ANNUAL REPORT OF THE ATTORNEY REGULATION ADVISORY COMMITTEE TO THE ARIZONA SUPREME COURT

APRIL 30, 2012

ARIZONA SUPREME COURT
ATTORNEY REGULATION ADVISORY COMMITTEE (ARC)
Committee Member Public Term List
As of February 10, 2012

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ATTORNEY REGULATION ADVISORY COMMITTEE ANNUAL REPORT

April 30, 2012

On May 4, 2011, the Supreme Court of Arizona established the Attorney Regulation Advisory Committee (ARC) to assist the Court in the attorney admissions and discipline system. The Court directed the Committee to submit an annual report each year by April 30. The report shall review case processing for attorney admission and discipline cases and may make recommendations on specific issues addressed by the Committee.

Lawyer Regulation

On July 1, 2009, the Supreme Court of Arizona established the Attorney Discipline Task Force to undertake a comprehensive review of the attorney discipline system. The Court directed that the Task Force file a petition to modify the attorney discipline system consistent with the Court's strategic direction. See Administrative Order No. 2009-73 attached hereto as Attachment One. The Task Force filed a petition recommending significant changes to the attorney discipline system incorporating the key elements of the Court's strategic direction. The Court adopted those recommendations on June 30, 2010, and they went into effect on January 1, 2011. The more significant changes to the system are set forth below and discussed individually.

I. Modification of the Intake process to allow a greater number of cases to be resolved expeditiously at the Intake stage.

II. Reduction in the processing time for charges in investigation to probable cause.

III. Establishing the Attorney Discipline Probable Cause Committee to review recommendations made by the State Bar on all cases where the State Bar seeks a probable cause order to authorize the filing of a formal complaint, an order imposing an informal sanction or an order of diversion.

IV. Establishing the Office of the Presiding Disciplinary Judge.

I. Modification of the Intake process to allow a greater number of cases to be resolved expeditiously at the Intake stage.

The new attorney discipline system incorporated changes designed to allow for the resolution of the greatest number of cases at the earliest stage of the process. There were a number of changes made to the Intake process to achieve the goal of early and efficient resolution. The reallocation of resources to staff Intake, including additional lawyers and administrative staff, coupled with process modifications were implemented to allow prompt evaluation of charges and expedited resolution. The goal to resolve more charges in the Intake process would allow greater attention to be devoted to the more serious charges that are referred for a full screening investigation.

Prior to the implementation of the new system, when receiving a charge, the bar would determine if it met the threshold for an investigation.[1] If it did, the charge would be placed into investigation where the respondent lawyer would be asked to provide a written response to the charge. This process could take a considerable amount of time due to the volume of charges being moved into this stage and the laborious practice of multiple written responses on each charge. This process forced a structure that conducted a more thorough evaluation of the charge at the backend of the process rather than at the front end of the process.

In anticipation of the new system, the Bar began shifting resources to Intake in July 2010. Lawyer and administrative staff were added to facilitate a new streamlined process. As part of that process, the bar encourages complainants to talk with an Intake lawyer before submitting a written charge. This change allows for a better and timelier evaluation of the complainant's concerns and permits an earlier determination of whether the matter should proceed or go no further. In a majority of cases the Intake lawyers talk to both complainants and respondent lawyers in an attempt to resolve matters without a full investigation. By engaging in a dialogue with both sides the bar has been able to reduce the number of written submissions and responses and can resolve cases much more efficiently. Even in cases where the bar decides not to proceed to investigation, the new process requires a thorough explanation to complainants regarding the decision. In addition, the bar has

[1] Pursuant to prior Rule 54, Ariz. R. Sup. Ct., the threshold for screening was met if the information received alleged facts which, if true, would constitute misconduct ..." The current rules allow the bar to exercise some discretion to initiate an investigation. Rule 55(a)(2), Ariz. R. Sup. Ct.

received favorable feedback from both the complainants and respondents regarding their telephonic contact with bar counsel.

Historically the State Bar has received approximately 4000 inquiries/charges annually. In 2011, there were 4052 inquiries/charges, a marginal increase over the previous year. Of the charges received, 2717 or 67% were resolved in intake. On average charges took 28 days to resolve, meaning that the matter had been concluded with no further action required. 999 charges or 25% were sent on from Intake for a full screening investigation.[2] These charges were attributable to 483 lawyers.

On average it took 31 days to review and decide to refer a charge for a full screening investigation. In those cases, complainants are usually asked to provide a written statement and other documents are often obtained. The matter is then sent forward.

II. Reduction in the processing time for charges in investigation to probable cause.

In 2000, following the Court's audit of the disciplinary process, several rule changes were made in an effort to expedite the processing of complaints by shortening the times for completion of specific steps in the disciplinary process. At that time, the Court directed that all disciplinary matters should be resolved within twenty-two months from the initiation of the charge and a shorter timeframe for more routine matters. The formal process was divided into two distinct time periods; eleven months from receipt of the charge through the filing of a formal complaint and eleven months from formal complaint to final judgment and order. Over the years significant improvements were made towards compliance with these timeframes. In 2008, a follow-up audit concluded that the overall average time for processing of formal cases complied with the Court's directed timeframe of twenty-two months.

Over the past several years, the bar tracked compliance with the eleven month timeframe that encompassed receipt of charge to informal disposition. The vast majority of charges were investigated and an informal disposition entered within

[2] Based on the number alone, it would appear that screening investigations increased. However, three lawyers accounted for 266 charges which is unusual in a given year.

the eleven month timeframe. Generally, the annual average was in the range of 96-98% compliance with the stated timeframe.[3]

For the most part, the charges currently moved into investigation represent the most serious allegations or those that by their volume and/or complexity require a full screening investigation. The new investigative process includes the assignment of an investigator, along with the assigned bar counsel, to conduct the full screening. The process is a collaborative one between the assigned lawyer and investigator. An investigative plan is established early on and relies heavily on interviewing relevant individuals as opposed to the previous process which relied more heavily on written responses. The current rules still require a written response by the respondent lawyer but in most instances, the respondent lawyer is also interviewed as part of the investigative process. The current investigative process is generally more comprehensive and the benefits of consistent and direct contact with relevant individuals is evident.

Under the new system, the average time for the referral of a charge to investigation through the investigative process was 117 days, a significant decrease from the previous timeframes.

III. Establishing the Attorney Discipline Probable Cause Committee to review recommendations made by the State Bar on all cases where the State Bar seeks a probable cause order to authorize the filing of a formal complaint, an order imposing an informal sanction or an order of diversion.

The Court established the Attorney Discipline Probable Cause Committee ("Committee") to function in place of the probable cause panelist.[4] This new Committee occupies the gatekeeper position in the new system and includes for the first time public input at this stage of the process. The Committee has three public members and six attorney members and meets monthly to review the bar's recommendations on charges.

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[3] This timeframe is no longer the relevant standard but provides context going forward for the appropriate measure.

[4] The panelist was a sitting Board of Governors' member. The panelist reviewed the Bar's recommendations on cases and could dismiss charges, enter probable cause orders, impose informal sanctions and orders of diversion. The Committee has the same authority.

Prior to each monthly meeting, the bar provides to each respondent a written report and the bar's recommendations in each case being presented to the Committee. The respondent or respondent's attorney may provide a written submission to the committee in response. Complainants are also provided the recommendation and opportunity to respond. At each meeting, the bar presents its cases orally, and Committee members may ask questions, request additional facts, challenge the bar's recommendations, offer their own recommendations and thoroughly discuss and debate each individual case. Upon motion, the Committee votes on a disposition for each case. The Committee meetings are confidential and not open to respondents or complainants.

In 2011, the Committee reviewed 312 charges, not including dismissal appeals, issuing 138 probable cause orders which authorized the filing of formal complaints, 26 orders of admonitions, 1 order of probation, 6 orders of restitution, and, 82 orders of diversion. AOC prepared statistics regarding the work of the Committee. See Attachment Two.

IV. Establishing the Office of the Presiding Disciplinary Judge.

The previous process relied on the use of volunteer hearing officers in the adjudicative role. Hearing officers were authorized to make recommendations as to the findings and appropriate sanction. The hearing officer's report would be considered by the Disciplinary Commission; they too could only make recommendations as to the appropriate sanction. Only the Court could issue orders of censure (reprimand), suspension or disbarment. The process itself created time delays such that a radical reduction in processing time was impossible. In order to address this issue, the Court established the office of the Presiding Disciplinary Judge ("PDJ").

The PDJ adjudicates all formal cases. Contested and default cases are heard by hearing panels, composed of the PDJ, an attorney member and a public member. The use of hearing panels has provided a second opportunity for public input into the lawyer regulation system which advances a system that is designed and administered to protect the public.

The PDJ has the authority to issue a final order of all sanctions, including disbarment. The use of the PDJ has significantly streamlined the processing of formal complaints. 68 complaints were filed in 2011. Of those, 23 were direct

consent agreements filed in lieu of a formal complaint.[5] This represents a 55% increase in the number of complaints filed in 2010.

Using all cases that closed out in 2011, the average time for a formal complaint filed to reach a final order was 143 days. This represents an approximate 50% decrease in the amount of time from filing to disposition compared to cases closed in 2010.

Looking at specific types of cases, contested cases took an average of 351 days from filing to final disposition, which represents a 19% decrease in the time from filing to final disposition compared to cases closed in 2010. This figure includes all cases closed in 2011 irrespective of whether the case was adjudicated under the old system or the new system. If one were to analyze only cases that went through the new system in 2011, the average time from filing to final disposition would be 154 days which is a 64% decrease in the amount of time to process.

Consent cases took an average of 105 days from the filing of a complaint/direct consent to the final order. This represents a 46% decrease in the time from filing to disposition compared to cases closed in 2010.

The average time elapsed between filing a complaint and a final order in a default case was 117 days. This is a 66% decrease in the amount of time from filing to disposition compared to cases closed in 2010.

Of the formal cases closed in 2011, 15% were contested cases, 11% were default cases and 74% were resolved by a consent agreement. Only two contested cases were appealed to the Supreme Court; one was later withdrawn. There were 13 lawyers disbarred, 43 suspended, and 27 censured/reprimanded.

[5] Direct consent agreements contain a stipulated set of facts and stipulated sanction.

ATTORNEY ADMISSIONS

PATHS TO ADMISSION: Since 2009, the path for attorney admissions has been modified to include new procedures for gaining admission to the practice of law in Arizona.

Admission on Motion: In 2010, the Supreme Court created admission on motion (AOM), which recognized recent, skillful practice as evidence of fundamental skills, allowing attorneys from reciprocal jurisdictions to bypass the bar examination and be admitted to the practice of law. Arizona was the first popular "retirement destination" state to adopt admission on motion and the program was enthusiastically received by attorneys across the country, with many AOM admittees hailing from the colder Midwestern climates of Michigan, Minnesota, Illinois, North and South Dakota.

	AOM Applicants	AOM Admissions
2010	394	234
2011	192	183

Uniform Bar Examination: In 2011, the Supreme Court adopted the Uniform Bar Examination (UBE), to be administered for the first time in July, 2012. States using the UBE as part of their admission process must administer the exact same test questions and components on the same days, adhering to controlled and uniform procedures of administration and grading, allowing all applicants to receive a grade which is portable to other UBE states. Arizona joins the compact of UBE states which includes Colorado, Washington, Idaho, Montana, North Dakota, Nebraska, Missouri and Alabama. New Mexico and Utah have announced intent to move to UBE. The UBE advances the goal of portability of licensure and skills across state borders, for attorneys who have met specific educational and professional standards.

With these rule changes, Arizona now has three paths for admission to the practice of law, including admission on motion, UBE testing in Arizona, and UBE transfer of score earned in another UBE jurisdiction. From 2007 to 2010, total testing pools dropped about 20% in Arizona and across the country, but have inched upward since 2011. Impact of UBE adoption on testing population is unknown at this time.

	Applicants Testing	Avg. Pass Rate	Admitted by Exam
2010	828	71	543
2011	882	69	506

CHARACTER AND FITNESS ISSUES: Trends in character and fitness have shown an increase in the number and complexity of issues presented by applicants. Prior to approximately 2007, problem files presented with one significant issue and, when hearings were necessary, could often be finalized within half a day, allowing the Committee on Character and Fitness to hear multiple matters in one day with few continuances and little delay. Since approximately 2007, the complexity of problem applications has increased. Many problem files now present with some degree of financial irresponsibility, in addition to the underlying employment, law enforcement or behavioral problems which triggered inquiry. Multiple issues mean the Committee often requires hearings over multiple days, causing delay to other matters in the pipeline. Complex procedural and discovery issues also add to length of hearings.

	Informal Hearings and Outcomes 2010	Informal Hearings and Outcomes 2011
Admit without Conditions	31	22

Admit with Conditions	9	12
Deny Admission	1	0
Refer for Formal Hearing	6	5
Applicant Withdrew or Was Granted Continuance	4	10
Total Hearings	51	49

	Formal Hearings and Outcomes 2010	Formal Hearings and Outcomes 2011
Admit without Conditions	1	1
Admit with Conditions	3	0
Deny Admission	1	2
Applicant Withdrew or Was Granted Continuance	1	4
Total Hearings	6	7

Committee Concerns Forming Basis of Conditional Admissions (Formal)	2010	2011
Financial	2	2
Substance Abuse	5	5
Ethics/Professionalism	2	1
Emotional Stability	0	1
Multiple Issues: Financial/Substance Abuse/Ethics/Emotional Stability	3	3
Total	12	12

Issues being considered by the Attorney Regulation Committee in 2012

ARC has identified a number of issues in the attorney discipline and admission areas that it intends to explore in the upcoming year.

Issues involving Lawyer Regulation:

1. ARC intends to prepare an amended petition regarding Rule 61, Ariz. R. Sup. Ct. , Interim Suspension. The Committee referred the pending rule petition to a subcommittee to consider and provide recommendations to the full Committee. The subcommittee will prepare an amended petition to reflect its recommendations concerning the procedure utilized in a proceeding for interim suspension.
2. The Committee will undertake a review of specific procedural rules which may require clarification, including, but not limited to, Rule 48, incorporating various civil rules into discipline and disability proceedings, Rule 58(d), default proceedings and Rule 56 relating to diversion.
3. Discuss whether the procedural rules applicable to lawyer discipline proceedings should be re-written to better reflect the unique administrative process that was adopted by the Court.

Issues involving the Admissions process:

1. Examine the entire admissions process holistically.
2. Explore whether Arizona law schools are properly preparing potential applicants for the admissions process.
3. Examine the continued need for all the exceptions to the admission and examination process in Rule 38 in light of the new routes for admission provided by Admission on Motion and the Uniform Bar Examination.
4. Explore possible correlation between conditional admission and future discipline.
5. Discuss need for clearer standards for admission and develop more objective criteria in this area.
6. Review Admission on Motion criteria.

Attachment One

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	
	)	
ESTABLISHMENT OF THE ATTORNEY DISCIPLINE TASK FORCE, MEMBERS, AND SCHEDULE	)	Administrative Order No. 2009 - 73
	)	
	)	

Over the past decade, the Arizona Supreme Court and the State Bar of Arizona have worked to improve the Court's attorney discipline system. The Court wishes to maintain a fair and impartial discipline system while decreasing the time and cost to process cases, especially those cases that proceed to formal charges. While considerable progress has been made, the Court's goal of processing cases within shorter time frames has not been accomplished.

The Court has determined the time has come to thoroughly review the attorney discipline system and consider whether significant changes are needed. The Committee will consider whether to adopt some of the features now used in the Colorado attorney discipline system. Key elements of that system are included in Appendix "A."

Now, therefore, pursuant to Article VI, Section 3 of the Arizona Constitution,

IT IS ORDERED that the Attorney Discipline Task Force is established as follows:

1. PURPOSE: The Task Force shall draft and file, not later than December 2009, a petition to amend the current attorney discipline system rules, consistent with the strategic direction provided in Appendix "A."

2. MEMBERSHIP: The membership of the Task Force is attached as Appendix "B." The Chief Justice may appoint additional members as may be necessary.

3. MEETINGS: At the discretion of the Chair, meetings may be scheduled and rescheduled, canceled, or moved. All meetings shall comply with the Arizona Code of Judicial Administration § 1-202: Public Meetings.

4. STAFF: The Administrative Office of the Courts and the Staff Attorneys Office shall provide staff for the Task Force and, as feasible, conduct or coordinate research as requested by the Task Force.

Dated this 1st day of July, 2009.

REBECCA WHITE BERCH
Chief Justice

Appendix "A"
Strategic Direction for Arizona's Attorney Discipline System

In reviewing the Arizona attorney discipline system, the Task Force shall incorporate best practices from the Colorado attorney discipline system and other states' systems, including the following:

1. The intake process at the State Bar will be modified to allow intake attorneys to divert more cases. The goal is to reduce the processing time for cases and to reduce the number of cases proceeding to investigation, as is the case in Colorado. This would allow the more serious matters to receive more attention. (Colorado's average time from the original call to Central Intake and an intake resolution is 1.5 weeks.)

2. Intake attorneys will have the authority to dismiss matters if there was no misconduct; to offer diversion if misconduct is minor; or to assign matters to a trial attorney if the alleged misconduct falls outside of diversion program guidelines or the Respondent rejects a diversion offer.

3. State Bar Counsel investigating a case will have eight months from the receipt of the complaint to bring a matter to probable cause.

4. The Disciplinary Commission's duties will shift to the front end of the system. The Commission will determine probable cause, as does the Colorado Probable Cause Committee. The Commission will be appointed by the Supreme Court, meet once per month, and be supported by staff from the Administrative Office of the Courts.

5. If agreement is reached on a case, the case will bypass probable cause and will be filed directly with the Office of the Presiding Disciplinary Judge. Colorado refers to these plea arrangements as "conditional admissions."

6. The Office of the Presiding Disciplinary Judge will be created in the Supreme Court (AOC). The Presiding Disciplinary Judge will be a full-time paid position. The Arizona Presiding Disciplinary Judge will have duties similar to the Colorado Presiding Disciplinary Judge, including ruling on all motions and pre-trial matters, deciding all questions of law before and during hearing, and sitting as the chair on the hearing boards.

7. An "at issues conference" will be required at which parties will be prepared to discuss potential settlement and related issues such as motions and discovery deadlines, and a hearing date. Cases not settled at least 30 days before the hearing date will proceed to hearing.

8. As needed, cases will be assigned to volunteer settlement officers. These volunteer settlement officers will be appointed by the Supreme Court and will have significant experience in the area of attorney ethics.

9. A three-person hearing board consisting of the Presiding Disciplinary Judge, a volunteer lawyer, and a public member will hear any cases proceeding to hearing. The Presiding Disciplinary Judge and the hearing boards will have the authority to impose all sanctions, including disbarment.

10. Strikes of the Presiding Disciplinary Judge and the other members of the hearing board will be permitted for cause only.

11. The Presiding Disciplinary Judge will issue the decision in a case within 60 days.

12. Hearings held in Phoenix will be recorded using a digital audio record. Transcripts will be prepared as needed. Outside of Phoenix, a certified reporter will be used if electronic recording equipment is not available.

13. Proportionality arguments will be eliminated. Sanctions will be imposed pursuant to the American Bar Association guidelines. Mitigating and aggravating evidence may be presented.

14. Either party may appeal to the Supreme Court. The Court may increase, reduce, or modify sanctions. The Court need not write an opinion in each case, but may choose to do so.

Appendix "B"
Membership of the Attorney Discipline Re-Engineering Task Force

Chair
Dave Byers, Director
Administrative Office of the Courts
Arizona Supreme Court

Vice Chair
Nancy Swetnam, Director
Certification and Licensing Division
Administrative Office of the Courts

Alan Bayham
State Bar of Arizona
Probable Cause Panelist and
Board of Governors Representative

Jeffrey Messing
Arizona Supreme Court
Disciplinary Commission Representative

Don Carson
Public Member

J. Scott Rhodes
Respondent's Counsel Representative

Honorable H. Jeffrey Coker
Arizona Supreme Court
Hearing Officer Representative

Maret Vessella
Acting Chief Bar Counsel
State Bar of Arizona

Attachment Two

Calendar Year 2011 Attorney Discipline Probable Cause Committee Statistics

	ACTION	JAN '11	FEB '11	MAR '11	APR '11	MAY '11	JUNE '11	JULY '11	AUG '11	SEPT '11	OCT '11	NOV '11	DEC '11	YTD
Cases Considered at Monthly Meeting[1]														
A	Order of Dismissal	0	0	1	0	0	0	0	1	0	1	1	1	5
B	Order of Diversion	3	1	11	4	14	5	6	2	1	8	14	10	79
C	Order of Admonition	1	3	1	2	9	0	1	4	1	1	0	2	25
D	Order of Probable Cause/Formal Complaint	3	1	3	3	7	5	3	8	9	7	9	2	60
E	Order of Restitution	0	0	0	0	0	1	1	1	0	1	1	1	6
F	Matter Deferred to Subsequent Meeting	3	0	0	0	1	3	0	0	0	1	0	0	8
G	Order for Further Investigation	0	1	1	0	2	0	0	0	0	0	0	0	4
H	Other[2]	0	0	0	0	0	1	0	0	0	0	0	2	3
	TOTALS	10	6	17	9	33	15	11	16	11	19	25	18	190
Dismissal Appeals[3]														
I	Dismissal Appeal Denied (Affirm State Bar Counsel Dismissal)	1	2	6	2	6	4	2	3	2	2	3	6	39
J	Dismissal Appeal Granted	0	0	0	1	0	0	0	0	0	0	0	0	1
	TOTALS	1	2	6	3	6	4	2	3	2	2	3	6	40
K	Application to Retain files	0	0	2	0	0	0	0	44	0	19	0	3	68

	JAN '11	FEB '11	MAR '11	APR '11	MAY '11	JUNE '11	JULY '11	AUG '11	SEPT '11	OCT '11	NOV '11	DEC '11	YTD
Cases Considered at Monthly Meeting[1]	10	6	17	9	33	15	11	16	11	19	25	18	190
Dismissal Appeals[3]	1	2	6	3	6	4	2	3	2	2	3	6	40
Application to Retain files	0	0	2	0	0	0	0	44	0	19	0	3	68
	11	8	25	12	39	19	13	63	13	40	28	27	298

[1] "Cases" does not include dismissal appeals or applications to retain file. "Cases" are per respondent and may involve multiple charges.

[2] Charges vs Bar Counsel, Order of Probation, Closed no action taken

[3] "Dismissal Appeals" are those matters where the complainant appeals the dismissal of the charges by State Bar Counsel.
The committee either affirms the dimissal or grants the appeal.

M	Respondent Appeal of ADPCC Orders	1	0	0	1	1	0	0	0	1	0	1	0	5

Y:\BOARDS COMMITTEES COMMISSION\PROBABLE CAUSE COMMITTEE ATTORNEY DISCIPLINE\ADPCC STATS\PC RESPONDENTS 2011