

A BRIEF DESCRIPTION OF MICHIGAN'S ATTORNEY DISCIPLINE SYSTEM

HISTORY

Michigan's system for attorney discipline has existed in its current form since 1978. With the creation of the State Bar of Michigan in 1935, the State Bar assumed the duty of conducting disciplinary proceedings, a task which had been undertaken by the State's Attorney General since the latter part of the 19th century. The State Bar was responsible for attorney discipline for the next 35 years and it would be fair to say that Michigan's system was probably no better or worse than the systems in other states during that period. This may be considered faint praise, however, in light of the 1970 report of the ABA's Special Committee on Evaluation of Disciplinary Enforcement ("The Clark Committee") which concluded that the state of attorney discipline in this country was "scandalous¹." Following a widely publicized investigation into alleged corruption in Livingston County, the Michigan Supreme Court stepped in and created an entirely new disciplinary body, the State Bar Grievance Board, in 1970.

Although nominally under the supervision of the Supreme Court, the State Bar Grievance Board, as its name suggests, received both its funding and administrative support from the State Bar. Nevertheless, the Grievance Board represented a sharp break from the past by giving investigative and prosecutorial authority to an independent Grievance Administrator answerable directly to the Grievance Board. The Board in turn was composed of lawyers and non-lawyers appointed by the Supreme Court together with two lawyer members appointed by the State Bar. The State Bar Grievance Board was similar to the model envisioned in the ABA's Model Rules for Lawyer Disciplinary Enforcement in that it was a unitary, permanent, statewide agency which performed both prosecutorial and adjudicative functions. The prosecutorial functions were directed by the Grievance Administrator and a full-time staff; public hearings were conducted before local hearing panels consisting of three lawyers; and there was appellate review, by right, to the Grievance Board and then to the State Supreme Court. The prosecutorial and adjudicative functions were separated within the agency, insofar as practicable, to avoid unfairness. Two features of the Grievance Board system were particularly innovative in 1970. The first was the inclusion of non-lawyer members on the Grievance Board (although not on the three-member hearing panels). The second was giving the hearing panel the authority to order (not recommend) all levels of discipline. Then, as now, a three-member hearing panel could enter an order of reprimand, suspension, or disbarment and unless appealed by the respondent, the Grievance Administrator, or the complainant, the order was a final order of discipline, with no further review by a higher body or court.

BIFURCATION

In 1978, responding to criticism of the dual prosecutorial and adjudicative functions of the State Bar Grievance Board, the Michigan Supreme Court established an entirely new, bifurcated disciplinary system consisting of an investigation and prosecution agency - the Attorney Grievance Commission - and a separate adjudicative body - the Attorney Discipline Board.

ATTORNEY GRIEVANCE COMMISSION

The Attorney Grievance Commission currently consists of six lawyers and three non-lawyers, all appointed by the Supreme Court. Members may serve no more than two three-year terms. The Commission has two primary functions. First, it supervises the Grievance Administrator

¹ The author of that report was the Clark Committee's official reporter, Michael Franck. In 1970, Mr. Franck began his 24 year tenure as Executive Director of the State Bar of Michigan. It is not coincidental that Michigan's discipline system was one of the first to incorporate many of the recommendations made by the Clark Committee and, later, by the ABA's Model Rules for Disciplinary Enforcement.

and his/her full-time professional staff which currently consists of 15 attorneys and 17 support staff. In its administrative/policy-making role, the Commission reviews and proposes court rule amendments, submits an annual budget to the Supreme Court and files quarterly and annual reports with the Court. The Commission's other primary function is to determine the disposition of the investigations completed by the Grievance Administrator and his/her staff. The Grievance Commission meets monthly to review the recommended dispositions submitted by the Administrator. All formal complaint filed with the Attorney Discipline Board must be approved by the Commission.

The Grievance Commission received 2,861 requests for investigation (grievances) in 2009. Of the 2,556 investigative files closed that year, 1,939 (84%) were rejected by the Grievance Administrator following review by a three attorney intake unit or following a preliminary investigation. Files warranting further investigation are assigned to a staff attorney and then referred, with a recommendation, to the nine member Commission. Of the 617 files considered by the Commission in 2009, 313 (51%) were closed (some with private "cautionary letters"); 137 (225%) resulted in private admonitions; and in 129 files (21%), the Commission directed the Grievance Administrator to institute formal public proceedings before a hearing panel. The Commission utilized a diversion program (known in Michigan as "contractual probation") in 38 cases in 2009 for attorneys whose relatively minor misconduct was substantially related to drug or alcohol problems.

Grievance Administrator

Since 1990, the Grievance Administrator has been appointed directly by the Supreme Court although he/she is still subject to "supervision" by the Attorney Grievance Commission. The Grievance Administrator has authority to undertake an initial review of an incoming grievance and to reject a grievance which does not state professional misconduct or which does not, in the Grievance Administrator's opinion, warrant investigation. As noted above, 84% of the investigative closures in 2009 were handled at this stage without review by the Commission. A complainant who is unhappy with a decision by the Grievance Administrator or the Grievance Commission to reject or close an investigation without filing formal charges may seek review by the Supreme Court in the form of a complaint for superintending control.

In 2010, the Grievance Administrator filed 77 new formal complaints with the Attorney Discipline Board (the number of new formal complaints does not correlate directly to the number of grievances approved for formal proceedings by the Grievance Commission. Multiple grievances against a single attorney may be, and often are, consolidated in a single multi-count complaint). In addition, the Administrator has authority to institute new proceedings based upon an attorney's criminal conviction, an attorney's adjudication of misconduct in another jurisdiction, or an attorney's failure to comply with a prior discipline order. The Grievance Administrator is charged with the responsibility of conducting a full investigation of a suspended or disbarred attorney who has petitioned for reinstatement. Finally, the Grievance Administrator has authority to enforce a discipline order through the institution of contempt proceedings in a circuit court.

ATTORNEY DISCIPLINE BOARD

Once the Attorney Grievance Commission has authorized the Grievance Administrator to institute formal proceedings, the Administrator files a formal complaint with the Attorney Discipline Board, a separate agency. The structure of the Discipline Board is similar to that of the Commission, that is the Board's governing body consists of six lawyers and three non-lawyers appointed by the Supreme Court to a maximum of two three-year terms. The Board oversees a professional staff of two lawyers and five support staff. Like the Commission, the Board performs certain administrative functions including the appointment and supervision of its Executive Director

and staff, submission of an annual budget, the filing of quarterly and annual reports, review and submission of proposed court rules, and the supervision of approximately 525 volunteer attorney hearing panelists.

In its formal adjudicative function, the nine members of the Board serves as the intermediate appellate level of the discipline system. (Appellate proceedings before the Board are described below).

Hearing Panels

Investigations and dispositions of the Attorney Grievance Commission are not open to the public. Once a formal complaint has been filed, however, the pleadings, transcripts and hearings are all open to the public. Once a complaint is filed, it is assigned to a hearing panel consisting of three volunteer attorneys appointed by the Board. If possible, the hearings are conducted in the county where the respondent attorney practices. The Board currently maintains a roster of over 525 panelists. The Board's 125 regularly constituted panels sit in about half of Michigan's 83 counties. Under the Michigan Court Rules, a hearing is to be held within 56 days after the complaint is filed. In practice, the first scheduled hearing date is always within 56 days of filing; however, approximately 50% of the initial hearing dates are adjourned, either at the request of a party, the request of the panel, or by stipulation in those cases where the respondent and Grievance Administrator are negotiating a consent discipline.

Hearings before the three-member panel are conducted under the general court rules and the rules of evidence. The Grievance Administrator must establish the misconduct charged in the complaint by a preponderance of the evidence. If the hearing panel finds that misconduct has been established, it must conduct a separate hearing to establish the level of discipline. (That hearing can be held immediately following the finding of misconduct.) Under a decision by the Michigan Supreme Court, the level of discipline must be based upon the American Bar Association's Standards for Imposing Lawyer Sanctions. Hearing panels are expected to submit a written report and order within 28 days after the conclusion of the hearing(s).

There is no formal discovery in Michigan discipline proceedings except that, upon request, the respondent and the Grievance Administrator must disclose in advance the names and addresses of witnesses who will be called and exhibits which will be offered.

A hearing panel's order of discipline must be accompanied by a transcript of the proceeding, a report summarizing the panel's factual findings and legal conclusions, and, if applicable, a separate report discussing the level of discipline, including reference to the ABA Standards for Imposing Lawyer Sanctions.

Special Masters

The Board occasionally utilizes a provision in the court rule which allows for the appointment of a special master to conduct the hearing on misconduct and to then file a report with a hearing panel containing the master's findings of fact and conclusions of law. The panel then determines whether the master's report is supported by the record and, if necessary, the panel conducts the separate hearing on discipline.

Hearing Panel Orders

Michigan is one of very few jurisdictions in which a discipline order entered by a hearing panel or the Board may constitute a final order of discipline without review or approval by a court. A panel or the Board may enter an order dismissing the complaint or imposing reprimand; probation (under closely defined conditions); suspension for a specified period (minimum 30 days); or

revocation of the attorney's license (disbarment). A panel and the Board may include conditions such as continuing legal education, practice under a mentor or monitor, treatment for alcohol/substance abuse, etc. An order of discipline may include restitution. Disbarment was ordered in 24 cases in 2009. There were 48 suspension orders, 33 reprimands, and 2 orders of probation. The charges of misconduct were dismissed or withdrawn in 13 cases in 2009.

Appeals to the Board

Within 21 days after the filing of the hearing panel's order of dismissal or discipline, the Grievance Administrator, the respondent, or the complainant(s) may file a petition for review with the Attorney Discipline Board. A hearing is then set before the Board which meets approximately monthly to conduct oral arguments and review cases. The parties are directed to file briefs. Oral arguments are generally conducted before the full Board, although the rules allow presentation of arguments to a sub-board of as few as three members. Confidential case summaries are prepared by the Board's staff attorneys and distributed to all Board members prior to the hearing. The Board's standard of review is whether or not there is "proper evidentiary support" in the record for the panel's findings. Review of legal conclusions is conducted *de novo*. The Board has broad discretion to modify the level of discipline based upon its "overview function," but often defers to the panel when the discipline imposed is within the range articulated by prior Board opinions and the ABA Standards. The Board may affirm a hearing panel decision without comment, but must explain its reasons for modifying a panel decision. The Board's opinions are drafted by staff counsel and then circulated to all Board members for review, comment and/or correction. The Board's orders and opinions are posted on its website www.adbmich.org.

Appeals to the Supreme Court

Within 28 days after the Board issues an order affirming, reversing, or modifying a hearing panel decision, the Grievance Administrator, the respondent, or the complainant may file an application for leave to appeal in the Michigan Supreme Court. If leave is granted, the case is briefed and argued before the Court. In most cases, however, leave to appeal is denied although the Court may, on occasion, enter an order in lieu of granting leave which remands the matter to the Board on a specific issue or which summarily modifies the Board's decision.

Costs

An order of discipline must include an order that the respondent reimburse the discipline agencies for the actual costs of the proceedings (typically, court reporting and transcript costs, subpoena fees, mileage, etc.). Since July 2002, an order of discipline also includes assessment of a fixed administrative cost of \$1,500.00 for discipline resulting from a hearing before a panel or \$750.00 if the matter was resolved by a stipulation for consent discipline. Costs are generally ordered to be paid within 21 days after entry of the order. Extensions and payment plans may be requested. Unpaid costs will accrue interest at the civil judgment rate. Costs must generally be paid before an attorney may be reinstated. Failure to pay the costs as ordered will result in automatic suspension if the costs are not paid within seven days after a certification of non-payment. Reimbursement costs in the total amount of \$95,341 was collected from disciplined attorneys in 2010.

Eligibility for Reinstatement

All suspension orders are for a fixed term. For suspensions of 179 days or less, the attorney may be reinstated by filing an affidavit with the Supreme Court showing that he/she did not practice law and complied with all terms of the order. For suspensions of 180 days or more, the term of suspension defines the minimum period before the attorney may petition for reinstatement. The petition must be accompanied by a lengthy affidavit including personal and financial information

for the period of suspension. Once the attorney has filed the petition with the Clerk of the Supreme Court and the Attorney Discipline Board:

1. The Grievance Administrator publishes a notice in the Bar Journal;
2. The Grievance Administrator conducts an interview which is transcribed and included in the Administrator's investigative report;
3. The Administrator's investigative report must be filed with the panel within 56 days after the reinstatement petition was filed; and
4. The matter is heard by a hearing panel within 90 days after the petition is filed.

The petitioner must establish eligibility for reinstatement by clear and convincing evidence under specific criteria (including fitness to practice) which appear in the court rules. The panel must file a report and order which may be appealed to the Discipline Board by the petitioner or the Grievance Administrator. The Grievance Administrator participates in the reinstatement hearing and may (but is not required to) oppose the petition. If the attorney has not practiced law for three years or more following a discipline order, he/she must also be recertified by the Board of Law Examiners. In 2010, reinstatement petitions were granted in six cases and denied or dismissed in five cases.

Public Proceedings

Investigations conducted by the Attorney Grievance Commission are not open to the public and, unless authorized by the Supreme Court, the Commission may not disclose the existence of an ongoing investigation or its decisions to dismiss a grievance or close an investigation with an admonition, cautionary letter, or contractual probation. However, a formal complaint filed with the Attorney Discipline Board, and all further pleadings, transcripts, exhibits and orders before a hearing panel or the Board are matters of public record. All hearings before a hearing panel, a master or the Board are open to the public. Requests to record, photograph or televise a discipline hearing are regulated by a Supreme Court administrative order governing such requests.

The Board's website maintains a list of all Michigan attorneys publicly disciplined since 1978, with links to the appropriate notice and/or opinion. Notices of discipline or reinstatement, summarizing the nature of the misconduct and the action taken, are posted on the Board's website in all cases and are published in the monthly Michigan Bar Journal, as well as various statewide and local legal periodicals. All public disciplines in Michigan are reported to the ABA's Center for Professional Responsibility.

Criminal Convictions

Criminal convictions may be heard by a hearing panel under a separate procedure instituted with the filing of the criminal conviction. Thirty-three such actions were filed by the Grievance Administrator in 2010. Once filed, a judgment of conviction against an attorney constitutes evidence of misconduct which must result in the entry of an order of discipline, regardless of whether the conviction, on its face, reflects adversely on the attorney's honesty, trustworthiness, or fitness as a lawyer. A hearing panel or the Board does not have authority to dismiss such a proceeding where the Grievance Administrator has proffered a valid judgment of conviction. Grievance Administrator v Deutch, 455 Mich 149; 565 NW2d 369 (1997).

Upon conviction of a felony, an attorney is automatically suspended on an interim basis until entry of the hearing panel's final order. "Conviction" is deemed to have occurred upon the return of a guilty verdict or the acceptance of a plea of guilty or no contest.

Reciprocal Discipline

On the filing of a certified copy by the Grievance Administrator of an order of discipline from another jurisdiction, the respondent is ordered to show cause before a hearing panel why a reciprocal discipline order should not be entered. Proof of an adjudication of misconduct in a discipline proceeding in another state or a United States court is conclusive proof of misconduct in the Michigan proceeding. The only issues to be addressed in the Michigan proceeding are:

1. Whether the respondent was afforded due process in the original proceeding; and
2. "Whether imposition of identical discipline in Michigan would be clearly inappropriate."

Reciprocal discipline orders were issued in two cases in 2010.

Funding

Michigan has a mandatory bar (approximately 41,000 members) with annual dues of \$315.00. Of that sum, \$120.00 is specifically earmarked for the attorney discipline system. Those funds are administered by the State Bar of Michigan, but it is the Supreme Court, not the Bar, which approves the annual budget requests submitted by the Grievance Commission and the Discipline Board. For the fiscal year which ended September 30, 2010, the expenses for the Attorney Grievance Commission and the Attorney Discipline Board were \$3,746,388 and \$97,054, respectively. No public funds are allotted for attorney discipline in Michigan.

Further information about the attorney discipline system in Michigan may be found online at www.adbmich.org and www.agcmi.com.