

The Letter from the WSBA Marked “CONFIDENTIAL”



WSBA President
Mark Johnson

Taking a closer look at lawyer discipline

There is probably no profession more regulated than ours. The Rules of Professional Conduct control, *inter alia*, who we can work for (RPC 1.7, 1.8, 1.9, 1.10, 1.11, Conflicts); who we can speak to about our work (RPC 1.6 and 1.9, Confidentiality of Information and Duties to Former Clients); how much we can charge, how we must keep track of the money we receive, and when we can spend it (RPC 1.5, Fees, and RPC 1.15A and B, Safeguarding Property and Required Trust Account Records); how we can advertise our services and obtain employment (RPC 7.1–7.4, Communication Concerning a Lawyer’s Services, Advertising, Direct Contact with Potential Clients, and Communication of Fields of Practice and Specialization); how quickly we must get our work done (RPC 1.3, Diligence, and RPC 3.2, Expediting Litigation); and the quality of the claims we make (RPC 3.1, Meritorious Claims and Contentions). Our professional responsibilities extend to the justice system, third persons, and our opponents (RPC 3.3, 3.4, and 3.5, Candor Toward the Tribunal, Fairness to Opposing Party and Counsel, Impartiality and Decorum of the Tribunal, and Title 4, Transactions with Persons Other Than Clients). Our personal behavior may also be the subject of discipline (RPC 8.4, Misconduct). The RPCs even regulate with whom we may share our affections (RPC 1.8 (j), prohibiting sex with clients).

The primary policy reason for the extensive regulation of lawyers is that we are not simply business people. By virtue of our licenses, we are authorized to represent people in the most life-defining events imaginable, in addition to helping to develop the law in a government of laws. The legal profession

is a regulated monopoly controlled by our Supreme Court through an express grant of authority contained in Article 4 Section 1 of the Washington Constitution and protected by the Court though the application of the separation of powers doctrine. See *Washington State Bar Ass’n v. State of Washington*, 125 Wn.2d, 901, 906, 890 P.2d 1047, 1050 (1995). Our Court has, in turn, delegated the function of lawyer discipline to the WSBA, its appointed agent. See GR 12.1(a)(7) and GR 12.1(b)(6).

The Rules for Enforcement of Lawyer Conduct, in addition to setting out the procedural process “by which a lawyer may be subjected to disciplinary sanctions or actions for violation of the Rules of Professional Conduct” (ELC 1.1), describe the spheres of authority with regard to lawyer discipline among the various components of the system, including the Supreme Court and the WSBA Board of Governors. The ELCs provide that the Board of Governors is to, *inter alia*, supervise “the general functioning of the Disciplinary Board, review committees, disciplinary counsel, Association staff” but the Board has “no right or responsibility to review hearing officer, hearing panel, or Disciplinary Board decisions or recommendations in specific cases.” See ELC 2.2.

Along with the bar exam, lawyer discipline is the WSBA’s most important function. It is also the WSBA’s most expensive department. For the WSBA’s fiscal year 2008–2009

(October 1, 2008, to September 30, 2009), the budget for the Office of Disciplinary Counsel (ODC) and the disciplinary-related functions of trust account audits and the Office of General Counsel’s supervision/oversight of hearing officers and the Disciplinary Board is \$4.7 million. (The WSBA’s total budget for this fiscal year is approximately \$20 million.)

During the course of a 30-, 40-, or 50-year

The primary policy reason for the extensive regulation of lawyers is that we are not simply business people. By virtue of our licenses, we are authorized to represent people in the most life-defining events imaginable, in addition to helping to develop the law in a government of laws.

career in the law, some of us will be the subject of a grievance. Some grievances are baseless, but all are reviewed by the Office of Disciplinary Counsel. Some are diverted when the lawyer agrees to corrective action. In many instances, the grievance will be dismissed and no disciplin-

ary action will be taken against the lawyer. Some grievances, however, will result in disciplinary action, ranging from the most serious — disbarment, the ultimate professional penalty — to suspension of up to three years, reprimand, or admonition. If a lawyer is sanctioned (reprimanded, suspended, or disbarred), the WSBA lawyer directory entry for the lawyer (or former lawyer) will contain a permanent notation and description of the discipline. If a lawyer is admonished, there will be a notation for at least five years.

Because of the importance of the operation of our discipline system to the public

and lawyers, I asked the lawyer in charge of WSBA's Office of Disciplinary Counsel, Chief Disciplinary Counsel Douglas Ende, to answer a few questions about the department he oversees and the discipline process.

Mark: Tell us a little bit about yourself, Doug.

Doug: I am a Washington lawyer. I graduated from the University of Washington School of Law and was admitted to practice here in 1987. I have practiced in a variety of contexts, including a large law firm, a small law firm, and a public-defense agency. I taught for several years at the University of Washington School of Law and I was a law clerk at Division I of the Court of Appeals. When not practicing law I can often be found attending my kids' youth football, basketball, or lacrosse games, reading science fiction and poetry, or playing board games.

Mark: Why did you take the job of WSBA Chief Disciplinary Counsel? What interested you about it?

Doug: I tend to be a rule-oriented person, and in law school I became particularly interested in the way that rules of ethics influence lawyer behavior. It is a rare thing to actually practice the law of legal ethics, and I had the good fortune to be afforded the opportunity to do that in 1998 when I started work as a disciplinary counsel at the WSBA. Over the years, I became acutely aware of the critical role that our system of regulation plays in protecting the public and assuring society that the legal profession abides by its ethical

standards. Nearly 10 years later, the WSBA was searching for a new chief disciplinary counsel, and I believed that the insight I had gained both at the WSBA and as a practicing lawyer would serve the profession well. I had also been privileged to work for two outstanding predecessors, Barrie Althoff and Joy



WSBA Chief Disciplinary Counsel Douglas Ende

McLean, and I was determined to maintain their standards of fairness and excellence.

Mark: Approximately how many grievances are received by the WSBA each year? How many result in some form of discipline?

Doug: For the years 2006 through 2008, the

WSBA received information leading to the opening of about 1,900 written grievances per year. Roughly half of those grievances were filed by clients or former clients. Bear in mind that this is only a fraction of the number of inquiries received by the Office of Disciplinary Counsel on a wide variety of topics relating to lawyer conduct. Our Consumer Affairs unit processes an average of 10,000 calls and visits every year, and many situations that might have resulted in the filing of a grievance are resolved informally.

Comparing those numbers with the cases that result in some form of discipline, there were 80 disciplinary actions in 2008, including 15 disbarments and 26 suspensions. To give you a further sense of scope, currently there are more than 33,000 lawyers admitted in Washington.

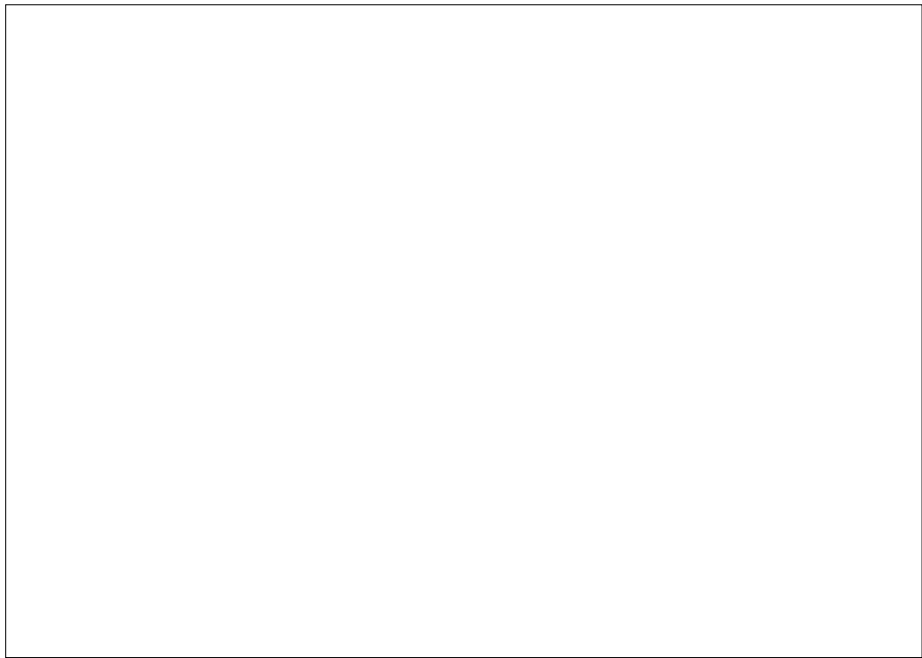
Mark: How many staff members are there in the Office of Disciplinary Counsel?

Doug: There are 37 staff members in the department, including me. That's 19 lawyers (although some are part-time), an office administrator, four investigators, five paralegals, five administrative assistants, two consumer affairs assistants, and a file clerk.

Mark: Describe the discipline process from the time a grievance is received and the possible resolutions.

Doug: Grievances in Washington are confidential and generally remain confidential unless and until there is an order making the matter public. Every written grievance is individually reviewed by an intake disciplinary counsel, and an initial decision is made to dismiss the grievance without further inquiry or to request a response. If a response is requested, after the response is received, intake disciplinary counsel reviews the file again and decides whether to dismiss the file or assign the file for further investigation. Approximately 60 percent of all grievance files are dismissed at the intake stage. Both the lawyer and the grievant receive notification of the dismissal.

If the file is assigned for further investigation, it will be directed to disciplinary counsel on one of the department's investigation/prosecution teams. The scope of the investigation will vary depending on the circumstances of the case, but once sufficient information has been obtained, disciplinary



counsel will make a determination as to whether the allegations of the grievance have sufficient merit to justify a recommendation of some form of discipline or not. If not, the grievance is dismissed. About 30 percent of all grievances are dismissed after some investigation. So if you're doing the math, you will have surmised that about 90 percent of all grievances are dismissed.

It is important to note that when a grievance is dismissed, the grievant may request review of the disciplinary counsel's decision. That review is conducted by a three-member subcommittee of the Disciplinary Board, known as a Review Committee. Typically, the Review Committee will either affirm the disciplinary counsel's decision or return the file to the Office of Disciplinary Counsel for further investigation. There is no appeal from the Review Committee's decision.

If the file is not dismissed, disciplinary counsel may recommend that a Review Committee issue a non-public advisory letter or a public admonition, or that a Review Committee order a public hearing based on the alleged misconduct.

Of course, this is just a very general overview of the process. There are many other possible paths a grievance might take, including deferral of the investigation pending resolution of related criminal or civil litigation, settlement by stipulation to discipline, or diversion.

Mark: Tell us about diversion. What types of circumstances allow a lawyer to seek diversion of a discipline matter? What does diversion usually entail?

Doug: Diversion is an alternative to disciplinary action for certain matters where education, counseling, therapy, monitoring, alternative dispute resolution, or other forms of assistance are likely adequate to address the lawyer's behavior and prevent recurrence of the misconduct. This program was initiated by rule in 2001 and it operates similarly to a deferred prosecution in the criminal justice system. Disciplinary counsel has discretion to offer diversion if, after investigation, it appears the lawyer committed "less serious misconduct" as defined by rule and the lawyer is otherwise eligible and appropriate for diversion.

After screening with the WSBA diversion administrator, a diversion contract is developed that may include training in office management or time management, trust-account education, auditing, alternative dispute resolution, or CLE attendance. In

matters involving mental health or addiction issues, psychological or behavioral counseling may be included in the recommended diversion terms. The typical diversion period is two years.

If the lawyer elects to participate in the offered diversion, the department and lawyer sign a diversion contract, and the lawyer signs a statement stipulating to misconduct. Unless the grievance was previously ordered to public hearing by a Review Committee of the Disciplinary Board, the diversion is non-public and the fact of diversion and its terms are kept confidential.

The diversion administrator then monitors the progress of the lawyer in diversion. If the lawyer successfully completes the diversion, the matter is dismissed and eventually deleted from the lawyer's record. If the lawyer breaches the diversion contract, the disciplinary process resumes and the stipulation to misconduct is admissible in a later disciplinary proceeding.

Between 2006 and 2008, the Office of Disciplinary Counsel diverted an average of about 60 grievances per year.

Mark: What should a lawyer do if he or she is presented with an ethical dilemma? What should a lawyer not do?

Doug: The best thing to do is stop, think, and review the Rules of Professional Conduct and the ethics opinions accessible through the WSBA website, www.wsba.org. If an internal red flag is waving, there is probably a reason for that. Don't ignore it. In my view, the great majority of lawyers will make good, ethically correct decisions if they are mindful

that there is a problem and that the Rules of Professional Conduct may be relevant to that problem. The next best thing to do, after formulating an opinion about the situation, is to get a second opinion. The point of view of a colleague or two can either confirm the correct course of action or provide a useful alternative perspective. There are lawyers out there with practices focused on ethics and risk management, and if the issue is serious enough, it may be worth consulting with one of them. And there is always the WSBA Ethics Line (206-727-8284 or 800-945-WSBA, ext. 8284). If the situation is not urgent, lawyers can also request a written informal ethics opinion from the Rules of Professional Conduct Committee.

Mark: What should a lawyer do if he or she is asked to respond to a grievance? What should a lawyer not do?

Doug: The thing to do is very simple: respond. I would elaborate by saying respond promptly and truthfully. And I guess the thing not to do is ignore the problem and hope it goes away. Lawyers have an affirmative duty to promptly respond to inquiries and requests for information under the Rules for Enforcement of Lawyer Conduct. The failure to cooperate with an investigation as required by the rules can result in the lawyer's deposition being taken and, in some cases, suspension from the practice of law. And failure to cooperate fully and promptly is, in itself, grounds for discipline. Sometimes good things happen following submission of a response to a grievance. By that, I mean dismissal of the grievance. But

nothing good comes from stonewalling the Office of Disciplinary Counsel.

Mark: What should a lawyer do if a disciplinary complaint is filed? What should a lawyer not do?

Doug: By the time a formal complaint is filed, an adversarial process has been commenced. The way that the case proceeds is defined largely by the procedural rules set forth in the Rules for Enforcement of Lawyer Conduct. Because strategic decision-making can be complex and context-dependent, it is difficult for me to identify a particular “to do” or “not to do.” As any civil or criminal litigator knows, there are many possible ways of handling and resolving a case within the rules, and familiarity with what is possible and an understanding of the system are important to evaluating the case and making decisions about appropriate resolutions. Disciplinary proceedings are no exception. Certainly at the point a complaint is filed, if not before, a lawyer should consider hiring counsel to represent him or her in the matter. While some lawyers do represent themselves in disciplinary proceedings, these are cases that

may have an impact on the lawyer’s license to practice law, and the decision to obtain the services of objective counsel is often a prudent one.

Mark: Describe how ODC makes the decision to file a complaint.

Doug: As I mentioned earlier, the Office of Disciplinary Counsel does not make that decision, it makes a recommendation. Under the Rules for Enforcement of Lawyer Conduct, only a Review Committee of the Disciplinary Board has the authority to order a public hearing on alleged misconduct. Once a matter is ordered to hearing, disciplinary counsel files a formal complaint as a matter of course.

A matter will not be recommended for hearing unless it has been adequately investigated by assigned disciplinary counsel and the decision to make that recommendation has been circulated to the chief disciplinary counsel and all senior disciplinary counsel in the office for review, comment, and approval. Many factors influence a decision to recommend that the Review Committee order a hearing, including whether the evidence

would prove the allegations of a violation of the Rules of Professional Conduct by a clear preponderance; whether the American Bar Association Standards for Imposing Lawyer Sanctions would justify imposition of a sanction of reprimand or above; and whether relevant Disciplinary Board and Supreme Court precedent support imposing a disciplinary sanction for the violation alleged.

Mark: What rights does a grievant have in the discipline process? What rights do lawyers have?

Doug: Much like a complaining witness or victim in a criminal proceeding, a grievant is not technically a party to a disciplinary matter, but a grievant does have certain rights spelled out in the Rules for Enforcement of Lawyer Conduct, including the right to be advised of receipt of the grievance; the right, with certain exceptions, to receive a copy of any response submitted by the lawyer; the right to attend any hearing conducted into the grievance; the right to provide relevant testimony at the hearing; and the right to be advised of the disposition of the grievance.

As I have emphasized, no one individual in the Office of Disciplinary Counsel has the authority without considerable supervision and review to recommend discipline against a lawyer, and the Office of Disciplinary Counsel as a whole is answerable directly to the Disciplinary Board, which serves both as a gatekeeper in terms of evaluating initial recommendations and as an intermediate appellate body after a matter has been decided by a hearing officer.

There is no corresponding litany of respondent lawyer rights set out in the rules, probably because many of the rules themselves were enacted by the Supreme Court to ensure that respondent lawyers are afforded due process. In other words, these rights are built into the system. Examples include the right to be represented by counsel, the right to proof of charges by a clear preponderance of the evidence, the right to issue subpoenas, the right to a hearing before an unbiased hearing officer, the right of appeal to the Disciplinary Board, and the right to appeal suspension and disbarment recommendations to the Supreme Court.

Mark: It is no secret that lawyers are scared of being the subject of a griev-

ance or a complaint; we see such actions placing our reputations and our livelihoods in jeopardy. How can our members be assured that they will be treated fairly?

Doug: The fact that the Office of Disciplinary Counsel is populated with experienced lawyers and non-lawyer staff who are committed to achieving a just result in every case provides, I hope, some assurance in that regard. But the hallmark of a fair system is its checks and balances. As I have emphasized, no one individual in the Office of Disciplinary Counsel has the authority without considerable supervision and review to recommend discipline against a lawyer, and the Office of Disciplinary Counsel as a whole

is answerable directly to the Disciplinary Board, which serves both as a gatekeeper in terms of evaluating initial recommendations and as an intermediate appellate body after a matter has been decided by a hearing officer. Finally, the Supreme Court is the ultimate authority over the system, as the arbiter in matters that come before it on appeal and by discretionary review, and as a result of its inherent power to main-

tain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline. Although the Supreme Court delegates many of its disciplinary functions to the Office of Disciplinary Counsel, we at the WSBA are very aware that it is the Court's disciplinary system and that we are acting under its authority.

Mark: Thank you, Doug.

Doug: It has been a pleasure chatting with you. ☺

WSBA President Mark Johnson can be reached at 206-386-5566 or mark@johnsonflora.com.