Administrator should present the case against reinstatement. After trial, the referee

should promptly file a report and recommendation to grant or deny the petition for reinstatement with the Court.

Regardless of whether the Court reinstates the petitioner, it should issue a written opinion explaining the grounds for its decision. Written opinions setting forth the reasons for granting or denying a petition help educate the public and the bar regarding the standards required in order for a lawyer to be reinstated. Since the purpose of lawyer disciplinary proceedings is to protect the public and not to punish lawyers, reinstatement may be appropriate. The presumption, however, should be against reinstatement. Disbarred lawyers seeking reinstatement should be required to take and pass both the bar and character and fitness examinations.

The Court may impose conditions on a petitioner's reinstatement. This should be done where the petitioner has met the burden of proof, but the Court feels that protection of the public requires additional precautions. Conditions may include limitations on practice, participation in continuing legal education courses, monitoring of the reinstated lawyer's practice and/or accounts, abstention from drugs or alcohol and active participation in any accredited alcohol or drug rehabilitation program.

Recommendation 15: The Court Should Provide Expedited Enforcement Procedures for Respondents Who Do Not Cooperate

Commentary

As noted in the Overview section of this Report, the Administrator cannot subpoena a respondent to provide information during the course of an investigation. The Administrator must issue a "notice to appear." The failure of a respondent to produce testimony or documents pursuant to a "notice to appear" constitutes misconduct. SCR 22.22 (2) currently provides that referees may enforce the attendance of witnesses and the production of documentary evidence. It is not clear if the power of the referees in this respect relates only to proceedings on formal charges. Since this provision falls under the Rule relating to subpoenas, the team concluded that the referees do not have to power to enforce a "notice to attend" during an investigation.

In order to ensure prompt and complete production of information, the Court should grant the Administrator the authority to subpoena respondents during investigations. It is important for the Administrator to have this investigative tool. Personal service of the subpoena should not be required. Service on the respondent, by regular or certified mail, at the last registered address should be sufficient.

The Court should further provide that upon the failure of a respondent to comply with a subpoena, the Administrator will file with the Court a request for a rule to show cause why the respondent should not be suspended until he/she complies with the outstanding subpoena. The respondent should be required to respond to the rule to show cause within a short period of time, with no continuances granted unless good cause is shown. For prompt resolutions, the Court may wish to delegate the authority for these enforcement proceedings to the referees.

Recommendation 16: The Court May Wish to Make SCR 21.14 and SCR 21.15 More Specific With Respect to Providing Immunity to Complainants, The Administrator, Staff, Referees and Volunteers

Commentary

SCR 21.14 provides that communications to the disciplinary agency regarding lawyer misconduct are privileged. SCR 21.15 provides that referees, volunteers, the Administrator and staff acting in their official capacities, are acting on behalf of the Court. These rules do not, however, specifically state that complainants, volunteers, referees, the Administrator and staff are immune from civil actions. The team believes that the Court should amend those rules to specifically set forth that such immunity exists and to what extent.

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. The Court's confidentiality rule protects lawyers from unwarranted public disclosure of unsubstantiated allegations made by members of the public or other lawyers.

The team recommends that the personnel of the disciplinary agency be provided with absolute immunity, instead of qualified immunity. MRLDE 12. A qualified privilege may not protect against harassment made possible by simply alleging malice in a lawsuit. Conduct exceeding the authority granted by the Court's Rules and policies is not protected.

SANCTIONS

Recommendation 17: The Court Should Adopt a Rule Providing for the Imposition of Probation as a Sanction

Commentary

To further protect the public and assist the profession, Wisconsin should have a probation rule. 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.

The consultation team believes that probation should be available as a sanction and not as a means to address lesser misconduct that does not require further involvement by the discipline system. Probation is not an alternative to discipline. Matters for which a lawyer is placed on probation remain in the discipline system, while matters referred to alternatives to discipline programs are removed from the system and handled administratively. The Court should adopt a separate rule creating an alternatives to discipline program as discussed in Recommendation Twenty below. The imposition of probation prior to the filing of formal charges constitutes a private sanction that may be used in subsequent disciplinary proceedings involving new charges of misconduct. As a result, a matter in which probation is imposed prior to the filing of formal charges should be exempt from expunction.

Any probation rule adopted by the Court should set forth in general terms the requirements for imposition of probation. These include: (1) the lawyer can perform legal services without causing the courts or legal profession to fall into disrepute; (2) the lawyer 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. Probation should be ordered for a specified period of time not to exceed two years.

The rule should provide that the order placing a respondent on probation must state the specific conditions 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 Multistate Professional Responsibility Examination; (8) successful completion of a course of study; (9) regular, periodic reports to the Administrator; 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 all terms 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, including immunity for probation monitors. The team recommends that the Court work with the Administrator, the Director of WISLAP Program and members of the State Bar Association to develop a system for monitoring lawyers placed on probation. The Court, working with these individuals, should develop qualifications for probation monitors; an overview of their duties; policies and procedures for appointing monitors; a method for supervising the monitors; policies and procedures regarding monitor reports to the Administrator; and policies and procedures for the removal of monitors. 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 with the Court's order to the Administrator. The monitor is not a counselor, sponsor or treatment provider for the probationer.

The team recommends that probation monitors report to the Administrator. Probation monitors should be required to immediately report any instances of noncompliance to the Administrator. Upon receipt of such a report the Administrator shall file a report with the Court setting forth the probationer's failure to comply with the conditions of probation. Upon a showing by the Administrator that a lawyer has failed to comply with the order of probation, the Court should issue a rule to show cause why probation should not be revoked and any stay of suspension vacated. After consideration of the lawyer's response to the rule 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 the modification of the terms of the probation.

Recommendation 18: The Court Should Eliminate Indefinite Suspensions

Commentary

A Wisconsin lawyer may have his/her license suspended for a definite, or indefinite, period of time. It was not clear to the team why a lawyer would be suspended indefinitely instead of being disbarred.

The Court should not suspend a lawyer indefinitely. It 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. If a lawyer has committed misconduct so severe that even a three year suspension will not protect the public, then the lawyer should be disbarred.

Recommendation 19: The Court Should Eliminate Dismissals With Caution and Replace the Private Reprimand With Admonitions Approved by The Professsional Responsibility Committees

Commentary

SCR 22.09 provides that in dismissing a case where the facts do not warrant discipline, the Board may caution a lawyer. According to Board Policy No. 10.3, a dismissal with caution occurs when a lawyer has violated the Rules of Professional Conduct, but that violation does not warrant discipline. The records of these cautions are maintained in the same manner as other dismissed cases, for a period of one year.

Respondents may also receive a private reprimand issued by the Board. This private, Board imposed sanction, is issued prior to the filing of formal charges. The respondent must consent to its issuance. Board Policy 10.5 provides that where the respondent refuses a private reprimand, no formal complaint shall be filed until the Board reviews the matter and decides whether formal charges should be filed. As the team understands the Rules, the Court may also issue a private reprimand.

It is not clear what purpose a dismissal with caution serves, other than to advise the respondent that his/her misconduct has crossed the line. Since cautions do not constitute discipline, it is hard to see how they may be beneficial to the public in a meaningful sense. If a lawyer has violated the rules, then protection of the public dictates that the lawyer should receive some form of sanction, or be referred to the alternatives to discipline program described in Recommendation Twenty below. Because letters of caution are not a sanction, they should not, therefore, be used in any subsequent disciplinary proceedings as prior discipline warranting an enhanced sanction. Despite this, the team was advised, via the Administrator's September 15, 1999 filing with the Supreme Court, that a "dismissal with caution can be used to enhance a sanction if other matters come to the Board's attention within the one-year period before destruction/expungement of the file."

The team believes that the Court should eliminate the dismissal with caution and replace it, and the private reprimand, with an admonition that can only be issued prior to the filing of formal charges. Any sanctions issued after the filing of formal charges should be public. The imposition of private discipline after the filing of formal charges fosters public distrust of the system and is inconsistent with the goal of protecting the public. Private sanctions should be reserved for lesser misconduct that does not rise to the level of formal charges, but creates enough of a concern that some action other than dismissal or referral to another agency is appropriate.

Any admonition procedures adopted by the Court should provide that the Administrator may impose such a sanction with the consent of the respondent and the approval of a chair of a Professional Responsibility Committee. Admonitions should be in writing and served upon the respondent. They should be imposed only in cases of lesser misconduct

where there has been little or no injury to a client or the public, and the likelihood that the lawyer will repeat the misconduct is minimal. Admonitions should be published to educate the profession and the public, but the name of the respondent should be omitted. Admonitions constitute discipline for purposes of introducing evidence of prior misconduct relating to the issue of an appropriate sanction in subsequent disciplinary proceedings.

ALTERNATIVE PROGRAMS

Recommendation 20: Matters Involving Lesser Misconduct Should Be Referred to an Alternatives to Discipline Program

Commentary

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 the disciplinary agency. 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. MRLDE 11(G).

The State Bar of Wisconsin has a voluntary fee arbitration program. The team has reviewed the fee arbitration rules. Arbitrations conducted by the State Bar Committee on Fee Disputes are binding. Pursuant to SCR 22.04, the Administrator may refer fee disputes to this Committee for resolution. The State Bar also has a lawyers' assistance program, WISLAP, to assist lawyers suffering from disabilities and addictions. Officials of the State Bar Association and members of the Board are interested in providing preventive education to assist members and in creating and implementing of an alternatives to discipline program. The Board and the State Bar are currently considering a proposal for such a program, and should be encouraged to work with the Court to see that it becomes a reality.

The team believes that the Court can work with the State Bar, the Board and the Administrator to establish these programs. The Court should delegate administration of these programs to the State Bar of Wisconsin. The State Bar's active role in this process is vital to the success of the alternatives to discipline concept and will only enhance the public's perception of the profession and the disciplinary system. The ABA Joint Committee on Lawyer Regulation is available to assist the Court, the State Bar, the Board and the Administrator in creating and implementing these 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 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: AThis 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." Wisconsin does have such a Rule. However, participation in the Alternatives to Discipline program differs from voluntary participation in a LAP program. The Alternatives to Discipline Rule recognizes this difference and requires the recovery monitor to make necessary disclosures in order to fulfill his or her duties under the contract.

The Court should consider adopting a rule with the following components:

a. In matters involving lesser misconduct, prior to the filing of formal charges, the Administrator, or the Professional Responsibility Committees may refer the lawyer to the Alternatives to Discipline Program. Lesser misconduct is conduct that does not warrant a sanction restricting the lawyer's license to practice law. Acts involving the misappropriation of funds, conduct causing, or likely to cause, substantial prejudice to clients or others, criminal conduct and conduct involving dishonesty, fraud, deceit or misrepresentation are not minor misconduct.

b. The complainant, if any, should be notified of the referral and should have a reasonable opportunity to submit new information about the respondent. This information should be made part of the record.

c. The Administrator, or the Professional Responsibility Committees should consider the following factors in deciding whether to refer a lawyer to the program:

(1) whether the presumptive sanction under the ABA Standards for Imposing Lawyer Sanctions for the alleged misconduct is likely to be no more severe than reprimand or censure;

(2) whether participation in the program will likely benefit the lawyer and accomplish the program's goals;

(3) whether aggravating and mitigating factors exist; and

(4) whether diversion has already been tried.

d. The Administrator and the respondent should negotiate a contract, the terms of which should be tailored to the unique circumstances of each case. The agreement should be signed by the Administrator and the lawyer, should set forth with specificity the terms and conditions of the plan and should provide for oversight of fulfillment of the agreement, including the reporting of any alleged breach to the Administrator. A practice and/or recovery monitor should be identified where necessary, and their duties set forth in the contract. If a recovery monitor is assigned, the contract should include the lawyer's waiver of confidentiality so that necessary disclosures may be made to the Administrator. The contract should include a specific acknowledgment that a material violation of a term of the contract renders voidable the lawyer's participation in the program for the original charge(s) filed. The contract should be amendable upon agreement of the lawyer and the Administrator. The agreement should also provide that the respondent pay all costs incurred in connection with the contract.

e. The lawyer should have the right not to participate in the program. If he or she chooses not to participate, the matter should proceed as if no referral had been made. While a respondent should suffer no adverse consequences for refusing to participate, that refusal is a factor that may be considered by the Administrator the Professional Responsibility Committees in determining whether to recommend the filing of formal charges. The Administrator or the Professional Responsibility Committees may recommend formal charges even if the original complaint alleged lesser misconduct. The Administrator or the Professional Responsibility Committees, of course, retain the discretion to dismiss the complaint.

f. After an agreement is reached, the disciplinary complaint should be dismissed pending successful completion of the terms of the contract.

g. The contract should be terminated automatically upon successful completion of its terms. This constitutes a bar to further disciplinary proceedings based upon the same allegations.

h. A material breach of the contract terminates the lawyer's participation in the program and disciplinary proceedings may be resumed or reinstituted.

CONCLUSION

During its visit, as noted throughout this Report, the team was impressed by the determination of all those involved to make the Wisconsin lawyer disciplinary system more effective, efficient and user friendly. The desire of the system's professionals and volunteers to have increased communication with the Court about the system is also notable. The team believes that the establishment of a continued, reciprocal working relationship between the Court and its discipline agency staff/volunteers will help ensure that the system is the best that it can be. The team 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 assistance program, the ABA Standing Committee on Professional Discipline will make members of the team available for further consultation with the Court. Additionally, the Joint Committee on Lawyer Regulation stands ready to assist the Court and the State Bar in the creation and implementation of central intake and alternatives to discipline programs.

APPENDIX A

Team biographies are not available electronically.

APPENDIX B

Full text expungement rules are included in the report, but are not available electronically. The report includes complete text of the following:

ABA Model Rules for Lawyer Disciplinary Enforcement
Rule 4. Disciplinary Counsel

Arizona State Supreme Court
Rule 60. Expunction of Records

Georgia Court Rules and Procedures
Part IV. Discipline, Chapter 2. Disciplinary Proceedings, Rule. 4-224. Expungement of Records

Illinois Supreme Court Rules
Article VII. Rules on Admission and Discipline of Attorneys, Part B. Registration and Discipline of Attorneys, Rule 778. Retention of Records by Administrator

New Jersey Rules of Court
Part I. Rules of General Application, Chapter II. Conduct of Lawyers, Judges and Court Personnel, Rule 1:20-9. Discipline of Members of the Bar