

Lawyer Discipline

BY TIM EIGO

“Look to Colorado.”

So ordered the Arizona Supreme Court last July, when it launched a focused initiative to examine and change how lawyers are disciplined in Arizona. Proposals—likely to be adopted by the Court—are largely drawn from the lessons and system of the state of Colorado, and they are open to public comment now through April 1.

That comment will be in regard to a rule-change petition filed by the Attorney Discipline Task Force, launched as part of the Court’s Administrative Order No. 2009-73 (see sidebar on p. 14 for the list of task force members). And the rule changes would alter the discipline process in significant ways (see page 13 for a flow chart of the current and proposed systems).

Proponents argue that the current system is a good one, but that changes are needed to improve its quality and timeliness. To do that, said Dave Byers, task force chair and Director of the Administrative Office of the Courts, the group looked at Colorado, “the best in breed.”

This article sets out some of the most pertinent proposals included in the petition.

Goals

The petition to amend the rules states:

The Task Force was specifically directed to include in its review the best practices currently being used in the Colorado attorney discipline system and to examine methods that would maintain due process and at the same time reduce the time and cost to process a case, particularly those cases that proceed to formal complaints.

Supreme Court Order No. 2009-73 directed the task force to integrate at least 14 of Colorado’s “best practices” (see Appendix A, Administrative Order No. 2009-73). They include changes to the complaint intake system, such as the authority to dismiss matters if there is no misconduct; creation of an Office of



Changes Proposed



the Presiding Disciplinary Judge, which would essentially step into the current role of the hearing officer; and steps to get the complainant and the respondent involved in the process earlier.

Advocates say that, taken together, the proposals will provide:

- Early and additional due process
- Additional contact with respondent and complainant
- Shorter time to resolution, especially for formal cases
- Predictability
- Reduced cost

Proposed Changes

The attorney discipline system is slated to change from beginning to end. Here are a few of the current features, as well as proposals for change:

Intake and Investigation

Currently, Bar counsel review complaints and launch the discipline process. That approach would remain, with significant changes in focus.

The proposals do all they can to reduce the time needed for resolution, and even to reduce the number of cases that require investigation. They seek to streamline the intake process and to focus on resolution from the outset. Bar counsel would be permitted to review information they receive “in any form”—unlike the current system, in which a written complaint must be received.

Changes also would require Bar counsel to provide early and detailed communication with the respondent and the complainant. At the time of disposition, the complainant would receive a detailed written explanation of the dismissal.

Proponents say that these changes would allow Bar counsel to spend more time and resources on the most serious matters. According to the petition:

The proposal attempts to encourage early resolution of cases, before they reach the formal complaint stage. Among other things, the rules permit bar counsel to refer matters to diversion prior to formal investigation and give [B]ar counsel additional discretionary authority to dismiss the charges, with or without comment, in appropriate cases. ... The Task Force anticipates these provisions, which reflect the Colorado approach, will permit early resolution in appropriate cases in which [B]ar counsel believes an alternative, such as dismissal with comment or diversion, will suffice to protect the public and to insure compliance by the lawyer.

From the receipt of a complaint, Bar counsel in the new regime must obtain a probable-cause determination within eight months.

Probable Cause

Currently, Bar counsel present matters to a probable cause panelist, who determines if the case should proceed. The panelist is a sitting member of the State Bar Board of Governors (the President-Elect).

Rather than one individual making that decision, the proposed system would assign that duty to an independent committee, called the “Attorney Regulation Committee,” with members—six attorneys and three public member—appointed by the Supreme Court. The committee would accept input from the complainant and the respondent, and it could impose informal discipline. The committee also would review any objection that a complainant made to Bar counsel’s dismissal of charges. In fact, the committee would review any Bar counsel recommendation other than dismissal or referral to diversion after an investigation.

If agreement for formal sanction is reached in a case, the matter may bypass the proposed Attorney Regulation Committee and proceed directly to the hearing stage.

The petition states that creation of the committee “not only makes the probable cause determination independent of the [S]tate [B]ar, but it brings public input into the process at an earlier stage.” The petition adds, “The meetings of [committee] are not open to respondent, respondent’s counsel, or the public; however, the respondent is permitted to provide a written statement.”

According to task force member Scott Rhodes, the proposed system will be an improvement for the public, complainants and respondents, all of whom will be brought in “earlier and throughout the process.” He adds that the results will be “faster and more clearly explained.”

The Hearing

It is at this stage that some of the most distinct differences emerge. The proposed approach contemplates two paths—one for cases in which there is agreement, and another for cases that are contested. The proposal contemplates that the majority of formal cases will be resolved via agreements.

Currently, following the probable-cause stage, a formal complaint is filed with the Disciplinary Clerk of the Supreme Court. The matter then goes before a paid or voluntary hearing officer, who recommends a sanction. Later, the Disciplinary Commission reviews the matter and renders its recommendation. Review by the Supreme Court is discretionary, but all formal sanctions must be ordered by the Court.

In the proposal, though, in non-contested matters a full-time Presiding Disciplinary Judge (PDJ) would perform many of those same duties. The PDJ (who must have been an active or judicial member of the Bar for at least five years) would be appointed by the Supreme Court to this paid position. According to the petition, he or she would be charged with “maintaining and supervising a central office in which disciplinary and disability proceedings are conducted.” The PDJ would rule on motions or pre-trial matters, decide questions of law, and preside over matters that come to the PDJ’s office via agreement.

The PDJ also would preside over “at-issues conferences,” where parties discuss potential settlement and related issues such as motions, discovery and hearing dates. The PDJ would issue the final order in cases resolved via agreement, and appoint counsel for conflict cases (*i.e.*, cases in which a Bar counsel or member of

CURRENT SYSTEM



PROPOSED SYSTEM



the State Bar Board of Governors is the respondent).

Contested cases would be handled differently. They would be heard by a three-person panel, comprised of the PDJ, a volunteer attorney and a volunteer public member. A strike of the PDJ could be for cause only. The hearing would be digitally recorded (transcripts would be prepared only when needed), and the panel would issue its decision within 30 days. Hearing panels would have statewide jurisdiction over proceedings on complaints of misconduct and applications for reinstatement.

Proportionality arguments would be eliminated. Instead, sanctions would be imposed pursuant to the American Bar Association

guidelines. Mitigating and aggravating evidence could be presented.

The three-person panel would have the authority to impose all sanctions, including disbarment. All decisions of the panel would be final, except that parties could appeal. Thus, unlike the current process in which decisions of the Disciplinary Commission are recommendations, the decisions of the PDJ (in matters in agreement) and the panel (in contested hearings) are final unless the parties appeal. As the petition says, “The proposal eliminates the intermediate review and recommendation function of the Disciplinary Commission, replacing it with a direct appeal right to the Court.”

In addition, as a “safety valve,” the Court would be author-



ROLLING OUT NEW DISCIPLINE RULES

- Supreme Courts forms Task Force: July 1, 2009
- Rule petition filed: December 28, 2009
- Public comment: Through April 1, 2010
- Task force meeting and revisions: April 6, 2010
- Additional comments: July 1, 2010
- Supreme Court Rules Agenda: September 2010
- Transition begins: October 2010
- New rules effective: January 2011



MORE INFORMATION

- <http://supreme.state.az.us/dc/AttorneyDisciplineTaskforce.htm>
- ADTF@courts.az.gov
- Learn about the proposed changes via State Bar podcast: www.myazbar.org

READ AND COMMENT

Find the petition online and post your own comment:

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- Go to <http://supreme.state.az.us/rules>
 - Click on “Court Rules Forum.”
 - Click on “View or File Rule Change Petitions and Comments”
 - Click on R-09-0044.

TASK FORCE MEMBERS

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- **Chair, Dave Byers**
Director, Administrative Office of the Courts
 - **Vice Chair, Nancy Swetnam**
Certification and Licensing Division, Administrative Office of the Courts
 - **Alan Bayham**, State Bar of Arizona Probable Cause Panelist and Board of Governors Representative
 - **Don Carson**, Public Member
 - **Hon. H. Jeffrey Coker**
Arizona Supreme Court Hearing Officer Representative
 - **Jeffrey Messing**
Arizona Supreme Court Disciplinary Commission Representative
 - **J. Scott Rhodes**
Respondent's Counsel Representative
 - **Maret Vessella**
Chief Bar Counsel, State Bar of Arizona

ized, in its discretion, to review any decision of a hearing panel or of the PDJ.

The Appeal

Currently, one could say that appeal is automatic, given that decisions of the Disciplinary Commission are essentially recommendations to the Supreme Court.

Proposed changes would eliminate the intermediate appeal from the hearing officer to the Disciplinary Commission, as well as the automatic review by the Supreme Court. Either party to the panels' decision may appeal to the Supreme Court, which may review the decision in its discretion.

The Supreme Court would be able to increase, reduce or modify sanctions. The Court may choose to write an opinion in each case, but would not be required to do so.

What's Made Public

The task force addressed the question of what part or parts of the attorney discipline system should be made public. It determined that “public” information (anything made available to members of the public who visit the Bar offices to view files) should be identi-

cal to “published” information (including information published on the State Bar Web site). Thus, dismissed complaints and diversion should not be public. But informal reprimands with probation, as well as all other sanctions, should be public and published.

According to the petition, “To avoid public misperception and to facilitate early resolution, cases resulting in dismissals or referrals to diversion would not become public.” The majority of the task force members (with the sole public member dissenting) believed that no purpose was served by maintaining as public diversions or dismissals.

Comment

Dave Byers, task force chair, acknowledges that changes to lawyer discipline can cause anxiety. But he is confident that Arizona lawyers will come to appreciate a system that he says has served Colorado well.

“Colorado [lawyers] would fight if someone tried to take their system away.”

At the request of the task force, the Supreme Court adopted an abbreviated public comment period for the proposals. Comments are due by April 1 (see link above to comment page on the Web). 