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THE FUTURE FOR LAWYER DISCIPLINE

by
Daniel C. Crane, Bar Counsel

The recently released report of the MBA Task Force on Lawyer Discipline calls for reducing the time it takes bar counsel to bring a petition for discipline or close matters under investigation. As the Task Force report acknowledged, I identified delay as the primary problem in bar discipline when I became bar counsel in 1999. Since then, much has been done to address the problem, and much more needs to be done.

First, focusing solely on the pace of disposing of cases overlooks the many things that the Massachusetts disciplinary system does right. In 2002, Halt, Inc., a consumer legal reform organization, awarded the Massachusetts Board of Bar Overseers and Office of the Bar Counsel the highest overall grade of any lawyer disciplinary system in the nation, even with the delays in case processing. The Halt award specifically recognized Massachusetts for responsiveness to client concerns.

Second, what has been done about delay? Since 1999, the Office of Bar Counsel has established an Attorney-Consumer Assistance Program (ACAP), streamlined the organization of the office, assisted in the drafting and adoption of amendments to Mass. R. Prof. C. 1.15 specifying recordkeeping requirements, and established a Web site providing important information and decisions to the bar and the public. When lawyers keep better records of funds held in connection with a representation, it reduces the time that bar counsel must devote to these matters. Our Web site makes a similar contribution by educating the bar and the public. Our ACAP unit provides assistance to approximately 6000 consumers and attorneys each year. ACAP is able to adjust more than 75% of these matters, usually in less than thirty days and to the consumer's satisfaction. As a result, the number of Office of Bar Counsel files opened against lawyers has been reduced since 1999 by more than 50%.

When it is necessary for bar counsel to open a file, every effort is made to resolve the matter as quickly as possible. During the most recent fiscal year, 28% of investigations of attorneys were disposed within 60 days of being filed and 77% were disposed within one year. Since 2002, the number of respondents who have had open files for three years or longer for whom a petition for discipline has not been filed has been reduced by 60%. We are continuing to explore and implement means to further reduce the time between receipt of the complaint and final resolution.

A prompt, efficient, and just disposition of complaints against attorneys is critical to maintaining the integrity of the bar and public confidence in self-regulation. While I share the Task Force's concerns about delay, many of the Task Force's proposals are not likely to provide a solution to the problem and are otherwise not consistent with the goals of bar discipline.

For example, ACAP is a program that is not broken. Nevertheless, the MBA Task Force suggests imposing obstacles in the way of clients who wish to call ACAP to discuss their problems with a lawyer. If clients are required, as the Task Force suggests, to put all inquiries in writing, the opportunity to resolve matters informally will be greatly reduced and considerable additional

time will have to be spent determining the nature of the problem and whether it can be resolved. The purpose of bar discipline is to protect the public from unethical conduct, and it is not appropriate to attack delay by making it more difficult for the public to file a grievance.

Discovery depositions of witnesses after the petition for discipline is filed--while a matter that, for other reasons, may be reasonable to put on the table for discussion--- would also increase, rather than decrease, the time it takes to conclude prosecution of bar discipline complaints. The delays that depositions bring to civil litigation will be imported to bar discipline proceedings. Time standards, another suggestion, also do not address or correct the causes for delay.

There are two proposals, however, on which the Task Force and I agree. The first is the Board of Bar Overseers' proposed amendment to S. J. C. Rule 4:01 and the Rules of the Board of Bar Overseers to permit the Office of Bar Counsel to decline to open files when the complaint against the attorney is frivolous or does not rise to the level of a rule violation. This amendment is currently pending before the Supreme Judicial Court, and I welcome the Task Force's endorsement.

The second proposal is to divert lawyers who commit minor violations of the rules to a law office management or other appropriate program. Whether as an alternative or an adjunct to discipline, the Office of Bar Counsel has long supported establishing a law office management assistance program (LOMAP). As long ago as 1996, the Office of Bar Counsel worked with (what is now) the MBA's Law Practice Management section to look into the development of such a program. LOMAPs exist in many other jurisdictions. An individual experienced in law office management audits the lawyer's law office management, makes recommendations for improvement specific to that lawyer, and provides follow-up evaluations. Lawyers struggling with organization and time management find such programs extremely helpful. Establishing LOMAP would require approval by the S.J.C. and the funding of an adequate program, and the MBA's support is an important endorsement of our effort.

The MBA report does not mention mandatory fee arbitration at the option of the client before suit as a tool for improving efficiency. This is a critical omission. Such a program would not only be a service to consumers, but would also free up resources that OBC devotes to matters that are a mixture of fee dispute and minor misconduct. A number of other jurisdictions, including Maine and New Jersey, have long and favorable experience with mandatory fee arbitration. The MBA and other bar associations already provide effective fee arbitration programs that could readily be expanded.

An effective bar discipline system needs the constructive cooperation of the bar. Improving our system will likely require all of us to consider changes that are not always comfortable. If we are to continue to possess the privilege of self-regulation under the supervision of the Supreme Judicial Court, we must be sure to maintain a system that continues to engender public confidence.