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August 1, 2014

Michigan Supreme Court
Office of Administrative Counsel
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Via email to:
ADMcomment@courts.mi.gov

Re: *Task Force on the Role of the State Bar of Michigan - ADB Comment*

Dear Chief Justice and Associate Justices:

The Attorney Discipline Board (“ADB”) offers these comments upon certain recommendations in the Report to the Michigan Supreme Court by the Task Force on the Role of the State Bar of Michigan (“Report”) which may affect Michigan’s attorney discipline system (“ADS”).

Background. Michigan is one of 34 states providing for lawyer discipline through agencies independent of a state bar association.¹ “The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys,” and the Attorney Grievance Commission (“AGC”) is the prosecutorial arm of the Court.²

In general, the evolution of Michigan’s discipline system has followed, or led, national trends with respect to the professionalization of lawyer regulation under the supervision of the highest court in the state. In the “first era” of lawyer regulation, lawyers

¹ Directory of State Disciplinary Agencies [accessed July 6, 2014], at: http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation.html

² MCR 9.110(A), which also includes within the Board’s jurisdiction “those temporarily admitted to practice under MCR 8.126 or otherwise subject to the disciplinary authority of the Supreme Court.” The Attorney Grievance Commission is the subject of a similar rule identifying it as an arm of the Court. MCR 9.108(A).

were subject to the summary jurisdiction of judges before whom they practiced.³ In the second era, beginning sometime around 1915, “the bar associations of the larger cities were investigating grievances.”⁴ In 1970, a national commission recommended “that discipline be centralized under ultimate control by the state’s highest court.”⁵ Twenty years later, another such commission offered “a new model in which lawyer discipline would become exclusively an arm of the highest court of the jurisdiction while programs oriented toward prevention, dispute resolution, and rehabilitation would be undertaken by the bar.”⁶

The history of lawyer regulation’s procedural development in Michigan during the last century is summarized in a brief description of the discipline system on the ADB website written by the former Executive Director of the ADB.⁷ Beginning in 1935, when the State Bar handled discipline, it traces the evolution of our system through the creation of an independent and unitary agency in 1970, following the issuance of a national report and a scandal in Michigan, to the bifurcation of the State Bar Grievance Board, in 1978, resulting in the creation of the AGC and the ADB.

In the late 1980’s and early 1990’s, various events and news articles raised questions about the supervision and funding of the discipline system. Thereafter, in stages during the early 1990’s, the Court assumed direct responsibility for hiring the Administrator, the appointment of all members of the ADB and AGC, and approval of the discipline agencies’ budget.⁸

These developments were consistent with the policy reflected in the American Bar Association’s Model Rules for Lawyer Disciplinary Enforcement, which stemmed from the 1992 “McKay Report,”⁹ strongly urging that: “The discipline system should be controlled and managed exclusively by the state’s highest court and not by state or local bar associations [in order to avoid, among other things,] the appearance of conflict of interest

³ Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 Geo. J. Legal Ethics 911, p 912-917 (1994). *In Re Mills*, 1 Mich 392 (1850).

⁴ Devlin, *supra*, at 919.

⁵ Devlin, *supra*, at 922 (discussing the ABA Special Committee on Evaluation of Disciplinary Enforcement, also known as the “Clark Committee”).

⁶ Devlin, *supra*, at 927 (discussing the ABA Commission on Evaluation of Disciplinary Enforcement, frequently referred to as the “McKay Commission”).

⁷ John F. Van Bolt, *A Brief Description of Michigan’s Attorney Discipline System*, p 1, at adbmich.org.

⁸ See Staff Comments to MCR 9.105, MCR 9.108, and MCR 9.110.

⁹ Formally named *Lawyer Regulation for a New Century*, or the *Report of the Commission on Evaluation of Disciplinary Enforcement*, the report has become known as the “McKay Report,” in honor of its initial Chair, Robert B. McKay.

or impropriety [which can exist] regardless of the actual fairness and impartiality of the system.”

However, it is well-recognized that the powers of appointment and budget review are not the only ways in which a bar association can have significant participation in the regulation of lawyers:

The McKay Commission expanded the model structure beyond discipline to a lawyer regulatory system composed of several additional elements: client protection or security funds; voluntary arbitration of lawyer malpractice claims and other disputes; mediation; mandatory fee arbitrations; law practice assistance; and lawyer substance abuse recovery. Unlike discipline, these components of the expanded lawyer regulatory system were to be conducted by the bar. The commission envisioned that unified bars would continue supporting lawyer discipline by providing facilities and equipment and such services as accounting, financing, and registration of lawyers.¹⁰

This essentially describes the situation in Michigan. The Report’s Recommendation 3 is in line with interagency cooperation already underway. An agreement for services exists between the discipline agencies and the SBM, and the preamble concisely articulates the interrelationship between the agencies, and the reasons for cooperation:

Whereas, the Parties are each under the supervision of the Supreme Court of Michigan but are separate, independent, and distinct legal entities, each with its own authorizing statute or rule and each governed by its own board. . . . Whereas, the Parties share a common genesis in that SBM was responsible for attorney discipline from 1935 until 1970, when the procedure to discipline members of the bar of this state was transferred to the State Bar Grievance Board. Thereafter, in 1978, the Supreme Court bifurcated the prosecutorial and adjudicative functions in separate entities, which today are the ADB and AGC.

Whereas, the Parties, to obtain certain efficiencies and economies and in light of their common genesis, have cooperated in sharing and consolidating certain business and administrative functions. For example, the Parties . . . are co-sponsors of a common retirement plan, are covered under a single policy of workers’ compensation insurance, and share a bank savings account. In addition, the SBM provides employee and financial services to the ADB and AGC on a contractual basis.

Whereas, the Parties recognize the administrative and financial efficiencies from which each benefits and desire to continue these

¹⁰ Devlin, *supra*, at 931 (footnotes omitted).

efficiencies while also properly and accurately allocating shared costs and responsibilities.

Recommendation 1. With regard to Recommendation 1, the ADB wishes to note that several key programs of the SBM, including the following, support the operations and mission of the ADS:

- Character and Fitness
- Lawyers and Judges Assistance Program (LJAP)
- Ethics Committee
- Ethics Helpline
- Educational seminars for respondents as well as members of the bar at large, such as Tips and Tools and trust accounting seminars
- Practice Management Resource Center (PMRC)
- Unauthorized Practice of Law
- Client Protection Fund
- Membership - maintaining records of those eligible to practice law in Michigan
- Special committees and task forces designed to consider ethics or disciplinary issues (such as the work group convened to consider amendments to MCR subchapter 9.100)
- Publications and Communications, such as the Bar Journal (both the publication of discipline and reinstatement notices, and articles which assist lawyers in substantive law and ethics and professionalism)

These activities protect the public, foster an ethical profession, and otherwise directly or indirectly further the goals and mission of the AGC, ADB, and the Court with respect to regulation of the bar. The SBM does these things in a manner that is cost-effective and tailored to the needs of the ADB and the AGC. For example, both agencies frequently rely upon the existence of programs such as LJAP, the PMRC, and Tips & Tools seminars in fashioning orders of discipline which impose sanctions that are of assistance to both the respondent-lawyer and consumers of legal services by addressing the causes of certain misconduct.

Such programs are essential to a modern system of lawyer regulation. In deciding whether an organization other than the current SBM could provide these functions and services as well or as efficiently as the SBM does today, the disruption, costs of transition, ultimate cost of operation and administration, and other consequences must be weighed against any potential gains of such a change. From the ADB's perspective, such gains have not been made apparent.

Although the modern regulatory system does not establish lawyer discipline agencies within a bar association, the vitally important activities mentioned above are of a regulatory nature and have been considered more than sufficient justification for a mandatory bar. As the McKay Commission report, which insisted that bar associations not have the powers of appointment or budget approval for discipline agencies, stated:

The Commission recognizes that unified bars can appropriately perform non-prosecutorial and non-adjudicative functions that are essential to the disciplinary system. These are clearly "activities connected with disciplining members of the bar" under *Keller [v State Bar of California]*, 496 US 1 (1990).]

Finally, it should be noted that the foregoing list of SBM programs which support the ADS does not include the administrative support, sharing of services, and pooling of resources that assists in the operation of the discipline agencies. Those are as significant as the items discussed above, but they are discussed in the context of Recommendation 3 below.

Recommendation 3. This recommendation suggests "better State Bar integration with the activities of the other attorney regulatory agencies." The ADB supports continued cooperation and sharing of resources with the SBM and AGC. When it has made sense to do so, these agencies have partnered with regularity – even without adoption of the Report's recommendations. The generality of some of the specific proposals within Recommendation 3, raises several questions which need to be addressed before the ADB can determine whether adoption would be beneficial. However, the ADB generally supports further coordination and offers the following observations and comments with regard to the following proposals in Recommendation 3.

1. The intake for grievances and inquiries about the discipline system should be either centered exclusively in the State Bar or coordinated so that the public's needs are addressed more efficiently, consistently, and effectively.

The impetus for this proposal is undoubtedly that the expanded system of lawyer regulation (discussed above) will operate best if the following aims, functions and allocation of responsibilities are in place:

Bar support of rehabilitative, preventative, and dispute resolution activities of an expanded system of lawyer regulation should enhance another frequently cited goal, protection of the legal profession and its reputation. Clearly, bar associations are best able to develop programs on law practice management, client relations, ethics, and substantive law for their members.

This emerging model of lawyer regulation—judicial branch control of lawyer discipline with public input and bar support of lawyer professional development—is a rational allocation of roles and responsibilities.¹¹

¹¹ Devlin, *supra*, at 939.

The idea behind “central intake” or “consumer assistance programs” is to prevent public disillusionment or frustration when a complaint about a lawyer does not reveal a violation of the Rules of Professional Conduct, but client dissatisfaction or other problems may be susceptible to a resolution outside the context of formal discipline. In some of these cases, a program, such as fee arbitration, may be helpful. The key question is: who should do the initial screening?

The intake for grievances and inquiries about the discipline system is currently handled by the AGC, the agency that must make a determination as to whether an allegation of misconduct set forth in a request for investigation warrants the filing of a formal complaint or whether other action is appropriate, such as admonition, contractual probation, or dismissal of the request for investigation. MCR 9.114. The AGC may also undertake to close an investigation and dismiss a request for investigation while cautioning an attorney regarding potential violations of the Rules of Professional Conduct. In some instances, we understand that the AGC staff will provide the attorney with information regarding services provided by the SBM such as educational seminars, LJAP or PMRC. Indeed, the AGC may condition the offer of admonishment upon the completion of such a program. When appropriate, the AGC offers voluntary fee arbitration under MCR 9.130(A).

In short, the staff of the AGC conducts intake as described above and conducts full investigations and prosecutions for rule violations. AGC staff understands the elements of various forms of misconduct and the range of discipline likely to be appropriate.

Therefore, AGC staff is, and will likely always be, in the best position to determine the appropriate disposition of grievances. The benefits, if any, of removing the intake function from the AGC are not clear. However, alternate recommendation #1 – coordination so that the public’s needs are addressed more efficiently, consistently, and effectively – is a worthy objective. The Court, the SBM, the AGC and the ADB each frequently receive inquiries from the public regarding functions which are handled by one of the other entities. Joint efforts to make the public’s interaction with the Court and its agencies regarding any aspect of lawyer regulation as efficient and transparent as possible are worthwhile. And, the AGC should remain fully informed of and encouraged to promote the services of SBM programs that could assist the public.

2. The status of attorney discipline employees as State Bar employees should be clarified, and the State Bar should be the central provider of personnel services. The terms and conditions of employment, however, should continue to be controlled by the Attorney Grievance Commission and the Attorney Discipline Board.

In practice, the SBM is the central provider of personnel services to the ADS. This arrangement works well at this time, and is marked by great responsiveness by the SBM and increasing utilization of its services by the ADS. In fact, the ADB Executive Director participated in the interview and hiring of the current HR manager. The ADB has confidence in the SBM’s HR Manager, as is evidenced by its increasing reliance upon that department for maintenance of records and assistance with various policy and

management issues. It is believed that the AGC also draws on the HR department to a similar extent. Given this level of service, the ADB is pleased to continue to use the State Bar as its central provider of personnel services.

The ADB's status as a state agency may be sui generis, or nearly so. It is, however, fairly familiar to many other agencies, persons, and institutions. To the extent that there is a need for, or benefit to be realized from, clarification with respect to the current status of ADS members and staff, the ADB is certainly willing to engage in an examination of the many potentially significant ramifications of such clarification. However, great care should be taken to avoid unintended consequences.

3. The State Bar should have a formal consultation role in the selection process for appointments to the Attorney Grievance Commission and the Attorney Discipline Board.

In the years since the Court assumed full responsibility for the appointment of members of the AGC and the ADB, the State Bar has been well-represented in the discipline system. The ADB, for example, has been chaired by two former presidents of the State Bar and has been served by former members of the SBM Board of Commissioners and Representative Assembly, and a former Chair of the Character and Fitness Committee. (And many current and former members of the leadership of the SBM serve on the hearing panels of the ADB.) The ADB and AGC have been well-served by appointees with a variety of experiences and backgrounds to draw upon. These appointees have been fair-minded, public-spirited individuals who are dedicated to performing many hours of work on behalf of the profession and the public, both of which benefit from the enforcement of high ethical standards. This was no doubt true of both Court appointees and appointees of the Bar before events led to a very public discussion of the potential for conflicts of interest when a bar association is given the powers of appointment and budget review with respect to discipline agencies. While the ADS would continue to benefit from a diverse pool of appointees, including some who have also served the profession in positions at the SBM, and the Court may certainly wish to consult Bar leadership or members in the selection process from time to time, formalization of a consultative role may not be necessary, and, at the very least, should not be done in such a way as to create an appearance of SBM control over the ADS, even if such does not exist.

4. The State Bar should have a formal consultation role in the selection process for the grievance administrator and deputy, and for the executive director of the Attorney Discipline Board.

As with the question of appointees to these two agencies, consultation by SBM leadership can offer expertise that is valuable to the Court in selecting the top positions at the AGC and ADB. The same caveats are offered, however. Any consultation role must not give rise to the reality or public perception that the Bar controls the attorney discipline process. This should be achievable if the Court takes pains to explain that it retains the ultimate authority to constitute any advisory group and act as it sees fit to appoint the candidate of its choice. In sum, the Court may wish to capitalize on the judgment and

knowledge brought to the selection process by the SBM as the Court sees fit, thereby providing assurance that public protection remains paramount for the overall regulatory system of which the SBM is a part.

5. The State Bar should have a formal role in the budgeting process for both the Attorney Grievance Commission and the Attorney Discipline Board, and should assist both agencies in preparation of their budgets. The budgets should be presented for approval to the Supreme Court as a single attorney discipline system budget, noting ancillary State Bar functions.

It is the current practice of both the ADB and the AGC to send a copy of the proposed annual budget to the SBM Executive Director and Director of Finance and Administration as it is being submitted to the Court. Well before that final submission, the Finance division at the Bar (and HR) has assisted the ADB in making various budget projections and estimates based on past and anticipated spending with which the Bar is intimately familiar because it handles the books and payables of the ADS. Thus, there would be no objection by the ADB to formalizing the role of the SBM in the budget process to the extent that a rule or practice were adopted, for example, requiring the ADB to do what it now does – forward the proposed budget to the SBM – and then giving the SBM a reasonable period of time to comment to the Court before the Court acts upon the proposed budget.

6. The State Bar's communications, financial and facilities management, insurance, printing, reception, and legal counsel resources should be available to the Attorney Grievance Commission and the Attorney Discipline Board.

The ADB believes this is largely the case now, and that it should continue. The ADB values its relationship with the SBM and the various individuals in the several departments the ADB relies upon for assistance with many of the administrative and other tasks necessary to discharge its duties. As has been noted above, continued and further collaboration in the enumerated areas and others is likely to prove beneficial to all three entities. The SBM staff with which the ADB currently has contact is professional, thoughtful, diligent, and attentive to the needs of the discipline agencies. In light of this, the ADB strongly supports the resource-sharing goals of this proposal.

7. The State Bar should establish a discipline system advisory committee as a standing Committee.

For several years, the Bar had a Standing Committee on Grievance which was charged with handling issues concerning MCR subchapter 9.100 and operation of the discipline agencies. While the AGC and ADB each have their own Boards to oversee the functions of those agencies, the reestablishment of this committee, or a similar advisory committee, might serve as a useful forum for communication between those agencies, members of the Bar, and other interested persons. The ADB would be pleased to participate should such a committee be considered beneficial.

8. The State Bar should undertake an examination of services offered in other states to determine whether they would enhance the effectiveness of the Michigan discipline system: mandatory arbitration of fee disputes, voluntary arbitration of attorney malpractice claims and other grievance-related disputes, and mediation of disputes.

This appears to be an opportunity to supplement Michigan's lawyer regulation system with additional programs benefitting members of the profession as well as the general public. The ADB supports this proposal.

9. Intake services (questions and complaints) for admission to practice and pro hac vice should be coordinated by the State Bar and the Board of Law Examiners.

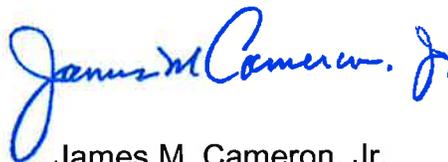
The ADB supports this proposal.

Recommendation 5. This recommendation calls for examination of "active and inactive licensing, pro hac vice, and recertification issues" in light of the increasingly cross-border nature of the practice of law. The ADB would be pleased to participate in the commission envisioned to explore these issues.

One final observation is offered in conclusion: while many who have close contact with Michigan's attorney discipline system recognize the significant value provided to the public by its effective operation, it is probably not widely known that the system is fully funded by Michigan's lawyers.

The ADB thanks the Court for the opportunity to address the recommendations of the Report. If any further assistance or information would be helpful, please do not hesitate to contact the ADB's staff or its members.

Very truly yours,

A handwritten signature in blue ink that reads "James M. Cameron, Jr." The signature is written in a cursive, flowing style.

James M. Cameron, Jr.