

## *Justice Delayed is Justice Denied While Living in a World of the Second Best*

By Nathan M. Crystal

At the invitation of the S.C. Supreme Court, the American Bar Association Standing Committee on Professional Discipline assembled a team of investigators to examine and make recommendations to improve the South Carolina disciplinary system for lawyers and judges. The consultation team issued its report in September 2008. The report points out a number of strengths of the South Carolina system. Any system can be improved, of course, and the report includes 17 recommendations for its enhancement. The full report with its recommendations is available on the Supreme Court's Web site at [www.sccourts.org/ABA](http://www.sccourts.org/ABA). The team prepared a separate report for the judicial discipline system. Several of the team's recommendations for the lawyer discipline system also apply to the system for judicial discipline. This article focuses on the recommendations for the lawyer discipline system.

The report includes many interesting and specific proposals for improving the South Carolina system, but I want to consider the report more generally. In particular, I will focus on two questions: What are the major themes that emerge from the report? What steps should the Court take to implement recommendations that it concludes are sound as a matter of policy?

As I studied the report, I was struck by two themes that reappeared throughout the document, themes that can be captured in two words: "delay" and "more."

### **The problem of delay**

Most lawyers who have been involved in the lawyer disciplinary system know that it can be slow, but the statistics provided in the report are striking and disturbing. Caseload statistics from the Office of Disciplinary Counsel (ODC) show that as of the time of the consulta-

tion team's visit in March 2008, the ODC had 778 active cases. Of these, 307 had been outstanding for more than two years. Of this group 104 cases were outstanding for at least four years, and some as many as 11 years. Page 14.

Where does delay occur in the system? The processing of cases begins well. Disciplinary counsel screen complaints and lawyer answers to determine whether the information set forth in these materials if true would constitute misconduct or incapacity. If not, disciplinary counsel should dismiss the complaint or refer it to another agency. Disciplinary Rule 19(a). This process takes an average of only two days, which the report characterized as "admirable." Page 15. If the matter proceeds to a preliminary investigation and is dismissed at that stage, it takes an average of 97 days, which does not seem unduly long. Page 14.

Suppose, however, that a case against a lawyer goes through the full disciplinary process to decision by the Supreme Court. How long does such a case take on average? The average time for submission of a preliminary investigation report to an investigative panel is 203 days. It takes 519 days on average for completion of a full investigation and authorization of formal charges by an investigative panel. Panels hold hearings on charges on average 184 days after the filing of formal charges. The rules require hearing panels to file their reports within 30 days after receiving the transcript of the hearing, but it may take some time for the court reporter to prepare the transcript, and even then many panels are slow in issuing their reports. Once the hearing is conducted, it takes another 264 days on average *after the receipt of the transcript* for the hearing panel to issue its report and recommenda-

tions. When a matter has been certified to the Court, oral arguments are held on average within 178 days, with a final order issuing 64 days later. Page 14. In other words, completion of a matter from initial complaint to resolution by the Supreme Court takes *on average* almost four years. Moreover, as noted above, many cases have been outstanding much longer.

The two major points of delay in the process occur during the investigation stage prior to dismissal or filing of formal charges and at the hearing panel report stage. The investigative stage can take anywhere from one to two years. One factor in delay at this stage is the use of Attorneys to Assist (ATA). The Rule on Lawyer Discipline provides for use by the ODC of ATAs, members of the bar appointed by the Court to assist disciplinary counsel. Disciplinary Rule 5(c). ATAs are used principally if not exclusively to conduct preliminary investigations. On average it takes 263 days for an ATA to receive and complete a case. Page 14.

Moreover, almost one third of the cases that were outstanding for more than two years had been assigned to ATAs. Page 14. Substantial delay also occurs at the stage of issuance of a report by a hearing panel. The period of time from receipt of a transcript to issuance of a panel's report takes on average 264 days. Moreover, additional delay can occur when the court reporter is slow in issuing the transcript.

### **More responsibilities for the Office of Disciplinary Counsel**

The second major theme of the report is a series of recommendations that, if adopted, will impose more responsibilities on the ODC.

The report recommends the creation of an Administrative Oversight Committee of the Commission on

Lawyer Conduct to develop a budgeting process, provide oversight of the processing of cases and develop training programs. This recommendation seems sound in the abstract, but it will involve substantial time of the Chief Disciplinary Counsel (CDC), working with the Committee to develop the budget (Page 20) and with Commission Counsel to arrange for training programs. Page 21.

Recommendation 5 calls for the Court to phase out ATAs. The consultation team was concerned about the delay in cases handled by ATAs, about the lack of consistency resulting from the use of volunteers, and about the public perception that ATAs will be biased in favor of a colleague. Unless the ODC receives substantial additional resources, however, it will face an increased burden of cases to handle.

Currently, discovery in disciplinary cases is quite limited. Page 30. The report recommends liberalization of the discovery rules, including appropriate deposition practice. Page 31. In addition, the report suggests that disciplinary counsel and respondents or their counsel be required to create and exchange privilege logs so that challenges to nonproduction of material can be evaluated. Again, all of these recommendations seem desirable in the abstract, but they will impose substantial new burdens on the ODC.

Other recommendations that would increase the work of the ODC are:

- Development of an alternatives to discipline program and greater use of deferred discipline agreements. Recommendation 9, pages 35-36.
- Movement of character and fitness cases from that Committee to the Commission on Lawyer Conduct. Recommendation 11, page 41.
- Creation of a probation system, under which an attorney can continue to practice law, but only with supervision and monitoring. Recommendation 13, page 46.
- Adoption of a rule for random audit of trust accounts and associated materials. Recommendation 14, page 50.

## Living in a world of the second best

The economic theory of the second best holds that if a condition necessary for an optimal state of affairs to occur is not satisfied, any change in the system may actually make things worse off. While the report of the consultation team has many useful suggestions, the great danger with the report is that adoption of recommendations that impose greater responsibilities on the ODC without increased resources is likely to exacerbate the already unac-

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ceptable levels of delay in the system.

To avoid this danger, I suggest that the Court proceed to handle the report as follows:

(1) Determine whether a recommendation is sound as a matter of principle assuming that there was adequate funding available to implement the recommendation.

(2) Identify and implement as soon as possible those sound recommendations (#1 above) that will decrease the work of the ODC or increase the speed by which the system handles cases, but which do not require additional funding. For example, Recommendation 3 of the report suggests that the Court grant disciplinary counsel increased discretion to institute full investigations and to dismiss cases without the need of approval by an investigative panel. Pages 24-25. Recommendation 8 provides that steps should be taken to increase the use of discipline by consent, including substituting approval by the chair of the hearing panel for approval by the full hearing panel. These rule changes are costless, efficiency improving steps.

(3) Rank order other sound recommendations (#1 above) by priority and estimate the cost of implementa-

tion of the recommendations both individually and in total. If the cost or possible impact of a recommendation on the system is unclear, the recommendation should be tabled while other recommendations whose cost is clearer are implemented. For example, it is probably very difficult to determine the added cost of the discovery changes recommended by the report. Such a change may turn out to be more burdensome than anticipated. Given the present degree of delay in the system, such a change should be deferred.

(4) Develop a budget plan to increase funding for the ODC.

(5) Implement those sound recommendations (#1) whose costs are reasonably ascertainable in order of priority based on the availability of funding. If a recommendation is too costly to implement, determine if less expensive steps can be taken. For example, the report recommends the abolition of ATAs. Without substantial new funding for the ODC, this may be impossible to do. However, it may be possible to develop a handbook, standards and case deadlines that could reduce the time required for ATAs to complete their cases.

(6) Each year review the progress toward achieving recommendations that the Court has found to be sound.

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The ABA's Report on the South Carolina Disciplinary System is an important step in the continued improvement of the disciplinary process in this state. The Court should be praised for inviting review of the system. However, the Court should be careful in considering implementation of the report to avoid increasing the problem of delay now encountered in the system. ■