THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
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August 20, 2010

Doug Hull
State Bar Court
180 Howard Street, 6th Floor
San Francisco, CA 94105

Re: Comment on the Proposed Revisions to the Rules of Procedure of the State Bar of California

Dear Mr. Hull:

Thank you for the opportunity to offer this comment to the proposed revisions to the Rules of Procedure of the State Bar of California, originally released for public comment by the Board of Governors in May 2010, and released again for further comment on July 24, 2010. Although we propose one major and several minor changes to the proposed revisions, we commend the proposal's attempt to streamline the State Bar Court's procedural practices. Our comments as they relate to the specific proposals follow.

1. Revision to the Default Process (Proposed Rule 7.3)

We support the proposal to revise to the default process, especially in its goal of eliminating the need for multiple disciplinary proceedings against respondents who decline to participate in the process. However, we note that the proposed rule signficantly extends the time for respondents to seek relief from default and relaxes the standard for obtaining such relief. Thus, there is a possiblity that dilatory respondents could use the new procedures to unreasonably delay their disciplinary proceedings. This office will work with the State Bar Court to avoid such problems but, if experience shows it necessary, we may later ask the Board to make any necessary amendments to the rule.

2. Open Exchange of Evidence (Proposed Rule 6.6)

We generally support the proposal to require a mutual, open exchange of evidence similar to that required under the Federal Rules of Civil Procedure. However, we believe that the rule should be written more clearly, so that the disclosure requirements can be easily understood by both parties. For example, proposed rule 6.6(c) requires disclosure of persons whom the party "...then intends to call as a witness and may call if the need arises..." OCTC believes that an objective standard should be employed in determining which witnesses must be disclosed. Similarly, the rule requires disclosure of "investigative reports" without defining that term or stating whether the work-product or attorney-client privileges might apply. OCTC requests that this proposal be tabled for the time being, so that the issue may be studied by OCTC, the Court and other interested parties.

In addition, we believe that there remains a need for formal discovery in State Bar disciplinary matters in certain situations. Written discovery could be allowed if ordered by a State Bar Court judge, following a discovery conference.

Further, we propose that *each* party be allowed to conduct one deposition of a non-expert witness without court authorization. (Additional non-expert depositions would occur only following court order.) We also propose that the parties be allowed to conduct unlimited depositions of expert witnesses properly disclosed in expert witness demand responses. (Experts not so disclosed should be excluded from testifying at formal hearings.) The parties should also be permitted to take depositions of out-of-State witnesses, since this can be the only way to compel their testimony in our proceedings.

Finally, we believe that the parties should have the right to unlimited depositions in reinstatement and moral character cases.

3. The Evidence Standard (Proposed Rule 7.12)

The State Bar Court's proposal to lower evidentiary standards applicable to State Bar proceedings—by replacing the Evidence Code with the Administrative Procedures Act admissibility standard—poses very significant issues for the disciplinary system.

OCTC respectfully, but strongly, disagrees with this aspect of the Court's proposal.

OCTC shares the concern of the State Bar Court that evidentiary issues on occasion have consumed undue time in disciplinary proceedings. This has been especially true with respect to the admission of documentary evidence. However, OCTC does not agree that the remedy to this problem is to eliminate the formal rules of evidence. Indeed, OCTC believes that the removal of the formal rules of evidence would have multiple adverse consequences.

(a) Reliability. The reliability of disciplinary findings is of paramount importance, both to respondents (whose careers are at stake) and to the State Bar (which is charged with safeguarding the reputation of the legal profession and protecting the public). OCTC believes that these interests are best served employing the high standards and safeguards set forth in the Evidence Code. In considering this issue, it is well to remember that State Bar disciplinary cases are different from other licensing matters. In contrast to other licensing cases, State Bar cases often turn on issues of witness credibility, which is best assessed under strict Evidence Code standards.

(b) Predictablilty. The formal rules of evidence provide needed and appropriate structure to the conduct of disciplinary hearings. Evidentiary rules provide a predictable framework for prosecutors, respondents and respondents' counsel to assess the merits of the case. If the relaxed standard of the Administrative Practices Act were adopted, both sides would be permitted to offer large quantities hearsay testimony and documents. However, the parties would be unable to predict what evidence the Hearing Judge will rely upon in reaching a decision.

(c) Efficiency. We do not believe that application of APA evidentiary standards would be more efficient. For example, under the APA, facts cannot be established by hearsay alone: the fact-finder

must identify corroborating non-hearsay evidence to support the hearsay assertions. This may well take considerable judicial time. Similarly, under the APA, hearsay objections can still be lodged, but need not be ruled on until just prior to submission. Thus, the need for a judicial ruling is simply moved to another point in the proceeding, saving little or no time. Moreover, because the parties are allowed to submit hearsay evidence, the hearing and review judges may find themselves performing *additional* work, i.e., sorting through piles of documents submitted without testimonial support. At the same time, these judges will receive less help from litigants because the proposed rule revisions prohibit most post-trial briefs and limit the length of review department submissions.

In reviewing the approach of other states, we do not detect any trend toward relaxation of evidentiary standards in disciplinary proceedings. A significant number of jurisdictions follow the approach now used in California, of applying the standard rules of evidence to disciplinary proceedings.

To the extent that there is presently an undue consumption of time due to evidentiary objections, OCTC believes that other remedies should be explored. This could include, for example, outside training in the rules of evidence for both hearing judges and OCTC trial counsel. Additionally, we would support relaxation of the foundational showing necessary for admission of inherently reliable documents, such as for certified court records and subpoenaed bank account records. The State Bar Court should handle evidentiary issues in the same way as the civil and criminal courts of California: counsel succinctly make their objections (without speaking objections), trial judges promptly sustain or overrule such objections, and only in rare instances is there any need for prolonged colloquy, much less briefing, of evidentiary issues. This does not diminish the prerogative of a hearing judge to give more extended attention to an evidentiary issue that may be unique or complex. However, prolonged treatment of evidentiary issues should be a rare exception.

4. Consecutive Trial Days (Proposed Rule 7.10)

We generally agree that trials should be handled on consecutive court days. Ordinarily, trials should continue until concluded and conflicting matters should trail (unless they are deemed "expedited" by statute or rule.)

5. Elimination of Post Trial Briefs (Proposed Rule 7.18)

We agree that in all but the most unusual of cases, post-trial briefs serve little purpose and unduly delay submission of trial matters for decision. To the extent unusual legal issues present themselves, judges should generally limit briefing to discrete issues, rather than inviting "complete case" briefing.

6. Limit Timing and Length of Brief on Review (Proposed Rule 9.3)

In general, we agree with this proposal. Our concern relates to the practice of presenting the Review Department with detailed factual statements with record citations, which can often run several pages in length. We suggest that the proposal be modified to either eliminate pages devoted to the factual statement from the total page count, or specify that factual statements need be offered only as they relate to contested issues.

7. Standard of Review (Proposed Rule 9.6)

We agree with this proposal.

8. Settlement Conference on Review (Proposed Rule 9.11)

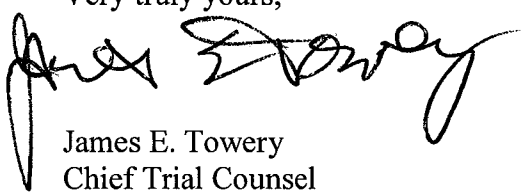
Although concerned that this proposal may cause delay in issuance of decisions in some review matters, we agree with this proposal. We believe, however, that cases will rarely settle at this point in the proceeding. However, the proposed rule may be useful in a few cases.

9. Standardized Procedures

We are committed to working constructively with all constituent groups in eliminating redundancy and confusion in the Rules of Procedure and agree that this continuing effort deserves priority.

I want to express my personal gratitude for the opportunity to comment upon these proposed rules after being appointed Chief Trial Counsel. I look forward to a collaborative working relationship with the State Bar Court on such issues of mutual interest. Thank you.

Very truly yours,



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July 27, 2010

Colin Wong
Chief Administrative Officer
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Dear Mr. Wong,

You have asked me to comment on proposed Rule 7.12 which would abandon the prior rule requiring the use of the civil rules of evidence in favor of the standard set forth in Government Code §11513 (hereinafter GC).

Let me say at the outset that I have no clients and no relationship with the State Bar. I am a full time law professor. My only interest in this matter is an academic one. I have spent most of my career teaching and researching California administrative law. I was the consultant to the California Law Revision Commission in its work on updating the California Administrative Procedure Act (APA). The Commission's proposed changes to the adjudication sections of the APA became effective in 1995. I wrote a casebook entitled "California Administrative Law" (with Marsha Cohen). I am currently writing a multi-volume treatise on California administrative law (with a number of collaborators) which will be published by the Rutter Group in its California Practice Guide series.

I am in favor of the proposed change. I am not sure how much the change will streamline State Bar Court proceedings, but it would seem that eliminating time-consuming evidentiary objections would be a step in that direction. We all know that debates over whether a particular item of evidence qualifies for a hearsay exception can be complex and even esoteric. Such debates take time and therefore cause delays and increased costs.

My support for this change goes beyond its effect on speeding up the Bar Court's hearings. I believe the change is the right thing to do.

Under both federal and state law, administrative agencies do not follow the rules of evidence. The California rule is consistent with the law on this point followed throughout the country. Under the California APA, "Any *relevant* evidence must be admitted if it is the sort of evidence on which *responsible persons are accustomed to rely* in the conduct of serious affairs..." [GC §11513(c)] In particular, hearsay evidence is admissible, but is not sufficient in itself to support a finding unless it is admissible over objection in civil actions. [GC §11513(d)] An ALJ "has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." [GC §11513(f)]

Thus under the APA and under the proposed State Bar Court Rule 7.12, there are substantial constraints on the admission of hearsay evidence. The evidence must be "relevant." It must be the "sort of evidence on which responsible people are accustomed to rely in the conduct of serious affairs." And the hearing judge has discretion to exclude evidence if its probative value is outweighed by the probability that its admission will waste time. The State Bar Court's findings must be supported by at least some evidence that is not hearsay. In addition, although not mentioned in the rule, hearsay would not be admissible if the effect of admitting it would deny due process on the grounds of denial of confrontation. [See *Carlton v. DMV* (1988) 203 Cal App. 3d 1428, 250 Cal. Rptr. 809—serious due process issue if DMV could revoke driver's license solely on basis of computer key stroke—triple hearsay involved]

In addition to these protections against unreliable hearsay, attorneys subject to State Bar discipline enjoy a variety of extraordinary protections against error. They have their very own Court with cases decided by judges who are wholly independent of the State Bar disciplinary staff. They have their very own Review Department. Unlike all other professions, there is no potential for an agency-head decision against an attorney that rejects an ALJs proposed decision. [GC §11517(c)] The case against them must be proved by clear and convincing evidence. [*Furman v. State Bar* (1938) 12 Cal. 2d 212, 229, 83 P.2d 12]. Thus attorneys enjoy a formidable array of protections that are not available to other professions.

The genesis of GC §11513 was the pioneering report of the Judicial Council in 1944. The Judicial Council recommended that agencies not be required to follow technical rules of evidence because most such rules are designed for jury trials rather than trials by expert adjudicators. In addition, many litigants are in pro per and would be penalized if technical rules of evidence were applied. Finally, the rules of evidence are too restrictive and are often not followed even in civil cases tried to a judge. [Judicial Council of California, Tenth Biennial Report 21 (1944)] Although the second of the three reasons suggested by the Judicial Council is

not applicable in the State Bar Court context, the first and third reasons are applicable and persuasive.

The courts have often applied the responsible-person test to permit the admission of hearsay on which it is sensible to rely. [See, e.g., *MacDonald v. Gutierrez* (2004) 32 Cal 4th 150, 159, 8 Cal. Rptr. 3d 48, 54—police officer's unsworn report satisfies responsible persons test; *Lake v. Reed* (1997) 16 Cal. 4th 448, 461, 467, 65 Cal. Rptr. 2d 860, 867, 872—unsworn report by a forensic laboratory satisfies responsible person test; *Donley v. Davi* (2009) 180 Cal. App. 4th 447, 462, 103 Cal. Rptr. 3d 1, 13—victim's statement to investigating officers satisfies responsible persons test.] These cases seem sensible and I believe their reasoning is as applicable to the State Bar Court as to other professions. All of us rely on hearsay evidence all the time in the conduct of our affairs and it seems wrong to deny the State Bar Court the same latitude in carrying out the vital function of protecting California consumers from dishonest or incompetent attorneys.

The ADDC argues that the disciplinary process involving lawyers is somehow different than that involving other professions. But this argument is hard to fathom. The issue in deciding the procedures applicable to disciplining professions is to balance consumer protection against fairness to an accused professional. If the Medical Board can admit responsible-person hearsay in considering discipline against a physician, it is difficult to imagine why it would be improper to do so when considering the discipline of an attorney. Surely the argument that attorneys are somehow deserving of greater protections against discipline that doctors, accountants, or architects would ring hollow with the general public.

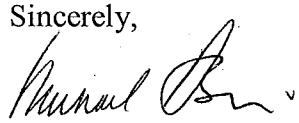
The ADDC letter stresses that attorney discipline is different from discipline involving other professions and in one sense that is certainly true. *In re Rose* [(2000) 22 Cal 4th 430, 93 Cal Rptr 2d 298, 306] makes this clear. The State Bar Court's decision is only a recommendation to the Supreme Court, not a proposed decision like that of other administrative licensing agencies. The Supreme Court retains original jurisdiction over attorney disciplinary cases. Consequently, the Bar Court has *less* power vis a vis its reviewing court than other administrative agencies. Consequently there is *less* need for unusual procedural protections before the Bar Court than in agencies regulating other licensed professionals since the Supreme Court has greater powers in reviewing attorney discipline cases than courts have when reviewing decisions involving other professions.

In short, existing Rule 214 is a historic anomaly. It is out of sync with administrative law involving other professions. It requires Bar Court judges to deal with difficult issues involving hearsay exceptions that certainly take time and increase the cost of operating the system. There is no justification for treating attorneys differently than other professionals with respect to the

evidence that can be admitted against them, especially given the array of unique protections already enjoyed by the legal profession.

Thanks for the opportunity to comment on proposed Rule 7.12.

Sincerely,



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June 28, 2010

Doug Hull
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Re: Proposed Changes to State Bar Rules of Procedure

Dear Mr. Hull:

The Association of Discipline Defense Counsel offers the following comments on the proposed changes to the Rules of Procedure of the State Bar of California sent out for public comment on May 12, 2010.

Introduction

The State Bar disciplinary system has reached a critical moment in its development. The backlog of cases has grown significantly in recent years, a challenge that the new Chief Trial Counsel will need to address. For reasons we discuss below, these proposed changes will not meaningfully address the backlog, but will impair the credibility and perception of even-handedness of the State Bar Court. We therefore suggest that the Board of Governors defer consideration of these proposals until a more comprehensive review of the system and its current status can be undertaken with input from the new Chief Trial Counsel.. Those changes are being considered in a rushed process that leaves inadequate time for reflection, consideration and comment by a number of stakeholders in the State Bar discipline system, especially local bar associations. The proposals in their final form were only available for scrutiny on May 5, 2010; the deadline for public comment is June 28, 2010. Indeed, no specific proposals were available for review during the two public comment sessions that preceded the May 5, 2010 publication of the pending proposal. Local bar associations typically hold meetings of their governing boards once a month; most bar associations require that proposals regarding the discipline system be vetted by their legal ethics committees,

which typically also meet but once a month. For these reasons, it is extremely difficult, if not impossible for local bar associations to evaluate, reflect and formulate intelligent comments when the public comment period is restricted to 45 days.

The Board of Governors has recently hired a new Chief Trial Counsel, James Towery. Mr. Towery is facing a Herculean task, taking charge of the Office of Chief Trial Counsel (OCTC) when it is facing a crisis that is paralleled only by the situation the State Bar faced in 1999 after returning from the shut down precipitated by Gov. Wilson's veto of the State Bar dues bill in 1997. It is clear that many changes in the organization and management of OCTC will be necessary. The current backlog of 1,400 disciplinary matters at "notice open" status must be dealt with expeditiously lest it continue to grow and make the task of catching up even more difficult.

The proposed changes to the rules of procedure will have a dramatic impact on the way OCTC operates. The new chief trial counsel will need time to assess that impact and offer his own informed comments on these proposed rules of procedure.

The Board of Governors itself is currently occupied with the task of choosing the next president of the State Bar. In addition, elections are underway to select five new board members. Both the current board and the board that will take office in September will be tasked with a number of momentous proposed changes in the law of attorney discipline, including a complete revision of the Rules of Professional Conduct and proposed changes in the Standards for Attorney Sanctions for Professional Misconduct.

Change can be a good thing. But many sweeping changes made in a hasty fashion, without time for adequate evaluation, are typically counterproductive. The history of the discipline system itself urges due deliberation. Between 1986 and 1989, the architecture of the discipline system was completely revamped. Only five years later, many of those changes had to be revisited through the Discipline Evaluation Committee, also known as the Alarcon Committee, because it was clear that some of the changes were leading to inefficiency in the discipline system.

The changes proposed by the State Bar Court are sweeping. While the changes are superficially characterized as "streamlining," in fact, they will radically change the way the Office of Chief Trial Counsel and the State Bar Court operate, as well as impact the rights of respondents in the discipline process. While some of the changes are clearly warranted, such as the rewriting of the current substance abuse rules with the assistance of Prof. Bryan Garner, many of the substantive changes are radical and proposed without

any evidence of their necessity, beyond the vague idea that they will "streamline" the State Bar Court's process, including:

- Eliminating discovery in State Bar court proceedings, except for document and witness list exchange, unless approved by the hearing judge (proposed new rule 6.6);

- Removing the Evidence Code in disciplinary proceedings, after many decades of its application, and replacing it with an evidentiary standard similar to the Administrative Procedures Act (proposed new rule 6.6);

- Allowing the State Bar Court to recommend that defaulting respondents be disbarred, simply because they have defaulted (proposed new rule 7.6); and

- Requiring discipline matters to be brought to trial within 125 days of filing and to be tried on consecutive days, at a time when the State Bar Court is groaning under the weight of its current workload, , which will likely necessitate extended trailing of trials at a prohibitive cost to respondents and the State Bar (proposed new rule 7.10).

There are reasons to be skeptical that these changes will result in the "streamlining" that will be sought, discussed in detail below.

Comments on Specific Proposals

Discovery

The State Bar was ordered to permit discovery by the California Supreme Court in in *Brotsky v. State Bar* (1962) 57 Cal.2d 287. *Brotsky* relied in part on Business and Professions Code section 6085, which provides that "any person complained against shall be given fair, adequate and reasonable notice and have a fair, adequate and reasonable opportunity and right...[t]o defend against the charge by the introduction of evidence." The *Brotsky* court acknowledges that the State Bar can modify the *right* to take discovery requirements by rule of procedure but the State Bar cannot effectively abolish it. If a rule of procedure is imposed and later found to violate *Brotsky*, there will be a lot of retrials several years from now.

The current rule allows the Office of Chief Trial Counsel and respondents to utilize most of the discovery devices contained in the Code of Civil Procedure, including depositions, interrogatories, request for admissions, and document demands, without leave of court. The argument for eliminating discovery without leave of court seems based on the idea that State Bar court hearing judges are spending significant amounts of their time resolving discovery disputes. That has not been the experience of the members of ADDC; our experience is that very little time is expended on discovery disputes. No evidence is presented to substantiate the idea that hearing judges are spending significant amounts of their time on discovery disputes. It is clear that adoption of the new rule will result in many motions seeking leave of court to conduct discovery, motions that will consume as much or more time from hearing judges than discovery disputes. Rather than saving judicial resources, it is just as likely that these motions will consume as much, if not more, time as hearing judges currently spend on discovery disputes.

Evidentiary Standards

Like the Civil Discovery Act, the California Evidence Code has been part of the State Bar Rules of Procedure since at least the 1980s. The proposed new evidentiary standard is based on Government Code section 11513, which is almost identical. Again the rationale for the change seems to be that hearing judges are spending an inordinate amount of time resolving evidentiary issues. However, no evidence is cited for the proposition, and no explanation has been offered to support the proposition that the substitution of the more general APA standards in place of the more precise Evidence Code standards will save judicial resources. To the contrary, a more general standard would seem to create more evidentiary issues than a more precise one. An examination of the annotated section 11513 shows no shortage of appellate cases involving questions of interpretation of that statute. By contrast, there are relatively few published Review Department cases addressing questions involving the admissibility of evidence.

But there is an even more important aspect to this proposed change. Another idea that seems to be inspiring it is that a State Bar disciplinary proceeding is "a mere licensing proceeding." This idea ignores the well-established case law holding that attorney discipline is *sui generis* and not comparable to licensing proceedings involving other professions (see *In Re Rose* (2000) 22 Cal.4th 430, 440 (Justices Kennard and Brown dissenting.) The reason is that, unlike doctors, dentists, cosmetologists, beekeepers and all the other professions subject to regulation by the executive branch of the California state government, "[m]embers of the bar are officers of the court, subject to [the Supreme Court's] primary regulatory power." *Rose*, at 453.

Attorneys as officers of the court are part of the machinery of justice; they owe duties not only to their clients but to the justice system and to society as a whole. A strong independent bar is one of the bulwarks of individual liberty. The possibility that professional discipline might be used to retaliate against members of the Bar who represent unpopular and powerless interests mandates the due process protections afforded by application of the Evidence Code. Diminishing the protections that lawyers currently have in the discipline system should be undertaken with care and deliberation, neither of which appear present in the rush to adopt this proposal.

Default = Disbarment

The proposal to allow the State Bar Court to recommend disbarment where a respondent defaults in a disciplinary proceeding is based on a legitimate concern with the amount of State Bar resources consumed in dealing with respondents who default in the initial disciplinary proceeding.

Consumption of resources is a concern but not the only concern of the discipline system. Standard 1.3 sets forth the purposes of imposing discipline; conservation of resources does not appear on that list. This proposal would in essence make conservation of resources the paramount value in the discipline system. But due process and fundamental fairness to respondent attorneys are also important concerns. A law license is a valuable property right that can only be constitutionally impaired through the exercise of due process. See *Conway v. State Bar* (1989) 43 Cal.3d 1107, 1113; *In re Ruffalo* (1968) 390 U.S. 544, 550, 20 L.Ed.2d 117, 122, 88 S.Ct. 1222. The current proposal would allow a complete deprivation of that property right regardless of the gravity of the underlying misconduct. Conduct that would merit a private reproval, or perhaps even an admonition, might result in disbarment. Moreover, the current proposal would authorize the hearing judge to recommend disbarment without even a judicial finding that the respondent had violated a Rule of Professional Conduct or a provision of the State Bar Act providing for discipline. A State Bar Rule of Procedure cannot expand the grounds for discipline beyond those provided for by State Bar Act. The proposed rule 7.6 is an unconstitutional deprivation of due process.

Currently, a respondent whose default is taken is placed on inactive status and cannot regain active status until he or she makes a successful motion under current Rule of Procedure 205. Rule of Procedure 205 was adopted as part of the recommendations of

the Alarcon Committee specifically to address the same problem that the proposed rule of procedure is meant to address. Successful motions under rule 205 are exceedingly rare; we are informed by the State Bar Court that only two have ever been granted. The rule is clearly working. But the current policy of the Office of Chief Trial Counsel is to continue to prosecute disciplinary matters against attorneys who are on inactive status pursuant to a default. The undue consumption of resources is the result of prosecution priorities that appear to serve little, if any, public protection purpose.

Current remedies are adequate to address this problem consistent with due process (see *Conway, supra.*) In addition to the inactive enrollment provided for by current rule 205, the hearing judge has the option of recommending a term of actual suspension (rather than meaningless probation conditions) on a defaulting respondent with the a requirement the respondent prove his rehabilitation as provided in standard 1.4(c)(ii) before he or she can resume active status. The hearing judge can also recommend compliance with rule 9.20, Cal. Rule of Ct.. Current remedies coupled with a thoughtful scheme of discipline prosecution priorities focused on achieving the goals of the disciplinary system can reduce the undue consumption of resources. Most of the delay that exists in the discipline system today results from the current mode of operation of the Office of Chief Trial Counsel, than to the operation of the State Bar Court. The current rules of procedure undoubtedly could be improved to expedite the disciplinary process, especially by encouraging early settlement. The current proposals don't focus on the real problems.

Fast Track Trial Calendaring

A few years ago, NASA instituted what it called its "faster, cheaper, better" program. An engineer of many decades experience is reputed to have commented "in the real world you can only have any two of those three."

The same unrealistic optimism underlies proposed rule 7.10. It takes current case disposition guidelines existing in the State Bar and cuts them in half. As daily practitioners in the State Bar Court, we see how burdened the court is dealing with the current caseload. To require the hearing department to complete its work in half the time is to impose a requirement that cannot realistically be met without great sacrifice to both quality and efficiency.

Equally unrealistic and unfair is a proposal requiring State Bar Court trials to be conducted on consecutive days. As is the case in the civil arena, a great many respondents are forced into settlement because they cannot afford the prospect of going to

trial. Every civil litigator, prosecutor and criminal defense lawyer will tell you of the difficulties and of the substantially increased costs that result from "trailing" cases set for trial. Respondents and their counsel will find it increasingly difficult to properly serve their clients while "trailing." State Bar prosecutors are also likely to find it more difficult to handle their caseloads in a timely manner and thus exacerbate the backlog the new rules are theoretically designed to alleviate. In a court system with only two venues and limited resources, this proposal is likely to exacerbate rather than eliminate the problems it is designed to address.

Conclusion

There is no doubt that the discipline system could benefit from a systemic, thoughtful and thorough review of the State Bar Rules of Procedure. No such review has occurred since the Alarcon committee in 1994. Much has changed since then. The current proposal is not such a review; it is a hastily drafted set of ideas that are being rushed into place without sufficient debate or consideration.

The Board of Governors has already chosen a new Chief Trial Counsel with a long record of experience in State Bar matters, in the legal ethics community, and in the bracing environment of private law practice. We hope the Board of Governors will make as wise a choice when a new Executive Director is chosen.

Until these key personnel are on board and sufficiently up to speed to weigh in on significant changes in the process, it is unwise and premature to undertake a major overhaul of the system. A better approach would be to defer changes until a deliberative process like the Alarcon commission can address the whole of the discipline system with input from all the stakeholders, including the new Executive Director of the State Bar and the new Chief Trial Counsel.

One area that this process should address is encouraging early settlement of disciplinary matters. This is most effective way to expedite the discipline process and conserve scare resources. One of the most important and effective procedures contained in the current rules is the Early Neutral Evaluation Conference ("ENEC"), set forth in rule 75. This process was adopted in 1999 to address the extremely high backlog that resulted from a delay in the approval of the State Bar's dues bill. It was proposed by Justice Elwood Lui (Ret.), the special master appointed by the Supreme Court. The ENEC

process as originally envisioned had as its purposes "to promote early settlement, the early exchange of information and the simplification of discovery." It worked exceedingly well to accomplish these purposes for many years after the rule was implemented. Renewed emphasis and respect for the existing ENEC process can accomplish many of the goals the proposed new rules of procedure. Last year, the Office of Chief Trial Counsel proposed changes that would have weakened the ENEC process by allowing the State Bar to opt out of it. This is moving in wrong direction. Alternative dispute resolution has played an important part in reducing delay in the civil courts; it should be encouraged in discipline system. In response to the Chief Trial Counsel's proposal to limit the ENEC process, we suggested rule changes that would codify the current pre-filing settlement procedures, including the requirement that OCTC meet and confer with respondents before filing charges and provide the respondent with informal discovery. We urge the Board of Governors to affirm its support for the existing ENEC process and explore ways to strengthen it, including possible rule changes.

The Association of Discipline Defense Counsel urges the Board of Governors to table these proposals and to wait until the new year begins in September when it we hope the Bar will institute a process similar to the Alarcon commission.

Very Truly Yours,

David Cameron Carr
for the Association of Discipline Defense Counsel

cc: ADDC Membership
James Towery

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June 28, 2010

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VIA FAX to 415-538-2090

RE: My comment on the proposed modification to Rules of Procedure of the State Bar of California.

Dear Mr. Hull:

Enclosed herewith and incorporated in this comment is the Motion for Reconsideration, filed on my behalf by my attorney, in connection with the default of the undersigned. which was void ab initio based on the case law cited therein.

The California Supreme Court advised the State Bar of California that its default procedures, including Rules 200-210, violated the due process rights of respondents and were unconstitutional. Mr. Wong refers to such communications by the California Supreme Court to the State Bar of California in his memorandum of May 5, 2010, which appears to be the impetus for the proposed modifications of the Rules of Procedure.

None of the issues raised in the Motion for Reconsideration and in the original motions on my behalf with respect to the violations of my due process rights by the OCTC and by Judge McElroy were addressed in the proposed modifications to the Rules of Procedure, even though they were on notice of the well established case law mandating that they default not be entered, as a matter of law as enunciated by the California Supreme Court in its opinions and separately to the State Bar of California, as indicated by Mr. Wong and others. They were not addressed by Judge McElroy either, in violation of my constitutional rights.

Clearly, the default rules, Rules 200-210, are unconstitutional on their face and as applied in my case and in connection with multiple other respondents. as Mr. Wong has indicated in his memorandum. The proposed changes in the rules do not address any of the issues raised in my motions in connection with these issues or in the other issues that were raised throughout my case, including the destruction of evidence, the withholding of Brady material and other exculpatory evidence for more than two years and in violation of court orders and then misrepresenting to the court the non-existence of these documents.

The proposed rules do not address the criticisms by former Governor Pete Wilson, when he shut down the State Bar of California in 1997 and called it the ultimate political animal.

The proposed rules do not address the falsified and exaggerated allegations of the OCTC and their ex parte communications with the State Bar judges, judges of the trial courts, lawyers and members of the California judiciary outside of the presence of respondents and their attorneys, as discussed by respondent in his response to the NDC, which are the stuff of politics and not justice. This is raised in multiple cases presently pending in the courts.

As a result of the failure to address any of these constitutional issues pertaining to the fairness of State Bar Court proceedings, the proposed State Bar Rules are again unconstitutional on their face and unconstitutional as applied.

Respondent also incorporates by reference the petition for review of Philip Edward Kay, Esq., in California Supreme Court Case No. S180405, which also deals with similar issues, including the default procedure of the State Bar of California and violations of due process rights. You have a copy of the petition of Philip Edward Kay in your files or complete access thereto. You have copies of my motions in your files or complete access thereto. If you need a further copy of any of these pleadings and declarations, please advise.

Finally, enclosed herewith is a copy of the declaration of Arthur Margolis, Esq. which deals specifically with certain of the above issues and is incorporated herein by reference. Mr. Margolis is well known to the OCTC.

Please acknowledge receipt of my comments in writing to the undersigned at the address set forth above or e-mail me at randypotter5@gmail.com.

Very truly yours,

Ronald Gottschalk

encl.

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Attorneys for All Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA,

SAN FRANCISCO DIVISION

PHILIP E. KAY, JOHN W. DALTON, LINDSAY MARCISZ, BLAIR POLLASTRINI, and JESSICA POLLASTRINI,

Plaintiffs,

v.

STATE BAR OF CALIFORNIA, a public corporation, and THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA, collectively; HOLLY FUJIE, in her official capacity, LUCY ARMENDARIZ, in her official capacity, SCOTT J. DREXEL, individually and in his official capacity, ALLEN BLUMENTHAL, individually and in his official capacity, JEFF DAL CERRO individually and in his official capacity, and DOES 1 through 50, inclusive.

Defendants.

Case No. C09-1135 JCS

DECLARATION OF ARTHUR MARGOLIS, ESQ. IN SUPPORT OF PLAINTIFFS' *EX PARTE* MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

DECLARATION OF ARTHUR MARGOLIS

I, ARTHUR MARGOLIS, certify and declare as follows:

1. I am an attorney duly licensed to practice law in the State of California. If sworn as a witness I would be competent to testify to the following facts of which I am personally familiar, except where indicated that the matter is based on information and belief:

2. I am a partner in the Los Angeles law firm of Margolis & Margolis LLP. The firm specializes in the area of attorney ethics and professional responsibility.

3. After my admission to the California Bar in December of 1973, I was a prosecutor for the State Bar of California for thirteen years. During that time, I investigated hundreds of complaints against attorneys, and prosecuted attorneys in formal disciplinary proceedings at the trial level as well as before the State Bar's Review Department. In addition to my trial calendar, I supervised other State Bar prosecutors. Further, I represented the California State Bar in disciplinary proceedings before the California Supreme Court. When I left the State Bar in December of 1986, I held the title of Senior Trial Counsel.

4. After leaving the Bar, I prosecuted possibly two cases at the Bar's request. My present practice consists almost entirely of defending attorneys in State Bar disciplinary proceedings and serving as a consultant on issues of professional responsibility.

5. At the request of California State Senator Robert Presley, I assisted in the formulation of legislation which significantly changed the California Business and Professions Code as to attorney discipline.

6. I have served as an expert witness on professional responsibility in federal and state courts, and I have lectured on the subject at law schools and bar associations, including numerous MCLE classes. I have also served as an expert consultant for the Los Angeles County District Attorney's office.

7. My partial resume is attached as **Exhibit 1.**

8. Since the institution of "professional judges" within the State Bar Court, in my experience and based upon extensive information and my belief, it is clear that petitions for review by respondent attorneys to the California Supreme Court regarding matters decided in the Hearing and Review Departments are nearly always denied, and, in the rare case in which review is granted, it is almost always the case that the Supreme Court has largely deferred to the State Bar Court's decision or resulted in increasing the negative result on the respondent.

9. In fact, I am unable to recall a single matter of a respondent petition for review to the Supreme Court, since the establishment of the Bar's professional court, in which a respondent attorney was granted affirmative relief that improved his situation.

10. It appears clear to me, based upon my experience, information and belief, that the California Supreme Court deals with the disciplinary system as though the Court and the State Bar prosecutor's office are operating some kind of joint venture, including ex-parte communications regarding matters which significantly affect accused attorneys.

11. In my opinion, the possibility of obtaining a meaningful review by the California Supreme Court is primarily theoretical, and it would be a mistake for a respondent to place any reliance upon the belief that he will receive a thoughtful or objective review in that Court.

12. That the "opportunity" for review is largely illusory is supported by California Supreme Court Justice Janice Brown's dissent in the case of In re Rose, 22 Cal.4th 430, 466-470, 466-470 (2000) in which she stated, in pertinent part, the following:

> * * * They say hard cases make bad law; the result here, however, is foreordained: the majority reaches the only provident conclusion possible in the current circumstances. But it is also true that, underlying its reasoning and result, one has to wonder at the practical value of what this court does

under the procedures now prevailing in bar discipline cases. As the court itself has acknowledged only recently, changes in our own rules made in the wake of legislative amendments to the administrative procedures governing bar discipline proceedings "relieve the court of the burden of intense scrutiny of all disciplinary recommendations." (Cal. Supreme Ct., Invitation to Comment- Proposed Adoption of Rule 951.5, Cal. Rules of Court (Nov. 23, 1999) p. 2; see also Cal. Supreme Ct., Practices and Proc. (1997 rev.) pp. 3, 18-19, 25-26.) Moreover, the matrix of grantable issues identified in California Rules of Court, rule 954 [footnote omitted] appears to truncate the scope of our review. And in cases where no writ is sought, we usually content ourselves with less than that measure of "review." Unless, by dint of skill or luck, the issues are framed so they are deemed to fall within the ambit of rule 954, an attorney facing suspension or disbarment from the right to practice her profession gets no hearing, no opportunity for oral argument, and no written statement of reasons-from this or any other article VI court. (Cal. Const., art. VI, § 14; hereafter article VI.) Instead, she gets a summary denial of review, the one-line order. Is that enough? Regrettably, it seems that, for now at least, it will have to do.

We should not, however, pretend the current legal order does not mark a transformation in the attorney discipline process, one in which a constitutional touchstone-meaningful judicial review by an article VI court-has been jettisoned. A decade ago, Justice Kaufman could trouble to write a vigorous dissent from an opinion of this court upholding summary administrative suspension of a lawyer under emergency circumstances. (*Conway v. State Bar* (1989) 47 Cal.3d 1107, 1126 [255 Cal.Rptr. 390, 767 P.2d 657, 80 A.L.R.4th 101].) That dissent continues to make persuasive reading today. Why? Because a like situation is presented here, following the 1988 legislative overhaul of the procedures governing attorney

discipline. (Stats. 1988, ch. 1159, § 1, p. 3699.) Should we care? More to the point, can we afford to care? Ten years have passed, and the majority sings the same refrain, even if substantively things are not the same as they were when this court filed between 20 and 40 State Bar opinions a term. Under the new regime, attorneys penalized for professional misconduct get less in the way of genuine judicial review of discipline than licensed nonattorneys do. The reasons for this paradox lie in the convoluted history of the legal profession and its intimate relation to the courts, coupled with the extraordinary growth in the number of lawyers admitted to practice in California over the past 30 years.

The contemporary anomaly is that that history has produced less in the way of judicial protection than our statutes give to, say, veterinarians and cosmetologists. Some of the circumstances that have contributed to that anomaly – the enormous growth of the legal profession in California and the consequent need for an elaborate disciplinary apparatus, for example-are matters lying beyond the control of this or any other court. Others, however – the threat posed by a growing legislative involvement in attorney discipline, the related bureaucratization of the disciplinary process-we conceivably might have mitigated. (See, e.g., Bus. & Prof. Code, § 6082 [jurisdiction to review attorney discipline lies in this court and the Court of Appeal].) As matters stand, and as the majority opinion attests, it is force of circumstance that obliges us to make our peace with the new legal order. The majority goes about that task studiously, employing the archaic lexicon of a bygone day to describe the new and different contemporary reality.

That new reality – what a pessimist might describe as the untoward merger of two branches of government in the regulation of attorneys -- is especially worrisome as a matter of state constitutional law. For that reason also, it

transcends parochial issues of professional discipline. Unlike Congress, by the text of the federal Constitution the legislature of a sovereign of limited powers, state legislatures possess plenary lawmaking powers. That is why structural principles of republicanism common to both state and federal governments -- the tripartite division into legislative, executive and judicial branches -- assume even greater significance where state government is concerned. What petitioner really objects to is the absence of any indication that, despite the elaborate administrative hoops through which attorneys facing discipline must jump, a court of law, a constitutionally founded judicial body, has considered the lawyer's claims on the merits before pronouncing judgment. It is not simply that judicial review ensures compliance with statutory commands. It does more, helping to sustain a complex of social values, maintaining a structural balance among the parts of government and, by its existence and vigorous exercise, protecting individual liberty.

What petitioner can legitimately ask from us is not procedural due process. Surely, the elaborate procedures provided attorneys subjected to the State Bar's disciplinary apparatus are sufficient to satisfy that concern. (See generally Rules Proc. of State Bar.) His complaint goes to a different flaw altogether. It is founded on the rock of the constitutional right to meaningful judicial review of government acts intended to deprive someone of the means of livelihood. Review by a constitutional court, review by real judges whose allegiance is to the judiciary, to its standards and ideals -- to the rule, in short, of law. Review, moreover, that is seen, observed in the form of reasoned judicial opinions, and in the ritual of oral argument. In combination, these features make up hallowed ground, for they comprise a signal feature of our democracy – the protection of the individual from executive and legislative overreaching by neutral magistrates, magistrates

whose decisions are constrained by objective principles of judicial reasoning and by precedent, and whose rulings are an open book. (See Bickel, The Morality of Consent (1975) p. 26 ["Confined to a profession, the explication of [legal] principle is disciplined, imposing standards of analytical candor, rigor, and clarity."].) Lacking, as Alexander Hamilton wrote, "either the sword or the purse," the judiciary exists by virtue of "merely judgment." (Hamilton, The Federalist No. 78 (Rossiter ed. 1961) p. 465; see also Scalia, The Rule of Law as a Law of Rules (1989) 56 U. Chi. L.Rev. 1175.) *That* is the essence of the judicial function; *that* is what is missing in this sui generis special proceeding over which we exercise an inherent authority. (See, maj. opn., ante,passim.)

Judicial judgment – *reasoned decisions*, rather than *decisions* with *reasons* – is the constitutional counter to the appetitive coordinate branches of government, implicit in the architecture of state as well as federal government. We expect, and justifiably so, a different discipline from a court than from a bureaucracy. And because the powers of state government are not textually limited, a close adherence to the principles of the separation of powers becomes all the more critical to constitutional government. Courts must be especially vigilant, must vigorously resist encroachments that heighten the potential for arbitrary government action. The existence of the administrative state is a legislative admission of an inability to articulate general rules governing conduct. If legislative delegation enlarges the scope of administrative action, it enlarges the scope for arbitrariness as well. When the judiciary cedes its authority to a bureaucracy, when it permits the Legislature to determine the scope of judicial review, the potential for arbitrary government action rises exponentially.

Nothing so well illustrates the through-the-looking-glass quality of the majority's reasoning as its rejection of petitioner's claim that his case qualifies as a "cause" under article VI and must be decided "in writing with reasons stated." The majority's reasoning is fine, as far as it goes. It omits, however, an observation that ought to be decisive: this court is the only judicial body involved in the attorney discipline process. An attorney's petition for review to this court marks the first and only time in the disciplinary process that article VI judges are asked to enter the case. For that reason, and for that reason alone, our decision, even if it is a summary denial of review, necessarily decides a cause. The majority makes an able attempt to paper over this reality, but in doing so it is compelled to adopt an empty formalism.

The reality is that, as the legal cartel of the past disintegrates, as the demand for legal services continues to surge, the profession has lost its guild-like character and become more like other occupations. (Cf. Posner, Overcoming Law (1995) pp. 63-70; Kronman, The Lost Lawyer (1993) pp. 273-306.) This trend toward occupational homogeneity is reflected in the elaborate administrative apparatus for attorney discipline. But, and again paradoxically, dynamic professional growth has produced contradictions, contradictions that are not lost on attorneys who defend lawyers facing disciplinary charges. By letter brief, an organization of State Bar defense counsel – the Attorney Discipline Defense Counsel – points out that vocational licensees enjoy greater judicial rights than lawyers. And they are right. The host of practitioners of this and that trade, licensed and regulated by government agencies, has access to administrative mandamus in discipline cases, where judges of article VI courts review questions of law de novo and questions of fact under the substantial evidence standard. They get both a full plate of administrative due process and real judicial review.

Before honest-to-God judges. (See Code Civ. Proc., § 1094.5.)

That is the way attorney discipline cases used to be decided, in the old days, before the 1988 amendments to the State Bar Act. True, one of the effects of the prior order was the obligation of this court to carry on its docket and decide almost always after oral argument, always by written opinion – at least 20 State Bar disciplinary cases each term. The substantiality of that largely fact-intensive task cannot be gainsaid. But the principled answer to that difficulty, if difficulty it was, is not to fold the attorney discipline system into the ceaselessly expanding administrative state, with the remark that our summary denial of review qualifies as review on the merits because it's ... well, *sui generis*.

Alas, attorneys faced with the loss of their livelihoods must now make do with the State Bar Court-an entity performing judicial functions but, despite the competence of its members, exercising no judicial powers – and our summary denials, unless the petition can be said to satisfy the criteria of rule 954. Yet the majority continues to pay lip service to the old regime, even using the same words and citing the same cases to paste over a hollowing-out of meaningful judicial review. We have tinkered with our rules so that it appears nothing has changed. But these are only words; the reality is different. In point of practice, in bar disciplinary cases in which we decline to grant review, we issue a pro forma order executing the State Bar Court's "recommended" discipline. (See rule 954(a).) In those cases where review is not sought, it is questionable whether any judicial act of substance takes place. Oh, to be sure, our rules purport to alleviate these concerns. Rule 953, for example, provides for entry of orders by this court, even if ministerial, rather than adopting the legislative model that makes the State Bar Court's recommendations self-executing. (Compare rule 953(b) with

Bus. & Prof. Code, § 6084, subd. (a).) Still, we no longer make an individual decision on the imposition of discipline. And the situation is not much improved if review is sought and denied; the rule gives us no choice but to impose the recommended discipline. (Rule 954(b).)

At the heart of the majority opinion is the supposition that review by any other name is still review and passes constitutional muster; that due process is satisfied by any process, however much the decisionmakers may be driven by bureaucratic agendas or political ties. In this corner of the law, at least, we seem to be presiding over a union of the legislative and judicial components of government. It may be efficient; it certainly isn't pretty. And because it seems antithetical to the constitutional design, I dissent. (*Id.*)

13. In my opinion, many of the negative consequences "antithetical to the constitutional design" discussed in Justice Brown's dissent have come to pass under the current disciplinary system, in which attorneys are, among other things, being denied their right to genuine and impartial judicial review, potentially with far-reaching and deleterious consequences on an attorney's right to pursue a livelihood.

14. It is also my experience and opinion that the State Bar prosecutor's office is generally far more inclined to prosecute charges against solo or small firm practitioners than it is large firms representing corporate interests at least in part because the Bar appears to accord greater credibility to the explanations and assertions of attorneys from large firms.

I declare under penalty of perjury that the foregoing is true and correct.

Executed March 10, 2009, at Los Angeles, California.

Arthur L. Margolis

ARTHUR MARGOLIS

EXHIBIT 1

Margolis & Margolis LLP
ATTORNEYS AT LAW

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ARTHUR L. MARGOLIS

LAW PRACTICE:

December 1973	Admitted to State Bar of California.
November 1987 - Present	Law practice devoted almost entirely to defending attorneys accused of misconduct in State Bar disciplinary matters. Services include representation at the investigation stage, at formal trials and at review hearings, as well as before the California Supreme Court. Serves as expert consultant and witness regarding professional responsibility. Frequent lecturer at MCLE programs on attorney ethics and State Bar disciplinary proceedings.
April 1987 - November 1987	Civil litigation with the law firm of Scott J. Spolin in Century City, California.
December 1986 - March 1987	Civil appellate practice with the law firm of Greines, Martin, Stein & Richland in Beverly Hills, California.
July 1976 - December 1986	Senior Trial Counsel, State Bar of California. Prosecutor in attorney disciplinary proceedings at trials and at review hearings. Responsibilities included matters of particular complexity and sensitivity. Supervised other prosecutors.
December 1973 - July 1976	Staff Attorney, Office of General Counsel, State Bar of California. Representation of the State Bar before the California Supreme Court in attorney disciplinary cases. Civil litigation. Advised the Board of Governors on legal issues.
1981 - present	Represented and/or worked with various animal welfare and animal rights organizations in federal litigation and before governmental agencies. (Has included Fund for Animals, Actors & Others for Animals, and People For The Ethical Treatment of Animals).

Exhibit "1"

LEGAL EDUCATION:

September 1969 - June 1973	Juris Doctor Degree, June 1973, University of San Francisco. Law Review McAuliffe Academic Honor Society. Teaching Assistant: -- Criminal Law Clinical Program. (Marin County Public Defender) -- Legal Writing and Research Class. -- Minority Law Student Program.

PRE-LEGAL EDUCATION:

February 1959 - June 1964	B.A. History, June 1963, University of California, Berkeley. General Secondary Teaching Credential, June 1964, University of California, Berkeley.

OTHER WORK EXPERIENCE:

June 1967 - August 1969	Newspaper and magazine writer and editor.
October 1965 - June 1967	Public Secondary School Teacher
December 1964 - October 1965	Social Worker for Los Angeles County.

OTHER ACTIVITIES:

1983 - November 1988	City Commissioner, Los Angeles Board of Animal Regulation. Appointed by Mayor. Member of National Board of Directors of Animal Legal Defense Fund and President of Los Angeles Chapter of Animal Legal Defense Fund.

PUBLICATIONS:

"Ethics: Communicating With 'Former' Clients" November 1998. California Lawyer

"Getting a Grip on Discipline," May 1, 1998. Los Angeles Daily Journal

"Plotting the Long Over-Due Death of Caveat Emptor in Leased Housing," 6 U.S.F. Law Review 147 (cited by Supreme Court of Iowa)

CONTINUING LEGAL EDUCATION LECTURER:

Speaker, 10 Dumb Things To Avoid When The Bar Calls! Ethical Ways To Prevent Attorney Discipline. 6/20/03. Solo & Small Firm Section. The State Bar of California. Omni Hotel. Los Angeles. CA

Speaker, Dealing With the State Bar & Selected Ethical Issues. 3/12/03. The Lawyer's Club of Los Angeles County. Los Angeles. CA

Speaker, Often-Asked Ethics Questions. 1/26/02. Juvenile Courts Bar Association. 19th Annual Juvenile Law & Procedures Seminar. Montebello. CA.

Panelist, Anti-Terrorism and Civil Liberties; Redefining the Legal Landscape in the Current Anti-Terrorism Climate & Related Issues of Ethics. 1/26/02 National Lawyers Guild. Los Angeles Chapter

Speaker, "What's New and Interesting in Legal Ethics," 1/16/02. Law Offices of Manatt, Phelps & Phillips. Los Angeles.

Speaker, "Legal Ethics" 5/15/01. Culver Marina Bar Association. Culver City. CA.

Speaker, "Legal Ethics and Juvenile Law Practice," 1/20/01. 18th Annual Juvenile Law & Procedures Seminar (Dependency & Delinquency). presented by Juvenile Courts Bar Association and the L.A. Superior Court: Montebello. CA.

Speaker, "The State Bar is On the Phone," 11/12/00. Law Offices of Sulmeyer. Kupetz. Baumann & Rothman. Los Angeles.

Speaker, Crime in the Suites vs. Crime in the Streets: State Bar Prosecutorial Policies. 1/24/00. Law Offices of Manatt. Phelps & Phillips. Los Angeles. California

Speaker, "Ethical Landmines and What To Do If the State Bar Calls." 1/28/99. San Bernardino County Bar Association. San Bernardino. California

Speaker, Legal Ethics & Juvenile Law Practice. 1/23/99. 16th Annual Juvenile Law & Procedures Seminar (Dependency & Delinquency) presented by Juvenile Courts Bar Association & the Los Angeles Superior Court

Speaker, Selected Topics in Ethics & Professional Responsibility, 6/20/98. University of LaVerne Law School. sponsored by Eastern Bar Association.

Speaker, Ethical Issues for Employment Lawyers & Labor Lawyers, 1/17/98. presented by the Labor & Employment Law Section. Los Angeles County Bar Association.

Speaker, Legal Ethics, 10/5/97. High Desert Bar Association. Cruise from Los Angeles to Ensenda, Mexico.

Speaker, Legal Ethics, 9/24/97. Iranian American Lawyers Association, Beverly Hills, California

Speaker, Attorneys' Ethical Concerns with (Possibly) Lying Clients. 5/2/97. The Labor & Employment Law Section of the State Bar of California. 1997 Spring Symposium. Omni Los Angeles Hotel & Centre.

Speaker, Selected Topics in Ethics and Professional Responsibility. 1/11/97. 14th Annual Juvenile Law Institute. Dependency Program. Loyola Law School.

Speaker, Ethics and Professional Responsibility. 1/20/96. 13th Annual Juvenile Law & Procedures Seminar for Dependency and Delinquency Practitioners; Los Angeles Superior Courthouse.

Speaker, Ethics and the State Bar. 11/11/95. National Lawyer's Guild.

Speaker, Attorney Ethics and the State Bar. 9/27/95. High Desert Bar Association. Victorville, CA.

Speaker, Ethics and Professional Responsibility. 1/28/95. National Lawyer's Guild.

Speaker. Attorney Discipline. BRIDGING THE GAP. Riverside & San Bernardino County Bar Associations. June 18. 1994.

Speaker, Attorney Ethics and the State Bar. Beverly Hills Bar Association. Family Law Workshop. June 11. 1994.

Speaker, Ethics and the Government Attorney. Los Angeles City Attorney's Office. December 21. 1993.

Speaker, Ethics and the State Bar. California Trial Lawyer's Association Annual Meeting. San Francisco. November. 1993.

Speaker, Ethics and Professional Responsibility, Pencle Productions. Vidcotape Continuing Legal Education Seminars. December. 1991; September 1993. "Ethical Close Calls." December. 1993, February 1993. "Legal Aspects of Medical Diagnostic Techniques/Substance Abuse."

Speaker, Ethics, Proper Withdrawal From Employment. October 1993. State Bar Annual Convention. San Diego.

Speaker, Attorney Ethics. January 1993. Hyatt Regency. Long Beach. CA. Legal Education Seminar for Law Firm of Kegel, Tobin & Truce.

Speaker, Professional Responsibility. December 1992. 10th Annual Juvenile Law and Procedures Seminar, Juvenile Courts Bar Association, Los Angeles.

Speaker, Attorney Ethics. November 1992. Eastern Bar Association. Covina, CA.

Speaker, Ethics & Disciplinary Procedures. September 1992 and September 1991. National Lawyers Guild Ethics-Substance Abuse Seminar.

Speaker, Attorney Ethics. June 1992 and January 1992. Los Angeles County Bar Association. "Bridging the Gap" Mandatory Continuing Legal Education Seminar.

Speaker, Disciplinary Issues. April, 1992 and April, 1991. 1st and 2nd Annual State Bar Court. State Bar of California. Bench/Bar Conferences.

Speaker, Attorney Ethics. September 1991. Beverly Hills Bar Association. 17th Annual Family Law Symposium. Sponsored by The Rutter Group.

Speaker, Attorney Ethics. "Law Without Malpractice". Continuing Legal Education Program. Law Firm of Manatt, Phelps, Phillips & Kantor.

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Via First Class Mail and Email

Colin Wong
State Bar Court
180 Howard Street
San Francisco, California 94105

Dear Colin:

On behalf of the Association of Discipline Defense Counsel ("Association"), I would like to thank the State Bar Court once again for the opportunity to participate in the rule making process. The letter will outline our position regarding the concepts discussed at the April 9 meeting. It will also present some proposed ideas of our own.

We are of the opinion that many of the opportunities for "streamlining" the State Bar Court's process lie not in rule changes but in the sound exercise of discretion already possessed by the hearing department judges.

Alternative Dispute Resolution

As we stated at the meeting, our view is that the best way to for the State Bar Court to expedite the process is to encourage the early settlement of discipline cases. Last year, in response to OCTC's ill-considered proposal to amend Rule 75 to give it a veto over holding Early Neutral Evaluation Conferences, we presented our own counterproposal that would have codified long-standing pre-trial meet and confer practices and encouraged a robust and timely ENEC process. We hereby renew that proposal: our original submission to the Discipline Oversight Committee is attached.

We are also of the opinion that the ENEC and settlement conference process might be made even better through an in depth study of how alternative dispute resolution processes available to civil litigants might be incorporated into the State Bar Court practice.

Rule of Limitations

One rule change that would help expedite the process would be a meaningful rule of limitation on the initiation of discipline proceedings. Everyone is familiar with

Parkinson's Law: work expands so as to fill the time available for its completion. The current Rule 51 is so porous and contains so many exceptions as to be almost meaningless. A rule of limitation with some teeth in it would encourage OCTC to prioritize its caseload, putting serious misconduct on a fast track while encouraging the resolution of more mundane matters at an earlier time. We propose an absolute five year limit from the date of the misconduct, with OCTC required to bring disciplinary charges within two years of the date it learns of the misconduct. These time limits would be subject to appropriate tolling provisions for conduct that is the subject of court or administrative proceedings.

Uniform Timelines

We think the idea of collapsing all timelines for various State Bar Court proceedings into three basic timelines has merit and we support this concept.

Default

Under current Rule 205, a respondent who defaults in a disciplinary proceeding is placed on inactive status until making a successful motion to be placed on active status. The Court indicated in our meeting that this seldom happens. As a direct result, the Court's workload increases when subsequent discipline proceedings, stemming from either the pending matter (e.g., failing to comply with probation conditions ordered as part of the discipline imposed) or as a result of charges of separate misconduct by the same respondent filed by the Office of Chief Trial Counsel, are instituted.

The consensus of our collective experience is that a respondent who allows a default to be entered against him or her is often someone for whom continuing the practice of law has, for one reason or another, become unimportant in the larger picture of their lives. Many of these people are on a deliberate or unavoidable path to further discipline and ultimate disbarment or resignation. Therefore, it makes sense to conserve resources of all involved to set up a default system that takes this apparent truism into account, and leaves open the possibility for those who truly want to continue to practice to be able to do so. Thus, we offer the following proposal:

1. When the clerk enters the default of a respondent, an order should issue requiring the respondent to comply with Rule 9.20, or some modified version of it, requiring notice to clients, opposing parties, courts.

2. The level of discipline in the default matter should be actual suspension or disbarment depending on the severity of the misconduct. The actual time suspension should be "and until" the respondent complies with Rule 1.4(c)(ii), or a modified version

thereof. The Hearing Department would not initially impose any probation conditions, and all further disciplinary cases should be immediately abated.

3. CSF cases would continue without regard to the abatements of the disciplinary cases.

4. If a 1.4(c)(ii) petition is granted, at that time the Hearing Department would impose probationary conditions, and the abatement of other disciplinary cases would be lifted.

The object of this proposal is to leave the respondent on not entitled to practice status without further time investment by the State Bar and the State Bar Court. For the attorneys who want back in, let them take the laboring oar to show that they are ready, then let the probation conditions fit the situation at that time.

We believe that the foregoing proposal, rather than the mushrooming of discipline charges and drain of resources which often occur after an initial default is entered, would be preferable to the current system.

Mandatory Discovery Exchange

While the Association understands the appeal of a mandatory discovery exchange, we are of the opinion that a much more vigorous enforcement of existing Pretrial rules would limit any surprise element in the litigation process, and would result in more efficient trial procedures. As appealing as mandatory discovery exchange might seem, one party should not be rewarded for its indolence by not taking efforts to properly investigate its case, and then relying on the industriousness of its opponent to do its work for it.

It is our further opinion that a mandatory discovery exchange, unless backed by significant and uniformly enforced sanctions, could be the subject of abuse, and could have the unintended consequences of parties concealing evidence. Any actual proposal involving mandatory discovery exchange would of necessity have to contain a clear time limit as to when material would have to be disclosed. Concomitantly, charges made in an NDC would have to be clear and specific enough to apprise respondent and respondent's counsel of what would be required to be disclosed.

Adoption of APA Evidence Standard

It is not clear to us how this proposal would streamline the State Bar Court's process. Our experience is that relatively little time is spent during a trial dealing with

evidentiary objections. Hearing Department judges have the experience and the present authority to consider whether evidence that is submitted by either party should be considered as reliable, relevant, material and probative. We suspect that the time now spent in evidentiary rulings would change to arguments over whether or not the hearsay is the sort of evidence that is reliable.

Post-trial Briefs

Our view is that the decision to require or not require post-trial briefs should remain within the sound discretion of the hearing judge. Sometimes post-trials briefs are necessary; sometimes they are not. We believe that a reasonable time limit of 30 days following the last day for trial for submission of all briefs would be workable in most cases.

Consecutive Day Trials

We believe that requiring consecutive trial days will result in "trailing" which is impractical in a trial court that covers a vast state with only two venues. The practical effect will require continuances in some other, already scheduled cases, and will inevitably favor long trials over "short cause" (those requiring two days or less to try) cases. Requiring consecutive trial days would only be practical if a separate "short cause" calendar is assigned to one hearing judge in each venue.

Limit Timing and Length of Briefs

We support shortening the timeline of filing the opening brief on appeal from 45 to 30 days so long as appropriate relief is available where the complexity of the matter demands more time. We think the Court should adopt the page limits contained in rule 8.204(1) and (2), Cal. Rules of Court (14,000 words if prepared by word processing, 50 pages if produced on a typewriter.

Modify Standard of Review

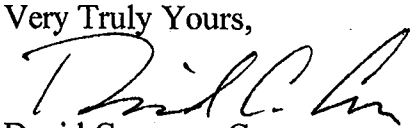
This is a proposal that should be submitted first to the Supreme Court. A modified standard of review might impact the workload of the Supreme Court. While looking forward to commenting on the actual proposal for a modification of the standard of review, the Association wishes to share its general thoughts on the subject in advance of its dissemination. In actions brought in Superior Court to review the determinations of administrative agencies pursuant to Code of Civil Procedure § 1094.5 (administrative or "certiorarified" mandamus), the California Supreme Court has held that where the decision of an agency at issue "substantially affects a fundamental vested right," the Court

must in such situations "exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence." Strumsky v. San Diego Employees Retirement Assn. (1974) 11 Cal.3d 28, 44. Although what constitutes a fundamental vested right is decided on a case by case basis (Bixby v. Pierno (1971) 4 Cal.3d 130, 144), the Strumsky independent judgment test has been regularly applied in cases dealing with both termination and discipline of public employees (See, e.g., Valenzuela v. Board of Civil Service Commissioners (1974) 40 Cal.App. 3d 557; Schmitt v. Rialto (1985) 164 Cal.App.3d 494; Richardson v. Board of Supervisors (1988) 203 Cal.App.3d 486). As the Supreme Court noted (in a case involving the judicial review by administrative mandamus of the revocation of an architect's license), it has "often recognized that an individual, having obtained the license to engage in a particular profession or vocation, has a 'fundamental vested right' to continue in that activity (Citations omitted.) . . .[and] has repeatedly held, with exceptions not pertinent [to the case], that the 'independent judgment' standard of review must be applied to an administrative decision that substantially affects such fundamental vested right." Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 788-789. See also Griffiths v. Superior Court (2002) 96 Cal.App.4th 757, 767.

Attorneys, like other professional licensees in California, have a fundamental vested right to continue to practice their profession (see In re Rose (2000) 22 Cal.4th 430, 456). The Association therefore concludes that any review of actions of the Hearing Department which affect that fundamental vested should be, at a minimum, subject to the Strumsky test: that is, to be upheld, the findings of fact of the Hearing Department must be supported by the weight of the evidence after independent review by the Review Department.

Once again, we appreciate the opportunity to be a part of this important process, and look forward to providing additional and further input on these and future proposals.

Very Truly Yours,



David Cameron Carr

cc: Russell Weiner (via email)

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May 4, 2010

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AND FIRST-CLASS MAIL

Colin Wong
State Bar Court
180 Howard Street
San Francisco, California 94105

Re: Comment on Proposed Changes to Rules of Procedure of the State Bar of California

Dear Mr. Wong:

Please allow this letter to serve as Pansky Markle Ham LLP's preliminary comment on the various concepts under consideration intended to effect a streamlining of the State Bar discipline process, which was a topic of the public comment meetings held in Los Angeles and San Francisco earlier this year.

Alternative Dispute Resolution

The discipline system would benefit from a more robust settlement mechanism. Prompt settlement of cases is an efficient and effective way to resolve State Bar complaints. An effective settlement process requires all parties to reasonably evaluate cases and to accept the assistance of experienced settlement officers regarding the evaluation and disposition of matters. In addition, meaningful settlement conferences require that parties with decision-making authority participate directly in the settlement process. When representatives appear at a settlement conference with set settlement instructions from non-participating superiors, it is difficult, if not impossible, to reach a satisfactory settlement of a case since the ultimate decision-maker is divorced from the settlement evaluation process, which often includes a detailed and careful examination of the strengths and weaknesses of the evidence and claims.

In the three decades this office has been involved in the California disciplinary process, only in the last five years has it been necessary to try as many case as we have done, in response to the failure of the settlement process. Moreover, in that time, we have found that in the substantial majority of the cases taken to trial, the ultimate disposition has been better than the settlement demand that was offered to the respondent early in the case.

Ellen A. Pansky
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R. Gerald Markle (1950-2004)

James I. Ham
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Limitations Period

Rule 51 should be modified to impose a reasonable and more definite period of limitations. The goal of public protection is not furthered and the resources of the State Bar are not utilized effectively when the Office of Chief Trial Counsel is required to pursue stale matters where there is no public protection issue. Among other things, the State Bar should be required to file formal disciplinary actions within five years of the alleged wrongdoing, except where fraud, concealment, misappropriation of trust funds or property, or other serious extenuating circumstances are shown.

Uniform Timelines

The concept of collapsing timelines for various State Bar Court proceedings into three basic timelines has some merit, and the details should be explored further.

Mandatory Discovery Exchange

The current rules permit discovery within a limited, 120 day period prior to trial. In the typical case, a voluntary exchange of discovery occurs, although in some cases additional discovery or follow up may be appropriate. It is not clear how, or in what way, a mandatory discovery exchange would expedite or streamline the process in a meaningful way.

Additionally, there are real and serious practical problems associated with the concept of a mandatory discovery exchange. For example, would such a requirement conflict with the lawyer's statutory right to assert constitutional and statutory privileges? *See, e.g.*, Cal. Bus. & Prof. Code § 6079.4. Also, as a practical matter, interpreting the breadth of a party's duty to engage in a mandatory discovery exchange will likely be complicated by numerous ambiguities relating to the scope of required compliance: what materials would be potentially responsive, and which materials would not be responsive? When the State Bar brings multiple charges with broad allegations, the burden of complying with a mandatory discovery exchange could be overwhelmingly burdensome or result in an expensive and time consuming process of producing thousands of pages of ultimately irrelevant and useless material. Who will be required to pay for the copying of voluminous documents that are arguably responsive to the scope of a Notice of Disciplinary Charges?

A mandatory discovery exchange also needs to be accompanied by significant and uniformly enforced sanctions as to all participants, and the exchange needs to be verified. There must be a mechanism for testing the completeness of the mandatory exchange, and procedures for the disclosure and examination of any claims of privilege.

With respect to other discovery matters, we believe it would make sense to limit depositions and provide that depositions are permissible only upon good cause shown to the Court. In the past five years, the Office of Chief Trial Counsel has engaged in the routine scheduling of depositions, including depositions of attorney respondents who in virtually all cases have already provided a written explanation that constitutes an admission. Depositions should be the exception, not the rule.

In light of the fact State Bar rules already contain a highly compressed discovery period and procedures already exist allowing both parties to seek and obtain relevant and needed discovery, we question whether a generalized mandatory discovery exchange would assist in streamlining the disciplinary process or result in a savings of time or expense.

Adoption of APA Standard of Review

It is not clear how changing the standard of review would streamline the disciplinary process. The current standard of review calls for the Review Department to give deference to the Hearing Department's credibility determinations and to review the application of the law to the facts *de novo*. This standard follows the traditional rule applicable to the respective roles of trial and appellate courts, and is fair and reasonable. After giving consideration to other standards of review, we are not convinced that an alternative standard would be an improvement or result in any streamlining of the disciplinary process. Should the Court issue a proposal in this regard, we would appreciate an opportunity to review and provide comment on the details of the proposal.

Post-Trial Briefs

The decision to require or not require post-trial briefs should remain within the sound discretion of the hearing judge, and is a decision to be made based on the complexity of the case and the need for additional briefing based on the evidence and issues actually presented at trial. Post-trial briefs are not always necessary, but where the evidence actually introduced differs significantly from the charges, or new or unexpected legal or factual issues arise, post trial briefs are appropriate. A blanket rule prohibiting post-trial briefing would not be prudent or fair to the litigants. However, to avoid unnecessary delay, the Rules could be modified to require that any post-trial briefing be completed within 30 days following the last day of trial unless the Court determines that good cause exists to extend that deadline.

Consecutive Trial Days

We agree with the Association of Discipline Defense Counsel that requiring consecutive trial days would be problematic and impractical. Such a system would likely favor "long cause" trials over shorter trials, and result in considerable calendar disruptions. Cases would likely begin to "trail" or continuances would be required in order to keep the court's calendar moving.

A rule providing that cases should be tried on consecutive trial days except where the schedule of the Court or the parties reflects good cause to schedule the trial otherwise would set forth a default preference for the trial of cases, and would be a reasonable incremental step that would encourage the prompt conclusion of trials once they begin.

Timing and Length of Briefs

The current 45 day period for the filing of an opening brief on appeal is reasonable in light of the considerable work that is required to review a trial record and present appropriate appellate argument. A shorter time period could lead to unfairness and unnecessary motions for additional time. A reasonable page limit, such as 40 pages, would be appropriate, subject to a party seeking relief to file an over length brief based on the particular case.

Independent Probable Cause Determination

Prior to the adoption of the current full-time professional State Bar Court system, the California State Bar utilized volunteer referees to conduct preliminary hearings. The referee approved the charges to be brought before the notice of disciplinary charges was filed. This interim step assured the respondent of an independent gatekeeper, who would evaluate whether probable cause existed for each potential charge. Currently, OCTC makes a unilateral decision to file, including the number of counts and the charging of Business & Professions Code Section 6106 (moral turpitude). Notably, the ABA Model Rules for Lawyer Disciplinary Enforcement (Rule 11(B)(3)) provides that disciplinary counsel make recommendations to a chair of a disciplinary board, who may "approve, disapprove or modify the recommendation ... ." A copy of Rule 11(B)(3) is attached for your convenient reference.

The California State Bar Court currently has in operation an Early Neutral Evaluation Conference ("ENEC") procedure, in which a different State Bar Court judge than the trial judge hears the proposed charges and (if the procedure works as intended) attempts to assist the parties to reach a pre-filing settlement. This procedure could very easily be adapted, so that the judge, and not the disciplinary prosecutor acting unilaterally, approves the charges to be included in a Notice of Disciplinary Charges. This would add a necessary element of fairness into the process, which is especially important given that unproven disciplinary charges are now posted on each lawyer's public electronic membership page on the State Bar's website.

We appreciate the opportunity to comment and we hope you find these comments useful in your evaluation and review of State Bar Court processes.

Sincerely yours,

James I. Ham
for
PANSKY MARKLE HAM LLP

dishonest or selfish motive; a pattern of misconduct; multiple offenses; bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; submission of false evidence, false statements or other deceptive practices during disciplinary process; refusal to acknowledge wrongful nature of conduct; vulnerability of victim; substantial experience in the practice of law; and indifference to making restitution. Mitigating factors include: absence of prior disciplinary record, absence of dishonest or selfish motive; personal or emotional problems; timely good faith effort to make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; inexperience in the practice of law; character or reputation; physical or mental disability or impairment; delay in disciplinary proceedings; interim rehabilitation; imposition of other penalties or sanctions; remorse; and remoteness of prior offenses. The Standards for Imposing Lawyer Sanctions set forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. Use of the Standards will help achieve the degree of consistency in the imposition of lawyer discipline necessary for fairness to the public and the bar.

Ultimate disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.

The purposes of lawyer sanctions can best be served, and the consistency of those sanctions enhanced, if courts and disciplinary agencies articulate the reasons for the sanctions imposed. Courts perform a valuable service for the legal profession and the public when they issue opinions in lawyer discipline cases that explain the imposition of a specific sanction. Written opinions of the court not only serve to educate members of the profession about ethical behavior, but also provide precedent for subsequent cases.

II. PROCEDURE FOR DISCIPLINARY PROCEEDINGS

RULE 11. GENERALLY.

A. Evaluation. The disciplinary counsel shall evaluate all information coming to his or her attention by complaint or from other sources alleging lawyer misconduct or incapacity. If the lawyer is not subject to the jurisdiction of the court, the matter shall be referred to the appropriate entity in any jurisdiction in which the lawyer is admitted. If the information, if true, would not constitute misconduct or incapacity, the matter may be referred to the central intake office, or to any of the component agencies of the comprehensive system of lawyer regulation established by Rule 1, or dismissed. If the lawyer is subject to the jurisdiction of the court and

the information alleges facts which, if true, would constitute misconduct or incapacity, disciplinary counsel shall conduct an investigation.

Upon the conclusion of an investigation, disciplinary counsel may:

(a) dismiss;

(b) refer respondent, in a matter involving lesser misconduct, to the Alternatives to Discipline Program, pursuant to Rule 11(G); or

(c) recommend probation, admonition, the filing of formal charges, the petitioning for transfer to disability inactive status, or a stay.

B. Investigation.

(1) All investigations shall be conducted by disciplinary counsel. Upon the conclusion of an investigation, disciplinary counsel may:

(a) dismiss;

(b) refer respondent, in a matter involving lesser misconduct, to the Alternatives to Discipline Program, pursuant to Rule 11(G); or

(c) recommend probation, admonition, the filing of formal charges, the petitioning for transfer to disability inactive status, or a stay.

(2) Notice to Respondent. Disciplinary counsel shall not recommend a disposition other than dismissal or stay without first notifying the respondent in writing of the substance of the matter and affording him or her an opportunity to be heard. Notice to the respondent at his or her last known address is sufficient.

(3) Disciplinary counsel's recommended disposition shall not be subject to review upon the respondent's request for review. Disciplinary counsel's recommended disposition other than a dismissal or a referral to the Alternatives to Discipline Program shall be reviewed by the chair of a hearing committee selected in order from the roster established by the board. The complainant shall be notified of the disposition of a matter following investigation. The complainant may file a written request for review of counsel's dismissal within [thirty] days of receipt of notice of disposition pursuant to Rule 4(B)(6)(c). Disciplinary counsel's dismissal shall be reviewed by the chair upon the complainant's request for review. The chair may approve, disapprove, or modify the recommendation or appealed dismissal. Disciplinary counsel may appeal a decision to disapprove or modify his or her recommendation to a reviewing chair of a second hearing committee also selected in order from the roster established by the board who shall approve either disciplinary counsel's recommendation or the action of the first reviewer, but the decision of the second reviewing chair shall not be appealable. Any hearing committee whose chair reviews a recommendation of disciplinary counsel is disqualified from participating in further consideration of the matter.

C. Admonition or Probation — Imposition.

(1) If a matter is recommended to be concluded by admonition or by probation, disciplinary counsel shall notify the respondent in writing of the proposed disposition and of the right to demand in writing within [fourteen] days that the matter be disposed of by a formal proceeding. Failure of the respon-