

Mark Neary, Clerk of the Supreme Court  
Comments (ABA Report on NJ Lawyer Disciplinary System)  
Hughes Justice Complex  
PO Box 970  
Trenton, NJ 08625

**Re:ABA Report on New Jersey's Lawyer Disciplinary  
System**

Dear Mr. Neary:

The New Jersey State Bar Association's Board of Trustees has considered the American Bar Association committee report on New Jersey's lawyer disciplinary system, and hereby respectfully submits its comments to the Supreme Court.

The NJSBA opposes the ABA's recommendations to phase out the role of District Ethics Committees (DECs) in the initial intake, investigation and prosecution of ethics grievances, and also opposes the recommendation to centralize those functions in the Office of Attorney Ethics (OAE). The NJSBA agrees that separating the investigation/prosecution and hearing functions merits further consideration by the Court. The NJSBA endorses the ABA committee's recommendation of more flexibility in the range of sanctions and diversionary options available, before and after the initiation of formal proceedings, and supports greater community outreach and public awareness of how our lawyer disciplinary system operates.

Interestingly, the ABA report paints a generally favorable picture of the disciplinary system that belies its sweeping recommendations on centralization of the system. For instance, the report on pages 9-11 states:

- "Timeliness goals are carefully articulated and enforced"
- The Disciplinary Oversight Committee "works to ensure that the discipline system operates effectively and efficiently"
- "The team was advised by interviewees, including complainants, that the New Jersey discipline system generally functions well"
- "New Jersey is justifiably proud of the many volunteers who assist in the discipline system...The team was particularly

impressed by the dedication of the volunteers in the District Ethics Committee network"

Regarding the scope of the ABA committee's inquiry, we note that although the report refers to a 1982 ABA report on New Jersey's system, it does not specifically mention the most important background documents: the 1993 report of the New Jersey Ethics Commission (better known as the Michels Commission, after its Chair, Judge Herman Michels), the bar responses to the report, the transcripts from the Supreme Court's public hearing on the report, and the Court's final determinations. The latter served as the basis for the current disciplinary structure, which utilizes OAE central staff and hundreds of lawyer and lay volunteers on the DEC's to comprise what we regard as a successful system that well serves the public and the bar.

### **Response to Specific ABA Recommendations**

The NJSBA response to each of the ABA's 13 recommendations, grouping some together where the subject matter was related, is set forth below.

#### **1. The Court Should Create a Central Intake System for Lawyer Grievances**

The ABA report recommends eliminating the role of DEC's and their secretaries in the initial intake and docketing of ethics grievances, and centralizing the process in the OAE, so that all public contact with grievants and respondents would be done by OAE staff. The NJSBA strongly opposes this recommendation, which we regard as a solution in search of a problem. To begin with, we reject the premise that there are significant disparities in treatment from one DEC to another. The ABA cites no specific evidence to support its position, and our members' own experience serving on DEC's throughout the State suggests otherwise.

Unlike the ABA committee, we regard decentralization of the initial intake process as a strength of our disciplinary system, not a weakness. The Supreme Court agreed in 1994 when it rejected the Michels Commission recommendations for a centralized disciplinary system in favor of retaining the DEC's. No solid reasons have been submitted that should persuade the Court to reverse course.

We conclude that DEC secretaries are experienced "real world" practitioners, well aware of accepted practices and client expectations in the local legal community. OAE provides training to DEC secretaries and in our experience, the secretaries take their

responsibilities seriously. Since all grievances filed in a particular jurisdiction flow through their offices, typically over a long period of time, they often serve as a valuable "institutional memory." Geographic location is somewhat less significant in the digital age, but the presence of DEC secretaries' offices in the communities they serve promotes greater accessibility and transparency, or at least the appearance of it which is just as important.

The NJSBA holds OAE and its dedicated staff in high regard, and agrees that, in certain complex or high profile cases, it may be more appropriate for OAE to handle the initial intake. However, we dispute the notion that the career prosecutors and staff of OAE are better positioned to achieve public confidence in the lawyer disciplinary system initial intake stage as a general proposition, and do not favor wholesale displacement of the DECs and their secretaries.

## **2. The OAE Should Handle All Investigations and Prosecutions for Alleged Misconduct**

The NJSBA rejects the ABA committee's position that the role of DECs in the investigation and prosecution of ethics grievances should be phased out "to reflect national practice"(report, p.23).The adoption of this recommendation, coupled with a central intake system, would eliminate from the system hundreds of dedicated lawyer and lay volunteers who are now members of DECs.

While we do support certain changes discussed below, we are unaware of any widespread public dissatisfaction with our current system, and the extraordinary expense of additional staffing for the OAE to undertake this responsibility is unwarranted, given the absence of any discernible problem. We note that the OAE already assumes responsibility for many cases involving unusual sensitivity or complexity. Where there is a perception of bias or favoritism, a matter already can be reassigned entirely to another DEC, or to a special master. We are satisfied that giving the OAE statewide responsibility for investigation and prosecution of all ethics grievances is unnecessary and will place a huge financial burden on the backs of the lawyers who pay for the operation of the disciplinary system.

The ABA committee report contends that "the backlog of cases at the DEC level continues to plague the system" (report, p.25) but cites now outdated statistics. The latest Annual Report of the OAE indicates

that the time to dispose of a disciplinary case has dropped from 406 days in 2008 to 327 days in 2010.

The monthly Statewide Ethics Caseload Report of the OAE provides a snapshot of the performance of the DEC's and the OAE, even though it does not show the age of cases. These reports show a disciplinary system coping adequately with its caseload. As of August 31, 2011 there were 962 "active" pending cases in the system. At the beginning of 2010 there were 1103 active cases in the system, suggesting that matters are being disposed of efficiently. Also according to OAE reports, during 2010 the DEC's added a total of 849 new cases to their dockets. By the close of 1020 930 cases were terminated, including a mix of new matters and older cases. So, the DEC's were successful in "clearing" their calendar for the year.

If any long term trend is to be discerned from available statistics, it is towards a decrease in caseloads, and not a plague of backlogged matters as contended by the ABA committee.

**3. If DEC Volunteers Continue to Investigate and Prosecute Matters, Increased Separation From Adjudication by Other DEC Members is Needed**

The NJSBA agrees that separation of the investigation/prosecution and hearing functions does warrant serious consideration by the Court, although such a change may cause logistical problems for DEC's. DEC members work closely throughout the year, often trading roles as investigator, prosecutor and hearing panel member. They usually practice in the same county, and often have social or business ties. We appreciate that a grievant, or a respondent, may view with suspicion the collegiality that often prevails between the prosecutor and hearing panel members, and assigning the hearings to a panel from a different DEC may well allay these concerns. To preserve convenience for the participants, as well as familiarity with local custom and practice, the alternate DEC should be located no more than one county away, or within a county with more than one DEC.

The NJSBA also considered the ABA's recommendation that hearings be held in a "courtroom setting," and not in a DEC member's office. Here again, our members' experience with local ethics hearings has revealed no evidence of grievant discomfort with the location of the hearings. The scheduling of hearings at an attorney's office also may be more convenient to the grievant and other participants in terms of parking, and access to photocopiers and other office equipment if needed.

**4. The Court Should Streamline the Disciplinary Review Board Process**

This recommendation is, in part, triggered by what the ABA committee characterizes as "the inconsistency and incomplete nature of volunteer driven work product" from the DEC's (report, p.29-30). We suggest that this problem be addressed by the OAE and DRB instructing the DEC's on the proper ways to submit reports and providing necessary oversight.

The NJSBA also suggests another way for the DRB to operate more efficiently. The 2009 Annual Report of the DRB indicates that until 2003 staff counsel prepared memoranda in "serious" cases, motions for consent to discipline, and matters with novel legal issues. Since 2003, however, staff prepares "in-depth memoranda" on all matters considered by the Board. According to the 2009 report, half of the matters considered by the DRB were grievant appeals, many of which were fee disputes. The NJSBA therefore questions whether staff counsel are being used in the most efficient manner, and that the Board should consider reverting to the pre-2003 policy as a means of reducing workload stress on its staff, and allowing more attention to be paid to the most serious matters coming before the Board.

**5. The Court Should Encourage the Policy Setting-Role of the Disciplinary Oversight Committee**

The ABA committee believes the Disciplinary Oversight Committee (DOC) should undertake a "policy setting role." Rule 1:20B establishes the DOC as an advisory body that assists the Supreme Court in administering the disciplinary system, most notably its financial operations. We fail to see a reason for altering the DOC's role, which it performs very well.

This recommendation also refers to the presence of an NJSBA officer on the DOC as somehow amounting to bar intrusion on the independence of the DOC. An NJSBA officer does sit on the DOC, but his membership predates his becoming an officer. Rule 1:20B provides the NJSBA with a seat on the DOC and we see no reason to change this policy. A number of lawyers sit on the DOC, as is entirely appropriate due to the fact that the bar funds the disciplinary system and should have an oversight role in its administration and finances.

**6. The Court and the DOC Should Ensure Adequate Funding Necessary to Centralize the System**

For the reasons already expressed, the Committee rejects the position that the disciplinary system should be centralized as suggested by the ABA committee. We are satisfied that the added

expense to assume the additional duties recommended by the ABA would be staggering. The ABA's suggestion that centralization could be accomplished with as little as a \$60 increase to the current \$140 disciplinary system fee is highly suspect. The bar can and should provide financial support for regulation of the profession, but the additional expense involved here cannot be justified given the absence of a problem needing solving.

The ABA committee report suggests that a central intake system "may" require additional staffing, but that much of the work can be done by existing staff that now assists and monitors the DEC's. This conclusion is highly speculative. If all public inquiries are to be handled by a central office it seems inconceivable that current staff could handle the workload. According to the OAE Annual Report for 2010 the DEC's are currently supported by a "District Group" consisting of four persons. If central intake were to be implemented there will no doubt be thousands of telephone inquiries annually and a significant amount of correspondence and grievant complaints to deal with. A very substantial increase in staff will be needed to cope with this workload.

The DEC's now investigate and prosecute about half of the disciplinary system caseload. Even though the OAE now handles many of the most complex cases, if the DEC role is eliminated an enormous burden will be shifted to the OAE and the hiring of additional professional staff will be inevitable. The OAE budget will increase dramatically, the only question is how much, with members of the bar picking up the tab.

One recommendation we agree with is the use of the "reserve" of funds maintained by the DOC. We understand that it is now approximately \$3 million. Some portion of the reserve should be used to pay for a portion of the disciplinary system, or be allocated to reducing the annual assessment paid by members of the bar.

7. **The Court Should Expand and Promote Alternatives to Discipline Programs for Minor Misconduct**
8. **Discipline on Consent Should Be Encouraged at All Stages of the Proceedings**
9. **The Court Should Adopt Probation as a Sanction**
10. **The Court Should Eliminate Indeterminate Suspensions**

The NJSBA Board of Trustees discussed these recommendations together, and wholeheartedly agrees that DEC's, the DRB and the Court should have available to them the widest range of options possible to tailor a result to the circumstances at hand. There should be more flexibility to address instances of minor misconduct through non-disciplinary diversion, such as training in law office management or the specific ethical precepts implicated by the attorney's behavior. We can conceive of no reason why discipline on consent should not be permitted at any stage of the proceedings. There are arbitrary timelines and procedural barriers presently in place that serve no useful purpose, and should be eliminated.

The NJSBA cannot support the elimination of indeterminate suspensions at this point. This sanction was adopted by the Court in response to an NJSBA recommendation in 2001 to abolish permanent disbarment, but has never been imposed so far as we are aware. The NJSBA remains persuaded that permanent disbarment should be reexamined by the Court but, in the meanwhile, urges retention of indeterminate suspensions as an option until there is a base of experience from which to judge its usefulness.

**11. Disciplinary Decision Makers Should Consider Using the ABA Standards for Imposing Lawyer Sanctions**

The NJSBA agrees that the ABA Standards may offer a useful frame of reference for imposing sanctions. We encourage DEC's to familiarize themselves with the various sanctioning factors adopted by the ABA, and to apply them when appropriate. However, we do not support formal adoption of the ABA Standards as binding authority in New Jersey, where there is already a well-established body of case law from the Court, the DRB and our advisory committees to guide disciplinary authorities in fashioning appropriate sanctions.

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

**13. The Court Should Increase Education of the Bar and the Public regarding Law Discipline**

The NJSBA agrees that our lawyer disciplinary system should be accessible to the public, and that greater effort should be devoted to increasing public awareness of how our system works. Were the OAE to assume the responsibilities suggested by the ABA, we might be inclined to agree that it should take a leading role in that regard. However, for the reasons already stated, we favor the decentralized model currently in place, and believe that the Judiciary's increasingly

user-friendly website, and educational programs, perhaps sponsored by the New Jersey State Bar Foundation and the organized bar, are the most appropriate vehicles for reaching out to the public.

In conclusion, while the NJSBA supports some of the recommendations made by the ABA committee, we oppose strongly the recommendations relating to centralized intake, and the expansion of the OAE to handle all investigations and prosecutions. The implementation of these particular recommendations may serve to fit New Jersey into a national model conceived by the ABA, but the result will be costly, inefficient, and will ill serve the public and the bar.

I thank the Supreme Court for permitting bar comment on the ABA committee report. If you need additional information on any point raised above please do not hesitate to contact me.

Very truly yours,

Susan A. Feeney  
President

c: NJSBA Board of Trustees  
Angela C. Scheck