

FILED

OCT 1, 1999

SUPREME COURT OF WISCONSIN

Marilyn L. Graves
Clerk of Supreme Court
Madison, WI

In the Matter of the Review of the
Lawyer Disciplinary System

ORDER
Requesting Further
Comment on Structure
of Lawyer Discipline
System

No. 99-03

On April 28, 1999, the court determined it advisable to initiate a comprehensive review of the structure of the lawyer disciplinary system in Wisconsin, including the structure of its Board of Attorney's Professional Responsibility (Board), the Board's administrative committee, Board staff, and the district professional responsibility committees, and scheduled a public hearing in the matter. The court invited numerous institutions, interested individuals, and the public to review the operation of the lawyer discipline system in Wisconsin and make recommendations for its improvement.

At the public hearing held September 14, 1999, the court considered the preliminary draft report of American Bar Association's Standing Committee on Professional Discipline and submissions from the Board, its administrator, its staff, the

State Bar BAPR Study Committee, Marquette University Law School, University of Wisconsin Law School and, numerous others who addressed the matter in person and in writing.

On the following day, the court held an open rule-making conference and discussed the issues raised in the matter. The court neither accepted nor rejected any of the various proposals, in whole or in part, and did not endorse the current discipline system. The court did, however, in an effort to clarify the problems with the current system and identify potential solutions, focus on the four major functions of the lawyer regulation and discipline system: 1) receipt and investigation of misconduct allegations; 2) preliminary adjudication (resulting in a determination of whether to seek discipline); 3) formal adjudication; and 4) administrative oversight. The important attributes of these discrete functions are independence, accountability, and integrity. The goal is to provide a reliable, efficient, fair and impartial lawyer discipline system throughout the state, one that is credible and serves the interests of the legal system and the public it serves.

The court determined at the conference to seek further comment from interested persons prior to making any changes in the structure of the lawyer discipline system.

Principles.

At the conference, the court agreed on the following principles governing the lawyer regulation and discipline system:

1. The Supreme Court is the ultimate authority for the regulation and discipline of attorneys.

2. The person(s) deciding whether discipline should be sought should not direct or control the person(s) investigating misconduct allegations; the investigation of misconduct allegations and the determination to seek discipline are two separate functions. Whether it would be appropriate for the decision maker(s) to ask investigative staff for further investigation and additional information depends on the nature of the decision maker. If the decision maker is the person who will prosecute the matter, akin to a district attorney in respect to a criminal proceeding, the decision maker may ask the investigator for additional information. If the decision maker is a neutral magistrate, akin to a judicial officer determining probable cause in a criminal proceeding, the decision maker will dismiss the matter if the information provided by the investigator is insufficient to warrant a determination to seek discipline; the investigator will have the opportunity to resubmit the matter with additional information.

3. Administrative oversight of the lawyer regulation and discipline system's operation, including the complaint process, timeliness, training, and proposals for modification of the system, is an important function.

4. Formal adjudication (fact finding, legal conclusions, and recommendation for discipline) should be separate from the investigation and decision-to-seek-discipline functions and should be reviewable.

5. Bodies that include nonlawyer members are an important part of the regulation and discipline system.

6. The regulation and discipline system must be fair. It must be neither attorney friendly nor complainant friendly but,

rather, "user" friendly, i.e., accessible and responsive to attorneys and to consumers of legal services.

7. Understanding of and confidence in the regulation and discipline system is essential and depends on the education of the public and the bar in its operation and the ease with which it may be used. Distrust of the system is always to be expected, but the system must in reality provide fair and balanced regulation of the bar in the public interest.

8. Each component of the system has a role to play in the training of the participants in the system as well as in the education of the public and the bar in the operation of the system.

9. Timeliness in the processing of misconduct allegations is important. Where possible, the time required for disposition of misconduct allegations should be reduced.

10. Each component of the system should have input in the system's budget process, but it is the responsibility of administrative staff to prepare an initial budget and submit a final budget for approval and implementation by the court.

11. Pursuant to the court's February 27, 1998 Statement of Principles, Policies and Procedures, the person directing the staff hires and supervises that staff, and the person who directs the staff is hired by the Supreme Court, with the assistance of the Director of State Courts. Issues concerning the performance of the director are to be referred to the Director of State Courts, who reports the matter to the Supreme Court when deemed appropriate.

Request for Further Comment

The court seeks comment in respect to the following:

1. Whether the investigation function should be carried out by central staff alone or with the addition of decentralized bodies.

2. If centralized bodies are to perform the investigative functions now performed by district professional responsibility committees, what are the fiscal implications and impact on the attorney assessments? How should the centralized bodies be composed and selected?

3. Which person or entity should be responsible for directing the prosecution of a disciplinary proceeding? Who is the prosecutor's client? Possibilities include the people of the State of Wisconsin, the person(s) responsible for the investigation, and the person or entity making the decision to seek discipline. Who should have oversight of the prosecution function?

4. Should the person or entity making the determination to seek discipline be a central entity or decentralized entities?

5. Who should perform the administrative oversight of the system? Should it be performed by a separate entity, with input from each component of the system, or by other means? Is it appropriate and advisable to merge the administrative oversight function with the determination to seek discipline function?

6. Is the person or entity determining to seek discipline the one who will prosecute it, akin to a district attorney, or a neutral adjudicator, akin to a preliminary hearing magistrate?

7. How are the various participants in the system selected, by whom (possibilities include the State Bar and the Supreme Court, with or without the assistance of a nominating committee), and according to what criteria?

8. What are the appropriate composition and proportion – lawyers and non-lawyers – of each entity within the system?

9. Whether a decentralized investigating body should conduct investigations of attorneys residing or practicing in the investigating body's locality.

10. What type of formalized training is appropriate for each component's participants?

11. What are appropriate procedures for handling misconduct allegations against current or former participants in the system?

12. Who should impose and collect attorney assessments to fund the system – the State Bar, the Supreme Court, another entity?

13. Comment on any of the proposals that have been proffered and any other matters relating to the lawyer regulation and discipline system.

IT IS ORDERED that comment on the matters set forth herein be filed in writing, with eight copies, with the Clerk of the Supreme Court, 110 East Main Street, Room 215, Madison, WI 53703, on or before January 4, 2000.

IT IS FURTHER ORDERED that the court hold further proceedings in this matter as deemed advisable following its consideration of comment filed pursuant to this order.

Dated at Madison, Wisconsin, this 1st day of October, 1999.

BY THE COURT:

Marilyn L. Graves,
Clerk of Court